

NOTES

RETHINKING DONOR DISCLOSURE AFTER THE PROPOSITION 8 CAMPAIGN

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I. INTRODUCTION

Proposition 8, the California ballot measure that amended the state constitution to deny marriage to same-sex couples, passed by a small margin in November 2008.¹ The campaign was contentious, well funded by both sides, and the subject of much media attention.² After Proposition 8 passed, however, the debate about same-sex marriage in California was far from over. Shortly after the election, Proposition 8 opponents organized protests against certain Proposition 8 supporters and their employers throughout California and in other states.³ For example, opponents protested at the Church of Latter-Day Saints in Los Angeles because the church and its members raised a significant amount of money to support Proposition 8.⁴ Opponents also organized boycotts of businesses whose

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1. See, e.g., Tamara Audi, Justin Scheck & Dionne Searcey, *Election '08: The New Landscape; California Set to Join Trend of Banning Gay Marriage*, WALL ST. J., Nov. 6, 2008, at A10 (discussing Proposition 8 results); Jessica Garrison, Cara Mia DiMassa & Richard C. Paddock, *Voters Approve Proposition 8 Banning Same-Sex Marriages*, L.A. TIMES, Nov. 5, 2008, at A1 (same); Cal. Sec'y of State, Statement of Vote 2008 General Election Summary Pages 13 (Nov. 4, 2008), available at http://www.sos.ca.gov/elections/sov/2008_general/8_13_sov_summary_final.pdf.

2. See Audi et al., *supra* note 1; Garrison et al., *supra* note 1.

3. See, e.g., Cara Mia DiMassa, Tami Adbollah & Shelby Grad, *Prop. 8 Boycott Talk Spreads to Movies and More*, L.A. NOW, Nov. 13, 2008, <http://latimesblogs.latimes.com/lanow/2008/11/the-boycott-eff.html>.

4. See, e.g., Jessica Garrison & Joanna Lin, *Mormons' Prop. 8 Aid Protested: Gay-Rights Activists Criticize the Church for Its Role in Helping to Pass California's Ban on Same-Sex Marriage*,

owners or employees donated to support Proposition 8.⁵ Several of these protests had negative repercussions for donors. For example, following threats of boycotts of his musical works and his employer, Scott Eckern, the longtime artistic director of the California Musical Theater, resigned from his position after it was revealed that he donated \$1000 to Proposition 8.⁶ Marc Shaiman, the composer of the music for *Hairspray*, told Eckern that he would not let his work be performed in the theater due to Eckern's support for Proposition 8.⁷

U.S. law requires a secret ballot for both candidate and issue elections,⁸ so how did opponents of Proposition 8 identify the donors to Proposition 8? The answer lies in disclosure laws. In California, as in most states, campaigns must publicly disclose certain information about individuals who donate to a ballot measure or candidate.⁹ California's Political Reform Act of 1974, as amended, provides that all campaign donations of \$100 or more must be published on the Secretary of State's website, allowing the public to easily search for the names of campaign donors online.¹⁰ Further, not only must the donor's name and the amount of the contribution be disclosed, but the donor's street address, occupation, and employer's name—or, if self-employed, the name of the donor's business—must also be disclosed.¹¹

On the federal level, campaign contributions to federal candidates are also now easily accessible to the public online.¹² Federal law requires disclosure of individuals who contribute \$200 or more to a candidate.¹³

L.A. TIMES, Nov. 7, 2008, at B1; *Mormon Church Draws Protest over Marriage Act*, N.Y. TIMES, Nov. 9, 2008, at A34.

5. See DiMassa et al., *supra* note 3.

6. See Jesse McKinley, *Theater Director Resigns amid Gay-Rights Ire*, N.Y. TIMES, Nov. 13, 2008, at C1.

7. See *id.*

8. See 29 C.J.S. *Elections* § 315 (West 2009).

9. See, e.g., CAL. GOV'T CODE § 84602 (West 2009); Campaign Disclosure Project, Grading State Disclosure 2008: Executive Summary, <http://www.campaigndisclosure.org/gradingstate/execsum.html> (last visited Nov. 15, 2009) [hereinafter Grading State Disclosure 2008: Executive Summary].

10. See CAL. GOV'T CODE §§ 84211, 84602; Grading State Disclosure 2008: Executive Summary, *supra* note 9. California donor disclosure information is available on the Secretary of State's website at <http://cal-access.ss.ca.gov/> (last visited Nov. 23, 2009).

11. See CAL. GOV'T CODE § 84211.

12. See Federal Election Commission, Disclosure Data Search, http://www.fec.gov/finance/disclosure/disclosure_data_search.shtml (last visited Nov. 23, 2009) [hereinafter FEC Disclosure Search].

13. Under the Federal Election Campaign Act ("FECA"), candidates must disclose donors who gave more than \$200 in an election cycle, including their address, occupation, and employer. See 2 U.S.C. § 434(b) (2006). This rule also applies to political committees. See Bipartisan Campaign Reform

This information can be viewed online through the Federal Election Commission's ("FEC's") website, as well as on other websites.¹⁴ Not only has technology increased the availability of donor information online, but political entrepreneurs have also taken the FEC's campaign finance data and made it even more accessible online, allowing users to search the data by multiple categories.¹⁵ For example, the Huffington Post, a popular blog, runs a search engine called "Fundrace 2008," which allows a user to search for donors to 2008 presidential candidates by a donor's first or last name, address, city, or employer.¹⁶ The website boasts about the easy access to the political leanings of nearly anyone a user knows of: "Want to know if a celebrity is playing both sides of the fence? Whether that new guy you're seeing is actually a Republican or just dresses like one?"¹⁷

Others have emulated the Huffington Post in making data provided by the government more salient and accessible to the public. In California, after Proposition 8 passed, opponents created a website called Eightmaps.com, which presents a map of donors in favor of Proposition 8; the map locates where donors live and lists each donor's name, donation amount, and occupation.¹⁸ The availability of this information led to even more protests against donors; for example, a restaurant manager in Los Angeles who gave \$100 to the Proposition 8 campaign resigned in response to a boycott of her restaurant in protest.¹⁹ Other supporters of Proposition 8 claimed to be the victims of threatening emails and phone calls.²⁰

In response to the Proposition 8 reprisals, some opponents of campaign finance disclosure have called for a repeal of disclosure laws, at

Act (BCRA) of 2002 § 103(a), 2 U.S.C. § 434(e)(3).

14. See, e.g., FEC Disclosure Search, *supra* note 12.

15. See, e.g., Center for Responsive Politics, <http://www.opensecrets.org> (follow "Donor Lookup" under "Quick Links") (last visited Nov. 23, 2009).

16. The Huffington Post, Fundrace 2008, <http://fundrace.huffingtonpost.com> (last visited Nov. 23, 2009) [hereinafter Fundrace 2008].

17. *Id.*

18. See Prop 8 Maps, <http://www.eightmaps.com> (last visited Nov. 23, 2009).

19. See John R. Lott, Jr. & Bradley Smith, Op-Ed, *Donor Disclosure Has Its Downsides*, WALL ST. J., Dec. 26, 2008, at A13.

20. The complaint that Proposition 8 supporters filed with the U.S. District Court for the Eastern District of California to challenge compelled disclosure of their identities noted:

The threats and harassment have included threatening phone calls, emails, and postcards. [] John Doe #1 (received harassing phone calls that referenced his support of Proposition 8); John Doe #4 (received multiple threatening emails including one that read "hello propagators & litigators [sic] burn in hell") In some instances, such phone calls and e-mails were accompanied by death threats, a threat made all the more plausible by the compelled disclosure of the addresses of the donors.

Second Amended Complaint ¶ 35, *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197 (E.D. Cal. Jan. 22, 2009) (No. 2:09-CV-00058-MCE-DAD) [hereinafter Second Amended Complaint].

least in the context of initiative campaigns, so that donors can remain anonymous. Anonymity, opponents argue, will prevent harassment that might discourage future political speech in the form of campaign contributions.²¹ John Lott, Jr., and Bradley Smith argue in a *Wall Street Journal* editorial that donor disclosure should be eliminated in ballot measure elections because disclosure violates donors' privacy rights, exposing them to threats and harassment.²² Unlike in candidate elections, they argue that in ballot measure elections "there are no office holders to be beholden to big donors" and therefore donor disclosure is unnecessary.²³ This argument stems in part from the Supreme Court's campaign finance jurisprudence, which identifies the need to prevent actual or apparent quid pro quo corruption as an important state interest justifying disclosure laws.²⁴ Lott and Smith conclude with a perilous prediction:

In the aftermath of Prop. 8 we can glimpse a very ugly future. . . . [W]ith today's easy access to donor information on the Internet, any crank or unhinged individual can obtain information on his political opponents, including work and home addresses, all but instantaneously. When even donations as small as \$100 trigger demonstrations, it is hard to know how one will feel safe in supporting causes one believes in.²⁵

Due to these "threats, harassment, and reprisals" against Proposition 8 donors, James Bopp, Jr., a prominent opponent of campaign finance reform,²⁶ sought an injunction to remove the names of Proposition 8 donors from the California Secretary of State's website.²⁷ This request for an injunction, however, was denied by U.S. District Judge Morrison England, Jr., on January 30, 2009.²⁸ Judge England noted that disclosure was necessary to protect the public by allowing it to see who supported a campaign.²⁹ Many watchdog groups and scholars agree—for example, the Campaign Disclosure Project, a project of UCLA School of Law, the Center for Governmental Studies, and the California Voter Foundation, maintains a website that grades each state's disclosure laws in order "to bring greater transparency and accountability to the role of money in state

21. See, e.g., Lott & Smith, *supra* note 19.

22. *Id.*

23. *Id.*

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

25. See Lott & Smith, *supra* note 19.

26. See James Bopp, Jr. & Susan Lee, *So There Are Campaign Contribution Limits That Are Too Low*, 18 STAN. L. & POL'Y REV. 266 (2007).

27. See, e.g., Second Amended Complaint, *supra* note 20, ¶ 96.

28. See *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1226 (E.D. Cal. 2009).

29. See *id.* at 1208–09.

and federal campaigns.”³⁰ The group asserts that comprehensive disclosure laws are necessary to achieve this objective.³¹ As such, it believes that state disclosure laws must include not only the donor’s name and address but also, *inter alia*, mandatory donor occupation and employer information, mandatory electronic filing of donations, and easily searchable online databases.³² This is the majority view; several authors have noted that disclosure regimes are widely accepted, even by those who do not support other aspects of campaign finance reform such as strict campaign contribution limits.³³ For example, both Senate Minority Leader Mitch McConnell, a Republican, and former Stanford Law School Dean Kathleen Sullivan, a purported potential Supreme Court nominee by Democratic President Barack Obama, support a “pure disclosure” regime, in which nearly all limits on campaign contributions are eliminated but candidates must immediately disclose all contributions they receive.³⁴

The difference between the views of Bopp, Lott, and Smith on the one hand, and the Campaign Disclosure Project and most legal commentators on the other hand, illustrates the significant tension between the benefits of donor disclosure, including providing transparency and deterring corruption, and the downsides of disclosure, including potentially discouraging political speech and facilitating harassment and reprisals. The negative aspects of disclosure have received little attention in legal scholarship and must be reexamined in both candidate elections and direct democracy in light of the Proposition 8 campaign.³⁵

30. See, e.g., Campaign Disclosure Project, <http://campaigndisclosure.org/about.html> (last visited Nov. 23, 2009). See also *infra* note 33.

31. See Campaign Disclosure Project, *supra* note 30.

32. See CAMPAIGN DISCLOSURE PROJECT, CAMPAIGN FINANCE DISCLOSURE MODEL LAW, at vii–x (2004), available at <http://campaigndisclosure.org/modellaw/ModelDisclosureLaw.pdf>.

33. See, e.g., Trevor Potter, *Campaign Finance Disclosure Laws*, in THE NEW CAMPAIGN FINANCE SOURCEBOOK 123 (Anthony Corrado et al. eds., 2005) [hereinafter SOURCEBOOK] (“Disclosure requirements historically have had the strong support of both the public and policymakers, and that support continues into the present.”); Clyde Wilcox, *Designing Campaign Finance Disclosure in the States: Tracing the Tributaries of Campaign Finance*, 4 ELECTION L.J. 371, 371 (2005) (“Even many of those who oppose contribution limits and other types of regulation support more rigorous disclosure laws . . .”).

34. See Ian Ayres, *Should Campaign Donors Be Identified?*, REGULATION, Summer 2001, at 12, available at <http://www.cato.org/pubs/regulation/regv24n2/ayres.pdf>.

35. See DICK M. CARPENTER II, INST. FOR JUSTICE, DISCLOSURE COSTS: UNINTENDED CONSEQUENCES OF CAMPAIGN FINANCE REFORM 13 (2007), available at http://www.ij.org/images/pdf_folder/other_pubs/DisclosureCosts.pdf (“[M]andatory disclosure on ballot issues is a public policy worthy of more critical attention and debate than it currently receives.”); William McGeveran, *Mrs. McIntyre’s Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1, 5 (2003) (noting that “[e]xisting scholarship and case law largely ignore the privacy problems inherent in disclosure of individual contributions”). It is worth noting, however, that some scholars have been

Proponents of modern campaign disclosure laws at the state and federal levels could not have anticipated the explosion of donor information available on the Internet.³⁶ Further, the amount of money spent for modern campaigns has substantially increased in the last several decades.³⁷ These trends, and the events that took place in the aftermath of Proposition 8, call for a new legal analysis of disclosure laws. This Note argues that courts and legislators must find a middle ground between the “full” disclosure regime, advocated by groups such as the Campaign Disclosure Project, and no disclosure laws at all.³⁸ This Note recommends a disclosure regime in which individual names are not disclosed to the public but are produced by the campaigns to the government for enforcement purposes. A donor’s occupation, employer, and city and state of residence would be disclosed; further, such information would be aggregated to publicize important information such as the percentage of out-of-state and large donations received by a campaign. Election officials would be required to make this information available online before the election so that members of the public could search the data before voting. This type of disclosure regime would help ensure that the primary benefits of donor disclosure are realized without significant First Amendment costs.

This Note is limited in scope in several ways. First, it will focus mostly on individual donors rather than corporate or interest group donors

critical of donor disclosure. Bruce Ackerman and Ian Ayres have proposed a disclosure regime that recommends, *inter alia*, anonymity of all contributors to candidate elections. BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* 9 (2002).

36. William McGeeveran juxtaposes the availability of disclosure information before and after the Internet:

Before the rise of the Internet, data on these disclosed contributions was available to the public in theory, but difficult to obtain in practice. A curious journalist or voter needed to travel in person to an election agency office and rummage through piles of paper reports arranged in filing cabinets. One could not search, sort, aggregate, or analyze these documents in the ways we take for granted using a computerized database.

McGeeveran, *supra* note 35, at 10–11 (footnote omitted).

37. For example, the amount of money spent on television advertising in the 2008 presidential election cycle was nearly double the money spent in the 2004 cycle. *See* Mark Preston, *Political Television Advertising to Reach \$3 Billion*, CNN, Oct. 15, 2007, <http://www.cnn.com/2007/POLITICS/10/15/ad.spending/index.html>. In the direct democracy context, money expended on the Proposition 8 campaign “shatter[ed] spending records.” Justin Ewers, *California Same-Sex Marriage Initiative Campaigns Shatter Spending Records*, U.S. NEWS & WORLD REP., Oct. 29, 2008, <http://www.usnews.com/articles/news/national/2008/10/29/california-same-sex-marriage-initiative-campaigns-shatter-spending-records.html>.

38. Elizabeth Garrett argues that “[t]he choice . . . is not between no disclosure and full disclosure. Rather, policymakers need to determine what information should be disclosed and in what form.” Elizabeth Garrett, *Voting with Cues*, 37 U. RICH. L. REV. 1011, 1012 (2003). She goes on to argue that “further study is required to learn precisely what information promotes voter competence so that statutes can be tailored to produce information that best serves as a shortcut.” *Id.* at 1014.

because the concerns disclosure regimes raise with regard to individual privacy are too often ignored in existing scholarship.³⁹ Further, individual donors' positions on issues are usually less well known than those of corporations or interest groups; therefore, disclosure reveals more information that would otherwise be unknown in the context of individuals (and thus raises more privacy concerns).⁴⁰ Few would be surprised, for example, to learn that the Sierra Club donated to an environmental initiative, and the group would support future pro-environmental ballot measures regardless of public reaction to its support.⁴¹ Elizabeth Garrett argues that such groups "actively work to develop ideological reputations and to publicize clear-cut positions on issues that are important to them . . . so that citizens who care about [their] issues become dues-paying members."⁴² While boycotts of a corporation can lead to financial losses, an individual donor does not have limited liability as a corporation does; if an individual loses his or her job or faces reprisals because of a donation, he or she will suffer immensely.

Second, this Note will focus solely on campaign disclosure requirements, rather than addressing other aspects of campaign finance regimes, such as contribution limits. Certainly, disclosure requirements are related to other aspects of campaign finance reform, and such relationships will be analyzed where relevant. It is not, however, the goal of this Note to provide a critique of all aspects of campaign finance regimes.

Part II of this Note provides information about disclosure requirements at the state and federal levels and summarizes Supreme Court jurisprudence regarding disclosure in both candidate and issue elections. Part III examines the types of threats, harassment, and reprisals that should warrant exemption from disclosure based on campaign finance jurisprudence. Here, Proposition 8 provides an excellent example of the negative repercussions of disclosure laws that lawmakers and jurists must take into account. Part IV argues for a new disclosure framework that protects donor privacy by not disclosing individual names, while still providing voters the information that relates to the important state interests identified in campaign finance jurisprudence.

Most importantly, this Note seeks to address an issue that most scholars and courts have neglected by providing a new framework for

39. See McGeeveran, *supra* note 35.

40. See Garrett, *supra* note 38, at 1027 (arguing that many group donors "are associated easily and correctly in voters' minds with particular policies").

41. See *id.*

42. *Id.*

disclosure. In the wake of the advent of technologies that have made donor information easily accessible,⁴³ substantial amounts of campaign spending,⁴⁴ and hotly contested elections such as Proposition 8 that have led to retribution against donors,⁴⁵ formulating such a framework is imperative.

II. DISCLOSURE LAWS AND JURISPRUDENCE REGARDING DISCLOSURE

The first Supreme Court case that guides analysis of disclosure laws in candidate elections is *Buckley v. Valeo*, a 1976 case.⁴⁶ In *Buckley*, the Court upheld the constitutionality of many provisions of the Federal Election Campaign Act (“FECA”), the statute that regulates federal candidate elections, including most of its disclosure requirements.⁴⁷ There, the Court determined the standard of review for disclosure statutes: to be constitutional, they must meet “exacting scrutiny,” which means the statute must be justified by an important state interest and there must be a “‘relevant correlation’ or ‘substantial relation’ between the governmental interest and the information required to be disclosed.”⁴⁸ This approach has continued to be used by the Court in subsequent cases dealing with candidate elections, and most importantly in the 2003 Supreme Court case of *McConnell v. FEC*.⁴⁹ In *McConnell*, the Court, *inter alia*, upheld the constitutionality of the majority of the Bipartisan Campaign Reform Act of 2002 (“BCRA”), also known as the “McCain-Feingold Act.”⁵⁰ The majority and most of the dissenting Justices upheld the BCRA’s disclosure requirements, including, notably, the requirement that an individual who spends more than \$10,000 on election communication must identify all other persons sharing the costs of those disbursements.⁵¹ Further, corporations and unions that make such disbursements must identify all individuals who contributed more than \$1000.⁵² In the wake of *McConnell*, scholars have argued that most disclosure requirements will be upheld

43. *See supra* note 36 and accompanying text.

44. *See supra* note 37 and accompanying text.

45. *See supra* notes 3–7 and accompanying text.

46. *Buckley v. Valeo*, 424 U.S. 1 (1976).

47. *See id.* at 143.

48. *Id.* at 64 (quoting *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963); *Bates v. Little Rock*, 361 U.S. 516, 525 (1960)).

49. *McConnell v. FEC*, 540 U.S. 93 (2003).

50. *See id.*

51. *Id.* at 194.

52. *Id.* at 194–95.

against most First Amendment challenges.⁵³

In candidate elections, as held in *Buckley* and *McConnell*, there are three main ways that disclosure statutes can be warranted.⁵⁴ First, disclosure can be warranted because it provides voters with information that assists them in making informed choices at the ballot box.⁵⁵ Thus, disclosure allows voters to determine what candidates stand for by “alert[ing] [them] to the interests to which a candidate is most likely to be responsive and thus facilitat[ing] predictions of future performance in office” by allowing voters to see who donated to the candidate.⁵⁶ Garrett notes that “most people will always have priorities in their lives other than elections and politics and will spend little of their scarce time and attention finding and processing political information”;⁵⁷ helpful voting cues therefore provide significant value in increasing voter competence.⁵⁸ Second, the Court noted in *Buckley* that disclosure statutes can deter quid pro quo corruption; it stated that “disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.”⁵⁹ Third, the Court noted “disclosure requirements are an essential means of gathering the data necessary to detect violations of . . . contribution limitations.”⁶⁰ Scholars have expanded on this view in light of increasing federal election law regulations, noting that “mandatory disclosure is not a self-executing reform, but a measure enacted in aid of subsequent regulatory initiatives built around the information that it produces.”⁶¹

The analysis of donor disclosure in issue elections differs from the analysis in candidate elections. The Court has only considered disclosure in issue elections on a handful of occasions and has held that, in contrast to candidate elections, the only important state interest that can justify disclosure is the voter informational interest.⁶² The risk of quid pro quo

53. See generally Elizabeth Garrett, *McConnell v. FEC and Disclosure*, 3 ELECTION L.J. 237 (2004) (stating that the ability of disclosure requirements to withstand constitutional challenges has been strengthened after *McConnell*).

54. See *Buckley v. Valeo*, 424 U.S. 1, 66–67 (1976).

55. *Id.*

56. *Id.* at 67.

57. See Garrett, *supra* note 38, at 1023.

58. See *id.* at 1023–26.

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

60. *Id.* at 67–68.

61. See Robert F. Bauer, *Not Just a Private Matter: The Purposes of Disclosure in an Expanded Regulatory System*, 6 ELECTION L.J. 38, 39 (2007).

62. See, e.g., *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 202–03 (1999) (noting that the voter informational interest can justify disclosure in the issue election context); Cal.

corruption is not present because there are no candidates and, therefore, the corruption rationale is not available to justify disclosure.⁶³

The voter informational interest is particularly important in issue elections; direct democracy is a “low-information environment” because voters have fewer voting cues, such as political party, than they do in candidate elections.⁶⁴ For this reason, disclosure proponents make arguments specific to the direct democracy context. The Ninth Circuit in *California Pro-Life Council, Inc. v. Getman*, a 2003 case that upheld California’s campaign finance disclosure laws for ballot measure campaigns, held that because direct democracy does not provide helpful voting cues such as political party and because ballot measure campaigns are typically confusing, voters should at least know who is behind a ballot measure campaign so that they can determine who will benefit from the passage or defeat of that ballot measure.⁶⁵ While the voter informational interest is particularly important in direct democracy, the court’s analysis does not account for the fact that disclosure of the names of individual donors does not provide a particularly helpful voting cue. Knowing the name of a donor of \$500 to a ballot measure will do little to counter its typically confusing language. There are much more powerful voting cues in direct democracy elections, as will be discussed in Part III, such as a donor’s employer.

The most significant Supreme Court case dealing with disclosure statutes in issue elections is *McIntyre v. Ohio Elections Commission*, a case that draws disclosure into question.⁶⁶ Ohio’s law required that any election communication related to a ballot initiative include the sponsor’s name and address.⁶⁷ The Court held that the law was unconstitutional as applied to Margaret McIntyre, a woman who distributed leaflets opposing a school tax levy referendum.⁶⁸ Some of the leaflets McIntyre passed out did not have any source identification; others used the pseudonym “Concerned Parents and Tax Payers.”⁶⁹ The Court held that McIntyre had a privacy interest in remaining anonymous while pamphleteering and noted that “handing out

Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1105–07 (9th Cir. 2003) (same).

63. See, e.g., *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 298 (1981); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978).

64. See Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295, 297 (2005).

65. See *Cal. Pro-Life Council*, 328 F.3d at 1105–06.

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

67. *Id.* at 338 n.3.

68. *Id.* at 334.

69. *Id.* at 337.

leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression.”⁷⁰ Moreover, “anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority.”⁷¹ Thus, the *McIntyre* Court placed a high value on anonymity. Further, the Court rejected the State’s argument that the Ohio statute would serve the voter informational interest because most members of the public would not know McIntyre.⁷² Opponents of Proposition 8 donor disclosure utilized *McIntyre* in their analysis, arguing that like McIntyre, the donors in favor of Proposition 8 were not widely known by the public and therefore disclosure of their identities would not serve any important state interest connected to providing information to voters.⁷³ The Court also held that other informational cues were present: voters could take into account the substance of the pamphlet when deciding if it was persuasive;⁷⁴ however, election law scholars have argued that donors’ names provide an effective voting cue that the substance of the arguments may not if voters do not understand the arguments.⁷⁵

Lower courts are divided regarding the breadth of the *McIntyre* holding.⁷⁶ Some have relied on a broad reading of *McIntyre* to hold that it established a constitutional right for an individual to engage in anonymous speech.⁷⁷ Recently, the Ninth Circuit, in *American Civil Liberties Union v. Heller*, relied on a broad reading of *McIntyre* to hold that a Nevada statute requiring any election materials (in both candidate and issue elections) to include the sponsor’s name was unconstitutional.⁷⁸ The Supreme Court also relied on a broad reading of *McIntyre* in *Watchtower Bible & Tract Society, Inc. v. Village of Stratton*, in which the Court held unconstitutional a town ordinance that required canvassers to register with and obtain a permit from the town because it violated their right to anonymous speech.⁷⁹

Other courts have disagreed with such a broad reading of *McIntyre* and have held that it did not establish a constitutional right to anonymous

70. *Id.* at 347.

71. *Id.* at 357.

72. *See id.* at 348–49.

73. *See, e.g.*, Second Amended Complaint, *supra* note 20.

74. *See McIntyre*, 514 U.S. at 342.

75. *See* Garrett, *supra* note 38, at 1048.

76. *See* SOURCEBOOK, *supra* note 33, at 142.

77. *See, e.g.*, *Yes for Life Political Action Comm. v. Webster*, 84 F. Supp. 2d 150 (D. Me. 2000); *Stewart v. Taylor*, 953 F. Supp. 1047 (S.D. Ind. 1997); *W. Virginians for Life, Inc. v. Smith*, 919 F. Supp. 954 (S.D. W. Va. 1996).

78. *ACLU v. Heller*, 378 F.3d 979, 981 (9th Cir. 2004).

79. *See Watchtower Bible & Tract Soc’y, Inc. v. Vill. of Stratton*, 536 U.S. 150, 160–64 (2002).

speech in all cases. These courts have found that *McIntyre*'s application is limited because it dealt with a single state statute that was overbroad in the particular circumstances of the case: it involved face-to-face encounters, and the leaflets were highly personalized.⁸⁰ These courts held that *Buckley*'s disclosure analysis still applied and that disclosure laws would withstand constitutional scrutiny so long as they had a relevant correlation to the voter informational interest.⁸¹ Thus, there is a continuing debate about how broadly *McIntyre* should be read. Some scholars have noted that "broad readings of *McIntyre* are inconsistent with other cases indicating approval of mandatory disclosure in issue elections through regulations requiring extensive filings with a state official throughout the campaign."⁸² Other disclosure scholars agree, noting that *Buckley* "placed the burden on the contributor to prove [a] high level of injury in order to avoid disclosure requirements."⁸³ The majority opinion in *McConnell* neither cited *McIntyre* nor distinguished that case from the BCRA. Justice Thomas, dissenting alone, argued that all federal campaign finance disclosure requirements were unconstitutional because *McIntyre* overruled *Buckley*.⁸⁴ However, Thomas was the only Justice espousing this view.⁸⁵ Thus, the Supreme Court has not bootstrapped *McIntyre* to declare that there is a constitutional right to anonymous speech in all cases.

In both candidate and issue elections, the important state interests served by disclosure must be balanced against its First Amendment costs.⁸⁶ The *Buckley* Court noted that "[t]here could well be a case, similar to . . . *NAACP v. Alabama* [*ex rel. Patterson*] and *Bates*, where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act's requirements cannot be constitutionally applied."⁸⁷ In *Patterson*, the state of Alabama attempted to enjoin the NAACP from operating in the state.⁸⁸ During the litigation, Alabama attempted to subpoena the NAACP's membership lists.⁸⁹ The NAACP challenged such disclosure. The Supreme Court held that Alabama

80. See, e.g., *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 647–48 (6th Cir. 1997); *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 296–98 (2d Cir. 1995).

81. See *Ky. Right to Life*, 108 F.3d at 296; *Survival Educ. Fund*, 65 F.3d at 296.

82. Garrett & Smith, *supra* note 64, at 301.

83. McGeeveran, *supra* note 35, at 15.

84. *McConnell v. FEC*, 540 U.S. 93, 275–77 (2003) (Thomas, J., concurring in part, dissenting in part).

85. See *id.*

86. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 71 (1976).

87. *Id.*

88. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 452 (1958).

89. *Id.* at 453.

was not entitled to the lists because it would violate the members' due process rights, as the NAACP "made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members [had] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."⁹⁰ Here, because of the reprisals against NAACP members, disclosure violated their First Amendment right to "pursue their lawful private interests privately and to associate freely with others."⁹¹ A few years later, in *Brown v. Socialist Workers '74 Campaign Committee*, the Court used the same rationale as in *Patterson* to hold that members of the Socialist Workers Party who donated to the party's candidate were exempt from an Ohio statute that required candidates to report the identity of all their donors.⁹² This was because the party's members had historically faced threats and harassment and there was a reasonable probability that they would again if their names were disclosed.⁹³

Patterson and *Brown* illustrate the Court's willingness to provide case-by-case exemptions for disclosure. The most recent candidate-election disclosure cases, including *McConnell*, indicate that this analysis is still applicable.⁹⁴ *McConnell* reaffirmed that disclosure requirements will not be upheld in all cases. The Court noted that "our rejection of plaintiffs' facial challenge to the requirement to disclose individual donors does not foreclose possible future challenges to particular applications of that requirement."⁹⁵ In particular, the *McConnell* Court, as in *Buckley*, noted that as-applied challenges to disclosure requirements can be brought by challengers who can evidence physical or economic reprisals.⁹⁶ Proponents of Proposition 8 utilized this type of argument when they challenged disclosure of their identities; they believed they were subject to the same types of reprisal and harassment as the party members in *Patterson* faced.⁹⁷ The protection afforded to individuals in direct democracy elections may be greater in issue campaigns because there is only one important state interest and only one issue (whereas candidate elections deal with many issues). Therefore, donations to issue campaigns may be closer to "pure

90. *Id.* at 462.

91. *Id.* at 466.

92. *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 88 (1982).

93. *See id.* at 98–101.

94. *See, e.g., McConnell v. FEC*, 540 U.S. 93, 198–99 (2003).

95. *Id.* at 199.

96. *Id.*

97. *See, e.g., Second Amended Complaint, supra* note 20, ¶¶ 34–40.

speech” because it is clear which issue each contribution supports.⁹⁸

The National Association of Manufacturers (“NAM”) used similar arguments to those used in *Patterson* and *Brown* when it challenged a section of the Lobbying Disclosure Act, as amended, which required disclosing the name, address, and principal place of business of any member who contributed more than \$5000 quarterly to fund the activities of a lobbying organization.⁹⁹ It argued that such disclosure “may lead to boycotts, political pressure, shareholder suits, or other forms of harassment” because the group’s policy positions were unpopular.¹⁰⁰ The U.S. District Court for the District of Columbia disagreed and held that lobbying disclosure is necessary to deter corruption and that the group did not demonstrate that its members experienced any “actual harm or harassment . . . as a result of the NAM’s lobbying activities.”¹⁰¹

More challenges to campaign finance regulations, including disclosure requirements, are likely in the near future, and some election law scholars believe that some of these regulations will be overturned by the Roberts Court.¹⁰² Chief Justice Roberts and Justice Alito are significantly more skeptical of campaign finance regulation than were their predecessors, Chief Justice Rehnquist and Justice O’Connor.¹⁰³ While the Court may be reluctant to overturn disclosure outright because of its widespread support,¹⁰⁴ as-applied challenges to disclosure have a greater likelihood of

98. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 344–45, 347–50 (1995).

99. *Nat’l Ass’n of Mfrs. v. Taylor*, 549 F. Supp. 2d 33, 43–44 (D.D.C. 2008). See also 2 U.S.C.S. § 1603(b)(3) (LexisNexis 2009).

100. See *Nat’l Ass’n of Mfrs.*, 549 F. Supp. 2d at 45.

101. See *id.* at 46.

102. See Richard L. Hasen, *Beyond Incoherence: The Roberts Court’s Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 MINN. L. REV. 1064, 1066–67 (2008).

103. See *id.* at 1104 (“[Recent cases] make clear that Chief Justice Roberts and Justice Alito form the controlling bloc on campaign finance questions, and they have sent strong signals through the tone of their opinions that they are both very skeptical of campaign finance regulation challenged under the First Amendment. They are quite willing to entertain challenges to existing campaign finance precedents in future cases. It is worth recalling that Justice Alito separately concurred in both *Randall* and *WRTL II* to invite litigants to bring facial challenges to *Buckley*’s contribution limits and to *McConnell*’s upholding section 203 of the BCRA against a facial challenge.”); Election Law Blog, <http://electionlawblog.org/archives/012833.html> (Jan. 16, 2009, 08:48 PST) (noting that “Chief Justice [Roberts] and Justice Alito take a much more deregulatory approach in the campaign finance area than Chief Justice Rehnquist and Justice O’Connor”). Cf. *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 223 (1999) (O’Connor, J., concurring in part, dissenting in part) (“‘Total disclosure’ has been recognized as the ‘essential cornerstone’ to effective campaign finance reform and ‘fundamental to the political system.’” (citation omitted) (quoting H. ALEXANDER, *FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM* 164 (4th ed. 1992)).

104. Richard Hasen notes that if the current Supreme Court makeup stays the same, “little will be left of campaign finance regulation beyond campaign finance disclosure within a decade.” Hasen, *supra*

success under the Roberts Court because of its more deregulatory approach and willingness to hear these types of challenges.¹⁰⁵

In fact, a challenge to federal disclosure requirements is currently before the Supreme Court in *Citizens United v. FEC*, a “potential blockbuster” case.¹⁰⁶ The case deals with a video entitled *Hillary: The Movie*, a documentary produced during the 2008 presidential campaign by Citizens United that is highly critical of Hillary Clinton’s record.¹⁰⁷ The three-judge panel of the district court ruled that Citizens United could not run ads for the movie without disclosing who financed the film and produced the ads.¹⁰⁸ The district court denied an as-applied challenge to the BCRA and denied injunctive relief to Citizens United, relying on the Court’s holding in *FEC v. Wisconsin Right to Life* in holding that *Hillary: The Movie* was an “electioneering communication” and as such must contain a disclaimer and disclose contributors to the group. Section 201 of the BCRA requires that any entity that spends more than \$10,000 in one year on an “electioneering communication” must disclose to the FEC that it was responsible for funding the communication.¹⁰⁹ If the group is a corporation or union, it must also disclose all individuals who donated \$1000 or more to the corporation or union.¹¹⁰

Citizens United argued that the disclosure requirements were unconstitutional as applied to *Hillary: The Movie* and unconstitutional under *Buckley*’s “exacting scrutiny” standard.¹¹¹ It argued that the “application of [exacting scrutiny] to restrictions on political speech is virtually indistinguishable from strict scrutiny.”¹¹² Further, it contended that the voter informational interest was not present because disclosing that

note 102, at 1067. Thus, few election scholars argue that all disclosure will be declared unconstitutional, even if other aspects of campaign finance regimes are.

105. See Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court* (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Group, Paper No. 09-198, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1338895 (discussing the Roberts Court’s preference for as-applied litigation).

106. Election Law Blog, *supra* note 103. See also Adam Liptak, *Hillary: The Movie Tests Campaign Finance Law*, N.Y. TIMES, Mar. 6, 2009, at A12.

107. See *Hillary: The Movie*, <http://hillarythemovie.com/> (last visited Nov. 23, 2009).

108. See *Citizens United v. FEC*, 530 F. Supp. 2d 274, 275, 280–82 (D.D.C. 2008).

109. Bipartisan Campaign Reform Act (BCRA) of 2002, Pub. L. No. 107-155, § 201(a), 116 Stat. 81, 88–90 (2002) (codified at 2 U.S.C. § 434(f) (2006)).

110. *Id.*

111. See Brief for Appellant, *Citizens United v. FEC*, No. 08-205 (U.S. Jan. 8, 2009) [hereinafter *Citizens United Brief*].

112. *Id.* at 44 (arguing that strict scrutiny should apply to disclosure). *But see* Brief for the Appellee at 37–38, *Citizens United*, No. 08-205 (U.S. Feb. 2009) [hereinafter *FEC Brief*] (arguing that intermediate scrutiny should apply to disclosure).

Citizens United produced the ad and disclosing the names of its individual donors “would not provide [voters] with information relevant to the electoral process.”¹¹³ Even if disclosure did have benefits, it argued, the benefits were outweighed by the “significant burdens that those requirements would impose on the First Amendment rights of Citizens United and its donors.”¹¹⁴ Disclosure would have significant costs: political speech would be discouraged because individual donors could be subject to “‘harassment or retaliation’ by those who disagree with the group’s political message” and thus could become less likely to make future political donations.¹¹⁵ Citizens United cited *McConnell*, which held that disclosure of donors’ names is unconstitutional when donors “can demonstrate ‘a reasonable probability that the compelled disclosure of [the organization’s] contributors’ names will subject them to threats, harassments, and reprisals.’”¹¹⁶ However, as will be discussed further in Part III, Citizens United did not specifically state what types of reprisals its donors would face if disclosed. *Citizens United* is a case that could have a significant impact on future challenges to the constitutionality of donor disclosure requirements.¹¹⁷

Thus, Supreme Court jurisprudence will likely continue to uphold disclosure but provide limited case-by-case exemptions for certain groups. The judicial and scholarly acceptance of widespread disclosure regimes, however, should be tempered, particularly with respect to the names of individual donors. More exacting scrutiny is required because the costs of such disclosures are serious, while the informational benefits are limited or nonexistent. Proposition 8 made this issue salient, but it is likely the first of many such examples; therefore, policymakers and jurists need to pay more attention to the First Amendment issues raised by disclosure. A new framework for disclosure must be adopted that serves the important state interests justifying disclosure in this realm while also protecting individual privacy rights.

III. THREATS, HARASSMENTS, AND REPRISALS: THE “CONSEQUENCES” OF DONOR DISCLOSURE IN MODERN CAMPAIGNS

The rise of the Internet, making access to donor disclosure information

113. Citizens United Brief, *supra* note 111, at 15.

114. *Id.* at 53.

115. *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 68 (1976)).

116. *Id.* (alteration in original) (quoting *McConnell v. FEC*, 540 U.S. 93, 198 (2003)).

117. See Election Law Blog, *supra* note 103.

significantly easier,¹¹⁸ has created a new reality in which the costs of donor disclosure must be examined, as illustrated by the Proposition 8 campaign and its aftermath. If individual donors are disclosed by name, which this Note does not recommend, they should have an opportunity to apply for case-by-case exemptions from disclosure, which should be granted if there is a reasonable probability they will be subject to “threats, harassments, and reprisals.” As discussed in Part II, current Supreme Court jurisprudence, including *Buckley* and *McConnell*, supports such case-by-case exemption.¹¹⁹ However, what constitutes a “consequence” of disclosure must be reexamined in light of recent events. While Proposition 8 supporters argued that protests and boycotts were consequences justifying exemption, these are legal means of political speech and not the type of reprisals with which campaign finance jurisprudence is concerned.

The California district court denied Proposition 8 supporters’ plea for an injunction against the disclosure requirement, noting that the exemption from disclosure is “historically reserved for small groups promoting ideas almost unanimously rejected.”¹²⁰ In *Brown*, the Socialist Workers Party (“SWP”) had only sixty members in Ohio, received little support in elections, and had contributions and expenditures of only about \$15,000 per year.¹²¹ Further, there was evidence of harassment: the SWP introduced

proof of specific incidents of private and government hostility toward the SWP and its members within the four years preceding the trial . . . [which] included 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.¹²²

There was also a history of government abuse targeting the party.¹²³ Similarly, in *Patterson*, the members were part of an unpopular minority group, the NAACP in the 1950s South. These members also produced substantial proof of past harassment, including “economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.”¹²⁴ Furthermore, *Buckley* noted that minor parties have an additional justification for receiving a disclosure exemption: they do not have significant funding, so if contributions drop because citizens are afraid

118. See, e.g., *supra* note 36.

119. See *supra* notes 94–97 and accompanying text.

120. See *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1205 (E.D. Cal. 2009).

121. *Brown v. Socialist Workers ’74 Campaign Comm.*, 459 U.S. 87, 88–89 (1982).

122. *Id.* at 99.

123. *Id.*

124. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1976).

to donate to the group, the group may not survive.¹²⁵

Proposition 8 supporters were not an unpopular minority, victims of years of harassment, or at risk of financial ruin.¹²⁶ Judge England noted that, unlike in past cases such as *Brown*, “the alleged harassment directed at Proposition 8 supporters occurred over the course of a few months during the heat of an election battle surrounding a hotly contested ballot initiative. [It involved] [o]nly random acts of violence directed at a very small segment of the supporters”¹²⁷ The supporters were far from unpopular; they “were successful in their endeavor, raising nearly \$30 million, securing 52.3% of the vote and convincing over seven million voters to support Proposition 8.”¹²⁸

Still, however, the notion of threats, retaliation, and reprisals has changed with new technology and more widespread access to disclosure. Social networking sites such as Facebook allow groups to organize boycotts and protests at a lower cost. Many of the Proposition 8 protests were “organized not by political professionals and established leaders in the gay community, but by young activists working independently on Facebook and MySpace.”¹²⁹ Certainly, the Internet also increases the likelihood that protests and boycotts will occur because they are much faster and easier to organize over the Internet than in person. The impromptu protests against Proposition 8 organized over Facebook allowed voters to attend protests they otherwise may not have known about.¹³⁰

Boycotts and protests, however, should not constitute threats, harassment, and reprisals that would warrant disclosure exemption. Rather, they are a fundamental means of practicing free speech. The California district court, in denying the Proposition 8 supporters’ injunction, noted that “[t]he decision and ability to patronize a particular establishment or business is an inherent right of the American people, and the public has historically remained free to choose where to, or not to, allocate its

125. *Buckley v. Valeo*, 424 U.S. 1, 71 (1976).

126. *See ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1214–15 (E.D. Cal. 2009).

127. *Id.* at 1217.

128. *Id.* at 1215.

129. Jessica Garrison, *Angrier Response to Prop. 8 Arises: After a Professional Campaign Failed to Defeat the Measure, a Web-Based Opposition Is Making Itself Heard*, L.A. TIMES, Nov. 13, 2008, at A1.

130. *See, e.g.*, Janet Kornblum, *Post-Prop 8, Thousands Join Protest: Gay-Marriage Ban in California Stirs Torchbearers*, USA TODAY, Nov. 14, 2008, at 3A (reporting that one young Proposition 8 protester noted that he “learned about the protests through Facebook after the measure passed”).

economic resources.”¹³¹ The fact that disclosure may lead to boycotts or protests does not justify exemption.¹³² Boycotts have been an important strategy used by groups throughout American history to force compliance with the boycotters’ demands.¹³³

Disclosure opponents may argue that boycotts usually occur as a result of a company’s public positions or company policies, not public disclosure of political donations. For example, a well-known boycott, the Southern Baptist Committee’s eight-year boycott of Disney, occurred because of Disney’s *public* position in support of a supposed gay agenda: producing gay-friendly movies and providing domestic partnership benefits.¹³⁴ Similarly, civil rights boycotts are launched in response to visible discrimination. For example, the Montgomery bus boycott was a direct response to the city’s racial segregation on its public transit system.¹³⁵ A boycott of Cracker Barrel by gay rights advocates beginning in 1991, which ultimately led a majority of the company’s shareholders to vote to add sexual orientation to the company’s nondiscrimination policy, occurred after it admitted to firing eleven employees solely because of their sexual orientation.¹³⁶ Cracker Barrel’s discrimination and employment policies were known to the public without compelled disclosure of political donations.¹³⁷ Gay rights supporters have also organized effective boycotts of Coors Brewing Company and United Airlines, both of which related to their positions and policies rather than employees’ private political donations.¹³⁸

While boycotts may not have historically occurred as a result of donor disclosure, the Proposition 8 campaign illustrated that, at least in the context of direct democracy, protests of businesses making political contributions may be the wave of the future. For this reason, in part, this

131. See *ProtectMarriage.com*, 599 F. Supp. 2d at 1218.

132. See, e.g., Californians Against Hate, <http://www.californiansagainsthate.com> (last visited Nov. 23, 2009) (“We will let the world know who these donors are.”).

133. See generally MONROE FRIEDMAN, *CONSUMER BOYCOTTS: EFFECTING CHANGE THROUGH THE MARKETPLACE AND THE MEDIA* (1999) (explaining the history and impact of consumer boycotts in the twentieth century); DONNIE WILLIAMS WITH WAYNE GREENHAW, *THE THUNDER OF ANGELS: THE MONTGOMERY BUS BOYCOTT AND THE PEOPLE WHO BROKE THE BACK OF JIM CROW* (2006) (analyzing the effectiveness of the Montgomery bus boycott to jumpstart the modern civil rights movement).

134. See, e.g., Alex Johnson, *Southern Baptists End 8-Year Disney Boycott: Company Seen as More “Family-Friendly,”* MSNBC, June 22, 2005, <http://www.msnbc.msn.com/id/8318263/>.

135. See WILLIAMS, *supra* note 133, at 56–59, 82–85, 103–06.

136. See, e.g., M. V. Lee Badgett, *A Win at Cracker Barrel*, NATION, Feb. 10, 2003, at 7.

137. See *id.*

138. See M. V. LEE BADGETT, *MONEY, MYTHS, AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN* 236 (2001).

Note recommends in Part IV that a donor's employer be disclosed. If a company's owner or employees donate in opposition to a cause such as gay rights, supporters see boycotts as a legal and effective means to counter this discrimination.¹³⁹ Without knowing which businesses contributed to the ballot measure, they argue, supporters will not be able to engage in such protests.¹⁴⁰ This is particularly important if individual donors' names are not disclosed because citizens would have no other way of knowing which businesses donated to the campaign.

Thus, fear of a boycott alone should not justify exemption from disclosure. Rather, the threats, harassment, and reprisals must be serious, illegal activities, and the donor must be vulnerable to them. In candidate elections, when exemption is applicable, it will almost universally apply to those donating to a minor party.¹⁴¹ It is nearly impossible to imagine a scenario where a donor could justify exemption when they donate to the two major parties because many people donate to those parties and do so for a variety of reasons.

The *Citizens United* case currently before the Supreme Court helps illustrate this point. The producers of the anti-Hillary Clinton movie argue that donors could be subject to "harassment or retaliation by those who disagree with the group's political message" and thus could be less likely to make future political donations.¹⁴² Yet the group does not illustrate what types of incidents of harassment or retaliation have occurred or are likely to occur.¹⁴³ Citizens United's evidence of harassment is much different from the situation of harassment in *Brown*, in which SWP members suffered years of harassment due to their political beliefs.¹⁴⁴ Further, the political beliefs of Citizens United's members hardly put them in a small, vulnerable minority; Hillary Clinton is a controversial figure who "may be the most polarizing figure on the current political landscape," according to *Time* magazine and voter polls.¹⁴⁵ Thus, Citizens United is part of a large class that does not support Hillary Clinton. If Citizens United's argument were accepted, any donor to a candidate or issue that did not have nearly uniform

139. See *supra* notes 132–33 and accompanying text.

140. For examples of boycotts Proposition 8 proponents engaged in, see Jim Carlton, *Gay Activists Boycott Backers of Prop 8*, WALL ST. J., Dec. 27, 2008, at A3.

141. See, e.g., *supra* note 125 and accompanying text.

142. See Citizens United Brief, *supra* note 111, at 53 (quoting *Buckley v. Valeo*, 424 U.S. 1, 68 (1976)).

143. *Id.*

144. See, e.g., *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 98–101 (1982).

145. See Ana Marie Cox, *How Americans View Hillary: Popular but Polarizing*, TIME, Aug. 19, 2006, <http://www.time.com/time/magazine/article/0,9171,1229053,00.html>.

support would have a solid case for exemption. Citizens United appears to misunderstand the campaign finance jurisprudence, which illustrates that only serious, documented consequences of disclosure should warrant exemption, and that it would most likely only apply to members of a despised or minority group.

In the direct democracy context, Proposition 8 supporters complained of death threats, vandalism, and job loss after their identities were disclosed.¹⁴⁶ Certainly, illegal activities are deplorable and should be criminally prosecuted to the fullest extent of the law. However, in order to receive a disclosure exemption, a donor must demonstrate a *reasonable probability* that such actions will occur.¹⁴⁷ Otherwise, if Proposition 8 were placed on the ballot again in 2010, parties on both sides of the issue could make a convincing case for exemption because controversial ballot issues on a topic such as gay marriage are always likely to lead to a few minor incidents of illegal activity. The illegal activities that were committed against some Proposition 8 supporters, such as death threats and vandalism, though deplorable, were rare occurrences.¹⁴⁸ That is, while donor disclosure may lead to reprisals, illegal reprisals are a small minority of such activities.

Despite the fundamental misunderstanding among some groups of what constitutes a consequence of disclosure in campaign finance jurisprudence, disclosure regimes can and should be set up so there are as few disclosure costs as possible—particularly because current disclosure regimes are not tailored to relate to the important state interests identified in campaign finance jurisprudence. Disclosure regimes should be tempered, particularly with respect to the names of individual donors. More exacting scrutiny is required because the First Amendment costs of such disclosure can be serious, while the informational benefits are likely to be low. Part IV proposes a disclosure regime that does not disclose donors by name but rather discloses other more pertinent information that provides effective voting cues without creating significant First Amendment costs.

IV. A NEW DISCLOSURE FRAMEWORK

The significant state interests of disclosure that the Court has recognized in candidate and issue elections in cases such as *Buckley* and *McConnell*, do not have a “relevant correlation or substantial relation” to

146. See, e.g., Second Amended Complaint, *supra* note 20.

147. *McConnell v. FEC*, 540 U.S. 93, 198 (2003).

148. See, e.g., *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1219–20 (E.D. Cal. 2009).

disclosing the names of individual donors. While some disclosure of donors' identities is warranted by these interests, it must be more closely related to the interests to avoid constitutional roadblocks. This Note suggests a disclosure regime that meets exacting scrutiny. It proposes that the names of individual donors should not be disclosed. Rather, voters should be identified in disclosure reports by their city and state of residence (not including personal address), amount contributed, employer, and occupation. Election officials should be required to make this information available online to the public before the election so they can search the data both by individual donations and by aggregated cues, such as the percentage of out-of-state donors. This disclosure regime is a significant improvement over the current disclosure regime operated at the federal level and in most states because it is more tailored to the goals of the disclosure statutes.

The names of individual donors should not be disclosed in either candidate or issue elections. They do not provide an effective voting cue, the only important state interest for disclosure in direct democracy.¹⁴⁹ Further, the likelihood of privacy costs to donors is higher in direct democracy because ballot measures deal with specific issues, whereas in candidate elections, it is less clear what caused the donor to contribute to the campaign. In candidate elections, the names of donors also do not have a relevant relation to deterring quid pro quo corruption or preventing violations of contribution limits. The balance is somewhat different in the context of large and small donors, discussed below, though donors should not be disclosed by name in either case.

A. DISCLOSURE OF LARGE INDIVIDUAL DONORS

For purposes of this Note, large individual donors are donors who contribute \$500 or more to a specific candidate or issue campaign. This is slightly above current disclosure-triggering thresholds. Currently, at the federal level, individuals who give \$200 or more must be disclosed.¹⁵⁰ In some states, the numbers are even lower; in California, the statute requires mandatory disclosure for all campaign donations over \$100.¹⁵¹ Individual donors making large contributions are a substantial minority of donors; very few Americans make political donations, and of those that do, most come from small donors.¹⁵² A 2008 donor study by the Center for

149. See *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 202–03 (1999).

150. See 2 U.S.C. § 434(b)(3)(A) (2006).

151. See CAL. GOV'T CODE § 84211 (West 2009).

152. Center for Responsive Politics, Donor Demographics, <http://www.opensecrets.org/bigpicture/>

Responsive Politics found that 0.07 percent of the U.S. population gave \$200 or more to a candidate or issue; 0.01 percent gave \$2300 or more.¹⁵³ However, the study found that while few Americans gave very large donations, “[t]he impact of those donations . . . is huge” because the money donated by large donors constituted a significant portion of money received by campaigns.¹⁵⁴

President Barack Obama, whose campaign was hailed as “grassroots,” still received “80 percent more money from large donors than small ones.”¹⁵⁵ Obama shattered campaign contribution records, and the large majority of those contributions came from large donors.¹⁵⁶ This is the case in nearly all modern presidential elections; John McCain received 59 percent of his donations from donors of \$1000 or more, and in the 2004 presidential election, John Kerry and George W. Bush received 56 and 60 percent of contributions from large donors, respectively.¹⁵⁷ This illustrates the importance of money in modern candidate campaigns; in the 2008 House of Representatives races, the candidate spending more money won 402 of 435 (or 92 percent of) elections.¹⁵⁸ The top individual contributors to political campaigns tended to be CEOs of corporations; for example, Jeffrey Katzenberg of Dreamworks gave \$352,402 to candidates in 2008, and James Pederson of The Pederson Group gave \$321,168.¹⁵⁹

However, it is not clear that disclosure of large individual donors is an effective voting cue. Disclosure may be an informative voting cue when the donations are made by well-known individuals.¹⁶⁰ Voters’ ability to

DonorDemographics.php (last visited Nov. 23, 2009) (“Only a tiny fraction of Americans actually give campaign contributions to political candidates, parties or PACs. The ones who give contributions large enough to be itemized (over \$200) is even smaller.”).

153. *Id.*

154. *Id.*

155. See Jeff Zeleny & Michael Luo, *New Donors Help Obama Raise a Record \$66 Million in a Month*, N.Y. TIMES, Sept. 15, 2008, at A1; Julie Kosterlitz, *Study: Big Donors Carried Obama*, NAT’L J., Nov. 26, 2008, <http://undertheinfluence.nationaljournal.com/2008/11/study-big-donors-carried-obama.php>.

156. See Zeleny & Luo, *supra* note 155.

157. See Robert Schlesinger, *Barack Obama’s Fundraising and the Small Donor Myth*, U.S. NEWS & WORLD REP., Nov. 25, 2008, <http://www.usnews.com/blogs/robert-schlesinger/2008/11/25/barack-obamas-fundraising-and-the-small-donor-myth.html>. Twenty-six percent of Obama’s donors gave less than \$200; 27 percent gave \$201–\$999; and 47 percent gave \$1000 or more. *Id.*

158. Center for Responsive Politics, *Winning vs. Spending*, <http://www.opensecrets.org/bigpicture/bigspenders.php?cycle=2008> (last visited Nov. 23, 2009).

159. Center for Responsive Politics, *Top Individual Contributors*, <http://www.opensecrets.org/bigpicture/topindivs.php?cycle=2008> (last visited Nov. 23, 2009) [hereinafter 2008 Top Individual Contributors].

160. See Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and “Disclosure Plus,”* 50 UCLA L. REV. 1141, 1143 (2003).

identify donors like Jeffrey Katzenberg or other CEOs can be a helpful decisionmaking shortcut when voters know that the individual whose name they recognize supports a candidate or issue. However, such well-known names are not a helpful voting cue if voters do not know what motivated the donation or what political leanings the donations represent.¹⁶¹ Even famous donors, such as Stephen Spielberg and Brad Pitt who each gave \$100,000 to the “No on 8” campaign,¹⁶² are not a good voting cue when voters do not associate these individuals with particular policy positions or political viewpoints.¹⁶³ The most salient voting cues in the large-donor context come from donors with well-known policy positions, such as “political elites”; for example, if voters know that Governor Arnold Schwarzenegger supports a particular ballot measure, this will serve as an effective voting cue because Schwarzenegger’s political views and policy positions are well known.¹⁶⁴

Yet, most large donors are neither well known nor political elites, and therefore their names alone do not provide an effective voting cue without other information, such as the names of their employers. Elizabeth Garrett notes:

In a few cases, [disclosure of large donors] meets the conditions for effective voting shortcuts. Some people, such as Gloria Steinem, Ross Perot, or William Bennett, have reputations that allow voters to draw accurate inferences about the ideologies of the candidates they support In most cases, however, support by individuals is not an effective heuristic because most well-known people do not have clear reputations for policy positions.¹⁶⁵

Few citizens would recognize many of the names on the Center for Responsive Politics’ list of the top individual contributors for the 2008 election cycle.¹⁶⁶ Besides Pederson and Katzenberg, the top individual contributors included Daniel Neidich, Angelo Tsakopoulos, Yalcin Ayasli, and Alan Fox.¹⁶⁷ These certainly are not household names (nor are many of the other names on the list). Only a very small percentage of large donors

161. See Garrett, *supra* note 38, at 1043 (“[I]ndividuals act from a mixture of motives so the signal their support provides is less informative.”).

162. See *DeGeneres Thanks Pitt for Fighting Prop 8: Actor Says Measure to Deny Gay Marriage Steps on Pursuit of Happiness*, MSNBC, Dec. 3, 2008, <http://www.msnbc.msn.com/id/28036757>.

163. See Garrett, *supra* note 38, at 1043.

164. See Kang, *supra* note 160, at 1143 (“Voters can quickly learn a great deal about ballot measures without investing much time or effort, simply by knowing which favored and disfavored political elites support or oppose those ballot measures.”).

165. See Garrett, *supra* note 38, at 1043.

166. To see the names on this list, see 2008 Top Individual Contributors, *supra* note 159.

167. *Id.*

would provide a voting cue, as even well-known names do not provide a salient voting cue if voters cannot associate the names with policy positions. Disclosure of large donors, therefore, is not substantially related to improving voter competence.

In candidate elections, there is a more convincing argument that disclosure of large donors substantially relates to the important state interests of deterring corruption and the appearance of corruption. One can infer from the 2000 Supreme Court case of *Nixon v. Shrink Missouri Government PAC* that disclosure of large donors may be justified by the quid pro quo corruption rationale: the Court noted that there is a corruption concern posed by “the broader threat from politicians too compliant with the wishes of large contributors.”¹⁶⁸ Political officials can easily become beholden to large donors; if they do not help with their donors’ policy concerns, the donors may not donate to the candidate in the future.¹⁶⁹ Some scholars have argued that large contributions, while legal, may cause a politician to be receptive to the needs of large donors at the expense of the public welfare.¹⁷⁰ Disclosure supporters therefore argue that the public has a legitimate right to know the identities of large donors so that they can monitor how beholden a candidate is to that donor’s interests and can respond by not supporting a candidate who ignores voters’ policy concerns in favor of the donor’s interests.¹⁷¹

However, this argument is suspect because, unlike in direct democracy, there are strict contribution limits for candidate elections. Under the FECA, an individual donor may give no more than \$2400 to one candidate or candidate committee per election.¹⁷² It is unlikely that a candidate would be beholden to a donor who contributed \$2400 when, for example, most candidates running for the 2008 House of Representatives spent well over \$1 million.¹⁷³ Since exacting scrutiny requires a significant relationship between the measure and the state interest, disclosure of large

168. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 389 (2000).

169. See, e.g., Ayres, *supra* note 34, at 12–13 (“Even when politicians do not condition their behavior on contributions, they may nonetheless expect that taking certain positions will cause donors to give more money. And . . . wealthy donors . . . may reasonably believe that giving to a candidate with whom they agree will increase the candidate’s chances of (re)election.”). But see Justin M. Sadowsky, *The Transparency Myth: A Conceptual Approach to Corruption and the Impact of Mandatory Disclosure Laws*, 4 CONN. PUB. INT. L.J. 308, 331–34 (2005) (arguing that disclosure requirements do not serve the corruption rationale).

170. See Ayres, *supra* note 34, at 13.

171. See, e.g., *Nixon*, 528 U.S. at 389.

172. See, e.g., FEC, CONTRIBUTION LIMITS (2009), available at <http://www.fec.gov/info/contriblimits0910.pdf>.

173. See *supra* note 158 and accompanying text.

donors' names is not significantly related to the quid pro quo corruption rationale. A more persuasive argument with respect to corruption is that disclosure may substantially relate to the appearance of corruption rather than to actual corruption. If all large donors' names are disclosed, campaign donations do not appear corrupt because the public can monitor the "big fish."¹⁷⁴ However, since the donation maximums are fairly low and many donors give the maximum amount, this also is not persuasive. Further, campaign contributions can be monitored without disclosing to the public the actual names of donors. Donors' names should be required to be reported to the government for enforcement purposes without being disclosed to the public.¹⁷⁵

Lastly, disclosing large individual donors does not have a substantial relationship to gathering the data necessary to detect violations of contribution limitations in candidate elections.¹⁷⁶ If contribution limits are violated, it is most likely by those who make substantial contributions, as they are more likely to have the resources to contribute more than the federal limit. This Note does not deal with campaign contribution limits, which are the subject of a significant amount of legal scholarship,¹⁷⁷ but it is important to note that large donors are capable of donating large sums of money and are likely to be capable of donating more than the federal limit. Still, however, it is unlikely that this third rationale alone would justify disclosure of large donors by name because such disclosure is not necessary for election officials to be able to monitor campaign contributions.¹⁷⁸ Thus, disclosing large individual donors to prevent contribution violations does not meet exacting scrutiny because there is not a significant relationship between disclosing the donors' names and deterring violations of contribution limits.

Further, the First Amendment costs of disclosing large donors are likely greater than the costs of disclosing small donors. Individuals who make large donations may be subject to more "threats, harassments, and reprisals" than donors of modest amounts because the large contributions indicate that the donors were more passionate about an issue or candidate¹⁷⁹ and that they had more influence on the outcome of the

174. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 66–68 (1976).

175. See McGeveran, *supra* note 35, at 32 (noting that "enforcement may require reporting, but not true public disclosure").

176. See *Buckley*, 424 U.S. at 67 (arguing that disclosure is essential to gathering necessary data to detect violations of contribution limits).

177. See, e.g., Bopp & Lee, *supra* note 26.

178. See McGeveran, *supra* note 35, at 32–33.

179. See, e.g., Garrett, *supra* note 38, at 1043–44.

election (because more money increases the chances a candidate or issue will prevail¹⁸⁰). One of the cases of “reprisal” from the aftermath of the Proposition 8 election was the case of Scott Eckern, the artistic director of the California Musical Theater, who resigned from his position after it was revealed that he donated \$1000 to Proposition 8.¹⁸¹ Even if contribution limits are set at a relatively high level, Eckern’s name likely still would have been disclosed. Although it is arguable whether Eckern’s situation constitutes reprisal, it is worth noting that the costs of disclosure to large donors are as great as, if not greater than, those incurred by small donors.

Anonymity itself can be an effective voting cue. Meredith Hattendorf argues that “even if political advocates are able to publish their ideas anonymously, it does not mean that they all will. Anonymity is just as much a part of a message as a statement of its author’s identity, and people can and will recognize that.”¹⁸² For example, if many donors to a campaign choose to remain anonymous for purposes of their donations in support of a ballot measure while maintaining a relatively quiet public campaign, voters can use the anonymity itself as a cue that donors to the measure do not want to publically participate in the campaign. Voters may, in turn, be skeptical of a candidate or issue if many of its donors choose to remain anonymous. Of course, exempting individual donors from disclosure does not mean that they have to remain anonymous; they can still be vocal supporters of the cause or candidate they are supporting in their communities and participate in the marketplace of ideas.¹⁸³ They can write pamphlets and Internet blogs and discuss their beliefs with friends and family.¹⁸⁴ For these reasons, disclosure of large donors does not meet exacting scrutiny.

B. DISCLOSURE OF SMALL INDIVIDUAL DONORS

The argument that disclosure of the names of small donors does not meet exacting scrutiny is even stronger because their names provide a less powerful voting cue than large donors and the corruption rationale is less persuasive in the context of small donors.

Disclosing the names of small donors does not provide a powerful

180. See *supra* text accompanying notes 155–58.

181. See *supra* note 6 and accompanying text.

182. Meredith Hattendorf, Comment, *Theoretical Splits and Consistent Results on Anonymous Political Speech: Majors v. Abell and ACLU of Nevada v. Heller*, 50 ST. LOUIS U. L.J. 925, 954 (2006).

183. See *id.* at 954–55.

184. Donors can even use Twitter.

voting cue.¹⁸⁵ If disclosure reveals that Jane Smith, an attorney from Salem, Oregon, donated \$200 to Barack Obama, what cues does this provide? Perhaps this is a cue that citizens of Salem, Oregon are Democrats or that attorneys are Democrats. Even if these are salient cues (which is highly questionable), it does not matter that it was Jane Smith *specifically* who donated \$200. Unless the voter knows who Jane Smith is, her name alone will not serve as a voting cue.¹⁸⁶

As the *McIntyre* Court noted, the Ohio statute was not an effective voting cue because most members of the public would not know McIntyre.¹⁸⁷ Similarly, disclosing the names of Jane Smith and other small donors does not serve as an effective voting cue because voters cannot associate them with any policy preferences without knowing of them. Common sense dictates that it is unlikely that someone making a very small contribution would be a well-known person, such as a powerful political figure, major CEO, or celebrity.¹⁸⁸ Therefore, disclosure of the name of small individual donors is not substantially related to improving voter competence. If Jane Smith's donation amount, location, and employment information were disclosed to voters but her name was not, the voting cues would be equally effective.

Further, disclosing Jane Smith's name raises First Amendment privacy concerns that disclosure of her employer, occupation, amount of contribution, and city and state of residence do not. For example, employees could be subject to reprisals based on their private political donations, especially in contentious and emotionally charged elections. Suppose Smith's employer, a prominent Democrat, learned from the disclosure that Smith had donated to a Republican candidate. The employer may be uncomfortable with Smith's donation, affecting the employer's treatment of her. Smith may even refrain from making political donations at all if she knows her employer is particularly well connected to a political party or passionate about politics. Suppose that Smith's colleague, a lesbian who is not "out" at work, donated to oppose Proposition 8. This may raise or verify the employer's suspicions about her sexuality and lead to discrimination against her in the workplace. A gay employee of the military may even be required to be fired for donating to a pro-gay organization or

185. See, e.g., Garrett, *supra* note 38, at 1042.

186. In fact, even if the voter knows who Jane Smith is, it is unclear this would be a helpful voting cue.

187. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348–49 (1995).

188. See, e.g., McGeeveran, *supra* note 35, at 30.

ballot measure due to the military's "Don't Ask, Don't Tell" policy.¹⁸⁹ As William McGeeveran notes, "if a gay donor to the Log Cabin Republicans serves in the military, publication of his contribution on the Internet could violate the 'Don't Ask, Don't Tell' policy and might well result in the end of his career."¹⁹⁰ These costs are unnecessary in light of the fact that disclosure of small donors does not have a relevant relation to the important state interests identified in disclosure jurisprudence.

Disclosure of the names of small donors is also not substantially related to the other important state interests identified in campaign finance jurisprudence for candidate elections. Proponents of disclosure argue that disclosure of small donors is substantially related to the corruption rationale; the high level of transparency inherent in disclosing all donors, including small donors, ensures that voters know exactly who is behind a political campaign.¹⁹¹ This view is best summarized by the words of Justice Brandeis, who is quoted in *Buckley* as stating that "[s]unlight is . . . the best of disinfectants."¹⁹² However, monitoring how beholden a candidate is to a donor's interests makes much less sense for small donors than it does for large donors. A small donor is less likely to have much influence over a candidate.¹⁹³ Further, given the number of contributions most candidates receive, it would be nearly impossible to determine to which of the donors the candidate was beholden.¹⁹⁴ The best corruption argument in this context, as it is in the context of large donors, is that disclosing the names of all donors prevents the "appearance of corruption" because all donor information is available to the public.¹⁹⁵ This argument, however, is substantially outweighed by the potential privacy costs to small donors. The "appearance of corruption" can be prevented with alternative measures that may be more successful than the disclosure of small donors' names. A disclosure requirement for information besides the name of donor would

189. See *id.* at 18 (citing *McVeigh v. Cohen*, 938 F. Supp. 215 (D.D.C. 1998)); Edward Stein, *Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace*, 38 HARV. C.R.-C.L. L. REV. 159, 199-202 (2003). For concerns about free speech and military personnel, see generally Danley K. Cornyn, Note, *The Military, Freedom of Speech, and the Internet: Preserving Operational Security and Servicemembers' Right of Free Speech*, 87 TEX. L. REV. 463 (2008).

190. See McGeeveran, *supra* note 35, at 18 (citing *McVeigh*, 938 F. Supp. 215).

191. See, e.g., Campaign Disclosure Project, Grading State Disclosure 2008, <http://campaigndisclosure.org/gradingstate/criteria.html> (last visited Nov. 23, 2009) [hereinafter Grading State Disclosure 2008].

192. See *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (quoting LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY: AND HOW THE BANKERS USE IT 62 (Nat'l Home Library Found. 1933) (1914)). See also Grading State Disclosure 2008, *supra* note 191 (supporting disclosure of donor names).

193. See, e.g., McGeeveran, *supra* note 35, at 30.

194. *Id.*

195. See, e.g., *Buckley*, 424 U.S. at 67.

deter the appearance of corruption by giving voters a reasonable belief that, because donations were being monitored and records kept, the election was not corrupt.

Lastly, disclosing the names of small donors is not substantially related to the third important state interest identified in campaign finance jurisprudence: deterring contribution violations.¹⁹⁶ If the disclosure regime proposed by this Note is adopted, disclosure will still detect violations of contribution limits.¹⁹⁷ If a donor or candidate violates campaign finance regulations, that individual would still be prosecuted to the fullest extent of the law.

Disclosure supporters make several other counterarguments to urge disclosing the names of small individual donors. First, they argue, the case of small donors is significantly different from *McIntyre*. Disclosure of McIntyre's identity would have been "particularly intrusive" because she published a "personally" crafted leaflet, which the Court contrasted with a political donation that is "less specific, less personal, and less provocative than a [leaflet]—and . . . less likely to precipitate retaliation."¹⁹⁸ However, this analysis seems shortsighted, especially in the issue election context in which donations are clearly made to support or oppose a particular issue and are therefore "specific." Further, the Proposition 8 campaign illustrated that these donations are often seen as "personal" and "provocative" by those who disagree with the donor's position. Lastly, because new technologies make public access to disclosure reports easy, disclosure can be "intrusive."

Other proponents of disclosure have argued that disclosure is necessary to ensure a full and accurate "marketplace of ideas," a concept from First Amendment jurisprudence "that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."¹⁹⁹ The FEC's brief in *Citizens United* makes this type of argument: "[D]isclosure serves important First Amendment values. '[I]ndividual citizens seeking to make informed choices in the political marketplace' have 'First Amendment interests' in learning how electoral advocacy is funded."²⁰⁰ While it is certainly an important state interest for

196. See *id.*

197. See, e.g., McGeveran, *supra* note 35, at 32–33.

198. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 355 (1995).

199. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

200. See FEC Brief, *supra* note 112, at 40 (second alteration in original) (quoting *McConnell v. FEC*, 540 U.S. 93, 197 (2003)).

individuals to receive voting cues from all *relevant* information in the marketplace of ideas, the identities of small donors is not particularly relevant information because it does not inform voters and, therefore, does not make a significant contribution to the marketplace of ideas.

Thus, disclosure of the names of both large and small individual donors does not substantially relate to the important state interests identified in campaign finance jurisprudence, so individual names should not be disclosed. However, as the next sections will argue, other important information about donors that significantly relates to these interests should be disclosed.

C. DONOR'S EMPLOYER AND OCCUPATION

A donor's employer and occupation should be disclosed in both candidate and issue elections, particularly if individual's name is not disclosed, because they provide an effective voting cue and prevent groups from attempting to shield their identities by donating under misleading names.²⁰¹ Currently, a donor's occupation and employer must be disclosed both at the federal level and in thirty-one states.²⁰² Additionally, four states require a donor's occupation, but not the donor's employer, to be disclosed; one state requires a donor's employer, but not the donor's occupation, to be disclosed; and fourteen states do not require that either be disclosed.²⁰³ The main rationale for disclosing a donor's occupation and employer is that it provides an effective voting cue because it is "crucial for categorizing donations or identifying efforts by large corporations and organizations to bundle their employees' contributions."²⁰⁴ For example, if a significant number of employees of American Electric Power, the nation's biggest carbon dioxide polluter,²⁰⁵ donate to an environmental initiative, voters may infer that the initiative is not actually environmentally friendly. Similarly, if the CEO of a major pharmaceutical company makes a large donation in favor of a ballot initiative regarding prescription drugs, voters could reasonably infer that that the ballot initiative would benefit the pharmaceutical industry.²⁰⁶ This is particularly important when individuals

201. See Garrett & Smith, *supra* note 64, at 300 (noting that groups sometimes seek to disguise themselves by using misleading or ambiguous names).

202. See Grading State Disclosure 2008, *supra* note 191.

203. *Id.*

204. *Id.*

205. See Marianne Lavelle, *The 10 Biggest Carbon Dioxide Polluters*, U.S. NEWS & WORLD REP., Nov. 14, 2007, <http://www.usnews.com/articles/business/economy/2007/11/14/the-10-biggest-carbon-dioxide-polluters.html>.

206. See, e.g., Garrett, *supra* note 38, at 1036.

make large donations through a political entity, the names of which are often misleading or ambiguous.²⁰⁷ If this CEO made the donation through a group ambiguously called “Citizens for Public Health,” citizens would have no way of knowing who supported the group if the employer of the CEO were not disclosed.²⁰⁸

Disclosing the name of a donor’s employer raises privacy concerns that disclosing a donor’s occupation does not; these concerns must be balanced against important state interests. Employer disclosure may lead to reprisals against an employee by the employer. It is possible that an employer may try to regulate its employees’ donations because it may be concerned that it will be judged by its employees’ contributions. One can easily search donations by employer on the Internet to determine patterns in a company’s employee donations. For example, disclosure database results reveal that well over 90 percent of contributions made by faculty members at the University of Southern California (“USC”) in the 2008 presidential primary and general election went to Democrats.²⁰⁹ Suppose that certain Republican donors to USC were concerned about the lack of political diversity on the faculty—might the USC faculty be subtly discouraged from donating to a Democratic candidate in an amount that triggers disclosure?

Of course, such a scenario is unlikely at an institution of higher education (where a high value is typically placed on freedom of speech), but it may be quite likely at an ideological nonprofit organization that relies on large donors. For example, if a Focus on the Family employee wanted to donate \$100 to oppose Proposition 8, the employee may be hesitant to make a donation out of fear of an adverse reaction from the employer due to their differences in beliefs. Most employers have at-will employment arrangements that make these types of reprisals legal.²¹⁰ In most states, this type of employment discrimination is legal so long as it is not a public

207. See Garrett & Smith, *supra* note 64, at 300.

208. See *id.*

209. See Fundrace 2008, *supra* note 16 (run “USC” employer search).

210. For example, in the Massachusetts case of *Korb v. Raytheon Corp.*, the court denied a wrongful discharge and civil rights claim by a defense contractor who was fired because he publicly advocated for a defense spending reduction because this made him an “at-will employee who [became] ineffective.” *Korb v. Raytheon Corp.*, 574 N.E.2d 370, 372 (Mass. 1991). See also Email from Richard Bales, Professor of Law and Assoc. Dean of Faculty Dev., N. Ky. Univ., to Author (Mar. 24, 2009, 07:32 EST) (on file with author) [hereinafter Bales Email]; Email from Marcia L. McCormick, Professor of Law, Samford University, to Author (Mar. 25, 2009, 17:45 PST) (on file with author) [hereinafter McCormick Email].

employer and there is no federal funding involved.²¹¹ Similarly, a nonprofit could argue that an employee who donates to causes that are in opposition to the group's platform is an ineffective employee and therefore fire the employee at will. Even if a group did not have a problem with its employees expressing personal viewpoints by making political donations, it would have to take into account the concerns of its donors, who may be uncomfortable with it employing individuals who oppose the causes at the core of the organization's platform. Thus, donor disclosure may have adverse consequences for employees.

Disclosing the name of a donor's employer also presents significant privacy concerns for donors employed by small businesses. For example, if a nurse at a doctor's office that employs five people makes a contribution and his or her employer (but not his or her name) is disclosed, it is still likely that the employer and coworkers will know (or could easily find out) who made the contribution because the business has very few employees. This is particularly important because small businesses represent 99.7 percent of all employer firms and provide over half of the private-sector jobs in the United States.²¹²

Disclosure opponents may argue that it will be rare for a donor's employer to provide a helpful voting cue and that the interests of management and employees may often be quite different, particularly in workplaces that are unionized. In this context, it is likely that the management of a company will donate to one side of a campaign and the employees will donate to another side. If one searches the donations of the employees of major corporations for the 2008 presidential general and primary elections, one finds a healthy mix of Republican and Democratic support; examples include Wal-Mart,²¹³ General Electric,²¹⁴ and Bank of America.²¹⁵ In most cases, a donor's employer will not provide information of value to a voter to assist them in making an informed choice at the ballot box, opponents argue. For example, the fact that Scott Eckern was employed by the California Musical Theater is not significant in determining the types of voters that supported or opposed Proposition 8.

211. Employment law scholar Richard Bales notes that "[t]he First Amendment protects public employees, but not employees of nonprofits." Bales Email, *supra* note 210. See also McCormick Email, *supra* note 210. One major exception is that a secular employer cannot fire an employee based on their religion, though there is an exception for religious institutions. See Bales Email, *supra* note 210.

212. See Office of Advocacy, U.S. Small Business Admin., Frequently Asked Questions (Sept. 2009), available at <http://www.sba.gov/advo/stats/sbfaq.pdf>.

213. Fundrace 2008, *supra* note 16 (run "Wal-Mart" employer search).

214. *Id.* (run "General Electric" employer search).

215. *Id.* (run "Bank of America" employer search).

Eckern's case, however, is only one example and, as noted, in many cases a donor's employer will provide an effective voting cue, particularly when groups use ambiguous or misleading names to hide their true interests. By knowing the employers of these donors, voters may have an idea of whose interests each candidate or issue represents.²¹⁶ If neither a donor's name nor employer were disclosed, disclosure would be meaningless and voters might not know the true policy interests held by a candidate or issue campaign.

Disclosure of a donor's occupation does not present the same privacy concerns that disclosure of a donor's employer does. If it were disclosed that the nurse discussed above was, in fact, a nurse, there would not be a privacy concern because it would be nearly impossible for someone to identify him or her based on occupation alone. Still, there is a sound argument that donor occupation disclosure provides an effective voting cue. Suppose that a candidate receives a substantial number of donations from trial lawyers; disclosure proponents would argue that voters can reasonably conclude that such a candidate would be supportive of trial lawyers' interests.²¹⁷ Further, a high percentage of doctors and insurance executives donating in favor of a ballot measure regarding insurance may illustrate that the measure will diminish patients rights.²¹⁸ This is of great significance in direct democracy elections because ballot measures pertain to a specific issue, whereas candidate elections involve many issues. The specific nature of a ballot measure may draw citizens employed in certain occupations to donate to specific sides of a campaign. For example, if a measure on tort reform appears on the ballot, it is likely that most lawyers would be against such a measure and most doctors would favor it.²¹⁹ This is a powerful voting cue, particularly in the absence of the political party cue. Therefore, occupation disclosure can be a powerful voting cue in direct democracy and helps prevent circumvention by groups using misleading names.

Nevertheless, it is still unclear that donor occupation always provides an effective voting cue; donations are made by citizens from nearly all occupations, and it is rare that nearly all donating members of a certain

216. See, e.g., Garrett & Smith, *supra* note 64, at 300.

217. See Bruce Ackerman & Ian Ayres, *Why a New Paradigm?*, 37 U. RICH. L. REV. 1147, 1168 (2003) ("An unmistakable signal that trial lawyers financially support Gore or that tobacco executives overwhelmingly support Bush [might improve voter competence].").

218. See, e.g., Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63, 69–72 (1994).

219. See, e.g., Mike Norbut, *Tort Reform Ballot Initiatives Face Off in Washington State*, AM. MED. NEWS, Oct. 10, 2005, <http://www.ama-assn.org/amednews/2005/10/10/gvsb1010.htm>.

occupation donate to the same side. Nurses, for example, donated to many Democrats and Republicans in the 2008 presidential primary and general elections.²²⁰ This is not always the case, however—nearly 80 percent of attorney donations²²¹ and nearly 90 percent of professor donations²²² went to Democrats. Because the privacy costs of disclosing a donor's occupation are nearly none, governments may want to consider disclosing a donor's occupation because it provides effective voting cues in certain cases, particularly in direct democracy.

In addition to providing effective voting cues, disclosure of a donor's occupation and employer may both substantially relate to the corruption rationale, which can justify disclosure in candidate elections. Donors from any employer can legally contribute to any candidate or ballot measure. However, there is a strong argument that employer disclosure can deter quid pro quo corruption; if many voters from a certain employer donate to a candidate, that candidate may be beholden to their interests. This is more likely than where individual donors are concerned because an individual can only contribute a certain amount to a candidate, whereas employee donations bundled together can add up to substantially more.²²³ For example, one of Barack Obama's top donors in the 2008 presidential election campaign was Google, whose employees contributed over \$800,000.²²⁴ Due to donor employer disclosure, this information is publicly available to voters and, if President Obama appears to be catering to Google's interests at the expense of public welfare, voters will be able to respond by demanding a change or by not voting for him in the future. This same corruption rationale relates to occupation disclosure: if Barack Obama received a substantial amount of donations from insurance executives, voters could monitor how beholden he became to the insurance industry's policy interests.

Lastly, employer and occupation disclosure do not have a strong relationship to the other state interest that can justify disclosure in candidate elections: enforcing campaign contribution limits. There are no federal regulations limiting the amount of money that employees from the same company or citizens employed in certain occupations can contribute

220. See Fundrace 2008, *supra* note 16 (run "nurse" occupation search).

221. See *id.* (run "attorney" occupation search).

222. See *id.* (run "professor" occupation search).

223. For example, Barack Obama received \$1,591,395 from the University of California and \$994,795 from Goldman Sachs in the 2008 presidential election cycle. See Center for Responsive Politics, Barack Obama: Top Contributors, <http://www.opensecrets.org/pres08/contrib.php?cycle=2008&cid=N00009638> (last visited Nov. 23, 2009).

224. *Id.*

to a candidate or ballot measure. Thus, this rationale would not justify disclosure of a donor's occupation and employer. However, because the voter-competence rationale justifies employer and occupation disclosure in both direct democracy and candidate elections, they should be disclosed. Further, the quid pro quo corruption rationale also likely justifies disclosure in candidate elections.

D. INSTITUTIONAL GROUP SUPPORT

William McGeveran recommends that disclosure could be administered like the census, which discloses "enormous[]" amounts of aggregate information without revealing individuals' names.²²⁵ Here, election officials could "reveal statistics such as the total amount of money and the total number of contributions that each candidate and public action committee has received from certain categories of sources. An agency could report on categories such as zip code and occupational group," as well as on other information that is deemed helpful, without disclosing individual donors' names.²²⁶ McGeveran's recommendation should be utilized. Aggregate statistics provide particularly helpful voting cues in the case of out-of-state donors, institutional group support, and large and small contributions. These cues are significant without disclosing individual names and are a more effective voting cue than individual support.²²⁷ For example, in the Proposition 8 campaign, aggregate statistics of group donations provided the electorate with helpful voting cues; they showed that the Mormon Church raised more than \$5 million and its members were approximately 40 percent of donors to the "Yes on 8" campaign.²²⁸ The Knights of Columbus, a well-known Catholic fraternal organization, gave \$1 million to the "Yes on 8" campaign.²²⁹ On the other side, the California Teacher Association donated \$1.3 million to oppose Proposition 8.²³⁰ Thus, voters were able to associate large, well-known groups with a particular side of an issue because of disclosure.

Nevertheless, there are still First Amendment costs to disclosing large

225. McGeveran, *supra* note 35, at 53–54.

226. *Id.* at 53.

227. See Garrett & Smith, *supra* note 64, at 325–26 ("[K]nowing the identity of individuals who are active in direct democracy is not as helpful a voting cue as the group-support heuristic . . ."). See also Ackerman & Ayres, *supra* note 217, at 1168.

228. See Ewers, *supra* note 37. See also *Donor Groups Identified, Largest Is Individual Mormons*, MORMONS FOR PROPOSITION 8, Sept. 28, 2008, <http://mormonsfor8.com/?p=154>.

229. See *Knights of Columbus Contributes \$1 Million to Prop. 8 Campaign*, CATH. NEWS AGENCY, Aug. 20, 2008, <http://www.catholicnewsagency.com/new.php?n=13582>.

230. See Ewers, *supra* note 37.

group support. If voters know that members of the Mormon Church made 40 percent of donations to the Proposition 8 campaign, but do not know the names of the individual members who donated, all members may be vulnerable to retaliation from those who know they belong to the church. This is still a less significant cost than disclosing donors by name. With a large group, voters cannot be certain which members made donations, and, therefore, websites revealing home addresses such as Eightmaps.com would not be possible. Further, some well-known Mormons (such as NFL quarterback Steve Young, who displayed a “No on 8” sign outside his home²³¹) opposed Proposition 8, illustrating that groups are rarely completely united in their support for a position, and voters may ultimately take this into account.

E. DONOR’S CITY AND STATE OF RESIDENCE

Disclosure statutes at the federal level and in most states currently mandate that a donor’s home address be disclosed. This information was used to create Eightmaps.com, discussed in the Introduction, a website that shows a map of the homes of Proposition 8 donors.²³² A person’s home address is sensitive information; many citizens may choose to keep this information private through a variety of methods, for example preventing its publication in public records such as the phone book.²³³ Disclosure of a home address may be particularly dangerous for certain citizens, such as stalking victims.²³⁴ Yet, if any of these citizens has chosen to keep his or her address private but donates \$200 to a presidential candidate, the donor’s address will be made public. This will certainly discourage political donations in some cases, which is unnecessary because there appear to be no benefits to disclosing a donor’s home address that could not be achieved through less restrictive means—a requirement of exacting scrutiny. A donor could provide his or her city and state of residence, and this would be an equally effective voting cue. It is not important that Joe Smith lives at 123 Main Street, but it may be important that he lives in Salt Lake City, Utah, particularly because it illustrates whether he is an in-state or an out-of-state donor.

Disclosing the percentage of donors who reside out of state is

231. Posting of John Wildermuth to SFGate.com Politics Blog, http://www.sfgate.com/cgi-bin/blogs/nov05election/detail?blogid=14&entry_id=32216 (Oct. 31, 2008, 18:58 PST).

232. Prop 8 Maps, *supra* note 18.

233. See, e.g., J. J. LUNA, HOW TO BE INVISIBLE: THE ESSENTIAL GUIDE TO PROTECTING YOUR PERSONAL PRIVACY, YOUR ASSETS, AND YOUR LIFE 57–70 (rev. ed. 2004).

234. See *id.* at 57–58, 266–69.

substantially related to providing an effective voting cue. Such donations may signal that a candidate will be beholden to out-of-state interests or that a ballot initiative serves out-of-state interests; in turn, these signals may cause voters to lose support for the candidate or ballot issue, or at least critically assess their support for it.²³⁵ This type of disclosure is particularly important because out-of-state donations are common: “97 percent of members of the House [of Representatives] raised more than half of their funds from donors living outside of their districts.”²³⁶ Many initiative campaigns, including the Proposition 8 campaign,²³⁷ the 2008 Proposition 2 California ballot initiative to treat farm animals more humanely,²³⁸ and the 2006 Michigan Civil Rights Initiative to ban affirmative action in the state,²³⁹ were funded largely by out-of-state donors. Thus, donors should be required to disclose their city and state of residence, but not their home address, because this will provide an effective voting cue without unduly sacrificing individual privacy.

F. PERCENTAGE OF LARGE AND SMALL CONTRIBUTIONS

Another effective aggregate voting cue is the number of “large” and “small” donations a campaign received.²⁴⁰ Currently, each state requires disclosure of the amount of every individual donation at various contribution thresholds, so compiling this information should be straightforward.²⁴¹ If 80 percent of donations to Candidate X were \$300 or less, this serves as a useful voting cue that the issue has large grassroots support. Such support may allow voters to correctly determine that the candidate is “pursuing policies that benefit the mass of voters rather than a small number of special interests.”²⁴² This voting cue is valuable even without knowing the names of individual donors.

235. See Garrett & Smith, *supra* note 64, at 306.

236. See Posting of Lindsay Renick Mayer to Center for Responsive Politics Capital Eye Blog, <http://www.opensecrets.org/news/2008/10/house-members-rely-on-outofsta.html> (Oct. 28, 2008, 09:28 EST).

237. See John Wildermuth, *California Prop 8 Attracts Out-of-State Donors*, SCRIPPSNEWS, July 30, 2008, <http://www.scrippsnews.com/node/35103>.

238. See Michael Doyle, *California Animal-Cage Measure Lures Out-of-State Donors*, SACRAMENTO BEE, Oct. 16, 2008 (on file with author).

239. See *Michigan Initiative Mostly Funded by Out-of-State Donors*, AFFIRMATIVE ACTION & DIVERSITY PROJECT, Feb. 23, 2005, <http://aad.english.ucsb.edu/docs/02-23-05CivilRights.htm>.

240. See, e.g., Garrett, *supra* note 38, at 1038.

241. See Grading State Disclosure 2008, *supra* note 191.

242. See Garrett, *supra* note 38, at 1038.

G. EFFECTIVE ADMINISTRATION OF A DISCLOSURE REGIME

For a disclosure regime to operate effectively, it must accurately compile donor information, as well as ensure that information is easily accessible, *before* the election takes place. Currently, forty-nine states disclose campaign finance information on the Internet.²⁴³ Most of this information is posted quickly after the contributions are disclosed to the government; forty states and the federal government currently post disclosure information within forty-eight hours of receiving it.²⁴⁴ However, there is room for improvement. Currently, 38 percent of states do not have searchable, online campaign finance databases.²⁴⁵ Such databases are important because they allow voters to sort donor information by the types of disclosure information that are important to them.²⁴⁶ Disclosure of contributions is not effective if disclosure does not occur before an election because voters will have already cast their ballots without the effective disclosure information.²⁴⁷ These suggestions have been considered by some states. For example, Wyoming, which does not post disclosures on the Internet, recently enacted legislation that will create an Internet disclosure database by 2010 and will ensure timely reporting of disclosure.²⁴⁸

Thus, for a disclosure regime to be effective, certain administrative matters must be handled efficiently and effectively. States, then, must also be willing to fund election agencies sufficiently to operate an effective disclosure regime. The Campaign Disclosure Project further recommends periodic audits of election agencies to ensure that disclosure reports have been accurately provided and disclosed.²⁴⁹ Additionally, at the state and

243. Campaign Disclosure Project, State Campaign Finance Disclosure in 2008: An Overview, <http://campaigndisclosure.org/gradingstate/statistics.html> (last visited Nov. 23, 2009) [hereinafter Campaign Disclosure Project Overview].

244. *Id.* See also 2 U.S.C. § 434(a)(6)(A) (2006).

245. See Campaign Disclosure Project Overview, *supra* note 243.

246. See *id.* For example, Alabama does not provide an online searchable database; it merely provides scanned PDFs of disclosures, and therefore it is difficult for users to process and sort this information. See Campaign Disclosure Project, Grading State Disclosure 2008: Alabama, <http://campaigndisclosure.org/gradingstate/al.html> (last visited Nov. 23, 2009). In contrast, Washington's online database gives voters multiple categories to search, and therefore it is easy to search the results. See Campaign Disclosure Project, Grading State Disclosure 2008: Washington, <http://campaigndisclosure.org/gradingstate/wa.html> (last visited Nov. 23, 2009).

247. Bopp's challenge to California's disclosure requirements argued that the "state's Informational Interest . . . ceases to exist the moment the last ballot is cast for the measure." See Second Amended Complaint, *supra* note 20, ¶ 105.

248. See Campaign Disclosure Project, Grading State Disclosure 2008: Wyoming, <http://campaigndisclosure.org/gradingstate/wy.html> (last visited Nov. 23, 2009).

249. Campaign Disclosure Project, Grading State Disclosure 2008: Campaign Disclosure Laws, <http://www.campaigndisclosure.org/gradingstate/lawfindings.html> (last visited Nov. 23, 2009).

federal levels, officials should continue to criminally prosecute violations of disclosure statutes to the fullest extent of the law.²⁵⁰

V. CONCLUSION

Courts must adopt a new disclosure framework that is significantly related to the important state interests identified in campaign finance jurisprudence. Proposition 8 made this issue salient, but it is likely only the first of many such examples because new technologies have made access to disclosure information much easier. This Note proposes a new framework for disclosure: a middle ground that would require disclosure of important donor information without ignoring the First Amendment issues disclosure raises, particularly the costs of disclosing the names of individual donors. By refraining from disclosing individual names, donors' First Amendment privacy rights are protected. By ensuring that important donor information such as a donor's employer is disclosed, voter competence is improved, and the public is protected against groups using misleading names. If the administrative measures proposed by this regime are adopted, voters will have easy access to relevant donor information on the Internet before the election. Most importantly, this Note has attempted to be part of a more substantial dialogue on individual donor disclosure, a too-often neglected topic in legal scholarship that judges, legislators, and scholars can no longer ignore after the Proposition 8 campaign.

250. Currently, disclosure is enforced at the federal level through the FEC's civil enforcement authority, the Justice Department's Public Integrity Section, or U.S. Attorneys; the BCRA implemented serious penalties for knowing and willful violations of its disclosure requirements. *See* SOURCEBOOK, *supra* note 33, at 134–35.