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## TWO CHALLENGES FOR CAMPAIGN FINANCE DISCLOSURE AFTER *CITIZENS UNITED* AND *DOE V. REED*

Richard Briffault\*

### INTRODUCTION

Disclosure moved front and center on the campaign finance stage in 2010. Indeed, the year just passed witnessed the emergence of not one, but two significant challenges for our disclosure laws.

2010 began with new concerns about the burdens disclosure can place on the rights of political participation and association protected by the First Amendment, with the possibility that the Supreme Court—which had become increasingly skeptical about campaign finance regulation since Chief Justice Roberts and Justice Alito joined the Court—might impose new restrictions on disclosure.

According to media reports in late 2008 and early 2009, financial supporters of California's Proposition 8—which successfully sought to overturn a state supreme court decision legalizing same-sex marriage—had been targeted for harassing phone calls and e-mails, threats, and vandalism of personal property after information about their donations had been spread across the Internet by Proposition 8 opponents.<sup>1</sup> The directors of the California Musical Theater in Sacramento and of the Los Angeles Film Festival both resigned after publicity about their financial support for Proposition 8 led to threats to boycott their organizations.<sup>2</sup> Backers of Proposition 8 ultimately brought suit to have the names and addresses of their campaign donors taken off the Internet.<sup>3</sup> The Proposition 8 allegations were invoked by the Supreme Court in its highly unusual order on January 13, 2010, in *Hollingsworth v. Perry*,<sup>4</sup> staying

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\* Joseph P. Chamberlain Professor of Legislation, Columbia Law School. William & Mary Bill of Rights Journal Symposium: Privacy, Democracy, and Elections, October 22, 2010.

<sup>1</sup> See Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 275 (2010); Jesse McKinley, *Marriage Ban Donors Feel Exposed by List*, N.Y. TIMES, Jan. 19, 2009, at A12.

<sup>2</sup> Briffault, *supra* note 1, at 275; see also Rachel Abramowitz, *Film Fest Director Resigns: Richard Raddon Steps Down Over Reaction to His Support of Prop. 8*, L.A. TIMES, Nov. 26, 2008, at E1; Marcus Crowder, *Theater Official Resigns: Eckern's \$1,000 Donation for Prop. 8 Created Furor*, SACRAMENTO BEE, Nov. 13, 2008, at A1.

<sup>3</sup> See *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197 (E.D. Cal. 2009). For more on the Proposition 8 controversy and its implications for disclosure see Briffault, *supra* note 1, at 274–75; David Lourie, Note, *Rethinking Donor Disclosure After the Proposition 8 Campaign*, 83 S. CAL. L. REV. 133 (2009).

<sup>4</sup> 130 S. Ct. 705 (2010).

the broadcast of the federal trial of the lawsuit challenging Proposition 8.<sup>5</sup> The *Hollingsworth* order cited allegations in briefs filed in *Citizens United v. Federal Election Commission*,<sup>6</sup> which was then pending before the Court and presented a disclosure issue, about the alleged harassment of Proposition 8 backers resulting from disclosure of their donations to the “Yes on 8” campaign.<sup>7</sup> Less than three months before *Hollingsworth*, the Court had acted in another hot-button disclosure case, staying a Ninth Circuit order which would have permitted the disclosure of the names and addresses of the signatories of a petition to place on the Washington state ballot a referendum nullifying that state’s newly-enacted law extending “everything but marriage” benefits to same-sex couples.<sup>8</sup> Two days after the *Hollingsworth* stay order, the Court granted a petition for certiorari in the Washington case, *John Doe #1 v. Reed*.<sup>9</sup> With the *Hollingsworth* order and *Citizens United* and *Doe v. Reed* pending in early January, the stage seemed set for a major revision of campaign finance disclosure doctrine.

In fact, not only did the Court not restrict the availability of disclosure but both *Citizens United* and *Doe v. Reed* confirmed the preferred position of disclosure in campaign finance regulation.<sup>10</sup> Although the opinions gestured at some recognition of the possibility that Internet-based activism could result in the abuse of disclosed information, the Court, particularly in *Citizens United*, seemed to revel in the fact that the Internet provides a technological means of assuring more immediate and more effective disclosure of campaign finance reports.<sup>11</sup> The availability of easy Internet-based dissemination of disclosed personal information about campaign donors presents a challenge to current disclosure law, but it is a challenge the Court in 2010 was not yet ready to take up.

Even as *Citizens United* declined to grapple with the first challenge to disclosure, it helped create the conditions for the second. Although it struck down the laws banning the use of corporate and union treasury funds for independent election spending, *Citizens United* also affirmed the validity of laws requiring corporate and union independent spenders to disclose their spending, including information concerning their major donors.<sup>12</sup> Indeed, the Court confirmed that disclosure requirements could reach broadly, well beyond the “express advocacy” which had been the traditional focus of campaign finance regulation.<sup>13</sup>

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<sup>5</sup> *Id.* at 706–07.

<sup>6</sup> 130 S. Ct. 876, 913–14 (2010).

<sup>7</sup> *Hollingsworth*, 130 S. Ct. at 707 (citing Brief for Ctr. for Competitive Politics as Amicus Curiae at 13–14, *Citizens United*, 130 S. Ct. 876 (No. 08-205); Reply Brief for Appellant at 28–29, *Citizens United*, 130 S. Ct. 876 (No. 08-205)).

<sup>8</sup> *Doe # 1 v. Reed*, 130 S. Ct. 2811, 2815 (2010).

<sup>9</sup> *Doe # 1 v. Reed*, 130 S. Ct. 1133, 1134 (2010) (mem.).

<sup>10</sup> *Doe*, 130 S. Ct. at 2828–29; *Citizens United*, 130 S. Ct. at 916.

<sup>11</sup> *Citizens United*, 130 S. Ct. at 916.

<sup>12</sup> *Id.* at 914.

<sup>13</sup> *Id.* at 915.

But, although constitutionally permissible, disclosure—particularly the disclosure of the donors paying for the independent spending of the nonprofit corporations that assumed a prominent position in the 2010 elections—has been difficult to accomplish in practice. Most business corporations prefer not to spend directly in their own names but rather to donate to intermediary entities.<sup>14</sup> These intermediaries can pool the donations of many corporations and wealthy individuals, thereby magnifying their campaign voice, while hiring skilled political operatives to hone their messages and determine the most strategically significant races in which to deploy their funds.<sup>15</sup> In 2010, much of the corporate campaign money legalized by *Citizens United* flowed through such intermediaries, organized as nonprofits, tax-exempt under either section 501(c)(4) of the Internal Revenue Code as social welfare organizations, or under section 501(c)(6) as trade associations and chambers of commerce.<sup>16</sup> These groups often combine electoral advocacy with other forms of political action, including legislative lobbying, public education, and issue advocacy.<sup>17</sup> As a result, they can claim they are not “political committees” under the Federal Election Campaign Act (FECA) and thus not subject to the general disclosure requirements applicable to such committees.<sup>18</sup> Although FECA requires groups other than political committees that engage in electioneering above a threshold level to disclose their donors,<sup>19</sup> a decision by the Federal Election Commission (FEC) in 2010 limits that disclosure obligation to those donors who have earmarked their contributions for specific campaign ads.<sup>20</sup> As a result, it is easy for many organizations that spend significant sums on electioneering communications to avoid disclosing their donors.

In other words, even as Justice Kennedy in *Citizens United* assured the public that “modern technology makes disclosure rapid and informative”<sup>21</sup> so that disclosure would be an effective response to any corporate spending that might have been unleashed by the Court’s decision, federal campaign law as currently interpreted enables many of these organizations to avoid disclosure of the identities of their donors. With much of the independent spending undertaken by organizations with anodyne names that say little about the organization’s purpose or backers—for example, American Crossroads Grassroads Political Strategies, Americans for Prosperity, American Future Fund, The 60 Plus Association—public interest in learning the identities of the donors

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<sup>14</sup> See Michael Luo & Stephanie Strom, *Donor Names Remain Secret as Rules Shift: Influence of Nonprofits is Felt in Midterms*, N.Y. TIMES, Sept. 20, 2010, at A1.

<sup>15</sup> See Briffault, *supra* note 1, at 287.

<sup>16</sup> Luo & Strom, *supra* note 14.

<sup>17</sup> See Briffault, *supra* note 1, at 287.

<sup>18</sup> See 2 U.S.C. § 431(a) (2006) (defining “political committee”).

<sup>19</sup> *Id.* § 434(f).

<sup>20</sup> See *In re Freedom’s Watch*, MUR 6002, Statement of Reasons of Chairman Matthew S. Peterson and Comm’rs Hunter and McGahn (Fed. Election Comm’n Aug. 13, 2010).

<sup>21</sup> See *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010).

behind the organizations has grown.<sup>22</sup> According to one account, just 93 of the 202 organizations that engaged in independent spending during the 2010 midterm election cycle disclosed their donors.<sup>23</sup> The press beat a steady drumbeat of stories and editorials decrying the lack of disclosure of the donors to the nonprofits that spent millions of dollars in last year's House and Senate races.<sup>24</sup>

Congress struggled with this issue in 2010. In the DISCLOSE Act<sup>25</sup> it sought to revise federal campaign finance law to provide for more effective disclosure. The DISCLOSE Act was extremely complex and controversial. Although it narrowly passed the House of Representatives,<sup>26</sup> it was twice filibustered in the Senate,<sup>27</sup> and was never enacted. A number of states did pass laws responding to *Citizens United*,<sup>28</sup> but only a handful directly addressed the question of how to obtain the disclosure of the donors who are ultimately paying for electioneering ads.<sup>29</sup>

These, then, are the two challenges for disclosure—how to respond to the concern that Internet-based dissemination of campaign finance information will burden political participation, and how to secure the disclosure of donors to politically active nonprofits that engage in both electoral and non-electoral activities. In a sense they are two facets of the same problem. The campaign finance laws of the 1970s and after—the post-Watergate Era—were focused primarily on large individual contributions to

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<sup>22</sup> See, e.g., Jim Rutenberg et al., *Offering Donors Secrecy, and Going on Attack*, N.Y. TIMES, Oct. 12, 2010, at A1; T.W. Farnam, *Disclosure of 'Issue Ad' Funding is on the Wane*, WASH. POST, Sept. 16, 2010, at A23.

<sup>23</sup> Bill Allison, *Daily Disclosures*, SUNLIGHT FOUNDATION (Oct. 18, 2010, 12:43 PM), <http://blog.sunlightfoundation.com/taxonomy/term/independent-expenditures/>.

<sup>24</sup> See, Editorial, *Secret Campaign Money*, WASH. POST, Oct. 12, 2010, at A16; Farnam, *supra* note 22; T.W. Farnam & Dan Eggen, *Outside Spending Up Sharply for Midterms: Fivefold Rise from 2006 Elections*, WASH. POST, Oct. 4, 2010, at A1; Luo & Strom, *supra* note 14; Mike McIntire, *The Secret Sponsors*, N.Y. TIMES, Oct. 2, 2010, at A1; Mike McIntire, *Under Tax-Exempt Cloak, Political Dollars Flow*, N.Y. TIMES, Sept. 23, 2010, at A1; Rutenberg et al., *supra* note 22; Eugene Robinson, *Midterm Campaigns, Brought to You by . . . ?*, WASH. POST, Oct. 5, 2010, at A4; Kenneth P. Vogel, *Secret Donors Fuel Crossroads Media Buy*, POLITICO (Oct. 5, 2010, 2:39 PM), <http://politico.com/news/stories/1010/43155.html>.

<sup>25</sup> Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act, H.R. 5175, 111th Cong. (2010).

<sup>26</sup> The measure passed the House on June 24, 2010, by a vote of 219-206. See *House Vote 391—Passing the DISCLOSE Act*, N.Y. TIMES (Jan. 14, 2011), <http://politics.nytimes.com/congress/votes/111/house/2/391>.

<sup>27</sup> See, e.g., Dan Eggen, *Senate GOP Blocks Measure to Require Greater Disclosure*, WASH. POST, Sept. 24, 2010, at A6. The vote on the cloture motion to bring DISCLOSE to a vote was 59-39, or one vote shy of the 60 votes needed to end the filibuster against the bill. *Id.*

<sup>28</sup> See, *Life After Citizens United*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=19607> (last visited Apr. 10, 2011).

<sup>29</sup> See *id.*

candidates.<sup>30</sup> This was partly because the major campaign finance problem in the late 1960s and 1970s was large individual donations to candidates, and partly because the Supreme Court in *Buckley v. Valeo*<sup>31</sup> framed campaign finance doctrine around the model of quid pro quo corruption, which essentially involves donations to candidates or to organizations that give to candidates.<sup>32</sup> As a result, our laws provide a lot of information about donations, including those involving relatively modest sums, to candidates. States that provide for ballot propositions followed the same model, with disclosure of donations to ballot proposition committees along the same lines.<sup>33</sup> But campaign finance law has given much less attention to disclosure by independent committees, particularly committees that do not give to candidates, and, committees that—because of their combination of electoral and non-electoral activities—are not “political committees.” And with the longstanding prohibition of corporate spending on the books,<sup>34</sup> campaign finance law had no need to address how to obtain effective disclosure from corporations. As a result, we can learn a great deal about relatively small donors to candidates and ballot proposition committees, but not much about very large donors or corporate donors to large, electorally active nonprofits.

These problems can be remedied. The first challenge turns on a conflict between values of transparency and privacy—and dueling assumptions about the rights and responsibilities of campaign donors—for which there is no obvious answer. Still, those tensions can be mitigated by a few changes in our disclosure rules, such as raising our disclosure thresholds to target only bigger donors or focusing on demographic aggregates rather than individual donors.

The second challenge can be addressed more technically through legislative measures, including some that were considered by Congress and adopted by a handful of states, that would require politically active nonprofits that rely on donated funds for their expenditures to use only funds that have been earmarked for electoral activity. Although this is likely to be subject to constitutional challenge, its value in advancing the goals of disclosure without interfering with protected campaign spending suggests that it ought to pass muster.

Part I reviews the development of campaign finance disclosure doctrine, with particular attention to 2010’s two major disclosure decisions—*Citizens United* and *Doe v. Reed*. Part II turns to the challenge of Internet-based dissemination of disclosed personal information about relatively small donors. Part III then considers how

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<sup>30</sup> See, e.g., Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended in scattered sections of U.S.C.).

<sup>31</sup> 424 U.S. 1 (1976) (per curiam).

<sup>32</sup> *Id.* at 26–27.

<sup>33</sup> See *Reforming the Ballot Initiative Process: Making Direct Democracy Work*, PROGRESSIVE STATES NETWORK, <http://www.progressivestates.org/node/22080> (last visited Apr. 10, 2011).

<sup>34</sup> See 2 U.S.C. § 441b (2006). This is the provision declared unconstitutional in *Citizens United*. See *Citizens United v. FEC*, 130 S. Ct. 876, 917 (2010).

to obtain disclosure of donors to politically active nonprofits that do not qualify as political committees but that collect, pool and spend significant sums of money on electioneering activities.

## I. THE DEVELOPMENT OF DISCLOSURE DOCTRINE

### A. *Before Buckley*<sup>35</sup>

The Supreme Court first considered campaign finance disclosure in the early case of *Burroughs v. United States*,<sup>36</sup> which upheld the provisions of the Federal Corrupt Practices Act of 1925 that required presidential campaign committees to report financial information, including the names and addresses of contributors, to the clerk of the House of Representatives.<sup>37</sup> The Court had little difficulty finding that Congress had the power to protect the integrity of federal elections, and that “public 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.”<sup>38</sup> Disclosure was not seen as burdening freedom of speech.

That changed through a series of cases in the late 1950s and 1960s which demonstrated that government-mandated disclosure of the identity of individuals affiliated with controversial organizations could threaten politically vulnerable groups. *NAACP v. Alabama*<sup>39</sup> focused on Alabama’s effort to require the NAACP to produce a list of the names and addresses of all its Alabama members, allegedly in order to determine whether the NAACP—a corporation chartered in New York—was conducting business in Alabama and so would have to register as a foreign corporation doing business in the state.<sup>40</sup> The Court found that the NAACP had shown that “on past occasions revelation of the identity of its rank-and-file members has exposed those members to economic reprisal, loss of employment, threat[s] of physical coercion and other manifestations of public hostility.”<sup>41</sup> Under those circumstances “compelled disclosure of affiliation with groups engaged in advocacy”<sup>42</sup> would be as great an interference with political expression and association as a direct restraint on political activity.<sup>43</sup> Accordingly, disclosure could be sustained only if it advanced a “compelling” or “substantial” state interest—which it did not as the membership list had no substantial bearing on whether the NAACP was subject to the Alabama foreign corporation statute.<sup>44</sup>

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<sup>35</sup> This section provides an abbreviated treatment of the history of disclosure doctrine I recently examined in *Campaign Finance Disclosure 2.0*, *supra* note 1.

<sup>36</sup> 290 U.S. 534 (1934).

<sup>37</sup> *Id.* at 548.

<sup>38</sup> *Id.*

<sup>39</sup> 357 U.S. 449 (1958).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 462.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 462–64.

Two years later in *Bates v. City of Little Rock*,<sup>45</sup> the Court rejected the city's demand for NAACP membership and employee lists in order to determine whether the civil rights organization was subject to the municipal occupational license tax.<sup>46</sup> Again, the NAACP demonstrated its members had been subject to "harassment and threats of bodily harm" and "community hostility and economic reprisals", so disclosure might very well cause people to withdraw from the embattled organization.<sup>47</sup> Although the city had a "legitimate and substantial" interest in assuring compliance with its tax laws, it was unable to show that disclosure of the membership list was necessary to determine whether the NAACP was subject to tax.<sup>48</sup>

Shortly after *Bates*, the Court in *Talley v. California*<sup>49</sup> struck down a Los Angeles ordinance forbidding the distribution of anonymous handbills.<sup>50</sup> Although the ordinance was not targeted at civil rights activists, as the Alabama and Arkansas measures had been, the Court recognized that handbilling is a medium that is particularly valuable to the poor, the politically marginal, and the unpopular.<sup>51</sup> It concluded that as a general rule "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance."<sup>52</sup>

### B. *Buckley and After*<sup>53</sup>

As a result of *NAACP v. Alabama*, *Bates*, *Talley*, and similar cases, when the Court considered FECA's reporting and disclosure requirements in *Buckley v. Valeo*<sup>54</sup> it could no longer rely simply on *Burroughs*, but had to consider the First Amendment implications. *Buckley* determined that, given the "potential for substantially infringing the exercise of First Amendment rights,"<sup>55</sup> compulsory disclosure of the names of and amounts donated by donors must be subject to "exacting scrutiny."<sup>56</sup> Although the meaning of "exacting scrutiny" was somewhat opaque, it was clearly less stringent than the strict scrutiny applied to spending limits, albeit more "exacting" than the rational basis review applied to ordinary economic and social legislation. Disclosure could survive a constitutional challenge if it served the "subordinating interests of

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<sup>45</sup> 361 U.S. 516 (1960).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 524.

<sup>48</sup> *Id.* at 525.

<sup>49</sup> 362 U.S. 60 (1960).

<sup>50</sup> *Id.* at 65.

<sup>51</sup> *Id.* at 64–65.

<sup>52</sup> *Id.* at 65.

<sup>53</sup> This section also builds on my analysis of *Buckley*'s treatment of disclosure in *Campaign Finance Disclosure 2.0*, *supra* note 1.

<sup>54</sup> 424 U.S. 1 (1976) (per curiam).

<sup>55</sup> *Id.* at 66.

<sup>56</sup> *Id.* at 64.

the state” and if there was a “substantial relation’ between the governmental interest and the information required to be disclosed.”<sup>57</sup>

*Buckley* upheld disclosure of campaign contributions and expenditures because such disclosure promotes three important governmental interests: informing the voters, deterring corruption and the appearance of corruption, and enforcing other campaign finance laws.<sup>58</sup> Of these, voter information, has proven to be the most significant. Disclosure is really not necessary to the enforcement of other campaign finance rules, like restrictions on contributions. That could be accomplished by requiring political actors to report their finances to the government; public disclosure of that information would not be necessary. So, too, while the original impetus for disclosure was the belief that publicity would discourage donors from offering and candidates from accepting large, potentially corrupting contributions, the anti-corruption role now plays a secondary role. Federal and most state laws cap the size of contributions to candidates and political parties,<sup>59</sup> so legally authorized contributions are limited and, thus, unlikely to be corrupting. Moreover, the Court has regularly upheld disclosure requirements with respect to campaign practices which, the Court has said, do not present the danger of corruption. These include the expenditures of independent committees,<sup>60</sup> and contributions to and expenditures by committees engaged in supporting or opposing ballot propositions.<sup>61</sup>

The key constitutional justification for campaign finance disclosure is, thus, voter information. Disclosure improves the ability of voters to evaluate candidates because “it allows voters to place each candidate in the political spectrum more precisely than is often possible on the basis of party labels and campaign speeches.”<sup>62</sup> By informing voters about the sources of a candidate’s funds, it also “alert[s] the voter to the interests to which a candidate is most likely to be responsive and thus facilitate[s] predictions of future performance in office.”<sup>63</sup> Requiring independent committees to disclose their donors “increases the fund of information concerning those who support the candidates” and “helps voters to define more of the candidates’ constituencies.”<sup>64</sup> Disclosure of donors can be required even in ballot proposition elections “so that the people will be able to evaluate the arguments to which they are being subjected.”<sup>65</sup>

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 66–68.

<sup>59</sup> See Michael A. Rosenhouse, *Validity, Construction, and Application of Campaign Finance Laws—Supreme Court Cases*, 19 A.L.R. FED. 2d 1, 13–19 (2007) (giving a brief overview of campaign finance law in the United States).

<sup>60</sup> See *Buckley*, 424 U.S. at 80–81.

<sup>61</sup> See *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981).

<sup>62</sup> *Buckley*, 424 U.S. at 67.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 81.

<sup>65</sup> *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 792 n.32 (1978) (citing *Buckley*, 424 U.S. at 66–67; *United States v. Harriss*, 347 U.S. 612, 625–26 (1954)).

The voter information justification also fits well with the Court's framing of campaign finance issues in terms of the First Amendment. By emphasizing the voter information that disclosure generates, disclosure actually "further[s] First Amendment values by opening the basic processes of our federal election system to public view."<sup>66</sup>

Still, drawing on the lessons of *NAACP v. Alabama, Bates and Talley, Buckley* recognized disclosure can burden First Amendment rights.<sup>67</sup> But rather than strike down disclosure requirements, *Buckley* held only that a party or candidate could win an exemption if it could demonstrate that, like the NAACP during the turbulent civil rights era, it was reasonably likely that disclosure would result in threats, harassment, or reprisals.<sup>68</sup> Six years later, in *Brown v. Socialist Workers '74 Campaign Committee*,<sup>69</sup> the Court operationalized the exemption when it found that the Socialist Workers Party, which had long been subject to both government and private harassment, was constitutionally entitled to an exemption from a state campaign finance law disclosure requirement.<sup>70</sup>

The Court has on occasion invalidated disclosure laws on constitutional grounds. *McIntyre v. Ohio Elections Commission*<sup>71</sup> struck down a state law prohibiting the distribution of anonymous campaign literature.<sup>72</sup> The case involved unsigned leaflets McIntyre composed and printed on her home computer and placed on cars parked at a meeting concerning a proposed local school tax levy.<sup>73</sup> In the Court's view, "[I]n the case of [ ] a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the document's message."<sup>74</sup> Moreover, requiring McIntyre to put her name and address on her "personally crafted statement" rather than merely filing an expenditure report with a regulatory agency struck the Court as "particularly intrusive," with such "compelled self-identification" on the leaflet itself likely to chill political activity by ordinary citizens.<sup>75</sup> In short, the information to be disclosed was of little educational value for voter decision-making, while the format of disclosure—printing a personal name on the same leaflet as the electioneering message—was seen as likely to discourage the political activity regulated.

The Court engaged in a similar balancing of informational gains against threats to political participation in *Buckley v. American Constitutional Law Foundation*<sup>76</sup>

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<sup>66</sup> *Buckley*, 424 U.S. at 82.

<sup>67</sup> *Id.* at 68.

<sup>68</sup> *See id.* at 74.

<sup>69</sup> 459 U.S. 87 (1982).

<sup>70</sup> *Id.* at 101–02.

<sup>71</sup> 514 U.S. 334 (1995).

<sup>72</sup> *Id.* at 357.

<sup>73</sup> *Id.* at 337.

<sup>74</sup> Briffault, *supra* note 1, at 283 (quoting *McIntyre*, 514 U.S. at 348–49).

<sup>75</sup> *McIntyre*, 514 U.S. at 355.

<sup>76</sup> 525 U.S. 182 (1999).

which struck down a Colorado law requiring that individuals circulating petitions to place a measure on the ballot wear identification badges stating their names and indicating whether they were paid for their efforts or were, instead, unpaid volunteers.<sup>77</sup> The badges, like the requirement that McIntyre sign her name to her leaflet, imposed a significant burden on political activity given “the reluctance of potential circulators to face the recrimination and retaliation that bearers of petitions on ‘volatile’ issues sometimes encounter . . . .”<sup>78</sup> Moreover, the badges provided the public with no new information, since a circulator was already required to include her personal name in an affidavit filed with the state when she submitted the voter signatures she had collected.<sup>79</sup> That much less intrusive form of disclosure satisfied the public’s informational interest.<sup>80</sup> As in *McIntyre*, the educational value for the voters was minimal, while the threat to political participation was significant.<sup>81</sup>

Neither *McIntyre* nor *ACLF* undermined the Court’s general support for the public dissemination of campaign finance information. Indeed, in *McConnell v. FEC*,<sup>82</sup> even as the Court divided closely over the constitutionality of the provision of the Bipartisan Campaign Reform Act of 2002 (BCRA) extending the ban on corporate and union campaign expenditures to include “electioneering communications”—which went beyond the “express advocacy” which *Buckley* had previously indicated marked the outer limit of constitutionally permissible campaign finance regulation, the Court easily upheld the extension of disclosure requirements to electioneering communications.<sup>83</sup>

Only Justice Thomas dissented from this approval of the extension of disclosure;<sup>84</sup> even Chief Justice Rehnquist and Justices Scalia and Kennedy, who found most of BCRA’s other central features to be unconstitutional, voted to sustain the broader disclosure requirement. *McConnell*’s affirmation of BCRA’s disclosure requirements followed both *McIntyre* and *ACLF*, yet neither was cited by the *McConnell* majority, which treated the matter as governed by *Buckley*.<sup>85</sup> Justice Thomas’s contention in his *McConnell* dissent that *McIntyre* changed the constitutional analysis of disclosure and required that disclosure requirements be subject to strict judicial scrutiny was given short shrift by the rest of the Court.<sup>86</sup>

<sup>77</sup> *Id.* at 200.

<sup>78</sup> *Id.* at 198.

<sup>79</sup> *Id.* at 197–200.

<sup>80</sup> *Id.* at 198.

<sup>81</sup> In both *McIntyre* and *ACLF*, the Court also noted that as these cases involved ballot propositions and not candidate elections, the anti-corruption argument invoked by *Buckley* carried little weight. *See Am. Constitutional Law Found.*, 525 U.S. at 203; *McIntyre v. Oh. Elections Comm’n*, 514 U.S. 334, 351–52 & n.15 (1995).

<sup>82</sup> 540 U.S. 93 (2003).

<sup>83</sup> *Id.* at 196–202.

<sup>84</sup> *Id.* at 275–77 (Thomas, J., concurring in part and dissenting in part). As Justice Thomas acknowledged, disclosure was an “issue on which I differ from all of my colleagues.” *Id.* at 275.

<sup>85</sup> *See id.* at 126–27.

<sup>86</sup> *See id.* at 275–77 (Thomas, J., concurring in part, dissenting in part).

*C. Disclosure in the Roberts Court: Citizens United and Doe v. Reed*

In the opening years of the past decade, the Supreme Court repeatedly rejected constitutional challenges to federal and state campaign finance laws.<sup>87</sup> *McConnell*, however, proved to be both the high point and the end of the Court's deferential approach to campaign finance regulation. With the retirement of Justice O'Connor—a co-author of *McConnell*—and her replacement by Justice Alito, the Court turned sharply against campaign finance restrictions. In just three years, the Court struck down a state contribution limit,<sup>88</sup> sharply narrowed *McConnell*'s approval of BCRA's limits on corporate and union electioneering communications,<sup>89</sup> and invalidated BCRA's "millionaire's amendment" which had relaxed the contribution limits for candidates running against wealthy self-funding opponents.<sup>90</sup> The Supreme Court's campaign finance U-turn was dramatically underscored at the start of 2010 in *Citizens United v. FEC*,<sup>91</sup> in which the Court struck down the sixty-year-old federal ban on the spending of corporate and union treasury funds in federal elections.<sup>92</sup> In so doing, of course, the Court also overturned the portion of *McConnell* that had upheld BCRA's electioneering communication title.<sup>93</sup>

Although it has drawn much less public attention, *Citizens United* also dealt with—and strongly upheld—some of the disclosure provisions of federal campaign finance law,<sup>94</sup> thus, confirming once again that even campaign spending that cannot be limited may be subject to disclosure.

*Citizens United* grew out of an action brought by a conservative advocacy non-profit corporation to obtain an exemption from the ban on corporate electioneering communications for a film it had made, *Hillary: The Movie*, when then-Senator Hillary Clinton was running for the Democratic nomination for president.<sup>95</sup> The film was not itself an electioneering communication, as it was released in theaters and on DVD but not broadcast or distributed by cable or satellite, which is a statutory prerequisite for "electioneering communication" status.<sup>96</sup> However, *Citizens United* also wanted

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<sup>87</sup> See, e.g., *McConnell*, 540 U.S. 93; *FEC v. Beaumont*, 539 U.S. 146 (2003) (upholding application of federal ban on corporate contributions to a nonprofit corporation); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (upholding federal limits on party coordinated expenditures); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) (upholding lower state contribution limits).

<sup>88</sup> *Randall v. Sorrell*, 548 U.S. 230 (2006).

<sup>89</sup> *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).

<sup>90</sup> *Davis v. FEC*, 554 U.S. 724 (2008).

<sup>91</sup> 130 S. Ct. 876 (2010).

<sup>92</sup> *Id.* at 917.

<sup>93</sup> *Id.* at 913.

<sup>94</sup> *Id.* at 913–17.

<sup>95</sup> *Id.* at 887.

<sup>96</sup> *Id.*

to distribute the film through video-on-demand (VOD) available to digital cable subscribers.<sup>97</sup> Distributing the film on cable, and television broadcasts of ads promoting the film which mentioned Senator Clinton by name, is electioneering communication within the statute if aired in any state within thirty days before a primary election in which she was a candidate.<sup>98</sup> Citizens United sought an exemption from the ban on the use of its treasury funds to pay for the VOD distribution and TV ads promoting the movie, and also from the disclaimer and disclosure provisions that would apply to that spending.<sup>99</sup> The disclaimer measure requires that any electioneering communication funded by anyone other than a candidate include a statement that the ad is not authorized by a candidate and that the spender is responsible for its content.<sup>100</sup> The ad must also display the spender's name and address or Web site address.<sup>101</sup> The disclosure provision requires that anyone who spends more than \$10,000 on electioneering communications in a calendar year must file with the FEC a statement identifying the person making the communication, the amount spent, the election at which it was directed, and the names and addresses of contributors of \$1,000 or more.<sup>102</sup>

In 2007, in *FEC v. Wisconsin Right to Life (WRTL)*,<sup>103</sup> the Court held BCRA's prohibition on corporate and union electioneering communications could be applied, consistent with the First Amendment, only to communications which were the "functional equivalent of express advocacy," which would occur "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."<sup>104</sup> *WRTL* did not quite go back to the "magic words" of express advocacy which had defined and constrained the scope of campaign finance regulation since *Buckley* but it indicated that Congress could not go much beyond them, at least when limiting spending. Left unclear after *WRTL* was whether the First Amendment mandates that the disclosure requirements BCRA had also applied to electioneering communications must be limited to the functional equivalent of express advocacy, too.

By an 8-1 vote, *Citizens United* held that disclosure need not be limited to the "functional equivalent of express advocacy" but could be applied far more broadly.<sup>105</sup> The Court emphasized that "disclosure is a less restrictive alternative to more comprehensive regulations of speech."<sup>106</sup> The Court insisted on the consistency of disclosure with the First Amendment and invoked the voter-information justification for disclosure: "The First Amendment protects political speech; and disclosure permits

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<sup>97</sup> *Id.*

<sup>98</sup> *See id.* at 887–88.

<sup>99</sup> *Id.*

<sup>100</sup> 2 U.S.C.A. § 441d(a)(3) (West 2009).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* § 434(f)(2).

<sup>103</sup> 551 U.S. 449 (2007).

<sup>104</sup> *Id.* at 469–70.

<sup>105</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 915 (2010). Only Justice Thomas, the author of *McIntyre*, dissented. *Id.* at 979 (Thomas, J., concurring in part and dissenting in part).

<sup>106</sup> *Id.* at 915 (majority opinion).

citizens and shareholders to react to the 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.”<sup>107</sup>

Not only did the Court accept that disclosure requirements could reach beyond express advocacy, it upheld the regulation of the Citizens United ads over the objection that, as messages intended to sell a movie, they were commercial rather than political: “Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election.”<sup>108</sup> The Court also upheld the application of BCRA’s disclaimer provision—which essentially requires an organization to take responsibility for its ad in the body of the ad rather than through a report filed with the FEC—even though “by forcing it to devote four seconds of each advertisement to the spoken disclaimer” the law necessarily decreases the quantity, and possibly the effectiveness, of the group’s speech.<sup>109</sup> Like disclosure, the disclaimer advanced a substantial government interest in voter information: “At the very least, the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party.”<sup>110</sup>

The Court addressed the argument—which had already played a prominent role in the *Hollingsworth v. Perry* stay order—that “disclosure requirements can chill donations to an organization by exposing donors to retaliation,”<sup>111</sup> citing the amicus briefs that pointed to the allegations of blacklisting, boycotts, and threats against the donors to the pro-Proposition 8 committee.<sup>112</sup> The Court reiterated its prior position that an exemption from disclosure could be created “if there were a reasonable probability that the group’s members would face threats, harassment, or reprisals if their names were disclosed.”<sup>113</sup> But the Court emphasized that the evidence supporting a reasonable probability of reprisal had to relate to the group seeking the exemption. The examples of retaliation “cited by *amici* are cause for concern” but they did not support an exemption for Citizens United, which “offered no evidence that *its* members may face similar threats or reprisals.”<sup>114</sup> Notwithstanding the Court’s general shift on campaign finance law, *Buckley*, *McConnell*, and the deferential approach of those cases to disclosure were repeatedly invoked; *McIntyre* and *ACLF* were nowhere to be found.

Disclosure was a side issue in *Citizens United*, but it was the central focus of *Doe v. Reed*, decided six months later.<sup>115</sup> *Doe* dealt with the application of Washington

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<sup>107</sup> *Id.* at 916.

<sup>108</sup> *Id.* at 915.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 916.

<sup>112</sup> *Id.* (citing Brief for Alliance Defense Fund as Amicus Curiae at 16–22, *Citizens United*, 130 S. Ct. 876 (No. 08-205); Brief for Inst. for Justice as Amicus Curiae at 13–16, *Citizens United*, 130 S. Ct. 876 (No. 08-205)).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* (emphasis added).

<sup>115</sup> *Doe #1 v. Reed*, 130 S. Ct. 2811 (2010).

State's Public Records Act—which makes all public records available for public inspection and copying—to the names and addresses of individuals who sign a petition to subject a law to public referendum.<sup>116</sup> Like the Proposition 8 dispute, *Doe* grew out of a conflict over marriage equality. Washington passed a law extending “everything but marriage”<sup>117</sup> benefits to same-sex couples, and proponents of Referendum Measure 71 (R-71) sought to subject the measure to a voter referendum.<sup>118</sup> When pro-marriage equality groups announced they would use the Public Records Act to obtain and publicly release the names and addresses of R-71 signatories, R-71 backers brought suit claiming that the state's disclosure of that information would violate the First Amendment.<sup>119</sup> Plaintiffs argued both that application of the Public Records Act to referendum petitions generally was unconstitutional and that the specific application to R-71 was unconstitutional because—given what had happened to proponents of Proposition 8 in California—there was a reasonable possibility that R-71 signatories would be subject to “threats, harassment, and reprisal[.]”<sup>120</sup> The Washington federal district court found that plaintiffs were likely to succeed on the first count and granted them a preliminary injunction;<sup>121</sup> the Ninth Circuit reversed;<sup>122</sup> the Supreme Court stayed the Ninth Circuit's decision and then granted certiorari.<sup>123</sup>

The Court's early intervention and grant of certiorari in the case, along with the *Hollingsworth* stay, suggested that some reconsideration of disclosure doctrine in light of the Proposition 8 experience would be forthcoming. But that proved not to be the case. Although not a campaign finance case, *Doe* relied heavily on campaign finance precedents and reemphasized two central themes of campaign finance doctrine—that a government publicity law “is not a prohibition of speech, but instead a *disclosure* requirement. [The requirement] ‘. . . do[es] not prevent anyone from speaking,’”<sup>124</sup> and that disclosure laws are subject only to “exacting scrutiny,” not strict scrutiny.<sup>125</sup> The Court found the disclosure of the names and addresses of petition signers to be justified by the state's constitutionally substantial interest in “preserving the integrity of the electoral process” by combating fraud, “ferret[ing] out invalid signatures caused . . . by simple mistake,” and “more generally [in] promoting transparency and accountability in the electoral process.”<sup>126</sup> The Court declined to reach

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<sup>116</sup> *Doe v. Reed*, 661 F. Supp. 2d 1194, 1196–97 (W.D. Wash., 2009), *rev'd*, 586 F.3d 671 (9th Cir. 2009), *aff'd*, 130 S. Ct. 2811 (2010).

<sup>117</sup> Verified Complaint for Declaratory and Injunctive Relief, *Doe*, 661 F. Supp. 2d 1194 (No. 09CV05456), 2009 WL3228490, at \*4.

<sup>118</sup> *Doe*, 661 F. Supp. 2d at 1198.

<sup>119</sup> *Id.* at 1199.

<sup>120</sup> Verified Complaint for Declaratory and Injunctive Relief, *supra* note 117, at \*1–2.

<sup>121</sup> *Doe*, 661 F. Supp. 2d at 1206.

<sup>122</sup> *Doe v. Reed*, 586 F.3d 671, 673 (9th Cir. 2009), *aff'd*, 130 S. Ct. 2811 (2010).

<sup>123</sup> *Doe v. Reed*, 130 S. Ct. 2811, 2817 (2010).

<sup>124</sup> *Id.* at 2818 (quoting *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010)).

<sup>125</sup> *Id.* at 2818 & n.2.

<sup>126</sup> *Id.* at 2819.

the state's argument that disclosure of petitioner names and addresses also served an interest in voter information, finding that the electoral integrity interest was enough.<sup>127</sup> However, in echoing *Citizens United's* point that disclosure is valuable because it “promotes transparency and accountability in the electoral process to an extent that other measures cannot.”<sup>128</sup> Chief Justice Roberts's opinion effectively linked up electoral integrity and voter information by suggesting an overarching public interest in being able to monitor and understand the workings of the political process.

In turning to the burden disclosure can place on First Amendment rights, *Doe* emphasized that the only issue before the Court was the constitutionality of the application of the Public Records Act to referendum petitions generally, not the R-71 petition in particular.<sup>129</sup> The Court acknowledged plaintiffs' claims concerning the ability of their opponents to disseminate information concerning the names and addresses—combined with publicly available maps and phone numbers—of petition signers over the Internet, as well as their assertions concerning the harassment of Proposition 8 supporters in California.<sup>130</sup> But the Court determined there was not sufficient evidence to demonstrate that the disclosure of the names and addresses of referendum petition signers would ordinarily create a reasonable probability that signers would be harassed.<sup>131</sup> The Court noted that plaintiffs could bring an as-applied challenge to disclosure in their specific case—although it provided little guidance as to how that case ought to be handled.<sup>132</sup>

Although the decision in *Doe* was 8-1—with Justice Thomas again, as in *Citizens United*,<sup>133</sup> the sole dissenter—there were five separate concurring opinions, joined by six Justices, as the members of the Court appeared interested in framing future debates about disclosure and, especially, the interpretation of the “reasonable probability” of harassment standard for an as-applied exception.<sup>134</sup> Justices Sotomayor, Stevens, Breyer, Ginsburg, and Scalia emphasized the “minimal” burdens disclosure places on expressive activity, and the consequent “heavy burden” those seeking exceptions from generally applicable disclosure requirements should have to bear.<sup>135</sup> Justice Sotomayor, joined by Justices Stevens and Ginsburg, clearly opposed making it easier to obtain an exemption from disclosure. Justice Sotomayor warned that “[a]llowing case-specific invalidation under a more forgiving standard would unduly diminish the

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 2820.

<sup>129</sup> *Id.* at 2820–21.

<sup>130</sup> *Id.* at 2820.

<sup>131</sup> *Id.* at 2821.

<sup>132</sup> *Id.*

<sup>133</sup> See *Citizens United v. FEC*, 130 S. Ct. 876, 979 (2010) (Thomas, J., dissenting in part and concurring in part).

<sup>134</sup> See *id.* at 2822 (Alito, J., concurring).

<sup>135</sup> *Doe*, 130 S. Ct. at 2828–29 (Sotomayor, J., concurring) (joined by Justices Stevens and Ginsburg); see also *id.* at 2830 (Stevens, J., concurring) (joined by Justice Breyer) (“[A]ny effect on speech that disclosure might have is minimal . . .”).

substantial breathing room States are afforded to adopt and implement reasonable, nondiscriminatory measures like the disclosure requirement . . . .<sup>136</sup> Justice Stevens, joined by Justice Breyer, emphasized “there would have to be a significant threat of harassment directed at those who sign the petition *that cannot be mitigated by law enforcement measures*”<sup>137</sup> before an exception from disclosure could be granted. Justice Scalia indicated he would grant no exceptions at all, and would rely instead on “laws against threats and intimidation” to deal with misuse of disclosed information.<sup>138</sup> To some extent, these concurring opinions in *Doe* reflected the fact that the case involved signatures on referendum petitions, rather than the disclosure of campaign donors. Referendum petitions are a part of the state’s law-making process. Justice Sotomayor observed that “the process of legislating by referendum is inherently public,”<sup>139</sup> and Justice Scalia stressed the “long history of public legislating.”<sup>140</sup> Nonetheless, the clear implication of the opinions of these concurring justices is that even the enhanced dissemination of disclosed information made possible by the Internet will not change the constitutional calculus for determining when exemptions from disclosure are required.

Justice Alito, in his concurring opinion, took a sharply differing approach which emphasized the “heavy burdens on First Amendment rights” that “facially valid disclosure requirements can impose in [specific] cases.”<sup>141</sup> As a result, Justice Alito focused on the need for individuals to “be able to obtain an as-applied exemption without clearing a high evidentiary hurdle.”<sup>142</sup> Justice Alito was particularly concerned to provide “speakers” an exemption “quickly and well in advance of speaking” to avoid chilling protected activity.<sup>143</sup> Thus, in order to protect petition signers from harassment, petition circulators would have to be able to get an exemption from the disclosure requirement before beginning to circulate a petition.<sup>144</sup> The need for an early exemption would necessarily affect the nature and amount of evidence required to obtain such an exemption, particularly for new groups which had not themselves previously been targeted for harassment.<sup>145</sup> Justice Alito asserted that the Proposition 8 experience “provides strong support for an as-applied exemption” for R-71 backers.<sup>146</sup> Justice Alito was also far less impressed than the other members of the majority with the adequacy of the state’s interests in disclosure. He contended there were other means of checking signatures that were sufficient to protect the integrity of the petition process,

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<sup>136</sup> *Id.* at 2829 (Sotomayor, J., concurring).

<sup>137</sup> *Id.* at 2831 (Stevens, J., concurring) (emphasis added).

<sup>138</sup> *Id.* at 2837 (Scalia, J., concurring).

<sup>139</sup> *Id.* at 2828 (Sotomayor, J., concurring).

<sup>140</sup> *Id.* at 2836 (Scalia, J., concurring).

<sup>141</sup> *Id.* at 2822 (Alito, J., concurring).

<sup>142</sup> *Id.* at 2823 (citing *Buckley v. Valeo*, 242 U.S. 1, 74 (1946)).

<sup>143</sup> *Id.* at 2822.

<sup>144</sup> *Id.* at 2823.

<sup>145</sup> *Id.* at 2823 (citing *Buckley*, 424 U.S. at 74).

<sup>146</sup> *Id.*

and he found no informational interest in publicly disclosing the names and addresses of petition signers; indeed, he treated that “interest” as really a threat to privacy and the source of the potential for harassment rather than a substantial public interest at all.<sup>147</sup>

As *Citizens United* and *Doe v. Reed* indicate, the Supreme Court’s post-2005 turn against campaign finance regulation has not affected its approach to disclosure. Rather, the Court has strongly and widely reaffirmed its commitment to disclosure as a constitutionally sound—indeed, constitutionally preferred—mode of regulation. *Citizens United* confirmed the potentially broad reach of disclosure requirements, while both *Citizens United* and *Doe v. Reed* emphasized that exemptions from generally valid disclosure requirements would require substantial, particularized evidence that the members or backers of an organization or group seeking an exemption would be subject to harassment if their identities were made public. Both cases demonstrate an awareness of the potential of the Internet to disseminate disclosed information more widely and effectively than previously. But Justice Kennedy’s *Citizens United* opinion celebrated that development<sup>148</sup> while Chief Justice Roberts’s *Doe* opinion was unwilling to allow the emergence of the Internet to change the standard for an as-applied exemption, let alone the facial constitutionality of disclosure requirements.<sup>149</sup>

To be sure, due to the specific nature of the question before it, the Court in *Doe* was able to avoid fully coming to grips with the issue of the increased possibilities of reprisals against donors due to the enhanced dissemination of disclosed information over the Internet and the use of social networking to organize opponents to challenge donors. Four members of the current Court—Justices Scalia, Breyer, Ginsburg, and Sotomayor—clearly oppose changing the standards for an exemption. But Justices Thomas and Alito are just as clearly willing to make an exemption far easier to obtain. As a result, the future course of doctrine in this area will turn on the views of the three justices who have not yet been heard from on the issue—Chief Justice Roberts and Justice Kennedy, who were on the *Doe* Court, and Justice Kagan, who joined afterwards.

For now at least, responses to the principal challenges to disclosure law are likely to be legislative rather than doctrinal. The Court has marked the outer bounds of the law in this area, but has left federal and state lawmakers and regulators considerable discretion to develop specific rules. At present, broad disclosure of both major donors to independent committees undertaking electioneering communications and of small donors to candidates and ballot proposition committees are constitutionally permissible, but the former is practically unavailable while the latter may not be desirable. The next two Parts consider possible legislative responses to these two questions for campaign finance disclosure law.

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<sup>147</sup> *Id.* at 2824–27.

<sup>148</sup> See *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) (noting that while television might be the favored medium at the moment, the influence of the Internet was likely to grow).

<sup>149</sup> *Doe*, 130 S. Ct. at 2820–21 (noting that while the data would be posted on the Internet and searchable by anyone, that by itself did not alter the fundamental test).

## II. THE INTERNET AND SMALL DONOR DISCLOSURE

In *Citizens United*, Justice Kennedy celebrated the fact that “modern technology makes disclosure more rapid and informative. . . . 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.”<sup>150</sup> In his view, the Internet gives us a “campaign finance system . . . with effective disclosure [that] has not existed before today.”<sup>151</sup> Justice Kennedy is right to emphasize the qualitative change in the effectiveness of disclosure resulting from the Internet.

As I have previously noted,<sup>152</sup> disclosed campaign finance information is now accessible, searchable, sortable, and downloadable to an extent unimaginable fifteen years ago at both the federal and state levels. In most jurisdictions, anyone with Internet access can obtain “names, zip codes, employers, occupations, or amounts given by donors above the reporting threshold. Moreover, public interest groups can further search, sort, classify, and analyze campaign finance reports, thus making still more information available to the public. The shift to Web-based electronic filing has dramatically improved the public accessibility of campaign finance information.

This more enhanced disclosure is unlikely to affect large donors who have significant interests in government decision making and who tend to treat campaign contributions as a cost of doing business.” Nor is Internet-based disclosure likely to deter ideological donors who are so deeply committed to their causes that they do not mind their views made public. But many a smaller or less committed donor might be unsettled if she knew that her political affiliations were being revealed to coworkers or neighbors. One recent study found that support for disclosure drops sharply when the respondent is asked whether she believes that her own name, address, and contribution amount should be posted on the Internet—and drops still further when asked whether her employer’s name ought to be on the Internet, as many states require.<sup>153</sup> Moreover, new technologies do not simply provide easy access to contribution reports, they also enable politically active individuals and groups to disseminate donor information, including home addresses and employers, via blogs, websites, and maps, to the public, thereby implicitly inviting a hostile response. Social networking sites like Facebook and MySpace make it easier for opponents to organize and sponsor boycotts and other protests against donors to causes they oppose.<sup>154</sup> This arguably is what occurred in

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<sup>150</sup> *Citizens United*, 130 S. Ct. at 916 (2010).

<sup>151</sup> *Id.*

<sup>152</sup> This section builds on my analysis of small donor disclosure as discussed in *Campaign Finance Disclosure 2.0*, *supra* note 1.

<sup>153</sup> DICK M. CARPENTER, INSTITUTE FOR JUSTICE, DISCLOSURE COSTS: UNINTENDED CONSEQUENCES OF CAMPAIGN FINANCE REFORM 7 (2007), *available at* [http://www.ij.org/images/pdf\\_folder/other\\_pubs/DisclosureCosts.pdf](http://www.ij.org/images/pdf_folder/other_pubs/DisclosureCosts.pdf).

<sup>154</sup> *See* Lourie, *supra*, note 3, at 150.

the aftermath of Proposition 8, when proponents claimed they were harassed by threatening e-mails and phone calls, and some had their businesses targeted for boycotts.<sup>155</sup>

The Proposition 8 experience does not fit easily within the model of exemption from disclosure articulated in *Buckley*. Unlike in *NAACP v. Alabama, Talley*, and *McIntyre* where disclosure burdened members of a persecuted civil rights group, a fringe political party, or lone individuals, Proposition 8's donors were part of the majority of California voters. Proposition 8 received seven million votes; its backers raised millions of dollars; and it advanced not a radical idea but "a concept steeped in tradition and history."<sup>156</sup> Indeed, the district court that considered the pro-Proposition 8 ballot committee's effort to bar disclosure of their contributions concluded that the group's majoritarian status precluded a First Amendment exemption from disclosure, which it concluded was available only for groups with tiny constituencies promoting "historically unpopular and almost universally rejected ideas . . . whose very viability was threatened by forced compliance with disclosure laws."<sup>157</sup> However, anxiety about the consequences of publicity—particularly disclosure that links one's political activity to one's home address or employer—is not limited to members of minority groups, even if minorities can demonstrate a greater likelihood of being subject to retaliation, and greater financial vulnerability to harassment and reprisal. As the Proposition 8 experience indicates, even majoritarian political causes can be unpopular with significant segments of the population, and public support for them can have negative consequences. Knowing that this information about their political activity will be broadcast over the Internet may lead some individuals to become less politically active.

The Proposition 8 experience and the dispute over Washington's Referendum 71 that led to *Doe* raise the question of whether a hostile response to disclosed political activity from other members of the public is an acceptable cost of disclosure. Although some of the allegations in Proposition 8 involved allegations of "repugnant and despicable" death threats, most of the other claimed acts of harassment and reprisal were relatively milder, albeit still hostile—the theft of yard signs, the defacing of "Yes on 8" bumper stickers, and nasty e-mails and Facebook messages.<sup>158</sup> The district court found such incidents were unsurprising "during the heat of an election battle surrounding a hotly contested ballot initiative."<sup>159</sup> Moreover, while threats of physical violence and vandalism were "deplorable" and properly subject to criminal sanction, the court viewed business boycotts and verbal challenges as acceptable forms of "uninhibited, robust, and wide-open" public debate.<sup>160</sup> Similarly, in *Doe*, the organizations

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<sup>155</sup> See *supra* note 1 and accompanying text.

<sup>156</sup> *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1216 (E.D. Cal. 2009).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 1199–1205 (describing the threats and acts of vandalism against Prop. 8 supporters).

<sup>159</sup> *Id.* at 1217.

<sup>160</sup> *Id.* at 1217–18 (quoting *NAACP v. Claiborne Hardware*, 458 U.S. 886, 913 (1982)).

pursuing disclosure of the names of the petition signers claimed that their goal was merely to stimulate a state-wide dialogue about marriage rights with their opponents.<sup>161</sup> As the co-director of KnowThyNeighbor.org explained, his group wanted to post on the Internet the names of those who signed the R-71 petition so “that conversations are triggered between people that already have a personal connection like friends, relatives, and neighbors. . . . conversations [that] can be uncomfortable for both parties.”<sup>162</sup>

But what for one person is a “conversation”—and an “uncomfortable” one at that—will for another be a confrontation, made especially unpleasant by the fact that it might be with a friend, relative, or neighbor. Is the possibility of uncomfortable conversation/confrontation an acceptable price to pay for the transparency and voter information benefits of disclosure? Is it actually a desirable addition to uninhibited, robust, and wide-open debate on matters of public concern—“the essence of self-government”<sup>163</sup>—as Judge England claimed in the Proposition 8 case? Or is it an undue burden on the freedoms of speech and association and the right to petition for a redress of grievances?

Strikingly, this question divided two members of the Supreme Court who frequently agree with each other on most other issues. Justice Alito quoted KnowThyNeighbor.org’s “uncomfortable conversation” language to support his view that the posting of the names and addresses of petition signers on the Internet created a “vast” potential for harassment,<sup>164</sup> while Justice Scalia urged that enduring “harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance.”<sup>165</sup> Where Justice Alito expressed the fear that disclosure which enables opponents “to locate and contact [petition signers and engage them in discussion] . . . becomes a means of facilitating harassment that impermissibly chills the exercise of First Amendment rights,”<sup>166</sup> Justice Scalia concluded that “[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.”<sup>167</sup> Justice Scalia was utterly untroubled by disclosure requirements that subject people to the “accountability of criticism.”<sup>168</sup>

Justice Scalia may be right that democracy in this, “the Home of the Brave,” must involve a willingness to accept criticism and that the Constitution may permit Congress and the states to require citizens to demonstrate a certain amount of “civic courage” when they make campaign contributions.<sup>169</sup> And the judge in the Proposition 8 case is surely correct in observing that “[j]ust as contributors to Proposition 8 are free to speak in favor of the initiative, so are opponents free to express their disagreement

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<sup>161</sup> John Doe #1 v. Reed, 586 F.3d 671, 675 & n.4 (9th Cir. 2009).

<sup>162</sup> *Id.*

<sup>163</sup> *ProtectMarriage.com*, 599 F. Supp. 2d at 1218.

<sup>164</sup> Doe #1 v. Reed, 130 S. Ct. 2811, 2825 (2010) (Alito, J., concurring).

<sup>165</sup> *Id.* at 2837 (Scalia, J., concurring).

<sup>166</sup> *Id.* at 2825 (Alito, J., concurring).

<sup>167</sup> *Id.* at 2837 (Scalia, J., concurring).

<sup>168</sup> *Id.*

<sup>169</sup> *See id.*

through proper legal means<sup>170</sup> including boycotts, so long as law enforcement responds effectively to violence and vandalism.<sup>171</sup> Yet Justice Alito is equally correct in warning that such responses can chill political participation by ordinary citizens who would prefer not to have evidence of their political beliefs—tied to their home addresses, phone numbers, and other personal identification information—broadcast over the Internet.<sup>172</sup>

There is no obvious constitutional standard for setting the balance between these privacy and publicity—and anonymity and accountability—concerns. One possibility would be to vary the availability of disclosure according to the nature of the election question, with less disclosure for hot-button ideological issues where retaliation might be more likely. But it will often be difficult to tell in advance which issues will be highly charged, and which will not. The amount of controversy an issue stirs up can vary from place to place and election cycle to election cycle, and even ballot questions involving regulatory or tax issues—think of Proposition 13<sup>173</sup>—can be controversial. And, of course, it would be even more difficult to apply such a standard in candidate elections.

A better approach would be to change the focus of our disclosure laws.<sup>174</sup> First, we should raise the monetary thresholds for the disclosure of personal information about donors. Our thresholds for the disclosure of campaign donors tend to be quite low—much lower than they need to be in order to effectively inform the public about a candidate's or issue committee's financial backers. Federal law requires that the donors of \$200 or more to a candidate in an election be disclosed.<sup>175</sup> That threshold was adopted in 1979<sup>176</sup> and has not been raised since.<sup>177</sup> If it had been adjusted for inflation, the disclosure threshold in 2010 would have been \$601.<sup>178</sup> The original federal Publicity Act of 1910 used a disclosure threshold for Congressional races of \$100.<sup>179</sup> If we used that number, adjusted for inflation, the 2009 threshold for disclosure would have been \$2,274.<sup>180</sup> Many state thresholds are even lower. The California disclosure threshold that led to the disclosure of the Proposition 8 donors was \$100.<sup>181</sup> In eighteen states and the District of Columbia, the threshold is \$50 or less,<sup>182</sup> in six states there

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<sup>170</sup> *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1217 (E.D. Cal. 2009).

<sup>171</sup> *Id.* at 1217–18.

<sup>172</sup> *Doe*, 130 S. Ct. at 2825 (Alito, J. concurring).

<sup>173</sup> See CAL. CONST. art. XIII A.

<sup>174</sup> The proposals that follow track similar proposals I made in *Campaign Finance Disclosure 2.0*, *supra* note 1, at 300–02.

<sup>175</sup> 2 U.S.C. § 434(b)(3)(A) (2006).

<sup>176</sup> See Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 102, 93 Stat. 1339 (codified at 2 U.S.C. § 434(b)(3)(A) (2006)).

<sup>177</sup> Briffault, *supra* note 1, at 300.

<sup>178</sup> See U.S. INFLATION CALCULATOR, <http://www.usinflationcalculator.com> (last visited Apr. 10, 2011).

<sup>179</sup> See *Buckley v. Valeo*, 424 U.S. 1, 83 (1976).

<sup>180</sup> See U.S. INFLATION CALCULATOR, *supra* note 178.

<sup>181</sup> *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1197 (E.D. Cal. 2009).

<sup>182</sup> *Id.* at 1221 n.10.

is no threshold at all;<sup>183</sup> even the donors of the smallest campaign contributions must be identified.<sup>184</sup>

Our disclosure thresholds are also low by world standards. A 2007 study of disclosure thresholds around the world calculated in terms of how many days it would take a person earning the average income in that country to earn the threshold amount found that it would take 2.4 days to earn the disclosure threshold amount in the United States, but 7 days in Japan, 10 days in New Zealand, 26 days in the United Kingdom, 112 days in Israel, and 154 days in Germany.<sup>185</sup> We require disclosure from a higher proportion of contributors than is the case in most other democratic countries.

Raising the disclosure threshold would protect the privacy of the most vulnerable political actors—small donors—with little or no harm to the public education function of disclosure. Indeed, disclosure that is more tightly focused on larger donors would actually serve that function better. As I have previously observed, “Knowing the names and addresses of large numbers of individual small donors is unlikely to be helpful to the public or the many intermediaries—the press, public interest groups, bloggers, political scientists—who evaluate campaign finance information.”<sup>186</sup> These names and addresses will mean little or nothing to most people. Indeed, massive disclosure of small donor information threatens to inundate us in a sea of useless data, while potentially distracting attention from the big donors whose funds play a more meaningful role in understanding a candidate and her likely place in the political arena. Raising the disclosure threshold makes it easier to focus on and assess the significance of “a candidate’s or committee’s major financial backers, much as clearing away the haystack ought to make it easier to see the needles.”<sup>187</sup>

There is no obvious standard for deciding what the disclosure threshold ought to be. But we could begin by raising the federal threshold to \$600 to take account of three decades of inflation, and then indexing it biennially thereafter. Alternatively, for all but the largest donors, only general information about donors in the aggregate, not information identifying specific individuals, should be publicly disclosed. Such individual information would still be reported to the FEC or state regulators, but, like the information provided to the IRS or the Census Bureau, personal names and addresses would be kept confidential. Instead, regulators would disclose only such information as zip code and profession or occupation or industry, along with the size of the donation. This could be aggregated either directly by a campaign finance agency, or, where there is properly accessible and usable online disclosure, by interested intermediaries, to determine which candidates, parties or political committees are getting

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<sup>183</sup> *Id.*

<sup>184</sup> *See id.*

<sup>185</sup> Ross Schaap, *Disclosure Rules: How Institutions Influence Campaign Finance Regulation*, 6 ELECTION L.J. 89, 98 (2007). The United States federal threshold was in line with those of Canada and Australia. *See id.*

<sup>186</sup> Briffault, *supra* note 1, at 300.

<sup>187</sup> *Id.* at 300–01.

what sizes of donations from particular places or economic sectors. This change could be adopted in tandem with raising the disclosure threshold, so that the federal disclosure would be set at, say, \$600, but individual identifying information would be available only for those who give, say, \$1,200 or more. Or \$200 could be retained as the reporting threshold but the threshold for individual identifiable disclosure would be, say, \$1,000. Donations from \$200 through \$999 would be subject to aggregate data analysis, but only givers of \$1,000 or more would be publicly identified.

Targeting disclosure on the major players would make sense even without the concern that the Internet facilitates hostile retaliation against campaign donors. As I have suggested,<sup>188</sup> more targeted disclosure would sharpen the public's focus on those donors who are more likely to be publicly known. So, too, aggregate data would provide a better measure of the groups and interests seeking to influence the election. Focused disclosure would protect the political privacy of the middling donors whose contributions present little danger of undue influence and who are more likely to be discouraged from giving by the prospect of broad public dissemination of their names, addresses, and employers.

To be sure, larger donors to controversial causes would still potentially be subject to harassment or economic retaliation by their most excited antagonists. But Justice Scalia's call for civic courage suggests that it is not entirely inappropriate that large donors be ready to justify their actions publicly. By the very size of their financial contribution, large donors are demonstrating an intense degree of support for a candidate, party, or cause. Large donors are much likelier to be wealthier and therefore less vulnerable to economic reprisals than small and middling givers. They are also more likely to be repeat participants and more used to public attention to their donations. Moreover, they are seeking to use their wealth and intensity of commitment to exercise a greater degree of influence over a collective, public decision than not only the vast majority of voters, but also most other donors. There is also a greater public information value in the disclosure of the names of large donors as there is a greater likelihood their names will mean something to some voters.

*Doe v. Reed* indicates that a more tightly focused disclosure law is not constitutionally required despite concerns that the Internet is increasing the burden disclosure places on First Amendment rights. But even if not constitutionally mandated, a more focused law would do a better job of reconciling the competing constitutional values that ought to inform disclosure. Focusing on major donors would protect the political privacy of smaller contributors and eliminate the disincentive to making contributions that disclosure might cause while simultaneously protecting, and arguably advancing, the voter-information purpose underlying disclosure.

### III. EFFECTIVE DISCLOSURE OF DONORS TO NONPROFIT INDEPENDENT SPENDERS

*Citizens United* confirmed that corporations and unions that engage in independent spending and electioneering communication may constitutionally be subject

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<sup>188</sup> See *id.* at 301–02.

to disclosure.<sup>189</sup> But actually obtaining disclosure of corporate spending has proven difficult in practice. There is considerable evidence that business corporations prefer not to spend directly, that is, through ads taken out by the corporations themselves. Instead, they prefer to act through intermediaries, that is, by donating to other organizations that then sponsor the political ads.<sup>190</sup> This can facilitate the pooling of funds from many like-minded corporate donors and the hiring of political strategists to determine where those funds can be used to the greatest political effect. Under current law, it may also make it possible for corporations to avoid disclosure.

Legal developments since *Citizens United* have authorized both the pooling of corporate funds with intermediaries and the avoidance of disclosure. In *SpeechNow.Org v. FEC*,<sup>191</sup> the United States Court of Appeals for the District of Columbia Circuit sitting en banc held that the federal statutory limit on donations to political committees could not, consistent with the First Amendment, be applied to committees that make only independent expenditures.<sup>192</sup> The Fourth Circuit Court of Appeals had previously taken the same position in a case involving North Carolina's campaign finance law,<sup>193</sup> and a panel of the Ninth Circuit Court of Appeals followed *SpeechNow* with a decision holding that a city ordinance imposing a monetary cap on contributions to independent expenditure committees violates the First Amendment.<sup>194</sup> The FEC declined to seek Supreme Court review of *SpeechNow*,<sup>195</sup> and instead followed it with two important advisory opinions authorizing political committees that intend to make only independent expenditures to accept unlimited donations.<sup>196</sup> One of the advisory opinions confirmed that such an independent expenditure committee could accept unlimited donations from corporations and unions as well as individuals.<sup>197</sup>

Technically, these cases and FEC advisory opinions deal only with "political committees," a formal legal category under federal campaign law consisting of organizations whose major purpose is electoral.<sup>198</sup> Such "political committees" are required to register with the FEC and abide by the organizational, record-keeping, and reporting rules applicable to such committees.<sup>199</sup> But the principle that an organization that engages only in independent expenditures and does not make contributions to

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<sup>189</sup> See *Citizens United v. FEC*, 130 S. Ct. 876, 886 (2010).

<sup>190</sup> Luo & Strom, *supra* note 14.

<sup>191</sup> 599 F.3d 686 (D.C. Cir.), *cert. denied*, 131 S. Ct. 553 (2010).

<sup>192</sup> *Id.* at 696.

<sup>193</sup> See *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008).

<sup>194</sup> See *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir.), *cert. denied*, 131 S. Ct. 392 (2010).

<sup>195</sup> Brief for Respondent, *Keating v. FEC*, 131 S. Ct. 553 (2010) (No. 10-145), 2010 WL 3777212 at \*13 (opposing the petition for certiorari).

<sup>196</sup> See FEC Advisory Op. 2010-11, at 1-2 (2010); FEC Advisory Op. 2010-09, at 1-2 (2010).

<sup>197</sup> See FEC Advisory Op. 2010-11, at 3.

<sup>198</sup> See 2 U.S.C. § 431(4) (2006).

<sup>199</sup> See *id.* §§ 432-34.

candidates or parties may accept contributions in unlimited amounts seems generally applicable to all politically active groups. As a result, corporations may now make unlimited contributions to committees that make only independent expenditures.<sup>200</sup>

*Citizens United* held that the identities of the donors who pay for such expenditures are subject to disclosure,<sup>201</sup> but the reality is more complicated than that.

If the organization is a “political committee” it must disclose those donors who have given it more than a threshold amount.<sup>202</sup> *Buckley*, however, interpreted the federal statutory definition of “political committee” to apply only to organizations that have “the major purpose” of supporting the nomination or election of a candidate for federal office.<sup>203</sup> It is unclear whether the requirement that electoral activity be “the major purpose” of an organization is a constitutional prerequisite for political committee status and thus controls state law definitions of political committee status for purposes of state elections,<sup>204</sup> but the “major purpose” requirement is the governing interpretation of federal law. That means that political committees organized under section 527 of the Internal Revenue Code, which exempts from taxation the income of organizations whose primary purpose is to influence elections, are subject to donor disclosure requirements, but nonprofit corporations organized under either 501(c)(4) or 501(c)(6) are not.<sup>205</sup> In order to qualify for tax-exempt status, (c)(4)’s and (c)(6)’s must not be primarily engaged in electoral politics, although they can combine electoral activity with legislative lobbying, voter education, and issue advocacy more generally.<sup>206</sup> In the 2010 Congressional elections, many of the largest spenders—such as the U.S. Chamber of Commerce,<sup>207</sup> Americans for Prosperity,<sup>208</sup> American Crossroads GPS,

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<sup>200</sup> See *Mich. Chamber of Commerce v. Land*, 725 F. Supp. 2d 665 (W.D. Mich. 2010) (holding state prohibition on corporate campaign contributions cannot be constitutionally applied to contributions to a committee that makes only independent expenditures).

<sup>201</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010).

<sup>202</sup> 26 U.S.C. § 527(j) (2006).

<sup>203</sup> *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (per curiam).

<sup>204</sup> Compare *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 287–89 (4th Cir. 2008) (holding “major purpose” test constitutionally required), with *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1009–10 (9th Cir. 2010) (holding “major purpose” not constitutionally required), *cert. denied*, 2011 WL 588952 (U.S. Feb. 22, 2011) (No. 10-686).

<sup>205</sup> Compare 26 U.S.C. § 501(c)(4), with 26 U.S.C. § 501(c)(6).

<sup>206</sup> See Benjamin S. Feuer, Comment, *Between Political Speech and Cold, Hard Cash: Evaluating the FEC’s New Regulations for 527 Groups*, 100 NW. U. L. REV. 925, 947–48 (2006); Edward B. Foley & Donald Tobin, *The New Loophole?: 527s, Political Committees, and McCain-Feingold*, BNA, <http://www.bna.com/moneyandpolitics/loophole.htm> (last visited Apr. 10, 2011).

<sup>207</sup> See, e.g., Dan Eggen & Scott Wilson, *Obama Steps Up Attack on Chamber*, WASH. POST, Oct. 11, 2010, at A1.

<sup>208</sup> See, e.g., Editorial, *‘Educating’ the Electorate: Americans for Prosperity Unsubtle Campaign*, WASH. POST, Sept. 28, 2010, at A24; Felicia Sonmez, *Who is “Americans for Prosperity”?*, WASH. POST (Aug. 26, 2010, 12:21 PM), <http://voices.washingtonpost.com/the-fix/senate/who-is-americans-for-prosperit.html>.

and American Future Fund<sup>209</sup>—were either organized under 501(c) or relied on a (c)(4) or (c)(6) unit for much of their campaign spending on the theory that they were not primarily electoral committees and were therefore not subject to regulation (and disclosure) as FECA political committees.<sup>210</sup>

For individuals or organizations that are not “political committees,” disclosure may still be required if the individual or organization undertakes independent spending or spends money on electioneering communications above a dollar threshold.<sup>211</sup> Federal law requires such organizations to disclose the identities of the donors “who contributed an aggregate amount of \$1,000 or more to the person making the disbursement.”<sup>212</sup> This was the provision interpreted and upheld in *Citizens United*,<sup>213</sup> Citizens United is not a FECA “political committee” but it did propose to make electioneering communication expenditures above the threshold level.<sup>214</sup> However, an action taken by the FEC a few months after *Citizens United* makes it extremely easy for such organizations to avoid having to disclose their donors.

According to the FEC’s regulation interpreting the statute, corporations engaged in independent electioneering communication are required to disclose those donors above the monetary threshold whose donations were “made for the purpose of furthering electioneering communications.”<sup>215</sup> That regulation was adopted in the aftermath of *WRTL*, which reinterpreted BCRA’s ban on corporate and union electioneering communications.<sup>216</sup> BCRA had originally barred all corporate and union electioneering communications, and so it did not address disclosure by corporations or unions that make electioneering communications.<sup>217</sup> When *WRTL* relaxed the electioneering communication spending restriction, the issue arose as to how to apply the contributor disclosure requirement to corporations and unions, which are not formed for or primarily engaged in electoral activity, and receive funds from sources—shareholders, customers, members, “or in the case of a non-profit corporation, donations from persons who

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<sup>209</sup> See, e.g., Farnam & Eggen, *supra* note 4; Rutenberg et al., *supra* note 22; Matt Viser, *Donor Names Stay Secret as Nonprofits Politick*, BOS. GLOBE (Oct. 7, 2010), [http://www.boston.com/news/politics/articles/2010/10/07/donor\\_names\\_stay\\_secret\\_as\\_nonprofits\\_politick](http://www.boston.com/news/politics/articles/2010/10/07/donor_names_stay_secret_as_nonprofits_politick).

<sup>210</sup> See Fred Wertheimer, *Calling on the IRS to Investigate Crossroads GPS’ Tax Status*, HUFFINGTON POST (Oct. 5, 2010, 1:49 PM), [http://www.huffingtonpost.com/fred-werthemier/irs-called-on-to-investig\\_b\\_750875.html](http://www.huffingtonpost.com/fred-werthemier/irs-called-on-to-investig_b_750875.html); Sonmez, *supra* note 208; *About Us*, AMERICAN FUTURE FUND, <http://www.americanfuturefund.com/about-us> (last visited Apr. 10, 2011); *Frequently Asked Questions*, U.S. CHAMBER OF COMMERCE, <http://www.uschamber.com/about/faqs> (last visited Apr. 10, 2011).

<sup>211</sup> See 2 U.S.C. § 434(f)(1) (2006) (the threshold is \$10,000 during any calendar year).

<sup>212</sup> *Id.* § 434(f)(2)(F).

<sup>213</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010).

<sup>214</sup> *Id.* at 887–88.

<sup>215</sup> 11 C.F.R. § 104.20(c)(9) (2009).

<sup>216</sup> *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 477–79 (2007).

<sup>217</sup> *Id.* at 457.

support the corporation's mission"<sup>218</sup>—that do not necessarily intend to fund electioneering. Accordingly, the FEC adopted a regulation limiting the disclosure of donations only to those “made for the purpose of furthering electioneering communications.”<sup>219</sup>

In 2010, by a 3-2 vote, the FEC applied that regulation very narrowly, determining that the disclosure of the identity of a donor will not be required unless the donation was made *expressly* “for the purpose of furthering the electioneering communication that is the subject of the report.”<sup>220</sup> The case involved Freedom's Watch, Inc., a non-profit advocacy corporation that spent \$126,000 on electioneering communication ads in a congressional special election in the spring of 2008.<sup>221</sup> Freedom's Watch filed the required electioneering communication report concerning its spending but did not disclose any donors. Indeed, Freedom's Watch did not disclose any donors for any of its 2008 electioneering communications because, it contended, all the donations it received were to support the organization's general purposes, and none were earmarked for specific electioneering communications.<sup>222</sup> Three members of the FEC concluded that under those circumstances Freedom's Watch was under no duty to disclose its donors and, as a result, the complaint brought against Freedom's Watch for its failure to disclose its donors was dismissed.<sup>223</sup>

After *Freedom's Watch*, an organization—other than a “political committee”—that accepts donations not specifically earmarked for electioneering ads and uses them to make electioneering communications is under no federal election law requirement to disclose the identities of its donors or the amounts donated. Indeed, *Freedom's Watch* protects even those donations given for the purpose of electioneering communications generally so long as the donor has not indicated that it wants its funds used in a particular contest. As a result, a firm can commit tens of thousands of dollars for spending in federal elections so long as it does not indicate it wants the funds to be spent in a specific race.

*Freedom's Watch* involved the FEC's interpretation of its own regulations.<sup>224</sup> It is not a constitutional case; it does not affect state disclosure laws or even limit the ability of the FEC to adopt new regulations that would require the disclosure of donations used to pay for electioneering communication. However, the decision and the FEC ruling point to what is the central disclosure question resulting from *Citizens United*—whether and how to require the disclosure of the identities of firms (and wealthy individuals) who look to finance electioneering communications by making contributions to intermediary organizations that claim not to be primarily electoral and that take funds for both electoral and nonelectoral purposes.

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<sup>218</sup> Electioneering Communications, 72 Fed. Reg. 72,899, 72,911 (Dec. 26, 2007).

<sup>219</sup> 11 C.F.R. § 104.20(c)(9) (2009).

<sup>220</sup> *In re Freedom's Watch*, MUR 6002, Statement of Reasons of Chairman Matthew S. Peterson and Comm'rs Hunter and McGahn (Fed. Election Comm'n Aug. 13, 2010).

<sup>221</sup> *Id.* at 6.

<sup>222</sup> *Id.* at 2.

<sup>223</sup> *Id.* at 1.

<sup>224</sup> *See id.* at 3.

Conceivably the definition of political committee could be expanded to include non-major purpose organizations. But the constitutionality of such a move is uncertain, and, in any event, that just pushes back the issue a step as it is not clear that an organization that undertakes both electoral and non-electoral political activities can be required to disclose all its donors. Disclosure requirements implicate First Amendment rights and are justified in terms of their ability to vindicate the voter “interest in knowing who is speaking about a candidate . . . .”<sup>225</sup> But when is it fair to say that someone who gives to a multi-purpose organization which devotes some of its expenditures to electioneering communications and others to lobbying or public advocacy about issues is speaking about a candidate?

Even many of the states that define “political committee” broadly to pick up organizations for which elections are “a” but not “the” major or primary purpose limit the disclosure of contributions to those made “for the promotion or defeat of a candidate,”<sup>226</sup> “for the purpose of furthering” campaign expenditures,<sup>227</sup> or for the purpose of making an “independent expenditure.”<sup>228</sup> If, like the FEC’s interpretation of the federal law concerning disclosure of electioneering communications by non-political committees, this requires express earmarking of the contribution for a particular campaign expenditure in order for the disclosure requirement to apply, then disclosure will be easily evaded. Moreover, requiring these organizations to register as political committees also raises the question of whether it is constitutional to impose a host of administrative burdens on organizations which are not primarily electoral.

A better approach is to require disclosure without mandating that the organization become a political committee and to require a politically active organization that relies primarily on donated funds to separate the funds it uses for electioneering into electioneering accounts, kept distinct from the funds it uses for other purposes. Donors would be given the opportunity to decide whether their funds are used for electioneering—in which case the names of, and other information about, donors above a dollar threshold would be subject to disclosure—or not used for electioneering, in which case those donors would not be so disclosed. This approach would avoid the imposition of all the regulatory burdens associated with political committee status, and would tightly link up the electoral use of donated funds, public disclosure, and donor intent. In so doing, it would also resolve the *Freedom’s Watch* problem of evasion of any “for the purpose” requirement since it would provide recipient organizations with an incentive to identify donations as for an electoral purpose, otherwise they could not so use them. And it would not require that donations be earmarked to support

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<sup>225</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 915 (2010).

<sup>226</sup> *See Nat’l Org. for Marriage v. McKee*, 723 F. Supp. 2d 245, 263 (D. Me. 2010) (discussing Maine’s election law).

<sup>227</sup> *See* W. VA. CODE ANN § 3-8-2(E) (LexisNexis 2010).

<sup>228</sup> *See* COLO. REV. STAT. § 1-45-103.7 (2010) (defining an exception to a \$5,000 limit on contributions).

or oppose a particular candidate in a particular election. An intent to support the organization's electoral activity would be enough.

This proposal builds on a provision of the DISCLOSE Act,<sup>229</sup> which sought to address the problem of obtaining disclosure of the identities of donors to politically active nonprofit organizations, particularly 501(c)(4) social welfare organizations and 501(c)(6) chambers of commerce and business leagues.<sup>230</sup> As passed by the House of Representatives, the DISCLOSE Act stopped short of mandating the use of electioneering accounts for the electioneering activities of multi-purpose organizations.<sup>231</sup> Instead, the Act provided for (i) disclosure of donations to nonprofits earmarked for electoral use, (ii) the creation of an optional Campaign Related Activity Account (CRAA)<sup>232</sup> as the exclusive account for campaign spending and the disclosure of only donations above a high \$6,000 threshold to the optional CRAA, (iii) a mechanism for donors to nonprofits to provide that their funds will *not* be used for electoral purposes; and (iv) a requirement that if a nonprofit does not create a CRAA and undertakes independent expenditures or electioneering communications that all donations of \$600 or more to the organization would be subject to disclosure except for contributions from donors who had expressly directed that their donations not be used for electoral purposes.<sup>233</sup> The DISCLOSE Act succumbed to a Senate filibuster in the fall of 2010 and so was not enacted, but the CRAA concept provides a useful model for future disclosure reform.

As the CRAA superficially resembles a political action committee (PAC) it would probably trigger a challenge that it is in tension with *Citizens United's* determination that corporations and unions may not be compelled to channel their election spending through a PAC.<sup>234</sup> But unlike the PAC requirement struck down in *Citizens United*, this proposal would not limit the size of contributions to the campaign account nor would it require that the account be housed in a separate committee or be subject to the organizational requirements that *Citizens United* found so troubling. The account would be no more than a bookkeeping device for separating and tracking electoral and non-electoral donations and assuring that the former are reported, not a separate committee.

To be sure, by requiring that only donations to a nonprofit intermediary's electoral spending account can be used for electioneering, the proposal may be said to place a limit on the amount of money the intermediary can spend on elections, and so may be subject to constitutional challenge. But the CRAA would not operate as a cap on

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<sup>229</sup> Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act, H.R. 5175, 111th Cong. § 213 (2010).

<sup>230</sup> *See id.* § 211(a)(5)(F) (defining the scope of covered organizations).

<sup>231</sup> *See id.* § 213 (mandating use of separate accounts only where an organization has already established such accounts).

<sup>232</sup> *See id.* (proposing an amendment to 2 U.S.C. § 431 entitled, "Optional Use of Separate Account by Covered Organizations for Campaign-Related Activity").

<sup>233</sup> *See id.* §§ 211–13.

<sup>234</sup> *See Citizens United v. FEC*, 130 S. Ct. 876, 897–99 (2010).

spending. Unlike the law governing PACs, there would be no limits on the size of donations to the account, or on who could contribute to, or be solicited to contribute to, the account. Moreover, the CRAA would protect the interest of donors to mixed electoral/nonelectoral organizations in not having their donations used for electoral activity if that is not their intention. Unlike the former federal ban on the use of corporate treasury funds for electioneering,<sup>235</sup> the proposal does not bar corporations from using their treasury funds to engage in electioneering but it recognizes that the resources of the intermediary (c)(4)s and (c)(6)s that emerged as 2010's most prominent campaign actors come not from treasury funds but from outside donations.

The CRAA requirement would also empower donors to determine whether their donations will be used in elections and protect them from disclosure if their funds are not put to an electoral purpose. To be sure, the proposal bears a family resemblance to the “dissenting shareholder protection” rationale for the corporate spending ban rejected in *Citizens United*.<sup>236</sup> But that now-unconstitutional law made no provision enabling shareholders who wanted their funds to be used for electoral purposes to authorize such electoral action—in effect, it protected shareholders whether they wanted such protection or not.<sup>237</sup> This proposal permits willing donors to give their funds in unlimited amounts to the nonprofit to be used for electoral purposes, and it is narrowly tailored to regulate only those corporations that rely on donations and, thus, are susceptible of being used by other political actors to avoid legitimate disclosure obligations.

Some of the specifics of the CRAA proposal, as incorporated in the DISCLOSE Act, are troubling, particularly the two different disclosure thresholds linked to whether or not an organization created a CRAA. The DISCLOSE Act did not mandate the CRAA mechanism but provided it as an option.<sup>238</sup> For organizations that did not take the CRAA option but still engaged in electoral spending, donors above the \$600 threshold would have been disclosed unless they took affirmative steps to exclude their donations from the organization's electoral activities.<sup>239</sup> In effect, the electoral purpose of such donations would have been presumed. The \$6,000/\$600 differential thresholds for disclosure were clearly intended to be a carrot for organizations to create CRAAs. But it seems problematic to apply a much higher disclosure threshold for donations expressly given for campaign-related activity than for donations not expressly so given.

Moreover, the provision of only an optional CRAA combined with the \$6,000/\$600 differential to encourage its use seems self-contradictory. The authors of the

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<sup>235</sup> See Bipartisan Campaign Reform Act (BCRA) of 2002, Pub. L. No. 107-155, 116 Stat. 81.

<sup>236</sup> *Citizens United*, 130 S. Ct. at 911.

<sup>237</sup> See Bipartisan Campaign Reform Act (BCRA) of 2002, Pub. L. No. 107-155, § 201(a), 116 Stat. 81, 88–89.

<sup>238</sup> See Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act, H.R. 5175, 111th Cong. § 213 (2010) (detailing the optional use of separate accounts for campaign-related activity).

<sup>239</sup> See *id.* § 211 (making an exception for expenditures covered under the CRAA).

DISCLOSE Act presumably thought they could not force nonprofits to rely exclusively on dedicated campaign accounts for their electoral activities. But the carrot of differential disclosure thresholds implicitly relies on the stick of disclosure of all donors above \$600 other than those who have expressly requested that their donations be excluded from political activity. But if that can be required, then surely Congress could also require nonprofits to create and rely on CRAAs for their political activity. Indeed, mandating that politically active nonprofits dependent on contributions use a dedicated campaign account for electoral activities actually more carefully respects the constitutional rights of donors since it more clearly limits disclosure to those who intend to support campaign-related activity. By contrast, under the DISCLOSE Act's approach, organizations that did not create CRAAs would have been required to disclose all donors above the \$600 who did not affirmatively opt out of electoral politics, rather than only those who opted in.

Should Congress return to the corporate donor disclosure issue, it should mandate the use of campaign accounts by organizations such as (c)(4)s and (c)(6)s that serve as vehicles for the pooling and spending of the funds of donors interested in financing campaign activity. This would simultaneously limit disclosure to those who have chosen to support campaign activity by contributing to a dedicated campaign account while protecting the political privacy of those who have not so chosen. Unlike the PAC model for corporate campaign spending struck down in *Citizens United*,<sup>240</sup> this would not limit the amount of money any donor could give the campaign account, or the categories of people or organizations that could contribute to such an account. As such, unlike the PAC, this would not inhibit spending. Moreover, consistent with the concern to avoid over-disclosure and to target only major donors, any disclosure requirement should use the \$6,000 threshold for CRAA donors as proposed in last year's DISCLOSE Act rather than the lower \$600 alternative threshold. This would target only major donors and also make it more likely that the major donors are actually disclosed.

#### CONCLUSION

The two challenges referred to in the title of this article are really different aspects of one challenge—how to enable disclosure to perform its voter information function effectively while minimizing the possible burden it may impose on political participation and political privacy. On the one hand, our laws currently require too much disclosure from individuals who donate relatively small amounts of money. On the other hand, our laws are ineffective in obtaining the disclosure of the sources of the often very large sums of money donated to independent expenditure committees.

Over-disclosure has the potential to discourage the political participation of the small donors whose contributions are among the least corrupting aspects of the campaign finance process, and whose increased involvement is desirable for democratizing

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<sup>240</sup> See *Citizens United*, 130 S. Ct. at 899.

our campaign finance system. The under- or non-disclosure of the donors to independent expenditure committees shrouds a large and growing component of campaign money in secrecy at a time when the public is clamoring for transparency.

The over-disclosure problem threatens to be exacerbated by the growing political role of the Internet which greatly facilitates both the dissemination of disclosed information and the organization of a hostile response to donors to certain candidates or causes. Although it is unclear how serious the threat of Internet-based reprisals against small donors will be, the very awareness of the wide dissemination of disclosed political information and of the possibility of a hostile response could itself chill donors. The under-disclosure problem, in turn, has exploded in the aftermath of *Citizens United* and the green light that decision gives to corporate participation in electoral politics. Although corporations are not the only donors who seek to act through intermediaries, they seem to have a particular preference to avoid publicity of their campaign role.

It is particularly striking that at a time when the Supreme Court has imposed more restrictions on, and is thus exerting a greater sway over, campaign finance law than ever before, it has chosen to take a relatively modest role in overseeing disclosure. *Citizens United* and *Doe v. Reed* together have endorsed disclosure as the preferred mode of campaign finance regulation, confirmed that disclosure laws will be subject to a relatively relaxed standard of review, embraced a relatively expansive view of the content of the communications that can be subject to disclosure, and, even—as the Court acknowledged the growing concern about the impact of Internet-based disclosure on donors—reaffirmed the relatively heavy burden of persuasion it previously imposed on political actors seeking broad exemptions from disclosure. Disclosure is still subject to real constitutional constraints; but virtually alone among campaign finance measures this is an area where Congress and state and local governments have considerable discretion to set policy and make law.

Thus, the real challenges for our legislatures will be to revise and update our disclosure laws in light of the technological and legal developments that have changed the settings in which disclosure applies. This Article sets out some proposals for revising the rules governing disclosure by individuals that should simultaneously enhance the voter education function of disclosure while reducing the burden on small donors, and for obtaining the disclosure of the identities of the large donors to organizations that engage in independent campaign spending without impinging on the privacy of donors whose political activity is not focused on elections. But more important than the specifics of these proposals is the need for our disclosure laws to be revised to address the challenges that prompted them. If they are not, then our disclosure laws will be increasingly ineffective in actually serving the purposes that justify their adoption.