

## ARTICLES

# CONGRESSIONAL DISCLOSURE OF TIME SPENT FUNDRAISING

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*This Article advocates passage of a law requiring members of Congress to disclose the amount of time they spend fundraising.*

*In the wake of Citizens United and other court decisions severely limiting lawmakers' ability to regulate campaign spending, many scholars have turned their focus to campaign finance disclosure laws. According to some, laws requiring campaigns and donors to reveal the source of contributions and expenditures are the last bastion of federal campaign finance law. Yet despite a history of broad acceptance, disclosure laws rest on an increasingly shaky foundation.*

*The most troubling aspect of current disclosure law is that it contains loopholes so obvious and irresistible that many political players choose to spend dark money, the source of which is unidentified. Further, some argue that even when the source of political spending is disclosed, the information provided to the electorate is of questionable usefulness for a host of reasons. Finally, opponents of disclosure laws point to their potential chilling effect and threats of retaliation that can occur when the public learns who supported a certain candidate or ballot measure. Even those who support disclosure laws have recently conceded that perhaps disclosure requirements should encompass only large spenders rather than those contributing only a few hundred dollars.*

*For these reasons, there have been calls to reform federal disclosure law so it is more properly tailored to serve its goals without chilling speech. Many have proposed effective, intelligent changes that would improve the disclosure regime greatly. However, the current discussion about disclosure largely ignores the fact that there is a gaping hole in disclosure requirements: while the electorate receives some information about a candidate's financial backers and can learn about a legislator's votes and other activities, voters cannot discover how much time their representatives spend raising money. Information about legislators' fun-*

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*draising time is critically important: the average member of Congress spends between thirty and seventy percent of their time seeking money.*

*The aim of requiring disclosure of fundraising time would be two-fold: First, it would supplement current disclosure law by providing new, valuable information about legislators that is less susceptible to avoidance, is more useful to voters, and would not risk chilling speech. Second, it would discourage legislators from spending egregious amounts of time fundraising, thereby encouraging them to devote more time to the jobs they are elected to do.*

*Though this Article focuses on the discrete proposal of requiring disclosure of time spent fundraising, it also advocates further scholarly examination of enhanced disclosure of legislators' activities. Such requirements, like the one proposed here, provide greater benefits and often lack the drawbacks of disclosure laws that seek information from nongovernment actors.*

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## INTRODUCTION

Laws requiring reporting and publication of the names and personal information of campaign spenders have a history of broad support.<sup>1</sup> Both federally and in many states, these laws attempt to ensure that the public will be informed about the people and entities supporting political campaigns and ballot measures. They also seek to deter corruption and aid in enforcing other campaign finance laws by requiring both campaigns and groups engaging in independent spending to provide specific information concerning their funding sources.<sup>2</sup> While First Amendment and policy arguments have arisen due to concerns over retaliation and the chilling effect of disclosure laws, the laws have for the most part been upheld by the courts and were the subject of positive attention by the *Citizens United* majority.<sup>3</sup>

Despite the fact that the Supreme Court has broadly upheld the constitutionality of disclosure requirements, federal disclosure laws are under more scrutiny than ever before. Loopholes in the legal framework allow many political advocacy groups to avoid disclosing the source of their funding. This prevents the laws from fulfilling their purposes, one of which is accurately informing voters of the sources of political speech. These loopholes and the Court's pronouncement in *Citizens United* notwithstanding, opponents of disclosure are increasingly calling for more

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<sup>1</sup> Until recently, such disclosure laws have enjoyed bipartisan support; even those who believe that the First Amendment prevents the government from restricting political spending have often argued in favor of broad disclosure requirements. Most notably, Justice Kennedy and three other conservative justices in *Citizens United v. Fed. Election Comm'n* expressed support for disclosure provisions. See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 916 (2010). However, as the Supreme Court has increasingly limited legislatures' ability to regulate contributions and spending, some previously supporting disclosure have begun to shift their viewpoints. See, e.g., Fred Hiatt, *A GOP Bait-and-Switch on Disclosure*, WASHINGTON POST (June 17, 2012), available at [http://www.washingtonpost.com/opinions/fred-hiatt-a-gop-bait-and-switch-on-disclosure/2012/06/17/gJQATPS2jV\\_story.html?hpid=z2](http://www.washingtonpost.com/opinions/fred-hiatt-a-gop-bait-and-switch-on-disclosure/2012/06/17/gJQATPS2jV_story.html?hpid=z2). See also Editorial, *Disclosure Vote Leaves Trail of Broken Republican Vows*, BLOOMBERG VIEW (Jul. 17, 2012), available at <http://www.bloomberg.com/news/2012-07-17/disclose-vote-leaves-trail-of-broken-republican-vows.html>; Norman Ornstein, *Full Disclosure: The Dramatic Turn Away From Campaign Transparency*, THE NEW REPUBLIC, May 7, 2011, at <http://www.tnr.com/node/88005?page=0,0> (listing prominent conservative voices that have switched positions on disclosure laws, such as John Boehner, Mitch McConnell, and *The Wall Street Journal*).

<sup>2</sup> See Part I, *infra*.

<sup>3</sup> *Citizens United*, 130 S. Ct. at 916; Cynthia L. Bauerly & Eric C. Hallstrom, *Square Pegs: The Challenges for Existing Federal Campaign Finance Disclosure Laws in the Age of the Super PAC*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 329, 351 ("Unlike other aspects of [campaign finance law] that are under challenge after *Citizens United*, there is no uncertainty from the Supreme Court about the extent to which effective disclosure is both constitutionally valid and prudent public policy.")

protections for anonymous speech, citing fears of chilled speech and harassment.<sup>4</sup>

The dearth of information accessible to voters concerning campaign funding is just one of the myriad of issues faced by our current campaign finance system. Reformers concern themselves with corruption and insider access, to be sure, but also have consistently decried the fact that members of Congress are essentially forced to be full-time telemarketers, constantly begging for more money for their next campaign.<sup>5</sup> This race for funds unquestionably debases the legislative process and our government as a whole—the only remaining question for debate is the extent of its detrimental effects.

This Article advocates supplementing the disclosure regime in a way that would seek to address the electorate's informational deficit and dampen the fire that drives the money race. The simplest version of such a law, and the principal example explored in this Article, is a requirement that legislators disclose the amount of time they spend fundraising.<sup>6</sup> More comprehensive versions of such a law might require lawmakers to provide additional information about the individuals and groups from which they solicit funds.<sup>7</sup>

Requiring politicians to disclose the amount of time spent fundraising would offer voters a new basis on which to assess their representatives. Making the information accessible to the public would increase awareness of the volume of fundraising that occurs, perhaps spurring more calls for change. To some degree, the requirement would lessen the incentive to spend time fundraising by shining a greater spotlight on

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<sup>4</sup> *Citizens United*, 130 S. Ct. at 916; see, e.g., James A. Bopp, Jr. & Jared Haynie, *The Tyranny of "Reform and Transparency": A Plea to the Supreme Court to Revisit and Overturn Citizens United's "Disclaimer and Disclosure" Holding*, 16 NEXUS: CHAP. J. L. & POL'Y 3, 21 (2011) ("Political Exposure Laws Do Not Prevent Anyone from Speaking in the Same Way that Jewish Armbands Did Not Prevent Anyone from Practicing Their Religion."). The Court has, of course, left the door open for challenges to disclosure laws for individuals and groups that face true threats of retaliation. *Citizens United*, 130 S. Ct. at 914; see also *Doe v. Reed*, 130 S. Ct. 2811, 2821 (2010) (reaffirming that "upholding the law against a broad-based challenge does not foreclose a litigant's success in a narrower one").

<sup>5</sup> See Part III.A.2, *infra*.

<sup>6</sup> While most commentators focus on disclosure of dollar amounts, Professor Anita Krishnakumar has made a proposal similar to the one presented here. She has suggested requiring legislators to make disclosures concerning their contacts with lobbyists. See Anita Krishnakumar, *Towards a Madisonian, Interest-Group-Based, Approach to Lobbying Regulation*, 58 ALA. L. REV. 513, 517, 543, 545-548 (2007) (noting need for focus shift from lobbyists to elected officials and arguing that "lobbying regulations should produce information not only about which lobbyists competing interests hire, or how much lobbyists are paid, but also about the amount of access that those lobbyists obtain vis-à-vis specific elected officials").

<sup>7</sup> Such enhanced disclosure laws would dovetail with current reporting requirements to provide the public with a more complete view of the activities of their legislators, as well as contribute to better enforcement of fundraising time reporting requirements.

the activities of legislators.<sup>8</sup> More robust versions of such a law would help connect the dots between donors and insider access.

Part I of this Article briefly explains the framework of current federal disclosure law, which generally requires candidates to report personal information about those who contribute to their campaigns. The law also requires some independent spending groups to reveal their funders. Part I also describes the three typically-cited purposes of disclosure law: providing information to the voting public, preventing corruption, and assisting in enforcement of other campaign finance laws.

Part II provides historical background of the development of campaign finance law since the Federal Election Campaign Act (FECA) was passed after the Watergate scandal. It explains how disclosure laws fit into FECA's existing framework and delves more deeply into the details of current federal disclosure requirements, supplemented by the 2002 Bipartisan Campaign Reform Act (BCRA). Most importantly, it discusses several of the major obstacles preventing the disclosure regime from reaching optimal efficacy. It explains how gaps in the existing law allow independent spenders to avoid disclosing the identities of the individuals or corporations funding their efforts. Part II also addresses shortcomings of disclosure provisions in general, such as data aggregation problems, timing problems, and questions concerning disclosed data's usefulness to voters. Finally, it looks at the recent anti-disclosure movement led by campaign finance reform opponents who attack disclosure laws based on allegations that they chill speech and subject speakers to retaliation and harassment.

Part III begins by discussing the benefits of enacting a law that would require legislators to disclose more of their own campaign finance activity, namely the amount of time they spend fundraising.<sup>9</sup> It concludes that the public has a vital interest in learning information about the amount of time its representatives spend raising money instead of performing other legislative functions. It also examines the deleterious effects created by the "money race" that dominates legislators' daily calendars and argues that increasing awareness of legislators' fundraising activities would help drive down the time members of Congress spend soliciting money.

Part III also examines how the proposed law would, to a significant degree, avoid the three major problems faced by current federal disclosure laws discussed in Part II: avoidance, informational problems, and concerns over chilling effects and retaliation. It goes on to address practical concerns about the proposed law and responds to several potential

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<sup>8</sup> See generally, Krishnakumar, *supra* note 6.

<sup>9</sup> Naturally, the law would be beneficial if passed by individual states as well. For the sake of simplicity, this Article couches the proposal in federal terms.

counterarguments. While disclosing fundraising time would add some work for legislators, the burden would not be overwhelming. And though any system relying on self-reporting will face some hurdles, the design of the law can ameliorate those problems. Though some would argue that the law would disadvantage incumbents and provide a leg up to self-financed candidates, such effects would be minor, especially in comparison to existing laws, and would not outweigh the benefits of time disclosure. The law could also be set up in a way to avoid discouraging small-donor fundraising.

## I. DISCLOSURE LAWS AND THEIR PURPOSE

Disclosure laws cover countless private and public institutions across the world, regulating corporations, local government entities, labor unions, and other groups and individuals. The government disclosure laws discussed in this Article share many traits with laws requiring corporate disclosure: both seek to deter undesirable behavior and address informational imbalances. Federal and state campaign finance disclosure laws address analogous issues by providing information to voters concerning the funding of campaigns and attempting to remedy informational imbalances that might otherwise “allow corruption to persist in important institutions that serve the public.”<sup>10</sup>

In the United States, campaign disclosure laws typically require candidates, political parties, political action committees (PACs), and other organizations to disclose information about their spending and fundraising. Under federal law, those actors must disclose information for contributions of \$200 or more to a candidate.<sup>11</sup> Importantly, candidates usually must file disclosure reports before elections are held, allowing the public to view the information before voting.<sup>12</sup> Federal law requires disclosure of a donor’s name, address, occupation, and employer.<sup>13</sup> Many states require similar information.<sup>14</sup> Federal law also mandates reporting of independent spending, which is money that is spent on election-related speech but not contributed directly to a candidate, including

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<sup>10</sup> ARCHON FUNG ET AL., *FULL DISCLOSURE, THE PERILS AND PROMISE OF TRANSPARENCY* 41 (2007) (explaining that “confidentiality of campaign contributions prevents voters from judging whether candidates are beholden to well-heeled interests”).

<sup>11</sup> 2 U.S.C. § 434(b)(3)(a) (2011).

<sup>12</sup> 2 U.S.C. § 434(a)(2) (2011).

<sup>13</sup> 2 U.S.C. § 434(b)(3) (2011); 11 C.F.R. s. 104.8 (2012); *see also* Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 *ELEC. L.J.* 273, 277 (2010) [hereinafter *Disclosure 2.0*].

<sup>14</sup> Richard Briffault, *Two Challenges for Campaign Finance Disclosure After Citizens United and Doe v. Reed*, 19 *WM. & MARY BILL RTS. J.* 983, 1000 (2011) [hereinafter *Two Challenges*]. *See also* *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 980 (2010) (Thomas, J., dissenting) (noting that California law required those donating over \$100 to any group supporting Proposition 8 to disclose name, address, occupation, and employer’s name).

“electioneering communications.”<sup>15</sup> Most states require some disclosure of independent spending as well.<sup>16</sup> Federal law also mandates that advertisements contain disclaimers identifying their funding sources.<sup>17</sup>

The specific purposes of campaign-related disclosure laws are often mentioned but sometimes taken for granted by courts.<sup>18</sup> Though there are three typically-cited bases for campaign finance disclosure (anticorruption, the electorate’s interest in information, and enforcement of other campaign finance laws, discussed below),<sup>19</sup> scholars have cited numerous additional benefits disclosure laws can provide.<sup>20</sup>

Currently, the first and strongest constitutional basis for disclosure laws is the electorate’s informational interest in campaign finance data. As described in *Citizens United*, disclosure of information about a candidate’s supporters allows voters and others to properly assess First

<sup>15</sup> Federal law distinguishes electioneering communications from other independent expenditures, stating that an electioneering communication is

any broadcast, cable, or satellite communication which (2) refers to a clearly identified candidate for Federal Office; (II) is made within — (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

2 U.S.C. § 434(f)(3)(2011). Independent expenditures are expressly excluded from the electioneering communication definition. *Id.* An independent expenditure is an expenditure “expressly advocating the election or defeat of a clearly identified candidate” that is not made in cooperation with a candidate. 2 U.S.C. § 431(17) (2011).

<sup>16</sup> Anne Bauer, *Best Practices for Independent Spending, Part One*, FOLLOW THE MONEY (Jan. 18, 2012), <http://www.followthemoney.org/press/ReportView.phtml?r=453> (“Twelve states don’t require any disclosure of independent expenditures, and 32 states either don’t require disclosure of electioneering communications or don’t have a definition as strong as the federal definition.”).

<sup>17</sup> 2 U.S.C. § 434(f)(1) (2011) (“Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of \$10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement [providing identifying information]”); 2 U.S.C. § 441d (2011).

<sup>18</sup> Courts and others have often been criticized for failing to fully examine and develop the theoretical underpinnings of disclosure laws and their constitutionality. See Anthony Johnstone, *A Madisonian Case for Disclosure*, 19 GEO. MASON L. REV. 414, 416 (2012) (noting the *Citizens United* Court’s fairly cursory treatment of the informational interest and stating that “[c]ampaign finance disclosure needs a more robust constitutional foundation than it has”).

<sup>19</sup> See *Buckley v. Valeo*, 424 U.S. 1, 66–68 (1976) (listing three purposes of disclosure provisions in FECA).

<sup>20</sup> For example, one commentator has found that increased disclosure can lead to more news articles about political money, resulting in fewer shallow “horseshoe” stories. Raymond La Raja, *Sunshine Laws and the Press: The Effect of Campaign Disclosure on News Reporting in the American States*, 6 ELEC. L.J. 236, 247 (2007) (noting that “evidence that better disclosure regimes encourage reporters to avoid the tried-and-true horseshoe story” is “potentially good news for civic life”). Disclosure of campaign finance data also provides invaluable data through which scholars can analyze political issues. See Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255, 258 (2010) (stating that “facilitating the study and knowledge of political behavior” is an additional reason for campaign finance disclosure).

Amendment-protected speech in elections.<sup>21</sup> Justice Kennedy explained that “[w]ith the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”<sup>22</sup> He further explained that “transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”<sup>23</sup> Though most see this as a venerable and perhaps necessary facet of democracy, especially considering deregulation of election spending, Justice Thomas voiced his disagreement with the idea that the informational interest is sufficient to require speakers to disclose their identities.<sup>24</sup>

Those who support upholding disclosure laws based on the informational interest claim that disclosure of the identity of a candidate’s supporters provides a valuable “heuristic cue” for voters.<sup>25</sup> The most common heuristic cue in the voting context is party affiliation—if a voter knows little or nothing about a candidate, they may vote based on party affiliation, and often will arrive at the same decision they would have had they known everything about a candidate’s platform.<sup>26</sup> The same logic applies to disclosure of a candidate’s (or a ballot measure’s) supporters and opponents: Voters who possess information about the donor (such as the NRA or the Sierra Club) can use that information to fill the gaps in their knowledge, leading them to vote a certain way.

Providing voters with information with which they can assess their representatives and other government officials is invaluable because it can affect voters’ choices. However, perhaps just as importantly, candidates’ actions will be affected by what they know they will be forced to disclose. Thus, a principal benefit of successful disclosure regimes is the behavioral effects they engender.<sup>27</sup> This benefit is typically said to pre-

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<sup>21</sup> *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 916 (2010).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 980 (“The disclosure, disclaimer, and reporting requirements in BCRA §§ 201 and 311 are also unconstitutional.”).

<sup>25</sup> A heuristic cue is essentially a shortcut that allows someone with incomplete information to arrive at the same answer they would have regardless of whether or not they possessed all necessary information. See, e.g., Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and “Disclosure Plus”*, 50 *UCLA L. REV.* 1141, 1149 (2003).

<sup>26</sup> *Id.* at 1150.

<sup>27</sup> See La Raja, *supra* note 20, at 239–40 (explaining that “politicians might alter their behavior when they know it is easier for others to keep track of their campaign finances” and “such adaptive behavior by politicians is precisely what many political reformers sought by improving disclosure”). See also FUNG ET AL., *supra* note 10, at 40 (explaining that “[t]argeted transparency policies” aim to alter disclosers’ behavior “in specified ways”). For more information on a view that a disclosure-only system is preferable to one with spending and/or contribution limits, see Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 *UTAH L. REV.* 311, 326 (1998). Under a disclosure-only system, voters serve as the judges of



vent corruption because “the light of publicity . . . may discourage those who would use money for improper purposes either before or after the election.”<sup>28</sup> Naturally, however, disclosure’s effect on an official’s behavior will not stop at discouraging the narrow *quid pro quo* definition of corruption promulgated by the current Supreme Court—the effect it may have on officials’ behavior can extend to actions that might demonstrate “undue influence”<sup>29</sup> of a financial supporter or otherwise garner a negative reaction from the official’s constituency. For example, mandated disclosure can cause candidates and incumbents to shy away from soliciting money from entities with whom they may not want to associate, or may cause them to return money from certain undesirable donors.<sup>30</sup> Further, it may encourage government officials to avoid allowing their financial supporters to exert undue influence on their decision-making, or even appearing to exert such influence.<sup>31</sup> Requiring disclosure of how legislators spend their time may have a similar effect to the anticorruption interest by encouraging them to make fewer fundraising calls and focus more time on legislative work.

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what constitutes undue influence and thus are the most desirable watchdog that can be used to change behavior of political actors.

<sup>28</sup> *Buckley v. Valeo*, 424 U.S. 1, 67 (1976). See generally, *Burroughs v. United States*, 290 U.S. 534 (1934); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). Anthony Johnstone, author of *A Madisonian Case for Disclosure*, noted how the *Buckley* Court’s repetition of a quoted phrase from *Grosjean v. American Press Co.*, “informed public opinion is the most potent of all restraints on misgovernment,” helps align disclosure with the First Amendment, because the press is relied upon in order to inform the public. See Johnstone, *supra* note 18, at 437.

<sup>29</sup> As recently as 2001, the Court described corruption as “not only *quid pro quo* agreements, but also as undue influence on an officeholder’s judgment, and the appearance of such influence.” *Fed. Election Comm’n v. Colorado Republican Fed. Campaign Comm’n*, 533 U.S. 431, 441 (2001). However, the Court in *Citizens United* clarified that the majority of the Court will now hold to the narrowest definition, which essentially means only bribery. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 908 (2010).

<sup>30</sup> There are numerous examples. In February 2012, Barack Obama’s campaign returned over \$200,000 in donations bundled by brothers of a fugitive linked to violence in Mexico. See *Obama Campaign Returns \$200,000 Donation from Fugitive’s Family*, THE GUARDIAN (Feb. 7, 2012, 6:54 EST), <http://www.guardian.co.uk/world/2012/feb/07/obama-campaign-donation-fugitive-family>. Interest groups also often pressure candidates to reject or return contributions from sources inimical to their interest. Presidential candidate Mitt Romney faced negative commentary when he failed to return donations from Daniel Staton, the chairman of a company that owns Penthouse magazine and several pornographic websites. See Adam Peck, *Romney Signs Anti-Porn Pledge, Ignores Demand to Return Contribution from ‘Hardcore’ Pornographer*, THINK PROGRESS, (Feb. 15, 2012, 5:27 PM) <http://thinkprogress.org/politics/2012/02/15/426391/romney-anti-porn-pledge-ignores-contribution-pornographer/?mobile=nc>.

<sup>31</sup> See, e.g., Krishnakumar, *supra* note 6, at 541 (“The threat of [exposure of a legislator’s meetings with lobbyists], could encourage (or force) elected officials, or at least their staffs, to split their dance cards more evenly between opposing interests for fear of how it will look to the electorate, and other interest groups, if lobbying disclosures reveal them to be unduly partial to one set of interests.”).

Finally, disclosure of contributions and expenditures is necessary in order to enforce any limits on monetary outlays. Of course, after *Citizens United*, expenditure limits are unconstitutional for individuals, domestic corporations and labor unions,<sup>32</sup> but contribution limits can only be policed if contributions are reported. One could argue that reporting requirements to government agencies (and not the public) would sufficiently serve this purpose,<sup>33</sup> though public disclosure could conceivably allow members of the general electorate to assist in detecting unlawful activity or violation of other campaign finance laws.

The following Part will discuss why the current disclosure laws are not completely fulfilling the intended purposes for which they were passed. First, however, it will take a broader look at campaign finance laws in order to provide background and demonstrate how disclosure laws fit into the campaign finance framework.

## II. THE CURRENT LAW AND ITS SHORTCOMINGS

### A. *The Long, Winding Road from Watergate*

The modern effort to regulate money in politics began in the wake of the Watergate scandal. Congress originally passed FECA in 1971, but amended it heavily in 1974. Corporate contributions had long been banned, but the FECA amendments attempted to get to the root of campaign finance problems by setting limits on contributions to candidates, independent expenditures, and total spending by candidates and campaigns.<sup>34</sup> FECA also required disclosure of certain contributions and expenditures, created an enforcement body (the Federal Election Commission), and created a public financing system for presidential campaigns.<sup>35</sup>

The law was torn apart by the Supreme Court in the seminal campaign finance case, *Buckley v. Valeo*.<sup>36</sup> Most critically, the Court placed

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<sup>32</sup> Currently expenditure limits still exist for foreign entities, see *Bluman v. Fed. Election Comm'n*, 132 S. Ct. 1087 (2012) (affirming district court's dismissal of case seeking to invalidate ban on contributions and expenditures), but commentators have noted the doctrinal incoherence of allowing such limits while banning limits on domestic corporate speech on a listener-oriented foundation. Richard Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 584 (2011) ("For example, it is unclear how, if the Court took its own broad pronouncements in *Citizens United* seriously, it could possibly sustain spending limits against foreign nationals and governments, who might seek to flood U.S. election campaigns with money.").

<sup>33</sup> Mayer, *supra* note 20, at 258.

<sup>34</sup> See *Buckley v. Valeo*, 424 U.S. 1, 7 (1976).

<sup>35</sup> *Id.* Though FECA's purposes varied, its principal goal was "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *Id.* at 25.

<sup>36</sup> *Id.*

campaign finance regulations squarely within the First Amendment arena by deciding that spending money qualifies as speaking for constitutional purposes. The Court struck down the law's limits on independent spending and did away with limits on a candidate's personal contributions and limits on total campaign spending.<sup>37</sup> However, the justices upheld the law's contribution limits, reasoning that contributions were more symbolic than expenditures, and thus could be constitutionally limited (but not banned).<sup>38</sup> The Court also upheld the optional public financing system for presidential campaigns.<sup>39</sup> As for FECA's disclosure provisions, the Court recognized their constitutionality but construed the section of the law requiring disclosure of the source of independent expenditures narrowly to avoid vagueness problems. Thus, FECA was interpreted to require disclosure of independent spending only when the communications at issue "expressly advocate the election or defeat of a clearly identified candidate."<sup>40</sup> This gave birth to the de facto "magic words" requirement, which required disclosure only for independent expenditures that used words such as "vote for," "vote against," and "elect."<sup>41</sup> Thus, after *Buckley*, those seeking to avoid disclosure of their independent spending could do so by avoiding use of such words, even though the content of the communication at issue clearly was intended to influence an election.<sup>42</sup>

The law has developed within *Buckley*'s framework for the past thirty-five years. Congress enacted significant amendments to the system in 2002 when it passed BCRA (also known as McCain-Feingold). BCRA instituted several major changes to the law: it banned the use of "soft money"—money not regulated by federal campaign finance law—by national parties, who had for years been skirting FECA by raising money for purposes such as party-building activities and using it to fund issue advertisements.<sup>43</sup> The other major change was a ban on corporate and union funding of electioneering communications.<sup>44</sup> BCRA also instituted disclosure requirements for electioneering communications, requiring disclosure of independent expenditures that did not contain the "magic words" set forth in *Buckley*.

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<sup>37</sup> *Id.* at 51, 54, 58.

<sup>38</sup> *Id.* at 20-21, 29.

<sup>39</sup> *Id.* at 86.

<sup>40</sup> *Id.* at 80.

<sup>41</sup> *Id.* at 44 n.52; Ciara Torres-Spelliscy, *Hiding Behind the Tax Code, the Dark Election of 2010 and Why Tax-Exempt Entities Should Be Subject to Robust Federal Campaign Finance Disclosure Laws*, 16 NEXUS: CHAP. J.L. & POL'Y 59, 66 (2011) (explaining magic words requirement stemming from *Buckley*).

<sup>42</sup> *Id.* Such advertisements are often called "sham issue ads."

<sup>43</sup> John McCain, *Reclaiming Our Democracy: The Way Forward*, 3 ELECT. L.J. 115, 117 (2004).

<sup>44</sup> 2 U.S.C. § 434(f)(3)(A)(i); § 441b(b)(2) (2011).

Though BCRA was initially upheld by the Supreme Court in *McConnell v. FEC*,<sup>45</sup> its efficacy was largely stripped shortly thereafter,<sup>46</sup> and the house of cards came down with *Citizens United* in 2010. As a result, corporations and unions now can spend unlimited amounts of money from their general treasury funds on speech that is not coordinated with a candidate. And due to several subsequent lower court decisions, the government also may not limit any contributions to PACs that only make independent expenditures.<sup>47</sup> Such PACs, now known as Super PACs, began to emerge in the 2010 midterm elections and are playing an increasingly dominant role in federal elections.<sup>48</sup>

However, federal disclosure requirements have remained relatively unscathed. *Citizens United* rejected the argument that disclosure could only be constitutionally required of communications that are the functional equivalent of express advocacy, leaving BCRA's disclosure requirements for electioneering communications intact.<sup>49</sup> As the remaining subsections in this Part will explain, however, disclosure laws are not without their own problems: many donors successfully avoid disclosure, it is unclear how well the public is able to use the information they are provided, and there are serious concerns that disclosure laws chill political speech and invade privacy.

These concerns notwithstanding, most have concluded that disclosure laws are a healthy addition to our democracy. However, reformers are under no false impression that even the best imaginable system of disclosure fills the void for the spending limits or robust public financing they desire. Disclosure of spending cannot directly prevent quid pro quo corruption. It is also unlikely that current disclosure laws will do much to check the much more common and amorphous problem of distortion, in which money can buy access to legislators, assistance on issues dear to

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<sup>45</sup> 540 U.S. 93 (2003).

<sup>46</sup> See *Fed. Election Comm'n v. Wisconsin Right to Life*, 551 U.S. 449 (2007). *Wisconsin Right to Life* upheld the ban on corporate and union electioneering communications, but only for advertisements that were the "functional equivalent" of express advocacy. *Id.* at 457.

<sup>47</sup> *Wisconsin Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 154 (7th Cir. 2011); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 687 (9th Cir. 2010); *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686 (D.C. Cir. 2010). The Fourth Circuit actually reached this issue before *Citizens United* and came to the same conclusion after reviewing a North Carolina law. *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 293 (4th Cir. 2008). Until *SpeechNow*, federal law limited individual contributions to PACs to \$5,000 per year. Before Super PACs were authorized by these cases, individuals could spend unlimited amounts of their own money on independent expenditures, but were limited in their donations to PACs. *SpeechNow*, 599 F.3d at 691.

<sup>48</sup> In the 2012 election, at least \$630 million was spent by Super PACs, which amounted to roughly half of spending by outside groups in that election. Center for Responsive Politics, *Outside Spending*, OPEN SECRETS, <http://www.opensecrets.org/outsidespending/index.php> (last visited Oct. 3, 2013).

<sup>49</sup> *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 915 (2010).

donors, and support for issues that are relatively minor and do not often catch the public eye.<sup>50</sup> Further, there is no reason to believe that revealing the identity of political spenders significantly reduces the public's mistrust of a government financed by wealthy backers,<sup>51</sup> as expenditure limits might.

Most importantly for purposes of this Article, disclosure in its current form does not have an appreciable effect on the overwhelming burden shouldered by legislators as a result of the de facto mandate that they constantly raise money.<sup>52</sup> As discussed in more detail below, many legislators have expressed immeasurable frustration at the current system, which in essence requires a member of Congress to have the "heart of a telemarketer."<sup>53</sup> The never-ending money race has been called the "most obvious[ ]" deleterious effect of the current system, and results in members of Congress spending between thirty and seventy percent of their time raising money.<sup>54</sup>

### B. Avoidance of Disclosure Requirements

Aside from the limits inherent in disclosure provisions discussed in the previous subsection, the current state of the law allows many people and entities to avoid public scrutiny by spending dark money, which is money that comes from undisclosed sources. Seen in the most positive light, the shortcomings that allow dark money are significant problems that need to be overcome; in the worst, they mean that "disclosure failed colossally in the 2010 election."<sup>55</sup> According to the Center for Respon-

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<sup>50</sup> LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS – AND A PLAN TO STOP IT* 124–143 (2011). Distortion can be caused in part by lobbyists, who often gain access to legislators through contributions and "bundling," or collecting contributions from many different people. *See, e.g.*, Richard Hasen, *Lobbying, Rent Seeking, and the Constitution*, 64 *STANFORD L. REV.* 191, 205 (2012) (noting concerns that bundling by lobbyists can "enhance the lobbyist's stature" with legislators and help them gain influence). Concerns about distortion are widespread, and can come from those of all political stripes. For example, Sarah Palin once lamented that "the big players who can afford lobbyists work the regulations in their favor, while their smaller competitors are left out in the cold." *Id.* at 194 (quoting Sarah Palin, "Institutionalizing Crony Capitalism," Facebook, Apr. 24, 2010, available at [http://www.facebook.com/note.php?note\\_id=382303098434](http://www.facebook.com/note.php?note_id=382303098434)).

<sup>51</sup> LESSIG, *supra* note 50, at 167 (reporting poll in which 79% of respondents believed that "members of Congress are 'controlled' by the groups and people who finance their campaigns").

<sup>52</sup> *Id.* at 121.

<sup>53</sup> Michael Leahy, *Washington Post*, *House Rules*, June 10, 2007, at <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/05/AR2007060501702.html> (quoting Connecticut Representative Joe Courtney, who described placing calls from the Democratic party's phone bank "leaving hundreds of messages a day" with donors).

<sup>54</sup> *Id.*

<sup>55</sup> William McGeeveran, *Mrs. McIntyre's Persona: Bringing Privacy Theory to Election Law*, 19 *WM & MARY BILL RTS. J.* 859, 864 (2011) (explaining how the rules in place led to disclosure of small donations, but allowed Karl Rove's 501(c)(4) group Crossroads GPS raised \$43 million from undisclosed donors). *See also* Johnstone, *supra* note 18, at 420 (commenting

sive Politics, the percentage of spending that came from groups not required to disclose their donors rose from one percent in the 2006 midterm elections to forty-seven percent in the 2010 midterms.<sup>56</sup> The trend continued during the 2012 election, in which expenditures by dark money groups surpassed the \$300 million mark and amounted to about one quarter of all outside spending.<sup>57</sup> The system's failures have been the subject of much disagreement in the years following *Citizens United*. As a result of the success spenders have had in avoiding meaningful disclosure, many have characterized the *Citizens United* Court's seeming reliance on disclosure provisions as naïve.<sup>58</sup>

Avoidance of disclosure requirements is not a new phenomenon. For some time, those seeking to influence elections without disclosing their identity could donate to "527 organizations," which are groups registered under section 527 of the Internal Revenue Code.<sup>59</sup> The code section was created in the aftermath of Watergate, but began to serve as a major vehicle for veiled political spending in the 1990s.<sup>60</sup> The organizations were originally especially attractive to political actors because they did not require disclosure of donors and they are not limited in any way from attempting to affect elections.<sup>61</sup> However, in 2000 Congress passed a law requiring disclosure of contributions to and expenditures of 527s.<sup>62</sup> Despite passage of the disclosure requirement, 527s still played a large

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on loopholes in the current regime); Torres–Spelliscy, *supra* note 41, at 66 (referring to 2010 mid-term election as a "Dark Election" because of disclosure avoidance).

<sup>56</sup> Spencer MacColl, *Citizens United Decision Profoundly Affects Political Landscape* (May 5, 2011), <http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html>.

<sup>57</sup> Center for Responsive Politics, *2012 Outside Spending, by Groups: Nondisclosing Groups*, OPEN SECRETS, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=U> (last visited Mar. 14, 2013); Center for Responsive Politics, *2012 Outside Spending, by Groups: All Groups*, OPEN SECRETS, <http://www.opensecrets.org/outside-spending/summ.php?cycle=2012&chrt=V&disp=O&type=A> (last visited Mar. 14, 2013).

<sup>58</sup> See Richard Hasen, *Justice Kennedy's Mistaken Citizens United Vision and the Lurch Toward Campaign Finance Deregulation*, ACS BLOG, (Jan. 21, 2011), <http://www.acslaw.org/acsblog/justice-kennedy%E2%80%99s-mistaken-citizens-united-vision-and-the-lurch-toward-campaign-finance-dere> ("Justice Kennedy's utopian information-flowing vision of the U.S. campaign finance system is now no more than a dream; the question is just how bad things will become in the 2012 election season.").

<sup>59</sup> The organizations are exempt from paying federal income tax and can spend unlimited amounts of money to influence elections. They were exceedingly popular in the 2004 presidential campaign; well-known organizations such as Swift Boat Veterans and POWs were 527 groups.

<sup>60</sup> Craig Holman, *The Bipartisan Campaign Reform Act: Limits and Opportunities for Non-Profit Groups in Federal Elections*, 31 N. KY. L. REV. 243, 266 (2004) ("Section 527s became known as 'Stealth PACs' and mushroomed in number and spending activity in the mid-1990s.").

<sup>61</sup> Paul S. Ryan, *527s in 2008: The Past, Present, and Future of 527 Organization Political Activity Regulation*, 45 HARV. J. ON LEGIS. 471, 481 (2008).

<sup>62</sup> Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELEC. L.J. 295, 318 (2005).

role in elections after 2000, notably in 2004 with well-known ads such as the “Swift Boat” attacks on John Kerry.<sup>63</sup>

Recently, anonymity-seeking actors have turned to section 501(c) of the tax code, most commonly 501(c)(4).<sup>64</sup> While Super PACs must disclose their donors because they are political committees, 501(c)(4) groups are “social welfare organizations,” and therefore need not disclose donors if they are not primarily engaged in electoral politics.<sup>65</sup> These groups gained popularity in the 2010 midterm elections, spending millions of undisclosed dollars. While 501(c)(4) has long been an option for political activity, it became a much more attractive choice after (1) *Citizens United* allowed spending of corporate money from general treasury funds and (2) subsequent cases, such as *SpeechNow.org v. FEC*, held that Congress could not limit the amount of money contributed to a group that makes only independent expenditures.<sup>66</sup> Perhaps most notable was Karl Rove’s Crossroads GPS, the 501(c)(4) sister to Rove’s Super PAC, which spent \$70 million on the 2012 election cycle.<sup>67</sup> Of the \$484 million in outside money spent on the 2010 election cycle, \$132.1 million was funneled through nondisclosing organizations, most registered as 501(c)(4)s.<sup>68</sup>

As discussed above, entities that do not qualify as political committees can often avoid disclosure requirements even when much of their activity is aimed at influencing elections. Another federal law requires disclosure of contributions of over \$1,000 to groups that make independent expenditures or electioneering communications regardless of

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<sup>63</sup> Swift Boat Veterans and POWs for Truth was later found to have violated campaign finance laws by failing to register as a political committee, with a “major purpose” of influencing elections. Ryan, *supra* note 61, at 493.

<sup>64</sup> Briffault, *Two Challenges*, *supra* note 14, at 1007. Some political organizations are also set up under 501(c)(6) of the tax code, which is used for trade associations or chambers of commerce.

<sup>65</sup> Section 501(c) organizations must be “primarily engaged in promoting the mission that is the basis of their respective exemptions.” Miriam Galston, *When Statutory Regimes Collide: Will Citizens United and Wisconsin Right to Life Make Federal Tax Regulation of Campaign Activity Unconstitutional?*, 13 U. PA. J. CONST. L. 867, 876 (2011). However, there is no accepted standard in the current law, which creates significant uncertainty and controversy. *Id.* at 876 n. 29.

<sup>66</sup> *SpeechNow.org v. Fed. Election Comm’n*, 599 F.3d 686 (D.C. Cir. 2010). *Citizens United* provided the reasoning for the D.C. Circuit to strike down provisions limiting contributions to independent expenditure-only organizations, giving rise to the infamous Super PAC. However, the Fourth Circuit had previously come to the same conclusion in *NC Right to Life, Inc. v. Leake*, 525 F.3d 274, 308 (4th Cir. 2008).

<sup>67</sup> Center for Responsive Politics, *American Crossroads/Crossroads GPS*, OPEN SECRETS, available at <http://www.opensecrets.org/outsidespending/detail.php?cmte=American+Crossroads%2FCrossroads+GPS&cycle=2012> (last visited Mar. 13, 2013).

<sup>68</sup> Center for Responsive Politics, *2010 Outside Spending, by Groups*, OPEN SECRETS, available at <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=D&disp=O&type=A> (last visited Mar. 13, 2013).

whether the group is a political committee, but the FEC created a gaping loophole when it decided by a 3-2 vote that the law should only apply to donors that earmark their donations for a specific electioneering communication or independent expenditure.<sup>69</sup> If the funds are donated generally to the organization, no disclosure is required.<sup>70</sup> In an unsurprising shift, donors to such organizations were less keen on earmarking their contributions after that decision.<sup>71</sup>

Thus, aside from the limited usefulness of disclosure, the current state of the law allows many of the country's biggest spenders to remain out of the public eye. Closing current loopholes would ameliorate the problem to some degree and would be vital to improve the efficacy of a more comprehensive legislator-based disclosure law discussed below.

### C. *Limited Usefulness for Voters*

Another limitation of current disclosure provisions is that, even if they were able to track all of the money spent in support of certain candidates, there are myriad unanswered questions about how effective the information is for voters and how best to present and distribute data.

As mentioned in Part I, information about a candidate's financial backing is often said to serve as a heuristic cue for voters—because they are not perfectly informed, disclosure about campaign financing can help voters come to the same conclusion they would if they knew all there was to know about a candidate. Party affiliation is also a heuristic cue and is clearly much more widely used than campaign finance data. Because of the existence of other cues, it is not clear that cues disclosing a candidate's funding sources are sufficient to make a significant difference for many voters,<sup>72</sup> perhaps principally because of the volume of

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<sup>69</sup> 11 C.F.R. s. 104.20(c)(9) (2010) (requiring disclosure of donations “made for the purpose of furthering electioneering communications”); 11 C.F.R. s. 109.10(e)(1)(vi) (2010) (same for those “made for the purpose of furthering the reported independent expenditure”).

<sup>70</sup> *In the Matter of Freedom's Watch*, Fed. Elec. Comm'n MUR 6002, available at <http://eqs.nictusa.com/eqsdocsMUR/10044274536.pdf>; Briffault, *Two Challenges*, *supra* note 14, at 1008–09.

This rule may change in the near future. In *Van Hollen v. Fed. Election Comm'n*, the District Court for the District of Columbia struck down the FEC's regulation as to electioneering communications under the Administrative Procedure Act, holding that the FEC undertook a policymaking function outside the scope of its authority under the *Chevron* test. 851 F.Supp.2d 69, 89 (D.D.C. 2012). According to the court, the FEC was not allowed to rewrite the disclosure rules in response to new Supreme Court precedent. *Id.* That decision was reversed and remanded by the D.C. Circuit to allow the FEC to determine whether to engage in a rulemaking and, if not, for the District Court to apply the second step of the *Chevron* test. *Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108, 112 (D.C. Cir. 2012).

<sup>71</sup> Nicholas Bamman, *Campaign Finance: Public Funding After Bennett*, 27 J.L. & POL'Y 323, 329 (2012) (noting that as a result of this decision, “statistics reveal a precipitous drop in independent expenditure disclosures over the past several years”).

<sup>72</sup> Mayer, *supra* note 20, at 265 (stating possibility that heuristic cues from disclosure create no new information on top of preexisting cues of party affiliation and endorsement).



data and the lack of clear evidence of corruption or influence between legislators and their funders.<sup>73</sup> It is especially unlikely that voters use data about small donors. As discussed in more detail in Part III.A.1, Michael Kang has argued (in the context of disclosure about financial supporters of ballot measures) that the limited use of this data should lead us to institute a system that focuses on disclosure of larger donors and effective distribution of that information.<sup>74</sup>

Assuming that knowledge concerning campaign spending is meaningful once it reaches voters, it remains unclear how widely the information is spread. It is unlikely that many voters look at lists of campaign contributors or spenders. Thus, it is the responsibility of the press and other independent outlets to report the relevant data in the manner best suited for use at the ballot box. Though the press serves this function to some extent, its role is shaped by other considerations, such as attempting to attract readers and by remaining objective.<sup>75</sup> Even nonprofit organizations dedicated to reporting political data may distort information to serve their own agenda.<sup>76</sup> And removing the concern of bias, it is simply difficult to design a system that will be the most efficacious for end users.<sup>77</sup>

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Negative information about a candidate's financial backers often will not trump other cues such as party affiliation, even if voters are aware of that information. For example, Senator Kirsten Gillibrand was one of the only Democrats to accept donations from tobacco companies in her 2008 congressional election, but won that election and also won her 2010 senate election against a Republican challenger that attacked her based on past legal work for Phillip Morris. Deniz Baykan, *Client List Disclosure: Ethical Dilemma or Politically Motivated Excuse*, 24 GEO. J. LEGAL ETHICS 443, 448 (2011). Of course, it is extremely difficult to discern the cues that would sway voters, given the multitude of factors that go into a voting decision.

<sup>73</sup> Corruption is notoriously difficult to define and prove. See, e.g., Peter J. Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 ARIZ. J. INT'L & COMP. L. 793, 803 (2001) ("Adding to the difficulty in defining corruption is the absence of reliable measures of its pervasiveness beyond general perceptions that a government or ministry is corrupt. Relying solely on conduct that constitutes a criminal violation would not demonstrate whether corruption is rampant because the misconduct is so difficult to detect that conviction rates provide little insight into the scope of the problem.").

<sup>74</sup> Kang, *supra* note 25, at 1179.

<sup>75</sup> Mayer, *supra* note 20, at 267; see also FUNG ET AL., *supra* note 10, at 42, explaining shortcomings of disclosure regimes (such as FECA) that fail to specify intended users of the information, and noting that while this can make policies more flexible to change, it can "keep policymakers from assuring that policies are designed for easy use by diverse audiences." Thus, potential users of the information contained in campaign finance disclosure are often dependent on nonprofit groups or the press to aggregate data. Though coverage of campaign finance is limited, there is evidence that more comprehensive disclosure regimes lead to at least marginally better press reporting and greater access to data. La Raja, *supra* note 20, at 246–47 (reporting results of study that showed newspapers print "relatively few articles about campaign finance").

<sup>76</sup> Mayer, *supra* note 20, at 268–69.

<sup>77</sup> CRAIG HOLMAN & WILLIAM LUNEBERG, *LOBBYING AND TRANSPARENCY: A COMPARATIVE ANALYSIS OF REGULATORY REFORM* 1–30 (2012) (noting, in the lobbying context, the

Other details add to the general problems of voter awareness and reporting of disclosed data. For example, political committees themselves make the choice of how to report expenditures, meaning that similar expenditures may be reported inconsistently from different groups.<sup>78</sup> The timing of mandated disclosures can vary, preventing effective and immediate dissemination of the information.<sup>79</sup> Further, the public is likely generally uninformed about the intricacies of disclosure laws, inhibiting them from appropriately assessing information they are provided. As Bauerly and Hallstrom explain, “voters may not realize that their access to the information the Supreme Court says they are entitled to varies drastically depending on the type of speaker they are hearing.”<sup>80</sup> Similarly, voters may often assume certain advertisements are campaign ads (and thus subject to the legal restrictions of FECA or BCRA) when they are not.<sup>81</sup> This voter confusion prevents current disclosure laws from fully achieving their purpose: Voters that are misinformed cannot accurately assess speech in the manner intended.

#### D. *The Chilling Effect and Privacy Concerns*

For the most part, federal courts have upheld the disclosure laws discussed in this Article in the face of arguments that they chill political speech. As mentioned above, *Citizens United* envisioned a world in which both individuals and corporations could spend as much they pleased, but their spending would be disclosed and easily accessible on the Internet.<sup>82</sup> Only Justice Thomas would have struck down BCRA’s disclosure provisions as facially unconstitutional.<sup>83</sup> Yet *Citizens United*, like cases preceding it, left open the possibility for as-applied challenges to disclosure provisions if donors were likely to be threatened by harass-

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“challenges of arranging the contents of databases and designing search engines in such a way as to maximize the ability to conduct carefully tailored comprehensive, comparative and specially targeted searches”).

<sup>78</sup> Bauerly & Hallstrom, *supra* note 3, at 356.

<sup>79</sup> See, e.g., Dan Glaun, *Stealthy Super PACs Influenced Primaries without Disclosing Donors*, OPEN SECRETS BLOG (July 2, 2012) <http://www.opensecrets.org/news/2012/07/stealthy-super-pacs-influenced-prim.html> (explaining the existence of “a period of 20 days before the primary election, during which [Super PACs] can take in and spend money without disclosing [their] donors until the next quarterly filing”). For example, the group Conservatives Acting Together PAC reported having only \$25 cash on hand but made a nearly \$100,000 expenditure just one day later, still within the window of time in which spending did not need to be immediately disclosed. *Id.*

<sup>80</sup> Bauerly & Hallstrom, *supra* note 3, at 357.

<sup>81</sup> *Id.* at 357-58.

<sup>82</sup> *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 916 (2010) (“With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”).

<sup>83</sup> *Id.* at 980.

ment or retaliation.<sup>84</sup> The Court reaffirmed the same principle later the same term in *Doe v. Reed*, a case challenging a Washington law allowing public access to the names of those signing petitions for a ballot measure.<sup>85</sup>

Increasingly, opponents of broad disclosure requirements have tried to ensure that *Citizens United* and *Doe v. Reed* are not the last word on the constitutionality of disclosure provisions by emphasizing the threat of harassment and intimidation caused by disclosure and arguing that disclosure (especially of the identity of donors of small amounts) has little or no benefit.<sup>86</sup> Perhaps because of reform opponents' recent success, talk has increasingly turned from the inefficacy or unconstitutionality of spending and contribution restrictions to the possible chilling effect that occurs when donors are required to reveal personal information.<sup>87</sup> However, it is not only opponents of reform that have cautioned about potential negative effects of disclosure laws; in the past several years, prominent scholars have increasingly questioned both low-dollar disclosure thresholds and courts' sometimes crabbed view of disclosure laws' potential to chill speech.<sup>88</sup>

The issue was perhaps most prominent in the national news when there were reports of incidents of violence and intimidation against those supporting California's Proposition 8, which banned gay marriage in the

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<sup>84</sup> See *id.* at 916.

<sup>85</sup> The ballot measure in question concerned a law passed by the legislature that granted same-sex couples the same rights as heterosexual couples (without conferring the "marriage" title to their relationships). *Doe v. Reed*, 130 S. Ct. 2811, 2816 (2010). But the court's decision applied to the disclosure law generally, not specifically as applied to this ballot measure. *Id.* at 2820–21. The court emphasized disclosure's ability to "help cure the inadequacies of the verification and canvassing processes" and prevent fraud. *Id.* at 2820. It also once again reaffirmed the availability of narrower challenges. *Id.* at 2821.

<sup>86</sup> See, e.g., Dale E. Ho, *NAACP v. Alabama and False Symmetry in the Disclosure Debate*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 405, 406 (2012) ("In the wake of *Citizens United v. FEC*, the legal fight over campaign finance has largely shifted from direct limits on expenditures to disclosure requirements."); Bopp & Haynie, *supra* note 4, at 21 ("Political Exposure Laws Do Not Prevent Anyone from Speaking in the Same Way that Jewish Armbands Did Not Prevent Anyone from Practicing Their Religion.").

<sup>87</sup> See, e.g., Hiatt, *supra* note 1; Will Evans, *Public Disclosure is Next Frontier in Campaign Finance Reform*, CALIFORNIA WATCH (Apr. 20, 2012) <http://californiawatch.org/dailyreport/public-disclosure-next-frontier-campaign-finance-reform-15848> ("After recent court rulings struck down significant campaign finance limits, the next frontier in the debate over money in politics appears to be public disclosure—whether there should be more or less of it.").

<sup>88</sup> See, e.g., McGeveran, *supra* note 55, at 862–64 (urging courts to reevaluate typical disclosure doctrine due to developments such as ease of access to information online); Briffault, *Disclosure 2.0*, *supra* note 13, at 276 ("In light of the limited benefit of disclosure and the potential burden on political participation that can result from it, disclosure thresholds ought generally to be raised not lowered, so that only major political players are targeted and the political privacy of smaller participants in the campaign finance process is better protected.").

state.<sup>89</sup> In one instance, news broke that the artistic director of the California Musical Theatre had given \$1,000 to support the ban. The story “popped up on web sites following the passage of Proposition 8.”<sup>90</sup> A short time later, the director resigned because of the public outcry surrounding the revelation.<sup>91</sup>

More recently, commentators have become concerned with other incidents that may discourage speech. Some have pointed out the negative effects created by boycotts led by those who disagree with certain political spending. Most notable was a boycott of companies that contributed to the American Legislative Exchange Council (ALEC), which promoted implementation of voter identification laws.<sup>92</sup> Former FEC Chairman Bradley Smith has argued that the threat of secondary boycotts “provides a strong rationale for limiting the scope of compulsory disclosure of political speech, contributions, and activities.”<sup>93</sup>

Perhaps even more fiery was the recent debate concerning the “naming and assailing” of those who have donated heavily to Super PACs. When an Obama campaign website called “Keeping GOP Honest” named and criticized certain donors to Mitt Romney’s Super PAC, Restore Our Future, there was a general uproar accusing the President and his administration of intimidating the opposition.<sup>94</sup> In particular, some complained about the treatment of Frank VanderSloot, a wealthy Idaho businessman and national finance co-chairman for Romney.<sup>95</sup> VanderSloot gave \$1 million to Restore Our Future, and was “smeared particularly as being ‘litigious, combative and a bitter foe of the gay rights movement’” by the Obama campaign.<sup>96</sup> Commentators have complained about this treatment, reporting that VanderSloot’s children were even “harassed.”<sup>97</sup> VanderSloot himself stated that the “public beatings”

<sup>89</sup> See Bopp & Haynie, *supra* note 86, at 22 (calling intimidators of Proposition 8 supporters a “modern-day mob”).

<sup>90</sup> Jesse McKinley, *Theater Director Resigns Amid Gay-Rights Ire*, N.Y. TIMES, Nov. 12, 2008, at C1. See also Shane Goldmacher, *Mormon Church Reveals Deeper Involvement in California’s Proposition 8*, SACRAMENTO BEE, Feb. 1, 2009 at A3 (discussing California Musical Theatre story and noting that “[t]here were similar cases elsewhere in the state”).

<sup>91</sup> McKinley, *supra* note 90.

<sup>92</sup> See Bradley Smith, *The Problematic Nature of Secondary Boycotts on Political Speech*, CENTER FOR COMPETITIVE POLITICS (Apr. 20, 2012), <http://www.campaignfreedom.org/2012/04/20/the-problematic-nature-of-secondary-boycotts-on-political-speech/>.

<sup>93</sup> *Id.*

<sup>94</sup> See, e.g., Kimberly A. Strassel, *Trolling for Dirt on the President’s List*, WALL ST. J. (May 10, 2012), <http://online.wsj.com/article/SB10001424052702304070304577396412560038208.html> (stating that “the president of the United States publicly target[ed] a private citizen for the crime of supporting his opponent”).

<sup>95</sup> Kenneth P. Vogel, *Mega-Donors: Quit Picking on Us*, POLITICO (May 31, 2012), <http://www.politico.com/news/stories/0512/76899.html>.

<sup>96</sup> Strassel, *supra* note 94.

<sup>97</sup> *Id.* See also CEO Frank VanderSloot Fights Back Against Obama Campaign and Defends His Romney Donation By Writing Another Check, FOX NEWS INSIDER (May 14,

would not deter him from making further donations,<sup>98</sup> though it did cause his company, which sells wellness products, to lose business from “a couple hundred customers.”<sup>99</sup>

Though the levels of alarm in reaction to such events differ amongst those in the campaign finance field, even proponents of disclosure have advocated that in response to these occurrences, disclosure thresholds should be high enough so as not to require public disclosure of personal data for relatively low-level donors.<sup>100</sup> As discussed in Part III.A.3 below, simple disclosure of legislators’ time spent fundraising carries no threat of chilling speech or causing privacy concerns for donors.

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Critically, disclosure requirements that are incomplete or avoidable can sometimes be harmful to the political process.<sup>101</sup> While few disclosure proponents would argue that the existing regime is outright harmful, it distorts the proper focus by failing to include all actors within its scope. The public is given incomplete information, affecting voters’ ability to make decisions based on disclosure of fundraising and spending data. Further, it creates a larger burden for those complying with the spirit of the law. And perhaps most importantly, rife with loopholes, it fails to have the desired behavioral consequences for those raising and spending money.

### III. LEGISLATOR DISCLOSURE OF FUNDRAISING TIME

#### A. *Benefits of Legislator Disclosure*

Disclosure regimes are inherently limited in their effectiveness because they do not restrict any action, and problems with current federal law exacerbate the system’s inherent shortcomings. As many have already argued, loopholes should be closed and the current system should be modified in order to ensure our democracy benefits as much as possible from fundraising disclosure.

Yet other steps can be taken to improve disclosure results without violating the Constitution, a problem that burdens many campaign fi-

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2012), <http://foxnewsinsider.com/2012/05/14/ceo-frank-vandersloot-fights-back-against-obama-campaign-and-defends-his-romney-donation-by-writing-another-check/> (reporting that Bill O’Reilly called attacks on VanderSloot “political terrorism”) [hereinafter *Vandersloot Fights Back*].

<sup>98</sup> Strassel, *supra* note 94.

<sup>99</sup> *VanderSloot Fights Back*, *supra* note 95.

<sup>100</sup> See, e.g., McGeveran, *supra* note 55, at 881; Briffault, *Disclosure 2.0*, *supra* note 13, at 300-01 (discussing wisdom of raising disclosure thresholds).

<sup>101</sup> See McGeveran, *supra* note 55, at 864 (arguing that in 2010, disclosure rules “reached their absurd climax, exposing numerous instances of small-scale citizen participation but concealing the giant influence of financially and politically powerful entities”).

nance reform attempts. First and most simply, candidates and incumbents should be required to report the number of hours they spend soliciting money—both contributions and independent expenditures.<sup>102</sup> While anecdotal evidence demonstrates that the time legislators spend fundraising is shocking, there is no indication that the public is aware of the extent of the problem, much less the amount of time their own representatives spend asking for money. The electorate must know how much time its representatives spend raising money in order to most effectively use information about fundraising and influence the behavior of elected officials. Preferably, the law would require disclosure of the fundraising method as well: legislators would have to report the amount of time they spent making telephone calls to potential donors, the time they spent at in-person fundraisers, and so on. The details contained in such reporting would provide constituents with an idea of how their representatives spend a typical day.

While some policies demonstrate recognition of the inherent usefulness of disclosure of time spent by government actors,<sup>103</sup> that recognition has not led to a strong movement for further disclosure of legislator time. For example, Senator Kirsten Gillibrand's website states that she is "proud to lead by example as the first member of Congress ever to post their official daily meetings online every day, so New Yorkers can see who is lobbying their Senator and for what."<sup>104</sup> The calendar of official meetings is commendable, but by only providing general descriptions of "public" meetings, the calendar necessarily fails to capture many of Senator Gillibrand's activities that would provide valuable information to voters.<sup>105</sup> Extending the disclosure requirements would transform the current array of information available, providing voters with more information on which to base their decisions.

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<sup>102</sup> It is most important that the public learn about the time incumbents spend fundraising. Requiring only incumbents to divulge the information, however, creates unfairness that can be avoided by making the rule also apply to challengers. Further, the public may well benefit from learning the amount of time a challenger is spending fundraising versus performing other campaign functions, such as meeting with and speaking to the electorate.

<sup>103</sup> See Parts III.A.1–3, *infra*.

<sup>104</sup> See Kirsten Gillibrand, *Schedule of Official Meetings*, UNITED STATES SENATE, <http://www.gillibrand.senate.gov/newsroom/schedule/> (last visited Oct. 3, 2013) (listing her schedule for all website visitors). Senator Gillibrand also posts her financial disclosure report on her website. The Sunlight Foundation reports that four other senators and three representatives post their daily schedules online. *Members of Congress Posting Schedules Online*, OPEN CONGRESS, [http://www.opencongress.org/wiki/Members\\_of\\_Congress\\_posting\\_schedules\\_online](http://www.opencongress.org/wiki/Members_of_Congress_posting_schedules_online) (last modified Aug. 1, 2013 15:04).

<sup>105</sup> See Marc Heller, *Sen. Gillibrand Praised for Online Posting of Daily Schedule*, WATERTOWN DAILY TIMES (Apr. 13, 2009) <http://www.watertowndailytimes.com/article/20090413/NEWS02/304139973/-1/NEWS> (noting that duration of meetings is not revealed and that information is not archived, so is unavailable one day after meetings occur).

## 1. Public Information Benefit

One principal benefit of disclosure laws is the information the laws provide to the public. While this benefit has been challenged as overly simplistic, the public has an undeniable interest in knowing the source of political speech and the identities behind those contributing to the election of a candidate. Any disclosure scheme that seeks to benefit the public in this manner, however, should be designed to provide the most useful information to the voter. Despite their value, current disclosure provisions (even if the loopholes were closed) are insufficient for reasons outlined above in Part II.C. Adding legislator time reporting would be a step toward providing more complete, valuable information to the voter.

There is a strong public interest in making legislators' fundraising activities more transparent. First, it provides a way for voters to determine how a legislator is carrying out the mandate she has received by being voted into office. If a congresswoman spends a large amount of her time making fundraising calls or hosting fundraising events, voters should have the opportunity to assess her effectiveness with that knowledge in mind. Often, information concerning time spent fundraising would be more valuable to voters than the identity of a legislator's donors. For a simple legislative race, the identity of small dollar donors is often meaningless, and the identity of larger donors may simply confirm what voters already know about a candidate. However, a news report revealing that a voter's representative spent an outrageous amount of time fundraising could lead undecided voters to vote against the incumbent because they disapprove of her use of time.<sup>106</sup> Conversely, a voter may hear that his representative spends comparatively less time raising money, and may decide to vote for her based on that knowledge.

Additionally, the information would provide benefits outside individual elections. If the public became more cognizant of the way in which their representatives were spending time, it is likely that media and the public would increase pressure on Congress to implement policies allowing leaders to focus on running the country rather than fundraising.

Though implementing these disclosure requirements may seem to provide an unprecedented level of transparency, it can also be viewed as an attempt to provide voters with a tool to assess their representatives that has long been missing. Clearly, voters already can find out how their representatives vote on any issue before the House or Senate. They can also discover more information about representatives' legislative ac-

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<sup>106</sup> If the disclosure requirements were more stringent, for example by requiring information about the identity of the person with whom a legislator spends time, voters would garner unprecedented information concerning the amount of access money can buy; journalists would gain greater power to connect legislative action with access. See *infra* Part III.C.1–3.

tivities,<sup>107</sup> personal finances,<sup>108</sup> and, of course, campaign finances. Given the broad recognition of the value of these disclosures, there is little justification for keeping legislators' main activity secret from voters.

The current transparency requirements demonstrate the importance of allowing the public to learn as much as possible about candidates. Other incidents demonstrate this importance. For example, most candidates for president disclose several years of their tax returns in an effort to provide voters with information about their personal lives. In the summer of 2012, the national news was littered with stories examining Mitt Romney's refusal to release tax returns for any years prior to 2010. As Romney continued to refuse to release the returns despite attack ads by the Obama campaign, fellow Republicans began to encourage him to adhere to typical practices.<sup>109</sup>

If personal financial information raises such fervor, information about candidates' fundraising practices should create even greater interest for voters—data concerning legislators' fundraising informs the electorate about their personal choices as they relate to their public responsibility, while tax returns address only personal choices in the private sphere. Research has shown that fundraising activities often occupy more of a legislator's time than any other function, clearly affecting indi-

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<sup>107</sup> Federal government proceedings can be seen on C-SPAN and on live streams via the Internet. See, e.g., *House Committee Live Streams*, THE LIBRARY OF CONGRESS THOMAS, <http://thomas.loc.gov/video/house-committee> (last visited Oct. 3, 2013). Other websites track members' votes and package information in easily-digestible formats, such as graphs that provide information concerning legislators' missed floor votes. *John Sullivan*, GOVTRACK.US, [http://www.govtrack.us/congress/members/john\\_sullivan/400392](http://www.govtrack.us/congress/members/john_sullivan/400392) (last visited Oct. 3, 2013).

<sup>108</sup> The Ethics in Government Act of 1978 requires government officials to file annual reports concerning their personal finances. See Center for Responsive Politics, *About the Reporting Requirements*, OPEN SECRETS, <http://www.opensecrets.org/pfds/disclosure.php> (last visited Oct. 3, 2013). Among required disclosures are

earned and unearned income, assets and related transactions, liabilities, contributions made in lieu of honoraria, gifts received, non-governmental positions held, travel that was paid for or for which the filer was reimbursed, and various agreements into which the filer has entered. Information relating to the spouse and dependent children of the filer is also reported in many cases.

*Id.* In 2012, the STOCK Act was signed into law, explicitly prohibiting members of Congress from trading on non-public information. Stop Trading on Congressional Knowledge Act of 2012 (STOCK Act), Pub. L. no. 112–105, 126 Stat. 291 (2012). As a part of the law, legislators and some executive employees must report securities transactions more frequently and disclose mortgages on personal residences. See Center for Responsive Politics, *About the Reporting Requirements*, OPEN SECRETS, <http://www.opensecrets.org/pfds/disclosure.php> (last visited Oct. 3, 2013). Soon the information will be available in an online database. Center for Responsive Politics, *A Primer on the STOCK Act*, OPEN SECRETS, <http://www.opensecrets.org/pfds/stockactprimer.php> (last visited Oct. 3, 2013).

<sup>109</sup> See Michael D. Shear & Trip Gabriel, *Romney Steadfast in the Face of Growing Calls to Release More Tax Returns*, N.Y. TIMES (July 18, 2012), <http://www.nytimes.com/2012/07/19/us/politics/romney-steadfast-against-release-of-more-tax-returns.html>.



vidual pieces of legislation (that do not receive the attention of a legislator because of time constraints) and the overall workings of our democracy.<sup>110</sup> Given the enormous, well-documented effects of the time legislators spend fundraising, voters should expect to have, at the very least, basic information concerning the amount of time their representative has devoted to securing reelection.

Moreover, the information that would be produced by disclosure of fundraising time provides the best type of cue to voters because it focuses on one salient piece of information about each candidate.<sup>111</sup> By focusing on a smaller number of disclosures that have greater meaning, voters are more likely to be able to use the information provided. Smaller amounts of information are also widely publicized more easily. As Michael Kang has argued in advocating an idea he calls “disclosure plus,” “effective disclosure measures would publicize the most useful information about the most interested parties, without adding to voter confusion by publicizing distracting information about others.”<sup>112</sup> Though Professor Kang’s argument concerned disclosure of ballot measure supporters, the same assessment of usefulness applies to the law proposed here. Many voters lack the time or ability to properly perform a full assessment of their representatives’ performance. Though they can look at voting records and perhaps their representatives’ campaign ads or speeches in Congress, this provides a limited picture of members’ activities. It is impossible to expose all the activity the public would like to see, but disclosing time spent fundraising is a step in the right direction.<sup>113</sup> Importantly, dissemination of that information could meet the criteria discussed by Professor Kang: A small amount of significant information could be widely disseminated, leading to the most widespread and efficient use of the data.

Aside from assisting voters, comprehensive information concerning fundraising time would provide valuable information to scholars and policymakers studying the way our government functions.<sup>114</sup> Most obvi-

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<sup>110</sup> LESSIG, *supra* note 50, at 121–24.

<sup>111</sup> Though requiring legislators to report time spent engaging in specific methods of fundraising would complicate the information presented slightly, the overall number of hours spent fundraising would obviously still be provided, and would be easily reported and digested.

<sup>112</sup> Kang, *supra* note 25, at 1179.

<sup>113</sup> Fundraising time should probably not be seen as strictly a heuristic cue because it provides more than a simple shortcut to voters—like a list of a legislator’s floor votes, it provides direct information (rather than a proxy) about legislators’ actions upon which they can be judged. It could also serve, however, as a shortcut for voters to assess a legislator’s dedication to his district and the nation versus his dedication to securing reelection.

<sup>114</sup> See, e.g., Mayer, *supra* note 20, at 258 (listing “facilitating the study and knowledge of political behavior” as additional reason for campaign finance disclosure); see also Ellen L. Weintraub & Samuel C. Brown, *Following the Money: Campaign Finance Disclosure in India and the United States*, 11 ELECTION L.J. 241, 253 (2012) (“Academics and civil society groups

ously, disclosure of fundraising time would make it easier to determine the amount of time legislators spend fundraising rather than performing other functions.<sup>115</sup> Knowledge about that time ratio could assist those who study the issue in assessing ways to prevent fundraising from negatively impacting our democracy. For example, Rick Hasen argues that courts should allow restrictions on lobbying and corporate spending in elections to protect the national economic welfare.<sup>116</sup> A similar argument could be made based on the overwhelming amount of time our Congress dedicates to fundraising; however, it is impossible to properly analyze the issue when comprehensive data do not exist. Legislator disclosure of fundraising time would provide the raw material that scholars need to fully examine such issues.

## 2. Changing Legislators' Behavior

Perhaps more importantly, requiring disclosure of legislators' fundraising time would discourage representatives from spending an excessive portion of their time fundraising. Successful disclosure or transparency policies in all fields not only inform voters or consumers, but the disclosers "perceive and understand users' changed choices" and "improve practices or products."<sup>117</sup> As one scholar has explained in an article concerning the costs and benefits of corporate disclosure, regulators considering a certain disclosure provision will ask the question: "Will the forced disclosure of information deter undesirable forms of behavior about which information must now be disclosed?"<sup>118</sup>

Current disclosure laws seek to alter legislators' behavior in certain ways—aside from trying to prevent corruption that might otherwise occur, they sometimes shame politicians into returning donations from

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such as the Campaign Finance Institute and the Center for Responsive Politics further enhance the public's understanding of campaign finance issues with their sophisticated analyses of the data made available by the FEC.").

<sup>115</sup> Vermont sought to ameliorate the effects of the fundraising time issue in passing expenditure limits, but the Supreme Court dismissed the argument with little consideration. *Randall v. Sorrell*, 548 U.S. 230, 245 (2006). See also *infra* note 133.

<sup>116</sup> Richard L. Hasen, *Lobbying, Rent Seeking, and the Constitution*, 64 STAN. L. REV. 191, 198 (2012) ("If courts accept the national economic welfare rationale as a sufficiently important interest to justify some lobbying laws, the rationale could have much broader implications. Most importantly, following the *Citizens United* case, the rationale could justify reestablishing limits on corporate spending in candidate elections, or at least reestablishing such limits as to government contractors.").

<sup>117</sup> FUNG ET AL., *supra* note 10, at 6 (summarizing positive benefits of disclosure regimes in general); see also La Raja, *supra* note 20, at 239–40 (explaining that "politicians might alter their behavior when they know it is easier for others to keep track of their campaign finances" and "such adaptive behavior by politicians is precisely what many political reformers sought by improving disclosure").

<sup>118</sup> Geoffrey A. Manne, 58 ALA. L. REV. 473, 476 (2007) (arguing that in asking this question, regulators sometimes fail to "consider that more nuanced behavioral responses may accompany this reduction").

questionable figures.<sup>119</sup> However, the law proposed in this Article would change legislators' behavior in a different way: legislators forced to disclose the amount of time fundraising could be expected, in some circumstances, to pare down the time they spend fundraising in order to avoid garnering negative reactions from the public and the press. If such information were available to the public, it would undoubtedly appear in newspapers and television attack ads. While disclosure would not prevent members of Congress from spending significant time fundraising, members of Congress might try to avoid spending amounts of time that would shock voters or significantly exceed their rivals.<sup>120</sup>

Many have argued, and common sense dictates, that legislators who spend less time fundraising have more time to devote to quality governance. Estimates vary, but most agree that members of Congress spend between thirty and seventy percent of their time raising money,<sup>121</sup> most notably on the banal task of "dialing for dollars," or making telephone solicitations to potential contributors. This is understandable, since in the 2010 midterm elections, the average winning candidate for the House of Representatives spent over \$1.4 million on his campaign, and the average winning Senate candidate spent about \$9.8 million.<sup>122</sup> If a representative needs to raise \$1.4 million in two years, that amounts to almost \$14,000 per week. For a senator to raise \$9.8 million in six years would require raising over \$31,000 per week. Members of Congress explain with frustration that fundraising for an election can begin before being sworn in from the previous election.<sup>123</sup>

Countless legislators lament the current situation, saying that members of Congress "spend too much of their time dialing for dollars rather than sitting in their committee room and protecting the dollars of their

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<sup>119</sup> See *Obama Campaign Returns \$200,000 Donation from Fugitive's Family*, *supra* note 30 (discussing Obama's return of \$200,000 bundled by family members of fugitive).

<sup>120</sup> More comprehensive disclosure laws, such as those requiring legislators to identify their contacts with donors, would of course provoke more extensive changes in behavior. In her article advocating for disclosure of legislator-lobbyist contacts, Anita Krishnakumar has made a similar point about disclosure laws encouraging behavior that will meet voter approval: "The threat of [exposure of a legislator's meetings with lobbyists], could encourage (or force) elected officials, or at least their staffs, to split their dance cards more evenly between opposing interests for fear of how it will look to the electorate, and other interest groups, if lobbying disclosures reveal them to be unduly partial to one set of interests." Krishnakumar, *supra* note 6, at 541.

<sup>121</sup> LESSIG, *supra* note 50, at 121. According to The California Group, a firm "helping political . . . clients craft and execute their fundraising/public affairs strategy," "[d]epending on the stage of the campaign, a candidate should devote 40 to 60 percent of their day making fundraising calls." The California Group, *The Importance and Value of Call Time* (July 20, 2011), <http://www.calgroupinc.com/2011/07/the-importance-and-value-of-call-time/>.

<sup>122</sup> Center for Responsive Politics, *Election Stats: 2010*, OPEN SECRETS, [http://www.opensecrets.org/bigpicture/elec\\_stats.php?cycle=2010](http://www.opensecrets.org/bigpicture/elec_stats.php?cycle=2010) (last visited Oct. 3, 2013).

<sup>123</sup> See Leahy, *supra* note 53 (lamenting that "in modern American politics, some campaigns never end, and many politicians never get off the fundraising treadmill").

constituents.”<sup>124</sup> Anecdotal descriptions of the congressperson’s fundraising life in Washington paint a bleak picture of government. Representatives describe rushing off the Hill to the phone bank in their party’s congressional campaign office in spare moments, as well as squeezing in as many evening fundraisers as possible after floor votes finish.<sup>125</sup> Representative Chris Murphy explained that “[o]n any given day, the foot traffic to and from the national Republican and Democratic campaign offices is constant, and the conditions under which we labor are pretty depressing.”<sup>126</sup> He added that “with several hours of every day dedicated to raising the millions of dollars necessary for reelection, I simply cannot devote all of my energy to solving problems.”<sup>127</sup> Former representative Eric Massa explained that “Congressmen spend between five and seven hours a day on the phone, begging for money.”<sup>128</sup> The days in which members of Congress deliberated with one another are over, due in part to the fact that members are constantly fundraising: “bells . . . ring; members race from wherever they are (which is most likely just off the Hill, making fund-raising telephone calls) to the floor; they are instructed by their staff as they enter the Chamber what the vote is and how they are to vote.”<sup>129</sup>

The effects of turning our representatives into fundraisers rather than deliberators are apparent. Studies show that as fundraising demands have risen, congressional committee meetings have gone down.<sup>130</sup> Further, members note the lack of collegiality (and bipartisanship) engendered by rushing to fundraisers rather than dining or drinking with congressional colleagues.<sup>131</sup> Based on these concerns, some have even pushed for the Supreme Court to consider the interest in protecting legislators’ time as a compelling interest justifying spending limits,<sup>132</sup> but

<sup>124</sup> LESSIG, *supra* note 50 at 123.

<sup>125</sup> Chris Murphy, *Dialing for Dollars in Congress*, THE PRESS DEMOCRAT (Feb. 6, 2008), available at [news.google.com/newspapers?nid=1673&dat=20080206&id=jLIjAAAAIBAJ&sjid=WSQEAAAIAIAJ&pg=6771,1234926](http://news.google.com/newspapers?nid=1673&dat=20080206&id=jLIjAAAAIBAJ&sjid=WSQEAAAIAIAJ&pg=6771,1234926).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Ben Smith, *Hating Call Time*, POLITICO, March 11, 2010 (internal quotation marks omitted), [http://www.politico.com/blogs/bensmith/0310/Hating\\_call\\_time.html](http://www.politico.com/blogs/bensmith/0310/Hating_call_time.html). The article notes that other freshman members called this number “something of a stretch,” but said it was not far from accurate.

<sup>129</sup> LESSIG, *supra* note 50, at 144.

<sup>130</sup> *Id.*

<sup>131</sup> See Murphy, *supra* note 125.

<sup>132</sup> Vincent Blasi, *Free Speech and the Widening Gyre of Fundraising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1283-84 (1994) (arguing that “candidate time protection” is the rationale that “holds the most promise of answering First Amendment concerns” regarding spending limits).

several years ago the Supreme Court brushed the idea aside with little serious consideration.<sup>133</sup>

There are numerous benefits to be derived from removing legislators from the hamster wheel of the money race. For example, if legislators are dissuaded from spending inordinate amounts of time with a certain number of large donors, they might also find reason to spend time with other people or interest groups that they might not otherwise meet, both during campaigns and their time in office.<sup>134</sup> There is good reason to believe that politicians who spend time with more diverse groups of people are more educated and understanding about a wider variety of concerns held by their constituents.<sup>135</sup> Discouraging legislators from spending time fundraising might encourage them to seek money from sources that require less of a time burden, such as small Internet donations or low-cost fundraising events.<sup>136</sup>

In addition to impairing government after elections are decided, the current fundraising demands discourage high quality potential candidates from running. In the Federalist Papers, James Madison opined that a large republic would be advantageous because of its ability to attract the very best representatives.<sup>137</sup> Though that may have held true for some period of time after the founding, today it likely does not, due to legislators' severely altered job description. Aware that a job in Congress

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<sup>133</sup> *Randall v. Sorrell*, 548 U.S. 230, 245 (2006). The *Randall* Court engaged in essentially no analysis in rejecting the time protection rationale, relying instead on *Buckley v. Valeo* and stating that it was “highly unlikely that fuller consideration of this time protection rationale would have changed *Buckley*’s result.” It then cited to a portion of *Buckley v. Valeo* that dealt with FECA’s public financing law as evidence that the *Buckley* Court was aware of the time protection rationale, and also noted that “in any event, the connection between high campaign expenditures and increased fundraising demands seems perfectly obvious.” *Id.* at 245–46.

<sup>134</sup> See Blasi, *supra* note 132, at 1283–84 (arguing that “[a] major goal of campaign finance reform . . . ought to be” protecting time, so that legislators can spend more time on constituent service, and that when a legislator cannot “spend her time considering . . . the grievances, information, and ideas of non-donors . . . the process falls short”).

<sup>135</sup> For example, in writing about the Voting Rights Act, one commentator has argued that crossover districts are superior to majority-minority districts because they reward candidates who appeal across diverse racial groups. Jason Rathod, *A Post-Racial Voting Rights Act*, 13 BERKELEY J. AFR.-AM. L. & POL’Y 139, 196 (2011). Similarly, candidates with less incentive to raise money and time to meet with more diverse portions of the electorate may gain broader appeal.

<sup>136</sup> Recent research has shown that legislators who seek donations from a wider swath of the electorate more deeply understand a broader set of concerns. As explained below, based on this research, it may be best to include an exception from the time reporting requirements for low-dollar fundraising events. See *infra* Part III.C.3 and n. 169.

<sup>137</sup> THE FEDERALIST NO. 10, at 82–83 (James Madison) (Clinton Rossiter ed., 1961) (arguing that “as each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to center on men who possess the most attractive merit and the most diffusive and established characters.”).

would require constant fundraising and comparatively little attention to legislative tasks, those who have a high level of expertise or intelligence may opt to remain in the private sector or serve in alternative government roles.<sup>138</sup> Not only does the de facto telemarketing requirement prevent the public from benefiting from such legislators, it also means that the people who do seek Congressional positions are those most likely to succeed at raising money and tolerate the burden.<sup>139</sup>

Multiple factors have created the current campaign finance picture as it exists today, principally the contribution-expenditure dichotomy born in *Buckley v. Valeo* almost forty years ago. Forcing legislators to disclose the time they spend fundraising will not erase this problem or other major campaign finance conundrums. However, as with disclosure generally, if implemented effectively, the proposed law could provide voters with valuable information and have a significant effect on legislators' decisions about how and when to raise money. With a disincentive to spend time raising money, legislators will be encouraged to spend more time focusing on the jobs they were elected to do.

### 3. Disclosure of Fundraising Time Faces Fewer Obstacles than Current Disclosure Requirements

Adding to the attractiveness of a legislator-focused regime, a disclosure law requiring reporting of time spent fundraising avoids most of the major problems discussed in Part II that undermine the effectiveness of today's disclosure laws. None of the arguments made below are an attempt to assert that current disclosure law should be replaced; rather, they demonstrate that the additions proposed would run into fewer roadblocks than those that currently predominate.<sup>140</sup>

#### a. Fewer Loopholes

First, a simple requirement of time reporting would not face the severe coverage problems that currently plague federal disclosure laws, discussed in Part II.B. As with current laws requiring reporting of personal financial data, there is no obvious means by which to avoid making the required disclosures. A uniform requirement for members of Congress does not allow for creative methods of avoidance, at least in the

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<sup>138</sup> As one freshman representative explained in 2007, "you could be Abraham Lincoln, but if you don't have the heart of a telemarketer, you're not going to make it to Congress." See Leahy, *supra* note 53 (quoting Democratic representative Joe Courtney) (internal quotation marks omitted). See also Murphy, *supra* note 125.

<sup>139</sup> Blasi, *supra* note 132, at 1302.

<sup>140</sup> Admittedly, the advantages discussed in this section derive partially from simplicity. With simplicity comes a lower ceiling on potential effects. For example, disclosure of time spent fundraising likely could not hope to uncover evidence of quid pro quo corruption as is possible with current law.

same manner that is currently practiced by donors. Legislators would clearly be required to record and report time they spend at their party committee phone banks, at fundraisers, and soliciting money from donors in person. While it remains a possibility that certain meetings and phone calls could walk the line between fundraising and other topics, any resulting underreporting would be minor, especially compared to the percentage of undisclosed money in the current system.<sup>141</sup> Moreover, because the disclosers are legislators themselves, there will be a greater spotlight on them and less incentive to walk the blurry line of legality as certain political spenders are willing to do through use of 501(c)(4) organizations and other similar tools.<sup>142</sup>

b. More Useful Data That is Easier to Distribute

There are serious questions concerning whether voters can and do effectively use donor disclosure as a means of making voting decisions—those reporting the data may be biased, and information about a candidate’s donors often will not provide much new information to a well-educated voter.<sup>143</sup> Timing issues and lack of voter knowledge about campaign finance law can also prevent voters from turning campaign finance data into useful, accurate information.<sup>144</sup>

Information about a candidate’s campaign finances is generally not the top issue on voters’ minds,<sup>145</sup> and for understandable reasons: a legislator’s constituents are more concerned about issues that affect them directly, such as the economy.<sup>146</sup> However, some data show that a significant portion of Americans, especially independents, care about campaign finance issues when they vote—one poll reported that two-thirds of independents stated that reducing the influence of money in

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<sup>141</sup> See *infra* Part III.B.

<sup>142</sup> Such organizations can spend money on elections and risk punishment after an election—surely a deterrent, but not nearly the deterrent a candidate would face from skirting disclosure requirements. See generally Ryan, *supra* note 61 (describing fines levied against 527 organizations after 2004 election).

<sup>143</sup> See *supra* Part II.C.

<sup>144</sup> *Id.*

<sup>145</sup> Polls are mixed to some degree, and generally pollsters group campaign finance issues into one category, so it is difficult to tell how important voters find disclosure of campaign spending. In a January, 2012 poll, the Pew Research Center released a report showing that only 28% of Americans considered “reforming campaign finance” as a “top priority” for the President and Congress, the second-lowest ranked issue on a list of 22. Pew Research Center, *Public’s Agenda for President and Congress 2001–2012* (Jan. 23, 2012), available at <http://www.people-press.org/2012/01/23/public-priorities-deficit-rising-terrorism-slipping/1-23-12-9/>. One Gallup poll in 2008 found that “Corruption in Government” was found to be an “extremely” or “very” important issue to 79% of voters, ranking fourth on a list of fourteen issues. Gallup Politics, *Iraq and the Economy are Top Issues to Voters* (February 13, 2008), available at <http://www.gallup.com/poll/104320/iraq-economy-top-issues-voters.aspx>.

<sup>146</sup> Gallup Politics, *supra* note 145.

politics is one of the most important issues to them.<sup>147</sup> This means that disclosure law should be formatted in a manner that will best overcome the problems mentioned above so that voters who care about their representatives' fundraising—especially otherwise undecided voters—can best use the information available.

Requiring legislators to report time spent fundraising would provide voters with information that they clearly desire without facing obstacles to usefulness that are to some degree inevitable with existing disclosure laws. In its most basic form, the proposed requirement would consist of a simple number (of hours) that could easily be reported objectively by the media and digested by the public; naturally, the information would “readily translate[ ] into a voting cue.”<sup>148</sup> Instead of sifting through much meaningless data in order to find something of interest, reporters and interested organizations would have straightforward numeric data that could easily be communicated to the public. Further, there would be few or no timing issues or complex legal distinctions that would have an appreciable effect on voters' understanding of the information disclosed—all candidates would have to provide reports containing the same type of information by a certain deadline.

On a similar note, the information would provide more than hints. Disclosure of donations and spending serves to provide heuristic cues for voters, but those cues are not necessarily straightforward because reasons for donations are often murky, and the reasons for a legislator's actions can almost never be conclusively linked to previous contributions. In-depth research is necessary to link a legislator's actions to a donor's money; any corruption that exists almost certainly cannot be proven. Disclosure of time spent fundraising creates a more concrete yardstick by which to make an assessment of a legislator's time.

### c. Less Chilling Effect

Finally, disclosure of time spent fundraising could not be attacked on grounds that it chills private citizen speech or subjects donors to harassment. As noted in Part II.D, *supra*, opponents of reform have recently set their sights on existing disclosure laws, complaining that speakers have faced boycotts and intimidation as a result of their constitutionally-protected speech. Even if a speaker does not fear harassment or boycotts, current federal disclosure provisions can prevent some people from speaking simply because they do not wish to have a light shined on their

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<sup>147</sup> Stan Greenberg et al., *Money in Politics is a Ballot Box Issue*, DEMOCRACY CORPS (May 7, 2012), available at <http://campaignmoney.org/files/may2012-pcaf-dcorps-memo.pdf>.

<sup>148</sup> Krishnakumar, *supra* note 6, at 539, 544 (noting that voters are typically disengaged and require “information entrepreneurs” to provide useful, accessible information).



political views.<sup>149</sup> In their article criticizing compelled disclosure by donors, Jim Bopp and Jared Haynie railed against requiring citizens to disclose their spending, arguing that the terms “disclosure” and “transparency” should not be used to describe laws forcing private citizens to disclose information; rather, the terms should apply when citizens require information from the government.<sup>150</sup>

The law proposed here seeks only information concerning activities of a legislator, and would not threaten to chill speech of private citizens or subject them to threats or harassment. Such a provision would meet the true definition of a disclosure law as laid out by Bopp and Haynie, simply trying to provide citizens with another barometer by which to measure their elected officials.

A more robust version of such a law may not be quite as innocuous, but still would present much less of a problem than exists with current laws. For example, if members of Congress were required to disclose both the time spent fundraising and the identity of the donor with whom the legislator spent that time, individual citizens would be identified. However, revealing this simple information would almost certainly not create the same risks that are felt by those who sign a petition supporting a ballot issue or take a similar stance on a specific issue. The principal examples of retaliation or economic boycotts mostly relate to stances people have taken on specific issues. Proposition 8 supporters, for example, were met with alleged threats and harassment because of their views about gay marriage. It is unlikely that individuals, or even companies, would face similar threats if it was simply reported that a legislator had contacted them to ask for a donation. After all, contributions, and many expenditures, are already reported.<sup>151</sup>

### *B. Practical Concerns*

Some may object that requiring disclosure of time spent fundraising would present practical difficulties and increase the burden on legisla-

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<sup>149</sup> Ho, *supra* note 86, at 437 (noting that some supporters of DISCLOSE Act hoped to “cause the supporters of one candidate, or one side of an issue, to refrain from saturating the airwaves”).

<sup>150</sup> See Bopp & Haynie, *supra* note 4, at 19 (arguing that “when the government demands transparency (or ‘disclosure’) from its citizens, it can only be called political exposure, and it is on that footing that the foundation of tyranny is laid”).

<sup>151</sup> It could be argued that individuals should not be subjected to disclosure if they are simply contacted by a government official and refuse to make a contribution or expenditure. This concern could easily be allayed by a provision that does not require disclosure when individuals refuse to donate or spend less than a threshold amount of time speaking with a representative.

tors' offices. Of course, some burden would be created,<sup>152</sup> and its weight would be determined by the level of disclosure required. However, members of Congress already keep internal calendars and track their fundraising activities—simply aggregating the number of hours spent fundraising would not likely create an excessive amount of work for legislators or their staffs.<sup>153</sup> The accounting required for such reporting would not outstrip the work that must be performed to track and report contributions.<sup>154</sup>

At the margins, it may also be somewhat difficult for a legislator to determine whether a certain activity should qualify as “fundraising.” While there might be some uncertainty in close cases, the bulk of fundraising activity consists of phone calls asking for money and fundraising events. Members of Congress could easily record the time they spend at their parties' phone banks and at events specifically designed for fundraising. Any uncertainty that exists on additional fundraising activities would not rival that of other campaign finance laws, such as the issue of whether independent spenders such as Super PACs have illegally coordinated their activities with a candidate.<sup>155</sup>

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<sup>152</sup> Other countries have recently passed laws requiring government officials to report lobbying contacts. Their experiences will likely be valuable in assessing practical problems with such laws. See HOLMAN & LUNEBERG, *supra* note 77, at 20.

<sup>153</sup> See, e.g., Ben Smith, *supra* note 128, (quoting Representative Eric Massa, who explained that making fundraising calls “includes filling out call sheets [and] detailing the amount of money raised per hour”); Anita Krishnakumar addressed a similar concern when writing in support of requiring disclosure of contacts between lobbyists and elected officials. See Krishnakumar, *supra* note 6, at 558 (explaining that “elected officials and their staffs already keep calendars listing their appointments, lunches, speaking engagements, and the like with particular lobbyists and interest groups” and that such records could be used as a starting point).

<sup>154</sup> See, e.g., Ellen L. Weintraub & Samuel C. Brown, *Following the Money: Campaign Finance Disclosure in India and the United States*, 11 ELEC. L.J. 241, 251 (noting that candidates must “report essentially all of their financial activity, itemizing each contribution and expenditure exceeding \$200” and that the candidates must file quarterly and other reports).

<sup>155</sup> Because campaign finance law treats contributions and expenditures differently, Super PACs (which by definition make only expenditures) may not coordinate their spending with candidates. If there is coordination, spending is treated as a contribution under federal law. 2 U.S.C. § 441a(a)(7)(B)(i) (2011) (“expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate”). However, there has been much controversy surrounding supposed skirting of the noncoordination rule—it is obviously difficult to enforce, and few seem to believe that Super PACs and campaigns are truly separate, especially since candidates' former aides often found and direct Super PACs. See, e.g., Kyle Langvardt, *The Sorry Case for Citizens United: Remarks at the 2012 Charleston Law Review and Riley Institute of Law and Society Symposium*, 6 CHARLESTON L. REV. 569, 574 (2012) (“In practice, noncoordination is a joke. Everybody knows the big super PACs coordinate with candidates.”); see also James A. Kahl, *Citizens United, Super PACs, and Corporate Spending on Political Campaigns: How Did We Get Here and Where Are We Going?*, 59–JUN FED. LAW. 40, 42 (2012) (explaining that “candidates and their surrogates actively raise funds for Super PACs that support them,” and pointing out that Mitt Romney's Super PAC re-aired a 2008 Romney campaign ad).

For those contacts that are more ambiguous, the law's details could provide some assurances that the disclosure is for the most part accurate. As a baseline, any meetings, telephone calls, or events that are specifically made in order to solicit contributions should be included. To ensure that the law is not circumvented, an additional provision could provide that all time must be reported when spent with those who spend money on the candidate's behalf within a certain time frame before or after a meeting.<sup>156</sup> These meetings would be presumed to qualify as fundraising, but a legislator could overcome the presumption with a report about the meeting's purpose. This would of course be subject to certain limitations, including an exception for legislator's family or staff, and perhaps other designated actors.

As with other disclosure regimes, a law requiring disclosure of fundraising time will inevitably face concerns over dishonesty and intentional avoidance<sup>157</sup>—there will likely never be a way to be completely certain that all of a candidate's fundraising time is being reported. The important question is to what extent auditing (that does not unacceptably invade a candidate's personal privacy) can deter underreporting.

Perhaps the greatest concern is that candidates would use personal phones and other devices to solicit money and fail to report it. If candidates are required to reveal the identity of those who they solicit, an auditing system would be able to discourage underreporting by comparing a candidate's reports to the contributions received and expenditures made—if a candidate received many contributions (or money was spent on her behalf) without reporting time spent contacting the donors in question, an enforcement agency would look more closely at the candidate's reports.<sup>158</sup> Inconsistencies might spur investigators to question donors about communications received from candidates.

Candidates may be discouraged from underreporting due to the likelihood that they would have to involve their staffs—while it would certainly be possible for a candidate to perform fundraising without the knowledge of their aides, doing so on a large scale would not be feasible. If aides keep lists of contacts with potential donors, a candidate reporting to his staff on the results of his fundraising efforts could easily at the

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<sup>156</sup> If the time window included spending that occurred before the meeting, it would likely help measure a donor's access, which should perhaps be addressed separately. Such a provision would not encompass unsuccessful fundraising that is not explicit. However, it is doubtful that this situation is common enough to lead to significant errors in reporting.

<sup>157</sup> See, e.g., Elisabeth Bassett, *Reform Through Exposure*, 57 EMORY L.J. 1049, 1070 (2008) (noting delay and avoidance efforts that thwarted effectiveness of federal lobbying law).

<sup>158</sup> This information could be publicized in order to achieve the greatest amount of transparency. To achieve the enforcement goals without publishing the names of those contacted, the law could simply require reporting to the FEC without allowing for publication.

same time also report the amount of time he spent fundraising. Though staff members might certainly collude with candidates to hide communications, the risk and burden of doing so would provide a significant disincentive. Further, aside from concerns about penalties, candidates would be subject to criticism from the press and their opponents if their reporting was suspicious: a candidate who reported a large contribution without reporting any contact with the donor would risk creating negative publicity.

### C. *Counterarguments and Extension*

The following subsections address some concerns that may be raised about the proposed requirements. While several of the concerns are valid, the discussion below demonstrates that they should not prevent implementation of the law. The drawbacks that do exist are minor, both in comparison to the benefits that the law would provide and in comparison to the drawbacks of existing disclosure laws.

#### 1. Effect on Incumbents and Self-Funded Candidates

One argument that can be made against the proposed law is that it would create a disadvantage for incumbents because voters would blame them for time spent raising money while in office, while challengers would not face similar scrutiny.<sup>159</sup> Though this is a valid concern, it should not prevent passage of such a law, for several reasons. First, incumbents are judged on their performance in office on a host of issues that challengers never have to face. Incumbents must make decisions on votes, work with their own party and the opposition, and perform a multitude of other tasks upon which they will be judged. As with substantive issues, an incumbent who performs better than average might gain an advantage. The same situation occurs with other disclosure laws—incumbents can face negative press if their votes align closely with their donors, or they have taken other legislative action that seems to favor certain parties. Challengers are generally immune from this, and it is an unavoidable result of democracy.

Under the law proposed, challengers would also be required to report the time they spend raising money. While disclosure of that time would not provide all of the benefits of incumbent disclosure, it would nevertheless provide the public with valuable information that would serve as a basis for comparison with the incumbent. The information would become even more helpful for voters if the challenger were elected.

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<sup>159</sup> See Krishnakumar, *supra* note 6, at 561 (discussing disadvantage for incumbents if contacts between lobbyists and legislators were disclosed).

Any disadvantage that an incumbent may face is also minor in comparison with the advantage they often receive because of contribution limits. Incumbents have a built-in name recognition advantage, and low contribution limits are often criticized as protecting incumbents by making challengers' races more difficult.<sup>160</sup> A slight disadvantage incumbents may see because of increased criticism is already outweighed by the contribution limit advantage.

The law could also be criticized on the grounds that it gives an advantage to self-financed candidates and candidates that benefit from large independent expenditures on their behalf. Once again, this concern is valid, but is too minor to outweigh the benefits of the law. Candidates that need to raise little money on their own already enjoy a wealth of advantages—they can focus more on legislating than fundraising and they can devote their time to other modes of campaigning. If they can also boast about the fact that they spend relatively few hours fundraising, it may seem unfair to others that are forced to spend a typical amount of time fundraising.

Regardless of whether the law would result create a greater burden for candidates that are forced to engage in more fundraising, it would be difficult to argue that such a result should induce us to support secrecy. Supporters of disclosure and good democracy generally see the value in providing voters with as much information as possible. Hiding information because of a fear of unfairness is too drastic a reaction, especially because it is valid and understandable for voters to prefer self-financed candidates, who (similar to publicly-financed candidates) should be less corruptible and less involved in fundraising. It is unclear whether most voters do feel this way, seeing that the public ostensibly feels at least some trepidation about candidates who “buy their seats” in Congress<sup>161</sup> or are particularly heavily-supported by Super PACs, which stir plenty of controversy. If those candidates attempt to tout their low fundraising time numbers, opponents will be none too reluctant to point out the causes of such low numbers. Introducing these issues to the public de-

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<sup>160</sup> See, e.g., George F. Will, *McCain–Feingold’s Wealth of Hypocrisy*, WASHINGTON POST (Nov. 22, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/21/AR2007112101859.html> (arguing that “by restricting the quantity and regulating the content and timing of political speech, the law serves incumbents, who are better known than most challengers, more able to raise money and uniquely able to use aspects of their offices—franked mail, legislative initiatives, C-SPAN, news conferences—for self-promotion”).

<sup>161</sup> A Google search for the phrase “buy seat’ in Congress” produces a plethora of news articles and blog posts commenting on candidates attempting to finance legislative races. See Peter Whoriskey, *Growing Wealth Widens Distance Between Lawmakers and Constituents*, WASHINGTON POST (Dec. 26, 2011), [http://www.washingtonpost.com/business/economy/growing-wealth-widens-distance-between-lawmakers-and-constituents/2011/12/05/gIQAR7D6IP\\_story.html](http://www.washingtonpost.com/business/economy/growing-wealth-widens-distance-between-lawmakers-and-constituents/2011/12/05/gIQAR7D6IP_story.html) (discussing effects of wealth on members of Congress and view of some that perspective of wealthy is fundamentally different than that of middle or lower classes).

bate will serve to improve democratic deliberation overall, and should not be hidden because of fairness concerns.

## 2. Chances of Passage

Some argument can be made that it would be unlikely for Congress to enact regulations burdening themselves in such a way. Indeed, it would require some measure of public push to persuade members of Congress to enact laws creating greater responsibility for themselves. Unlike Watergate, there will not be a large scandal involving time spent raising money that will create outrage. Yet disseminating knowledge about the state of the political system might create at least some spark.

There may actually be reason to think that members of Congress would be willing to impose such rules, just as members of Congress in the 1970s were willing to impose contribution limits, spending limits, and disclosure requirements. It is often legislators themselves that sound the alarm about the perils of campaign fundraising requirements. Innumerable current and former members of Congress lament the demands of fundraising.<sup>162</sup> Disclosure rules would clearly not extinguish the problem, but could make some progress toward making legislators' lives better.

Congress has also shown on multiple occasions that it is willing to regulate itself if there is sufficient call for reform and little valid reason to oppose it. For example, the recently-passed STOCK Act prohibits members of Congress from using nonpublic information for private gain and prohibiting insider trading by members of Congress.<sup>163</sup> Members of Congress (as well as other government officials) are currently required to disclose certain financial information to the public by the Ethics in Government Act of 1978. They must file annual reports of "earned and unearned income, assets and related transactions, liabilities, contributions made in lieu of honoraria, gifts received, non-governmental positions held, travel that was paid for or for which the filer was reimbursed, and various agreements into which the filer has entered."<sup>164</sup>

While the existence of such requirements does not guarantee that Congress will pass the law proposed, it provides precedent for the idea that if there is sufficient backing and little legitimate reason to oppose a law, Congress may see fit to act. Furthermore, precedent could be set if the proposed law was first passed in individual states. Though this Article discusses federal law for the sake of uniformity, experiments at the

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<sup>162</sup> See *supra* notes 124-29 and discussion in accompanying text.

<sup>163</sup> PL 112-105, April 4, 2012, 126 Stat 291. See note 108, *supra* (discussing requirements of STOCK Act).

<sup>164</sup> Center for Responsive Politics, *About the Reporting Requirements*, OPEN SECRETS, <http://www.opensecrets.org/pfds/disclosure.php> (last visited on March 9, 2013).

state level would likely provide valuable precedent for adoption of a federal law. Broad support of a successful experiment in one or several states would be a beneficial tool in persuading wider adoption.

### 3. Effect on Super PAC Power and Solicitation of Small Donors

Some may also worry that forcing legislators to disclose the time they spend fundraising would make it even more likely for legislators to eschew direct contributions and seek outside money not subject to those limits. However, even the most basic version of the proposed law would require legislators to report fundraising geared at independent spending as well. Under the current version of the regulations, candidates can appear at fundraisers that solicit money for Super PACs supporting them.<sup>165</sup> If they spend more time soliciting independent spending on their behalf, they will still need to disclose that additional time. Further, the law already strongly encourages legislators to seek independent spending, since there is no ceiling on spending by Super PACs, 501(c)(4)s, or anyone else spending independent of a candidate. Any minor effect the new disclosure law would have in further encouraging solicitation of private funds would be vastly outweighed by the utility in learning more about legislators' fundraising.

On a related note, some may object to requiring disclosure of candidate time because it could discourage candidates from soliciting small contributions from the electorate, instead hoping to squeeze as much money as possible out of large donors or encourage Super PAC spending. Commentators have recently attempted to demonstrate that when a larger portion of the populace makes contributions, participation levels rise and make our democracy more robust and representative of society's true interests.<sup>166</sup> Any disclosure regime focusing on legislators' time should, to the extent that it is possible while still maintaining efficacy of the law, avoid discouraging candidates from soliciting small contributions.<sup>167</sup>

First, it is unclear that the proposed law would have a major negative effect on the type of fundraising that has been identified as beneficial. Much of legislators' current time spent fundraising involves telephone solicitation. In soliciting small donors, candidates often now

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<sup>165</sup> Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1667 (2012).

<sup>166</sup> See, e.g., Spencer Overton, *The Participation Interest*, 100 GEO. L.J. 1259 (2012); see also Wesley Y. Joe et al., Campaign Finance Institute, *Do Small Donors Improve Representation? Some Answers from Recent Gubernatorial and State Legislative Elections* (Aug. 2008), [http://www.cfinst.org/pdf/books-reports/APSA\\_2008\\_SmallDonors.pdf](http://www.cfinst.org/pdf/books-reports/APSA_2008_SmallDonors.pdf).

<sup>167</sup> In a disclosure regime that identified the legislator's contacts, there would likely be less discouragement of soliciting small donors, because the media's focus would likely be more on the entities and individuals with whom the candidate spent time.

rely on Internet fundraising,<sup>168</sup> and sometimes “low dollar” community fundraising events.<sup>169</sup> From the perspective of campaign finance reformers, Internet fundraising should actually be encouraged because it limits the opportunity for corruption and requires a lesser time commitment from candidates.<sup>170</sup> Thus, discouraging fundraising hours would not necessarily have a significant effect on legislators’ decisions to reach donors outside of their typical sphere, and may actually encourage greater reliance on those donors through increased Internet solicitation.

If implementation of such a disclosure requirement did begin to drive down small donor participation, it is feasible that a law could be passed excepting reporting requirements for in-person fundraising events when the resulting contributions are below a certain threshold. Though there would be details to iron out in implementing such an exemption, regulators could devise a system that would generally provide the desired effect. For example, the reporting requirement could be lifted for events at which a certain portion of the resulting contributions were lower than \$500, or where the tickets cost under \$100.<sup>171</sup>

#### 4. Public Financing

There are clearly other methods for lightening Congress’ fundraising burden. One of the most discussed is instituting a public financing system for Congress. However, even if a new major law were passed that significantly reduced the time legislators spend fundraising, it should be passed in conjunction with the law proposed in this Article rather than in place of it. If a public funding system were implemented, there would remain a strong public interest in knowing how representatives spend the time granted to them by their constituents. If members of Congress spend an average of twenty percent of their time fundraising, rather than thirty-five percent, fifty percent, or seventy percent, voters still have a right to assess their performance based on that number.

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<sup>168</sup> See, e.g., Ellen L. Weintraub & Jason K. Levine, *Campaign Finance and the 2008 Elections: How Small Change(s) Can Really Add Up*, 24 ST. JOHN’S J. LEGAL COMMENT. 461, 472-73 (2009) (noting that President Obama received 2.5 million online donations of \$200 or less in 2008, a number that matched the total number of \$200 or less donations in the entire 2004 presidential election).

<sup>169</sup> See, e.g., *id.* at 473 (describing donors spending five dollars to attend a large speech); Gloria Borger, *How to Stop a Cash Rush*, U.S. NEWS (Apr. 8, 2007), <http://www.usnews.com/usnews/news/articles/070408/16glo.htm> (arguing that there is “something democratizing” about holding “low-dollar” fundraising events).

<sup>170</sup> Weintraub & Levine, *supra* note 168, at 472 (“Raising funds over the Internet substantially limits the opportunities for the kind of actual or apparent improper influence that can arise in direct face-to-face or telephone solicitations by candidates.”).

<sup>171</sup> Borger, *supra* note 169. It would be more difficult to ensure that such events do not essentially seek to entice large spenders to anonymously donate to Super PACs through corporate entities or to 501(c) organizations. Avoiding this problem would be contingent on improvement of implementation of current disclosure laws.



As mentioned above, FECA instituted an optional presidential public funding scheme. The Supreme Court upheld the optional public funding law in *Buckley v. Valeo*.<sup>172</sup> Since then, a few states have made strong efforts to induce candidates to accept public funding; Arizona's efficacious system for enticing candidates to do so was recently struck down by the Supreme Court.<sup>173</sup> The presidential public financing system is now essentially defunct,<sup>174</sup> and there have been few signs that Congress is ready to revive it, let alone institute a congressional public funding scheme. Even if such a system were instituted, it would not obviate the need for disclosure of time spent fundraising. As stated above, the informational interest remains. But further, the Supreme Court has made clear that public financing systems must be optional (and cannot be overly coercive),<sup>175</sup> and though candidates that accept public funding generally spend less time raising money, those that reject the scheme spend just as much time as they otherwise would.<sup>176</sup> Thus, even if a significant number of members of Congress opted into the system, the fundraising time concern would remain for those that rejected the system.

Further, a public financing system could not prevent outside groups from spending on a candidate's behalf. With the rise in outside group spending, candidates may increasingly rely on Super PACs and 501(c)(4)s to support their campaigns with legally uncoordinated spending. If this is the case, even candidates who accept public funds may feel compelled to maintain the torrid pace of fundraising, but do so by requesting that donors give to independent groups.<sup>177</sup> Thus, though a pub-

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<sup>172</sup> 424 U.S. 1, 86 (1976).

<sup>173</sup> *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2913 (2011).

<sup>174</sup> See, e.g., Catalina Camia, *Obama, Romney Skip Taxpayer Money for Campaign*, USA TODAY (Apr. 27, 2012), <http://content.usatoday.com/communities/onpolitics/post/2012/04/mitt-romney-public-financing-presidential-campaign-/1> (noting that Buddy Roemer was the only GOP candidate to take fundraising in the 2012 primaries, and reporting Rick Hasen's comment that "[t]his is the end of any kind of effective presidential financing system").

<sup>175</sup> See, e.g., Eric H. Wexler, Comment, *A Trigger Too Far?: The Future of Trigger Funding Provisions in Public Campaign Financing After Davis v. FEC*, 13 U. PA. J. CONST. L. 1141, 1180 (2011) ("Courts considering the constitutionality of public financing systems as a whole have undertaken such an analysis by insisting that they must not coerce participation . . . .").

<sup>176</sup> Peter Francia & Paul Hernnson, *The Impact of Public Finance Laws on Fundraising in State Legislative Elections*, 31 AM. POLITICS RESEARCH 520, 531 (Sept. 2003), available at <http://apr.sagepub.com/content/31/5/520.short> (finding that state legislators who ran in states without public financing spent an average of 28% of their campaign time on soliciting contributions, compared with 27% of campaign time for legislators who rejected available public financing).

<sup>177</sup> Similar arguments could be made if Congress decided to raise contribution limits. There are many who advocate for that course of action, especially on the right, but even if Congress managed to come to an agreement on new, higher limits, the public information interest in disclosure of time spent fundraising remains. Moreover, raising contribution limits

lic financing system may improve the current situation, it would not eliminate the need for disclosure of legislators' fundraising time.

### 5. Extension

While this Article principally advocates simple disclosure of time spent fundraising, more demanding requirements would produce enhanced results and should continue to be examined. For the reasons described above, disclosure of legislator activity is a valuable tool that has not been fully explored in the legal literature. A natural extension from time disclosure is a requirement focusing more on access to legislators, which would essentially require disclosure of a member's calendar, so the public would know who has access to a legislator. Preferably, a law requiring such disclosure would also create a government-run system linking those involved in meetings with a legislator with the amount of money they contributed or spent in support of that legislator. Such a system could be supplemented by additional requirements of a candidate's supporters: those making contributions or expenditures in excess of a certain threshold could be required to report the time they spend with legislators as well. If this information were reported by both legislators and their supporters, those required to report would have a greater incentive to report accurately and regulators and the media would be aided in verifying and analyzing the data.<sup>178</sup>

As Anita Krishnakumar explains, more comprehensive schemes concerning government-citizen contacts do exist and have been promoted by others.<sup>179</sup> For example, regulations require the FCC and parties interested in its rulings to make certain disclosures concerning their meetings.<sup>180</sup> If interest groups or other parties make presentations to an FCC decision-making panel, the presenter must submit copies of a summary of the presentation to the FCC for the public record, and the Secretary must notify the public of such presentations at least twice weekly.<sup>181</sup> Furthermore, both Slovenia and Taiwan have recently passed statutes requiring legislators to report their contacts with lobbyists.<sup>182</sup> The exist-

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might lessen the amount of time legislators spend fundraising to some degree, but there would remain an interest in discouraging large amounts of time spent fundraising through disclosure laws.

<sup>178</sup> Krishnakumar has described the benefits of dual reporting in the lobbying context. Krishnakumar, *supra* note 6, at 546–47.

<sup>179</sup> *Id.* at 548.

<sup>180</sup> 47 C.F.R. §§ 1.1200-1.1216 (2011).

<sup>181</sup> 47 C.F.R. § 1.1206(b)(1)-(4) (2011).

<sup>182</sup> See HOLMAN & LUNEBERG, *supra* note 77, at 20 (“Perhaps the most unique aspect of the lobbying law in Slovenia is its emphasis on requiring government officials to report lobbying contacts, which are then posted on the Commission’s Web page.”). Slovenia’s Integrity and Prevention of Corruption Act requires that

tence of these more extensive disclosure requirements demonstrates the potential for movement toward broader and deeper legislator disclosure.

#### CONCLUSION

Current federal disclosure laws provide valuable information to voters, and should be strengthened in order to ensure fairness and accuracy in the public's picture of campaign finance. However, even if current law were crafted perfectly and enforced to the best degree humanly possible, a large part of the picture is missing. Scholars and lawmakers need to begin to explore requiring more extensive disclosure of legislators' activity. The first and most simple step, advocated here, is to require members of Congress to disclose the time they spend fundraising. Information about legislators' devotion to fundraising provides important information that will assist voters in assessing their representatives' performance. Publicizing this information would also make the public more aware of the fundraising issue in general, perhaps discouraging legislators from devoting such egregious amounts of their time asking for money rather than focusing on legislative tasks.

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[t]he lobbied persons shall make a record on any contact with a lobbyist intending to lobby containing data on the lobbyist: personal name, information whether the lobbyist has identified himself/herself in accordance herewith, area of lobbying, name of the interest organization or another organization for which the lobbyist is lobbying, statement of any enclosures, the date and place of the visit of the lobbyist and signature of the lobbied person. The lobbied person shall submit the record within three days as information to the superior and to the commission.

Art. 68(2). The Taiwanese law requires lobbied persons to report "content of lobbying" as well. It can be found at: <http://sunshine.cy.gov.tw/GipOpenWeb/wSite/ct?xItem=3806&ctNode=380&mp=6>.

