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Recommended Citation

Elizabeth Garrett, "The Future of Campaign Finance Reform Laws in the Courts and in Congress" (University of Chicago Public Law & Legal Theory Working Paper No. 19, 2001).

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PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 19

THE FUTURE OF CAMPAIGN FINANCE REFORM LAWS IN THE COURTS AND IN CONGRESS

The William J. Brennan Lecture in Constitutional Law

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Forthcoming, Ok. City. U. L. Rev., 27 #2 (2002)

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The William J. Brennan Lecture in Constitutional Law: The Future of Campaign Finance Reform Laws in the Courts and in Congress

Presented at the Oklahoma City University School of Law, Center for the Study of State Constitutional Law and Government, November 5, 2001

*Elizabeth Garrett**

Few people would disagree that campaign finance regulation provides an example of institutional failure in this country. Neither the legislatures that pass campaign finance laws nor the courts that rule on their constitutionality have managed to produce a satisfactory system. As Dan Ortiz writes: “Seldom have so many worked so hard and so long to accomplish so little.”¹ We should not be surprised at this state of affairs—neither Congress nor the courts should be expected to deal effectively with the question of the appropriate regulation of the campaign finance system. Although legislators have expertise in campaigns and should have the tools and capabilities to figure out solutions to problems posed by campaign finance,² they suffer from a conflict of interest. Effective reform of campaign finance laws would inevitably threaten the power of incumbents to easily retain their seats for as long as they want to remain in politics. We should not be surprised, given this self interest, that lawmakers are slow to act, pass largely symbolic laws, and devise regulatory systems that work to the advantage of incumbents who have name recognition and access to the franking privilege, the media, casework, and other tools providing them advantages in the electoral realm.³

The judicial branch has also participated in this story of institutional failure. The courts, which assess all campaign finance regulation through the lens of the First Amendment, have turned campaign finance into a case study of the

*University of Chicago. Thanks to Lillian BeVier, Paula Dalley, John Harrison, Andrei Marmor, Dan Ortiz, and Mike Seidman for helpful conversations, Kent Olson for research help, and Peggy Cusack (Virginia '02) and Crista Leahy (Chicago '02) for excellent research assistance.

¹ Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 Stan. L. Rev. 893, 893–94 (1998).

² See *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 402–04 (2000) (Breyer, concurring).

³ See Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 Cal. L. Rev. 1045, 1076–78 (1985).

law of unintended consequences.⁴ The Court's decision in *Buckley v. Valeo*,⁵ which allowed limitations on campaign contributions but not on expenditures, has led to a campaign finance system that virtually no one views as acceptable. The current regime is attacked from the right because of the limitations it does include, and from the left because the jurisprudence makes a comprehensive regulatory scheme impossible.⁶ Money in the political system has a hydraulic quality.⁷ A system that leaves possible avenues of spending unregulated encourages the money to flow into the unregulated canals, and sometimes these new streams are relatively hard to discover and publicize. In addition, a jurisprudence that allows the supply of money to be restricted while leaving the demand for that money unaffected is unstable.⁸ It virtually ensures that the resulting system will be characterized by a series of substitution effects, as those who wish to supply politicians with the money they demand work to circumvent the piecemeal restrictions.

In this lecture, however, I want to discuss the institutional failings in the campaign finance arena from a slightly different perspective. My thesis is that the objective of campaign finance has been incorrectly formulated. The main goal of campaign finance regulation articulated by legislators and judges has been to eliminate a certain kind of corruption from the political system. This corruption is described as a subtle kind of bribery where large campaign contributions are used to motivate particular kinds of legislative behavior.⁹ In addition to such actual *quid pro quo* corruption, *Buckley* identifies as a compelling state interest the desire to eliminate the appearance of such corruption. The appearance of corruption stems from "public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions."¹⁰ The Court reformulated and extended this corruption objective recently in *Nixon v. Shrink Missouri*

⁴ See Steven M. Gillon, "That's Not What We Meant to Do": Reform and its Unintended Consequences in Twentieth-Century America 234 (2000); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 Colum. L. Rev. 1390 (1994).

⁵ 424 U.S. 1 (1976) (per curiam).

⁶ See Daryl J. Levinson, *Market Failures and Failures of Markets*, 85 Va. L. Rev. 1745, 1756 (1999) ("Neither side has any patience with *Buckley's* contribution/expenditure distinction, which seems both unworkable in practice and normatively arbitrary—not a successful compromise on any account.").

⁷ See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 Tex. L. Rev. 1705 (1999).

⁸ See Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 Utah L. Rev. 311 (1998).

⁹ *Buckley*, 424 U.S. at 26–27.

¹⁰ *Id.* at 27.

Government PAC.¹¹ There it recognized “a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors.”¹²

The Court is struggling with an issue that has long beset judges and others attempting to distinguish corrupt activity on the part of government officials from politics as usual. At the extreme, corruption is easy to identify – in return for some private gain, a public official performs an act she would otherwise not perform. The problem arises when the act is one that the official probably would have performed whether or not she received the benefit, and/or when the benefit is something allowed by the political system, such as campaign contributions to officials whose policies and ideology the contributor supports. Dennis Thompson has worked to define corruption in these less obvious cases, a phenomenon he terms “institutional corruption.”¹³ The prototype of institutional corruption may be the Keating Five scandal of the mid-1980s where members of Congress provided particular attention and energy to the problems of Charles Keating and the Lincoln Savings and Loan. In part they provided these services because they believed federal regulators were behaving inappropriately and in part because they wanted to provide exceptional casework for an important constituent who had given them \$1.3 million in campaign contributions.

Thompson describes this episode as institutional corruption because virtually none of the legislators personally benefited; instead, they all received important political gain on account of their efforts. Arguably, none of the legislative activity in dealing with the banking regulators was inappropriate, although there is a strong appearance of favoritism: it seems unlikely that every constituent would receive such sustained energy and attention. In fact, the tactics used by the legislators, perhaps intimidating the regulators by threatening to oppose budget requests or by promising favorable legislative actions, may well have been inappropriate – illustrating that the manner in which legislators provide services may be relevant to a finding of institutional corruption.

Relying on the desire to eradicate institutional corruption as the guiding rationale for campaign finance reform efforts is problematic for reasons I will discuss in the first part of this lecture. The primary problem lies in the difficulty

¹¹ 528 U.S. 377 (2000).

¹² Id. at 389. See Richard L. Hasen, Shrink Missouri, *Campaign Finance*, and “*The Thing that Wouldn’t Leave*,” 17 Const. Comment. 483 (2000) (discussing impact of this reformulation).

¹³ Dennis F. Thompson, *Ethics in Congress: From Individual to Institutional Corruption* (1995).

of determining when a member of Congress is “too” compliant with the wishes of some of her constituents and when she is properly responsive to the people who elected her.

Because the notion of institutional corruption that seems to propel most campaign finance reform and that structures the court’s analysis is difficult to define precisely and may not be a concern usefully addressed through campaign finance reform without larger, and politically unlikely, changes in the distribution of wealth and other resources, we would do better to reformulate the objectives of campaign finance entirely. I propose that Congress shift its orientation and work to devise a system of campaign finance laws that empowers people to make decisions in their own interests. Congress would thus adopt as its guiding principle the objective of improving voter competence. A system dedicated to enhancing voter competence would enable citizens to get the information necessary to vote in accordance with their preferences and to hold politicians accountable for their decisions.

I will conclude my lecture by arguing that the objective of voter competence justifies a campaign finance system that regulates only through aggressive disclosure, but I will also suggest that such a system faces constitutional and logistical challenges. It is such challenges that should command our attention, not the hopeless task of enacting increasingly Byzantine restrictions on soft money, issue ads, and other political activity.

I. The Inadequacy of Current Corruption Rationale

The Court’s articulation of the corruption rationale – whether solely *quid pro quo* corruption or the apparently broader concern of *Shrink Missouri Government PAC* – lacks much specificity. It is clearly a corruption that is less “blatant and specific” than bribery itself, and therefore the Court believes that it requires more than bribery laws to police it.¹⁴ Because it is termed as corruption, this behavior evidently cannot be the type of activity that we find acceptable in a system of representative government. That distinction is important. Presumably, it is unproblematic – indeed, it is desirable – that the political system allows voters to signal to representatives what their preferences are and to support candidates that they believe will effectively represent their interests. If my senator works diligently and effectively to implement my views on an issue

¹⁴ See *Shrink Missouri*, 528 U.S. at 389. But see *id.* at 428 (Thomas, dissenting) (arguing that bribery laws are narrowly tailored to deal with any real corruption in the system).

important to me, I should be able to support her when she runs for reelection. If she does not, I should be able to use my money, my voice and my vote to support a challenger who more closely mirrors my preferences. The electoral connection is the main mechanism through which we ensure political accountability from elected officials.

So when is a representative “too” compliant, and when is she appropriately solicitous of her constituents’ desires? Is she acting corruptly when she votes according to the wishes of a minority of her constituents and not according to the wishes of a majority? Let us take that as the measure – although it is controversial because the representative might well be acting incorruptly if the minority intensely prefers one outcome and her other constituents do not care very much about this issue, or if the representative believes that the minority are right in their position on the issue. But for the sake of our analysis, let us assume that a vote that is inconsistent with the preferences of a majority of constituents would be corrupt. There is very little evidence that campaign contributions buy votes in this way. The main factors that determine a legislator’s vote are party affiliation, ideology, and constituent preferences. To the extent that a legislator’s voting behavior seems to mirror the interests of wealthy contributors, that reality seems to reflect that contributors send money to people with compatible perspectives and ideologies who would vote their way regardless of the campaign contribution.¹⁵

Thus, the influence of contributions on legislators must be much more subtle than the vote-buying scenario. A variety of possibilities have been suggested, only some of which I will mention here. Some political scientists have argued that contributions seem to result in more access for contributors, although that conclusion is contested.¹⁶ Others argue that contributions are linked to the amount of energy a legislator will spend on an issue. In other words, even without the contribution the legislator would vote in the same way,

¹⁵ See Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 Yale L.J. 1049, 1068 (1996) (discussing studies); Jeffrey Milyo, David Primo & Timothy Groseclose, *Corporate PAC Campaign Contributions in Perspective*, 2 Bus. & Pol. 75, 80 (2000). (“Studies that do attempt to control for ideological and constituent preferences find no evidence of any *quid pro quo* manifest in roll-call votes of members of Congress.”). But see E. Joshua Rosenkranz, *Faulty Assumptions in “Faulty Assumptions”: A Response to Professor Smith’s Critiques of Campaign Finance Reform*, 30 Conn. L. Rev. 867, 879 (1998) (arguing that campaign contributions can influence votes with respect to nonsalient issues that do not mean much to the politician or her constituents).

¹⁶ See, e.g., David Austen-Smith, *Campaign Contributions and Access*, 89 Am. Pol. Sci. Rev. 566 (1995).

but she would not work as energetically on the matter in committee without the additional incentive of campaign dollars.¹⁷ Others argue that the primary influence of money in politics is that it determines who will be the candidates and which of them will win office. Wealthy contributors make sure that elected officials are people who share their values and ideologies; hence, lawmakers' votes will not have to be bought because they will necessarily act in the interest of contributors when they follow their own preferences.¹⁸

All these explanations of corruption suffer from one general difficulty: there is no evidence that contributions close to the federal limit of \$1000 for individuals or \$5000 for political action committees pose the danger of even these limited sorts of "corruption." One never gets a sense either from the cases or the legislative deliberations that much systematic thought has been given to the level of campaign contributions that cause the threat of the actuality or appearance of corruption. The Keating Five scandal, the quintessential case of institutional corruption, involved contributions of approximately \$1.3 million in the mid-1980s.

Furthermore, the most convincing of these arguments – that money ensures the election of sympathetic politicians whose votes and attention will not have to be subsequently bought – appears to be a larger concern about equality in the political process.¹⁹ Well-funded interests can influence the recruitment and selection of candidates; they can manipulate the salience of issues that will dominate the public agenda; and they can shape other conditions of political engagement in a way that less wealthy people cannot. Although some organizations rich in human resources rather than cash can also influence

¹⁷ See Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 Am. Pol. Sci. Rev. 797 (1990). This empirical result is consistent with the more general finding that special interests and minority factions tend to be most successful at setting the policy agenda and determining the salience of particular issues than they are in actually changing votes. John W. Kingdon, *Agendas, Alternatives, and Public Policies* (2d ed. 1995).

¹⁸ See, e.g., Anthony Gierzynski, *Money Rules: Financing Elections in America* 95 (2000) ("Some groups, however, follow an electoral strategy in making their contributions to candidates. They attempt to influence government policy by changing the type of candidate elected. This strategy means supporting candidates who already agree with them. In this case, there is no need to use money to try to persuade a lawmaker to vote his/her conscience or constituency."). But see Jeffrey Milyo, *The Political Economics of Campaign Finance*, 3 Indep. Rev. 537, 539 (1999) (referring to studies that "neither candidate wealth nor campaign war chests deter challengers").

¹⁹ See David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 Colum. L. Rev. 1369 (1994) (arguing that the corruption rationale is essentially an equality argument).

political outcomes by delivering votes to candidates, economic power tends to result in disproportionate political power, a reality that is unsettling if we believe that economic resources are not a legitimate justification for political clout. Yet, campaign finance regulation, even the politically unlikely reform of complete public financing of elections,²⁰ will do little to change the ability of the wealthy to influence public opinion, the policy agenda, and legislative outcomes in a world where economic resources are unequally distributed and money is a crucial component of political and other influence. Even if achieving some amount of equality of influence through campaign contributions and expenditures is possible, other effective avenues of political influence exist and could be used in lieu of money in campaigns. Indeed, corporations and other wealthy interests spend relatively little for campaign contributions compared to other ways to seek access and affect the agenda, like lobbying, stirring up grassroots activity, broadcasting issue advertisements, and influencing the media.²¹

The more subtle and diffuse the “corruption” of the system, the more difficult it is to discover the right solution. Do other regulatory strategies offer more promise if Congress continues to view campaign finance laws as designed primarily to deal with institutional forms of political corruption? Although prophylactic rules are sometimes the solution to conflict of interest problems, we

²⁰ I do not discuss public financing as a reform option in this lecture for several reasons. First, it is extremely unlikely that Congress will adopt a broader system of public financing; even in states that have adopted limited systems, usually through popular votes, reform has been blocked by established players that must enforce and implement any system. For example, in Massachusetts, supporters of a public financing law that passed by popular vote have been forced to go to court to force elected officials to implement the new law. In addition, as long as public financing is only partial and private money remains a component of campaigns, candidates and their supporters will work to evade the restrictions of a system through independent expenditures and other familiar techniques of circumvention. See, e.g., Michael J. Malbin & Thomas L. Gais, *The Day After Reform: Sobering Campaign Finance Lessons from the American States* 90 (1998). But see Richard Briffault, *Public Funding and Democratic Elections*, 148 U. Pa. L. Rev. 563 (1999) (supporting public financing as preventing corruption and serving equality values).

²¹ See Milyo, et al., *supra* note 15, at 83–84 (finding that lobbying expenditures were substantially greater than money spent by PACs in campaigns, and charitable giving by corporations far outstripped either kind of expenditure). See also Martin A. Sullivan, *Trade Groups Spend Big Bucks Seeking, Getting Tax Changes*, Tax Notes, Sept. 10, 2001, at 1381 (providing data about lobbying expenditures and campaign contributions of major groups interested in tax code changes and showing that the amount of the former substantially exceed the latter). Issacharoff and Karlan fear that restrictions on campaign contributions will encourage wealthy interests to increase their use of other mechanisms for political influence, which they find problematic because they are not mediated by institutions like political parties. See Samuel Issacharoff & Pamela S. Karlan, *supra* note 7, at 1714.

often employ other means to deal with more subtle types of political corruption. One solution, proposed by John Nagle, is to require that representatives recuse themselves from voting on or participating in any legislation or other matter that directly affects those who contribute to their campaign.²² He argues that money itself is not a political evil—it can be used to fund political speech that increases public awareness of issues, just as it can be used to encourage voter turnout or serve other important civic goals. The problem, identified by Congress and the courts, is that money can have an inappropriate influence on legislative outcomes.

Nagle's solution is a creative one—and forces us to think about innovative approaches to campaign finance. But it seems both unworkable and undesirable. To the extent that campaign money buys energy and attention, rather than votes, it might be hard to enforce a recusal policy. A legislator intent on advancing the interests of a particular contributor could do so in many undetectable ways, while still recusing herself from the final vote or from overt participation in committee consideration or drafting. It may also be undesirable because the interests of the contributor usually mirror the interests of the legislator's constituents. A senator from Oklahoma may receive numerous contributions from oil and gas companies, but legislation that directly affects these companies is also of great importance and interest to her constituents. To recuse herself from the issue deprives her constituents of effective representation. If the recusal policy is a broad one, legislative business may be hard to conduct effectively. Nagle responds that the effect of recusal will be that contributions by interest groups will vanish—more likely they will be channeled in other directions.

The recusal proposal does encourage us to think of the corruption problem relevant to campaign finance as we do other problems of alleged distortion of the political process. In many cases, we adopt policies of aggressive public disclosure to allow the light to shine on political interactions and to enable

²² John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 Harv. J. on Legis. 69 (2000). Another intriguing reform proposal to serve the anticorruption and equality rationales is to mandate donor anonymity with respect to campaign contributions. See Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 Stan. L. Rev. 837 (1998). Inspired by the success of the secret ballot, Ayres and Bulow argue that anonymity would make it impossible for contributors to buy access or votes. This creative approach to campaign finance reform responds to the corruption concerns, but it undermines the objective of voter competence, which should be a substantial goal of any campaign finance regulation. For further discussion of how my view of reform and voter competence differs from that of Ayres and Bulow, see *infra* text accompanying note 36.

the public to judge any conflicts of interest and to hold elected officials accountable at the polls. Such was the answer to concerns about undue influence in the lobbying arena when Congress adopted the fairly aggressive Lobbying Disclosure Act of 1995.²³ Disclosure serves at least two functions. First, if the activity is indeed corrupt it may wither in the light of day.

Second and more importantly, disclosure is an effective solution if the existence of institutional corruption is not clear-cut but rather a question of degree – when does influence that is usually appropriate in an electoral system where voters can reward faithful legislators with both their votes and their campaign contributions suddenly become unacceptable because it causes legislators to become *too* compliant? As the previous analysis has suggested, the answer to this question will vary from voter to voter and from situation to situation. In that case, a ban on the activity will necessarily be both under- and over-inclusive, while disclosure can allow voters to tailor their behavior accordingly. Thus, disclosure is a promising regulatory tactic if Congress and courts continue to believe that corruption is the primary aim of campaign finance laws. Disclosure statutes also serve the more concrete objective of empowering voters so that they use their vote effectively. In my view, that is the best objective of campaign finance reform, whether it is pursued by the Congress, or it is used to shape the judicial review of the legislative product.

II. Voter Competence as the Objective of Campaign Finance Reform

Although disclosure may be an effective response when the legislative objective is institutional corruption of the sort discussed in *Buckley* and *Shrink Missouri*, it can also be justified by an independent rationale: the objective of improving voter competence. Improving voter competence is a goal of campaign finance regulation alluded to in the *Buckley* opinion when the Court upheld, albeit in a narrowed form, the disclosure requirements of the Federal Election Campaign Act. In addition to finding that disclosure helped to combat *quid pro quo* corruption by exposing large contributions and expenditures to the “light of publicity,” the Court held that disclosure “provides the electorate with information ‘as to where political campaign money comes from and how it is

²³ Pub. L. 104–65, 109 Stat. 691 (codified at 2 U.S.C. 1601–7). Disclosure is not always the solution to these conflict of interest problems. For example, Congress chose to ban honoraria for certain legislative and executive branch officials rather than requiring only disclosure. See The Ethics Reform Act of 1989, 5 U.S.C. 501, 505, held unconstitutional in part in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995).

spent by the candidate' in order to aid the voters in evaluating those who seek federal office."²⁴

As we assess this new reform objective, it is important to be precise in what we expect of voters in terms of their capacity to process, evaluate, and act on information. If all voters are highly motivated when it comes to politics and willing to become sophisticated participants, then the structure and amount of information may be relatively unimportant. Citizens will have the skills to find relevant information and to sift through it to determine what is credible and what is not. Of course, if voters behaved in this fashion, campaign finance regulation would be much less necessary because these civically virtuous and informed citizens could disregard overblown campaign rhetoric and vote on the basis of the candidates' positions on important issues. Although structured disclosure is not likely to significantly improve the voting decisions of such voters, it may benefit them somewhat. Additional information could marginally improve their competence or allow them to spend less time acquiring and understanding the information necessary for them to vote competently.

The concern about voter competence is not directed at the voters who fit the description of the model voter, but at the majority of citizens who do not. These people should not be criticized or penalized for failing to live up to the ideal of civic virtue. Rather, reformers should seek to empower them to make competent political decisions, taking account of the reality that most people have important priorities in their lives other than elections and politics. They search for time to spend with family, to enjoy relaxing leisure activities, and to put in the hours required for satisfying work. Everyone has limited time and attention; using those resources to better understand candidates and political issues means that the resources are not available for other competing life activities. It is not surprising that people would rather spend time with their families, instead of surfing the Net to research the platforms of all the candidates for all offices on the ballot.

Even this group of people—the non-civically virtuous citizens—is not monolithic but exhibits a variety of characteristics relevant to voting and political participation.²⁵ Some of these people not only are uninterested in information about candidates and issues, but they are also unwilling to expend the time and

²⁴ *Buckley*, 424 U.S. at 66-67.

²⁵ I appreciate conversations with Dan Ortiz on this point.

energy to vote.²⁶ They are likely to ignore any additional political information, although they may occasionally encounter some data that convinces them to participate because they learn that the election implicates an important interest. Other citizens in this group are largely rational people who have priorities other than acquiring information about politics and governance, although they are willing to vote. They want to select the candidates who will pursue policies that implement their preferences, so they seek shortcuts to help them cast such a ballot without spending a great deal of time studying the candidates or the issues. It is this group of voters that should be the primary target of campaign finance reform.

The key to helping these voters is to figure out what information will enable them to vote competently with limited information, that is, to vote as they would if they had full information. Political scientists and cognitive psychologists have worked to figure out what shortcuts or heuristics ordinary citizens can use to cast ballots competently. They note that the structure of elections helps a great deal: voters are presented with binary choices, by and large, which reduce the requirements for voter competence significantly. Studies have also begun to suggest that there exist simple and either widely-available or capable-of-becoming-widely-available pieces of information that allow voters to cast the same votes they would have cast if they had the most accurate information about the consequences of their electoral choices.²⁷ So what are the helpful bits of information?

First, and most importantly, is the party cue, which appears on most state ballots in the general election. Anthony Downs argued that party identification is a shortcut for voters, allowing them to economize on information about issues. Parties invest resources in developing and communicating a “verbal image of the good society and of the chief means of constructing such a society”²⁸ so that voters can sort candidates on this basis without learning the candidates’ precise positions on particular issues. A candidate’s party affiliation is the strongest and

²⁶ The voting paradox has long interested and confounded rational choice scholars who argue that no rational person should incur the costs of voting because no one vote will affect the outcome of the election. See Kenneth A. Shepsle & Mark S. Bonchek, *Analyzing Politics: Rationality, Behavior, and Institutions* 251–58 (1998) (discussing paradox and possible explanations for the fact that “in the real world of mass elections there is considerable participation”).

²⁷ See Arthur Lupia, *What We Should Know: Are Ordinary Citizens Competent to Make Extraordinary Choices* (April 2001) (unpublished manuscript).

²⁸ Anthony Downs, *An Economic Theory of Democracy* 96 (1957).

most accurate voting cue for the electorate, and its strength has increased recently as the two major parties have moved somewhat farther apart on issues.²⁹ In addition, incumbency is a strong voting cue (and is sometimes apparent from the ballot), although it is unclear if reliance on this cue will improve voter competence.³⁰

It turns out another effective voter shortcut is relying on information that reveals which groups support a candidate and the intensity of their support. Voters often use group affiliation as a heuristic, relying either on information about a candidate's membership in groups or on knowledge about interest group endorsements.³¹ Consider for a moment the National Rifle Association or the Sierra Club. These groups provide a service to their members of developing a program to implement certain ideological or policy goals, and their leaders spend time determining which candidates and ballot questions will further those goals. NRA and Sierra Club members have delegated this task to their leaders, and they derive satisfaction from limited participation in an organization devoted to these objectives. Moreover, the groups have an incentive to make sure the public knows what they stand for, so that all citizens who care about these issues have a reason to become dues-paying members. Ordinary voters can free-ride on all this information, determining what programs candidates are likely to implement from data about groups' financial support of candidates and endorsement patterns.

²⁹ See, e.g., David G. Lawrence, *On the Resurgence of Party Identification in the 1990s*, in *American Political Parties: Decline or Resurgence?* 30 (J. E. Cohen, R. Fleisher and P. Kantor eds., 2001) (finding a resurgence in mass partisanship in the 1980s and 1990s, although the recovery has not completely eliminated the decline that occurred in the 1960s and 1970s); Gary C. Jacobson, *Party Polarization in National Politics: The Electoral Connection*, in *Polarized Politics* 9 (J. R. Bond and R. Fleisher eds., 2000). See also James H. Kuklinski & Paul J. Quirk, *Reconsidering the Rational Public: Cognition, Heuristics, and Mass Opinion*, in *Elements of Reason* 153 (A. Lupia, M. D. McCubbins and S. L. Popkin eds., 2000) (in a piece generally critical of voting heuristics, noting that the party cue is an accurate heuristic that improves voter competence).

³⁰ Another dubious voting cue that seems to influence electoral outcomes is the order of the names on the ballot. Some voters are more likely to vote for the first person on the list of candidates. See Paul Allen Beck & Marjorie Randon Hershey, *Party Politics in America* 210 (9th ed. 2000).

³¹ See Michael X. Delli Carpini & Scott Keeter, *What Americans Know About Politics and Why It Matters* 51 (1996) (describing the use of membership in groups as a shortcut to broader conclusions about ideology); Paul M. Sniderman, Richard A. Brody & Philip E. Tetlock, *Reasoning and Choice: Explorations in Political Psychology* 113 (1991) (noting that voters can draw conclusions about ideology and positions on particular issues from knowledge of the groups to which candidates belong).

Not only ideological groups provide helpful information for voters; knowing which economic interests support particular candidates and the strength of their support, measured in dollars, also serves as a heuristic for voters. Firms work to advance the interests of their shareholders, and it is often clear to voters with a knowledge of everyday life which general policies will help major industries and which will hurt them. In a study of voting on insurance-related ballot initiatives, political scientist Skip Lupia compared voters who knew nothing about the initiatives' details but knew the insurance industry's preference, with voters who were "model citizens" in that they gave consistently correct answers to detailed questions about the ballot questions. He also included in the study a third group of voters who knew nothing about the ballot question or about the insurance industry's position. The first two groups of voters demonstrated similar voting patterns, while the completely ignorant voters had very different voting patterns.³² This finding, supported by other studies, convinced Lupia that the position of a group with known preferences on an issue or a candidate can serve as an effective shortcut for ordinary voters, substituting for encyclopedic information about the electoral choice.³³ This cue may be less helpful than the cue provided by ideological groups, both because some economic interests contribute to both parties³⁴ and because firms do not invest in a political brand name in the same way that policy groups do. Nonetheless, the information that the steel industry strongly supports a candidate might allow voters to draw valid inferences about her views on trade

³² Arthur Lupia, *Shortcuts versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 Am. Pol. Sci. Rev. 63 (1994). See also Paul Milgrom & John Roberts, *Relying on the Information of Interested Parties*, 17 Rand J. Econ. 18 (1986).

³³ This information may be critical in the context of ballot questions, where the party cue is unavailable, or in primary battles, where the party cue provides no distinguishing information.

³⁴ The phenomenon of double-giving is unlikely to cause a significant impediment to using economic groups' support as a voting cue, however. Even groups that give to both parties tend to favor one over the other, see Public Campaign, *Whoever Wins, They Win: Double-Giving in the Presidential Campaign* 1 (2000); Common Cause, *You Get What You Pay For* (2000), and the double-givers are prevalent in only a few industries, see Press Release of Public Campaign, *Whoever Wins, They Win, Double-Giving in the Presidential Campaign*, March 3, 2000 (noting that double-giving is a practice mainly of the financial industry, communications firms, and law firms). See also Victoria A. Farrar-Myers & Diana Dwyre, *Parties and Campaign Finance*, in American Political Parties: Decline or Resurgence? 138, 160 (J. E. Cohen, R. Fleisher & P. Kantor eds., 2001). Moreover, the data seem to indicate that double-giving is observed more at the national party level or the presidential level than it is in races for other offices. The data about trends in double-giving do suggest that some firms allocate most of their money to incumbents, no matter what their ideology, which may weaken the strength of this voting cue. See, e.g., Brody Mullins, *The Democrats' New Donations*, Nat'l J., Sept. 22, 2001, at 2928.

policy, just as the information about the oil and gas industry's support might allow valid conclusions about the candidate's support for certain tax preferences.

Information about campaign contributions is particularly helpful for voters seeking to rely on such a shortcut because a contribution is an observable and costly effort on the part of the contributor. Thus, it is more credible than cheap talk, and it allows voters a sense of how important the election of a particular candidate is for the interest group. This insight from sophisticated studies produced by political scientists, economists, and psychologists is just a scholarly way to say that voters understand that "actions speak louder than words." This insight suggests that limitations on the amount of money that groups can contribute to a candidate substantially reduce the helpfulness of the information.³⁵ If no one can give a candidate more than \$1000 or \$5000 per election, then the signal provides less information to voters seeking to measure the intensity of preferences. Changing our perspective to one of voter competence causes us to view money in the political system not primarily as a method of control, but primarily as information – for both elected officials and voters.

In short, it turns out that for busy people information about the identities of people and groups spending money to support or oppose candidates and the amount of money they are spending can be much more helpful than detailed information about complex issues and platforms. This conclusion differs from those of some law professors and political philosophers who argue that we should expect voters to develop full and accurate information on candidates' positions on the issues. As Ian Ayres and Jeremy Bulow have written: "It might be more conducive to democratic deliberation for voters to learn about a candidate's positions on policy matters rather than to learn whether Jane Fonda or the NRA contributed to the candidate's campaign."³⁶ In a perfect world, we might expect voters to live up to the ideal of civic virtue this statement presumes. But we do not live in a perfect world, and real reform should take the world as we find it and try to implement improvements within present realities. In the real world, it may substantially improve the electoral decisions of citizens if they

³⁵ See Jeffrey Milyo, *supra* note 18, at 542–43 (discussing how campaign expenditures reflects one way to communicate intensity of preferences).

³⁶ See Ian Ayres & Jeremy Bulow, *supra* note 22, at 877. See also Lillian R. BeVier, *Mandatory Disclosure, "Sham Issue Advocacy," and Buckley v. Valeo: A Response to Professor Hasen*, 48 UCLA L. Rev. 285, 303 (2000) (wondering, from a classically liberal perspective, about the "marginal value to voters of information about who or what organizations support a candidate as compared to the value of information about what issues the candidate supports").

know that Jane Fonda supports one candidate and Ross Perot a different one—or that the NRA supports one candidate and the Sierra Club a different one. Moreover, knowing that the NRA or Sierra Club gave most of the money for a campaign or a disproportionate contribution to a candidate is even more helpful as a shortcut. Disclosure, just like any form of regulation of the political process, will work best when it empowers all citizens, not just those willing to make the sacrifices of time and energy required to become political experts.

Voting cues must provide accurate information to voters in order to empower them; that is, the limited information that citizens obtain must allow them to draw correct conclusions about the ideology and future behavior of a particular candidate. How likely is it that these voting heuristics will lead to inaccurate conclusions, perhaps because voters are misinformed about the groups' objectives or ideologies or because voters are manipulated by wily political operatives? This is a legitimate concern, in part because most voters will not spend a great deal of time verifying information or probing to learn more than superficial data or information that they obtain as a byproduct of their everyday activities. That is, after all, why they rely on shortcuts in the first place. Thus, they are more susceptible to misinformation than civically virtuous voters. The concern would be heightened if empirical analysis suggests that manipulation of disclosure results in the dissemination of inaccurate information that actually reduces the competence of voters who are currently voting competently, or that it prompts people who currently decline to vote to go to the polls and cast their ballots in ways contrary to their own self-interest.

More study of voting heuristics is required to respond fully to these concerns. The concern about misinformation may be significantly alleviated because a great deal of the information on which voters will rely is itself a byproduct and thus not as subject to strategic manipulation. Ideological or policy groups have an incentive to develop distinct political brand names in order to attract members and shape the political agenda, and firms pursue their interests assiduously in order to maximize shareholder wealth. These groups have incentives to correct any misinformation produced by opponents or others. These incentives will increase in a world of expanded disclosure, just as the incentives for strategic manipulation will increase. Moreover, the misinformation campaigns themselves may produce valuable cues for voters. If a group attempts to mischaracterize the views of the Sierra Club, for example, their campaign may more credibly reveal their objectives, particularly as the Sierra Club works to clarify its position. Because effective disclosure statutes should require that the

source of all political speech around the time of an election be revealed,³⁷ voters will learn a great deal about the motives of the attack group, and then they can use that information as a voting cue with regard to candidates whom the attack group supports.

This discussion reveals another concern with these voting cues. Voters learn only about firms and groups that are powerful in the political and economic arenas, and they draw conclusions from certain issues and positions that are made salient because of the activities of these groups. Thus, economic clout and organizational power are strong determinants of what issues shape the policy agenda and are available for people searching for voting heuristics. For example, gun control may not be an issue that interests most people, but it still dominates the policy agenda relative to issues that more people care about because a few have intense preferences on gun control. This objection is a reformulation of the general observation that money influences politics profoundly in ways other than financing campaigns. Regulation of the political process can do little to alter this reality absent larger shifts in the economic and social landscape. Moreover, the objection in this context may be only a weak indictment of voting cues. Perhaps the majority of voters do not care much about gun control, but a candidate's position on this issue may reveal information about her general ideology and thus provide voters helpful and accurate data about her likely votes on other issues.³⁸ Combined with information about the support of other groups, voters may be able to quickly and easily form an accurate picture of the candidate's preferences and perspectives.

Coming to the broad conclusion that disclosure is the only justified type of campaign finance regulation only begins the hard work. Any disclosure proposal will face constitutional challenge, and there are logistical problems to be worked out. In the final section of this lecture, I hope to identify some of these hurdles and to suggest some ways to overcome them.

III. Concerns about Disclosure Laws

The Supreme Court has been asked to pass on the constitutional validity of disclosure statutes affecting political speech and campaign contributions. In *Buckley v. Valeo*, where the Court upheld disclosure requirements applying to

³⁷ See *infra* text accompanying notes 56 through 58.

³⁸ See Elizabeth Garrett, *The Law and Economics of "Informed Voter" Ballot Notations*, 85 Va. L. Rev. 1533, 1545 (1999) (making this point with respect to candidates' positions on term limits).

contributions and some independent expenditures, it applied “exacting scrutiny,” looking for an important state interest to justify the regulation and for a “ ‘relevant correlation’ or ‘substantial relation’ between the government interest and the information required to be disclosed.”³⁹ A more recent case dealt with disclosure issues in the context of the petition circulation stage of the initiative process. In *Buckley v. American Constitutional Law Foundation*,⁴⁰ the Court struck down a requirement that petition circulators wear name badges and also a requirement that reports filed with the state reveal the names, addresses and compensation paid to individual circulators. The Court strongly suggested, however, that disclosure of the identity of the proponents of a ballot question and the total amount of money spent for a petition campaign, which would include the aggregate figure paid to circulators, was appropriately aimed at the state’s substantial interest in controlling the domination of the initiative process by special interests.⁴¹ In her partial dissent in this second *Buckley* case, Justice O’Connor characterized disclosure laws as the “ ‘essential cornerstone’ to effective campaign reform.”⁴² She expressly noted that disclosure of the amounts and sources of campaign contributions and expenditures “assists voters in making intelligent and knowing choices in the election process.”⁴³

Thus, current jurisprudence contains strong hints that disclosure statutes would be found constitutional using a state interest similar to the concern with voter competence I have identified. Any disclosure statute should be narrowly tailored to provide only the information most necessary for voter competence. This requirement is important not only to allow the law to pass the constitutional test, but it is also crucial to the effectiveness of the statute. It would be counterproductive to draft a disclosure law that overwhelms voters with information so that unhelpful data threaten to drown out valuable voting cues. Small contributions and expenditures are not generally informative to voters, so the disclosure statute could exempt individuals and groups that spend insubstantial amounts in this arena. Such an exemption would have the additional benefit of reducing compliance costs for small organizations that can

³⁹ 424 U.S. at 64.

⁴⁰ 525 U.S. 182 (1999).

⁴¹ *Id.* at 202–3.

⁴² *Id.* at 223 (O’Connor, dissenting in part) (quoting H. Alexander, *Financing Politics: Money, Elections and Political Reform* 164 (4th ed. 1992)).

⁴³ *Id.* at 224. Similarly, in dictum in *First National Bank of Boston v. Bellotti*, a case striking down prohibitions on corporate expenditures in issue campaigns, the Court noted that “[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected.” 435 U.S. 765, 792 n.32 (1978).

find the administrative hassle of regulations burdensome.⁴⁴ Any such exemption must be carefully constructed to be high enough to exempt small contributions, but not so generous that large contributors could structure their giving through various conduits in amounts small enough to evade disclosure mandates.

Such an exemption might also allow any disclosure statute to clear another possible constitutional hurdle found in cases providing First Amendment protection to some forms of anonymous political speech. In *McIntyre v. Ohio Elections Commission*,⁴⁵ the Court affirmed Mrs. McIntyre's right to disseminate an anonymous leaflet containing her views on a referendum proposing a school tax levy. Many commentators think it likely that the strongest version of the holding will be limited to individuals attempting to get a political message out and preferring to do so anonymously, and that it will not be extended to invalidate disclosure statutes that are ubiquitous features of the election law landscape in all the states and the federal government.⁴⁶ An exemption for relatively small contributions and expenditures will cover most, if not all, of the people like Mrs. McIntyre who desire to engage in small-scale anonymous political speech.

Any disclosure statute will also have to contain a second kind of exemption to protect groups that fear retaliation because the ideas they promote are violently disliked by the majority. Drawing on *NAACP v. Alabama*,⁴⁷ the Court in *Buckley v. Valeo* required that minor parties be allowed an exemption from disclosure if they presented specific evidence of hostility, threats,

⁴⁴ See Bradley A. Smith, *supra* note 15, at 1082-83 (arguing that any sort of regulation disadvantages grassroots movements relative to the wealthy because "regulation favors those already familiar with the regulatory machinery and those with the money and sophistication to hire the lawyers, accountants, and lobbyists needed to comply with complex filing requirements"). See also *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (Brennan opinion raising related concerns with requirement that even small ideological nonprofit corporations use segregated funds for political expenditures).

⁴⁵ 514 U.S. 334 (1995).

⁴⁶ See, e.g., Trevor Potter, *Buckley v. Valeo, Political Discourse and the First Amendment*, 33 Akron L. Rev. 71, 86 (1999). But see *Griset v. Fair Political Practices Commission*, 69 Cal. App. 4th 818 (Ct. App. 1999), *rev'd on other grounds*, 107 Cal. Rptr. 2d 149 (2001) (reading *McIntyre* very broadly to protect anonymous political communications by candidates). We may have a better sense of the breadth of the *McIntyre* holding when the Court renders its decision in a case this term challenging an Ohio statute that requires people who are advocating political, religious, and other causes door-to-door to wear nametags. *Watchtower Bible and Tract Society of New York v. Village of Stratton*, 240 F.3d 553, cert. granted, 2001 WL 575663 (2001).

⁴⁷ 357 U.S. 449 (1958).

harassment and reprisals.⁴⁸ A few years later, the Court applied that exemption to the Socialist Workers Party after the Party submitted proof of threatening phone calls, hate mail, destruction of property, police harassment, and shots fired at an office.⁴⁹ Certainly, a similar exemption must be included in any new campaign finance disclosure law.

Another set of groups is also likely to resist disclosure, not because they fear the sort of retaliation suffered by true political outcasts like the Socialists, but because they are just disliked by the public. These groups would prefer that their support of candidates remain private because they fear voters armed with this information might react by voting against their favored candidate. For example, empirical evidence reveals that in some issue campaigns, the expenditure of a great deal of money by a disliked group, such as a cigarette manufacturer or an insurance company, may backfire and actually produce more negative than positive votes.⁵⁰ Such firms appear to be seeking to avoid complete disclosure under the Lobbying Disclosure Act because they do not want most people to know how important it is to them to resist certain legislative actions.⁵¹ Given their reputations, public knowledge of their positions may well cause a grassroots reaction contrary to the outcomes they prefer.

With respect to these groups that are widely disliked by the public, forced disclosure is likely to produce two effects relevant to the First Amendment analysis. First, it will chill some of the speech that disfavored groups would otherwise fund through contributions and expenditures. Ironically, the improvement in voter competence produced by disclosure of contributions by such groups is likely to be greater than the effect of disclosing other sources of contributions and expenditures. These disliked groups resist disclosure precisely because they know that voters have a good idea of the policies they promote. In other words, the chilling effect here is particularly great because this information is so directly linked to voter competence, so the greater burden on speech may be counterbalanced by the correspondingly greater enhancement in voter competence.

⁴⁸ *Buckley*, 424 U.S. at 74.

⁴⁹ *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982).

⁵⁰ Shaun Bowler & Todd Donovan, *Demanding Choices: Opinion, Voting, and Direct Democracy* (1998).

⁵¹ See William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 313–14 (3d ed. 2001).

Second, disclosure statutes are likely to encourage such disfavored groups to adopt strategies to circumvent them.⁵² Drafters of disclosure statutes must work to anticipate these concealment tactics and try to discourage them. Groups and businesses could organize coalitions with benign sounding names – Americans for a Strong Future – and channel money to candidates through these shell organizations. In response, disclosure statutes attempt to pierce these veils. For example, current FCC regulations governing paid political issue advocacy broadcast by television and radio stations require disclosure of the “true identity” of the entity paying for the ads and that stations make available to the public the list of officers or the board of directors of any corporation or group behind the ads.⁵³ And, the Lobbying Disclosure Act requires disclosure not only of the coalition that employs a lobbyist, but also of the name of any organization that contributes more than \$10,000 toward the lobbying activities and that “in whole or in major part plans, supervises, or controls such lobbying activities.”⁵⁴

Such provisions may be somewhat successful at ferreting out the real source of political money, but determined groups can use a series of shell organizations to conceal themselves. The hope is that the media, challengers and voters will demand to know the real parties in interest when contributions and expenditures seem to come from groups with banal and uninformative names. In addition, it will be costly for groups to construct an impenetrable veil by using a string of sham organizations to evade provisions designed to pierce through at least a few. This cost should reduce the amount of strategic behavior somewhat.

Any provisions that seek to pierce the veils provided by sham organizations or to attribute the actions of individuals to a larger organization that directs their efforts must be carefully drafted to ensure that they operate fairly. For example, what is the appropriate regulatory response to evidence that an organization called “Americans for a Strong Future” has contributed hundreds of thousands of dollars to a candidate’s campaign and that all the members of the coalition are also active members of the National Rifle Association? Should the contribution of the coalition be imputed to the NRA? Perhaps, but that attribution may be erroneous. After all, people join the NRA because of ideological commitments, and it would not be surprising if they

⁵² This circumvention is apt to be substantially reduced relative to the current regime where parties work to circumvent substantive limitations on contributions. See Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. Davis L. Rev. 663, 689 (1997).

⁵³ See 47 C.F.R. 73.1212 (1998). See also Trevor Potter, *supra* note 46, at 91–92 (discussing the regulations).

⁵⁴ Sec. 4(b)(3).

engaged in other forms of collective action, some of which is unrelated to their involvement in the NRA.⁵⁵ For such attribution, the disclosure statute should require more evidence than mere shared membership in other ideological or policy groups.

A second route for circumventing a disclosure statute is to take advantage of any gap in coverage. Current federal disclosure laws contain gaps, some the result of judicial cases rather than drafting errors. For example, although it upheld disclosure of some independent expenditures, the *Buckley* Court limited this disclosure to money used for communications that expressly advocate the election or defeat of clearly identified candidates. Many argue that groups have taken advantage of this loophole to produce issue advertisements that are the virtual equivalent of express advocacy and to broadcast them in the days around an election.⁵⁶ These issue ads come very close to taking a position on a candidate while avoiding the so-called magic words of *Buckley*⁵⁷ that are seen as the test to differentiate disclosed from undisclosed expenditures.

This possible avenue of circumvention can be blocked to some extent. An aggressive statute should require disclosure of the organizations funding all political speech, not just those currently classified as express advocacy, and the amount of their expenditures. Broadened disclosure requirements should be limited to advertisements disseminated during the heat of the campaign since voters are likely to pay attention to voting cues only around the time of elections.⁵⁸ But even with a temporal limitation and an exemption for groups spending only a small amount of money on political speech, these disclosure provisions will raise the First Amendment stakes considerably. Such laws concern expenditures more directly related to core political speech than do disclosure provisions affecting contributors and the amounts they contribute to candidates, and thus enhanced disclosure will receive more exacting scrutiny from courts.

⁵⁵ This problem is similar to the one faced currently in the context of bundling, a practice that can be used to circumvent limitations on PAC contributions.

⁵⁶ See Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 Tex. L. Rev. 1751 (1999); Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. Rev. 265 (2000).

⁵⁷ 424 U.S. at 44 n.52.

⁵⁸ Richard Briffault also includes a temporal limitation in his proposal to regulate issue advertisements, although his reform proposal is motivated by equality and corruption concerns, not primarily by the objective to improve voter competence. See Richard Briffault, *supra* note 56, at 1782–87.

Convincing arguments tied to voter competence can be offered to support disclosure of the source of political speech and the amounts spent on advertisements concerning issues as well as those directly discussing particular candidates. Linking issue ads to their authors provides an environment with more information about groups and their ideologies, policies, and positions. That knowledge serves as the background that allows voters to construct and use accurate voting cues. Knowing that doctors oppose certain health reform changes or that trial lawyers oppose certain tort reform can help establish voting cues for citizens when they learn that these groups are large contributors to political campaigns. Aggressive disclosure of the groups behind large-scale political advertising run around the time of a candidate election can be justified with rationales similar to those used to support disclosure of the source of advertisements run in the heat of issue campaigns. In both cases, regulation is aimed primarily to empower people and provide information.

Before I conclude, let me address one obvious response to my argument in favor of disclosure statutes, a response that I have neglected even though it is in many ways the first question we should answer: Why require disclosure by law at all? If self-interested, rational political actors know that the information I describe will be helpful to voters and will change voting patterns, don't these same actors have powerful incentives to discover the information themselves and publicize it? At the least, won't challengers, the media and other political entrepreneurs demand that candidates identify major contributors and the intensity of their support as measured by the amount of their contributions? If politicians decline to provide the information, then voters can take that silence into account when casting their ballots, just as voters can discount the credibility of any political advertisement that does not disclose who is behind the communication.⁵⁹ This objection to disclosure statutes – which, as I have acknowledged, will result in chilling some core political speech that would have occurred anonymously – is a serious one. In the end, although I believe that a great deal of information might be disclosed without any legal requirement to do, on balance, a statute ensuring the fullest possible disclosure is warranted for several reasons.

First, a voluntary disclosure system does not entirely meet the demands of voter competence. Challengers and the media have incentives to discover and publicize potentially embarrassing or negative information about the sources of opponents' funds, but other more neutral information may also serve as valuable

⁵⁹ See *McIntyre*, 514 U.S. at 348–49.

cues for voters. In other words, a challenger may reveal that the NRA is backing the incumbent's campaign, which will be helpful in a positive way for some voters and in a negative way for others, but may not think information about business or corporate backers produces the same political "gotcha." Disclosure will be spotty, as challengers and media seek to find information that will produce a backlash against incumbents, and as candidates will try to disclose only favorable information about their own source of funds. A candidate who discloses nothing does send an interesting signal about her credibility, but my concern in this arena is not so much with institutional corruption as with voter competence – which is served primarily by obtaining particular pieces of information, not by drawing inferences from silence.

Second, relying on Democrats to reveal negative information about Republicans and vice versa may be insufficient if the sophisticated political players decide it is in their collective interest to avoid this line of attack. Currently candidates will sometimes avoid raising extremely controversial issues during a campaign, even though highlighting such an issue may attract additional voters, because they fear similar attacks from their competitors. Furthermore, making controversial issues a salient part of campaigns may antagonize as many voters as they attract. Some voters will oppose a candidate because she is financed by the NRA, but others will view this as positive information about the candidate. Certainly, there will be entrepreneurs who will defect from any tacit agreement to avoid disclosing relevant information about funding sources to voters, but the possibility of this collusion-like behavior reduces the effectiveness of any completely voluntary system.

Third and perhaps most importantly, there are systemic values to a legal regime committed to disclosure. Not only can a system characterized by disclosure laws ensure that information is provided in a timely way and in a central location that makes discovery relatively simple. It also sends a powerful signal to voters and others that democratic institutions are intentionally designed to empower voters by providing them data necessary to make good judgments in the voting booth. Just as disclosure in the corporate realm improves confidence in the economic system and demonstrates values undergirding the economy, disclosure can serve the same function in the political realm.⁶⁰

⁶⁰ See Louis Loss & Joel Seligman, *Securities Regulation* 169–93 (3d ed. 1998) (discussing disclosure laws in the securities field as well as arguments against mandatory disclosure given the incentives for voluntary disclosure).

IV. Conclusion

In the end, the concern justifying any regulation of the political process is to ensure that institutions of governance hold representatives accountable to the people for their decisions. In that way, we ensure the integrity of the process. Justice Brennan once referred to the right to vote as a linchpin right because it is “the right that is preservative of all rights.”⁶¹ As the Justice recognized in numerous decisions affecting campaign finance, voting procedures, redistricting decisions, and political speech, the conditions under which voters act determine their power and influence. And those conditions are shaped by the view the Court and other government institutions take of the First Amendment. As he explained the Court’s task in resolving conflicting interests under the First Amendment, Brennan wrote: “The illuminating source to which we turn in performing the [balancing] task is the system of government the First Amendment was intended to protect, a democratic system whose proper functioning is indispensably dependent on the unfettered judgment of each citizen on matters of political concern.”⁶² Enhancing the ability of voters to make good judgments when they select their representatives should be the primary, and perhaps the sole, aim of the campaign finance system. It is my hope that this objective, and a system designed to further it, will be the future of campaign finance laws in the Congress, the state legislatures, and the courts.

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⁶¹ *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966).

⁶² *Elrod v. Burns*, 427 U.S. 347, 371–73 (1976) (case dealing with political patronage).

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