Article

Campaign Disclosure in Direct Democracy

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Not long ago, Justice Sandra Day O'Connor declared disclosure the "'cornerstone' to effective campaign finance reform,"[1] but campaign disclosure laws now are under legal and political attack as never before. In several prominent cases, plaintiffs challenged campaign disclosure laws in direct democracy, alleging a likelihood of harassment as a result of compelled disclosure in today's Internet age. Although the legal challenges so far have been unsuccessful, the Supreme Court has invited further challenges along the same lines on an as-applied basis. What is more, legal scholars who once universally agreed on disclosure's value now call increasingly for scaling back compelled campaign disclosure. Campaign disclosure thus has emerged as a new front in election law, with direct democracy as the main battleground.

The new attacks on disclosure are explained by recent political and technological developments in campaign finance. On the political side, the sudden transformation of campaign finance law after *Citizens United* re-set the stakes for campaign finance reform by stripping away so much of longstanding campaign finance regulation, leaving disclosure laws as one of the most prominent regulatory elements still in place. Opponents of regulation once in favor of "deregulate and disclose" no longer feel compelled to settle for disclosure now that the "deregulate" component of their former approach has already taken place.[2] On the technological side, the Internet dramatically

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1. Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 223 (1999) (quoting Buckley v. Valeo, 424 U.S. 1, 39 (1976)).

2. *See infra* text accompanying note 14 (describing the "deregulate and disclose" approach).

decreased the costs of acquiring disclosed information, which is now at the touch of a finger away from anyone with web access. The lower cost of information has made it simpler to pursue political opponents identified by their disclosed activity, particularly within the contentious single-issue politics of direct democracy.

In this Article, I argue that recalibration of campaign disclosure laws in direct democracy may well be advisable in light of these developments but are best addressed legislatively, not judicially. Legislatures are better positioned than courts to calibrate the extraction of useful information of voters against competing interests in privacy and potential harassment based on that compelled disclosure. Disclosure laws serve as an important source of voter information about the political merits of ballot measures by revealing their most intense and well-known supporters and opponents. In direct democracy, such information is particularly helpful to voters in figuring out how to vote because the familiar voting cues upon which they rely in candidate elections, such as party identification and an incumbent's past performance, are not as salient or simply unavailable.

What is more, broader privacy worries about campaign disclosure are, even in the Internet age, fairly limited as best we can tell so far.[3] The low-grade chilling and harassment alleged in recent challenges to campaign disclosure laws in direct democracy are the type of generalized worry that any citizen is susceptible to suffer and amenable to redress through the political process. With the changing dynamics of campaign disclosure in the Internet age, courts should let legislatures do their jobs in adapting the law appropriately to a problem that they have proper incentives to monitor.

I. THE LEGAL AND POLITICAL CONTEXT OF CAMPAIGN DISCLOSURE LAWS

Disclosure is the most popular and least controversial form of campaign regulation.[4] Disclosure of campaign finance infor-

3. Here I address the privacy costs of campaign disclosure to individuals, as plaintiffs and commentators have presented them. I do not address, for example, compliance costs of disclosure laws for political committees and candidates that may raise concerns outside the scope of this Article.

4. *See, e.g.*, Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 273 (2010) ("[D]isclosure is probably the most successful element of our campaign finance system."); Daniel R. Ortiz, *The Informational*

mation dates back longer than a century in state and federal law and is routinely required not only in the United States, but across democracies around the world. It owes its popularity to both its relative non-intrusiveness and its perceived power to deter corruption. As Justice Brandeis once famously wrote, "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[5] Disclosure, by shining a light on politics, is assumed to deter corruption without interfering materially with free expression.

Campaign finance disclosure is thus a basic and familiar component of every system of campaign finance regulation. Federal law requires disclosure of contributions above $200, including the name, address, business, and occupation of the contributor, as well as disclosure of expenditures above $200 per election cycle.[6] State law disclosure requirements vary, but virtually every state requires a level of reporting of contributions to candidates and almost all states require reporting of expenditures above some threshold amount. What is more, state regulation of direct democracy, while less extensive than regulation of candidate elections, typically requires disclosure of campaign finance expenditures expressly advocating in support of or opposition to a particular ballot measure above a specified threshold.

The Court long ago announced in *Buckley v. Valeo* that disclosure requirements of campaign contributions and expenditures were justified constitutionally by the government's interest in informing voters.[7] This government interest in informing voters constituted a separate government interest from the interest in preventing corruption and the appearance thereof, as well as from the interest in facilitating enforcement of campaign finance restrictions. Disclosure, the Court reasoned, "provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office."[8] By exposing sources of support and opposition,

Interest, 27 J.L. & POL. 663, 664 (2012) ("For most of the post-*Buckley* history of campaign finance regulation, reformers and deregulationists alike viewed disclosure as an uncontroversial regulatory technique.").

5. Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WKLY., Dec. 20, 1913, at 10, 10 (describing the value of disclosure in the context of investment banking regulation).

6. 2 U.S.C. § 434 (2006).

7. 424 U.S. 1 (1976).

8. *Id.* at 66–67 (quoting H.R. REP. NO. 92-564, at 4 (1971)) (internal quo-

campaign finance disclosure helped voters understand more precisely where candidates stood on the political spectrum and alerted voters to the interests to which candidates were most likely to be responsive.

Disclosure of campaign contributions and expenditures in support or opposition of a candidate may reveal more meaningful information than the candidate would otherwise want to reveal. Candidates and their proxies, at least in first-past-the-post elections, have incentives to obscure their positions to a degree in pursuit of the median voter. They seek not to alienate too many voters by being unnecessarily specific about their positions and therefore gain from a measure of ambiguity.[9] However, even when candidates and their proxies are thus predictably ambiguous, voters may find more guidance about their sincere positions by looking instead to campaign finance disclosures. Disclosed contributions and expenditures represent more than the cheap talk of campaign rhetoric and require the real investment of money. Only sincere supporters would invest significant amounts of money in a candidate's campaign, and only sincere opponents would invest significant money against a candidate, such that their identities can provide trustworthy cues about the candidate's substance.

Disclosure serves this interest in informing voters at what the Court considered little cost to political expression.[10] Other forms of campaign finance regulation, such as contribution limits and source restrictions, impose hard prohibitions on the use of money for campaign speech.[11] They cut off the amount of speech and present courts with difficult, contested tradeoffs between the value of the prohibited speech and the countervailing government interests. By contrast, disclosure laws simply require public notification but otherwise do not directly restrict the breadth or depth of campaign finance activity.[12] For this

tation marks omitted).

9. *See generally* Benjamin I. Page, *The Theory of Political Ambiguity*, 70 AM. POL. SCI. REV. 742 (1976); Kenneth A. Shepsle, *The Strategy of Ambiguity: Uncertainty and Electoral Competition*, 66 AM. POL. SCI. REV. 555 (1972).

10. *See Valeo*, 424 U.S. at 64–68 (deeming disclosure in most applications as the least restrictive means of addressing campaign ignorance and corruption).

11. *See id.* at 64 ("[D]isclosure requirements impose no ceiling on campaign-related activities.").

12. *See* Citizens United v. FEC, 130 S. Ct. 876, 914 (2010) ("[D]isclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities,' and 'do not prevent anyone from speaking.'" (quoting McConnell v. FEC, 540 U.S. 93, 201 (2003); *Valeo*, 424 U.S. at 64)).

reason, disclosure laws may deter campaign finance activity, and any attendant risk of corruption, by exposing it and scaring away those who worry about public suspicion that may result. However, candidates and supporters whose financial relationships do not raise public suspicion about corruption or undue influence have less reason to curb their campaign finance activity and probably will not. Disclosure is less intrusive than direct limits because it "places the question of undue influence or preferential access in the hands of the voters, who, aided by the institutional press, can follow the money and hold representatives accountable for any trails they don't like."[13]

For these reasons, many opponents of campaign finance reform advocated for disclosure as a substitute for other forms of campaign finance regulation. Richard Briffault describes an approach among a group of commentators and political actors that he calls "deregulate and disclose."[14] This group long urged a repeal of direct campaign finance restrictions in favor of reliance on public disclosure alone. The Citizen Legislature and Political Freedom Act embodied the approach,[15] introduced by Republican congressmen John Doolittle and Tom DeLay with academic support from former FEC commissioner Bradley Smith, among others.[16] As Smith put it, "disclosure of contributions and expenditures is one part of the law on which virtually all observers agree."[17] Under this view, though, disclosure was not only necessary, but also *sufficient* as campaign finance regulation.

However, disclosure laws recently have begun to face significant criticism for the first time, after the rest of campaign finance law was so radically destabilized by *Citizens United v. FEC*.[18] In *Citizens United*, the Supreme Court struck down as unconstitutional federal prohibitions on corporate electioneer-

13. Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 326.

14. Briffault, *supra* note 4, at 286–90; *see also* David Schultz, *Disclosure is Not Enough: Empirical Lessons from State Experiences*, 4 ELECTION L.J. 349 (2005) (identifying the same group and arguing against its empirical premises).

15. H.R. 965, 105th Cong. (1997).

16. *See* BRADLEY A. SMITH, UNFREE SPEECH 82 (2001); *see also* LARRY J. SABATO & GLENN R. SIMPSON, DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS 328–35 (1996); Sullivan, *supra* note 13, at 326.

17. Bradley A. Smith, *A Moderate, Modern Campaign Finance Reform Agenda*, 12 NEXUS 3, 15 (2007).

18. 130 S. Ct. 876 (2010).

ing and in the process began a chain of legal developments that rapidly de-regulated campaign finance in a matter of months.[19] *Citizens United* narrowed its definition of quid pro quo corruption, squeezing away the constitutional grounds for many longstanding forms of campaign finance regulation.[20] By declaring unequivocally that independent expenditures presented no risk of quid pro quo corruption under any circumstances as a matter of law, *Citizens United* sent a powerful signal to lower courts, as well as the FEC.[21] By the next federal elections in the fall of 2010, the FEC had rapidly de-regulated much of the campaign finance regulatory apparatus that had stood in place at least since the 1974 comprehensive revisions of the Federal Election Campaign Act. As a result, only candidates, parties, and groups that contribute to candidates and parties remained comprehensively regulated by federal contribution limits, while most other non-connected groups were regulated mainly, if at all, through disclosure requirements.

Citizens United, however, said little about disclosure other than to reiterate and affirm longstanding understandings about disclosure's value. In fact, eight of nine justices in *Citizens United* itself upheld applicable disclosure requirements on corporate electioneering even as the Court struck down limits on that spending.[22] The majority opinion explained that "transparency [provided by disclosure] enables the electorate to make informed decisions and give proper weight to different speakers and messages."[23] As a result, even when the Court found no applicable government interest in the prevention of corruption that could justify the federal regulations on corporate electioneering in *Citizens United*, the Court upheld associated disclosure requirements on the basis of this separate interest in informing voters firmly rooted since *Buckley v. Valeo* in campaign finance law.[24]

Against this background, disclosure nonetheless became a new contested front in campaign finance law *because* it survived largely unchanged from the post-*Citizens United* transformation of campaign finance law. It survived intact after *Cit-*

19. *Id.*

20. *Id.*

21. *See* Michael S. Kang, *The Year of the Super-PAC*, 81 GEO. WASH. L. REV. (forthcoming 2013).

22. *Citizens United*, 130 S. Ct. at 914–16.

23. *Id.* at 916.

24. *See* Ortiz, *supra* note 4, at 674–75.

izens United, while much of the rest of campaign finance regulation was declared unconstitutional or at least constitutionally suspect.[25] As a result, the timing of any new offensive against disclosure was to an important degree strategic, targeting what regulation remained intact after *Citizens United*, rather than responding to substantial change to the constitutional law regarding disclosure. Past support for "deregulate and disclose," which had now arrived in important respects, does not seem to diminish today's criticism of disclosure.[26] Past supporters of deregulate and disclose, such as Senator Mitch McConnell, became newly vocal opponents of disclosure only after *Citizens United* helped wipe away much of the longstanding regulation that previously had been their focus.[27]

II. NEW WORRIES ABOUT HARRASMENT FROM CAMPAIGN DISCLOSURE: THE MARRIAGE OF DIRECT DEMOCRACY AND TECHNOLOGY

In fairness, technological advances have changed the sociopolitical impact of disclosure laws, particularly so during the past decade. The ready availability of disclosed campaign finance information on the Internet now spreads that information more rapidly and widely throughout the mass public than ever before. Campaign finance disclosures that once required great labor to obtain from the state in written format, and therefore almost always filtered through the news media in piecemeal fashion, now are seconds away from the fingertips of anyone with Internet access. This democratization of access also potentially democratizes the propensity for harassment based on disclosure. Contributors to unpopular causes or candidates now could be investigated at low cost, revealed, and potentially harassed by those with divergent views for their campaign finance activity. What is more, the sophistication of the major parties and other political actors in analyzing campaign

25. *See generally* Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1 (2012) (describing the ramifications of *Citizens United*).

26. *See* Thomas E. Mann, Commentary, *Campaign Finance in the Wake of* Citizens United, 44 J. MARSHALL L. REV. 583, 590 (2011) ("Now effective disclosure is opposed by the same people who once championed it.").

27. *See, e.g.*, Fred Hiatt, *A GOP Bait-and-switch on Disclosure*, WASH. POST, June 18, 2012, at A15; *see also Disclosure Vote Leaves Trail of Broken Republican Vows*, BLOOMBERG VIEW (July 17, 2012), http://www.bloomberg.com/news/2012-07-17/disclose-vote-leaves-trail-of-broken-republican-vows.html (reporting the shift of the Republican Party on campaign finance disclosure since *Citizens United*).

finance data, along with a rich stew of other individual-level data, has made disclosure of campaign finance activity a part of a larger concern about personal privacy in the context of campaign mobilization.[28]

An expanded risk of harassment is the core premise of new academic criticism of campaign finance disclosure laws. William McGeveran argues that "Internet disclosure on a massive scale changes everything."[29] During an earlier age, only the biggest or most well-known spenders might find their political advocacy revealed for public consumption, but with the Internet, average people find their low-level donations reported in highly trafficked websites such as the *Huffington Post*. This shift in the scale of publicity given to campaign finance disclosures, in the minds of critics, dramatically increases the privacy costs of disclosure for low-level spenders. What is more, the informational benefits from disclosure of such low-level spenders is quite minimal.[30] If the financial commitment of large-level campaign spending makes credibly clear the campaign's association with the spender's interests, then the same salient inference of association is largely absent for low-level spending by politically unknown sources.

Constitutional concerns about the privacy of low-level donors have played out most prominently in the context of direct democracy. Proposition 8, presented directly to the California state electorate as a ballot measure in 2008, proposed to amend the state constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California."[31] After Proposition 8's passage in 2008, opponents of the measure used

28. *See, e.g.*, Michael S. Kang, *From Broadcasting to Narrowcasting: The Emerging Challenge for Campaign Finance Law*, 73 GEO. WASH. L. REV. 1070, 1075–84 (2005) (discussing sophisticated use of data analysis and individual tailoring of partisan messaging); William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1, 18–20 (2003) (describing data mining of campaign finance data). *See generally* SASHA ISSENBERG, THE VICTORY LAB: THE SECRET SCIENCE OF WINNING CAMPAIGNS (2012) (describing the use of social science analysis to discriminate among voters for purposes of tailoring political appeals).

29. William McGeveran, *Mrs. McIntyre's Persona: Bringing Privacy Theory to Election Law*, 19 WM. & MARY BILL RTS. J. 859, 863 (2011).

30. *See* Briffault, *supra* note 4, at 300 ("Knowing the names and addresses of large numbers of individual small donors is unlikely to be helpful to the public or the many intermediaries . . . who evaluate campaign finance information.").

31. CAL. SEC'Y OF STATE, VOTER INFORMATION GUIDE, TEXT OF PROPOSED LAWS, PROPOSITION 8 (2008), *available at* http://vig.cdn.sos.ca.gov/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop8.

the state Internet database of campaign finance data to identify individuals who had donated money in support of Proposition 8 and then set up websites that listed their personal information, including addresses and phone numbers.[32] Several such supporters claimed subsequent harassment, alleging among other things, retaliatory boycotting of their businesses, threats of violence, job loss, and nasty emails and phone calls at home and work.[33] They sued in *ProtectMarriage.com v. Bowen* for injunctive relief, arguing that they had demonstrated a reasonable probability that disclosure would result in threats, harassment, and reprisals to qualify for the as-applied exemption from compelled disclosure,[34] defined in *NAACP v. Alabama ex rel. Patterson*[35] and *Brown v. Socialist Workers '74 Campaign Committee*.[36] The district court, however, found that the alleged harassment in the case amounted to "[o]nly random acts of violence directed at a very small segment of the supporters," different not in degree but in kind from the pervasive, well-documented harassment, past and present, from both private and government sources, alleged by the NAACP in Jim Crow Alabama and the Socialist Workers Party in Ohio and beyond.[37]

Even so, the Supreme Court appeared to give credence to the allegations of harassment by Proposition 8 supporters in a related case, *Hollingsworth v. Perry*.[38] The Court stayed the live broadcast of the federal trial of Proposition 8's constitutionality and cited a worry that witness testimony would be chilled.[39] The Court explained that witness apprehension about public broadcasting of their testimony was substantiated by incidents of past harassment in connection with Proposition 8, which the Court described prominently in introducing the case's background.[40] The Court mentioned a *New York Times* article reporting death threats to Proposition 8 supporters and "Internet blacklists of pro-Proposition 8 businesses," as well as instances

32. David Lourie, Note, *Rethinking Donor Disclosure After the Proposition 8 Campaign*, 83 S. CAL. L. REV. 133, 133–35 (2009).

33. ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197, 1200–04 (E.D. Cal. 2009).

34. *Id.* at 1205.

35. 357 U.S. 449, 462–63 (1958).

36. 459 U.S. 87, 91–98 (1982).

37. *Bowen*, 599 F. Supp. 2d at 1216–17.

38. 130 S. Ct. 705, 713 (2010) (per curiam) (granting a stay of a broadcast of a federal trial partly for fear that witnesses would suffer harassment).

39. *Id.*

40. *Id*. at 707–13.

of vandalism and violence.[41] Roughly the same evidence was detailed by Justice Thomas in his dissent on disclosure in *Citizens United*, only in greater detail. As the lone dissenter on disclosure in the case, Justice Thomas cited the evidence as warning of a "cottage industry that uses forcibly disclosed donor information to *pre-empt* citizens' exercise of their First Amendment rights."[42] He argued that examples of harassment from the Proposition 8 cases, as well as other harassment of conservatives cited in his dissent, "sufficiently demonstrate why this Court should invalidate mandatory disclosure and reporting requirements."[43]

Despite these attacks on mandatory disclosure, the Court so far has re-affirmed the constitutionality of disclosure laws, even as it dismantles much of the rest of campaign finance law. In yet another case involving a ballot measure dealing with same-sex marriage, the Court rejected a challenge to the constitutionality of election-related disclosure and reporting in *Doe v. Reed*.[44] The 2010 case involved ballot measure R-71 in Washington that proposed the effective repeal, through direct democracy, of a law that previously expanded the rights of domestic partners.[45] Washington, like most states, requires public disclosure of signatories on petitions to place a ballot measure on the ballot.[46] At least two groups requested a list of signatories in support of R-71 and announced their intention to post the list online in searchable format.[47] R-71 supporters sought a preliminary injunction, claiming that the combination of disclosure requirements and the Internet provided "what will effectively become a blueprint for harassment and intimidation."[48] The Court, on appeal, rejected the plaintiffs' facial challenge. The Court found that the plaintiffs offered "scant evidence" of persuasive burdens on R-71 petition signers that would trigger judicial concerns along the lines of *NAACP v. Alabama ex rel. Patterson*.[49] The Court concluded that "there is no reason to as-

41. *Id.* at 707.

42. Citizens United v. FEC, 130 S. Ct. 876, 981 (2010) (Thomas, J., concurring in part and dissenting in part).

43. *Id.*

44. 130 S. Ct. 2811, 2821 (2010).

45. *Id.* at 2816.

46. *See* Washington Public Records Act, WASH. REV. CODE § 42.56.070(1) (2006).

47. *Reed*, 130 S. Ct. at 2816.

48. *Id.* at 2820.

49. *Id.* at 2821.

sume that any burdens imposed by disclosure of typical referendum petitions would be remotely like the burdens plaintiffs fear."[50]

The Court's fractured decision in *Doe v. Reed* belies the Court's united front in turning away the facial constitutional challenge. Although the Court rejected the plaintiffs' facial challenge, Chief Justice Roberts's majority opinion expressly left open the opportunity for further challenges to disclosure on an as-applied basis, a familiar procedural posture for the Roberts Court in striking down other instances of government regulation of the political process.[51] Several Justices, including Justices Stevens and Scalia, argued in concurrence that this was an easy case and dismissed the burdens of disclosure, even in the Internet age.[52] But Justice Thomas, as always on the issue, dissented again that compelled disclosure chills citizen participation and should be held per se unconstitutional, without any individual showing of special burden.[53] What is more, Justice Alito concurred with the majority but noted that "courts should be generous in granting as-applied relief in this context."[54] Justice Alito observed that the potential for harassment was "vast" and cited the previous examples from Proposition 8 as evidence of "strong support for an as-applied exemption in the present case," even though he did not support the plaintiffs' broader facial challenge.[55]

Direct democracy has thus emerged as the venue for current constitutional challenges over campaign disclosure's constitutionality. Direct democracy presents the risk of harassment perhaps with greater focus than candidate elections because it presents issues individually in isolation for votes, making particularly clear any campaign contributor's view.[56] A person's view on gay marriage, for instance, is easy to infer from her contributions to campaigning for Proposition 8,

50. *Id.*

51. *See* Nathaniel Persily & Jennifer S. Rosenberg, *Defacing Democracy?: The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court's Recent Election Law Decisions*, 93 MINN. L. REV. 1644, 1644–46 (2009) (discussing the Roberts Court's preference for as-applied challenges in the election law context).

52. *See Reed*, 130 S. Ct. at 2829 (Stevens, J., concurring); *id.* at 2832 (Scalia, J., concurring).

53. *Id.* at 2837 (Thomas, J., dissenting).

54. *Id.* at 2824 (Alito, J., concurring).

55. *Id.* at 2822–23.

56. *See* Lourie, *supra* note 32, at 154.

whereas her view on gay marriage, or any other specific issue, is not at all clear from her contributions to a major party or to all but the most unusual candidate.[57] The major parties and most candidates bundle issues together into a package that make inferences about their supporters view necessarily non-specific. People with opposing views therefore learn more precise information about their fellow citizens from campaign disclosures about ballot measures and can more precisely target their putative enemies for harassment if they seek to do so.[58] Single-issue politics clearly exposes contributors' views on a particular narrow question, which can be nonetheless important and controversial, when unbundled from the many issues in play at once in candidate elections.

Not only does direct democracy disaggregate issues for individual decision, it also features some of the most politically controversial and morally contentious issues in American politics. People on both sides of ballot measures dealing with issues such as abortion, affirmative action, and gay rights may identify themselves morally with their causes that perhaps increase the emotional stakes of these campaigns, along with the impulse to harass their opponents. It is no surprise that any harassment over Proposition 8 arose over the issue of gay marriage rather than a routine ballot measure over a regulatory matter more typical of direct democracy in California. Indeed, the Court in *Reed* noted prominently in turning away the facial challenge there that the "typical referendum petitions 'concern tax policy, revenue, budget, or other state law issues'" that do not generally raise the risk of harassment from either side.[59] However, ballot measures on more controversial valence issues occur with enough regularity, where the perceived risk of harassment is higher, that the constitutional challenges to disclosure likely will recur and continue to be at their most salient in direct democracy.

57. *See id.* at 152 ("It is nearly impossible to imagine a scenario where a donor could justify [a disclosure] exemption when they donate to the two major parties because many people donate to those parties and do so for a variety of reasons.").

58. *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876, 980–81 (2010) (Thomas, J., concurring in part and dissenting in part) (describing the targeting of Proposition 8 supporters).

59. *Reed*, 130 S. Ct. at 2821 (majority opinion) (quoting Brief for Respondent Washington Families Standing Together at 36, Doe v. Reed, 130 S. Ct. 2811 (2010) (No. 09-559)).

III. THE SPECIAL RELATIONSHIP BETWEEN CAMPAIGN DISCLOSURE AND VOTER COMPETENCE IN DIRECT DEMOCRACY

The irony is that campaign disclosure in direct democracy is more valuable to voter competence than in candidate elections for the same reason that the perceived risk of harassment, and therefore the vulnerability to constitutional challenge, is more salient. Indeed, the same defining characteristic of direct democracy makes the perceived risk of harassment greater for ballot measures but also explains why voters need campaign disclosure in direct democracy far more so than in candidate elections. This defining characteristic, of course, is the absence of intermediation in direct democracy by candidates and parties.

The Progressive Era insight of direct democracy was to mitigate the agency costs of representative democracy by bypassing elected representatives altogether for a determined set of policy questions. Direct democracy puts decision-making on a discrete policy question directly into the hands of the electorate, without the representative filter of elected officials. As a result, the usual concerns about quid pro quo corruption associated with campaign finance are inapplicable in direct democracy.[60] There is quite literally no candidate to corrupt in the usual sense of quid pro quo exchange. At least on a given policy question, the representative process is bypassed, and the public decides for itself.

For this reason, the principal government interest in regulating campaign finance—the prevention of quid pro quo corruption and the appearance thereof—does not apply in direct democracy as a matter of law. The Court explained that "[t]he risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue."[61] Given that most campaign finance regulation is based on the government interest in prevention of corruption,[62] the grounds for campaign finance regulation in direct democracy is far more limited than in candidate elections. For instance, the

60. *See* Todd Donovan & Shaun Bowler, *An Overview of Direct Democracy in the American States*, *in* CITIZENS AS LEGISLATORS 1, 2 (Shaun Bowler et al. eds., 1998) ("[Direct democracy] provide[s] an end-run around partisan legislatures, mitigating the corrupting influences thought to operate within them.").

61. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 790 (1978) (internal citation omitted).

62. *See* Buckley v. Valeo, 424 U.S. 1, 26 (1976).

Court has held that limits on contributions to support campaigning on ballot measures are unconstitutional, even though limits on contributions to candidates are almost always upheld.[63] Similarly, based on the narrower ground for regulation of direct democracy, the Court long ago struck down prohibitions on corporate electioneering on ballot measures,[64] while upholding analogous prohibitions on corporate electioneering in candidate elections until only recently.[65]

Campaign finance disclosure in direct democracy, however, has always enjoyed strong constitutional support from courts under a separate government interest in voter competence. As described earlier, the Court continues to recognize a government interest in informing voters that undergirds the constitutionality of compelled campaign finance disclosure.[66] Just as in candidate elections, the Court has found in direct democracy too that "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected."[67] This interest in voter information supports campaign finance disclosure in candidate elections, working in connection with the government interest in preventing corruption applicable there. But in direct democracy where the anticorruption interest does not apply, the Court has nonetheless upheld campaign finance disclosure requirements for ballot measure campaigning based *solely* on the interest of voter competence.[68]

This interest in voter competence is particularly salient in direct democracy, much more so than in candidate elections. In the absence of candidates and parties to simplify and bundle issues for voters, voters need to know more to vote competently about a ballot measure than they do when they vote on candidates.[69] Candidates and parties work hard to build a brand rep-

63. *See* Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, 454 U.S. 290, 296 (1981).

64. *See Bellotti*, 435 U.S. at 795.

65. *Compare* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990) (upholding a state campaign finance act), *with* Citizens United v. FEC, 130 S. Ct. 876, 912–13 (2010) (striking down a federal campaign finance restriction).

66. *See supra* notes 7–8 and accompanying text.

67. *Bellotti*, 435 U.S. at 792 n.32.

68. *See* Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1105 n.23 (9th Cir. 2003) ("Only the informational interest applies in the ballot-measure context . . . ."); Briffault, *supra* note 4, at 281 ("Indeed, voter information provides the real foundation for today's disclosure requirements.").

69. *See* Michael S. Kang, *Democratizing Direct Democracy: Restoring Vot-*

utation that simplifies politics for voters and gives voters the ability to vote confidently for their interests without knowing many specifics about politics and public policy.[70] Although voters are famously ignorant about basic information in politics, voters nonetheless learn much of what they need to know to navigate their vote choices over candidates and parties by referring to simple heuristics that boil down a lot of information into crude but useful voting cues.[71] Those cues are crucial for voting in candidate election but largely absent in direct democracy.[72]

The most important voting cue missing in direct democracy is party identification. Party identification in candidate elections enables the average voter to vote confidently and competently without a great deal of information. Party identification serves as the "structuring principle or lens for viewing and understanding politics."[73] The average voter need not know a great deal about individual candidates or their position, provided that he knows the candidates' party identification and his own orientation toward their party. Party identification summarizes enough about individual candidates such that the average voter can infer whether or not to vote for them.

However, ballot measures, not partisan candidates, are presented for public vote in direct democracy. Ballot measures are presented on the ballot without partisan endorsement or affiliation, typically accompanied by only their titles and a brief description of their substance. Voters therefore have no simple voting cue associated with individual ballot measures and instead must independently assess their substance to guide voting decisions. What is more, other familiar heuristics that regularly inform voting on candidates, such as likeability and previous performance as an incumbent, are basically unavailable for ballot measures as well.[74] As a result, voters are often

er Competence Through Heuristic Cues and "Disclosure Plus", 50 UCLA L. REV. 1141, 1151 (2003).

70. *Id.* at 1149–51.

71. *Id.*

72. *See generally id.* (framing the problem of voter ignorance in direct democracy as flowing from the absence of familiar voting cues from candidate elections).

73. JOHN H. ALDRICH, WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA 166 (1995).

74. *See generally* MORRIS P. FIORINA, RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS (1981) (describing retrospective voting based on candidates' past performance in office); SAMUEL L. POPKIN, THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS

forced make more difficult judgments based directly on ballot measures' policy substance that require greater background information than voters typically possess.

If candidates and parties regularly took visible positions on ballot measures, then voters might be able to infer their voting preference on ballot measures from those cues from partisan elites. In fact, empirical studies find that voters are responsive to elite position-taking on ballot measures and refer to endorsements for their voting decisions much in the same way that they do for party identification of candidates.[75] When a public official publicly supports or opposes a ballot measure, voters can estimate their preference about the ballot measure without a great deal more information simply by siding with the public officials they support and opposing the position of public officials they oppose. For this reason, some commentators have proposed means for inserting such elite endorsements onto the ballot as a voting cue for ballot measures.[76]

The problem, though, in direct democracy is that candidates and parties do not have compelling incentives to involve themselves consistently in ballot measure campaigning. Parties and candidates are in the business of winning and holding office, and unlike in candidate elections, no offices are directly at stake in direct democracy. Of course, parties and candidates also seek to influence policy outcomes, which are affected by direct democracy. But parties and candidates care only a limited amount about most ballot measures relative to the costs of visible campaign involvement. Candidates and parties prefer in the usual case to save their material and reputational capital for candidate elections and therefore generally avoid visible involvement unless they can enhance their public standing by taking a side. This standing calculus has meant that candidates and parties tend not to campaign very visibly for or

97 (1994) (describing a range of candidate-based voting heuristics).

75. *See, e.g.*, Jeffrey A. Karp, *The Influence of Elite Endorsements in Initiative Campaigns*, *in* CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES 149, 157 (Shaun Bowler et al. eds., 1998); David M. Paul & Clyde Brown, *The Dynamics of Elite Endorsements in Professional Sports Facility Referendums*, 6 ST. POL. & POL'Y Q. 272, 282–83 (2006); Lee Sigelman, *Voting in Gubernatorial Succession Referenda: The Incumbency Cue*, 51 J. POL. 869, 876 (1989).

76. *See* Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. (forthcoming).

against most ballot measures in a way that voters can easily identify and adopt as a voting cue for themselves.

Campaign finance disclosure helps to fill some of this informational gap in direct democracy. Voters can reasonably infer that the biggest spenders on campaigning for or against a particular ballot measure are likely to have strong preferences about the policy substance of the ballot measure. By identifying those biggest spenders, voters obtain crude but generally helpful information about a ballot measure and can position themselves in relation to their feelings about those spenders.[77] As the Ninth Circuit put it, "[A]t least by knowing who backs or opposes a given initiative, voters will have a pretty good idea of who stands to benefit from the legislation."[78] Just as the average voter can decide how to vote in a candidate race based on which party has nominated the respective candidates, the average voter can decide to vote on a ballot measure based largely on what interest group has contributed most, and therefore has effectively announced a preference, on the competing sides of the campaign over that ballot measure.

The seminal study most clearly demonstrating the usefulness of campaign finance information as a voting cue is Arthur Lupia's study of voter behavior on a confusing series of California ballot measures dealing with tort reform.[79] Lupia quizzed voters about their knowledge about the policy substance of five tort reform measures on the ballot at the time, as well as whether they knew the positions of the insurance industry, trial lawyers, and Ralph Nader on each proposition.[80] Lupia found that voters who knew only the positions of the interest groups, but were ignorant about the ballot measures' substance, were able to vote identically to voters who actually knew the ballot measures' substance.[81] Voters who knew neither the interest group positions nor the ballot measures' substance, however, voted very differently from the other two groups of voters in

77. A similar cognitive process may actually underlie party identification itself. *See, e.g.*, Arthur Miller, Christopher Wlezien & Anne Hildreth, *A Reference Group Theory of Partisan Coalitions*, 53 J. POL. 1134, 1147 (1991).

78. Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1105 n.23 (9th Cir. 2003).

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

80. *Id.* at 67–68.

81. *Id.* at 72.

Lupia's study, even controlling for other important influences.[82] In other words, knowledge of the interest group position on the ballot measures appeared to be a substitute for actual substantive knowledge about the policy details of the ballot measures.

Cue-taking on the basis of campaign finance information is not a purely academic point. One recent survey found that just less than half of all voters report that they are aware of specific organizations or individuals, as well as specific funders of campaigns, that support or oppose a ballot measure in their state.[83] Although a smaller percentage of voters reports that they actively sought out information about contributors on ballot measure campaigning, voters receive at least some information about contributors from news reporting on ballot measures, campaign advertisements calling out sources of support and endorsements for both sides, and source disclosures on each advertisement itself identifying its funding. The same survey found that a large majority of voters support compelled campaign finance disclosure in direct democracy and believes that it would change their opinion about a ballot measure if they know which well-known organizations contributed money to campaigning.[84] Along these lines, a federal district court and then the Ninth Circuit credited trial evidence showing that California voters were significantly influenced by knowledge about sources of campaign finance contributions in direct democracy and thought it was important to have public access to that information.[85]

Campaign finance disclosure not only offers a snapshot of overall support and opposition on a ballot measure, but common requirements of source disclosure efficiently provide voters with information about speaker credibility. Source disclosure laws in most states require the identity of the financial sponsor of a campaign advertisement to be disclosed in the body of the advertisement itself.[86] Of course, this disclosure informs voters about the identity of at least one group or individual invested enough in the ballot measure to pay for a campaign advertise-

82. *Id.*

83. Dick M. Carpenter II, *Mandatory Disclosure for Ballot-Initiative Campaigns*, 13 INDEP. REV. 567, 573 (2009).

84. *Id.* at 572.

85. Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1106 n.25 (9th Cir. 2003).

86. *See generally* Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255, 255–56 (2010) (arguing in favor of source disclosure and surveying state law).

ment. More importantly, the disclosure occurs at the point of receipt, mediating absorption of the advertisement's message, so that voters can incorporate a judgment about the sponsor's credibility when it assesses the message. Research from psychology and political science finds that people are skilled at crediting and discrediting the truth of a communication when they have knowledge about the source,[87] but particularly when they have knowledge about the source at the time of the communication as opposed to subsequent acquisition.[88] Source disclosure equips voters with credibility information alongside the communication itself without requiring separate effort by voters to look up campaign finance information. If the voters receive the communication, they also receive at the same time a bit of campaign finance disclosure that helps them evaluate its content.

Of course, disclosure is hardly a panacea for voter competence. Voters are notoriously uninformed about politics, and disclosure can improve voter competence only so much. Many commentators question whether heuristic reasoning based on simple cues should be understood as a normatively desirable basis for election decisions, in place of a more robust ideal of informed engagement.[89] Other commentators contend that disclosure does not disseminate sufficiently through the public to make an important difference to voter competence,[90] while other work suggests that voting cues ought to be provided on the ballot itself to increase their salience in voter decision-making.[91] What is more, certain types of mandated disclosure—disclosure of ballot measure petition signatories, for instance—

87. *See, e.g.*, Cheryl Boudreau, *Closing the Gap: When Do Cues Eliminate Differences Between Sophisticated and Unsophisticated Citizens?*, 71 J. POL. 964, 974–75 (2009).

88. *See, e.g.*, Pamela M. Homer & Lynn R. Kahle, *Source Expertise, Time of Source Identification, and Involvement in Persuasion: An Elaborative Processing Perspective*, 19 J. ADVERTISING 30, 37 (1990); Brian Sternthal et al., *The Persuasive Effect of Source Credibility: A Situational Analysis*, 42 PUB. OPINION Q. 285, 288–89 (1978); Brian Sternthal et al., *The Persuasive Effect of Source Credibility: Tests of Cognitive Response*, 4 J. CONSUMER RES. 252, 259 (1978); Charles D. Ward & Elliott McGinnies, *Persuasive Effects of Early and Late Mention of Credible and Noncredible Sources*, 86 J. PSYCHOL. 17, 17 (1974).

89. *See, e.g.*, James H. Kuklinski & Norman L. Hurley, *On Hearing and Interpreting Political Messages: A Cautionary Tale of Citizen Cue-Taking*, 56 J. POL. 729, 732 (1994).

90. Carpenter II, *supra* note 83, at 569.

91. *See* Craig M. Burnett, Elizabeth Garrett, & Mathew D. McCubbins, *The Dilemma of Direct Democracy*, 9 ELECTION L.J. 305, 317 (2010).

offer much less useful information to voters than disclosure of high-level campaign finance sponsors. But disclosure of some sort is an imperfect but useful tool that legislatures have deployed to help fill the large informational gap that voters face in direct democracy. As the Internet eases the costs of acquiring campaign finance information for average voters, it makes it even more likely that average voters have access to useful information and in some cases directly tap into the databases available at the fingertips of many voters.[92]

IV. LEGISLATURES, NOT COURTS

Despite expressions of new worry about campaign disclosure, the Internet age does not require a fundamental revision of the constitutional orientation toward campaign disclosure in direct democracy. The case law already accommodates the threat of harassment in light of the minimal demonstrated risk from campaign disclosure. Although commentators have argued that the current law does not strike the right balance between privacy and disclosure on other grounds, these considerations are best left to legislative adjustment rather than judicial constitutionalization. They raise policy questions that the political process, left to itself, is fully able to accommodate even better than courts, and indeed, judicial interference would limit legislative experimentation by constitutionalizing the law even further.

What the litigation over campaign disclosure in direct democracy demonstrates more than anything else is the lack of evident risk of serious harassment even in the Internet age. As Rick Hasen summarizes, "there is virtually no record of harassment of donors outside the context of the most hot-button social issue, gay marriage, and even there, much of the evidence is weak."[93] In *Doe v. Reed*, an amicus brief from direct democracy scholars noted that not a single petition signer alleged any harassment or intimidation among the more than a million citizens who signed petitions to qualify any of the twenty-eight statewide referenda nationwide between 2000 and 2009 before the case.[94] On remand, the district court likewise

92. *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876, 916 (2010) (arguing that "modern technology makes disclosures rapid and informative").

93. Richard L. Hasen, *Chill Out, A Qualified Defense of Disclosure Laws*, 27 J.L. & POL. 557, 559 (2012).

94. Brief for Direct Democracy Scholars as Amici Curiae Supporting Respondents at 12, Doe v. Reed, 130 S. Ct. 2811 (2010) (No. 09-559).

found with respect to the specifics of the case that the plaintiffs "supplied evidence that hurts rather than helps its case" and concluded that the "set of experiences of threats, harassment, or reprisals suffered or reasonably likely to be suffered by R-71 signers cannot be characterized as 'serious and widespread.'"[95] As a consequence, in all but perhaps the rarest case, the balance of constitutional interests appears to swing decisively in favor of disclosure, or at least government discretion about disclosure requirements in direct democracy.

Recently, however, some commentators have argued that the existing law on disclosure does not take into proper account the broader privacy interests implicated by disclosure beyond the risk of harassment. For instance, William McGeveran argues that "the orthodox view of privacy harms in election law construes those harms much too narrowly."[96] He criticizes the district court for relying on the fact of Proposition 8's passage as evidence of its popularity and its supporters' nonmarginality. McGeveran argues against limiting constitutional recognition of privacy concerns about campaign disclosure to marginal political groups and more broadly that "individuals whose opinions differ from those around them will put their heads down and disengage from political activity if that is the only way to avoid disclosure."[97]

Prominent commentators including Richard Briffault, Rick Hasen, and Bruce Cain have similarly argued that there is little or no voter information to be gained from disclosure from average, low-level contributors, for example, at least relative to the privacy interests that McGeveran champions.[98] They may be right on policy grounds that disclosure laws should be recalibrated toward privacy and less disclosure. Particularly for the typical low-level contributor, the compelled disclosure of name, address, and occupation adds little to the electorate's understanding of the relevant ballot measure except perhaps in the aggregate across many other low-level contributors. The aggregate pattern of many contributors of a certain profile, say from a particular industry or region, may be useful for voters to

95. Doe v. Reed, 823 F. Supp. 2d 1195, 1212 (W.D. Wash. 2011).

96. McGeveran, *supra* note 29, at 865.

97. *Id.* at 878.

98. *See* Briffault, *supra* note 4, at 276; *see also* Bruce Cain, *Shade from the Glare: The Case for Semi-Disclosure*, CATO UNBOUND, Nov. 8, 2010, *available at* http://www.cato-unbound.org/2010/11/08/bruce-cain/shade-from-the-glare-the-case-for-semi-disclosure/. *See generally* Hasen, *supra* note 93.

learn,[99] but the contributor-specific information at the individual level is valueless from the standpoint of voter education when the contributor is not well known and the contribution is not large.

However, this type of policy calibration can and should occur by legislative adjustment, not judicial dictate through constitutional litigation.[100] McGeveran argues against what he sees as "the overwhelming presumption in favor of disclosure now applied,"[101] but this position tends to overstate the judicial position on disclosure. True, courts generally uphold campaign disclosure laws, but they do so only in deference to legislatures that enact them as part of a larger political process. In other words, disclosure is not a judicially mandated requirement, as McGeveran knows.[102] Campaign disclosure requirements are legislated by the political process and of course subject to amendment and repeal by the same political process.[103] Indeed, anti-disclosure arguments to constitutionalize the issues sweep so broadly that they potentially undercut what should be broad political support for trimming back disclosure requirements through thoughtful legislative adjustment.

99. *See* Cain, *supra* note 98.

100. *See generally* Eugene Volokh, *Tort Law vs. Privacy* (undated) (unpublished draft manuscript), *available at* http://www.law.yale.edu/documents/pdf/Intellectual_Life/LTW-Volokh.pdf (arguing similarly that courts should not impose certain new privacy rights and should instead defer to legislatures with respect to the appropriate balance between privacy interests and conflicting duties under tort law).

101. McGeveran, *supra* note 29, at 880.

102. *Id*. at 865–66 (acknowledging legislatures and administrators could provide greater protection for privacy and elect not to do so).

103. Indeed, a number of states recognize worries about retaliation for political activity and have statutes protecting against such retaliation. *See, e.g.*, Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295 (2012) (surveying state laws prohibiting employment retaliation for various forms of political activity). Many states specifically list certain disclosed political activity for protection against retaliation, such as petition signing. *See, e.g.*, D.C. CODE § 1-1001.14(b)(3) (2012) (enacted 1978); MO. ANN. STAT. § 115.637(6) (West 2012) (enacted 1939) (prohibiting employment retaliation for signing any ballot measure petition); OHIO REV. CODE ANN. § 731.40 (West 2011); WASH. REV. CODE ANN. § 42.17A.495(2) (West 2012) (enacted 1993) (prohibiting retaliation for "in any way supporting or opposing a . . . ballot proposition"). The same is true for campaign finance activity. *See, e.g.*, LA. REV. STAT. ANN. §§ 18:1461.1(A)(2), 1483, 1505.2 (2011) (enacted 1997); MASS. GEN. LAWS ANN. ch. 56, § 33 (West 2012) (enacted 1994); OR. REV. STAT. ANN. §§ 260.665(1)-(2) (West 2012) (enacted 1971). *But see* Fowler v. Neb. Accountability & Disclosure Comm'n, 330 N.W.2d 136 (Neb. 1983) (declaring unconstitutional a state law of a similar type).

First, to the extent that the technology alters the appropriate balance between disclosure and privacy, legislatures have the regular capacity to monitor changing conditions as they develop and update the law, at least to the degree that courts leave them the discretion to do so.[104] How best to balance the general chilling effect of disclosure against the public interest, absent greater evidence of a larger threat of harassment, is precisely the type of policy question where legislatures have comparative institutional advantages over courts. Legislatures can marshal available empirical evidence about harassment and the general chilling effect of disclosure law more effectively, at least in theory, than courts. Indeed, when it comes to campaign finance disclosure laws, the Court has declined to exercise such fine-grained oversight about legislative distinctions in degree that cannot be said to amount to difference in kind.[105]

Second, new concerns about privacy and harassment alleged in the most recent cases are generalizable worries applicable across citizens and amenable to redress through the political process. Proposition 8 supporters, for instance, may be correct that their legislature has set the threshold too low for disclosure and introduced an unnecessary opportunity for social friction that is not offset by the resulting gains in voter competence and other government interests. However, this low-grade chilling and mild harassment is a generalized harm that might be suffered by any particular person or group on a particular ballot measure in the issue-by-issue politics of direct democracy. On a different ballot measure, it may be a very different category of person or group that is at greatest risk of low-grade chilling and harassment. In other words, the injury claimed in these cases is less about the chronic concerns of worried, stigmatized minorities than single-shot complaints from one side in the episodic, evenly matched, but heated single-issue politics of direct democracy. Over the run of ballot measures, however, no individual voter is likely to belong to the unpopular minority consistently across many varied issues.

104. This appears to be what Congress has done with respect to privacy concerns surrounding other forms of personal data. *See* McGeveran, *supra* note 28, at 2–3; *see also* Jacob Gardener, *Sunlight Without Sunburns: Balancing Public Access and Privacy in Ballot Measure Disclosure Laws*, 18 B.U. J. SCI. & TECH. L. 262 (2012) (proposing a four-level disclosure policy with different measures of public disclosure dependent on the type of donor, ballot measure, and corruption concerns).

105. *See* Buckley v. Valeo, 424 U.S. 1, 30 (1976).

The low-grade chilling effect from campaign disclosure laws therefore is entirely different from the type of harassment requiring constitutional exemption from disclosure under the case law.[106] Those were exceptional cases where the harassment flowed from the unpopularity of stigmatized minorities subject to retaliation for their views by the majority. The potential harm involved was not only far more severe and obvious than what was claimed by the Proposition 8 supporters, but also not amenable to accommodation from the political process. For stigmatized and unpopular minorities, the same majority animus underlying their harassment makes redress through a majoritarian political process unlikely as well. The same was not true for Proposition 8 supporters, and thus the relevance of Proposition 8's passage to the district court's decision. To the degree that Proposition 8 supporters suffered a demonstrable, troubling harm from disclosure, they also comprised a majority of the electorate presumptively with the political clout to defend themselves through the political process, and even repeal the disclosure requirements.

To the degree that the legislature wrongly sets the balance between low-grade chilling and harassment and other government interests, the legislature is the lawmaking institution best-positioned to receive complaints and best-incentivized to correct the problem. McGeveran claims persuasively that campaign disclosure entails certain privacy costs that may chill participation to a degree. People may be less willing to participate if they have less control over the way that they are perceived by others and must consider that congregants, patients, or parents may learn of their political activity.[107] Of course, disclosure nonetheless entails a risk of displeasing fellow citizens, but the legislature should be trusted to decide what reasonable measure should be required of what Justice Scalia describes as "civic courage, without which democracy is doomed."[108] These are concerns, borne by all citizens and voters, that legislatures can assess and should dial into their standard calibration of electoral regulation, including campaign disclosure laws.

Third, it is unclear how well courts could incorporate broader concerns about chilling on an as-applied basis to better

106. *See, e.g.*, McGeveran, *supra* note 28, at 14–15 (distinguishing privacy costs from the risk of outright harassment recognized by the Court).

107. *See id.* at 16–20 (discussing the dignitary and privacy costs of disclosure short of harassment).

108. Doe v. Reed, 130 S. Ct. 2811, 2837 (2010) (Scalia, J., concurring).

calibrate disclosure laws to those concerns. As-applied challenges, to preempt harassment as alleged, must seek exemptions from public disclosure ex ante, before a pattern of harassment specifically from disclosure can be established. As-applied exemptions must be based on a predictive judgment about the likelihood and severity of harassment to occur. Such predictive judgments were easier in cases like *NAACP v. Alabama* and *Brown*, where the inference of continued harassment would follow from the long, indisputable history of private and government harassment against the locally disfavored, politically stigmatized groups in those cases.[109] The Court relied upon the historical record of harassment suffered by stigmatized groups that would predictably recur in the absence of judicial protection. For this category of exceptional case, the expected harm is not only far greater than the chill on speech specifically from disclosure, the probability of the harm was far more certain on the basis of established history.

However, similar predictive judgments about the likelihood of severe harassment for a particular ballot measure, outside of a longer narrative of sociopolitical harassment, is much more difficult. In a case like *ProtectMarriage.com v. Bowen*, courts would need to predict ex ante, for that particular ballot measure, the likelihood of harassment or chilling participation from disclosure of contributions above a particular dollar level. Then, courts would need to balance that chill against the government interest in voter competence from disclosure above some higher threshold. For a particular ballot measure, at what dollar amount, but not below it, would the government be justified in requiring individual disclosure because the generalized chill is outweighed by an interest in voter competence? On what evidence would that case-by-case judicial judgment be based? There is little case-specific information about harassment on which an as-applied judgment could be based, because of a lower-grade risk of harassment or chill, in the absence of any clear historical record of such. These doubts multiply when the claim is made by members of a popular electoral majority, such as

109. *See* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 99–102 (1982) (describing the long history of government harassment of the Socialist Workers Party, including surveillance, counterintelligence, and investigation of its membership and sources of support); NAACP v. Alabama, 357 U.S. 449, 462–63 (1958) (citing the uncontroverted showing of past economic reprisal, loss of employment, threat of physical coercion, and public hostility as a consequence of membership disclosure).

supporters of Proposition 8 in *Hollingsworth*, who obviously can claim no meaningful history of ongoing political discrimination.

Arguments in favor of hemming in campaign disclosure requirements through as-applied challenges therefore may ultimately reveal themselves in practice to be nearly categorical claims against disclosure that apply uniformly across the wide swath of cases. These arguments do not depend so much on particularized showings of evidence, but instead flow from broader worries about the costs of compelled disclosure per se.[110] To the degree that exemptions on an as-applied basis should be granted "generous[ly]," as Justice Alito proposes in *Doe v. Reed* on the basis of the evidence of harassment there,[111] as-applied exemptions would be likely to be based less on a properly individualized judgment of each case's special circumstances than on a general belief that disclosure requirements require too much risk of low-grade harassment except when the ballot measure is too mundane to be controversial. This intrusive judicial oversight of campaign disclosure would threaten to flip the presumption of constitutionality and quickly collapse into the type of policy fine tuning that courts typically have shunned in campaign finance law.[112] The precise calibration of the specific thresholds and requirements for campaign disclosure is a difficult legislative question, not a judicial one that can be thoughtfully or efficiently administered through liberally granted as-applied exemptions.

Of course, the Court recognized a broader right to privacy for certain election-related disclosures. In *McIntyre v. Ohio Elections Commission*, the Court struck down an Ohio statute that compelled disclosure of authorship on campaign literature.[113] The statute was challenged by Margaret McIntyre, who opposed a local school tax levy, printed anonymous leaflets advocating against it, and distributed them on car windshields in the school parking lot. The Court, in holding unconstitutional the disclosure requirement, explained that "an author's decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment."[114] Relying heavily

110. *See, e.g.*, Lourie, *supra* note 32, at 152–53 (observing that the claimed harm from disclosure in *Citizens United* would apply broadly to virtually any donor to a candidate or issue that did not have nearly uniform support).

111. *Id.* at 2824 (Alito, J., concurring).

112. *See* Buckley v. Valeo, 424 U.S. 1, 30 (1976) (warning that Congress's "failure to engage in such fine tuning does not invalidate the legislation").

113. 514 U.S. 334 (1995).

114. *Id*. at 342.

on *McIntyre*, the Court later struck down a Colorado disclosure law in the context of direct democracy in *Buckley v. American Constitutional Law Foundation (ACLF)*.[115] The case addressed a requirement that petitioners collecting signatures to qualify initiatives for the ballot must wear name badges while soliciting signatures. The Court concluded that the badge requirement "discourages participation . . . by forcing name identification without sufficient cause."[116]

However, these decisions recognizing a broader privacy right against campaign disclosure are best seen as categorically tailored to the cases' specific circumstances.[117] Unlike general campaign finance disclosure requirements, for instance, the challenged laws in *McIntyre* and *ACLF* were particularly unlikely to produce information useful to voters.[118] The late Mrs. McIntyre was not a public figure and epitomized the local activist whose authorship of her leaflets was unlikely to be meaningful to many people. Likewise, the names of the various anonymous circulators in *ACLF* were similarly unlikely to help voters assess the merits of the ballot measures for which they petitioned. As the Court explained in *McIntyre*, "[I]n 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."[119] A required disclosure on hand-distributed campaign literature, or a circulator's name badge, were exceedingly unlikely to advance voter competence. The non-usefulness of this information was specifically contrasted by the Court against the value of more comprehensive campaign finance disclosures usually required by law.[120]

115. 525 U.S. 182 (1999).

116. *Id*. at 200.

117. *See generally* Kang, *supra* note 28, at 1089–95 (contrasting judicial solicitude toward face-to-face advocacy and pamphleteering on one hand and retail, broadcast campaign-finance politics on the other hand).

118. *See* Ctr. for Individual Freedom v. Madigan, 697 F.3d 464, 482 (7th Cir. 2012) (noting that "in these cases the state's interest in disseminating such information to voters is at a low ebb" (citation omitted)).

119. *McIntyre*, 514 U.S. at 348–49.

120. *See ACLF*, 525 U.S. at 202–03 ("Disclosure of the names of initiative sponsors, and of the amounts they have spent gathering support for their initiatives, responds to that substantial state interest."); *McIntyre*, 514 U.S. at 354–56 (noting that the disclosure interest in voter competence articulated in campaign finance cases did not apply to the kind of independent activity pursued by Mrs. McIntyre); *see also* Anthony Johnstone, *A Madisonian Case for Disclosure*, 19 Geo. Mason L. Rev. 413, 456–57 (2012) (developing this contrast

Even more important, the challenged laws in these decisions required disclosure in a face-to-face context where the worry about harassment was understood by the Court to be categorically more severe. In *McIntyre*, the Court distinguished the risk of harassment from local pamphleteering and campaign finance disclosure by noting 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."[121]

The limited nature of pamphleteering typically confines its usefulness mainly to the local level where a worry about personal harassment among friends and neighbors is greatest. In *ACLF*, the Court took pains to explain that the required disclosure of identity while circulators approach potential signatories "operates when reaction to the circulator's message is immediate and may be the most intense, emotional, and unreasoned" and "expose[s] the circulator to the risk of 'heat of the moment' harassment."[122] In comparing *McIntyre* and *ACLF*, the Court looked to the degree of "one-on-one communication" as the measure for the risk of harassment, concluding that there was an even greater risk of harassment in *ACLF* because "[p]etition circulation is the less fleeting encounter."[123]

By comparison, the harassment worry with respect to general reporting and government disclosure is several steps removed from the risk of face-to-face harassment. If nothing else, face-to-face contact simply provides the immediate opportunity for harassment that is absent in general reporting and disclosure obligations at issue in recent cases like *Hollingsworth v. Perry* and *Doe v. Reed*. Unlike local pamphleteering and signature gathering, general collection of mass information by the government lends itself to any sort of harassment only if an interested party takes several steps to investigate disclosed information and then track down the targets. One must go through the effort of poring through government reporting, pick out some limited set of targets, and then organize a plan for harassment. True, the Internet reduces the costs of the effort, but the series of steps involved, with the likelihood that only

in the context of an antifactionalist rationale for campaign disclosure).

121. 514 U.S. at 355.

122. 525 U.S. at 199 (internal quotation marks omitted).

123. *Id*.; *see also* Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150 (2002) (articulating the same reasoning).

the most prominent or most active citizens will be chosen for harassment if at all, severely reduces the risk of harassment of low-level figures such as Mrs. McIntyre on the basis of compelled disclosure. Absent more convincing evidence of harassment that can be traced back to disclosure of this nature, the harassment worry in *McIntyre* and *ACLF* should be understood as an order of magnitude different.

This is not to say that the privacy worries of plaintiffs in cases like *Hollingsworth* and *Doe v. Reed* are without merit, at least over the longer run if not today. There is no doubt that the risk of harassment increases as the costs of information acquisition from disclosure decrease, such that the type of allegations in those cases may become more common and substantiated over time. However, it is better for legislatures rather than courts to monitor those risks and calibrate an appropriate policy adjustment that balances the increased risk of harassment against whatever interests in voter competence weigh on the other side. Courts can protect against those risks only on a cumbersome as-applied basis, or by overgeneralizing credible risks recognized in *NAACP v. Alabama* and *ACLF* to a large run of circumstances where the same dynamics are materially different but difficult to distinguish by ex ante judicial ruling.

CONCLUSION

Disclosure has always been the most widely supported form of campaign regulation across partisanship and political persuasion. In *Citizens United*, the most consequential campaign finance case in thirty years, eight of nine justices voted to uphold the comprehensive disclosure provisions of the Bipartisan Campaign Reform Act, even as the Court dismantled other longstanding campaign finance regulations and re-made the future of campaign finance law. However, disclosure may not be on as secure constitutional ground as this history of support suggests. De-regulation activists who have re-made campaign finance law in stunningly rapid fashion now are training their sights on campaign disclosure laws as their new target for constitutional challenge.[124] Although I argue here that legislatures deserve judicial deference on campaign disclosure, campaign finance reformers and sympathetic legislatures would also be

124. *See* James Bennet, *The New Price of American Politics*, ATLANTIC MONTHLY, Oct. 2012, at 66, 68 (summarizing Jim Bopp's litigation success against campaign finance regulation and quoting Bopp as regarding the complete de-regulation of campaign finance as "in the endgame").

best advised to monitor the politics of direct democracy rather closely and adapt disclosure laws pre-emptively to the degree appropriate, sooner rather than later as a hedge against more aggressive judicial intervention that seems likely to come.