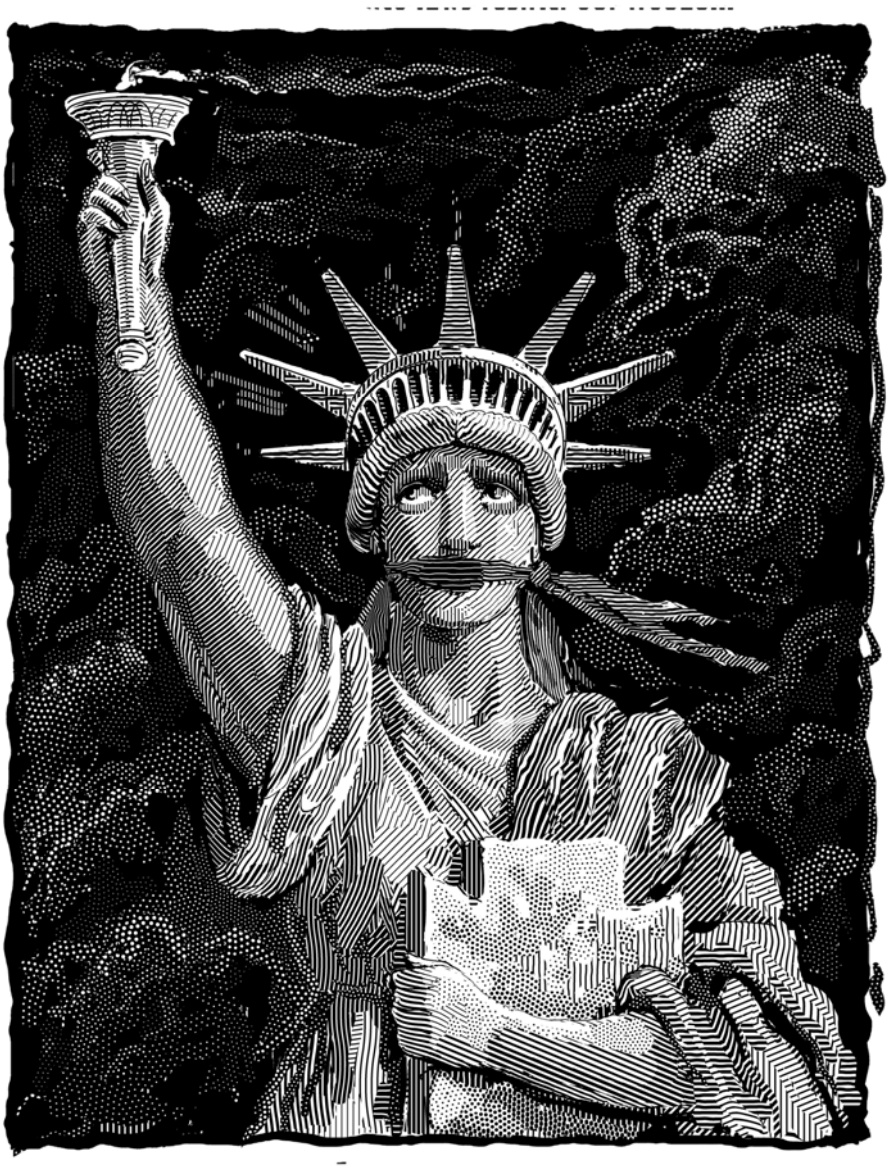

Excerpts From

Struck Dumb: The History and Consequences of Campaign Finance Reform

(forthcoming title)

by Allison R. Hayward

Summary:

The following chapter of the book describes how current law mandates the disclosure of campaign contributions and expenditures, and highlights some of the strengths, weaknesses, and hazards of disclosure.

Disclosure's Chill Wind

In May 2004, actress Gwyneth Paltrow gave birth to a daughter, Apple. A friend, who teaches at an elite Massachusetts college contacted me with a question soon thereafter. As an exercise, he was considering having his class contact Paltrow with their best wishes for her and the baby. Was it possible, he wondered, to obtain her address through campaign finance records?

In fact, FEC records led us to a New York address, which the class used for its correspondence. The search also yielded an address for Blythe Danner, Ms. Paltrow's mother, and my own search just now – still early in the 2006 cycle -- found records of contributions, complete with addresses, for Chevy Chase, Robert DeNiro, John Grisham, Larry Hagman, Ed Harris, Erica Jong, Garrison Keillor, Paul Reiser, Gloria Steinem, and Dennis Weaver. Several of these donors provided post office box addresses, and several others provided what appear to be professional office addresses. But for many of these famous donors, there, listed on the Internet, was something that looked to my eyes like their home addresses. The records, of course, also tell something about their political opinions. Not too surprisingly, each one listed above is a donor to a Democratic party committee or candidate.

A more localized search turned up home addresses for a few Republicans, among them Watergate figure and attorney John Dean, former Michigan Governor John Engler, and television commentator and former presidential candidate Pat Buchanan. If you want to visit former lobbyist Jack Abramoff at home using these records, you would be out of luck – he consistently listed his work address when making contributions.

The exercise was easy, because federal law requires that recipient committees ask for the address, occupation and employer of donors, and itemize each donor with that information when his cumulative contributions exceed $200 in a year. That information is then released by the FEC, enhanced by third-party information websites, such as PoliticalMoneyLine, and made easily searchable by name, zip code, occupation, or employer. I did not need to comb through pages of committee information looking for famous people. I could just type "actor" or "author" into the occupation search field.

Of course, the database is only as good as the information donors provide. So, you won't have much luck finding "pornographer," "escort," "criminal," "idle rich," or "arms dealer." I found 24 donors in the FEC records who "refused" to provide the information. One donor listed an occupation "CEO of Household." Some use it as an opportunity to

display their multifaceted talents – one donor had no reported employer, but listed his occupation as "sailor/author/commentator."

Disclosure has become the least controversial aspect of campaign finance regulation. Liberals and conservatives agree that there is something wrong with secret funding for politicians.[1] Conventional reform advocates want more conduct reported, perhaps knowing that financial revelations can help build support for greater regulation when turned into expressions of reform outrage in press releases. Even those on the deregulatory side want better and quicker reporting in exchange for fewer constraints in other aspects of the law. Almost everybody invokes Justice Brandeis's 1912 aphorism that "sunlight is the best disinfectant" – and assume it has some relevance in the campaign finance context. Few recall that Brandeis was talking about corporate financial publicity for then secret "money trusts," not the political activity of ordinary Americans.[2]

Should we be so quick to accept disclosure as a desirable – or even benign – element of reform? As Justice Burger observed, "[S]ecrecy and privacy as to political preferences and convictions are fundamental in a free society."[3] In his concurrence in 1976's *Buckley v. Valeo*, Burger criticized Congress's neglect of these rights in the Federal Election Campaign Act, noting that the (then) $100 threshold for listing occupation and employer in the law was "lifted out of a 65-year-old-statute."[4]

Before the 1970s and the *Buckley* decision, the courts looked with great skepticism at laws requiring disclosure of political information. Observed Professor Bradley A. Smith, "prior to *Buckley* the Court had only once upheld a law compelling the disclosure of the names of people engaged in political association" and that case involved the Communist Party, which, among other activities, sought to overthrow the existing government by any means necessary.[5] Typically, this is *not* the goal of the common campaign contributor.

Yet, since the Supreme Court in *Buckley* concluded that federal campaign finance laws could constitutionally require the reporting of campaign contributors and their personal information, disclosure has seemed beyond reproach. But should it be? After reviewing the disclosure requirements, this chapter will examine whether disclosure alone is sufficient to regulate campaign finance, as some critics of conventional reform have argued. Then it considers the costs of disclosure – whether it discourages beneficial political activity, whether enforcement of these requirements is invasive, and whether knowing the identity of donors is the key ingredient of corruption itself, justifying mandated secrecy. To close, it takes a step back and discusses how disclosure feeds an

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[1] Bruce Ackerman and Ian Ayres, *Voting with Dollars* (New Haven, CT: Yale University Press, 2002), p. 4.
[2] Louis Brandeis, *Other People's Money and How the Bankers Use It* (1914) available at http://library.louisville.edu/law/brandeis/opm-toc.html.
[3] *Buckley v. Valeo*, 424 U.S. 1, 237 (1976) (Burger, C.J.) (concurring in part).
[4] Ibid., p. 239.
[5] Bradley A. Smith, *Unfree Speech* (Princeton, N.J.: Princeton University Press, 2001), p. 222.

attitude of cynicism and contempt for political donors, and argues that the system should better support political contribution activity as a positive good.

Types of Disclosure

Disclosure requirements fall into two general categories. The first is reporting, which includes the information filed by recipient committees like candidates, parties, and PACs, the forms filed by people who make independent expenditures and electioneering communications, conduit reports by people who collect contributions from donors and deliver them to recipients of the donors' choosing, and member communications reports by entities who use the exemption for member communications to express political views or solicit contributions among members.

The second are disclaimers. More properly, these might better be called "notices" but this set of disclosure rules dictate how the sponsor of a letter, advertisement, flyer, or billboard must be identified in the specific document.

The Mechanics of Reporting

It would be unduly confusing to discuss all the reporting requirements for all the various kinds of entities. This section will just cover the disclosure requirements applicable to a candidate's committee, which are similar in most important respects to the reporting requirements of PACs and parties.

First, the candidate files organizational paperwork, due when the candidate decides to run for office and raises or spends $5,000 for the campaign. He designates a campaign committee, and says whether or not he plans to use personal funds in an amount that would trigger the Millionaire's Amendment. He also names a treasurer, who is the person responsible for recordkeeping, reporting, and legal compliance, and the committee's bank. All committee expenses must be paid out of the designated account.

Then the fundraising begins in earnest. Candidates can take money (or in-kind contributions of goods or services) from individuals, committees, parties and certain groups under a matrix of limits. For reporting purposes, each contribution is itemized once the donor exceeds *$200* to the candidate in *that year*. That means the amount of the contribution, the donor's name, address, occupation and employer are listed on schedules filed as part of the campaign's report. Campaigns with contributions or expenditures over $50,000 in a year (or that have reason to expect they'll exceed $50,000) *must* file electronically – paper filings are not acceptable substitutes. (The Senate has excluded Senators and Senate candidates from this requirement). Even though candidates can legally make unlimited contributions to themselves, those contributions must also be disclosed. If contributions were "bundled" by an intermediary (who isn't serving as a representative of the campaign), then the report also should disclose the identity of that person, and the intermediary is obliged to file separately.

Although donors *may* refuse to provide an address or occupation and employer information (not many *know this*), if the committee wants to keep the money it must show it made "best efforts" to get that information. The recipient candidate or group must ask for it in its solicitation and, if the donor is not forthcoming, make a follow-up request within 30 days. The committee also has to explain – in the solicitation, redundantly -- that the law requires it to make its "best effort." Moreover, even if the donor refuses to divulge the address, occupation or employer details, if the committee has the information in *other* records, it still needs to provide those details on its reports. Fortunately, the law prohibits outsiders from selling or using the individual contributor information from FEC reports for soliciting money or for any commercial use.

Candidates must also report what they spend. These include the operating expenditures of the campaign, loan repayments, and contributions to other committees (federal and nonfederal). The committee files schedules listing the date and amount of a disbursement, the name of the payee (the person who *provides* the goods or services – not any intermediary such as a credit card company), and the purpose of the payment. Disbursements are reportable when the commitment is made – such as when a contract is signed – not on delivery. If the transaction isn't actually paid on that date, then under FEC rules the unpaid balance may be a "debt" to be reported on yet *another* form.

If a candidate runs for office, and loses, his committee can't just stop filing reports. Even when a committee is no longer raising money, and the candidate has retired from public life, reports are still due until the committee has "wound down." This can be a challenge when a committee has debts, since any money it might obtain must come in contributions raised under the limits applied to the failing election. Since the core supporters of a losing candidate are likely the first to "max-out" (that is, give up to their limit) repaying debt from a failed race isn't easy. In one extreme example, "Friends of John Glenn," the committee behind the astronaut and former Senator's presidential campaign committee for the 1984 Democratic primaries, has only recently convinced the FEC to allow it to terminate – 22 years after the campaign.

Sometimes candidates do (try to) walk away from their filing obligations. As I write this, a wealthy businessman who ran a largely self-funded challenge in 2004 against Rep. Frank Wolf of Virginia stopped filing reports after losing the election. Each missed report accumulates a fine – according to the FEC the penalty on his latest missed report is $14,250. Who knows what has happened – it could be the treasurer who should be receiving notices and filing reports has moved or is just ignoring the mailgrams from the FEC. It could be that the candidate – who lost by a margin of 2-1 after spending almost a million dollars, wants to put the whole business behind him. Maybe those involved assume that losing candidates with debt are somehow automatically terminated from the system. Perhaps the unsuccessful candidate believes what he reads in the paper about the Commission's ineffectiveness at enforcement. Any of these misapprehensions will prove costly, as this campaign will come to realize.[6]

[6] Federal Election Commission, "Committees Fined for Filing Reports Late," (Jan. 27, 2006) (news release announcing penalty in AF 1422), available at

Disclaimers

Disclaimer notices tell the world who financed a communication, such as an advertisement or a flyer. Typically, they say who paid for the message, and whether it was "authorized" by a relevant candidate.

A candidate's radio or television ads must also feature the candidate saying "I'm John Doe and I approve of this message." This separate requirement was added by McCain-Feingold and has been widely lampooned by comedians and commentators. It was intended to improve the "tone" of campaign advertisements, the theory being that candidates wouldn't be too nasty if they were compelled to state their approval of the message in person. So far, there has been no indication that this time-consuming (and expensive) requirement has improved the "tone" of campaigns. Candidates use arguments they believe will win with voters – and if those arguments are negative, their strategic value will outweigh any small psychological disincentive created by this additional requirement.

Other Disclosure Laws

Campaign finance laws are not the only ones that require disclosure of personal or political activity. The Ethics in Government Act requires candidates and officeholders to report personal financial information. Groups that are exempt under Section 527 of the Internal Revenue Code, but are not political committees reporting to the FEC, file itemized donor disclosure reports with the IRS resembling the FEC schedules in most respects. The IRS filings from other exempt organizations are available by request or from compilation services such as Guidestar. Foreign agents engaged in certain activities report those expenditures under the Foreign Agent Registration Act, and lobbyists report broad categories of expenditures under the Lobbying Disclosure Act. Information about political advertising requests and dispositions are kept in the "political files" maintained by broadcasters, which are available for public review (typically only reporters take advantage of these). Of all these records, the ones that are easiest to access and analyze are the records filed with the FEC.

"Like Christianity and Democracy": Can Disclosure Alone Work?

From the first days of campaign finance regulation, some reformers have advocated disclosure as a sufficient means to discourage corruption but permit active political campaigning. The first reform organization in America was the National Publicity Law Organization, founded in 1904 by Perry Belmont. It favored publicity laws over corrupt practices laws, but only won passage of a publicity law (in 1911) after the Corrupt Practices Act was made law in 1907. Belmont and others believed that the prohibitions in the Corrupt Practices Act were unnecessary if the laws provided for publicity. They

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http://www.fec.gov/press/press2006/20060127af.html; Michael N. Graff, "Wolf's Congressional Return Cost More than $1 Million," *Winchester Star*, Dec. 8, 2004.

also believed that prohibitions were undesirable because they suggested that there was something generally "wrong" with making contributions.[7]

Belmont's group was not interested in thwarting private money in politics:

> Our organization never took the position that contributions to political campaigns were necessarily discreditable. On the contrary, we described them as evidence of the interest that any citizen should have in political campaigns. But we insisted that, with the enforcement of the campaign publicity law, public opinion could decide as to their character in individual cases.[8]

Noted Belmont elsewhere, "The real penalty for violation is public condemnation."[9] Belmont, a prominent Democrat, had little patience for Republican reformers, such as President Theodore Roosevelt, who resisted publicity while assailing corruption. "So far as campaign funds are concerned, Mr. Roosevelt has always been very much of a reactionary, especially about his own."[10]

Supporting disclosure as the chief means of regulation has not retreated completely into the misty past. Some of the most vocal critics of our current campaign finance system urge just that approach. For instance, sounding quite a bit like Belmont, Congressman John Doolittle has argued:

> We should demand a system that values political participation and encourages the exercise of our First Amendment rights of speech and association by allowing voters to contribute freely to the candidate of their choice. A healthy campaign finance system would require that candidates fully disclose the source of their contributions so that voters can make informed decisions about who may be attempting to influence a candidate. This new system would scare some people in Washington because it will require them to do something very rarely considered around here: trust the American people, once informed, to make good decisions.[11]

A similar regulatory approach was endorsed by political scientist Larry Sabato and journalist Glenn Simpson in their 1996 book *Dirty Little Secrets*:

> Call it *Deregulation Plus*. Let a well-informed marketplace, rather than a committee of federal bureaucrats, be the judge of whether someone has accepted

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[7] Belmont, *Return to Secret Party Funds*, p. xx.
[8] Belmont, *An American Democrat*, p. 494.
[9] Belmont, *Return to Secret Party Funds*, p. xxii.
[10] Belmont, *An America Democrat*, p. 511.
[11] John Doolittle, "The Case for Campaign Finance Reform," in *Political Money: Deregulating American Politics*, ed. Annelise Anderson (Stanford, CA: Hoover Institution Press, 2000), pp. 308-09, available at http://www.campaignfinancesite.org/proposals/book-doolittle.html.

> too much money from a particular interest group or spent too much to win an election.[12]

In response, one might wonder why, if disclosure works so well and has been in place since 1911, evasions and scandals persist. Or put another way, isn't this proof that disclosure is ineffective?

Part of the explanation in disclosure's defense is that the means for *meaningful* disclosure have only been in place for about a decade. From 1911 to 1974, the law itself was inadequate – reports were warehoused without review, enforcement was ineffective, and information about campaigns only came after the fact through lengthy congressional hearings and study.

Louise Overacker, writing in 1932, explained the challenge:

> [T]here can be no fair test of popular government until the voters have a chance to know who is paying their political bills and how the money is spent. Those who scoff at publicity as a solution should remember that if we cannot compel publicity it is obviously impossible to secure compliance with a law which attempts to go further. They should remember, too, that, although we have talked much about publicity, and passed a great many so-called "publicity" laws, we have had little real publicity. *Like Christianity and democracy, publicity of campaign funds has not been tried and found wanting, but being found hard has not been tried at all.* The difficulty is not that the prescription is too simple, but, that, like many apparently simple things, it is really very complicated.[13]

(Emphasis mine).

For a brief period, a regulatory system that relied on disclosure *was* in place. From 1971 to 1974, Congress had repealed the Hatch Act limits (both the contribution limits and the spending limits) and had implemented a rigorous disclosure system. As Professor Bradley Smith observed, "during the brief experiment with a system based primarily on disclosure, it seemed to work. The disclosure of large – but legal – contributions to the Nixon campaign . . . was a major source of controversy and contributed to the erosion of the president's support during the Watergate scandals."[14]

The 1974 Amendments to the Act provided comprehensive disclosure requirements and established an agency dedicated to assembling and publicizing the data, and enforcing the disclosure requirements. However, reports were filed on paper and searching the FEC's database required a trip to the Commission's Public Information office in Washington DC, or (for a "lucky" few) wrestling with a cumbersome remote log-in system.

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[12] Larry J. Sabato & Glenn R. Simpson, *Dirty Little Secrets: The Persistence of Corruption in American Politics* (New York, NY: Times Books, 1996), p. 330.
[13] Overacker, *Money in Elections*, p. 380.
[14] Smith, *Unfree Speech*, pp. 220-21.

The promise of quick and useful disclosure has only approached reality in the last few years, with the advent of the World Wide Web, convenient access to the Internet, needed improvements in the research interface of the government database, and the growth of private sites that specialize in campaign finance research.[15] Today, the FEC's own Web site gets over a million hits each month, and in October 2005 had 84,993 unique visitors**.** Similar figures for private sites are not available, but given their ease of use and added features one can assume they should be at least as popular as the FEC's site. There would have been no way the FEC could have handled such volume pre-Internet, even if people seeking the information were otherwise willing to put up with the inconvenience of traveling to Washington DC.

Another part of the problem with disclosure's record as a policing factor has been the distortions introduced by the other limits and prohibitions in the law. It's the pursuit of work-arounds, legal or otherwise, that give the public the feeling that nefarious schemes are at work. The work-arounds themselves, such as a wealthy benefactor who donates to an "issues campaign" that will indirectly assist his candidate, rather than the candidate directly, are opaque and make it hard to see what's going on. With these other limits in place, the public arguably doesn't get the full benefit disclosure might provide as a monitoring and policing mechanism.

Baring it all?

Disclosure can suppress political conduct, too. That's a good thing if it means suppressing the purchase of national policy, but it may not be a good thing when it thwarts ordinary Americans from expressing legitimate opinions. Recall the contributions by celebrities discussed above. Suppose you are a writer, actor or producer trying to succeed in Hollywood. Would you feel comfortable giving to candidates or causes unpopular with the liberal power center? If your political views are Republican that *might* be acceptable, but say you're enthusiastic about the American Constitution Party, or Lyndon LaRouche? Functionally, you're limited to contributing $199 a year if you want to avoid having your name and the fact of your support reported, and available on the Internet for anyone to see, 24 hours a day for *years to come*.

[15] William McGeveran, "Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure," *University of Pennsylvania Journal of Constitutional Law*, Vol. 6 (September 2003), pp. 10-12.

It isn't difficult to think of other situations where political views can prove delicate, and disclosure would chill political activity. A donation to the Log Cabin Club, an organization of Republican gays and lesbians, might imply – accurately or inaccurately – something about a donor's sexual preferences. Psychologists or ministers might find their relationship with clients and congregants more difficult if their personal political views become public.[16] Interestingly, when I informally tested this proposition on data from 2005-06, I found 95 psychologists as donors, 11 therapists, and 7 counselors, but only 11 ministers, 3 rabbis, and *no* priests, bishops, reverends, rectors or elders listed among occupations.

In some families, sympathy for Israel, Islam, or immigration reform might create real friction, discouraging support for candidates that campaign on those issues. Donors may give anonymously to some tax-exempt organizations that work on these issues – but not the one kind, a Congressman's campaign, involving the person who has the means to act *directly* on legislation. Voters can keep their votes secret, even from their spouses and children. Funders of charities can remain anonymous. Donors to candidates or political committees – even donors of a mere $200 - cannot.

The courts have identified a narrow exception from disclosure requirements for groups that suffer real threats of harassment and abuse of members and supporters. Only one group, the Socialist Worker's Party, has claimed this exception with success.[17] Few remark on the irony that the one modern political party advocating the overthrow of the U.S. government is the one that today need *not* identify its supporters.

In addition, candidates and committees must file detailed reports of their expenditures. Local businesses and vendors may not want to appear on the reports of a candidate challenging a powerful incumbent. Even if one accepts that there is a public right to know itemized information about every donor of $200 a year or more, is there the same public interest in having the same kind of information for businesses, staff, vendors, and contractors? Disclosure requirements may also tell the world information a candidate is

[16] McGeveran, p. 17.
[17] *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982); Federal Election Commission, Advisory Opinion 2003-2.

otherwise entitled to keep secret under legal privilege – like the fact he's retained an attorney, the identity of that legal counsel, and how much he is paid.

Occasionally, disclosure of disbursements makes headlines. In the 2004 election, reports revealed that some bloggers who had been writing about a campaign were paid by one of the candidates. Critics argued that the bloggers paid by campaigns should be required to disclose promptly – by filing a report or by placing a notice or disclaimer on their web page.[18] That would open up another array of questions, since it may be unclear when a person is "paid" to write something and when they are writing independently, or when someone who has chosen to write anonymously or pseudonymously would be required to reveal their identity.

Although notice requirements on pamphlets and other communications provide less personal information and are more narrowly applied than reporting requirements, the burden such notices place on political communications receives *some* sympathy from the courts. The Supreme Court has held that there is a right to distribute pamphlets anonymously – without including your name and address on the document.[19] The Court has also recognized a right to anonymous door-to-door canvassing.[20] But after the Supreme Court's *McConnell* decision, there is a real question about what extent anonymous campaign speech remains protected from disclaimer requirements.[21] It would seem at this point that the legal right to anonymity is most accessible to political activists who act alone, in small groups, or otherwise participate on a small scale and pose little danger of affecting the status quo. That's hardly a principled legal position, or one fostering vibrant democratic participation.

Another direction disclosure may take is in requiring specific donors and fundraisers to file reports. At present, the reporting burden is placed almost exclusively upon political committees – on candidates, parties and PACs. But in California, individual *donors* must also file reports once their contributions exceed $10,000. Counted in that $10,000 are not just direct contributions to California committees and candidates, but contributions to other groups that are then used in California campaigns. Some reform activists have proposed requiring "bundlers" – individuals who raise funds and deliver them to a candidate – to file separate reports, even when the bundlers are volunteers acting on behalf of the campaign. These kinds of requirements could extend the reach of campaign finance law to occasional and casual political actors, beyond those who are accustomed to complying with it. When that happens, there is enormous potential for inadvertent violations, embarrassment, and further chilling of political activity.

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[18] Richard Hasen, "The Ripple Effects of the FEC's Rules on Political Blogging," *Findlaw* (Ap. 5, 2005), at http://writ.news.findlaw.com/commentary/20050405_hasen.html.

[19] *McIntyre v. Ohio Election Commission*, 514 U.S. 334 (1995).

[20] *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999).

[21] *Majors v. Abell*, 361 F.3d 349 (7th Cir. 2004).

Enforcement of Disclosure

A friend once asked, if the law provided for disclosure only, could Congress abolish the FEC? Congress has already tried that approach in a way – laws required disclosure through the 20th century, but provided no way to enforce the requirements, or disseminate or audit the information. How effective would the government be at collecting income tax revenue if we abolished the IRS? Disclosure requirements that *work* require substantial governmental supervision, assistance and enforcement. As Louise Overacker observed in the quote above, disclosure "is really very complicated."

Few people think about the regulatory apparatus that administers the law's disclosure requirements. FEC staff are trained and made available to answer questions. Another FEC office has a staff of reporting experts who review every report for problems and work with filers to correct mistakes. Another office releases the data and oversees public access to it. All of this takes time.

This review process can nab significant violations. Recently, the Giordano for Senate committee and numerous donors were fined a cumulative $156,169 for a variety of violations, including corporate contributions, excessive contributions, "straw" donors, and improper reporting.[22] This enforcement matter started as a referral from the FEC's Reports Analysis Division, which initially detected irregularities. As an aside, the FEC matter may be the least of Giordano's troubles, and he is presently serving a prison sentence for a very serious, but unrelated crime.[23]

If filers make many errors over time, they may be audited. A bad audit report can lead to an enforcement action, and legal penalties. For example, the campaign committee of former Rep. Tom Campbell for his 2000 race for the Senate from California made persistent errors on campaign reports indicating, among other things that the campaign could be accepting excessive contributions. The committee earned enough "audit points" to receive an FEC audit, which discovered significant accounting deficiencies as well as considerable excessive contributions. In January 2004, the committee settled the enforcement matter and paid a $79,000 penalty.[24] Since running for the Senate, Campbell has served as the Director of the California Department of Finance and the Dean of the Haas Business School at the University of California, Berkeley. If any candidate should be prepared to deal with the rigors of campaign finance compliance, you would assume he would be.

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[22] Federal Election Commission, "FEC Investigation of Giordano For U.S. Senate Committee Nets $156,169 Penalty," (News Release, MUR 5453) (Feb. 14, 2006) available at http://www.fec.gov/press/press2006/20060214MUR.html.

[23] Lynne Tuchy, "Everybody Waits, But No Giordano Ruling," *Hartford Courant* (Feb. 19, 2006), available at http://www.courant.com/news/local/hc-giordano0219.artfeb19,0,2860718.story?coll=hc-headlines-local.

[24] Federal Election Commission, MUR 5372, available at http://eqs.nictusa.com/eqsdocs/000006E2.pdf.

Some reform advocates have contended that the FEC's "audit-for-cause" process is insufficient, and have called for random auditing of FEC filers. When random audits were used in the early years of the Act, auditors found many errors, especially on the reports of challengers and losing candidates, but a generally high level of overall compliance. However, the auditing process took years in some prominent cases, was expensive for audited candidates, and grew unpopular with incumbents on Capitol Hill. So, Congress banned random audits in the 1979 Amendments to the Act.[25]

Members of the public, political competitors, disgruntled ex-campaign workers, and whistleblowers can file complaints about disclosure violations. The FEC has a staff of attorneys and investigators that handle these enforcement matters. Many disclosure violations that are not apparent from the "face" of a report, and might not be picked up by the FEC reviewers, are flagged in this way.

For instance, a financier of a massive 2000 fundraiser for Hillary Clinton's Senate campaign filed a complaint in 2001 alleging that the campaign had deliberately understated his expenses for the event. The event was held jointly with a nonfederal committee and governed by the FEC's technical allocation rules. The complainant's expenses exceeded his federal contribution limit, and thus would have been allocated to the "soft" side of the ledger. He asserted the campaign wanted to avoid full disclosure, because this would have meant fewer "hard" dollars allocated from the event for the Clinton Senate campaign.[26] The joint fundraising effort, called "New York Senate 2000" settled with the FEC for $35,000, agreeing for settlement purposes that the event's expenditures were underreported by over $700,000.[27] In a parallel investigation the Department of Justice indicted the lead fundraiser for filing false reports with the FEC.[28] (That trial ended in acquittal, with jurors complaining about the credibility of witnesses and the tedious financial data produced at trial.[29]) Since these were in-kind expenses incurred by an outside fundraiser, there would be no indication from the face of the report that anything was missing. A complaint based on inside knowledge would be the path exposing such a violation.

The FEC's administrative duties would persist, even if the law required *disclosure only*. The Commission would also continue to be in the business of writing rules defining how to disclose, what to disclose, how to treat certain transactions, and so forth. In the end, a disclosure regime can be complex, confusing, and bureaucratic, too. When someone

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[25] Mutch, *Campaigns, Congress and Courts*, pp. 97-99.
[26] Federal Election Commission, Complaint, MUR 5225, available at http://eqs.nictusa.com/eqsdocs/00004DFA.pdf
[27] Conciliation Agreement, MUR 5225, available at http://eqs.nictusa.com/eqsdocs/00004E2D.pdf
[28] United States Department of Justice, "Political Fundraiser David Rosen Indicted for Causing False Filings with Federal Election Commission" (Press Release), (Jan. 7, 2005), available at http://www.usdoj.gov/opa/pr/2005/January/05_crm_010.htm.
[29] Josh Gerstein, "Clinton Finance Chief Acquitted," *New York Sun* (May 27, 2005), available at http://www.nysun.com/article/14598.

advocates "immediate disclosure on the Internet" as the best form of campaign finance regulation – they may have a point, but what they're advocating is neither easy nor free from later legal entanglement or controversy.

When is Enough, Enough?

Should disclosure requirements be abolished? We could expect first that such a deregulatory reform would be unpopular. Whether it provides useful information or not, political activists, candidates, incumbents and their staff, reporters, lobbyists and lawyers like knowing who gives to whom.

Abolishing disclosure would seem to thwart the enforcement of other aspects of the law, since it is through disclosure that the FEC is able to monitor contribution limits and restrictions. But it is not necessary that information used for enforcement of the law be made *public*. The IRS requires details about a taxpayer's finances, but none of that is made public, and in fact there are serious legal consequences if tax information is unlawfully disclosed. The same is true with census information. The law could require campaigns to report to the FEC, but protect that information from the public eye.[30]

What would be lost, however, is the enforcement impetus that comes from public review of campaign reports, by people who may have information behind the bare reported facts. Also lost, perhaps for the better, would the aggressive use of report by opponents to manufacture politically motivated complaints in pursuit of negative publicity during a campaign.

One intriguing reform idea in recent years turns disclosure in its head. Rather than requiring reporting of donors and expenses, Professors Bruce Ackerman and Ian Ayres in their book *Voting with Dollars* argue that the law should require anonymity. Donors would give to candidates through a central clearinghouse where the identity of a candidate's funders would be concealed. The crux of the proposal is that, like the voting booth, there would be no way to know for *certain* who gave to whom. Donors could tell candidates they will get money (just as they might now promise a vote), but no verification, coercion of a "bought vote," or corruption would be possible.

One wonders whether, human nature being what it is, candidates and their supporters could keep financial support an unverifiable secret from one another. Also, government agents with access to the data might leak it during the campaign if donors or candidates start to crow about secret fundraising "facts" or engage in "disinformation" – providing the *confirmation* the system is designed to prevent. If our government can't keep intelligence gathering methods secret, how could we expect it to keep campaign finance information under wraps?

The secret donation process may have theoretical appeal, but is unlikely to be adopted. Disclosure, rightly or wrongly, is popular, and almost sacrosanct among opinion leaders

[30] McGeveran, p. 32-33.

and politicians. It may be that the best we can hope for are some modifications that show more respect for donor privacy.

If we tolerate disclosure requirements that "out" donors and their political preferences, then at least the law could calibrate that invasion of privacy. Since the concern for donor influence is at its greatest when donors and candidates deal directly with each other, then the law should provide its lowest threshold for identifying donors here. It would seem that there may be a public right to know (other than just nosiness) the identity and personal information of donors giving $2,000 a year to a candidate. That would also be roughly equivalent to the inflation-adjusted value of the original $100 itemization threshold enacted in 1911. Because the occupation and employer information provides the information necessary to sort quickly for donors who are, say actors or rabbis, and I did earlier in this chapter, if we retain that requirement at all it should only be disclosed of donors who give at a level that justifies public scrutiny. If the law did away with that burden, then the invasion of privacy would not be as acute and the threshold might be set lower.

For donors to political parties, their relationship is with a party instead of an officeholder or potential-officeholder, the threshold for itemization should be higher (say $5,000). Similarly, donors to other political committees are not giving to a candidate or officeholder who could affect policy on the donor's behalf. So, again, the threshold for identifying those PAC supporters should be significantly higher than the threshold for identifying candidate donors. Since the privacy problem with donor disclosure stems from easy public access, more detailed information could be disclosed confidentially to the FEC, to aid in detection of campaign finance fraud, for example.

If we value privacy in political expression, then the $200 itemization requirement of name, address, occupation and employer is more invasive than necessary to serve a public need to know the identity and employment of significant donors, and infringes upon the privacy rights of more modest donors. In fact, the abundance of information may be detrimental. As Elizabeth Garrett, a prominent law professor, has observed, it is "counterproductive to draft a disclosure law that overwhelms voters with information so that unhelpful data threatens to drown out valuable voting cues."[31]

Political Contributions as a Positive Good

Perhaps the most discouraging element of the disclosure debate is that few seem troubled by this burden on donors. The notion that political giving was a noble, or even a legitimate means of political activity worthy of protection has eroded over time.

The campaign finance donor has become yet another black hat in popular culture. The funder, in popular lore, diverts the otherwise virtuous public servant away from the public good. I do not exaggerate the sentiment. Serious people claim that private

[31] Elizabeth Garrett, "The Future of Campaign Finance Reform Laws in the Courts and in Congress," *Oklahoma City University Law Review*, Vol. 27 (2002), p. 683.

financing has turned government away from pursuit of the public good to where, as Archibald Cox remarked "money driven American politics stinks."[32] Cox also asserts that contributions have become the sole determinant of how political deals are struck in Congress. Ronald Dworkin calls the "biggest threat to the democratic process" -- what else – "money."[33]

This quote from Gore Vidal betrays the attitude of many elites toward the private financing of politics: "[O]ur system of electing politicians to office is rotten and corrupted to its core, because organized money has long since replaced organized people as the author of our politics. And most of it comes from rich people and corporations, who now own our political process – lock, stock, and pork barrel. . . . These happy few are prepared to pay a high and rising price for the privilege of controlling our government."[34]

Vidal's claims lack empirical justification and analytical rigor, but others who study this area can become infected by the cynicism and distaste in Vidal's remarks. When campaign finance research groups report on funding patterns, it is all too tempting to assert vast activity by corporations and businesses, then use as proof the donation patterns of individual donors reporting those companies as employers.

The Center for Responsive Politics, for instance, prepares profiles of "industries" for each election cycle that are really just the sum of those individual donors who work in the industry blended with the PACs of companies in that industry. When the Center reports that the "commercial banking" industry made over $31 million in contributions in the 2004 election cycle, in fact 65% of that total are contributions by individuals who just happen to work at banks, out of their own money.[35] The balance is PAC money, which comes from individual employees, too.

The Center for Public Integrity reported before the 2004 election that the donors to Bush and Kerry "are looking more similar than ever – and that the campaigns shared "4 of their ten largest donors."[36] Citigroup is on the list as having given Kerry $169,254 and Bush $246,645. But what the Center spins as cynical corporate behavior is more likely

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[32] Archibald Cox, "Ethics, Campaign Finance, and Democracy," lecture delivered upon receiving the 1995 Paul H. Douglas Ethics in Government award from the University of Illinois Institute of Government and Public Affairs, available at www.igpa.uiuc.edu/ethics/lecture-Cox.htm.

[33] Ronald Dworkin, "The Curse of American Politics," *New York Review of Books* (Oct. 17, 1996), p. 19.

[34] Gore Vidal, Forward, *Are Elections For Sale?*, (Boston, MA: Beacon Press, 2001) pp. ix-x.

[35] Center for Responsive Politics, "Commercial Banks: Long Term Contribution Trends," available at http://www.opensecrets.org/industries/indus.asp?Ind=F03.

[36] Center for Public Integrity, "Millionaires Raising Millions: Bush and Kerry Have New Major Donors In Common," (Sept. 7, 2004), available at http://www.publici.org/bop2004/printer-friendly.aspx?aid=374.

evidence that, in a company with 294,000 employees (in 2004),[37] a significant number of people there will be ardent Democrats, and a significant number of others will be Republicans. We should be pleased that employees of Citicorp feel comfortable giving publicly to the candidates they prefer, no thanks to the negative publicity generated by the Center for Public Integrity.

Interest-group reductionism can be taken to extremes. For example, a Center for Responsive Politics press release in July 2005 reported that Senator Hillary Clinton (D-NY) "raised more than any other member of the Senate or House from each of the four most generous industries to lawmakers in the first quarter of this year: lawyers and law firms, real estate interests, doctors and other health professionals and persons describing themselves as retired."[38] The "retired" as an *industry*? By the way, "retired" was number two, exceeded only by lawyers. The "Retired Industry" also gave heavily to conservatives George Allen (R-VA) and Rick Santorum (R-PA) and liberal Maria Cantwell (D-WA). Perhaps "Retired" is pursuing a clever bipartisan strategy to curry favor on all sides of the political spectrum? More likely, a substantial percentage of donors happen to be retired, and the occupation information here is meaningless.

It may be that a particular candidate is of distinct interest to a specific company's executives for business reasons, but it might also be that those individuals support that candidate for partisan reasons, or out of bonds of past employment, or regional bias, or celebrity, or other motives that say very little about corruption, abandonment of the "public good" or "ownership of the political process." A few donors give to candidates (typically incumbents) to attract support for their interests, but in the vast majority of cases this is an oversimplification of the motives behind political donors. A few even resort to bribery. These events are newsworthy, often scandalous, involving violations of existing law. Perpetrators of crimes should be punished. Donating to candidates or other political entities is *not* criminal behavior.

Most donors give to candidates because they approve of the candidate's ideology or partisan affiliation. A 1997 Joyce Foundation funded national survey of donors revealed that seven out of ten stated that ideology was always important when making a contribution.[39] They want to see the person elected – or reelected – because of shared beliefs about proper governance. Sometimes, to be sure, people give because they dislike the candidate's opponent. They give to their party because they support their party. They give to politically active groups because they believe in the cause. Or, in a few cases, they give to a *number* of candidates out of allegiance to a particular policy

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[37] Hoover's Fact Sheet for Citigroup, Inc., available at http://www.hoovers.com/citigroup/--ID__58365--/free-co-factsheet.xhtml.

[38] Center for Responsive Politics, "Broad Appeal: Senator Clinton is the Industry Favorite in Campaign Giving," (July 13, 2005), available at http://www.capitaleye.org/inside.asp?ID=176.

[39] John Green, Paul Herrnson, Lynda Powell and Clyde Wilcox, "Individual Congressional Campaign Contributors: Wealthy, Conservative and Reform-Minded," (June 9, 1998) available at http://www.opensecrets.org/pubs/donors/donors.asp.

position. One donor chiefly concerned about the Mideast explained his donations to six Democratic contenders in the 2004 primary: "A litmus test for me is a candidate has to be good on Israel. But all of these candidates are good on Israel."[40]

Donors may give for less thoughtful reasons, too. Perhaps a friend prevailed upon them, or they felt peer pressure. Americans have notoriously fluid allegiances to class, religion and politics, and I can think of several instances where once-liberal urban denizens have moved to the suburbs, taken on the responsibilities of middle-class life, and moved to the right politically. Or other examples of individuals who started out conservative, then moved into the arts or academia and turned to the left. Some of this may be dismissed as naked self-interest, but in many cases these are people who are disinclined to spend the time to think through their "interests." A lot of the transformation should be attributed to the very human impulse to fit in socially.

Most donors probably pursue a mixture of motives. None of this is corrupt. As Alexander Heard observed, "Money at work in politics is not, per se, deplorable. It may simply reflect a citizen's political goals and his preferences among candidates, which are, after all, legitimate end products of a democratically organized politics and society."[41]

Advocates of greater restrictions on contributions decry the money-in-politics arena by noting that only about 2% of voting age Americans bother to contribute. In fact, it is not possible to know the true percentage, because the law does not require itemization of contributions under $200. In some contexts (union member payroll deductions being but one) the specific contribution amounts are tiny, perhaps only a nickel or dime a pay period, but they are *very* numerous.

The "elitism" argument could be made to criticize any type of political activity. A bare majority of voting age Americans vote, a tiny percent volunteer on campaigns, write letters to the editor, comment on blogs, perform in benefit concerts, or attend rallies. These activities are as much the domain of an "elite" as giving money. In fact, donating to a campaign is easier for people than these other options.

As Bruce Ackerman and Ian Ayres noted, "[P]olitical gift-giving has become an increasingly important way in which Americans manifest their civic concern."[42] "Money is the single easiest method for most people to participate directly in political campaigns. Indeed, for a great many Americans, it is the only realistic form of direct political participation" observed Bradley A. Smith.[43] Not everyone is sufficiently spry to walk a precinct, or has the temperament to work on a phone bank. One possible reason the

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[40] Matthew E. Berger, "Jewish Donors Split Funding, Give to Multiple Candidates," *Jewish News Weekly* (July 25, 2003) available at http://www.jewishsf.com/content/2-0-/module/displaystory/story_id/20705/edition_id/424/format/html/displaystory.html.
[41] Heard, *The Costs of Democracy*, p. 9 (1960).
[42] Bruce Ackerman and Ian Ayres, p. 34.
[43] Smith, *Unfree Speech*, p. 217.

"retired" industry is such a presence in the donor pool is that for older people donating is the "only realistic form" of participation.

Maybe we are only less sensitive to the "inequality" accompanying other political activities, like walking precincts, because it doesn't involve *money* directly. But they require the possession of education, health, or leisure time, which are also unequally distributed and may in fact be *proxies* for money.

Is it self-evident that sweat equity is superior to making a donation? If there is virtue in volunteering for a campaign (which obviously gives you access to the key people around a candidate) or calling in to a political talk show, or attending a rally, or registering voters, then there is virtue in writing a check that pays for these projects. On the other hand, if private financial assistance in electoral politics is ignoble, then it isn't much of an analytical reach to find problems and potential for "corruption" in these other political activities.

Finally, corruption of the policy-buying variety, which is what is usually alleged in the campaign finance reform context, is a problem of *incumbency*. None of Howard Dean's or John Kerry's top donors are political appointees in 2005. We can stipulate that George Soros, having invested roughly $20 million on the losing side in the 2004 cycle, has not seen much in the way of personal or professional gain as a result. Even though Ohio Senate candidate Eric Fingerhut raised over a million dollars in 2004, people aren't much concerned about the lawyers (or members of the "Retired Industry") who opened their pockets to him – because he *lost*. Do we need to know, for purposes of preventing corruption, the name, address, occupation and employer of those individuals who gave Jennifer DePalma $4,835 in individual contributions in her campaign as the Republican nominee against House Democratic Leader Nancy Pelosi (who, by the way, raised $791,244 from individuals and another $759,000 from PACs)? Or even who gave Terry Baum (the Green Party candidate against Pelosi) the $7,134 he raised from individuals? The only people who do care are (possibly) vindictive partisans of the winner, who can use these records for their own purposes.

Ironically, we place no source restrictions or contribution or expenditure limits on lobbying, where the attempt to influence officials is evident. We do in campaigns, where people may or may not be donating with any intent or expectation of "influencing" officeholders, and where it isn't nearly so clear the recipient, particularly if he or she loses, will be in a position to favor anybody.

The Good People and the Bad

Political giving should be encouraged. If we are concerned that only a few donors from privileged backgrounds are financing politics, then broadening the base of funding is a cure that doesn't impose legal burdens on people's political activities. As Alexander

Heard noted "campaign money must come from somewhere, and *if the good people will not supply it the bad ones will*."[44] (Emphasis added).

Justice Stephen Breyer, one of the Supreme Court's more sympathetic ears to campaign finance regulation arguments, has written in his book *Active Liberty* that the First Amendment is "seeking to facilitate a conversation among ordinary citizens that will encourage their informed participation in the electoral process." He also says that proper laws "seek to democratize the influence that money can bring to bear upon the electoral process, thereby building public confidence in that process."[45] Although I understand that Justice Breyer may not see it this way, what better way to accomplish those goals than to encourage *more* individuals to make campaign contributions? Overly ambitious disclosure requirements work against this goal.

Perhaps those ill effects can be reduced by using other incentives to encourage people to donate. One way to encourage political contributions is to favor them in the tax law. There are a number of good arguments for why we shouldn't try to implement too much social policy through tax incentives. However, if we want to institute respect for political giving that corresponds to the respect we give to charitable giving, providing a tax deduction or credit would seem appropriate.[46] Tax preferences would also make giving more affordable, though at present many people who could afford to make contributions don't, so affordability is not the chief problem. The real impact of enacting tax preferences for contributions may be more the signal that policy sends about the virtue of giving, rather than the financial consequences for donors.

Tax deductions might be criticized because the only taxpayers who would take advantage of them are those who itemize, and those tend to be the more prosperous among us. Charitable giving faces the same issue – only *itemizing* taxpayers can take charitable deductions (it is estimated that the charitable gifts of non-itemizers are 18% of the total.)[47] A tax credit helps more taxpayers, but the impact on revenue might also be greater. The credit could always be limited, but then one wonders whether the net effect of offering it would do much toward broadening the base of political funding. There would also be a battle over which recipients should trigger the benefit – just candidates? Candidate and party committees? All political committees?

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[44] Heard, *The Costs of Democracy*, p. 166 n. 90.

[45] Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution*, (New York, NY: Alfred A. Knopf, 2005), pp. 46-47.

[46] Allan B. Goldman, "Income Tax Incentives for Political Contributions: A Study of the 1963 Proposals," *University of California, Los Angeles Law Review*, Vol. 11 (1964), pp. 213-15.

[47] See Forum of Regional Associations of Grantmakers, "Data to Collect for Individual Giving," (2005), available at http://www.givingforum.org/pdfs/RGS/Data%20to%20Collect%20for%20Individual%20Giving.pdf

Tax credits for contributions are not new to federal law – from 1972 to 1986 taxpayers could take a 50% credit for contributions to federal, state or local candidates, up to $50. As of this writing, six states have tax credits for contributions, and several others provide for deductions. The credits are usually capped at low levels, suggesting that these are not serious efforts to change the mix of dollars as much as they are efforts to bring new small donors into the system.[48]

Short of changes to the tax law, there are other methods we could use to encourage contributions. In 1955, Philip Graham, publisher of what was then the *Washington Post & Times Herald*, decided to encourage political giving as an approved civic activity. Through the Advertising Council, he sought $10 million in advertising to encourage every citizen to make some campaign contribution to the party or candidate of his choice. The Ad Council implemented the program in 1960, with mixed results.[49] Under current law, corporations and labor organizations are allowed to engage in nonpartisan voter education and registration activity, including candidate appearances –but it is not evident that many do, or that the effect has been to broaden donor participation. Quite possibly this is because the regulations governing this exemption are complex and corporations in particular fear complaints and bad publicity even if such a program were well-executed.

Any effort to encourage contributions will require advertising and editorial support. Noted a recent study on political tax credits by Professors Robert Boatright and Michael Malbin: "We should not expect a tax credit directly to stimulate potential donors to go out and look for candidates worthy of their contributions, without any further stimulus or motivation."[50]

To close, here's another Justice Brandeis quote, this from the 1927 decision in *Whitney v. California*: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[51] If we want to avert the "evil" of certain self-interested political donors, the remedy should involve broader giving, not the enforced silence represented by additional limits and restrictions. For this we will need to acknowledge that giving to politics is good. One wonders which habit will be harder to break – the indifference many in the public feel toward contributing to politics, or the habitual denigration of that activity by political elites in the academy and in the media.

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[48] Robert Boatright and Michael Malbin, "Political Contribution, Tax Credits, and Citizen Participation," *American Politics Research*, Vol. 33, No. 6 (Nov. 2005), p. 787.
[49] Goldman, pp. 252-53.
[50] Boatright and Malbin, p. 792.
[51] *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J. concurring)

About the Author

Ms. Hayward is an attorney and writer specializing in campaign finance, government ethics, and related fields. She writes widely on these topics and has been published in a variety of magazines and journals, including *National Review*, the *Weekly Standard*, *Reason*, the *Journal of Law and Politics*, and the *Election Law Journal*. She also authors a blog at www.skepticseye.com.

Ms. Hayward graduated from Stanford University with degrees in political science and economics, and received her law degree from the University of California, Davis. She clerked for Chief Judge Danny J. Boggs of the United States Court of Appeals for the Sixth Circuit. She was an associate at Wiley, Rein & Fielding in Washington DC and Of Counsel at Bell, McAndrews & Hiltachk in Sacramento, California. She also served as the in-house attorney at the National Republican Congressional Committee, and served on the Senate Special Investigation of the 1996 Federal Election Campaigns, chaired by Senator Fred Thompson (R-TN). Most recently, she was Counsel to Commissioner Bradley A. Smith of the Federal Election Commission.

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