FULL DISCLOSURE: THE NEXT FRONTIER IN CAMPAIGN FINANCE LAW

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ABSTRACT

The influence of money in politics has beguiled and beleaguered legislators and judges for decades. Campaign finance laws were borne out of a desire to limit the role that money plays in the political process. The constitutionality of those laws hinges on a judge's interpretation of the First Amendment and whether and how it applies to laws that limit the giving and spending of money in elections and the disclosure of those sums.

While the role that money plays in our political system has increased exponentially, the Supreme Court has continued to strike down laws that seek to stem the flood of money that is pumped into our elections. Particularly in the wake of landmark rulings like *Citizens United v. FEC* and *McCutcheon v. FEC*, limits on how much individuals and groups can give and spend in elections are constitutionally suspect. As a result, lawmakers and judges are looking to transparency and disclosure laws to do much of the work that campaign contribution and expenditure limits were designed to accomplish.

Unfortunately, while lawmakers throughout the country are rushing to draft new and more robust disclosure laws to limit the influence of money in our political system, it is becoming clear that the Supreme Court's campaign disclosure jurisprudence is a loophole-ridden failure. This leaves lawmakers and lower judges with little guidance when crafting and ruling on disclosure laws.

This is the moment for the Supreme Court to clarify its campaign disclosure jurisprudence. The Court must be specific about the benefits and burdens that result from disclosure provisions and must also consider additional factors, such as the identity of the donor and the recipient of campaign funds, the type of election, and the revolutionary impact the Internet has had on campaign disclosure laws. This Article provides a roadmap for the Supreme Court and the lower courts to rule on campaign disclosure laws.

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I. INTRODUCTION: IT IS ALL ABOUT DISCLOSURE

Lawmakers throughout the country have long sought to guard against the pernicious influence of money in politics by enacting campaign finance laws.[1] Money can affect every step of the electoral process: from who runs for office, to who wins, to which bills are introduced and passed. Campaign finance law can be seen as a tool chest filled with four tools—contribution limits, expenditure limits, public financing programs, and disclosure provisions.

Unfortunately, the Court has whittled away at the ability of lawmakers to employ three of these four tools.[2] Since 2006, when Justice

1. *See* 148 CONG. REC. S1991-02 (daily ed. Mar. 18, 2002) (statement of Sen. Feingold); S. REP. NO. 93-689, at 5587–88 (1974).

2. The Court's 1976 decision in *Buckley v. Valeo* remains the bedrock of campaign finance law. 424 U.S. 1 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010). There it struck down limits on expenditures by candidates and independent individuals and groups. *Id.* at 143. Decades later in *Citizens United v. FEC*, the Court struck down limits on independent expenditures by corporations and unions. 558 U.S. 310, 372 (2010). Shortly thereafter in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the Court invalidated a key provision of many public campaign financing programs throughout the nation. 131 S. Ct. 2806, 2812 (2011). In 2014, the Court invalidated aggregate contributions limits in *McCutcheon v. FEC*. 134 S. Ct. 1434, 1462 (2014). It sadly now seems possible that the Court could

Samuel Alito replaced Justice Sandra Day O'Connor on the Supreme Court, the Court has struck down or weakened, in five-to-four rulings, the constitutionality of expenditure limits,[3] certain types of contribution limits,[4] and portions of public campaign financing laws.[5] While the Court has recently looked with disfavor on laws that limit the amount of money that can be given and spent in elections, it has consistently endorsed laws requiring report and disclosure of campaign spending.

Simply put, campaign disclosure laws face increasing pressure in the wake of recent United States Supreme Court decisions such as *Citizens United v. FEC*[6] and *McCutcheon v. FEC*.[7] Because of the Court's campaign finance jurisprudence, voters, legislators, and judges are looking to disclosure provisions to fix the problems that all of the tools in the campaign finance toolbox were meant to remedy.

Disclosure laws have served as an important facet of our legal framework for more than a century.[8] Reporting laws require electoral actors (candidates, political committees, political parties, and others) to report campaign funds, both raised and spent, to a government agency. Disclosure laws then require public dissemination of that information. Disclosure laws will bear a much heavier burden than they have in the past. This is problematic for at least five interconnected reasons.

First, disclosure laws are only one-fourth of a comprehensive campaign finance solution. They were never intended to, nor can they, solve all of the ills that contribution and expenditure limits and public campaign financing programs were also designed to remedy.

Second, even if disclosure laws could conceivably bear a heavier burden, our current system of campaign disclosure is largely a loophole-ridden failure. So-called dark money, campaign money that is undisclosed to the public, flows freely throughout our political system.[9] One need only look at the vast sums of money funneled through 501(c) non-

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also invalidate direct contribution limits. At that point, lawmakers truly will be left with little more than disclosure provisions as the only tool through which to try to regulate the flow of money in politics.

3. *See, e.g.*, *Citizens United*, 558 U.S. at 316, 372; Davis v. FEC, 554 U.S. 724, 727, 744–45 (2008); FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 454, 476–81 (2007).

4. *McCutcheon*, 134 S. Ct. at 1462.

5. *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. at 2812.

6. 558 U.S. 310 (2010).

7. 134 S. Ct. 1434 (2014).

8. *See, e.g.*, 2 U.S.C. § 241 (1910) (repealed 1972). This Article focuses on campaign disclosure laws and at times references other election law related disclosure laws. It does not address disclosure laws that apply in other contexts.

9. Andy Kroll, *Follow the Dark Money*, MOTHER JONES (July–Aug. 2012), http://www.motherjones.com/politics/2012/06/history-money-american-elections.

profit corporations to know that transparency laws have failed to meet their goals.[10]

Third, while at first blush the Court's rulings on the constitutionality of disclosure provisions appear to embody a rare moment of consistency on campaign finance issues, a closer reading of the cases demonstrates that the doctrinal foundation of the Court's campaign disclosure jurisprudence is badly fractured. Doctrinally, the Court's analysis is both potentially contradictory and shallow. This manifests in three main areas. First, what burden do disclosure laws place on constitutional rights? How much of a burden is too much? The Court often fails to fully define the precise burden at issue. Second, what standard of review should be used to review disclosure provisions? The Court has employed a loosely defined standard known as "exacting scrutiny" to disclosure laws. Worse, it has inconsistently applied what amounts to a balancing test. Third, what is the government's interest in enacting disclosure laws? Legislators and members of the public often exaggerate or misunderstand the purposes of disclosure, if not both. The government must be more specific about what it hopes to accomplish through disclosure provisions and whether those goals are achievable.

Fourth, the Court's thin doctrinal treatment of disclosure laws ignores or glosses over a number of important factors that could alter the Court's analysis. First, should the identity of the donor matter? The benefits and burdens associated with disclosure provisions could change depending on whether the donor is a small or big donor, or an individual or an artificial entity. Second, should the identity of the recipient (the donee) change the Court's calculus? The Court's analysis could, and perhaps should, shift depending on whether a candidate, a political party, a political committee, a nonprofit corporation, or another individual or entity is the recipient of a campaign donation. Third, should the Court's analysis change depending on the type of election? For instance, perhaps both legislators and the courts could take into account the differences between candidate and ballot measure elections before crafting and ruling on disclosure laws. Fourth, should the temporal aspect of disclosure play a bigger role in the Court's analysis? Disclosures made before elections differ significantly from those made after elections.

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10. *See* CAUSE OF ACTION, CONPROFIT: HOW THE IRS'S FAILED OVERSIGHT ALLOWS NONPROFIT MONEY LAUNDERING 5 (2013), http://causeofaction.org/assets/uploads/2013/06/130614-Fiscal-Sponsorship-FINAL-report.pdf; BRENDAN FISCHER & BLAIR BOWIE, ELECTIONS CONFIDENTIAL: HOW SHADY OPERATORS USED SHAM NON-PROFITS AND FAKE CORPORATIONS TO FUNNEL MYSTERY MONEY INTO THE 2012 ELECTIONS 1–2 (2013), http://www.uspirg.org/sites/pirg/files/reports/USP%20Elections%20Report%20Jan13%201%203.pdf; Ciara Torres-Spelliscy, *Hiding Behind the Tax Code, the Dark Election of 2010 and Why Tax-Exempt Entities Should Be Subject to Robust Federal Campaign Finance Disclosure Laws*, 16 NEXUS: CHAP. J.L. & POL'Y 59 (2010–2011); Kim Barker, *How Nonprofits Spend Millions on Elections and Call it Public Welfare*, PROPUBLICA (Aug. 18, 2012, 10:25 PM), http://www.propublica.org/article/how-nonprofits-spend-millions-on-elections-and-call-it-public-welfare.

Fifth, the Court's doctrine fails to account for the revolutionary impact of online campaign finance disclosure. Both the doctrine and the policy must change in light of online disclosure, which significantly increases both the benefits and burdens of disclosure requirements.

It is past time to solidify the framework we use to analyze the constitutionality of disclosure laws. Legislators throughout the country are rushing to propose new ways to shed light on campaign giving and spending. When crafting these laws, we must ask at least the following questions: Who should disclose? What do they need to disclose?[11] When should information be reported to a government agency, and when should that information be disseminated to the public? Before we craft and adopt more disclosure provisions, we must be specific about what these laws can accomplish and at what cost.

Part II discusses the creation and implementation of disclosure regimes and the Supreme Court's response to those laws. Part III focuses on the burdens created by disclosure laws. Part IV addresses the standard of review applicable to disclosure provisions. Part V focuses on the application of that standard of review, exacting scrutiny, and focuses on the government's interest in providing public disclosure. Part VI addresses the implications of online disclosure. This Article concludes in Part VII by discussing potential solutions to campaign disclosure regimes.

II. THE DISCLOSURE DOCTRINE—EXAMINING THE COURT'S APPROACH TO DISCLOSURE PROVISIONS

The following part explores the legislative and jurisprudential history of disclosure provisions.

In 1910, Congress passed the nation's first federal disclosure provisions as part of the relatively toothless Federal Corruption Practices Act (the Publicity Act).[12] The Publicity Act required disclosure of political spending by certain political committees after an election.[13] The next year, Congress amended the Act to include both disclosure of donations to and expenditures by federal candidates.[14] Congress once again amended the Publicity Act in 1925 by, in part, broadening and strengthening the disclosure requirements to apply to presidential elections.[15]

The Court evaluated the validity of campaign disclosure laws contained in the Publicity Act in *Burroughs v. United States*.[16] In that 1934

11. For instance, must they disclose their name, address and/or occupation?
12. Act of June 25, 1910, ch. 392, 36 Stat. 822.
13. *Id.* § 2, 36 Stat. at 823.
14. BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 24 (2001).
15. Federal Corrupt Practices Act, 1925, Pub. L. No. 68-506, §§ 303–306, 43 Stat. 1070, 1071–72.
16. 290 U.S. 534 (1934).

case, the Court upheld the law as within congressional power.[17] The Court framed the question as whether such laws must be left to the states or if Congress could legislate in this area.[18] Hence, the Court treated the law as raising a question of federalism, not the First Amendment.

Congress supplanted the Publicity Act in 1971 when it passed the nation's first comprehensive campaign finance scheme, the Federal Election Campaign Act (the FECA).[19] The FECA was later amended in 1974 to establish an independent agency to monitor campaign spending, the Federal Election Commission, as well as create stricter restrictions on contributions and expenditures, and establish public financing options for candidates.[20] The FECA required disclosure of contributions over $100.[21]

As is typically the case, with a new law comes a lawsuit challenging that law. In 1976, in *Buckley v. Valeo*,[22] the Court analyzed the constitutionality of, among other provisions, the disclosure provisions in the FECA.[23] *Buckley* stands as the foundation of our understanding of the constitutionality of campaign finance laws, including campaign disclosure provisions.

Prior to delving into *Buckley*, it is important to survey the legal landscape in place in 1976 and to have an understanding of the cases that *Buckley* relied upon. *Buckley* was the first case since *Burroughs* to analyze the constitutionality of campaign disclosure provisions. Hence, all other pre-*Buckley* case law focuses on laws providing for disclosure in areas outside of the campaign finance context.

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17. *Id.* at 547–48.

18. *Id.* at 544–45.

19. *See* Federal Election Campaign Act of 1971, Pub. L. No. 92–225, 86 Stat. 3 (1972). Prior to the passage of the FECA, in 1946, Congress passed the Federal Regulation of Lobbying Act to increase information regarding federal lobbyists. 2 U.S.C. §§ 261–270 (1964) (repealed 1995). In 1954, the Court upheld the Federal Regulation Lobbying Act against a challenge that it was unconstitutionally vague. United States v. Harriss, 347 U.S. 612, 617, 624 (1954). Chief Justice Warren, writing for the Court, expressed his full-throated support of the disclosure provisions. *Id.* at 624–25. The Court found that in passing that Act Congress "ha[d] merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much." *Id.* at 625. The Court further found that "full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressure. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal." *Id.* The Court rejected the argument that the law would act as a deterrent to the exercise of First Amendment rights, finding that "the restraint is at most an indirect one resulting from self-censorship, comparable in many ways to the restraint resulting from criminal libel laws." *Id.* at 626. Congress repealed the Federal Regulation of Lobbying Act in 1995 with the passage of the Lobbying Disclosure Act. Lobbying Disclosure Act of 1995, Pub. L. No. 104-65 § 11(a), 109 Stat. 691, 701.

20. Act of Oct. 15, 1974, Pub. L. No. 93-443, §§ 309–318, 88 Stat. 1263, 1280–89.

21. Buckley v. Valeo, 424 U.S. 1, 63–64 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010).

22. 424 U.S. 1 (1976), *overruled by* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

23. *Id.* at 60–84.

The Court appears to be more likely to strike down disclosure laws or create exemptions to those laws in cases outside of the campaign finance context. It is also important to note that typically, when the Court reviews campaign disclosure laws, it does so in the context of challenges to other facets of campaign finance laws as well, such as contribution and expenditure limits. The Court has only once ruled on a challenge to a campaign disclosure law in isolation.[24] Hence, in the campaign finance context, the Court may feel additional pressure to uphold disclosure provisions when it strikes down limits on campaign contributions and expenditures so as not to entirely dismantle campaign finance laws. The Court often views disclosure laws as a less burdensome alternative to contribution and expenditure limits. However, outside of the campaign finance context, the Court has ruled on isolated challenges to disclosure provisions. The Court evidences none of the same concerns when ruling on noncampaign disclosure laws in isolation.

In 1958, in a noncampaign finance case, the Court created what would become the test for qualifying for exemptions from disclosure laws. In *NAACP v. Alabama*,[25] the Court ruled on the propriety of a request by the State of Alabama to obtain the names and addresses of members and staff of the National Association of Colored People (NAACP) residing in Alabama.[26] There, the Court first recognized that disclosure provisions can raise serious associational and speech concerns under the First Amendment.[27] The Court concluded that disclosure was not justified where the NAACP has shown "on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."[28] Hence, the Court protected the disclosure of membership lists when members faced serious threats. This, as demonstrated by subsequent decisions, is a difficult standard to satisfy.

In 1964, in *Talley v. California*,[29] the Court struck down a Los Angeles law that required the authors and distributors of handbills and leaflets to disclose their names and addresses.[30] Based on a First Amendment challenge to the laws, the Court struck down the disclosure provisions even though they provided the public with information about the identity of the authors and distributors. In striking down this disclosure provision, the Court noted that the affected forms of communication, handbills and leaflets, had "played an important role in the progress of mankind."[31]

24. *See* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 89–90 (1982).
25. 357 U.S. 449 (1958).
26. *Id.* at 451.
27. *See id.* at 461–62.
28. *Id.* at 462.
29. 362 U.S. 60 (1960).
30. *Id.* at 60–61, 65.
31. *See id.* at 64–65.

Hence, it may be that in *Talley*, instead of protecting lists of members facing serious threats (as in *NAACP*), the Court protected potentially poor and marginalized people who might not want to disclose their names to the public.

Where did the law stand at this point? Again, unlike *Burroughs, NAACP* and *Talley* were not campaign disclosure cases. They dealt with disclosure of membership lists (in the case of *NAACP*) or the authors and distributors of handbills and leaflets (in the case of *Talley*). *Burroughs* upheld campaign disclosure provisions as within congressional authority, and *NAACP* and *Talley* struck down other disclosure provisions as governmental overreaching in light of First Amendment concerns. Prior to the Court's decision in *Buckley*, it was not entirely clear which course the Court would follow the next time a campaign disclosure law came before it.

This lack of clarity was resolved in 1976 in *Buckley*, where the Court followed the path tread in *NAACP* and *Talley* and firmly placed an analysis of the propriety of campaign disclosure laws as falling within the First Amendment.[32] The Court concluded that laws requiring the disclosure of names of members of political organizations (such as those at issue in *NAACP*) did not differ substantially from those that require the names of campaign contributors (such as those contained in the FECA).[33] Simply put, the Court concluded that "[o]ur past decisions have not drawn fine lines between contributors and members but have treated them interchangeably."[34] Therefore, the Court imported the *NAACP* analysis into the campaign finance context.

In *Buckley*, the Court employed a deferential standard of review and upheld the disclosure laws against a challenge that they were overbroad as applied to minor-party and independent candidates and small contributors but were not per se unconstitutional.[35] The Court concluded that disclosure provisions serve three interests: preventing corruption or the appearance of corruption, providing the public with information regarding campaign contributors and spenders, and detecting violations of other campaign finance laws.[36]

Brown v. Socialist Workers '74 Campaign Committee (Socialist Workers)[37] stands at the intersection of *NAACP* and *Buckley*. There, the

32. *See* Buckley v. Valeo, 424 U.S. 1, 64–68 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010).

33. *Id.* at 65–66. The Court concluded that "the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations." *Id.* at 66.

34. *Id.* at 66.

35. *Id.* at 60–61.

36. *Id.* at 66–68.

37. 459 U.S. 87 (1982).

Court protected the disclosure of campaign contributors to the Socialist Workers Party (SWP) and the recipients of those contributions when members of the SWP faced harassment by government officials and private parties.[38] *Socialist Workers* is the first and last case since *Buckley* where plaintiffs successfully waged an as-applied challenge to a campaign disclosure law. This is because it is difficult for any group to bring forth specific evidence of threats that survive the *NAACP* test. It is also a rare case in which the Court addresses a campaign disclosure provision in isolation. Again, it is typically the case that the Court reviews challenges to campaign disclosure provisions in cases in which other campaign laws are also challenged. This may be another reason why the Court carved out an exemption to the disclosure provision here.

In *McIntyre v. Ohio Elections Commission*,[39] the Court once again analyzed a disclosure law outside of the campaign finance context.[40] In that 1995 case, the Court struck down an Ohio law that prohibited the distribution of anonymous campaign literature (including pamphlets geared toward candidate and ballot measure campaigns).[41] Plaintiff Margaret McIntyre distributed anonymous campaign literature to people attending a public meeting at a school, in violation of the statute.[42] Justice Stevens, writing for a majority of the Court, relied heavily on *Talley*, another case dealing with disclosure laws outside the realm of campaign disclosure, to strike down the Ohio law requiring the identification of authors of campaign literature.[43]

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38. *Id.* at 101–02. The *Socialist Workers* majority rejected the argument that the test elucidated in *Buckley* applies only to campaign contributors and not also campaign recipients. *Id.* at 94–95. The Court held that "[c]ompelled disclosure of the names of such recipients of expenditures could therefore cripple a minor party's ability to operate effectively and thereby reduce 'the free circulation of ideas both within and without the political arena.'" *Id.* at 98 (quoting *Buckley*, 424 U.S. at 71). Justice O'Connor wrote a separate opinion in which she argued that "there are important differences between disclosure of contributors and disclosure of recipients of campaign expenditures." *Id.* at 109 (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor concluded that "the heightened governmental interest in disclosure of expenditures and the reduced marginal deterrent effect on associational interests demand a separately focused inquiry into whether there exists a reasonable probability that disclosure will subject recipients or the party itself to threats, harassment, or reprisals." *Id.* at 112.

39. 514 U.S. 334 (1995).

40. *See id.* at 334.

41. *Id.* at 357. Justice Ginsburg wrote a concurring opinion to emphasize her perception of the Court's ruling as a narrow one. Justice Ginsburg concluded that "[w]e do not thereby hold that the State may not in other, larger circumstances require the speaker to disclose its interest by disclosing its identity." *Id.* at 358 (Ginsburg, J., concurring). Justice Thomas wrote a concurring opinion to underline his point that the Court should have taken an originalist's perspective and analyzed only "whether the phrase 'freedom of speech, or of the press,' as originally understood, protected anonymous political leafletting." *Id.* at 359 (Thomas, J., concurring). Justice Thomas concluded that it did. *Id.* Justice Scalia wrote a dissenting opinion in which he agreed with Justice Thomas on how to frame the pertinent question but disagreed with him as to the ultimate conclusion. *See id.* at 371–72 (Scalia, J., dissenting). Justice Scalia concluded that the Court has improperly "discover[ed] a hitherto unknown right-to-be-unknown while engaging in electoral politics." *Id.* at 371.

42. *Id.* at 337–38 (majority opinion).

43. *See id.* at 341–44. The law in *Talley* was broader, as it applied to all handbills and leaflets, not just campaign literature.

The *McIntyre* Court rejected the voter information interest and found the state's interest in preventing fraud and libel to be insufficient, despite acknowledging that it "carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large."[44] The Court found that other portions of Ohio's statutory scheme served those interests sufficiently well.[45] In addition, the Court rightly pointed out that the prohibition on the distribution of anonymous campaign literature "encompasses documents that are not even arguably false or misleading."[46]

The Court once again entered the election disclosure thicket in 1999 in *Buckley v. American Constitutional Law Foundation, Inc. (ACLF)*.[47] There, Justice Ginsburg, writing for a majority of the Court, struck down a Colorado law that, among other things, required that ballot initiative proponents file disclosure reports including the names and addresses of paid circulators, the amount paid per petition signature, and the circulator's total salary.[48]

The Colorado law at issue in *ACLF* also required the reporting of the petition proponents' names and the amounts they spent on circulating petitions for specific measures.[49] The Court did not review whether those reports would alone survive review.[50] The Court's opinion relied, in large part, on the existence and availability of monthly reporting requirements as a way to provide the electorate with important information and provide a check against the power of special interests on the initiative process.[51]

Legislative reforms often follow scandals.[52] After the explosion of so-called soft money, not to mention the use of the Lincoln bedroom for

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44. *Id.* at 349.

45. *See id.* at 350.

46. *Id.* at 351. Justice Scalia took the majority to task on this point, finding that Ohio's law served important interests: "How much easier—and sanction free!—it would be to circulate anonymous material (for example, a *really* tasteless, though not actionably false, attack upon one's own candidate) with the hope and expectation that it will be attributed to, and held against, the other side." *Id.* at 383 (Scalia, J., dissenting).

47. 525 U.S. 182 (1999).

48. *Id.* at 201. Justice Thomas wrote a separate concurring opinion to emphasize his point that mandatory disclosure provisions can chill the First Amendment rights of association and belief. *See id.* at 212 (Thomas, J., concurring) (citing Buckley v. Valeo, 424 U.S. 1, 64 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010)). Justice Thomas also argued that the government's interest in providing the electorate information was lower as applied to ballot measures, at least at the petition phase, than as applied to candidate elections. *Id.* at 213.

49. *Id.* at 201 (majority opinion).

50. *Id.*

51. *Id.* at 202–03. The Court also pointed out that "ballot initiatives do not involve the risk of '*quid pro quo'* corruption present when money is paid to, or for, candidates." *Id.* at 203.

52. *See* Amanda S. La Forge, Note & Comment, *The Toothless Tiger -- Structural, Political and Legal Barriers to Effective FEC Enforcement: An Overview and Recommendations*, 10 ADMIN. L.J. AM. U. 351, 356–57 (1996).

campaign donors,[53] Congress passed its first major overhaul of the campaign finance system since the FECA. The 2002 Bipartisan Campaign Reform Act (commonly known as McCain-Feingold) partially revamped federal disclosure, disclaimer,[54] and reporting requirements.

McCain-Feingold provided for disclosure of so-called electioneering communications, or radio advertisements that refer to a clearly identified federal candidate and air sixty days before a general election or thirty days before a primary election.[55] The creation of electioneering communications as a new class of communications subject to, among other things, mandatory disclosure provisions came as a result of heavy spending of soft money[56] on sham-issue advertising.[57] These are advertisements that are clearly designed to advocate for the election or defeat of a candidate, but do not use the "magic words" described in *Buckley* that previously triggered the application of the disclosure requirements.[58] Hence, individuals, corporations, and labor unions could donate soft money to political parties that could then use that money to air sham-issue ads that were not subject to limitations or disclosure provisions.[59]

One year later, in 2003, in *McConnell v. FEC*,[60] the Supreme Court upheld the disclosure, disclaimer, and reporting requirements contained

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53. Editorial, *The Soft Money Explosion*, N.Y. TIMES (May 28, 2000), http://www.nytimes.com/2000/05/28/opinion/the-soft-money-explosion.html.

54. Disclaimer requirements are distinguishable from disclosure requirements because they mandate that a communicator set aside space in or on a communication. The disclaimer provision at issue requires that noncandidate televised electioneering communications provide that "____ is responsible for the content of this advertising." Bipartisan Campaign Reform Act (BCRA) of 2002, Pub. L. No. 107-155, § 311, 116 Stat. 81 (codified as 2 U.S.C. § 441(d)(2)). Under 2 U.S.C. § 441d(d)(2) the required disclaimer had to be made in a "clearly spoken manner" and displayed on the television screen in a "clearly readable manner" for a minimum of four seconds. *Id.* The disclaimer also had to state that the electioneering communication "is not authorized by any candidate or candidate's committee" and had to display the name and address (including web site address) of the individual or group that paid for the advertisement. Citizens United v. FEC, 558 U.S. 310, 366 (2010) (emphasis omitted). In addition, "any person . . . spend[ing] more than $10,000 on electioneering communications []in [one] calendar year [has to] file a disclosure statement with the FEC" that identifies that person, the amount of the expenditure, and the names of some contributors. *Id.*

55. BCRA, Pub. L. No. 107-155, § 201(a), 116 Stat. 81, 88–89 (2002) (codified as 2 U.S.C. § 434(f)(3)).

56. "Soft money" began as "nonfederal" money that can be given "to political parties for activities intended to influence state or local elections." McConnell v. FEC, 540 U.S. 93, 123 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010). An FEC ruling held that soft money could be used to fund "mixed-purpose activities" that would affect both state and federal elections. *See id.* As the Court found in *McConnell*, "[t]he solicitation, transfer, and use of soft money thus enabled parties and candidates to circumvent FECA's limitations on the source and amount of contributions in connection with federal elections." *Id.* at 126.

57. *Id.* at 126–27.

58. *Id.* In *Buckley* the Court upheld disclosure requirements for independent expenditures but only with respect to those expenditures that contained the so-called "magic words," such as "vote for," "vote against," "cast your ballot for," "elect," or "defeat." FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 513 (2007) (quoting Buckley v. Valeo, 424 U.S. 1, 44 n.52 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010)). Hence it was easy to avoid the disclosure provisions by simply avoiding use of the magic words.

59. *McConnell*, 540 U.S. at 126.

60. 540 U.S. 93 (2003).

in McCain–Feingold under a relaxed standard of review.[61] The disclosure provisions at issue required disclosure of those making electioneering communications of over $10,000.[62] The Court concluded that the provisions imposed a minor burden and served the three governmental interests identified in *Buckley*—providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions applied to the disclosure provisions contained in the Bipartisan Campaign Reform Act of 2002 (BCRA).[63]

McConnell v. FEC was the Court's last campaign finance case decided with Justice Sandra Day O'Connor on the bench. In 2006, Justice Samuel Alito replaced Justice O'Connor, shifting the balance of the Court from five-to-four favoring campaign finance regulations, to five-to-four against such regulations. Justice Alito authored the first campaign finance decision the Court made during his tenure on the bench. In *Davis v. FEC*,[64] the Court struck down a provision of McCain–Feingold commonly referred to as the "Millionaire's Amendment" and its accompanying disclosure provisions.[65] While the substance of that ruling has little to do with disclosure, it is important because it clearly marks the shift in the Court's course away from deference to campaign finance laws that limit the amount of money given and spent in elections. That shift in the Court's composition ushered in our modern era in which campaign disclosure laws bear the weight of remedying the problems contribution and expenditure limits and public campaign finance laws were designed to solve.[66]

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61. *See id.* at 190–202.
62. *Id.* at 194–95.
63. *Id.* at 196.
64. 554 U.S. 724 (2008).
65. *See id.* at 728–29, 744–45.
66. It is true that even before Justice Alito joined the Court in 2006, a majority of its members struck down limits on expenditures by in part relying on the efficacy of disclosure provisions. For instance, in 1986, in *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)*, the Court struck down a prohibition on the ability of corporations to make independent expenditures, as applied to a small, ideological nonprofit. FEC v. Mass. Citizens for Life, Inc. (*MCFL*), 479 U.S. 238, 262 (1986). As is often the case when the Court strikes down prohibitions on spending, it specifically relied on disclosure provisions to do some of the work the monetary limitation was supposed to do. For instance, Justice Brennan, writing for the majority of the Court, dismissed the FEC's argument that without the prohibition there would be "massive undisclosed political spending by similar entities, and . . . their use as conduits for undisclosed spending by business corporations and unions" because independent expenditures would trigger the disclosure provisions still in place. *Id.* In *MCFL* the Court also worried about the organizational burdens that disclosure laws can place on outside spenders. *Id.* As Justice Brennan observed, "These additional regulations may create a disincentive for such organizations to engage in political speech." *Id.* at 254. Justice O'Connor wrote separately to emphasize her view that *Buckley* "was concerned not only with the chilling effect of reporting and disclosure requirements on an organization's contributors, but also with the potential burden of disclosure requirements on a group's own speech." *Id.* at 265 (O'Connor, J., concurring in part and dissenting in part) (citation omitted).

This pattern of striking down expenditure limits and upholding disclosure provisions continued in subsequent cases,[67] including, most famously, the Court's 2010 decision in *Citizens United*.[68] There, while the Court struck down a prohibition on the ability of corporations and labor unions to use general treasury funds on electioneering communications on a five-to-four basis, the Court upheld both disclaimer and disclosure requirements at issue by a vote of eight-to-one.[69]

The *Citizens United* Court relied heavily on *Buckley* and *McConnell* in upholding the disclaimer and disclosure provisions against as-applied challenges. The Court had recently upheld the same provisions under a facial challenge in *McConnell*.[70] In *Citizens United*, eight members of the Court emphasized "that disclosure is a less restrictive alternative to more comprehensive regulations of speech."[71] Put another way, the Court characterized disclosure provisions as a less burdensome alternative to contribution and expenditure limits.

The *Citizens United* Court found "that independent expenditures . . . [could] not give rise to corruption or the appearance of corruption" and struck down limits on those expenditures.[72] The disclaimer and disclosure provisions at issue were tied to independent expenditures. Hence, when upholding those disclaimer and disclosure provisions, the Court necessarily had to conclude that the informational interest alone was sufficient.[73]

In *Citizens United*, it was only Justice Thomas who dissented from the Court's decision to uphold the disclaimer and disclosure requirements against as-applied challenges. Unsurprisingly, Justice Thomas relied in part on *McIntyre* to argue that the "right to anonymous speech" cannot be abridged "based on the 'simple interest in providing voters with additional relevant information.'"[74] Justice Thomas concluded that "[d]isclaimer and disclosure requirements enable private citizens and elected officials to implement political strategies *specifically calculated*

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67. *See, e.g.*, FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007). *Wisconsin Right to Life* also evidences the Court's current hostility to campaign finance laws. *See id.* at 457. However, that case does not relate to disclosure laws and has little bearing on the issues discussed in this Article.

68. Citizens United v. FEC, 558 U.S. 310 (2010).

69. *See id.* at 316, 365–66.

70. *See* McConnell v. FEC, 540 U.S. 93, 196 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010).

71. *Citizens United*, 558 U.S. at 369. Interestingly, while Justice Thomas was the only justice to dissent from this portion of the Court's holding in *Citizens United*, it was Justice Thomas in another case, *Nixon v. Shrink Mo. Gov't PAC*, who suggested that disclosure may often be a less restrictive vehicle through which to limit corruption and the appearance of corruption. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 429–30 (2000) (Thomas, J., dissenting).

72. *Citizens United*, 558 U.S. at 356–57.

73. *See id.* at 368–69.

74. *Id.* at 480 (Thomas, J., concurring in part and dissenting in part) (quoting McConnell v. FEC, 540 U.S. 93, 276 (2003) (Thomas, J., concurring in part, concurring in the judgment in part, and dissenting in part), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010)).

to curtail campaign-related activity and prevent the lawful, peaceful exercise of First Amendment rights."[75]

The bulk of Justice Thomas's dissent focused on the events following the passage of Proposition 8 in California.[76] Proposition 8 was a ballot initiative that defined marriage as between only a man and a woman.[77] In the aftermath of its passage, opponents of the measure gathered information about who donated money in favor of the measure, including their names, addresses, occupations, employer's names, and total amount of the contributions.[78] This information was posted online at the California Secretary of State's website.[79] Opponents of the measure used this information to create web sites with maps showing the locations of the homes or businesses of those who donated in favor of the measure.[80] Some of those donors experienced property damage and threats.[81] Others resigned from their jobs.[82]

Because of the events following the passage of Proposition 8, late contributors sued in federal court seeking a preliminary injunction to prevent forced disclosure of their names and addresses.[83] However, the court upheld the disclosure provisions, finding that the provisions would not result in "a threat of harm so substantial" that plaintiffs were entitled to an exemption from the disclosure provisions.[84] The court emphasized that exemptions from disclosure provisions are "historically reserved for small groups promoting ideas almost unanimously rejected" as opposed to a majority of voters whose ballot measure was successful.[85] The court concluded that the plaintiffs were not entitled to an exemption to the disclosure requirements because they were successful at the polls, which "evidenced a very minimal effect on their ability to sustain their movement," and were "unable to produce evidence of pervasive animosity even remotely reaching the level of that present in [*Socialist Workers*]."[86]

While the majority in *Citizens United* focused on the importance of online disclosure to increasing the effectiveness of transparency provisions, Justice Thomas, focusing on the Proposition 8 litigation, argued

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75. *Id*. at 483.

76. *Id.* at 480–85. Justice Thomas also argued that "the threat of retaliation from *elected officials*" was another reason to invalidate the disclosure requirements. *Id.* at 483.

77. Hollingsworth v. Perry, 558 U.S. 183, 184 (2010) (per curiam).

78. *Citizens United*, 558 U.S. at 481 (Thomas, J., concurring in part and dissenting in part).

79. *Id.*

80. *Id.*; *see also* Stephen R. Klein, *A Cold Breeze in California: ProtectMarriage Reveals the Chilling Effect of Campaign Finance Disclosure on Ballot Measure Issue Advocacy*, 10 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 68, 68 (2009).

81. *Citizens United*, 558 U.S. at 481 (Thomas, J., concurring in part and dissenting in part).

82. *Id.* at 482.

83. ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197, 1199 (E.D. Cal. 2009).

84. *Id.* at 1205.

85. *Id.*

86. *Id.* at 1214. It may be that the informational interest is not high enough to sustain post-election late disclosures. *See, e.g.*, Klein, *supra* note 80, at 71.

that online disclosure increases the potential chill on First Amendment rights that results from mandatory disclosure laws.[87] Justice Thomas concluded that online disclosure provides "political opponents 'with the information needed' to intimidate and retaliate against their foes."[88] Both the majority of the Court and Justice Thomas agreed that online disclosure changes the impact of disclosure laws; they just disagreed as to whether that was a benefit or a detriment.

Following on the heels of its endorsement of the disclaimer and disclosure provisions in McCain–Feingold in *Citizens United*, the Court examined and upheld disclosure provisions outside of the campaign finance context in *John Doe #1 v. Reed*.[89] In that 2010 case, the Court upheld a Washington state law that provided for the disclosure of the names and addresses of those who signed referendum petitions.[90] Justice Roberts, writing for an eight-member majority of the Court,[91] found that a signature on a referendum is entitled to some First Amendment protection because "[a]n individual expresses a view on a political matter when he signs a petition under Washington's referendum procedure."[92] The Court upheld the disclosure requirement, finding that it preserved "the integrity of the electoral process by combating fraud, detecting invalid signatures, and fostering government transparency and accountability."[93] Justice Roberts explained that Washington's interest in maintaining electoral integrity extended beyond combating fraud to things like discover-

87. *Citizens United*, 558 U.S. at 484 (Thomas, J., concurring in part and dissenting in part).

88. *Id.* (quoting *Id.* at 916 (majority opinion)).

89. 561 U.S. 186, 191 (2010).

90. *Id.* The Court framed the issue broadly as "whether disclosure of referendum petitions in general would [violate the First Amendment.]" *Id.* The Court found that plaintiffs had to satisfy the standards for a facial challenge, in part because the claim "is not limited to plaintiffs' particular case, but challenges application of the law more broadly to all referendum petitions." *Id.* at 194.

91. Justice Breyer wrote a separate concurrence in *Reed* to emphasize that there were "competing constitutionally protected interests" at issue that had to be balanced. *Id.* at 202 (Breyer, J., concurring) (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring)).

92. *Id.* at 194–95 (majority opinion). The Court held that most often "the individual's signature will express the view that the law subject to the petition should be overturned. Even if the signer is agnostic as to the merits of the underlying law, his signature still expresses the political view that the question should be considered 'by the whole electorate.'" *Id.* at 195 (quoting Meyer v. Grant, 486 U.S. 414, 421 (1988)). Justice Scalia wrote separately in *Reed* to contend that "[o]ur Nation's longstanding traditions of legislating and voting in public refute the claim that the First Amendment accords a right to anonymity in the performance of an act with governmental effect." *Id.* at 221 (Scalia, J., concurring). Justice Scalia also emphasized a point he made in *McIntyre,* arguing that "[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed." *Id.* at 228. Justice Scalia argued that petition signers were akin to legislators or voters, and there was nothing to indicate that the act of legislating or voting is entitled to First Amendment protection. *See id.* at 221.

93. *Id.* at 197 (majority opinion). The Court did not address Respondents argument that the laws were justified by the government's interest in "providing information to the electorate about who supports the petition." *Id.* Instead, the Court found the interest "in preserving the integrity of the electoral process" to be sufficient. *Id.*

ing invalid signatures caused by mistakes and "more generally to promoting transparency and accountability in the electoral process."[94]

In *Reed*, and consistent with his position in *Citizens United*, Justice Thomas found that because of the "'vital relationship between' political association 'and privacy in one's associations'" the Court should apply "strict scrutiny to laws that compel disclosure of protected First Amendment association."[95] The compelled disclosure provisions failed to survive this level of review, according to Justice Thomas.[96] First, Justice Thomas found that the asserted interests were not compelling.[97] Justice Thomas relied on *McIntyre* to conclude that the informational interest was insufficient in this context.[98] Next, Justice Thomas argued that the availability of as-applied challenges did not sufficiently alleviate the harm caused by disclosure provisions because they "require substantial litigation" and "risk . . . chilling protected speech."[99]

Most recently, in *McCutcheon v. FEC*, the Court struck down aggregate contribution limits as contravening the First Amendment but again endorsed disclosure provisions as a less burdensome alternative.[100] Justice Roberts, writing for five-members of the Court, trumpeted the efficacy of online disclosure.[101] While disclosure may have been "only a partial" remedy in 1976 when the Court decided *Buckley*, Justice Roberts found that online disclosure "now offers a particularly effective means of arming the voting public with information" and "offers much more robust protections against corruption."[102] Justice Roberts failed to acknowledge that online disclosure also significantly increases burdens on privacy rights.

In sum, the legislative and jurisprudential history of disclosure provisions reveals a fractured constitutional approach to those provisions.

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94. *Id.* at 198. It is worth questioning whether, unlike in the case of *McIntyre* when the Court protected the identity of leaf letters and handbill distributors against forced disclosure, here the Court is simply less concerned with protecting ballot measure signatures from disclosure.

95. *Id.* at 232 (Thomas, J., dissenting) (quoting NAACP v. Alabama, 357 U.S. 449, 462 (1958)).

96. *Id.* at 233.

97. *Id.* Justice Thomas analyzed the asserted interests in "'transparency and accountability,' which . . . encompasses several subordinate interests: preserving the integrity of its election process, preventing corruption, deterring fraud, and correcting mistakes by the secretary of state or by petition signers." *Id.* (quoting Brief of Respondent Sam Reed at 40, *Reed*, 561 U.S. 186 (2010) (No. 09-559)). Justice Thomas concluded that "[i]t is readily apparent that Washington can vindicate its stated interest in 'transparency and accountability' through a number of more narrowly tailored means than wholesale public disclosure." *Id.* at 238.

98. *Id.*

99. *Id.* at 241 (quoting Citizens United v. FEC, 558 U.S. 310, 326–27 (2010)).

100. McCutcheon v. FEC, 134 S. Ct. 1434, 1459 (2014).

101. *See id.* at 1460.

102. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 28 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010)). Justice Roberts concluded, somewhat naively, that the invalidated aggregate contribution limits could have encouraged money to be given and spent by entities not subject to disclosure provisions. *Id.*

The Court has inconsistently described the burdens, benefits, and standard of review to be employed when analyzing disclosure provisions.

III. THE BURDEN RESULTING FROM DISCLOSURE PROVISIONS

In part because of a larger doctrinal incoherence with respect to campaign finance law, the Court has been purposefully or ignorantly inconsistent about defining the burden imposed by disclosure laws and in analyzing how severely that burden affects various individuals and groups. The Court's jurisprudence focuses much more heavily on the government interests served by disclosure and does not give the same weight to defining the rights burdened by such provisions.[103]

It is worth initially asking which rights we are worried about when we talk about the burdens imposed by disclosure provisions. We are likely worried about First Amendment rights, but which ones? First, we are worried about speech rights because forced disclosure can chill speech and reduce the flow of ideas by discouraging people from giving and spending money. Second, we are also worried about associational rights because forced disclosure may make people reticent to join and contribute money to a particular group.[104] Third, we are additionally worried about privacy rights. It is unclear whether those rights are separate or connected to privacy rights that fall under the umbrella of First Amendment protections. The Court, unfortunately, provides no guidance on those questions.

The Court's campaign disclosure jurisprudence also begs the question of what exactly gives rise to a cognizable burden. Is it simply fears of physical and economic harms and public hostility, such as those discussed in *NAACP*[105] and *Socialist Workers*?[106] Or can and should we include additional concerns, such as fears related to personal or professional isolation, simple loss of privacy or anonymity and aversion to public exposure, or the more abstract concept loss of dignity and autonomy in the ability to shape one's identity? The Court glosses over these nuances and instead discusses the rights to anonymity and privacy.

In *Buckley*, the seminal case in the area of campaign disclosure, the Court declared that while "disclosure requirements impose no ceiling on campaign-related activities . . . we have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and

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103. Left with little guidance regarding the burden imposed by disclosure laws, the Court is unsurprisingly inconsistent when defining and applying the proper standard of review.

104. Disclosure laws can infringe on the First Amendment rights of association and speech by acting as a deterrent to an individual's ability to associate and speak or an organization's ability to speak, which in this case is the giving and spending of money. While the majority opinions in this area often give a thin treatment to how exactly disclosure laws can infringe on First Amendment rights, some of the justices' separate opinions paint a slightly fuller picture.

105. NAACP v. Alabama, 357 U.S. 449, 462–63 (1958).

106. Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 98–101 (1982).

belief guaranteed by the First Amendment."[107] The Court has relied on this language in subsequent cases. For instance, relying on *Buckley*, the *Socialist Workers* Court characterized the burden as one on "privacy of association and belief guaranteed by the First Amendment."[108] But the Court has failed to examine fully what it meant by the First Amendment guarantee of "privacy of association and belief."

The *Buckley* Court treated the freedom of association as important only insomuch as it leads to speech and advocacy.[109] Having explained why association is significant, the Court concluded that "funds are often essential if 'advocacy' is to be truly or optimally 'effective,'" and "the right to pool money through contributions" bolsters the "advancement of beliefs and ideas."[110]

According to *Buckley*, courts must look to *NAACP* to determine whether the burdens on those challenging disclosure provisions are so great that they are entitled to an exemption. Courts look to whether there is a "reasonable probability" that the compelled disclosure will lead to "threats, harassment, or reprisals from either Government officials or private parties."[111] The *Buckley* Court added that proof could include "specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient."[112] When plaintiffs can come forward with such evidence, then there "exists the type of chill and harassment identified in *NAACP v. Alabama*."[113] It is only at that point that would-be disclosers could obtain an exemption from forced disclosure.

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107. Buckley v. Valeo, 424 U.S. 1, 64 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010). The Court later referred to "the invasion of privacy of belief" that may occur from the imposition of disclosure laws. *Id.* at 66.

108. *Socialist Workers*, 459 U.S. at 91 (quoting *Buckley*, 424 U.S. at 64). The Court also provided that disclosure laws could only survive as-applied challenges where there is a "substantial relation between the information sought and [an] overriding and compelling state interest." *Id.* at 91–92 (alteration in original) (quoting Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 546 (1963)).

109. Citing to *NAACP*, the Court provided that, "group association is protected because it enhances '(e)ffective advocacy.'" *Buckley*, 424 U.S. at 65 (alteration in original) (quoting *NAACP*, 357 U.S. at 460).

110. *Buckley*, 424 U.S. at 65–66 (quoting *NAACP*, 357 U.S. at 460). The Court refused to differentiate between contributors and members. *Id.* at 66.

111. *Id.* at 74.

112. *Id.* The Court added that "[n]ew parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views." *Id.* Reviewing the Court's ruling in *NAACP*, there the Court found an "uncontroverted showing" of "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* at 69 (quoting *NAACP*, 357 U.S. at 462). Further, the Court found that the government could now show a "'substantial bearing' on the issues it sought to clarify." *Id.* (quoting *NAACP*, 357 U.S. at 464).

113. *Id.* at 74. As Justice O'Connor noted in a separate opinion in *Socialist Workers*, "[T]he application of the *Buckley* standard to the historical evidence is most properly characterized as a

The Court found the *NAACP* exemption to be met in only one campaign disclosure case. Justice Marshall, writing for a majority of the Court in *Socialist Workers*, concluded that, among other things, there was "proof of specific incidents of private and government hostility toward the SWP and its members within the four years preceding the trial."[114] There, the evidence consisted of "threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members' property, police harassment of a party candidate, and the firing of shots at an SWP office."[115] Additionally, there was "a past history of government harassment of the SWP," including massive FBI surveillance of SWP.[116]

There may be indications that at least outside the campaign finance context, the Court is willing to recognize that the burdens imposed by disclosure laws sometimes require exemptions from those laws. The *McIntyre* Court waxed poetic about the importance of anonymity. "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."[117] The Court continued by pointing out the following:

> [Q]uite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. . . . Thus, even in the field of political rhetoric, where 'the identity of the speaker is an important component of many attempts to persuade,' the most effective advocates have sometimes opted for anonymity.[118]

Hence, *McIntyre* recognizes that disclosure laws may lead to cognizable burdens that stretch beyond immediate threats.[119] *NAACP* and *Socialist Workers* hinge on specific evidence of immediate threats. *McIntyre*, by contrast, discusses the importance of a mere desire to be free from forced identification.[120]

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mixed question of law and fact, for which we normally assess the record independently to determine if it supports the conclusion of unconstitutionality as applied." *Socialist Workers*, 459 U.S. at 113 (O'Connor, J., concurring in part and dissenting in part).

114. *Socialist Workers*, 459 U.S. at 99.

115. *Id.*

116. *Id.*

117. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–42 (1995).

118. *Id.* at 342–43 (citation omitted) (quoting City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994)).

119. It may be that *McIntyre* can now be viewed as an outlier in the Court's disclosure jurisprudence. *McIntyre* may represent the height of the Court's protection of anonymous speech.

120. Justice Scalia touched on this point in his dissent. *See McIntyre*, 514 U.S. at 379 (Scalia, J., dissenting). He argued:

> [*NAACP* and *Socialist Workers*] did not acknowledge any general right to anonymity, or even any right on the part of *all* citizens to ignore the particular laws under challenge. Rather, they recognized a right to an *exemption* from otherwise valid disclosure requirements on the part of someone who could show a "reasonable probability" that the com-

In another case outside of the campaign finance context, the Justices' many separate opinions displayed a marked disagreement regarding the burden caused by the disclosure of the names and addresses of those signing referendum petitions. In *Reed*, once Justice Roberts decided to frame the case as a facial challenge rather than as an as-applied challenge, it was relatively easy for him to reject plaintiffs' contention that the potential First Amendment burdens caused by the law were too great in light of the government interests served by the law.[121] The Court rejected the claim that online disclosure could "become a blueprint for harassment and intimidation,"[122] finding that it relied on specific harms that could result from signing a particular referendum, not any referendum.[123]

Justices Alito and Thomas both wrote separately to emphasize the burdens wrought by public disclosure. Justice Alito was particularly concerned with the "associational privacy" interests that could be harmed by compelled disclosure.[124] Online disclosure, Justice Alito argued in his concurrence, allowed "anyone with access to a computer [to] compile a wealth of information" about those signing referendum petitions or making campaign contributions.[125]

Justice Thomas wrote the lone dissent in *Reed*, arguing that compelled disclosure of signed referendum and initiative petitions "severely burdens" the First Amendment rights of speech and association and that "there will always be a less restrictive means" of "preserving the integrity of [the] referendum process."[126] Justice Thomas specifically focused

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pelled disclosure would result in "threats, harassment, or reprisals from either Government officials or private parties."

Id. at 379 (quoting Buckley v. Valeo, 424 U.S. 1, 74 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010)). As Justice Scalia rightly pointed out, there was no evidence that Mrs. McIntyre faced the sort of threats that would rise to the level of the *NAACP* and *Socialist Workers* standard. *Id.* at 380.

121. *See* John Doe #1 v. Reed, 561 U.S. 186, 199–200 (2010). Justice Roberts concluded that, "there is no reason to assume that any burdens imposed by disclosure of typical referendum petitions would be remotely like the burdens plaintiffs fear in this case." *Id.* at 201. While Justice Alito agreed with the Court's result, his agreement seemed to stem only from the fact that the Court framed the case as a facial challenge. *See id.* at 202–04 (Alito, J., concurring). Justice Alito, in fact, laid out the reasons why the Plaintiffs in *Reed* had likely alleged a sufficient case for an as-applied challenge to the law. *Id.* at 207–08. Justice Alito stressed the need for speakers to be able to obtain as-applied exemptions from disclosure provisions "quickly and well in advance of speaking." *Id.* at 203. Justice Alito's concurrence focused on the necessity of maintaining as-applied challenges as a viable option for those seeking exemptions from disclosure laws. Justice Alito pointed to the aftermath of the passage of Proposition 8 and commented that "if the evidence relating to Proposition 8 is not sufficient to obtain an as-applied exemption in this case, one may wonder whether that vehicle provides any meaningful protection for the First Amendment rights of persons who circulate and sign referendum and initiative petitions." *Id.* at 205.

122. *Id.* at 200 (majority opinion).

123. *Id.* at 201.

124. *Id.* at 204–07 (Alito, J., concurring).

125. *Id.* at 208. Justice Alito concluded that, "[t]he potential that such information could be used for harassment is vast." *Id.*

126. *Id.* at 228–29 (Thomas, J., dissenting).

on the "privacy of association."[127] Justice Thomas discussed the risks that online disclosure can pose and relied on his opinion in *Citizens United* to conclude that "the state of technology today creates at least *some* probability that signers of every referendum will be subjected to threats, harassment, or reprisals if their personal information is disclosed."[128]

By contrast, Justices Sotomayor and Stevens wrote separate concurrences in *Reed* to argue that the disclosure provisions caused relatively minor burdens. Justice Sotomayor focused on "the character of initiatives and referenda"[129] and concluded that "the burden of public disclosure on speech and associational rights [is] minimal in this context."[130] The impact on "expressive interests is even more attenuated" with respect to initiatives and referenda as compared to campaign finance disclosure, Justice Sotomayor argued.[131]

In the campaign finance context, the Court pretty consistently dismisses claims in which the burdens of disclosure provisions outweigh their benefits. The Court grants exemptions only when plaintiffs can demonstrate that the burdens imposed by the laws rise to the level of the standard elucidated in *NAACP*. In such cases, plaintiffs must make an uncontroverted showing of economic or physical harms or public hostility.[132] Outside of the campaign finance context, the Court has been less consistent about when burdens are too great to overcome the benefits of disclosure provisions. In both areas, the Court fails to fully define the burden or burdens it is worried about and when those burdens are so great that disclosure laws should not stand.

IV. THE STANDARD OF REVIEW APPLICABLE TO DISCLOSURE PROVISIONS

The Court is inconsistent about the applicable level of scrutiny because it lacks clarity when defining the burdens imposed by disclosure laws. Again, *Buckley* provides the foundational understanding for this question. There, the Court rejected rational basis as the proper test, explaining that disclosure cannot be justified by "a mere showing of some legitimate governmental interest."[133] The Court cited to *NAACP v. Ala-*

127. *See id.* at 240. Contrary to the positions staked out by Justices Stevens and Sotomayor, Justice Thomas concluded that "signing a referendum petition amounts to 'political association' protected by the First Amendment." *Id.* at 232 (quoting Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 295 (1981)).

128. *Id.* at 242.

129. *Id.* at 212 (Sotomayor, J., concurring).

130. *Id.* at 214. Justice Sotomayor further argued that "[d]isclosure of the identity of petition signers, moreover, in no way directly impairs the ability of anyone to speak and associate for political ends either publicly or privately." *Id.*

131. *Id.*

132. *See* NAACP v. Alabama, 357 U.S. 449, 462 (1958).

133. Buckley v. Valeo, 424 U.S. 1, 64 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010).

bama for the proposition that such laws must survive "exacting scrutiny," which requires "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed."[134] Later in the opinion, the Court reiterated that "[t]he strict test established by *NAACP v. Alabama* is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights."[135]

The exacting scrutiny standard falls somewhere in between the strict scrutiny and rational basis tests.[136] Courts have applied something less than strict scrutiny because "disclosure requirements impose no ceiling on campaign-related activities."[137] By the same token, courts have applied a more searching standard than rational basis because disclosure provisions can present a "significant encroachment[] on First Amendment rights."[138]

This level of scrutiny is, therefore, typically seen as requiring both "a sufficiently important governmental interest" and a "substantial relation[ship]" between the restriction and that interest.[139] These words alone provide little guidance to legislators and lower courts. An interest is "sufficiently important" when the Court says that it is. The same is true for when a relationship will be "substantial" or "relevant."

In part because the exacting scrutiny standard presents serious definitional issues, it is inconsistently applied. While this criticism may be lodged against other standards of review, exacting scrutiny, in particular, suffers from definitional issues. In addition, application of exacting scrutiny often looks like little more than a balancing test, which is easily malleable depending on the judge's predilections.[140] Hence, exacting scrutiny is tailor-made for inconsistent application.[141]

The discretion given to judges when applying exacting scrutiny is almost complete. The only real guidance comes from looking at how this

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134. *Id.* (footnotes omitted). The Court later described this as a "strict test," despite the fact that it applied the test in a most deferential fashion. *See id.* at 66–67.

135. *Id.*

136. As many of the justices and legal scholars have pointed out, "exacting scrutiny" is not the same as strict scrutiny. As Justice Thomas has explained, "in *Buckley*, although the Court purported to apply strict scrutiny, its formulation of that test was more forgiving than the traditional understanding of that exacting standard." Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 214 (1999) (Thomas, J., concurring).

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

138. *Id.*

139. *Id.* at 16, 64 (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968)).

140. *See* Lloyd Hitoshi Mayer, *Nonprofits, Politics, and Privacy*, 62 CASE W. RES. L. REV. 801, 813 (2012) ("Once one or more particular governmental interests have been identified as sufficiently important, however, the Court appears to have essentially weighed the benefits from that interest or interests being furthered against the costs of disclosure to the affected parties.").

141. *See* Anthony Johnstone, *A Madisonian Case for Disclosure*, 19 GEO. MASON L. REV. 413, 419–20 (2012) (arguing that exacting scrutiny "may be more subject to change than either strict scrutiny or rational basis review because, unlike those standards, 'exacting scrutiny' does not put a thumb on either side of the constitutional scale").

standard has been applied in precedent. Prior case law puts meat on the bones of these all-but-hollow terms. This is a problem when trying to give legislators and members of the public notice about what is permissible under the First Amendment. Simply put, exacting scrutiny provides too little protection for those subject to disclosure provisions in light of sometimes significant privacy costs.

For instance, the exacting scrutiny applied in *Buckley* looks more like a rational basis level of review than a heightened level of review. The *Buckley* Court took a permissive, deferential view of congressional power in this area, upholding all of the challenged disclosure provisions.[142] First, with respect to the applicability of the FECA's disclosure provisions to minor party and independent candidates, the Court upheld the provisions despite finding that the government's interests in applying disclosure provisions is decreased and that the burden on the contributors is significant.[143]

Second, with respect to the applicability of the FECA's disclosure provisions to small contributors, the Court upheld the $10 and $100 thresholds despite finding that small contributors are "likely to be especially sensitive to recording or disclosure of their political preferences."[144] In fact, the Court explicitly acknowledged that Congress had merely adopted the thresholds that were part of the 1910 Publicity Act.[145] Clearly applying something far less than strict scrutiny, the Court held that the thresholds were not "wholly without rationality."[146] This language sounds like a far cry from anything approaching exacting scrutiny.[147]

Indeed, Chief Justice Burger dissented from the portion of *Buckley* upholding the disclosure provisions as applied to small contributors. Burger acknowledged that disclosure "is an effective means of revealing the type of political support that is sometimes coupled with expectations of special favors or rewards" but cautioned that "disclosure impinges on

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142. *See Buckley*, 424 U.S. at 83–84.

143. *See id.* at 70–71. Specifically, with respect to the burden that the disclosure provisions placed on contributors to minor party and independent candidates, the Court acknowledged that:

> [T]he damage done by disclosure to the associational interests of the minor parties and their members and to supporters of independents could be significant. These movements are less likely to have a sound financial base and thus are more vulnerable to falloffs in contributions. In some instances fears of reprisal may deter contributions to the point where the movement cannot survive. The public interest also suffers if that result comes to pass, for there is a consequent reduction in the free circulation of ideas both within and without the political arena.

Id. at 71 (footnotes omitted).

144. *Id.* at 83.

145. *See id.*

146. *Id.*

147. Indeed, Chief Justice Burger spent much of his dissent in *Buckley* arguing that the Court failed to apply the proper level of scrutiny. *Id.* at 240 (Burger, C.J., concurring in part and dissenting in part).

First Amendment rights."[148] Burger argued that while disclosure provisions serve many important governmental purposes, the provisions contained in the FECA were "irrationally low" and should be struck down.[149] Burger worried that with such low limits many small contributors would be deterred from contributing to candidates and committees.[150] Concluding that the disclosure provisions were impermissibly low, Burger famously found that "Congress has used a shotgun to kill wrens as well as hawks."[151]

In *McIntyre*, and in contrast to its decision in *Buckley*, the Court applied a much more stringent version of exacting scrutiny than applied in *Buckley*. Finding that the Ohio statute burdened "core political speech," the *McIntyre* Court applied exacting scrutiny to the prohibition on the distribution of anonymous campaign literature.[152] The Court defined exacting scrutiny as requiring narrow tailoring to serve "an overriding state interest."[153] This language sounds much more like strict scrutiny than the exacting scrutiny standard applied in *Buckley*.

In sum, while the Court has consistently used exacting scrutiny as the level of scrutiny applicable to disclosure provisions, it has been inconsistent in its discussion of how that standard should be applied.[154] At times, the Court has appeared to apply something akin to strict scrutiny, while at other times, the Court has applied something much closer to rational basis.

V. APPLYING EXACTING SCRUTINY

Exacting scrutiny, like other constitutional tests, includes two prongs. First, courts look to the strength of the government's purpose.[155] Second, courts look to the level of fit between the law and that purpose.[156] In the case of exacting scrutiny, prong one requires "a sufficient-

148. *Id.* at 236.
149. *Id.* at 236–37.
150. *Id.* at 237.
151. *Id.* at 239.
152. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995). Justice Scalia, by contrast, characterized the statute as far from burdensome. Justice Scalia concluded that the law "forbids the expression of no idea, but merely requires identification of the speaker when the idea is uttered in the electoral context." *Id.* at 378 (Scalia, J., dissenting). In fact, Justice Scalia viewed the disclosure provisions in *Buckley* as far more burdensome. *Id.* at 383–85. Justice Scalia believed the court should have been more deferential to legislative judgment, concluding that the issue "bears closely upon the real-life experience of elected politicians and *not* upon that of unelected judges." *Id.* at 381.
153. *Id.* at 347 (majority opinion) (citing First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 782 (1978)).
154. As the Ninth Circuit noted in *California Pro-Life Council, Inc. v. Getman*, "[T]he Supreme Court has been less than clear as to the proper level of judicial scrutiny we must apply in deciding the constitutionality of disclosure regulations such as those in the [Political Reform Act]." 328 F.3d 1088, 1101 n.16 (9th Cir. 2003).
155. *See* Buckley v. Valeo, 424 U.S. 1, 16 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010).
156. *See id.* at 64.

ly important government[] interest," and prong two requires a substantial relationship between the restriction and that interest.[157] This Article, like the courts that analyze campaign disclosure provisions, focuses on the first prong of the test.

We again return to *Buckley* for the foundation of our understanding about campaign disclosure laws, this time about what those laws seek to accomplish. *Buckley* discusses three government interests served by such restrictions: preventing corruption or its appearance, informing voters, and enforcing other campaign finance laws.[158] These remain the three interests most often discussed as sufficient to uphold disclosure provisions.

A. Corruption and the Appearance of Corruption

1. Definitional Issues

The Court has provided little guidance regarding the specific type of corruption that disclosure laws prevent and how exactly those laws serve that goal. *Buckley* stated, in expansive terms, that disclosure provisions "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity."[159] The Court did little to explain what it meant by this broad proclamation. The Court added only a few explanatory statements. First, public disclosure "may discourage those who would use money for improper purposes either before or after the election."[160] Second, disclosure gives the public "information about a candidate's most generous supporters [so they are] better able to detect any post-election special favors that may be given in return."[161]

In essence, the Court argues that disclosure provisions serve pre- and post-election purposes. The underlying assumption here seems to be that there is something nefarious about certain contributions, and subjecting those contributions to the light of day will have a cleansing effect.[162] Before the election, the requirement that contributions be disclosed could avert the giving of problematic contributions because donors will want to avoid revealing themselves and the recipient of their donations to the public.[163] After the election, the disclosure requirement could place a

157. *Id.* at 16, 64 (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968)).
158. *Id.* at 66–68.
159. *Id.* at 67.
160. *Id.* The Court later found that disclosure "tends 'to prevent the corrupt use of money to affect elections.'" *Id.* (quoting Burroughs v. United States, 290 U.S. 534, 548 (1934)).
161. *Id.*; *see also* Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 326 (arguing that disclosure laws put "the question of undue influence or preferential access in the hands of voters, who, aided by the institutional press, can follow the money and hold representatives accoutable [sic] for any trails they don't like.").
162. *See* Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 274 (2010).
163. *Id.* at 281.

check on elected officials who might be predisposed to make decisions that favor their contributors. If the disclosure provisions do not lead elected officials to avoid such behavior, they will at least allow the public to be aware of special favors. In this way, corruption may be seen to encompass accountability.[164] Knowledge regarding who contributes to candidates and groups could allow members of the public to hold their officials accountable.[165] For instance, even Justice Thomas, long hostile to disclosure provisions, concluded that "disclosure laws work to make donors and donees accountable to the public for any questionable financial dealings in which they may engage."[166] But what exactly does public accountability look like? Who is watching? How? And what are the consequences?

The government's interest in preventing corruption or its appearance after the election can at times sound like an iteration of the voter informational interest. Essentially, corruption is avoided by empowering voters to obtain the information necessary to root it out. However, this interest is distinct from the pure voter informational interest, which in a way is broader and encompasses a voter's desire to place a candidate along a political spectrum, not necessarily to detect or prevent problematic behavior.

Corruption now stands as a narrow concept that arguably prevents little more than bribery.[167] In *Citizens United*, the Court dispelled any beliefs that corruption could embrace a broad concept and defined corruption as merely quid pro quo.[168] The Court reiterated this crabbed view of corruption again in *McCutcheon*.[169] Hence, it is unclear how much force the interest in reducing the appearance of corruption has in the wake of *Citizens United* and *McCutcheon*.

Was corruption intended to embrace much more than merely the concept of quid pro quo? *Buckley* and earlier campaign finance cases likely envisioned corruption as a broader concept. For instance, *Buckley* talks about preventing the "'buying' of elections and . . . undue influence of . . . contributors on officeholders."[170] In *Socialist Workers*, Justice O'Connor explains that "[c]orruption of the electoral process can take

164. *See* Johnstone, *supra* note 141, at 436–37 (explaining that *Buckley* can be interpreted as supporting disclosure on the basis that it prevents corruption or its appearance because disclosure laws promote accountability).

165. Briffault, *supra* note 162, at 281 ("Most advocates for disclosure from the 1890s through the 1960s emphasized the Brandeisian 'cleansing power' of disclosure.").

166. Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 643 (1996) (Thomas, J., concurring in the judgement and dissenting in part).

167. *See* FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985).

168. *See* Citizens United v. FEC, 558 U.S. 310, 359 (2010).

169. *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1441 (2014).

170. Buckley v. Valeo, 424 U.S. 1, 70 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010).

many forms: the actual buying of votes; the use of 'slush funds;' dirty tricks; and bribes of poll watchers and other election officials."[171]

2. Other Factors to Consider

Outside of the definitional issues regarding what exactly we mean by corruption, we also must dig deeper than the Court and ask more nuanced questions about how the identity of the contributor and the recipient might alter the Court's analysis as to the importance of the government's interest in preventing corruption or its appearance. With respect to the identity of the contributor, it may be that donations by small contributors go entirely unnoticed by recipients and fail to provide useful information to the public to hold public officials accountable for their actions or root out corruption.

Further, with respect to the identity of the recipient, when the recipient is a third-party member or independent candidate who is unlikely to win, "[t]he Government's interest in deterring the 'buying' of elections and the undue influence of large contributors on officeholders also may be reduced."[172] In such cases, it becomes unclear whether disclosure can serve anticorruptive purposes.

Next, one must ask whether there is a difference between disclosures made before and after the election. Mandating disclosure on the basis of preventing corruption or its appearance before an election is likely based on assumptions that there is something nefarious or problematic about certain contributors or contributions. But there must be more than that. It must also be that disclosure will do something to remedy those problems. Perhaps disclosure will deter contributions made by people who would expect something in return for their contributions. Pre-election disclosure, therefore, seems premised on the belief that contributions will predict the behavior of candidates once they are officeholders, specifically, behavior with respect to certain contributors. After the election, disclosure laws premised on preventing corruption or its appearance are likely designed on a belief that disclosure will place a check on elected officials who might be predisposed to make improper decisions that favor their contributors.

B. Voter Information

1. Definitional Issues

The voter informational interest clearly places First Amendment concerns on both sides of the balance when analyzing disclosure provi-

171. Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 109–10 (1982) (O'Connor, J., concurring in part and dissenting in part).

172. *Buckley*, 424 U.S. at 70.

sions.[173] Simply put, under the voter informational interest, disclosure can be seen supporting, rather than merely burdening, First Amendment rights.[174]

The Court recognized that disclosure provisions provide the public with useful information regarding the identity of those who seek to influence ballot box decisions.[175] With respect to candidates, the *Buckley* Court found that disclosure "allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches."[176] The Court concluded that disclosure of campaign contributions "alert[s] the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office."[177] Hence, disclosure of contributions essentially serves as a voting cue and an indication of a candidate's position as an officeholder, much like party affiliation or the identity of endorsers might.

In contrast to its decisions in *Buckley*, *McConnell*, and *Citizens United*, in *McIntyre* the Court found the voter informational interest to be insufficient to uphold the prohibition on the distribution of anonymous literature.[178] The Court treated the identity of the speaker as indistinguishable from any other piece of content in a document.[179] From this conclusion, it followed that "[t]he simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise

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173. Justice Breyer has noted that "constitutionally protected interests lie on both sides of the legal equation." Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 400 (2000) (Breyer, J., concurring).

174. Justice Stevens wrote separately in *Reed* to emphasize his point that "[t]his is not a hard case" because the regulation did not affect pure speech, and "any effect on speech that disclosure might have is minimal." John Doe #1 v. Reed, 561 U.S. 186, 215–16 (2010) (Stevens, J., concurring).

175. For an argument that the Court has misidentified the foundations of the informational interest, see Johnstone, *supra* note 141, at 415–16. Johnstone argues that the informational interest is both broader and narrower than the Court's current understanding. *Id.* at 415.

> It is broader in the sense that informing voters through disclosure of a wide range of interests in political campaigns is critical to the full function of the Constitution's antifactional machinery. It is narrower in the sense that the interest is in disclosing interests—factions—and not other information that voters may find valuable for other reasons.

Id.

176. *Buckley*, 424 U.S. at 67; *see also* Burt Neuborne, *One Dollar-One Vote: A Preface to Debating Campaign Finance Reform*, 37 WASHBURN L.J. 1, 15 (1997) ("[C]ompelled public disclosure of campaign contributions, campaign expenditures, and individual expenditures on behalf of a candidate was sustained in *Buckley*, in part, because the Court believed that knowledge of a candidate's financial supporters was of great value to voters in assessing the candidate's political positions.").

177. *Buckley*, 424 U.S. at 67.

178. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 348–53 (1995).

179. *Id.* at 348 ("Insofar as the interest in informing the electorate means nothing more than the provision of additional information that may either buttress or undermine the argument in a document, we think the identity of the speaker is no different from other components of the document's content . . . .").

omit."[180] However, the speaker's identity is not the same as any other piece of content that might be omitted from or added to a communication. The speaker's identity allows the voters to evaluate how much credibility they want to give to a message. There is a reason that some advertisements must tell viewers whether a spokesperson is paid; we will evaluate the message based on the speaker's motivations. There is a reason why people take advice on taxes from their accountants and medicine from their doctors. Having said that, all of those examples presume that the listener or viewer will be able to identify the speaker. If that is not the case, then the disclosure obviously provides little information.

The *McIntyre* Court distinguished *Buckley* on the basis of the informational interest.[181] However, it is difficult to square *Buckley*'s holding regarding the importance of disclosure with respect to independent expenditures and *McIntyre*'s holding regarding the importance of anonymity with respect to campaign literature. Both provisions serve the government's interest in providing information to the electorate. As Justice Scalia argued in his dissent, "The provision . . . here serves the same informational interest" as those discussed in *Buckley*.[182]

The *McIntyre* Court acknowledged that *Buckley* addressed the disclosure of not just contributions to or expenditures by candidates but also independent activity, like Mrs. McIntyre's activity.[183] But the basis on which the *McIntyre* Court distinguished the disclosure provision at issue in *Buckley* from the Ohio statute fails to withstand serious scrutiny.[184]

The *McIntyre* Court held that while the mandatory reporting at issue in *Buckley* "undeniably impedes protected First Amendment activity, the intrusion is a far cry from compelled self-identification on all election-related writings. A written election-related document—particularly a leaflet—is often a personally crafted statement of a political viewpoint."[185] But the same is true for many independent expenditures, which

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180. *Id.* The Court added that, "in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the document's message." *Id.* at 348–49.

181. *Id.* at 353–57. The Court quickly dismissed *Bellotti* as concerning the protections given to corporations. *See id.* at 353–54.

182. *Id.* at 384 (Scalia, J., dissenting).

183. *Id.* at 354–55 (majority opinion) (citing Buckley v. Valeo, 424 U.S. 1, 75–76 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010)). The Court recognized that in *Buckley* it had "expressed approval of a requirement that even 'independent expenditures' in excess of a threshold level be reported to the Federal Election Commission." *Id.* at 355.

184. The Court distinguished *Buckley* by finding that the Federal Election Campaign Act "entailed nothing more than an identification to the Commission of the amount and use of money expended in support of a candidate." *Id.*

185. *Id.* The Court further concluded, without evidence, that "even though money may 'talk,' its speech is less specific, less personal, and less provocative than a handbill—and as a result, when money supports an unpopular viewpoint it is less likely to precipitate retaliation." *Id.* If that were

the Court has said are akin to the spender's speech. And while reporting information to the Federal Elections Commission (FEC), as opposed to placing it on the face of a leaflet, may have been qualitatively different before the advent of widespread online disclosure, the same is not true now. While it is of course true that the disclosure provision in *Buckley* was not identical to the one at issue in *McIntyre*, that does not make the provisions analytically distinguishable.

Back in the campaign finance arena, in both *McConnell* and *Citizens United*, the Court focused primarily on the informational interest when upholding disclosure provisions.[186] For instance, the *Citizens United* Court found that "[a]t the very least, the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party."[187] Similarly, with respect to the disclosure requirements, the Court found that "the public has an interest in knowing who is speaking about a candidate shortly before an election."[188] The Court concluded that "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[189] Hence, the *Citizens United* Court focused on the importance of pre-election disclosure.

The voter informational interest, unlike the interest in preventing corruption or its appearance, mainly supports pre-election purposes. Simply put, the Court concluded that information regarding a candidate's supporters tells the public more about who their candidates are and who those candidates may later support than other information provided during the often rancorous political campaigns.

The voter informational interest must stand alone with respect to laws that require disclosure of funds, which the Court says cannot give rise to corruption or its appearance. For instance, the Court has said that spending by independent groups does not lead "to corruption or the appearance of corruption."[190] For the same reason, lower courts have concluded that contributions to independent groups cannot lead to corruption or the appearance of corruption.[191] Therefore, disclosure provisions that

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true, then limits on independent expenditures should not be treated as limits on pure speech that are subject to strict scrutiny.

186. *See* Citizens United v. FEC, 558 U.S. 310, 368 (2010); McConnell v. FEC, 540 U.S. 93, 195–96 (2003), *overruled by Citizens United*, 558 U.S. 310.

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

188. *Id.* at 369. The Court also rejected Citizens United's contention that the disclosure requirements would chill speech by exposing donors to retaliation. The Court found that Citizens United "offered no evidence that its members may face similar threats or reprisals." *Id.* at 370.

189. *Id.* at 371. The Court found that "[a] campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today." *Id.* at 370.

190. *Id.* at 357.

191. *See, e.g.*, SpeechNow.org v. FEC, 599 F.3d 686, 692–94 (D.C. Cir. 2010).

apply to independent expenditure groups must be supported only by the voter informational interest.[192]

The same is true of disclosure provisions on the state level regarding the financing of ballot measure campaigns. Because the Court has said that spending by ballot measure committees cannot give rise to corruption or its appearance,[193] it is the informational interest alone that supports disclosure provisions affecting ballot measures.

It may be that the voter informational interest applies with special force in the ballot measure context.[194] In *ProtectMarriage.com v. Bowen*,[195] the Ninth Circuit found that the informational interest applies most strongly in the ballot measure context because "[v]oters rely on information regarding the identity of the speaker . . . particularly where the effect of the ballot measure is not readily apparent."[196] In addition, citizens act as legislators in the ballot measure context and have a strong interest in knowing who is trying to sway their votes.[197]

However, while the informational interest must stand alone in supporting disclosure regarding independent expenditure groups and ballot measure committees, this interest has been found to be insufficient with respect to distributors of leaflets and handbills in *Talley* and *McIntyre*.[198]

2. Other Factors to Consider

As is true for the government's interest in preventing corruption or the appearance of corruption, courts must look to additional factors to see if the government's voter informational interest is truly served by disclosure provisions.

For instance, with respect to the identity of the contributor, one must evaluate which contributors provide the voters with useful information. Small individual donors are unlikely to give the voters any in-

192. *See* Buckley v. Valeo, 424 U.S. 1, 76 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010). In *Buckley* the Court upheld the disclosure of independent expenditures, despite striking down limits on those expenditures because the limits failed to prevent corruption or its appearance. The Court found that the disclosure provisions "serve another informational interest, and . . . increase[] the fund of information concerning those who support the candidates." *Id.* at 81. The Court held that disclosure of independent expenditures "helps voters to define more of the candidates' constituencies." *Id.* This, of course, assumes those who make independent expenditures on a candidate's behalf are a candidate's constituency.

193. *See, e.g.*, Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 297–98 (1981); First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 790 (1978).

194. *See* ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197, 1207 (E.D. Cal. 2009).

195. 599 F. Supp. 2d 1197 (E.D. Cal. 2009).

196. *Id.* at 1208 (quoting Cal. Pro-Life Council, Inc. v. Getman, No. 00–1698, slip op. at 17:12–28 (E.D. Cal. Feb. 25, 2005)).

197. *Id.* (citing Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1106 (9th Cir. 2003)).

198. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 348–49 (1995); Talley v. California, 362 U.S. 60, 63–65 (1960).

formation that could bear on their ballot box decisions. Instead, when it comes to small donors, and indeed most individual donors, what would be useful to the public is the aggregation of certain types of information. It would be helpful, for example, for the public to know if forty percent of the donors to a ballot measure committee, a candidate committee, or another political committee were all employed in the real estate industry, the health care industry, or the legal industry. Similarly, it might be elucidative for the public to know what percentage of the donors to a committee live in a certain area, are a certain age, or even identify as being from a certain racial background.

With respect to donors that are artificial entities, it is important for the public to obtain information about that entity and the identity of its supporters, members, and employees. Innocuous sounding names like Americans for a Better Tomorrow or even Smith and Adams LLC may provide the public with little information. However, information regarding the source of its funds (in the case of Americans for a Better Tomorrow) or the identity of its members (in the case of Smith and Adams LLC) can give the public important information about the identity of those campaign contributors. Disclosure laws should be designed to provide the public with the information necessary to evaluate the motivation of contributors and spenders.

Further, with respect to the identity of the recipient, when the donee is a third-party member or independent candidate, the voter informational interest may be low because "minor parties usually represent definite and publicized viewpoints."[199] In such cases there is a decreased need to give the voters information about the views that a candidate espouses.

When the donee is a ballot measure committee, as opposed to a candidate committee, it may be that disclosure of campaign funds most directly serves the voter informational purpose. In the case of candidate elections, the voters are confronted with a living, breathing candidate who they can evaluate. Candidates typically share their views on a wide range of issues prior to an election. In the case of ballot measure elections, the voters face only a proposal on which they can vote yes or no. The proposal may have a somewhat misleading title and summary and may be confusing to understand for those few voters who endeavor to

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199. Buckley v. Valeo, 424 U.S. 1, 70 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010). The Court continued:

> Major parties encompass candidates of greater diversity. In many situations the label "Republican" or "Democrat" tells a voter little. The candidate who bears it may be supported by funds from the far right, the far left, or any place in between on the political spectrum. It is less likely that a candidate of, say, the Socialist Labor Party will represent interests that cannot be discerned from the party's ideological position.

Id.

read it. When the donee is an artificial entity, the same considerations apply as when the entity is a donor.

Again, the voter informational interest demonstrates that disclosure provisions can also foster, not merely burden, First Amendment rights. Disclosure provisions increase the amount of information available to voters when deciding who will represent them and, in the case of ballot measures, which laws to enact.

C. Detecting Violations and Enforcement

Finally, in *Buckley*, the Court found that "recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations [contained in the FECA]."[200]

Here, the Court likely conflated these various restrictions. Public disclosure is not necessary to detect violations; instead, recordkeeping and reporting alone serve that purpose. It may be that the public serves a watchdog function. But it is far from clear how much the public truly polices campaign finance laws.

VI. THE EFFECT OF ONLINE DISCLOSURE

Online access to campaign finance information significantly enlarges both the benefits and burdens of disclosure laws. The case law should essentially be divided between cases decided before and after the advent of widespread online disclosure. *Citizens United*, decided in 2010, is arguably the first major decision regarding the constitutionality of disclosure provisions made in our modern Internet Age. And it is no coincidence that the majority focused on the efficacy of online disclosure when striking down limits on expenditures, while the dissent focused on the detriments of online disclosure and discussed privacy concerns.

A. Benefits

There can be no doubt that the ability to access disclosure information with the click of a mouse button, as opposed to a trip to a city hall, county seat, state capitol, or the District of Columbia, has radically increased the ease of obtaining disclosed information. Online disclosure facilitates the government's interests identified in *Buckley*: enhancing voter information, preventing corruption or its appearance, and promoting enforcement of campaign finance regulations.

In *Citizens United*, Justice Kennedy leaned heavily on the utility of disclosure provisions when striking down McCain–Feingold's prohibi-

200. *Id.* at 67–68. It is worth noting that this interest may be losing efficacy because there are simply fewer contribution and expenditure laws to enforce. Therefore, courts seeking to uphold disclosure provisions should be careful about putting too much weight on this interest.

tion on the ability of corporations and labor unions to use general treasury funds on electioneering communications.[201] Justice Kennedy, writing for five other Justices, explicitly found that "[a] campaign finance system . . . with effective disclosure has not existed before today."[202] Justice Kennedy took this to mean that limits on spending were no longer required because disclosure laws could do much of the work that contribution and spending limits were designed to achieve.

But what exactly does "effective disclosure" mean to Justice Kennedy? Justice Kennedy focuses on accountability: "[M]odern technology makes disclosures [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."[203]

The *Citizens United* Court additionally emphasized the importance of online disclosure to the efficacy of disclosure rules.[204] There are a number of assumptions that must be examined regarding the ability of disclosure laws to provide voters with useful information about candidates before an election. First, should the voters associate a candidate's ideology with that of her contributors? Second, how often do contributions affect an officeholder's decisions and votes? Third, does the current form of delivering campaign finance data to the voters serve this purpose? For instance, would it be more useful to aggregate information based on factors such as geography and type of employment?

The world that Justice Kennedy describes is a dream far from reality. Dark money flows freely throughout our political system.[205] Immense sums of money are spent to sway the ballot box decisions of voters throughout the country. And much of that goes undisclosed. If money is speech, as the Court has said, quite often the voters do not know who is speaking.[206]

The public similarly faces very real challenges in obtaining the information necessary to hold their officials accountable.[207] This is a failing, not of online disclosure, but of a complex web of rules and regula-

201. *See* Citizens United v. FEC, 558 U.S. 310, 366–67 (2010).

202. *Id.* at 370.

203. *Id.*; *see also* Briffault, *supra* note 162, at 276 ("[E]ven if the constitutional rules governing disclosure do not change, the enhanced potential for disclosure to affect political participation ought to force us to think more carefully about what we want and what we can get from disclosure and how disclosure laws ought to be tailored to provide important election-related information with the least impact on participation.").

204. *Citizens United*, 558 U.S. at 370.

205. "The political involvement of tax-exempt nonprofit organizations, which often do not disclose their financial supporters, has become a topic of national interest." Mayer, *supra* note 140, at 802.

206. *See* Kroll, *supra* note 9.

207. *See* Johnstone, *supra* note 141, at 417 (arguing that "[i]n short, 'disclosure failed colossally in the 2010 election.'" (quoting William McGeveran, *Mrs. McIntyre's Persona: Bringing Privacy Theory to Election Law*, 19 WM. & MARY BILL RTS. J. 859, 864 (2011))).

tions promulgated by the FEC and Internal Revenue Service (IRS). While federal election law requires that some entities that engage in political activity, such as political action committees, must disclose their donors, it also allows other entities that engage in some amount of political activity, like social welfare organizations, trade associations, chambers of commerce, and labor unions, to not disclose their donors.[208]

Additionally, the world Justice Kennedy describes has also failed to come to fruition for some practical reasons. Notably, the press corps is dramatically shrinking. One study of DC Media Corps found "a significant decrease in the reporting power of mainstream media, [in part] because . . . the number of newspapers" devoted to covering Congress has decreased by fifty percent, and the number of reports monitoring Congress has fallen by thirty percent.[209] Members of the press often serve a watchdog function by mining data, finding connections between contributors or spenders and candidates, and digesting and contextualizing campaign finance information. However, there are simply fewer performing that function.

Further, while the Internet can serve a democratizing function by providing anyone with access to a computer with the ability to obtain disclosed information, the reality is that very few citizens take it upon themselves to pore over disclosure reports. Hence, while campaign finance information is available, it is largely underutilized.

Justice Kennedy naively misstates the legal and practical implications of online disclosure. The legal framework has failed to bring about full and complete disclosure. Practical realities have similarly failed to create a world in which disclosure laws can supplant other campaign finance tools—such as contribution and expenditure limits.

B. Detriments

The Internet no doubt bolsters the effectiveness of disclosure provisions by making information easier and faster to access. However, with the ease and speed come increased concerns about burdening speech and associational rights.[210] Our current rules were crafted in a pre-Internet era in which legislators could little fathom our current systems of delivering information to the public. As discussed above, the detriments of online disclosure are thoughtfully detailed in Justice Thomas's dissent in *Citizens United*.[211] In the wake of the threats, harassments, and reprisals faced by donors to "Yes on [Proposition] 8" campaigns, there can be

208. Mayer, *supra* note 140, at 804–05.

209. LEA HELLMUELLER, THE WASHINGTON, DC MEDIA CORPS IN THE 21ST CENTURY: THE SOURCE-CORRESPONDENT RELATIONSHIP 20 (2014).

210. Briffault, *supra* note 162, at 274; *see also* William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1, 8–24 (2003).

211. *See* Citizens United v. FEC, 558 U.S. 310, 480–85 (2010) (Thomas, J., concurring in part and dissenting in part).

little doubt that online disclosure can have negative consequences.[212] These consequences must be examined and, if possible, quantified.

VII. CONCLUSION

While disclosure laws can serve important purposes, campaign finance laws, including contribution and expenditure limits, are designed to accomplish much more than disclosure laws alone can.[213] Contribution limits, for example, can allow qualified candidates without a preexisting network of financial support to run for office. Expenditure limits can serve to prevent the drowning out of voices of those who cannot or do not wish to spend large sums of money in political campaigns.

A. Change the Existing Framework

While citizens, legislators, and even members of the judiciary are looking to disclosure laws to carry a heavy burden in our current electoral system, we lack a strong doctrinal framework through which to view and evaluate disclosure provisions. We begin by looking at the existing doctrine and reconceptualizing the way we analyze disclosure provisions. First, we must recognize that disclosure provisions often impose deeper and more varied burdens than we currently recognize. Courts should consider protecting additional concerns, including those that do not rise to the level of *NAACP*-like harms. The Court's opinion in *McIntyre*, for instance, provides support for the idea of recognizing additional burdens imposed by disclosure laws. Second, we should accept that exacting scrutiny is a vague standard of review that provides little guidance. Once we recognize that the burdens imposed by disclosure provisions are greater than currently thought, it might make sense to apply something closer to strict scrutiny. Third, it is important to realize that the government's interests in enacting disclosure provisions are ill-defined and overstated. It is time to be more specific about what we can and hope to achieve in our current framework.

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212. *See* ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197, 1200–01 (E.D. Cal. 2009).

213. Briffault, *supra* note 162, at 276 ("Disclosure alone is likely to accomplish little. It is unlikely to be effective at advancing the anti-corruption value that is one of its justifications, and reliance on disclosure alone effectively abandons many of the other long-established goals of campaign finance regulation, such as voter equality, promoting electoral competition, ameliorating the time-burdens of fundraising, and reducing the role of private wealth in politics."). Justice White's dissent in *Citizens Against Rent Control* addresses this issue. *See* Citizens Against Rent Control v. City of Berkeley/Coalition for Fair Housing, 454 U.S. 290, 306–08 (1981) (White, J., dissenting). There the Court struck down a California law that limited contributions to ballot measure committees on the grounds that the law failed to serve a governmental interest. *Id.* at 298–99 (majority opinion). Justice White noted that disclosure laws alone failed to sufficiently serve the voter information interest. *Id.* at 309 (White, J., dissenting).

B. Explore Additional Factors

We must then be explicit about additional factors that should weigh into the Court's analysis. First, we should undertake a deeper exploration of how the identity of the contributor and recipient, and the type of election may factor into the Court's analysis. Disclosure may be more important with respect to ballot measure elections than candidate elections. The disclosure of campaign contributions may be one of the important indications of who would benefit from ballot measure proposals because there are few other voting cues in such elections.

Second, all of this should be done with an understanding that online disclosure of campaign finance data significantly alters both the benefits and burdens of public disclosure. The Court has focused on how online disclosure increases the effectiveness of disclosure provisions but has not similarly recognized the increased burden that online disclosure can impose on First Amendment rights.

C. Maintain Campaign Contribution and Expenditure Limits

Disclosure provisions are not a substitute for a comprehensive system of campaign finance law that includes limits on contributions and expenditures. Indeed, in *Buckley*, the foundation of modern campaign finance law, the Court explicitly rejected appellants' arguments that "disclosure requirements are the proper solution to virtually all of the evils Congress sought to remedy."[214] However, the Court's current trajectory is to leave disclosure as the only tool or solution through which to remedy the problems of money in politics. Given that, now is the time for the Court to clarify its campaign finance jurisprudence.

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214. Buckley v. Valeo, 424 U.S. 1, 60 (1976) (quoting Brief of the Appellants at 171, *Buckley*, 424 U.S. 1 (Nos. 75-436, 75-437)), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* McConnell v. FEC, 540 U.S. 93 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010).