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The Public's Right to Know versus Compelled Speech: What Does Social Science Research Tell Us about the Benefits and Costs of Campaign Finance Disclosure in Non-Candidate Elections?

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THE PUBLIC’S RIGHT TO KNOW VERSUS COMPELLED SPEECH: WHAT DOES SOCIAL SCIENCE RESEARCH TELL US ABOUT THE BENEFITS AND COSTS OF CAMPAIGN FINANCE DISCLOSURE IN NON- CANDIDATE ELECTIONS?

Dick Carpenter & Jeffrey Milyo***

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INTRODUCTION

The National Conference of State Legislatures has called campaign finance disclosure the most basic form of campaign finance regulation and further notes that “[a]ll states require some level of disclosure from candidates, committees, and political parties of the amount and source of contributions and expenditures.”¹ One function of

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1. *Campaign Finance Reform: An Overview*, NAT’L CONF. ST. LEGISLATURES (Oct. 3, 2011), <http://www.ncsl.org/legislatures-elections/elections/campaign-finance-an-overview.aspx#Disclosure>.

campaign finance disclosure is to prevent corruption in candidate elections.² The manner in which disclosure may deter corruption is not difficult to imagine. For example, disclosure reports may be examined by investigative journalists and opposition researchers looking for evidence of unsavory relationships between contributors and candidates. Further, disclosure of contributions to candidates may facilitate the enforcement of contribution limits in candidate elections. After all, it would be difficult to know whether a contribution limit has been violated without some accounting of how much contributors have given to candidates.

In this Article, we question neither the desirability of creating transparency in the ties between candidates and their contributors, nor the efficacy of disclosure regulations in affecting this end. This is despite the fact that several recent studies cast doubt on the extent to which state campaign finance laws reduce either corruption or the appearance of corruption.³ Rather, we focus on compelled disclosure of political finances in non-candidate contexts, such as ballot measure elections and grassroots issue advocacy. Grassroots issue advocacy is “any effort to organize, coordinate or implore others to contact public officials in order to affect public policy.”⁴ We argue that the extension of disclosure regulations to political activities unrelated to candidate elections cannot be justified in a similar way as a means to prevent corruption. In non-candidate contests, there can be no revelation of an unsavory relationship between a contributor and a candidate because, simply, there is no candidate. Similarly, because contribution limits do not exist outside of candidate elections, disclosure cannot facilitate the enforcement of non-existent contribution limits in non-candidate contexts.

2. JEFFREY MILYO, INST. FOR JUST., CAMPAIGN FINANCE RED TAPE: STRANGLING FREE SPEECH & POLITICAL DEBATE 18 (2007).

3. See, e.g., Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 174 (2004); David M. Primo & Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence from the States*, 5 ELECTION L.J. 23, 38 (2006); Beth Ann Rosenson, *The Effect of Political Reform Measures on Perceptions of Corruption*, 8 ELECTION L.J. 31, 42 (2009); Adriana Cordis & Jeffrey Milyo, *Do State Campaign Finance Reforms Reduce Political Corruption?* (Jan. 2013) (unpublished manuscript) (on file with author); Jeffrey Milyo, *Do State Campaign Finance Reforms Increase Trust and Confidence in State Government?* (Apr. 2012) (unpublished manuscript) (on file with author).

4. JEFFREY MILYO, INST. FOR JUST., MOWING DOWN THE GRASSROOTS: HOW GRASSROOTS LOBBYING DISCLOSURE SUPPRESSES POLITICAL PARTICIPATION, Executive Summary (2010).

Another argument for disclosure regulations in non-candidate elections is that compelled disclosure of the finances of groups engaged in non-candidate political activities provides voters with vital information while at the same time imposing no real costs on those groups.⁵ In our experience, this argument is a fairly conventional view among advocates for increased disclosure, so for ease of exposition, we will dub it “the conventional view” of disclosure. However, we take issue with both elements of this view: first, that disclosure provides vital information to the general public and, second, that disclosure regulations impose little cost on political speakers and groups.

We identify several challenges to the conventional view of disclosure requirements. In short, there is little support from the social scientific literature for the notion that compelled disclosure generates important public benefits by augmenting voters’ knowledge. However, there is evidence that disclosure regulations may impose significant costs on political activity. This does not necessarily weigh against disclosure laws in candidate-centered elections, as there still remains the anti-corruption rationale for such regulations. Nevertheless, our findings do call into question the rationale for extending compelled disclosure to other political contexts.

The potential over-regulation of non-candidate political activities is of serious concern. Ballot initiatives are an important tool for the public to circumvent and discipline non-responsive elected officials, as well as a means for increasing the public’s participation in politics, knowledge of pertinent issues, and trust in government.⁶ Furthermore, “[g]rassroots lobbying is therefore not just the exercise of free speech and association, but the very process by which like-minded people coordinate their efforts and petition government for the redress of grievances.”⁷ Together, these non-candidate political activities are the means by which many ordinary citizens become

5. See Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295, 298 (2005).

6. See DANIEL A. SMITH & CAROLINE J. TOLBERT, EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES 117 (2004).

7. See MILYO, *supra* note 4, at 2.

actively engaged in politics and the route by which new political entrepreneurs enter politics.⁸

In the next Part, we describe existing state disclosure laws in two prominent non-candidate contexts: ballot measure elections and grassroots issue advocacy. We then review the legal arguments for compelled disclosure in these contexts, followed by the social science literature as it pertains to the benefits and costs of compelled disclosure. We conclude with a discussion of the lessons from the social science literature and implications for practical reforms to state disclosure regulations.

I. DISCLOSURE REGULATIONS IN THE STATES

Campaign finance disclosure laws are ubiquitous in candidate elections in the states.⁹ Some states make it quite easy for interested persons to search disclosure reports online.¹⁰ The National Institute on Money in State Politics, a non-profit group located in Montana, collects data from state disclosure reports and also maintains a searchable database online.¹¹ Given this archive, an Internet connection, and a few clicks of a mouse, it is a trivial exercise to discover that a Mr. Roy Bash, a lawyer residing in Mission Hills, Kansas, contributed \$500 to the re-election campaign of the incumbent Governor of Missouri, Jeremiah Nixon, on June 30, 2011.¹² Using the online searchable disclosure database created by the Missouri Ethics Commission, it is also quite easy to verify this information and even obtain such personal information as Mr. Bash's home street address and the identity of his employer.¹³ As we noted at the start, it is beyond the scope of this Article to examine the

8. See JEFFREY MILYO, INST. FOR JUST., KEEP OUT: HOW STATE CAMPAIGN FINANCE LAWS ERECT BARRIERS TO ENTRY FOR POLITICAL ENTREPRENEURS 7-8 (2010).

9. See Primo & Milyo, *supra* note 3, at 29.

10. For example, the state of Illinois permits online searches of disclosure reports. See ILL. ST. BOARD ELECTIONS, <http://www.elections.il.gov/> (last visited Mar. 6, 2013).

11. See NAT'L INST. ON MONEY ST. POL., <http://www.followthemoney.org/> (last visited Mar. 6, 2013).

12. See *Contributor Summary: BASH, ROY*, NAT'L INST. ON MONEY ST. POL., http://www.followthemoney.org/database/StateGlance/contributor_details.phtml?d=1381511515 (last visited Mar. 25, 2013).

13. See *All Contributions & Expenditures Search*, MISS. ETHICS COMMISSION, http://www.mec.mo.gov/EthicsWeb/CampaignFinance/CF12_ContrExpend.aspx (search Year: "2012"; Last Name: "Bash"; First Name: "Roy") (last visited Mar. 25, 2013).

benefits and costs of such readily available information about contributors to candidates. However, as we show below, several states also apply similar disclosure requirements to activities not directly connected to candidates.

A. Ballot Measure Elections

Every state and most localities permit some form of direct legislation through popular vote, from constitutional amendments to non-binding advisory measures.¹⁴ The most commonly employed of these ballot-measure procedures are initiatives, or proposals for new laws or constitutional amendments placed on the ballot via popular petition.¹⁵ Twenty-four states use initiatives, including many of the largest states by population: Arizona, California, Colorado, Florida, Illinois, Missouri, Massachusetts, Michigan, Ohio, Oregon, and Washington.¹⁶

In two recent reports, Jeff Milyo examines state disclosure requirements in ballot measure elections.¹⁷ In general, states apply very similar disclosure rules to candidate elections and ballot measure elections. In Table 1, *infra*, we reproduce selected disclosure requirements and the minimum dollar thresholds that trigger these reporting requirements in all twenty-four of the initiative states.¹⁸ In other words, individuals and groups that advocate for or against a ballot measure must register as a political committee if they collect or spend in excess of a minimum dollar threshold.¹⁹ Registration also involves naming a treasurer who will be subject to punishment for violations of reporting requirements.²⁰ As indicated in Table 1, in most such states, the thresholds of activity that trigger registration requirements are \$500 or less. The states with higher triggers for registration are: California (\$1000), Illinois (\$3000), Maine (\$5000), Nebraska (\$5000), and Nevada (\$10,000).²¹ However, several states require registration for any amount of activity; these are:

14. See *State I&R*, INITIATIVE & REFERENDUM INST. U. S. CAL., http://www.iandrinstute.org/statewide_i%26r.htm (last visited Mar. 6, 2013) (providing up-to-date information on ballot-measure procedures in the states).

15. See *id.*

16. See *id.*

17. See MILYO, *supra* note 8, at 20, 22, 25–26; MILYO, *supra* note 2, at 5–14.

18. See *infra* Table 1 (citing MILYO, *supra* note 8).

19. See MILYO, *supra* note 4, at 9–10.

20. See MILYO, *supra* note 2, at 5.

21. See *infra* Table 1 (citing MILYO, *supra* note 8).

Massachusetts, Montana, North Dakota, Ohio, Oregon, Washington, and Wyoming.²²

In every state, contributor names and addresses must be reported for aggregate contributions over a minimum threshold that ranges from \$0 to \$1000, with more than half of the states setting this disclosure threshold at \$50 or less.²³ In addition, all but seven initiative states also require employer/occupation information from contributors.²⁴ The states that do not require employer information are: Arkansas, Idaho, Nebraska, Nevada, North Dakota, South Dakota, and Wyoming.²⁵ Finally, among the initiative states, only South Dakota does not require itemization of expenditures; most states set the threshold for itemizing expenditures at \$100 or less.²⁶ However, Alaska, Arizona, Montana, and Wyoming require all expenditures to be itemized, regardless of amount.²⁷

Political committees that fail to comply with these extensive disclosure requirements may be subject to fines and even criminal penalties.²⁸ Further, because disclosure reports are filed multiple times throughout the year, the failure to correct a past oversight can lead to the accumulation of large fines.²⁹ For example, in just this way, one ballot measure committee in California racked up over \$800,000 in fines despite the fact that the maximum penalty per violation was only \$2,000 and the committee had only raised and spent just over \$100,000.³⁰

B. Grassroots Issue Advocacy

Grassroots issue advocacy is the act of political organizing through communications to the general public.³¹ This activity may entail exhortations for members of the public to contact their elected officials in regard to some policy concern.³² Regardless of the presence of such exhortations, though, grassroots issue advocacy is

22. See *infra* Table 1 (citing MILYO, *supra* note 8).

23. See *infra* Table 1 (citing MILYO, *supra* note 8).

24. See *infra* Table 1 (citing MILYO, *supra* note 8).

25. See *infra* Table 1 (citing MILYO, *supra* note 8).

26. See *infra* Table 1 (citing MILYO, *supra* note 8).

27. See *infra* Table 1 (citing MILYO, *supra* note 8).

28. MILYO, *supra* note 2, at 3.

29. *Id.*

30. *Id.*

31. MILYO, *supra* note 4, at 2–4.

32. *Id.* at 3–4.

often described as “grassroots lobbying” or “outside lobbying.”³³ We use these terms interchangeably throughout. And while such grassroots communications are far removed from the activities of hired guns that roam state capitol buildings, several states nevertheless regulate grassroots lobbying as if it were a form of traditional and direct lobbying of legislators.³⁴

In a recent report, Milyo examines state regulation of grassroots lobbying.³⁵ In Table 2, *infra*, we reproduce a list of states by the ways in which they define lobbying activities.³⁶ Lobbying of public officials is regulated in every state, as well as at the federal level.³⁷ In general, persons engaged in lobbying activities that exceed a threshold of activity must register and file periodic reports on their activities.³⁸ As indicated in Table 2, however, only fifteen states, including Illinois, Michigan, Ohio, and Texas, define lobbying simply as “direct communication with public officials.”³⁹ Twenty-two states define lobbying more broadly so as to include indirect communication with public officials.⁴⁰ In these states (e.g., California, Georgia, Massachusetts, New Jersey, and Virginia), persons and groups that communicate with the public about policy issues *and* encourage people to contact government officials are considered to be engaged in lobbying.⁴¹ But in the remaining fourteen states (e.g., Florida, Missouri, New York, Oregon, and Washington), *any* communication with the public about policy issues meets the definition of lobbying.⁴²

As should be apparent, “grassroots lobbying” is a somewhat misleading term because communicating indirectly with public officials is quite unlike lobbying in the traditional sense. A more accurate and descriptive term for indirect lobbying is “grassroots issue advocacy,” inasmuch as the action being regulated is communicating to the public at large, not the subsequent actions of individuals that may contact public officials.⁴³

33. See KEN KOLLMAN, *OUTSIDE LOBBYING: PUBLIC OPINION & INTEREST GROUP STRATEGIES* 3–4 (1998).

34. MILYO, *supra* note 4, at 8–10.

35. See *generally id.*

36. See *infra* Table 2 (citing MILYO, *supra* note 4, at 8).

37. See *infra* Table 2 (citing MILYO, *supra* note 4, at 7–8).

38. MILYO, *supra* note 4, at 9.

39. See *infra* Table 2 (citing MILYO, *supra* note 4, at 8).

40. See *infra* Table 2 (citing MILYO, *supra* note 4).

41. See MILYO, *supra* note 4, at 8.

42. See *infra* Table 2 (citing MILYO, *supra* note 4, at 8).

43. MILYO, *supra* note 4, at 8–10.

In Table 3, *infra*, we reproduce a list of the threshold activity levels that trigger reporting requirements for grassroots issue advocacy in the thirty-six states that regulate this activity.⁴⁴ As with ballot measure disclosure, persons and groups engaged in grassroots issue advocacy campaigns that meet some threshold of activity typically must register as lobbyists and file periodic reports.⁴⁵ Such reports typically require disclosure of any specific legislative or regulatory interests, as well as itemized expenditures (and contributions if applicable).⁴⁶ The dollar threshold for itemizing varies by state; for example, the state of Washington requires that “grassroots lobbyists” itemize contributions over \$25.⁴⁷ Also, as with ballot measure committees, failure to comply with grassroots lobbying disclosure requirements can result in civil and criminal penalties.⁴⁸

II. WHY DISCLOSURE?

The ground rules for government regulation of political campaigns were set more than thirty-five years ago in the landmark Supreme Court decision of *Buckley v. Valeo*.⁴⁹ The Court ruled that regulations may not unduly burden First Amendment rights and must be narrowly tailored to prevent the “actuality and appearance of corruption resulting from large individual financial contributions.”⁵⁰ This standard begs the question of how to define corruption, but the Court has been fairly consistent in defining corruption as direct exchanges of cash for political favors and the like (i.e., bribery and influence-peddling).⁵¹

Given that corruption requires an explicit quid pro quo, it follows that campaign contribution limits may be imposed on political committees that receive or make contributions in candidate elections, but not on candidates that choose to self-finance. This is because a candidate cannot corrupt herself with her own funds. Similarly, although a large contribution may influence the actions of a candidate in office, the plain language of a ballot proposition cannot be influenced in the same way. It is no surprise then that states neither

44. See *infra* Table 3 (citing MILYO, *supra* note 4, at 10).

45. MILYO, *supra* note 4, at 11.

46. *Id.*

47. *Id.* at 16.

48. *Id.* at 17–18.

49. 424 U.S. 1 (1976).

50. *Id.* at 26.

51. See Cordis & Milyo, *supra* note 3, at 6.

limit contributions to ballot measure committees nor impose limits on grass roots issue advocacy campaigns because these activities do not directly involve a candidate that could be party to a quid pro quo transaction.

A. The Transparency Rationale for Disclosure Laws

The conventional rationale for disclosure laws is that transparency itself is a desirable end.⁵² Indeed, this is seen clearly in legislative declarations of intent attached to lobbying and campaign finance statutes in several states.⁵³ For example, consider the language of Rhode Island's law:

Public confidence in the integrity of the legislative process is strengthened by the identification of persons and groups who on behalf of private interests seek to influence the content, introduction, passage, or defeat of legislation and by the disclosure of funds expended in that effort.⁵⁴

Another example is found in this declaration from the state of Washington:

The public's right to know of the financing of political campaigns and lobbying and the financial affairs of elected officials and candidates far outweighs any right that these matters remain secret and private.⁵⁵

The strength of these claims is disconcerting in two respects. First, the almost casual dismissal of a right to privacy ignores the Supreme Court's repeated recognition that mandatory disclosure can impose unacceptably high costs on certain disfavored groups and speakers.⁵⁶ Second, not only are there are no empirical studies of the efficacy of disclosure in non-candidate contexts on corruption or public confidence in government, but more generally, there is little support for the notion that campaign finance regulations have such salutary effects.⁵⁷

52. See Garrett & Smith, *supra* note 5. *But see* MILYO, *supra* note 2, at 19.

53. MILYO, *supra* note 4, at 8.

54. R.I. GEN. LAWS ANN. § 22-10-1(b) (West 2012).

55. WASH. REV. CODE ANN. § 42.17.010 (West 2012).

56. See, e.g., McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995); Talley v. California, 362 U.S. 60 (1960); NAACP v. Alabama, 357 U.S. 449 (1958); Thomas v. Collins, 323 U.S. 516 (1945).

57. For a discussion of recent studies that cast doubt on the efficacy of state campaign finance reforms as a means of preventing corruption or improving public opinion of state government, see sources cited *supra* note 3.

Rather than assuming that disclosure in non-candidate contexts yields great social benefits at little cost, we review the social science research on disclosure for evidence that speaks to the benefits and costs of disclosure in non-candidate contexts. The motivation for this exercise is our contention that in the spirit of *Buckley*, there is a need to demonstrate that such laws not only generate some benefit from disclosure laws in non-candidate contexts, but also that such laws impose no burden on the freedoms of speech and association or the right to petition.

As discussed in greater detail below, the most prominent purported benefit of transparency through disclosure in the non-candidate context is a more informed electorate: transparency produces information that voters need or want in order to make an informed vote.⁵⁸ Proponents of this view also assert that disclosure laws place no real burden on political speech or association, so there is no meaningful impediment to persons or groups exercising their First Amendment rights.⁵⁹ These claims of informational benefits at no cost will be examined more closely in the next section.⁶⁰

But in general, is more transparency in politics always better than less? Apparently not, as the existence of the secret ballot is one example where privacy concerns are widely perceived to trump any potential benefits from public disclosure of citizen's votes in elections.⁶¹ The rationale for the secret ballot is that this mechanism makes it more difficult to bribe, intimidate, or otherwise coerce citizens to vote a certain way and protects citizens from reprisals by persons with contrary political views.⁶²

As a further demonstration that disclosure entails some costs, consider the nature of information that is and is not disclosed under current laws. Details such as home address and employer provide some information about contributors, but might voters want to know more about contributors' beliefs and associations? Why not compel disclosure of union and interest group membership, religion, race, or even sexual preference? Clearly, there is some boundary where

58. See Garrett & Smith, *supra* note 5, at 295.

59. See Richard Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age* (Univ. Cal. Irvine Sch. of Law, Working Paper No. 2011-46, 2012).

60. See *infra* Part III.

61. See generally Jac C. Heckelman, *The Effect of the Secret Ballot on Voter Turnout Rates*, 82 PUB. CHOICE 107 (1995).

62. *Id.* at 107-08.

privacy becomes more important than the public's right to know details about who supports or opposes an issue.

These examples suffice to demonstrate that transparency is not an unquestionable end in itself, but may also entail some costs. Consequently, transparency must be evaluated as a means toward some policy goal. This requires some weighing of costs and benefits of disclosure laws in practice.

III. LESSONS FROM THE SOCIAL SCIENCE LITERATURE

Among proponents for increased regulation of campaign finances, disclosure in the non-candidate context is widely supported as an effective and low-cost vehicle for achieving the purported benefit of a better-informed electorate.⁶³ As disclosure advocates Elizabeth Garrett and Daniel Smith describe: "Disclosure is crucial to ensuring and improving voter competence in initiative and referendum elections."⁶⁴

The argument for disclosure relies on a simplistic application of the theory of heuristics, or cognitive cues in political science.⁶⁵ The basic notion is that voters spend little time and attention finding and processing information to make an informed vote.⁶⁶ Therefore, according to disclosure enthusiasts, policymakers can improve voter competence by creating an information environment that provides citizens with "cues" or informational shortcuts that will help them vote competently. Mandatory disclosure is alleged to be such a cue.⁶⁷

The logic is this: through mandatory disclosure, voters can see who supports and opposes ballot issues.⁶⁸ Based on voters' opinions of those supporters, voters receive a cue on how they might vote on issues.⁶⁹ For example, suppose the National Rifle Association (NRA) gives money to a campaign supporting hypothetical ballot Proposition 20. A voter discovers this, and because she holds a negative opinion

63. See Garrett & Smith, *supra* note 5, at 296; see also Hasen, *supra* note 59, at 4.

64. Garrett & Smith, *supra* note 5, at 296.

65. See Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63 (1994).

66. *Id.* at 63.

67. Michael Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 UCLA L. REV. 1141, 1170 (2003).

68. *Id.*

69. *Id.*

about the NRA, she votes against Proposition 20 under the premise that she likely would oppose anything that the NRA supports.

Several scholars argue that ballot measure contests are particularly challenging for voters compared to candidate elections.⁷⁰ Ballot measures can be complex and voters often have little information about how a specific policy will translate into policy outcomes.⁷¹ Also, in candidate elections, voters have the benefit of political party “brand names” attached to each candidate, which are particularly powerful and informative cues.⁷² For these reasons, disclosure of campaign contributors to ballot measure committees is thought to be particularly valuable information for most voters.⁷³

A case for disclosure of grassroots advocacy can be made along similar lines, although we are unaware of any scholars that make such an argument. Instead, all of the relevant empirical studies examine ballot measure committees.⁷⁴ It is probably safe to infer from this dearth of attention to disclosure regulations applied to grassroots issue advocacy that scholars have considered this a less important policy area than disclosure for ballot measure contests.⁷⁵

70. See Shaun Bowler & Todd Donovan, *Do Voters Have a Cue? Television Advertisements as a Source of Information in Citizen-Initiated Referendum Campaigns*, 41 EUR. J. POL. RES. 777, 777 (2002); Garrett & Smith, *supra* note 5, at 297.

71. See sources cited *supra* note 70.

72. Garrett & Smith, *supra* note 5, at 297; see generally Robert Huckfeldt et al., *Accessibility and the Political Utility of Partisan and Ideological Orientations*, 43 AM. J. POL. SCI. 888 (1999).

73. See Kang, *supra* note 67, at 1166.

74. See, e.g., Lupia, *supra* note 65; cf. Cheryl Boudreau, *Closing the Gap: When Do Cues Eliminate Differences Between Sophisticated and Unsophisticated Citizens?*, 71 J. POL. 964 (2009) (a generalized empirical study, the results of which may apply to both ballot issue or candidate contexts).

75. We make this inference based on the theory of issue salience, which is explained in Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 66 (2000). Issue salience measures how important or prominent an issue is among various audiences. A common way to measure issue salience is to count the number of articles or publications created on a given issue. See, e.g., Donald P. Haider-Markel & Kenneth J. Meier, *The Politics of Gay and Lesbian Rights: Expanding the Scope of the Conflict*, 58 J. POL. 332, 339 (1996) (measuring issue salience by counting the number of articles on gays and lesbians per 100,000 population that appear for each state between 1985 and 1993 on the Newsbank Electronic Information System; the greater the number of articles, the more important, or salient, an issue is considered to be). Applied here, we infer that grassroots issue advocacy is considered a topic of low importance or salience among scholars given the paucity of sources devoted to it.

Meanwhile, possible costs associated with disclosure are seldom, if ever, given serious attention.⁷⁶ Again, seen through the lens of revealed preference, this lack of scholarly attention indicates what might appear to be a widely held consensus about the benign nature of disclosure.⁷⁷ Yet, even proponents of disclosure have noted possible costs: “Concern about individuals’ First Amendment rights is heightened when statutes require disclosure of such information as the contributors’ occupations and employers.”⁷⁸ Further, these same authors note that “[d]isclosure will certainly chill some speech, particularly from groups that fear voter backlash in the election. Moreover, regulation imposes costs of compliance that can be significant for smaller organizations.”⁷⁹ Yet, in a thirty-four page article on disclosure specifically in the ballot issue context, those statements represent the total attention paid to possible costs associated with disclosure.⁸⁰ Amidst a list of recommendations in the article, not one calls for research on potential costs.⁸¹

There is not only a lack of empirical attention to the issue of disclosure costs. The alleged benefits in the non-candidate context are frequently discussed but rarely examined empirically. Indeed, even the aforementioned proponents acknowledge that “[n]otwithstanding . . . broad support, disclosure statutes have not received much scholarly attention.”⁸² Until recently, for example, no one bothered to ask if disclosure laws actually provide any informational benefit over and above information already available to voters. Similarly, no attempt was made to measure to what extent information produced by disclosure was actually used. Specific to costs, Garrett and Smith rightly identified possible costs associated with disclosure—chilled speech and participation—but up until the research published within the past five years, empirical examinations of such costs were almost non-existent.

76. For two recent exceptions, see Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 276 (2010); Lloyd Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255, 271–80 (2010).

77. See Richard Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. REV. 265, 266 (2000) (“In the endless debate between supporters and opponents of campaign finance limits, the one thing both sides seem to have agreed upon is the need for effective disclosure of campaign contributions and expenditures.”).

78. Garrett & Smith, *supra* note 5, at 326.

79. *Id.* at 304.

80. *See id.*

81. *See id.*

82. *Id.* at 295.

Recent research challenges the conventional wisdom about purported benefits of disclosure and reveals costs that are anything but benign. Each of those studies is discussed in some detail below, beginning with research on alleged benefits and then moving to costs. Note that the focus is on disclosure in the non-candidate context. This Article does not review works on costs associated with disclosure in the candidate context.⁸³

A. Re-Examining the Value of Cues

Decades of survey research have established that American voters possess low levels of information regarding politics.⁸⁴ So low, in fact, that many prominent scholars have questioned whether democratic institutions can be trusted to accurately reflect the interests of citizens.⁸⁵ However, in a seminal study, Arthur Lupia argued that voters employ cognitive shortcuts, or heuristic cues, as effective substitutes for encyclopedic information about candidates or issues.⁸⁶

Lupia analyzed voter knowledge and behavior in a California election that involved several competing ballot initiatives on reforming auto insurance in the state.⁸⁷ Despite the complexity of the ballot measures, Lupia found that voters who were aware of the sponsors of the initiatives voted similarly to those that could correctly answer some factual questions about the initiatives.⁸⁸ However, the frequent interpretation that cues allow voters to vote as if they were well-informed involves some heroic leaps of logic.

83. For a discussion of costs associated with disclosure in the candidate context, see BIPARTISAN COMM'N ON THE POLITICAL REFORM ACT OF 1974, OVERLY COMPLEX AND UNDULY BURDENSOME: THE CRITICAL NEED TO SIMPLIFY THE POLITICAL REFORM ACT 23–33 (2000); Alexandre Gagnon & Filip Palda, *The Price of Transparency: Do Campaign Finance Disclosure Laws Discourage Political Participation by Citizens' Groups?*, 146 PUB. CHOICE 353 (2011); David Schultz, *Disclosure Is Not Enough: Empirical Evidence from State Experiences*, 4 ELECTION L.J. 349, 349–50 (2005); Randolph Sloof, *Campaign Contributions and the Desirability of Full Disclosure Laws*, 11 ECON. & POL. 83 (1999); Hanming Fang et al., *An Experimental Study of Alternative Campaign Finance Systems: Transparency, Donations, and Policy Choices* (June 22, 2012) (unpublished manuscript) (on file with author).

84. See generally MICHAEL DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS (1996).

85. See Philip Converse, *The Nature of Belief Systems in Mass Publics*, in IDEOLOGY AND DISCONTENT 219 (David Apter ed., 1964).

86. See Lupia, *supra* note 65, at 63.

87. *Id.* at 67.

88. *Id.* at 70–71.

First, in Lupia's study, so-called well-informed voters were not necessarily informed about the *policy consequences* of the insurance reform measures on which they were voting. For example, it is one thing to know that a reform proposal will roll back insurance premiums, but quite another to understand how such a proposal will affect the market for automobile insurance over the long run. Thus, there is no guarantee that so-called informed voters are in fact voting "correctly." Second, the informed voters in Lupia's study also had access to cognitive cues about which interest groups were sponsoring which measure. Consequently, it is quite possible that these voters were also basing their voting decisions on cues—again, not necessarily voting "correctly".

Apart from the logical challenges to the hypothesis that heuristic cues substitute perfectly for information, subsequent studies have yielded decidedly mixed results.⁸⁹ While it is clear that voters make use of cues such as party labels and major endorsements, it is by no means clear that voters make systematically better choices as a result.⁹⁰ More importantly for our purposes, the empirical literature has focused on cues like political party and endorsements, not details of contributor information.⁹¹ A major difference between these different types of cues should not be missed: party labels and endorsements are disclosed to voters willingly. State disclosure laws compel disclosure of information when some unpopular groups may prefer to remain anonymous.⁹² Advocates of disclosure almost always

89. For a recent review, see Cheryl Boudreau & Scott MacKenzie, *Informing the Electorate? How Party Cues and Policy Information Affect Public Opinion About Initiatives* (unpublished manuscript) (on file with author). See also Shaun Bowler & Todd Donovan, *Information and Opinion Change on Ballot Propositions*, 16 POL. BEHAV. 411, 411 (1994) [hereinafter Bowler & Donovan, *Ballot Propositions*]; Bowler & Donovan, *supra* note 70, at 788; Mark Forehand et al., *Endorsements as Voting Cues: Heuristic and Systematic Processing in Initiative Elections*, 34 J. APPLIED SOC. PSYCHOL. 2215, 2228 (2004); Mark R. Joslyn & Donald Haider-Markel, *Guns in the Ballot Box: Information, Groups, and Opinion in Ballot Initiative Campaigns*, 28 AM. POL. Q. 355, 356 (2000).

90. See Geoffrey Cohen, *Party Over Policy: The Dominating Impact of Group Influence on Political Beliefs*, 85 J. PERSONALITY & SOC. PSYCHOL. 808, 819 (2003); Wendy Rahn, *The Role of Partisan Stereotypes in Information Processing About Political Candidates*, 37 AM. J. POL. SCI. 472, 492 (1993); Ellen D. Riggle et al., *Bases of Political Judgments: The Role of Stereotypic and Nonstereotypic Information*, 14 POL. BEHAV. 67, 81 (1992).

91. Examples of studies on cues from party and endorsements include Forehand et al., *supra* note 89; Huckfeldt et al., *supra* note 72.

92. See Jessica Garrison, *Gay Marriage Foes Want Campaign Contributions Anonymous, Citing 'Harassment,'* L.A. TIMES (Jan. 8, 2009, 5:42 PM), <http://latimesblogs.latimes.com/lanow/2009/01/proponents-of-1.html>.

consider a scenario in which a nefarious group fools the public by hiding its identity.⁹³ However, it is also possible that compelled disclosure ignites prejudice in listeners that might have been avoided had the speaker been able to remain anonymous. For all these reasons, proponents of compelled disclosure err in assuming that disclosure necessarily provides valuable information to voters.

It is by no means clear that voters can or will use disclosed details about financial activities of groups in a fashion that improves their decision-making.⁹⁴ Further, given the easy availability of other more powerful cues, such as party labels and endorsements, it is by no means clear that there is any marginal value to be gained from the details of financial activities of groups. Recent research reviewed below suggests there is not.

B. Re-Considering the Benefits of Disclosure

In 2010, David Primo completed a study that examined the *marginal* benefit of disclosure.⁹⁵ We emphasize “marginal” because Primo was interested in examining the specific benefit of disclosure over and above information already available to voters without disclosure.⁹⁶ This is an important distinction because, despite assertions that ballot issue elections are “low-information” environments,⁹⁷ results from Primo and others (as discussed below) suggest that voters often have an abundance of information during ballot issue elections. Therefore, Primo measured the informational value added specifically by disclosure.⁹⁸

To do so, he “designed an experiment where participants had the chance to vote on a ballot issue, but different groups were given access to different information about the issue.”⁹⁹ This “allowed [him] to assess three aspects of voter behavior in ballot issue campaigns.”¹⁰⁰ “First, are voters interested in information about

93. See Garrett & Smith, *supra* note 5, at 296.

94. DICK M. CARPENTER, INST. FOR JUST., DISCLOSURE COSTS: UNINTENDED CONSEQUENCES OF CAMPAIGN FINANCE LEGISLATION 11–12 (2007).

95. DAVID PRIMO, INST. FOR JUST., FULL DISCLOSURE: HOW CAMPAIGN FINANCE DISCLOSURE LAWS FAIL TO INFORM VOTERS AND STIFLE PUBLIC DEBATE (2011).

96. *Id.* at 11.

97. Bowler & Donovan, *supra* note 70, at 779.

98. PRIMO, *supra* note 95, at 14.

99. *Id.*

100. *Id.*

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ballot issues?”¹⁰¹ “Second, and related, are voters interested in *disclosure* information?”¹⁰² “Third, does viewing disclosure information improve the ability of voters to identify the positions of interest groups on a ballot issue, once the other information they access is taken into account?”¹⁰³ If so, one could surmise that disclosure can provide unique cues useful in deciding how to vote.

A sample of 1,066 registered voters in Florida was presented with a hypothetical ballot issue in an online survey concerning taxes and illegal immigration, similar to Colorado’s ballot in 2006.¹⁰⁴

Then, respondents were randomly assigned to one of three groups, A, B, or C. Group A was immediately provided with the opportunity to vote yes, no, or unsure on the ballot issue. . . .

Groups B and C were then presented with headlines that linked to a series of newspaper articles, as well as links to a voter guide and two advertisements.¹⁰⁵

Groups B and C differed in that Group C had access to two additional newspaper articles which contained information that was almost surely obtained by the reporter through campaign finance disclosure (e.g., the amount of a particular contribution).¹⁰⁶

Once individuals in groups B and C were done reviewing the information of their choice, they voted and were then given the following prompt:

Below is a list of groups that have taken or could take a position on this ballot issue. Based on your existing knowledge of the issue, as well as any information obtained during this survey, please assess the likely position of each group on this ballot issue.¹⁰⁷

Respondents were then asked to indicate whether the group supported or opposed the initiative.¹⁰⁸

The results were twofold. First, “respondents with access to information about the ballot issue viewed very little of it.”¹⁰⁹ Approximately 40% of those in groups B and C chose not to view any information at all, and approximately 35% viewed only one to three

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 15.

105. *Id.* (footnotes omitted)

106. *Id.* at 15–16.

107. *Id.* at 16.

108. *Id.*

109. *Id.*

items.¹¹⁰ Among those who did view information, the single most popular item was the voter guide—a document similar to guides created and distributed by state agencies during election seasons.¹¹¹ The least viewed items were the two articles available only to Group C that contained campaign finance disclosure information.¹¹² One of the articles was headlined “Elite Donors Fuel Ballot Initiatives,” clearly indicating the story discussed well-known donors.¹¹³ Yet, despite the alleged importance of campaign finance information that would be created by disclosure, “[r]espondents preferred to read any other material . . . rather than an article featuring campaign finance information.”¹¹⁴ Moreover, those who read the “Elite Donors” article read three times more references than those who did not.¹¹⁵ According to Primo, this suggests “voters who access campaign finance information are the least likely to need it to make informed choices.”¹¹⁶

Second, in the comparison of the average number of interest groups correctly identified by each group, respondents in Groups A and B were virtually identical, while Group C—the group with access to sources with disclosure-related information—correctly identified more interest groups than those in A or B.¹¹⁷ At first consideration, this result appears to suggest that because respondents in Group C were the most successful in identifying interest groups, and because they were the only ones with access to disclosure-related information, the result must come from disclosure.¹¹⁸ Primo notes, however, that this is not the case.¹¹⁹ While only members of Group C had access to disclosure information, not all of them took advantage of this extra information.¹²⁰ In fact, most did not.¹²¹ To isolate the effect of viewing disclosure information, Primo accounted for differences in viewing behavior by separating members of each group by the kind of

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 18.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

information they viewed.¹²² In so doing, he found that respondents who viewed the voter guide—no matter what other information they viewed—were most successful in identifying the positions of interest groups.¹²³ Viewing disclosure information, on the other hand, had almost no impact.¹²⁴

Clearly, Primo's findings contradict the primary purported benefit of disclosure—providing much-needed information to the electorate¹²⁵—and further evidence in his report combined with other research appears to indicate the source of the discrepancy.¹²⁶ Simply stated, disclosure-related information is superfluous.¹²⁷ Voters enjoy an abundance of information about ballot issues.¹²⁸ Moreover, numerous interest groups clamor for attention in order to tell citizens how to vote.¹²⁹

In a simple demonstration, Primo chose a 2010 ballot issue in Florida—Amendment 4—and performed a Google search on the proposed amendment.¹³⁰ The result was a flood of information.¹³¹ He discovered position statements by the Chamber of Commerce, the Florida Chapter of the American Planning Association, the Realtors association, the Audubon Society of the Everglades, Clean Water Action, Friends of the Everglades, the Sierra Club of Florida, FL Public Interest Research Group (Florida PIRG), and the Save the Manatee Club.¹³² As Primo concludes,

All of this information came from press releases or statements on the websites of groups involved in the initiative and was *not* related to government-forced disclosure. Yet, from these simple searches that took minutes to perform, I learned that environmentalists and interests opposed to development were on one side of the issue, and development supporters were on the other.¹³³

122. *Id.*

123. *Id.*

124. *Id.*

125. *See* Briffault, *supra* note 76, at 273.

126. For an example of other research, see Dick M. Carpenter, *Mandatory Disclosure for Ballot-Initiative Campaigns*, 13 INDEP. REV. 567 (2009).

127. *See* PRIMO, *supra* note 95, at 19.

128. *Id.* at 20.

129. *Id.* at 10.

130. *Id.* at 11.

131. *Id.*

132. *Id.*

133. *Id.* at 12.

Similarly, Carpenter amassed information available to Colorado voters in 2006 on all of that year's state ballot issues.¹³⁴ Using LexisNexis, ProQuest, general internet searches, and searches of state-based think-tanks, he found that from January 1 through November 7, 2006 (Election Day), voters had access to more than one thousand pieces of information that dealt with ballot issues.¹³⁵ This information ranged from newspaper stories, to the state voter guide, to policy papers and briefs created by think tanks.¹³⁶ Not included were countless advertisements and position statements made by campaigns and interest groups at the time but that were largely unrecorded for posterity. It seems little wonder, then, that disclosure-related information would appear to have little marginal utility.

Particularly interesting about all of these sources was how little of it made any mention of information likely produced by disclosure.¹³⁷ Less than 5% of newspaper articles, editorials, and letters to the editor, think tank and nonprofit material, state-produced documentation, and campaign-generated documentation referenced disclosure information.¹³⁸ That figure dropped to 3.4% in the two weeks leading up to the election.¹³⁹

This finding was consistent with another study that examined articles for state-level campaign finance from 194 newspapers covering all 50 states from 2002 to 2004.¹⁴⁰ The author found that each newspaper averaged only about three stories per year regarding campaign finance.¹⁴¹ And less than 20% of those stories fell into the category of "analysis"—the category that would provide information about contributors to campaigns.¹⁴²

What makes these small percentages so telling is the assertion that "information entrepreneurs"—which include news media, think tanks, and other groups that disseminate information—report sought-after disclosure information to voters who value such data but lack the time necessary to track it down (despite the fact that disclosure

134. See Carpenter, *supra* note 126, at 574.

135. *Id.* at 578.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. Raymond La Raja, *Sunshine Laws and the Press: The Effect of Campaign Disclosure on News Reporting in the American States*, 6 ELECTION L.J. 236, 237 (2007).

141. *Id.* at 242.

142. *Id.*

data are easily available on state websites).¹⁴³ Yet, these recent studies demonstrate something quite different: Information about who contributes to ballot issues and other statewide races is not, in fact, used extensively by information entrepreneurs in communicating with voters. If disclosure-related information were indeed as vitally beneficial as campaign finance reformers claim, it seems that demand by information consumers would compel information entrepreneurs to provide it in more abundance, but amidst a superfluity of information available to voters, disclosure data does not appear all that useful.¹⁴⁴ Taken together, these studies suggest that the marginal social value of current financial disclosure in non-candidate contexts is approximately nil. Yet, research reviewed below suggests the potential costs are anything but.

C. Re-Considering the Costs of Compelled Disclosure

The costs of disclosure fall into three broad categories: 1) the risk of harassment to individuals based on disclosed information;¹⁴⁵ 2) the red-tape costs of compliance to political groups and political entrepreneurs;¹⁴⁶ and 3) the deterrent effects of harassment and red-tape costs on political organization and activity.¹⁴⁷ Only recently have scholars begun to take seriously the task of investigating the magnitudes of these costs. Even so, unlike the empirical studies that call into question the actual benefits resulting from compelled disclosure, recent research indicates that the costs may be more than trivial.¹⁴⁸

One measure of chilled speech and political association resulting from state disclosure laws comes from Carpenter's 2009 survey of more than two thousand voters in six states in the weeks leading up to the 2006 elections.¹⁴⁹ When asked about support for disclosure generally, more than 82% of respondents expressed approval for mandatory disclosure.¹⁵⁰ However, once asked about whether their

143. Garrett & Smith, *supra* note 5, at 297.

144. PRIMO, *supra* note 95, at 9.

145. David Lourie, *Rethinking Donor Disclosure After the Proposition 8 Campaign*, 83 S. CAL. L. REV. 133, 135–36 (2009).

146. *See generally* MILYO, *supra* note 2.

147. *Id.*; *see also* Carpenter, *supra* note 126, at 579.

148. *See* Carpenter, *supra* note 126, at 570.

149. *Id.* at 570.

150. *Id.* at 574–75.

own political activities should trigger disclosure, the tables turned.¹⁵¹ Fifty-six percent disagreed that their own information should be publicized—and that figure grew to 71% when disclosure included their employer.¹⁵² When asked why they did not want their information released, 63% cited a desire to remain anonymous.¹⁵³

Detailed responses tied to the desire for anonymity were particularly revealing. Some stated, “Because I do not think it is anybody’s business what I donate and who I give it to,” and, “I would not want my name associated with any effort. I would like to remain anonymous.”¹⁵⁴ Respondents also frequently mentioned a concern for their personal safety or the potential for identity theft: “Because I am a female and [it’s] risky having that info out there;” “With identity theft I don’t want my name out there;” and “I wouldn’t donate money because with all the crazy people out there, I would be frightened if my name and address were put out there to the public.”¹⁵⁵

Other participants saw a relationship between disclosure and a violation of their private vote: “I don’t want other people to know how I’m voting,” or, “Because that removes privacy from voting. We are insured [sic] privacy and the freedom to vote.”¹⁵⁶ Still others noted the opportunity for repercussions. “I think it’s an opening for harassment;” ‘I don’t think my information should be out there for fear of retaliations;’ and ‘My privacy would be invaded by the opposition,’ illustrate such concerns.¹⁵⁷

Respondents also often cited the issue of anonymity when asked about donating if their *employer’s* name were disclosed.¹⁵⁸ One concern was over revealing where they work.¹⁵⁹ For example, “It’s not anybody’s business who my employer is and it has nothing to do with my vote,” or, “My employer’s name is nobody’s business.”¹⁶⁰ Of particular concern was the longevity of their job should their employer, through mandatory disclosure, learn of the employee’s beliefs expressed through a contribution: “Because that could

151. *Id.* at 575.

152. *Id.*

153. *Id.* at 575–76.

154. *Id.* at 576 (internal quotation marks omitted).

155. *Id.* (internal quotation marks omitted).

156. CARPENTER, *supra* note 94, at 8–9 (internal quotation marks omitted).

157. Carpenter, *supra* note 126, at 576 (internal quotation marks omitted).

158. *Id.*

159. *Id.*

160. CARPENTER, *supra* note 94, at 9 (internal quotation marks omitted).

jeopardize my job;” “I might get fired for that kind of stuff;” and, “If you were a union member and you vote on another side it would come back at you and hit you in the face.”¹⁶¹

On the flip-side, others thought mandatory disclosure of the employer’s name might misrepresent an employer: “It is my choice, not my employer;” “I don’t think it is appropriate for my employer’s name to be given out related to what I do;” “Because I don’t know if he wants his name put out there;” “Because it’s a violation of the employer’s privacy;” “I don’t want to involve my boss involuntarily.”¹⁶² Still others feared for the negative affect on their own business: “I am self-employed, and I wouldn’t want that to be released to the public,” or, “Because I own a business and who I support is part of my own internal business practices and should not be public.”¹⁶³

This concern about the disclosure of personal information translated into a potential chill on speech.¹⁶⁴ When participants were asked about their likelihood of contributing to a campaign in the face of disclosure, almost 60% said they would think twice about contributing when their personal information is disclosed.¹⁶⁵ When asked if they would think twice before donating to a campaign if their employer’s name was disclosed, the number approached 50%.¹⁶⁶

In the abstract, then, citizens may appear to favor disclosure, but when the consequences of disclosure are personalized, their opinions change dramatically.¹⁶⁷ Moreover, the “fear factor” associated with disclosure comes at a cost—less political speech.¹⁶⁸ And recent events, including the well-publicized harassment of individuals and economic boycotts based on disclosed information, likely only increase the chill associated with compelled disclosure.¹⁶⁹

The costs associated with disclosure also come in the form of substantial burdens on political involvement and association that

161. Carpenter, *supra* note 126, at 576 (internal quotation marks omitted).

162. CARPENTER, *supra* note 94, at 9 (internal quotation marks omitted).

163. *Id.* (internal quotation marks omitted).

164. Carpenter, *supra* note 126, at 575.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 576.

169. See Elian Dashev, *Economic Boycotts as Harassment: The Threat to First Amendment Protected Speech in the Aftermath of Doe v. Reed*, 45 LOY. L.A. L. REV. 207, 247–51 (2011).

create significant disincentives.¹⁷⁰ One way this is done—and one largely unknown to the average citizen—is through campaign committee requirements, specifically disclosure, imposed upon ordinary citizens who band together in an ad hoc fashion to convince others how to vote.¹⁷¹ In many states that allow ballot issues, any group that spends more than a certain threshold—sometimes as little as a few hundred dollars—to tell others how to vote must register with the state as an issue committee and track and disclose all fundraising and expenditures.¹⁷² These compliance requirements create an overwhelming and disincentivizing burden.¹⁷³

To measure just how burdensome the process can be, Milyo gave 255 experimental subjects—mostly graduate students—a hypothetical campaign issue. He then asked them to fill out the appropriate paperwork to register a ballot committee called Neighbors United and comply with reporting requirements of three different, representative states (California, Colorado, and Missouri).¹⁷⁴ The participants were also asked to complete the forms for specific tasks common to grassroots issue advocacy, the latter of which included purchasing and making signs, t-shirts, and the like, or holding neighborhood information sessions at which refreshments were served.¹⁷⁵ Of the 255 participants, not a single one correctly completed each of the twenty tasks on the campaign finance disclosure forms.¹⁷⁶ The participant with the highest score correctly completed only 80% of the tasks.¹⁷⁷ The mean correct score was just 41%.¹⁷⁸ Had this been a real world exercise, every single participant could have been liable for violating campaign finance laws.¹⁷⁹

In the experiment, the trouble started early: 93% of participants had no idea that they needed to register as a political committee to speak out in the first place.¹⁸⁰ Without the explicit instructions provided, participants would have done even worse.¹⁸¹ While

170. MILYO, *supra* note 2, at 18.

171. *Id.* at 2.

172. *Id.*

173. *Id.*

174. *Id.* at 5.

175. *See infra* Table 4 (citing MILYO, *supra* note 2, at 5–6).

176. MILYO, *supra* note 2, at 8.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

reporting simple contributions proved difficult, subjects had even more trouble with non-monetary contributions—the t-shirts, posters, flyers, and other supplies that are typical of grassroots activity.¹⁸² Even when informed of the fair market value of the objects to be itemized—not always readily available in the real world—participants could only report a gift of \$8 in refreshments correctly 30% of the time in California, 36% of the time in Colorado, and 24% of the time in Missouri.¹⁸³ Another scenario in which a contributor spent \$500 on t-shirts and then donated them to the group was the most formidable.¹⁸⁴ No one in the California group reported this transaction correctly, and only 6% in the Colorado group and 14% in the Missouri group succeeded.¹⁸⁵

Subjects were also directed to aggregate multiple donations from an individual donor in two separate tasks.¹⁸⁶ The highest score on either task from any state was only 7% in California.¹⁸⁷ Participants simply made minor errors in arithmetic that threw off the sum total.¹⁸⁸ This illustrates how fines that are levied per violation can compound.¹⁸⁹

Participants were given the opportunity to comment in writing on their experiences with the disclosure forms and instructions. Ninety-four of the 255 participants did so.¹⁹⁰ Of those, ninety out of ninety-four expressed frustration with the forms:

“These forms are confusing!”¹⁹¹

“These forms seem lengthy, full of jargon, confusing”¹⁹²

“Too complex and not clear.”¹⁹³

“This is horrible!”¹⁹⁴

“My goodness! These were incredibly difficult to understand.”¹⁹⁵

182. *Id.* at 12–13.

183. *Id.* at 12.

184. *Id.*

185. *Id.*

186. *Id.* at 13.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 17.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

“One truly needs legal counsel to complete these forms”¹⁹⁶

“Seriously, a person needs a lawyer to do this correctly.”¹⁹⁷

“Worse than the IRS!”¹⁹⁸

“Good Lord! I would never volunteer to do this for any committee.”¹⁹⁹

“These forms make me feel stupid!”²⁰⁰

Another participant observed:

I serve as the Treasurer of a political coordinating committee/political action committee formed within the last year. Even with that limited experience I found this exercise to be complicated and mentally challenging The burdensome paper work and fines imposed for errors in reporting proved to be a hurdle that prevented the formation of our PAC (that is affiliated with the non-profit I work for) for a number of years. That being said, in politics it is important to know the major contributors of our elected officials and hold contributors and recipients accountable to the degree possible.²⁰¹

That is, even a political treasurer sympathetic to mandatory disclosure (though notably for contributions to elected officials and not ballot initiatives) failed to comply with the law.²⁰² This fact hints at something more than just ordinary citizens struggling with unfamiliar tasks and jargon; when even experienced political wonks have trouble filling out basic disclosure forms, it raises the concern that perhaps forms are not intended to be user-friendly.

Milyo also queried subjects about their attitudes toward compelled disclosure in a debriefing session.²⁰³ While this exercise differs from Carpenter’s survey in that it is not representative, it is nevertheless interesting to consider the opinions of subjects that have just had a brush with disclosure regulations. When asked if the paperwork burden of disclosure alone would deter ordinary citizens from engaging in independent political activity, 63% agreed.²⁰⁴ When prompted to consider that mistakes on disclosure forms could result

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 18.

202. *Id.*

203. *Id.* at 16.

204. *Id.*

in fines or criminal penalties, 89% agreed that ordinary citizens would be deterred.²⁰⁵ Milyo concludes that “Subjects were sincerely frustrated in their attempts to complete the disclosure forms—and believed that these difficulties would deter political activity.”²⁰⁶ But it is not just individuals who can be swept up in these disclosure requirements. So, too, can nonprofit organizations through the regulation of “electioneering communications.”²⁰⁷

The term “electioneering communications” is most closely associated with the 2002 Bipartisan Campaign Reform Act (BCRA) and covers political speech in ads on broadcast media that mentions a candidate for federal office within thirty days of a primary or sixty days of a general election.²⁰⁸ Shortly after BCRA’s passage, states began adopting similar laws, extending the reach beyond candidates to ballot issues and expanding the scope to things like flyers, the Internet, billboards, and even hand-lettered signs.²⁰⁹ More than a dozen states regulate electioneering communications for candidates, but two states—Illinois²¹⁰ and Oklahoma²¹¹—also include ballot issues.²¹² Prior to *Broward Coalition v. Browning*,²¹³ Florida also regulated speech concerning ballot issues.²¹⁴

The consequence of these laws in Oklahoma (and in Florida prior to *Broward Coalition v. Browning*) is that nonprofit organizations (among other types) spending more than \$5000 to communicate with anyone about ballot issues must comply with the same types of extensive disclosure requirements discussed above.²¹⁵ Practically speaking, this includes even non-political civic associations of any size

205. *Id.*

206. *Id.* at 15.

207. MICHAEL C. MUNGER, INST. FOR JUST., LOCKING UP POLITICAL SPEECH: HOW ELECTIONEERING COMMUNICATIONS LAWS STIFLE FREE SPEECH AND CIVIC ENGAGEMENT 3 (2009).

208. *Id.*

209. *Id.*

210. 10 ILL. COMP. STAT. 5/9-1.14 (2010).

211. OKLA. STAT. tit. 74, Ch. 62, App. § 257:10-1-16(c) (2012).

212. *See* MUNGER, *supra* note 207, at 1.

213. *Broward Coal. of Condos., Homeowners Ass’ns., & Cmty. Orgs., Inc. v. Browning*, No. 4:08-cv-445-SPM/WCS, 2009 WL 1457972 (N.D. Fla. May 22, 2009).

214. *See* MUNGER, *supra* note 207, at 4.

215. *See id.* Illinois exempts 501(c)3 organizations from electioneering communications laws. In Oklahoma, disclosure requirements are also triggered when an organization speaks to an audience of more than 25,000 people. Given the unlimited reach of the internet, the audience of 25,000 is met instantly. In Florida, no such thresholds existed. Even a penny spent in electioneering communications triggered the disclosure requirements. *See id.* at 5–7.

that merely provide information, in newsletters for example, to constituents about forthcoming elections.²¹⁶ Note that the information need not even be advocacy.²¹⁷ Simply informing others of what a ballot issue says qualifies as electioneering communications.²¹⁸

To measure the costs imposed upon such organizations, Munger surveyed more than one thousand civic groups in Florida.²¹⁹ These groups ranged in size from very small community charities to large, recognized nonprofits.²²⁰ His results identified significant concerns regarding the existence of expensive, burdensome, and intrusive regulations required of civic groups before they exercise their First Amendment right to speak about ballot issues.²²¹ Namely, although less than 1% of the groups have an intrinsically political mission, at least 30% occasionally communicate with the public about policy issues, which made them a target of regulation.²²² Many of the groups in the sample were small, with few donations to support their work and few employees.²²³ In more than half of the organizations, either no one kept track of contributions of any kind or one person did the task part-time.²²⁴ This means compliance would have imposed potentially large costs on these groups and diverted them from their core missions.²²⁵

Particularly troublesome to many in the sample was how disclosure requirements would have forced most organizations to compromise donor privacy as a result of speaking about politics, thereby risking financial support.²²⁶ Almost 70% of the groups in the study strongly resist revealing donor information, and more than 36% of the groups would have expected a decline in fundraising if they were required to reveal detailed donor information.²²⁷ As Munger concluded, “[f]or nonprofits that do not want to compromise donor wishes for anonymity and yet want to keep their support, the best bet in a state

216. *See id.* at 1.

217. *Id.* at 3.

218. *Id.* at 10.

219. *Id.* at 11.

220. This is evident by reviewing organizational demographic responses in Appendix A. *Id.* at 20–23.

221. *Id.* at 17.

222. *Id.* at 2.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

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with electioneering communications laws is to stay silent about politics.”²²⁸

IV. DISCUSSION

Freedom of speech and freedom of association are the twin pillars of American democracy. These principles are so valued that the Supreme Court permits regulation of money in politics only for the purpose of preventing corruption or the appearance of corruption.²²⁹ Nevertheless, many states impose complex and onerous disclosure requirements on political groups participating in ballot measure elections or grassroots issue advocacy.²³⁰ These disclosure regulations tend to be very similar to those required of political committees active in candidate elections, even though there is no anti-corruption rationale for disclosure in non-candidate contexts.²³¹

Policy makers and reform advocates typically assume that the benefits of disclosure are significant and that the costs are trivial.²³² However, recent research consistently finds just the opposite.²³³ State disclosure laws require frequent and detailed reports and impose penalties for non-compliance.²³⁴ Large, well-organized and well-financed interest groups are probably not much deterred by such red-tape costs, but experimental evidence reveals that ordinary citizens find disclosure requirements to be baffling and intimidating.²³⁵ Having been exposed to actual disclosure forms and instructions, participants in the compliance experiment expressed incredulity at existing disclosure regulations, and when asked if the process of complying with such regulations would deter ordinary citizens from participating in independent political activity, more than 60% agreed.²³⁶

Surveys also reveal that ordinary citizens are tolerant of disclosure requirements when they are imposed on others, but once they are asked about revealing detailed information about themselves,

228. *Id.* at 14.

229. Persily & Lammie, *supra* note 3, at 125.

230. *See* MILYO, *supra* note 2, at 2–3; MILYO, *supra* note 4, at 1.

231. *See* MILYO, *supra* note 2, at 18.

232. *See* Hasen, *supra* note 77, at 266.

233. *See* MILYO, *supra* note 2, at 21; MUNGER, *supra* note 207, at 18; Carpenter, *supra* note 126, at 579.

234. *See* MILYO, *supra* note 2, at 3.

235. *See id.* at 5.

236. *Id.* at 16.

respondents demur.²³⁷ Roughly 60% prefer to remain anonymous when supporting political causes and 71% object to providing employer information.²³⁸

It isn't just ordinary citizens that find disclosure costly. Surveys of civic groups also reveal widespread concern and dissatisfaction with mandatory disclosure.²³⁹ The costs of disclosure, in red-tape and chilled political participation, are undeniably real. But what of the supposed benefits?

Proponents of mandatory disclosure in non-candidate contexts argue that transparency is an important end in itself.²⁴⁰ In effect, they argue that the public has a "right to know" who is speaking and that disclosure confers vital information to voters.²⁴¹ However, claims regarding the efficacy of mandatory disclosure are simply not well supported in theory or in empirical analyses.²⁴²

The claim that financial disclosure constitutes an informative cue is logically flawed. There is no reason to believe that cognitive shortcuts necessarily yield better decisions. Further, voters are inundated with more readily accessible and understandable cues from parties²⁴³ and endorsements,²⁴⁴ as well as actual information from media sources and campaigns themselves.²⁴⁵ In a world of low-cost and abundant information, the marginal benefit of details about contributors that give as little as \$25 to a political cause are not likely to be very great.²⁴⁶ Recent empirical studies confirm that the marginal value of compelled disclosure is nil.²⁴⁷

In summary, the small but growing literature that examines state disclosure laws finds negligible information benefits,²⁴⁸ but potentially large hassle costs associated with such regulations—costs that impose a non-trivial burden on First Amendment rights.²⁴⁹ While the studies

237. Carpenter, *supra* note 126, at 579.

238. *Id.* at 572.

239. See MUNGER, *supra* note 207, at 22.

240. See Garrett & Smith, *supra* note 5, at 299–300.

241. See Briffault, *supra* note 76, at 276.

242. See PRIMO, *supra* note 95, at 20.

243. See Huckfeldt et al., *supra* note 72, at 891–93.

244. See Forehand et al., *supra* note 89, at 2228.

245. See PRIMO, *supra* note 95, at 10; Carpenter, *supra* note 126, at 568.

246. See PRIMO, *supra* note 95, at 18–19.

247. See *id.*

248. See *id.*

249. See MILYO, *supra* note 2, at 21; MUNGER, *supra* note 207, at 2; Carpenter, *supra* note 126, at 579.

reviewed here examine the costs and benefits of disclosure mainly for ballot measure elections, the required disclosure tasks for grassroots issue advocacy are very similar, and so the lessons from this literature should apply to both contexts.²⁵⁰

Given the dearth of empirical support for the prevailing view that disclosure is both vital to the integrity of democracy and costless to society, some rethinking of disclosure regulations in the states is in order. As two campaign finance scholars noted, “[i]t is all too normal for legislators to pass laws, accept praise, and then not worry about implementation. In a field such as campaign finance . . . this is particularly foolish . . . A poorly implemented law in this field may as well be no law at all.”²⁵¹

Our review of state disclosure laws reveals that states mandate registration and reporting of political activities at fairly low levels of activity. Since there is no anti-corruption rationale for disclosure in non-candidate contexts, an obvious reform is to eliminate mandatory disclosure for ballot measure elections and grass roots advocacy. Indeed, citizens in fourteen states appear to navigate state politics just fine despite the absence of state disclosure rules for grassroots lobbying.²⁵²

Absent the repeal of disclosure laws in non-candidate contexts, the next best alternative may be to raise the activity thresholds for groups to register and report activities. Further, there is no reason to impose the same disclosure rules of contributors to candidates on contributors to ballot measure campaigns or grassroots issue advocacy campaigns. State policymakers should reconsider the need for collecting information on contributor identities (let alone contributors’ employers) in non-candidate elections. Above all, in campaign finance regulation in non-candidate contexts, the presumption should be on the side of free speech and association. Those who advocate for greater regulation should bear the burden of proof in demonstrating empirically real benefits from such regulations, particularly in light of evidence of non-trivial costs.

250. See MILYO, *supra* note 4, at 22.

251. See Thomas Gais & Michael Malbin, *Campaign Finance Reform*, 34 SOCIETY 56, 61 (1997).

252. See MILYO, *supra* note 4, at 8.

Table 1. Selected Disclosure Requirements for Ballot Measure Committees (Minimum Dollar Thresholds)²⁵³

	Itemize Contributions:			
	Register as Committee	Include Name and Address	Include Employer or Occupation	Itemize Expenditures
Alaska	500	0	250	0
Arizona	500	25	25	0
Arkansas	500	50	-	100
California	1,000	100	100	100
Colorado	200	20	100	20
Florida	500	0	100	100
Idaho	500	50	-	25
Illinois	3,000	150	500	150
Maine	5,000	50	50	100
Massachusetts	0	50	200	50
Michigan	500	0	100	50
Mississippi	200	200	200	200
Missouri	500	100	100	100
Montana	0	35	35	0
Nebraska	5,000	250	-	250
Nevada	10,000	1,000	-	1,000
North Dakota	0	100	-	100
Ohio	0	0	100	25
Oklahoma	500	50	50	50
Oregon	0	100	100	100
South Dakota	500	100	-	-
Utah	50	50	50	50
Washington	0/5,000*	25	100	50
Wyoming	0	25	-	0

* The second figure represents threshold for reporting requirements. Full reporting also triggered by single contributor giving more than \$500 in aggregate.

253. Milyo, *supra* note 8, at 23 tbl.7 (author compilation from state government websites on campaign finance disclosure).

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Table 2. Definitions of Lobbying in the States²⁵⁴

Direct communication with public officials	Arizona, Delaware, Illinois, Iowa (lobbying the executive branch), Kentucky, Louisiana, Maine, Michigan, Nevada, Ohio, Oklahoma, South Carolina, Texas, Utah, Wisconsin
Direct and indirect communication with public officials	Alaska, Arkansas, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Massachusetts, Maryland, Minnesota, Mississippi, North Carolina, North Dakota, New Jersey, Pennsylvania, Rhode Island, Tennessee, Virginia, Vermont, West Virginia, Wyoming
Any attempt to influence public officials	Alabama, Florida, Iowa (lobbying the legislature), Indiana, Kansas, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, Oregon, South Dakota, Washington

254. Milyo, *supra* note 4, at 8 tbl.1.

Table 3. Thresholds for Reporting Grassroots Lobbying Activity in the States²⁵⁵

Alabama – any employment or \$100 in expenses
Alaska – 10 hours employment in a 30 day period
Arkansas – \$400 in compensation or expenses in a 90 day period
California – \$5,000 compensation or expenses
Colorado – any employment
Connecticut – \$2,000 in compensation or expenses
Florida – any employment
Georgia – \$250 in compensation or expenses
Hawaii – 5 hours employment per month or \$750 in expenses in a 30 day period
Iowa – any employment or \$1,000 in expenses
Idaho – paid \$250 in a 90 day period
Indiana – \$500 in compensation
Kansas – any employment or \$100 in expenses
Maryland – \$2,000 in compensation or expenses
Massachusetts – \$250 in compensation or expenses
Minnesota – \$3,000 in compensation, or \$250 in expenses
Mississippi – \$200 in compensation or expenses
Missouri – any employment
Montana – \$2,500 in compensation
Nebraska – any employment
New Hampshire – any employment
New Jersey – \$100 compensation or expenses in a 90 day period
New Mexico – any employment
New York – \$5,000 in compensation
North Carolina – \$3,000 compensation or expenses in a 90 day period
North Dakota – no threshold
Oregon – \$200 in compensation or expenses in a 30 day period (or \$500 in 90 days)
Pennsylvania – \$2,500 in compensation or 20 hours in any quarter
Rhode Island – no threshold
South Dakota – any employment
Tennessee – any employment or 10 days
Virginia – \$500 in compensation or expenses
Vermont – \$500 in compensation or expenses
Washington – \$500 in compensation or expenses in any 30 day period (or \$1,000 in 90 days)
West Virginia – \$200 in compensation or expenses in any 30 day period (or \$500 in 90 days)
Wyoming – any compensation or expenses

255. Milyo, *supra* note 4, at 10 tbl.2. Annual thresholds unless otherwise indicated.

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Table 4. Selected Tasks for Neighbors United²⁵⁶

Task	Percentage of Participants Completing Task Correctly		
	California	Colorado	Missouri
Register as political committee	25%	72%	82%
Statement declaring position on ballot issue	36%	n.a.	n.a.
Reporting initial funds on hand	44%	67%	52%
Record \$2,000 check contribution	60%	72%	80%
Record Anonymous \$15 cash contribution	69%	51%	77%
Record Illegal Anonymous \$1,000 Contribution	2%	3%	8%
Record Non-Monetary Contribution of \$8 in refreshments	30%	36%	24%
Record Non-Monetary Contribution of \$40 in supplies	18%	46%	26%
Record Non-Monetary Contribution of \$500 in t-shirts	0%	6%	14%
Report expenditure of \$1,500 for a newspaper advertisement	49%	89%	72%
(No miscellaneous clerical errors on all tasks)	5%	6%	2%

256. Dick M. Carpenter, Jeffrey Milyo & John K. Ross, *Politics for Professionals Only: Ballot Measures, Campaign Finance "Reform," and the First Amendment*, ENGAGE, Oct. 2009, at 80, 83 tbl.1.