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CAMPAIGN FINANCE DISCLOSURE AND THE LEGISLATIVE PROCESS

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*This Article analyzes an underappreciated and oft-overlooked method of campaign finance regulation: the use of reporting and disclosure requirements. Although disclosure has long been overshadowed by more prominent forms of campaign finance regulation, disclosure requirements have recently begun to receive new attention as the Supreme Court has signaled an increasingly skeptical attitude toward direct restrictions on the use of campaign funds. This Article demonstrates that both sides of the campaign finance debate have failed to recognize the full range of possible disclosure schemes, and it argues that a particular set of disclosure requirements can have a much more dramatic effect on the legislative process than has previously been recognized. Applying these insights, the Article shows that a carefully crafted disclosure scheme can offer an effective solution to the problem of quid pro quo corruption (*i.e.*, political bribery) and can overcome serious constitutional concerns about retaliation against those who support unpopular views, while at the same time providing public officials with more detailed information about the needs and preferences of the citizens they represent.*

The public debate over campaign finance reform has at its core a very serious and troubling contradiction. Advocates of campaign finance restrictions decry the subversive effect of money on politics, an effect which they claim undermines the egalitarian ideal of democracy by giving wealthy interests greater access to public officials and greater influence over electoral and policy outcomes.[1] In recent years, the campaign finance reform movement has sought to address this problem by pushing for increasingly detailed reporting and disclosure requirements for campaign contributions.[2] Yet an unintended effect of these requirements is to make it easier for political candidates to trace their vital financial support back to the individual donors who, in turn, can demand various favors in exchange for their continued support.[3] Thus, the current prevailing approach to campaign finance regulation—favoring complete disclosure—is ultimately self-defeating.

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[1] *See infra* Part I.A.

[2] *See* Elizabeth Garrett, *Voting with Cues*, 37 U. RICH. L. REV. 1011, 1011 (2003) ("[T]he campaign finance reform eliciting nearly uniform support has been disclosure of the source and amount of campaign contributions and expenditures.") (reviewing BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE (2002)). For a review of recent trends toward increased disclosure, see *infra* Part III.A.

[3] *See* discussion *infra* Part I.B.

This Article argues that those debating the merits of campaign finance reform have largely failed to recognize the full range of possible disclosure schemes or how a particular set of disclosure requirements can have a dramatic effect on the legislative process. The issue of disclosure is not a simple question of whether or how to achieve "full disclosure." Rather, the choice of a particular disclosure scheme can allow for careful and nuanced control over precisely what information is made available to public officials to help them legislate in the public interest and, perhaps more importantly, what information is concealed from them to prevent decisions from being made on corrupt or improper grounds.[4] The choice of a particular disclosure scheme thereby plays a crucial role in shaping the legislative process, and a more rigorous approach to the disclosure problem requires regulators to confront difficult questions about the nature of political corruption and the essence of democracy.

Although questions of disclosure have long been overshadowed by the contentious debates over contribution limits and other, more prominent forms of campaign finance regulation, the promise and problems of disclosure recently have begun to receive increased attention. Early decisions by the Roberts Court have signaled an increasingly skeptical approach toward the constitutionality of contribution limits and other direct restrictions on campaign funds.[5] This skepticism has driven reform advocates toward increased reliance on reporting and disclosure requirements.[6] Meanwhile, in the wake of the 2008 election cycle—and particularly in light of the much-publicized backlash against those who provided financial backing to the campaign in support of California's Proposition 8, which abolished same-sex marriage rights in the state—the constitutionality of mandatory disclosure schemes has come under serious attack.[7] This Article argues that a carefully crafted disclosure scheme, reporting selected aggregate data rather than the individual identifying information currently published, can overcome these significant constitutional concerns, while at the same time providing a rich and valuable source of information to aid both voters and policymakers alike.[8]

The argument herein proceeds in four Parts. Part I examines the two main policy justifications offered in support of campaign finance reform—egalitarian concerns about the distortionary effects of money on politics and bribery concerns about quid pro quo corruption—and shows that these two competing rationales have drastically different implications for the permissible scope of campaign finance regulation.

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[4] *Cf.* Garrett, *supra* note 2, at 1012 ("The choice, therefore, is not between no disclosure and full disclosure. Rather, policymakers need to determine what information should be disclosed and in what form.").

[5] *See infra* Part II.A.3.

[6] *See infra* Part II.A.

[7] *See infra* Part II.B.

[8] *See infra* Part IV.

Part II then briefly reviews the Supreme Court's campaign finance jurisprudence and shows how the Court's notion of "corruption" as a compelling government interest has shifted between these two different rationales. The result is a doctrine that leaves considerable uncertainty as to how far reformers may go in order to advance egalitarian ends through direct restrictions on campaign funds. The Court's decisions appear more receptive to the use of reporting and disclosure requirements as an alternative to direct regulation, but the constitutionality of disclosure schemes that identify individual campaign contributors rests on extremely fragile foundations that recently have begun to erode.

The final two Parts focus on the issue of disclosure. Part III identifies two model approaches, the full disclosure model and the information-suppressing model, but argues that neither model proves entirely satisfactory. Part IV argues for a more nuanced, selective approach to the disclosure problem. After first showing how the reporting of aggregate, rather than individual-level, disclosure data can both solve the problem of quid pro quo corruption and overcome the First Amendment concerns that threaten current disclosure schemes, it then demonstrates how the proper set of reporting and disclosure requirements should be determined by one's view of the legislative process and by one's conception of political "corruption."

I. Why Regulate Campaign Finance?

In order to determine the proper approach to campaign finance regulation, and the role of reporting and disclosure requirements in particular, one must first understand the different concerns that motivate the many advocates and critics of reform. The public debate over campaign finance regulation has focused largely around a set of egalitarian concerns about the detrimental effect of large campaign donations on the equality of political influence and on electoral competitiveness.[9] Yet when the Supreme Court set out the tenets of its modern campaign finance jurisprudence with its seminal opinion in *Buckley v. Valeo*,[10] the Court rejected these egalitarian concerns and instead focused on a narrower set of concerns about quid pro quo political corruption.[11] These two different rationales for campaign finance reform give rise to drastically different views about the best approach to campaign finance regulation.

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[9] *See infra* Part I.A.

[10] 424 U.S. 1 (1976) (per curiam). The Court's treatment of these various concerns in *Buckley* and subsequent cases is examined in detail *infra* Part II.

[11] *See infra* Part I.B.

A. Egalitarian Concerns: Limiting the Role of Money in Politics

There is little question that money plays a powerful role in modern politics. Through voter outreach efforts, such as political advertising or "get-out-the-vote" programs, political campaigns convert their financial capital into crucial votes that can play a decisive role in close elections.[12] As a result, political success often may depend as much on the influence of large donors as it does on voter opinion.[13] Thus, campaign financing has been analogized to a "shadow election" where those with more money get to cast more votes.[14] But unlike the right to vote, which extends equally to all citi-

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[12] *See, e.g.*, Anthony Downs, *An Economic Theory of Political Action in a Democracy*, 65 J. POL. ECON. 135, 141 (1957) ("In order to persuade voters that [his] policies are good for them, [a candidate] needs scarce resources such as television time, money for propaganda, and pay for precinct captains."); Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1204 (1994) ("Money . . . is an indispensable element of any electoral campaign because money pays for the publicity and advertising that attempt to convince the undecided voters to support the campaign on election day."); Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 77 (2004) ("Massive disparities in the distribution of wealth cause disparities in political participation. The donor class effectively selects which candidates will be viable through large hard money contributions.").

Of course, the precise extent of money's influence over politics is a question of much dispute. *Compare, e.g.*, Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1064–67, 1074 & n.152 (1996) (disputing the "assumption" that "money buys elections" and alleging that "[t]hose few studies that have attempted to isolate and quantify the effect of campaign spending on votes have found that, once a candidate spends the minimal amount needed to penetrate the public consciousness, additional spending affects a very limited number of votes"), *and* Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 677 (1997) [hereinafter Sullivan, *Political Money*] ("[T]here are limits to how far private funding can permit a candidate to deviate from positions acceptable to the mass of noncontributing voters: . . . polls will discipline the candidate to respond to preferences other than those of his wealthiest backers."), *with* E. Joshua Rosenkranz, *Faulty Assumptions in "Faulty Assumptions": A Response to Professor Smith's Critiques of Campaign Finance Reform*, 30 CONN. L. REV. 867, 886 (1998) ("Professor Smith's conception is contradicted by that of a veritable army of politicians, consultants, and operatives, each of whom behaves as if we were living in a world where campaign spending can win elections.").

[13] There is much disagreement, however, over whether large contributions simply help the donor's preferred candidate get elected or if they can actually lead elected officials to change their policy positions. *Compare* Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENT. 127, 139 n.45 (1997) (contending that campaign contributions influence legislators' votes) (collecting sources), *and* Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 309 [hereinafter Lowenstein, *On Campaign Finance Reform*] ("According to most scholars who have considered the question, economic interest contributors tend to follow a legislative [influencing] strategy."), *with* Smith, *supra* note 12, at 1068 & nn.115–17 (arguing that while contributions may affect electoral outcomes, they do not change a legislator's policy positions or voting patterns). The significance of this distinction is discussed *infra* Part I.B.3.

[14] Sullivan, *Political Money*, *supra* note 12, at 672. On this view, "unequal campaign outlays amount to a kind of metaphysical gerrymander by which some votes count more than others in that shadow election." *Id.*; *see also* Sanford Levinson, *Regulating Campaign Activity: The New Road to Contradiction?*, 83 MICH. L. REV. 939, 951 (1985) ("What we have done is to insist, even if not to explain why, that 'speech is special' and thus immune from the regulation that we complacently accept in other realms of our social life.") (reviewing ELIZABETH DREW, POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION (1983)). *But see* Sullivan,

zens,[15] wealth is not generally distributed according to any politically relevant factors.[16] The intimate relationship between money and politics thus creates a significant danger that economic inequality will translate into political inequality in ways that may be antithetical to certain democratic aspirations of our political system.

1. Equality of Political Influence

Reliance on private campaign contributions has been said to threaten equality of political influence on both theoretical and practical grounds. In a political system that allows unlimited and unregulated campaign donations, campaign contributions can be used not just to convey the position that a donor or a candidate has on a given issue, but also the intensity of those feelings.[17] Those individuals or organizations that have an especially large stake in a given policy decision are likely to devote a significant amount of funds to lobbying for their position.[18] From a purely utilitarian perspective, this might be thought of as a desirable outcome, as it guides public officials toward the decisions that best maximize the total satisfaction of voter preferences. Even putting aside a pure utilitarian calculus, "arguably more intensely felt positions should be accorded more weight in the democratic process."[19]

Yet many scholars find the notion of intensity-based policymaking to be highly objectionable. For instance, Cass Sunstein has argued that

> Politics should not simply register existing preferences and their intensities, especially as these are measured by private willingness

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Political Money, *supra* note 12, at 673 (arguing that even if the analogy holds, "[c]onventional First Amendment norms of individualism, relativism, and antipaternalism preclude [legislative restrictions to impose] any such affirmative equality of influence.").

[15] *See, e.g.*, U.S. CONST. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); *id.* amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."); Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966) (holding poll tax unconstitutional under the Equal Protection Clause of the Fourteenth Amendment).

[16] Other valuable political tools—such as "celebrity, time to volunteer, speaking ability, personal magnetism, and good looks"—tend to be "randomly distributed throughout society in a way that wealth is not." Overton, *supra* note 12, at 97.

[17] *See* Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 127 ("[B]ecause money is a cardinalized value, individuals and groups can express the intensity of their preferences in a way that the single-valued, equally weighted vote cannot."); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1374 (1994) [hereinafter Strauss, *Corruption and Campaign Finance Reform*] ("[C]ontributions allow voters—that is, contributors—to register the intensity of their views."); *see also* Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1393 (1994) ("If a candidate can accumulate a lot of money, it is probable that many people like what she has to say, or that even if the number of supporters is not so great, their level of enthusiasm is high indeed.").

[18] *See* Downs, *supra* note 12, at 138.

[19] Strauss, *Corruption and Campaign Finance Reform*, *supra* note 17, at 1378.

> to pay. In the American constitutional tradition, politics has an important deliberative function. The constitutional system aspires to a form of "government by discussion." Grants of cash might compromise that goal by, for example, encouraging legislatures to vote in accordance with private interests rather than reasons.[20]

Sunstein's concern seems to be that intensity-based policymaking leads to unwise policy outcomes, since representatives should evaluate policies not by how well they satisfy personal preferences, but rather by how well they hold up to moral and practical reason.[21] Other theorists go a step further and reject intensity-based policymaking as fundamentally undemocratic, regardless of its outcome, because each person is entitled as a matter of justice and political fairness to an equal say in any decision over the laws that bind her.[22] Yet other commentators maintain that while public officials must ultimately be responsible to public opinion at some level, it is neither necessary nor advisable for them to simply defer to prevailing public sentiment on every decision.[23]

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[20] Sunstein, *supra* note 17, at 1392; *see* Burke, *supra* note 13, at 143–44 (arguing that "[t]he Framers, in sum, embraced deliberative theory"); *id.* at 148 (concluding that "[d]eliberative theory is well-grounded in American political philosophy and practice"); *see also* J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1018 (1976) [hereinafter Wright, *Is Money Speech?*] ("Th[is] mechanistic conception tends to drain politics of its moral and intellectual content.").

[21] David Cole has likewise argued that unregulated campaign contributions lead to policymaking based on factors other than reason, but through a different (though related) means:

> [C]apitalism and democracy are an uneasy mix. Free market capitalism threatens the free market of ideas by giving certain voices inordinate influence, not because of the power of their ideas, but because of the volume they can generate for their voices with dollars earned through commercial activities. . . . Absent government intervention of some kind, the marketplace of ideas, and in turn the election of our representatives, threatens to go to the highest bidder.

David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POL'Y REV. 236, 237 (1991).

[22] *See* Foley, *supra* note 12, at 1204 ("The Constitution of the United States should contain a principle, which I shall call 'equal-dollars-per-voter,' that would guarantee to each eligible voter equal financial resources for purposes of supporting or opposing any candidate or initiative on the ballot for any election held within the United States."); J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 625–26 (1982) [hereinafter Wright, *Money and Politics*] ("Political equality is the cornerstone of American democracy. Today's electoral processes, tainted by huge inequalities in funds and special access for special interests, fall far short of that ideal and are moving further away every year.").

Bruce Cain labels this the "moralist/idealist" perspective, as contrasted with the "realist/proceduralist" perspective that takes intensity of feeling into account. *See* Cain, *supra* note 17. *But see* Daniel Hays Lowenstein, *Campaign Contributions and Corruption: Comments on Strauss and Cain*, 1995 U. CHI. LEGAL F. 163, 174–82 [hereinafter Lowenstein, *Comments on Strauss and Cain*] (arguing that the proceduralist perspective itself rests on a contested moral theory).

[23] *See, e.g.*, Strauss, *Corruption and Campaign Finance Reform*, *supra* note 17, at 1375 ("To some extent representatives are supposed to reflect their constituents' wishes. But on any plausible conception of representative government, elected representatives sometimes should exercise independent judgment.").

Even assuming that the intensity of voter preferences is a valid consideration, however, there are several practical reasons to think that the relative size of campaign contributions has little relationship to the strength or direction of public sentiment. For example, an individual's willingness to contribute to candidates in order to advance a policy position will depend not only on how strongly she feels about the issue, but also on how much money she has available to spend.[24] The distribution of wealth in society often bears little relationship to the objectivity of one's policy judgment;[25] indeed, wealthy citizens often have a strong incentive to push for policies that further entrench their business interests at the expense of others.[26] Meanwhile, well-organized interests that can coordinate a vast number of contributions, often through a Political Action Committee ("PAC"),[27] will achieve disproportionate influence relative to diffuse and unorganized interests,[28] and some important interests may not be represented by any groups at all.[29] Taken to-

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[24] Sunstein illustrates this point:

> The correlation between public enthusiasm and the capacity to attract money is crude. There is a large disparity between donations and intensity of interest in a candidate. Candidate A might, for example, attract large sums of money from wealthy people; but A's supporters may be less interested in her success than Candidate B's poorer supporters are interested in B's success, even though B's supporters donate less money.

Sunstein, *supra* note 17, at 1393–94.

[25] As Sanford Levinson explains:

> If both political views and the propensity to spend money on politics were distributed randomly among the entire populace, it is hard to see why anyone would be very excited about the whole issue of campaign finance. It is only because we know there is no such randomization that we are concerned about spending by the rich. That is, we believe that they think differently from the rest of us, and that they are willing to spend their money to convince us that we ought to accept their views.

Levinson, *supra* note 14, at 945; *see also* Overton, *supra* note 12, at 89–92 (arguing that the political contributions of wealthy donors fail to adequately represent the interests of the less fortunate).

[26] *See generally* Cole, *supra* note 21, at 247 ("Wealth poses a unique threat of systematic distortion in part because one of the most important issues the state addresses is the distribution of wealth itself. If those who hold favored positions in the existing distribution of wealth are allowed to use their inequitable distributions to maintain the status quo against majority desires, the legitimacy of the democratic process is directly undermined."). *But see* Richard Briffault, Nixon v. Shrink Missouri Government PAC*: The Beginning of the End of the* Buckley *Era?*, 85 MINN. L. REV. 1729, 1769 (2001) (pointing out that low spending limits can also be anti-competitive).

[27] For detailed investigations into the role of PACs and the influence they wield over political candidates, see generally DREW, *supra* note 14; Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1128, 1136–40 (1994); Wright, *Money and Politics*, *supra* note 22, at 614–20.

[28] *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (2d ed. 1971). Of course, others believe that the solution to this problem is not to minimize the influence of money on politics altogether, but rather to encourage *greater* participation in PACs and other groups that help overcome the collective action problem. *See, e.g.*, Overton, *supra* note 12, at 106–07; Strauss, *Corruption and Campaign Finance Reform*, *supra* note 17, at 1374–75.

[29] *See* OLSON, *supra* note 28, at 53–57; David A. Strauss, *What is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141, 150 [hereinafter Strauss, *What is the Goal?*].

gether, these practical concerns suggest that a system of unregulated campaign financing does a very poor job of conveying voter preferences to legislators, and that such a system has the troubling side effect of providing the wealthy class with an arbitrary and unfair political advantage.

The motivation of many campaign finance reform advocates thus can be traced back to a theoretical commitment to a view of democracy in which the legislative process should operate less like an auction, and more like a "one person, one vote" election.[30] On this view, an electoral process that gives greater influence to the wealthy is corrupt and illegitimate. These deeply-held beliefs about the relationship between democracy and equality will have important practical consequences for the design and implementation of any egalitarian scheme of campaign finance regulation.

2. Electoral Competitiveness and Political Accountability

For those concerned with equality and political accountability, it is important not only that citizens have roughly equal influence over public officials, but also that competing candidates for public office have roughly equal resources to devote to their campaigns. As Richard Briffault argues, "[e]lections are about giving voters choices," but "[i]f one candidate is well-funded, while the others are not, the voters are likely to hear far more information and arguments from the first candidate than from her opponents."[31] If these imbalances become so great that poorly-funded challengers are unable to run competitive campaigns, then well-funded officials will no longer be disciplined at the ballot box by the force of public opinion, and political accountability will suffer as a result.

Yet the case for campaign finance regulation on grounds of political accountability is uneasy at best. While equalizing the amount of money available to competing political candidates would no doubt help to increase political accountability if all else were fair and equal, the existence of campaign finance disparities is only one of many obstacles to electoral competitiveness. Issues such as political gerrymandering, public apathy, and a lack of legislative transparency ensure that any increase in electoral competitiveness from campaign finance reform would be marginal at best.[32]

Similarly, some argue that campaign finance regulation is necessary to promote electoral competitiveness because of the enormous advantages that incumbents have for raising money, especially from PACs and other coordi-

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[30] *See also* Strauss, *What is the Goal?*, *supra* note 29, at 146–49 (discussing question of when it is appropriate for government decisions to be made by auction); *cf.* Sullivan, *Political Money*, *supra* note 12, at 667 (explaining that campaign finance issues pose an "analogical crisis" because we must "decide whether outlays of political money more resemble voting, on the one hand, or political debate, on the other").

[31] Briffault, *supra* note 26, at 1764.

[32] *See generally* Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737 (2004).

nated interest groups.[33] But because incumbents also have other substantial advantages, such as greater name recognition and a government-funded staff,[34] challengers may actually be better able to compete against incumbent officials if they were allowed to raise unlimited funds to compensate for these disadvantages.[35] Whether, as a general matter, campaign finance reform would ultimately increase or decrease overall political competitiveness is a difficult empirical question that is impossible to answer at present.

B. Political Bribery Concerns: Campaign Contributions as Quid Pro Quo

Apart from these broad egalitarian concerns, reform advocates have also identified a separate set of concerns about the use of campaign contributions for what amounts to political bribery.[36] On this view, campaign finance reform is necessary to limit "the extent to which a contributor can use money to secure special favors that the officeholder might not otherwise grant."[37] Contribution patterns strongly suggest that many donations are made in order to influence official decisions, rather than simply to support a favored candidate. Many researchers studying these contribution patterns have concluded that the use of campaign contributions as a sophisticated tool for political bribery is a serious and widespread problem.[38]

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[33] *See, e.g.*, Briffault, *supra* note 26, at 1764–65; Cain, *supra* note 17, at 138; Wertheimer & Manes, *supra* note 27, at 1134–36.

[34] *See* Cain, *supra* note 17, at 138.

[35] *See* William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 Nw. U. L. Rev. 335, 339 ("Challengers generally need greater funds in order to promote name recognition"); *see also* Foley, *supra* note 12, at 1243–45; Smith, *supra* note 12, at 1072–75; Sullivan, *Political Money*, *supra* note 12, at 685–87. In addition, campaign finance limits would increase the relative influence of factors such as "good looks, . . . celebrity, and access to or control of the popular press," which might favor candidates from elite backgrounds. Smith, *supra* note 12, at 1077, 1080–81.

[36] For a detailed discussion of bribery and related forms of public corruption, see Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. Rev. 784 (1985) [hereinafter Lowenstein, *Political Bribery*].

[37] Rosenkranz, *supra* note 12, at 873.

[38] For instance, one reform advocate notes that "the moment a politician takes office, his ability to raise campaign funds improves dramatically. In most cases, the new contributors . . . are driven to contribute not because of some newfound appreciation for the candidate's philosophy, but because the candidate is suddenly in a position to deliver lucrative political favors." Rosenkranz, *supra* note 12, at 874; *see also* Lowenstein, *On Campaign Finance Reform*, *supra* note 13, at 308–13 (noting this and other contribution patterns tied to the benefits of incumbency). Similarly, many large donors employ a "hedging strategy" by "giv[ing] large sums to both major parties." Sullivan, *Political Money*, *supra* note 12, at 679. This hedging strategy implies that these PACs believe that their contributions are influencing policy decisions rather than just electoral outcomes. *See* Lowenstein, *On Campaign Finance Reform*, *supra* note 13, at 312; Rosenkranz, *supra* note 12, at 874–75; *see also* Wertheimer & Manes, *supra* note 27, at 1135 (asserting that "PAC money is generally an investment in the decision–making process in Congress" and that "contributions to challengers are seen as a waste of money. Moreover, few PACs are willing to run the risk of antagonizing an incumbent Member of Congress by contributing to his or her opponent.").

1. Bribery as a Model of Political Corruption

In the bribery model, political corruption consists of a public official consciously acting to advance the interests of an individual or group in exchange for some private gain, in a manner that she would not have acted but for the bribery, and without due regard for the effect upon the public interest or the interest of her constituents.[39] Yet because the "public interest" is a highly contested concept subject to widespread disagreement, it is difficult to objectively assess whether a public official is acting in the public interest on a given matter.[40] Nor can the focus be solely, or even primarily, on the existence or the magnitude of the private gains that an official receives, for an official who makes good decisions for those she represents often will share in the benefits of her decision along with her neighbors.[41]

To be sure, at least one empirical study has concluded that PAC contributions "generally do not maintain or change House members' voting patterns," and that PACs instead only "contribute in hopes of influencing the outcomes of elections." Janet M. Grenzke, *PACs and the Congressional Supermarket: The Currency is Complex*, 33 AM. J. POL. SCI. 1, 19 (1989). However, the validity of the statistical inference used in this type of study has been seriously called into question. *See* Lowenstein, *On Campaign Finance Reform*, *supra* note 13, at 314 ("[R]oll call votes are the most visible actions of legislators, and therefore are the least likely settings in which legislators are willing to prefer the desires of contributors to the desires of constituents."); Rosenkranz, *supra* note 12, at 877–79 (criticizing empirical focus on voting patterns).

[39] Of course, if an elected official acts against the interests of her constituents, she could find herself removed from office rather quickly. In order for the bribery model of corruption to make sense, it must be that the official will sometimes act against the voters' interests without serious electoral repercussions. *See* Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893 (1998); *see also* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1717–18 (1999). This could occur, for instance, if voters fail to notice some of the adverse measures buried in detailed legislation, if voters are willing to overlook some adverse decisions by their representative because they favor her other positions, or if the official can use clever advertising to convince her constituents that a questionable decision really *is* in their interest. *See, e.g.*, *id.* at 1719–23.

[40] *See* JAMES C. SCOTT, COMPARATIVE POLITICAL CORRUPTION 3–4 (1972); Lowenstein, *Political Bribery*, *supra* note 36, at 800; John G. Peters & Susan Welch, *Political Corruption in America: A Search for Definitions and a Theory*, 72 AM. POL. SCI. REV. 974, 975 (1994).

Another problem with defining corruption in terms of right or wrong decisions is that "if such a . . . definition of corruption is accepted, the determination of whether a particular policy-influencing action is or is not corrupt will depend on whether the direction in which it seeks to influence policy is or is not desirable." Lowenstein, *Political Bribery*, *supra* note 36, at 804. Not only will this question of desirability often be highly controversial, but it is a decision that we normally delegate to the very same elected officials whose judgment we would now be calling into question.

[41] Indeed, when possible, we should want public officials to have a stake in their decisions, just as private corporations often compensate high-level executives with stock options and performance bonuses. *See generally* FRED KAEN, A BLUEPRINT FOR CORPORATE GOVERNANCE 174–78 (2003). Policymakers who are personally invested in the outcome of their decisions can reasonably be expected to consider the issues more thoroughly and to confront fewer potential conflicts of interest. Thus, for example, we often demand that politicians live in the district they represent or that members of a school board send their children to the public schools.

Rather, whether a decision should be deemed corrupt in the bribery sense must turn on some notion of corrupt intent.[42] The same decision under the same set of circumstances could be labeled as either corrupt or as entirely proper, depending on whether the official believes herself to be faithfully acting in the interest of those she represents.[43] More specifically, a charge of corruption requires a complex counterfactual inquiry: would the official have acted differently if not for her private gain?[44] Thus, for example, it is a defense to charges of bribery if the official can show that she would have taken the same action even if she had not received the questionable payment; such a payment might possibly be an unlawful gratuity, but not a bribe.[45]

For those concerned about the dangers of bribery, the paradigmatic case of political corruption is the quid pro quo, in which a public official is offered something of value in return for political favors.[46] This is the primary concern of the federal bribery statute, which makes it unlawful for "a public official or person selected to be a public official, directly or indirectly, corruptly . . . [to] agree[ ] to receive or accept anything of value personally . . . in return for being influenced in the performance of an official act . . . ."[47]

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[42] *See, e.g.*, Lowenstein, *Political Bribery*, *supra* note 36, at 816 ("The only thing that may take many everyday political practices out of the literal coverage of the [bribery] statutes is the element of corrupt intent."). For an excellent extended treatment of what it means to act with corrupt intent, see *id.* at 798–806.

[43] Therefore, on the bribery model, corruption must be addressed through motive-based regulation. *See generally* Lowenstein, *On Campaign Finance Reform*, *supra* note 36, at 302. *See also* Cain, *supra* note 17, at 113–18 (critiquing Lowenstein).

[44] Some attempts to define corrupt intent may require an even greater showing of culpability; the claim here is only that this counterfactual inquiry is required at a minimum. Note also that the counterfactual aspect of corrupt intent means that it will sometimes be an extraordinarily difficult inquiry, especially when the private gain coincides with other factors that might change the official's belief about what the public interest favors. For example, suppose that a candidate who seeks the support of a local civic group is offered its endorsement in exchange for agreeing to support a particular bill, and she agrees to do so. *Cf.* Cain, *supra* note 17, at 115–16 (posing a similar hypothetical). One might at first assume that the candidate has changed her position because of the private gain she gets from the group's endorsement. However, it is also possible that the official changed her position not because of her private gain, but because she respects this group's views and has reconsidered her earlier position after learning of its opinion. *Cf.* Lowenstein, *Political Bribery*, *supra* note 36, at 834–35, 845–56. In order to determine if the private gain has caused the official to change her position, one must compare what the candidate does in light of the endorsement with what she would have done if the group had simply asked her to change her opinion without offering to endorse her for doing so.

[45] *See* United States v. Campbell, 684 F.2d 141, 148 (D.C. Cir. 1982) ("Payments to a public official for acts that would have been performed in any event—whether before or after those acts have occurred—are probably illegal gratuities rather than bribes."); United States v. Brewster, 506 F.2d 62, 72 (D.C. Cir. 1974) ("The bribery section makes necessary an explicit quid pro quo which need not exist if only an illegal gratuity is involved.").

[46] This definition is adopted from Sunstein, *supra* note 17, at 1391. *Cf.* BLACK'S LAW DICTIONARY 1282 (8th ed. 2004) (defining quid pro quo as "[a]n action or thing that is exchanged for another action or thing of more or less equal value . . . . See Reciprocity.").

[47] 18 U.S.C. § 201(b) (2006). The federal bribery statute also forbids the acceptance of an unlawful gratuity, which does not require a showing of corrupt intent, *see id.* § 201(c), but recognizes the substantial difference between these offenses by prescribing a maximum prison

Campaign contributions raise this same concern, where the "thing of value" that the official seeks is a contribution that she can use to help "attain the income, prestige, and power which come from being in office."[48] Thus, the private campaign financing system, left unchecked, leaves open a dangerous path to political corruption.

2. Campaign Finance Regulation as an Anti-Bribery Mechanism

While many instances of quid pro quo corruption may already be covered by bribery laws,[49] campaign finance regulation remains an important tool for combating this sort of corruption because laws against bribery are often very narrow and under-inclusive. Bribery laws "deal only with the most blatant and specific" instances of corruption.[50] Even in cases where a clearly unlawful quid pro quo exists, it may be extremely difficult to prove that such a transaction took place without testimony from a cooperating witness.[51] Moreover, beyond these few easy cases lies a substantial gray area,[52]

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term of just two years for an unlawful gratuity compared to fifteen years for a bribe. Even then, a conviction for acceptance of an unlawful gratuity requires proof of a direct link between the gratuity and a "specific 'official act' for or because of which it was given." United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 414 (1999).

A similar analogy can be made to the crime of extortion, which is prohibited by the Hobbs Act, 18 U.S.C. § 1951 (2006). Extortion is similar to bribery, except instead of a donor requesting a favor from the official, the official withholds something to which the prospective donor has a just entitlement, and the official then demands some payment in exchange for its return. In this regard, extortion is very similar to blackmail, and the contributor is seen as a victim rather than one of the perpetrators. Several critics of the bribery rationale for campaign finance reform, believing that quid pro quo campaign contributions are ineffective because an official who goes against the voters' interests will be voted out of office, nonetheless admit that extortion remains a legitimate concern. *See* Cain, *supra* note 17, at 123–26; Strauss, *What is the Goal?*, *supra* note 29, at 152–55. *See generally* Lowenstein, *Comments on Strauss and Cain*, *supra* note 22, at 182–85 (discussing the significance of this point).

[48] *See generally* Anthony Downs, An Economic Theory of Democracy 28 (1957).

[49] Indeed, many courts have interpreted bribery statutes to reach cases involving campaign contributions. *See* Lowenstein, *Political Bribery*, *supra* note 36, at 808 nn.86–88 and cases cited therein. But others have argued that there are significant differences between campaign contributions and traditional bribes:

> Campaign contributions are useful because they help get votes. Bribes, however, deal in a currency of self-interest other than votes. If campaign contributions can only be used to persuade others to vote a certain way, then voters still have sovereignty—their votes are what matter in the end, and they can ignore or discount the messages they receive if they choose.

Cain, *supra* note 17, at 117; *see also* Strauss, *Corruption and Campaign Finance Reform*, *supra* note 17, at 1372 (making this same distinction); Strauss, *What is the Goal?*, *supra* note 29, at 148 (same).

[50] Buckley v. Valeo, 424 U.S. 1, 27–28 (1976) (per curiam). Campaign contributions may also be immune from the federal prohibition on unlawful gratuities, which exempts funds given "as provided by law for the proper discharge of official duty." 18 U.S.C. § 201(c)(1).

[51] *See* Ackerman & Ayres, *supra* note 2, at 27 ("[T]he kinds of deals that are illegal (money for access) are not provable.").

[52] The significant uncertainty over precisely what sorts of behavior qualify as "political corruption" is demonstrated clearly by Peters & Welch, *supra* note 40, at 978–82. Peters and Welch present a survey of several hundred public officials in which the officials were each

in which courts applying doctrines such as the rule of lenity must give defendants the benefit of the doubt in any prosecution for bribery.[53]

Within the gray area, campaign finance restrictions can serve an important prophylactic role as a second-order safeguard against political corruption by preemptively regulating or restricting campaign donations in circumstances where there is a high likelihood that a transaction may exert undue influence on a candidate's ability to act as a fair steward of the public interest. Such limits on campaign financing can be far more easily enforced than laws requiring authorities to detect and prosecute corrupt exchanges only after the damage has already been done.[54]

Preventing bribery in campaign contributions, however, can be a far more challenging task than policing other forms of bribery. In other contexts, such as lobbying reform, it may be entirely reasonable to ban all payments without regard to whether these payments actually lead an official to change her behavior—either the payment causes the official to make a different decision, in which case it is akin to a bribe, or it is a gratuitous handout that serves no apparent purpose, in which case little is lost by prohibiting it.[55] In the campaign context, however, the very point of many contributions is to provide a "gift[ ] from citizens who simply wish to express their ideological commitment to a candidate's causes without any expectation of special access or influence."[56] And the First Amendment grants individuals the right to advance and support their political views in this way.[57] Moreover, campaign contributions can, in the aggregate, convey important information about how a candidate's positions are regarded by various constituencies, and thus can serve a useful purpose that gifts from lobbyists do not.[58] Thus, a regime of campaign finance regulation based on the bribery model will need to focus closely on ways to distinguish legitimate transactions from those involving corrupt intent.

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presented ten hypothetical actions by public officials and asked which ones they considered corrupt. Upon examining the results, they find that:

> the simple rank ordering of our ten examples shows at one end of the continuum a clustering of acts that are clearly illegal or represent a direct financial gain, at the other, acts that are minor influence peddling, and in between a set of acts representing a variety of conflict-of-interest situations.

Id. at 982.

[53] *See* United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 412 (1999) ("[T]his is an area where precisely targeted prohibitions are commonplace, and where more general prohibitions have been qualified by numerous exceptions. Given that reality, a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter.").

[54] *See generally* Samuel L. Bray, *Power Rules*, 110 COLUM. L. REV. (forthcoming 2009).

[55] *See* Lowenstein, *Political Bribery*, *supra* note 36, at 850 ("Barring special circumstances, the mere provision of a personal benefit by a person interested in the recipient's official actions creates a strong inference of an intent to influence because there is no plausible alternative explanation of the gift.").

[56] ACKERMAN & AYRES, *supra* note 2, at 7.

[57] *See* Buckley v. Valeo, 424 U.S. 1, 16–17 (1976); *see also infra* Part II.

[58] *See infra* Parts III.B, IV.B–C.

C. Using Corrupt Intent to Distinguish between Reform Rationales

The corrupt-intent requirement marks a crucial difference between the bribery rationale and the egalitarian rationale for campaign finance reform.[59] To highlight this difference, consider two scenarios in which a wealthy pharmaceutical company with a substantial interest in the passage of a new biotechnology law makes a large campaign contribution that helps a candidate achieve victory in a close election.[60] In the first scenario, suppose that the candidate normally would have voted against the law, but she decides to vote in its favor because she needs the pharmaceutical industry's support to stay in office. In the second scenario, suppose that the candidate is a personal supporter of the law and would have voted for it anyway, but without this large campaign contribution she would have lost the election to an opponent who would have voted against the law.[61] In both cases, the company making the contribution has in some sense "bought" a vote for the law, in that it gained an additional vote by making a single large expenditure. Nevertheless, only in the first scenario has the candidate acted with corrupt intent and accepted something tantamount to a bribe. If there is some objection to the second scenario, it must be rooted in the greater political power of wealthy interests relative to others—an egalitarian concern which may encounter substantial First Amendment obstacles that prohibitions on quid pro quo corruption might avoid.[62]

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[59] To be sure, concerns about quid pro quo corruption are not wholly independent of egalitarian concerns. *See* Strauss, *Corruption and Campaign Finance Reform*, *supra* note 17. To the extent observers care about politicians offering policy favors in exchange for campaign contributions but have no objection to them doing so in exchange for actual votes, it must either be because these observers think financial pressure skews differently than voter pressure, *cf. supra* notes 24–29 and accompanying text, or because we believe the role of the public official should be something different than refereeing between different interest groups, *cf. supra* notes 20–23 and accompanying text. *See generally* Strauss, *Corruption and Campaign Finance Reform*, *supra* note 17. Indeed, the bribery-like model presented here is based on a concern of the latter type: a belief that public officials should follow their own understandings of the public interest, which may or may not coincide with interest group pressures. Nevertheless, the analytical distinction between egalitarian rationales and corruption-based rationales is important because they have very different implications for which transactions should be deemed problematic, as explained here.

[60] A more sophisticated variation on the simple thought experiment offered here is presented in Lowenstein, *Comments on Strauss and Cain*, *supra* note 22, at 168–74.

[61] The first scenario is sometimes referred to as a "legislative" strategy and the second an "electoral" strategy. *See* Lowenstein, *On Campaign Finance Reform*, *supra* note 13, at 308; Smith, *supra* note 12, at 1064 n.92, 1075–76.

[62] *Cf.* Sullivan, *Political Money*, *supra* note 12, at 674 ("[L]obbying and demonstrations could not, without great alteration in First Amendment understandings, be regulated on the ground that their leaders had amassed too many resources."). Lowenstein likewise draws a distinction between trying to influence a public official's actions, which he argues is a violation of political bribery laws, and trying to influence the outcome of an election, which he sees as permissible. Lowenstein, *Political Bribery*, *supra* note 36, at 850.

II. The Supreme Court and Campaign Finance: A Doctrine in Flux

The differences between these two theoretical grounds for campaign finance reform have had enormous practical implications when challenges to campaign finance regulation have come before the Supreme Court. While the Court has consistently recognized that political corruption is a serious concern and that restrictions designed to prevent this corruption can overcome even the most exacting First Amendment scrutiny, the notion of "corruption" underlying its decisions has shifted dramatically over time. The result of this theoretical confusion has been a series of seemingly inconsistent opinions that leave considerable uncertainty regarding the constitutionality of further egalitarian-minded reforms.

A. The Questionable Prospects for Direct Restrictions on Campaign Funds

Direct restrictions on the provision and use of campaign funds can take either of two forms. The most direct means for regulating campaign contributions is through contribution limits, capping the supply of money that any individual or association can give to political candidates during each election cycle. Alternatively, on the demand side, reformers have sought to reduce overall dependence on campaign contributions by placing limits on candidates' total campaign expenditures.[63] Over the last three decades, the Court has developed a constitutional framework that strictly forbids expenditure limits, but generally subjects contribution limits to a more lenient standard. Recent cases, however, appear to signal that the Court is becoming increasingly skeptical toward the use of campaign finance restrictions to advance egalitarian ends, indicating that further attempts to regulate campaign finance through direct restrictions on campaign funds may be in substantial jeopardy.

1. Buckley *and Its Progeny: A Rebuke to Egalitarianism?*

In *Buckley v. Valeo*,[64] a challenge to the 1974 amendments to the Federal Election Campaign Act ("FECA"),[65] the Supreme Court explicitly rejected attempts to justify campaign finance regulation on egalitarian grounds, yet left the door open for any measures necessary to prevent quid pro quo corruption. In broad terms, the *Buckley* Court made clear its belief that "the concept that government may restrict the speech of some elements

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[63] This supply-demand model has previously been suggested by Justin A. Nelson, Note, *The Supply and Demand of Campaign Finance Reform*, 100 Colum. L. Rev. 524 (2000); Sullivan, *Political Money*, *supra* note 12, at 666–67.

[64] 424 U.S. 1 (1976) (per curiam).

[65] Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended at 2 U.S.C. §§ 431–55 (2006, Supp. I 2007, Supp. II 2008)).

of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."[66] Nevertheless, the Court recognized that "[t]o the extent large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined."[67] *Buckley* thus held that campaign finance limitations can overcome the "exacting scrutiny required by the First Amendment"[68] as long as their "primary purpose [is] to limit the actuality and appearance of corruption resulting from large individual financial contributions,"[69] where corruption is understood in terms of quid pro quo.[70]

Applying this egalitarian versus quid pro quo distinction, *Buckley* held that the First Amendment prohibits campaign expenditure limits but permits the imposition of certain contribution limits.[71] The Court permitted these contribution limits not only because contributions are less directly related to speech than expenditures are,[72] but also because contributions raise the specter of quid pro quo corruption.[73] By contrast, the Court reasoned, campaign expenditures do not necessarily implicate the same quid pro quo concerns as political contributions,[74] or at least they do not do so as directly.[75] In the wake of *Buckley*, the Court also has held that the First Amendment bars the

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[66] *Buckley*, 424 U.S. at 48. The Court reiterated this point in a later passage: "The ancillary interest in equalizing the relative financial resources of candidates competing for elective office . . . provides the sole relevant rationale for § 608(a)'s expenditure ceiling. That interest is clearly not sufficient to justify the provision's infringement of fundamental First Amendment rights." *Id.* at 54.

[67] *Id.* at 26–27.

[68] *Id.* at 16.

[69] *Id.* at 26.

[70] *Id.* at 26–27; *see also* FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985) ("Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial quid pro quo: dollars for political favors."). It is important to distinguish this narrow sense of "corruption" as quid pro quo from the common use of the term in popular discourse to refer to any way in which wealthy interests exert undue influence over the political process, which can encompass egalitarian concerns. Some articles inadvertently conflate these two very different ideas. *See, e.g.*, Sullivan, *Political Money*, *supra* note 12, at 678–82.

[71] *Buckley*, 424 U.S. at 58.

[72] *Id.* at 26–27.

[73] *Id.* at 26–29.

[74] *Id.* at 46–48. However, it is important to distinguish campaign expenditures from so-called independent expenditures, such as when a wealthy supporter pays to run her own commercial in support of a candidate rather than donating funds to the campaign for its official advertising. These independent expenditures, when used to advocate for a candidate, remain problematic because "an 'independent' expenditure may inspire just as much gratitude by the candidate as a direct contribution." Sullivan, *Political Money*, *supra* note 12, at 667. This may be true even for expenditures not officially coordinated with a campaign. If these "electioneering communications" may be regulated, they then need to be distinguished from "issue advertising" that is unrelated to any particular campaign, and genuine issue advertising needs to be distinguished from "sham issue advertising" that is really intended to support a candidate. For discussions of these issues, see generally *McConnell v. FEC*, 540 U.S. 93, 126–32, 189–211 (2003), upholding campaign finance law regulating electioneering communications against facial challenge for vagueness and overbreadth, and *FEC v. Wis. Right to Life, Inc.*,

imposition of expenditure limits not just on candidates and their campaigns, but also on PACs[76] and political parties,[77] so long as these groups act independently of any candidates or their campaigns—that is, so long as the expenditure is not a contribution in disguise.

Later cases have refined *Buckley*'s rules for campaign contribution limits in ways that may reduce their usefulness for egalitarian reformers. For contributions by individuals, the Court held in *Randall v. Sorrell* that the First Amendment forbids contribution limits from being set too low.[78] The Court has taken a more permissive stance with respect to the regulation of corporate contributions, upholding laws that require most corporations to establish segregated accounts to manage their political contributions and laws that prohibit the use of general treasury funds for these purposes.[79] However, restrictions on corporate contributions are hardly enough to address the problems perceived by egalitarian-minded reform advocates, who note that this "artificial" line between contributions by corporations and those by individuals does not allow the more stringent limits to be applied to many forms of corporate-derived wealth.[80] Every corporation can be traced to individual owners, investors, or shareholders, whose interests align with those of the corporation and who are free to spend their share of the profits as they would the rest of their wealth.[81]

Although *Buckley* at first appears to be a stinging rebuke to all egalitarian efforts at campaign finance reform, the decision must in some important sense be understood as more limited than its broad pronouncements suggest. For one thing, powerful norms of equal political influence still exist in other, closely related doctrines, which govern similar aspects of the political process such as the principle of "one person, one vote" that guides political redistricting.[82] For another, the Court's broad language aside, nothing in the Constitution prohibits egalitarian measures that pose little burden on politi-

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551 U.S. 449 (2007), holding unconstitutional, in an as-applied challenge, application of same law to genuine issue ads.

[75] One can imagine that expenditure limits might limit quid pro quo corruption in more indirect ways. For instance, if a candidate expects to raise enough money to reach the spending limit without much difficulty, then she will have no need to take a contribution that requires her to change her policy positions.

[76] *See* FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 501 (1985).

[77] *See* Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996).

[78] 548 U.S. 230 (2006); *see also* Nixon v. Shrink Miss. Gov't PAC, 528 U.S. 377, 397 (2000) ("[T]he outer limits of contribution regulation . . . ask[ ] whether . . . the limits were so low as to impede the ability of candidates to 'amas[s] the resources necessary for effective advocacy.'" (quoting *Buckley*, 424 U.S. at 21) (last alteration in original)).

[79] *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990). *But see* FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 256–65 (1986) (requiring exception for nonprofit corporations formed solely to advance a political position rather than engage in business activity).

[80] *See* Cole, *supra* note 21, at 236–37.

[81] *Id.*

[82] *See* Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962). Thus, Justice Breyer has argued that *Buckley*'s rejection of all egalitarian concerns "cannot be taken literally." *Shrink Miss.*, 528 U.S. at 402 (Breyer, J., concurring); *see also* Cole, *supra* note 21, at 247–48 (offering additional examples).

cal speech and thus do not implicate serious First Amendment concerns, as can be seen in the decision to uphold FECA's public financing measures.[83] Thus, the Court's rejection of egalitarian concerns must be understood to mean only that these concerns are not sufficient to overcome the most exacting First Amendment scrutiny, rather than to impose a complete prohibition on all measures designed to protect political equality and electoral competitiveness. The Court's resistance to egalitarianism in *Buckley* might have taken several reform tools off the table for egalitarian-minded reform advocates, but even under the *Buckley* framework, these reformers may continue to find ways to pursue their goals through less directly restrictive means.

2. *From* Austin *to* McConnell*: A Theoretical About-Face?*

Though the *Buckley* framework still ostensibly defines the permissible boundaries of campaign finance regulation,[84] the Court's understanding of "corruption" has changed significantly over the ensuing years. The Court first began to embrace a new, broader notion of corruption in *Austin v. Michigan Chamber of Commerce*,[85] in which it upheld a stringent ban on corporate campaign contributions. The Court recognized that this ban was "aim[ed] at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[86]

Though this new approach was slow to catch on,[87] *Austin*'s theory of corruption resurfaced a decade later in *Nixon v. Shrink Missouri Government*

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[83] Part IV, *infra*, argues that disclosure of contributor data in the form of aggregate statistics does not impose a serious burden on speakers and thus survives First Amendment scrutiny. Similarly, *Buckley* upheld a limited public financing scheme applied to presidential elections and funded by a voluntary check-off item on federal tax returns. *Buckley*, 424 U.S. at 85–108 (per curiam). Because public financing "facilitate[s] and enlarge[s] public discussion and participation in the electoral process," the Court explained, it "furthers, not abridges, pertinent First Amendment values." *Id.* at 92–93.

Thus it is apparent that some critics of campaign finance reform inadvertently overstate their hand. For instance, Kathleen Sullivan has asserted that "[t]he key point for now is simply that, short of a major revision of general First Amendment understandings, campaign finance reform may not be predicated on equality of citizen participation in elections . . . ." Sullivan, *Political Money*, *supra* note 12, at 675. This is true of campaign finance reform measures that may be readily characterized as limitations on speech, such as contribution and expenditure limits, but the First Amendment may be less of an impediment to other measures such as disclosure requirements and public financing.

[84] *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 137–38 (2003) ("Considerations of *stare decisis*, buttressed by the respect that the Legislative and Judicial Branches owe to one another, provide additional powerful reasons for adhering to the analysis of contribution limits that the Court has consistently followed since *Buckley* was decided.").

[85] 494 U.S. 652 (1990).

[86] *Id.* at 659–60.

[87] Indeed, some scholars came to suggest that *Austin* may have simply been an "aberration." *See, e.g.*, Daniel Hayes Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment after* Austin, 21 CAP. U. L. REV. 381, 383 (1992).

PAC.[88] Though holding that the *Buckley* framework extended to state laws and state campaigns, the Court in *Shrink Missouri* 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"[89]—a threat that operates "*in addition to* 'quid pro quo' arrangements."[90]

In the Court's recent opinion in *McConnell v. FEC*,[91] the results of this transformation are evident.[92] In upholding most of the major provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA"),[93] the *McConnell* Court purported to apply the same anti-corruption rationale that had guided it in *Buckley*.[94] But as was the case in *Austin* and *Shrink Missouri*, the notion of "corruption" that underlies *McConnell* is very different from the meaning applied in *Buckley*. *McConnell* upheld limits on soft-money contributions to local political parties that engage in federal election activities,[95] but it did so even "absent any evidence that local parties can serve as conduits for corruption of federal officials."[96] Thus, *McConnell*'s notion of "corruption" is not the narrow, motive-based concern about quid pro quo that underlies *Buckley*[97] and bribery laws;[98] rather, this new definition must rest on a broader conception that encompasses all the ways in which wealthy interests achieve disproportionate influence over the legislative process, including the egalitarian concerns rejected in *Buckley*.

This broadening notion of corruption has been helped along by two other changes in the Court's campaign finance jurisprudence. First, in the

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[88] 528 U.S. 377 (2000).

[89] *Id.* at 389.

[90] *Id.* (emphasis added). Richard Hasen shows that the quid pro quo rationale cannot support low contribution limits or total bans through a simple question: "Which candidate for state or federal office would be bought (or even appear to be bought) by a $1075 donation, an individual's limited hard money donation made to a political party, or a small contribution from an ideological corporation?" Richard L. Hasen, Buckley *is Dead, Long Live* Buckley*: The New Campaign Finance Incoherence of* McConnell v. Federal Election Commission, 153 U. PA. L. REV. 31, 57 (2004) [hereinafter Hasen, Buckley *is Dead*].

[91] 540 U.S. 93 (2003). *McConnell* is a lengthy decision, spanning nearly 300 pages in the U.S. Reports, and has already sparked a voluminous literature. The aim here is not to provide a comprehensive account, but rather to outline the ways in which the *McConnell* decision represents a shift in the Court's attitude toward the different rationales for campaign finance regulation. For excellent early commentary on *McConnell* and its implications, see Symposium, McConnell v. Federal Election Commission, 3 ELECTION L.J. 115 (2004).

[92] For a comprehensive account of the jurisprudential transformation leading up to *McConnell*, see generally Hasen, Buckley *is Dead*, *supra* note 90.

[93] Pub. L. No. 107-171, 116 Stat. 81 (2002) (codified at 2 U.S.C. § 441i(a) (2006)).

[94] *See McConnell*, 540 U.S. at 143–44, 150. The *McConnell* decision lays out the history and definition of "soft-money" contributions, also known as "nonfederal money," which include funds used for state and local elections, "get-out-the-vote" campaigns, and generic party advertising. *See id.* at 122–26.

[95] *See id.* at 161–73.

[96] Hasen, Buckley *is Dead*, *supra* note 90, at 33; *see also id.* at 49–50 (discussing this issue in detail). For a discussion of several other holdings in *McConnell* that cannot be supported on *Buckley*'s narrow quid pro quo notion of corruption, see *id.* at 48–57.

[97] *Cf. supra* Part II.A.

[98] *Cf. supra* Part I.B.

line of cases culminating in *McConnell*, the Court began to grant "unprecedented deference to legislative determinations on both the need for [campaign finance] regulation and the means best suited to achieve regulatory goals," thereby lowering the evidentiary burden for enacting new regulation.[99] Second, the Court in *McConnell* relied extensively on the "appearance" of corruption as "a catchall for upholding any campaign finance regulation that fails to meet the test for actual corruption."[100] While academics might be careful to distinguish between the egalitarian and quid pro quo forms of corruption and perhaps find one to be a more compelling ground for regulation than the other, to the public at large the bribery problem and the egalitarian problems may "appear" to be one and the same.[101] Thus, both may justify extensive campaign finance regulation.

3. *Recent Developments:* Randall*,* Davis*, and a Questionable Future*

Though *McConnell* may have appeared to signal a new consensus over the constitutional limits on campaign finance reform, its theoretical underpinnings rested on the delicate foundation of a 5-4 vote,[102] and the new Roberts Court soon had the opportunity to revisit this issue. In *Randall v. Sorrell*,[103] the Court struck down Vermont's stringent campaign expenditure and contribution limits, but the Justices failed to agree on an opinion for the Court. The plurality opinion, authored by Justice Breyer and joined by both Chief Justice Roberts and Justice Alito,[104] purported to examine whether the law "harm[s] the electoral process by preventing challengers from mounting effective campaigns"[105]—that is, whether the law has a detrimental effect on political competitiveness. Yet the *Randall* plurality's use of competition as an organizing principle is a more restrictive standard than the

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[99] Hasen, Buckley *is Dead*, *supra* note 90, at 34, 42–46. *See generally* Robert F. Bauer, *When "the Pols Make the Calls":* McConnell*'s Theory of Judicial Deference in the Twilight of* Buckley, 153 U. PA. L. REV. 5 (2004).

[100] Hasen, Buckley *is Dead*, *supra* note 90, at 62; *cf. id.* at 43 (discussing *Shrink Missouri*'s above mentioned extension of the concept of corruption beyond quid pro quo arrangements).

[101] For a review of the empirical data on public perceptions of how the campaign finance system contributes to corruption in government, see Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119 (2004); see also Wertheimer, *supra* note 27, at 1129–30, for a collection of the results of numerous public opinion polls.

[102] *See* McConnell v. FEC, 540 U.S. 93 (2003).

[103] 548 U.S. 230 (2006).

[104] Justice Alito, however, declined to join the portions of Breyer's opinion discussing *Buckley*'s continued validity, explaining that respondents' call for the Court to reconsider that decision had not been properly raised. *See id.* at 263 (Alito, J., concurring in part and concurring in the judgment).

[105] *Id.* at 249 (plurality opinion).

more deferential approach that reigned in *McConnell*,[106] virtually ensuring further litigation in this area.

A more dramatic reversal underlies the Court's recent decision in *Davis v. FEC*,[107] which appears to signal a return to *Buckley*'s narrow, quid pro quo understanding of corruption. *Davis* addressed a federal campaign finance provision known as the Millionaire's Amendment, which applied whenever a candidate for the House of Representatives spent more than $350,000 of "personal funds" on her own campaign.[108] When the Millionaire's Amendment was triggered, a special set of "asymmetrical" contribution limits went into effect, incorporating the normal limits for the self-financing candidate but increasing the limits for her opponent to approximately three times the normal amount.[109] Writing for the Court, Justice Alito explained that the law could not be justified by any "anticorruption interests" because a self-financing candidate should be *less* susceptible than her opponent to bribes, and therefore, concerns about quid pro quo exchanges could not justify a higher contribution limit for the non-self-financing candidate.[110] Justice Alito then rejected the government's argument that the Millionaire's Amendment should be permitted in order to "level electoral opportunities for candidates of different personal wealth," contending instead that the Court's "prior decisions . . . provide no support for the proposition that this is a legitimate government interest."[111] In reaching this conclusion, Justice Alito not only pointed to the anti-egalitarian language in *Buckley*, but also cited approvingly to the dissenting opinions in *Austin* and *Shrink Missouri*.[112] The *Davis* majority therefore appears poised to overrule the long line of cases permitting the use of campaign finance regulation to counter the inegalitarian effects of money on politics.

The theoretical underpinnings of the Court's campaign finance jurisprudence thus remain in flux. To the extent that regulation can be justified as necessary to combat the problem of quid pro quo corruption, it appears likely to withstand First Amendment scrutiny. The Court's receptiveness to egalitarian arguments for campaign finance regulation, on the other hand, remains a question of considerable uncertainty. This doctrinal instability suggests that egalitarian-minded reformers might need to shift their focus away from the most direct means for achieving their goals, such as contribu-

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[106] Richard L. Hasen, *The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law After* Randall v. Sorrell, 68 Ohio St. L.J. 849, 852–53 (2007) ("[T]he Court's use of competition in *Randall* appears evanescent, perhaps to be replaced in a few years with a more coherent, but considerably less deferential, deregulationist approach.").

[107] 128 S. Ct. 2759 (2008).

[108] 2 U.S.C. § 441a-1(a) (2006).

[109] *See id.*; *see also Davis*, 128 S. Ct. at 2766–67.

[110] *See Davis*, 128 S. Ct. at 2773.

[111] *Id.* at 2773.

[112] *Id.* (citing Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 705 (1990) (Kennedy, J., dissenting) and Nixon v. Shrink Miss. Gov't PAC, 528 U.S. 377, 428 (2000) (Thomas, J., dissenting)).

tion limits, and toward alternative methods that are less vulnerable to First Amendment challenges, such as increased reporting and disclosure requirements.

B. Disclosure Requirements as a Constitutionally Fragile Alternative

Unlike direct restrictions on campaign funds, FECA's use of reporting and disclosure requirements to permit public scrutiny of political contributions appeared to survive *Buckley* relatively unscathed. *Buckley* rejected a challenge to the compelled disclosure of the names and addresses of all campaign contributors who donate more than a trivial sum.[113] The Court explained that "disclosure requirements certainly in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress has found to exist."[114] Quoting Justice Brandeis, the Court vividly proclaimed that "'[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman.'"[115]

Following *Buckley*, increased reporting and disclosure of political contributions has seen widespread support from across the political spectrum.[116] Even the most vociferous opponents of contribution and expenditure limits have come to embrace disclosure as an acceptable alternative.[117] One opponent of most other forms of campaign finance regulation has gone so far as to call for "[w]eekly disclosure in the newspapers, or better, daily reporting on the internet."[118]

Yet the Court's embrace of mandatory disclosure requirements has been significantly more measured than proponents of disclosure often suggest. Even when upholding the disclosure requirements in *Buckley*, the Court expressed a concern that "[i]n some cases, disclosure may even expose contributors to harassment or retaliation."[119] As an example, the Court pointed

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[113] *See* Buckley v. Valeo, 424 U.S. 1, 60–74 (1976) (per curiam).

[114] *Id.* at 68.

[115] *Id.* at 67 (quoting LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 62 (Nat'l Home Library Found. 1933)).

[116] *See, e.g.*, Garrett, *supra* note 2, at 1011 (discussing "the widespread acceptance of disclosure"); William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1, 1–2 & nn.3–7 (2003); Trevor Potter, Buckley v. Valeo*, Political Disclosure and the First Amendment*, 33 AKRON L. REV. 71, 71–72 & n.3 (1999); Clyde Wilcox, *Designing Campaign Finance Disclosure in the States: Tracing the Tributaries of Campaign Finance*, 4 ELECTION L.J. 371, 371 (2005) ("[A]mong all the proposals for campaign finance regulation, only disclosure comes close to universal acceptance.").

[117] *E.g.*, LARRY J. SABATO & GLENN R. SIMPSON, DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS 320 (1996); BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 32, 133–36 (2001); Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 327 [hereinafter Sullivan, *Against Reform*] (proposing mandatory disclosure as a possible alternative to direct campaign finance restrictions and suggesting that this "would seem justified by the massive gains in democratic accountability").

[118] Sullivan, *Political Money*, *supra* note 12, at 688.

[119] *Buckley*, 424 U.S. at 68 (per curiam).

to the facts of *NAACP v. Alabama*,[120] where the petitioners "'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.'"[121] The Court therefore expressly left open the possibility that "there could be a case . . . where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial" that compelled disclosure would be unconstitutional.[122]

Moreover, the Court has set a relatively low standard for those challenging disclosure requirements on the grounds that they could be subject to retaliation, holding that the challengers "need show only a *reasonable probability* that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties."[123] Applying this standard in *Brown v. Socialist Workers '74 Campaign Committee*,[124] the Court held that an Ohio campaign disclosure law was unconstitutional as applied to the Socialist Workers Party, "a minor political party which historically has been the object of harassment by government officials and private parties."[125] It was generally assumed, however, that this retaliation exception to disclosure requirements would only be necessary for small or fringe groups and that disclosure of contributors to major parties was constitutionally sound.[126]

The aftermath of the campaign in California to pass Proposition 8 ("Prop. 8"), a measure to eliminate same-sex marriage rights in the state,[127] has led many commentators to conclude that the retaliation problem may be

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[120] 357 U.S. 449 (1958).

[121] *Id.* at 69–70 (quoting NAACP v. Alabama, 357 U.S. 449, 462 (1958)) (alteration in original); *see also* Bates v. City of Little Rock, 361 U.S. 516, 523–24 (1960) (holding unconstitutional a local tax ordinance that would have required NAACP to disclose its member list, where "[t]here was substantial uncontroverted evidence that public identification of persons in the community as members of the organizations had been followed by harassment and threats of bodily harm," and "[t]here was also evidence that fear of community hostility and economic reprisals that would follow public disclosure of the membership lists had discouraged new members from joining the organizations and induced former members to withdraw").

[122] *Buckley*, 424 U.S. at 71 (per curiam).

[123] *Id.* at 74 (emphasis added).

[124] 459 U.S. 87 (1982).

[125] *Id.* at 88.

[126] *See Buckley*, 424 U.S. at 68–72 (per curiam) (discussing problems with disclosure as "appli[ed] to contributions to minor parties and independent candidates"); *Brown*, 459 U.S. at 92–98 (same); Garrett, *supra* note 2, at 1011 ("Publicity . . . may undermine the ability of *disliked or distrusted groups* to influence policy in ways consistent with their interests." (emphasis added)); Potter, *supra* note 116, at 104 ("By contrast, the Court has yet to strike a political disclosure provision claimed to burden a large and/or presumably politically powerful organization.").

[127] *See* CAL. SEC'Y OF STATE, CALIFORNIA GENERAL ELECTION—OFFICIAL VOTER INFORMATION GUIDE 54–57 (2008), *available at* http://www.voterguide.sos.ca.gov/pdf-guide/vig-nov-2008-principal.pdf.

a far more serious threat to disclosure reform than had previously been recognized.[128] After a heated campaign and a total of $83 million in expenditures by groups on both sides,[129] Prop. 8 passed by a margin of 52.3% to 47.7%.[130] In response, gay rights advocates launched a series of large-scale protests throughout California, with additional protests taking place in all fifty states, England, Australia, and Canada.[131]

Troublingly, a small number of advocates have gone beyond these peaceful protests and targeted Prop. 8 supporters with more serious retaliation. There have been numerous reports of harassment, vandalism, and threats targeted at individuals who donated even just small amounts to the "Yes on 8" campaign.[132] A college professor who contributed a mere $100 has reported receiving numerous confrontational letters and emails, with his colleagues and supervisors copied on one of the messages.[133] An ice cream shop whose owner contributed to the campaign has seen its employees harassed, its phone line and email clogged with angry messages, and obscene Valentine's Day cards sent to the owner.[134] A restaurant in Los Angeles has faced crippling boycotts and picketing simply because the daughter of the store's owner donated $100 to support Prop. 8.[135] Numerous other contributors, both large and small, claim to have been subjected to death threats,[136] vandalism,[137] harassment,[138] and economic reprisal.[139] Much of this backlash has been targeted at members and representatives of the Mormon

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[128] *See, e.g.*, John R. Lott, Jr. & Bradley Smith, Op.-Ed., *Donor Disclosure Has Its Downsides*, WALL ST. J., Dec. 26, 2008, at A13; Bob Bauer, Disclosure and Two Critics, http://www.moresoftmoneyhardlaw.com/updates/disclosure.html?AID=1393 (Dec. 26, 2008).

[129] John Wildermuth, *Prop. 8 Among Costliest Measures in History*, S.F. CHRON., Feb. 3, 2009, at B1.

[130] CAL. SEC'Y OF STATE, STATEMENT OF VOTE 7 (2008), *available at* http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf.

[131] *See, e.g.*, Wyatt Buchanan, *Prop. 8 Protests Could Become National Movement*, S.F. CHRON., Nov. 15, 2008, at A1.

[132] *See, e.g.*, Jennifer Garza, *Prop. 8 Victors Upset by Personal Attacks*, SACRAMENTO BEE, Nov. 12, 2008, at A1; Alison Stateman, *What Happens If You're on Gay Rights' "Enemies List,"* TIME, Nov. 15, 2008, at A1; *see also, e.g.*, Bob Egelko, *Prop. 8 Supporters Want Donors Anonymous*, S.F. CHRON., Jan. 9, 2009, at B3; Press Release, ProtectMarriage.com, Prop 8 Urges Court to Enjoin Campaign Finance Reporting Rules That Have Resulted in Harassment of Prop 8 Supporters (Jan. 29, 2009), *available at* http://protectmarriage.com/article/prop-8-urges-court-to-enjoin-campaign-finance-reporting-rules-that-have-resulted-in-harassment-of-prop-8-supporters.

[133] Brad Stone, *Prop 8 Donor Web Site Shows Disclosure Law is 2-Edged Sword*, N.Y. TIMES, Feb. 7, 2009, at B3.

[134] Jennifer Garza, *Prop. 8 Fallout Doesn't Daunt Ice Cream Shop's Owner*, SACRAMENTO BEE, Feb. 16, 2009, at 3B.

[135] Jim Carlton, *Gay Activists Boycott Backers of Prop 8*, WALL ST. J., Dec. 27, 2008, at A3; Steve Lopez, *A Life Thrown Into Turmoil by $100 Donation for Prop. 8*, L.A. TIMES, Dec. 14, 2008, at B1.

[136] Stone, *supra* note 133.

[137] *See, e.g.*, *Police Suspect Prop. 8 Behind Vandalism*, UNITED PRESS INT'L, Nov. 24, 2008.

[138] *See, e.g.*, Martin Wisckol, *Prop. 8 Leaders Accuse Foes of Harassment, Intimidation*, ORANGE COUNTY REG., Nov. 14, 2008.

Church,[140] whose membership provided much of the financial support for Prop. 8, including a significant number of large donations from out-of-state church members.[141]

This unprecedented backlash against Prop. 8's financial supporters has been made possible in large part by the availability of campaign finance disclosure data posted on the Internet. Searchable databases of all Prop. 8 contributors have been posted by three major California newspapers,[142] among others.[143] Making use of this data, some Prop. 8 opponents have posted interactive maps that mark the addresses of every Prop. 8 contributor.[144] Others have posted online blacklists of businesses to boycott,[145] with some of these lists supplementing the public disclosure data with detailed personal information from a variety of sources.[146] Similar measures are underway to publicize the names of contributors to similar ballot measures in other states.[147]

The aftermath of the Prop. 8 campaign is significant because it represents retaliation against the supporters of a *majority* position. Supporters of Prop. 8 cannot claim to be a small or fringe group,[148] nor can it be said that they resemble the "minor parties" that the Court had in mind in *Buckley* and *Brown*.[149] Nor are victims of past retaliation the only ones concerned about the very real costs of disclosure; even Bob Bauer, general counsel for the Democratic National Committee and former general counsel of Barack

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[139] *See, e.g.*, Tamara Audi, *Gay Activists Target Businesses*, WALL ST. J., Aug. 27, 2008, at A3; James Hebert, *Theater Company Leaves in Protest*, SAN DIEGO UNION-TRIB., Feb. 10, 2009, at A3; Lott & Smith, *supra* note 128; Stone, *supra* note 133; Wisckol, *supra* note 138.

[140] *See, e.g.*, Jennifer Garza, *Mormons Step Up Security After Anti-Prop. 8 Vandalism*, SACRAMENTO BEE, Nov. 17, 2008, at 9A; Ashley Surdin, *Protesters Target Supporters of Gay Marriage Ban*, WASH. POST, Nov. 15, 2008, at A12.

[141] *See, e.g.*, Tony Semerad, *Utahns, LDS Church Spent More on Prop. 8 Than Previously Known*, SALT LAKE TRIB., Feb. 9, 2009.

[142] Los Angeles Times, The Gay-Marriage Battle: Follow the Donors, http://www.latimes.com/news/local/la-metro-prop-8,0,2463893.htmlstory (last visited Oct. 31, 2009); SFGate, Proposition 8 Contributions, http://www.sfgate.com/webdb/prop8/ (last visited Oct. 31, 2009); Sacramento Bee, Search for Prop. 8 Donors, http://www.sacbee.com/1098/story/1392716.html (last visited Oct. 31, 2009).

[143] *E.g.*, California Secretary of State, Campaign Finance: Proposition 008, http://cal-access.ss.ca.gov/Campaign/Measures/Detail.aspx?id=1302602&session=2007 (last visited Oct. 26, 2009).

[144] Prop 8 Maps, http://www.eightmaps.com/ (last visited Oct. 31, 2009); *see also* Stone, *supra* note 133 (discussing the effect of eightmaps.com and proposals for reform).

[145] *See, e.g.*, Bob Keefe, *Prop. 8 Backlash Reaches Texas*, AUSTIN AM.-STATESMAN, Nov. 25, 2008; William M. Welch, *Prop. 8 Foes Turn to "Blacklist" Tactics*, USA TODAY, Dec. 21, 2008.

[146] *E.g.*, Californians Against Hate, Dishonor Roll, http://www.californiansagainsthate.com/dishonorRoll.html (last visited Oct. 26, 2009).

[147] *See, e.g.*, Richard Roesler, *Group Will Publish Names of Partner-Rights Opponent*, THE SPOKESMAN-REV., June 3, 2009; WhoSigned.org, http://www.whosigned.org/ (last visited Oct. 26, 2009).

[148] *Cf. supra* notes 119–26.

[149] *Cf.* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982); Buckley v. Valeo, 424 U.S. 1, 68–72 (1976) (per curiam).

Obama's presidential campaign,[150] has recently expressed concerns about the "downsides" to disclosure.[151] The retaliation exception to disclosure requirements now threatens to overwhelm the traditional rule that mandatory disclosure requirements are generally constitutional.

The continuing viability of mandatory disclosure as a powerful tool for campaign finance regulation thus rests on exceedingly fragile constitutional foundations. As the aftermath of Prop. 8 shows, the threat of retaliation may be much greater than has generally been assumed, and this problem may extend far beyond widely unpopular "minor parties" to create a chilling effect even for supporters of the winning side. As a result, despite the longstanding assumption that most mandatory disclosure requirements are constitutionally sound, "the reality is that disclosure's constitutional status is unclear"[152]—and many common disclosure schemes may soon be in jeopardy. The next Part will discuss two prominent approaches to the disclosure problem in order to develop a more detailed understanding of the advantages and disadvantages of some possible disclosure schemes and their interaction with these constitutional doctrines.

III. Two Models of Campaign Finance Disclosure

As a result of the limitations the Court has placed on the use of contribution and expenditure limits, recent campaign finance reform measures have focused on reporting and disclosure requirements. Two different model approaches to the disclosure issue have attracted significant attention. The first model, which represents the prevailing theory behind recent reforms, seeks full public disclosure of all information about a candidate's financial supporters.[153] The second model, which has attracted significant scholarly attention,[154] takes the opposite approach and seeks to conceal any information about the source of a donation from the candidate herself as well as from the public. Upon close examination, however, neither of these model approaches proves entirely satisfactory.

A. The Full Disclosure Model

The dominant model for campaign finance disclosure is to require full disclosure of all information relating to campaign contributions and their sources. Disclosure requirements, *Buckley* explained, "deter actual corrup-

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[150] Kenneth P. Vogel, *Bauer's New, Unmatched Legal Power*, Politico, Feb. 2, 2009, http://www.politico.com/news/stories/0209/18273.html.

[151] *See* Bauer, *supra* note 128.

[152] Potter, *supra* note 116, at 72.

[153] *See infra* Part III.A.

[154] *See, e.g.*, Symposium, *The Brennan Center Jorde Symposium on Constitutional Law*, 91 Cal. L. Rev. 641 (2003) (symposium issue on Ackerman & Ayres, *supra* note 2); Symposium, *Commentaries on Bruce Ackerman and Ian Ayres's* Voting with Dollars: A New Paradigm for Campaign Finance Reform, 37 U. Rich. L. Rev. 935 (2003) (same).

tion and avoid the appearance of corruption by exposing large contributions to the light of publicity."[155] The full disclosure model has significant appeal because it adopts "a sort of free-market approach to democracy: just let the voters know who is trying to buy influence with huge contributions, and, if they disapprove, they can vote the bums out."[156] Full disclosure is also attractive to those who believe that political money will always find a way around any attempt to impose contribution limits; it may be better to allow large contributions and publicize them, rather than to drive this money into unmonitored back channels.[157]

Recent trends in campaign finance reform have embraced full disclosure as a key regulatory tool.[158] For instance, a major concern for campaign finance reformers during the last two decades has been the problem of "bundling," where "[o]ne political entrepreneur may collect several individual contributions of one thousand dollars each and turn over the entire sum to the candidate, PAC, or party—taking political credit for a much larger amount than she personally could have contributed."[159] Initially, reform proposals would have closed this loophole by counting all of the bundled contributions toward the contribution limit for the bundler (be it an individual, a lobbyist, or a PAC), so that bundling would not be able to accomplish anything that a PAC cannot.[160] Yet, rather than imposing these direct limits on bundling, Congress ultimately decided to simply impose new disclosure requirements for bundled contributions.[161] The focus of campaign finance reform thus shifted away from direct regulation of campaign funds and toward the use of new and expanded disclosure requirements in their place.

As a practical guide for crafting effective campaign finance regulation, however, the full disclosure model faces a number of very serious obstacles. First, there is substantial reason to question whether the full disclosure

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[155] Buckley v. Valeo, 424 U.S. 67, 68 (per curiam).

[156] Rosenkranz, *supra* note 12, at 896; *see also* ACKERMAN & AYRES, *supra* note 2, at 4 ("With every deal open and aboveboard, let the voters decide whether a big gift or giver taints the candidate's integrity.").

[157] *See, e.g.*, Issacharoff & Karlan, *supra* note 39; Sullivan, *Political Money*, *supra* note 12, at 687–89.

[158] *See* ACKERMAN & AYRES, *supra* note 2, at 5 ("Liberals and conservatives have increasingly converged on the 'full information' plank of the traditional reform agenda—to the point where it is fast becoming a Motherhood issue."); Garrett, *supra* note 2, at 1011; *see also* GOVERNOR'S BLUE-RIBBON COMM'N ON CAMPAIGN FIN. REFORM, STATE OF WIS., REPORT OF THE COMMISSION ch. 2, app. I (1997) (concluding that "[t]he Wisconsin campaign finance system ought to set as a goal the instantaneous reporting and disclosure of all relevant campaign finance information"), *available at* http://www.lafollette.wisc.edu/campaign_reform/final.htm.

[159] Sullivan, *Political Money*, *supra* note 12, at 668; *see also* Wertheimer & Manes, *supra* note 27, at 1140–42 (leaders of reform advocacy group Common Cause detailing the "bundling loophole").

[160] *See* Sullivan, *Political Money*, *supra* note 12, at 668.

[161] *See* Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, § 204, 121 Stat. 735, 744–46 (codified at 2 U.S.C. § 434(i) (Supp. I 2007)); Reporting Contributions Bundled by Lobbyists, Registrants and the PACs of Lobbyists and Registrants, 72 Fed. Reg. 62,600 (proposed Nov. 6, 2007) (to be codified at 11 C.F.R. § 104.22).

model actually works as well in practice as it does in theory. While the democratic ideal assumes all voters to be fully informed and deliberative, in reality voters' civic capacities may sometimes be limited.[162] This is a particularly serious concern with regard to voters' ability to make use of data about campaign contributions. The full disclosure model assumes that voters will process tremendous amounts of disclosure data, recognize sometimes-subtle trends representing the potential of illicit influence, and then collectively act to penalize corrupt officials at the voting booth.[163] This assumption often does not hold true.

Second, the reporting and disclosure requirements established under this model would need to be exceedingly detailed and comprehensive.[164] For example, prior to recent changes in the law,[165] donors who might be providing bundled contributions were asked to disclose only basic information such as their name, address, and occupation, which is not enough detail to detect this bundling or other interpersonal connections.[166] If disclosure requirements are not sufficiently comprehensive, then sophisticated interests can employ a variety of tactics to evade disclosure[167]—and because plugging one loophole often just causes political money to shift to another, a truly comprehensive disclosure scheme may never be possible.[168]

Moreover, as donors are required to provide increasingly detailed and comprehensive information, several additional problems arise. First, imposing such a heavy burden on those making campaign donations would likely deter many potential donors, and this deterrent effect may be skewed against

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[162] *See* Issacharoff & Karlan, *supra* note 39, at 1727–28; Ortiz, *supra* note 39.

[163] *See* ACKERMAN & AYRES, *supra* note 2, at 27 (discussing the problems that "low voter motivation" causes for the full disclosure model). Ackerman and Ayres thus refer to current disclosure schemes as "transparency in name only." Bruce Ackerman & Ian Ayres, *The Secret Refund Booth*, 73 U. CHI. L. REV. 1107, 1107 (2006). *But see* Robert F. Bauer, *Not Just a Private Matter: The Purposes of Disclosure in an Expanded Regulatory System*, 6 ELECTION L.J. 38, 52 (2007) (asserting that "[a] network of media and nonprofit organizations, dedicated to the 'money in politics' narrative, provides the expertise, because it has both the resources and the interests, to make sense of the numbers."); Sullivan, *Political Money*, *supra* note 12, at 688 ("If the lists of names and figures seemed too boring to capture general attention, enterprising journalists could 'follow the money' and report on any suspect connections between contributions and policymaking.").

[164] *See* ACKERMAN & AYRES, *supra* note 2, at 94–95.

[165] *See supra* notes 159–61 and accompanying text.

[166] Ackerman & Ayres, *The Secret Refund Booth*, *supra* note 163, at 1115 & n.24.

[167] *See generally, e.g.*, Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295 (2005) (surveying some of the tactics used to evade disclosure and obscure the real source of political money); *see also* Wertheimer & Manes, *supra* note 27, at 1140–42 (detailing use of the "bundling loophole").

[168] *See* Ackerman & Ayres, *The Secret Refund Booth*, *supra* note 163, at 1117 (arguing that whenever we plug one gap in the disclosure scheme, "the next electoral cycle would precipitate a search for an unregulated technique serving the same purpose," and thus "[a]n ongoing cycle of cat-and-mouse would ensue"). *See generally* Issacharoff & Karlan, *supra* note 39, at 1705–17 (discussing the difficulty of designing a disclosure system that cannot be circumvented).

certain constituencies, such as privacy advocates or the poor.[169] Indeed, if the disclosure requirements are onerous enough to pose a significant impediment for many voters, they might be found to run afoul of the First Amendment.[170] Second, just as the release of too little information may cause important details to go unreported, requiring an overload of information may obscure certain connections and cause important information to go overlooked. Third, such extensive reporting requirements could not be enforced without an expansive regulatory agency, which would be difficult to maintain, costly to administer,[171] and would create a new target of influence for the very interests that campaign finance reform seeks to restrict.[172]

Additionally, disclosure does little to regulate the degree of influence that money exerts over politics—that is, to serve the egalitarian concerns identified above.[173] It places no direct limitations on who may contribute, on the amount of money they can contribute, or on how that money may be used.[174] To be sure, there may be an indirect egalitarian effect: if a significant number of voters begin to take notice that a candidate receives a substantial amount of funding from certain identifiable interests, this may lead voters to rally against a candidate.[175] But this effect is highly speculative and unreliable at best,[176] and even where voter backlash exists, it seems a crude way of regulating the role of money in politics. The contributions that provoke a public reaction, and the consequences that follow, are determined not through a considered policy judgment, but rather through the arbitrary reactions of many individual voters converging together in an unpredictable way. To the extent that full disclosure is deemed a valuable safeguard, this must be for its ability to detect or deter those public officials who are using cam-

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[169] *See generally* McGeveran, *supra* note 116, at 1–24 (discussing the various ways in which disclosure requirements may chill political speech, particularly with respect to certain marginalized groups).

[170] *See* discussion *supra* Part II.B.

[171] *See* SMITH, *supra* note 117, at 90–91 (detailing administrative costs of monitoring and enforcing campaign finance regulations).

[172] *See* ACKERMAN & AYRES, *supra* note 2, at 128–39 (detailing this concern and proposing several new measures to protect the FEC's independence); *see also* Thomas Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039 (1997).

[173] *See supra* Part I.A.

[174] *See generally* Richard Briffault, *Reforming Campaign Finance Reform: A Review of* Voting with Dollars, 91 CAL. L. REV. 644, 660–61 (2003) (reviewing ACKERMAN & AYRES, *supra* note 2).

[175] *See* Sullivan, *Against Reform*, *supra* note 117, at 326 ("Mandatory disclosure . . . places the question of undue influence or preferential access in the hands of voters, who, aided by the institutional press, can follow the money and hold representatives accountable for any trails they don't like."); Sullivan, *Political Money*, *supra* note 12, at 690 ("Political money [c]ould itself be an election issue; a candidate would have to decide which was worth more to her—the money, or the bragging rights to say that she did not take it.").

[176] One empirical study to address the issue concluded that "mere disclosure fails to produce more competitive elections or reduce the impact of special or large contributions on the political process." David Schultz, *Disclosure is Not Enough: Empirical Lessons from State Experiences*, 3 ELECTION L.J. 349, 350 (2005).

paign contributions as a means for quid pro quo corruption, and not for any ability to promote egalitarian ends.

B. The Information-Suppressing Model and the "Secret Donation Booth"

Whereas the full disclosure model aims to give the public access to all of the information possessed by candidates about their donors, an alternative approach is to limit the candidate's information so that she can know nothing about the identity of her donors.[177] This model, which has been championed by Bruce Ackerman and Ian Ayres in their book *Voting with Dollars*,[178] employs what this Article calls the "information-suppressing" approach. Specifically, Ackerman and Ayres propose that the government establish a "secret donation booth," where all contributors must pass their donations through a government-run blind trust that would then pass the funds along to the candidate without revealing any information about the donor's identity.[179] A variation of this proposal was recently adopted for elections in Chile.[180]

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[177] Indeed, while "[t]he two initiatives may seem diametrically opposed, . . . they share a common goal: informational parity. Both systems try to guarantee that candidates know no more about their gifts than the public does." ACKERMAN & AYRES, *supra* note 2, at 94; *see also* Ackerman & Ayres, *The Secret Refund Booth*, *supra* note 163, at 1111 (describing "the principle of symmetric information: candidates should not know more than the general public about the identity of their contributors. Both publicity and anonymity strategies should be seen as tools for achieving the larger aim of informational symmetry.").

[178] ACKERMAN & AYRES, *supra* note 2. Ackerman and Ayres also propose a comprehensive public financing system that would credit each citizen with an equal amount of "Patriot dollars," which could only be used to fund political campaigns. *See id.* at 4–5, 7, 12–24, 66–92, 150–54. The merits and mechanics of public financing have developed an extensive literature and are largely beyond the scope of this Article, though a few brief points are worth noting. Public financing could in one sense be conceived of as a third approach to the disclosure problem, one which seeks to "drown out" the corrupting influence of private financing by injecting massive amounts of public funds into the campaign system (although doing this successfully might be prohibitively costly). It differs markedly from these other model approaches, however, in that public financing would inevitably have a tremendous substantive effect on the balance of resources between candidates; indeed, advocates of public financing often focus on electoral competitiveness rather than any explicit concern about corruption. At least one prominent study of public financing in state elections has found that it failed to increase electoral competitiveness, *see* Kenneth R. Mayer & John M. Wood, *The Impact of Public Financing on Electoral Competitiveness: Evidence from Wisconsin, 1964–1990*, 20 LEGIS. STUD. Q. 69 (1995); *see also* Karlan & Issacharoff, *supra* note 39, at 1735 (arguing that "public financing of presidential campaigns has failed in three separate ways"), but its prospects as an anti-corruption measure may be worth further examination. For a concise critique of public financing, see Smith, *supra* note 12, at 1084–86.

[179] *See generally* ACKERMAN & AYRES, *supra* note 2, at 6, 25–44, 48–50, 93–110. While this government-run blind trust would pose some administrative difficulties and would need to be funded by tax dollars, advocates of full disclosure acknowledge that a similar government role might be necessary on that model as well. *See, e.g.*, Sullivan, *Against Reform*, *supra* note 117, at 327 ("If there were concerns that candidates might chisel on such reporting, . . . a government agency . . . might act as a clearinghouse to collect political contributions and to forward them to candidates while ensuring simultaneous reporting on the Internet.").

[180] *See* Ackerman & Ayres, *The Secret Refund Booth*, *supra* note 163, at 1108–09 & nn.5–7; Joel W. Johnson, The Rival Partners' Finance Game: Electoral Institutions, Competition, and Campaign Finance in Chile 6, 40–43 (Mar. 27, 2007) (unpublished manuscript), *available at* http://dss.ucsd.edu/~jwjohnso/JWJ%20-%20MPSA2007%20chile.pdf.

The secret donation booth effectively disrupts the ability of campaign contributions to be used as bribes because there is no way for the candidate to verify that the promised donation has been made. Any attempt by a contributor to claim responsibility for a donation and to request a favor in return is easily foiled by other citizens claiming, albeit falsely, that *they* were the actual source of that donation and then trying to claim the favor for themselves.[181] In this way, the secret donation booth blocks the corrupt purchase of political favors in the same way that the secret ballot has succeeded at solving the problem of vote-buying.[182]

Yet the information-suppressing model, at least in this pure form, is not without its flaws. While the information that Ackerman and Ayres would suppress is no doubt a problem when it is used to facilitate quid pro quo corruption, campaign finance disclosure data also serves several socially valuable purposes.[183] First, as previously noted, the size of a contribution can indicate the intensity of a donor's support,[184] even if it is only a weak proxy for this information.[185] Second, contribution patterns provide candidates with precise and valuable feedback about how the policy positions they adopt are viewed by various constituencies. Third, disclosure data provide voters with a simple and effective tool to help interpret a candidate's policies by observing which organized interests they engage, as well as to determine which interests might be in a position to exert strong influence over the official.[186] Yet if all donor information is suppressed rather than disclosed, however, then both public-minded officials and the voters are deprived of this important source of policymaking information.

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[181] *See* ACKERMAN & AYRES, *supra* note 2, at 6, 27–28, 101–04. Ackerman and Ayres also detail several measures to defeat attempts to circumvent this forced anonymity through the specific timing or amount of a donation. *See id.* at 48–50, 93–110, 104–08, 113–18, 227–31. *But see* Pamela S. Karlan, *Elections and Change Under* Voting with Dollars, 91 CAL. L. REV. 705, 707–14 (2003) (reviewing ACKERMAN & AYRES, *supra* note 2) (contending that "the pedigree and extent of anonymity are more complicated than [Ackerman and Ayres] suggest").

[182] ACKERMAN & AYRES, *supra* note 2, at 6 ("Just as the secret ballot makes it more difficult for candidates to *buy* votes, a secret donation booth makes it harder for candidates to *sell* access or influence."). The analogy between campaign contributions and vote-buying is also discussed by Ortiz, *supra* note 39, at 910–13.

[183] *See generally* Garrett, *supra* note 2, at 1022–38 (discussing research on how voters use this information to make informed decisions).

[184] *See supra* note 17 and accompanying text.

[185] *See supra* notes 24–29 and accompanying text.

[186] *See* Cain, *supra* note 17, at 127 ("Recent research reveals that under certain conditions voters are likely to use information about contributions to infer what candidates stand for and what initiative measures mean: they are a kind of information cue that voters can use when they are otherwise uncertain about how to vote."); Karlan, *supra* note 181, at 720 ("[I]n deciding which candidate to support . . . an engaged citizen can consider information about the likely base of a candidate's time-honored support."). *See generally* Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 UCLA L. Rev. 1141, 1157–59 (2003) (discussing interest group support as a heuristic cue for voters).

In addition, while the information-suppressing model shows great potential for disrupting quid pro quo corruption, it does little to address any egalitarian concerns. It does not stop the disproportionate spending power of wealthy donors from tipping the scales in close elections, and it does not prevent wealthy donors from spending enormous sums to promote candidates whose policy platforms might provide the donor with huge windfalls. To be sure, if the secret donation booth truly succeeds at ending quid pro quo payments, the result might be a significant drop-off in special interest contributions and thus greater influence for the remaining donors, especially small donors.[187] But egalitarian goals might actually be better served by full disclosure, which would allow voters to observe, measure, and respond to the effect that wealthy interests have on politics, even if it is less effective in disrupting bribes and quid pro quo corruption.[188] Thus the information-suppressing model may face substantial opposition both from those who believe that data on private contributions serve valuable social purposes and from those who desire more egalitarian solutions to the problems posed by private campaign financing.

IV. Selective Disclosure and the Virtues of an Intermediate Approach

Although the debate over campaign finance regulation is often discussed as a choice between extensive disclosure requirements or no disclosure at all, this simple dichotomy overlooks a wide range of possible intermediate policies between these two extremes. For example, instead of requiring the disclosure of specific identifying information, such as a contributor's name and address, regulations might instead focus on more general characteristics, such as the donor's occupation, income bracket, race, or geographic region. Moreover, data of this sort could be reported as aggregate statistics, rather than as individual donations. Careful consideration of these different possibilities allows for a more nuanced set of reporting and disclosure requirements, which can be carefully tailored to control precisely what kinds of information are available as part of the legislative process.

The proper choice from among all of the possible reporting and disclosure schemes will depend on one's views about what information may be legitimately considered in the legislative process and what information instead gives rise to "corruption."[189] This Part offers three examples to illustrate how different theories of corruption and the legislative process should guide one's approach to campaign finance disclosure. The first example con-

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[187] *See* Ackerman & Ayres, *supra* note 2, at 30–32.

[188] *Cf.* Cain, *supra* note 17, at 128 ("Ironically, money may yield more information in initiative campaigns, in which little or no regulation exists beyond disclosure, than in candidate campaigns that respect contribution limits and expenditure caps.").

[189] *Cf.* Burke, *supra* note 13, at 128 (arguing that "[a]ny adequate standard of corruption . . . must be grounded in a convincing theory of representation").

cerns the individual identifying information reported by current disclosure schemes, which has inadvertently given rise to the quid pro quo and retaliation problems discussed earlier; once proponents of each theory recognize the promising alternative of reporting disclosure information as only aggregate statistics, all should agree that individual identifying information should be suppressed. The next example concerns aggregate statistics that correspond to various interest groups, which would be valuable information for one who favors a pluralist conception of the legislative process, but which many egalitarians would want to suppress. The final example concerns demographic information, which on the pluralist view could only be irrelevant, misleading, and subject to abuse as a tool for corrupt rent-seeking behavior, but which might be seen as important information for those who advocate an egalitarian approach to democracy.

A. The Problems with Individual Identifying Information

Traditional disclosure schemes have required campaign contributors to report information that allows anyone examining the disclosure data to identify the specific individual responsible for each donation—typically the contributor's name, address, and occupation.[190] However, it is exactly this specific identifying information that makes it possible for corrupt officials to engage in quid pro quo exchanges and for opponents of a politically disfavored cause to retaliate against its supporters with threats of harassment, violence, or economic reprisal. This sort of particularized disclosure therefore proves to be self-defeating.

Yet eliminating the disclosure of individual identifying information need not mean eliminating mandatory disclosure altogether; rather, many of disclosure's goals can still be achieved by reporting disclosure data on the aggregate rather than individual level. Once aggregate disclosure is recognized as a superior alternative to current reporting schemes, it becomes apparent that the individual identifying information that forms the basis of current disclosure regimes should be suppressed rather than disclosed.

1. Aggregate Versus Individual-Level Reporting

It is crucial at the outset to recognize that campaign finance data can be reported in either of two very different ways. In the standard approach, campaigns are required to report an itemized list of all donations, with each entry identifying the specific individual who made the contribution. Alternatively, disclosure information could be reported in the form of aggregate statistics—for instance, disclosure reports might include what percentage of a

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[190] *See* Ackerman & Ayres, *The Secret Refund Booth*, *supra* note 163, at 1115 (reporting that "[e]xisting federal law requires timely public disclosure of a contributor's name, address, and occupation").

candidate's funds comes from out-of-state sources, what percentage comes from members of each political party, or what percentage comes from those employed in the banking industry. This approach is somewhat akin to the data reported by electoral exit polls, where the information that individuals provide is published only as percentages,[191] not as an itemized list linking each individual to her specific responses.

Aggregate disclosure can provide a rich and valuable source of politically relevant information while still obscuring the identities of individual donors. If the proper information is collected and disclosed, aggregate disclosure can provide important information on patterns of political support that may prove insightful to both voters and policymakers alike. At the same time, if combined with the "secret donation booth" that Ackerman and Ayres propose,[192] aggregate disclosure would keep donor identities secret both from the candidates who receive these funds and from the donors' political opponents. Although this forced anonymity has gained little traction in American campaign finance laws thus far, aggregate disclosure can provide an elegant solution to both the quid pro quo and retaliation problems that plague current mandatory disclosure schemes.

2. Individual Identifying Information and the Quid Pro Quo

One point of general agreement is that private quid pro quo exchanges between public officials and individual donors are inconsistent with the public interest. It is widely recognized that "[t]he goals of those who offer personal benefits to officials to influence their decisions are unlikely to reflect public opinion."[193] Just as a number of different moral and political theories "agree that bribery and extortion, as traditionally defined, are bad things for democracy,"[194] these many theories can also agree that a quid pro quo involving campaign contributions undermines the legislative process in the very same way.

The traditional approach to preventing quid pro quo corruption is to require candidates to report the name and address of each donor[195]—but this approach undermines rather than furthers the goals of disclosure. Quid pro quo exchanges are only possible to the extent that a contributor's promise to

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[191] For a detailed discussion of how exit poll data is collected and presented, see Richard Hilmer, *Exit Polls—A Lot More than Just a Tool for Electoral Forecasts*, *in* PUBLIC OPINION POLLING IN A GLOBALIZED WORLD 93, 106–07 (Marita Carballo & Ulf Hjelmar eds., 2008) ("The sample precincts are categorized according to regional, economic, social, and political factors (e.g. region, city, rates of unemployment, strength of parties, etc.). Pre-structured tables periodically provide the party results for each aggregate category . . . ."). The many ways in which these different factor groupings can be used to structure an optimal disclosure regime are explored *infra* Parts IV.B–C.

[192] *See supra* Part III.B.

[193] Lowenstein, *Political Bribery*, *supra* note 36, at 834.

[194] Cain, *supra* note 17, at 140.

[195] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 60–74 (1976) (per curiam); ACKERMAN & AYRES, *supra* note 2, at 94–95.

make a donation is credible, which depends on the candidate being able to examine donation records and confirm that the promised contribution has been made. If, on the other hand, all donations must be made through a secret donation booth, and individual identifying information is concealed rather than disclosed, a candidate will not be able to tell apart a real bribe from a fake offer made by a crafty citizen who requests a political favor but never actually follows through with the promised donation.[196]

For combating corruption, the better approach is for all individual identifying information, including each donor's name and address, to be suppressed rather than disclosed. While current disclosure requirements are intended to deter corruption and inform voters by drawing attention to the source of campaign funds, the theory behind these disclosure schemes is premised on a false choice between a donor's identity being known only to the candidate or being reported to everyone. Because aggregate disclosure conceals the identities of individual donors while still providing the public with an important source of political information, disclosure of individual identifying information serves little necessary or valuable public purpose. Thus, aggregate disclosure is a superior third alternative to the traditional choice between full disclosure and no disclosure at all.

3. Solving the Retaliation Problem Using Aggregate Data

In cases where supporters of a politically disfavored cause face a serious threat of personal retaliation if their names are published,[197] aggregate-level disclosure provides a means to overcome this obstacle to the free exercise of their First Amendment rights. Just as the suppression of individual identifying information prevents candidates who receive funds from knowing who their individual donors are, it also prevents their political opponents from knowing who these supporters are. And if the contributors to an unpopular candidate or cause cannot easily be identified, then they cannot be targeted with the harassment, threats, economic reprisal, and other retaliation that might otherwise discourage their free participation in the political process.

Thus, both the reformers who support disclosure to prevent quid pro quo corruption and their opponents who worry about retaliation are actually concerned about different manifestations of the same problem. Corrupt quid pro quo bargains depend on the *recipients* of funds being able to trace them back to specific contributors; likewise, the threat of retaliation depends on their *opponents* being able to link these contributions to individual donors. In both cases, abandoning individual-level disclosure in favor of aggregate disclosure provides an effective means to overcome these problems while

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[196] *See supra* notes 178–82 and accompanying text.
[197] *See supra* Part II.B.

still providing a valuable source of political information that plays an important role in the legislative process.

B. Aggregate Statistics and Interest Group Pluralism

Even within a system of only aggregate reporting, disclosure data can be an important tool for shaping political agreement. Despite the consensus that quid pro quo exchanges are a serious threat to the public interest, many other kinds of legislative bargains and exchanges have become routine practice in the political arena. The legislative process commonly involves bargaining and political tradeoffs, not just in the course of balancing competing interests within a single bill, but also from lawmakers building coalitions to trade votes and support across multiple bills. The result of this logrolling is for various interests to be routinely allied together or traded off against each other, and thus numerous special interest groups[198] arise through which interested parties can organize together to lobby for or against matters of particular concern to them.

For democratic theorists in the pluralist tradition, the prominence of these special interest groups, and the competition and negotiations between them, is to be embraced and even encouraged.[199] Special interests "achieve a form of 'functional representation,' based upon intersecting economic and social groupings."[200] On this view, it is the interaction between these interest groups that ultimately guides public officials to enact the policies that best express the will of the people and thus conform to the public interest.

A sophisticated campaign finance disclosure scheme could easily facilitate the representation of these different interests, while still concealing individual identifying information, by collecting certain donor information to serve as a proxy for these interests and reporting that data in the form of aggregate statistics. For instance, donors at the secret donation booth might be asked to report their occupations, which could then be used to generate statistics indicating, for example, which candidates rely heavily on support from the insurance industry, or which candidates are preferred by public school teachers. This sort of aggregate-level data indicating the different interest groups that support each candidate could prove valuable in several

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[198] As characterized by Peter Schuck, "special interests . . . include any group that pursues contested political and or policy goals, and that is widely regarded by the public as being one contending interest among others." Peter Schuck, *Against (and For) Madison: An Essay in Praise of Factions*, 15 YALE LAW & POL'Y REV. 553, 558 (1997). It should be noted, however, that some special interests might not be as easy to detect in campaign finance data as others, depending on which statistics are collected and disclosed.

[199] *See, e.g.*, ROBERT DAHL, DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY AND CONTROL (1982); ROBERT DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT (1967); V.O. KEY, POLITICS, PARTIES, AND PRESSURE GROUPS (1958); ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY (1956).

[200] Wright, *Is Money Speech?*, *supra* note 20, at 1016.

ways.[201] The information may be very helpful for public officials uncertain about which policy would be the best way to achieve some public goal; for instance, a legislator uncertain of how to vote on education bills might be particularly interested in listening to the arguments of her colleagues who receive significant backing from teachers and other educators. This data could similarly be valuable for voters, who might be suspicious of an energy policy proposed by a candidate who receives a substantial portion of her funding from the oil industry. And in any case, even if a disclosure regime is adopted that fails to report any of this information, it is likely that public officials would still have a pretty good sense of who their supporters generally are.[202] Reporting and disclosing this data to the public therefore yields a great increase in transparency with little risk of increased corruption.

It is true that the release of this aggregate data could lead candidates to change their positions in order to garner the support of certain powerful interests, but under the pluralist view of democracy, this is precisely how the political process should operate. It is a decidedly non-egalitarian view, and egalitarian critics allege that this process "gives undeserved weight to highly organized and wealthy groups."[203] But to the extent that campaign finance regulation is motivated primarily by worries about quid pro quo corruption rather than by grand egalitarian ideals, this model successfully prevents individual donors from engaging in political bribery while still permitting the sort of political deal-making that might plausibly be said to further important public interests.

But even if it is common for public officials to take these special interest groups into account, and despite the embrace of many pluralist thinkers, this form of interest group politics remains very controversial as a normative matter. One who views these sorts of bargains between various special interests as a corruption of the legislative process would surely object to a disclosure scheme that draws greater attention to these groups. Critics allege that the pluralist view of the legislative process "tends to drain politics of its moral and intellectual content,"[204] thereby failing to respect an important set of public commitments. Thus, some theorists have argued that if a legislator is to act as a fair and conscientious trustee for those she represents, she "must condemn all the bargaining, the wheeling and dealing, and all the consciously applied pressure that characterizes American politics . . . ."[205] Apparently adopting this theory, Wisconsin law makes it a felony for legisla-

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[201] *See supra* notes 184–86 and accompanying text.

[202] *Cf.* Karlan, *supra* note 181, at 712 ("[A]s a descriptive matter, while it is generally difficult to determine how any particular individual has voted, it is not difficult to make quite intelligent estimates about the choices of voters within a particular category.").

[203] Wright, *Is Money Speech?*, *supra* note 20, at 1017. *See generally* OLSON, *supra* note 28. Of course, Wright notes, "[f]or the pluralist, this imbalance is a virtue to be embraced, not a flaw to be redressed." Wright, *Is Money Speech?, supra* note 20, at 1017.

[204] Wright, *Is Money Speech?*, *supra* note 20, at 1018.

[205] Lowenstein, *Political Bribery*, *supra* note 36, at 833–34; *see also id.* at 846–47 (referring to campaign contributions by special interest groups as "the most difficult case" and

tors to engage in logrolling,[206] and one old case from New York has held that an official could be found guilty of bribery for "enter[ing] into bargains with their fellow legislators or with others for the giving or withholding of their votes . . . ."[207]

This dispute over the democratic legitimacy of interest group politics, and whether these interests should be recognized and embraced as part of a campaign finance disclosure scheme, turns on the same distinction that separates egalitarian reformers from those who focus more narrowly on the issue of quid pro quo corruption. On the narrow view, bargaining between these different interests is routine and inevitable, and special interest groups form a helpful organizing principle for voters and candidates alike,[208] in which case the political system should embrace this process. But on the other hand, interest group politics is a starkly inegalitarian process, which is easily exploited by wealthy, well-organized, and intensely felt interests to obtain a significant advantage over other public concerns.[209] Though many eminent thinkers may continue to disagree over which side has the better of this debate, it highlights the important link between campaign finance regulation and our beliefs about corruption: the proper scheme of reporting and disclosure requirements must ultimately turn on how one interprets "political corruption" and what sorts of considerations one deems to be fair game as part of the legislative process.

C. Demographic Data and Participatory Democracy

Another difficult issue arises with respect to demographic data, such as the amount of support a candidate receives from different geographic regions,[210] from different racial and ethnic groups, or from male versus female voters. These characteristics often correlate with one's view on many issues,[211] but they are arguably not "interests" in themselves. Thus, for example, it certainly may be important for a public official to know about the different concerns of voters who live in urban versus rural areas, but she should not be able to broadly favor the desires of citizens in an electoral "swing state" like Pennsylvania over those of citizens in New York. Similarly, it may be valuable for the official to know whether her supporters favor affirmative action, but it is not clear that she should be taking into

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arguing against permitting such contributions because they provide value to the candidate regardless of "the extent the voters identify with or approve of [the group]").

[206] *See* WIS. STAT. § 13.05 (West 2008).

[207] People *ex rel.* Dickinson v. Van de Carr, 84 N.Y.S. 461, 464 (1903); *see also* Lowenstein, *Political Bribery*, *supra* note 36, at 813–15 (discussing the difficulty of distinguishing logrolling from traditional bribes under most bribery statutes).

[208] *See* Karlan, *supra* note 181, at 709 (noting that "mediating institutions like political parties . . . can serve as a focus for organizing and mobilization").

[209] *See supra* Part I.A.1.

[210] *See* Karlan, *supra* note 181, at 717–21 (suggesting that contributions should be "tagged" with information about the geographic region in which the donor resides).

[211] *See* JEFFREY M. STONECASH, CLASS AND PARTY IN AMERICAN POLITICS (2000).

account precisely how many of her financial supporters are members of groups that would receive a private gain from such a policy. Reporting these statistics could draw attention away from relevant policy considerations and instead give undue focus to characteristics that allow discrete and organized groups to engage in private rent-seeking[212] at the public's expense.[213]

But for many concerned about maintaining a well-functioning democratic process, there is something very troubling if a candidate systematically fails to obtain meaningful support from discrete and identifiable groups such as women or ethnic minorities. This may be viewed as problematic in part because such a disparity suggests a pattern of behavior that may arise from invidious discrimination rather than from legitimate concerns about the public good. But it also raises a deeper concern for many democratic theorists who believe that "democracy" does not just mean unfettered majoritarian rule, but rather is premised on some norm of equal political empowerment, equal participation, or equal respect.[214] For this reason, many egalitarians believe that it is important to have "meaningful, widespread participation in establishing democratic legitimacy."[215] If one finds these arguments compelling and believes that significant variations in a candidate's support across different demographic groups are indicative of serious failures in the democratic process, then it is important that these statistics be disclosed so that the public may recognize and address these problems.

The question of whether campaign finance regulation should require the reporting and disclosure of donors' demographic information thus turns on

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[212] The economic concept of rent-seeking in this context has been concisely explained by Richard Hasen:

> Rent seeking occurs when resources are used in order to capture a monopoly right instead of being put to a productive use. . . . [O]rganized interest groups expend their resources competing for political favors, such as tax breaks or subsidies, instead of putting them to some productive use. Rent seeking is Kaldor-Hicks inefficient because it leads to an overall decline in social wealth.

Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 9 (1996) (citing Gordon Tullock, *Rent Seeking*, *in* THE NEW PALGRAVE: THE WORLD OF ECONOMICS 604 (John Eatwell et al. eds., 1991)).

[213] That is, it might "exacerbate the tendency of politics to become a process of accommodation among groups with particular selfish interests, instead of an effort to reach the best decisions for society as a whole." Strauss, *Corruption and Campaign Finance Reform*, *supra* note 17, at 1376; *see also* Garrett, *supra* note 2, at 1042 (arguing that "[a]ny mandatory disclosure statute should be tailored to provide only the information most necessary for voter competence").

[214] *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW 17, 25 (1996); JOHN RAWLS, POLITICAL LIBERALISM 360–61 (1993). Similarly, Justice Stephen Breyer has argued for the importance of "broadening the base of a candidate's meaningful financial support, and encouraging greater public participation." Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 253 (2002). For a discussion of these competing views of democracy and an argument that the equal respect view is most consistent with modern practice, see Scott M. Noveck, *Is Democracy Compatible with Judicial Review?*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 401 (2008).

[215] Overton, *supra* note 12, at 100–04; *see also id.* at 98 ("To the extent one values diversity in concentrations of power, the democratic sphere should be as independent as possible from concentrated power in the economic sphere.").

another difficult and controversial question of democratic theory. If a public official's failure to garner meaningful support among certain discrete and identifiable demographic populations is a democratically suspect outcome, then the release of this information might be encouraged. However, the availability of these demographic statistics also raises significant prospects of corruption because this information enables groups to engage in private lobbying and rent-seeking behavior that threatens to subvert the public interest. The decision whether to disclose this information must therefore depend on how one conceives of political corruption and how strongly one weighs this danger against other important democratic values.

V. Conclusion

The public debate over campaign finance reform, and the attendant push toward increasingly detailed reporting and disclosure requirements, has failed to recognize the full and nuanced array of disclosure policies available to choose from. The narrow focus on "full disclosure" is especially troubling because the current approach empowers those who abuse the campaign finance system to engage in political bribery, while at the same time subjecting those who provide legitimate support for unpopular causes to the threat of harassment and retaliation. More sophisticated approaches, such as aggregate disclosure, offer a simple solution to these problems while simultaneously forcing political officials to focus on issues that are truly important to those they represent.

Having identified some of these neglected possibilities, this Article has shown how the choice among these different disclosure schemes requires careful consideration of deep theoretical questions about the nature of democracy and what it means for money to "corrupt" the legislative process. These are difficult issues, and as the Supreme Court's ongoing struggle with the issue of campaign finance reform makes clear, they are not likely to be fully resolved any time soon. By calling attention to the previously unrecognized complexities of the campaign finance disclosure issue and the theoretical tensions that underlie current disclosure policies, this Article hopes to engage both theorists and policymakers alike in a new discussion over how to structure a reasoned and effective disclosure scheme in order to shape the legislative process in a way that best reflects our democratic ideals.