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Disclosure Statutes**

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Abstract

Disclosure statutes have not been the focus of much scholarly attention, particularly in the legal academy. This lack of attention is unfortunate because the design of disclosure laws is crucial in several ways. First, the constitutional test applied to campaign finance laws, including disclosure, requires that statutes be narrowly tailored to serve an important state interest. In addition, targeting is important for the effectiveness of disclosure laws. Voters have limited time and attention, so they should be provided the information most crucial to improving their ability to vote consistently according to their preferences. Finally, current experience with campaign regulation demonstrates that entities adopt strategies to circumvent restrictions, so statutes must be drafted to reduce opportunities for evasion. This study sheds light on some of the evasive tactics by political entities that wish to avoid disclosure relating to the source and extent of their spending on ballot questions. These veiled political actors (VPAs) take advantage of regulatory loopholes to spend substantial amounts of money to influence the outcomes of initiative and referendum elections while avoiding publicity of their efforts. Part I describes the interest served by disclosure beyond enforcing other campaign finance regulations or exposing *quid pro quo* corruption of candidates. We argue that improving voter competence is the most persuasive rationale in direct democracy and leads to various conclusions about the structure of effective disclosure laws. In Part II, we assess the jurisprudence relating to disclosure statutes in direct democracy to provide a sense of the legal hurdles such statutes must overcome, hurdles that become more daunting the more burdensome disclosure is for political actors. The jurisprudence suggests that targeted disclosure statutes will survive judicial scrutiny. Part III presents our description and analysis of various VPAs organized under federal and state laws that are used currently to evade disclosure restrictions in initiative campaigns. Part IV provides preliminary conclusions.

Veiled Political Actors: The Real Threat to Campaign Disclosure Statutes

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Disclosure statutes are ubiquitous in the regulatory landscape of political campaigns. Disclosure is the primary kind of campaign finance regulation affecting initiative and referendum elections, and it may be the only regulation that is constitutionally permissible in this context. Disclosure elicits fairly widespread support; those who oppose contribution or expenditure limits are often willing to support disclosure statutes.¹ And those who support more extensive campaign finance regulation accept disclosure as a necessary component that may serve the traditional objective in candidate elections of combating corruption and may be independently justified in both candidate and issue elections as providing necessary information to voters.² The willingness of the majority and most dissenting justices to uphold the disclosure provisions in the Bipartisan Campaign Reform Act (BCRA) suggests that disclosure statutes are more likely to

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¹ See, e.g., *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 428 (2000) (Thomas, dissenting) (noting disclosure with approval in discussion of the need for narrow tailoring of campaign finance laws); Bradley A. Smith, *Unfree Speech: The Folly of Campaign Finance Reform* 219-25 (2001) (considering justifications for disclosure-only regimes and accepting that it might be justified by a voter competence rationale, although there remain first amendment issues to consider). Not all opponents of broader campaign finance reform support disclosure. See, e.g., Lillian R. BeVier, *Mandatory Disclosure*, "Sham Issue Advocacy," and *Buckley v. Valeo: A Response to Professor Hasen*, 48 UCLA L. Rev. 285 (2000). Justice Thomas may have changed his mind about the constitutionality of disclosure. *McConnell v. Federal Election Commission*, 124 S.Ct. 619, 735-36 (Thomas, dissenting) (stating he would hold all the disclosure provisions of the new campaign finance reform act unconstitutional). But see *id.* at 730 (citing his dissent in *Shrink Missouri PAC* for the proposition that disclosure is an acceptable campaign regulation along with bribery laws).

² For a notable exception, see Bruce Ackerman & Ian Ayres, *Voting with Dollars: A New Paradigm for Campaign Finance* 26-28 (2002) (advocating mandatory anonymity of contributors in candidate elections). Ackerman and Ayres have subsequently indicated that they would support disclosure laws in direct democracy. Bruce Ackerman & Ian Ayres, *Why a New Paradigm?*, 37 U. Rich. L. Rev. 1147, 1172-73, 1184 (2003).

withstand constitutional scrutiny in the wake of *McConnell v. Federal Election Commission*.³

Notwithstanding this broad support, disclosure statutes have not been the focus of much scholarly attention, particularly in the legal academy. This lack of attention is unfortunate because the design of disclosure laws is crucial in several ways. First, the constitutional test applied to campaign finance laws, including disclosure, requires that statutes be substantially related to important state interests. Thus, if disclosure is justified because it provides useful information to citizens, the information elicited should be the most helpful to voters. In addition, targeting is important for the effectiveness of disclosure laws. Voters have limited time and attention, so they should be provided the information most crucial to improving their ability to vote consistently with their preferences. Finally, current experience with campaign regulation demonstrates that entities adopt strategies to circumvent restrictions, so statutes must be drafted to reduce opportunities for evasion. Although subterfuge may be even more common when the law also imposes limitations on contributions and expenditures, experience on the state level in issue campaigns, where regulation is almost entirely through disclosure, suggests that some political actors go to great lengths to avoid publicity.

This study sheds light on some of the evasive tactics by political entities that wish to avoid disclosure relating to the source and extent of their spending on ballot questions. These veiled political actors (VPAs) take advantage of regulatory loopholes to spend substantial amounts of money to influence the outcomes of initiative and referendum elections while avoiding disclosure of their efforts. Complicated arrangements consisting of nonprofit corporations, unregulated entities, and unincorporated groups can lead to structures resembling Russian matryoshka dolls, where each layer is removed only to find another layer obscuring the real source of money. Reformers must understand the structure and tactics of VPAs in order to design disclosure laws that can remove the veils and provide information that can improve voter competence in issue elections.

³ 124 S.Ct. 619 (2003). See Elizabeth Garrett, *McConnell v. FEC and Disclosure*, 3 *Elect. L.J.* 237 (2004) (discussing holding and dissents as they relate to disclosure). See also Richard L. Hasen, *The Surprisingly Easy Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 3 *Elect. L.J.* 251 (2004) (arguing *McConnell* is insufficiently clear with regard to its holding on disclosure).

Part I describes the interest served by disclosure beyond enforcing other campaign finance regulations or exposing *quid pro quo* corruption of candidates. Particularly in the context of direct democracy, where courts have struck down regulation other than disclosure, independent justification is required. We argue that improving voter competence is the most persuasive rationale and leads to various conclusions about the structure of effective disclosure laws. In Part II, we assess the jurisprudence relating to disclosure statutes in direct democracy to provide a sense of the legal hurdles such statutes must overcome. The jurisprudence suggests that targeted disclosure statutes will survive judicial scrutiny. Part III presents our description and analysis of various VPAs organized under federal and state laws that are used currently to evade disclosure restrictions in initiative campaigns. Part IV provides preliminary conclusions.

I. Voter Competence and Campaign Finance Reform

Disclosure is crucial to ensuring and improving voter competence in initiative and referendum elections. Voters are competent “if they cast the same votes they would have cast had they possessed all available knowledge about the policy consequences of their decision.”⁴ If ordinary voters understand the likely consequences of a vote for or against a particular ballot question, they can make a “reasoned choice.”⁵ Lupia and Johnston explain voter competence in the context of candidate elections:

Suppose, for example, that knowledge of a particular set of facts is sufficient for a competent choice (for example, suppose that knowing Bill Clinton’s position on 100 political issues is sufficient for a competent vote in the 1996 US presidential election). Then, if a person does not know these facts, and cannot access facts that allow her to make the same choice, then she cannot choose competently. If, however, there exists another, perhaps simpler, set of facts that leads her to make the same choice (that is, Bill Clinton is endorsed by the Sierra Club), then knowing the initial set of facts is not a prerequisite for competence. When a few, simple pieces of

⁴ Elisabeth R. Gerber & Arthur Lupia, *Voter Competence in Direct Legislation Elections*, in *Citizen Competence and Democratic Institutions* 147, 149 (S.L. Elkin & K.E. Soltan eds., 1999).

⁵ Arthur Lupia & Mathew D. McCubbins, *The Institutional Foundations of Political Competence: How Citizens Learn What They Need to Know*, in *Elements of Reason: Cognition, Choice, and the Bounds of Rationality* 47 (A. Lupia, M.D. McCubbins & S.L. Popkin eds., 2000).

information can lead citizens to make the same choices as many, complex pieces of information, citizens can be competent without detailed knowledge.⁶

As this passage illustrates, no voter needs to acquire all available information to competently make a reasoned decision.⁷ Instead, she can rely on particular pieces of information, connected non-accidentally to accurate conclusions about the consequences of her vote,⁸ and still vote competently. Thus, voter competence depends on voters' paying attention to credible information that allows them to draw accurate conclusions about the consequences of their electoral decisions.

A focus on voter competence is most helpful when it includes a realistic picture of the capabilities of voters and their willingness to spend time learning about ballot questions. Although some voters will meet a high standard of civic virtue, learning as much as they can about their electoral choices and making fully informed decisions at the polls, most voters will spend little of their scarce time and attention finding and processing political information. Even civically engaged voters are not well informed about every ballot question, and their level of knowledge declines as they move from salient initiatives to more obscure ones.⁹ Accordingly, policymakers who want to improve the competence of ordinary voters can work to structure the information environment to provide citizens with cues or heuristics that will help them vote competently with limited data.¹⁰ Appropriately tailored disclosure statutes are vital to this endeavor.

⁶ Arthur Lupia & Richard Johnston, *Are Voters to Blame? Voter Competence and Elite Maneuvers in Referendums*, in *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* 191, 194-95 (M. Mendelsohn & A. Parkin eds., 2001).

⁷ See Arthur Lupia & Mathew D. McCubbins, *The Democratic Dilemma: Can Citizens Learn What They Need to Know?* 2, 25 (1998).

⁸ The non-accidental nature of the connection between the information and the conclusion about consequences is an important part of voter competence. For example, it may be the case for a few elections that a voter who votes on the basis of candidate height or position of the candidate's name on the ballot (when the latter does not also signify some important information like incumbency) actually also votes for the candidate whose policies will benefit her. But such a voter is not voting competently; she is merely lucky.

⁹ See David Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* 122-23 (1984) (on ballot drop-off); Shaun Bowler & Todd Donovan, *Demanding Choices: Opinion, Voting, and Direct Democracy* 48-54 (1998) (on voter abstention); Shaun Bowler, Todd Donovan & Trudy Happ, *Ballot Propositions and Information Costs: Direct Democracy and the Fatigued Voter*, 45 *W. Pol. Q.* 599 (1992); Stephen P. Nicholson, *The Political Environment and Ballot Proposition Awareness*, 47 *Am. J. Pol. Sci.* 403 (2003).

¹⁰ For recent work arguing that voter competence should be the primary objective of campaign finance regulation, see Elizabeth Garrett, *The William J. Brennan Lecture in Constitutional Law: The Future of Campaign Finance Reform Laws in the Courts and in Congress*, 27 *O.C.U. L. Rev.* 665 (2002) [hereinafter

Just as people rely on shortcuts to help them make daily choices, citizens can obtain cues from certain limited political information that will help them decide whether to vote for or against a particular ballot question.¹¹ Lupia summarizes this reality of shortcuts as a “general attribute of human cognition”:

[O]ur ability to vote competently depends on how we use the limited information to which we attend. . . . We collapse complex phenomena into simple categories that we can later use and process quickly. We do not take these actions randomly, but when we observe aspects of the environment that have systematic and similar properties, we convert them into informational shortcuts, some of which are better known as brand names, interest-group endorsements, personal reputations, or political ideologies.¹²

Direct democracy is particularly challenging to voters because it poses complex questions in a low-information environment.¹³ Complexity is managed somewhat because voters are presented with binary choices on questions often limited to a single subject, a structure designed to simplify the process. The environment of direct democracy lacks one of the most powerful voting cues in candidate elections: party affiliation, a cue that appears on most general election ballots next to candidate names.¹⁴ Political parties and

Elizabeth Garrett, *Future of Campaign Finance*]; Elizabeth Garrett, *Voting with Cues*, 37 U. Rich. L. Rev. 1011 (2003) [hereinafter Elizabeth Garrett, *Voting with Cues*] (both making the argument primarily in the context of candidate elections, but referring to direct democracy); Michael Kang, *Restoring Voter Competence in Direct Democracy: Heuristic Cues and “Disclosure Plus,”* 50 UCLA L. Rev. 1141 (2003) (focusing only on direct democracy).

¹¹ See, e.g., Arthur Lupia & Mathew D. McCubbins, *supra* note 7, at 37 (“In politics as elsewhere, people respond to the bounds that the twin scourges of scarcity and complexity impose upon them. . . . [P]eople lack detailed information about almost everything, yet they do not regret most of the numerous choices that they make each day. It is wrong to conclude that people who lack detailed political information cannot make reasoned choices.”). See also Arthur Lupia & Richard Johnston, *supra* note 6, at 202 (noting that people “employ information shortcuts for nearly every conscious decision they make,” relying on cues such as brand names, reputations, and party ideologies).

¹² Arthur Lupia, *Dumber than Chimps? An Assessment of Direct Democracy Voters*, in *Dangerous Democracy: The Battle over Ballot Initiatives in America* 66, 69 (L.J. Sabato, H.R. Ernst & B.A. Larson eds., 2001).

¹³ Shaun Bowler & Todd Donovan, *Do Voters Have a Cue? Television Advertisements as a Source of Information in Citizen-Initiated Referendum Campaigns*, 41 Eur. J. Pol. Res. 777, 778 (2002) (noting that issues in direct democracy “may be quite complex and the cue provided by partisanship may not apply” and assessing how that affects the voters’ need for and use of other cues).

¹⁴ For work discussing the strength of the party cue in candidate elections, see David G. Lawrence, *On the Resurgence of Party Identification in the 1990s*, in *American Political Parties: Decline or Resurgence?* 30 (J.E. Cohen, R. Fleisher & P. Kantor eds., 2001) (finding a resurgence in mass partisanship in the 1980s and 1990s, although the recovery has not completely eliminated the decline that occurred in the 1960s and 1970s); Donald Green, Bradley Palmquist, & Eric Schickler, *Partisan Hearts and Minds: Political Parties and the Social Identities of Voters* (2002) (finding a resurgence in the social identity of partisanship); Gary C. Jacobson, *Party Polarization in National Politics: The Electoral Connection*, in *Polarized Politics* 9

officeholders may seek to provide a similar cue to voters in issue elections by endorsing a ballot question or publicly opposing it. However, this information is not provided on the ballot at the crucial moment of choice and may not be available in every election if voters must rely on voluntary endorsements. Mandatory disclosure statutes can be crafted so that they provide relevant information in a timely fashion and thereby allow information entrepreneurs to bring data to the voters' attention. The key is making sure that the right information is disclosed and in a way that increases its helpfulness to voters.

In issue elections, an effective voter shortcut is provided by information that reveals which groups support and oppose an initiative and the intensity of their views.¹⁵ For group-support to serve as a heuristic in issue elections, three conditions must be met. First, voters must correctly associate the group with a particular ideology or policy position that allows them to draw accurate inferences about the consequences of a vote for or against the ballot question.¹⁶ Second, the information conveyed by the group's support must be credible. Third, voters must be able to learn of the group's support at a time when it can affect their decisions.

At least two types of groups meet the first condition because they are associated easily and correctly in voters' minds with particular policies. First, ideological groups actively work to develop reputations and to publicize clear-cut positions on issues important to them. Examples of this type of group include the National Rifle Association

(J.R. Bond & R. Fleisher eds., 2000). Ballots for candidate elections may contain other helpful information, such as incumbency status or candidate occupation. See Monika L. McDermott, *Candidate Occupations and Voter Information Shortcuts* (work-in-progress, unpublished manuscript 2003).

¹⁵ See Michael X. Delli Carpini & Scott Keeter, *What Americans Know About Politics and Why It Matters* 51 (1996) (describing the use of membership in groups as a shortcut to broader conclusions about ideology); Paul M. Sniderman, Richard A. Brody & Philip E. Tetlock, *Reasoning and Choice: Explorations in Political Psychology* 113 (1991) (noting that voters can draw conclusions about ideology and positions on particular issues from knowledge of the groups to which candidates belong); Lawrence LeDuc, *Referendums and Initiatives: The Politics of Direct Democracy*, in 2 *Comparing Democracies* 70, 84-85 (2002) (in comparative work, noting that voters rely on party cues when available, and also on information provided by position taken by "well known groups, organizations, or individuals"). See also Ballot Initiative Strategy Center Foundation, *The Campaign Finance Reform Blind Spot: Ballot Measure Disclosure available at <http://www.ballot.org/blindspot/>* (Sept. 2002) [hereinafter BISCFC, *Blind Spot*] ("[V]oters may depend more heavily on organizational endorsements and an awareness of the chief funders of a ballot measure effort when casting their vote").

¹⁶ See Arthur Lupia & Mathew D. McCubbins, *supra* note 7, at 20 ("Information is valuable *only* when it improves the accuracy of predictions about consequences of choices."). Lupia has recently argued that persuasive cues are those based on attributes of the cue-giver that are "necessary to inform a cue-seeker's perceptions of a cue-giver's knowledge or interests." Arthur Lupia, *Who Can Persuade Whom?*

(NRA), NARAL Pro-Choice America, the Concord Coalition, and the Sierra Club. Such groups have an incentive to make sure the public knows what they stand for so that they can attract members who will pay dues and so that they can influence policymakers. Their efforts create a distinctive brand name. Ordinary voters can free-ride on this information about political reputation, learn about an ideological group's position on a ballot question, and determine with this limited information which vote on an initiative is consistent with their preferences.

Second, the support or opposition of some economic groups, like trade organizations, corporations, and labor unions, can serve as a voting cue. It is often clear to average citizens which general policies will help certain economic groups and which will hurt them. In a study of voting on insurance-related ballot initiatives, Lupia compared voters who knew nothing about the initiatives' details but knew the insurance industry's preference, with voters who were "model citizens" in that they consistently gave correct answers to detailed questions about the ballot questions. He also included in the study a third group of voters who knew nothing about the ballot question or about the insurance industry's position. The first two groups of voters demonstrated similar voting patterns, while the completely ignorant voters had very different voting patterns.¹⁷ This finding, supported by other studies, convinced Lupia that the position of an economic group with known preferences on an issue can serve as an effective shortcut for ordinary voters, substituting for encyclopedic information about the electoral choice. Similar accurate inferences would be possible if voters knew the position of Philip Morris on an initiative dealing with smoking, or if they knew the position of the American Federation of Teachers on a school choice proposal.¹⁸

The second necessary condition for group-affiliation to serve successfully as a voting cue is for the information it conveys to be credible. Information is credible when it is

Implications fro the Nexus of Psychology and Rational Choice Theory, in *Thinking About Political Psychology* 51, 56 (J.H. Kuklinski ed., 2002).

¹⁷ Arthur Lupia, *Shortcuts versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 *Am. Pol. Sci. Rev.* 63, 72 (1994). See also Paul Milgrom & John Roberts, *Relying on the Information of Interested Parties*, 17 *Rand J. Econ.* 18, 30-31 (1986) (using economic model to confirm findings that voters can use certain credible information provided by interested parties to make competent decisions).

¹⁸ But see Elizabeth Garrett, *Voting with Cues*, *supra* note 10, at 1029 (discussing limitations of the economic group voting cue).

costly to the speaker.¹⁹ Information about group-support is trustworthy when it is backed up by money, or when there is some reputational cost to the group if it lies. A particularly credible way to learn of a group's support is to learn how it is spending money in campaigns. Knowing that the oil and gas industry spent substantial sums to support or oppose a ballot initiative affecting the environment provides a credible signal of the industry's views on the initiative and of the intensity with which they hold such views. A voter can then determine, perhaps also armed with information about the Sierra Club's spending behavior, whether passage of the ballot question is likely to be in her interest, without knowing more about the details of the proposal.²⁰

Disclosure laws can therefore make relevant and credible information available to voters – or to informational entrepreneurs like the media and challengers in elections who act as intermediaries – at a time it can be helpful in the voting decision. Groups themselves sometimes voluntarily make information available about their financial support because they want to provide signals to like-minded voters. In such cases, mandatory campaign finance disclosure laws may do little to enhance voter competence because information about campaign spending is already publicly available. Even when some trustworthy information is available through the voluntary actions of groups, however, mandatory disclosure laws remain important to broadly publicize the group-support cues.²¹

Groups supporting or opposing ballot questions through endorsements or campaign contributions know that they provide signals for voters who disagree with their positions, as well as for those who share them. High profile ideological groups such as the NRA provide cues to all voters, some of whom will support a ballot question on the basis of the group's endorsement and some of whom will oppose it for the same reasons. Similarly, some voters will react positively to the National Organization of Women's endorsement;

¹⁹ See, e.g., Arthur Lupia & Mathew D. McCubbins, *supra* note 7, at 53-58 (describing how observable costly effort allows voters to assess credibility of cue).

²⁰ In some cases nonfinancial endorsements can credibly provide helpful information. See Elizabeth Garrett, *Voting with Cues*, *supra* note 10, at 1131-32. See also Bradley A. Smith, *supra* note 1, at 224 (drawing parallel between contributions and endorsements).

²¹ It is possible that more information would actually decrease voter competence because it would cause information cascades; however, it seems more likely that more information disseminated broadly would generally improve the overall competence of voters. See Elizabeth Garrett, *Voting with Cues*, *supra* note 10, at 1145-47 (discussing cascades and disclosure).

others will vote against the endorsed initiative solely because of NOW's support. Publicizing such a group's support beyond the members of the group, or beyond the universe of voters disposed favorably toward the group's objectives, may work counter to its objectives. Thus, groups may seek to target their endorsements so that the information reaches only their members and other sympathetic people, perhaps by publicizing their support in member newsletters or through emails sent only to members. Wider and systematic dissemination of the information through disclosure statutes is crucial, however, to improve the competence of all voters, including those who would react negatively to the signal provided by a particular group's support.

Learning of the position of economic groups on ballot initiatives may be even more difficult for voters. In some cases, businesses, unions, and trade organizations may widely publicize their support with credible evidence. In many other cases, they will try to target the publicity so that it reaches only their members, shareholders, employees, and other sympathetic people, particularly if they fear negative voter reaction to news of their activity. Bowler and Donovan found that heavy, one-sided spending in initiative campaigns may increase negative voting if the spending reveals that some disfavored group, like tobacco companies or insurance companies, is a major supporter of the ballot proposal.²² Lupia's work studying the insurance industry, as well as Bowler and Donovan's analysis, demonstrates that information about certain economic groups may increase voter competence, often in ways that the economic groups will not like. In competitive campaigns, groups may not be able to control how widely the information is disseminated, but absent comprehensive and mandatory disclosure, some groups may make substantial and successful efforts to avoid publicity.

A focus on ideological organizations and notorious economic groups – that is, groups with reputations that are likely to cause substantial voter backlash – is important for any assessment of disclosure statutes because these groups are among the most likely to strongly resist widespread publicity. If groups understand that knowledge of their support actually produces a public reaction *against* their position on ballot questions, they will work to hide the information. They may not even publicize their support to others

who share their objectives for fear of wider publicity. However, they will still want to spend money in the campaign in a way that will help achieve their policy objectives, and they can adopt one of two strategies to do so. Either they can work to hide the spending altogether, or they can rely on deception, disguising the source of the income by using conduit organizations with names that resonate positively for many voters. Often, these VPAs are designed to sound as though they are grassroots organizations, or they are named so that voters confuse them with other well-known organizations with more favorable reputations.

Thus, mandatory disclosure of the true sources of campaign spending may be the only way to provide voters with credible signals based on group-support. Although some information is available for voters now through well-publicized interest group endorsements, online voter guides, and voluntary disclosure of campaign contributions and lobbying activity, disclosure is not systematic without mandatory disclosure laws. Moreover, disclosure must include more than the name of an organization, which may be misleading, but must also identify the entities providing the main financial support for the organization and whether the group receives only a few large contributions or is truly part of a grassroots movement. Some information most likely to allow voters to construct accurate heuristics – the costly activity of notorious groups – is precisely the information least likely to be revealed absent disclosure laws. Of course, these groups may work diligently to circumvent aggressive disclosure statutes. And, if disclosure statutes are crafted to reduce loopholes significantly, some of these groups may choose not to communicate in the political realm. Thus, the more successful the disclosure statute, the higher the First Amendment stakes. Before we describe some of the methods of circumvention currently occurring in direct democracy, we will set out the legal principles that will determine the constitutionality of disclosure regimes.

II. Jurisprudence Relating to Disclosure

²² Shaun Bowler & Todd Donovan, *supra* note 9, at 53-55 (also suggesting that the noise that the expenditure of so much money produces may result in defensive “no” voting as the electorate begins to worry that a substantial policy change will have unexpected deleterious consequences).

Disclosure has often been portrayed as relatively unproblematic from a First Amendment perspective, at least compared to more intrusive regulations limiting contributions and expenditures. Increasingly, however, constitutional challenges are being mounted against disclosure statutes. Courts have held that statutes must pass “exacting scrutiny,” and they look for an important state interest to justify the regulation and for a “ ‘relevant correlation’ or ‘substantial relation’ between the government interest and the information required to be disclosed.”²³ Many but not all disclosure regulations pass this test, and *McConnell v. FEC*’s analysis strengthens the case in favor of the constitutionality of disclosure that removes the deceptive veils shrouding VPAs.

Disclosure statutes in candidate elections are justified in three ways: they shed light on campaign activity so they reduce the actual occurrence and appearance of *quid pro quo* corruption; they help enforce permissible limitations on contributions and expenditures; and they provide information that allows voters to evaluate candidates and “to place more precisely each candidate along the political spectrum.”²⁴ The Supreme Court has held that issue elections do not pose the risk of *quid pro quo* corruption, but some mandatory disclosure may nevertheless be justified on other grounds. First, the informational interest is present in direct democracy, and it is more acute because the information environment is less robust with the absence of party cues. Recently, the Ninth Circuit used a concept much like voter competence to describe the state interest served by disclosure statutes in direct democracy. “By requiring disclosure of the source and amount of funds spent for express ballot-measure advocacy, California – at a minimum – provides its voters with a *useful shorthand* for evaluating the speaker behind the sound bite.”²⁵

²³ *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam).

²⁴ *Id.* at 66-68. See also *McConnell*, 124 S.Ct. at 690 (opinion of Stevens and O’Connor) (relying on three *Buckley* justifications to uphold BCRA disclosure).

²⁵ *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1107 (9th Cir. 2003) (holding that disclosure statutes relating to communications that advocated positions with respect to initiatives could be constitutional and remanding to lower court to determine whether the California statute was tailored to meet this state interest). See also *id.* at 1105 (stating that all the money spent on initiatives “produces a cacophony of political communications through which California voters must pick out meaningful and accurate messages. Given the complexity of the issues and the unwillingness of much of the electorate to independently study the propriety of individual ballot measures, we think being able to evaluate who is doing the talking is of great importance.”).

Second, the Supreme Court has suggested that disclosure “may well be justified ... by the special state interest in protecting the integrity of the ballot-initiative process.”²⁶ This corruption-like rationale arises because of the history and nature of direct democracy, a lawmaking process designed to empower ordinary people and grassroots movements and to reduce the influence of wealthy special interests.²⁷ Disclosure statutes that reveal the activity of such interest groups, as well as the grassroots character of groups supporting and opposing ballot questions, are thus related to the “integrity” of the process.

Third, some groups active in campaigns seek to disguise themselves using misleading or meaningless names, so disclosure statutes can be justified as a way to reveal such deceptions.²⁸ Using an analogy that underscores the relationship between disclosure and the integrity of citizen lawmaking, the Ninth Circuit in *California Pro-Life Council, Inc. v. Getman* observed that voters in initiative elections act as legislators, and thus, just as traditional legislators, they have an interest in knowing who is lobbying them.²⁹ In *McConnell v. FEC*, the Court was particularly concerned that interest groups had run advertisements to influence candidate elections and yet had hidden their sponsorship behind “dubious and misleading names.”³⁰ It identified two VPAs: “Citizens for Better Medicare,” a front organization for the pharmaceutical industry that was active in the 2000 congressional races, and “Republicans for Clean Air,” a group funded by the Wyly brothers that spent \$25 million in the 2000 Republican presidential primaries.³¹

The few cases considered by the Supreme Court that implicate disclosure statutes in direct democracy suggest that some regulation is constitutional as long as it is tailored to meet important state interests and does not involve substantial disclosure of information about individuals during face-to-face encounters. For example, in *Buckley v. American Constitutional Law Foundation (ACLF)*, the Court struck down requirements that petition

²⁶ *Watchtower Bible & Tract Society of New York v. Village of Stratton*, 536 U.S. 150, 167 (2002) (distinguishing typical disclosure statutes from the regulation found unconstitutional in the case).

²⁷ See *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 202-203 (1999) [hereinafter *ACLF*].

²⁸ Frances R. Hill, *Corporate Philanthropy and Campaign Finance: Exempt Organizations as Corporate-Candidate Conduits*, 41 N.Y. Sch. L. Rev. 881, 937-38 (1997).

²⁹ *Getman*, 328 F.3d at 1106 (citing rationale for requiring disclosure by lobbyists used in *United States v. Harriss*, 347 U.S. 612 (1954)).

³⁰ *McConnell*, 124 S.Ct. at 691 (opinion of Stevens and O’Connor) (quoting *McConnell v. Federal Election Commission*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003)).

³¹ See *id.* at 651, 691.

circulators wear name badges and that reports filed with the state reveal the names, addresses, and compensation paid to individual circulators.³² The Court suggested, however, that disclosure of the identity of the proponents of a ballot question and the total amount of money spent for a petition campaign, which would include the aggregate figure paid to circulators, was appropriately aimed at the state's substantial interest in controlling the domination of the initiative process by special interests.³³ In her opinion in *ACLF*, Justice O'Connor characterized disclosure laws as the "essential cornerstone" to effective campaign reform.³⁴ She noted that disclosure of the amounts and sources of campaign contributions and expenditures "assists voters in making intelligent and knowing choices in the election process."³⁵

Other cases dealing with regulation of initiative campaigns hint that disclosure is constitutionally acceptable and even a necessary part of a legitimate electoral process. In dictum in *First National Bank of Boston v. Bellotti*, a case striking down prohibitions on corporate expenditures in issue campaigns, the Court noted that "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected."³⁶ Crucial for voters, the Court stated, is knowing the "source and credibility of the advocate" of a certain position.³⁷ When it struck down limits on contributions to ballot committees, the Court in *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley* opined that "[t]he integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed; if it is thought wise, legislation can outlaw anonymous contributions."³⁸ These statements strongly suggest that the Supreme Court has understood the need for disclosure in the initiative process and acknowledges an independent informational interest.

³² *ACLF*, 525 U.S. at 200.

³³ *Id.* at 202-203.

³⁴ *Id.* at 223 (O'Connor, dissenting in part) (quoting H. Alexander, *Financing Politics: Money, Elections and Political Reform* 164 (4th ed. 1992)).

³⁵ *Id.* at 224.

³⁶ 435 U.S. 765, 792 n.32 (1978). See also *McConnell*, 124 S.Ct. at 696 n.88 (opinion of Stevens and O'Connor) (citing this aspect of *Bellotti* with approval).

³⁷ *Bellotti*, 435 U.S. at 791-92.

³⁸ 454 U.S. 290, 299-300 (1981).

Two lines of cases may prove problematic for a state wishing to outlaw anonymity in direct democracy, although *McConnell v. FEC* has changed the landscape with regard to the second group of precedents so that disclosure is more likely to overcome these objections. Even with the recent favorable Supreme Court decision, however, these cases reveal that disclosure statutes must be drafted carefully to avoid constitutional pitfalls. First, in *McIntyre v. Ohio Elections Commission*,³⁹ the Court affirmed Mrs. McIntyre's right to disseminate an anonymous leaflet containing her views on a referendum proposing a school tax levy. Interestingly, a recent study of the case reveals that Mrs. McIntyre did not intend to distribute literature anonymously. Instead, a letter she wrote to the counsel for the Ohio Elections Commission explained that a copying error resulted in her name and address being left off the leaflets.⁴⁰ Nevertheless, the issue decided in the case was the constitutionality of a regulation fining individuals who passed out anonymous campaign literature. Some courts have read the holding of *McIntyre* broadly to protect anonymity with respect to various forms of election-related speech, including in one case (later reversed on other grounds) to protect anonymity of candidate-originated literature.⁴¹ Justice Thomas, the only justice in *McConnell* who would have found all of BCRA's disclosure provisions unconstitutional, understood *McIntyre* as overruling *Buckley*'s holding allowing disclosure of express advocacy.⁴²

Such broad readings are inconsistent with other cases indicating approval of mandatory disclosure in issue elections through regulations requiring extensive filings with a state official throughout the campaign. Moreover, broad holdings are not compelled by *McIntyre*. The Supreme Court's opinion left ample room for the conclusion that the holding would not apply to most disclosure regimes.⁴³ Justice

³⁹ 514 U.S. 334 (1995).

⁴⁰ Brian K. Pinaire, *A Funny Thing Happened on the Way to the Market: The Supreme Court and Freedom of Speech in the Electoral Process* 209 (Ph.D. dissertation, Rutgers University, Spring 2003).

⁴¹ *Griset v. Fair Political Practices Commission*, 82 Cal. Rptr. 2d 25, 33-34 (Cal. Ct. App. 1999), *rev'd on other grounds*, 23 P.3d 43 (Cal. 2001). There are other examples of broad readings of *McIntyre*. See, e.g., *Yes for Life PAC v. Webster*, 84 F. Supp. 2d 150 (D. Me. 2000) (allowing broadcast advertisements in ballot question campaign to be run anonymously); *West Virginians for Life, Inc. v. Shoda*, 960 F. Supp. 1036 (S.D.W.V. 1996) (applying *McIntyre* to issue advocacy in candidate elections as well as issue elections).

⁴² *McConnell*, 124 S.Ct. at 736 (Thomas, dissenting).

⁴³ See *McIntyre*, 514 U.S. at 349 (little information imparted by the identity of "a private citizen who is not known to the recipient"); *id.* at 351 (statute overbroad because it applies to "individuals . . . using their own modest resources"); *id.* at 353 (distinguishing this case from the dictum in *Bellotti* because *Bellotti* was not

Ginsburg wrote separately solely to emphasize that the case concerned “an individual leafleteer who, within her local community, spoke her mind, but sometimes not her name. We do not thereby hold that the State may not *in other, larger circumstances* require the speaker to disclose its interest by disclosing its identity.”⁴⁴ The facts of *McIntyre* – an individual passing out leaflets in a school board referendum, which might involve face-to-face contact in some circumstances – are significantly different from the circumstances to which most disclosure statutes apply.

A relatively narrow reading of *McIntyre* is also consistent with the analysis in *Watchtower Bible & Tract Society of New York v. Village of Stratton*.⁴⁵ In that case, the Court invalidated a local ordinance requiring door-to-door canvassers, including those with political objectives, to obtain a permit. The Court described the activity that it was protecting as communicating about “the poorly financed causes of little people.”⁴⁶ The majority in *McConnell v. FEC* took account of context in noting that BCRA’s “fidelity to those imperatives [of protecting electoral integrity and providing information to voters] ... sets it apart ... from the Ohio statute banning the distribution of anonymous campaign literature struck down in *McIntyre*.”⁴⁷ The First Amendment issues are significantly different in the context of disclosure through official channels of the source of substantial sums of money spent on widely-broadcast political advertisements from the issues raised when an individual distributes handbills in a small community.

If *McIntyre* is appropriately limited to protecting anonymity of individuals passing out leaflets and occasionally encountering others who might vehemently disagree with them, effective disclosure statutes can be drafted to protect those interests. To ensure that disclosure statutes do not implicate the kind of speech and speaker at issue in *McIntyre*,

dealing with “independent communications by an individual like Mrs. McIntyre”). See also *Majors v. Abell*, 792 N.E.2d 22, 28-29 (Ind. 2003) (providing answer to certified question that statute requiring all general public political advertising to disclose who paid for it was constitutional notwithstanding *McIntyre* because it exempted small direct mailings and applied only in candidate elections); *Majors v. Abell*, 361 F.3d 349 (7th Cir. 2004) (holding Indiana statute constitutional, after guidance from state supreme court, with a discussion of the somewhat unclear relationship between *McConnell* and *McIntyre*).

⁴⁴ *McIntyre*, 514 U.S. at 358 (Ginsburg, concurring) (emphasis added).

⁴⁵ 536 U.S. 150 (2002).

⁴⁶ *Id.* at 163 (quoting *Martin v. City of Struthers*, 319 U.S. 141, 144-46 (1943)). In addition, the Court characterized *McIntyre* as involving the “distribution of unsigned handbills” and suggested different constitutional treatment for disclosure statutes could be justified by the interests identified in the text. *Id.* at 166-67. See also Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. Rev. 265, 274-76 (2000).

de minimis provisions can exempt individuals spending relatively small amounts to fund political speech. Most statutes require disclosure forms be filed with government officials and then broadly disseminated or included on broadcast advertisements, rather than requiring individuals to disclose their identities in personal encounters with other citizens. As suggested by the opinions in *ACLF*, a disclosure statute should focus on revealing the identities of entities primarily bankrolling a petition drive or communications in a political campaign, not the names of the people who circulate petitions or actually hand out printed communications.

The Court's analysis in *McIntyre* is limited in another way: the opinion overlooks the concern about voter competence. The Court describes the relevant informational issue in *McIntyre* as allowing voters enough information to assess the arguments provided in the communication. The majority holds that "the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude."⁴⁸ It argues that voters can take silence into account when casting their ballots, discounting the credibility of any political advertisement that does not disclose who is behind it. This understanding of the informational interest at stake in disclosure is different from the voter competence concern.⁴⁹ If voter competence is the policymakers' objective, then disclosure of the source of the communication is not important because it allows a citizen to judge the accuracy of the content of the advertisement. Rather, the identity of some sources and the aggregate amount that they are spending in a campaign provide voters the cues they need to determine whether the ballot question is in their interest.⁵⁰ This information is separate from any arguments made in the ad, except to the extent that the latter reveal the group's position and provide further information about its ideology and policy agenda. But such information is helpful as a group-support voting cue only when it is linked explicitly to a particular group – not when it is assessed in the absence of information about the communicator.

⁴⁷ *McConnell*, 124 S.Ct. at 696 n.88 (opinion of Stevens and O'Connor).

⁴⁸ *McIntyre*, 514 U.S. at 348. See also id. at 349 n.11 (stating that while the "identity of the source is helpful in evaluating ideas," "the best test of truth is the power of the thought to get itself accepted in the competition of the market").

⁴⁹ The *Getman* court recognized this when it rejected the argument that *McIntyre* compels invalidation of disclosure statutes. 328 F.3d at 1103-04.

⁵⁰ See Michael Kang, *supra* note 10, at 1172 (discussing information provided by source-disclosure that is independent of the content of the communication).

Although *McIntyre*'s strong support for anonymity may be limited to individuals mounting relatively unsophisticated campaigns, there is a larger concern about protecting groups that fear retaliation after disclosure because the ideas that they promote are violently disliked by the majority. Drawing on *NAACP v. Alabama*,⁵¹ the Court in *Buckley v. Valeo* required that minor parties be allowed an exemption from disclosure if they presented specific evidence of hostility, threats, harassment and reprisals.⁵² A few years later, the Court applied that exemption to the Socialist Workers Party after the Party submitted proof of threatening phone calls, hate mail, destruction of property, police harassment, and shots fired at an office.⁵³ The *McConnell* Court reaffirmed the need for case-by-case exceptions to protect groups at risk of "economic reprisals or physical threats."⁵⁴ The structure of any exemption must be carefully devised so that groups actually can avoid publicizing the names of their members or signaling that they might be involved in presenting despised viewpoints.⁵⁵ This concern for anonymity, while important, does not sweep broadly, and it would not allow economic and ideological groups that prompt some negative voter reaction to avoid disclosure justified by a voter competence rationale.

There may be an additional concern about reprisals in the context of direct democracy.⁵⁶ Groups often resort to the initiative process because they support policy change opposed by government officials. If legislators could be convinced to enact the proposed reforms through the regular legislative process, presumably in most cases supporters would take that route. Thus, it is possible that lawmakers and executive branch officials might retaliate against those who seek to bypass them by bringing a ballot question directly to the people.⁵⁷ Whether this is a significant fear remains to be

⁵¹ 357 U.S. 449 (1958).

⁵² *Buckley*, 424 U.S. at 74. *McIntyre* seems also to be concerned about the possibility of this sort of retaliation in the context of individual pamphleteers. See 514 U.S. at 355.

⁵³ *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982). The Federal Election Commission recently decided to retain the exemption for the Socialist Party because its members still face a threat of harassment and retaliation. See Sharon Theimer, *Socialist Workers Party Gets FEC Exemption on Revealing Donors*, AP Newswires, Apr. 3, 2003.

⁵⁴ *McConnell*, 124 S.Ct. at 691-92 (opinion of Stevens and O'Connor).

⁵⁵ For a discussion of these concerns, see Elizabeth Garrett, *Voting with Cues*, supra note 10, at 1143-44.

⁵⁶ We appreciate John Matsusaka's suggestion here.

⁵⁷ Policy makers can undermine the results of direct democracy in ways other than retaliating against the group using the initiative process successfully; legislative and executive branch officials can fail to implement measures, underfund programs, or in rare instances, reverse statutory initiatives. See Elisabeth

seen; many of the case studies we provide in Part III suggest that the groups seeking to evade disclosure are relatively powerful in legislatures and find their influence limited only because politicians do not want to be too closely associated with groups disliked by most citizens, such as tobacco companies and pharmaceutical manufacturers. In addition, groups do not necessarily take the direct democracy route just because they cannot influence change in the legislature; for example, constitutional initiatives are attractive because they cannot be changed unless the people vote for another initiative, and even some legislative initiatives can be insulated from changes by future, perhaps less sympathetic legislatures.

Nonetheless, it is likely that at least some groups and people work to keep their involvement in certain ballot questions private because they fear lawmakers who know of their activity will react negatively, perhaps by refusing to help them with future projects or by limiting their access to policymakers. Such fears may well reduce the willingness of groups to become involved in direct democracy and to engage in the political communication it engenders, which may also result in fewer initiatives aimed at issues ignored by politicians. This would reduce the ability of direct democracy to serve its original purposes – to circumvent entrenched interests and allow the people to implement policies opposed by a few powerful entities. This cost must be balanced against the improvement in voter competence disclosure produces.

The reasoning that supports a second line of problematic cases has been rejected by the Supreme Court in *McConnell v. FEC*. Until this recent decision, there was a judicial distinction between express advocacy and issue advocacy. The distinction arose because the *Buckley* Court limited federal disclosure provisions to money used for political communication that expressly advocated the election or defeat of clearly identified candidates.⁵⁸ It provided examples of words used for express advocacy in a footnote,⁵⁹ terms which came to be known as the “magic words” because many courts used them to

R. Gerber, Arthur Lupia, Mathew D. McCubbins & D. Roderick Kiewiet, *Stealing the Initiative: How State Government Responds to Direct Democracy* (2000); Daniel A. Smith, *Overtaking Term Limits: The Legislature's Own Private Idaho?* 36 PS 215 (2003); Daniel A. Smith, *Homeward Bound? Micro-Level Legislative Responsiveness to Ballot Initiatives*, 1 State Politics & Pol'y Q. 50 (2001).

⁵⁸ 424 U.S. at 80.

⁵⁹ 424 U.S. at 44 n.52 (providing examples of “ ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’ ”).

distinguish between communications that could be regulated consistent with the First Amendment and those that could not.⁶⁰

In upholding disclosure and other regulation of “electioneering communication,” a term that includes broadcast advertisements that merely refer to a federal candidate in the period before an election and do not necessarily contain the magic words, the *McConnell* majority clarified that the *Buckley* line between express advocacy and other campaign communication “was the product of statutory interpretation rather than a constitutional command.”⁶¹ It rejected the *Buckley* test because it could not “be squared with our longstanding recognition that the presence of absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad.”⁶² It held instead that most of the advertisements during a political campaign that avoided the use of the magic words were clearly intended to influence the federal election, and they may well have been more effective in persuading voters. Thus, the Court allowed Congress to apply disclosure rules and segregated fund requirements to electioneering communication and noted that broader coverage eliminated a way political actors had used the loophole caused by *Buckley*’s interpretation of express advocacy to circumvent campaign laws.

Even with the Court’s resounding rejection of cases that had drawn a constitutional line between express advocacy using the magic words and other electioneering communication, some of the reasoning behind the judicial distinction remains important. *Buckley*’s interpretation of the federal statute and the subsequent cases applying the magic words test reflected the view that election-related communication can be regulated in a way that other political speech cannot, and perhaps also the view that candidate-related speech can be regulated in a way that issue-related speech cannot. Although the Supreme Court now accepts a broader definition of election-related speech in the candidate election context, the differences in context surrounding political advertisements remain important. Courts are generally hesitant to allow substantial regulation of communication that is not clearly linked to an election, and in some cases to a candidate.

⁶⁰ See, e.g., *Faucher v. Federal Election Commission*, 928 F.2d 468 (1st Cir. 1991); *Virginia Society for Human Life, Inc. v. Federal Election Commission*, 263 F.3d 379 (4th Cir. 2001); *Chamber of Commerce v. Moore*, 288 F.3d 187 (5th Cir. 2002). But see *Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir. 1987) (not requiring magic words but allowing regulation when communications “take as a whole and in context unambiguously” urge a particular electoral outcome).

⁶¹ *McConnell*, 124 S.Ct. at 688 (opinion of Stevens and O’Connor).

Disclosure is more susceptible to constitutional challenge when it applies to initiative campaigns because the justification for regulation must be based primarily on informational concerns and cannot rely on combating *quid pro quo* corruption.⁶³ The informational rationale, which implicates a different kind of corruption that occurs when groups deceive voters about the groups behind a political advertisement, must be balanced against the burdens of disclosure. Disclosure will certainly chill some speech, particularly from groups that fear voter backlash in the election. Moreover, regulation imposes costs of compliance that can be significant for smaller organizations.⁶⁴

Although the constitutional landscape still contains some minefields, much mandatory disclosure of groups active in direct democracy and the amounts of money they are spending is likely to be permissible, particularly after *McConnell*. Some of the groups we study, like those organized under Section 527, are organized explicitly to affect elections so all their communications would seem presumptively related to their support or opposition of candidates who will affect their political agendas.⁶⁵ Drafters cannot be heedless of First Amendment concerns, however, because *McIntyre* evidences a concern with anonymous speech in limited circumstances and there is still some sort of line between electioneering communication and pure political speech, a line that may be drawn differently when disclosure relates to direct democracy.

In addition to negotiating around remaining constitutional hurdles, drafters must be aware that groups seeking to evade disclosure will seek out gaps in coverage so that they can remain active in campaigns but not risk negative voter reactions. Such activity is even more pronounced when regulations impose limitations on contributions and expenditures, but avoiding disclosure alone can be a sufficient rationale for evasive

⁶² Id. at 689.

⁶³ See Elizabeth Garrett, *supra* note 3, at 237 (noting that Kennedy finds informational concerns an independent justification for disclosure, and the majority puts great emphasis on such concerns while also linking it to the corruption implicated by deception).

⁶⁴ See Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 Yale L.J. 1049, 1082-83 (1996) (arguing that any sort of regulation disadvantages grassroots movements relative to the wealthy because “regulation favors those already familiar with the regulatory machinery and those with the money and sophistication to hire the lawyers, accountants, and lobbyists needed to comply with complex filing requirements”).

⁶⁵ See Donald B. Tobin, *Anonymous Speech and Section 527 of the Internal Revenue Code*, 37 Ga. L. Rev. 611, 675-76 (2003). A federal court of appeals has recently upheld disclosure requirements for Section 527 organization, holding that the federal government can condition the grant of a tax subsidy on the condition

tactics. In Part III, we provide examples of ways groups are currently seeking to evade disclosure regulations imposed by many states on the initiative and referendum process.

III. VPAs in Ballot Issue Elections

The involvement of VPAs in ballot issue elections is merely the latest iteration of political operatives attempting to shelter their campaign finance activities. By exploiting existing disclosure loopholes in the federal tax code (e.g., entities organized under sections 501(c) and 527 of the code), in state statutes concerning corporations and associations (e.g., limited liability corporations and education committees), and state campaign finance statutes (e.g., committees of continuous existence and independent expenditure committees), political operatives can use VPAs to circumvent campaign finance disclosure laws and shroud the identity of people and groups active in direct democracy contests.

Not all entities organized under one of these federal or state structures are VPAs. Hoping to benefit from group-support heuristics, many ideological groups with established political reputations publicize their involvement in initiative campaigns, as do some economic groups like trade associations and unions. In 2002, for instance, four prominent federal nonprofit organizations were instrumental in passing Amendment 6 in Florida, a winning constitutional initiative that prohibited workplace smoking. The involvement of the four nonprofits was broadly known before the election due to state disclosure laws and press coverage, and their expenditures accounted for \$5.850 million of the \$5.854 million (99.9 percent) of the total raised by Smoke-Free for Health, Inc., the registered issue committee sponsoring the measure. The American Cancer Society (its national headquarters and several of its state chapters) anted up \$4.35 million, with the American Heart Association contributing \$1 million, the American Lung Association adding \$400,000, and the Campaign for Tobacco-Free Kids another \$100,000.⁶⁶

that organizations disclose information about their expenditures and contributions. *Mobile Republican Assembly v. United States*, 353 F.3d 1357 (11th Cir. 2003).

⁶⁶ Florida Department of State, Division of Elections, *Smoke-Free for Health, Inc. (PAC)*, available at <http://election.dos.state.fl.us/cgi-bin/ComHtml.exe?account=34548> (last visited May 28, 2003). While the contributions to the Smoke-Free for Health issue committee by these four charitable organizations constituted “lobbying expenditures” by charitable organizations, the American Heart Association, for

Similarly, entities with broad name recognition accounted for the bulk of contributions to the Florida issue committee that sponsored Amendment 9 in 2002, a successful class-size reduction measure. The issue committee that backed the initiative, the Coalition to Reduce Class Size, raised a total of \$1,342,473. Two charitable organizations, People for the American Way (PFAW) and the National Association for the Advancement of Colored People (NAACP) – both of which have worked to associate their names with a particular ideology so that knowing of their support, without additional information, can serve as a cue – accounted for 29 percent of the total contributions made to the Coalition. PFAW, a liberal 501(c)(4) based in Washington, D.C., contributed \$184,000 directly to the issue committee (and loaned it an additional \$150,000), while the NAACP contributed another \$50,000. PFAW also contributed \$411,150 to People for the American Way/Florida Campaign Account, the nonprofit’s PAC registered in the state of Florida, to produce and air a hard-hitting ad promoting Amendment 9 (while simultaneously attacking Governor Jeb Bush’s record on public education). Two other nonprofits that often serve as voting cues, the National Educational Association and the American Federation of Teachers, both 501(c)(5) labor unions, contributed \$450,000 and \$175,000 respectively to the issue committee, which combined amounted to nearly 47 percent of the total raised by the Coalition to Reduce Class Size.⁶⁷

However, the federal and state structures can work to hide the real political actors from voters, rather than to provide voters cues to improve their competence. There are several ways that VPAs can be used to cloak pertinent information concerning the financing of ballot measure campaigns. First, VPAs may intentionally mislead voters by

example, did not report its contributions on line 81a on its Form 990 for 2002, as it did not exceed the “no substantial part” limitation of its lobbying activities. American Heart Association, *2001 990 Report*, available at http://www.americanheart.org/downloadable/heartsmart/1039042012210IRS_2001_990.pdf (Nov. 14, 2002).

⁶⁷ Florida Department of State, Division of Elections, *Coalition to Reduce Class Size (PAC)*, available at <http://election.dos.state.fl.us/cgi-bin/ComHtml.exe?account=34393> (last visited May 28, 2003). As with other nonprofits, unions [501(c)(5)s] may engage in a political activity (i.e., “one intended to influence the selection, nomination, election or appointment of anyone to a federal, state, or local public office”) without jeopardizing their exempt status as long as it does not constitute their primary activity. Unions are required to report their political expenditures on their Form 990 (line 81). In a complaint filed in 2000 with the Internal Revenue Service, the conservative Landmark Legal Foundation claims that the NEA has consistently reported no political expenditures on its recent Forms 990. *The Organized Labor Loophole*, Wash. Times, Mar. 16, 2002, at A11.

using patriotic or populist sounding names. An entity can be named with an uplifting or grassroots catch-phrase so that voters in direct democracy contests will incorrectly assume that these groups support issues more likely to be aligned with their interests than are efforts that are openly financed only by wealthy people or industries.⁶⁸ For example, to appeal to environmentalists, a VPA funded primarily by real estate developers might call itself Citizens for a Greener Oregon. Without aggressive disclosure of the contributions made to these VPAs, efforts to reveal the vested interests behind them are virtually impossible.

Second and often simultaneously, VPAs may be used to disguise notorious entities that fear voter backlash if they are revealed publicly. Such VPAs hide the real parties-in-interest behind innocuous sounding or, even more problematically, behind disingenuous names that closely resemble the names of groups with established ideological brand names.⁶⁹ These organizations can only provide an accurate voting cue if more information about the sources of funding is disclosed. For example, a group might try to appropriate a voting cue by using a name like American Citizens for Drug Reform or American Association of Seniors rather than using an accurate and helpful name like Association of American Pharmaceutical Manufacturers.⁷⁰ Although their

⁶⁸ See Elizabeth Garrett & Elisabeth R. Gerber, *Money in the Initiative and Referendum Process: Evidence of its Effects and Prospects for Reform*, in *The Battle Over Citizen Lawmaking* 73, 87-90 (M.D. Waters ed., 2001) (discussing information provided by grassroots nature of group); Daniel A. Smith & Robert J. Herrington, *The Process of Direct Democracy: Colorado's 1996 Parental Rights Amendment* 37 Soc. Sci. J. 179, 181-82 (2000) (discussing the relationship between the absolute number and average dollar amount of contributions to a ballot campaign and its grassroots nature).

⁶⁹ See Michael Kang, *supra* note 10, at 1158-59 (describing this phenomenon).

⁷⁰ This scenario is not far-fetched. Citizens for Better Medicare (CBM), a nonprofit Section 527 organization not required at the time to disclose its supporters, was active in congressional races in 1999-2000. Despite its grassroots-sounding name, CBM was actually bankrolled by the pharmaceutical industry to the tune of \$40 to 65 million. See Allan Cigler, *Interest Groups and Financing the 2000 Elections*, in *Financing the 2000 Election* 180 (D. Magleby ed., 2002); Common Cause, *Under the Radar: The Attack of the "Stealth PACs" on Our Nation's Elections* 8 (2002). In 2002, several other groups (such as United Seniors Association, The Seniors Coalition, and the 60 Plus Association) allegedly made up of American seniors were largely shells for drug companies. See David Magleby & J. Quinn Monson, *The Last Hurrah? Soft Money and Issue Advocacy in the 2002 Congressional Elections*, in *The Last Hurrah?* 21 (D. Magleby & J.Q. Monson, eds., 2003); Daniel A. Smith, *Strings Attached: Outside Money in Colorado's Seventh Congressional District*, in *The Last Hurrah?* 191 (D. Magleby & J.Q. Monson, eds., 2003). The majority in *McConnell* relied on the CBM example and others in its decision to uphold BCRA's aggressive disclosure regulations applying to candidate elections. See 124 S.Ct. at 651, 691 (opinion of Stevens and O'Connor). The industry now has plans to turn its attention and substantial resources to state ballot initiatives, budgeting nearly \$16 million to fight an initiative in Ohio that would lower drug prices for the uninsured, and spending nearly \$50 million on all state advocacy. See Robert Pear, *Drug Companies Increase*

opponents in issue campaigns have an incentive to reveal trickery, particularly if the deceptive name is an attempt to appropriate some of the brand name of other ideological groups who will work to protect the strength of their voting cue, entities with low popular appeal are able to use VPAs to participate in issue campaigns with reduced risk that their activities will become widely known.

Third, even organizations with broad name recognition and established credentials may be used as vehicles for other interests not normally associated with the organizations. Because the structures we discuss below allow groups to avoid disclosure of their donors, groups that agree to be used as conduits are usually not at risk of being discovered, and they thereby avoid tarnishing their reputations. Although these generally reputable groups may have other reasons to resist accepting funding from entities and individuals who do not share their ideological commitments, in some cases the desire for funds and influence, and the relatively low possibility of discovery, may prove to be irresistibly tempting. Although we would not expect this sort of behavior to occur frequently because of the threat of brand name dilution and the undermining of the groups' larger objectives, without disclosure statutes it is difficult to determine whether groups with established brand names are being used as cleansing conduits for other interests. For those entities with recognized brand names that do not accept support from interests with conflicting objectives, disclosure will work little harm, other than compliance costs, and may actually enhance their ability to credibly associate their groups with particular policy positions.⁷¹

Fourth, VPAs may be used to hide the fact that funding is primarily coming from out-of-state sources. Voters could use information that a ballot question is backed primarily by national interests or out-of-state entities as a cue that the issue is not necessarily in the best interests of the state or its citizens.⁷² In such cases, out-of-state interests have an incentive to use VPAs so they can be covertly active in initiatives that may have national consequences, perhaps by raising an issue's profile on the national

Spending on Efforts to Lobby Congress and Governments, N.Y. Times, June 1, 2003, at A20. It seems likely that at least some of that money will flow through VPAs.

⁷¹ This has long been the argument of some good governance nonprofits, such as Colorado Common Cause, which has indicated on several occasions that it would be willing to provide a list of contributors.

⁷² See, e.g., *Getman*, 328 F. 3d at 1106 n.25 (discussing evidence that learning that majority of support for a ballot proposition came from out-of-state interests caused popular support to wane significantly).

agenda. The following discussion of the various organizational structures available in direct democracy provides examples of all four uses of VPAs.

A. A Brief History of VPAs in Ballot Campaigns

Beginning with the first ballot initiative campaigns in the early 20th century, individuals and interest groups have tried to conceal their identities. At the time, artifice was relatively simple due to weak or nonexistent state statutes regulating campaign finance disclosure.⁷³ Unfortunately, the scholarly research documenting such cloaked activities is thin and largely anecdotal. There is also little research that reveals the levels of spending on ballot measures in the early part of the 20th century. Yet there is some evidence that individuals and groups involved in issue elections endeavored to shroud their true identities in the very earliest of issue campaigns.

In 1912, the first year statewide initiatives were permitted in Colorado, for instance, voters were confronted with 32 ballot measures, including 20 initiatives. One of the initiatives, Measure 4, a statute designed to regulate public utilities, was advertised as the work of organized labor. Indeed, the sponsorship of the proposition seemed self-evident, as the official ballot title of the measure clearly stated:

DENVER TRADES AND LABOR ASSEMBLY ACT TO ESTABLISH
PUBLIC SERVICE COMMISSION, AND TO PROVIDE FOR THE
REGULATION OF PUBLIC SERVICE CORPORATIONS.

A month before the November election rumors began to surface that the statutory initiative was not sponsored by organized labor. Rather, it was alleged that lawyers of several corporations that would be regulated by the public utilities agency, chiefly Mountain States Telephone and Telegraph Company, actually drafted the measure. Despite denials by both the Trades and Labor Assembly and the public utilities, the authorship and financial underwriting of the “joker” initiative remained a focal point during the waning days of the campaign.⁷⁴ The controversial public utilities measure was

⁷³ Daniel A. Smith, *Campaign Financing of Ballot Initiatives in the American States*, in *Dangerous Democracy? The Battle Over Ballot Initiatives in America* 71, 73 (L.J. Sabato, H.R. Ernst & B.A. Larson eds., 2001).

⁷⁴ Daniel A. Smith & Joseph Lubinski, *Direct Democracy during the Progressive Era: A Crack in the Populist Veneer?* 14 *J. Pol’y Hist.* 349, 360-61 (2002).

not the only initiative with a dubious provenance that year. Several other measures, including initiatives favoring agricultural interests, newspaper publishers, and smelter and mining operators, were underwritten by vested economic players who worked obliquely to remain anonymous.

Disclosure statutes, at both the state and federal levels during the Progressive Era, were notoriously weak. While Colorado's legislature adopted campaign finance disclosure laws for parties in 1909 and candidates in 1910, the state had no disclosure regulations for ballot issue committees in 1912. But state disclosure laws (in Colorado and elsewhere) had little practical effect, as was the case with federal disclosure statutes.⁷⁵ In most states, such as in California, the "financial statement [was] only partly enforced" by the Secretary of State.⁷⁶ As Winston Crouch and Dean McHenry reported in the late 1940s, campaign disclosure in California was "hopelessly inadequate," existing in name only, with many of the returns "wholly incomplete or unintelligible." "The persistent citizen who seeks full information on campaign contributions may work through the files in the Secretary of State's office in Sacramento," the two political scientists lamented, "only to discover...that large sums are listed as gifts of campaign managers and camouflage committees, obviously acting as fronts for persons who did not wish their names known as contributors."⁷⁷

It was not until the 1920s, well after the initial highpoint of statewide initiative use, that a few states with direct democracy began requiring ballot committees to file regular reports accounting for campaign contributions and expenditures. In 1923, the

⁷⁵ Several states adopted disclosure laws for candidates in the early 1890s, including New York and Massachusetts, which codified disclosure statutes in 1890 and 1892, respectively. In 1893, the California legislature passed a law requiring the full disclosure of campaign receipts and expenditures for every candidate and campaign committee. In 1907, the California legislature passed the Purity of Elections Act, extending the state's disclosure law. That same year, Congress approved the Tillman Act, which prohibited corporations and national banks from making financial contributions to candidates running for federal office. Three years later, Congress passed the Publicity Act of 1910 which required the disclosure of campaign contributions and expenditures in House elections and the post-election disclosure of political party activities. Anthony Corrado, *A History of Campaign Finance Law*, in Campaign Finance Reform: A Sourcebook 27, 28 (A. Corrado, T.E. Mann, D.R. Ortiz, T. Potter & F.J. Sorauf eds., 1997); Ruth Jones, *The Historical Context of Campaign Finance Regulation* (unpublished manuscript, Aug. 16, 1994, cited in Center for Responsive Politics, A Brief History of Money in Politics, available at <http://www.opensecrets.org/pubs/history/historyindex.asp> (1996)).

⁷⁶ Winston Crouch & Dean McHenry, California Government 63-64 (1949).

⁷⁷ Id. at 64. Similar problems existed at the federal level during the Progressive Era, as candidate and party committees were not required to disclose their campaign finance activities until after an election. Julian Zelizer, *Seeds of Cynicism: The Struggle over Campaign Finance, 1956-1974*, 14 J. Pol'y Hist. 73 (2002).

California state legislature tightened its disclosure laws, requiring groups raising or spending more than \$1,000 on a ballot measure to file with the Secretary of State. The legislation came on the heels of a state Senate investigation that found there were “startlingly large expenditures in [ballot] campaigns,” which “constitute a menace to our electoral system.”⁷⁸ In 1922, more than \$1 million was spent on seven ballot propositions, including over \$660,000 by the Pacific Gas and Electric Company in its effort to defeat the Water and Power Act. Despite the enhanced disclosure law, official ballot committees and other entities would still avoid filing reports, even though ads on billboards and newspapers during campaigns were often omnipresent.⁷⁹

Although disclosure of campaign contributions relating to issue elections became widespread in the states during the post-Watergate reform period, political operatives desiring to conceal their identities would typically utilize front organizations as their official issue committees. Many of these issue committees had populist sounding or intentionally misleading names. It remained difficult for the public to determine in a timely fashion the financial sources contributing to the proponents and opponents of ballot measures, because campaign contributions were not required to be disclosed until well after an election. Before the advent of electronic disclosure for contributions and expenditures on ballot campaigns,⁸⁰ groups involved in ballot campaigns that wanted to stay anonymous could shield their identities by relying on the slow process of making disclosure records available to the public.

Two classic examples from tax limitation ballot campaigns demonstrate how groups have capitalized on untimely disclosure laws. Not until well after the passage in 1978 of California’s landmark Proposition 13 did the public discover that Howard Jarvis’ tax-cutting outfit, the United Organizations of Taxpayers (UOT), was partially bankrolled – both directly and with independent expenditures – by the Los Angeles Apartment Owners Association (LAAOA), of which Jarvis was the executive director.⁸¹ Jarvis’ issue committee would routinely file incomplete or late campaign finance disclosure

⁷⁸ Quoted in David McCuan, Shaun Bowler, Todd Donovan, & Ken Fernandez, *California’s Political Warriors: Campaign Professionals and the Initiative Process*, in *Citizens as Legislators: Direct Democracy in the United States* 55, 57-58 (S. Bowler, T. Donovan & C. Tolbert eds., 1998).

⁷⁹ Winston Crouch & Dean McHenry, *supra* note 76, at 31.

⁸⁰ Four states with the initiative process (Arkansas, Montana, Oklahoma, Wyoming) still do not provide campaign finance data on ballot measures via the Internet. See BISCFC, *Blind Spot*, *supra* note 15, at 8.

statements with the state, and when they were finally made available to the public in the Secretary of State's office in Sacramento, they were difficult to sort through, making timely analysis difficult at best.⁸² Similarly, in the 1980 anti-tax ballot campaign in Massachusetts, Citizens for Limited Taxation (CLT), the sponsor of Proposition 2 ½, worked behind the scenes with the Massachusetts High Tech Council and its *faux* populist front organization, Concerned Citizens for Lower Taxes (CCLT), to finance the measure. Despite its name, CCLT received only seven (of its 72 contributions) from citizens; nearly all of the \$254,650 that CCLT raised in October came from a cluster of high tech industries belonging to the High Tech Council. Although the state's campaign disclosure laws required CCLT's to make their activities public, the high tech industry's parallel campaign went largely undetected by the media and the public.⁸³

In the 1990s, with the implementation in many states (as well as at the federal level) of laws requiring that disclosure be available online and allowing reporting through electronic methods, the immediate analysis of contributions and expenditures made by ballot issue committees became possible. An unintended consequence of this technological advancement was that political operatives began to devise a range of VPAs designed to avoid disclosure and shield their involvement in ballot campaigns. VPAs often serve as conduits through which contributions can flow undetected to the issue committees officially registered with a state's campaign finance disclosure agency. More surreptitiously, VPAs are set up to influence issue campaigns independent of the official ballot issue committees. Because there are no limits on what contributors may give to ballot campaigns, the reliance on VPAs is motivated chiefly by the desire to evade

⁸¹ Daniel A. Smith, *Tax Crusaders and the Politics of Direct Democracy* 80-83 (1998).

⁸² *Id.* Throughout the campaign, Jarvis would make pronouncements to the media that underestimated the amount of money his campaign was spending on the Yes on 13 campaign. He also frequently misrepresented the activities funded by his campaign (such as paying for the collection of signatures).

⁸³ *Id.* at 118-24. Some of the major contributors to CCLT included: Data General (\$16,000); Foxboro Company (\$14,500); GenRad, Teradyne, Prime Computer, Computervision, and Millipore (\$12,000 each); New England Nuclear (\$8,000); and Wang (\$6,000). In 2002, a similar pattern in Massachusetts of corporate donors using late filing deadlines to shield their contributions to a ballot campaign occurred on Question 3, a non-binding advisory referendum on campaign finance reform. Opponents of the measure did not file their disclosure reports for the final reporting period until Election day, making it all but impossible for advocates of the measure to educate voters about the \$600,000 in contributions from vested interests – including Anheuser Busch (based in Missouri), Timberleaf Homes (based in Texas), Wheelabrator Technologies (based in New Hampshire), Fidelity Investments, EMC, Raytheon, Verizon, Gillette, National Grid USA, and John Hancock – that were aligned against the measure. Ballot Initiative

disclosure. The structures of VPAs have become more creative and complex as some disclosure laws remove avenues of deception so those who seek concealment must alter their plans to take account of new or different gaps in the law.

B. 501(c)(3)s and 501(c)(4)s

Using federal nonprofit corporations as flow-through entities to circumvent campaign finance disclosure in ballot issue elections is a growing phenomenon as groups and individuals use these VPAs to redirect contributions to issue committees that are officially sponsoring and opposing ballot measures. Nonprofits account for by far the largest number of VPAs involved in issue elections, with the amount of money contributed by them to initiative and referendum campaigns in 2002 surpassing tens of millions of dollars. Use of some nonprofit structures has the added benefit of allowing a tax deduction for contributions, but our focus here is on their use to avoid disclosure.⁸⁴ A tax law scholar who studies the use of nonprofit corporations in elections has concluded that “[a]chieving deductibility for contributors seems less important than the ability to accept contributions from any sources without limitation while at the same time avoiding disclosure.”⁸⁵ 501(c) nonprofits are increasingly being used by political operatives as flow-through conduits in ballot campaigns, particularly since Congress passed new disclosure rules relating to Section 527 organizations so that the latter organizations are no longer effectively used as VPAs.⁸⁶

1. Regulatory Framework

Strategy Center Foundation (www.ballotfunding.org), *Money and Ballot Measures in the 2002 Election*, available at www.ballotfunding.org/MoneyandBallotMeasures.pdf (Dec. 2002).

⁸⁴ See Frances R. Hill, *Softer Money: Exempt Organizations and Campaign Finance*, 32 Exempt Org. Tax Rev. 27, 50-51 (2001) (explaining that not all federal nonprofit structures provide tax deductibility for contributions, although virtually all can be used to evade disclosure). See also *id.* at 28 (“Exempt nonprofit organizations are virtually perfect structures for raising and deploying softer money because the exempt form is malleable, exempt purposes are plastic, and exempt organization structures lack accountability and malleability.”).

⁸⁵ *Id.* at 42.

⁸⁶ See *infra* text at notes 137 through 149 (discussing disclosure rules for Section 527 organizations). See also Letter from Public Citizen, Center for Responsive Politics, Common Cause and Democracy 21 to IRS regarding Announcement 2002-87, Comments on Form 990, Jan. 28, 2003, at 2 (“For independent groups

501(c)(3) corporations are operated exclusively for religious, charitable, or educational purposes, or some other narrowly defined similar purpose. Donations to 501(c)(3)'s are generally tax-deductible, and the identities of the donors are not made public by the IRS (although donors contributing more than \$5,000 are disclosed to the IRS).⁸⁷ The federal tax code expressly forbids tax-exempt 501(c)(3) organizations from engaging in political activities on behalf or against any candidate (federal, state, or local) running for political office.⁸⁸ However, these organizations are permitted to participate directly in ballot campaigns, as they may advocate for or against issues of public concern that are related to the purpose of their organization. Rather than constituting "electioneering," the involvement of 501(c)(3)s in ballot campaigns is considered by the IRS to be "lobbying" because involvement in a ballot campaign affects legislation – laws enacted by the people. Charitable organizations are constrained in the extent of permissible lobbying activities: they may not constitute a "substantial" part of an organization's activities. Normally, 501(c)(3)s are prohibited from spending more than 5 percent of their annual budget on lobbying activities.⁸⁹ However, most 501(c)(3)s may elect to file a Form 501(h) with the IRS, a supplemental filing on lobbying expenditures

that still wish to evade federal campaign finance law, the joint effect of [527 disclosure law and BCRA] makes registering as a 501(c) non-profit group somewhat more attractive.").

⁸⁷ Some states may require the identities of contributors to 501(c)s active in politics to be disclosed to the public under their campaign disclosure laws. In California, for instance, many ballot measure committees in California register with the state's Franchise Tax Board as 501(c)4s. The Fair Political Practices Commission (FPPC) may require these committees to disclose their campaign contributions and expenditures in certain circumstances. See *infra*, Part III.E. (discussing state disclosure rules and gaps in some states' coverage). It is also important to keep in mind that laws providing for exempt nonprofit status differ among the states, and the rules are not necessarily the same as the federal regulations. For a description of the rules in California, for example, see California Franchise Tax Board, *Exempt Organizations: Nonprofit Doesn't Mean Tax Exempt*, available at: <http://www.ftb.ca.gov/forms/misc/927.pdf> (2004).

⁸⁸ I.R.C. § 501(c)(3) (2000). BCRA imposes a segregated fund requirement on incorporated nonprofits that fund electioneering communications, a term which includes any broadcast advertisement aired in a certain period before an election that "refers to a clearly identified candidate for Federal office." FECA, § 304(f)(3)(C). The Court in *McConnell* read the Act to exempt from the segregated fund requirements so-called *MCFL* organizations, which are nonprofits that are organized for the express purpose of promoting political ideas, have no shareholders, and accept no funds from labor organizations or business corporations. 124 S.Ct. at 698-99 (opinion of Stevens and O'Connor) (using criteria established in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 264 (1986)). Disclosure relating to electioneering communication once expenditures have exceeded \$10,000 is still required from *MCFL* organizations just as it is from individuals.

submitted with the nonprofit's annual return (form 990). This election permits a charitable nonprofit to spend as much as 20 percent of its annual budget on lobbying and grassroots activities to influence legislation.⁹⁰ Nonprofit charities, then, may participate in ballot campaigns, and they are bound only by the scope of their stated purposes and by the limitation on the percentage of their budget they may spend "lobbying."

501(c)(4) organizations are operated "exclusively for the promotion of social welfare,"⁹¹ which means "promoting in some way the common good and general welfare of the people of the community."⁹² While donations to 501(c)(4)s are not tax-deductible and large donations may be subject to the gift tax, the identities of the donors are unavailable to the public. A 501(c)(4) corporation may engage in unlimited lobbying, including efforts relating to ballot questions;⁹³ indeed, lobbying may be its primary activity as long as it is consistent with its social welfare objectives. Besides lobbying, social welfare organizations may engage in electioneering activities, "including direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office," but such electioneering cannot be its primary activity. Often 501(c)(4) organizations are affiliated with 501(c)(3) corporations, an arrangement that allows the charitable organizations an outlet for their political activities, and the 501(c)(4) can create a segregated political fund under Section 527. There are complex rules regulating these relationships,⁹⁴ but they are sufficiently malleable to allow ingenious tax lawyers to construct complicated arrangements of nonprofit entities to accomplish political objectives while erecting a virtually impenetrable curtain over the identity of those funding the organizations.

The Internal Revenue Code uses a broader definition of electioneering activity than exists under the Federal Election Campaign Act (FECA), as amended by BCRA.

⁸⁹ See Daniel L. Simmons, *An Essay on Federal Income Taxation and Campaign Finance Reform*, 54 Fla. L. Rev. 1, 48 (2002) (noting that the quantitative test is not determinative and citing cases accepting higher percentages).

⁹⁰ See *id.* at 48-49 (explaining the 501(h) election process and describing penalty for exceeding the "lobbying ceiling"). See also Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*, 69 Brooklyn L. Rev. 1, 64-71 (2003) (legislative history of 501(h) election). Churches and conventions or associations of churches cannot make the 501(h) election.

⁹¹ I.R.C. § 501(c)(4) (2000).

⁹² Treas. Reg. § 1.501(c)(4)-1(a)(2)(i) (2003).

⁹³ See Daniel L. Simmons, *supra* note 89, at 66-67; Oliver A. Houck, *supra* note 90, at 82-83.

The tax code defines electioneering as an activity designed to shape the election or appointment of individuals to political office or office in a political organization – what it calls the “selection process” – but it also includes some issue advocacy that falls outside BCRA’s definition of “electioneering communication”⁹⁵ and voter mobilization. Under neither the tax nor federal election campaign regulatory structure does activity relating to direct democracy necessarily trigger disclosure provisions or threaten the tax-exempt nature of the organization. Under the tax laws, involvement in ballot campaigns is lobbying, not electioneering, and permitted to some extent for both 501(c)(3)s and (c)(4)s. Only if FECA requires disclosure of sources of funding will the 501(c) be required by a federal statute to reveal that information publicly. But, involvement in ballot campaigns is not covered by FECA, which does not apply to elections without candidates or to nonfederal elections.

Of course, some disclosure may be required of 501(c) organizations’ activity in direct democracy, although the federal provisions not only allow groups to veil the source of their funds, they can also obscure the extent of their activity. 501(c)s are required to report to the IRS their involvement in ballot campaigns on Form 990 under lobbying expenditures (line 81a). This format is somewhat misleading, because their involvement in a ballot campaign is a distinct activity from that of pressuring elected officials on an issue but the expenditures do not need to be separately reported. The confusion is compounded by the fact that many 501(c)s evidently combine their normal lobbying expenditures (line 81a) with the electioneering expenditures (as it pertains to candidates) under line 85 on their Form 990. It is therefore difficult to get a sense of the extent to which the organizations spend time on direct democracy as distinct from other lobbying and in some cases as distinct from candidate electioneering. Most importantly, donor information is hidden from view unless the activity also falls within the scope of federal campaign laws. Some 501(c) organizations involved in initiative and referendum campaigns may be subject to state disclosure laws, but there are other ways to evade these disclosure provisions.⁹⁶

⁹⁴ For a discussion of these complex arrangements, see Frances R. Hill, *supra* note 28, at 930-34.

⁹⁵ FECA, § 304(f)(3)(C).

2. Use of nonprofits as VPAs

Political operatives frequently use nonprofits with patriotic and grassroots-sounding names to generate popular support and divert attention from their financial backers. Republican insider Grover Norquist – the president of the populist sounding Americans for Tax Reform (ATR), a 501(c)(4) organization, as well as the head of its sister 501(c)(3), Americans for Tax Reform Foundation (ATRF) – was one of the early pioneers to use ostensibly grassroots nonprofits to channel undisclosed and untraceable sums of money into ballot campaigns from entities wishing to remain anonymous. In 1993, Norquist authored a mock policy memo (fictitiously dated “November 9, 1996”) addressed to “Republican Congressional Leaders.” His fictitious memo detailed the GOP’s hard won “success” in the 1996 elections. Noting the electoral power of initiatives, Norquist wrote, “I believe the wave of initiative elections in 1992 and 1994 paved the way for Republican electoral victories this year [1996].” He highlighted how initiatives limiting legislative terms, cutting taxes and government spending, as well as anti-crime, victims rights, and parental rights ballot measures, brought fiscal and “social conservative Republican voters to the polls.”⁹⁷

Republican leaders apparently were convinced by Norquist’s electoral prediction. In October 1996, the Republican National Committee quietly contributed \$4.6 million in soft money to ATR to promote federal candidates by broadcasting issue ads.⁹⁸ While Norquist’s nonprofit did not have to disclose its subsequent expenditures, a congressional investigation (Minority Report) into campaign finance abuses in the 1990s found that ATR acted “as an alter ego of the Republican National Committee [RNC] in promoting the Republican agenda and Republican candidates, while shielding itself and its

⁹⁶ See infra Part III.E.

⁹⁷ Grover G. Norquist, *Prelude to a Landslide: How Republicans will Sweep the Congress*, Policy Review (Heritage Foundation), Fall 1993, at 30.

⁹⁸ U.S. Senate, 1997 Special Investigation, Final Report of the Investigation of Illegal or Improper Activities in Connection With 1996 Federal Election Campaigns together with Additional and Minority Views, available at http://www.senate.gov/~gov_affairs/sireport.htm (last visited June 9, 2003). Records indicate that ATR also used the Republican Party receipts to conduct direct mail and phone bank campaigns focusing on the presidential and several congressional races. Deborah Beck, Paul Taylor, Jeffrey Stanger and Douglas Rivlin, *Issue Advocacy Advertising During the 1996 Campaign: A Catalog*, Annenberg Public Policy Center Report No. 16, available at http://www.appcpenn.org/issueads/old/past_research.htm (Sept. 1997).

contributors from the accountability required of campaign organizations.”⁹⁹ Although ATR has now developed a reputation for a particular conservative, often libertarian ideology, fewer voters are as familiar with its brand name as they are with the agenda of the national Republican Party. Knowing of the RNC’s financial beneficence towards ATR (as opposed to solely ATR’s involvement) is helpful to more voters contemplating ballot measures, especially those who are somewhat civically disengaged. The cue of the Republican Party, of course, has negative connotations for some voters. Thus, Norquist’s VPA allowed the political party to disguise itself, under the popular rubric of “tax reform,” in circumstances where it must have believed its brand name was more of a hindrance than a help.

ATR did not limit itself to running issue ads on behalf of or against federal candidates. Although the congressional investigation makes no mention of these activities, Norquist’s nonprofit also backed several conservative initiatives on statewide ballots. ATR transferred a substantial amount of money to issue groups in California, Colorado, and Oregon that sponsored tax cut and paycheck protection ballot measures. In the fall of 1996, for example, ATR contributed \$509,500 to Oregon Taxpayers United (OTU), an issue committee run by Bill Sizemore that sponsored Measure 47, a successful constitutional amendment cutting property taxes and limiting annual property tax increases. In keeping with ATR’s overall mission, which was not widely known to voters in Oregon, the victorious measure had the direct effect of downsizing state and local governments in the state.¹⁰⁰

Two years later, Norquist’s ATR spearheaded the early financing of a California ballot measure designed specifically to weaken organized labor. ATR’s financial involvement meant that funds that otherwise would have been contributed to Democratic candidates were redirected to opposition efforts in the initiative campaign. During the

⁹⁹ See 1997 Special Investigation, *supra* note 88, at 11-1, available at http://www.senate.gov/~gov_affairs/11chap.pdf (last visited June 9, 2003).

¹⁰⁰ See Daniel A. Smith, *Howard Jarvis’ Legacy? An Assessment of Antitax Initiatives in the American States*, 22 *State Tax Notes* 753 (2001). ATR also contributed money to the sponsors of Measure 26, another paycheck protection initiative in Oregon in November 1998. In the late 1990s, similar ATR inspired efforts to place paycheck protection measures on the ballot were stymied by the courts in Nevada and stalled by a union-led counterproposition in Colorado.

crucial petition gathering phase of the campaign,¹⁰¹ ATR transferred \$441,000 to the Campaign Reform Initiative in California, one of four issue committees advocating Proposition 226, a paycheck protection measure. Moreover, a bevy of other nonprofits with populist sounding names contributed to the anti-labor measure, including \$245,000 from the Foundation for Responsible Government, a little-publicized 501(c)(3) with ties to former New Jersey governor, Christine Todd Whitman, and Lewis Eisenberg, the founder of the socially moderate and fiscally conservative Republican Leadership Council.¹⁰² In the end, voters defeated the measure at the polls, in part because cue-providing unions in California (aided by contributions from labor organizations across the country) spent over \$23 million fighting the June 1998 primary initiative, which they dubbed “paycheck deception.”¹⁰³

Besides redirecting RNC soft money to influence candidate races and ballot initiatives, ATR took full advantage of its nonprofit status to hide the source of campaign contributions received by state-level anti-tax operations, such as Sizemore’s OTU. In testimony in a racketeering trial in 2002 in which a civil jury ordered OTU to pay \$842,000 in damages to the two largest teachers unions in Oregon, a former aide to Sizemore detailed how OTU would bundle checks it had solicited in the name of ATR, redirect them to Norquist’s nonprofit, and then have ATR transfer a single check back to OTU.¹⁰⁴ The process effectively cleansed the identities of the donors to Sizemore’s issue

¹⁰¹ See Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 *Tex. L. Rev.* 1845, 1854-63 (1999) (discussing importance of signature gathering phase).

¹⁰² Good Jobs New York, *Reconstruction Watch*, Publication #1, available at <http://www.reconstructionwatch.net> (Feb. 2002); California Secretary of State, *Filings for Foundation for Responsible Government*, available at <http://primary98.ss.ca.gov/lcrP98/f/498558.htm> (June 2, 1998).

¹⁰³ John Jacobs, *Unmasking 226’s ‘Paycheck Protection’ Masquerade*, *Sacramento Bee*, May 28, 1998, at B7; Daniel A. Smith, *Special Interests and Direct Democracy: An Historical Glance*, in *The Battle over Citizen Lawmaking* 61, 67-68 (M.D. Waters ed., 2001).

¹⁰⁴ Becky Miller, the former Sizemore aide, testified that OTU would “frequently” receive checks made out to ATR. She would FedEx the checks to ATR, and within a few days, OTU received a corresponding “contribution” from ATR. While like other states, there are no contribution limits to issue campaigns in Oregon, Oregon law requires that all donations to campaigns must be disclosed in reports to the Secretary of State. Violation of the law is a felony. The jury in the civil suit found that OTU fabricated its state and federal tax returns as well as its state Contribution & Expenditure (C&E) Reports. The jury also found that OTU engaged in fraudulent activities on its own, by routing tax-deductible political contributions intended for its numerous ballot campaigns through Sizemore’s nonprofit 501(c)(3), the Oregon Taxpayers United – Educational Foundation (OTU-EF). OTU-EF paid the salaries for all Sizemore’s OTU employees, including those who worked on the issue campaigns, his radio station, and even his failed bid for governor in 1998. In 1998, Sizemore even wrote in a fundraising letter that contributors who wanted to support his political action committee, OTU-PAC, or to his various issue committees, could do so by donating to OTU-

committee. As such, voters – or at least the media and good governance watchdogs – were unable to identify who was financing Sizemore’s various ballot measures, information which could have provided voters with more information about the content of the initiatives.

Examples abound of political operatives using the 501(c) veil of anonymity to avoid disclosing notorious donors wishing to contribute to ballot issue campaigns. A familiar Washington, D.C.-based 501(c)(3), U.S. Term Limits (USTL), helped to fund over two dozen term limit ballot measures in nearly as many states during the 1990s.¹⁰⁵ Its sister organization, Americans for Limited Terms (ALT), a 501(c)(4), continues to play a major role in ballot campaigns. In 2002, ALT accounted for 99 percent (over \$1.5 million) of the total raised by the issue committee set up to defeat Proposition 45, a California initiative that would have extended the number of terms allowed to be served by incumbent legislators.¹⁰⁶ Because the financial backers of USTL and ALT are not disclosed, the ability of voters to appreciate the motivations of the interests funding the organizations is hindered. Indeed, in the late 1980s and early 1990s, USTL was financed primarily by Charles and David Koch, libertarian oil executives from Oklahoma who had earlier financed Citizens for Congressional Reform, an organization dedicated to ending the Democratic control of Congress.¹⁰⁷ Since a broad array of individuals with various ideologies support term limits,¹⁰⁸ targeted information about the financial backers of USTL could help voters determine whether proposed initiatives were consistent with their own ideological and political stances. Moreover, source disclosure assists

EF, thereby concealing their identities from public disclosure and receiving a tax break. See Don McIntosh, *Jury Agrees that Sizemore’s OTU Groups Engaged in Racketeering*, Northwest Labor Press, available at <http://www.nwlaborpress.org/10-4-02Sizemore.html> (Oct. 4, 2002); Oregon AFSCME, *Legal Challenges Mount For Sizemore*, available at <http://www.oregonafscme.com/frontpage/sizelegal.html> (Dec. 10, 2002).

¹⁰⁵ See *The Test of Time: Coping with Legislative Term Limits* 230 (R. Farmer, J.D. Rausch & J. Green eds., 2003). In California’s 1998 primary election, for example, U.S. Term Limits contributed \$317,498 (of the \$401,648 raised) to the issue committee sponsoring Proposition 225, a constitutional amendment calling for limited congressional terms. Proposition 225: Limiting Congressional Terms, available at www.ss.ca.gov/prd/bmprimary98/prop225.htm (last visited June 9, 2003).

¹⁰⁶ California Secretary of State, Cal-Access, *Campaign Finance Activity: No on 45: Stop the Politicians, Sponsored by Americans for Limited Terms*, available at <http://cal-access.ss.ca.gov/Campaign/Committees> (2002).

¹⁰⁷ See 1997 Special Investigation, *supra* note 88, at 15-4, available at http://www.senate.gov/~gov_affairs/15chap.pdf (last visited June 9, 2003).

¹⁰⁸ See Robert Kurfirst, *Term-Limit Logic: Paradigms and Paradoxes*, 29 Polity 119 (1996) (describing various political perspectives that can lead to a support for legislative term limits).

information entrepreneurs in making connections between a particular initiative and the larger ideological platform of the groups supporting the ballot question.

The Koch brothers were also instrumental in establishing in the mid-1980s another nonprofit that recently has become a major player in anti-tax ballot measures. Run by Paul Beckner and Dick Arme, Citizens for a Sound Economy (CSE), a 501(c)4 (with a sister 501(c)3, Citizens for a Sound Economy Foundation), by its own admission, now “leads [the] national tax revolt.”¹⁰⁹ While nearly impossible to calculate its overall direct and indirect financial commitment to anti-tax ballot measures, CSE has contributed hundreds of thousands of dollars, much of it funneled through its local chapters, to defeat recently proposed tax increases on the ballot in Alabama and Oregon and to derail current efforts in Nevada and Washington.¹¹⁰ In Oregon, for example, CSE was instrumental in financing and organizing the petition drive of Measure 30, a popular referendum that overturned the state legislature’s \$1.1 billion budget-balancing tax package. During the campaign, CSE funneled \$105,836 to its local chapter, Oregon Citizens for a Sound Economy (OCSE), which constituted nearly 25% of the total contributions raised by

¹⁰⁹ See Yvonne Woods, Citizens for a Sound Economy Issues Update, *CSE Leads National Tax Revolt*, available at http://www.cse.org/informed/issues_template.php?issue_id=1750&isitsearch=1&search1=yvonne (Apr. 28, 2004).

¹¹⁰ See Dick Arme, Citizens for a Sound Economy Issues Update, *A Call to Action in Nevada: CSE is Mobilizing Against a Massive New Tax Increase*, available at http://www.cse.org/informed/issues_template.php?issue_id=1732&isitsearch=1&search1=nevada (Apr. 6, 2004); Jamie Daniels, Citizens for a Sound Economy Issues Update, *Washington State Taxpayers Alert!*, available at http://www.cse.org/informed/issues_template.php?issue_id=1695&isitsearch=1&search1=jamie (Feb. 26, 2004); Max Pappas, Citizens for a Sound Economy Issues Update, *Anti-Tax Brushfire*, available at http://www.cse.org/informed/issues_template.php?issue_id=1689&isitsearch=1&search1=pappas (Feb. 12, 2004).

In 2004, CSE posted information supporting the signature collection effort by a California political action committee, Californians to Stop Shakedown Lawsuits, to qualify for the November 2004 ballot an initiative that would limit an individual’s right to sue under California unfair business competition laws. See Citizens for a Sound Economy, *California: Get the 17200 Reform Initiative Petition*, available at http://www.cse.org/informed/issues_template.php?issue_id=1715&isitsearch=1&search1=california (Mar. 23, 2004). The initiative qualified for the ballot in May. CSE (filer ID #499544) has been involved in state-level campaign finance activities in California in the past (it last filed in 1999). CSE has not filed a Form 460/461 with the California Secretary of State in the 2004 election cycle. As of June 1, 2004, there was no indication that CSE had contributed any contributions, including in-kind, to Californians to Stop Shakedown Lawsuits, or to a sister proponent of the initiative, California Motor Car Dealers Association Fund To Stop Shakedown Lawsuits. See California Secretary of State, Cal-Access, *Campaign Finance Activity: Californians To Stop Shakedown Lawsuits, A Coalition Of Taxpayers, Automobile Dealers, Business Groups And Civil Justice Reform Supporters*; and *California Motor Car Dealers Association Fund To Stop Shakedown Lawsuits*, available at <http://cal-access.ss.ca.gov/Campaign/Committees> (2004).

OCSE, and the Washington, DC-based group channeled another \$21,971 to the Taxpayer Defense Fund (TDF), the chief sponsor of the referendum, which again amounted to nearly 25% of the total raised by TDF. In all, CSE's \$105,836 in recorded expenditures amounted to roughly 10% of the total raised by all the ballot measure committees aligned to defeat the legislature's tax increase.¹¹¹ Because of its nonprofit status, it is nearly impossible to determine who is contributing to CSE, but according to documents leaked to the *Washington Post* in the late 1990s, CSE's millions in contributions did not flow from its alleged 250,000 membership base, but rather from large foundations (e.g., Koch Family Foundations, John M. Olin Foundation, Lynde and Harry Bradley Foundation, Scaife Foundation) and major corporations (e.g., Philip Morris, U.S. West (now Qwest), Exxon, Microsoft, U.S. Sugar).¹¹² The use of CSE to obscure the source of funds that may have influenced issue campaigns in several states illustrates that 501(c) organizations are increasingly becoming the VPA of choice for wealthy corporations and other entities interested in being involved in direct democracy.

Nonprofits are not only used by conservative political interests and individuals to veil their contributions to ballot measure campaigns. In Colorado, Jared Polis, the millionaire author of an election day voter registration measure, created a 501(c)(3) intentionally designed to obscure and mischaracterize the sources of contributions to the issue committee sponsoring his ballot initiative, Amendment 30. Wishing to conceal the identities of those contributing to Amendment 30 (and to qualify for tax breaks), Polis incorporated a nonprofit, Colorado Youth Charity, only months before the November 2002 election.¹¹³ Polis' new charity immediately contributed \$170,000 to the issue committee backing his initiative. Initially, when asked by a newspaper columnist to

¹¹¹ Janice Thompson, Money in Politics Research Action Project, *Final Analysis of Contributions in Ballot Measure 30 Election* available at <http://www.oregonfollowthemoney.org/Press/2004/031504bm30.PDF> (Mar. 15, 2004); Janice Thompson, Money in Politics Research Action Project, *Referendum Signature-Gathering Campaign Circumvents Spirit of Disclosure Laws*, available at <http://www.oregonfollowthemoney.org/Press/2003/121803.pdf> (Dec. 18, 2003); Janice Thompson, Money in Politics Research Action Project, *Transparency or Transparency Defeated*, available at <http://www.oregonfollowthemoney.org/Press/2003/TaxpayerDefenseFund%20report.pdf> (Dec. 19, 2003).

¹¹² See Center for Media & Democracy, *Funding for Citizens for a Sound Economy*, available at http://www.disinfopedia.org/wiki.phtml?title=Citizens_for_a_Sound_Economy#Funding (Apr. 23, 2004) (citing Dan Morgan, *Think Tanks: Corporations' Quiet Weapon*, Wash. Post, Jan. 29, 2000, at A1).

¹¹³ In 2000, he contributed \$47,500 to the proponents of Amendment 23, the successful initiative that provided additional funding for K-12 education. The following year he established the eponymous Jared

divulge who was behind the substantial contribution (which at the time accounted for 77 percent of the total raised by his issue committee), Polis refused to reveal the source, saying “it shows why we need campaign finance laws, so that nonprofits can’t hide behind a cloak of secrecy.” After telling the reporter he could “lie” about who made the contribution to his charity, he called back to say that he actually contributed \$1 million to his charity, which he then directed to his issue committee. “Thank goodness,” Polis said sanctimoniously, “somebody as upstanding as myself is involved because public disclosure laws don’t force this sort of thing.” Polis is obviously committed to enhancing the educational opportunities of Colorado’s youth.¹¹⁴ Nonetheless, the use of a VPA to fund his activities with respect to election day voter registration could have denied voters information both about the real source of funds and the absence of any other significant financial support for the charity.

Nonprofits can also be used to mislead voters when organizations with established name recognition sponsor ballot issues that are seemingly the outgrowth of their membership’s preferences and values, but in fact are financially supported by contributions from individuals or organizations not normally associated with the nonprofits. In California, Gerald Meral – the President of the nonprofit Planning and Conservation League Foundation (PCL/F), a 501(c)(3) charitable foundation, and former Executive Director of PCL/F’s sister 501(c)(4) lobbying organization, the Planning and Conservation League (PCL) – has deftly used his organizations to skirt state campaign finance disclosure laws to promote a host of ballot measures.¹¹⁵ During the campaign for the November 2002 election, several nonprofits bolstered the passage of Proposition 50,

Polis Foundation, a not-for-profit foundation bringing technology into public schools. Daniel A. Smith, *The Millionaire’s Club: Why Leave Ballot Initiatives to the Rich?* Denver Post, Aug. 18, 2002, at E1.

¹¹⁴ Peter Blake, *Of Polis and Nonprofits*, Rocky Mountain News, July 3, 2002, at A31. In addition to his tax-deductible contributions routed through his nonprofit, Polis contributed \$569,904 out of his own pocket to Yes on 30! Colorado Secretary of State, Fair Campaign Practices Act, “Yes on 30!” available at <http://www.sos.state.co.us/pubs/elections/main.htm> (2002).

¹¹⁵ Meral served for 20 years (1983 to 2003) as Executive Director of PCL. Under Meral’s guidance, which included stints as campaign manager, PCL was the driving force behind numerous successful ballot initiatives, including Proposition 70 in 1988, an initiative bond measure protecting coastal lands, Proposition 116 in 1990, a \$1.99 billion Rail Bond Act Initiative, Proposition 117 in 1990, a Wildlife Protection Act Initiative. Meral also managed the 1984 campaign for Proposition 18, a \$380 million Park Bond Act referendum, and worked on two park bond referendums in 2000 (Proposition 12) and 2002 (Proposition 40), as well as on water bond initiatives in 2000 (Proposition 13) and 2002 (Proposition 50). PCL was also behind Proposition 85 in 1982, a bond measure protecting Lake Tahoe, and Proposition 99 in 1988, a

an initiated bond measure to improve water quality and protect coastal wetlands that sponsored by Meral's environmental nonprofits.¹¹⁶ Environmental nonprofits (directly and via their PACs) also gave substantial sums to the issue committee that sponsored Proposition 51, an initiative statute designed by Meral also on the November ballot. The measure, which failed, would have taxed the sale or lease of motor vehicles to fund a variety of open-space and transportation projects in the state. The Conservation Action Fund, a political action committee created by PCL, contributed the most money (\$773,000) to the sponsoring issue committee, Yes on 51 - Citizens for Traffic Safety.¹¹⁷

On first blush, the involvement of these environmental nonprofits in the initiative campaigns does not appear especially troubling, as voters seemingly could use the financial contributions of the nonprofits as voting cues. But appearances are sometimes deceiving: California developers were largely behind the two November ballot measures (Prop. 50 and Prop. 51). Besides contributing directly to the supporting issue committees (which is easily traceable through the state's on-line campaign finance disclosure system), developers made significant contributions to the PACs created by environmental nonprofits. By laundering their contributions to the ballot issue committees through the nonprofits' PACs, the contributions were largely cleansed of any stigma that might have been attached to the developers. For example, the \$2.9 million raised in 2001-02 by the Planning and Conservation League's PAC, the Conservation Action Fund, came from just 12 sources, with only \$100,000 coming from the nonprofit Planning and Conservation League. The bulk of the contributions to the Conservation Action Fund –

tobacco tax initiative providing money for parks and wildlife. Planning and Conservation League, *available at* <http://www.pcl.org> (last visited June 9, 2003).

¹¹⁶ Dozens of nonprofits contributed to two official ballot issue committees sponsoring the initiative – 1) Yes on 50, Californians for Safe, Clean Water, Funded by PACs and Organizations Established to Protect the Environment, Conservation Groups, and Owners of Open Space; and 2) Yes On 50, Coalition of Conservationists, Business, Water & Engineering Cos., Owners of Open Space. The Conservation Action Fund, a political action committee created by PCL, contributed \$1,020,000 of the \$1,618,600 raised by the first issue committee, and an additional \$590,000 to the second issue committee. The Nature Conservancy Action Fund of California, a PAC created by The Nature Conservancy, a 501(c)(3), contributed \$853,222 to the second issue committee, and the California Conservation Campaign, a PAC created by the charitable organization Trust for Public Land, contributed \$160,000 to the first issue committee. CA Secretary of State, Cal-Access Campaign Finance Activity, *available at* <http://www.cal-access.ss.ca.gov/Campaign/Committees> (2002).

¹¹⁷ In addition, the California Conservation Campaign contributed \$440,000 to the issue committee behind Prop. 51, with its parent nonprofit, Trust for Public Land, directly contributing another \$15,052. CA Secretary of State, Cal-Access Campaign Finance Activity, *available at* <http://www.cal-access.ss.ca.gov/Campaign/Committees> (2002).

some \$1,845,000 – came from four developers, including \$1.33 million from Playa Capital Company, LLC, based in Los Angeles.¹¹⁸ While the developers' contributions to the Conservation Action Fund were required to be disclosed, interested parties had to take several steps to unearth the transfers, because the developers' money was routed through Meral's PAC. More troubling, however, is the possibility that developers and other vested interests completely avoided disclosure by funneling money through the environmental 501(c)(3)s, which was then transferred to their affiliated PACs.¹¹⁹

Finally, as some of the preceding examples have demonstrated, the 501(c) structure can hide the fact that wealthy out-of-state interests are bankrolling local initiatives, a fact that is often relevant to voters. In Massachusetts in 2002, both the proponents and opponents of a successful initiative that dismantled the state's bilingual education program in the public schools relied heavily on the financial support of nonprofits. The issue committee opposed to the ballot measure, the Committee for Fairness to Children and Teachers (FACT), raised \$384,194 in its failed effort to defeat the initiative. Its largest donor was a Philadelphia-based nonprofit charitable foundation, the Shefa Fund. The 501(c)(3) contributed \$225,000, which amounted to 59 percent of the total raised by FACT. According to news reports, a major individual donor to the Shefa Fund alerted the charitable organization to the campaign against Question 2 in Massachusetts, and Shefa responded by contributing to FACT.¹²⁰

¹¹⁸ By October 19, 2002, Playa Capital Company, LLC had contributed \$380,496 to the Yes on 50 committees, with Signal Landmark contributing \$200,000. Similarly, Pardee Homes contributed \$500,000, Sun Ridge, LLC contributed \$190,000, and Hillwood Development Group, LP, and Newhall Land and Farming Company each contributed \$150,000 to the Yes on 51 committee. In addition, the National Audubon Society contributed \$150,000, the University of Southern California contributed \$450,000, the Agua Caliente Band of Cahuilla Indians contributed \$125,000, and the American Land Conservancy and the Riverside Land conservancy each contributed \$50,000 to Yes of 51. The sole individual contributing to the Conservation Action Fund, Anne G. Earhart, donated \$150,000. California Online Voter Guide, available at <http://www.calvoter.org/2002/general/propositions/topten.html> (Nov. 5, 2002).

¹¹⁹ In a few states, including California, campaign finance disclosure laws are effective with regard to disclosure of ballot measure contributions and expenditures. See BISC, *Blind Spot*, supra note 15 (grading California's disclosure system with an A). It is possible in these states for journalists, researchers, and ordinary citizens to uncover some of the veiled campaign finance transactions. However, in other states with inadequate disclosure statutes, such activities would likely go unnoticed.

¹²⁰ Anand Vaishnav, *Bilingual Foes Fault Donation*, Boston Globe, Sept. 26, 2002, at B3. Unz claimed, "As one of the investigating reporters mentioned to me, the donor of the \$100,000 contribution decided to make his political contribution through The Shefa Fund because he wanted to take a tax-deduction on the money and also wanted to ensure that his name remained secret." Email from Ron Unz, "Subject: How the Shefa Fund Changed America," Sept. 26, 2002, rkunz@earthlink.net (on file with Daniel Smith). A few other national nonprofits contributed funds against the anti-bilingual education measure, including the

California businessman Ron Unz, who spearheaded the passage of anti-bilingual education ballot initiatives in California (1998) and Arizona (2000), was the driving force behind the education reform measure in Massachusetts. Unz also paid for the qualification of a similar (though unsuccessful) measure in Colorado in 2002. Unz's English for the Children-California, a 501(c)(3) charity run out of his Silicon Valley home, contributed \$123,000 of the \$457,000 (27 percent) raised by English for the Children of Massachusetts.¹²¹ Because 501(c)s are not required to disclose the names of or amounts raised by their contributors there is no way to determine if the contributions made to the Massachusetts and Colorado issue committees by Unz's California charity originated from Unz or other nonresidents.

The influence of out-of-state money is clear from a 1996 initiative campaign in Colorado. A Virginia nonprofit with conservative credentials and a benign sounding name, Of the People, single-handedly financed the qualification of the ill-fated Amendment 17, the Parental Rights Amendment. Of the \$444,609 raised by the Coalition for Parental Responsibility, the issue committee that officially sponsored Amendment 17, Of the People accounted for \$362,900, or 82 percent of the total. Though impossible to verify because of the absence of mandatory disclosure rules, it is likely that much of Of the People's proceeds came from Amway and the members of the DeVos family, who have given millions to the Republican Party and conservative causes over the years.¹²²

Using 501(c)s to shield the identities of entities active in direct democracy is likely only to increase. In September 2003, a Sacramento Superior Court refused to issue a preliminary injunction requested by the Fair Political Practices Commission (FPPC) in

Ballot Initiative Strategy Center, a 501(c)(4) based in D.C., which contributed \$20,000, as well as a handful of unions, led by the easily identifiable American Federation of Teachers, which gave \$60,000 to FACT. Office of Campaign and Political Finance, Commonwealth of Massachusetts, Searchable Campaign Disclosure Reports, 2003, available at <http://www.efs2.cpf.state.ma.us/EFSProd/servlet/WelcomeServlet> (May 30, 2003).

¹²¹ Anand Vaishnav, *Funding for Challenge to Bilingual Education Questioned*, Boston Globe, Apr. 17, 2002, at B8. Unz personally loaned the Massachusetts issue committee \$175,000, which accounted for 38 percent raised by the issue committee. Office of Campaign and Political Finance, Commonwealth of Massachusetts, Searchable Campaign Disclosure Reports, 2003, available at <http://www.efs2.cpf.state.ma.us/EFSProd/servlet/WelcomeServlet> (May 30, 2003).

¹²² Richard DeVos, Jr. is the CEO of Amway Corporation and his wife, Betsy DeVos, was Of the People's co-chair. People for the American Way, *Parental Rights*, available at <http://www.pfaw.org/pfaw/general/default.aspx?oid=1999> (last visited June 9, 2003).

California that would have forced the American Civil Rights Coalition (ACRC) to disclose its contributors list.¹²³ A 501(c)(4) nonprofit corporation registered in California, ACRC was established by Ward Connerly in 1997 following the passage of California's Proposition 209, the successful 1996 anti-affirmative action initiative. Connerly's organization, now under the executive directorship of Kevin Nguyen, was the sponsor of Proposition 54, a racial privacy initiative that attempted to prohibit state and local governments from collecting data on or using classifications based on race, ethnicity, color, or national origin.¹²⁴ ACRC's constitutional amendment, officially titled "Race, Ethnicity, Color, or National Origin Classification," was defeated in October, 2003, when it was placed on the ballot in the special election to recall Governor Gray Davis. According to campaign finance filings with the FPPC, ACRC contributed 94 percent (\$1,570,400 of \$1,671,958) of the total raised in 2001-02 by the ballot issue committee, Yes on Proposition 54/Racial Privacy Initiative Sponsored by American Civil Rights Coalition.¹²⁵ The veiled contributions made to ACRC were subsequently transferred to its sister ballot committee to help finance the paid signature-gathering effort to qualify the measure.¹²⁶ Less than a month before the special election, however, Superior Court Judge Thomas Cecil denied the FPPC's request for a preliminary injunction, keeping ACRC's funding sources from being revealed. As FPPC Chairwoman Liane Randolph lamented following the ruling, "The voters are the ones who lost out. They're the ones who need to know who's funding major ballot measures and they should be able to have that information before the election." FPPC attorney William Lenkeit warned that the practice of using 501(c)s to mask donors in ballot campaigns in California could increase, with the ruling opening up "a Pandora's box,

¹²³ Fair Political Practices Commission v. American Civil Rights Coalition, Case No. 03AS04882 (Sacramento Sup. Ct. Sept. 19, 2003), *appeal filed*, Case No. C045570 (Cal. App. 3d Dist. Dec. 3, 2003).

¹²⁴ Connerly also heads a related 501(c)(3), the American Civil Rights Institute. The American Civil Rights Institute is bankrolled primarily by conservative foundations, such as the Lynde and Harry Bradley Foundation, the Sarah Scaife Foundation, and the John M. Olin Foundation. See California Connected, "Your Vote," *available at* <http://www.californiaconnected.org/yourvote/2002/05/16> (May 2003).

¹²⁵ California Secretary of State, Cal-Access Campaign Finance Activity, *available at* <http://cal-access.ss.ca.gov/Campaign/Committees> (2002).

¹²⁶ Dan Smith, *Anonymous Donations to Race-Privacy Initiative Challenged*, Sacramento Bee, Apr. 19, 2003, at A3.

allowing any campaign committee or individual to do the same thing and avoid disclosure.”¹²⁷

C. 501(c)(6)s

1. Regulatory Framework

Section 501(c)(6) provides a tax-exempt structure for trade associations and business leagues. Because these entities can act as conduits for their corporate members, they are barred from using their general treasury funds to make contributions to candidates or independent expenditures related to candidate elections.¹²⁸ To engage in such activity, they can form political action committees which are subject to FECA regulations. Similar restrictions on the use of treasury funds for expenditures relating to ballot questions have been held unconstitutional by some courts,¹²⁹ so states probably cannot require trade organizations to use segregated funds to participate in direct democracy. Trade organizations may lobby, and they may engage in educational activities, as long as those activities are consistent with their purpose and not their primary activity.¹³⁰ Just like other 501(c) organizations, they can be structured so that the identities of their donors are hidden. Of course, some of these trade and business organizations have their own political brand names or well-known reputations associated with their economic interests so knowing more about the source of their funds may add little to voter competence. In other cases, however, they can be used to obscure the real parties in interest and deny voters an opportunity to use a valuable heuristic.

2. Use of 501(c)(6)s as VPAs

¹²⁷ Rebecca Trounson, *Disclosure Request is Denied*, Los Angeles Times, Sept. 20, 2004, at A20.

¹²⁸ See *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). *Austin* was affirmed by *McConnell* and more extensive segregated fund requirements imposed in BCRA ruled constitutional. See 124 S.Ct. at 695-98 (opinion of Stevens and O'Connor). This restriction would apply to any nonprofit corporation that receives enough contributions from corporate donors to allow an inference that it may be serving as a conduit for corporate spending.

¹²⁹ See, e.g., *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1048 (9th Cir. 2000) (finding the case controlled by *Bellotti* not *Austin*).

The involvement of business leagues in issue campaigns is fairly common and tends to be non-controversial in part because these associations have established political brand names that can serve as cues. They do not therefore typically serve as VPAs. Business associations regularly contribute money to ballot issue committees either directly or indirectly through their connected PACs. The California Chamber of Commerce, for example, has contributed money to a wide range of issue committees, making payments directly to the official issue committees, or alternatively routing them through its PAC, the California Business Political Action Committee (CALBUSPAC). In 2000, CALBUSPAC made over \$250,000 in contributions to six ballot committees supporting and opposing an array of propositions on the primary and general election ballots.¹³¹ The support of the Chamber of Commerce, much like a political party, can serve as a helpful cue for voters; the Chamber of Commerce and its state affiliates are broad-based entities with well-known positions on a variety of issues and a coherent policy platform.¹³²

Lesser-known business associations are also involved in issue elections. One 501(c)(6) organization in particular, the Ballot Issues Coalition (BIC), was expressly created by political operatives for the purpose of defeating animal protection and promoting pro-hunting ballot measures. Little public information is available concerning BIC, beyond the fact that the organization was incorporated in Minnesota in 1997. While neither the IRS nor Minnesota requires donor disclosure data for 501(c)(6)s, there is evidence that BIC has financed numerous ballot campaigns during the past few elections. The Chairman of BIC, Stephen Boyton, claims that by “pooling human and financial resources of national organizations,” BIC has spent over \$1 million since 1998 fighting animal protection initiatives and supporting pro-hunting measures in more than a dozen states.¹³³ In 1998, BIC actively fought initiatives banning the use of snares to trap wolves

¹³⁰ See Daniel L. Simmons, *supra* note 89, at 68-69 (describing political activities of such organizations).

¹³¹ California Secretary of State, Cal-Access Campaign Finance Activity, *available at* <http://cal-access.ss.ca.gov/Campaign/Committees> (2002).

¹³² See Paul A. Beck & Marjorie R. Hershey, *Party Politics in America* 16 (9th ed. 2000) (noting similarity between major political parties and Chamber of Commerce). See also Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 Sup. Ct. Rev. 95, 109-12 (2003) (discussing similarities and differences among major parties, minor parties, and broad-based ideological groups).

¹³³ Phone Interview with Steven Boyton by Daniel A. Smith, Feb. 20, 2003. BIC has participated in pro-hunting ballot campaigns (initiatives and referendums) in Alaska, Arizona, California, Ohio, Oklahoma, Oregon, Minnesota, North Dakota, Utah, Virginia, and Washington. Most recently in 2002, BIC

in Alaska, dove hunting in Ohio, and leg hold traps in California. It also backed right-to-hunt legislative referendums in Minnesota and Wisconsin, and a constitutional amendment in Utah requiring supermajority votes to change wildlife management policies. That year, BIC was successful in five of the six initiative campaigns in which it took sides, “losing” only with the passage of California’s leg hold trap ban.¹³⁴

BIC is used as a VPA by pro-hunting groups, many of which are very well-known to voters and thus provide both positive and negative voting cues. Roughly two dozen organizations have participated in the coalition since its inception, including the National Trappers Association; the NRA; the Congressional Sportsmen's Association; the Archery Manufacturers and Merchants Association; the Foundation for North American Sheep; the National Shooting Sports Foundation; Safari Club International; the Sporting Arms & Ammunition Manufacturers Institute; and the Wildlife Management Institute.¹³⁵ Consider perhaps the most prominent (and notorious) of these groups: the NRA. Although knowledge of its support provides a positive voting cue for many Americans, increasingly its involvement in campaigns may provoke a backlash from voters who oppose its policies. If it has the option to cloak its involvement by contributing to VPAs that do not have to reveal the source of their funding, the NRA can support policies financially while reducing or even eliminating the negative signal its association provides. At the same time, targeted communications associating the NRA with the stealth organization can provide members the positive voting cue they need. VPAs afford a group like the NRA with a choice – if it believes the positive voter reaction will overwhelm the negative reaction, it can take a public position on a ballot initiative. If it believes that voter backlash may be substantial, it can instead funnel money through

contributed \$20,000, or roughly one third of the money raised by the ballot issue committee, Protect Oklahoma's Heritage (POH). See IRS, “PAC Listing: Protect Oklahoma’s Heritage,” *available at* http://eforms.irs.gov/pac_list.asp?irs_pac_key=743057951 (2002). POH was the official sponsor of a legislative referendum, SQ 698, that would have raised the number of signatures needed to propose an initiative from 8 percent to 15 percent on any ballot measure restricting the methods of hunting, fishing, or trapping. Oklahoma’s disclosure of ballot activities is one of the poorest in the country, as Oklahoma’s Ethics Committee does not post initiative donor data on-line. POH, however, also filed as a 527. While the IRS’s 527 on-line disclosure is poor, it is better than what presently exists in Oklahoma. BISC, Blind Spot, *supra* note 15, at 24.

¹³⁴ Stephen Boyton, “Sportsmen rally to fight anti-hunting, anti-trapping ballot initiatives BIC rides again...” *Ballot Issues Coalition*, *available at* http://www.responsiblewildlifemanagement.org/ballot_issues_coalition.htm (last updated Mar. 30, 2003).

VPAs, such as BIC, and inform only its members of its relationship to BIC.¹³⁶ The latter strategy may reduce the strength of its voting cue to those sympathetic to the NRA's policy, but this may be a price the group is willing to pay to avoid significant negative fallout.

D. 527s

Section 527 organizations are nonprofit groups organized for the “function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office.”¹³⁷ All political action committees, as defined by FECA, are 527 organization, although not all 527s are PACs.¹³⁸ Section 527 was enacted nearly thirty years ago to clarify the tax treatment of political organizations so that donations to them are not taxed, although any investment income is.¹³⁹ Donations to Section 527 organizations are not tax-deductible for the contributor. At the time Section 527 was enacted, legislators expected that FECA would require disclosure of entities contributing to the political organizations, but subsequent court decisions narrowed the scope of the federal campaign act's disclosure provisions so that they applied only to express advocacy relating to the election or defeat of specific federal candidates, until BCRA widened the coverage of the federal disclosure rules.

¹³⁵ Other participants in the coalition include Quail Unlimited, Izzak Walton League; The Sportsmen's Foundation; Rocky Mountain Elk Foundation; Field Archery Association of the US.

¹³⁶ NRA Institute for Legislative Action, *Hunting Fact Card*, available at <http://www.nra.org/FactSheets.asp?FormMode=Detail&ID=124> (June 17, 2002).

¹³⁷ I.R.C. § 527(e)(2) (2000). For a list of exempt functions permitted to § 527 organizations, see Bruce R. Hopkins, *The Law of Tax-Exempt Organizations* 414-15 (8th ed. 2003).

¹³⁸ In May 2004, the Federal Election Commission postponed a rulemaking proceeding which would determine whether all 527s active in federal elections should be treated like PACs, with regard to laws limiting contributions. Many argue that the reasoning in *McConnell* would allow this sort of regulation of all 527s, although there is serious disagreement about whether the FEC or Congress should be the institution to decide to extend regulation. See Edward B. Foley & Donald Tobin, *Tax Code Section 527 Groups Not an End-Run Around McCain-Feingold*, 72 U.S.L.W. 2403 (Jan. 20, 2004) (making argument that expanded regulation is permissible). Interestingly, one reason the FEC postponed its rulemaking was the outpouring of comments by 501(c) nonprofits worried that any expanded regulation would be applied to them, again demonstrating the relationship among all these nonprofit vehicles. See Lisa Getter, *Panel Won't Restrict Unlimited Political Spending by Groups*, L.A. Times, May 14, 2004, at A22.

¹³⁹ See Daniel L. Simmons, *supra* note 89, at 36-39 (providing details of tax treatment); Donald B. Tobin, *supra* note 65, at 620 (same).

Until 2000, Section 527s were used as VPAs because organizers exploited a loophole in the laws regulating the organizations. Some 527s argued that they fit the IRS definition of electioneering because their activities are designed to influence candidate elections generally, so they could appropriately use this nonprofit structure, which at the time was not regulated by disclosure laws. But they further argued that they could avoid campaign disclosure rules because they did not target their activity to *specific* candidates.¹⁴⁰ So successfully were they used to disguise the identities of contributors that they became known as “stealth PACs.”¹⁴¹ Although BCRA extends federal campaign disclosure provisions to broadcast advertisements that do not include the “magic words” of express advocacy, disclosure is still limited to money used for communication that refers to a clearly identified federal candidate and broadcast a month or two before an election. Thus, without disclosure laws targeted to all the activities of 527 organizations, disclosure about the contributors to these organizations would have remained incomplete.

In July 2000, Congress closed (or at least reduced) the gap by passing legislation requiring Section 527 political organizations to disclose contributions of \$200 and more and expenditures of \$500 and more. Although Congress subsequently enacted legislation in October 2002 designed to make the disclosure of 527 activities more extensive and easily discernable, disclosure remains cumbersome and not timely.¹⁴² Paper filings are scanned by the IRS, and contribution and expenditure information must be tabulated manually. Some 527s may also be exploiting a loophole left unclosed by Congress. A group need not comply with disclosure rules as long as it pays a tax on the amount of

¹⁴⁰ See David D. Storey, *The Amendment of Section 527: Eliminating Stealth PACs and Providing a Model for Future Campaign Finance Reform*, 77 Ind. L.J. 167, 175 (2002) (describing loophole); Richard Kornylak, *Disclosing the Election-Related Activities of Interest Groups Through Section 527 of the Tax Code*, 87 Cornell L. Rev. 230, 245-46 (2001) (same). See also Donald B. Tobin, *supra* note 65, at 622 (providing evidence that Congress expected such organizations to be covered by FECA’s disclosure rules when section 527 was enacted).

¹⁴¹ See, e.g., Common Cause, *supra* note 70, at 3.

¹⁴² Juliet Eilperin, *Congress Passes Bill to Monitor ‘527’ PACs*, Wash. Post, Oct. 19, 2002, at A4. See David D. Storey, *supra* note 140, at 179-80 (providing details of 2000 disclosure law). The 2002 legislation also exempted from federal disclosure requirements certain political organizations that already disclose comparable information to state agencies. See IRS Fact Sheet, *Section 527 Political Organizations Revised Tax Filing Requirements* (Nov. 2002); Joint Committee on Taxation, *Technical Explanation of H.R. 5596 Relating to Political Organizations Described in Section 527 of the Internal Revenue Code, as Passed by the House and the Senate*, No. JCX-102-02 (Oct. 22, 2002).

money that relates to the information withheld.¹⁴³ The Center for Responsive Politics has determined that a few dozen 527s have not disclosed using this provision, although it appears that some of the failure to disclose resulted from confusion about the rules rather than an intentional decision to conceal sources of funding.¹⁴⁴ Whether this gap in disclosure will be taken advantage of by many groups that value secrecy over tax-exempt status remains to be seen.

Despite the limitations in the disclosure regimes, stealth PACs have not been involved in ballot issues to any great extent. Perhaps this is because 527s must have a partisan purpose, which is at odds with the technically nonpartisan initiative process. The 527s that are involved in ballot campaigns, therefore, must make a plausible argument that the issue they are funding is partisan in nature. Increasingly, however, that is an argument that 527s can make. Initiatives can be affiliated with candidates as part of their election strategy, and some are the target of significant activity by political parties.¹⁴⁵ In that respect, ballot questions can be related to partisan goals, and the involvement of 527s in such campaigns is not inappropriate. The IRS has addressed the issue of the participation of Section 527 organizations in direct democracy in a private letter ruling.¹⁴⁶ As long as such activities are not the “primary” activity of the 527 organization, they can be consistent with its exempt purposes. Moreover, if the group’s involvement is part of a “deliberate and integrated” effort supporting or opposing a political candidate, then it is clearly part of the exempt activity of the 527 group. The Service stated that such an effort could be supported by evidence showing that “participation in [ballot question]

¹⁴³ I.R.C. § 527(j).

¹⁴⁴ See Steven Weiss, Center for Responsive Politics: Money in Politics Alert, *Another Loophole? 527 Disclosure Provision Could Allow Big Donors to Remain Anonymous*, available at <http://www.capitaleye.org/inside.asp?ID=126> (May 26, 2004).

¹⁴⁵ See Daniel A. Smith & Caroline Tolbert, *The Initiative to Party: Partisanship and Ballot Initiatives in California* 7 Party Politics 781 (2001) (showing involvement of political parties in ballot measure contests and a strong impact of partisanship on initiative voting); Richard L. Hasen, *Parties Take the Initiative (and Vice Versa)*, 100 Colum. L. Rev. 731 (2000) (discussing role of political parties in direct democracy); Elizabeth Garrett, supra note 101, at 1858-59 (discussing coordination with candidate elections). California Governor Arnold Schwarzenegger has followed a governance strategy that heavily relies on initiatives – or at least the threat to resort to initiatives – and he has set up a continuing campaign apparatus to focus on issue campaigns. See Elizabeth Garrett, *Democracy in the Wake of the California Recall*, 152 U. Pa. L. Rev. __ (forthcoming 2004), available as USC-Caltech Center for the Study of Law and Politics Working Paper No. 24, <http://lawweb.usc.edu/cslp/pages/papers.html>.

¹⁴⁶ See Priv. Ltr. Rul. 1999-25-051. See also Daniel L. Simmons, supra note 89, at 77-78 (discussing letter ruling and its ramifications).

campaigns is for the purpose of linking candidates, in the minds of voters, to positions on certain issues.”¹⁴⁷

The modest success of the disclosure laws relating to Section 527 demonstrates both the promise of disclosure for voter competence and also the need for comprehensive reform. Once Congress regulated 527 organizations, those who wished to construct political matryoshka dolls to hide the sources of funding simply switched their attention to less regulated entities. There are drawbacks to 501(c) organizations relative to 527 groups because some of the former are limited in the amount of political activity they can undertake. But, as we have seen, those limits are not severe with respect to activity in direct democracy at the state and local levels because that is classified as lobbying, not electioneering.

Even after the passage of federal disclosure laws, some 527s have been involved in ballot campaigns in California. Though its involvement was minimal, the Council for Responsible Government (CRG), a conservative 527 created in July 2000, contributed \$6,000 to the issue committee opposing Proposition 45, an initiative on California’s March 2002 ballot.¹⁴⁸ Proposition 45, which was defeated, would have weakened California’s limitation on legislative terms. CRG’s IRS Form 8872 reports indicate that it received the bulk of its contributions in 2002 from the Club for Growth, a pro-business 527. During the November 2002 elections in California, a handful of 527s were also involved in the defeat of a nonpartisan ballot measure to allow election day voter registration (Proposition 52). Three Republican-allied 527s (American Success PAC, Congressional Leadership California Fund, and Peace Through Strength PAC Non-Federal) contributed a total of \$125,000 (of the \$343,665 raised) to Citizens & Law Enforcement Against Election Fraud, No On Proposition 52, the official opposing issue

¹⁴⁷ Priv. Ltr. Rul. 1999-25-051. See also Judith E. Kindell & John Francis Reilly, Election Year Issues 401 (Oct. 2001), made available by Internal Revenue Service, Charities and Non-Profits: Continuing Professional Education (CPE) Technical Instruction Program for FY, *available at* <http://www.irs.gov/exempt/display> (2002) (referring to a Technical Advice Memorandum (TAM 91-30-008) that allowed as an exempt activity a direct mail campaign in a referendum election that was tied to a particular gubernatorial candidate).

¹⁴⁸ California Secretary of State, Cal-Access Campaign Finance Activity, *available at* <http://www.cal-access.ss.ca.gov/Campaign/Committees> (2002). IRS, PAC Listing, “Council for Responsible Govt,” *available at* http://efrms.irs.gov/pac_list.asp?irs_pac_key=541986610 (2002).

committee.¹⁴⁹ Unfortunately, voters are not privy to most of the financial transactions of 527s involved in ballot campaigns, as the IRS's database is neither easily searchable, nor timely (the pre-election Form 8872 is not disclosed until the January after the election).

E. State VPAs

Most states require that any group raising or spending money to support or oppose an initiative or referendum register with the state as a ballot or issue committee and file regular disclosure reports.¹⁵⁰ These requirements are in addition to any federal disclosure provisions, so if the group active in state issue campaigns is a federal 501(c)(4), it may be required to reveal the sources of its funding pursuant to state laws, notwithstanding the absence of federal disclosure provisions. As the Ballot Initiative Strategy Center's 2002 report on ballot measure disclosure revealed,¹⁵¹ state laws are uneven with regard to disclosure of groups' involvement in issue campaigns, with a few states providing excellent and timely disclosure and many other falling far short of adequate disclosure regulations. Disclosure is not sufficient in some states either because not enough information about sources of funding is required or because information is not made publicly available in a timely fashion and in a format that is easy to use. The major evasive tactics at the state level occur in two ways. First, groups are organized so that they do not technically qualify as "issue committees" covered by the disclosure statute. Instead, they argue that they are merely informing voters about a particular ballot question, rather than advocating for one side or the other, or that they are operating independently of groups that fall under the disclosure law's scope. Second, those

¹⁴⁹ Major contributors in 2002 to American Success PAC, whose stated purpose is to "Support Republican Issues and Causes," include American International Group (\$60,000), AT&T (\$57,000), and DDF Y2K Family Trust (\$50,000). As of January 15, 2003, Congressional Leadership California Fund had not yet filed its Forms 8872 disclosing its activities in the fall election. Peace Through Strength PAC, also designed to "Support Republican Issues and Causes," donated over 43 percent of its total contributions in 2002 to the No on 52 ballot issue. Its major contributors include Trex Enterprises Corporation (\$8,000) and Oshkosh Truck Corporation (\$5,750). Ballot Initiative Strategy Center Foundation, A Buyer's Guide to Ballot Measures 8, *available at* <http://www.ballotfunding.org> (Mar. 2003) [hereinafter BISCFC, Buyer's Guide].

¹⁵⁰ BISCFC, Blind Spot, *supra* note 15, at 13. See, e.g., Cal. Gov't Code §§ 82013, 82015, 82031 (defining "committee" as any group who receives political contributions of more than \$1000 for any calendar year or makes expenditures totaling more than \$1000 in any calendar year in order to expressly advocate the passage or defeat of a ballot measure).

¹⁵¹ BISCFC, Blind Spot, *supra* note 15.

donating to covered entities may themselves not be covered by aggressive disclosure laws. Thus, the issue committee may receive a donation from a limited liability corporation (LLC) called Americans for a Better Future. The issue committee discloses the source of its funding, but without state disclosure rules relating to the LLC, which act as the VPAs in this scenario, citizens are deprived of information necessary for voter competence.

I. State Education Committees

Routing contributions through charities and social welfare organizations to cloak the identities of donors with a stake in ballot campaigns is possible by using nonprofit corporations registered in a state. While the practice is relatively new, it is likely to become more common if campaign disclosure laws become more restrictive and timely in several of the states. Prior to the passage of a campaign finance constitutional amendment ballot initiative in 2002, which is currently being challenged in federal district court,¹⁵² political operators in Colorado used so-called education committees to circumvent state disclosure laws in a variety of campaigns.¹⁵³ In an effort to forge the link between candidates and ballot issues, and to avoid contribution and expenditure limitations placed on state parties, political operatives used these extra-party, nonpartisan, educational committees to independently inform voters about candidates' stances on ballot issues. Under the definitions used by many state laws, education committees will not trigger disclosure regulations. The holding in *McConnell* allowing disclosure of electioneering communication that merely refers to a candidate rather than explicitly taking a position on her election suggests that states can apply disclosure rules to such entities, at least with respect to activities undertaken in the period close to an issue election.

Democratic Party operatives in Colorado among the first to exploit the education committee loophole concerning ballot initiative elections. In 1998, a former chair of the Colorado Democratic Party established the Save Colorado First education committee to

¹⁵² Colorado Right to Life Committee, Inc. v. Davidson, Case No. 03 CV 1454 (D. Colo., filed July 31, 2003).

support ballot measures that could be linked to issues on which Democratic candidates were campaigning. Republican party operatives countered shortly thereafter by forming their own education committee, Centennial Spirit. Though leading technically separate entities, the heads of both education committees worked closely with the officially registered issue committees sponsoring and opposing the various ballot measures. Neither education committee was required by state law to report its receipts and expenditures, although both groups purportedly raised and spent more than \$1 million promoting a handful of ballot initiatives.¹⁵⁴

The mastermind behind Save Colorado First, Howard Gelt, formed his committee to link Republican candidates with ballot measures that Democrats opposed. The former state Democratic Party chair met regularly with the political staff of Planned Parenthood, which led the campaign against anti-abortion measures on the ballot. In fact, Gelt served as the co-chair of the finance committee opposing the initiatives. In the television ads Save Colorado First ran during the fall campaign, the group painted GOP gubernatorial candidate Bill Owens as anti-choice and pro-vouchers, tying him directly to the anti-abortion and private school tax credit initiatives on the ballot. Similarly, Centennial Spirit, under the direction of former GOP state chair Donald Bain, depicted Democratic candidates for statewide office in a negative light by linking them to the more liberal measures on the ballot, especially Referendum B, a statutory measure allowing the legislature to retain taxes to pay for state education and transportation projects.¹⁵⁵ The two education committees' "informational" ads on the candidates were, according to Gelt, "absolutely correlated on what was on people's minds" – that is, the controversial initiatives that were on the ballot.¹⁵⁶ Yet none of the contributions to either education committee or their expenditures to pay for the ads were required to be reported.

2. Limited Liability Corporations

¹⁵³ Peter Blake, *Dems Plot Senate Strategy*, Rocky Mountain News, Feb. 5, 2003, at A47.

¹⁵⁴ Daniel A. Smith, *The Role of Political Parties in State Ballot Initiatives*, in *Initiative-Centered Politics: The New Politics of Direct Democracy* (D. McCuan & S. Stambough eds., forthcoming 2004).

¹⁵⁵ Karen Abbott, *Nonprofit Organization Says Owens Would Be Quicker to Solve Traffic Congestion*, Rocky Mountain News, Oct. 23, 1998, at 29A.

¹⁵⁶ Daniel A. Smith, *supra* note 154.

Because of the absence of disclosure in some states, political operatives have used limited liability corporations (LLCs) to funnel contributions to ballot issues campaigns, while shielding the identities of their officers and shareholders.¹⁵⁷ For instance, in California, a Philadelphia-based LLC, Freba Fay, made contributions to two different ballot measures in 2000 and 2002. In 2002, Freba Fay contributed \$100,000 to Yes on 51 – Citizens for Traffic Safety, the issue committee backing Proposition 51 on California’s November ballot. Two years earlier, the corporation had contributed \$120,000 to two separate issue committees opposed to Proposition 22, the successful California initiative in November 2000 that prohibited gay marriages. Unlike in California, where LLCs are required to file the names of their officers with the Secretary of State, Pennsylvania law does not require the public disclosure of officers or shareholders. When contacted by the press, John Taylor, the agent who created the corporation, refused to disclose who was financing the corporation.¹⁵⁸

A similar situation occurred in California in 2000 when two LLCs registered in Seattle, Washington – Wild Rose, LLC and Rosebud, LLC – made contributions of more than \$1 million to two bond initiatives for public parks (Proposition 12 and Proposition 13). After considerable public outcry, with Washington state legislators calling for the LLCs to unveil their officers, Caroline Getty, an oil baroness and environmental philanthropist, voluntarily revealed that she was the sole contributor to Wild Rose and Rosebud.¹⁵⁹ In January 2002, this time with Getty’s name identified with Wild Rose, her LLC contributed \$500,000 to the Nature Conservancy Action Fund of California, which transferred the money to Yes On 40: Protect California’s Land, Air and Water, the group officially sponsoring Proposition 40, a legislative bond referendum on the March ballot.¹⁶⁰

¹⁵⁷ Some states, such as Michigan and Washington, require LLCs to disclose their officers and shareholders if they are engaged in certain campaign related activities.

¹⁵⁸ Evan Halper, *Political Donors Shielded by Loophole*, L.A. Times, Sept. 30, 2002, at B6. For contribution reports, see California Secretary of State, Cal-Access Campaign Finance Activity, available at <http://www.cal-access.ss.ca.gov/Campaign/Committees> (2002).

¹⁵⁹ Evan Halper, *supra* note 158. For contribution reports, see California Secretary of State, Cal-Access Campaign Finance Activity, available at <http://www.cal-access.ss.ca.gov/Campaign/Committees> (2002).

¹⁶⁰ California Secretary of State, Cal-Access, “Getty, Caroline and her Affiliated Entity Wild Rose, LLC,” available at <http://www.cal-access.ss.ca.gov/Campaign/Committees> (2002).

Interestingly, this example provides an instance where knowing the identity of the individual behind political activity could have provided a helpful voting cue. In some cases, using support by individuals as a heuristic can be problematic because many well-known people do not have clear reputations for policy positions. For example, what information is conveyed by substantial financial support from Bill Gates? The ballot question he supports might benefit Microsoft specifically and information technology generally, but perhaps Gates' advocacy signifies his views on education, views that he holds for reasons other than financial ones. More often than ideological or economic groups, individuals act from a mixture of motives, so the signal their support provides is less helpful. Here, however, knowing that Caroline Getty was behind the LLCs would have been helpful because of her very public position on issues relating to public land and environmental issues in this part of California. This example suggests that disclosure of substantial financial activity by individuals might provide cues in some instances, although generally disclosure of actions by individuals is less helpful than group-support heuristics and implicates more serious First Amendment concerns.

3. Independent Expenditure Committees

Although occurring relatively infrequently, political operatives in a few states are able to avoid disclosure of campaign contributions by making independent expenditures on behalf of a ballot issue. While there is no standard definition in the states of what constitutes an independent expenditure, it essentially is a contribution that is “not made in cooperation, consultation, or concert with, or at the request, suggestion, or prior consent of a candidate or committee.”¹⁶¹ In some states, independent expenditures on ballot campaigns must be disclosed, but the state agencies do not make the reports easily available. Third party expenditures on ballot campaigns in Idaho are not required to be filed until five days before an election, thereby minimizing public revelation. In Alaska, payments made by committees making independent expenditures must be disclosed, but not the committee's receipts which means that the sources of funding remain veiled. In a handful of states – Florida, Massachusetts, Missouri, and Oregon – political operatives

¹⁶¹ BISCF, *Blind Spot*, supra note 15.

are not required to report their independent expenditures on ballot campaigns, effectively concealing their identities.

The level of independent expenditures on issue campaigns by groups that are not the official proponents/opponents of ballot measures, though not possible to verify in these states that do not require disclosure, may be considerable. Washington, for example, requires that entities making independent expenditures on ballot campaigns provide in a timely and well publicized fashion the full disclosure of their expenditures and their receipts. In 2000, the state recorded over \$1 million in independent expenditures on ballot measures.¹⁶² In contrast to the comprehensive disclosure of independent expenditures in Washington, Alaska requires only the partial disclosure of the financial activities of committees making independent expenditures. In 2002, the Alaska Committee (Against Measure 2) spent \$1,089,651 opposing a ballot initiative that proposed to move all sessions of the state legislature from Juneau to the Matanuska-Susitna Borough. The issue committee that was registered officially to oppose the initiative, the Frank Committee, spent only \$344,768, a fraction of the Alaska Committee's independent expenditures.¹⁶³ Yet Alaska requires the disclosure only of the payments made by committees making independent expenditures, and not the identities of the contributors to the committees independently spending on behalf of an issue.¹⁶⁴ There is thus no way to determine what political operatives were behind the independent expenditure campaign that helped to defeat Measure 2.

4. *Committees of Continuous Existence*

Prior to a law that took effect on July 1, 2004, committees of continuous existence (CCEs) constituted a major loophole that political operatives in Florida were able to exploit to avoid disclosing the amounts and identities of their contributions and expenditures in ballot (and candidate) campaigns. According to Florida statutes, CCEs

¹⁶² Id.

¹⁶³ Alaska Public Offices Commission, "2002 State General Election Summary for FRANK Committee," available at <http://apoc.admin.state.ak.us/listgroups.jsp?year=2002&grouptype=ballot&type=state> (last updated May 30, 2003).

¹⁶⁴ Alaska Public Offices Commission, "Independent Expenditures: Alaska Committee," available at <http://apoc.admin.state.ak.us/independent.jsp> (last updated May 30, 2003).

must meet only minimal requirements; they must have a “written charter or set of bylaws which contains procedures for the election of officers and directors and which clearly defines membership in the organization,” and “at least 25 percent of the income of such organization, excluding interest, must be derived from dues or assessments payable on a regular basis by its membership pursuant to provisions contained in the charter or bylaws.”¹⁶⁵ As of May 2004, 500 CCEs were registered with the Division of Elections in Florida.¹⁶⁶ Before the new reform law, CCEs were not required to reveal their members or contributors, making it impossible, unless they voluntarily disclosed their activities, to verify their contributions and expenditures.¹⁶⁷ Furthermore, while CCEs are prohibited from making “expenditures in support of, or in opposition to, an issue unless such committee first registers as a political committee,”¹⁶⁸ voters will still likely be unable to substantiate whether or not CCEs are engaged in such prohibited activities due to the vagueness of the disclosure requirements.

¹⁶⁵ Fla. Stat. § 106.04 (2004).

¹⁶⁶ Florida Department of State, Division of Elections, “Download Committee List,” available at <http://election.dos.state.fl.us/online/downloadcomlist.asp> (2004). Only 324 PACs were registered with the Division of Elections in January 2004. Peter Blake, *Of Polis and Nonprofits*, Rocky Mountain News, July 3, 2002, at A31.

¹⁶⁷ Before passage of Senate Bill 2346 in May 2004, some CCEs had begun to voluntarily reveal their contributors after critical press coverage. See Steve Bousquet, *IRS Wants the Details, and Some Aren't Complying*, St. Petersburg Times, Sept. 28, 2003, at A10; Steve Bousquet, *Lifting Veil from Hidden Donations*, St. Petersburg Times, Jan. 27, 2004, at B1; Gary Fineout, *More Fund-Raising in Secret; Some Legislators are Still Withholding the Names of Contributors to Fund-Raising Committees*, Sarasota Herald-Tribune, Oct. 19, 2003, at B1; Daniel A. Smith & Nicole M. James, *Committees Hold the Secret to Campaign Financing*, St. Petersburg Times, Apr. 10, 2003, at A19.

¹⁶⁸ Fla. Stat. § 106.04(5) (2004). The statute does provide one exception to the prohibition on a CCE’s “expenditures in support of, or in opposition to, an issue.” The statute goes on to state: “provided such committee may make contributions in a total amount not to exceed 25 percent of its aggregate income, as reflected in the annual report filed for the previous year, to one or more political committees registered pursuant to s. 106.03 and formed to support or oppose issues.” Unfortunately, it is ambiguous if the language “such committee” refers to the CCE or to the political committee that the CCE “first registers as,” as indicated in the previous clause. According to the interpretation of Mark Herron, a Florida-based lawyer representing a political committee that received contributions from a CCE, a CCE may make direct contributions to an issue-oriented political committee, but the CCE is limited to expending up to 25 percent of its aggregate income from the previous year. Herron submits that in 1978 the Florida Division of Elections in an advisory opinion, (DE) 78-41, concluded that a CCE could contribute to a political committee supporting or opposing an issue without limitation and without registering as a political committee, and that the 25 percent limitation was added in 1989. An alternative interpretation is that a CCE must first register as a political committee before that political committee (“such committee”) “may make contributions in a total amount not to exceed 25 percent of its aggregate income, as reflected in the annual report filed for the previous year.” Email from Mark Herron, “Subject: Re: CCEs,” May 5, 2004, mherron@lawfla.com (on file with Daniel Smith). See Nicole M. James & Daniel A. Smith, *Stop Political Fund-Raising Arm*, Gainesville Sun, Apr. 25, 2004, at G2; Tim Ryan, *A Wrong Assertion*, Gainesville Sun, May 4, 2004, at A8.

The inability to identify campaign financing activities of CCEs surfaced during Florida's 2002 election. Of the five initiatives on the ballot, developers and home builders were especially opposed to Amendment 9, a classroom-size reduction measure, but they also opposed the other four ballot measures. Only Amendment 9 was opposed by an official committee that registered as PACs with the state Division of Elections.¹⁶⁹ It is certainly possible that CCEs, in conjunction with some Florida-based 527s, led stealth campaigns against the ballot measures. For example, the Florida Home Builders PAC (FHB PAC), a registered CCE that raised \$900,131 from its unidentified and undisclosed number of "members" between 2000 and 2002, has given generously over the years to other CCEs and 527s, as well as to other PACs in Florida.¹⁷⁰ On September 11, 2002, FHB PAC contributed \$60,000 to the Florida Freedom Council (FFC), an obscure 527 registered in Tallahassee with apparent ties to home builders. FFC's obliquely stated purpose on its Form 8871 on file with the IRS is to "advocate positions on public issues and may make incidental references to candidates whose views on these issues are consistent or inconsistent with the issues advocated by the Committee."¹⁷¹ The FFC raised \$218,744 between July and the end of September, 2002, largely from contractors and home builders, including the \$60,000 from FHB PAC. Then, sometime between August 22 and September 30, FFC paid a direct mail company, Public Concepts, LLC, \$79,225, for "direct mail services."¹⁷² During this period, FFC also contributed \$75,000 to another 527, Alliance for Florida's Future (AFF), with ties to developers registered in Tallahassee. AFF, which raised \$607,790 between August 20 and September 30, 2002, then paid Multi Media Services Corp. in Alexandria, Virginia, \$348,000 and made additional expenditures topping \$250,000 to several media production firms and television stations.¹⁷³

¹⁶⁹ Coalition to Protect Florida, "Supporting Information: Amendment 9 Opponents," *available at* <http://www.protectflorida.com/amend9.htm> (2002).

¹⁷⁰ Florida Department of State, Division of Elections, "Campaign Expenditures: Florida Home Builders PAC(CCE)," *available at* <http://election.dos.state.fl.us/cgi-bin/TreFin.exe> (2001).

¹⁷¹ IRS, "PAC Listing: Florida Freedom Council." Form 8871, *available at* http://eforms.irs.gov/pac_list.asp?irs_pac_key=020630982 (2002).

¹⁷² *Id.*

¹⁷³ IRS, "PAC Listing: Alliance for Floridas [sic] Future," *available at* http://eforms.irs.gov/pac_list.asp?irs_pac_key=223865096 (2002).

Weaknesses of Florida's donor disclosure system before the 2004 legislation, as well as that of the IRS, impeded the abilities of voters to determine if certain groups were involved in ballot campaigns. The electoral missions of CCEs registered with the Florida Division of Elections and 527s registered with the IRS are often vacuous. Until recently, Florida's perfunctory disclosure requirements of expenditures by CCEs (as with 527s) were inadequate to reveal to voters the purpose of a group's expenditures. Thus, before the passage of the reform legislation in 2004, there was no way to verify if expenditures by FHB PAC, FFC, and AFF were used to promote (or oppose) either ballot measures or issues related to candidate races. The deliberately concealed nature of the numerous transactions involving various Florida CCEs and 527s with ties to Florida home builders, combined with the timing of the expenditures, however, is suspect. The few voters who may have been aware of the involvement in ballot issue (or candidate) campaigns by the Alliance for Florida's Future or the Florida Freedom Council would not likely have known that contributions were being made by home builders with vested interests in the state.

IV. Conclusions

These examples, demonstrating the efforts of various groups to avoid transparency and to veil the source of their funding in ballot issue elections, present substantial challenges for those designing effective disclosure statutes to promote voter competence. Keep in mind that the only regulation of political spending in direct democracy is disclosure, so the activities described in the previous section were undertaken primarily to evade publicity, not to also avoid limits on contributions or other spending.¹⁷⁴ Our focus on VPAs underscores the importance of the design of disclosure statutes. Under current First Amendment jurisprudence, designing a statute so that it provides information related to the important state interest justifying the regulation is vital to whether a court will find it constitutional. But avoiding jurisprudential pitfalls is not the only reason for careful tailoring, or, after *McConnell's* willingness to accept broad disclosure statutes (albeit in the candidate-election context), the most important reason.

The rationale of voter competence is based on the view of voters as relatively inattentive to political information and in need of shortcuts. Too much information can overwhelm voters, or at least make it more difficult for them to pick out the data that support accurate voting cues. In short, current disclosure statutes are flawed because they are both over- and under-inclusive. They provide too much information that is not relevant to voter competence, and thus drowns out helpful voter cues, and they are not sufficiently aggressive at piercing VPAs to provide information about the real parties-in-interest behind spending in initiative campaigns.

In this conclusory section, we will discuss two types of design issues: the importance of targeting a disclosure statute to produce information most helpful for voter competence, and the need to address logistical issues to ensure that necessary information is accessible and available before the election. Timing is important to successful disclosure because, as the majority in *McConnell* emphasized, information must be available “to curious voters *in advance of elections.*”¹⁷⁵ Drafters must also expect that some groups will work to evade regulation, so comprehensive statutes must be designed to pierce veils, a task made especially difficult in a world of multiple jurisdictions that do not necessarily coordinate. *McConnell*’s analysis of disclosure provisions in BCRA emphasized that the law worked to pierce deceptive veils so that voters are provided information about the “proximate and ultimate” source of funds for certain political activity.¹⁷⁶ The Court was also concerned throughout its analysis of BCRA with the possibility that groups would evade legal restrictions by altering their organizational form or changing the way they spent money. It signaled a judicial willingness to accept the need to avoid circumvention of regulation as a justification for more aggressive legal restrictions.¹⁷⁷

¹⁷⁴ Some of the federal nonprofits are also working to conceal their activities related to federal candidate elections and may be used to avoid contribution and expenditure limitations that apply in those campaigns.

¹⁷⁵ 124 S.Ct. at 693 (opinion of Stevens and O’Connor) (emphasis added).

¹⁷⁶ This phrase is used by Scalia’s dissent, which is favorably disposed to disclosure as the best regulation of campaign finance in candidate elections. See *id.* at 726 (Scalia, dissenting). See also *id.* at 691 (opinion of Stevens and O’Connor) (sharing concern about deceptive names and the need for disclosure to pierce veils).

¹⁷⁷ *Id.* at 661-65 (discussing governmental interests supporting the soft money provisions in BCRA and noting the ways soft money had been used to circumvent other contribution limitations).

The examples we have provided indicate that information relevant to the group-support heuristic can be hidden in the absence of mandatory disclosure. First, VPAs are used to cloak the identity of groups or individuals who are the major source of funds. In this way, entities worried about voter backlash when the public learns of their support can essentially launder their political money and make it appear that the initiative or referendum is supported only by a group with a patriotic or innocuous sounding name. Not only will this deception avoid negative electoral consequences, but if the VPA's name is chosen carefully enough, perhaps it will actually attract voter support. Thus, the Americans for Tax Reform moniker hid the substantial involvement of the Republican Party, a group that provides a strong voting cue to all voters and one that is decidedly negative for some voters. Similarly, Save Colorado First was used as part of a Democratic strategy to push the party's issues and help its candidates, but no disclosure statute forced revelation of the state Democratic Party's involvement. The Conservation Action Fund hid the involvement of developers in a California initiative and made it appear that the groups supporting the ballot measures were environmental groups. Only if disclosure of the sources of funding is required would these VPAs cease to be effective, and the disclosure must sometimes perforate several layers of groups, if for example a LLC is contributing to a 527, or a series of nonprofit organizations are being used.

Second, VPAs are used to hide the fact that a group's funding comes primarily from one wealthy individual or organization. In that way, support for a position can appear more populist or grassroots than the funding realities would suggest. The wealthy Koch brothers bankrolled the U.S. Term Limits group; the Shefa Fund contributed three-fifths of the total money raised by Committee for Fairness to Children and Teachers; multimillionaire Ron Unz financed several groups involved in direct democracy; and Caroline Getty was the real party-in-interest behind several LLCs active in particular California initiatives that affected her economic interests. In some cases, knowing the identify of the major funding source provides a voting cue to citizens familiar with its political reputations. For example, the Koch brothers' long involvement in libertarian interests might accurately reflect the larger political agenda of U.S. Term Limits.

But even when the wealthy individual or organization has no political brand name, voters – or more realistically, the information entrepreneurs on which citizens will rely –

find it relevant and often helpful to know that a group that sounds as though thousands of Americans in favor of education reform have bankrolled a movement is really controlled and funded by one multi-millionaire with his own, possibly idiosyncratic vision of reform. Armed with such data, information brokers can then enlighten citizens about whether the contributors to nonprofits active in issue campaigns also support specific candidates or political parties, a disclosure cue that could allow citizens make more competent choices when voting on ballot measures.¹⁷⁸ Interestingly, the justices in *McConnell* who upheld BCRA's disclosure provisions believed that information about the identities of both veiled groups and concealed individuals would be helpful to voters.¹⁷⁹

Of course, disclosure statutes cannot be drafted so that only groups used as VPAs must comply with their proscriptions. Drafters cannot distinguish *ex ante* between groups with reputations that accurately reflect the extent of grassroots support or their ideological commitments from those used to hide the identities and character of funders deep within the matryoshka doll.¹⁸⁰ To eliminate the phenomenon of VPAs, mandatory and comprehensive source disclosure is crucial. Furthermore, source disclosure with respect to well-known organizations might provide insight into the character of that support and verify the accuracy of their reputations. Thus, even groups with political reputations sufficient to serve as voting cues without further disclosure of funding sources should be required to comply.

However, because statutes must sweep relatively broadly, they should include *de minimis* provisions which exempt the disclosure of entities that provide relatively

¹⁷⁸ Darrell West and Burdett Loomis cast doubt on the ability of the press to serve as good information brokers because they have not been "very rigorous" in monitoring interest groups in the political process or unmasking "stealth consequences." See Darrell M. West & Burdett A. Loomis, *The Sound of Money: How Political Interest Get What They Want* 233-35 (1998). Better disclosure statutes should improve the performance of the media, but clearly more work must be done to analyze the role of information entrepreneurs like press and challengers and how well they fulfill those roles.

¹⁷⁹ *McConnell*, 124 S.Ct. at 691 (opinion of Stevens and O'Connor) (using as examples veiled groups used by the pharmaceutical industry and by two wealthy conservative brothers).

¹⁸⁰ The lower court judges upholding BCRA's disclosure provisions made this point in response to the Chamber of Commerce's argument that it was not a VPA, but instead had a well-established political brand name. They held that "the Chamber does not provide, and the Court cannot formulate, a disclosure rule that would take into account the notoriety of the groups involved." *McConnell v. FEC*, 251 F. Supp. 2d 176, 243-44 (D.D.C. 2003) (per curiam).

insignificant sums of money.¹⁸¹ Currently, FECA does not require candidates to reveal information about people who contribute less than \$200. BCRA's disclosure provisions require disclosure of those contributing more than \$1,000 to a disbursing fund that will be used for electioneering communications, but only after the expenditures from the fund exceed \$10,000. These provisions can serve as guides for the appropriate threshold to trigger disclosure with respect to funding of political activity in direct democracy. Because knowing the identity of individuals who are active in direct democracy is not as helpful a voting cue as the group-support heuristic, and because the constitutional issues may be more serious with respect to individuals' political speech, a higher threshold for individuals than for groups might be justified. Concern about individuals' first amendment rights is heightened when disclosure statutes make public information like the contributors' occupations and employers. Any threshold must remain low enough, however, to discourage wealthy individuals from contributing money directly, rather than through organizations, in order to circumvent disclosure statutes. Such thresholds for coverage have the additional advantage of reducing the burden of compliance for average Americans and smaller organizations. However, although the names of those spending small sums of money in direct democracy need not be revealed, statutes should require that the number of small contributions to each active organization be disclosed so that voters can assess the character of the group's funding base.

To further assist in the formulation of voting cues, disclosure statutes should link the groups on which information is provided to the particular ballot initiatives and referendums that the communication or expenditures are intended to influence. In other words, a broad definition of issue committee or regulated entity is required so that groups do not escape regulation and so information is linked the relevant ballot question. To vindicate the voter competence interest fully, all political communication that is broadcast widely or appears in the mass media should be accompanied by information revealing the major sources of funding for the entity producing the advertisement. Current Federal Communications Commission guidelines require that all paid political advertising include information about the "true identity of the person or persons, or

¹⁸¹ See Elizabeth Garrett, *Voting with Cues*, supra note 10, at 1042-45 (discussing various de minimis exemptions).

corporation or other entity by whom or on whose behalf such payment is made.”¹⁸² The FCC regulation applies to any paid political advertising, whether close to an election or not, and such scope is sensible from a voter competence perspective. The best way for voters to accurately link groups with a particular ideology or policy is for people to encounter credible evidence about their political positions. Thus, revealing the source of political communication in a timely and transparent manner, at least where that communication is widely-broadcast and expensive, helps create an information environment that allows for effective use of voting cues when elections occur.

However, disclosure statutes that apply at all times, rather than only close to an election, are more constitutionally problematic, so cautious drafters may consider requiring disclosure only for expenditures within a certain, rather generous window surrounding a ballot question vote.¹⁸³ The window should be large enough to include communication designed to influence voters during the petition gathering phase as well as during the vote itself. Requirements that speakers identify themselves simultaneously with the communication should be limited to advertisements shown in the mass media. Such tailoring not only avoids concerns raised by the Court in *McIntyre*, but it is also justified because such communication is the most likely source of voting cues. In all cases, statutes must set up a process to allow groups whose members face serious reprisals to receive an exemption from coverage.

More generally, additional research is required to determine which pieces of information best serve voter competence and which of these are not otherwise available in most cases through public endorsements and voluntary disclosure of campaign activities. Certainly, some of the information that entities attempted to hide in the case studies we have provided would have assisted voters trying, on the basis of limited information, to draw accurate conclusions about the consequences of their votes. For example, knowing of the link between political parties and certain VPAs or of the involvement of trade organizations in initiative campaigns would likely have enhanced

¹⁸² See Trevor Potter, Buckley v. Valeo, *Political Discourse and the First Amendment*, 33 Akron L. Rev. 71, 92 (1999) (discussing and quoting from 47 C.F.R. § 73.1212 (1998)). The Court upheld similar provisions in BCRA applied to broadcasters and requiring disclosure relating to candidate requests, election message requests, and issue requests. See *McConnell*, 124 S.Ct at 712-19 (opinion of Breyer).

voter competence. Mandatory disclosure would have allowed entrepreneurs like the media and opponents of the groups to discover the information relatively easily and make it known in a salient way to voters. But not all information promises to increase voter competence, and too much information will overwhelm voters with limited time and attention for ballot questions. Our case studies generally show the extent of the evasive activity and the substantial gaps in current disclosure statutes; they do not allow us to conclude that all the information hidden would have served voter competence had it been publicized. Whether disclosure statutes can be drafted to target only, or mostly, the information required for voter competence remains to be seen, but to begin the analysis, we must have a clear sense of the information necessary for competence and what of that data is currently unobtainable or difficult to discover.

The second set of design issues is more technical in nature, although it also involves regulatory design. Disclosure statutes must provide information in a way that allows information entrepreneurs to obtain the data relatively easily and in a timely fashion. Our analysis in Part III suggests various technical deficiencies in disclosure statutes in addition to the failure to require that the source of significant funds for political activity be publicly revealed. For example, the forms on which nonprofits report their lobbying and electioneering activity do not require the groups to separate their various activities and provide more detail about their outlays. Furthermore, the assortment of state and federal disclosure systems differ enough that an effective search requires a researcher to access a variety of databases, requiring different search techniques. The most extensive federal disclosure regime affecting groups somewhat active in direct democracy – the law relating to Section 527 – is unsatisfactory because it does not facilitate easy and efficient searches, it provides inadequate information about a group’s contributors and expenditures, and it does not require the disclosure of considerable campaign activities until well after the election season. Nonetheless, the disclosure rules affecting Section

¹⁸³ See Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 Tex. L. Rev. 1751 (1999) (discussing the different regulatory regimes allowed with respect to political speech and speech seen as election-related, but in the candidate election context).

527 organizations are superior to the state systems which are not yet online or which do not provide any information online before the election.¹⁸⁴

Perhaps the greatest drawback to disclosure statutes is their patchwork quality. Currently, there is a plethora of federal and state disclosure regimes, some of which require duplicative information. But over-reporting is not the real problem. Without coordination or uniformity, it is easier for entities seeking to cloak their activity to take advantage of an organizational structure that falls between the regulatory cracks. In many cases, state disclosure statutes that apply in the context of direct democracy are not sufficiently expansive in their scope, and the federal statutes may not pick up entities that focus their efforts purely at state and local politics. If a group can be organized in one state, under laws that protect the anonymity of its members (such as LLCs or education committees), and contribute money to an issue committee in another state without revealing anything other than its name, voter competence is severely undermined. Or if a matryoshka doll of state and federal nonprofit organizations can mask the ultimate source of funding used to influence the outcome of a ballot measure, voters will construct helpful heuristics only with great effort. Such effort is unlikely, even with the assistance of information entrepreneurs – that is precisely why voting cues are so important in the first place. Our work underscores the need for reform, uniformity, and expanded coverage.

Aggressive, targeted disclosure statutes written to work compatibly with disclosure regimes in other states and on the federal level and to provide data in a way that is easy to access online well before an election are crucial to reducing the malign influence of VPAs. With appropriate source-disclosure rules, the real parties-in-interest providing funds for campaigns to influence the outcomes of ballot questions should be discoverable even if they use a series of VPAs as conduits for the money. Of course, some groups will continue to seek to evade publicity with the help of political operatives who proudly proclaim that if you show them a regulation, they will show you a loophole.¹⁸⁵ But the

¹⁸⁴ The Ballot Initiative Strategy Center Foundation has detailed many of the limitations in the state disclosure systems. BISCf, *Blind Spot*, supra note 15.

¹⁸⁵ See Larry Levine, *When Political Contributions Become an Act of Civil Disobedience*, 1 *Elect. L.J.* 499, 499 (2002) (statement made with respect to regulations limiting contributions and spending, from a political consultant active in California for 33 years).

hodgepodge of disclosure regimes with glaring gaps and looming lacunae invites evasion; thus, serious reform with uniform requirements could certainly improve the situation.

After *McConnell v. FEC*, judicial hurdles to disclosure statutes are vastly reduced, so the focus of policy makers should turn to drafting legislation at the federal and state levels. Well-drafted and targeted statutes can make circumvention costly enough that its incidence will decrease substantially, with corresponding gains to voter competence. The stakes for reform are high. Substantial sums of money are spent in ballot measure campaigns, with registered issue committees spending over \$173 million in 2002 races and over \$400 million in 1998 races.¹⁸⁶ These figures do not include money spent by currently unregulated entities that take advantage of loopholes in disclosure statutes. The importance of disclosure of financial activity in direct democracy is also related to transparency with respect to candidate elections. Spending on issue campaigns can either directly or indirectly be used to influence candidate elections, a situation which may increase as political operatives search for loopholes in BCRA and find the largely unregulated environment of ballot questions.¹⁸⁷ More study is required of the relationship between spending in issue campaign and influence in candidate elections at the state and federal level, but history suggests that money will flow to unregulated canals that offer opportunities for influence.

¹⁸⁶ See BISCF, Buyer's Guide, *supra* note 149, at 3.

¹⁸⁷ *Id.* at 10-11. The interaction between BCRA's requirements and federal candidate involvement in state ballot measures has already prompted an advisory opinion from the Federal Election Commission. Representative Jeff Flake (R-Ariz.) established a group called Stop Taxpayer Money for Politicians Committee to mount a petition drive to repeal the Clean Election fund that provide public money for state candidates. Several public interest groups argued that he should not be allowed to raise money outside BCRA's limitations "when the ballot measure committee is deeply entangled with a Federal candidate and intends to engage in voter mobilization activities aimed at turnout at the polls for precisely the date Federal candidates stand for election, or to finance public communications promoting or attacking Federal candidates." See Letter from the Campaign Legal Center to FEC General Counsel, Apr. 21, 2003, available at <http://www.fec.gov/aoreq.html> (last visited June 9, 2003) (one of the comments on AOR 2003-13, Rep. Flake's request for an advisory opinion). The FEC ruled against Flake. See FEC Advisory Opinion No. 2003-12 (July 29, 2003).