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MRS. MCINTYRE'S PERSONA: BRINGING PRIVACY THEORY TO ELECTION LAW

William McGeeveran*

INTRODUCTION

In 1995, the Supreme Court reversed the imposition of a one hundred dollar fine for violating disclosure requirements in Ohio election law.¹ The case involved the late Mrs. Margaret McIntyre, who had distributed homemade leaflets arguing against a proposed local school tax levy, some of which were signed only by “CONCERNED PARENTS AND TAXPAYERS.”² The rationale for the Court’s decision was a robust understanding of privacy rights for political speech and association: “The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible.”³

For a time, it appeared that *McIntyre* might herald a more capacious understanding of the interests in anonymity when ordinary individuals engage in politically-related speech. Two later Supreme Court cases relied on the broad conceptualization of privacy in *McIntyre* to invalidate state or local laws mandating disclosure: one required that people wear identification badges when gathering petition signatures in connection with ballot initiatives,⁴ and another mandated prior registration for door-to-door canvassers.⁵ Assessing these trends, I published a law review article in 2003 that suggested the Supreme Court might find constitutional problems with mandatory disclosure of modest campaign contributions.⁶

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¹ See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 338 & n.3 (1995). The Ohio statute applied to any “general publication” that sought, among other things, to “influence the voters in any election.” *Id.*

² See *id.* at 337 (quoting one of Mrs. McIntyre’s leaflets).

³ *Id.* at 341–42.

⁴ *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 199 (1999) (citing *McIntyre* decision as “instructive”).

⁵ *Watchtower Bible & Tract Soc’y of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 166 (2002) (quoting language from *McIntyre* with approval).

⁶ William McGeeveran, *Mrs. McIntyre’s Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1, 33–48 (2003).

Boy, was I wrong. High Court rulings since then have consistently upheld disclosure requirements in election law.⁷ Last year the Court, by an 8-1 vote in *Doe v. Reed*, brushed aside personal privacy interests of people whose signatures referendum petitions would be posted online, and the majority opinion never even cited *McIntyre*.⁸ These newer cases returned to an earlier understanding of privacy that requires proof of a “reasonable probability” of “threats, harassment, or reprisals” to raise constitutional problems.⁹ While the judicial branch relaxed its scrutiny, the other branches increased disclosure in elections by imposing more requirements, releasing more data, and enabling internet technology to spread the disclosed information more widely.¹⁰

Outside of government, some scholars and advocates have questioned whether this embrace of disclosure gives short shrift to privacy concerns. This symposium exemplifies the ongoing debate about privacy and elections within academia. Yet serious attention to political privacy remains relatively invisible compared to areas such as health care or social media.¹¹ Judicial and scholarly analyses typically ignore the extensive development by privacy scholars of theoretical justifications for personal privacy and anonymity in many realms.

The time is ripe to reconsider the Court’s cramped view of privacy in politics. Thanks to the internet, the intrusiveness of disclosure has grown greater than ever before.¹² Besides, the current loophole-ridden regime doesn’t even work: the recent

⁷ See *Doe v. Reed*, 130 S. Ct. 2811 (2010); *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *McConnell v. FEC*, 540 U.S. 93 (2003).

⁸ *Doe*, 130 S. Ct. at 2815–21.

⁹ See, e.g., *id.* at 2820 (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (per curiam)); *Citizens United*, 130 S. Ct. at 916 (citing *McConnell*, 540 U.S. at 198).

¹⁰ In campaign finance, one comprehensive report found in all these respects “a clear and continuing trend toward greater public access to campaign disclosure data at the state level.” See CAMPAIGN DISCLOSURE PROJECT, GRADING STATE DISCLOSURE 2008, at 2, available at <http://www.campaigndisclosure.org/gradingstate/GSD08.pdf> [hereinafter GRADING STATE DISCLOSURE]; see also Reporting Contributions Bundled by Lobbyists, Registrants and the PACs of Lobbyists and Registrants, 72 Fed. Reg. 62,600 (proposed Nov. 6, 2007) (to be codified at 11 C.F.R. § 104.22) (imposing new federal campaign finance disclosure regulations); Miriam Galston, *Campaign Speech and Contextual Analysis*, 6 FIRST AMEND. L. REV. 100, 131–32 (2007) (discussing new federal disclosure rules for tax-exempt organizations); Lloyd H. Mayer, *The Much Maligned 527 and Institutional Choice*, 87 B.U. L. REV. 625, 626–27 (2007) (same). Meanwhile, California apparently is the only state that now exempts petitions from presumptive public disclosure. See *Doe v. Reed*, 130 S. Ct. 2811, 2826–27 (Alito, J., concurring) (citing CAL. GOVT. CODE ANN. § 6253.5 (West 2008); CAL. ELEC. CODE ANN. § 18650 (West 2003)); *id.* at 2828 (Sotomayor, J., concurring) (stating that only one state has such limited disclosure).

¹¹ See, e.g., James Grimmelman, *Saving Facebook*, 94 IOWA L. REV. 1137 (2009); Deven McGraw, *Privacy and Health Information Technology*, 37 J.L. MED. & ETHICS 123 (Fall Supp. 2009).

¹² See *infra* notes 27–34 and accompanying text.

midterm elections featured rampant circumvention of disclosure requirements by savvy big donors.¹³

This Symposium Essay updates what I wrote eight years ago about the costs of disclosure and applies the theoretical insights of privacy scholars to the full range of disclosure requirements in election law—especially in campaign finance, but also including petition signatures and even party registration.¹⁴ It argues that the interest in anonymous political participation should not be anchored only in effects-oriented reasoning that demands a danger of imminent physical or financial harm. Election law and policy should recognize a broader range of circumstances where disclosure may discourage political involvement, and also should respect personal interests in dignity and autonomy that animate much of privacy law and theory in other areas. Beyond just chilling effects, privacy law and commentary increasingly recognize that Mrs. McIntyre has an interest in the integrity of her persona. Whether in constitutional jurisprudence or in workaday policy decisions, disclosure rules must better embody the tricky balance between ideals of open elections, encouraging engagement in politics, and the classic “right to be let alone.”¹⁵

Part I of the Essay describes the current pro-disclosure atmosphere and notes some reasons it might change. Part II critiques the cramped view of privacy interests now dominating election law jurisprudence. Part III brings better-developed privacy theory into the picture. It shows how a more robust understanding of privacy respects individuals’ interests in their private personae and autonomous development of beliefs, not just their physical or economic security. Finally, although this Essay focuses on privacy costs, Part IV briefly discusses what a broader understanding of these costs might mean for both constitutional jurisprudence and wise policy around disclosure in election law. This examination does not compel any sweeping ban on disclosure laws, but it does indicate that we are too cavalier about privacy interests today.

I. THE CURRENT SITUATION AND THE PROSPECT OF CHANGE

A. Current Law and Rhetoric

Because others have written comprehensive recent summaries of current law,¹⁶ I will offer only a brief recap here. The Supreme Court’s 2003 decision in *McConnell*

¹³ See *infra* notes 40–42 and accompanying text.

¹⁴ See McGeeveran, *supra* note 6.

¹⁵ See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (quoting THOMAS M. COOLEY, COOLEY ON TORTS 29 (Chicago, Callahan & Co. 2d ed. 1888)).

¹⁶ See, e.g., Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 279–86 (2010), Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255, 257–70 (2010).

v. *FEC*¹⁷ initiated the turn away from the broader *McIntyre* view to an older and narrower understanding of relevant privacy interests. The *McConnell* Court, while striking down some provisions of the McCain-Feingold campaign finance law,¹⁸ upheld that statute's enhanced requirements for disclosure of political contributions.¹⁹ Without citation of *McIntyre*, the decision reached back to earlier cases and determined that only "economic reprisals or physical threats as a result of the compelled disclosures" would seriously chill political activity, so that only rules with these dramatic results would raise constitutional difficulties.²⁰

Last year's decisions in *Citizens United v. FEC*²¹ and *Doe v. Reed*²² intensified this focus on a narrow set of harms. Both cases repeated the requirement that an as-applied challenge must demonstrate a "reasonable probability" that disclosure would result in "threats, harassment, or reprisals"—language originating in the landmark *Buckley v. Valeo* case from 1976.²³ While the Court left open an extremely narrow opportunity for exceptions in particular circumstances,²⁴ these cases represent an almost complete disregard for individual privacy interests, especially compared to the *McIntyre* decision. A few lower courts have struck down some disclosure requirements based on their administrative burdens on small-scale political activity.²⁵ But reliance on *McIntyre* and political privacy rationales against disclosure has dried up almost entirely in recent lower court decisions.

B. The Prospect of Change

At first blush, the recent expansion of disclosure requirements and the string of Supreme Court decisions upholding them might appear to foreclose any significant change in our approach toward privacy in politics. Notwithstanding this trend toward ever-increasing disclosure, however, certain recent developments might—and should—force courts and policymakers to reevaluate.²⁶

¹⁷ 540 U.S. 93 (2003).

¹⁸ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

¹⁹ *McConnell*, 540 U.S. at 108.

²⁰ *Id.* at 198 (comparing *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), with *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)).

²¹ 130 S. Ct. 876 (2010).

²² 130 S. Ct. 2811 (2010).

²³ 424 U.S. at 74.

²⁴ *See infra* Part II.C.

²⁵ *See Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010); *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009). *But see Worley v. Roberts*, No. 4:10CV423-RH/WCS, 2010 WL 4339374 (N.D. Fla. Oct. 26, 2010) (denying preliminary injunction in similar circumstances).

²⁶ *See Briffault, supra* note 16, at 276 (suggesting that both constitutional and policy approaches to campaign finance disclosure may be appropriate for reconsideration).

First, the changing nature of journalism and the maturation of the internet continue to intensify the effect of disclosure on ordinary political participants. Internet disclosure on a massive scale changes everything.²⁷ In the past, disclosed data entered general circulation only if conventional media outlets considered it especially newsworthy.²⁸ Traditional news judgment involved choosing individual political actions of special relevance to highlight, and surrounding this information with extensive context. This occurs rarely: even in jurisdictions with strong campaign finance disclosure regimes, for example, newspapers publish very few stories about political fund-raising.²⁹

As conventional news outlets shrink overall and cut back political coverage in particular, we see two online replacements arising, each with some of their own problems. First, online databases offer massive quantities of searchable information, in the hope that voters might use it to sort for useful heuristic cues about their votes.³⁰ The overwhelming volume of data becomes so unmanageable, however, that it offers little aid to the average voter.³¹ Dissemination of raw data removes most of the filtering function once performed by journalists, so drops of relevant information mix with oceans of data.³² Alternatively, new “informational entrepreneurs”³³ such as interest groups and partisan bloggers provide their own analysis of disclosed data. However, these groups naturally shape the narrative about disclosed data to suit their own purposes and agendas.³⁴

²⁷ See Mayer, *supra* note 16, at 276–77; McGeeveran, *supra* note 6, at 10–13.

²⁸ See Nancy S. Marder, *From “Practical Obscurity” to Web Disclosure: A New Understanding of Public Information*, 59 SYRACUSE L. REV. 441, 449 (2009).

²⁹ See Raymond J. La Raja, *Sunshine Laws and the Press: The Effect of Campaign Disclosure on News Reporting in the American States*, 6 ELECTION L.J. 236, 246–47 (2007) (summarizing results of empirical study).

³⁰ The Federal Elections Commission’s disclosure database is a representative example. See *Campaign Finance Disclosure Data Search*, FED. ELECTION COMM’N, http://www.fec.gov/finance/disclosure/disclosure_data_search.shtml (last visited Apr. 10, 2011). Many states disclose this much information or more online. See GRADING STATE DISCLOSURE, *supra* note 10.

³¹ See Briffault, *supra* note 16, at 288; Mayer, *supra* note 16, at 265–67; Justin M. Sadowsky, *The Transparency Myth: A Conceptual Approach to Corruption and the Impact of Mandatory Disclosure Laws*, 4 CONN. PUB. INT. L.J. 308, 332–34 (2005).

³² See Briffault, *supra* note 16, at 288.

³³ See Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295, 298 (2005).

³⁴ See Robert F. Bauer, *Not Just a Private Matter: The Purpose of Disclosure in an Expanded Regulatory System*, 6 ELECTION L.J. 38, 52–53 (2007) (pointing out that independent good-government organizations responsible for much disclosure of “money in politics” also pursue their own agenda of promoting increased electoral regulation); PROP 8 MAPS, <http://www.eightmaps.com/> (last visited Apr. 10, 2011) (opponents of a referendum disclosing donors who supported it); KNOW THY NEIGHBOR, <http://knowthyneighbor.org/> (last visited Apr. 10, 2011) (gay rights organization identifying people who signed the petitions to put measures on the ballot that the organization opposes).

Whether or not it is funneled through a third-party intermediary, both routes for disclosure expose the personal political beliefs of individuals, without necessarily yielding a corresponding increase in useful information for voters.³⁵ As online disclosure replaces traditional news media, tens of thousands of average people whose names would never appear in any story in the *Washington Post* nevertheless find their political activity reported in online databases hosted by the *Huffington Post*.³⁶ This exposure has accelerated with every election cycle, and it may create momentum for reconsidering the values behind disclosure.

A second possible catalyst for change is more political. Advocates for campaign finance regulation who support pervasive disclosure must be careful what they wish for. Traditional opponents of campaign regulation frequently cite disclosure as the cure for abuses—and as a worthy substitute for other rules such as contribution limits.³⁷ Courts often adopt this reasoning, striking down other rules while emphasizing that the benign alternative of disclosure supposedly keeps campaign abuses in check.³⁸ This “deregulate and disclose” strategy only works if it can portray disclosure as virtually cost-free.³⁹ Supporters of broader regulation may have played into their adversaries’ hands, accepting the proposition that privacy costs of disclosure are unimportant. If they realize their error, advocates of campaign finance reform could shift toward a more nuanced view of political privacy interests and their relationship to other regulatory tools.

Finally, and perhaps most important, disclosure failed colossally in the 2010 election. The upside-down rules reached their absurd climax, exposing numerous instances of small-scale citizen participation but concealing the giant influence of financially and politically powerful entities.⁴⁰ In campaign finance, federal law required disclosure of numerous two-hundred fifty dollar contributions to candidates but allowed Crossroads GPS to raise forty-three million dollars in unlimited donations from undisclosed sources

³⁵ See McGeeveran, *supra* note 6, at 26–29.

³⁶ See *Campaign Donors: Fundrace 2010*, HUFFINGTON POST, <http://fundrace.huffingtonpost.com> (last visited Apr. 10, 2011) (allowing visitors to search for political campaign contributors by name, address, location or occupation).

³⁷ See, e.g., Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 688 (1997) (“What scenario are we left with if both political expenditure and contribution limits are deemed unconstitutional? Will political money proliferate indefinitely, along with its accompanying harms? Not necessarily, provided that the identity of contributors is required to be vigorously and frequently disclosed.”).

³⁸ See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010) (“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.”).

³⁹ See Briffault, *supra* note 16, at 286–87 (discussing the embrace of the “deregulate and disclose” approach by critics of campaign finance regulation).

⁴⁰ See David G. Savage, *Ad Transparency Not So Clear; Loopholes, Laxity Let Big Sums Flow for Campaigns*, CHI. TRIB., Oct. 27, 2010, at A14.

under section 501(c)(4) of the tax code.⁴¹ Similarly, Supreme Court case law confers greater anonymity on organized entities collecting signatures than on the individual voters signing them, thanks to the contrast between *Doe v. Reed* (which found disclosure of petition signatories unobjectionable) and an earlier precedent rejecting requirements that petition circulators wear identification badges.⁴²

As reformers sift through the failures and abuses of the 2010 election and formulate their response, they should recognize the need to revisit disclosure. Part II discusses some of the problems they may now see with current thinking.

II. PROBLEMS WITH THE NEW OLD DISCLOSURE STANDARDS

As described in Part I, most courts in the last decade relied on an earlier characterization of privacy interests from *Buckley v. Valeo*⁴³ rather than the more recent and broader understanding in *McIntyre* and its progeny.⁴⁴ This Part identifies how these new standards—the same as the old ones—underrate important values and interests in political privacy. First, the orthodox view of privacy harms in election law construes those harms much too narrowly. Second, it adheres to an inflexible view that divides all information into “public” and “private” categories without reference to particular circumstances. Finally, the means by which current doctrine allows for exceptions to the general rule of disclosure offers no help to most political actors with compelling privacy interests.

Before proceeding, one clarification is in order. There are sound reasons for courts to limit constitutional requirements and defer to the political branches and to the states in the particular design of electoral structures.⁴⁵ As will be clear below, I am not arguing for a sweeping constitutional right of anonymity in political activity. In principle, legislators and election administrators could provide greater protection for privacy than any constitutional minimum.⁴⁶ In practice, they don't. Because courts have engaged in more explicit and extensive analyses of the tension between privacy and disclosure

⁴¹ 26 U.S.C. § 501(c)(4) (2006); *see also* Peter Overby & Andrea Seabrook, 'Independent' Groups Behind Ads Not So Independent, NAT'L PUB. RADIO (Oct. 27, 2010), available at <http://www.npr.org/templates/story/story.php?storyId=130836771>; Kenneth P. Vogel, *SEIU, American Crossroads Look Back at 2010 Spending*, POLITICO (Dec. 14, 2010, 9:52 PM), <http://www.politico.com/news/stories/1210/46355.html>.

⁴² Compare *Doe v. Reed*, 130 S. Ct. 2811 (2010), with *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999).

⁴³ 424 U.S. 1, 74 (1976) (per curiam).

⁴⁴ *See infra* Part I.

⁴⁵ *See Doe*, 130 S. Ct. at 2818 (citing *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992)); *id.* at 2830 & n.3 (Stevens, J., concurring in part); Richard H. Pildes, Foreword, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004). *But see* *Meyer v. Grant*, 486 U.S. 414, 424–25 (1988) (rejecting expansive “greater includes the lesser” interpretation of state power to regulate petition-gathering procedures).

⁴⁶ *See* Briffault, *supra* note 16, at 276, 295.

than other institutions, this Part focuses on the judicial articulation of privacy interests. To the extent that legislators and election administrators pay any attention to those interests, they generally share the courts' narrow understanding of relevant privacy costs.⁴⁷ These policymakers could broaden their view, and part of my goal in critiquing the courts is to encourage them to do so.

A. Narrow Views of Harm

The crucial shortcoming in the dominant valuation of privacy is twofold. First, the standard limits privacy costs to dramatic physical or economic attacks by one's opponents. The formulaic words most often repeated in the major Supreme Court decisions speak of "threats, harassment, or reprisals."⁴⁸ This language calls to mind violent hatred directed toward civil rights activists in the segregated South or McCarthy Era blacklists.⁴⁹ Indeed, several key cases in which the Supreme Court upheld political privacy arose in precisely these unusual circumstances.⁵⁰ Sometimes, the phrasing suggests a limitation of privacy interests to a chilling effect on the precise political activity at issue, not even on political activity in general.⁵¹ In his *Doe* concurrence, Justice Stevens goes further still, insisting upon "a significant threat of harassment directed at those who sign the petition that cannot be mitigated by law enforcement measures."⁵²

Second, not only does this view construe the chilling effect too narrowly, but it ignores entirely any other deleterious effects beyond the chilling ones. Debates about privacy of medical records, financial transactions, or online activity all consider the possibility that disclosure might inhibit desirable behavior.⁵³ Those debates then

⁴⁷ See *id.* at 293–94 (explaining that over the last century, federal and state campaign disclosure laws have reflected the Court's "lump it" attitude towards donors' privacy concerns).

⁴⁸ See *Doe*, 130 S. Ct. at 2821; *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010); *McConnell v. FEC*, 540 U.S. 93, 198 (2003); *Buckley*, 424 U.S. at 71.

⁴⁹ On the pervasive dangers of blacklists beyond initial reprisals, see generally Seth Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1 (1991).

⁵⁰ See *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982); *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449 (1958).

⁵¹ See Daniel Winik, Note, *Citizens Informed: Broader Disclosure and Disclaimer for Corporate Electoral Advocacy in the Wake of Citizens United*, 120 YALE L.J. 622, 646–48 (2010) (describing the Court's requirement that governmental interests in disclosure outweigh privacy interests unless reprisal is likely in that instance).

⁵² *Doe*, 130 S. Ct. at 2831 (Stevens, J., concurring in part).

⁵³ See, e.g., Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1215–17 (1998) ("[P]ersonal information can be misused by making us vulnerable to prejudice or unwarranted disesteem."); McGraw, *supra* note 11, at 124 ("Without appropriate protections for privacy and security in the healthcare system, some patients engage in 'privacy-protective' behaviors to avoid having their personal health information used inappropriately. According to a recent poll, one in six adults (17%)—representing about 38 million persons—say they withhold information from their health providers due to worries about how the medical data might be disclosed.").

extend much further to consider additional inherent values of information privacy. For example, we consider medical or sexual privacy important for its own sake, regardless of whether disclosure would inhibit an individual's future use of the health care system or activities in the bedroom.

Courts and policymakers ignore reality if they require blacklists or burning crosses before recognizing any potential chilling effect. And they arbitrarily disregard important interests if they consider disincentives to future behavior the only valid concern about disclosure. As described below in Part III, privacy scholars have developed sophisticated normative and theoretical explanations of the value of privacy that move well beyond this narrow view.

B. "Public" and "Private"

Traditionally, U.S. law has viewed privacy dichotomously: a set of defined information merits protection, but "for all the rest, anything goes."⁵⁴ Thus, in the election disclosure cases, calls for "civic courage," characterizations of political activity as "lawmaking," and references to the "public sphere" all endeavor to define conflict away, simply by placing involvement with elections on the "public" side of a clear and dispositive line.⁵⁵

These gambits beg the main question. After all, we go to great lengths to preserve the anonymity of voting, the most fundamental electoral activity. If political contributions or petition signatures are "public" and voting "private," it is only because legal rules say so, and perhaps because those rules eventually shape public expectations.⁵⁶

Most privacy scholars reject the simplistic notion that people reveal the same information about themselves in every context⁵⁷—and also rejects any notion that they *should* do so.⁵⁸ Rather, ordinary people play different roles in different portions of their lives—work, family, various distinct circles of friends and acquaintances, church, online activity, and so forth.⁵⁹ Social scientists have long understood that

⁵⁴ Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119, 136–37 (2004); see also DANIEL SOLOVE, *THE DIGITAL PERSON* 143–49 (2004).

⁵⁵ See, e.g., *Doe v. Reed*, 130 S. Ct. 2811, 2828–29 (2010) (Sotomayor, J., concurring); *id.* at 2836–37 (Scalia, J., concurring in the judgment).

⁵⁶ See Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1142–43 (2002).

⁵⁷ For some foundational arguments to this effect, see generally, ALAN F. WESTIN, *PRIVACY AND FREEDOM* 53–54 (1970); Charles Fried, *Privacy*, 77 YALE L.J. 475 (1968). I go into more depth about the importance of context in Part III.C, *infra*.

⁵⁸ For this reason I question James Gardner's suggestion in this symposium that "sincerity," or the notion that citizens must act in accordance with a true self, represents a requirement of good citizenship. James A. Gardner, *Anonymity and Democratic Citizenship*, 19 WM. & MARY BILL RTS. J. 927, 940–42 (2011). As Gardner himself acknowledges in quoting psychology scholar John Suler, "a single disinhibited [self] probably does not exist at all. . . ." *Id.* at 949 (quoting John Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCHOL. & BEHAV. 321, 325 (2004)).

⁵⁹ See Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 958–70 (2005) (applying network theory to privacy law).

the information others hold about us greatly influences the way we navigate these different roles. Erving Goffman's classic sociological examination, *The Presentation of Self in Everyday Life*, analyzes how that knowledge changes behavior.⁶⁰

In areas where contemporary privacy concerns loom especially large (including interactions in social media, online targeted advertising, and disclosure of government records), the traditional dichotomies do a poor job of addressing widespread concerns. In each of these situations, information was revealed in one setting but later disclosed in a different and more invasive setting. So too with actions such as giving a donation or signing a petition; these may appear to be a private political commitment at the moment they are consummated but, depending on the law, they may result in the permanent identification of individuals' political beliefs through Google.

C. Unavailability of Exceptions

Political privacy interests should not trump disclosure rules based only on "rank conjecture and speculation."⁶¹ Yet onerous requirements for proving a "reasonable probability" of "threats, harassment, and reprisals" make it difficult to mount an as-applied challenge to any disclosure requirement. For starters, the Supreme Court never articulated the standard very clearly.⁶² *Buckley v. Valeo* specified that courts should permit "flexibility in the proof of injury."⁶³ On the other hand, that case also assumed that "[w]here it exists the type of chill and harassment identified in *NAACP v. Alabama* can be shown."⁶⁴ Demonstrating possible injury from disclosure has not always been so easy. The Socialist Workers Party secured an as-applied exemption to campaign finance disclosure from the Supreme Court, but the Party was able to present plentiful specific evidence of severe government and private retribution aimed directly at the organization and its members.⁶⁵

⁶⁰ See, e.g., ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959). For just one example of relevant discussion found throughout this classic work, see *id.* at 222–25.

⁶¹ *Doe v. Mortham*, 708 So. 2d 929, 935 (Fla. 1998); see also, e.g., *Ohio Right to Life Soc'y, Inc. v. Ohio Elections Comm'n*, No. 2:08-cv-00492, 2008 WL 4186312, at *9 (S.D. Ohio Sept. 5, 2008) ("Plaintiff . . . has not even attempted to establish a record that would permit this Court to conclude that its contributors face a real threat of retaliation if their names were disclosed.").

⁶² See *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1206 (E.D. Cal. 2009) ("Supreme Court precedent regarding the appropriate standard of review is not a model of clarity.").

⁶³ *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (per curiam).

⁶⁴ *Id.*

⁶⁵ *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 98–101 (1982); see also *Averill v. City of Seattle*, 325 F. Supp. 2d 1173, 1178 (W.D. Wash. 2004) (granting exemption for political campaign associated with Freedom Socialist Party based on evidence of death threats).

In practice, courts rarely grant exceptions to disclosure. Most of those are issued to marginal political groups, often socialists, with little realistic likelihood of influencing any election.⁶⁶ Courts often emphasize the small scale of political activities, limiting the impact of political privacy cases to situations like Mrs. McIntyre's modest personal pamphleteering.⁶⁷ When supporters of a 2008 California ballot proposition to ban gay marriage sought an exemption and presented anecdotal evidence of death threats, boycotts, and vandalism,⁶⁸ the court explicitly relied on the success of the measure as a basis for rejection.⁶⁹ That court went on to limit the exemption to fringe political activity, holding that "minor status is a necessary element of a successful as-applied claim," but not a sufficient basis, and that exemptions were limited to "groups seeking to further ideas historically and pervasively rejected and vilified by both this country's government and its citizens."⁷⁰ In other words, exemptions from disclosure would only be available when the disclosed activity has no effect on political outcomes.

In his *Doe* concurrence, Justice Alito argued that, to be effective, exemptions from disclosure must not be delayed past the time of the political activity in question and must not demand an unrealistic evidentiary showing of the necessary effects.⁷¹ These two features interact in a potentially pernicious way: if an as-applied exemption requires proof of actual reprisals against the signers of a petition, for example, then by definition it cannot be secured in advance.⁷² No other Justice signed his concurrence, and only Justice Thomas dissented from the 8-1 ruling in the case.⁷³

⁶⁶ See, e.g., *Brown*, 459 U.S. at 92–93 (citing *Buckley*, 424 U.S. at 60–74 (characterizing as-applied exemption as limited to "minor parties")); *Averill*, 325 F. Supp. 2d at 1178 (involving socialist candidate in municipal election); *McArthur v. Smith*, 716 F. Supp. 592 (S.D. Fla. 1989) (same).

⁶⁷ See, e.g., *Swaffer v. Cane*, 610 F. Supp. 2d 962, 970–71 (E.D. Wis. 2009); *Doe v. Mortham*, 708 So. 2d 929, 934–35 (Fla. 1998).

⁶⁸ *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1200–04 (E.D. Cal. 2009); see also *Briffault*, *supra* note 16, at 275 (discussing the California situation and opining that "the incidents that did occur raise troubling questions about the potential for disclosure to undermine political participation").

⁶⁹ *ProtectMarriage.com*, 599 F. Supp. 2d at 1214 ("They were successful in their endeavor to pass the ballot initiative and raised millions of dollars in the process. This set of circumstances is a far cry from the sixty-member SWP party [in *Brown*], repeatedly unsuccessful at the polls, and incapable of raising sufficient funds.").

⁷⁰ *Id.* at 1215.

⁷¹ *Doe v. Reed*, 130 S. Ct. 2811, 2822–23 (2010) (Alito, J., concurring) ("[T]he as-applied exemption becomes practically worthless if speakers cannot obtain the exemption quickly and well in advance of speaking. . . . Additionally, speakers must be able to obtain an as-applied exemption without clearing a high evidentiary hurdle.").

⁷² *Id.* at 2823–24 (arguing that evidence of harassment against signers of a petition in one state should be probative of possible harassment against signers of a similar petition in another state).

⁷³ See *id.* at 2837 (Thomas, J., dissenting).

In contrast to Justice Alito's concerns, several other Justices in *Doe* expressed palpable skepticism about as-applied exemptions (or, in the case of Justice Scalia, hostility to the entire notion of political privacy).⁷⁴ In all, four current Justices (Justices Scalia, Ginsburg, Breyer, and Sotomayor) signed one of the opinions stating such views.⁷⁵ Justice Stevens also was in that group, so it was actually a five-vote majority in *Doe* that nearly foreclosed exemptions. With his retirement, it is just possible to imagine a coalition of five Justices (Roberts, Kennedy, Thomas, Alito, and Kagan) who might give as-applied challenges a realistic chance of success beyond extreme cases. But the general trajectory of the Court's jurisprudence does not create much cause for optimism.

As discussed further below, a richer account of the values underlying political privacy would support more robust protection, and also would provide more useful guidance for the development of political disclosure practices that afford the proper respect to privacy. To be sure, at the extremes, the dangers of disclosing personal information can run to such consequences as stalking, harassment, loss of a job, or retribution from powerful entities. But there is more to data privacy than the prevention of these especially serious and relatively unusual harms.

⁷⁴ See *id.* at 2829 (Sotomayor, J., concurring) (arguing that courts should be “deeply skeptical” of as-applied challenges to disclosure of petition signers in referendum campaigns); *id.* at 2831 (Stevens, J., concurring in part and concurring in the judgment) (considering a successful as-applied challenge “unlikely” and opining that judges should require “a significant threat of harassment . . . that cannot be mitigated by law enforcement measures” and should “demand strong evidence” of such dangers); see also *id.* at 2836–37 (Scalia, J., concurring in the judgment) (arguing against any constitutional scrutiny of disclosure requirements).

⁷⁵ It is possible that the Justices' views were colored by the nature of the particular issue in *Doe*, a referendum to repeal gay rights legislation. See *id.* at 2816 (majority opinion). It may be coincidence, but Justices generally seen as more likely to support gay rights wrote the opinions most skeptical about the prospect of as-applied exemptions in *Doe*, and vice versa. Meanwhile, Justice Scalia's hostility to the concept of political privacy dates at least to his scathing dissent in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 371 (1995) (Scalia, J., dissenting). On the other hand, in an unusual case ordering an injunction against televising a trial on the constitutionality of a similar ballot initiative in California, five Justices (Roberts, Scalia, Kennedy, Thomas, and Alito) credited anecdotal evidence of threats and reprisals against supporters of the referendum. See *Hollingsworth v. Perry*, 130 S. Ct. 705, 707, 712–13 (2010). Four other Justices (Stevens, Breyer, Ginsburg, and Sotomayor) dissented, partly out of disagreement with the majority's finding of irreparable harm to those supporters. *Id.* at 718–19 (Breyer, J., dissenting). While I personally support gay rights and oppose the referenda at issue in *Doe* and *Hollingsworth*, that should have no bearing on the privacy analysis. Privacy interests, like free speech rights, must belong especially to those with whom we disagree strongly. See *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”). As a check against this bias, readers who disagree with the *Doe* plaintiffs' views should imagine instead that those persons had signed a gay rights petition in a conservative state.

III. BRINGING INFORMATION PRIVACY THEORY TO ELECTION LAW

Privacy theory has undergone great development in the last fifteen years—more or less the same time span in which election law moved from the expansiveness of *McIntyre* to the narrow focus of *Doe v. Reed*.⁷⁶ Much of the new privacy theory responds to problems far removed from the administration of elections, such as the aftermath of the 2001 terrorist attacks,⁷⁷ the spread of increasingly pervasive technology like video cameras and ubiquitous computing,⁷⁸ or changes in regulation of the health care and financial industries.⁷⁹ But this thinking also offers useful guidance for reconsidering many elements of election disclosure law and the scope of political privacy.

A. *Public, Private, and Context*

Privacy theory has developed a more sophisticated view of the delineation between the public and the private than any found in election law rhetoric.⁸⁰ In response to the traditional view's unsatisfactory normative grounding, scholars have urged a shift to a less rigid view of the information that might qualify for privacy protection.⁸¹ An approach more sensitive to the nature of the initial disclosure of information and of the subsequent redistribution of that information would not rest simply on categorical definitions of inherently “sensitive” or “private” data.⁸²

Helen Nissenbaum calls her version of this approach “contextual integrity.”⁸³ Rather than governing privacy by placing every piece of information in one of two

⁷⁶ For helpful overviews of the development of data privacy law, see generally Neil M. Richards, *The Information Privacy Law Project*, 94 GEO. L.J. 1087 (2006) (reviewing SOLOVE, *supra* note 54); Paul M. Schwartz & William M. Treanor, *The New Privacy*, 101 MICH. L. REV. 2163, 2176–84 (2003) (reviewing JOHN GILLIOM, *OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE AND THE LIMITS OF PRIVACY* (2001)).

⁷⁷ See Richards, *supra* note 76, at 1088.

⁷⁸ See HELEN NISSENBAUM, *PRIVACY IN CONTEXT* 192–93 (2010); Mark Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World that Tracks Image and Identity*, 82 TEX. L. REV. 1349 (2004); A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1476–79, 1497 (2000); Jerry Kang & Dana Cuff, *Pervasive Computing: Embedding the Public Sphere*, 62 WASH. & LEE L. REV. 93 (2005).

⁷⁹ Froomkin, *supra* note 78, at 1474; Edward J. Janger & Paul M. Schwartz, *The Gramm-Leach-Bliley Act, Information Privacy, and the Limits of Default Rules*, 86 MINN. L. REV. 1219 (2002); Peter A. Winn, *Confidentiality in Cyberspace: The HIPAA Privacy Rules and the Common Law*, 33 RUTGERS L.J. 617 (2002).

⁸⁰ See *supra* Part II.B.

⁸¹ See, e.g., Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1664–70 (1999); Strahilevitz, *supra* note 59, at 973–80.

⁸² See, e.g., Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 1013 (2003); Strahilevitz, *supra* note 59, at 921.

⁸³ Nissenbaum, *supra* note 54, at 137.

boxes, she argues, we should observe the distinct norms associated with different activities and environments.⁸⁴ These norms identify what sorts of disclosures might be appropriate, and to whom. While she does not discuss election disclosure in particular, Nissenbaum more generally presents the movement of public records online as a case study.⁸⁵ In that context, she concludes that the radical increase in access to personal information and the extensive data mining by third parties pull this disclosure away from its original context and its purpose of government accountability, thus breaching contextual integrity.⁸⁶ This conclusion does not forbid disclosure, but does signal the need to carefully justify it based on countervailing values.⁸⁷

Another eminent privacy scholar, Daniel Solove, has developed an influential descriptive taxonomy of privacy that responds to a range of loosely related harms.⁸⁸ These harms include chilling effects, but extend to a wide range of other problems, some of which share only “family resemblances” to one another.⁸⁹ Like Nissenbaum, Solove advocates a move away from rigid classifications of “public” and “private.”⁹⁰

These richer accounts of privacy interests entail a two-step analysis.⁹¹ The relationship of political activity to the larger realm of public affairs would be relevant, but not conclusive. First, one would need to assess existing norms about disclosure—is a particular political activity closer to the entrenched norm of the secret ballot or to the equally well-established (if self-evident) norm that lawn signs and bumper stickers represent intentional public declarations of support? I would argue that donations, petition signatures, and party registration generally are not intended as announcements of political views to one’s neighbors. Any communication to the general public in these settings is ancillary, and comes about solely because of legal rules that require it. An individual may not realize the public disclosure that will occur later as a result of those rules. Because this flow of information to other people in other contexts is largely unanticipated and unintended, these acts are not inherently public.

At the second step, even when approaches such as contextual integrity suggest that privacy interests are at stake, those interests might give way to countervailing values in particular situations, as described further below.⁹² The baseline presumption, however, would favor privacy rather than disclosure, and this would represent a significant departure from current thinking. Instead of requiring justification for privacy, this approach would demand good reason for disclosure.

⁸⁴ *Id.* at 136–38; *see also* NISSENBAUM, *supra* note 78.

⁸⁵ Nissenbaum, *supra* note 54, at 120–21.

⁸⁶ *Id.* at 151–52.

⁸⁷ *Id.* at 146.

⁸⁸ *See* Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477 (2006).

⁸⁹ DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 42–44, 174–79 (2008).

⁹⁰ Solove, *supra* note 82, at 1013.

⁹¹ *See, e.g.*, NISSENBAUM, *supra* note 78, at 186–230.

⁹² *See infra* Part IV.

B. Digital Dossiers

Beyond the broader chilling effect, a critical aspect of the modern threat to privacy arises from the aggregation of vast quantities of information about individuals. These “digital dossiers” permit data mining with sophisticated algorithms to search for patterns of behavior and taste.⁹³ Marketers, creditors, government officials, employers, and many others—including political campaigns—can reach additional inferences about individuals’ preferences and proclivities with these tools. Each drop of information added to the mix seems trivial, but the cumulative effect is profound.⁹⁴ Digital dossiers contain plentiful data from disclosed public records, including such items as voter turnout, political contributions, and petition signing.⁹⁵

Even if these dossiers contain only “public” information, its processing and use raise independent privacy concerns. The law has recognized these issues for many years, going back to the enactment of the Fair Credit Reporting Act⁹⁶ in 1970. That statute is more concerned with the crunching of data by credit bureaus and reliance on the results by lenders and employers than on the original collection of the information.⁹⁷

Privacy scholars identify a range of consequential concerns about data aggregation. To start with, dossiers may be wrong, either because they contain erroneous information or because of flaws in the algorithmic assumptions applied to data.⁹⁸ Those inaccuracies can lead to direct harm such as denial of credit or reputational injury, and indirectly they prompt misjudgments of others based on fragmentary and possibly incorrect information.⁹⁹ The mystery surrounding the mechanized process by which unknown entities draw conclusions about our character causes independent harm, because the lack of transparency prevents individuals from responding to decisions, or even understanding them.¹⁰⁰ As Daniel Solove has suggested, the appropriate literary metaphor for this privacy invasion from data mining is not Orwell’s *1984* but Kafka’s *The Trial*, with its inscrutable bureaucratic assessments of individual character.¹⁰¹ Finally, even seemingly anonymized data may, in combination with other identifiable data and some relatively basic computer science techniques, be re-identified—and every

⁹³ See ROBERT O’HARROW, JR., NO PLACE TO HIDE 34–73 (2005); SOLOVE, *supra* note 54, at 13–26.

⁹⁴ See Froomkin, *supra* note 78, at 1502–06 (discussing the phenomenon of “privacy myopia”); SOLOVE, *supra* note 54, at 44–45.

⁹⁵ See SOLOVE, *supra* note 54, at 20.

⁹⁶ Fair Credit Reporting Act, Pub. L. No. 91-508, 84 Stat. 1127, 1128 (1970).

⁹⁷ See 15 U.S.C. § 1681b (2006).

⁹⁸ See O’HARROW, *supra* note 93, at 139–42.

⁹⁹ See JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 8–11 (2000).

¹⁰⁰ Tal Z. Zarsky, *Thinking Outside the Box: Considering Transparency, Anonymity, and Pseudonymity as Overall Solutions to the Problem of Information Privacy in the Internet Society*, 58 U. MIAMI L. REV. 991, 1005–24 (2004).

¹⁰¹ SOLOVE, *supra* note 54, at 37–55.

additional piece of data released to the public makes the task of re-identification incrementally easier.¹⁰²

Scholars also point out how the mere act of slicing and dicing aspects of our identity in this way can offend our individual dignity and autonomy. Some suggest that commodifying personal beliefs (and especially political ones) as a means to sell toothpaste threatens to so intrude on aspects of our self that it ought to lie beyond the reach of alienability and markets.¹⁰³ As Julie Cohen argues in her powerful response to the dominant rhetoric praising “knowledge” and “sunlight”:¹⁰⁴

The more profound objection to the prevailing legal-economic approach to information is that it conflates information with knowledge of (or truth about) reality. Information theory, in contrast, recognizes that ‘information’ and ‘reality’ are different (though related) things, and that ‘knowledge’ forms an imperfect and culturally contingent bridge between them. . . . Data processing practices are predicated on a belief that individuals are reducible to the sum of their transactions, genetic markers, and other measurable attributes¹⁰⁵

To be sure, the government’s disclosure of data about individual political activity represents only a small portion of the cause of these problems. Yet as noted above, every added bit of data contributes to the problems.

Moreover, *political* personal information raises special concerns. First, it is a relatively sensitive data point compared to an individual’s favorite laundry detergent or even one’s online activity. Second, its diversion to unintended purposes, political or non-political, may particularly debase collection of information originally intended for high-minded functions such as preserving the integrity of elections.¹⁰⁶

When this political information is in turn used for political purposes, it can also have negative effects on democratic discourse. Campaigns and other political actors increasingly process data about voting and other political activity to tailor messages

¹⁰² See Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701, 1719–23 (2010).

¹⁰³ See Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055, 2069–72 (2004) (analyzing the commodification of personal information through processing and trade).

¹⁰⁴ See Julie Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1375 (2000); see also Kreimer, *supra* note 49, at 6–7.

¹⁰⁵ Cohen, *supra* note 104, at 1404–05.

¹⁰⁶ See Marder, *supra* note 28, at 450 (discussing use of disclosure information by Proposition 8 activists to confront those who disagree with their views); McGeveran, *supra* note 6, at 18 (discussing appropriation of disclosed political information for commercial purposes); see also *supra* notes 83–89 and accompanying text (discussing contextual integrity).

and guide get out the vote efforts.¹⁰⁷ Trenchant critiques question whether the increasingly narrow targeting of political discourse enabled by this data mining threatens values of broader societal dialogue. As privacy expert Peter Swire has phrased it, “[A] pessimistic vision is [that] we’re splitting America into tiny pieces and we’re not sharing America.”¹⁰⁸

Processing personal information obviously provides many benefits, both commercial¹⁰⁹ and political,¹¹⁰ that can offset these problems. After all, campaigns use the stuff because they find it effective. And most of the advantages feel more tangible than the drawbacks. Nevertheless, releasing information about individual political beliefs exacerbates the problematic aspects of aggregation and data mining. Concerns about our digital dossiers extend well beyond the sorts of “threats, harassment, and reprisals”¹¹¹ credited in current law, and deserve consideration in the balancing of pros and cons from political disclosure laws.

¹⁰⁷ See Guy Charles & Sunshine Hillygus, Panel Remarks at the William & Mary Bill of Rights Journal Symposium: Privacy, Democracy & Elections (Oct. 22, 2010) (on file with author). As one journalist describing the Obama campaign’s massive data mining effort summarizes its implications:

It means the campaign may not wind up wasting time contacting people who are probably voting for McCain, and that when Obama aides or volunteers go out looking for supporters, they have a pretty good idea of what issues those potential supporters care about most. It’s the political equivalent of what big corporate marketers have been doing for years: If you’re a baby boomer living in Westchester County, N.Y., golf gear catalogs will show up in your mailbox, but if you’re a 20-something living in Williamsburg, Brooklyn, you might get a free trial of Spin magazine instead. Now the same goes for politics—if you’re in a demographic that makes you statistically likely to have children, Obama might send you an e-mail about education policy instead of one about taxes.

Mike Madden, *Barack Obama’s Super Marketing Machine*, SALON (July 16, 2008, 7:00 AM), http://www.salon.com/news/feature/2008/07/16/obama_data (describing the implications of the Obama campaign’s massive data mining efforts); see also Michael S. Kang, *From Broadcasting to Narrowcasting: The Emerging Challenge for Campaign Finance Law*, 73 GEO. WASH. L. REV. 1070, 1070 (2005); Jon Gertner, *The Very, Very Personal is the Political*, N.Y. TIMES, Feb. 15, 2004, (Magazine), at 42.

¹⁰⁸ Swire raised these concerns in an interview in connection with the PBS series *Frontline*. Interview with Peter Swire, Ohio State Law Professor, *Frontline: The Persuaders* (June 1, 2004), available at <http://www.pbs.org/wgbh/pages/frontline/shows/persuaders/interviews/swire.html>. Swire continued, “[A]nother pessimistic problem here is that it’s manipulation. It’s a hidden persuader, because we don’t realize that we’re being pigeonholed; we don’t realize that the words we’re reading are not the words that people down the street are reading, and we might be fooled that way.” *Id.*; see also *supra* notes 101–02 and accompanying text (discussing lack of transparency in data mining as a distinct source of harm).

¹⁰⁹ LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 153, 155 (1999).

¹¹⁰ James Verini, *Big Brother Inc.*, VANITY FAIR (Dec. 13, 2007), <http://www.vanityfair.com/politics/features/2007/12/aristotle200712>.

¹¹¹ *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (per curiam).

C. The Bigger Chill

The first two sections of Part III have argued that excessive disclosure of information about individual political activity wrenches information out of its original context and facilitates aggregation and processing of personal data, both of which can disadvantage and dehumanize its subjects. This section focuses on the responses of individuals to these problems. In some ways, that response could be called a chilling effect, but one much broader and more insidious than the narrow band of extreme situations now recognized as concerns related to political disclosure.

Unlike dramatic confrontations from the Civil Rights Era or extreme outliers such as socialist parties, most expressions of political views do not draw such colorful opposition. I have previously catalogued many situations where individuals might legitimately expect and desire privacy around their political affairs—from journalists and pastors maintaining their impartial image to neighbors and friends withholding political views from those whom they suspect disagree.¹¹² I will not repeat those exhaustively here.

In numerous settings, people generally consider their political views to be deeply personal matters—hence the common warning of etiquette mavens to be delicate when discussing them.¹¹³ Despite plentiful talk about the issue in both case law and scholarship, however, there remains precious little empirical work on the existence and strength of such inhibitions and their effect on behavior, and what research exists does not permit robust conclusions.¹¹⁴

Modern privacy theory can help fill this empirical gap. For example, Paul Schwartz has drawn on the concept of preference falsification in social norm theory to demonstrate how everyday social pressures and the human desire to conform constantly shape disclosure of individual views and tastes, and eventually might *change* those views.¹¹⁵ A more comprehensive and accurate view of chilling effects would acknowledge how this insidious process of preference falsification interferes with political

¹¹² McGeeveran, *supra* note 6, at 16–24 (noting negative consequences of displaying one’s political beliefs in, among others, professional, commercial, and social contexts).

¹¹³ See, e.g., PEGGY POST, EMILY POST’S ETIQUETTE 288 (17th ed. 2004).

¹¹⁴ See Gardner, *supra* note 58; Mayer, *supra* note 16, at 278–79 (calling research on the question “almost nonexistent”). For some modest efforts to gather empirical measurements about political chilling effects, see DICK M. CARPENTER II, INST. FOR JUSTICE, DISCLOSURE COSTS: UNINTENDED CONSEQUENCES OF CAMPAIGN FINANCE REFORM 7–8 (2007), available at http://www.ij.org/images/pdf_folder/other_pubs/DisclosureCosts.pdf (reporting results of a telephone survey); Christian R. Grose & Carrie A. Russell, *Avoiding the Vote: A Theory and Field Experiment of the Social Costs of Public Political Participation* 17–25 (Vanderbilt University Dep’t of Political Sci., Working Paper, 2008), available at <http://ssrn.com/abstract=1310868> (reporting experiment comparing turnout at the Iowa Caucus among groups who were and were not sent postcards explaining the public nature of voting in the caucus).

¹¹⁵ See Paul M. Schwartz, *Internet Privacy and the State*, 32 CONN. L. REV. 815, 840–43 (2000).

participation. The prospect of disclosure can discourage individuals from taking certain political actions, and it pushes citizens toward conformity with dominant views.¹¹⁶

First, the chill on present and future participation is a serious problem. One should anticipate that individuals who wish to avoid confrontation with others, or to maintain an apolitical reputation within at least some of their relationships, likely avoid political activity that will later be disclosed.¹¹⁷ Moreover, the *perception* of possible negative consequences itself can contribute to a chill on political activity.¹¹⁸ In other areas of much less dramatic societal importance than political debate, privacy rules recognize the risk that disclosure might inhibit honest communication and self-expression.¹¹⁹

It is platitudinous in political discussion to praise high voter turnout, perhaps explaining why the secret ballot remains sacrosanct in that discourse. There is more ambivalence about the virtues of other means of engagement with elections, and particularly financial contributions.¹²⁰ We should want to encourage all different forms of involvement, however, from voting to contributing money to signing petitions to volunteering for campaigns, because broader participation enriches the debate for all of us and opens avenues of political self-realization for individuals. Moreover, various forms of political activity reinforce one another. For instance, one empirical study examined actual petitions and voter files to determine that signing petitions correlates positively with the same individual later turning out to vote, even among otherwise less habitual voters.¹²¹

Second, disclosure and resulting social pressures (or perceived risks of those pressures) do not affect all views equally. Disclosure and preference falsification have the greatest impact on controversial views that challenge the consensus.¹²² This is precisely why socialist parties often benefit from exemptions under current law, because disclosure imposes a disparate impact on those views.¹²³ Why stop there, however? Democrats in a largely Republican town, Republicans in a workplace dominated by Democrats, tea party adherents in blue states, and gay rights supporters in red states all

¹¹⁶ See Kreimer, *supra* note 49, at 97 (discussing the “conformity-inducing” effects of disclosure).

¹¹⁷ *Id.* at 67–71 (discussing social pressure received in response to disclosure).

¹¹⁸ See Mayer, *supra* note 16, at 278–80.

¹¹⁹ See *supra* note 52 and accompanying text.

¹²⁰ Richard Briffault, *The Return of Spending Limits: Campaign Finance After Landell v. Sorrell*, 32 *FORDHAM URB. L.J.* 399, 432 (describing other means of engagement with elections).

¹²¹ See Janine Parry et al., *We Know What You Did Last Summer: The Impact of Petition Signing on Voter Turnout*, presentation to the Annual Meeting of the State Politics and Policy Section of the Am. Political Sci. Ass’n (June 4, 2010), available at <http://www.sppc2010.org/Papers/SPPC%202010%20parry%20smith%20henry%20final.pdf>.

¹²² See McGeveran, *supra* note 6, at 22 (“This lopsided impact, favoring plain-vanilla candidates and causes over others, distorts the marketplace of ideas and further threatens First Amendment values.”); Schwartz, *supra* note 115, at 841 (“[B]eyond a certain point of intensity, this herd behavior distorts public discourse . . .”).

¹²³ *Brown v. Socialist Workers’74 Campaign Comm.* (Ohio), 459 U.S. 87, 100–02 (1982).

might face significant negative consequences if their identities and views are disclosed publicly. These consequences look more like the “social ostracism”¹²⁴ and “desire to preserve as much of one’s privacy as possible”¹²⁵ of *McIntyre* than the overt harassment or reprisals of more recent cases, but they are no less real.

Many individuals whose opinions differ from those around them will put their heads down and disengage from political activity if that is the only way to avoid disclosure. When they do, society loses the benefit of their diverse ideas, prevents them from locating and engaging with like-minded followers of their minority viewpoint, and reinforces social and political conformity. In an ironic twist, the more subtle chill that goes unrecognized in the dominant account can actually lead to just the sort of democratic distortions and disparate impact that the doctrine sought to avoid by exempting socialists and Freedom Riders from disclosure obligations.

Like the gravitational pull of an unseen planet, we can use what we know from privacy theory about individuals’ tendency to communicate and alter their views as a means to ascertain the existence of a more serious chilling effect than that recognized in current doctrine. Privacy protects individuals from the scrutiny of others and the accompanying social pressure that can discourage and distort their actions.¹²⁶ Election law ought to prioritize those protections.

D. Democratic Development

The final concern extends beyond the traditional “marketplace of ideas” scope of election-law thinking to embrace a view of the First Amendment concerned with individuals’ self-actualization and autonomous formation of their own political views.¹²⁷ On this account, individuals engage in political activity in part to fulfill their own search for truth and meaning, and disclosure impedes their freedom to do so.

It is peculiar that election law, which often claims special devotion to constructing and maintaining sheltered space for democratic processes, tends to have so little regard for data privacy. Data privacy is a precondition for democratic society.¹²⁸ Democratic participation necessarily requires that individuals enjoy some private breathing space for exploration, reflection, and expression of political views.¹²⁹ Neil Richards calls

¹²⁴ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995).

¹²⁵ *Id.*

¹²⁶ See Schwartz, *supra* note 115, at 841.

¹²⁷ See C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 22–24 (1989).

¹²⁸ See Schwartz, *supra* note 81, at 1648–53.

¹²⁹ See Julie E. Cohen, *The Right to Read Anonymously: A Closer Look at “Copyright Management” in Cyberspace*, 28 CONN. L. REV. 981, 1007 (1996) (noting threat to privacy value from copyright protection technology that monitors reading activity); Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 416–25 (2008); Paul M. Schwartz, *Privacy and Participation: Personal Information and Public Sector Regulation in the United States*, 80 IOWA L. REV. 553, 559–63 (1995).

this value “intellectual privacy.”¹³⁰ Legal and social institutions protect intellectual privacy in many ways, such as the Fourth Amendment safeguard of personal papers, statutes and regulations prohibiting electronic eavesdropping on personal conversations, and libraries’ maintenance of confidentiality about borrowers’ book choices.¹³¹ Election law ought to follow suit.

A supporter of disclosure in election law might respond to these observations by conceding the importance of private reflection for political self-realization, but argue that disclosed activities such as financial contributions or petition signatures constitute public “legislating.”¹³² Perhaps, but deciding the question requires more than a simple assertion. Declaring that donations or signatures automatically qualify as public acts repeats the question-begging error discussed above.¹³³ We should evaluate each form of political activity on a case-by-case basis rather than relying on historically-rooted categorical definitions of public and private. The courts have recognized, for example, that interactions with petition circulators provide an opportunity for individuals to educate one another about issues and for those on the receiving end of a solicitation to further develop their own views.¹³⁴ Whatever advantages may flow from disclosure in these situations are purchased with the foreclosure of intellectual privacy and with lost opportunities to help individual citizens formulate their own views. The dominant thinking in election law disregards this trade-off.

IV. RECALIBRATING THE BALANCE

I want to close with some brief comments about how to integrate these insights from privacy theory into election law’s treatment of disclosure. Up to this point, I have argued that privacy interests threatened by disclosure requirements are broader and more nuanced than election law currently recognizes. Yet none of the courts or scholars discussed here would consider those interests absolute. On the contrary, everyone recognizes the need for a balance between privacy and the legitimate interests advanced by transparency.¹³⁵ The problem addressed by this Essay is the inaccurate weight given to privacy interests, which throws off that crucial balance.

¹³⁰ Richards, *supra* note 129, at 389 (“Intellectual privacy is the ability, whether protected by law or social circumstances, to develop ideas and beliefs away from the unwanted gaze or interference of others.”).

¹³¹ *See id.* at 412–25.

¹³² *See, e.g., Doe v. Reed*, 130 S. Ct. 2811, 2833–34 (2010) (Scalia, J., concurring in the judgment).

¹³³ *See supra* Part II.B.

¹³⁴ *See Meyer v. Grant*, 486 U.S. 414, 421–23 (1988).

¹³⁵ *See, e.g., McGeeveran, supra* note 6, at 49–50 & n.242 (discussing balance of benefits and burdens from campaign finance disclosure); Nissenbaum, *supra* note 54, at 146, 151 (identifying countervailing values that could justify intrusions on contextual integrity, including mention of “open government”); Schwartz, *supra* note 115, at 840 (“To be sure, democratic community requires access to personal data.”); *see also supra* note 15 and accompanying text (introducing the factors that must be balanced when considering disclosure rules).

Because it relies on privacy theory, this Essay has focused on the “cost” side of the scale. I will not engage in detailed analysis of the “benefit” side, except to note that courts often assume extensive benefits that do not necessarily stand up to examination.¹³⁶ Admittedly, voters may gain useful heuristic cues from information about the position of familiar organized entities with respect to candidates and, especially, ballot initiatives.¹³⁷ But there are many questions about how often voters actually rely on such data, whether a surfeit of information might overload them, and whether the possible usefulness of information about the political preferences of the oil industry or labor unions realistically extends to information about ordinary individuals’ personal views.¹³⁸

However significant the benefits of disclosure, privacy theory suggests that they do not categorically trump an accurate understanding of privacy costs. Rather than the overwhelming presumption in favor of disclosure now applied, courts and policy-makers should consider the importance of contextual integrity, the problem of data mining, a more realistic assessment of chilling effects, and the core role of privacy in democratic development. If they do so, there will be considerably less reliance on disclosure than we see today.

This recalibrated balancing would highlight the central importance of *scale* in evaluating both costs and benefits of disclosure. On the benefit side, public knowledge of single financial contributors or individual signatories on a petition offers little helpful information to most voters, and provides minimal aid in controlling corruption or enforcing other election laws.¹³⁹ On the other hand, knowing about very large donations that effectively bankroll a candidate or ballot initiative, or about organized entities supporting a petition drive, would more likely provide valuable information to voters and perhaps bear on corruption concerns.¹⁴⁰

¹³⁶ I examined those justifications at length in my earlier article. See McGeeveran, *supra* note 6, at 24–33 (analyzing government interests in preventing corruption and perception of corruption, informing voters, and aiding in enforcement of campaign finance law); see also Briffault, *supra* note 16, at 286–90 (examining benefits of disclosure in context of evaluating “deregulate and disclose” or “disclosure-only” models of campaign finance regulation); Mayer, *supra* note 16, at 257–71 (analyzing government interest in informing voters); Scott M. Noveck, *Campaign Finance Disclosure and the Legislative Process*, 47 HARV. J. ON LEGIS. 75, 77–89 (2010) (reviewing egalitarian and anti-corruption rationales for disclosure).

¹³⁷ See, e.g., Garrett & Smith, *supra* note 33, at 296–99 (arguing that mandatory disclosure is an important component of voters’ ability to use organized groups’ support of ballot initiatives as a heuristic cue); Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63, 72 (1994) (using a survey of ballot initiative voters to assert that relatively uninformed voters used their knowledge of the insurance industry’s preferences to emulate the behavior of relatively well-informed voters).

¹³⁸ See Mayer, *supra* note 16, at 265–70; McGeeveran, *supra* note 6, at 24–29.

¹³⁹ These are the three governmental interests identified in *Buckley v. Valeo*, 424 U.S. 1, 66–68 (1976) (per curiam).

¹⁴⁰ See Garrett & Smith, *supra* note 33, at 296 (describing how regulatory loopholes that allow “political entities wishing to avoid disclosure relating to the source and extent of their

Courts have acknowledged this scale difference in some recent campaign finance decisions where they diminished the weight of the state's informational interest in proportion to the amount of money contributed or spent in political activity.¹⁴¹ A number of observers, including me, have opined that thresholds triggering disclosure obligations should be raised meaningfully so that only the "big fish" suffer potential privacy costs.¹⁴² Perversely, the current regime often does exactly the opposite, disclosing modest individual political activity while allowing savvy interest groups and wealthy individuals to evade disclosure altogether.¹⁴³

In addition to raised thresholds, policymakers might consider other methods to advance disclosure's goals without revealing small-scale political actions that identify individuals' beliefs. For example, reports of aggregate information about small donors might provide many of the same benefits without exacting any privacy costs.¹⁴⁴ And, as many reformers have already noted, it might make sense to extend disclosure to areas where it currently falls short, such as the use of nonprofit entities that fall outside existing requirements or the bundling of donations.¹⁴⁵ The scale of these activities increases the justification for disclosure requirements, more so than in many areas where those requirements now exist.

Finally, and crucially, privacy theory focuses on individuals, not collectives. The theory of contextual integrity, or a more nuanced understanding of personal private space, relies on the dignity interests of individuals and a respect for their autonomy, reputation, and capacity to form life plans.¹⁴⁶ Case law is the same. *McIntyre* focused on individuals' interests, concluding that protection for some anonymous political

spending" to do so and thus hide their influence); Mayer, *supra* note 16, at 283 ("As for concerns relating to corruption or the perception of corruption . . . it is the higher dollar amount contributors that raise such concerns, not the \$200 or even \$1000 contributors in most instances.").

¹⁴¹ See *Sampson v. Buescher*, 625 F.3d 1247, 1261 (10th Cir. 2010) ("There must be a 'substantial relation' between the requirement and a governmental interest that is sufficiently important to justify the burden on the freedom of association." (citing *Doe v. Reed*, 130 S. Ct. 2811, 2818; *Buckley*, 424 U.S. at 64)); *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1034 (9th Cir. 2009) ("[T]he value of public knowledge that the Church permitted a single like-minded person to use its copy machine on a single occasion to make a few dozen copies on her own paper—as the Church did in this case—does not justify the burden imposed by Montana's disclosure requirements.").

¹⁴² See, e.g., Briffault, *supra* note 16, at 300–02; Mayer, *supra* note 16, at 281–83; McGeveran, *supra* note 6, at 51–52.

¹⁴³ See *supra* notes 33–34 and accompanying text.

¹⁴⁴ See Briffault, *supra* note 16, at 301; McGeveran, *supra* note 6, at 53–54; Noveck, *supra* note 136, at 107–14.

¹⁴⁵ See, e.g., Briffault, *supra* note 16, at 302 (advocating for public disclosure of bundling).

¹⁴⁶ See Cohen, *supra* note 104, at 1423–27; Nissenbaum, *supra* note 54, at 154–55; Michael Selmi, *Privacy for the Working Class: Public Work and Private Lives*, 66 LA. L. REV. 1035, 1045 (2006). Forced campaign disclosure is an affront to all of these interests. See McGeveran, *supra* note 6, at 19–20.

speech “exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.”¹⁴⁷ Classic disclosure cases allowing the NAACP to withhold the names of its members explicitly rely on protection of the individual members’ rights, and allow the organizations to assert those personal rights on their behalf.¹⁴⁸

A corporation, a political action committee, or a tax-exempt social welfare organization each has a legal identity that brings with it certain election-related rights—arguably more rights than ever after *Citizens United v. FEC*.¹⁴⁹ But these entities do not have individual privacy rights like natural persons do.¹⁵⁰ Corporations cannot bring tort suits based on privacy or infliction of emotional distress.¹⁵¹ Just this year, the Supreme Court unanimously rebuffed an effort to extend the “personal privacy” exemption under the Freedom of Information Act to corporations.¹⁵² Without a persona, there is no privacy interest.¹⁵³ As a result, the concerns discussed in this Essay should not apply to proposals for enhanced disclosure of such group activity in response to *Citizens United*.¹⁵⁴

¹⁴⁷ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995).

¹⁴⁸ *See Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960) (“On this record it sufficiently appears that compulsory disclosure of the membership lists of the local branches of the National Association for the Advancement of Colored People would work a significant interference with the freedom of association of their members.”); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458–59 (1958) (finding that the NAACP has standing to “assert, on behalf of its members, a right personal to them to be protected from compelled disclosure by the State of their affiliation with the Association as revealed by the membership lists”) *rev’d*, 360 U.S. 240 (1959), *reh’g denied*, 361 U.S. 856 (1959).

¹⁴⁹ 130 S. Ct. 876 (2010).

¹⁵⁰ Scott Hartman, Comment, *Privacy, Personhood, and the Courts: FOIA Exemption 7(c) in Context*, 120 *YALE L.J.* 379, 391–94 (2010) (drawing on privacy theory to argue that privacy rights are anchored in the individual’s personhood and are not generally applicable to corporations).

¹⁵¹ *See* RESTATEMENT (SECOND) OF TORTS § 652I cmt. c (1977) (“A corporation, partnership or unincorporated association has no personal right of privacy. It has therefore no cause of action for any of the four forms of invasion covered by [the privacy torts].”).

¹⁵² *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1182 (2011) (“In fact, we often use the word “personal” to mean precisely the *opposite* of business-related: We speak of personal expenses and business expenses, personal life and work life, personal opinion and a company’s view.”). Although the opinion was narrowly focused on statutory interpretation, it demonstrates the common-sense difference between “personal” and “corporate” identities. Of course, agencies *do* interpret the exemption to protect individual persons’ privacy.

¹⁵³ *See* Hartman, *supra* note 150, at 391–94.

¹⁵⁴ *See, e.g.*, Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act, H.R. 5175, 111th Cong. §§ 211, 301 (2010) (requiring organizations covered under Section 304(g) of the Federal Election Campaign Act of 1971 to disclose certain additional information regarding political activity).

CONCLUSION

This Essay has argued that contemporary privacy theory can contribute a great deal to thinking about the role and scope of disclosure in election law. Today's narrow view of privacy interests recognizes only imminent harm from "threats, harassment, or reprisals" as valid reasons to limit political disclosure. The resulting doctrine ignores other meaningful harms, it relies on an artificial and unjustified categorical division between private and public spheres, and it denies realistic opportunities for exceptions to the general rule of massive disclosure.

Privacy theory offers a richer account of an individual's interests in controlling his or her persona, including information about political activity and beliefs. Political privacy is a positive value. A proper understanding of those interests would account for the importance of personal autonomy, the problems of data-mining and ubiquitous internet search, and a more sophisticated understanding of chilling effects, preference falsification, and intellectual privacy.

Bringing privacy theory to election law presents an opportunity. The existing overall disclosure regime simply does not work. It intrusively disseminates vast quantities of information about ordinary individuals' modest activities but allows huge and consequential influence to remain concealed. An accurate balancing of interests, with a proper regard for the privacy costs of disclosure and not just the alleged benefits, would yield quite a different set of rules than those we have today. Proper respect for Mrs. McIntyre's persona could provide the cornerstone for a long overdue restructuring of electoral disclosure.