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BALANCING DISCLOSURE AND PRIVACY INTERESTS IN CAMPAIGN FINANCE

*Sarah Harding**

*The law of campaign finance pits two important First Amendment interests against each other: disclosure and privacy. The Supreme Court has recognized the need to balance these two interests to allow for effective elections and to safeguard individual rights. However, through the years the Court has failed to balance these interests equally, resulting in vacillating decisions that unfairly sacrifice one for the other. From *Burroughs v. United States* in 1934 to *Citizens United v. FEC* in 2010, the Court has failed to provide a workable roadmap for legislatures in the creation of campaign finance disclosure laws and for lower courts in determining their constitutionality. This Article argues that a balance between privacy and disclosure can be struck by employing a “zone of constitutionality” test. The Article proposes factors the Court could weigh in determining whether a disclosure law falls within the zone of constitutionality. Finally, the Article argues that clear guidelines are essential to balance both interests; protect citizens and corporations’ First Amendment rights; and avoid unnecessary litigation to the lower courts.*

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I. INTRODUCTION

The Supreme Court has recognized two significant, and sometimes competing, First Amendment interests in campaign finance: (1) disclosure and (2) privacy of campaign contributions and contributors.¹ However, the Court has not clearly defined an appropriate method for balancing these two interests against each other, and has not provided standards for how both courts and legislatures should reconcile their discordance.² The cases that uphold campaign disclosure laws are in tension with those cases that safeguard associational and political privacy.³ Further, the Court sometimes has favored an approach that protects privacy interests and at other times has favored compelled disclosure at the expense of those very same privacy interests.⁴ Without authoritative guidelines for legislators to follow, disclosure and privacy interests are inadequately protected and unstable.⁵ Lawmakers and lower courts have been left struggling to understand and apply the emerging disclosure doctrine.⁶ The Court's lack of guidance regarding how these interests should be balanced—and its failure to consistently balance the interests themselves—will have grim results: one interest will be favored at the expense of the other,⁷ citizens and corporations will risk losing First Amendment rights,⁸ and unceasing litigation will flow to the lower courts.⁹

The First Amendment guarantees the right of free speech.¹⁰ However, there are two sides to this constitutional interest with respect to campaign finance disclosure: one side favoring disclosure

1. Compare *Doe v. Reed*, 130 S. Ct. 2811 (2010), and *Citizens United v. FEC*, 130 S. Ct. 876 (2010), with *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

2. See *infra* Part III.

3. See *infra* note 132 and text accompanying Part II.C.

4. See *infra* Part II.

5. Chesa Boudin, *Publius and the Petition: Doe v. Reed and the History of Anonymous Speech*, 120 YALE L.J. 2140, 2148–49 (2011) (asserting that the Court's opinion in *Doe v. Reed* was overly fact-bound and avoided providing lower courts with clear guidance).

6. *Id.* at 2150 (finding that the Court's holdings in some cases, such as *Doe v. Reed*, fail to create a clear standard or definitively answer the legal question, thus “guarantee[ing] confusion in the lower courts”).

7. See *infra* Part III.

8. See *infra* Part III.

9. See *infra* Part III.C.2.

10. U.S. CONST. amend. I.

and one side favoring privacy.¹¹ Disclosure provides information about candidates and issues to voters.¹² This disclosure facilitates an uninhibited flow of information and ideas, which leads to the goal of an informed electorate and an effective democracy.¹³ But forced disclosure can also inhibit or “chill” political speech.¹⁴ Nondisclosure may be important to protect associational rights and to encourage citizen engagement in political discourse.¹⁵ This Article argues that the Court should protect both interests by appropriately weighing their value and balancing them in each case, rather than protecting only one at a time.¹⁶

Ideally, the Court should maximize and protect both interests, to allow effective elections and to safeguard individual rights. The goal of this balance is a transparent, open, and inviting democratic process. Despite the seeming contraposition of these two values, this Article argues that there is a “zone of constitutionality” where both disclosure and privacy interests coexist. Lawmakers should aim for this zone, and craft disclosure laws that represent, protect, and balance these interests to the fullest extent possible. Although using a bright-line test to protect both interests is probably impractical, the Court should ensure that laws fall within the zone of constitutionality by balancing both interests using a defined set of factors. The Court must be clear about which factors it is considering and what weight it is giving to them. This Article explains what this zone of constitutionality would look like and the factors the Court should use to ensure that laws fall within it. Part II explores the history of disclosure laws and the possibilities and goals for balancing the interests of disclosure and privacy. It diagrams the judicial landscape

11. See *infra* Part II.C.

12. See Richard Briffault, *Two Challenges for Campaign Finance Disclosure After Citizens United and Doe v. Reed*, 19 WM. & MARY BILL RTS. J. 983, 990 (2011); Jonathan Turley, *Registering Publius: The Supreme Court and the Right to Anonymity*, 2001-2002 CATO SUP. CT. REV. 57, 61-62 (2002).

13. See Briffault, *supra* note 12, at 990.

14. See NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958); Dale E. Ho, NAACP v. Alabama and False Symmetry in the Disclosure Debate, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 405, 413 (2012).

15. See Turley, *supra* note 12, at 75-78.

16. This Article utilizes a broad usage of the term “privacy.” Some scholars consider this type of privacy to be anonymity. See, e.g., Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 433 (1980) (asserting that anonymity is one of privacy’s three elements). This Article, however, will be using the terms “privacy,” “anonymity,” and “nondisclosure” interchangeably.

of the evolving disclosure doctrine, beginning with *Burroughs v. United States*¹⁷ in 1934 and ending with *Citizens United v. FEC*¹⁸ and *Doe v. Reed*¹⁹ in 2010. Part II studies this volatile time in judicial history and the Court's vacillating holdings, which have advanced disclosure at some points and privacy at others. It also lays out the constitutional interests of both disclosure and privacy and explains the likely effects of these juxtaposed interests on the First Amendment's right to free speech.

Part III exposes three principal problems with the current state of the disclosure doctrine. The Supreme Court's holdings have left the disclosure doctrine without balance, without guidelines, and without clarity. The result of these inadequacies could be severe: chilled political speech, sacrificed privacy and disclosure interests, and increased litigation.²⁰ Unless the Court corrects these problems, future lawmakers and judges will be unable to make consistent and constitutional decisions regarding disclosure requirements, and citizens will continue to face the loss of First Amendment rights.²¹

Finally, Part IV proposes factors that judges, justices, and lawmakers should consider when assessing disclosure laws. Taking these factors into consideration will help to maximize the interests of both disclosure and privacy. To illustrate how these factors would be used, this part applies the factors to past disclosure law proposals. It analyzes whether these proposals would have struck the correct balance between disclosure and privacy and thus landed within the "zone of constitutionality," where both disclosure interests and privacy interests are best protected.

Ultimately, this Article does not support one interest over the other. Rather, it concludes that disclosure and privacy must be balanced within the context of election law. Each has a high constitutional value that lawmakers need to protect. If lawmakers

17. 290 U.S. 534 (1934).

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

19. 130 S. Ct. 2811 (2010).

20. See Boudin, *supra* note 5, at 2149, 2179; cf. Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 276 (2010) (proposing increased disclosure thresholds in order to combat the current ills of discouraged political participation, intrusion upon privacy rights of individuals, and non-useful information).

21. Briffault, *supra* note 12, at 1003–04 (stating that because "[t]here is no obvious constitutional standard for setting the balance between these privacy and publicity—and anonymity and accountability—concerns," different courts and laws may set the balance in different places).

apply the factors that this Article proposes and seek to find the zone of constitutionality, then both sides of free speech can be safeguarded.

II. BACKGROUND

In order to understand the current state of the disclosure doctrine, it is necessary to look at how Congress and the Court have interpreted the evolving doctrine over the years.²² The following section provides an overview of the judicial and legislative history of disclosure in campaign finance.

A. Judicial and Legislative History of the Disclosure Doctrine: An Evolving Record

The concept of disclosure in campaign finance is hardly novel in the United States.²³ In fact, Congress and the judiciary have reflected on the role of disclosure in campaign finance for much of the last century.²⁴ However, the disclosure doctrine in election financing is still developing; throughout the years, the Court has not consistently held in favor of either disclosure or privacy.²⁵

In 1925, Congress amended the Federal Corrupt Practices Act, originally enacted in 1910.²⁶ This act, as amended, paid particular attention to “political committees” that accepted contributions “for the purpose of influencing or attempting to influence the election of presidential and vice presidential electors in two or more states.”²⁷ A treasurer from each of these committees was required to submit to the clerk of the House of Representatives a list of the committee’s contributors, including the contributor’s name and address, as well as the date and amount of the contribution.²⁸ This act came on the tails

22. See, e.g., *id.* at 988–99.

23. See generally Federal Corrupt Practices Act, 2 U.S.C. §§ 241–45 (1925) (established campaign spending limits); *Burroughs v. United States*, 290 U.S. 534 (1934) (upheld the disclosure requirements of the Federal Corrupt Practices Act).

24. See Federal Corrupt Practices Act §§ 241–45; *Burroughs*, 290 U.S. at 544–48.

25. Compare *Burroughs*, 290 U.S. at 548 (upholding disclosure requirements), with *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995) (upholding privacy interests), and *McConnell v. FEC*, 540 U.S. 93, 115–16 (2003) (acknowledging the privacy interest), *overruled* by *Citizens United v. FEC*, 120 S. Ct. 876 (2010).

26. 2 U.S.C. §§ 241–45.

27. *Burroughs*, 290 U.S. at 541.

28. *Id.*

of the Tillman Act, which completely banned corporate monetary contributions in connection with a federal election.²⁹

Despite the passage of these two acts, the Court did not consider disclosure in the campaign finance realm until 1934.³⁰ In *Burroughs v. United States*, the Court held in favor of disclosure, finding that “Congress [had] reached the conclusion that public disclosure of political contributions, together with the names of contributors and other details, would tend to prevent the corrupt use of money to affect elections.”³¹ The Federal Corrupt Practices Act was a way for Congress to protect the United States’ republican government from corrupt elections without banning corporate contributions outright as the Tillman Act had done.³²

For several decades, no notable legislative or judicial changes took place, and the law seemed firmly rooted in the doctrine of mandatory disclosure.³³ However, by mid-century, the country’s support for disclosure began to waver.³⁴ In 1958, the Supreme Court decided the seminal case of *NAACP v. Alabama ex rel. Patterson*.³⁵ It was decided against the backdrop of the Civil Rights Movement³⁶: it was filed in 1956, which was the same year that the Montgomery bus boycott took place and the same year that an Alabama district court declared racial segregation of public buses to be unconstitutional.³⁷ The question at issue in *Patterson* was whether the Alabama State Attorney General could compel the National Association for the Advancement of Colored People (NAACP) to reveal the names and addresses of its members who reside in

29. *McConnell*, 540 U.S. at 115 (citing Tillman Act, ch. 420, 34 Stat. 864 (1907) (codified as amended at 52 U.S.C. § 30118 (2012))).

30. *McConnell*, 540 U.S. at 116; Briffault, *supra* note 12, at 988.

31. *Burroughs*, 290 U.S. at 548.

32. *Id.* at 547; Tillman Act, ch. 420, 34 Stat. 864 (1907) (current version at 52 U.S.C. § 30118 (2012)).

33. Twenty-four years passed between the Court’s decision in *Burroughs* and the Court’s decision in *Patterson*. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Burroughs*, 290 U.S. at 534.

34. *See, e.g., Patterson*, 357 U.S. at 449; Briffault, *supra* note 20, at 279 (“A series of cases in the late 1950s and early 1960s demonstrate[ed] the threat [that] government-mandated disclosure could pose to unpopular political organizations . . .”).

35. 357 U.S. 449 (1958).

36. Ho, *supra* note 14, at 409.

37. *Id.* at 409; *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956), *aff’d sub nom. Owen v. Browder*, 352 U.S. 903 (1956).

Alabama.³⁸ Justice Harlan, who wrote the opinion of the behalf of the majority, held that requiring the NAACP to produce the records was a denial of due process because it “entail[ed] the likelihood of a substantial restraint upon the exercise by petitioner’s members of their right to freedom of association.”³⁹

In arriving at its decision, the Court addressed petitioners’ claim that compelled disclosure infringed upon a fundamental freedom of association that was protected by the due process clause of the 14th amendment.⁴⁰ In persuasive dicta, Justice Harlan reasserted the constitutional principle that a fundamental right cannot be infringed upon without a valid state interest: “It contends that governmental action which, although not directly suppressing association, nevertheless carries this consequence, can be justified only upon some overriding valid interest of the State.”⁴¹ Moreover, the Court wrote, in dicta, that privacy of association was necessary to preserve the fundamental right to freedom of association.⁴² The Court wrote: “Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”⁴³ Finally, Justice Harlan discussed the connection between the right to freedom of association and the right to freedom of speech to effective advocacy: “It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”⁴⁴

The Court ultimately found that disclosure of the NAACP’s membership roster would have the adverse effect of inhibiting the ability of the NAACP “to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs

38. Ho, *supra* note 14, at 451 (“Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”).

39. *Id.* at 462.

40. *Id.* at 460.

41. *Id.*

42. *Id.* at 462.

43. *Id.*

44. *Id.*

shown through their associations and of the consequences of this exposure.”⁴⁵

Patterson became the first significant step away from mandated disclosure by demonstrating that disclosure could have the negative effect of threatening politically vulnerable groups in a way that would hinder their political activity.⁴⁶ However, only a decade and half later, Congress undermined the significance of *Patterson* and took a step back toward disclosure when it enacted the Federal Elections Campaign Act⁴⁷ (FECA) in 1971. This act limited political contributions and media broadcasts to candidates for federal elective office by individuals, groups, and political committees.⁴⁸ More importantly, it required political committees to keep detailed records of most contributions and expenditures⁴⁹ and to file quarterly reports with the Federal Elections Commission disclosing the source of every expenditure over one hundred dollars.⁵⁰

The Court followed suit, by deciding in favor of disclosure in *Buckley v. Valeo* in 1976.⁵¹ In this seminal case, the Supreme Court assessed the constitutionality of several sections of the recently-enacted FECA, as well as some sections of the Internal Revenue Code of 1954.⁵² The appellants, a group of politicians running for political office, argued that political contributions and expenditures “are at the very core of political speech, and that the Act's limitations thus constitute restraints on First Amendment liberty that are both gross and direct.”⁵³

The FECA sections at issue concerned the following:
(a) individual political contributions were limited to \$1,000 to any

45. *Id.* at 463.

46. Briffault, *supra* note 12, at 988.

47. Federal Elections Campaign Act of 1971, 2 U.S.C. § 431 (1971) (amended 1974) (transferred to 52 U.S.C. § 30101 (2012)).

48. *Id.*

49. The Federal Elections Campaign Act of 1971 “requires political committees to keep detailed records of contributions and expenditures, including the names and address of each individual contributing in excess of \$100, and his occupation and principal place of business if his contribution exceeds \$100 . . . and also requires every individual or group, other than a candidate or political committee, making contributions or expenditures exceeding \$100 to file a statement with the Commission.” 2 U.S.C. § 431(c) (1971) (transferred to 52 U.S.C. § 30101 (2012)).

50. *Id.*

51. *Buckley v. Valeo*, 424 U.S. 1 (1976). This case came to the Supreme Court as a constitutional challenge to the Federal Election Campaign Act of 1971.

52. *Id.* at 6.

53. *Id.* at 15.

single candidate per election, with an overall annual limitation of \$25,000 by any contributor; (b) contributions and expenditures above certain threshold levels were required to be reported and publicly disclosed; (c) a system for public funding of presidential campaign activities was established by Subtitle H of the Internal Revenue Code; and (d) a Federal Election Commission was established to administer and enforce the legislation.⁵⁴

The primary issue in this case was whether these provisions violated the First Amendment because, as the Court wrote in dicta, “discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.”⁵⁵ The Court was more concerned with FECA’s expenditure limitations than its contribution limitations because they “necessarily reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”⁵⁶ The Court considered this to be a “substantial” restraint on the quality and quantity of political speech.⁵⁷

To determine whether FECA’s disclosure requirements violated the First Amendment, the Court applied “exacting scrutiny.”⁵⁸ “Exacting scrutiny” requires a “relevant correlation” or a “substantial relation” between the governmental interest and the information to be disclosed as required by the law.⁵⁹

The Court addressed each regulation separately. For the \$1,000 contribution limit to candidates, the Court upheld the restriction because it found that the corruption interest was strong enough, under a heightened scrutiny, to justify an intrusion onto First Amendment rights.⁶⁰ The Court also upheld the \$5,000 contribution limit by political committees and the \$25,000 annual contribution limitation on similar reasoning.⁶¹

54. *Id.* at 7.

55. *Id.* at 14.

56. *Id.* at 19.

57. *Id.*

58. *Id.* at 64 (“[S]ignificant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest.”).

59. *Id.* (citing *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 544 (1963); *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960)).

60. *Id.* at 29.

61. *Id.* at 35.

However, the Court's holdings for campaign expenditures fell opposite to its contributions holding because, as the Court wrote in dicta in the prelude to its holdings: "It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates."⁶² Ultimately, the Court held that the corruption interest was inadequate to justify a limitation on independent expenditures.⁶³ "While the independent expenditure ceiling thus fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process, it heavily burdens core First Amendment expression."⁶⁴ The Court additionally held that FECA's restriction on a candidate's personal expenditures was unconstitutional.⁶⁵ Finally, the Court held that the overall contribution limitations were unconstitutional because it found that no sufficient governmental interest had been asserted to justify the First Amendment intrusion.⁶⁶ Thus, in sum, the Court in *Buckley* upheld as Constitutional FECA's restrictions on campaign contributions due to corruption concerns, however, it found FECA's expenditure limitations to be unconstitutional due to their substantial intrusion on First Amendment expression.⁶⁷

Following *Buckley*, the Court's holding remained the status quo for political speech for more than twenty years until the Court decided *McIntyre v. Ohio Elections Commission* in 1994.⁶⁸ The issue in *McIntyre* was whether an Ohio law that prohibited the distribution of anonymous campaign literature violated the First Amendment.⁶⁹ In April 1988, Margaret McIntyre distributed leaflets at a public meeting in Ohio expressing her personal opposition to a proposed local school tax levy.⁷⁰ She signed some of the leaflets with the phrase "Concerned Parents and Tax Payers" and others with her name.⁷¹ The Ohio Elections Commission fined McIntyre \$100 for violating a state statute that prohibited persons from distributing

62. *Id.* at 39.

63. *Id.* at 45.

64. *Id.* at 47.

65. *Id.* at 54.

66. *Id.* at 55–58.

67. *Id.* at 58–59.

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

69. *Id.* at 336.

70. *Id.* at 337.

71. *Id.*

campaign literature without including the name and address of the sponsor.⁷²

The Court applied “exacting scrutiny” because the Ohio law burdened “core political speech,” and which it defined as requiring the restriction to be narrowly tailored to an overriding state interest.⁷³ While assessing the Ohio law, the Court compared the law to the restrictions in *Buckley* and found the *McIntyre* disclosure requirement to be more intrusive than the *Buckley* requirements.⁷⁴ Ultimately, the Court held that the Ohio law was unconstitutional under the First Amendment because it could not find a sufficient interest to justify the intrusion on the free speech.⁷⁵ In dicta, offered as explanation, the Court wrote that the purpose of the First Amendment was to protect the proponents of unpopular views from retaliation.⁷⁶ “The right to remain anonymous,” it held, “may be abused when it shields fraudulent conduct, but political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.”⁷⁷

Finally, just three years after *McIntyre*, the Court concluded the twentieth century with a decision leaning back in favor of disclosure.⁷⁸ In *Federal Elections Commission v. Akins*,⁷⁹ the Court again examined FECA, this time to address the record-keeping and disclosure requirements that the act imposed upon political committees to combat corruption.⁸⁰ If a group fell within the Federal Elections Commission’s (FEC) definition of a “political committee,” then FECA required the group to “register with the FEC, appoint a treasurer, keep names and addresses of contributors, track the amount and purpose of disbursements, and file complex FEC reports” on “contributions, expenditures, and any other

72. *Id.* at 338.

73. *Id.* at 347.

74. *Id.* at 356.

75. *Id.* at 357.

76. *Id.*

77. *Id.* (citing *Abrams v. United States*, 250 U.S. 616, 630–31 (1919)). Additionally, the Court noted, “Don’t underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing And then, once they have done so, it is for them to decide what is ‘responsible’, what is valuable, and what is truth.” *Id.* at 348 n.11 (quoting *New York v. Duryea*, 351 N.Y.S.2d 978, 996 (N.Y. Sup. Ct. 1974)).

78. *See* *FEC v. Akins*, 524 U.S. 11, 26 (1998).

79. 524 U.S. 11 (1998).

80. *Id.* at 14.

disbursements.”⁸¹ According to FECA, a “political committee” “includes ‘any committee, club, association or other group of persons which receives’ more than \$1,000 in ‘contributions’ or ‘which makes’ more than \$1,000 in ‘expenditures’ in any given year.”⁸²

The case arose after a group of voters petitioned the FEC to treat the American Israel Public Affairs Committee (AIPAC) as a political committee because the group’s expenditures exceeded \$1,000 per year.⁸³ The FEC decided not to proceed against AIPAC as a political committee because it felt that FECA’s definition of “political committees” includes “only those organizations that have as a ‘major purpose’ the nomination or election of candidates.”⁸⁴ The FEC believed that AIPAC was an issue-oriented lobbying organization, rather than a campaign organization, and thus concluded that that it was not a “political committee” under FECA.⁸⁵ The voters filed a petition in the U.S. District Court seeking review of the FEC’s determination.⁸⁶

The relevant issue that the Court addressed was whether an organization that otherwise satisfied FECA’s definition of a “political committee” could be excluded from the act’s disclosure requirements because “‘its major purpose’ is not ‘the nomination or election of candidates.’”⁸⁷ The Court, in dicta, was concerned that the FEC’s application of this definition had the effect of “narrowing” the definition of a “political committee,” which could affect First Amendment rights.⁸⁸ The Court expressed strong concern over the narrowing of the definition of “political committee” that would allow groups to evade the record-keeping and disclosure requirements of the Act.⁸⁹ In fact, in a prior discussion on the issue of standing, the Court held that voters’ inability to obtain information—lists of AIPAC donors, donations, and contributions—constituted an “injury in fact,” which gave them standing to challenge the FEC.⁹⁰ By finding this “injury in fact,” the Court acknowledged the importance

81. *Id.* at 15–16.

82. *Id.* at 15.

83. *Id.* at 15–16.

84. *Id.* at 18.

85. *Id.*

86. *Id.*

87. *Id.* at 26.

88. *Id.* at 28.

89. *Id.* at 28–29.

90. *Id.* at 21.

and necessity of disclosure and disseminating information to voters.⁹¹

The Court remanded the case to allow the FEC to develop a new definition and to determine whether “AIPAC’s expenditures qualify as ‘membership communications,’ and thereby fall outside the scope of ‘expenditures’ that could qualify it as a ‘political committee.’”⁹²

The twentieth century concluded without a clear answer on whether, in the context of campaign finance, the disclosure interest or the privacy interest was more important. As implemented, FECA preferred the disclosure of donators, contributors, and contributions. However, the Supreme Court’s parallel decisions throughout the century wavered between a clear preference for disclosure and a clear preference for privacy. The Court’s opinions expressed a fear of corruption that was balanced against recognition of the importance of confidentiality, but the Court’s holdings did not provide a method for how to reconcile these two interests.

B. Current State of the Disclosure Doctrine

The early part of the twenty-first century has, thus far, seen several major Supreme Court decisions on campaign finance disclosure.⁹³ Some of the first major cases of the twenty-first century came about as a result of another Congressional attempt to reform campaign finance: the Bipartisan Campaign Reform Act of 2002 (BCRA), which amended FECA. Two seminal cases—*McConnell v. Federal Elections Commission*⁹⁴ and *Citizens United v. Federal Elections Commission*⁹⁵—addressed challenges to the BCRA’s provisions.⁹⁶

The BCRA was passed amid public concern of political corruption.⁹⁷ The major subjects addressed by the BCRA are: soft money; electioneering communications (issue ads); coordinated and

91. *See id.* at 20–21 (explaining that information would help voters evaluate political candidates and decide who to vote for and financially support).

92. *Id.* at 29.

93. *See, e.g.*, *Doe v. Reed*, 561 U.S. 186 (2010); *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *McConnell v. FEC*, 540 U.S. 93 (2003).

94. 540 U.S. 93 (2003).

95. 130 S. Ct. 876 (2010).

96. Bipartisan Campaign Reform Act, Pub. L. No. 107-155, § 101, 116 Stat. 81 (2002).

97. Paul S. Herrnson, *The Bipartisan Campaign Reform Act and Congressional Elections*, in *CAMPAIGN WARRIORS: POLITICAL CONSULTANTS IN ELECTIONS* 107, 113–14 (James A. Thurber & Candice J. Nelson eds., 2000), available at <http://web.mit.edu/~17.261/www/herrnson.pdf>.

independent expenditures; contribution limitations and prohibitions, disclaimers; personal use of campaign funds; and millionaire candidates.⁹⁸ The purpose of the act was “to ensure that campaign advertisements are subject to disclosure . . . [and] to ensure that meaningful rules governing ‘coordination’ between an outside spender and an a [sic] candidate are in place to prevent evasion of the contribution limits, disclosure requirements and source prohibitions of federal law.”⁹⁹ In general, the act served to end the use of “soft money,” restrict corporate and union contributions to electioneering communications, require donor disclosures of electioneering communications costing more than \$10,000, increase campaign contribution limits for individuals and some political committees, and require disclaimers on any communication by a political committee.¹⁰⁰

The soft money restrictions and increased hard money limitations of the act created a heated political dynamic in Congress, and opponents of the act were preparing to challenge it while it was still being debated in the Senate.¹⁰¹ Senator McConnell, a Republican from Kentucky, was active in the filibuster against the bill and swore that he would be the lead plaintiff in a lawsuit to invalidate the bill if it became a law.¹⁰² Shortly after President Bush signed the BCRA into law, McConnell filed suit in the U.S. District Court for the District of Columbia against the FEC, claiming that the BCRA violated the First Amendment and the Fifth Amendment’s Due Process Equal Protection Clause.¹⁰³

Ultimately, the case, a consolidation of more than eighty claims, made its way to the U.S. Supreme Court as *McConnell v. Federal Elections Commission*,¹⁰⁴ where the Court upheld some portions of the BCRA and found other portions to be unconstitutional. In a

98. 36 U.S.C. § 510 (2012); 52 U.S.C. §§ 30111, 30117, 30125, 30126 (2012).

99. *Id.* (quoting Plaintiff’s First Amended Complaint for Declaratory and Injunctive Relief at 2, *Shays v. FEC*, 340 F. Supp. 2d 39 (D.D.C. 2002) (No. 02-1984)).

100. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 166 Stat. 81 (current version at 52 U.S.C. § 30101 (2012)).

101. *See* Herrnsen, *supra* note 97, at 121.

102. *Id.*

103. L. PAIGE WHITAKER, CAMPAIGN FINANCE: BRIEF OVERVIEW OF *MCCONNELL V. FEC 1* (May 19, 2003), available at <http://fpc.state.gov/documents/organization/22686.pdf>.

104. 540 U.S. 93, 224 (2003); Torres-Spelliscy, *Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics After Citizens United*, 27 GA. ST. U. L. REV. 1057, 1061 (2010).

five to four decision, the Court upheld most of the major provisions of the BCRA, as well as finding the plaintiffs lacked standing to challenge the Millionaire Provisions,¹⁰⁵ mandatory electioneering-communications-disbursements disclosure was constitutional,¹⁰⁶ prohibition of individual contributions by minors was unconstitutional,¹⁰⁷ and candidate request requirements were constitutional.¹⁰⁸

The largest part of the Court's opinion focused on Titles I and II of the BCRA. First, the Court assessed the constitutionality of Title I, which regulates and restricts the use of soft money.¹⁰⁹ "Soft money" refers to contributions by individuals, corporations, or labor unions to a political candidate, or committee, that are not restricted by federal contribution limitations¹¹⁰ and are made solely for the purpose influencing election for federal office.¹¹¹ Soft money donations are primarily distinguished from hard money donations because hard money donations are those that have been made subject to FECA's disclosure requirements.¹¹² However, prior to the enactment of BCRA, contributors could avoid FECA's restrictions by donating to "non-federal" campaigns, such as to a political party for its state and local activities.¹¹³

BCRA Title I sought to restrict soft money because contributors who had already made hard money contributions to the FECA limit were using soft money as way to continue contributing to political

105. *McConnell*, 540 U.S. at 107.

106. *Id.*

107. *Id.* at 108.

108. *Id.* at 109.

109. *Id.* at 132. Specifically, "[a] national committee of a political party (including a national congressional campaign committee of a political party) may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act." *Id.* at 342 (quoting 2 U.S.C.A. § 441i(a)(1) (West 2002), *invalidated by* *McConnell v. FEC*, 540 U.S. 93 (2003)).

110. W. Parker Baxter, Recent Development, *Recent Developments in Campaign Finance Law: Implementing the Bipartisan Campaign Finance Reform Act of 2002*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 589, 592 (2003). This money is largely unregulated and has been used for campaign advertisements that support or criticize a political candidate. *Id.* at 592-93.

111. *McConnell*, 540 U.S. at 122. The soft money disclosure loophole comes from FECA, which defined the term "contribution" to only money that was donated "for the purpose of influencing any election for Federal office." Justin S. Teff, *The Need for Campaign Finance Reform in New York*, N.Y. ST. B.A. J., March/April 2007, at 37 (quoting 2 U.S.C.A. § 431(8)(A)(i) (West 2002)) (emphasis added).

112. *McConnell*, 540 U.S. at 122.

113. Teff, *supra* note 111, at 37.

parties beyond that maximum amount.¹¹⁴ Following FECA, soft money contributions were used extensively and these contributions were frequently larger than hard money contributions.¹¹⁵ From 1984 to 2002, soft money contribution increased from accounting for just 5 percent of major party spending to 42 percent.¹¹⁶ This money was typically raised using the fundraising expertise of a national political party, and was then distributed to state campaigns with specific and detailed instructions on how to spend the money.¹¹⁷ The state campaigns would launch campaigns that were coordinated with the federal campaigns in a manner that would bolster the federal campaign without coming directly from the federal campaign.¹¹⁸ Through this soft money loop hole, federal candidates even went so far as to direct would-be contributors to donate to specific state and local political committees.¹¹⁹ According to the Court in *McConnell*, such contributions were “not uncommon.”¹²⁰ As a result, BCRA Title I closed the soft money loophole by adding Section 323(a) to FECA, which prohibits national political party committees and their agents from accepting soft money.¹²¹

In assessing the constitutionality of Title I, the Court applied “the less rigorous scrutiny applicable to contribution limits to evaluate the constitutionality of new FECA § 323” because the Court found that restricting campaign contributions only marginally limits the contributor’s ability to engage in free speech.¹²² The Court found that there was a government interest at play because there was “substantial evidence to support Congress’ determination that large soft-money contributions to national political parties give rise to corruption and the appearance of corruption.”¹²³ Then, by weighing the governmental interest of avoiding corruption, or the appearance of corruption, against section 323(a), the Court upheld section 323(a) because this interest was “sufficient to justify subjecting all

114. *McConnell*, 540 U.S. at 122.

115. *Id.* at 123, 133. Hard money is campaign contributions that are subject to a \$5,000 donation limit. Nick Hoffman, *Case Notes: Emily’s List v. FEC*, 42 URB. LAW. 210 (2010).

116. *McConnell*, 540 U.S. at 124.

117. See Herrnsen, *supra* note 97, at 112.

118. *Id.*

119. *McConnell*, 540 U.S. at 125.

120. *Id.*

121. *Id.* at 133.

122. *Id.* at 133–35, 141.

123. *Id.* at 143–53.

donations to national parties to the source, amount, and disclosure limitations of FECA.”¹²⁴ The Court’s decision ultimately deferred to Congress and allowed Congress to regulate contributions through source restrictions and disclosure requirements.¹²⁵

The era from 2007, when *McConnell* was decided, to 2010 is known by some as the “dark days for disclosure.”¹²⁶ During this time, a “jurisprudential battle [was] raging in the courts,”¹²⁷ and opponents of campaign finance laws and disclosure laws were challenging the Court’s definition of “political action committee[s]” and “election ad[s].”¹²⁸ The reason for this was that many states only mandated campaign finance reporting for organizations that were classified as political action committees.¹²⁹ One of the strongest attacks on disclosure was that the state could only “require disclosure of ads that were the functional [equivalent] of express advocacy.”¹³⁰ Nonetheless, these “dark days” for disclosure would end by 2010,¹³¹ at least for the time being, when the Supreme Court decided two seminal cases, *Citizens United v. Federal Election Commission*¹³² and *Doe v. Reed*.¹³³

In 2008, Citizens United, a nonprofit corporation,¹³⁴ produced a documentary entitled *Hillary: The Movie* that was critical of Senator Hillary Clinton, who was then a primary candidate for President.¹³⁵ After releasing the documentary in theaters and on DVD, Citizens United sought to increase distribution of the film by making it available through video-on-demand.¹³⁶ To promote the film, as well

124. *Id.* at 156.

125. Torres-Spelliscy, *supra* note 104, at 1063.

126. *Id.* at 1060.

127. *Id.*

128. *Id.* at 1062.

129. *Id.*

130. *Id.* at 1064–65 (quoting *FEC v. Wis. Right to Life, Inc. (WRTL II)*, 551 U.S. 449, 465 (2007)).

131. *See Citizens United v. FEC*, 130 S. Ct. 876 (2010) (upholding disclosure requirements).

132. *Id.*

133. 130 S. Ct. 2811 (2010).

134. Non-profit organizations structure themselves as 501(c)(3) or 501(c)(4) corporations to gain a tax advantage because the Internal Revenue Code exempts such organizations from federal taxes. *See* 26 U.S.C.A. § 501 (West 2012). Courts in the past have found that non-profits such as these are exempt from disclosure regulations because the corporate form matters. Richard Briffault, *Nonprofits and Disclosure in the Wake of Citizens United*, 10 *ELECTION L.J.* 337, 341 (2011). Citizens United’s non-profit status is important because corporations often funnel campaign contributions through non-profit intermediaries. Briffault, *supra* note 12, at 985.

135. *Citizens United*, 130 S. Ct. at 886–87.

136. *Id.* at 887.

as fundraiser for its distribution, Citizens United produced advertisements about Senator Clinton to run on broadcast and cable television.¹³⁷ The advertisements concluded with the name of the documentary and the website address for the film.¹³⁸ Citizens United wished to make the documentary available on video-on-demand up to, and through, thirty days prior to the 2008 Presidential election.¹³⁹

At the time, 2 U.S.C. § 441b prohibited corporations from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections.¹⁴⁰ Additionally, the Bipartisan Campaign Reform Act, which was upheld in *McConnell*, modified § 441b to prohibit “electioneering communications,” which it defined as “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and is made within thirty days of a primary or sixty days of a general election.¹⁴¹

Concerned that *Hillary* and its accompanying ads would violate the prohibition on independent expenditures and electioneering communications, Citizens United sought declaratory and injunctive relief against the FEC to enjoin enforcement of § 441b on the grounds of unconstitutionality.¹⁴²

Ultimately, the case made its way to the Supreme Court where the Court was asked to revisit *McConnell* and § 441b.¹⁴³ After declining to decide the case on narrow grounds particular to Citizens United and *Hillary*, the Court determined whether § 441b violated the First Amendment’s free speech provisions.¹⁴⁴ Upfront, the Court

137. *Id.*

138. *Id.*

139. *Id.* at 888.

140. *Id.* at 887.

141. *Id.*

142. *Id.* at 887–88. The Bipartisan Campaign Reform Act section 203 amended section 441b to prohibit “electioneering communication.” *Id.* “Electioneering communication is defined as ‘any broadcast, cable, or satellite communication’ that ‘refers to a clearly identified candidate for Federal office’ and is made within 30 days of a primary or 60 days of a general election.” *Id.* (quoting § 434(f)(3)(A)). The FEC regulations further define it as a communication that is “publicly distributed.” *Id.* (quoting 11 C.F.R. § 100.29(a)(2) (2009)).

143. *Id.* at 886.

144. *Id.* at 891–92.

found the § 441b was a clear prohibition on corporate speech.¹⁴⁵ The Court quoted the opinion in *Buckley v. Valeo* to explain its reasoning: “As a ‘restriction on the amount of money a person or group can spend on political communication during a campaign,’ that statute ‘necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.’”¹⁴⁶ The Court continued, “If § 441b applied to individuals, no one would believe that it is merely a time, place, or manner restriction on speech. Its purpose and effect are to silence entities whose voices the Government deems to be suspect.”¹⁴⁷

Significantly, the opinion disregards the primary argument in *Buckley*, which was that restrictions were needed to avoid corruption or the appearance of corruption: “The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt”; and “The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.”¹⁴⁸

Ultimately, in a five-four decision, the Court overruled *McConnell*'s upholding of § 441b's individual expenditure restrictions: “No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”¹⁴⁹ However, the Court did uphold the disclosure and disclaimer requirements of the BCRA as constitutional.¹⁵⁰ Five years after this holding, *Citizens United* is viewed as a controversial decision where the Court's stated desire for transparency and disclosure was contradicted with a loophole where individuals and corporations may make unlimited political contributions that undermine the goals of disclosure.¹⁵¹

145. *Id.* at 897 (“Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak.”).

146. *Id.* at 898 (quoting *Buckley v. Valeo*, 424 U.S. 1, 19 (1976)).

147. *Id.*

148. *Id.* at 910.

149. *Id.* at 913.

150. *Id.* at 916.

151. Gabrielle Levy, How Citizens United Has Changed Politics in 5 Years, U.S. NEWS AND WORLD REPORT (Jan. 21, 2015, 12:26 PM EST), available at <http://www.usnews.com/news/articles/2015/01/21/5-years-later-citizens-united-has-remade-us-politics>.

However, at least on paper, the Court continued to support disclosure in *Doe v. Reed*, another influential 2010 decision.¹⁵² In May 2009, the State of Washington had extended certain state benefits to registered same-sex couples by signing into law SB 5688.¹⁵³ In response, a state political committee collected over 137,000 petition signatures and submitted them to the Washington Secretary of State, pursuant to the state referendum requirements, to place a referendum on the ballot to allow the voters to vote on SB 5688, with the goal of encouraging voters to reject the bill.¹⁵⁴ When the referendum appeared on the November 2009 ballot, the voters ratified the benefits law by a narrow margin.¹⁵⁵

The case arose when the political committee that launched the referendum, Protect Marriage Washington, sought to enjoin the Secretary of State from publicly releasing documents with names and addresses of those who signed the petition.¹⁵⁶ Beginning in August prior to the election, the Secretary of State had received requests for copies of the petition from several organizations, such as Washington Coalition for Open Government and Washington Families Standing Together.¹⁵⁷ The requests were made pursuant to a Washington State public records act, under which Washington State considers petitions to be “public records.”¹⁵⁸ Protect Marriage Washington claimed that releasing the petition records would violate the First Amendment privacy rights of the petition signers.¹⁵⁹

The Court, using exacting scrutiny, held that disclosure under the public records act would not violate the First Amendment with respect to referendum petitions because the disclosure was “sufficiently related” to protecting the integrity of the elections process.¹⁶⁰ By The Court found that public disclosure of petition signatures promoted transparency and accountability, in addition to combating fraud, by ensuring that only valid signatures that should

152. *See Doe v. Reed*, 130 S. Ct. 2811 (2010).

153. *Id.* at 2815–16 (describing SB 5688).

154. *Id.* (stating that about 120,000 valid signatures were required to place the referendum on the ballot and the Washington Secretary of State determined that the petition contained enough valid signatures to place the referendum on the ballot).

155. *Id.*

156. *Id.* at 2816.

157. *Id.*

158. *Id.*; Public Records Act, WASH. REV. CODE § 42.56 (2006).

159. *Reed*, 130 S. Ct. at 2816–17.

160. *Id.* at 2818–21.

be counted were counted.¹⁶¹ Additionally, the Court found that there was insufficient evidence that compelled disclosure would expose the signatories to “threats, harassment, or reprisals.”¹⁶² Therefore, the Court upheld the petition disclosure under the public records act as Constitutional.¹⁶³

From 2010–2015, there was little jurisprudence in the way of disclosure and privacy in campaign finance. However, action in the lower courts may be signaling that change is coming. In July 2015, the U.S. District Court for the Southern District of New York decided a case involving Citizens United, the same political committee that was the nameplate of the 2010 seminal case.¹⁶⁴

In *Citizens United v. Schneiderman*, Citizens United sought to preliminarily enjoin the New York Attorney General from enforcing his policy of requiring registered charities to disclose the names, addresses, and total contributions of their major donors to solicit funds in the state.¹⁶⁵ They argue that this disclosure violates their First Amendment rights of freedom of speech and association.¹⁶⁶

Using exacting scrutiny, as the Supreme Court has used in previous campaign finance disclosure cases, the court found that there is a sufficiently important governmental interest in overseeing charitable organizations and enforcing solicitation laws, and that the Attorney General’s policy is substantially related to that interest.¹⁶⁷ Additionally, the court held that this governmental interest is strong enough to justify a minimal burden on the First Amendment rights of the charities’ donors.¹⁶⁸ The court also addressed other tangential issues, however the court ultimately held that Citizens United was not entitled to a preliminary injunction prohibiting the Attorney General from obtaining donor names and addresses from charities.¹⁶⁹

The Court’s variable decisions over time have left a state of uncertainty because lower courts and legislators do not know how or what the Supreme Court will decide next in the campaign finance

161. *Id.* at 2819.

162. *Id.* at 2820–21.

163. *Id.* at 2821.

164. *Citizens United et al v. Schneiderman*, No. 14-cv-3703, 2015 WL 4509717 (S.D.N.Y. July 27, 2015), *appeal docketed*, No. 15-2718 (2d Cir. Aug. 24, 2015).

165. *Id.* at *1.

166. *Id.*

167. *Id.* at *4–5.

168. *Id.* at *6.

169. *Id.* at *13.

arena.¹⁷⁰ Although the current law seemingly favors the interests of disclosure over the interests of privacy, the Court has not created a consistent test that can be used to balance these constitutional issues.¹⁷¹ It remains to be seen if the Court will choose a firm balancing point, or if the pendulum will continue to waver back and forth. Although the courts are not currently addressing these issues directly, lower court decisions in favor of disclosure in the face of the First Amendment may indicate that more decisions are to come.

C. Constitutional Issues Implicated in Campaign Finance

The Court has grounded many of its campaign finance disclosure cases in the constitutional interests underlying the First Amendment's right to free speech.¹⁷² Specifically, the Court relied upon two interests under the First Amendment: the informational interest and the anonymity interest.¹⁷³ The informational interest says that free speech and an uninhibited flow of information and ideas will lead to informed voters and create an open, inviting, and effective democratic process.¹⁷⁴ In contrast, the anonymity interest says that a speaker's identity should be kept anonymous to prevent speech from being "chilled" and the speaker silenced for fear of retaliation.¹⁷⁵ Within the context of campaign finance disclosure regulations, these two interests are oppositional because voters cannot have full access to donor information at the same time that

170. See, e.g., Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL'Y REV. 217, 222–23 (2010) (explaining that there are questions left unanswered and much is unclear following *Citizens United*).

171. See, e.g., Briffault, *supra* note 12, at 1004 ("There is no obvious standard for deciding what the disclosure threshold ought to be.").

172. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 105 (2003) (upholding BCRA's disclosure requirements based on the voters' informational interest); *Buckley v. Valeo*, 424 U.S. 1, 81 (1976) (relying on the informational interest to justify disclosure requirements); cf. *Doe v. Reed*, 130 S. Ct. 2811, 2824–25 (2010) (dismissing the privacy interest and relying on the informational interest); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (relying on the privacy interest).

173. *Doe*, 130 S. Ct. at 2824; *McIntyre*, 514 U.S. at 357.

174. *Citizens United v. FEC*, 130 S. Ct. 867, 914 (2010); *Buckley*, 424 U.S. at 66 (explaining that disclosure can be justified on the basis of the governmental interest in providing information to the electorate).

175. *McIntyre*, 514 U.S. at 341–42; William McGeveran, *Mrs. McIntyre's Persona: Bringing Privacy Theory to Election Law*, 19 WM. & MARY BILL RTS. J. 859, 859 (citing *McIntyre*, 514 U.S. at 341–42) (stating that the anonymity interest may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible).

donor identification is kept confidential.¹⁷⁶ However, the application of these two interests and the constitutional bases for campaign finance disclosure is underdeveloped.¹⁷⁷

The following section lays out the two primary constitutional interests that encompass disclosure laws: the informational interest and the anonymity interest.

1. The Informational Interest

It is generally recognized that the main reason for campaign finance disclosure is having an informed electorate.¹⁷⁸ By informing voters about sources of funding and other support for candidates or ballot propositions, disclosure “improves the ability of voters to evaluate candidates.”¹⁷⁹ This disclosure ultimately furthers the First Amendment interest of free speech because voting (especially for legislators) and other political activity, such as signing a petition, is a form of political speech.¹⁸⁰ As the Court in *Citizens United* noted, “[t]he First Amendment protects political speech[,] and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.”¹⁸¹ Time and time again, the Court has used the informational interest as its primary basis for finding disclosure requirements constitutional.¹⁸²

Buckley was the first case to really establish the purpose and importance of the informational interest.¹⁸³ Early in the opinion, in a section entitled “General Principles,” the Court’s discussion on FECA’s restrictions explained that the restrictions implicated “an area of the most *fundamental* First Amendment activities.”¹⁸⁴ The Court stated that public discussion of issues is integral to our

176. See, e.g., *Doe*, 130 S. Ct. at 2824–25 (explaining the implications of both constitutional interests and stating that the informational interest runs “headfirst” into a half-century of case law saying that individuals have a right to privacy); Anthony Johnstone, *A Madisonian Case for Disclosure*, 19 GEO. MASON L. REV. 413, 430 (2012) (explaining that anonymity is the original doctrinal principle opposed to disclosure).

177. Johnstone, *supra* note 176, at 414.

178. Briffault, *supra* note 12, at 990.

179. *Id.*

180. *Doe*, 130 S. Ct. at 2830 (voting serves an “expressive purpose”); *Nev. Comm’n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2350 (2011); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (stating the politically-motivated speech is highly protected by the First Amendment).

181. *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010).

182. See, e.g., *Citizens United*, 130 S. Ct. at 915–17; *McConnell v. FEC*, 540 U.S. 93, 105 (2003); *Buckley v. Valeo*, 424 U.S. 1, 81 (1976).

183. Johnstone, *supra* note 176, at 434.

184. *Buckley*, 424 U.S. at 14 (emphasis added).

governmental system, and protected by the First Amendment specifically to assure an exchange of ideas that may bring about changes people desire.¹⁸⁵ The Court reasoned that the purpose of this interest was to create a society where uninhibited public debate would thrive, and that without this, the United States would not have a healthy democracy.¹⁸⁶

More than thirty years later, the Court in *Citizens United* also principally based its decision on the informational interest.¹⁸⁷ This interest, which it defined as “‘provid[ing] the electorate with information’ . . . and ‘insur[ing] that the voters are fully informed’ about the person or group who is speaking,” became the centerpiece of its holding.¹⁸⁸ Some scholars predict that even more than being the linchpin of its own holding, *Citizens United*’s reliance on the informational interest will make this interest do most of the work to justify disclosure laws¹⁸⁹ looking forward.¹⁹⁰

Similarly, the information interest, by way of an informed electorate, was central to the Court’s holding in *Doe v. Reed*.¹⁹¹ In *Doe*, the Court held that disclosing the identities of the referendum petition signers protected the informational interest because this information would inform voters about which interest groups were supporting the referendum.¹⁹² Utilizing exacting scrutiny as it did in *Citizens United*, the Court found a substantial relation between the disclosure of information and the sufficiently important governmental interest of preserving the integrity of the electoral process.¹⁹³ Thus, the Court firmly rooted disclosure as a constitutionally protected interest.¹⁹⁴

185. *Id.*

186. Johnstone, *supra* note 134, at 434 (citing *Buckley*, 424 U.S. at 93).

187. *Citizens United*, 130 S. Ct. at 914 (stating that speech holds officials accountable to the public and allows citizens to make informed choices).

188. *Id.* at 915 (quoting *McConnell v. FEC*, 540 U.S. 93, 231 (2003) and *Buckley*, 424 U.S. at 76).

189. Although not the focus of this Article, courts and legislators have also justified disclosure laws on the bases of preventing corruption, distortion, and the appearance of corruption, among other reasons. *See, e.g., Citizens United*, 130 S. Ct. at 901–03; *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990); *Buckley*, 424 U.S. at 25.

190. Johnstone, *supra* note 134, at 420.

191. *Doe v. Reed*, 130 S. Ct. 2811, 2824 (2010).

192. Steve Simpson, *Doe v. Reed and the Future of Disclosure Requirements*, 2010 CATO SUP. CT. REV., 139, 150–51 (2009–2010).

193. *Doe*, 130 S. Ct. at 2819.

194. Briffault, *supra* note 20, at 285.

In conclusion, as the disclosure doctrine evolved across the twentieth century through judicial decisions, the constitutional basis that repeatedly and prominently arose was the informational interest.¹⁹⁵

2. The Anonymity Interest

The countervailing First Amendment interest is anonymity.¹⁹⁶ Many of the Court's twentieth-century decisions were rooted in this interest.¹⁹⁷ The anonymity interest is grounded in the idea that individuals have the right to protect the privacy of their identities because forced disclosure will inhibit political speech, due to fear of threats or reprisals.¹⁹⁸ Anonymity as a constitutional interest has a long history in the United States, with its use dating back to the time of the Constitution's framers.¹⁹⁹ Though their revolutionary experiences were behind them, the Framers were well aware that setting their names to controversial or inflammatory writings might subject them to public ridicule or political retribution.²⁰⁰ Therefore, many of the new republic's earliest political pieces, like those that had preceded them in the colonies, were written under pseudonyms.²⁰¹ Because of this, the framers viewed anonymity as an important part of free speech.²⁰² Though the First Amendment has long been interpreted to protect anonymity in a variety of situations, arguably the Court has never fully extended this blanket of protection to speech in the electoral context.²⁰³

In the disclosure cases, the Court found several compelling interests protected by the anonymity right.²⁰⁴ These include

195. See, e.g., *Doe*, 130 S. Ct. at 2824 (Alito, J., concurring); *Citizens United*, 130 S. Ct. at 914; *McConnell v. FEC*, 540 U.S. 93, 140 (2003), *overruled by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995); *Buckley v. Valeo*, 424 U.S. 1, 81 (1976).

196. See *Boudin*, *supra* note 5, at 2147.

197. See *McIntyre*, 514 U.S. at 341; *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466 (1958).

198. See *Patterson*, 357 U.S. at 462–63; Ho, *supra* note 14, at 413.

199. See *Turley*, *supra* note 12, at 61.

200. *Id.* at 58.

201. *Id.* at 59–60.

202. See *id.* at 61.

203. *Id.*

204. *Id.* at 75. See, e.g., *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 166 (2002); *Talley v. California*, 362 U.S. 60, 64–65 (1960).

protection from persecution,²⁰⁵ preventing disenfranchisement, encouraging pluralistic values and thoughts, protecting spontaneity, enhancing privacy values, and protecting Internet speech.²⁰⁶ In the case of campaign finance disclosure, there are two general aspects to the anonymity interest: the first is that although disclosure does not literally restrict speech, it does cause “chilling” of political speech, especially in those who fear retaliation;²⁰⁷ the second is that disclosure can discourage political activity when would-be supporters are able to see who is financially supporting a certain candidate.²⁰⁸

In the past, the Court’s holdings in other First Amendment cases stood in favor of the anonymity interest by finding that privacy is necessary in some circumstances to allow people to freely associate and advocate.²⁰⁹ These holdings stand for the idea that compelled disclosure can deter individual expression.²¹⁰ A state’s compelled disclosure laws do not directly restrain speech.²¹¹ Instead, such laws only deter expressive conduct and thus fall within First Amendment prohibitions.²¹² The Court explained that this privacy interest arises from the potential harm that these laws have on speaker expression, including the possibility of public scorn, “economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.”²¹³

However, this chilling effect is not limited to extreme acts of violence and bigotry.²¹⁴ “Courts and policymakers ignore reality if they require blacklists or burning crosses before recognizing any potential chilling effect.”²¹⁵ For instance, citizens who want to avoid confrontations with neighbors or friends may avoid political activity

205. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342, 357 (1995); see Turley, *supra* note 12, at 75.

206. Turley, *supra* note 12, at 75–78.

207. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

208. See *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010) (describing *McConnell v. FEC*, 540 U.S. 93, 197 (2003), in which the Court held that some advertising groups were hiding behind “dubious and misleading names” which indicated that disclosure helped voters make the informed choice of whether to support a candidate after learning who the real advertiser is).

209. See *Patterson*, 357 U.S. at 462.

210. See Ho, *supra* note 14, at 413.

211. *Id.* at 412.

212. *Id.*

213. *Id.* at 413 (quoting *Patterson*, 357 U.S. at 464).

214. McGeveran, *supra* note 175, at 866–67.

215. *Id.* at 867.

that will be disclosed.²¹⁶ Disclosure may also have the effect of simply inhibiting “honest communication and self-expression.”²¹⁷

Additionally, the effect of disclosure on monetary contributions may not have the same extreme chilling result as it does on political speech.²¹⁸ The Court in some cases has compared the level of intrusion on a person’s anonymity with the likelihood that the intrusion would chill political speech.²¹⁹ It has concluded that revealing the identity of a person who contributed money is less intrusive than revealing the personality behind a political statement because someone’s identity speaks more to the internal thoughts of the person.²²⁰ For example, disclosure of someone’s expenditures does not expose as much information as the handbill author’s identity at issue in *McIntyre* because McIntyre’s handbill proposition was a more personal expression than the simple donation of funds to a candidate.²²¹

In sum, the interest in anonymity has been supported at different points in time and is recognized as a validly protected interest under the First Amendment.

III. THREE PRIMARY PROBLEMS WITH THE COURT’S HOLDINGS REGARDING COMPELLED DISCLOSURE

The Court’s long history of varied and inconsistent disclosure doctrine holdings has left the doctrine in disarray.²²² The various decisions and holdings lack clear reconciliation and appear mainly *ad hoc*.²²³ If the Court sees a principled balance between disclosure and privacy interests, it has not clearly articulated what that balance is. The Court in some cases has struck down laws in order to protect anonymous speech and in other cases has allowed the anonymity right to be curtailed.²²⁴ It has strongly upheld the anonymity right in

216. *See id.* at 877.

217. *Id.*

218. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 355 (1995).

219. *See id.*

220. *Id.*

221. *Id.*

222. *See supra* Part II.

223. This is because the Court’s decisions in campaign finance disclosure cases changed back and forth so drastically. *See supra* Part II. Additionally, the Court did not necessarily use the same standard since the Court hesitated to define the level of scrutiny it used to analyze the constitutionality of compelled disclosure on First Amendment rights. *See Garrett, supra* note 95, at 238.

224. *See supra* Part II.

a few cases, but only where threats of retaliation infringed upon the freedom of association.²²⁵ As the previous discussion has illustrated, the Court's holdings over the past century have varied from supporting disclosure, to supporting privacy, to supporting disclosure again. These fluctuating holdings have resulted in three major problems: (1) a lack of balance between the interests of disclosure and the interests of privacy;²²⁶ (2) a lack of guidelines provided by the Court on how to balance these interests;²²⁷ and (3) a lack of clarity in the disclosure doctrine itself.²²⁸

Given these problems, citizens and corporations face continued uncertainty unless the Court finally seeks a more rational posture toward disclosure.²²⁹ Within the electoral realm, the United States faces a future where important First Amendment rights are lost and unprotected, the Court continues to issue inconsistent holdings, and judges and lawmakers are left with laws that are difficult to interpret.²³⁰ The following discussion further explains each of these three problems and what they mean for the future of the disclosure doctrine. Because of these defects in the disclosure doctrine, the Court has much work ahead.

A. Lack of Balance

One current problem with the disclosure doctrine is the Court's failure to balance the competing interests of disclosure and privacy.²³¹ Both interests are important and need to be protected by the Court, but by sacrificing the anonymity interest, as the Court has

225. See Turley, *supra* note 12, at 62 (discussing NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958)).

226. See, e.g., Citizens United v. FEC 130 S. Ct. 876, 916–17 (2010) (concluding that the informational interest was “sufficient to justify” the regulation at issue, without reaching the anonymity interest); see also *infra* Part III.A.

227. See, e.g., Citizens United, 130 S. Ct. at 916 (saying only that unrestricted political speech should be paired with “effective disclosure,” without explaining what effective disclosure would be); see *infra* Part III.C.

228. See also *infra* Part III.D.

229. Without clear guidelines, the legislature may pass acts that intrude on free speech more than necessary, or more than the Court ever intended. See, e.g., DISCLOSE Act Stalls in Senate, 52 GOV'T CONTRACTOR, no. 29, Aug. 4, 2010, at 2 (quoting the ACLU, which commented that the disclosure requirements of the Disclose Act were too narrow and should not justify the speech restriction).

230. See *infra* Part III.C.

231. See, e.g., Doe v. Reed, 130 S. Ct. 2811, 2821 (2010) (finding disclosure of individual signers of referendum petitions constitutional without providing an exemption for individual signers of controversial petitions who made a stronger case for anonymity).

done in its recent holdings, the Court allows citizens to lose everything this interest is meant to protect.²³² The two most recent seminal cases, *Citizens United* and *Doe v. Reed*, are illustrative examples of the Court favoring the information interest over the anonymity interest.²³³

1. A Lack of Balance Could Result in Completely Diminished First Amendment Interests

In arriving at decisions like *Citizens United* and *Doe v. Reed*, the Court did not attempt to balance the interests of disclosure with the interests of privacy.²³⁴ Rather, it favored only one of these interests.²³⁵ The result of the Court's lack of balance is that the privileges and security of the other interest are completely lost.²³⁶

The Court's willingness to make a decision that disregards one interest is extremely problematic because of the high constitutional value of each interest.²³⁷ For example, anonymity, which was recognized by the Court itself as being an important interest in *Patterson* and *McIntyre*, can protect citizens from physical and professional reprisals.²³⁸ Additionally, as discussed above, the right of anonymity protects several other extremely compelling interests:

232. See *DISCLOSE Act Stalls in Senate*, *supra* note 229.

233. *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *Doe v. Reed*, 130 S. Ct. 2811 (2010).

234. See Ciara Torres-Spelliscy, *Transparent Elections After Citizens United*, BRENNAN CTR. FOR JUSTICE AT N.Y.U. 11 (2011), available at http://brennan.3cdn.net/a11b62a1ae58821838_z8m6iiruw.pdf ("The logic of *Citizens United* and *Doe v. Reed* stand for similar principles—that elections are special circumstances where a right to anonymous speech must generally give way to governmental interests in the overall integrity of the democratic process of electing candidates on the one hand, or putting a referendum to a public vote on the other.").

235. Lately the Court has relied on the significance of the disclosure interest alone. For example, the Court in *Citizens United* wrote: "The disclaimers required by § 311 'provid[e] the electorate with information' . . . and 'insure that the voters are fully informed' . . . [T]he informational interest alone is sufficient to justify application of § 201 to these ads." *Citizens United*, 130 S. Ct. at 915–16 (quoting *McConnell v. FEC*, 540 U.S. 93, 196 (2003), *overruled by Citizens United*, 130 S. Ct. 876 (2010), and *Buckley v. Valeo*, 424 U.S. 1, 76 (1976)). While it briefly considered the privacy interests (although not in those terms), the Court did not appear concerned about these interests and did not attempt to equilibrate or weigh them against the favored interests of disclosure. *Id.* at 916.

236. See, e.g., *Doe*, 130 S. Ct. at 2821 (holding that disclosure of the identity of individuals who signed a petition was not unconstitutional and none of the signers were exempted from disclosure).

237. The anonymity interest is especially at risk, and the state's interest in preserving anonymity is important because compelled disclosure can chill political speech to the point where the disclosure intrudes upon freedom of speech. See Briffault, *supra* note 12, at 1003–05.

238. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 355 (1995); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

freedom from persecution, the sanctity of the voting franchise, encouraging pluralistic values and thoughts, protecting spontaneity, enhancing privacy values, and protecting Internet speech.²³⁹ The loss of one of these constitutional rights could have the devastating effect of chilling speech and causing a lack of political participation by citizens.²⁴⁰

In *Doe*, the Court explicitly denied the right to the privacy of the names and addresses of signatories.²⁴¹ In addition, the Court implicitly denied the right to be free from fear of retaliation, harassment, and intimidation, either from government entities or from private parties.²⁴² While the Court made clear that petition-signers would be protected from fear of *great* retaliation, it did not ensure they would be protected from moderate or mild retaliation that may result from a non-highly controversial referendum petition.²⁴³ Had the Court balanced disclosure interests and privacy interests, it may have found that privacy should be preserved even when only mild retaliation could be expected.²⁴⁴ The Court perhaps could have balanced the two interests by finding that any person who could demonstrate a probability of harassment would be excused from the disclosure requirements.²⁴⁵ Instead, the Court protected disclosure interests at the expense of privacy interests, thereby leaving individuals' privacy interests almost entirely unprotected.²⁴⁶ The Court's high threshold for harassment

239. Turley, *supra* note 12, at 75–78.

240. Briffault, *supra* note 12, at 1003.

241. 130 S. Ct. at 2815, 2821.

242. *Id.* Under the Court's examination, "modest burdens" are not sufficient to render disclosure unconstitutional.

243. *Id.* at 2821 (stating essentially that the fear of reprisal is not high in typical referendum petitions).

244. For example, as in the debate over the closed-circuit televising of the Proposition 8 trial in the Northern District of California District Court, the Supreme Court concluded that irreparable harm would come to the Plaintiff if their case was to be broadcast live on closed-circuit television to other federal courthouses. In this case, the Court weighed and measured the relative harms and benefits of the broadcast to the applicant and respondent. *Hollingsworth v. Perry*, 130 S. Ct. 705, 712–13 (2010).

245. *Doe*, 130 S. Ct. at 2821 (finding that there was not a "reasonable probability" of threats and reprisals although petitioners cited examples of harassment and intimidation from similarly controversial petitions in the region, and although the referendum signers' names would be posted in searchable form on the internet).

246. *Id.*

and reprisal means that the anonymity interest can almost never protect individuals from compelled disclosure.²⁴⁷

Of course, there will always be winners and losers in litigation. In compelled disclosure cases, courts will have to decide whether a disclosure law unconstitutionally intrudes on a right without a sufficient state interest, and either anonymity or information will lose.²⁴⁸ The Court's most recent decisions choose disclosure at the expense of anonymity.²⁴⁹ However, in some situations it may be possible to favor disclosure while still protecting anonymity to a certain degree.²⁵⁰

2. The Effect of the Level of Scrutiny

Arguably, the level of scrutiny may be to blame for the Court's lack of balance because a higher standard would require stronger justification for a state's interest in disclosure and in subverting anonymity rights.²⁵¹

The Court's clear dismissal of the privacy interest in *Citizens United* and *Doe v. Reed* has shown that the Court does not perform a thorough balancing of these interests and does not always require a sufficiently strong governmental interest to justify compelled disclosure.²⁵² Rather, the Court looks for any evidence that disclosure will provide the public with information, even if such evidence is scant, the informational need is questionable, or there are good reasons to preserve anonymity. Having found some justification for disclosure, the Court proceeds, heedless of the consequences.²⁵³

247. *Id.*

248. In campaign finance cases, the Court has made clear that the information interest is a sufficient state interest in at least some situations to justify compelled disclosure. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 67–68 (1976) (per curiam); Torres-Spelliscy, *supra* note 234, at 8.

249. For example, in the case of independent expenditures, if disclosure thresholds are set at a higher monetary value, then the anonymity of “small fish” will be protected while still advancing the information interest of voters. *See* Torres-Spelliscy, *supra* note 234, at 13.

250. *See id.*

251. *See, e.g.*, *Doe*, 130 S. Ct. at 2820 (“Plaintiffs’ more significant objection is that ‘the strength of the governmental interest’ does not ‘reflect the seriousness of the actual burden on First Amendment rights.’” (quoting *Davis v. FEC*, 554 U.S. 724, 744 (2008))).

252. *Citizens United v. FEC*, 130 S. Ct. 876, 917 (2010); *Doe*, 130 S. Ct. at 2820–21.

253. *Citizens United*, 130 S. Ct. at 915–16 (finding that there was sufficient government interest in providing information to voters and ignoring arguments that the disclosure requirements were underinclusive would chill speech, and would not help voters make informed choices); *Doe*, 130 S. Ct. at 2820–21.

A higher level of scrutiny would allow the Court to give appropriate balance to the anonymity interest in the disclosure debate rather than simply satisfying the scrutiny analysis with the information interest alone.²⁵⁴ Strict scrutiny, requiring disclosure regulations to be narrowly tailored to a compelling state interest,²⁵⁵ would force the Court to ensure that the information interest truly is strong enough to justify sacrificing anonymity in each case, thereby properly balancing the two interests.²⁵⁶

B. Lack of Guidelines

The second major problem facing the disclosure doctrine is the Court's failure to provide guidelines on how to interpret the meaning and value of protected interests. By varying its holdings and reasoning in disclosure doctrine cases over the past century, the Court has left lawmakers and future lower court judges without firm guidelines on how to assess the constitutionality of disclosure requirements and how to balance disclosure and privacy interests in any situation other than those in which the court has already decided.²⁵⁷ For example, how should a lower court factor in whether a speaker is an individual or a corporation? What if the organization is a nonprofit?²⁵⁸ Does it matter if the person is signing a petition versus donating money to a political candidate?

Without firm guidelines, there will be more litigation on this matter because no one will know where the balance between disclosure and privacy should fall, and whether there is a range or a bright line of constitutionality.²⁵⁹ There are two major costs that will result from this increase in litigation: (1) First Amendment rights, particularly the right of anonymity, will suffer directly or through

254. *Doe*, 130 S. Ct. at 2836–37 (Scalia, J., concurring) (opining that strict scrutiny should be applied in cases involving compelled disclosure against protected First Amendment association).

255. *Id.* at 2839 (Thomas, J., dissenting).

256. *Id.* at 2843 (finding that in *Doe v. Reed* the information interest should not have been sufficient to justify compelled disclosure because “[p]eople are intelligent enough to evaluate the merits of a referendum without knowing who supported it”).

257. *See, e.g., Citizens United*, 130 S. Ct. at 916 (involving only the financial backers of an organization producing electioneering communications and how it provided information to voters); *McConnell*, 540 U.S. 93, 196–97 (2003); *cf. Doe*, 130 S. Ct. at 2817–19 (involving the signatures of individuals on a referendum to provide information to voters).

258. The Court did not provide guidance to lower courts on how *Citizens United*'s nonprofit status affected compelled disclosure, although nonprofit status is important and lower courts need to know how to interpret this. *See, e.g., Torres-Spelliscy, supra* note 234, at 17.

259. *See infra* Part III.B.

potential neglect; and (2) repetitious and copious litigation that will cause lost time and money.²⁶⁰

1. Costly to First Amendment Rights

Because the Court has not defined how lower courts should analyze compelled disclosure in certain situations, lower courts run the risk of blindly favoring disclosure regardless of the circumstances.²⁶¹ The lower courts may recognize that the Supreme Court's holdings in *Citizens United* and *Doe v. Reed* favor disclosure and simply find in favor of disclosure so long as they can find any justification for it.²⁶²

Following *Citizens United*, lower courts have followed much of the Supreme Court's reasoning when assessing disclosure regulations, overwhelmingly reaching decisions that favor disclosure.²⁶³ These courts have been following the very few guidelines and exceptions promoted by the Court.²⁶⁴ However, *Doe* and *Citizens United* still provide states and lower courts with "considerable leeway" to develop and interpret disclosure regulations as they wish; as a result, courts may find these regulations constitutional without giving any regard to the anonymity interest.²⁶⁵

The right to anonymity is facing challenges in other areas of the law, such as communication in cyberspace, which may signify that anonymity is vulnerable in campaign finance as well.²⁶⁶ The lack of guidelines for disclosure and privacy in the cyberspace arena and the potential effects of this deficiency on everyday citizens online is concerning because cyberspace and campaign finance disclosure

260. See *infra* Part III.B.

261. See Torres-Spelliscy, *supra* note 234, at 11 ("Lower courts have been quick to pick up the new pro-disclosure language from *Citizens United* and *Doe* to uphold disclosure laws before the 2010 election.").

262. *Id.* ("Two Circuit Courts have upheld state and federal disclosure laws. Also, seven federal district courts across the country have upheld state disclosure laws post-*Citizens United* and *Doe* against election eve-challenges in 2010. Again and again, in state after state, federal courts have come to nearly the identical conclusion that campaign finance disclosure laws are perfectly constitutional.").

263. Torres-Spelliscy, *supra* note 104, at 1086–87.

264. *Id.* at 1094–98 (referencing the harassment exception from *Doe* and the *de minimis* exception from *Citizens United*).

265. See *id.* at 1103; see also Briffault, *supra* note 12, at 1003, 1005 (2011) (chilling speech and leaving citizens and corporations to deal with reprisals).

266. See Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639 (1995).

laws are becoming intimately intertwined.²⁶⁷ Information about campaign contributions is already available online in searchable databases.²⁶⁸ If lawmakers and courts sometimes allow the anonymity right to go by the wayside without firm conditions for when this is appropriate, citizens may not be able to insulate themselves when exercising their right to free speech, or, in the case of cyberspace, when “serv[ing] some useful public purpose like whistle-blowing.”²⁶⁹

The anonymity interest in the cyberspace law arena is in a state of uncertainty because citizens and courts are still trying to determine how First Amendment rights such as anonymity should be applied to cyberspace communications.²⁷⁰ There is a debate about whether use of anonymity online to facilitate frank discussion should prevail over the threat that this anonymity will allow some people to be rude to, defraud, or endanger others.²⁷¹ This conflict about which First Amendment interests courts should protect demonstrates what can happen to the anonymity right in the absence of guidelines.²⁷²

Senator Jim Exon introduced a bill in the 104th Congress that would have prohibited anonymous messages online that intended to “annoy, abuse, threaten, or harass” the receiver.²⁷³ Forbidding anonymous messages would disclose the identity of the sender and promote accountability, which could benefit the receiver of the message; however, it could also threaten the sender’s anonymity right.²⁷⁴ In some cases, an online speaker might require anonymity to protect herself from retaliation or harm if her identity were revealed.²⁷⁵ However, courts and lawmakers have established few guidelines for how to balance disclosure and privacy in cyberspace.²⁷⁶ This means that these rights could be completely

267. The Internet has “qualitatively transformed the nature of disclosure laws.” Briffault, *supra* note 20, at 290 (quoting William McGeeveran, *Mrs. McIntyre’s Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1, 11 (2003)).

268. *Id.* at 291.

269. Branscomb, *supra* note 266, at 1676.

270. *Id.* at 1641.

271. *Id.* at 1665.

272. *See id.* at 1647–50 (discussing conflicts and debates regarding anonymity in the cyberspace arena and the *Cubby* case, which demonstrates how the right of anonymity can be lost).

273. *Id.* at 1675 (citing S. 314, 104th Cong., 1st Sess. § 2(a)(1)(B) (1995)).

274. *See id.*

275. *Id.* at 1642.

276. *See id.* at 1678–79.

unprotected and could leave unsuspecting citizens without either the protection from retaliation or protection from harassment.²⁷⁷

In conclusion, without guidelines—on how to protect the First Amendment, how to define fundamental First Amendment rights that need protecting, and how to assess the extent to which these rights should be protected—these rights could be lost in the future of campaign finance disclosure.²⁷⁸

2. Costly in Time and Money

Additionally, without guidelines on how to interpret and protect certain rights, there will be an increase in litigation because lower courts will need to perform a case-by-case analysis.²⁷⁹ This will be both time-consuming and expensive.²⁸⁰ Parties will bring case after case before the lower courts because the Supreme Court's holdings in *Citizens United* and *Doe v. Reed* were fact specific and did not provide guidance on how to further interpret the holdings beyond those facts.²⁸¹ Each new case will, of course, present a fresh set of facts, and lower courts attempting to apply the Supreme Court's numerous and fractured precedents in unique situations will struggle to piece together a coherent approach.²⁸² The expense of this litigation is problematic because many of those wanting to bring cases will be individuals, not corporations with deep pockets.²⁸³ Additionally, this litigation has a high social cost because litigation

277. *Id.* at 1679 (“Judges and juries must forbear in casting the net of existing laws too wide. Legislators must be thoughtful in their approach to rigid statutory requirements.”).

278. Also, it should be noted that “guidelines” means specific situational parameters, not simple even-handed rules. As scholar Anne Wells Branscomb has nicely summarized: “Generic principles applied uniformly will not suffice to govern the information superhighways of the future, for the latter will be at least as rich and vast a technological landscape as the many media we see deployed today. . . . The landlords of cyberspaces will be no more uniformly in agreement than the landlords of real spaces.” Branscomb, *supra* note 266, at 1678.

279. Boudin, *supra* note 5, at 2149 (declaring that the Court's former holdings, particularly in *Doe v. Reed*, were so fact-based and without clear guidelines that lower courts will need to perform a case-by-case analysis to determine when and to what extent anonymity and disclosure are necessary).

280. See William A. Taylor, *The Economics of a Civil Lawsuit*, THEBUSINESSLAWYERS.COM, www.thebusinesslawyers.com/BBL_News_Articles/Litigation%20Economics%20101.pdf (last visited Aug. 14, 2013).

281. *Id.*

282. Boudin, *supra* note 5, at 2149–50.

283. Some of the biggest cases involving the right of anonymity involve individuals (rather than corporations). See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

can last for many years, and much of it will not be completed before the next election.²⁸⁴

In this area of the law, which needs clear interpretation, the Court chose not to provide needed guidelines.²⁸⁵ The Court will likely continue a tradition of protecting the disclosure interest in certain situations and protecting the anonymity interest in other situations, but the law should not be developing erratically.²⁸⁶ As one scholar asks, “[h]as the tide turned in favor of disclosure?”²⁸⁷ Without a firm and clear framework, the tide could turn forever in favor of disclosure to the detriment of the anonymity interest.²⁸⁸

C. Lack of Clarity

The third major problem facing the disclosure doctrine in campaign finance is a lack of clarity in the Court’s holdings. The Court’s most recent holdings in *Citizens United* and *Doe v. Reed* are both vague²⁸⁹ and overbroad.²⁹⁰ When making decisions centering on disclosure in campaign finance, future Supreme Court justices must be cognizant of vagueness and overbreadth to avoid chilling political speech.²⁹¹ The framework of other First Amendment cases leads to the conclusion that overly broad and vague laws are extremely problematic and possibly unconstitutional.²⁹² In earlier campaign

284. For instance, if litigation is not resolved before the next election, then advocacy groups will still need to display their name on electioneering communications, such as advertisements before the election. *Citizens United v. FEC*, 130 S. Ct. 867, 915 (2010).

285. *Id.* at 918–19 (Roberts, J., concurring) (“[S]ometimes it is necessary to decide more. There is a difference between judicial restraint and judicial abdication.”).

286. *See id.* at 920.

287. *See Torres-Spelliscy, supra* note 104.

288. This issue develops because the lower courts have been following the Supreme Court’s holdings in favor of compelled disclosure. *Id.* at 1086–87.

289. A law that does not clearly explain to a reasonable person what forms or content of speech are prohibited is considered unconstitutionally “vague.” GREGORY E. MAGGS & PETER J. SMITH, *CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH* 902 (2d ed. 2011). A law must mean what it says and must provide notice to the public that certain conduct or speech is prohibited. Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 284 (2003).

290. There are two types of overbreadth claims—those that are invalid as applied and those that are challenged facially and invalid when applied to others. MAGGS & SMITH, *supra* note 289, at 903. Any law can be invalidated on its face if it is overly broad unless there is sufficient justification for the law. *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 67 (1981).

291. *See sources cited supra* note 249.

292. *Schad*, 452 U.S. at 66 (finding that certain laws are unconstitutional because they “deter privileged activit[ies],” such as chilling protected free speech).

finance cases such as *McConnell*, the Court expressly used the vagueness doctrine to hold that the electioneering standard developed in *Buckley* allowed BCRA to be constitutional under the vagueness doctrine.²⁹³

Despite the Court's awareness of previous decisions that were, in retrospect, overly vague or broad, its recent holdings have been flawed in the same way.²⁹⁴ As discussed in the previous section, the Court's most recent cases regarding the disclosure doctrine have varied holdings and failed to provide usable guidelines for lawmakers and judges to apply when balancing disclosure and privacy.²⁹⁵ Individual holdings, such as in *Citizens United*, do not provide any greater specificity.²⁹⁶

The Court's guidelines for applying the disclosure doctrine in *Citizens United* do not provide much specificity beyond the facts at issue and, as such, this holding may have the same chilling effect as vague statutory laws.²⁹⁷ Overly broad and vague holdings can chill lawful conduct in the same manner as overly broad and vague legislation because the effect on citizens and corporations is the same.²⁹⁸ When citizens are not sure of the guidelines for acceptable disclosure, they may refrain from speaking altogether, choosing not to risk the penalty.²⁹⁹ On the other hand, citizens may refrain from fully protecting information because they do not understand what the disclosure requirements are.³⁰⁰ They might be justified;³⁰¹ to one

293. Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After Citizens United*, 20 CORNELL J.L. & PUB. POL'Y 643, 649 (2011) (discussing *McConnell v. FEC*, 540 U.S. 93, 206 (2003)).

294. See *Citizens United v. FEC*, 130 S. Ct. 867, 915 (2010) (rejecting the idea that disclosure is limited to "express advocacy," but not specifying what could possibly be excluded).

295. See, e.g., *Citizens United*, 130 S. Ct. at 916; *McConnell* 540 U.S. at 196-97; cf. *Doe v. Reed*, 130 S. Ct. 2811, 2817-19 (2010).

296. The Court's holding is fact-specific and finds that the disclosure requirements are constitutional as applied "to a movie broadcast via video-on-demand." *Citizens United*, 130 S. Ct. at 916-17 (failing to specify whether the requirements would still be constitutional were the movie in another form).

297. Vague laws "trap the innocent" because they do not provide warning and do not provide explicit standards. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The same may hold true for vague holding such as this because individuals and corporations may not know when their speech is subject to disclosure.

298. *Id.*

299. *Id.* at 108.

300. *Id.*

301. Vague laws sometimes deferred to judges and policemen to be implemented on an ad hoc basis, the same way that the Court's holdings defer specification to lower courts. See *id.* at 109.

judge, certain conduct might violate the doctrine, but to another judge it may be acceptable.³⁰² This leaves citizens lost as to how to act, inhibits their First Amendment right to free speech and thus damages the “integrity of the electoral process,”³⁰³ and leaves the disclosure doctrine in a continual state of unpredictability.

In conclusion, vague court holdings may cause the same problems as vague or overbroad legislation, compelling speakers to inhibit their speech.³⁰⁴ So long as the Court’s holdings regarding the disclosure doctrine in campaign finance fail to provide guideposts for disclosure requirements, citizens and corporations face intrusion (or at least inhibition) on their First Amendment right to free speech.³⁰⁵

IV. RECOMMENDATIONS

To address the issue posed by the problems described above, the Court should consider several factors, which will allow the Court to resolve its prior vacillating decisions with a solid holding that not only provides direction to balance the paramount interests of disclosure and privacy, but also maximizes the democratic process in campaign finance. As an illustration, this Section applies these factors to a past proposal to create balance in the disclosure doctrine.

A. Method of Analysis

This Article argues that the goal of balancing disclosure and privacy is to find a space in campaign finance where anonymity and disclosure coexist to the greatest extent possible: a zone of constitutionality. Outside of this zone, the law should be considered per se unconstitutional as violating one of the protected interests. When lawmakers and judges craft or refine future disclosure laws, they should ensure that the laws fall within the zone of constitutionality, by effectively balancing a variety of factors for disclosure and privacy.

302. *See id.*

303. *Doe v. Reed*, 130 S. Ct. 2811, 2819 (2010).

304. *See Supra* Part III.C.

305. *Id.*

1. The Zone of Constitutionality

“Zones” are found in many areas of law.³⁰⁶ In constitutional law, for example, Justice Jackson in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* defined three distinct zones of presidential authority.³⁰⁷ According to Jackson, the President’s power was “at its lowest ebb” if he was not acting within one of the first two zones.³⁰⁸ Moreover, in due process and economic due process cases, the Court has adopted a “zone of reasonableness” standard.³⁰⁹ This zone makes assessing regulations easier for the Court because the zone has clearly delineated criteria for rate structures.³¹⁰ Also, it is notable that *Buckley* itself alluded to a zone of constitutionality.³¹¹

The Court should likewise find a zone within the disclosure doctrine in order to reconcile the competing interests of disclosure and privacy.³¹² A law should be within this zone if it protects both disclosure and privacy interests.³¹³ This should not be a bright-line test where a law must equally protect disclosure interests and privacy interests.³¹⁴ Nor should it be a test where each disclosure law must be

306. *See infra* Part IV.A.1.

307. 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (describing the three zones of presidential authority as: (1) acting pursuant to an implied or express authorization from Congress; (2) acting in absence of a Congressional grant or denial of authority; and (3) acting incompatibly with the express or implied will of Congress).

308. *Id.*

309. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 765–68 (1997) (Souter, J., concurring) (regarding a zone of reasonableness); *McCarthy v. Madigan*, 503 U.S. 140, 157–58 (1992) (Rehnquist, C.J., concurring); *CBS, Inc. v. FCC*, 453 U.S. 367, 397 (1981) (White, J., dissenting) (characterizing majority’s holding) (1981); George S. Ford & Lawrence J. Spiwak, *The Need for Better Analysis of High Capacity Services*, 28 J. MARSHALL J. COMPUTER & INFO. L. 343, 370 (2011) (finding the “Zone of Reasonableness” to be such that “the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interest, both existing and foreseeable.” (quoting *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968))).

310. *In re Permian Basin Area Rate Cases*, 390 U.S. at 790–92.

311. *See* Kenneth J. Levit, Note, *Campaign Finance Reform and the Return of Buckley v. Valeo*, 103 YALE L.J. 469, 503 (1993).

312. This holding would be similar to Justice Jackson’s zones where he clearly defined the areas of presidential action that was unconstitutional: anything outside of the first two zones. *Youngstown*, 343 U.S. at 635–38. In this case, any disclosure regulation law outside of the zone of constitutionality is per se unconstitutional.

313. For a disclosure law to be within the zone of constitutionality it does not need to protect both disclosure and privacy interests fully in all cases. However, it must ensure that the anonymity interest is not disregarded altogether.

314. *See, e.g.*, Joseph D. Herrold, Note, *Capturing the Dialogue: Free Speech Zones and the “Caging” of First Amendment Rights*, 54 DRAKE L. REV. 949, 991–92 (2006) (explaining how a

sure to protect disclosure and privacy interests consistently, regardless of the situation. For instance, a law that seeks to require disclosure of large donations from corporations may not need to require as much privacy protection as another law that requires disclosure of small donations from individual citizens.³¹⁵

Therefore, the zone of constitutionality should strive to be an area where myriad laws with divergent objectives may find a proper balance, protecting disclosure and privacy interests to differing degrees depending on the circumstances and players. This zone would allow flexibility and breathing room for judges and lawmakers while ensuring that both interests are protected.³¹⁶ As with other zones in the past, it will need to be developed by the Court.³¹⁷

2. Factors

There are eight factors that the legislature should consider when drafting a disclosure law. These factors will help avoid the past problems of imbalance, variability, and vagueness. If the legislature considers all of these factors, the law will be within the zone of constitutionality and, therefore, presumptively constitutional.³¹⁸

First, the legislature should consider monetary thresholds when creating disclosure regulations.³¹⁹ This factor is the leading factor, and many scholars have touched on it before.³²⁰ Richard Briffault, for example, has suggested that disclosure requirements should be applicable only to large donations from “major actors.”³²¹ Setting a bright line threshold seems fairly arbitrary, but Briffault suggests that the informational interest is not advanced by public disclosure of donors who give less than \$1,000 to presidential candidates.³²² The

zone application can be more effective than a bright-line test, especially when the matter is fact-intensive).

315. The Court has recognized in the past that the information interest is not as compelling against anonymity rights for small donations as it is for large donations. Torres-Spelliscy, *supra* note 234, at 14.

316. One of the reasons for the use of zones in other areas of law is the need for flexibility because bright-line tests can be impracticable and lead to absurd distinctions. See Benjamin Donahue, Case Note, McGarvey v. Whittredge: *Continued Uncertainty in Maine’s Intertidal Zone*, 64 ME. L. REV. 593, 608 (2012).

317. See Ford & Spiwak, *supra* note 309.

318. See *supra* Part III.

319. Torres-Spelliscy, *supra* note 234, at 13 (“Disclosure laws should not trap the unwary or entangle tiny groups of people spending relatively small amounts of money.”).

320. See, e.g., Briffault, *supra* note 20, at 300.

321. *Id.*

322. *Id.* at 301.

Court should decide the disclosure threshold as a bright line, but it must remember that a low threshold challenges the privacy of small donors, while very high thresholds evade the informational interest for even the largest donors.³²³ The goal is to find a balance between a threshold that satisfies the government's interest in providing information to the voters and one that is so high as to be a burden on free speech and freedom of association.³²⁴ Currently, BCRA requires disclosure of independent expenditures of more than \$250.³²⁵ However, this threshold number was "set in the 1970s and ha[s] never been adjusted for inflation."³²⁶ To make the informational interest compelling, the legislature should raise the disclosure threshold.

Second, the legislature should consider where the donation is going. Is it going directly to a candidate, or is it funding issue advocacy? This is the traditional dividing line that the Court has toed since *Buckley* in deciding whether contributions are "express advocacy" or "issue advocacy."³²⁷ The Court has traditionally taken a very narrow interpretation, limiting the disclosure requirements to expenditures for candidates or for organizations that clearly support a particular candidate.³²⁸ To ensure consistency, guidance, and specificity in judicial holdings, the legislature should be sure to always consider where the money is going and what its purpose is. This factor is not necessarily determinative; rather it is simply a factor for the legislature to weigh into the balance. But if the legislature chooses to restrict the constitutionality of disclosure requirements to express advocacy for a particular candidate, then the legislature should consistently consider this factor along those restricting lines.

Third, the legislature should consider the nature of the campaign.³²⁹ This distinction is separate from differentiating between issue advocacy and express advocacy. For example, is this direct

323. The lower the amount spent, the lower the information value to voters and the lower the state's interest in compelling disclosure. See Torres-Spelliscy, *supra* note 193, at 14 (noting that the 10th Circuit adopted this logical chain).

324. *See id.*

325. 2 U.S.C. § 434(c)(1) (2005).

326. *See* Torres-Spelliscy, *supra* note 234, at 13.

327. *Buckley v. Valeo*, 424 U.S. 1, 41–44 (1976) (per curiam).

328. *See id.*

329. *Doe v. Reed*, 130 S. Ct. 2811, 2827 (2010) (Sotomayor, J. concurring) ("[W]e must be mindful of the character of initiatives and referenda.").

democracy (voting to enact) or representative democracy (voting to elect)? *Doe v. Reed* is an example of a case that involves direct democracy because a group of citizens had signed a referendum petition putting legislation on the ballot for voter approval.³³⁰ The Court's decision to uphold the disclosure of the referendum petitioners' names took into account the nature of the campaign and the citizens' involvement with the election.³³¹ This case may have been decided differently had it involved representative democracy because the courts already allow the states leeway to regulate direct democracy (such as the subjects to be on the ballot and the number of signatures required).³³² Therefore, this is an important factor for the legislature to consider when drafting disclosure laws because the Court has already recognized that regulation of direct democracy does not impair political speech.³³³

Fourth, although seemingly self-evident, the legislature should consider the nature of the issue in the case. Is it a social issue or an economic issue? If the case involves a petition advocating a social cause, the Court's reasons for favoring privacy may be stronger because the effects on those involved might be more personal and harmful.³³⁴ As in *Patterson* and more recently with Proposition 8 in California,³³⁵ social issues can be extremely stigmatizing in communities, and speaking out about a controversial issue could result in violent or harmful retribution.³³⁶ The legislature must be mindful of the type of issue at hand and the fact that the reasons for

330. *Id.* at 2816 (majority opinion).

331. *Id.* at 2818 ("Petition signing remains expressive even when it has legal effect in the electoral process. But that is not to say that the electoral context is irrelevant to the nature of [the Court's] First Amendment review.").

332. For example, Sotomayor's concurrence indicates that states have "considerable leeway" to determine which issues will be placed on the ballot. *Id.* at 2827 (Sotomayor, J., concurring) ("These mechanisms of direct democracy are not compelled by the Federal Constitution.").

333. *Id.* at 2828–29 (stating that most referendum petitions are signed in public and the expressive act of signing a petition is modest).

334. Emotions run high regarding social issues and individuals taking part in controversial matters may need the state's protection of privacy to protect their reputation or safety. See, e.g., Rachel Abramowitz & Tina Daunt, *Prop. 8 Rifts Put Industry on Edge: Hollywood Is at Odds over Whether to Shun Supporters of the Ban*, L.A. TIMES, Nov. 23, 2008, at A1.

335. California's constitutional amendment to outlaw same-sex marriage. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 930 (N.D. Cal. 2010), *aff'd sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

336. *Id.* at 935 ("Social epidemiologist Ilan Meyer . . . explained that Proposition 8 stigmatizes gays and lesbians because it informs gays and lesbians that the State of California rejects their relationships as less valuable than opposite-sex relationships.").

protecting the privacy of donors in certain issues may be stronger than in other cases.

Fifth, the legislature should consider whether there is a history of violence or retaliation against individuals or corporations involved, or whether minority groups are affected. For example, *Patterson* centered mostly on racial hatred toward members of the NAACP.³³⁷ When drafting a disclosure law, the legislature may want to leave anonymity exceptions for groups that can demonstrate a history of violence against them because these groups may remain more vulnerable to attack. Another example is the immigrant community in the United States.³³⁸ Immigrants lack political power because they are a minority group and have “historically been lightning rods for fear and loathing among the general public.”³³⁹ Given this history, groups such as immigrants may need the legislature’s protection from the retribution and the restricted speech that follows disclosure.

Sixth, the legislature should consider whether the donor financing at issue is direct or indirect.³⁴⁰ Excessive disclosure can have a chilling effect, and perhaps restricting disclosure to only direct contributions will reduce this inhibition.³⁴¹ Disclosure of indirect financing, such as donating to an intermediary, may have a less chilling effect on political speech.³⁴² The donor may feel protected, for example, with the result that he may not second-guess his decision to donate. Thus, within the zone of constitutionality, disclosure requirements for indirect financing donors may not need as much protection from the privacy interest and may allow more people to be involved in politics and enrich the political debate.³⁴³

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

338. Kevin R. Johnson, *A Handicapped, Not “Sleeping,” Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CAL. L. REV. 1259, 1262 (2008).

339. *Id.* at 1263.

340. Although *Buckley* did not distinguish between indirect and direct contributions. *Buckley v. Valeo*, 424 U.S. 1, 78 (1976).

341. McGeeveran, *supra* note 175, at 876.

342. Individuals see their political views to be highly personal, and those who want to retain a reputation as being apolitical or want to avoid confrontation with colleagues may feel more comfortable contributing to an organization rather than directly to a candidate. See *id.* at 876–77.

343. See *id.* at 877 (“We should want to encourage all different forms of involvement . . . because broader participation enriches the debate for all of us and opens avenues of political self-realization for individuals.”).

Seventh, the legislature should consider, in individual cases, whether the donor at issue has already been identified with a specific issue or candidate. If a contributor has already given public support for a particular candidate or issue, there may be little chilling effect on his speech by “disclosing” his support because the information is already available. A person’s or a corporation’s need for privacy protection stems mostly from a fear of retribution.³⁴⁴ However, if a person has already been publicly identified with a particular political issue, then this fear of retribution via disclosure laws may be misplaced.

Lastly, the legislature should consider whether the donor is already heavily regulated, such as in the case of large corporations and labor unions.³⁴⁵ Disclosure requirements may have very little effect on these donors, either because they are heavily restricted in how they can donate in the first place, or because their donations are already effectively disclosed.³⁴⁶ Many corporations are already public entities, which essentially means that “[c]orporate anonymity is a contradiction in terms in a further sense as well.”³⁴⁷ In cases such as these, the legislature should be careful about asserting that a certain law is within or outside of the zone of constitutionality when the law will not have an effect on the corporation or labor union anyway. The legislature should consider whether disclosure is required by other laws, such as securities laws or labor laws, when it assesses whether the donor is already regulated. For example, in securities law, the Dodd-Frank Act has disclosure requirements for credit rating agencies in order to preserve stability in the United States’ finances.³⁴⁸

344. See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

345. *Thomas v. Collins*, 323 U.S. 516, 532 (1945) (“That the State has power to regulate labor unions with a view to protecting the public interest is, as the Texas court said, hardly to be doubted.”).

346. For example, hospitals, colleges, secondary schools, and health maintenance organizations are already highly regulated. 1 WILLIAM W. BASSET ET AL., *RELIGIOUS ORGANIZATIONS AND THE LAW* § 3:45 (2009). Securities are also highly regulated. 18A AM. JUR. 2D *Corporations* § 410 (2013).

347. Daniel Winik, *Citizens Informed: Broader Disclosure and Disclaimer for Corporate Electoral Advocacy in the Wake of Citizens United*, 120 YALE L.J. 622, 661–63 (2010) (arguing that “privacy has historically been bound up with personhood and the trappings of personhood” and “corporations lack the kind of dignitary interests that justify privacy for individuals”).

348. Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Congress, §§ 111, 152, 1011 (2010); Troy S. Brown, *Legal Political Moral Hazard: Does the Dodd-Frank Act End Too Big to Fail?*, 3 ALA. C.R. & C.L. L. REV. 1, 40 (2012).

In sum, these eight factors should provide guidance to legislatures as they seek to balance disclosure and privacy when drafting disclosure laws. If the legislature considers each factor when creating disclosure regulations, the resulting regulations should fall within the zone of constitutionality. The benefit of this zone approach is that there is no bright line—only room for the legislature to act. The legislature would only act unreasonably when it fails to consider all of the relevant factors.³⁴⁹

As a mechanical matter, the legislature has the power to make a law prescribing these factors.³⁵⁰ However, it is impracticable for Congress to pre-determine how these factors will be applied in any given situation. Therefore, to best utilize these factors, Congress could take one of three approaches. First, Congress could legislate the basic disclosure requirements but then delegate³⁵¹ to a relevant agency (such as the FEC) the ability to authorize exceptions to the disclosure requirements on a case-by-case basis using the eight factors. In this case, the agency would be carrying out Congress's goal of protecting disclosure in some cases and privacy in others. Using its expertise, the agency could then enforce the legislation by allowing exceptions consistent with the parameters established by these factors.³⁵²

Alternatively, Congress could incorporate the basic requirements into its disclosure law but then allow a defense to violation (and prosecution by the FEC) based on the eight factors.³⁵³ Or, finally, Congress could choose not to apply the statute ad hoc. Rather, the statute itself would distinguish among the factors and give clear and specific guidelines for exceptions from disclosure requirements. This would not require any involvement from the

349. And the Court would have to determine whether this legislation is unconstitutional because it is not within the zone of constitutionality.

350. See U.S. CONST. art. I, § 1.

351. Generally, Congress can delegate its rulemaking power to the executive branch so long as it provides an intelligible principle. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001); see also Ron Beal, *Ad Hoc Rulemaking: Texas Style*, 41 BAYLOR L. REV. 101, 103 (1989); Gary J. Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567, 568 (1994).

352. See 73 C.J.S. PUBLIC ADMINISTRATIVE LAW AND PROCEDURE § 68 (“A legislative body may delegate to an administrative body the authority to adopt and enforce reasonable rules for implementing or carrying out the purposes of a statute or ordinance, or to promulgate subordinate rules within specified limits.”).

353. The FEC has broad discretionary power to decide how to investigate claims, including civil enforcement and prosecution. See *Nader v. FEC*, 823 F. Supp. 2d 53, 58 (D.D.C. 2011).

courts or administrative agencies, but it would also leave less room for individuals and organizations to claim that they should not fall under disclosure requirements. This final approach is likely the superior method because it allows the legislature to precisely establish the elements that make an individual or organization exempt from disclosure requirements, but any of the three approaches could prove highly effective.

B. Exemplifying the Method by Applying It to a Recent Proposal

To illustrate how a court could apply the above factors to disclosure legislation, this section applies the factors to the Disclose Act of 2012.³⁵⁴ By considering these factors when determining whether this legislation is within the zone of constitutionality, this section concludes that the act is constitutional.

1. Disclose Act 2.0

The Democracy is Strengthened by Casting Light on Spending in Elections Act of 2012 (“Disclose Act 2.0”)³⁵⁵ replaced the Democracy is Strengthened by Casting Light on Spending in Elections Act of 2010 (the “Disclose Act of 2010”), which was defeated by the Senate in 2010.³⁵⁶ Democrat Chris Van Hollen, who introduced the bill to the House, intended the Disclose Act of 2010 to amend FECA and establish additional disclosure requirements for organizations such as labor unions, corporations, and Super PACs.³⁵⁷ Sponsors of the bill created it in response to *Citizens United* and included many new provisions for campaign expenditures.³⁵⁸

Disclose Act 2.0 was created following the earlier bill’s demise and with the same goal as its predecessor: to revise FECA and

354. Bill Summary & Status, 111th Cong. (2009–2010), H.R. 5175, All Information, LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR05175:@@L&summ2=m&> (last updated June 24, 2010).

355. S. 3369, 112th Cong. (2012).

356. Democracy is Strengthened by Casting Light on Spending in Elections Act (DISCLOSE Act), H.R. 5175, 111th Cong. (2010); Linda Pall, *Corporate Citizens and Political Speech: The Perils Surrounding A Supreme Court Game-Changer: Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010), 53 ADVOCATE 32, 34 (2010).

357. H.R. 5175.

358. However, the act exempted many large-member groups such as the National Rifle Association and AARP. Pall, *supra* note 356, at 34.

increase campaign finance disclosure requirements.³⁵⁹ Disclose Act 2.0 required disclosure of the identity of large campaign contributors and spenders.³⁶⁰ For contributions over \$10,000 to § 527 or § 501(c) electioneering organizations, the organization must certify that the spending is not being made in coordination with a candidate and must reveal the identity of the sponsor “so that the actual sources of funds being spent to influence federal elections will be known.”³⁶¹ At the time the bill was first introduced, supporters argued that these disclosure requirements would deter corporate spending.³⁶² Additionally, the act, which has not yet passed, would “achieve . . . transparency without imposing any unconstitutional burdens on political speakers.”³⁶³

To avoid the faults of its decisions in the past when analyzing the Disclose Act (assuming the act becomes law), the Court should achieve a balance between disclosure and privacy, provide guidelines for future courts and lawmakers to interpret the act, and avoid vagueness in its holding. A balance between disclosure and privacy that falls outside of the zone of constitutionality should be unconstitutional. If a zone approach is followed, a challenged law would be facially unconstitutional only where the legislature neglected relevant factors. Where the factors are overtly invoked, at most a law would be unconstitutional as applied to particular facts.

2. Is the Act Constitutional?

First, the Court should consider whether or not the disclosure threshold is high enough that the anonymity interest of small donors is not sacrificed.³⁶⁴ Disclose Act 2.0 raises the disclosure threshold to \$10,000.³⁶⁵ At present, federal law requires that donor identity be

359. S. 3369, 112th Cong. (2012).

360. FAQ Disclose Act 2.0, LEAGUE OF WOMEN VOTERS, www.lwv.org/content/faq-disclose-act-2012 (last visited Aug. 15, 2013).

361. *Id.*; S. 3369, 112th Cong. § 324(a)(2) (2012).

362. T.W. Farnam, *The Influence Industry: Disclose Act Could Deter Involvement in Elections*, WASH. POST (May 13, 2010), <http://www.washingtonpost.com/wpdyn/content/article/2010/05/12/AR2010051205094.html>.

363. J. Adams Skaggs, *Letter to Senate Urging Support for the Disclose Act of 2012*, BRENNAN CENTER FOR JUST. N.Y.U (July 13, 2012), available at http://brennan.3cdn.net/747ede fd3f8454143a_4zm6bhetn.pdf.

364. See Levit, *supra* note 311 and accompanying text.

365. See Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Congress, §§ 111, 152, 1011 (2010); Brown, *supra* note 348, at 40; see also *supra* text accompanying note 347.

disclosed for donations greater than \$200 to election candidates.³⁶⁶ A threshold this low clearly raises concerns for protecting the anonymity interest. Additionally, small donations have a proportionally smaller effect on elections, and so their contribution to the informational interest is low.³⁶⁷ Raising the threshold would abate the privacy and disclosure concerns because only larger donors would be affected.³⁶⁸ Although large donors are not immune to reprisals, due to their immense wealth, they are likely less vulnerable, especially to economic retaliation.³⁶⁹ Disclose Act 2.0's higher disclosure threshold would likely be within the zone of constitutionality because this limit allows the information interest to outweigh the anonymity interest.

The next relevant factor is whether minority groups are affected by the act.³⁷⁰ The Court should consider the fact that this act specifically targets contributions by corporations, labor unions and super PACs.³⁷¹ Privacy is favored when a law has a high potential to chill speech by members of minority groups.³⁷² However, corporations, labor unions, and super PACs,³⁷³ given their large numbers and comparatively deep pockets, are unlikely to have the same fear of reprisal that chills speech within minority groups.³⁷⁴ Therefore, the Court should weigh as favoring disclosure the fact that the act will not directly affect minority groups of citizens. Another relevant factor is the nature of the donor entity and whether the donor entity is already heavily regulated. In this case, since the act affects only corporations and labor unions, its chilling effect would be

366. Briffault, *supra* note 12 at 983, 1003–04.

367. *Id.*

368. *See supra* note 277 and accompanying text.

369. Briffault, *supra* note 12, at 1005 (adding that Justice Scalia has suggested that “it is not entirely inappropriate that large donors be ready to justify their actions publicly”).

370. *See supra* notes 337–39 and accompanying text.

371. S. 2219, 112th Cong. (2012) (“Provide[s] for additional disclosure requirements for corporations, labor organizations, Super PACs and other entities, and for other purposes.”).

372. *See supra* notes 340–43 and accompanying text.

373. Super PACs (Political Action Committees) differ from regular PACs because they can take and spend unlimited amounts of money including donations from corporate treasury accounts. Torres-Spelliscy, *supra* note 104, at 1085.

374. *See, e.g., About: Who We Are*, UNITED AUTO WORKERS, <http://www.uaw.org/page/who-we-are> (last visited August 15, 2013) (stating that the United Auto Workers union has more than 390,000 active members in the United States); *Apple Reports Fourth Quarter Results*, APPLE (Oct. 25, 2012), <http://www.apple.com/pr/library/2012/10/25Apple-Reports-Fourth-Quarter-Results.html> (stating that Apple posted a quarterly revenue of \$36 billion in the fourth quarter of 2012).

relatively low; these organizations are already heavily monitored and regulated.³⁷⁵ There is no need for the disclosure laws to repeat regulation that already exists, such as securities regulation,³⁷⁶ because of the potential for this regulation to also infringe upon anonymity rights.

In sum, in this hypothetical analysis, Disclose Act 2.0 would probably be found constitutional because the threshold is high enough to advance the information interest without hurting the anonymity interest and because the act seeks to regulate organizations whose large memberships and comparative wealth would allow them to deflect attack.³⁷⁷ Since the zone of constitutionality allows the Court to weigh either disclosure or privacy more heavily depending on the factors at issue, the Court has more leeway to lean in one direction—in this case toward disclosure. The factors introduced earlier provide a for the Court to follow in determining when to give one interest slightly more weight than the other interest without harming one. This system should be distinguished from the Court's current ad hoc interpretation of disclosure regulations because application of each of the eight factors will favor either the anonymity interest or the information interest. However the Court must consider each interest within certain parameters.

3. Is the Act Good Policy?

In addition to being constitutional, disclosure requirements are good policy because they provide valuable information to voters.³⁷⁸ However, Disclose Act 2.0, by substantially raising the disclosure thresholds, would allow the Court to focus on finding a balance that maximizes the purpose of disclosure in the first place: to inform the public about who is funding their elections.³⁷⁹ If the thresholds remain low, the Court will always need to pay attention to protecting individuals, small businesses, and even large corporations from

375. See 12 EMP. COORD. LABOR RELATIONS § 70:1 (2012); 18A AM. JUR. 2d *Corporations* § 410 (2004); *supra* Part IV.A.2.

376. See *supra* notes 310–13.

377. See *supra* pp. 63–65.

378. See *supra* notes 12–13 and accompanying text.

379. See *supra* notes 12–13 and accompanying text (finding that the purpose of disclosure is to inform the public about who is funding their elections).

hostility and retaliation.³⁸⁰ As Richard Briffault has written, “[T]here is no obvious constitutional standard for setting the balance between these privacy and publicity—and anonymity and accountability—concerns.”³⁸¹

It is important to remember that disclosure laws were created to control increased political spending in campaigns.³⁸² Disclosure laws are used to regulate this spending, rather than stop it altogether, and are the primary means used to achieve this end.³⁸³ When the Court balances the interests of disclosure with those of privacy in assessing disclosure laws, it must not be hindered to the extent that the purpose for the law is lost. Raising the disclosure threshold is good policy because it allows the Court to focus on its primary goal of facilitating democracy with an involved electorate.³⁸⁴ However, lawmakers could use methods other than thresholds to achieve this same goal.³⁸⁵ For instance, even where exemption is not required by the fifth factor, organizations with a history of reprisals, threats, or harassment could be exempt from the disclosure requirements.³⁸⁶

Congress initially set lower monetary thresholds for disclosure in order to prevent candidates from “bundling” small donations together without having to disclose their sources.³⁸⁷ Theoretically, the lower the contribution limit, the more difficult it is for a candidate to raise money, or to raise money in an effective and efficient manner.³⁸⁸ However, bundlers have allowed campaign contributors to avoid contribution limits by aggregating small donations in increments.³⁸⁹ Therefore, while a substantially lower disclosure threshold may hinder bundler donations, the cost to small contributors is potentially very high and future disclosure regulations should err on this side of higher thresholds.

380. See *supra* Part IV.A.2.

381. Briffault, *supra* note 12, at 1003.

382. Torres-Spelliscy, *supra* note 104, at 1102–03.

383. *Id.*

384. See Johnstone, *supra* note 176, at 434 (quoting *Buckley v. Valeo*, 424 U.S. 1, 92–93 (1976) (per curiam)) (noting that the point of urging disclosure is to increase “public discussion and participation in the electoral process, goals vital to a self-governing people”).

385. See *supra* Part IV.A.2.

386. See Torres-Spelliscy, *supra* note 104, at 1103–04.

387. *Id.*

388. See *id.* (quoting PETER J. WALLISON & JOEL M. GORA, *BETTER PARTIES, BETTER GOVERNMENT: A REALISTIC PROGRAM FOR CAMPAIGN FINANCE REFORM* 43 (2009)).

389. Anthony J. Gaughan, *The Futility of Contribution Limits in the Age of Super PACs*, 60 *DRAKE L. REV.* 755, 797 (2012).

In sum, Disclose Act 2.0 is both constitutional and relatively good policy. Because the Disclose Act of 2010 and the Disclose Act 2.0 of 2012 have been unsuccessful, perhaps a similar disclosure law will be proposed soon.

V. CONCLUSION

The Supreme Court has failed to protect both First Amendment disclosure and privacy interests in campaign finance disclosure cases.³⁹⁰ Even worse, it has failed to provide a usable framework for lower court judges and lawmakers to assess whether disclosure laws are appropriately balancing these two protected interests.³⁹¹ Unless the Court corrects these ills in the disclosure doctrine, citizens and corporations will risk losing their First Amendment rights and the goal of an effective democracy.³⁹² By remembering the reason for disclosure requirements and keeping in mind a prescribed list of factors, the Court can consistently and clearly balance disclosure and privacy in a constitutional manner.³⁹³ In the post-*Citizens United* era with swelling campaign donations and increased momentum for disclosure,³⁹⁴ the Court's actions could have vast consequences.³⁹⁵ The best the Court can do is balance disclosure and privacy interests in such a way that neither is neglected and both are protected, and enlighten others with its method. If this is accomplished, perhaps the next century of disclosure doctrine will be less unpredictable than the last.

390. *See supra* Part II; Part III.A.

391. *See supra* Part III.B.

392. *See supra* Part II.

393. *See supra* Part IV.

394. *See* Torres-Spelliscy, *supra* note 104 (concluding that “[t]he tide has turned in favor of campaign finance disclosure”).

395. *See supra* Part IV.