

A DEBATE ON CAMPAIGN FINANCE DISCLOSURE

Tara Malloy* & Bradley A. Smith**†

Moderator Ross Sneyd††: Joining me here is Tara Malloy, Senior Counsel for the Campaign Legal Center, and Bradley Smith, Chairman of the Center for Competitive Politics and Chair of the West Virginia University College of Law. Today we will address the state of campaign finance disclosure law as it stands in the wake of *Citizens United v. FEC* and, of course, the 2012 elections. Can each of you explain your view of how campaign finance has changed since *Citizens United* and in the wake of the most recent elections, and has that change been good or bad?

Tara Malloy: So, how has campaign finance disclosure changed since the blockbuster Supreme Court decision in 2010, *Citizens United v. FEC*? To reach for some sort of literary allusion, it is the best of times and the worst of times for campaign finance disclosure. It is the best of times because the courts have affirmed, reaffirmed, and reaffirmed again the constitutionality of campaign finance disclosure as well as its importance.¹ In fact, although it is not well known, *Citizens United* actually reaffirmed the constitutionality of a federal campaign finance disclosure law so the actual statutes were not in any way changed by *Citizens United* in the

* Senior Counsel, Campaign Legal Center. Ms. Malloy joined the Campaign Legal Center in November 2006. She litigates a wide range of campaign finance and election law cases in state and federal court and has expertise in campaign finance, lobbying, and congressional ethics issues. Ms. Malloy has spoken at conferences and events nationwide on election law and has appeared as a legal expert on various news programs, including on MSNBC, PBS, and NPR. She has written articles on campaign finance and ethics issues for various publications, including POLITICO and The Legal Times, and is frequently quoted in national news publications, including The Washington Post, Los Angeles Times, USA Today, Time, and Roll Call. Recent publications include *A New Transparency: How to Ensure Disclosure from "Mixed Purpose" Groups after Citizens United*, 46 U.S.F. L. Rev. 425 (2011).

** Chairman, Center for Competitive Politics, and Visiting Judge John T. Copenhaver, Jr. Chair of Law, West Virginia University College of Law, and Josiah H. Blackmore II/Shirley M. Nault Professor of Law, Capital University.

† Please note that this Article is based heavily on a transcript of the debaters' remarks at the Vermont Law Review 2013 Symposium, *The Disclosure Debates: The Regulatory Power of an Informed Public*, held on September 27, 2013. The author and the Vermont Law Review have made stylistic changes to improve readability.

†† Ross Sneyd is a veteran journalist who worked in news media for over two decades. Mr. Sneyd served as a reporter for both the Burlington Free Press and The Associate Press. From 2008 until 2013, Mr. Sneyd was News Director at Vermont Public Radio.

1. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 224 (2003) (upholding the Bipartisan Campaign Finance Reform Act of 2002's regulation of electioneering communications and soft money); *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (upholding disclosure and reporting requirements established by the Federal Election Campaign Act of 1971); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 397-98 (2000) (expressly refusing to overrule the logic set forth in *Buckley*); *California Med. Ass'n. v. FEC*, 453 U.S. 182, 184-85 (1981) (upholding limits on contributions by political action committees).

disclosure sphere.² But it is also the worst of times, and that is partially because these disclosure laws have not changed and were not designed to take into account the flood of independent, corporate, and union spending that the *Citizens United* decision basically authorized.³

To expand on why we are in the worst of times, *Citizens United* struck down the longstanding federal restrictions on corporate independent expenditures in federal elections⁴ that have been in place since 1947.⁵ Up until this point, corporations and unions had to use PACs, a very highly regulated political committee, in order to do any spending in elections.⁶ So, independent spending went from of moderate amount to a flood. In the 2012 elections we saw over one billion dollars in independent spending.⁷ That was up three- or four-fold from the last presidential election.⁸ And it is the worst of times because the law did not take into account that spending, or it was not designed to catch that spending for the purposes of disclosure. And so, we were left, practically speaking, with a great dearth of disclosure. Moreover, there has been a shift in the politics and the ideology of disclosure, where many groups and individuals that were supportive have now changed their tune.

But I would also like to go a little more in-depth into why it is the best of times for disclosure. *Citizens United*, and constitutional jurisprudence on campaign finance disclosure as a whole, has not really changed since the 2003 decision of the Supreme Court in *McConnell v. FEC*.⁹ In fact, the fundamental validity of the disclosure of money funding candidates, political parties, and independent electoral spending has not really been disputed for forty years—maybe even eighty years—depending on how far back you go. *Citizens United* essentially reaffirmed the status quo. As I said, the campaign finance disclosure laws have also been on the books for

2. *Citizens United v. FEC*, 558 U.S. 310, 367–69 (2010).

3. *A Guide to the Current Rules for Federal Elections*, CAMPAIGN LEGAL CENTER, http://www.campaignlegalcenter.org/index.php?option=com_content&id=1187%3Aa-guide-to-the-current-rules-for-federal-elections (last visited Apr. 27, 2014).

4. *Citizens United*, 558 U.S. at 372.

5. *Id.* at 343 (dating the prohibition on independent expenditures by corporations and labor unions to 1947).

6. See BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 28 (2001) (describing the rise of PACs in response to limits on direct political contributions).

7. Press Release, Fed. Election Comm'n, FEC Summarizes Campaign Activity of the 2011–2012 Election Cycle (Apr. 19, 2013) [hereinafter FEC Press Release], available at http://www.fec.gov/press/press2013/pdf/20130419_2012yesummary.pdf.

8. *Total Outside Spending by Election Cycle, Excluding Party Committees*, CTR. FOR RESPONSIVE POLITICS, https://www.opensecrets.org/outsidespending/cycle_tots.php (last visited Apr. 27, 2014).

9. See *McConnell v. FEC*, 540 U.S. 93, 224 (2003) (upholding regulation of electioneering communications and soft money).

a very long time; really, the bare bones of disclosure laws have been on the books for almost a century.¹⁰ They, if anything, have been expanded and refined over the decades, not shrunk. So, in some ways, we are at the zenith of campaign finance transparency.

What's more, there has been longstanding and very broad public support for disclosure of money in politics. According to a New York Times poll shortly after the 2010 *Citizens United* decision, 92% of Americans say it is important for campaigns to be required by law to disclose their donors and how their funds are used.¹¹ This is really across party lines. There is almost no distinction between Democrats and Republicans.¹² This is pretty overwhelming support. So, in some ways it is almost a debate that is not a debate. It has been constitutionally settled, and certainly settled in the court of public opinion, for a very long time that political disclosure is a good idea.

I do not really want to cut off the debate before we even start, however, and it certainly does not look like my side is winning in terms of what information you have available when you think about a candidate or a ballot measure proposal. And although in broad brushstrokes the courts have been very supportive of disclosure, when you get down to the details of a law it is much more difficult to determine what is constitutional and what is beneficial in the realm of disclosure.

In terms of these details, one legal point that I will highlight because it is a threshold question is: "What do I mean when I use the term *campaign finance disclosure*?" The Court has shown unwavering support for campaign finance disclosure, which is the disclosure of spending by candidates, political parties, and, in some instances, independent spenders. Its decisions have been much more mixed when you talk about *political* disclosure, and by that I mean *issue advocacy* as a term of art.¹³ Issue advocacy might constitute spending for or against a ballot measure or initiative. Or, it might simply mean lobbying. It might mean issue advocacy, when the spenders claim at least to be talking simply about a political issue and not a candidate. There the courts have been much more mixed.¹⁴ That is not to say these laws are unconstitutional, but they

10. See SMITH, *supra* note 6, at 26 (describing the Federal Corrupt Practices Act of 1925).

11. Megan Thee-Brenan, *Americans Want Disclosure and Limits on Campaign Spending*, N.Y. TIMES (Oct. 28, 2010), http://thecaucus.blogs.nytimes.com/2010/10/28/americans-want-disclosure-and-limits-on-campaign-spending/?_php=true&_type=blogs&_r=0.

12. *Id.*

13. Tara Malloy, *A New Transparency: How to Ensure Disclosure from "Mixed-Purpose" Groups After Citizens United*, 46 U.S.F. L. Rev. 425, 440 (2011) (describing the Court's skepticism towards regulating "issue advocacy" to the same degree as election spending).

14. *Id.* at 440–41.

certainly have had a much more mixed record. So, really I am simply talking about campaign finance disclosure. In terms of certain core disclosures, for instance candidates disclosing who gives money to them, I am not even sure my opponent would disagree about their constitutionality or even advisability. But, again, defining the broader sphere of what might be political or what might be candidate advocacy is more difficult.

I would just throw out two terms—*express advocacy* and *electioneering communications*. These are somewhat technical terms, but this is the spending that we are talking about. In the spree of independent spending that has been freed up by *Citizens United*, there have been two independent types of spending that are deemed campaign related and, therefore, subject to disclosure.¹⁵ That is, if a group were to make these types of expenditures, they would have to disclose their donors and would have to disclose a lot of information about their spending. These communications are express advocacy,¹⁶ which is when you say, “Vote for a Candidate,” “Support/Oppose McCain 2008,” whatever. That is express advocacy, and that has been regulated for a very long time—since the 1970s.

A more recent category that also has been deemed campaign related is called “electioneering communications.”¹⁷ Congress decided to regulate this category of spending to plug the gap of people getting around the express advocacy definition, which is pretty narrow. An electioneering communication is a communication that runs shortly before an election (thirty days before a primary, sixty days before a general election); mentions a federal candidate; and is targeted towards the relevant electorate.¹⁸ Also, we are talking only about TV and radio ads. So this category captures all sorts of candidate specific advertising in a very, very narrow preelection window. And these are the two types of independent spending the Court has by and by declared can be subject to disclosure, and so, this is what I am talking about today.

Unfortunately, following *Citizens United*, practically speaking, the laws that used to subject these two categories of spending to disclosure have fallen apart. And that is simply because of the nature of the federal campaign finance statute and, even more, the actions of the federal player,

15. CIARA TORRES-SPELLISCY, TRANSPARENT ELECTIONS AFTER *CITIZENS UNITED* 1 (2011), available at <http://www.brennancenter.org/sites/default/files/legacy/Disclosure%20in%20the%20States.pdf>.

16. *Buckley v. Valeo*, 424 U.S. 1, 44 n.25, 47 (1976); TORRES-SPELLISCY, *supra* note 15.

17. Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 434(f) (2012) (amending the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431–442 (2012)); TORRES-SPELLISCY, *supra* note 15.

18. 2 U.S.C. § 434(f)(3)(a).

the Federal Election Commission (FEC), the agency in charge of campaign finance regulation. The FEC has so narrowed the laws applicable to these types of speech that groups only have to disclose their donors when their donors specifically earmark their money for election spending.¹⁹ For example, if I were to give \$100,000 to Priorities USA (a nonprofit organization that has engaged in spending in the election), and not earmark the funds for anything, I would not have to be disclosed. I could give \$20 million and not have to be disclosed as long as I was not foolish or honest enough to say, “Please use my millions of dollars for an election ad that falls into the two legal categories.” This is why we saw this flood of spending in 2012, and to some extent 2010, at the federal level from of all these groups like “Americans for America,” “Americans for Prosperity,” “Priorities USA,” “Crossroads GPS”—groups with very vague, patriotic names that do not indicate where their money was coming from. So, again, *Citizens United* was technically or theoretically a reaffirmation of disclosure. But, in practice, it led to this confusing maze of very patriotic-sounding, but otherwise shadowy, groups influencing our elections.

Moderator Ross Sneyd: We do not have too much concern about having a debate here. So Brad, would you like to take on the broad question?

Bradley Smith: I certainly agree with Tara that there is not really a big debate. It is often framed as “you favor disclosure” or “you oppose disclosure.” I do not think that is an accurate representation because almost everyone favors disclosure. It is very hard to find people who are opposed to all disclosure. Almost everybody favors some disclosure. The question is really what should be disclosed? The Supreme Court, for example, has upheld disclosure laws repeatedly, but it has not upheld *all* disclosure laws.²⁰ It has not upheld many of the disclosure laws that state legislatures are now offering. In fact, it has struck some of them down, both as a facial matter and as applied challenges to the law.²¹

19. See *Citizens United v. FEC*, 558 U.S. 310, 357 (2010) (limiting disclosure requirements and contribution limits to direct contributions).

20. See, e.g., *supra* notes 1–5 and accompanying text; *Randall v. Sorrell*, 548 U.S. 230, 236 (2006) (invalidating Vermont’s political expenditure limits); *FEC v. Nat’l Conservative PAC*, 470 U.S. 480, 510 (1985) (holding restrictions on PAC expenditures unconstitutional); *First Nat’l. Bank of Bos. v. Bellotti*, 435 U.S. 765, 767 (1978) (declaring a Massachusetts limit on corporate referendum spending unconstitutional).

21. Nathaniel Persilly & Jennifer S. Rosenberg, *Defacing Democracy? The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court’s Recent Election Law Decisions*, 93 MINN. L. REV. 1644, 1658 (2009).

So, what is it that should be disclosed? What does the public have a right to know? This is a cost–benefit analysis. Does the public have a right to know who gives money to nonprofits, such as the Center for Competitive Politics that I chair? Does it have a right to know who gives money to Vermont Public Radio? Does it have a right to know who gives money to the Brennan Center, which by the way does not disclose its donors but works very hard to have political influence? It comes down to things like this. So, what is it that needs to be disclosed?

Now, let me do a little thought experiment with you here. This gets a little dated. It was much more effective when I did it in 2008. But, imagine if in the late days of the Bush Administration it had introduced the Patriot II Act. And imagine that it said that the purpose of the Patriot II Act, or at least one purpose, is to make sure that terrorists or foreigners do not infiltrate our politics. President Obama has recently raised that possibility, so this is not a big stretch of the imagination. So, to make sure that does not happen, one of the provisions of the Act requires Americans to report their political activity to the U.S. government, which will keep that information in a database. But it is worse because it will actually make that database available to Halliburton, your employer, medical companies, insurance companies, and the like. What would be the reaction? I think the reaction of many Americans would be, “This is outrageous. What the heck is going on here?”

We have that law. It is called the Federal Election Campaign Act.²² Under that law your political activity, at least certain forms of it, including your employer and your address, is reported to the federal government,²³ which puts it in a database and makes it available to Halliburton, insurance companies, prospective employers, nosy neighbors, and your enemies. That is what disclosure is. So, there is a basic cost–benefit analysis that has to be undertaken.

The reality is we have more disclosure than ever, and, as Tara pointed out, *Citizens United* did not change that in 2010. Although, she is also correct that the change in the law makes the disclosure system work a bit differently; we still operate in a system where we have more disclosure laws in American politics than at any time in our nation’s history.

Some say that there has been this flood of money coming in. It’s true that independent spending, after *Citizens United*, has gone up to about one billion dollars,²⁴ which is about fourteen or fifteen percent of the total

22. Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431–442 (2012) (as amended).

23. 2 U.S.C. § 434(b).

24. FEC Press Release, *supra* note 7.

amount spent on elections.²⁵ This does not seem that bad to me. It seems quite good to me. I have never quite bought into the idea that campaigns should only be reserved to the candidates and that independent citizens should not have anything to say about them. But how much of that is actually undisclosed?

Let us start with the proposition that *all of it* is disclosed at some level. You cannot see a political ad in this country that does not disclose who paid for it.²⁶ So when we say that we want to know more, what we really are saying is we want to know not just who is paying for it, but who gave money to the people who are paying for it. That might be a very important thing to know. But if we know that Crossroads GPS paid for an ad, we do know who paid for it. We may say we want to know who gave money to Crossroads, but really how secretive are these “shadowy groups”? I can’t help but laugh when I get a press report that says, “One such shadowy group is Crossroads GPS, a front group formed by former Republican Party Chairman Ed Gillespie and Karl Rove that promotes conservative and Republican values.” I think, well if these guys are a shadowy group they are doing a pretty crummy job of it, right? We know all about them. So, we do get a lot just from that, it is not hard to look these things up. But still, we might want to know who is giving them money. How much of a problem is that?

According to the Center for Responsive Politics, a disclosure reform organization that is certainly no friend of what I would call the free speech position, about \$315 million was non-disclosed in the sense that donations to the organization were *non-itemized*. We do not know who gave the money to the group that did the spending. This sounds like a lot of money, \$315 million. But that is about 4% of what was spent in the 2012 campaign.²⁷ Now, \$315 million sounds like a major problem facing this country. But maybe we can live with 4%. And we can live with it if we start thinking about the consequences of further disclosure, and why might people not want to have more information disclosed.

As I’ve been hinting, disclosure can have a downside, including invasion of privacy. In certain cases people have been targeted for harassment, threats, and bullying. These things are also costs. Also, I want to suggest that there are some costs in our political civility. Remember, the Federalist Papers were published anonymously. And one reason they were published anonymously is because the authors wanted the people to focus

25. *Id.*

26. 2 U.S.C. § 441d.

27. See FEC Press Release, *supra* note 7, pt. 5 (totaling all 2011–2012 campaign contributions and listing separately by contribution type).

on the issues involved, not to engage in ad hominem attacks on the people involved.²⁸ And that is what typically happens now with disclosure; we use it as an excuse to make ad hominem attacks on the particular speaker, at least too often we do.

So, I want to suggest we put two issues on the table. We want to think a little bit harder about disclosure. Is it really worth the benefit? Raise your hand to answer the following question: how many of you actually go to the FEC website and look up who is giving money to your candidate so you can determine how to vote? Not very many. And this crowd is going to be a lot more likely to do so than your typical audience. I will add, when Chuck Schumer introduced the DISCLOSE Act in Congress to try to get more disclosure after *Citizens United*, he said quite openly and specifically, “The deterrent effect should not be underestimated.”²⁹ In other words, his goal was to deter political speech hostile to the Democratic Party. That is what he meant, and that is what he said. I think that we should recognize that this type of cost is there when we get into this business. I return to the privacy example, which is another downside. What we are jeopardizing in this quest for the manic disclosure of everything is, to me, a very hard won constitutional right of privacy. This right came out of a series of Supreme Court decisions in the 1940s, 1950s, and 1960s: *Bates v. City of Little Rock*, *NAACP v. Alabama*, *NAACP v. Button*, and *Talley v. California*. Many of these cases involved the civil rights movement and held that the government could not force organizations to disclose their membership or donor lists because doing so would inhibit speech and could allow the government, or other private individuals, to retaliate and silence that speech.³⁰ We have actually made it an exception to that rule already in the realm of political speech, oddly the area that is supposed to be the most protected under the First Amendment. So, when we do a good cost–benefit analysis, we realize that a lot of voiced concern these days about disclosure is really a cover to deter certain forms of speaking.

28. See Kathleen M. Sullivan, *Foreword* to ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, *THE FEDERALIST PAPERS*, at iii–iv (ABA ed. 2009) (noting the intellectual and political resistance facing the authors).

29. *Campaign Spending Rules*, C-SPAN (Feb. 11, 2010), <http://www.c-span.org/video/?292059-1/SpendingRu>.

30. See *NAACP v. Button*, 371 U.S. 415, 444 (1963) (protecting NAACP council’s First Amendment rights in absence of a substantial state regulatory interest); *Bates v. City of Little Rock*, 453 U.S. 516, 527 (1960) (holding compulsory disclosure of petitioners’ membership list unconstitutional in the absence of a controlling justification); *Talley v. California*, 362 U.S. 60, 65 (1960) (“[I]dentification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance.”); *NAACP v. Alabama*, 357 U.S. 449, 463, 466 (1958) (explaining that government compelled disclosure can result in a “repressive effect” on member participation).

Moderator Ross Sneyd: Tara has a microphone and will take your questions as we go along. Let us dig deeper into the question of the cost–benefit analysis. Tara, what practical effect, would you argue, has there been from disclosing donations to political campaigns over forty years, eighty years, whatever term you want to use? Who has benefited?

Tara Malloy: Who has benefited? Well, I have benefited. You have benefited. We have benefited. I think it probably comes as no surprise that I would say that the public benefits from campaign finance disclosure. Knowing who funds your candidate, who funds your political parties, who funds even those shadowy or not so shadowy groups that run express advocacy telling you how to vote in your elections. I think the interests in disclosure are well articulated by *Buckley v. Valeo*, which was decided in 1976 and is kind of the grandfather of all campaign finance cases.³¹ There, the court identified two principle public interests in having campaign finance disclosure: (1) an anti-corruption interest; and (2) an informational interest.³² The anti-corruption interest is probably the one that people are most familiar with, the “sunlight is the best disinfectant” idea.³³ The Court said, “[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. . . . A public armed with information about a candidate’s most generous supporters is better able to detect any post-election special favors that may be given in return.”³⁴ This is the most basic reason why people think we need disclosure, because if you are going to be able to connect the dots of corruption, you’re going to have to know who gave the quid and who got the quo. Right now you can say, “Everyone knows who Crossroads GPS is,” but you don’t know who is funding Crossroads GPS. So indeed, if its donors got an earmark, a tax break, or an ambassadorship, how would you even know that these benefits were government favors? Well, you wouldn’t. Crossroads GPS spends hundreds of millions of dollars, so there are donors who gave very generously. I do not mean to say in any way that Crossroads GPS is unique. There was a large spectrum of groups across both sides of the aisle that were spending in 2010 and 2012. So, that is the anti-corruption interest.

31. See *Buckley v. Valeo*, 424 U.S. 1, 6 (1976) (“These appeals present constitutional challenges to the key provisions of the Federal Election Campaign Act of 1971 . . .”).

32. *Id.* at 66–67.

33. Louis D. Brandeis, *What Publicity Can Do*, *HARPERS WEEKLY*, Dec. 20, 1913, at 10, available at <http://www.law.louisville.edu/library/collections/brandeis/node/196>.

34. *Buckley*, 424 U.S. at 67 (citing *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936)).

An even broader interest that has been invoked is the informational interest. This is the idea that if you want a democracy, you need an electorate that knows what they are doing. *Buckley* said:

[D]isclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid voters in evaluating those who seek federal office . . . [S]ources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.³⁵

Translation: if you know who brought you, you know with whom you are dancing. Whether donors fund independent groups or give directly to candidates, it is helpful to know the identity of supporters when evaluating the candidate's positions. What is a better, more credible measure of support for a candidate than giving money—putting skin in the game? This is the idea of the informational interest.

You might say, “Okay, well this sounds nice in theory, but in practice does the electorate really get informed?” Professor Smith brought up that maybe people do not really check the FEC database. Well, that's never really how it has worked. We rely on nonprofit groups and the media, in particular, to aggregate that information for us. Very few of us are going to weed through every single report by every single candidate. But by and by these intermediaries do a decent job.

Furthermore, another area where you get direct disclosure is where you actually have a disclaimer on an ad. Various social science studies have shown that when you actually see on the ad that the National Rifle Association (NRA) or an insurance company paid for it, you have a pretty good idea of how to assess the credibility of the ad or the bias of the speaker.³⁶ There has been considerable research in the area of ballot measures (which is a question presented to the voters, as opposed to a candidate) about how much information helps voters. There was a study on insurance-related ballot initiatives showing that voters, who knew nothing about initiative details but knew the insurance industry's preference or who they were funding, voted their interests just as well as people who knew

35. *Id.* at 66–67 (internal quotation marks omitted).

36. See Michael D. Gilbert, *Campaign Finance Disclosure and the Information Tradeoff*, 98 IOWA L. REV. 1847, 1884–86 (describing the impact of disclosure on a candidate's credibility as well as a supporter's credibility).

everything about the insurance related ballot measures.³⁷ Simply knowing the positions of the key players or the key funders was almost enough to get you to a point of education or enlightenment.

In particular, the Ninth Circuit has picked up on this idea and has upheld a lot of ballot measure campaign finance disclosure laws. In the case of ballot measures, it is even harder to pick out who is supporting and who is opposing a measure because there is often not even a Republican or Democratic label.³⁸ Since voters may not understand the details of a policy concept or a particular measure, they often base their decision to vote for or against the measure on “cognitive clues such as the names of individuals or groups who back or oppose a proposed measure as listed in the ballot pamphlet, or the identity of those who make contributions or expenditures for and against the measure in question.”³⁹ This has been the maxim of the Ninth Circuit case law; disclosure is a way that voters figure out how a complicated measure is going to affect them. The voters look at who is financing the measure in terms of the advocacy. In other words, what the insurance industry wants or Greenpeace wants. But very often, in all contexts, groups—I think you have to admit—deliberately cloak their identities and interests in vague names and sometimes even take on names that indicate the opposite of their interests. The Ninth Circuit gave a specific example of how disclosure “prevent[ed] the wolf from masquerading in sheep’s clothing.”⁴⁰ In Proposition 199, in the 1990s, the Mobile Home Fairness and Rental Assistance Act was presented as a noble effort to create fairness and rental assistance for mobile home park residents.⁴¹ However, the disclosure laws—and by extension various newspaper editorials—exposed the real interests behind the act. They explained that the initiative’s real purpose was to eliminate the local rent control for mobile home parks and was supported almost entirely by two mobile home park *owners*.⁴² Despite the fact that the mobile home park owners outspent opponents six to one, the measure was defeated once that information was disclosed and people realized that “fairness” and “rental assistance” might have different meanings to different people. That is just

37. *Cf. id.* (arguing that disclosure informs the value of speech, which influences the way a voter views a candidate or policy).

38. *See, e.g., Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1104 (9th Cir. 2003) (“[T]here can be no doubt that states may regulate express ballot-measure advocacy through disclosure laws.”).

39. Expert Report & Affidavit of Bruce E. Cain at ¶ 3, *Cal. Pro-Life Council v. Getman*, No. 00-CV-01698 (E.D. Cal. June 2, 2004), 2004 WL 3773419, ¶ 3.

40. *Cal. Pro-Life Council*, 328 F.3d at 1106 n.24.

41. *Id.*

42. *Id.*

one of many examples of how often groups choose names that are very deceptive or at least vague, and that the informational interest is not simply a grand constitutional theory, but also provides a very practical benefit to you and me.

Moderator Ross Sneyd: Let us look at this from the other side, specifically, what damage would you argue has been done by disclosing the people and organizations that pay for political campaigns?

Bradley Smith: I would go back to *Buckley*, where Tara started. *Buckley v. Valeo*, for example, generally upheld disclosure requirements in the Federal Election Campaign Act.⁴³ But, it did that only after it substantially narrowed those requirements; as Tara explained, limiting it to express advocacy or to organizations that were political committees that were organized with the major purpose of electing candidates to office. So if you were the NAACP or Citizens to Clean the Connecticut River, you did not have to register unless you were a political committee engaged in partisan campaign activity as your primary mission. Only then did you have to disclose all of your donors.

Tara cited a survey that asked whether campaigns should be required to disclose their donors. Campaigns are required to disclose their donors, so that's the law, right? And this takes us back again to this point that I agree with Tara on: in certain cases, disclosure is a very valuable asset. And I certainly agree that many times it is a good short-hand voting cue for people who want to figure out how to vote and can't begin to understand issues, especially very complex ballot measures. But, again, what I call for is some sense of measurement, which I think is being lost. Almost everything that Tara cited is something we already have on the books. So the question now really is this: Are we going to go further into disclosure? Nobody is seriously talking about rolling back disclosure in any significant way. Nobody is talking about not requiring candidate campaigns to disclose. The question is whether we are going to go even further than we currently do, than we have already gone.

What are some of the problems with requiring more disclosure? One that I have not mentioned, something I really noticed when I was serving at the FEC, is that disclosure really harms grassroots groups. One of the best ways to silence these naggy, little grassroots groups, whether they are Occupy, the Tea Party, or almost anything else, is to hit them with campaign finance violations. These groups violate campaign finance laws,

43. *Buckley v. Valeo*, 424 U.S. 1, 143 (1976).

and disclosure laws in particular, all of the time. The Center for Competitive Politics is representing a group out in Colorado called Coalition for Secular Government, which is a group of people publishing long, turgid pro-choice policy papers on its website. The State of Colorado says, “You have to register and report as a political committee, you violated the law.”⁴⁴

We are also representing a guy in Ohio, on the other side of the spectrum, named Corsi. Corsi started a blog, and blogged using the name the Geauga Constitutional Council (he lived in Geauga County). He was a member of the Tea Party who was very critical of the local Republican establishment.⁴⁵ So, the local Republican establishment struck back. The Chairman of the local party, who happened to be on the county elections board, filed a complaint against him with the Ohio Elections Commission saying, “We have to know who you are, you are not filing a disclosure report, you should be registered as a political committee. You are a ‘council.’ You are two or more people working together. We need to know. The public has a right to know.” This is done all of the time, with very low thresholds on spending triggering these laws.

Taking this further, while I was at the FEC, I noticed that it’s pretty easy for a grassroots group to understand the basics of campaign finance laws. For example, don’t take a contribution more than “X.” Let’s say you are a candidate running a long-shot campaign for Congress, but you are going to give it a try. In that situation, you can’t take a corporate contribution or a contribution more than \$2,600. Pretty easy to understand. Pretty easy to do. Filling out the disclosure forms, on the other hand, is the problem. That is the bear. That is where they get caught, and that is where they cannot do it.

One study asked forty people to fill out a standard disclosure form and gave out a cash reward if done correctly. Not a single person in the group was able to do it correctly. It is a very complex, difficult form. It goes on and on and on. Under federal law, you cannot even dissolve as a political committee without getting the federal government’s permission.⁴⁶

In addition to that issue, we should also look at the idea that you can get information from the press. As Tara said, people don’t look at the

44. *Current Litigation*: Coalition for Secular Government v. Gessler, CENTER FOR COMPETITIVE POLITICS, <http://www.campaignfreedom.org/litigation/current-litigation/coalition-for-secular-government-v-gessler/> (last visited Apr. 24, 2014).

45. Corsi v. Ohio Elections Comm’n, 981 N.E.2d 919, 921 (Ohio Ct. App. 2012), *cert. denied*, 134 S. Ct. 163, 163 (2013); *Completed Litigation*: Corsi v. Ohio Elections Commission, CENTER FOR COMPETITIVE POLITICS, <http://www.campaignfreedom.org/litigation/completed-litigation/corsi-v-oc/> (last visited Apr. 24, 2014).

46. Federal Election Campaign Act of 1971, 2 U.S.C. §§ 433(d) (2012) (as amended).

disclosure reports; they get it from the press. You don't really need to know who funds Crossroads GPS, the press can tell you. It doesn't take a lot of digging, frankly; they know all kinds of stuff about Crossroads GPS and almost all these groups. But the question is should some people be able, if they are so inclined, to keep their actions a bit more private?

We have other ways to address the potential problems. For example, in jurisprudence there is something known as the least restrictive means. If the law infringes on First Amendment rights, as campaign finance disclosure laws admittedly do, government has to justify it with a compelling government interest, which we have with the information and anti-corruption interests, and the government must use the least restrictive means to serve this interest. But we don't use the least restrictive means. We could require that you disclose your donors only if you are asking for or get an earmark. If you get an earmark then disclose all of your donors; we could see that trade. We could have more sealed bidding rather than a competitive sealed bidding to get the elements. So, there are other things that I think we could do that would address the government interest that would not say, to essentially all Americans, "Because some of you are corrupt, all of you have to give up your First Amendment rights." I think we could achieve the information interest with a lesser degree of free speech restriction.

Overall, these campaign finance disclosure reports in the news deaden and dull American political discourse. Do you ever read these reports? "The FEC released third quarter fundraising results of a congressional race," "So-and-so raised 'X' amount and so-and-so raised 'Y' amount." Pretty soon your mind numbs, you have not learned a thing about the race, nobody is talking about the issues, and nobody cares. We are telling everybody, "The issues do not really matter; it is all about the money." That is a real harm. I think that is a mistake. I think it tells others that they cannot do anything. I think it fails to inform voters. It is much easier to learn who gave money to somebody than to actually find out what the candidate thinks or wants to do. These are the kind of harms that need to be addressed before we even get into some of the more aggressive personal harms that can fall on particular people when they are targeted for retaliation by their government or by others in the private sector.

Moderator Ross Sneyd: Let us look into some of these consequences that you have suggested. In fact, Brad, you have written about some examples where you argue someone has been hurt because of his or her disclosed contribution. For example, you wrote about a Republican donor, Sam Fox, whose nomination for ambassador to Belgium was derailed in the

U.S. Senate because of the contributions that he made to Swift Boat Veterans in 2004.⁴⁷ Why isn't that the price of playing politics? If you can play in the big leagues shouldn't there be a price?

Bradley Smith: Sam Fox is an interesting case, but I will try to make this point: it shows that there are folks in Congress, in government, who will retaliate against you for your political activity. In this particular case, John Kerry was very mad because Sam Fox had given money to Swift Boat Veterans for Truth. He was very mad about that, and he was very open. Kerry essentially argued, "This man is not going to be ambassador, not because he is unqualified, or anything else, but because he gave money to Swift Boat Veterans for Truth, my political opponents." Now, we might say if you are nominated as an ambassador you should have a higher level of scrutiny; after all, we require office holders to file financial disclosure reports. One of the things somebody said today was, "Does the public have a right to see you tax returns?" We were all kind of uncomfortable with that to varying degrees. But we might want to see tax returns of office holders. Why? The purpose of disclosure is for us, the citizenry, to monitor our government, but it is not for our government to monitor us, right? Sometimes those two cannot be separated. If we know that I gave money to a candidate, that is public information, and so we know who the candidate is and that he got money from me. It's all traceable and inseparable. But the idea that we should evaluate disclosure laws by that criterion is a valid one. So the question of Sam Fox really just shows that there can be retaliation in government, and that people will base their decisions in government on something other than what we think about as "good government." That is nothing new. That is what Tara has been saying all along. The question is: are we going to go further with added disclosure? Maybe we should know more about a person applying for an ambassadorship, maybe not. There are many people who do not apply for ambassadorship and can also face that kind of retaliation or threat.

Moderator Ross Sneyd: Let us follow up on that. Tara, from a different perspective, what is wrong with that argument? Another thing that Brad has written about is contributions by much smaller players and the results of their disclosure. One of the examples that he has cited is Gigi Brienza,⁴⁸ an employee of Bristol-Myers Squibb, who was targeted by an animal rights group that was trying to shut down a lab that tested drugs on

47. Bradley A. Smith, *In Defense of Political Anonymity*, CITY JOURNAL (Winter 2010), available at http://www.city-journal.org/2010/20_1_political-anonymity.html.

48. *Id.*

animals. She actually had no affiliation with the lab, but she still had to deal with her name and address being publicized. She only donated \$500 to John Edwards, so she was not a big player. Why should she be forced to pay, in essence, to participate in politics?

Tara Malloy: Harassment. That is the counter argument that we hear constantly these days. I have two points that I want to raise: (1) there is already a legal remedy for true instances of harassment; and (2) I will actually make a concession to Professor Smith's side and acknowledge that we could perhaps design disclosure laws better to avoid possible harassment. First, in terms of the legal remedy, yes of course there is a possibility that a donor to a particularly unpopular group or a historically disadvantaged group may be targeted for harassment. But the Supreme Court has already taken that possibility into account when it upheld all of these disclosure laws that we have been talking about.⁴⁹ There is something called, in short hand, the Socialist Worker Exception.⁵⁰ The Court said that to be exempt from disclosure, "[t]he evidence offered 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."⁵¹ This is called the Socialist Worker Exception, because it is a fairly stiff standard, and the main exceptions that have been granted have been to the Socialist Worker Party and the Communist Party. They are exempt from having to disclose their contributors and the Campaign Legal Center does not oppose that. But when you are talking about the Socialist Workers Party, it has been subject to a lot of harassment, not just privately, but by the government as well. And in those cases, when you are talking about a very unpopular group—historically unpopular—we do not want to suppress that speech altogether through disclosure. So while we would say that, "Yes, harassment is a problem," we would also point out that we have a remedy or we have at least some way out for these types of groups.

My concession to Professor Smith is: yes, harassment is raised all of the time, and while I think it is somewhat illusory most of the time, there is probably something to be said about setting a meaningful monetary threshold for disclosure. At what point do you have to disclose someone's identity if they are a donor? And at what point does a group have to fall into a disclosure system? If you are really talking about a mom and pop group that is spending \$800 on a ballot measure, then maybe it is not that helpful

49. See, e.g., *supra* note 1 and accompanying text.

50. *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 93, 102 (1982).

51. *Id.* at 93 (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976)).

to the voters to know that Mom & Pop, Inc. is actually behind this ballot measure. So, I think there are probably ways to raise and lower the disclosure threshold such that really small donors do not get caught up. Many of the examples raised by the media are of these \$200 donors where one would really question the informational value. How much corruption can they really cause? I think that might be a point of agreement between the campaign finance reform community and the speech community. There is probably a way to intelligently set thresholds such that everyone agrees on the amount of money that really might be able to buy influence.

But I do have a caveat to that concession: too often we are seeing the plight of these small donors being raised as a front for tremendously influential donors. One example is the Chamber of Commerce, which has repeatedly talked about harassment as a reason not to pass the DISCLOSE Act and other federal disclosure laws to remedy the post-*Citizens United* disclosure gap.⁵² This is exactly what reform groups fear: that if we acknowledge harassment, which we do, then suddenly massive billion dollar groups and billion dollar corporations are going to claim that they too are harassed and should be exempt from disclosure. But when they cry “harassment,” they really mean only that people do not like their politics; people disagree with their politics; people might even boycott their stores. But all of this is not harassment; it is simply protected speech or honest political disagreement. Thus, while I think there are ways to design campaign finance laws to minimize harassment, I am very concerned about, again, this “wolf in sheep’s clothing” scenario, where small donors are being used to justify exemptions for huge influential donors who have no reason to fear harassment.

Moderator Ross Sneyd: Let us turn to Super PACs, these big committees that have developed particularly since *Citizens United*. Brad, is there some level of anonymity that you think they should have? How much disclosure should we have from those groups?

Bradley Smith: Here is an area where there is a lot of confusion. Super PACs disclose all of their donors. So they actually have the full regime of disclosure.⁵³ They are like any other PAC except that they can take money in unlimited amounts, and they can take it from any source, not just from individuals. If I give money and pay dues to a trade group, and the trade

52. See Press Release, U.S. Chamber of Commerce, DISCLOSE Act Is Partisan Effort to Silence Critics and Gain Political Advantage (May 19, 2010), available at <https://www.uschamber.com/press-release/us-chamber-disclose-act-partisan-effort-silence-critics-and-gain-political-advantage>.

53. *Citizens United v. FEC*, 558 U.S. 310, 337–38 (2010).

group gives money to the Super PAC, there is a point at which the Super PAC will disclose the trade group as giving it the money. It will not disclose me as giving the money. And if that is the information you really want to know, I suppose you would have an issue. As I pointed out earlier, that only amounts to about 4% of spending nationally, and it creates certain problems to try to go much further than that. You have what you might call the “Russian nesting doll problem.”

This is a very real scenario. Campaign finance attorneys do this all of the time for people who have no desire to do anything nefarious. For example, the Acme Company pays a million dollars in dues to the Widget Manufacturing Association. The Widget Manufacturing Association pays \$800,000 in dues to the U.S. Business Chamber. The U.S. Business Chamber likes to work with state business chambers and, to promote its national interests, it tells state chambers, “If you raise some money for races in your state, we will match it.” So a state business chamber raises \$600,000 from fifty or sixty companies or donors, and they get \$600,000 from the U.S. Business Chamber. Then the state chamber has all of this money now, but it decides that instead of spending it itself, it will give the money to the State Business Alliance, which is a coalition of the retailers, the wholesalers, the manufacturers, and the Business Chamber, and then *that* group spends the money. Let’s say Acme made its contribution in December of 2014, shortly after the election. The money is spent on ads in October of 2016. What should be disclosed? This has passed through the system. How far up are you going to go? How much are you helping people understand what is going on if you say, “Well this is really Acme money”? It’s not really Acme money; you could not say that it is in any meaningful way. Nor do I think you could say, in any meaningful way, “It’s Widget Manufacturing Association money.” So you have this kind of problem. You can say, “Well, we are going to go two levels or three levels back, or back a certain time period.” Whatever you want to do. But if I am the clever lawyer who wants to protect my clients’ legitimate anonymity, or even to be nefarious, believe me, I will work around it. I will make sure contributions are made at the right time frame. I will stick more groups in between the donor and the ultimate public communication.

You can have situations where such disclosure is actually misleading because most of us are members of groups, and I do not know anyone who is a member of a group and who agrees with absolutely everything the group does. Sometimes groups do things you do not like. So let’s say I give money to the Republican Party or the NRA, because I think it is the best way to support Republicans. “The NRA,” I think, “really gets the vote out.” But the NRA has a policy of endorsing incumbent Democrats that have a

pro-gun record. So, they endorse the incumbent Democratic governor of my state who has a pro-gun record. Now am I tagged with endorsing the Democrat? This is a very real possibility. For example, think about Bob Perry giving money to the NRA and then endorsing Ted Strickland running for reelection as governor of Ohio in 2010. Is it really true that Bob Perry is endorsing Ted Strickland? Bob Perry, uber-Republican? No, of course it is not true. It is not true at all, and it does not inform voters to have that information put out there.

So, bottom line: Super PACs do disclose. One could argue that we want to know more than we are getting, but note that we are getting quite a bit and to get more requires further chipping away at the confidentiality that some people might prefer. Further, it should be clear that getting this added information is very hard to do and may lead to what is called “junk disclosure,” where people are getting information that is actually misleading rather than enlightening.⁵⁴

Moderator Ross Sneyd: Tara, take a shot at that. It can be a somewhat circuitous route when you try to follow the money in these PACs. So, what information should they be required to disclose? And what would that information’s practical use be to the voters?

Tara Malloy: I agree with Professor Smith that first, Super PACs are not the problem. They are federally registered political committees, and they basically have to disclose every dollar that comes in, and every dollar that goes out.⁵⁵ When I use my “shadowy-group” language, I’m actually talking about certain tax-exempt, nonprofit groups that organize under section 501(c) of the tax code.⁵⁶ This all sounds very complicated, but you may have heard various news reports of politically active 501(c)(4)s or 501(c)(6)s, and these are the groups that do not disclose anything.⁵⁷ As I mentioned earlier, tax law is really not designed to obtain disclosure from such groups and campaign finance law has been weakened to the point that unless a donor says, “Please use my money for a hit ad,” then that group

54. *Politicizing Procurement: Will President Obama’s Proposal Curb Free Speech & Hurt Small Business? Before Committee on Oversight & Government Reform*, 112th Cong. 178 (2011) (statement of Bradley Smith, Professor, Capital University Law School), available at http://oversight.house.gov/wp-content/uploads/2012/01/5-12-11_Bradley_Smith_Procurement_Testimony.pdf.

55. *Citizens United*, 558 U.S. at 337–38.

56. I.R.C. § 501(c)(3) (2012).

57. Sarah Childress, *More Politicians Accused of Illegal Collusion with Dark-Money Group*, FRONTLINE (Jan. 28, 2014), <http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/big-sky-big-money/more-politicians-accused-of-illegal-collusion-with-dark-money-group/>.

does not have to disclose that donor. And that is the heart of the problem. There is this “Russian nesting doll problem” where “Americans for America” will give to “Americans for Reform,” which will give to “Americans for Prosperity,” which will give to “Americans for Apple Pie,” and it is hard to trace the money. I don’t think this problem is a reason not to have disclosure because if people are trying to keep their spending secret, there is probably a reason to shine a light on them as opposed to just turning your back.

You would think that the people who are funneling huge contributions into the system are exactly the ones who secretly want to influence elections or get a payback and have no one know about it. So I would say it is the opposite: the bigger the “Russian nesting doll problem,” the more you might want to investigate it. Finally, this disclosure problem is not 100% solvable, but there are solutions. The DISCLOSE Act had a fairly simple solution: any time a group takes money for electoral purposes—including for transfers to another group—it has the option of creating a segregated account for this purpose.⁵⁸ Groups can take all the money they want and they can put it in either a general fund or a segregated fund. If a group puts all the money it uses for electoral purposes in the segregated fund, it must disclose only the donors to the segregated fund; if the group puts money used for electoral purposes into the general fund, it has to disclose *all* of its donors. So, under this law, a group has an interest in always putting its election money into the segregated fund in order to avoid having to disclose all of its donors. If you thus create an interest for all of these groups to keep their election money separate and to disclose it, perhaps they will do so. This will not necessarily get rid of all schemes, but there are definitely ways to design the law to both greatly ameliorate the “Russian nesting doll problem” and prevent people from deliberately keeping their money secret, while at the same time protecting fundraising or transfers from the more innocuous sort of chambers of commerce or unions that may have many affiliates. So, I do not think that defeatism is really the answer to people trying to game the system. I think concentrating on the problems and designing laws to address such problems is the way we should respond.

Moderator Ross Sneyd: Maybe the media sometimes confuses things by using Super PAC as a term of art that is a cover.

Tara Malloy: Absolutely. We deal with that confusion probably every week.

58. DISCLOSE Act of 2012, S. 3369, 112th Cong. § 324(a)(2)(E) (2012).

Moderator Ross Sneyd: Let us go to the first question from the audience.

QUESTION #1: I am wondering about the cost–benefit analysis that you both talk about and whether it makes a difference if the donor is an individual person as opposed to a corporation? It seems to me that most of the benefits that Ms. Malloy is identifying are most applicable to a corporate actor, and most of the examples Professor Smith identifies are a parade of the horrors in the context of privacy and harassment of individuals. When I think about the costs and benefits of disclosure, to who did John Q. Public give his individual donation, I think the disclosure’s public benefit is perhaps not that great because the privacy concern is higher for an individual. I assume, even if I disagree with him, he is an individual making his choice based on what he believes to be in the public’s best interest. Corporations, on the other hand, are making decisions based on bottom lines and profits. Therefore, I think the benefit of disclosure of corporate donations is certainly higher. As I understand it, Supreme Court doctrine may not permit this kind of distinction, but do you think this distinction should make a difference?

Moderator Ross Sneyd: Professor Smith, would you like to address that?

Bradley Smith: I think you raise a number of good points. One of the things I again want to stress is that in this debate the aggressors are those seeking more disclosure. The “reform community” is saying, “We need new laws with more disclosure.” With perhaps rare exceptions, my side of this debate has not been arguing to roll back disclosure, except perhaps to modestly raise the thresholds at which current reporting begins. Instead, my side’s goal is simply to prevent expansion of disclosure laws. And we have had some success in arguing for higher thresholds. Fifteen years ago you wouldn’t have found a person in Tara’s position saying, “Yeah, we should raise the limits.” It was “every penny, instantly, on the internet.” Now, we’ve kind of come around to recognizing, “You know, maybe we don’t need to know every penny, we don’t need to know it instantly.” Which goes to the concern for small donors, individuals, whom we do not necessarily need to know more about. I do think there is a difference based on the size of the donation, but note that the legislation Tara’s side now favors, to get at this 4% of all independent election spending, is legislation that would require trade associations and nonprofits to disclose their donors. Now, some of those donors to trade associations—especially trade associations

and the nonprofits—are corporations, both big and small. But those donors are not necessarily corporations. They can also be private individuals. For example, the NAACP case held that government could not require a group to divulge all of its members or donors as a general matter, in order to protect the individual members of the group. That is precisely the information that the reform community now wants to get. Of course, they also want to get the big corporations; there is no doubt about that. But I think we could do a better job of figuring how to tease the two apart.

I think that something could be done in that way. But that is not what the reform community is proposing. That is not what was in the DISCLOSE Act.⁵⁹ That is not what various state governments are proposing.⁶⁰ So, until we get some kind of willingness on the part of the “reform community” and its partisans to back off, we cannot really launch a debate on what kind of reform is worthwhile.

I want to point out one other thing: Tara is right when she said, “We have a right to boycott people; you have a right to explain that you do not like them.” I do not disagree with that. But where is the significant government interest in forcing people to provide information to their political enemies so that their political enemies can harass and boycott them? Just because I have a right to do something does not mean the government has an interest in intruding on your right to enable me to harass you. Remember, we have got to start by asking: what is the compelling government interest in forcing you to divulge information that you would prefer not to divulge? I submit to you that encouraging political harassment is not a compelling government interest. In fact, that is exactly the problem. Too often people are not looking for the disclosure information because they want that voting cue that Tara correctly mentioned. They already know what they think of the speech and the group making it. They are saying, “I know what I think about this speech, and I hate it. I want to harass the person who is putting it out there and make them stop.” Such an approach is a very illiberal. It is not the approach you want to foster, and there is no significant government interest, at all, not even a minor government interest, in assisting that behavior, even though it might be legal.

Moderator Ross Sneyd: Tara, is there a distinction between individuals and corporations?

59. *Id.*

60. See Ciara Torres-Spelliscy, *Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics After Citizens United and Doe v. Reed*, 27 GA. ST. U. L. REV. 1057, 1061, 1064 (2011) (describing state law variance in campaign finance disclosure).

Tara Malloy: I think that in many cases there really is a greater interest in learning about corporate support or nonprofit corporate support for candidate or ballot measures simply because we want to have a background on what that group stands for and where their financial interests lie. However, the Supreme Court might not allow that type of distinction following *Citizens United* because the whole basis of that decision was that you cannot distinguish between corporations and individuals for the purposes of First Amendment rights.⁶¹ Now, clearly many others and I disagree with that, but that seems to be the law of the land. One of the interesting areas where there is some question about that principle though is the Socialist Worker Exception that I mentioned earlier and that Brad alluded to in mentioning the NAACP case. This exception seems to imply that we are talking about an individual, as opposed to a group or corporation, because it is based on a reasonable fear of physical violence or personal harassment. In fact, there was a recent D.C. Circuit case dealing with lobbying disclosure that raises this issue.⁶² The National Association of Manufacturers did not want to disclose their corporate donors, and the court dismissed the harassment claim and implied that this harassment claim seems to relate a lot better to individuals than corporations.⁶³ So while some may question whether there should be a harassment exemption for corporations, I do not know how that circuit court holding would be reconciled with *Citizens United* if there ever is an attempt to distinguish between corporations and individuals.

I would also point out that while it may be true that the informational interest is less strong with individuals, the anti-corruption interest is still quite strong when you are talking about individuals that make large donations. In some ways those donations often go under the radar during the election, but might become very, very salient years later, or a government contract later. So, I certainly do not think that simply because knowing the identity of Joe Schmo donor is not particularly informative at the time of the election that it might never be, given the anti-corruption interest in connecting the dots between quid pro quos.

Finally, although there is probably harassment of individual donors, we have had very strong disclosure laws for candidates and parties for over forty years. Almost half of the states have ballot measure disclosure laws.⁶⁴

61. *Citizens United v. FEC*, 558 U.S. 310, 352 (2010).

62. *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 6 (D.C. Cir. 2009).

63. *Nat'l Ass'n of Mfrs. v. Taylor*, 549 F. Supp. 2d 68, 76 (D.D.C. 2008) (holding that public disclosure of members is not sufficient to establish harm).

64. David M. Primo, *Information at the Margin: Campaign Finance Disclosure Laws, Ballot Issues, and Voter Knowledge*, 12 *ELECTION L.J.* 114, 114 (2013).

There have been millions, maybe billions, of disclosures in the last forty years, and we only have a handful of harassment examples. So, while I do not want to completely downplay or pretend harassment does not exist, I think we have to take this into account too if we are doing a cost-benefit analysis. The costs have been relatively small when you consider they have been spread out over forty years in a country the size of United States.

Bradley Smith: Two quick points. First, I agree with Tara that harassment can be overdone. However, we need to recognize that a lot of it does not have to rise to a level of strong harassment before we might want to reconsider it. For example, many candidates' challengers normally complain that they have a difficult time raising funds precisely because the donors would be disclosed and the donors know that this candidate is a relative long-shot to beat the incumbent and they don't want to risk retaliation by that incumbent. Sometimes that is just an excuse for their own poor fundraising, but I think there is a lot of truth to it. I know people who contribute \$199 precisely so they stay below the mandatory disclosure threshold in federal races. They do this for business or other reasons.

A second point, I have always found the Socialist Worker's Exemption kind of comical. While I agree with it, it seems odd that the one group that does not have to disclose its members and supporters is a group that openly calls for the overthrow of the U.S. government. But if you are just an ordinary citizen wanting good government, then you have got to disclose all of this and subject yourself to all of this various harassment.

QUESTION #2: The example you gave earlier about not-ambassador Mr. Fox, it seems like small beer when you think about it. He tried to mask his involvement in certain political activity; it was unveiled; he lost out on a plum perk that is typically given to wealthy donors or political endorsers. Most people are not afraid of that. They are not afraid of one rich person losing out on one very nice title. They are afraid of bigger corruption. They are afraid that Mr. Fox's goal would not be an ambassadorship, but might be a pipeline, a tar sands pipeline, or an electric car investment from the federal government. I am curious Professor Smith, why aren't you afraid of those things?

Bradley Smith: First, I agree with you, which is why I do not want to talk so much about Sam Fox. I think the relevance of Sam Fox is only that it is a case that shows that members of Congress are interested in retaliating against their political opponents and will do so sometimes when they have the chance. And that is just one example. I have not talked about Sam Fox

in years. I don't ever remember writing about Sam Fox, but I must have because Ross found it and brought it up. So, I agree with you there.

As to the issue of corruption, to a large extent, I agree with you there too. These things can be problematic, but we should not overstate these things. Again, remember we are talking 4%, right? We are not really talking that much, and we've got to start asking what type of tradeoffs do we want to make in life? Any economist can tell you that you cannot get rid of everything. You cannot stamp out all crime. If you do you're going to have a police state. You can't stamp out all pollution. If you do you're going to be living in poverty and dying from lack of clean water, and food, and medical care. You can't get rid of anything completely in society, and you cannot get rid of all corruption in government. There are corrupt people out there. Corrupt people are elected to office, and they are booted out of office when we find them. They are not found because of disclosure laws, by the way, those never really helped. You have to engage in realistic balancing. When you start with the recognition that we have more disclosure now than we ever had in history, and the reform community is fixated on the remaining 4%, though we know who paid for that remaining 4%, we just do not know who gave money to the people who paid it. You have to ask: "Is that really where we want to go?" Because you are putting at risk *NAACP v. Alabama* and the cases that support it, including *Talley v. California*, *NAACP v. Button*, *Bates v. City of Little Rock*, and *Thomas v. Collins*, which deals with the ability of union organizers to operate anonymously without having to disclose.⁶⁵ You're putting that whole line of cases at risk. The vast majority of them deal with civil rights in one form or another. You're doing this for *what*? What proof is there, what evidence is there that you are going to get what you think you are going to get? What evidence is there that you are suddenly going to uncover and stop some avalanche of corruption? The era of McCain-Feingold is the era of William Jefferson, with \$50,000 in cash in his office fridge in Congress. It is the era of Bob Ney. It is the era of Jack Abramoff, who is out now stumping for campaign finance regulation, arguing "Yes, we've got to have more disclosure." Truly corrupt people like Abramoff frequently adopt the reform agenda to hide and excuse their ethical failures. So that is my basic message today. Again, there is not, to my knowledge, a single bill in Congress that would roll back any disclosure law, *period*. There is not even a bill to slightly raise the thresholds to \$1,000 before you have to report. Something even Tara said

65. See *supra* note 30 and accompanying text (striking down disclosure laws); *Thomas v. Collins*, 323 U.S. 516, 518–20 (1945) (finding that union organizers have a right to operate anonymously).

she might agree with, a \$600 or \$800 threshold, there is not even one of those.

What we have is an effort to force people, under government compulsion, to reveal their political activity for the primary purpose of allowing their political adversaries to harass them. The “problem,” now cited as such a menace, is not new. Prior to *Citizens United* it was common. For example, we can go back to 2000; NAACP was running ads reenacting the death of James Burr, a black male murdered by white racists by being dragged behind a pickup truck. They ran ads right before the election, with James Burr’s daughter on TV saying, “When George Bush wouldn’t sign hate crime laws, it was like my father was killed again.” And we did not know who gave the NAACP that money. We knew the NAACP paid for the ads, but we did not know who gave them that money and nobody cared. The Brennan Center was in business then, and they did not say, “This is terrible.” They did not say a word about it many years ago. Maybe things change. Maybe, as Tara suggested, attitudes change. Some people want more disclosure than they used to care about. But I suggest that the reason they did not care then is that they liked the NAACP, whereas now they do not like the people they think are going to speak under *Citizens United*, so they want to get them and they want to silence them. Or as Chuck Schumer said, “The deterrent effect should not be underestimated.”⁶⁶ That is what we are talking about today and you should not presume, if you think this is a great idea, that you are always going to be the one who is deciding who needs to be “deterred” and who does not.

Moderator Ross Sneyd: Tara, would you like to underline your basic message?

Tara Malloy: Yes, I actually, despite it all, want to go back to Sam Fox, because really this is an example that does not support Professor Smith’s side but supports my side. You say, “Oh, Sam Fox has suffered retaliation.” I say, “Why the heck was Sam Fox up for the ambassadorship of Belgium?” He was not a Foreign Service officer. He did not have any background in foreign policy. As far as I know, he had no connection to Belgium.⁶⁷ He was given the ambassadorship as a reward, and this is very typical. It is not just Bush. There have been comparisons of Obama and Bush and the same plum assignments go to the same big contributors. In fact, it is almost normal, and I would suggest that this should not be normal.

66. *Campaign Spending Rules*, *supra* note 29.

67. See 153 CONG. REC. D220 (daily ed. Feb. 27, 2007) (mentioning Sam Fox as the nominee for Ambassador to Belgium).

And that this type of quid pro quo absolutely should be, if not forbidden, punished by the electorate. So, I think we have a very different impression of what corruption is or what we need to solve. Brad says that disclosure is not going to do anything. Well, that is easy to say if we do not have any disclosure because then we will not actually know when donors are possibly corrupting government. We should get to a point of transparency first, and then maybe we will decide whether or not there are any problems with government. Not knowing anything is a great way to not know if there is a problem. So I would acknowledge that yes, disclosure is not the be all, end all, and we would like a lot more in terms of campaign finance regulations, such as the corporate spending restriction that was struck down in *Citizens United*, and public financing.⁶⁸ We certainly are not advocating for disclosure of everything, and clearly there are going to have to be additional, much more broad-based solutions to address not only the corruption problem and the voter information problem, but also the problem that the number of people financing our elections is miniscule. Throughout the last decades, people who give more than \$200 account for only 0.5% of the entire American population.⁶⁹ We are talking about a tiny group of donors and when we are talking about the type of Sam Foxes that actually give the real money; we are talking about probably 10,000 people. This is a very small group of donors. Part of the problem is that everyone feels disconnected from government because they think these small groups control it, and that is probably accurate. So, I think part of the problem is not just corruption; it is not just public information; it is not just disclosure; it is about empowering everyone to think that they actually own their government. That is going to take a very broad-based solution of which disclosure is a key, but not exclusive, component.

Moderator Ross Sneyd: I want to thank Tara Malloy, Senior Counsel to the Campaign Legal Center, and Bradley Smith, Chairman of the Center for Competitive Politics. Thank you.

68. *Citizens United v. FEC*, 558 U.S. 310, 372 (2010).

69. *The Top 10 Things Every Voter Should Know About Money-In-Politics*, OPENSECRETS.ORG, <http://www.opensecrets.org/resources/dollarocracy/04.php> (last visited Apr. 24, 2014).

