



## Campaign Finance in the Hybrid Realm of Recall Elections

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## Campaign Finance in the Hybrid Realm of Recall Elections

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In the ever-evolving jurisprudence of campaign finance, one principle has endured: the rules governing candidate elections are analyzed differently from the rules governing ballot measures because the latter elections have been found not to implicate the state's legitimate interest in combatting *quid pro quo* corruption.<sup>1</sup> In the absence of candidates in initiative elections (so the courts naively believe), there is no one for monied interests to influence unduly in order to gain favorable votes, access, or other targeted benefits. Therefore, there is no specter of *quid pro quo* corruption that might lead voters to lose faith in democratic institutions. It should now be apparent to even a casual observer of the initiative process that candidates are very involved in ballot measures; they use initiatives to influence turnout in elections in which they are also running, and they resort to initiatives to adopt policy change they cannot enact through the traditional legislative system.

The close relationship between candidates and direct democracy is formally present in a context of growing salience: recall elections. In the 19 states that allow recalls on the state level and the 29 or more that provide for recalls of local

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<sup>1</sup> See, e.g., *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999).

officials,<sup>2</sup> the hybrid nature of our democratic institutions is clear and draws into question any easy bifurcation of campaign finance rules that turn on the formal presence of a candidate. Recall elections have garnered more attention as governors and state legislators face the possibility of being removed from office in the midst of their terms.<sup>3</sup> The successful recall of Gray Davis in California was unusual enough to have made national news; the fact that he was succeeded by movie star and politician Arnold Schwarzenegger ensured that the world focused on the 2003 election. More recently, in 2012, Wisconsin Governor Scott Walker fought successfully to complete his term in the face of a recall sparked by reaction to his championing state legislation weakening collective bargaining rights for government workers. Local officials in more than half the nation's municipalities have long dealt with the prospect of recalls;<sup>4</sup> use of this tool of direct democracy is more frequent at the local level and more often successful.<sup>5</sup>

Scholarly and judicial attention to the rules governing recall elections – particularly the campaign finance regulations – has been minimal, with only a few challenges to contribution limitations reaching the appellate courts in the last few years.<sup>6</sup> In this article, I will use recall elections as a way to consider the current state of campaign finance jurisprudence as it relates to all the mechanisms of direct democracy. Recalls provide a different framework to assess campaign finance rules because they are explicitly hybrid elections, combining a ballot question about the

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<sup>2</sup> National Conference of State Legislatures, *Recall of State Officials* (Mar. 14, 2012), <http://www.ncsl.org/legislatures-elections/elections/recall-of-state-officials.aspx> [hereinafter NCSL, *Recall of State Officials*].

<sup>3</sup> See Joshua Spivak, *2011, the Year of the Recall*, L.A. Times, Dec. 27, 2011 (noting the accelerating trend of recalls at the state level over past thirty years). Only one other governor in history has faced a recall: Lynn Frazier of North Dakota was successfully recalled in 1921. Mark Baldassare & Cheryl Katz, *The Coming Age of Direct Democracy: California's Recall and Beyond* 11 (2008).

<sup>4</sup> By 2001, more than 60 percent of cities allowed for the recall. Richard C. Feiock & Seung-Bum Yang, *Factors Affecting Constitutional Choice: The Case of the Recall in Municipal Charters*, 37 State & Local Gov't Rev. 40, 41 (2005).

<sup>5</sup> See Rachel Weinstein, *Note: You're Fired! The Voters' Version of "The Apprentice": An Analysis of Local Recall Elections in California*, 15 S. Cal. Interdisc. L.J. 131, 131, 142 Table 1 (2005); Bruce E. Cain, Melissa Cully Anderson & Annette K. Eaton, *Barriers to Recalling Elected Officials: A Cross-State Analysis of the Incidence and Success of Recall Petitions*, in *Clicker Politics: Essays on the California Recall* 17, 21 Table 2.1 (S. Bowler & B.E. Cain eds. 2006).

<sup>6</sup> See, e.g., *Citizens for a Clean Government v. City of San Diego*, 474 F.3d 647 (9th Cir. 2007); *Farris v. Seabrook*, 667 F.3d 858 (9th Cir. 2012).

recall of an official with, sometimes simultaneously, the election of a successor. The Court's recent articulation of constitutional principles that apply to campaign finance laws in candidate elections, *Citizens United v. Federal Election Commission*,<sup>7</sup> affects the analysis of the laws that can regulate the various players in a recall election. The analysis of recalls and campaign finance will be relevant not only to future consideration of laws applying to such elections, but it also offers a lens through which to assess campaign finance rules applying to ballot measures generally and to evaluate the Court's narrow view of the kind of state interest that can justify regulation in candidate elections.

Part I will lay out the structure of the recall process, particularly in California and Wisconsin, the two states in which statewide recalls of governors have shaken the political establishment and caught the attention of the nation. Part II will analyze the constitutional issues raised by campaign finance regimes that often include contribution limitations affecting recall elections; this discussion is shaped now by *Citizens United* and other relevant decisions of the Roberts Court.<sup>8</sup> I will argue that the Court's insistence that the only important state interest in the realm of campaign finance is a narrow understanding of *quid pro quo* corruption means that any framework to regulate recall spending will be partial. Part III will extend this analysis and argue that the conclusions reached about permissible regulatory structures in the context of recalls implicate the way states and municipalities regulate money in ballot measure campaigns generally. Moreover, the conclusions that emerge from the analysis powerfully suggest that the Court's current jurisprudential framework for campaign finance rules in all elections is insufficient,

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<sup>7</sup> 130 S. Ct. 876 (2010).

<sup>8</sup> I will focus here on limitations on contributions. It is clear since *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), that expenditures cannot be capped or limited, other than in the context of some voluntary public financing programs. Disclosure with respect to contributions and expenditures seems unproblematic under current jurisprudence, although challenges to disclosure are increasing and issues of the appropriate design of disclosure laws raise policy issues. See, e.g., Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 Election L.J. (2010); Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, \_\_ J. Law & Pol. \_\_ (forthcoming 2012) [hereinafter Hasen, *Chill Out*]; Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 Election L.J. 295 (2005). See *infra* text at notes 128 through 147 (discussing proposed changes in disclosure laws prompted by this analysis).

ignoring a more compelling justification for regulating money in direct democracy: working to ensure equality of the opportunity to participate in the political realm.

### **I. Modern Gubernatorial Recalls: California and Wisconsin**

I have argued that the importance of direct democracy as part of the comprehensive design of democratic institutions means that the best way to understand these institutions, and to devise meaningful reforms at the state and local levels, is through the lens of hybrid democracy. Taken as a whole, democracy in the United States is hybrid because it is neither wholly representative nor wholly direct; instead it is a complex combination of both at the local and state levels, which in turn influences national politics.<sup>9</sup> Nowhere is hybrid democracy more evident than in the context of recalls, particularly those in the six states, including California and Wisconsin, in which the election is called after a successful petition drive and the recall and the vote on the successor for the office occur simultaneously.<sup>10</sup> In both cases, campaign contributions to committees or for expenses related to the recall, even those controlled by the officeholder or potential candidates, are unlimited, while contributions made directly to candidates' campaigns are governed by the contribution limits that apply in regular elections for the office at issue.

The bifurcated campaign rules affect the dynamics of fundraising in California and Wisconsin differently, however, because they have adopted somewhat different recall processes. In both states a petition drive begins the recall process, and money raised during the petition circulation period is not restricted by contribution limits, although disclosure laws apply. Neither state limits the availability of the recall to particular grounds, such as misconduct, but relies entirely on the petition process to

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<sup>9</sup> Elizabeth Garrett, *Hybrid Democracy*, 73 Geo. Wash. L. Rev. 1096, 1097 (2005).

<sup>10</sup> Even in states that do not have simultaneous successor elections, the hybrid nature of a recall has been identified as relevant to the assessment of campaign finance laws. See, e.g., *Farris v. Seabrook*, Order on Plaintiffs' Motion for Preliminary Injunction, Case No. 11-5431 RJB, at 11 (W.D. Wash. July 15, 2011) (noting recalls are a "hybrid of the two" kinds of elections in a process where the recall vote is held separately and a successor is appointed from a list provided by the political party of the recalled official).

trigger the election, just as in any initiative process.<sup>11</sup> In California, those seeking to recall a governor must obtain signatures equal to 12% of those who voted in the last gubernatorial election;<sup>12</sup> in Wisconsin, the threshold is higher so that recall proponents must obtain signatures equal to 25% of such voters.<sup>13</sup> California is also an easier place to qualify a recall than Wisconsin because recall advocates have longer to get the signatures; they have 150 days for circulation, compared to only 60 days in Wisconsin.<sup>14</sup> In both the recall efforts against Davis and Walker, recall proponents made sure to find many more petition signers than necessary to ensure qualification. Pro-recall forces in California turned in 1.6 million signatures when they needed only around 900,000.<sup>15</sup> Anti-Walker forces gathered nearly double the required 540,208 signatures, turning in petitions with more than 900,000 valid signatures.<sup>16</sup>

Usually success in gathering signatures turns on the ability to raise significant amounts of money for the petition drives, an effort unrestrained by contribution limitations. As petition drives increasingly rely on paid circulators – now the norm in successful efforts in California and other states with active initiative processes – money is a sufficient condition for ballot access and therefore often viewed as necessary.<sup>17</sup> The forces seeking to unseat Gray Davis in California faced an uncertain fate until Representative Darrell Issa, who aspired to the position, injected \$1.7 million of his own money into the campaign.<sup>18</sup> The Wisconsin recall is atypical because supporters used an army of volunteer signature gatherers working feverishly in the relatively brief time allowed for circulation and in the midst of the

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<sup>11</sup> NCSL, *Recall of State Officials*, *supra* note 2.

<sup>12</sup> Cal. Const. art. II, § 14(b).

<sup>13</sup> § 9.10(1)(b) Wis. Stats.

<sup>14</sup> Compare Cal. Const. art. II, § 14(a) with § 9.10(2)(d) Wis. Stats.

<sup>15</sup> See Derek Cressman, *The Recall's Broken Promise: How Big Money Still Runs California Politics* 45 (2007). Almost 1.36 million were certified by the Secretary of State.

<sup>16</sup> See Wisconsin Government Accountability Board, *Recall Election Information: 2012 Recall Petitions and Challenges*, [gab.wi.gov/elections-voting/recall](http://gab.wi.gov/elections-voting/recall) (visited May 25, 2012).

<sup>17</sup> See Shaun Bowler & Bruce Cain, *Introduction – Recalling the Recall: Reflections on California's Recent Adventure*, 37 PS 7, 8 (2004); Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 Tex. L. Rev. 1845, 1851-52 (1999) [hereinafter Garrett, *Agenda Setting*].

<sup>18</sup> Shaun Bowler & Bruce E. Cain, *Introduction*, in *Clicker Politics: Essays on the California Recall* 1, 5 (S. Bowler & B.E. Cain eds. 2006).

harshest winter months.<sup>19</sup> Nevertheless, some financial resources were required to provide organizational leadership for such a large volunteer effort and to provide resources for the certification process and ensuing challenges, and the leading pro-recall group raised at least half a million dollars during the 60 days the petitions were circulated.<sup>20</sup>

The key differences in the two states' recall process result from the structure of the election and the ballot. In California, once the recall is certified, the election it triggers has two parts on the same ballot – a structure that underscores the hybrid nature of the process. First, voters are asked to vote on whether or not to recall the official. Next, voters are asked to pick a replacement from among a list of successors – a group that does not include the incumbent. The plurality winner takes office only if the recall succeeds. Thus, voters choose a successor without knowing whether the current incumbent will be recalled, and even voters who vote against the recall, or do not vote at all on the recall, can vote in the replacement election.<sup>21</sup> This structure can lead to a situation in which the incumbent is recalled by only a slim majority, and his successor enters office with fewer votes than those cast opposing the recall (and presumably supporting the incumbent). That specter of a successor with less popular support than the incumbent was a real possibility in 2003 because 135 candidates were listed in the second half of the ballot.<sup>22</sup> Arnold Schwarzenegger's substantial popularity, combined with the lack of strong support for the lackluster Governor Davis, prevented that unfortunate outcome from occurring, as Schwarzenegger captured 48% of the vote, and only 45% of the voters opposed the recall (and thus supported Davis' retention in his office).<sup>23</sup>

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<sup>19</sup> Sasha Issenberg, *The Power of the Petition: How the Effort to Recall Scott Walker Could Swing the 2012 Presidential Election*, Slate.com, May 8, 2012

<sup>20</sup> Wisconsin Government Accountability Board, *Recall 60 Day report for Committee to Recall Walker*, <http://cfis.wi.gov/Public/Registration.aspx?page=FiledReports> (visited May 26, 2011).

<sup>21</sup> See *Portnoy v. Shelley*, 277 F. Supp. 2d 1064 (S.D. Cal. 2003).

<sup>22</sup> Peter Schrag, California: America's High-Stakes Experiment 167 (2006). Confusing ballot access laws led the Secretary of State to rule that candidates seeking to run in a gubernatorial recall election needed only to obtain 65 signatures and pay \$3500 or obtain 10,000 signatures. Elizabeth Garrett, *Democracy in the Wake of the California Recall*, 153 U. Penn. L. Rev. 239, 254 (2004) [hereinafter Garrett, *California Recall*].

<sup>23</sup> See Bowler & Cain, *supra* note 18, at 1.

The process in Wisconsin is crucially different. A sufficient number of valid signatures on a recall petition triggers a new election for the office. There is no separate vote on the recall itself, as in California; instead, there is a recall election for the office six weeks after the certification of the petitions, and the incumbent automatically appears as a candidate in that election unless he has resigned. If there are more than two candidates for the position, then a partisan recall primary is held six weeks after the certification and the recall election occurs four weeks after that primary. Access to the ballot is governed by the rules that apply in regular elections for that position. Independent candidates, subject to ordinary ballot access rules, appear only on the final recall election.<sup>24</sup> Of the six states that allow simultaneous recall and successor elections, Wisconsin's process is the more typical.<sup>25</sup> They exhibit the hybrid nature of recalls in that they are triggered by a petition on an issue – the recall – and thus include a period of time governed by the rules that apply in initiative campaigns.

This structural difference leads to variations in the application of campaign finance restrictions, other than disclosure laws, which apply throughout both states' processes. Both states allow unlimited contributions during the recall portion of the election, while applying the usual contribution limitations for candidates during the part of the election focused on who will serve the remainder of the term. However, the different structures for recall elections mean that this common general rule plays out differently in the two states. In California, the recall election begins from the time the petitions are circulated and ends only after the popular vote. Thus, not only can committees unrelated to the officeholder or replacement candidates raise unlimited money throughout the entirety of the election period, but so can the officeholder himself, who is not a candidate in the second half of the election. Gray Davis was involved in the 2003 recall election only to the extent he opposed the recall, the sole method through which he could remain in office. The anti-recall

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<sup>24</sup> Wisconsin Government Accountability Board, *Recall of Congressional, County and State Officials* 8-9 (June 2009).

<sup>25</sup> See NCSL, *Recall of State Officials*, *supra* note 2 (Colorado and California use a two-part ballot; Wisconsin's approach is shared by Arizona, Nevada and North Dakota).



committee he controlled, “Californians Against the Costly Recall of the Governor,” raised nearly \$18.3 million in part because he was not limited at any point by the then-effective \$21,200 cap on contributions by individuals to gubernatorial candidates.<sup>26</sup>

This structure in California also allows replacement candidates a mechanism through which to raise money through unlimited contributions throughout the campaign period, even though donations to campaign committees are restricted. A candidate can form a separate committee with the purpose of supporting the recall; that committee is governed by the campaign rules that apply to recalls, not to candidate elections. Thus, Arnold Schwarzenegger had both a campaign committee and a pro-recall committee, called the “Total Recall” committee, with the latter raising \$4.5 million in unrestricted contributions that were deployed in part to fund advertisements featuring Schwarzenegger supporting the recall.<sup>27</sup> Other than minor differences in the words the candidates said, the ads funded by the Total Recall committee and by the campaign committee communicated the same message: Arnold should be the next governor of California. Other major candidates like Lieutenant Governor Cruz Bustamante used the same two-committee strategy for maximum flexibility with regard to fundraising,<sup>28</sup> although Democrat Bustamante’s recall-oriented committee opposed the recall, arguably sending a confused and confusing message to voters.

In contrast, in Wisconsin an incumbent governor can raise money from unlimited contributions only with respect to expenses related to the recall and incurred before the recall election is certified.<sup>29</sup> Once the election is scheduled, the regular limitations on contributions regulate all the candidates’ campaigns,

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<sup>26</sup> Garrett, *California Recall*, *supra* note 22, at 250-51. The campaign records for this committee show several six-figure gifts from individuals, unions, and political organizations. See California Secretary of State, Contributions for the Californians Against the Costly Recall of the Governor, <http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1256416&session=2003&view=received> (visited May 26, 2012).

<sup>27</sup> Garrett, *California Recall*, *supra* note 22, at 251.

<sup>28</sup> Floyd Feeney, *The 2003 California Gubernatorial Recall*, 41 Creighton L. Rev. 37, 60 (2007).

<sup>29</sup> § 11.26(13m)(b) Wis. Stats. See also Wisconsin Government Accountability Board, *Campaign Finance Overview: State Candidates* 6 (May 2010).

including that of the incumbent. Currently the limit on individual contributions in a gubernatorial election is \$10,000.<sup>30</sup> However, the incumbent can continue to raise unlimited amounts throughout the election period to use to defray pre-certification recall expenses, including any contests of the order to hold a recall election, and to pay debts incurred during the petition circulation period. Walker continued to raise money through unlimited contributions after the election was ordered because he had \$2.5 million of debts related to recall expense;<sup>31</sup> these contributions included a \$100,000 donation from the chairman of a Wisconsin construction company accepted just days before the election.<sup>32</sup> In addition, there is no requirement that the incumbent form separate committees for recall fundraising and re-election campaign fundraising so regulated and unregulated money is comingled, with accounting done through annotated expense reports.<sup>33</sup>

Scott Walker clearly understood how important this period of fundraising – and political spending – was for his future. He and his supporters worked to extend the period on both ends. When it appeared inevitable that Democrats and union supporters would mount a recall effort, a Republican activist filed paperwork to circulate a recall petition a week or so before the Democrats were ready to file theirs.<sup>34</sup> That preemptive action allowed Walker to begin collecting unlimited donations earlier than waiting for the other side to trigger the process. Similarly, Walker’s decision to contest the petitions was likely motivated at least in part to postpone beginning of the time when ordinary contribution restrictions would

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<sup>30</sup> § 11.26, Wis. Stats.

<sup>31</sup> Phone conversation with Jonathan Becker, Division Administrator of the Ethics Division, Wisconsin Government Accountability Board, June 1, 2012, notes provided by Alex Fullman.

<sup>32</sup> See Ryan Ekvall, *Murky Campaign-Finance Laws Depend on “Honor System,” Expert Says*, Wisconsin Reporter, July 9, 2012.

<sup>33</sup> Wisconsin rules applying to gubernatorial recalls makes separating recall fundraising from election fundraising tricky because “all campaign donations go into one pot.” Judith Davidoff, *Walker’s Unlimited Recall Fundraising Set to End*, The Daily Page, Mar. 29, 2012. See also Ekvall, *supra* note 32 (noting difficulty of tracking expenses that can be paid for by unlimited contributions and those that are campaign related).

<sup>34</sup> Meghan Chua, *Scott Walker Recall Underway: Democrats Critical of Petition Filed by Republican Donor*, Daily Cardinal, Nov. 7, 2011.

apply.<sup>35</sup> During this recall period, he was able to raise about half of the \$30 million he ultimately accumulated in his war chest, which included several large donations from individuals such as \$500,000 from a Houston-based home developer and \$510,000 from a Wisconsin billionaire.<sup>36</sup>

The vast majority of Walker's recall-focused campaign war chest was spent on communications to voters opposing the recall,<sup>37</sup> which also allowed him to begin his campaign earlier than any other contenders and make his case for retention under much more lenient campaign finance rules. In addition, he set up a website and other infrastructure during the circulation period, funded by unlimited contributions,<sup>38</sup> that he continued to use when the election campaign commenced. Although he could not spend this money for any expenses incurred after the election was ordered (other than to contest that order), he could use money from unlimited contributions up to the contribution limitation per contributor for his campaign.<sup>39</sup>

The other difference relating to campaign finance rules caused by the difference in the structure of the recalls in the two states affects candidates running to replace the governor. In Wisconsin, there is no opportunity for replacement candidates to simultaneously control campaign committees, subject to contribution limits, and recall-focused committees, free of contribution limits, during the primary or general election campaign following a successful recall petition. No Democrat running in the recall primary could adopt the strategy of Schwarzenegger or Bustamante and thus

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<sup>35</sup> *Governor Scott Walker Seeks More Time for Review of Recall Signatures*, Green Bay Press Gazette, Feb. 16, 2012.

<sup>36</sup> See Paul Blumenthal, *Huffpost Fundrace: Scott Walker's Unbelievable Fundraising Haul*, April 30, 2012 (Walker raised more than \$13 million in the first three months of 2012 before the election was certified); Tom Kertscher, *Behind the Rhetoric: The In-State, Out-of-State Campaign Money Debate*, Politifact.com (May 22, 2012), [www.politifact.com/wisconsin/article/2012/may/22/behind-the-rhetoric-state-out-state-money-debate/](http://www.politifact.com/wisconsin/article/2012/may/22/behind-the-rhetoric-state-out-state-money-debate/) (identifying Bob Perry of Houston and Diane Hendricks of Wisconsin); Jason Stein, et al., *Walker Raises Over \$5 Million in a Month, Bringing Total to \$30 Million*, Milwaukee Journal Sentinel, JSONline, May 30, 2012.

<sup>37</sup> The bulk of Walker's expenditures during the petition circulation period, around \$11.5 million, were for broadcast ads and mailing. See Wisconsin Campaign Finance Information Systems, *Receipts*, <http://cfis.wi.gov/Public/Registration.aspx?page=ReceiptList> (accessed July 23, 2012). See Davidoff, *supra* note 33 (noting that Government Accountability Board allowed recall funds to be used for advertisements).

<sup>38</sup> Walker spent over \$100,000 during this period on website development. See *id.*

<sup>39</sup> Memorandum from Kevin J. Kennedy, Director and General Counsel of the Wisconsin Government Accountability Board, *Recall Expense Funds: Contribution Limits and Residual Funds*, Mar. 15, 2011.

faced significant limits on their ability to answer the publicity that Walker had generated in the 60-plus days of the petition circulation. The language of the Wisconsin statute appears to allow potential candidates the opportunity to raise unlimited contributions for expenses related to the recall petition process.<sup>40</sup> However, no potential contender to Governor Walker used this capability in 2012, even though one of the leading Democratic candidates, Kathleen Falk, signaled her intention to run in January by creating a gubernatorial campaign committee ostensibly focused on the 2014 election.<sup>41</sup> The failure of potential candidates to take advantage of this gap in regulation is likely due to the uncertainty of whether they would actually be on the general recall election ballot in the event a petition succeeds.<sup>42</sup> In Wisconsin, aspiring gubernatorial candidates also have to win a primary; indeed, Falk lost in the primary to Tom Barrett, the mayor of Milwaukee. In addition, potential candidates would presumably be limited to communications in favor of a recall, perhaps with themselves as spokespeople, whereas the incumbent governor can produce a message opposing the recall that also emphasizes why he should stay in office – a message much more helpful in both stages of the recall process.<sup>43</sup>

This structure provides a significant advantage to the incumbent; indeed, the Wisconsin system generally is more favorable to incumbents than is the California

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<sup>40</sup> Wisc. Stat. 11.25 (13M) is phrased generally and would apply to anyone's expenses falling into the category.

<sup>41</sup> See Campaign Registration Statement, State of Wisconsin GAB-1, filed by Kathleen Falk, Democrat, on January 18, 2012 (copy on file with author). The staff of the Wisconsin Government Accountability Board indicated that while the statute seems to allow anyone to take advantage of the petition period to raise money from unlimited contributions to support or oppose the recall petition, no one who was a candidate in the subsequent election other than the incumbent did so and the Board has never directly addressed the question. Email from Jonathan Becker to Alex Fullman, June 22, 2012 (copy on file with author).

<sup>42</sup> It is somewhat surprising that those in Wisconsin planning to run in the election, like Falk, did not take advantage of the period between the time it seemed certain the petition drive had been successful to the time the election was certified to spend money in pro-recall ads designed also to benefit their campaigns, activities that could have been funded through contributions of unlimited amounts that could be accepted even after this period.

<sup>43</sup> This is an open question not addressed by the Government Accountability Board in any format, although it has opined that the target of a recall could defend his record in communications during the petition drive period. See Notes from Phone Conversation with Jonathan Becker, *supra* note 31.

one.<sup>44</sup> Not only are Wisconsin incumbents in the best situation to exploit the bifurcated campaign finance system, but the incumbent also benefits from automatic inclusion on the ballot for the election, as well as from the shorter time period for opponents to obtain signatures to trigger a recall and the higher percentage of voter signatures required. It seems likely that these structural advantages played some role in Scott Walker's becoming the first governor in the nation to withstand a recall attempt that qualified for the ballot.

As this description of the two systems indicates, both states have chosen to apply a bifurcated campaign finance system of contribution limits, although in different ways. Moreover, many players with different characteristics relevant to the regulatory system are affected by the rules: committees focused on the recall effort but not affiliated with the officeholder or prospective candidates; committees ostensibly focused on the recall effort but affiliated with declared candidates or people with ambitions for the office; campaign committees controlled by candidates; and independent committees focused on the candidate elections but unaffiliated with any particular candidate. In the next section, I will discuss whether regulation other than disclosure could be more broadly applied to some of these players, and how the Court's recent holding in *Citizens United* might affect that analysis.

## **II. *Citizens United* and the Permissible Regulation of Campaign Contributions in Recall Elections**

The campaign finance systems governing recalls in both California and Wisconsin are bifurcated using the same principle: The campaign finance regime that governs initiative campaigns applies to the parts of the recall campaign that are focused only on the question of the recall; the campaign finance regime that applies generally to candidate elections applies to the parts of the recall campaign focused

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<sup>44</sup> See Bruce E. Cain, Melissa Cully Anderson & Annette K. Eaton, *Barriers to Recalling Elected Officials: A Cross-State Analysis of the Incidence and Success of Recall Petitions*, in Clicker Politics, *supra* note 18, at 17, 28-30 (discussing some structural differences and effects on incumbents).

on the election of a replacement. Although the general approach of each state is the same, it plays out differently because of structural differences of the hybrid elections. In California the recall portion begins with the petition circulation period and ends only on Election Day, when both the fate of the recall and the replacement, if necessary, are determined by the people. In Wisconsin, the recall portion ends with the certification of the signatures and ordering of an election, which then proceeds as any other regularly scheduled election. Of course, the recall process itself is not so neatly bifurcated; unlike a ballot measure which is primarily targeted at a political issue, a recall is entirely focused on removing a public official from office and replacing her with another candidate. Every recall is explicitly candidate-focused. Thus, one could envision a system of contribution limitations that would apply throughout the process and be derived from the model of candidate elections. Such a regulatory approach would apply contribution limits to any committee controlled by an officeholder or candidate, whether or not focused on the question of recall, and might well seek to extend those limits to all committees formed to support the recall, whether or not associated with a candidate.

Indeed, many cities in California have adopted campaign finance regimes that apply contribution limits much more broadly than either California or Wisconsin do at the state level. In California, localities can adopt different systems because the bifurcated system of recall-focused campaign finance regulation at the state level is a matter of statute, not a constitutional command. The Political Reform Act lists recall within the definition of a ballot measure: the “issue” to be placed on the ballot is the question whether to recall the targeted official or not.<sup>45</sup> Thus, the state campaign finance regime in place for ballot measures applies to political committees opposing or supporting the recall. Similarly, the Act provides that any state officer who is the target of a recall may establish a committee to oppose the recall and that committee will not be subject to contribution limitations generally applicable to candidate committees.<sup>46</sup> Replacement candidates in California are subject to contribution limitations, again by statute, because they are candidates seeking

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<sup>45</sup> Cal. Elect. Code § 82043.

<sup>46</sup> Id. at § 85315.

elective state office. However, all these regulations are statutory and aimed at state offices, and therefore they do not automatically apply in recalls of local officials. Instead, the Political Reform Act explicitly allows a local jurisdiction “to impose additional requirements on any person if the requirements do not prevent the person from complying with this title.”<sup>47</sup>

California’s regulatory body that applies the Political Reform Act, the Fair Political Practices Committee (FPPC), has interpreted this statutory scheme to allow local jurisdictions to impose a more extensive system of contribution limits in their recall elections than apply at the state level. If the locality has no campaign finance ordinance, the FPPC has held that a recall is more like a ballot measure than a candidate election and thus contributions made in connection with the recall are not subject to contribution limitations.<sup>48</sup> However, the FPPC has also determined that cities have the ability to add more contribution limits to recall elections, including limits that are more stringent, i.e., lower, than state limits, through their city charters.<sup>49</sup> For example, the FPPC found permissible under the Political Reform Act a city’s decision to apply a limit of \$250 per person to any candidate or committee associated with a recall election, including the officeholder and committees formed to support or oppose the recall, whether or not a candidate controlled them.<sup>50</sup> Several cities in California have adopted campaign finance ordinances that impose relatively low contribution restrictions on recall committees and officeholders, as well as replacement candidates, and impose those restrictions from an early stage in the campaign, such as the filing of a notice of intent to circulate a recall petition.<sup>51</sup>

That more far-reaching systems of contribution limitations have been proposed and adopted for this hybrid institution is not surprising. The question is where the line between permissible regulation and unconstitutional burden lies under current

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<sup>47</sup> Id. at § 81013.

<sup>48</sup> Cohen Advice Letter, No. I-96-364 (Feb. 18, 1997).

<sup>49</sup> Cal. Elect. Code § 85706.

<sup>50</sup> Angus Advice Letter, No. A-97-173 (June 10, 1997).

<sup>51</sup> See, e.g., San Diego Election Campaign Control Ordinance §§ 27.2903, 27.2935; City of Santa Rosa Ordinance §§ 10-34.060, 10-34.040; City of Petaluma Ordinance §§ 1.30.030, 1.30.035; City of Ukiah ordinance §§ 2079, 2080.

jurisprudence. To determine that, I will assess a variety of recall actors: incumbent officeholders during the recall as well as during the replacement election; candidates during the replacement election; recall committees associated with public officials or potential candidates and acting during the petition drive; and recall committees unaffiliated with officeholders and candidates at any point in the recall process. The state interest that any contribution limit must vindicate is the current Court's narrow conception of *quid pro quo* corruption: "dollars for political favors"<sup>52</sup> not mere "influence over or access to elected officials."<sup>53</sup>

#### **A. Contributions to Officeholders with Respect to the Recall**

Applying contribution limits that govern any regular candidate election to an officeholder running as a candidate in a recall election is unproblematic. Scott Walker's campaign to retain office in the recall primary and recall general election was just like a regular campaign except for the timing. The harder issue arises in California where the officeholder cannot run in the replacement election but must oppose the recall, and in Wisconsin for expenses incurred during the period before a recall election is ordered. Regardless of the posture of the officeholder in this portion of the election, however, he is acting to retain his position just as he would in a re-election campaign. In the California situation, the only way he can retain office is to defeat the recall. Interestingly, the Political Reform Act includes in the definition of a "candidate" "any officeholder who is the subject of a recall election."<sup>54</sup> If contributions to a re-election campaign committee can give rise to *quid pro quo* corruption or the appearance of such, contributions to a committee controlled by the officeholder seeking to avoid or defeat a recall are the functional equivalents and pose a similar danger.

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<sup>52</sup> *Citizens United*, 130 S. Ct. at 910 (quoting *McConnell v. FEC*, 540 U.S. 93, 296-87 (2003) (opinion of Kennedy, J.)).

<sup>53</sup> *Id.*

<sup>54</sup> Cal Election Code § 82007.



The absence of contribution limits on the officeholder in Wisconsin during the petition circulation drive is particularly problematic because his potential opponents have no effective mechanism through which to pursue unlimited contributions. Although theoretically they could form pro-recall committees during the petition circulation drive, none did so in the 2012 election, likely because the benefit of such activity at this early stage was seen as minimal. On the other hand, because the Wisconsin governor is sure he will be running in any recall campaign (he qualifies automatically for the ballot), he can confidently use the first period of the recall to begin his campaign early. Certainly, one of his best arguments against the recall petition is that he is governing ably and should retain his position; that will be the same argument he makes once the election is ordered and other candidates enter the race. This ability to campaign early is an inevitable characteristic of a recall election, but it need not be augmented by a regulatory regime that allows the incumbents to raise unlimited amounts of money for weeks before any other candidate can effectively begin to accumulate a political war chest – an activity that will be restricted by contribution limits.

In short, throughout the entire recall process, not only is it permissible under current jurisprudence to apply contribution limitations to any committees associated with the incumbent officeholder, but such limits are necessary to ensure fair competition, particularly in Wisconsin. Although one can defend a recall structure designed to provide some benefits to the incumbent given the disruptive nature of a mid-term election, to allow only the incumbent to raise unlimited amounts of money, while restricting opponents in their ability to compete along this crucial dimension, skews the system unjustly.

## **B. Contributions to Candidates during the Election for a Replacement**

In both states, the candidates, other than the officeholder, running in any election to replace the recalled official are subject to the same contribution limits that would apply in a regularly scheduled election. In Wisconsin, the election is essentially the same as a regular election – with typical ballot access procedures,

provision for primaries, and a general election – so it is not surprising that the same campaign finance rules apply. In California, someone running in the second part of the election is a “candidate” for purposes of the Political Reform Act and, unlike the target of a recall, such a candidate is not expressly excluded from the contribution limits that the statute imposes on candidates for office.

The more interesting question that arises in California is whether the state can constitutionally limit contributions made to pro-recall committees that are controlled by replacement candidates. Currently, the ability to have two committees operating simultaneously throughout the election – one focused on the election and one ostensibly on the issue of the recall – allows for evasion of the limits applied to campaign committees. Sophisticated candidates and consultants can comply with any rules shaping the content of ads funded by the pro-recall committee and still ensure all communications benefit the candidate’s chances of election. In *McConnell v. Federal Election Commission*, the Court recognized that some campaign finance regulations could be justified as preventing circumvention of contribution limits imposed elsewhere in the comprehensive scheme.<sup>55</sup> Evasion of permissible contribution limits imposed to combat *quid pro quo* corruption and the appearance of such is facilitated, and likely encouraged, when the two committees are able to operate simultaneously and target their activities to influence the same election which is primarily about who will hold state office.

Indeed, the close connection between the pro-recall activity of a candidate-controlled committee and the candidate’s own electoral fate provides sufficient justification for contribution limits that apply to both committees. If the recall campaign finance system is changed to limit contributions to the committees of the officeholder throughout the process – not just during the replacement campaign as occurs now in Wisconsin – then shutting down the spigot of unlimited donations to pro-recall committees of other candidates is required to ensure fair competition. Again, none of this regulation should be constitutionally problematic: Recalls are truly hybrid elections that are focused mostly on candidates and officeholders. All

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<sup>55</sup> 540 U.S. 93, 170-71 (2003) (noting anti-circumvention rationale in context of regulation of state and local parties).

the committees associated with those seeking the targeted position are essentially candidate committees: their focus is not on enacting a particular policy, as occurs in a ballot measure campaign. They are focused on office holding, and large donations to any committees involved in any aspect of the recall and associated directly with a candidate raise the specter of political favors for money, undermining people's faith in democratic institutions.

### **C. Recall Committees Active During the Petition Drive and Associated with Public Officials or Potential Candidates other than the Target**

During the petition drive period, four types of committees can be involved. I have already discussed those controlled by the target of the recall; I will assess those entirely unaffiliated with any public official or potential candidate in the next subsection. The other two kinds of committees are those controlled by potential candidates and those controlled by current public officials. Of course, there is overlap here because many of the current officials involved in the recall effort likely have plans to run in the replacement election should the recall succeed. Certainly, that was true of Representative Issa in California, and one of the leading Democratic contenders to oppose Scott Walker, Milwaukee Mayor Tom Barrett. However, Kathleen Falk, the other serious Democratic candidate, did not hold public office at the time of the recall, having served as Dane County Executive until 2010 and run unsuccessfully in the past for governor and attorney general. The ultimate victor in California, Arnold Schwarzenegger, had never sought public office before, but had been involved in politics through the initiative process. Although Falk was clearly a candidate during the petition drive period,<sup>56</sup> Schwarzenegger made his decision to run only after the recall petition had succeeded.<sup>57</sup> Therefore, trying to craft a rule that would limit contributions to committees controlled by potential candidates is difficult: How do regulators know someone is a candidate before she has formally

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<sup>56</sup> See *supra* note 41.

<sup>57</sup> See Joe Mathews, *The People's Machine: Arnold Schwarzenegger and the Rise of Blockbuster Democracy* chapter 9 (2006).

declared? If the rule applies only to those who have given some sort of legal notice of their candidacy – assuming that would be possible before the petition had been filed and an election scheduled – then potential candidates who are private parties will merely refrain from taking the formal step as long as possible.

The question of regulating contributions to the committees controlled by public officials is somewhat different. Contributions to these committees can give rise to the appearance of *quid pro quo* corruption not just because some are likely planning a run in the replacement campaign, but because as sitting public officials they are susceptible to undue influence by large donors with respect to their actions in their current positions. If the public official deems it valuable to be involved in the recall petition drive period – as she must if she is spending money to influence the outcome – then presumably large donations to that effort give rise to the same sort of *quid pro quo* corruption or appearance of such that can justify contribution limits under Roberts Court jurisprudence. Moreover, because a public official's involvement in a recall petition is very likely motivated by her serious consideration of entering any replacement election, the benefit to her is almost certainly the same as that of a contribution to a committee involved directly in a candidate election: it makes it more likely she will win the office to which she aspires.

Thus, the legal argument for applying contribution limits to public-official-controlled recall committees is even stronger than those made in the context of regulating similar committees involved in ordinary ballot measures. Others have argued persuasively that limits could be applied to these committees because public officials become involved in ballot measures to aid their electoral chances or further their legislative agenda, and thus contributions could be regulated on the basis of the actuality or appearance of *quid pro quo* corruption.<sup>58</sup> Indeed, in the wake of the California recall, the Fair Political Practices Commission adopted a regulation limiting contributions to a candidate-controlled ballot measure committee to the same amount as allowed to be contributed directly to the candidate's campaign

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<sup>58</sup> See Hank Dempsey, *The "Overlooked Hermaphrodite" of Campaign Finance: Candidate-Controlled Ballot Measure Committees in California Politics*, 95 Cal. L. Rev. 123 (2007); Center for Governmental Studies, *Democracy by Initiative: Shaping California's Fourth Branch of Government* 294-96, 308 (2d. ed. 2008).

committee.<sup>59</sup> These regulations were subsequently invalidated but on the ground that the FPPC exceeded its authority in adopting them, not because they were constitutionally infirm.<sup>60</sup>

I will return to the issue of contribution limits on candidate-controlled ballot measure committees in the final part of this article; for now, our attention is on the regulation of public-official-controlled recall committees. The link to *quid pro quo* corruption is stronger in this context because the recall is closely linked to a simultaneous candidate election, whereas a candidate may be involved in a ballot measure at issue in a campaign in which she is not running for office, perhaps because she is attempting to implement her policy agenda in this way. The latter type of contributions is arguably more like lobbying expenditures – typically not limited in amount but disclosed – than campaign contributions to the campaign committee of a candidate. Even in the case of ballot measures designed to enhance a candidate’s electoral prospects – perhaps by affecting turnout or shaping the campaign debate in ways that favor the candidate<sup>61</sup> – the connection is somewhat less direct than in the case of a recall. Success on the recall question is necessary, although not sufficient, for the election of the public official to the new office, not merely helpful or influential.

The challenges facing a regulatory system that limits contributions to public-official-controlled recall committees during the petition drive, including the committee controlled by the incumbent, are logistical, not constitutional. One challenge has been identified previously: the difficulty in determining at this early stage which actors in the petition drive who are not currently public officials might be contemplating a run for the office should the recall succeed. In Wisconsin, for example, had both leading Democratic candidates formed pro-recall committees and spent money on recall activities, only one, Mayor Barrett, would have been affected

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<sup>59</sup> Calif. Code of Regulations, Title 2, § 18530.9 (2004), *invalidated by Citizens to Save California v. FPPC*, 145 Cal. App. 4th 736 (2006).

<sup>60</sup> *Citizens to Save California*, 145 Cal. App. 4th at 751-52.

<sup>61</sup> See Elizabeth Garrett, *Direct Democracy*, in Research Handbook on Public Choice and Public Law 137, 158-61 (D.A. Farber & A.J. O’Connell eds. 2010) [hereinafter “Garrett, *Direct Democracy*,” or “Research Handbook”]. See also *infra* text at notes 91 through 103 (discussing possible regulation of candidate-controlled ballot measure committees).

by a system that applied only to sitting public officials. This merely draws the line between limited and unlimited contributions in a Wisconsin recall in a slightly different place than does the currently bifurcated system, but in a place that still causes inequities among candidates.

Second, regulators would have to determine what contribution limit to apply to any public-official-controlled committee. For example, the regulations adopted by California's FPPC for candidate-controlled ballot measure committees applied the contribution limit that would apply to the candidate's campaign committee. Thus, a governor involved in a ballot measure could have legally accepted larger donations than could a state representative. Using Wisconsin as an example, had a similar system been in place for recalls, Walker would have been able to accept donations up to \$10,000 per individual, while Barrett would have been limited to \$3,000 per individual.<sup>62</sup> Solving this practical issue is easier in the context of recalls than ordinary ballot measures, however, because the limit can be tied to the office that is targeted in the recall, rather than the office held by the politician.<sup>63</sup> This solution still poses some risk of circumventing lower contribution limits for certain political offices. If regulators believe the right limit for mayoral candidates is \$3,000, for example, allowing donors to provide \$10,000 to a recall committee that the mayor controls undermines that regulatory structure. Nonetheless, it is an evasion of much smaller magnitude than allowed in a system of unlimited contributions.

#### **D. Independent Recall Committees**

In both gubernatorial campaigns, spending by groups formally unaffiliated with any candidate was significant, but arguably did not play a consequential role, in large part because there were other avenues for raising unlimited direct contributions – money candidates vastly prefer and thus value more. Independent

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<sup>62</sup> See City of Milwaukee, Campaign Contribution Limits for Citywide Candidates, <http://city.milwaukee.gov/CitywideCandidates22562.htm> (viewed on June 24, 2012).

<sup>63</sup> This is the approach adopted by California cities that limit contributions to recall committees; they adopt the limit that applies to the target office. See San Diego Municipal Code § 27.2935.

expenditures related to the California gubernatorial election exceeded \$10.5 million,<sup>64</sup> a figure that was no doubt lower than it would have been had supporters of various candidates not been able to contribute unlimited amounts directly to candidate-controlled recall committees. Total spending from all sources in the recall election was close to \$80 million.<sup>65</sup> Among the largest independent spenders were committees dominated by Indian tribes and unions, and they mostly supported Lieutenant Governor Bustamante, a Democratic contender to replace Governor Davis.<sup>66</sup> Independent spending occurred as well in the Wisconsin recall, particularly for candidates other than Governor Walker who did not raise money through unlimited contributions for recall expenses. The more than \$63 million campaign set a record for political spending in Wisconsin, with about half of that raised by Walker directly. Unions provided significant funding for independent expenditures supporting Democrat Tom Barrett, as did the Greater Wisconsin Political Expenditure Fund, which was supported by several interest groups that traditionally back Democrats.<sup>67</sup> In all, groups spent more than \$30 million in independent expenditures or issues ads throughout the entire recall campaign.<sup>68</sup> While independent expenditures constituted about half of all spending, both sides had a roughly even playing field along this dimension. It was the peculiar campaign finance structure of the recall process that provided a disproportionate advantage

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<sup>64</sup> California Fair Political Practices Commission, *Independent Expenditures: The Giant Gorilla in Campaign Finance 10* (2008).

<sup>65</sup> Bowler & Cain, *supra* note 18, at 6.

<sup>66</sup> See *Independent Expenditures*, *supra* note 64, at 12, 13, 18, and 42 (describing First Americans for a Better California Independent Expenditure Committee, funded mostly by tribes and spending more than \$4 million; Morongo Band of Mission Indians Native American Rights PAC, spending nearly \$2.5 million for Republican contender Tom McClintock and nearly \$500,000 for Bustamante; Community Civic Participation Project, funded mostly by unions and spending nearly \$1 million for Bustamante; and First Americans for a Better California, spending more than \$4.2 million for Bustamante).

<sup>67</sup> Forces explicitly supporting Walker or opposing Barrett spent nearly \$9 million (split fairly evenly between the two aligned positions), while those opposing Walker and (much less frequently) supporting Barrett spent nearly \$10.9 million. Data available from Wisconsin Government Accountability Board, Wisconsin Campaign Finance Information System (CFIS), [cfis.wi.gov](http://cfis.wi.gov) (visited July 7, 2012). Overall independent spending was greater when one includes money spent for all candidates and issue ads.

<sup>68</sup> See Phil Hirschhorn & Nancy Cordes, *A Record Amount of Money Spent on Wisconsin Recall*, CBS News, June 7, 2012; Paul Abowd, *Wisconsin Recall Breaks Record Thanks to Outside Cash*, Huffington Post, June 3, 2012, [http://www.huffingtonpost.com/2012/06/03/wisconsin-recall-unions\\_n\\_1565921.html](http://www.huffingtonpost.com/2012/06/03/wisconsin-recall-unions_n_1565921.html).

to the incumbent: Walker's biggest fundraising advantage came from raising ten times as much as his Democratic opponent through direct contributions.<sup>69</sup>

Although neither California nor Wisconsin applied contribution limits to recall committees created without apparent candidate involvement, other campaign finance regimes for recalls do apply more broadly. For example, the San Diego municipal code applies the \$500 limit on contributions to candidates to "any *committee* for purposes of supporting or opposing the recall of that officeholder, regardless of whether such *payment* is made before, during, or after the circulation of a recall *petition*."<sup>70</sup> Similarly, the state of Washington has applied statutory limits to contributions to political committees that made expenditures in a recall election.<sup>71</sup> In the wake of *Citizens United*, however, the courts have held that independent expenditure committees cannot constitutionally be subject to limitations on contributions, including in the context of a recall. Justice Kennedy's majority stated, without equivocation, that independent expenditures "do not give rise to corruption." He went on: "The appearance of influence or access... will not cause the electorate to lose faith in our democracy. ... In fact, there is only scant evidence that independent expenditures even ingratiate. ... Ingratiation and access, in any event, are not corruption."<sup>72</sup> Following this reasoning, the D.C. Court of Appeals has found no acceptable state interest to justify limiting contributions to entities making independent expenditures in federal campaigns. In *SpeechNow.org v. Federal Election Commission*,<sup>73</sup> a unanimous court held that "because *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations."<sup>74</sup>

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<sup>69</sup> *The Wisconsin Recall's Big Money*, Washington Post, June 6, 2012, [http://www.washingtonpost.com/politics/the-wisconsin-recalls-big-money/2012/06/06/gJQAKAyjV\\_graphic.html](http://www.washingtonpost.com/politics/the-wisconsin-recalls-big-money/2012/06/06/gJQAKAyjV_graphic.html) (using data through May 21, 2012).

<sup>70</sup> § 27.2935(b) (italics in original).

<sup>71</sup> Wash. Rev. Code § 42.17A.405(3).

<sup>72</sup> 130 S. Ct. at 909, 910-11.

<sup>73</sup> 599 F.3d 686 (D.C. Cir. 2010) (en banc).

<sup>74</sup> *Id.* at 696.



The same approach has been used in two cases related to spending independent of candidates in recall campaigns. Striking down Wisconsin's \$10,000 contribution limit with respect to independent expenditure-only committees in candidate elections at the state level, the Seventh Circuit Court of Appeals identified *Citizens United* as the controlling precedent.<sup>75</sup> The political action committee that challenged the contribution limitations was eager to engage in political activity related to the nine Wisconsin senators who had to run in recall elections the year before Walker faced his recall threat. Although the court did not apply any analysis specific to recalls, probably because the anticipated spending was directed at the candidate election following a successful petition drive, its reasoning would apply to any spending that is independent from a candidate during any part of a recall. Characterizing the holding in *Citizens United* relating to independent expenditures "categorical,"<sup>76</sup> the Seventh Circuit concluded that "after *Citizens United* there is no valid governmental interest sufficient to justify imposing limits on fundraising by independent-expenditure organizations."<sup>77</sup>

The Ninth Circuit focused more particularly on independent recall committees in *Farris v. Seabrook*,<sup>78</sup> and reached the same conclusion, invalidating contribution limits that Washington had applied to political committees making expenditures in a recall election. The State of Washington prohibited contributions in excess of \$800 to a political committee spending money in the recall election for a county official.<sup>79</sup> The court explicitly drew the comparison between recall committees unaffiliated with candidates and independent expenditure-only committees in regular candidate elections. Holding that both "have at most a tenuous relationship with candidates,"<sup>80</sup> it also noted that the state statutes governing the two types of committees provided similar structures to the organizations. The appellate court noted that the Court in *Citizens United* concluded explicitly that independent

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<sup>75</sup> *Wisconsin Right to Life State Political Action Committee v. Barland*, 664 F.3d 139 (7th Cir. 2011).

<sup>76</sup> *Id.* at 155.

<sup>77</sup> *Id.* at 144 (emphasis in original).

<sup>78</sup> 677 F.3d 858 (9th Cir. 2012).

<sup>79</sup> Wash. Rev. Code § 42.17A405(3).

<sup>80</sup> 677 F.3d at 866.

expenditures could not give rise to *quid pro quo* corruption or the appearance of such.<sup>81</sup>

The recall system in Washington is different from the systems in California and Wisconsin because a successful recall triggers an appointment of a successor by a designated governmental entity, not a successor election.<sup>82</sup> Thus the process is somewhat less candidate-centered than a process that includes an election of a replacement; certainly, the officeholder is implicated, but there are no contending candidates running for office either at the time of the recall or soon thereafter. Nonetheless, independent political committees actively making expenditures in all parts of recalls, but refraining from contributing to candidates, are mirror images of independent expenditure-only committees in typical candidate elections. If one cannot be restrained by contribution limits, then neither can the other.

The Ninth Circuit had been more open to the possibility of limits on contributions to independent recall committees before *Citizens United*. An independent recall committee challenged the then-\$250 limit applied to any committee opposing or supporting a recall of a city official from the time of the petition drive through the election, regardless of direct involvement by a candidate.<sup>83</sup> The court accepted the possibility that the state interest in preventing *quid pro quo* corruption or the appearance of such might be present in a recall campaign – unlike, in its view, the possibility in a typical ballot measure campaign. However, it required some evidence of corruption or the potential of corruption specifically in the context of local recalls, and it intimated that general allegations of a “recent pattern of corrupt conduct in local politics” together with hypotheticals was not a sufficient empirical foundation to support the challenged ordinance.<sup>84</sup>

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<sup>81</sup> *Citizens United*, 130 S. Ct. at 909. See also *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826-27 (2011) (In the case of independent expenditures, “[t]he candidate-funding circuit is broken. The separation between candidates and independent expenditure groups negates the possibility that independent expenditures will result in the sort of *quid pro quo* corruption with which our case law is concerned.”).

<sup>82</sup> See Wash. Rev. Code § 36.16.110. See also *Farris*, 677 F. 3d at 867.

<sup>83</sup> *Citizens for a Clean Government v. City of San Diego*, 474 F.3d 647 (9th Cir. 2007).

<sup>84</sup> *Id.* at 653-54.

Whether or not a state can produce such evidence of corruption in state-level recalls given their infrequency is a question; it might be an easier requirement to meet at the local level where recalls occur fairly regularly. However, in June 2012, the Supreme Court firmly closed the door on the possibility that specific evidence of corruption with respect to independent expenditures in candidate elections could support limits on contributions to committees engaging in that activity. The Montana Supreme Court had upheld a state restriction on direct corporate spending for independent expenditures in candidate elections in part on the basis of a long history of improper behavior by corporations in state elections.<sup>85</sup> The Supreme Court summarily reversed the decision, declaring that there can be “no serious doubt” that *Citizens United* applies, and that “Montana’s arguments in support of the judgment below either were already rejected in *Citizens United*, or fail meaningfully to distinguish that case.”<sup>86</sup> Justice Breyer’s brief dissent highlighted that the position rejected by the majority was that the government could defend a restriction on independent expenditures (in this case made by corporations directly) on the basis of evidence “given the history and political landscape” that they had led to corruption in the jurisdiction.<sup>87</sup> It is not a surprise, therefore, that the Ninth Circuit after *Citizens United* did not offer Washington the possibility of supporting its contribution limit on recall committees with evidence of corruption, an approach quite different from its position only five years before.

### III. Implications for Campaign Finance Regulation

Others have argued that the current campaign finance jurisprudence leads to a system that draws lines that create policy tension: for example, regulating the supply of money in candidate elections (contributions) but not the demand (expenditures),<sup>88</sup> or treating corporate independent expenditures differently from

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<sup>85</sup> *Western Tradition Partnership, Inc. v. Attorney General*, 363 Mont. 220 (2011).

<sup>86</sup> *American Tradition Partnership, Inc. v. Bullock*, 2012 U.S. LEXIS 4666 (2012).

<sup>87</sup> *Id.* (Breyer, J., dissenting).

<sup>88</sup> Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 Utah L. Rev. 311.

corporate contributions.<sup>89</sup> The bifurcated campaign finance rules applied in the two recent gubernatorial recall campaigns similarly produced unfortunate policy consequences. They allowed the officeholder the ability to escape contribution restrictions, although only for part of the campaign in Wisconsin. And in California, they allowed all candidates an outlet to accept unlimited contributions, substantially undermining the integrity of any restrictions applied to candidate committees. That raises the final question: Is there a way to approach campaign finance regulations so that a more effective and comprehensive system can be devised for our hybrid democracy? I will first assess that question using the state interest in preventing *quid pro quo* corruption as the guiding principle, then expand the perspective to consider a broader state interest in avoiding corruption of the democratic system when money plays a disproportionate role in agenda-setting or outcomes, and finally, and briefly, consider a system that relies only on aggressive disclosure laws.

#### **A. More Sophisticated Conceptions of *Quid Pro Quo* Corruption**

Even with the relatively narrow conception of *quid pro quo* corruption favored by the Roberts court, case law could support applying contribution limits to any committee controlled by an officeholder or candidate, thereby eliminating the loophole that allowed Gray Davis and Scott Walker to amass considerable political war chests through unlimited contributions and that allowed many challengers in California a similar opportunity through their recall-focused committees. Because of the close connection between the success of the recall and the electoral fates of these politicians, the same danger of hard-to-prove but “pernicious practices” akin to bribery<sup>90</sup> exists when candidates affected by a recall can evade contribution limits through directly controlled recall committees.

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<sup>89</sup> Richard Hasen, *Citizens United and the Illusion of Coherence*, 109 Mich. L. Rev. 581, 615-17 (2011).

<sup>90</sup> *Citizens United*, 130 S. Ct. at 908 (quoting *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (per curiam)).

This analysis also clarifies that contributions to ballot measure committees controlled by politicians could be constitutionally subject to limits.<sup>91</sup> Although traditional ballot measures might be less directly connected to an officeholder's electoral fate than a recall measure, two relevant realities are now abundantly clear from the findings of social scientists studying direct democracy. Politicians become deeply engaged in the initiative process where hybrid democracy exists because that activity is likely to benefit them in concurrent candidate elections or it helps them implement their policy agenda, which in turn helps them in any subsequent re-election effort. Not only does the presence of an initiative increase voter turnout,<sup>92</sup> but also the topic of the initiative may more effectively energize certain voters. Strategic candidates who can appear on the ballot with initiatives thus generate or back measures that will bring more voters to the polls who support them, and not similarly motivate voters who might support their opponents.<sup>93</sup> Certainly, it is not difficult to make the argument that the relationship between a candidate running for office and a ballot measure committee she controls that is active with respect to an initiative on the same ballot provides a serious possibility of *quid pro quo* corruption as the Roberts Court describes. This kind of candidate-controlled ballot measure committee is almost the same as a candidate-controlled recall committee, which I previously argued could easily be subject to contribution limits.<sup>94</sup>

In addition, once in office, politicians who are stymied in the traditional legislative process may turn to the ballot to succeed in their policy objectives. Arnold Schwarzenegger began his term as governor successfully wielding the initiative threat, using his popularity with the people and ability to raise money to

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<sup>91</sup> See Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. Cal. L. Rev. 885, 896 (2005) (reaching similar conclusion before *Citizens United*).

<sup>92</sup> Daniel A. Smith & Caroline J. Tolbert, *Educated by the Initiative* 40 (2004) (in presidential elections, each initiative boosts turnout by half a percentage; in midterm elections, each initiative boosts turnout by 1.2 percent).

<sup>93</sup> Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policymaking in Direct Democracy*, 78 S. Cal. L. Rev. 949 (2005) (terming such initiatives "crypto-initiatives" because they are drafted and pursued because of their spillover effects on a candidate election not because of their policy consequences).

<sup>94</sup> See *supra* Part II.C.

support an initiative campaign to pressure the legislature into adopting workers compensation reform.<sup>95</sup> Current governor Jerry Brown has staked his political fortune to a ballot initiative that will raise income and sales taxes to help fund education and reduce the state's monumental budget deficit.<sup>96</sup> In both these examples, governors turned to the initiative process as a matter of choice (or perhaps political necessity in Brown's case given the unlikelihood of getting a tax increase through the legislature<sup>97</sup>), but in other instances, a politician must take his policy to the people because of constitutional requirements. In March 2004, for example, Schwarzenegger succeeded in gaining approval for a \$15 billion deficit bond to answer the state's ever-present fiscal woes; under the California Constitution he was required to submit such a bond to a vote.<sup>98</sup> Both governors embarked on aggressive fundraising for their efforts in the realm of direct democracy, using committees not subject to contribution limitations, and often raising money simultaneously from the same funders for their re-election campaigns.<sup>99</sup> Granted these measures are somewhat removed from an actual candidate election in that neither Schwarzenegger nor Brown appeared on the ballot with these initiatives. Yet the success of the ballot measures was viewed as

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<sup>95</sup> Garrett, *California Recall*, *supra* note 22, at 280.

<sup>96</sup> See Jim Christie, *Brown Pushes Tax Hike as California's Money Woes Deepen*, Reuters, May 13, 2012, <http://www.reuters.com/article/2012/05/14/us-usa-california-budget-idUSBRE84D00020120514> (calling it the "centerpiece of his fiscal plan").

<sup>97</sup> This ballot measure is also structured as a constitutional amendment, which requires a vote of the people. However, tax increases are not required to be submitted to the people, and Brown could probably have structured the proposal as a statute or statutory initiative (although it now makes some changes to local funding that require constitutional amendment). See California Secretary of State, *Qualified Statewide Ballot Measures, November 2012 Statewide Ballot Measures, 1578, Temporary Taxes to Fund Education, Full Text*, <http://www.sos.ca.gov/elections/ballot-measures/qualified-ballot-measures.htm> (visited July 6, 2012). This structure may also have allowed him to gain higher ballot placement than a competing statutory tax increase proposal because the legislature changed the law to require constitutional initiatives be placed first on the ballot. See Anthony York, *Jerry Brown's Tax Measure Faces Legal Challenge*, LA Times, *PolitiCal*, June 29, 2012.

<sup>98</sup> Garrett, *California Recall*, *supra* note 22, at 277-78, 281-83.

<sup>99</sup> See *id.* at 281 (describing Schwarzenegger's "California Recovery Team" system encouraging large donations to his ballot measure committee from supporters); Hasen, *supra* note 91, at 900-01 (describing donors to the committee); David Siders, *Jerry Brown Builds Political Operation to Win Tax Vote, Re-election*, Sacramento Bee, Dec. 31, 2011 (noting that Brown's initiative campaign had raised \$1.2 million from just 9 donors, including several six-figure donations by interest groups).

vital to the political success of their gubernatorial sponsors, playing a significant role in their re-elections.

Once the relationship between candidates' political and electoral fortunes to certain ballot measures is understood, one simply cannot conclude that the initiative process is free from the dangers of *quid pro quo* corruption because there are no politicians involved who might be corrupted.<sup>100</sup> On the contrary, the importance of ballot measures to modern politicians is abundantly clear, and any campaign finance system that leaves committees they control unregulated is one that has little integrity because of the ease of circumvention. Thus, the current understanding of the state's interest in avoiding *quid pro quo* corruption or its appearance could support a campaign finance system that applied contribution limits to candidate-controlled ballot measure and recall committees. Yet it is not clear that such a system – which is simply differently bifurcated than the current one – is sensible, as we saw in the analysis of recall elections. It leaves unregulated most ballot measure committees, because only a fraction are explicitly controlled by candidates or politicians.<sup>101</sup> Thus, it leaves unregulated those that are controlled by politically ambitious people who have not yet announced their intention to run for political office. It poses practical problems such as the right contribution limit to apply when the politicians involved are themselves subject to varying limitations depending on their office.<sup>102</sup> It encourages politicians to rely on committees that they do not expressly control but that are run by operatives close to them and who share their views, much as is occurring now with Super PACs in the federal system.<sup>103</sup>

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<sup>100</sup> See *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296-99 (1981) (making this argument).

<sup>101</sup> See Hasen, *supra* note 91, at 908 (of 622 ballot measure committees in California from 1990-2004, only 40 were candidate-controlled). See also Dempsey, *supra* note 58, at 145-48 (noting increase in number of such committees over time).

<sup>102</sup> See *supra* text at notes 62 and 63.

<sup>103</sup> See Richard Briffault, *Super PACs*, 96 Minn. L. Rev. 1629, 1665-66 (2012); see also *Super PACs: All the Speech Money Can Buy*, The Week, Dec. 9, 2011, <http://theweek.com/article/index/222222/all-the-speech-money-can-buy> (reporting that American Crossroads, a Super PAC associated with GOP strategists Karl Rove and Ed Gillespie, announced plans to spend \$240 million in 2012; and every candidate in the presidential race, including President Obama, has close aides leading Super PACs and committed to substantial independent spending to help elect their candidates); Patrick O'Connor, *Campaigns Drop Clues to PACs*, Wall St. J., July 6, 2012 (detailing ways candidates communicate to super PACs without violating

The Court's strict adherence to the anticorruption interest leads to a bifurcated system in the context of recalls that draws the line between regulated and unregulated contributions in a way that is not particularly sensible – and the act of drawing the line is likely to change behavior in a way that will make the unregulated behavior more problematic from the anticorruption perspective. That is, interests seeking influence over electoral outcomes and candidates will shift spending into the unregulated channels, a feature that has led Issacharoff and Karlan to term the system of campaign financing “hydraulic.”<sup>104</sup> Given the vital importance of money in successful petition drives and its influence in initiative campaigns,<sup>105</sup> it strains credulity to maintain that politicians whose fates are affected by recalls or other ballot measures will not be particularly attentive to those who provided the funding, even if politician and the group did not expressly coordinate their activities during the election itself. As Justice Thurgood Marshall observed, applying a common sense understanding of politics: “Surely an eager supporter will be able to discern a candidate's needs and desires; similarly, a willing candidate will notice the supporter's efforts.”<sup>106</sup> The influence of such a supporter's independent expenditures becomes greater when other avenues of expressing financial support are constrained. In the modern gubernatorial recalls, independent expenditures were less consequential than in many federal and state campaigns because these candidate-focused races had the unusual feature of permitting some candidates the opportunity to gather unlimited direct contributions. In California, total independent spending was a relatively small part of the total spending; in Wisconsin, it was about half of the total spending, but fairly evenly split, with the main funding advantage enjoyed by the incumbent who had a way to raise money

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regulations). For a discussion of how this might work if candidate-controlled ballot measure committees were subject to contribution limits, see Dempsey, *supra* note 58, at 164. One committee crucial to Schwarzenegger's ballot measure success was controlled by a group that included former aides. See Peter Nicholas, *Group to Aid Gov.'s Push for Reforms*, L.A. Times, Jan. 12, 2005, at B1 (noting involvement by Joel Fox, who had worked for Schwarzenegger during the recall campaign).

<sup>104</sup> Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 Tex. L. Rev. 1705 (1999).

<sup>105</sup> See Garrett, *Direct Democracy*, *supra* note 61, at 147-50.

<sup>106</sup> *Federal Election Commission v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 519-20 (1985) (Marshall, J., dissenting).



through unlimited contributions. If the avenue of unlimited direct contributions were closed off, those seeking to deploy wealth to help candidates in recalls would certainly funnel much of that money to independent expenditures. Although such spending is a second-best alternative to candidates who in most instances would prefer direct control, independent expenditures are better than losing the benefit of the money altogether.

Justice Kennedy's categorical conclusion that independent expenditures can never pose a risk to the integrity of democratic institutions is not as naïve as it might appear on first reading or in the light of subsequent developments. Rather, his view is that preferential treatment and increased access to politicians – the consequences of substantial amounts of targeted independent campaign spending – do not constitute *quid pro quo* corruption. He wrote in *Citizens United*: “The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. ... The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposed that the people have the ultimate influence over elected officials.”<sup>107</sup> The flaws in his analysis are several: The empirical basis of his assertion that such an appearance does not undermine the public's faith in the integrity of democratic institutions is not clear,<sup>108</sup> and it seems likely that influence and preferential access, not actual bribes, are the root of the anticorruption interest that the Court believes can support limits on direct contributions.<sup>109</sup>

The thrust of his argument, however, is more persuasive. He believes that the problem with independent expenditures, if there is any, does not neatly fit into the notion of bribery-like *quid pro quo* corruption of dollars for concrete special benefits. This challenge to define precisely what is wrong with people and entities with wealth deploying substantial amounts in elections is one reason the Court

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<sup>107</sup> *Citizens United*, 130 S. Ct. at 910.

<sup>108</sup> Very little empirical work exists. For an exception, see Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. Pa. L. Rev. 119 (2004).

<sup>109</sup> See Samuel Issacharoff, *On Political Corruption*, 124 Harv. L. Rev. 118, 129-30 (2010) (discussing one kind of preferential access, clientelism, that leads to political corruption).

struggled after *Buckley* to define *quid pro quo* corruption and to determine what level of evidence was required to sustain a government's decision to regulate the campaign process.<sup>110</sup> This difficulty suggests that limiting the government's interest in regulating campaign finance to avoiding bribery-like actions – which are not pervasive in the modern political context and can often be combatted deploying bribery laws directly – misses the point. Such a focus ignores one of the primary motivations behind campaign finance regulation in the recall context – and indeed throughout hybrid democracy: to seek to provide greater equality with respect to the opportunity to participate in the electoral process by reducing the role of money in determining political access.<sup>111</sup>

## **B. Providing Greater Equality of Opportunity to Participate in the Electoral Process**

Continuing disagreement among jurists and scholars about the legitimacy of some sort of egalitarian state interest that could constitutionally support campaign finance regulations is well known and amply discussed in the literature.<sup>112</sup> A majority of the Court continues to eschew any such interest, making it clear in *Citizens United* that they strongly adhered to the ruling in *Buckley* that the government has no acceptable interest in “equalizing the relative influence of

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<sup>110</sup> See Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 Election L.J. 147, 162-63 (2004); Michael S. Kang, *The End of Campaign Finance Law*, 98 Va. L. Rev. 1, 22-24 (2012).

<sup>111</sup> There may well be other state interests that could support more comprehensive campaign finance regulations than the courts current articulation of a particular kind of *quid pro quo* corruption, both in issue campaigns and candidate campaigns. I explore one interest here that is particularly compelling in the context of direct democracy given its historical pedigree.

<sup>112</sup> See, e.g., Symposium, *Money, Politics, and Equality*, 77 Tex. L. Rev. 1603-2021 (1999) (see, in particular, articles by Strauss and Sunstein); Ronald Dworkin, *The Curse of American Politics*, N.Y. Rev. of Books, Oct. 17, 1996, at 19, 21; Richard Briffault, *Public Funding and Democratic Elections*, 148 U. Pa. L. Rev. 563, 577-78 (1999); John S. Shockley, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence be Found?*, 39 U. Miami L. Rev. 377 (1985) (discussing issues in context of ballot measures); Richard L. Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, \_\_ Ga. State L. Rev. \_\_ (forthcoming 2012); *Landell v. Sorrell*, 406 F. 3d 159, 163 (Calabresi, J., concurring in the denial of rehearing en banc), *rev'd sub nom.*, *Randall v. Sorrell*, 548 U.S. 230 (2006).

individuals and groups to influence the outcome of elections.”<sup>113</sup> The majority concluded that “[t]he rule that political speech cannot be limited based on a speaker’s wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker’s identity.”<sup>114</sup> In contrast, dissenting justices over the decades have been willing to take seriously the demand of democratic principles that institutional design address the role wealth plays in the political realm and to consider reforms that attempt to ensure greater equality in political access. Most recently, that argument was advanced by Justice Stevens: “Minimizing the effect of concentrated wealth on our political process, and the concomitant interest that addressing the dangers that attend the perception that political power can be purchased, are, therefore, sufficiently weighty objectives to justify significant congressional action.”<sup>115</sup> Justice White had explicitly accepted such a justification in the context limiting corporate campaign expenditures relating to ballot measures. He wrote in dissent in *Citizens Against Rent Control v. City of Berkeley*, “[r]ecognition that enormous contributions from a few institutional sources can overshadow the efforts of individuals may have discouraged participation in ballot measure campaigns and undermined public confidence in the referendum process.”<sup>116</sup>

In this article, I will not further engage in this debate, which continues to rage, nor will I analyze at length why citizens in a democracy are legitimately concerned when those with wealth have greater opportunity to influence electoral outcomes or political decisions solely by virtue of their control over economic resources.<sup>117</sup> This apprehension has only grown in recent years as economic developments have

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<sup>113</sup> 130 S. Ct. at 904 (quoting *Buckley*, 424 U.S. at 48).

<sup>114</sup> *Id.* at 905. The Court reaffirmed this position broadly in the recent case concerning public financing, a case that is notable because the state aimed to augment the speech of the less-well-financed candidate rather than restricting the ability of the wealthier candidate to spend money. See *Arizona Free Enterprise Club’s Freedom Club v. Bennett*, 131 S. Ct. 2806, 2825-26 (2011).

<sup>115</sup> *Davis v. Federal Election Commission*, 554 U.S. 724, 756 (2008) (Stevens, J., dissenting).

<sup>116</sup> 454 U.S. 290, 308 (1981) (White, J., dissenting).

<sup>117</sup> For my views, see Elizabeth Garrett, *New Voices in Politics: Justice Marshall’s Jurisprudence on Law and Politics*, 52 *How. L.J.* 655, 669-82 (2009) (discussing the equality rationale in the context of candidate elections and the opinion in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)).

widened wealth inequality in the country, a reality that likely has contributed to the enactment of policies that further entrench disparities. For this analysis inspired by the structures of recalls, the key observation is that adoption of the mechanisms of direct democracy – including the recall – was driven in large part by progressives who convinced voters that monied interests had too much influence over the state and local legislative agendas and political outcomes.<sup>118</sup> Contrary to Justice Kennedy’s blithe assertion that “the appearance of influence or access ... will not cause the electorate to lose faith in our democracy,”<sup>119</sup> it was precisely that appearance, and the underlying reality that such access shaped the policy agenda and political outcomes, that provided the impetus for the recall, the initiative and the popular referendum. In the eyes of voters who supported hybrid democracy, a system that allowed wealth, particularly but not exclusively corporate wealth, to frequently determine state policy lack integrity and was profoundly corrupt.

The vision of the equality of opportunity to participate that is a necessary aspect of a well-functioning hybrid democracy can also shape the regulatory structure that accompanies the tools of direct democracy, including campaign finance regulations that apply in elections concerning ballot measures and recalls. This motivation is broader than a narrow conception of bribery-like *quid pro quo* corruption, but rather it is a concern about the negative consequences on policy that arise from the disproportionate influence enjoyed by actors deploying large sums of money amassed because of economic prowess not the power of their political ideas. It then follows that the campaign finance system put into place to further that broader

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<sup>118</sup> See, e.g., Kira L. Klatchko, *The Progressivist Origins of the 2003 California Gubernatorial Recall*, 35 McGeorge L. Rev. 701, 702-03 (2004) (discussing recall in particular); Joshua Spivak, *California’s Recall: Adoption of the “Grand Bounce” for Elected Officials*, 82 Cal. Hist. 20, 22-25 (2004) (discussing recall in particular). Certainly, there are other factors responsible for the successful adoption of these mechanisms in particular states. For literature identifying some of these factors, see Amy Bridges & Thad Kousser, *Where Politicians Gave Power to the People: Adoption of the Citizen Initiative in the U.S. States*, 11 State Pol. & Pol’y Q. 167 (2011); Daniel A. Smith & Dustin Fridkin, *Delegating Direct Democracy: Interparty Legislative Competition and the Adoption of the Initiative in American States*, 102 Am. Pol. Sci. Rev. 333 (2008). See also Dennis F. Thompson, *Two Concepts of Corruption: Making Campaign Safe for Democracy*, 73 Geo. Wash. L. Rev. 1036, 1047-49 (2005) (making the point about this kind of electoral corruption more broadly).

<sup>119</sup> *Citizens United*, 130 S. Ct. at 910. See Hasen, *supra* note 91, at 907-14 (discussing evidence that voter confidence in democratic institutions is undermined by precisely this appearance of unequal influence).

interest would regulate more than the money raised by candidates; it would also apply to groups making independent expenditures. Accepting some articulation of this equality of opportunity interest as a legitimate basis for regulation might convince courts to leave in place campaign finance systems that did not draw the line at candidate-controlled committees but that sought to regulate more comprehensively, particularly in the context of recall, initiative and popular referendum elections.

Allowing this expansion of the kind of state interest that can support campaign finance regulation would mean that more extensive campaign finance regulations could withstand judicial scrutiny. It does not mean, however, that all states and localities would adopt systems that applied beyond the current contours of state regulation. Even now California could regulate contributions to the target of the recall – the barrier to that is state statute, not the state or federal constitution – and it could limit the ability of any candidate to set up separate recall-focused fundraising operations during the election, just as Wisconsin does now. California has chosen not to extend its regulatory structure to that extent, and it is likely that other jurisdictions would not accept the invitation to regulate to the greatest extent allowed. A less aggressive judiciary allows states and localities to experiment with a variety of regulatory schemes, tailoring them to particular realities of the political environment and learning from experience both in the jurisdiction and in other locations.<sup>120</sup>

Of course, more judicial deference may also permit legislators to adopt regulations designed to serve less laudable goals; for example, there is ample reason to believe that incumbent legislators shape democratic institutions, including campaign finance rules, to entrench themselves in office and make successful election challenges exceedingly difficult.<sup>121</sup> One strongly suspects that the provision in the Bipartisan Campaign Finance Act that Justice Stevens defended on egalitarian

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<sup>120</sup> Cf. Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 Sup. Ct. Rev. 95 (2003) (arguing for judicial modesty in the arena of law and politics).

<sup>121</sup> See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 Stan. L. Rev. 643 (1998); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 Geo. L.J. 491 (1997).

grounds – the so-called Millionaire’s Amendment that allowed higher contribution limits to candidates facing opponents who spent large amounts of their personal wealth on their campaigns<sup>122</sup> – may have garnered many votes in Congress because it would protect incumbents from wealthy, self-financed challengers, the kind of challenger most likely to unseat an incumbent.<sup>123</sup> Similarly, it should not surprise us that some of the supporters of severe contribution limits during petition drives on independent recall committees in San Diego were the incumbent city officials who would be the targets of such recalls.<sup>124</sup> Remember that the volunteer effort that succeeded in obtaining sufficient signatures to trigger a recall election of Governor Walker in Wisconsin is unique; usually, money – and lots of it – is necessary to pass the high hurdle of the petition drive.

Interestingly, one answer to the entrenchment critique – one that applies forcefully in a system where the regulated is also the regulator – is that hybrid democracy provides avenues to adopt reforms to institutional design that bypass elected officials. One of the motivations behind the adoption of the initiative was to reduce the power wielded by self-interested legislators and party elites who used their office to block reforms that would empower ordinary citizens.<sup>125</sup> Direct democracy therefore allows voters to determine how to structure institutions, including campaign finance rules that apply to candidate and ballot measure campaigns. Even scholars who are generally skeptical about direct democracy have been willing to support a role for this decision-making mechanism with regard to the design of democratic institutions in light of the inevitable conflict of interest that besets legislators.<sup>126</sup> Indeed, one of the primary differences in democratic

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<sup>122</sup> 2 U.S.C. § 441a-1(a).

<sup>123</sup> Jennifer A Steen, *Self-Financed Candidates and the “Millionaires’ Amendment,”* in *The Election After Reform: Money, Politics, and the Bipartisan Campaign Reform Act 2004*, 206-07 (M.J. Malbin ed. 2006). See generally Samuel Issacharoff & Laura Miller, *Democracy and Electoral Processes*, in *Research Handbook*, *supra* note 61, at 173, 189 (discussing campaign finance laws limiting expenditures generally).

<sup>124</sup> Not only is the author aware of the situation in San Diego because of her involvement in the litigation, but this reality is alluded to in *Citizens for Clean Government*, 474 F. 3d at 647.

<sup>125</sup> Garrett, *Direct Democracy*, *supra* note 61, at 162.

<sup>126</sup> See, e.g., Dennis F. Thompson, *The Role of Theorists and Citizens in Just Elections: A Response to Professors Cain, Garrett, and Sabl*, 4 Election L.J. 153, 158-60 (2005).

institutions that can be observed when comparing initiative states to non-initiative states is that the former are more likely to provide for public financing for legislative offices.<sup>127</sup> One challenge to using direct democracy to alter the features of democratic institutions is that the current campaign finance rules allow unlimited spending and unlimited contributions during the campaigns because the judiciary continues to adhere to a narrow conception of corruption when analyzing campaign finance rules and, at least up to now, has failed to understand the important role candidates and officeholders play in the initiative and referendum process. Thus, the forces that wish to preserve the power of money to influence electoral outcomes can deploy those resources to oppose any reform even when the people have the outlet of direct democracy.

Arguments based on the principle of equality of opportunity to participate in politics, regardless of economic wealth, derived from the history of direct democracy would support greater regulation of campaign contributions and expenditures in recalls, as well as in ballot measure campaigns, but such rules would presumably be rejected under current Supreme Court jurisprudence. Thus, we are left with some sort of bifurcated system, one that allows ample opportunity for entities and individuals with wealth to spend money to obtain influence, access, and a greater chance of political outcomes they favor. Given that such a system allows substantial gaps in regulatory coverage, funneling money into some streams – such as independent expenditures or, in some cases, candidate-controlled committees active in direct democracy – and limiting its flow in others – such as direct contributions to candidates and their campaign committees, it is worth briefly describing a different, more consistent regulatory landscape that is increasingly attractive to reformers and would likely withstand judicial scrutiny. One answer to the difficulties of sensible campaign finance regulation under current rules would be

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<sup>127</sup> See Nathaniel Persily & Melissa Cully Anderson, *Regulating Democracy through Democracy: The Use of Direct Legislation in Election Law Reform*, 78 S. Cal. L. Rev. 997 (2005). See also John Phippen, Shaun Bowler & Todd Donovan, *Election Reform and Direct Democracy: Campaign Finance Regulations in the American States*, 30 Am. Pol. Sci. Res. 559 (2002) (finding difference in presence of laws restricting campaign contributions).

to remove the restrictions entirely and focus on well-crafted disclosure laws aimed to provide voters credible and helpful information.

### **C. Disclosure as a Comprehensive Campaign Finance System**

One way to ameliorate any unfortunate effects of a bifurcated system of contribution limits in recalls, and possibly ballot measure campaigns should a jurisdiction seek again to apply limits to candidate-controlled committees, would be to eliminate all limits and regulate only through disclosure of the source and amount of campaign-related funds. Although under increased challenge, campaign finance disclosure laws have largely survived judicial scrutiny, both in the context of candidate and ballot measure campaigns. Even in environments where the Court does not acknowledge a risk of corruption – direct democracy and now independent expenditures in candidate elections – it has been willing to leave disclosure laws in place because they serve the governmental interest in providing voters information about the entities behind election-related communications, which then allows them to better evaluate the arguments being made.<sup>128</sup> In addition, California courts have recognized that the identities of some donors act as a voting cue when voters know whether their interests are aligned, or not, with the donors' and can gauge the intensity of the donors' position through the amount of the financial commitment.<sup>129</sup> This informational interest has become more weighty in light of ample evidence that some groups and individuals are seeking to avoid publicity about their involvement in campaigns by organizing under misleading names or routing spending through several organizations, some of which may face fewer disclosure requirements.<sup>130</sup>

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<sup>128</sup> *Citizens United*, 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 66) (allowing disclosure with respect to independent expenditures that could not be subject to contribution limits); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978) (supporting disclosure in ballot measure campaigns).

<sup>129</sup> *Protectmarriage.com v. Bowen*, 803 F. Supp. 2d 914, 937-939 (E. D. Ca. 2011). For a discussion of voting cues in direct democracy, see Garrett, *Direct Democracy*, *supra* note 61, at 151-55.

<sup>130</sup> *Citizens United*, 130 S. Ct. at 914 (quoting *McConnell v. Federal Election Commission*, 540 U.S. 93, 197 (2003)).



One insight provided by the analysis of campaign finance rules in the context of recalls is that disclosure laws can be supported not only by the informational interest but also by the traditional *quid pro quo* corruption interest, at least with respect to ballot measures, like recalls, that include candidate involvement. This should strengthen the case for effective disclosure laws, aimed to provide complete information to voters and to pierce any veils that groups create,<sup>131</sup> as they are increasingly under attack by those who seek to dismantle any type of regulatory structure governing campaigns. As they become the only regulatory response likely to withstand judicial scrutiny, disclosure laws have become the subject of more scholarly analysis. Again, I do not intend to provide a lengthy analysis of disclosure laws here, but the perspective gained from the analysis of recall elections allows for a few observations.

First, given the importance of money in petition drives, disclosure of the forces behind the drive and the amount of money they are spending is vital to serve voters' informational needs. Thus, disclosure must begin early in the process and occur regularly and in a timely way so that voters can learn about the groups involved as the petitions are circulated. Information should also be provided in ways designed to catch voters' attention. For example, petitions could include in print designed to be noticeable the identities of groups providing the funding behind the signature gathering effort. Disclosure laws could also require that petition signers initial any disclaimer revealing of financial interests to ensure that it was at least brought to their attention.

Second, petition circulators should also be required to wear badges indicating whether they are paid circulators or volunteers. Although the Court has ruled unconstitutional a requirement that circulators wear name badges,<sup>132</sup> a tag with the status of either paid or volunteer does not present the same dangers for intimidation or harassment. Yet it provides useful information about the intensity of any grassroots support for the topic of the petition. Several states currently

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<sup>131</sup> See Garrett & Smith, *supra* note 8.

<sup>132</sup> *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) (leaving undecided any constitutional issues relating to tags identifying circulators as "paid").

require that the petition identify whether the circulator is paid.<sup>133</sup> One of the most notable aspects of the petition drive to recall Governor Walker is that it was mounted primarily and perhaps entirely by volunteers working quickly in the cold of the winter, a characteristic that provided credible and persuasive information about the depth of the support for the recall among the population at that time. Indeed, Walker's forces tried to discredit the recall movement by claiming that they were paying signature gatherers,<sup>134</sup> a tactic that suggests how powerful this information may be in motivating voters' decision whether to sign a petition. When the tools of direct democracy were designed in the early twentieth century, the signature gathering stage was to be an effective threshold that regulated ballot access, allowing only those topics that could garner a significant amount of grassroots support. Now that money guarantees ballot access, the only petition drives that actually provide good evidence of popular support are those using volunteers – in that case, the volunteer workers provide the evidence, not the signatories.<sup>135</sup>

Although the Court has upheld disclosure of significant information about those signing the petition, this information should not be provided to the public, although state officials will use it to engage in oversight of the petitions to ensure that the names are valid. In *Doe v. Reed*,<sup>136</sup> the Court upheld a Washington law that required public release of the petitions, with the names and addresses of the signatories, under the state's open records law. The Court did not reach the state's claim that the disclosure of these names served an informational interest, holding instead that this process was a legitimate method of ensuring that the integrity of the electoral process by combatting fraud.<sup>137</sup> There is no reason to believe, and certainly no evidence, that knowing the names of those who sign petitions provides any useful information to voters. People sign petitions for many reasons, including getting past

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<sup>133</sup> Colorado requires a badge, Colo. Rev. Stat., tit. 1, art. 40, § 112, while several other states like Arizona, Ariz. Rev. Stat., tit. 19, ch. 1, art. 1, § 19-102, require notice on the petition itself.

<sup>134</sup> *Walker Claims Recall Petition Circulators are Being Paid*, Channel3000.com, Dec. 6, 2011.

<sup>135</sup> See Garrett, *Agenda Setting*, *supra* note 17, at 1879-89.

<sup>136</sup> 130 S. Ct. 2811 (2010).

<sup>137</sup> *Id.* at 2819.

persistent circulators so that one can shop in Costco or Target, indicating that the question is one that voters should decide, and supporting the policy proposed by the measure. Signing a petition is cheap and ambiguous talk – disclosure only adds to the cacophony of noise in an election. It may be constitutional to disclose the names, but it is not good law.

Third, effective and well-structured disclosure must continue throughout the campaign period. New technology provides both opportunities and challenges for regulators. The opportunity is for regulators to use websites and other means of communication to provide voters and intermediaries like the press information that is well organized, easy to search and understand, and timely, provided throughout the campaign in regular and frequent intervals. The challenge is to apply disclosure provisions to new methods of communication used by campaigns and entities involved in campaign-related speech. The Federal Election Commission has promulgated regulations applying disclaimers to Internet communications,<sup>138</sup> and states are beginning to move to extend disclosure laws broadly to electronic communications, with reach beyond broadcast, radio and print advertisements. Regulation needs to strike a balance between applying the same disclosure rules – in terms of disclosure about spending and disclaimers on the communications – to communications over the Internet as they have with traditional media and ensuring that the Internet remains “a flourishing source of robust and vibrant political discussion among citizens.”<sup>139</sup> In some cases, statutory language allows thoughtful regulatory approaches, but often the language itself will have to be broadened to include methods of communication unimagined by drafters.

Another challenge in crafting disclosure laws is piercing the veils that increasingly shield the real parties behind the funding from public view. Political groups are now using various nonprofit structures for election-related activities, including 501(c)(4) organizations, which are civic and social welfare organizations

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<sup>138</sup> Federal Election Commission, *Internet Communications*, 71 Fed. Reg. 18589, *codified at* 11 CFR Parts 100, 110 & 114, May 12, 2006.

<sup>139</sup> Fair Political Practices Commission, *Internet Political Activity and the Political Reform Act 9* (Aug. 11, 2010).

that promote the “common good and general welfare” and that can engage in political activity that is issue driven. One advantage of the 501(c)(4) structure is that there is no legal requirement for them to disclose their individual donors. The organization of political groups can be stunningly complex, as one group may use various nonprofit structures — including, to a limited extent, charitable 501(c)(3) organizations — to arrange its political activities to provide the most flexibility, the desired level of protection against disclosure, and the greatest ability to raise funds. A study by the Center for Responsive Politics concludes that 53% of federal non-party independent political spending was fully disclosed publicly in 2010;<sup>140</sup> the rest has been called “dark money.” Even organizations that are subject to federal or state disclosure requirements manage to evade or significantly delay disclosure by receiving contributions from nonprofits not subject to disclosure themselves or from corporations that do not disclose their owners or go out of business soon after the donation.

Designing disclosure laws to provide necessary information despite complex organizational structures should be a primary focus. California’s Fair Political Practices Commission recently passed regulations designed to appropriately disclose contributors to nonprofits of any kind that are active in state campaigns. The regulation seeks to limit disclosure to donors who knew their contributions would be used to fund California election campaigns – candidate or ballot measure – and donors who made the contributions after the group made at least one campaign expenditure in California, an act which would put them on notice that their money could be used for campaigns.<sup>141</sup> Richard Briffault provides a different solution to

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<sup>140</sup> See Center for Responsive Politics, *Outside Spending by Disclosure*, 2010 Election Cycle <http://www.opensecrets.org/outsidespending/index.php> (visited January 29, 2012). See also Briffault, *Super PACs*, *supra* note 103, at 1764 (describing tactics used by Super PACs); Garrett & Smith, *supra* note 8 (generally discussing tactics used to hide sources of political money in direct democracy); Mike McIntire & Nicholas Confessore, *Tax-Exempt Groups Shield Political Gifts of Businesses*, N.Y. Times, July 7, 2012 (describing tactics used to create dark money despite disclosure laws).

<sup>141</sup> See Cal. Reg. 18215 and 18412; Memorandum to the FPPC from Commission Counsel, *A More Accurate Rule for Reporting the Source of Funding for Expenditures by Multi-Purpose Groups*, Mar. 26, 2012, <http://www.fppc.ca.gov/agenda.php?id=485>. See also *California Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1186 (9th Cir. 2007) (upholding disclosure applied to such committees as serving informational interests, particularly when donors try to avoid publicity through complicated organizational arrangements).

disclosing donors in a way that still allows some to support nonprofits anonymously, as long as they limited their financial participation to non-campaign-related activities. He suggests that nonprofits could be required to set up separate accounts dedicated to political activity, much like a PAC, and regulators could then apply disclosure laws only to donors to those accounts, an approach similar to that included in the proposed DISCLOSE Act at the federal level and found in some state systems.<sup>142</sup>

Finally, disclosure laws must be structured so that only donors making significant contributions to candidate, ballot measure, or recall campaigns are disclosed. To avoid information overload that diminishes the utility of helpful information for voters, statutes should work to provide only the information that can serve as a voting cue. Although more empirical work is necessary to determine what kind of information improves voter competence and how that information can best be provided,<sup>143</sup> there is a growing consensus that disclosure thresholds should be set significantly higher in most states and localities (although still at different levels depending on the dynamics of the campaigns).<sup>144</sup> This change typically requires legislative involvement because thresholds usually appear in statutes or ordinances, perhaps with directions for regulators to adjust them periodically for inflation. Bruce Cain has advocated for “semi-disclosure” of small donors, providing only aggregate information about their general characteristics (for example, zip codes, occupations, resident or nonresident status, number of donors at particular levels).<sup>145</sup> If regulators believe they need more information to effectively administer

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<sup>142</sup> Richard Briffault, *Nonprofits and Disclosure in the Wake of Citizens United*, 10 Election L.J. 337, 356-57 (2011).

<sup>143</sup> For the only empirical work done so far, see Craig Burnett, Elizabeth Garrett, & Mathew D. McCubbins, *The Dilemma of Direct Democracy*, 9 Election L.J. 305 (2010); Arthur Lupia, *Shortcuts versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 Am. Pol. Sci. Rev 63 (1994).

<sup>144</sup> See, e.g., Elizabeth Garrett, *Voting with Cues*, 37 U. Rich. L. Rev. 1011, 1044-45 (2003); Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 Election L.J. 273, 300-01 (2010) [hereinafter Briffault, *Disclosure 2.0*]; Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 Ind. L. Rev. 255, 280-81 (2010)

<sup>145</sup> Bruce Cain, *The Shade from the Glare: The Case for Semi-Disclosure*, Cato Unbound, Nov. 9, 2010. See also David Lourie, *Rethinking Donor Disclosure after the Proposition 8 Campaign*, 83 S. Cal. L. Rev. 133, 159-70 (2009).

the system, additional information could be disclosed to them, but not disseminated broadly to the public.<sup>146</sup>

This aggregated information may provide helpful cues to voters by characterizing how grassroots the level of support for a candidate or ballot measure is, by suggesting interest groups that may be involved significantly on one side or the other, and by revealing the extent of out-of-state support for an issue or candidate. Protecting small donors from more individualized public disclosure also helps to protect them from any possible retaliation, which is arguably more likely in a world where third parties are providing information about individuals' political activities through websites. Claims of economic and other retaliation directed toward relatively small donors have been made in the context of ballot measures relating to the definition of "marriage," although the evidence supporting the claims often falls short of the allegations and has not sustained a successful constitutional challenge.<sup>147</sup> Nonetheless, in a world of instant and broad dissemination of information on the Internet, the threat that some small donors may fear reprisal and thus decline to participate in the political realm is serious enough for policy makers to consider when crafting laws, particularly because the disclosure of particularized information has little informational benefit.<sup>148</sup>

#### IV. Conclusion

Although state-level recalls remain rare, they are the quintessential example of hybrid democracy, combining an issue campaign, albeit one explicitly tied to a public official, and a candidate campaign. They provide therefore an environment to study the effect of campaign finance rules on all aspect of hybrid democracy, and to determine whether the jurisprudential approaches to assessing their validity lead to sensible policy results. My analysis reveals that the current narrow focus on a particular understanding of *quid pro quo* corruption allows only for a bifurcated

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<sup>146</sup> See Briffault, *Disclosure 2.0*, *supra* note 144, at 301.

<sup>147</sup> See, e.g., *Doe v. Reed*, 823 F. Supp. 2d 1195 (W.D. Wash. 2011).

<sup>148</sup> See Hasen, *Chill Out*, *supra* note 8, at 10 (making similar recommendation).

system of campaign rules that is likely to continue to leave voters suspicious that democratic institutions lack integrity. Similarly, any expanded regulation of contribution limits in other ballot measure campaigns – a possibility once we understand the close relationship between initiatives and candidates – will also necessarily be bifurcated. To successfully enact a comprehensive system of contribution limits, either the courts will have to accept state interests that stem from egalitarian values, or lawmakers will need to replace bifurcated regulatory structures with comprehensive, extensive and effective disclosure statutes.