Three Can Keep a Secret, If Two of Them Are Dead: A Thought Experiment Around Compelled Public Disclosure of "Anonymous" Political Expenditures

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INTRODUCTION

"Three can keep a secret, if two of them are dead." Variously attributed to Benjamin Franklin and the Hell's Angels,[1] this aphorism captures an important concern posed by the recent upswing in "anonymous" political activity. In short, much of it is not actually anonymous.

This essay explores one possibility for fundamentally changing the existing disclosure regime around political expenditures. Specifically, it considers the application of a potential new disclosure regime that seeks to strike a better balance between, on the one hand, the First Amendment interest in political expression, including genuinely anonymous political expression, and on the other the public interest in protecting our system of government from the dangers of corruption and undue influence threatened by opaque, private leverage over public officials.

To accomplish this goal, the alternative disclosure regime discussed below would move from the existing disclosure regime under which disclosure is triggered based on the content of a political communication to a regime that premises public disclosure on private disclosure. Admittedly, this new regime would present significant, although perhaps surmountable, administrative challenges. This game still may be worth the candle, however, as this new regime has the potential to better focus disclosure on ferreting out corruption while simultaneously removing a disincentive to at least some political engagement by allowing those whose interests are purely electoral (and not legislative) to operate with genuine anonymity.

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[1] *See generally* BENJAMIN FRANKLIN, POOR RICHARD'S ALMANAC (1735); YVES LAVIGNE, HELL'S ANGELS: 'THREE CAN KEEP A SECRET IF TWO ARE DEAD' (1989).

I. PUBLIC ANONYMITY, PRIVATE DISCLOSURE

There are two related considerations around dollar-denominated political activity that is other than fully anonymous[2]: first, complete anonymity is often not truly desired by funders; and second, therefore, funders' identities are often revealed to or discovered by public officials. There is strong evidence that funders of political activity generally do not desire to remain completely anonymous, but rather prefer to be known to elected officials, party insiders, and perhaps even the public more broadly.

For example, in the 1970s, Dade County, Florida experimented with requiring all contributions to judicial elections to be anonymous.[3] Beginning in 1972, all contributions to judicial candidates were placed into a blind trust and then periodically distributed to candidates. As a reform measure, the experiment failed because donations quickly dried up,[4] but it did illustrate that enforcing a requirement of actual anonymity tends to discourage more political activity than it encourages. Similarly, the identities of many funders of political activity are ultimately disclosed, even if not to the general public but instead only privately to a purposefully selected audience.

For an example of how this kind of selective disclosure can occur in practice, consider a hypothetical of particular relevance in the current campaign finance era of so-called "Super PACs" and their nonprofit affiliates. Assume that the leaders of a newly organized tax-exempt 501(c)(4) social welfare organization wish to fund independent expenditures attacking a particular incumbent who they believe holds positions contrary to their interests. The group successfully raises several million dollars to fund a wide variety of advocacy work: first a relatively inexpensive website, thin on functionality and detail, but nevertheless available to anyone with an internet connection. Shortly thereafter, the group uses a much larger proportion of its funds to undertake public

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[2] For purposes of this essay, "fully" or "completely" anonymous means activity where the source is known to literally no one other than the actor him or herself.

[3] Requiring donor anonymity has also been prominently advocated by Professors Ian Ayres and Jeremy Bulow. *See* Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837 (1998).

[4] *See* Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J.L. & POL. 57, 124 (1985) (admitting that "[d]espite having begun this project enthusiastic about non-disclosure of lawyers' giving as a reform measure, after considering these factors, I find it neither worth doing nor doable"); *see also* Leona C. Smoler & Mary A. Stokinger, Note, *The Ethical Dilemma of Campaigning for the Judicial Office: A Proposed Solution*, 14 FORDHAM URB. L.J. 353, 378 (1986).

education efforts of varying stripes. First, electioneering communications[5] and independent expenditures[6] in the days and weeks leading up to the incumbent's primary and/or general elections, and later, after election day, a robust series of similar activities advocating around public policy issues instead of directly or indirectly attacking or supporting candidates as such.

Assume furthermore that the group itself is not widely known among the general public, but has been organized by individuals who are relatively well known by political professionals. Indeed, as explained above, the group may wish to affirmative ensure that its existence, purposes, and the identities of its funders become well known to certain public officials and political insiders. Towards that end, this information about the group can be shared with public officials either explicitly by disseminating information about the group and a list of its donors, or implicitly by, for example, hosting a "Trustees' Retreat," or a similar event to which only top donors and select public officials are invited. The context of the retreat could make it abundantly clear to the public officials in attendance that the "trustees" are the group's strongest and most important financial supporters, a description which will not be misunderstood by any political professionals or public officials in attendance. Indeed, the trustee's meeting itself may even be a fundraiser for the group, with donors pledging hundreds, thousands, or millions to the group in the presence of public officials.[7]

At this private trustee's meeting, questions about public policy could be asked of public officials, the group and its trustees could voice their support for or concerns with certain policies, and the public officials and donors in attendance could leave the retreat with an all-but-explicit understanding about the consequences of their future action. Even if never announced out loud, the message conveyed by the subtext of this "Trustees' Retreat" would be clear: the group and its donors hold the purse strings bankrolling the group's future advertisements, and any public officials in attendance can ensure those resources only help, and not harm,

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[5] An electioneering communication is any broadcast, cable, or satellite communication referring to a clearly identified federal candidate for federal office and targeted to the candidate's state or district, sixty days before a general election and thirty days before a primary election. 11 C.F.R. § 100.29(a) (2012).

[6] Independent expenditures are communications that expressly advocate the election or defeat of a clearly identified candidate that are not made in cooperation, consultation, or concert with, or at the request or suggestion of a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents. 11 C.F.R. § 100.16(a) (2012).

[7] The FEC has advised that the presence of a federal candidate or elected official does not preclude such fundraising activity. *See* 2011 Op. Fed. Election Comm'n 12, 2011 WL 2662412 (June 30).

their election campaigns by favorably addressing the public policy concerns privately raised at the meeting.

To be sure, the public advertising need not even necessarily focus on the same set of policy concerns as those aired in the meeting. And likewise, the ads need not necessarily be negative. The same set of facts are as easy to envision regarding a group willing to fund positive advertising or perhaps negative ads against a candidate or officeholder's challengers – again, pending suitable answers from the candidate or officeholder in question.

Under current campaign finance and tax laws, this hypothetical group could undertake the entirety of the fact pattern laid out above while triggering no legal obligation whatsover to disclose to the public the sources of its funds. Indeed, donors who wish to fund such groups without being publicly identified have a range of potential approaches available that allow them to do exactly that.

First, tax-exempt social welfare entities organized under Section 501(c)(4) of the U.S. Tax Code are allowed to engage in partisan political activities, including seeking to influencing elections, provided that those activities are not the "primary activity" of the organization.[8] Independent expenditure-only political action committees (commonly referred to as "Super PACs")[9] allow more efficient funding of independent expenditures, although these committees are still PACs and therefore still must file reports of their receipts and disbursements with the FEC. These two vehicles for donor anonymity were made possible by the Supreme Court's ruling in *Citizens United v. FEC*[10] as well as two related rulings of the D.C. Circuit[11] and Advisory Opinions issued by the FEC in July 2010.[12] Both Super PACs and 501(c)(4) entities are allowed to solicit and accept unlimited contributions from individuals, corporations, and unions

[8] Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (1990) (providing that the promotion of social welfare does not include "direct or indirect participation in political campaigns on behalf of or in opposition to any candidate for public office."). The "primary purpose" of a 501(c)(4) must be to promote social welfare, i.e., the good of the community as a whole, as opposed to engaging in political activity. In practice, this limitation means that a maximum of forty-nine percent of a 501(c)(4)'s resources may be spent on political activities.

[9] 2010 Op. Fed. Election Comm'n 9, 2010 WL 3184267, at *1 (July 22).

[10] 130 S. Ct. 876 (2010).

[11] SpeechNow v. FEC, 599 F.3d 686, 689 (D.C. Cir. 2010) (holding that individuals may make unlimited independent expenditures and unlimited contributions to independent expenditure-only committees); EMILY's List v. FEC, 581 F.3d 1, 10 (D.C. Cir. 2009) (holding that if a federal PAC does not make contributions to candidates, it may accept contributions that exceed federal contribution limits).

[12] 2010 Op. Fed. Election Comm'n Adv., *supra* note 9, at *11; 2011 Op. Fed. Election Comm'n Adv., *supra* note 8, at *1.

provided that their expenditures are "independent," meaning that they are not "coordinated" with federal candidates or political parties.[13] Maintaining such independence from candidates is relatively easy due to the FEC's permissive coordination regulations.[14]

While both Super PACs and 501(c)(4)s are required to file certain disclosure reports with the FEC, existing regulations allow both Super PACs and 501(c)(4)s to easily avoid disclosing the identities of their funders. Super PACs need not disclose anything about the actual people involved in donations to the Super PAC from corporations or labor unions.[15] In the case of 501(c)(4)s, donors may remain undisclosed indefinitely, as the FEC only requires 501(c)(4)s to disclose the names of individuals funding a such a group's independent expenditures if such individuals donate more than $200—or $1000 in the case of electioneering communications—to the organization specifically "for the purpose of furthering" independent expenditures or electioneering communications.[16] This means that contributions donated *generally* to the 501(c)(4), but *not specifically* for any particular independent expenditure or electioneering communication, need not be disclosed by the 501(c)(4) in its reports to the FEC.[17]

As applied to the hypothetical Trustees' Retreat outlined above, so long as the specifics of the advertising itself is not discussed at the retreat in the presence of the elected official that will benefit or be damaged by the advertising, the names of the groups donors attending the retreat who pledged funds for such advertisements may not ever need to be disclosed. The ads would not meet the FEC's coordination test, because nothing in the fact pattern even remotely supports the conclusion that the incumbent (or his or her agents) requested or suggested that the advertising be

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[13] In Federal Election Commission ("FEC") terminology, a Super PAC is an "independent expenditure-only political committee." Op. Fed. Election Comm'n Adv., *supra* note 10, at *1.

[14] Under 11 C.F.R. § 109.21 (2010), in order to be considered "coordinated" with a federal candidate, an advertisement must satisfy the FEC's coordination three-part test: payment, content, and conduct. For example, provided that a federal candidate did not request or suggest that the advertisement be aired or become materially involved in its production, an advertisement is likely to be meet the coordination test.

[15] While Super PACs are required to disclose the names of all donors of more than $200, 11 C.F.R. § 104.8(a) (2010), that disclosure need only list the name and mailing address of corporate donors, which can effectively introduce a powerful level of opacity between the actual people undertaking the political activity and the juridical person whose name appears on the FEC reports.

[16] 2 U.S.C. § 434(b)(3)(A) (2006); 11 C.F.R. § 104.20(c)(9) (2007); 11 C.F.R. § 109.10(e)(1)(vi) (2003).

[17] Explanation and Justification for Final Rules on Electioneering Communications, 72 Fed. Reg. 72899, 72911 (Dec. 26, 2007), *available at* http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-26.pdf. This regulation has much to do with the declining proportion of independent expenditure reports and electioneering communications reports that actually disclose any donors at all.

produced or distributed, nor was the incumbent "materially involved" in producing the advertisement, or engaged in a "substantial discussion" about the candidate's plans, projects, or needs as a candidate.[18]

Indeed, the Trustees' Retreat need not involve much of a reference at all to the group's advertisements or to the incumbent's campaign, but instead could focus on issues of official government policy and the incumbent's positions on those issues as an officeholder. The implication that the group could air ads attacking or supporting candidates going forward, depending on their positions of those issues, would not be lost on even the most naïve of public officials.

This is not to say that the group could not be more explicit. To be sure, a member of the group could freely tell the incumbent that he or she was very interested in the incumbent's position on a particular issue and that he or she would be looking to spend a considerable amount on advertisements in the upcoming election to support candidates with likeminded views. Whether presented to the incumbent implicitly or explicitly, the result is the same: such an interaction between a donor and an incumbent does not by itself amount to "coordination," and the identity of a donor who reacted to the meeting with significant funding of political activities could be lawfully withheld from public disclosure.

II. PRIVATE TRANSPARENCY AND PUBLIC OPACITY UNDERMINES DEMOCRATIC ACCOUNTABILITY

As demonstrated by this hypothetical Trustees' Retreat, current campaign finance laws allow many funders of political advertisements to remain undisclosed to the public. It does not follow, however, that the funding itself or the resulting ads are really "anonymous" in any broadly accurate sense. Rather, the funders' identities are typically always known to the groups receiving their money, are also most likely to be known to the other major funders of the same group, and can easily be made known – albeit privately – to the elected officials whom the group and its funders seek to support, oppose, and influence. To put it more simply, rather than being "anonymous," donors like these are more accurately understood as both selectively anonymous and, simultaneously, selectively transparent. Known to some, in other words, but not to all.[19]

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[18] *See* 11 C.F.R. § 109.21 (2010).

[19] This phenomenon has also been identified by others as allowing for "public anonymity and private disclosure." *See, e.g.*, Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence,* 50 STAN. L. REV. 837, 843 (1998) (describing

While the general disparity between private transparency and public opacity is not itself necessarily problematic, it raises concerns from a democratic accountability standpoint when the universe of people who know a donor's identity includes public officials. Viewed uncharitably, the circumstances of the hypothetical trustees' retreat present enormous opportunity for undue influence and even outright corruption. In the post-*Citizens United* campaign finance era, an individual donor or interest group is no longer limited to the leverage over or access to public officials that can be extracted from withholding or making contributions from a political action committee or their personal account, which are capped at $5000 and $2500 per election, respectively.[20] Even the most successful bundlers typically raise at most several hundred thousand dollars in the aggregate, and must do so only in limited amounts from a necessarily broad range of donors. The more successful a bundler becomes, in fact, the more likely it is that his or her identity will be voluntarily disclosed by the campaign itself or made known by one of the dozens or hundreds of donors from whom the bundler raised the funds. Now, the same group may be able to spend literally millions of dollars to benefit or disadvantage an elected official or candidate, even if the all those dollars come from a single person.[21]

The kind of opaque, private leverage over a public official that results from this informational disparity is recognized as undue influence per se in other contexts. For example, consider the so-called "honey traps" arranged by clandestine services in order to use illicit sex as a means of compromising a target.[22] And similarly, consider the theoretical basis for the legal prohibition of bribery itself: the absence of the public disclosure of the exchange of the bribe for the official act is one part of what makes the transaction corrupt, since the electorate cannot hold the officeholder

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this phenomenon in the political contribution context as a "laissez-faire" information regime, in which both the donor and candidate know the identity of contributors, but the public does not know donor identities); Peter Overby, *Illegal During Watergate, Unlimited Campaign Donations Now Fair Game*, NAT'L. PUB. RADIO (Nov. 16, 2011), http://minnesota.publicradio.org/features/npr.php?id=142314581.

[20] 2 U.S.C. §§ 441a(a), 441a(c) (2006).

[21] In the view of economists Marcos Chamon and Ethan Kaplan, the actual money spent on the activities at hand is only the beginning of the issue, since the influence exerted by an interest group over a candidate can also include the candidate's estimation of the potential of future contributions and expenditures being made supporting or opposing their campaign. *See* Macros Chamon & Ethan Kaplan, The Iceberg Theory of Campaign Contributions: Political Threats and Interest Group Behavior (April 2007) (working paper available on SSRN at http://www.webcitation.org/5zcG5GQGy). Interestingly, a truly anonymous funder would have to forgo this kind of influence, perhaps further illustrating why relatively few funders seek true anonymity.

[22] *See, e.g.*, Phillip Knightley, *The History of the Honey Trap*, FOREIGN POL'Y (Mar. 12, 2010), http://www.foreignpolicy.com/articles/2010/03/12/the_history_of_the_honey_trap.

accountable for his or her role in the transaction if those voters know nothing about it.[23]

But even in those other contexts, without an explicit quid pro quo, a prosecution for bribery or an anti-gratuities violation would be (and should be) exceedingly hard to prove.[24] And without facts supporting collaboration between the candidate and the group about the ads, rather than just the issues, any allegation that the ads are "coordinated," and therefore an in-kind contribution instead of an independent expenditure, would likewise fail. As a result, the degree to which these potentially corrupting circumstances can be policed under existing law is highly limited, given the appropriately narrow scope of criminal laws against bribery and the fast-shrinking scope of the administrative law around campaign finance.

Viewed less skeptically, however, the fact pattern presented by the Trustees' Retreat has much in common with other circumstances that not only are not seen as corrupting, but are properly understood as valuable, even laudable, in a representative democracy. The communication in the advertising itself (both the campaign ads prior to election day and the public education efforts that come later) has the potential to enhance and inform public dialogue, which is precisely the type of speech that the Supreme Court has repeatedly stated is "indispensable to decisionmaking in a democracy."[25] Democratic self-government thrives and depends on public engagement around issues and politics.

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[23] There can be surprisingly little difference between common and permissible campaign pledges and impermissible quid pro quo transactions. For example, a candidate speaking to a crowd at a fundraiser who asks those in attendance to donate to her campaign so that she can "bring home the troops," "increase the minimum wage," or "reduce taxes on corporations" is not thought to have solicited a bribe. *See* JOHN T. NOONAN, JR., BRIBES 621-23 (1984). If, however this same solicitation was made privately by the candidate to a potential donor, particularly regarding a relatively narrow issue, we may view the transaction quite differently, and perhaps as a bribe. *Id.* at 623.

[24] Buckley v. Valeo, 424 U.S. 1, 28 (1976) (noting that bribery laws deal with "only the most blatant and specific attempts of those with money to influence governmental action."). *See also* JOHN T. NOONAN, JR., BRIBES 569 (1984) (describing the criminal law as inherently "muzzled" with regard to bribery); Peter J. Henning, *The Pitfalls of Dealing with Witnesses in Public Corruption Prosecutions*, 23 GEO. J. LEGAL ETHICS 351, 353-354 (2010) (noting the challenge facing prosecutors in "[s]eparating out the ordinary intercourse of political life from the illicit transfer of benefits or money exchange for the exercise of government authority"). Recent court decisions have also rendered more difficult prosecutions for violations of the federal illegal gratuities statute, 18 U.S.C. § 201(c)(1) (2006). *See* United States v. Sun-Diamond Growers, 526 U.S. 398 (1999); United States v. Valdes, 475 F. 3d 1319 (D.C. Cir. 2007). One positive result of these cases is the degree to which they make it harder to use a criminal law frame to analyze fundamentally political relationships.

[25] Citizens United v. FEC, 130 S. Ct. 876, 904 (2010) (stating that "[p]olitical speech is indispensable to decisionmaking in a democracy") (internal citations omitted); *see also* N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 208 (2008) (describing political speech as an "open marketplace" of ideas wherein ideas may "compete" freely "without government interference");

Genuinely anonymous political speech also has long been protected precisely on the basis of the First Amendment values inherent in the actual speech itself. As Justice Stevens wrote for the Court in 1995 in striking down an Ohio election law that prohibited the distribution of anonymous leaflets, "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."[26] Indeed, anonymous publications have played a valuable and prominent role in American politics since the colonial era.[27] Thomas Paine's *Common Sense* was not initially claimed by Paine, but was rather "Written by An Englishman."[28] The Federalist Papers authored by Hamilton, Jay, and Madison were originally published under the name "Publius."[29]

Similarly, despite the generally negative public view of lobbyists and the lobbying profession, expressing policy ideas and concerns directly to public officials is likewise a critical component of a representative democracy and is, of course, the subject of its own clause in the First Amendment.[30] We trust that constituents will hold their elected officials accountable, and if the policy decisions of elected officials are in tension with the preferences of their constituents, then those constituents owe it to themselves, to the officeholder, and perhaps even to the rest of the general public to explain those tensions to their elected officials and their fellow citizens –urging those officials to better represent their concerns and urging those citizens to join the cause.

Outside the context of concern over the influence of money on public policy, all these communications provide unobjectionable and even admirable examples of democratic accountability in action. Nevertheless, powerful opportunities for undue influence and outright corruption arise when the funded political expression is not only an end in itself, but when it is also or instead used as a "carrot" or "stick" in a lobbying context.

Virginia v. Hicks, 539 U.S. 113, 119 (2003) (describing the value of an "uninhibited marketplace of ideas").

[26] *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341-43 (1995).

[27] *See generally* Note, *The Constitutional Right to Anonymity: Free Speech, Disclosure, and the Devil*, 70 YALE L.J. 1084 (1961); Note, *Publius and the Petition:* Doe v. Reed *and the History of Anonymous Speech*, 120 YALE L.J. 2140 (2011). In his dissent in *McIntyre v. Ohio Elections Comm'n*, Justice Thomas provides a lengthy history of the role of anonymous speech in the founding era. *See McIntyre*, 514 U.S. at 360-67.

[28] *See* Thomas Paine, *Common Sense* (1776), reprinted in THOMAS PAINE: COMMON SENSE AND OTHER WRITINGS 5 (Gordon S. Wood ed., 2003).

[29] THE FEDERALIST PAPERS, *available at* http://thomas.loc.gov/home/histdox/fedpapers.html.

[30] U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.").

Political expression that remains strictly anonymous, however, presents no such danger of corruption or undue influence.[31] While the practice of lavishing campaign contributions on lawmakers in order to gain access or influence is hardly a new phenomenon, the electorate is able to closely monitor publicly reported contributions to federal candidates on websites such as OpenSecrets.org and the like. Currently, however, the electorate is unable to play its role in policing these opportunities for undue influence and corruption when donor identities remain unknown to the electorate.

III. CURRENT CAMPAIGN FINANCE REGIME

The following table represents a generalization of the modern campaign finance regime regarding disclosure of funders of political advertisements. In sum, regardless of whether the funder voluntarily self-disclosed to a public official, the funder typically must be disclosed if the relevant advertisement surpasses mere issue advocacy.

Modern Campaign Finance Disclosure Regime		
Nature of communication/ degree of funder's voluntary self-disclosure	*Political communications (electioneering communications and independent expenditures*	*Issue advocacy*
Funder known to public officials	Public disclosure compelled	No compulsory disclosure
Funder unknown to public officials	Public disclosure compelled	No compulsory disclosure

There are two principal shortcomings of the existing disclosure regime that this proposal seeks to address. First, the disclosure regime fails to adequately protect the legitimate First Amendment interest in truly anonymous political expression by instead employing an across-the-board presumption that public officials and candidates benefiting from political advertisements already know the identities of the individuals funding the

[31] That truly anonymous speech presents no such threat of corruption has been frequently recognized. For example, most recently even Harvard Law School Professor Lawrence Lessig, who advocates a broad view of corruption, recognizes that "the only way to clearly separate the gift to the Member from the Member's actions in return would be if such gifts were anonymous." LAWRENCE LESSIG, REPUBLIC, LOST 114 (2011).

advertisements.[32] Second, disclosure is only required during certain windows leading up to an election or when an advertisement crosses the blurry line between express and issue advocacy, and thereby fails to capture many payments for advertisements or other political assistance potentially valuable to public officials. In short, the existing regime is both overbroad in terms of *which funders* are required to be disclosed and simultaneously underinclusive in terms of *which circumstances* trigger disclosure obligations in the first place.

A. Shortcoming One: Overbreadth

The focus of modern campaign finance regulation has been to compel public disclosure of the sources of money used to fund political advertisements based on their content, timing, and placement, but regardless of whether the individuals funding such advertisements attempt to translate these advertisements into policy-making access to or other specific influence over public officials.[33] This is not because the existing regime fails to recognize a First Amendment right to engage in anonymous speech. Indeed, the Court has long recognized a First Amendment interest in anonymous political speech, subjecting compelled disclosure to "exacting scrutiny," which requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental decision.[34] The Court, however, has repeatedly found certain governmental interests to be sufficiently important to overcome the right to anonymous political speech.

Several rationales have been identified by the Court as justifying such disclosure. The primary governmental interest the Court has recognized as justifying disclosure of the funders of advertisements is that disclosure allows citizens and investigators to determine whether representatives are "in the pocket" of moneyed interests.[35] The Court has also recognized that disclosure provides the electorate with valuable information about the sources of spending, empowering voters to "evaluate the arguments to which they are being subjected."[36] Finally, disclosure also aids in the

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[32] Nevertheless, the fact that federal law imposes a $50 limit on "anonymous" contributions suggests at least some justification for this assumption. *See* 11 C.F.R § 110.4(c)(3) (2012).

[33] The existing regime requires disclosure of those advertisements that amount to either "independent expenditures" or "electioneering communications." *See supra* notes 6-7.

[34] *See Citizens United*, 130 S. Ct. at 914; McConnell v. FEC, 540 U.S. 93, 251 (2003) (Scalia, J., concurring); *McIntyre*, 515 U.S. at 334-35; *Buckley*, 424 U.S. at 64.

[35] *Citizens United*, 130 S. Ct. at 916.

[36] First Nat'l Bank v. Bellotti, 435 U.S. 765, 792 n.32 (1978); *see also* Buckley v. Valeo, 424 U.S. 1, 66 (1976).

enforcement of other legal provisions, such as the ban on direct political contributions by corporations and labor organizations[37] and the ban on political contributions and expenditures by foreign nationals, national banks, and federal contractors.[38]

These rationales are, however, largely premised on the assumption that candidates or officeholders benefiting from political activity already know the information that the law requires to be made public. The anticorruption rationale supplies the most explicit example, in that it presumes that an officeholder will know who to be beholden to on the basis of the spending in question. Likewise, the voter information rationale likewise presumes that the benefiting officeholder's future conduct in office can be predicted on the assumption he or she will know which supporters backed which efforts and will therefore govern in accordance with the preferences of those particular supporters. In this context, the general presumption that public officials know the identities of the individuals funding political advertising affecting their elections is perhaps reasonable.

If, however, the funder of a political advertisement never reveals him or herself to an elected official, then the anti-corruption governmental interest is no longer present at all. Enforcement of other campaign finance laws, moreover, could be achieved through a more narrowly-tailored disclosure regime, such as requiring disclosure only to the FEC and not publicly.[39] The remaining highly generalized interest in "voter information," when balanced against the First Amendment interests in anonymity, would be unlikely to prevail on its own.[40] People viewing or listening to an "anonymously" funded ad would still be free to make their own judgments about the credibility of the communication in light of the anonymity of the source. In short, the current disclosure regime neither contemplates nor adequately protects the strong First Amendment interests present in genuinely anonymous political activity.

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[37] Enforcement of this ban requires determining whether any advertisements have been impermissibly "coordinated" with a federal candidate.

[38] *See* 2 U.S.C. §§ 441(b), 441(c), 441(e) (2006).

[39] In fact, such disclosure to the IRS is already required of 501(c)(4) entities, although the IRS is prohibited by law from releasing the names of donors to the public. 26 U.S.C. § 6104(b) (2006). *See also* IRS Notice 88-120, 1988-48 I.R.B. 10, 1988-2 C.B. 454, 1988 WL 561090 (1988).

[40] The Court has stated that standing alone, the "simple interest in providing voters with additional relevant information" is not a sufficient interest to justify abridging the right to anonymous speech. McIntyre v. Ohio Elections Comm'n, 514 U. S. 334, 348 (1995).

B. Shortcoming Two: Underinclusiveness

Under the existing disclosure regime, the factor triggering compelled disclosure is not the extent of funders' voluntary self-disclosure to public officials, but rather the content of the advertisement itself. This focus on the nature of an advertisement, however, has largely proven a failure, as lawmakers, regulators, and courts have struggled to draw a workable yet constitutional line between regulated political communications (express advocacy and electioneering communications) on the one hand and unregulated issue advocacy on the other.[41]

While after *Citizens United* the obscure line between express advocacy and issue advocacy is no longer relevant for determining whether it is *permissible* for a corporation or union to fund an advertisement using its general treasury funds, the line between express and issue advocacy still determines whether the funding of advertisements falling outside of the thirty- and sixty-day electioneering communications windows must be *disclosed*. This is because outside of the electioneering communications windows, only those advertisements meeting the definition of an "independent expenditure"—which is limited to ads "expressly advocating the election or defeat of a clearly identified candidate"—trigger disclosure obligations.[42]

Yet this express advocacy standard clearly fails in the task of capturing the full array of spending that has value to candidates. Indeed, as the Court recognized in *McConnell*, political candidates themselves rarely use words of express advocacy in their own political advertisements.[43] Thus, while broadcast advertisements aired outside of the electioneering communications periods that avoid using express advocacy trigger only the FCC's sponsorship identification requirements[44] under the existing regime, that generalized disclaimer fails to provide enough information to justify the rationales offered for compulsory public disclosure.

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[41] Indeed, the failure of express advocacy and the "magic words" test adopted in *Buckley v. Valeo* to adequately capture the full array of advertisements of value to candidates was the motivating factor behind BCRA's adoption of the broader "electioneering communications" standard. *See* Trevor Potter, *The Current State of Campaign Finance Law*, in THE NEW CAMPAIGN FINANCE SOURCEBOOK 56 (2005) (noting that the electioneering communications provisions in BCRA were "crafted to encompass what have been referred to as 'sham issue ads' paid for with corporate or labor union funds—ads that clearly intend to influence an election but avoid the use of *Buckley*'s 'magic words' . . . and so escape federal regulation as political express advocacy expenditures . . . .").

[42] *See* 11 C.F.R. § 100.16(a) (2009); 11 C.F.R. § 100.22 (2009) (defining the phrase "expressly advocating" for purposes of the disclosure obligations imposed on "expenditures").

[43] McConnell v. FEC, 540 U.S. 93, 193 n.77 (2003).

[44] 47 C.F.R. § 73.1212 (2005).

IV. PROPOSED DISCLOSURE REGIME

The following table represents a generalization of an alternative campaign finance disclosure regime based not on the content of a political advertisement, but instead on the extent of voluntary self-disclosure of the individuals funding the advertisement. The funders of all political communications, regardless of the content of the communication or when the communication aired, could remain undisclosed provided that they remained undisclosed to candidates and public officials. Conversely, individuals funding political communications who voluntarily disclose their status as funders to candidates or public officials would required to be contemporaneously disclosed to the general public.

Proposed Campaign Finance Disclosure Regime		
Nature of communication/ degree of fund's voluntary self-disclosure	*Political communications (electioneering communications or independent expenditures*	*Issue advocacy*
Funder known to some in government* **Meant to exclude private disclosures on IRS Form 990, for example*	Public disclosure compelled	Public disclosure compelled
Funder truly anonymous	No compulsory disclosure	No compulsory disclosure

This alternative has two principal advantages over the existing regime. First, it would create a more narrowly-tailored disclosure regime. It allows a person who truly wishes to fund political advertisements anonymously—perhaps because they fear reprisal by fellow citizens or an employer—to do so provided that they do not seek to "cash in" on their political advertising by leveraging the fact of their spending into private influence over public officials. The proposal does not prohibit such leverage over public officials, it merely requires that this otherwise-private political leverage be publicly disclosed so that citizens may effectively monitor

their elected representatives. In other words, it seeks to eliminate the "privateness" of any leverage over public officials that results from political expenditures by requiring public disclosure and thereby enabling political accountability. Even the cases that broadly support "anonymous" speech rights have not identified a justification to leave officeholders and candidates subject to private or selectively-opaque political leverage.[45]

Second, disclosure would no longer be triggered based on illusory distinctions in the content of the advertisement. Instead, the disclosure requirement is triggered by any ad mentioning a public official or a specific public policy issue combined with the funders' voluntary disclosure to a candidate or public official. The existing disclosure requirements, which can trigger disclosure only if a donor gives to a PAC or provides funds to a 501(c) or other organization with the intent to bankroll a specific advertisement, would be replaced with a test that could impose funding disclosures for a much broader range of ads, but which also provides a clear means for both funders and the groups they support to control whether any funders need be identified publicly.

Conditioning privacy on an individual's voluntary self disclosure also is an entirely familiar concept within other areas of law. The common law attorney-client privilege, for example, is only valid to the degree that communications with an attorney are actually kept confidential by the person asserting the privilege. A client can choose to share such communications freely with others, but will have waived the privilege of confidentiality upon doing so. Similarly, under this proposal an individual would effectively be estopped from funding political advertisements under a claim of "anonymity" if they voluntarily disclosed the fact of their donation(s) to a public official charged with upholding a public trust.[46]

Despite its conceptual appeal, this proposal presents serious challenges for implementation and enforcement. Indeed, accurately and effectively determining the point at which a funder's identity has been disclosed to a candidate or public official is critical to the proposed regime's success. In certain cases, identifying such voluntary self-disclosure would be easy, such as where a public official attends an annual banquet where donors are

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[45] *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995); NAACP v. Alabama, 357 U.S. 449 (1958).

[46] This proposal would not require a funders' name to be publicly disclosed if they only revealed their political activities to individuals in the private sector. Rather, what would trigger disclosure is the donor revealing his or her political activities to public officials, political parties, and their agents. That a person who contributes to a 501(c)(4) is listed in that entity's Form 990 Schedule B filed with the IRS would not alone constitute a voluntary disclosure that would trigger the proposal's disclosure requirements.

recognized during a presentation or are featured in a program. In other cases, potentially involving only small variations on the Trustees' Retreat hypothetical used above, determining the point at which the donor was "disclosed" to a public official could be considerably more difficult.

Nevertheless, there are ways these difficulties could be overcome. One possibility would be to require candidates and public officials to file certifications revealing the names of individuals who they or their agents know to have funded or be contemplating funding political communications. Such a certification requirement would not be unprecedented. Public officials already make extensive disclosures of their personal finances, and members of the House of Representatives are already required to file statements certifying that they do not have a financial interest in earmarks they request.[47] Indeed, there appears to be broad support at the moment for imposing increased reporting requirements on elected officials generally.[48]

Alternatively, or perhaps additionally, entities who already file reports under the Lobbying Disclosure Act or with the Federal Election Commission could be required to disclose the names of any funders who the filer itself disclosed to any candidates and/or public officials. These existing avenues may provide a template for an effective enforcement mechanism. Also, the principle that funders should not use their donations to leverage political gain may carry enough normative appeal that disputes about who has and has not voluntarily revealed their identities as donors to public officials may be relegated to the margins.

CONCLUSION

In conclusion, the potential regime for the disclosure of individuals who fund political communications discussed above aims to cohere the legal line for compelled public disclosure with the protection of funders' legitimate rights to control the boundaries of their own expression. Donors directly funding political speech where the speech is the end in itself get maximum protection; donors whose funding is aimed to send a symbolic message to friends in high places are still protected, so long as that message is as transparent to the public as it is to the public's agent. While

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[47] U.S. House of Representatives, House Rules, Rule XXIII(17)(a)(5).

[48] *See, e.g.*, Sarah Palin, *How Congress Occupied Wall Street*, WALL ST. J., Nov. 18, 2011, http://online.wsj.com/article/SB10001424052970204323904577040373463191222.html (calling for applying the Freedom of Information Act to Congress and for "more detailed financial disclosure reports" including rapid disclosure of stock transactions above $5000).

not a panacea for the issues presented by the current explosion of independent expenditures at the federal level, and while this kind of change clearly would present its own challenges for implementation, it may still be a worthwhile thought experiment about ways to better balance the degree of the public's legitimate "right to know" with a political actors legitimate right to make their own decisions about whether to keep the fact of their political expenditures truly "anonymous."