

# DISCLOSURE V. ANONYMITY IN CAMPAIGN FINANCE

by

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# DISCLOSURE V. ANONYMITY IN CAMPAIGN FINANCE

## INTRODUCTION

About the only campaign finance issue on which there is a strong consensus is the belief that the law should force candidates to disclose the identity of their contributors. The Supreme Court in *Buckley v. Valeo* has signed off on such regulation as a means of deterring candidates from selling access and influence in return for contributions. Today there are calls for “instantaneous” disclosure via the Internet. Indeed, a growing group of scholars and advocates are coming to believe that mandated disclosure should be the *only* campaign finance regulation. For example, Representative John Doolittle has proposed “The Citizen Legislature and Political Freedom Act” which essentially would repeal all limits on political campaign contributions merely require immediate disclosure by candidates when they do receive contributions.<sup>1</sup> This type of “pure disclosure” reform has garnered support from a wide spectrum of both liberals and conservatives -- including the CATO Institute, Sen. Mitch McConnell, and Kathleen Sullivan.<sup>2</sup> People who want to repeal all campaign finance regulation save mandatory disclosure have come to believe that other restrictions are counterproductive because they tend to shift money to less accountable forms of political speech -- such as “independent expenditures” and “issue advocacy.”

An set of enduring poetic images for the advocates of mandated disclosure was provided by Justice Brandeis:

Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.

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<sup>1</sup>See Pete du Pont, Campaign Finance Defies a Complicated Solution, Tampa Trib., Sept. 7, 1997, at 6.

<sup>2</sup> See, e.g., Kathleen M. Sullivan, Political Money and Freedom of Speech, 30 U.C. Davis L. Rev. 663, 688-89 (1997); Campaign Finance: Full Disclosure, More Options Might Help, The Dallas Morning News, col. 1, p. 2j (Oct. 12, 1997).

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But there exists in our polity a counter image -- the voting booth -- that stands against this cult of disclosure. Ballot secrecy was adopted toward the end of the nineteenth century to deter political corruption. "Before this reform, people could buy your vote and hold you to your bargain by watching you at the polling place."<sup>6</sup> Voting booth privacy disrupted the economics of vote buying, making it much more difficult for candidates to buy votes because, at the end of the day, they could never be sure who voted for them.

A similar pro-anonymity argument can be applied to campaign finance. We might be able to harness similar anonymity benefits by creating a "donation booth": a screen that forces donors to funnel campaign contributions through blind trusts. Like the voting booth, the donation booth would keep candidates from learning the identity of their supporters. Just as the secret ballot makes it more difficult for candidates to *buy* votes, mandating anonymous donations through a system of blind trusts might make it harder for candidates to *sell* access or influence because they would never know which donors had paid the price. Knowledge about whether the other side actually performs his or her promise is an important prerequisite for trade. People - including political candidates - are less likely to deal if they are uncertain whether the other side performs. The secret ballot disrupts vote buying because candidates are uncertain how a citizen actually voted; anonymous donations disrupts influence peddling because candidates are uncertain whether contributors actually contributed.

So which is better mandated disclosure or mandated anonymity? Each holds the potential for disrupting political corruption. This article tries to imagine the effects of pure disclosure and anonymity

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<sup>3</sup>Bruce Ackerman, *Crediting the Voters: A New Beginning for Campaign Finance*, 13 *Am. Prospect* 71, 71 (1993); see also Ashley C. Wall, *The Money of Politics: Financing American and British Elections*, 5 *Tul. J. Int'l & Comp. L.* 489, 503 (1997) (commenting that the Ballot Act of 1872 "brought into existence the secret ballot, which had long term effects on curbing bribery").

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regimes.<sup>4</sup> If we were to repeal all contribution or expenditures limitations and were only going to regulate information, which should we prefer? I tentatively argue that mandated anonymity is preferable. It is a lesser restrictive alternative that is more likely to deter political corruption.

Critics are quick to point out that mandated anonymity is likely to convert some direct contribution into independent, “issue advocacy” expenditures (where anonymity cannot be required), but fail to see that mandated disclosure, if it were effective in deterring political corruption, would also likely to shift some direct contributions toward issue ads (where disclosure cannot be required). The simple reason why mandated disclosure is unlikely to hydraulically push money toward issue advocacy is that disclosing the identity of donors deters very little corruption. Disclosure regimes may make us feel good about ourselves but they probably don’t produce very different results than a true *laissez-faire* regime where contributors had complete freedom whether to remain anonymous or to disclose their identity to the candidate and/or the public. Thus, while the article nominally confronts the choice between mandated anonymity and mandated disclosure, in most cases this will be essentially the same as a choice between mandated anonymity and informational *laissez faire*. At the end of the day reasonable people could disfavor mandated anonymity -- for example, because of the predictable shift of resources toward less accountable independent, issue advocacy – but they should not particularly favor mandated disclosure because it generates substantial benefits beyond a regime which declined to mandate either disclosure or anonymity.

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<sup>4</sup>In an earlier article that forms the basis for much of the present analysis, Jeremy Bulow and I argued that mandated anonymity would be a useful complement to the current limitation on contributions. See Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 *Stanford L. Rev.* 837 (1998). The idea that mandating donor anonymity might deter corruption has been discussed previously by a number of authors. See, e.g., Saul Levmore, *The Anonymity Tool*, 144 *U. Pa. L. Rev.* 2191, 2222 (1996) (“It should not be surprising to find a system that made political contributions anonymous by channeling them to candidates through intermediaries ....”) and sources cited in Ayres & Bulow at note 4.

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Several states have already experimented with prohibiting judicial candidates from learning who donates to their (re)election campaigns.<sup>5</sup> The rationale, of course, is that judges don't need to know the identity of their donors: Judicial decisions should be based on cases' merits, not contributors' money. But there is no good reason why legislators or the executive needs to know the identity of their donors. An individual's power to influence government should not turn on personal wealth. Small donors are already effectively anonymous because \$100 isn't going to buy very much face time with the President. n5 Mandating anonymity is likely to level the influence playing field by making small contributions count for relatively more. Anonymous donors can still signal the intensity of their preferences by marching on Washington - barefoot, if need be.

In what has become a post-election ritual, politicians wring their hands about the problem of campaign donors buying unwarranted "access." Candidates claim that contributions do not affect their political positions. Nonetheless, the suspicion that "access" leads to corruption persists. If candidates really want to stop themselves from selling influence or access, they should forego finding out the identity of their contributors.

The idea of mandating anonymity at first strikes many readers as a radical and dangerous departure from the current norm of disclosure. The metaphors of "sunshine" and "open air" are currently very

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<sup>5</sup>The commentary to the 1972 Code of Judicial Conduct ("CJC") stated, "[T]he [judicial] candidate should not be informed of the names of his contributors unless he is required by law to file a list of their names." E. Wayne Thode, Reporter's Notes to Code of Judicial Conduct 99 (1973). This provision was subsequently adopted - and, to varying degrees, applied - in ten different states. Stuart Banner, Note, Disqualifying Elected Judges from Cases Involving Campaign Contributors, 40 Stan. L. Rev. 449, 473 n.130 (1988) (identifying the 10 adopting states as Arkansas, Nebraska, North Dakota, South Carolina, South Dakota, Tennessee, Utah, Washington, West Virginia, and Wyoming) 470 (1988); see also 1978 N.Y. St. Comm. on Jud. Conduct Ann. Rep. 63 (1979) ("The intent behind keeping a judge from knowing his contributors is obvious: to avoid the impression that, if elected, the judge will administer his office with a bias toward those who supported his candidacy."). See also Ayres & Bulow, *supra* note 4, at 870 for an assessment of the ultimate effectiveness of these judicial regulations.

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powerful. But to assess the anonymity idea fairly, it is necessary to free ourselves from what might be little more than the happenstance of history. The public ballot was similarly accepted as a natural and necessary part of democracy for roughly half of our nation's history. This system produced "the common spectacle of lines of persons being marched to the polls holding their colored ballots above their heads to show that they were observing orders or fulfilling promises."<sup>6</sup> These spectacles put such pressure on the disclosure norm that, ultimately, the secret "Australian ballot" caught on and spread like wildfire at the end of the nineteenth century.<sup>7</sup> Readers need to consider whether the current spectacle of campaign corruption might be sufficient to overturn our deeply ingrained disclosure norm.

This article is divided into three parts. Part I compares how mandated anonymity and disclosure regimes might disrupt the market for political influence. Part II then describes in more detail how a system of mandated anonymity might operate. To avoid the "nirvana fallacy" of comparing an idealized reform to a real-world market failure, this part assesses whether the private efforts to evade anonymity - via "independent expenditures" or "issue advocacy" - undermine the usefulness of the proposal. Part III argues that mandated anonymity is clearly constitutional. Indeed, appreciating the possibility of anonymity may even undermine *Buckley v. Valeo*'s conclusion that mandated disclosure is constitutional.

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<sup>6</sup>Wayne Andrews, Voting, in *Concise Dictionary of American History* 989 (Wayne Andrews ed., 1962). The thesis that the Australian ballot was adopted in order to deter vote buying specifically - and cleanse the political system generally - is hotly contested. An alternative interpretation is that these voting reforms were motivated, at least in part, to dampen mass political activism. The "spectacle" of lines of voters marching to the polls with colored ballots in hand might not have indicated that their votes were bought, but instead that their votes were not for sale - a symbol of the solidarity between voters and labor or other mass political movements. See, e.g., Michael E. McGett, *The Decline of Popular Politics: The American North 1865-1928*, at 12 (1986); Walter Dean Burnham, *The Changing Shape of the American Political Universe*, 59 *Am. Pol. Sci. Rev.* 7 (1965). Even if this alternative reading of the Australian ballot is correct as historical matter, the donation booth (unlike the secret ballot) has the potential to dampen the political power of those with disproportionate wealth and thereby increase the incentives for wider popular politics.

<sup>7</sup>John H. Wigmore, *The Australian Ballot System As Embodied in the Legislation of Various Countries* 1-57 (2d ed. 1889).

I. MITIGATING THE PROBLEMS OF POLITICAL CORRUPTION

The corrupting influence of campaign contributions has been a central concern of finance reform.<sup>8</sup>

The notion that wealthy donors are able to purchase political access or influence is antithetical to our ideal of equal citizenship.<sup>9</sup> As Cass Sunstein has observed, "[T]here is no good reason to allow disparities in wealth to be translated into disparities in political power. A well-functioning democracy distinguishes between market processes of purchase and sale on the one hand and political processes of voting and reason-giving on the other."<sup>10</sup> Bruce Ackerman also advocates separating market and political processes: "A democratic market society must confront a basic tension between its ideal of equal citizenship and the reality of market inequality. It does so by drawing a line, marking a political sphere within which the power relationships of the market are kept under democratic control."<sup>11</sup> The most popular reforms for decoupling these spheres operate by regulating money: They either limit the amount that donors can give, or they limit the amount that candidates can spend.

But there is another way to decouple private wealth from public power. Instead of limiting money, we might limit information. Since Watergate, the only informational reforms have been those that have increased the amount of mandated disclosure. Discussions of disclosure often assume that we must choose between a world in which everyone knows of a gift (the disclosure regime) and a world in which only a

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<sup>8</sup>See Cass R. Sunstein, Political Equality and Unintended Consequences, 94 Colum. L. Rev. 1390, 1391 (1994) (identifying corruption as the "[f]irst and most obvious, perhaps," ground for campaign finance reforms).

<sup>9</sup>See Daniel Hays Lowenstein, On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted, 18 Hofstra L. Rev. 301, 302 (1989) ("[P]ayment of money to bias the judgment or sway the loyalty of persons holding positions of public trust is a practice whose condemnation is deeply rooted in our most ancient heritage.").

<sup>10</sup>Sunstein, *supra* note 8, at 1390.

<sup>11</sup>Ackerman, *supra* note 3, at 71.



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donor and her candidate know the source of a gift (the laissez-faire regime). But as shown in Table I, this analysis overlooks the possibility of moving toward a world in which only the donor knows about a gift.

Disclosure Regime	Donor, Candidate and Public Know
Laissez Faire Regime	Donor and Candidate Know
Anonymity Regime	Only Donor Knows

In fact, there are several different continua of possible informational regulations. For example, we could require the blind trusts who received a candidate's contributions to publicly disclose the identity of all donors but not the amounts that the individuals gave.<sup>12</sup> For specificity, I will image a "mandated anonymity" regime where the donor has the option of remaining completely anonymous or having the blind trust verify publicly that she gave up to \$200. The trust would never disclose whether a donor had given more than \$200. It is my thesis that failure of scholars and courts to consider these alternative informational regimes is largely responsible for the strong consensus in favor of public disclosure.

The impetus for disclosure is that a public armed with knowledge about political contributions will be able to punish candidates who sell their office or who are otherwise inappropriately influenced. It has, however, proved exceedingly difficult to infer inappropriate influence from the mere fact of contributions. Politicians claim they would have acted the same way regardless of whether a questionable contribution

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<sup>12</sup>Richard Craswell has also suggested in comments that it might be possible to use a modified version of the donation booth to give candidates information about voters' aggregate preferences, but not voters' identities. If the blind trusts solicited donors' policy preferences and revealed these preferences to the candidates - for example, if the trusts revealed that \$300,000 of total donations support NAFTA - the mandated anonymity regime might reveal something more to the candidates about the intensity of the donors' aggregate preferences while still disrupting the market for quid pro quo corruption.

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had been made. Moreover, we have been unwilling to prohibit selling access (re: face time) in return for contributions. The Attorney General has flatly concluded that such quid pro quo agreements are legal.<sup>13</sup> And today's jaded citizenry imposes hardly any electoral punishment on candidates known to have sold political access. In sum, public disclosure produces very little deterrent benefit: Types of corruption that can be proved (contributions for access) are legal, and types of corruption that are illegal (contributions for influence) can't be proved. At most, disclosure deters only the most egregious and express types of influence peddling.

In contrast, a regime of mandated anonymity interferes with an informational prerequisite for corruption. Put simply, it will be more difficult for candidates to sell access or influence if they are unsure whether a donor has paid the price. Of course, much turns on whether government can actually keep candidates uninformed about who donates to their campaigns. But to begin, this section considers what an idealized regime of mandated anonymity - without evasions or substitute speech - can and cannot accomplish.

An idealized donation booth would severely impede quid pro quo corruption -- the trading of contributions for political access or influence. This effect would encompass not only explicit trades (donations for nights in the Lincoln bedroom, presidential coffees, legislative activity), but also a large range of implicit deals, including sequential action whereby either the politician or donor "performs" in expectation of subsequent performance by the other side. The Supreme Court's concern with the corrupting effects of

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<sup>13</sup>Letter from Janet Reno, United States Attorney General, to Rep. Henry J. Hyde, House Judiciary Chairman, reprinted in N.Y. Times, Oct. 4, 1997, at A9.

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"political debts"<sup>14</sup> would also be neutralized by the donation booth for the simple reason that politicians would be unable to determine to whom they were indebted. This rationale was explicitly used to justify a proposed system of anonymous donations to presidential legal defense funds. In 1993, the Office of Government Ethics ("OGE") reasoned, "Anonymous private paymasters do not have an economic hold on an employee because the employee does not know who the paymasters are. Moreover, the employee has no way to favor the outside anonymous donors."<sup>15</sup>

Mandated anonymity could also deter politicians from extorting donations. The popular discussion of quid pro quo corruption focuses solely on campaign contributions in return for legislative favors. In the terminology of public choice theory, donors would be engaged in a kind of "rent seeking." But there is a radically different kind of quid pro quo corruption. Politicians engage in "rent extraction" when they threaten potential donors with unfavorable treatment unless a sufficiently large contribution is made.<sup>16</sup> Rent extraction almost surely explains some of the anomalous patterns of giving - particularly, the "everybody loves a winner" phenomenon. The high level of contributions made to incumbents with safe seats is consistent with rent extraction because incumbents have the greatest ability to extort donations.<sup>17</sup> Understanding rent extraction also explains why several corporations have privately agreed not to make soft money contributions.<sup>18</sup> Fear of rent extraction may even keep private interest groups from organizing

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<sup>14</sup>First National Bank of Boston v. Bellotti, 435 U.S. 765 788 n.26 (1978).

<sup>15</sup>Op. Off. Gov't Ethics 93x21, at 93 (1993). See generally Kathleen Clark, Paying the Price for Heightened Ethics Scrutiny: Legal Defense Funds and Other Ways That Government Officials Pay Their Lawyers, 50 Stan. L. Rev. 65 (1997).

<sup>16</sup>See Fred S. McChesney, Rent Extraction and Rent Creation in the Economic Theory of Regulation, 16 J. Legal Stud. 101, 102 (1987).

<sup>17</sup>See Frank J. Sorauf, Inside Campaign Finance: Myths and Realities 60-97 (1992).

<sup>18</sup>See Richard J. Mahoney, Letter to the Editor, A Corporate Mood, N.Y. Times, Jan. 30, 1997, A14.

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because politicians will have a harder time shaking down an unorganized mass.<sup>19</sup> Mandated donor anonymity would allow private interests to organize without fear of being targeted for extortion.

Just as the secret ballot substantially deterred vote buying, mandating secret donations might substantially deter both forms of quid pro quo corruption: rent seeking and rent extraction. There is a lively academic debate about how much current campaign donations are intended to garner access or influence or to avoid unfavorable treatment.<sup>20</sup> Since mandated anonymity is better suited than mandated disclosure to deter quid pro quo corruption, an important part of its justification must turn on the extent to which this form of corruption is truly a problem.

However, the problems of "monetary influence corruption" or "inequality" also plague our current system of campaign finance.<sup>21</sup> Although mandated anonymity would not eliminate these problems, a regime of mandated anonymity is also likely to mitigate these problems much more than a regime of mandated disclosure. Even when politicians don't condition their behavior on contributions, they may nonetheless expect that taking certain positions will cause donors to give more money. This is the problem of "monetary influence." And even when wealthy donors don't expect their giving to change a candidate's behavior, they may reasonably believe that giving to a candidate with whom they agree will increase that

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<sup>19</sup>See Fred S. McChesney, Rent Extraction and Interest-Group Organization in a Coasean Model of Regulation, 20 J. Legal Stud. 73, 85-89 (1991).

<sup>20</sup>See generally Stephen G. Bronars & John R. Lott, Jr., Do Campaign Donations Alter How a Politician Votes? Or, Do Donors Support Candidates Who Value the Same Things That They Do?, 40 J.L. & Econ. 317 (1997); cite Levitt, xxx.

<sup>21</sup>See Thomas F. Burke, The Concept of Corruption in Campaign Finance Law, 14 Const. Commentary 127, 131 (1997)(arguing that Supreme Court decisions have identified "three distinct standards of corruption," which the author labels "quid pro quo," "monetary influence," and "distortion"). Thomas Burke shows how each of these effects has been characterized as a problem of corruption, although the last possibility - "distortion" - is more often described as the problem of inequality. See id.

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candidate's chance of (re)election. This at times is referred to as the inequality problem. In the first instance, the possibility of a contribution has a corruptive influence on the candidate's behavior. In the second, even though the candidate's positions are uncorrupted (read "unchanged") by the contribution, the contributions of those with disproportionate wealth corrupt the process by increasing the likelihood that positions favored by the wealthy will be disproportionately favored in our political sphere.

Some might argue, however, that monetary influence is not a problem because donors' willingness to pay usefully informs candidates about the intensity of voter preferences. Yet there is strong consensus from a broad range of scholars that politicians should not choose their policies with an eye toward campaign contributions.<sup>22</sup> Not all interest groups can readily organize to compete for candidates' monetary interests. A concentrated interest group advocating a law that decreases social welfare may be able to donate more money than can more diffuse interests opposing the measure. Under such conditions, donations may give candidates a false signal of citizens' intensity of preference. Insulating candidates from the influence of donations may lead toward legislation that more truly reflects the preference intensity of voters.<sup>23</sup> Monetary influence corruption, like vote buying, is rejected because the legitimate preferences of citizens with unequal abilities to pay or unequal opportunities to pay are given undue influence.<sup>24</sup>

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<sup>22</sup>For example, even market-oriented scholars such as James Buchanan and Gordon Tullock have argued that contributions might not accurately measure intensity of preferences because of "market imperfections". James M. Buchanan & Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* 272 (1962).

<sup>23</sup>The possibility of rent extraction also militates against using donations to register the preference intensity of voters. Politicians trying to extort donations under threat of harmful laws are likely to pass a retaliatory law from time to time in order to make their threats credible. An uninsulated system of monetary influence might therefore lead to worse policies than one that insulates candidates from the preference intensity of voters.

<sup>24</sup>See generally Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 *Stan. L. Rev.* 893 (1998). Moreover, citizens can credibly signal the intensity of their preferences by engaging in other activities, such as marching on Washington, that are more generally available to a large proportion of the populace. Even if citizens wish to signal the intensity of their preferences by spending money, it is not clear that donating money is superior, literally, to burning

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Scholars have also rejected the notion that contributions should influence politicians in part because contributions tend to reduce independent deliberation and reason-giving.<sup>25</sup> David Strauss, in particular, has argued:

[O]n any plausible conception of representative government, elected representatives sometimes should exercise independent judgment .... Campaign contributions do not create the possibility that representatives will follow instead of lead; that is an unavoidable (and to some extent desirable) part of any democracy. But because contribution-votes can be so much better targeted than votes at the ballot box, a system in which contributions are explicitly exchanged for official action will accentuate this tendency of representative government.<sup>26</sup>

Under this view, the monetary influence of contributions impedes the deliberative processes of democracy. At times, representatives should take positions that are not merely aggregations of their constituents' preferences.

Mandated anonymity would reduce the corrupting influence of contributions on candidates' behavior by reducing both the candidates' feedback about how particular positions affect giving and the willingness of donors to make large donations to influence candidate behavior. Candidates would still learn the total amount of money that had been contributed to their campaigns, but they wouldn't learn how particular positions translate into particular contributions. Mandated anonymity would create a kind of Tiebout model<sup>27</sup> for candidates' policies. In the original Tiebout model, different towns committed to

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the money for a cause. It is one thing for a candidate to change positions because her constituents are willing to part with considerable money. Such behavior is consistent with the idea that politicians should faithfully represent the aggregate preferences of their constituents. But it is another thing to change positions in order to receive this money. Because there is no natural way to aggregate preferences, it is suspect for a candidate to choose an aggregation that self-interestedly increases her chance of election.

<sup>25</sup>See Burke, *supra* note 21, at 148 ("[W]here contributor-influenced representatives predominate, legislative deliberation becomes a sham.").

<sup>26</sup>David A. Strauss, *Corruption, Equality and Campaign Finance Reform*, 94 *Colum. L. Rev.* 1369, 1375-76 (1994).

<sup>27</sup>See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. Pol. Econ.* 416 (1956).

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particular taxes and amenities, and then potential citizens voted with their feet by moving to the towns with the tax and expenditure package they most preferred. Mandated anonymity would push the contribution market in the same direction. Politicians would announce policies and wait and see whether those policies garnered financial support. This is not true independent leadership, but it is likely to be more independent than the current regime - one in which private interests can bestow gifts on a politician in full expectation that she will see and appreciate on which side her bread is buttered.

Past giving would be a poor guide for predicting future donations under a mandated anonymity regime because donor anonymity would exacerbate the "donor's paradox." Just as it is irrational to vote when there is an infinitesimal chance that one's vote will affect the election, it is irrational to give if one's gift imperceptibly increases the chance of a candidate's victory. Under the current regime, politicians overcome the donor's paradox by developing a reputation for giving donors special consideration; large donors expect their contributions to yield concrete benefits concerning a candidate's policy, legislative activity, or at the very least, the candidate's willingness to meet with the donor. But mandated anonymity greatly diminishes the expected return on an individual donation and thus, in all likelihood, will substantially reduce the number of large donations. It would be difficult for candidates to provide favors or special access for individual contributors without knowing the contributors' identities.

Mandating donor anonymity would reduce the disproportionate influence of wealth in our political system not only by reducing the number of large donations, but also possibly by increasing the number of small donations. While mandating anonymity exacerbates the donor's paradox for large donors, the same anonymity might mildly mitigate the paradox for small donors. Under the current system, small donors have virtually no impact on the electoral process. "For example in the 1996 election cycle less than one-fourth

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of 1 percent of the American people gave contributions of \$200 or more to a federal candidate," but this tiny group of donors generated an astonishing eighty percent of total donations.<sup>28</sup> By reducing the importance of large donations, mandated anonymity would make small donors relatively more important and thus might induce less affluent donors to give more.

Mandated anonymity -- even if perfectly implemented -- is not a panacea. Candidates would still have a muted incentive to take certain positions in order to generate contributions, and the wealthy would continue to have a disproportionate voice in electioneering. But by (1) making it harder for politicians to reward their contributors, (2) substantially reducing the number of large donors, and (3) possibly increasing the number of small donors, a regime of mandated anonymity could mitigate the problems of monetary influence and inequality.

In contrast, mandated disclosure is much less likely to affect these problem. Monetary influence and inequality could only be deterred if voters punished candidates who pandered to contributors or received disproportionate contributions because of their position favoring wealthy contributors. Our experience with mandated disclosure is that the benefits to a candidate of having extra contributions for the campaign almost always outweigh any the possibility that some voters will be put off by the fact of the contribution itself. At the end of the day, a workable regime of mandated anonymity is likely to have a much larger effect than mandated disclosure on monetary influence and inequality for the simple reason that it is likely to reduce the number of 5 and 6 figure contributions.

### II. CONFRONTING PRACTICAL PROBLEMS OF IMPLEMENTATION

The preceding part considered the effects of an idealized system of mandated anonymity. But to

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<sup>28</sup>David Donnelly et al. Going Public, 22 The Boston Review (April-May, 1997).



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avoid the nirvana fallacy, one must consider whether and how anonymity could be implemented. If candidates could easily decode the identity of their contributors, then the superficial requirement of anonymity would be counterproductive: We would lose the limited benefits of public disclosure and gain nothing, thus permitting quid pro quo corruption to proceed unabated. This part considers the details of implementation, assesses the extent to which anonymity can be maintained, and ultimately concludes that, even given predictable evasions, mandating donor anonymity is sufficiently workable to remain a plausible candidate for reform.

While it has been difficult to force candidates to disclose meaningful and timely information about the identity of their contributors, implementing a regime that keeps candidates in the dark is potentially even more daunting. To mitigate problems of implementation, the implementation rules in this section are organized around a “mimicry” principle. Contributions are kept effectively anonymous not by restricting the signals that true donors can send to candidates, but instead by allowing faux donors to send identical signals. As long as faux donors can mimic the signals of true donors, candidates will have difficulty discerning whether a contribution was actually made.

### *A. Details of Implementation*

Mandated donor anonymity might be applied to any election. As mentioned above, some judicial election reforms have already successfully prevented candidates from learning the identity of their donors. For concreteness, this section considers how to implement a regime of mandated donor anonymity in federal elections.

#### 1. Private versus public administration.

One could imagine a system of literal donation booths controlled by the government: Once the

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curtain closed, people could drop their cash donations into a slot for the candidate of their choice, and the government would periodically pass these contributions on to the appropriate candidates. Just as there is a "ceremonial aspect[ ] of voting ... [that] is to some degree a self-conscious act of citizenship,"<sup>29</sup> visiting a government donation booth might in time also come to be viewed as a constitutive act of citizenship.

Donation booths - whether publicly or privately administered - run greater risks of fraud than do voting booths. For either "booth" to be effective, we must trust the administrator not (1) to reveal for whom citizens vote or to whom they donate, or (2) to misapply the donation or vote to an unintended candidate. But with donations - unlike votes - there is the added risk that the administrator will convert the gift to her own private benefit.

Because of this embezzlement risk, we tentatively prefer a privatized system of blind trusts, operated by seasoned trust companies (say, those in existence for at least ten years) with substantial, preexisting assets (of more than, say, \$100,000,000).<sup>30</sup> More than 1000 financial institutions satisfy these requirements. Requiring the trust companies to be seasoned and large would make donors, candidates, and the public more likely to trust the participating institutions. The diversity of qualifying institutions would help assure that all candidates are treated fairly. But because the threat of defalcation is so high, the trusts' records should be publicly audited ten years after each election. This ex post auditing would inform donors whether their donations had been properly routed and would allow the public to assess whether donations were - notwithstanding the trust - purchasing access or influence. Computer encryption software might

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<sup>29</sup>Strauss, *supra* note 26, at 1376 n.18.

<sup>30</sup>Similar requirements have been imposed on trusts serving as corporate fiduciaries. See Cal. Fin. Code 1500-1591 (West 1989) (imposing requirements such as security deposits on trust companies); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 *Yale L.J.* 625, 638-39 & n.64 (1995) (describing modern-day, institutional trusteeships).

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make it possible for donors to verify anonymously that their contributions were credited to the appropriate campaign funds.

### 2. Mechanics of blind trust operation.

Each candidate, political party, and PAC would choose a qualified institution to establish a separate blind trust account. Representatives of the blind trust could not be employed in positions influencing access or policy and, as a prophylactic, should be prohibited from privately communicating with candidates or campaign workers. The core regulation would require all donations to individual candidates, political parties, or PACs to be made to the blind trusts by mail. Campaigns would no longer be allowed to accept money in cash or by check. Campaigns would still need check books, but not deposit slips. The blind trusts would conceal the source of all contributions larger than \$200. Large donors would have the option of having the trust disclose that they had given up to \$200, but under no circumstance would the trust identify a donor as having contributed more than \$200. Allowing donors to prove that they have contributed to a particular campaign mitigates the free speech burden of the regulation. The exact dollar amount for the anonymity threshold is unimportant, but the notion is that small donations pose a much smaller threat of corruption.

The blind trusts would then report to the candidates on a weekly or biweekly basis how much money had been donated, but would not detail the amounts given by large donors. The frequency of reporting would have to balance the candidate's need to know how much she could spend against the desire to impede candidates from decoding the identity of particular donors. Hourly disclosure of amounts available would allow a donor to say, "I bet your total went up \$100,000 during the past hour." Large donations on Israel's independence day might analogously signal contributors' interest in pro-Israel policies.

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One way to shorten the time between disclosures would be to require that trusts intentionally obscure the presence of large donations. Trusts might even be allowed to report the daily amount available for spending, but this amount might be calculated using a randomizing procedure that breaks up unusually large contributions for future disclosure.

### 3. Donor speech.

One might consider reinforcing the anonymity of the blind trust by prohibiting donors from discussing their contributions with the candidate or others. Such a prohibition could be backed up by criminal penalties, civil penalties, or both. But such a regulation is fraught with problems of enforcement and constitutionality. The law can do little to stop private, one-on-one conversations between donors and candidates. Even if such conversations could be regulated, the resulting burden on donors' free speech rights may not be compatible with the First Amendment.

A "cheap talk" regime is preferable. Just as anyone can tell Clinton they voted for him, allowing anyone to tell Clinton they gave him money - without more - would not give Clinton a very good idea of who his true contributors were. For the blind trusts to be effective, it is only necessary that donors cannot credibly communicate whether they have contributed. As long as the candidate cannot verify whether the donor's representation is true, the blind trust can impede influence peddling. Some will argue that it is simply wrong for the government to tacitly promote lying. However, it can be a civic virtue to dissemble in order to disrupt criminal activity. The possibly apocryphal World War II story of the Danish King wearing - and urging other Christians to wear - the Jewish yellow star is a prime example of the virtue of social

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"ambiguation."<sup>61</sup> More prosaically, the ubiquitous (and oftentimes false) cab driver stickers - "Not more than \$20 kept by driver" - shows that lying to discourage crime is an acceptable exception to truth telling.

Donors wishing to prove they donated to a particular candidate may brandish a canceled check showing the amount of their donation. To mitigate this problem, trusts should be required to providing a check cashing service for nondonors. A faux donor could mail a check to a trust with a note asking the trust to deposit the check and (once it had cleared) to mail back to the faux donor a reimbursement check. The faux donor requesting reimbursement would receive both a canceled check from her bank and a reimbursement check from the trust. A candidate seeing a canceled check made out to a blind trust couldn't be sure whether the canceled check evidences a contribution or merely a cash conversion. And since the trust's reimbursement check could be cashed or posted to a different account, showing the candidate a bank statement or audited books would not prove that a contribution had been made. As with cheap talk, appropriate regulation could undermine the credibility of canceled checks.

Donors wanting to signal their gift credibly might instead mail the check to the blind trust while in the presence of a campaign representative (or simpler yet, give the check to the campaign worker to mail to the trust on the donor's behalf). We favor prohibiting such behavior. Yet even here, a system of mandated anonymity does not need to rely solely on the deterrent effect of ex post penalties. It might be advisable to give donors a ten-day cooling-off period, during which they could cancel any donation. As long as a period exists in which donors can privately cancel their contributions, the credibility of previous public signals will be attenuated.

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<sup>31</sup>See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. Chi. L. Rev. 943, 1010-11 & n.225 (1995) (citing Jewish Museum, *Kings and Citizens: The History of the Jews in Denmark 1622-1983* (Jorgen H. Barfod, Norman L. Kleebatt & Vivian B. Mann, eds., 1983)).

4. Soliciting contributions.

The fundamental requirement would be that, in fundraising, no one from the candidate's campaign could accept contributions; only representatives of the blind trust could accept checks (via the mail). Candidates could still ask individuals for support, but they could not close the deal. Bob Dole could still have fundraisers and limit invitations to rich, registered Republicans. But under this regime of mandated anonymity, the invitations could not be conditioned on a campaign contribution, and the dinner could not be priced above cost. Instead, campaign workers could do no more than distribute postage-free envelopes addressed to the blind trust so that attendees could later mail in a contribution. Making it more difficult for candidates (and their political opponents) to solicit funds personally from wealthy contributors might alleviate the current fundraising marathon.<sup>32</sup>

This scheme of mandated anonymity would go a long way toward eliminating the longstanding practice of rewarding successful fundraisers with ambassadorships. The representatives of the trust could not take jobs or even consult with the administration. A candidate might observe a fundraiser's inputs (how many New Hampshire coffees she hosted), but not her output (how many donations she generated).

5. Drawing the line.

In deciding what types of contributions to subject to the anonymity requirement, we will be obliged to distinguish close cases. Line drawing is a necessary feature of any reform program trying to constrain

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<sup>32</sup>Under a regime of mandated anonymity, candidates are likely to spend less time fundraising because this activity would be less productive and because the candidate would need fewer funds to effectively compete with an opponent who faces similar constraints. There is the theoretical possibility - called an "income effect" - that if anonymity causes less giving generally, then candidates will respond by engaging in more fundraising. As an empirical matter, however, economists typically find that substitution effects dominate income effects - that is, when fundraising becomes more difficult, politicians are likely to spend less time on it (especially when their opponents' fundraising also becomes more difficult).

the influence of money in the political sphere. To begin, the in-kind contribution of services by political volunteers would not be made anonymously because it would be impossible for a candidate not to know their identities. Thus, people could still volunteer in order to receive undeserved access or influence. There is also no practicable way to stop candidates from knowing how much they contribute to their own campaign.<sup>33</sup>

Benefit concerts present a difficult issue. If Barbra Streisand performs a series of concerts to benefit the Clinton campaign, Clinton could easily estimate how much revenue is being generated. Allowing benefit concerts would provide an easy end run of the rule mandating that fundraising dinners must be priced at cost. Many of today's \$1000-a-plate fundraising dinners could become tomorrow's \$1000-a-seat benefit concerts with only nominal entertainment. Accordingly, performers should be prohibited from contractually dedicating the proceeds from an event to a political campaign. The performer or audience could independently contribute or claim that they gave or will give the proceeds; they just couldn't enter into an enforceable contract ensuring that attendance ensures contribution. We would still allow politically motivated concerts and rallies, but any profit would need to escheat to the state (or possibly to a nonpolitical charity).

*B. Can Anonymity Be Maintained?*

The metaprinciple of implementation is to allow nondonors to ape easily any signal that true donors might try to send. If nondonors can mimic the signals of donors, then donors will have difficulty credibly communicating their contributions. This principle explains the specific regulations regarding donor speech,

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<sup>33</sup>But as the Supreme Court has noted, contributing to yourself does not present the same risks of quid pro quo or monetary influence corruption. See *Buckley v. Valeo*, 424 U.S. 1, 53 n.59 (1976) (per curiam). Self-contribution, however, often exacerbates problems of inequality.

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check cashing, and cooling-off periods. Instead of prohibiting donors from speaking, the regime allows nondonors to use the same words. To undermine the credibility of a donor's canceled check, the regime gives nondonors the option of acquiring an identical canceled check by merely cashing a check with the blind trust. And to undermine the credibility of mailing a check in the presence of a campaign worker, the cooling-off period allows nondonors to publicly donate and then privately cancel.

There are, however, limitations to the mimicry principle. A poor person can not credibly mimic the representations of a rich person - saying that she donated \$100,000, for example. But it is unlikely that ability to pay is a close enough proxy for willingness to pay to cause politicians to kowtow to rich people generally. For example, if a law mandated that sellers of Cadillacs could not learn the identity of their customers, sellers would not respond by giving Cadillacs to the universe of rich people. Even if wealth (ability to pay) signals something about whether a donor actually gave, the important point is that the signal would be much weaker than it is now. Similarly, it would not be credible for liberals to represent that they contributed to conservatives (or vice versa). In the shadow of a donation booth, Ralph Nader could not credibly represent that he had donated to the Republican Party. At the end of the day, rich conservatives are the only people who would potentially make large soft money contributions to the Republicans. Therefore, it is reasonable to ask who among this group would be willing to go to the trouble of becoming a faux donor - to noise up the system, for example, by making the ratio of canceled checks to net donations fairly high. My answer is that the current class of Republican contributors who either feel they are being extorted or think they are paying for favors are prime candidates to fake donation. Victims of extortion are likely to have few qualms about lying to avoid the political shakedown, and even those contributors who are trying to corrupt the system by buying political favoritism may prefer to get the same favoritism for a



reduced price.

Although this proposal tries to undermine a donor's ability to communicate her contribution credibly, I am under no illusion that this (or any other) system of anonymity would be completely successful in keeping candidates uninformed. Some inventive donors, with the aid of inquiring candidates, will undoubtedly devise methods to credibly signal. For example, donors or candidates may bribe a representative of the blind trust to violate her fiduciary duty and disclose donor identities.<sup>34</sup> Undoubtedly, incumbents will have an easier time than nonincumbents discovering the identity of their contributors because a previous history of giving provides a stronger basis for belief; nonincumbents often must start with no track record of fundraising. But simply relying on reputation will not suffice. A history of giving when donations were public does not create a very strong reputation for continuing to give once contributions become anonymous. Candidates will rightfully be concerned that even faithful contributors, once behind the cloak of anonymity, will decide to chisel on their past tradition of giving.

The most predictable and serious evasions of mandated anonymity is likely to be a substitution toward "independent expenditures" or "issue advocacy." The test for what constitutes independence turns on who controls the content of the speech. Independent expenditures - in contradistinction to "coordinated expenditures" - fund political expression that is not controlled by a candidate's campaign. Independent expenditures are made without "prearrangement and coordination." The test for "issue advocacy" turns on the content of the speech itself. Issue advocacy - in contradistinction to "express advocacy" - does not expressly advocate the election of a particular candidate.

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<sup>34</sup>The FEC could be empowered to audit campaigns for compliance with the anonymity regulations. Much like Fair Housing tests, such audits could determine whether campaign officials are willing to conspire with purported donors or trust representatives to learn donor identities.

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Because the Supreme Court has shown greater willingness to protect political speech that it deems either "issue advocacy" or an "independent expenditure," mandating donor anonymity for large gifts would undoubtedly cause more extensive use of these two end runs. And it is clear that independent expenditures and issue advocacy still pose some danger of corruption. "Candidates often know who spends money on their behalf, and for this reason, an [independent] expenditure may in some contexts give rise to the same reality and appearance of corruption."<sup>35</sup>

**Figure 1**

		Content Test	
		Express Advocacy	Issue Advocacy
Control Test	Independent		
	Coordinate		

Mandated Contributor Anonymity Constitutionally Permissible	
Mandated Contributor Anonymity Not Constitutionally Permissible	

As shown in Figure 1, these two dichotomous categories create four permutations of control and content. Coordinated express advocacy, like candidate express advocacy, is the most regulated type of political speech. One might initially predict a hydraulic response if donor anonymity were applied to this

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<sup>35</sup>Sunstein, *supra* note 8, at 1395 (citation omitted).

category: Every dollar of direct contribution that the donation booth deterred might simply reemerge in one of the three other boxes - as an independent expenditure, an issue advocacy campaign, or both. Recent history has already provided ample evidence of substitution toward these three categories.<sup>36</sup> What's more, because candidates are not accountable for "independent" ad campaigns, these campaigns are likely to be particularly negative and reckless. It is not surprising, therefore, that the infamous "Willie Horton" ads were independent expenditures.<sup>37</sup>

If mandated anonymity is likely to produce anything like a dollar-for-dollar hydraulic shift from direct contributions to independent expenditures or issue advocacy, the benefits of mandated anonymity reform would largely be lost. However, (1) mandated anonymity can be extended to reduce the possibility of an end run, and (2) where mandated anonymity is not constitutionally permissible, existing structural factors will ensure that independent or issue advocacy will not be a perfect substitute for corrupt, direct contributions. What would it mean to extend mandated anonymity? To begin, it is straightforward to cover coordinated issue advocacy. As a constitutional matter, coordinated speech can be regulated as much as direct candidate speech.<sup>38</sup> And although there is currently a lively debate about whether current law

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<sup>36</sup>Both Clinton and Dole orchestrated the use of party soft money to fund coordinated issue campaigns. See Jill Abramson, 1996 Campaign Left Finance Laws in Shreds, *N.Y. Times*, Nov. 2, 1997, at 1 ("[T]he Democratic committee spent at least \$32 million on early issue advertising. The advertisements, which began airing in mid-1995, were created by the Clinton-Gore team and prominently featured the President in patriotic settings."). Labor and business spent millions on independent issue campaigns in the 1996 election cycle. See Eliza Newlin Carney, Campaign Reform Debate Will Linger, 22 *Nat'l J.* 2026 (1997).

<sup>37</sup>See Richard L. Hasen, Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers, 84 *Calif. L. Rev.* 1, 19 n.79 (1996).

<sup>38</sup>See *Colorado Republican Fed. Campaign Comm. v. FEC*, 116 S. Ct. 2309, 2317 (1996) (plurality opinion) (indicating that the Court has treated coordinated expenditures as contributions, which Congress may constitutionally regulate).

regulates coordinated issue advocacy,<sup>39</sup> there is little question that informational regulation (such as mandated disclosure or mandated anonymity) is constitutional.

Independent express advocacy poses a harder problem. This circumvention, however, could also be substantially reduced by requiring that such campaigns be funded solely by contributions from individuals (not corporations or unions) funneled through blind trusts.<sup>40</sup> Under such a regime, organizations could establish committees to orchestrate independent express advocacy ad campaigns, but the funding for such campaigns would need to come from individuals' donations to blind trusts. As with the earlier anonymity proposal, individuals would be able to communicate credibly that they had contributed (up to \$200) and thus, for example, have their names appear in a newspaper advertisement saying "we support candidate x." But such individuals would not be able to signal the amount of a large contribution.

Requiring that independent express advocacy be funded by individual anonymous donations would substantially reduce the viability of this circumvention. To be sure, some wealthy individuals would still be able to completely fund an independent express advocacy campaign.<sup>41</sup> But given the costs of effective advertising, we predict that it would be difficult to raise individual contributions in the shadow of a blind trust. Those donors who are deterred by mandated anonymity from contributing directly to a candidate's campaign are unlikely to give to a blind trust that needs numerous contributions for effective independent

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<sup>39</sup>See, e.g., Jill Abramson, *Tape Shows Clinton Involvement in Party-Paid Ads: Legal Line Is Unclear*, N.Y. Times, Oct. 21, 1997, at A1 (discussing television issue ads that "advanced the Democratic Party's agenda as well as Mr. Clinton's").

<sup>40</sup>See *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 654-55 (1990) (prohibiting independent political expenditures from a corporation's general treasury is constitutional); *Buckley v. Valeo*, 424 U.S. 1, 80-82 (1976) (per curiam) (mandating disclosure with regard to independent express advocacy is constitutional).

<sup>41</sup>For example, Michael R. Goland, "apparently motivated by the pro-Israel policies of Senators Paul Simon and Alan Cranston, funded large independent expenditure campaigns against their opponents." Hasen, *supra* note 37, at 19 n.79.

express advocacy. And few individuals have the wherewithal to individually fund effective independent ads.

The most unyielding problem concerns substitution toward the upper right-hand box in Figure 1 - that is, substitution toward independent issue advocacy. This combination of content and control has proven constitutionally unregulable. *Buckley v. Valeo* suggests that mandated disclosure of speaker identity in this quadrant is unconstitutional, and mandated anonymity would fare no better. Still, some progress might be made by expanding the definition of what counts as express advocacy. The Supreme Court might accept a broader definition than the "magic words" test suggested in *Buckley*. The McCain-Feingold Bill attempts just this broadening by defining as express advocacy any advertisements picturing or naming a candidate within thirty days of a primary election or sixty days of a general election. But instead of capping such expenditures or requiring disclosure of the names of those people who fund such campaigns, mandating contributor anonymity would more effectively balance the government's interest in deterring corruption with the First Amendment interest in allowing unfettered discussion of political issues.

Even under the broadest imaginable constitutional definition of express advocacy, there will still be significant opportunity to use independent issue ads to affect the outcome of an election. But independent issue ads are not perfect substitutes for direct donations - especially donations made as part of quid pro quo corruption. As the Supreme Court has repeatedly emphasized:

Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.<sup>42</sup>

This quotation nicely underscores the procedural and substantive differences between direct contributions

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<sup>42</sup>*Buckley*, 424 U.S. at 47.

and independent expenditures. Procedurally, the absence of prearrangement and coordination makes it more difficult for candidates and contributors to agree on the terms of quid pro quo corruption. The inability of candidates to solicit these expenditures, in particular, is likely to reduce a candidate's ability to extort (extract rent from) potential donors. Substantively, the absence of prearrangement and coordination makes it more likely that the independent expenditure will be spent differently than the candidate would have spent a direct contribution. The Supreme Court is overly sanguine in suggesting that, "independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." But because candidates would often use the money differently - for example, on express advocacy - candidates will tend to value \$1,000,000 of independent issue ads less than \$1,000,000 of direct contributions.<sup>43</sup>

Under a regime of mandated anonymity, candidates might still take positions in order to induce independent issue ads on their behalf (and vice versa), but the prohibition of both coordination and express advocacy acts as a tax on such indirect giving, tending to reduce its value to the candidate. Because mass communication exhibits dramatic economies of scale, it may be much more difficult for individuals who had been giving, say, \$10,000 or \$20,000 to the Democratic Party (and its candidates) to find an equally effective issue ad substitute. To be sure, independent issue ad organizations will start soliciting contributions, but these organizations are likely to find it more difficult to convince the erstwhile political donor to contribute.

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<sup>43</sup>An exception to this tendency might occur when the independent expenditure is used for purposes the politician supports, but doesn't want attributed to herself - for example, "going negative" by attacking her opponent. See text accompanying note 37 supra (discussing the Willie Horton ads). Yet the fact that independent expenditures are attributed to another speaker can often be a political liability. An independent ad campaign paid for by, say, Jane Fonda or tobacco interests might alienate as many voters as it persuades. Hence, independent expenditures by well-heeled but unpopular speakers would be much less valuable than direct contributions.

While I concede mandated anonymity would lead to an increase in independent issue ads, I simultaneously predict that a regime of mandated anonymity would nevertheless reduce quid pro quo and monetary influence corruption by reducing the overall level of direct and indirect contributions - i.e., both independent expenditures and issue advocacy. A donation booth is likely to dramatically reduce the number of five and six figure "soft money" contributions. Moreover, mandated anonymity would prohibit the current practice of PAC bundling – whereby PACs gain influence with candidates by bundling together contributions from individual donors.

The predictable, hydraulic shift of contributions toward less accountable issue advocacy -- even if only partial -- is a reasonable grounds for ultimately opposing a mandated anonymity regime. But this hydraulic criticism perversely should also undermines the conviction that mandated disclosure by itself will be effective in deterring corruption. If mandated disclosure could deter corrupt direct giving, the hydraulic critics would have to fear that the same corrupt contributions would reappear as anonymous "issue advocacy" ads.<sup>44</sup> Mandated disclosure might not deter corruption but merely shift it to less accountable independent expenditures. Proponents of mandated disclosure must admit either that finance regulation can sometimes deter unwanted direct contributions without creating an unacceptable substitution or that mandated disclosure is simply window dressing which is not really expected to deter unwanted contributions. My intuition is that the hydraulic response is not a concern when it comes to mandated disclosure because we don't believe that disclosure deters very many direct contributions in the first place.

*C. Is the Game Worth the Candle?*

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<sup>44</sup>See Sullivan, *supra* note 2, at 690 ("[C]ompelled disclosure avoids a regime of absolute laissez-faire. Even this partial deregulation might have unintended consequences.")

## DISCLOSURE V. ANONYMITY -- P. 30

This section will consider three additional drawbacks of the scheme -- beyond the shift of money to less accountable issue advocacy. While this essay has previously argued that a candidate had a legitimate interest in learning the identity of her contributors, the donation booth also denies identity information to voters and other donors. This section considers whether preventing these people from learning donor identities undermines the usefulness of mandated anonymity. But first the section considers an even more fundamental problem: whether anonymity would unduly limit a candidate's ability to speak.

### *1. Less candidate speech.*

The claim that mandated anonymity could cause a campaign-financing crisis must be taken seriously. Anonymity exacerbates the donor's paradox for large donors and might lead to a dramatic drop-off in giving. As a general matter, donors like to be recognized for their charity. The donation booth may have an overbreadth problem in that contributors who currently give, in part, to acquire status among their peers may be deterred from giving through blind trusts. Even donors who are not motivated by a desire to corruptly influence policy may thus be chilled by mandated anonymity.

Access to the media requires funding. A reduction in donations could mean a reduction in media access. In this regard, mandated anonymity could limit a candidate's ability to speak - and the public's right to listen. Indeed, the very uncertainty of the effect of mandated anonymity on contributions could give policymakers pause.

A related concern is that, by reducing the ability of candidates to speak, mandated anonymity will unduly increase the influence of other speakers, such as the media, unions, and rich, self-funded candidates. Media speech, the quintessential independent expenditure, will go unregulated under any reform proposal. We might worry about who will be next in line to influence the candidate corruptly if anonymity undermines



the influence of large donors. Candidates unable to sell influence in exchange for contributions might begin to kowtow to the imagemakers of the mass media. It might be better to countenance the undue influence of large donors under the current system than to transfer this influence to an even smaller media oligarchy. Under this theory, the contributions of James Riady and the millions of other millionaires among us may provide a Jeffersonian counterweight against the potentially disproportionate influence of Citizens Hearst or Murdoch - or the even less accountable corporations and unions that bankroll issue ads.

Nevertheless, facilitating quid pro quo and monetary influence corruption is too high a price to pay for political speech. The Constitution doesn't require Congress to facilitate corruption in order to subsidize political speech. Prohibiting quid pro quo deals might also substantially reduce the ability of candidates to speak, but the First Amendment doesn't mandate generating money to produce a meaningless debate in which donors have already purchased candidates' positions outside the realm of open deliberation. If noncorrupt private donations do not sufficiently fund campaigns or offset the undue influence of media moguls, we should supplement private contributions with public money. A belief that mandated anonymity would produce far fewer net political expenditures than a mandated disclosure should be a signal that disclosure by itself would not be effective in deterring corruption.

*2. Less donor information for voters.*

Mandated anonymity keeps voters - as well as candidates - in the dark about donors' identities. Denying voters this information could be problematic. The Supreme Court in *Buckley* identified two adverse effects:

[Disclosing the identity of a candidate's donors] allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the

interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.<sup>45</sup>

The second advantage of donor identity is absent under a system of mandated anonymity: Candidates are not "more likely to be responsive" to donors if they don't know who their donors are. Moreover, it is unclear whether the first effect of donor identification - more precisely placing the candidate in the political spectrum - should be classified as an advantage. It might be more conducive to democratic deliberation for voters to learn about a candidate's positions on policy matters rather than to learn whether Jane Fonda or the NRA contributed to the candidate's campaign. Individual donors at times may have better information - possibly based on private conversations with the candidates - about a candidate's true intentions than could be gleaned from the public record. But because there are other avenues of gaining this information, the government's interest in contributor identity as a proxy for candidate beliefs is less compelling than its interest in deterring corruption.

The proposed regime of mandated anonymity also partially accommodates the voters' interest in donor identity. Under the proposal, a contributor would have the option of having the blind trust disclose the amount of her contribution up to \$200. Given the pervasive interest of donors in identifying themselves, it is likely that the vast majority of donors would opt to be identified as having given something. Given that voter knowledge of donor identity is less important in a regime in which candidates as well as voters are kept in the dark, and given that some voter information about donor identity would be generated under the proposed system of optional partial disclosure, the public's interest in donation information does not ultimately militate against the proposed anonymity regime.

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<sup>45</sup>Buckley v. Valeo, 424 U.S. 1, 67 (1976) (per curiam).

*3. Less donor information for PAC contributors.*

Finally, mandated anonymity will make it more difficult for donors to monitor how PACs and other political intermediaries spend their money. Under the proposed system, PACs would only have the option of disclosing a donation of \$200 or less to any one candidate. Prospective PAC donors would have more difficulty assessing whether the PAC had served their interests effectively.

For those who think PAC influence is a destructive force in our polity, disrupting donors' ability to monitor PACs is all to the good because potential PAC donors who are unable to monitor are less likely to contribute. One might argue that mandated anonymity goes too far in impeding the ability of insular groups to organize and influence government. But while mandated anonymity creates this potential harm, I believe this effect would be relatively minor. Restricting PAC donor information is unlikely to disrupt PAC formation because most PAC donors don't avail themselves of this information.<sup>46</sup> Most donors give to Newt Gingrich's leadership PAC, for instance, because they trust his ideological and political instincts, not because they have microanalyzed the effectiveness of the way in which his PAC allocates its contributions. Mandated anonymity might disrupt PACs because donors would not be as willing to donate to an organization that can no longer corrupt/influence politicians, but this effect is a benefit rather than a cost of the proposal.

III. CONSTITUTIONALITY

Mandated anonymity is clearly constitutional. It burdens speech less than mandated disclosure and is more likely to further the government's compelling interest in deterring corruption. And while the

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<sup>46</sup>Joseph P. Kalt & Mark A. Zupan, Capture and Ideology in the Economic Theory of Politics, 74 Am. Econ. Rev. 279, 283 (1984)

Supreme Court upheld the constitutionality of mandated disclosure, appreciating the possibility of mandated anonymity calls into question whether a disclosure regime constitute the least restrictive alternative required by the First Amendment.

In locating the exact anonymity burden, we should begin by remembering what the proposal does not do. It does not affect how much a donor can contribute, and it does not limit the words a donor might say. the regime would even allow a donor to prove she had given up to \$200. The only burden of the anonymity proposal is that donors could not credibly signal that they had given more than \$200. The inability to prove a large contribution certainly burdens a donor's ability to communicate. Reducing the "expressive value" of a contribution might deter some large donors from giving.

However, the Supreme Court's jurisprudence suggests that the size of this burden is rather marginal, particularly because donors can prove they contributed \$200. In discussing the burden of contribution limits, the Court in *Buckley* found that:

a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing.... A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.<sup>47</sup>

This analysis suggests that a donor's burden of proving that she gave Clinton \$1000 instead of \$200 should be considered only "a marginal restriction upon the contributor's ability to engage in free communication."

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<sup>47</sup>Buckley, 424 U.S. at 20-21.

## DISCLOSURE V. ANONYMITY -- P. 35

The quantity of communication involved in proving that a donor gave a larger amount "does not increase perceptibly." And the effect of the restriction is mitigated by the donor's unrestricted ability to speak independently in favor of a particular candidate.

Ackerman's "brute property" argument<sup>48</sup> correctly identifies a deeply held impulse in our polity: "It's my property and I have a right to use it to support any candidate I want." The donation booth accommodates this impulse while simultaneously restraining property's influence. The donation booth does not affect how property can be used, nor does it limit the words (or other signals) a donor may employ to describe her use. But because the ability to prove credibly how one uses her property is not a firmly established concomitant of ownership, the donation booth does not directly contradict the "brute property" impulse.

The constitutionality of mandated anonymity can most clearly be demonstrated by comparing the constitutional costs and benefits of the specific proposal to two other free speech restrictions that have passed constitutional scrutiny: mandated voter anonymity and compelled disclosure of donor identity (reporting requirements). By showing that mandated anonymity is less burdensome and more supportive of the government's interest in preventing corruption, these comparisons provide two *a fortiori* arguments for the constitutionality of anonymity regulation.

First, the constitutionality of the voting booth - i.e., mandated voting anonymity - suggests that mandated donor anonymity is also constitutional. The voting booth also burdens political expression. No matter how much a conservative wants, she can never prove she did not vote for McGovern, nor can a liberal prove he did not vote for Reagan. Since voting is the quintessential act of political expression,

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<sup>48</sup>See Ackerman, *supra* note 3, at 78

denying citizens the right to prove for whom they voted is surely more burdensome than denying citizens the right to prove they gave a candidate more than \$200.<sup>49</sup>

Although the privacy of the voting booth is an innovation of less than 100 years' standing, we cannot conceive that the Supreme Court would strike down this form of mandated anonymity as unduly burdening voters' free speech rights. Opponents of mandated donor anonymity will be hard pressed to explain why a donation booth is unconstitutional, but a voting booth is not.

Second, the Supreme Court's willingness in *Buckley* to approve compelled disclosure of donor identity suggests that compelled nondisclosure is all the more constitutional. Mandated nonanonymity is more burdensome than mandated anonymity. The Supreme Court has traditionally protected the right to silence or anonymity much more than the the right to speak credibly. Plenty of cases can be found where the Supreme Court has struck down regulations requiring speakers to identify themselves.<sup>50</sup> But it's hard to find cases where the First Amendment has been abridged because a statute won't allow a speaker to prove what he says is true. Indeed, the strong antilibel impulse enunciated by Justice Hugo Black and others makes it harder for speakers to signal the truth of their allegations credibly because false statements often do not expose the speaker to monetary damages. Mandated disclosure may deter potential donors from giving to unpopular causes for fear of retaliation or ostracism; in comparison, the chilling effect on those

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<sup>49</sup>The government's interest in preventing vote as compared to donation corruption cannot easily explain why the voting booth would stand on a firmer constitutional footing than the donation booth. The danger of donation corruption is greater than the danger of voting corruption because wealth is much more concentrated than votes. The transaction costs of vote corruption are much higher because candidates would need to cut deals with many more people for vote corruption to have an effect.

<sup>50</sup>See, e.g., *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 353 (1995) (striking down an Ohio statute that prohibited the distribution of anonymous campaign literature as a violation of the First Amendment); *Talley v. California*, 362 U.S. 60, 66 (1960) (striking down a city ordinance that forbade the distribution of anonymous handbills).

legitimate donors who want to prove they gave more than \$200 should be considered only a secondary concern.

Mandated disclosure is also less likely to further the government's interest in preventing corruption. Even though the Supreme Court suggested that mandated disclosure could deter corruption, it has proved exceedingly difficult to prove either quid pro quo or monetary influence corruption from the mere knowledge of identity. As adumbrated in Part I, donor anonymity is more likely to deter corruption because uninformed candidates have less opportunity to peddle influence or change their positions in the hope of garnering greater contributions -- and this effect is likely to be stronger than any voter discipline caused by a mandatory disclosure regime.

Indeed, the possibility of mandated anonymity calls into question the constitutionality of mandated disclosure. The First Amendment requires not only that the effect of furthering the government's compelling interest outweigh the speech burden, but that government choose the least restrictive alternative for achieving its compelling interest.<sup>51</sup> *Buckley* did not discuss this additional "least restrictive alternative" requirement in constitutionalizing mandated disclosure, probably for the simple reason that the Court thought that lawmakers' only relevant informational regulatory options were mandated disclosure or laissez faire regimes. But as once we appreciate that mandated anonymity can provide a smaller speech burden and more strongly deters corruption -- it becomes difficult to characterize mandated disclosure as the least restrictive alternative.

#### CONCLUSION

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<sup>51</sup>See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). See generally Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. Pa. L. Rev. 2417 (1996).

This article stands against the strong consensus in favor of disclosure, but then again, so does the secret ballot. The strategy of keeping the candidate as well as the public in the dark has a long pedigree. Maimonides long ago extolled the benefits of anonymous charity.<sup>52</sup> We should remind ourselves why we chose to make voting a solitary act. Indeed, anyone opposing mandated donor anonymity needs to explain why we shouldn't also jettison mandated voting anonymity.

Mandated anonymity also provides a useful perspective from which to rethink whether mandated disclosure can be defended. In the end, reasonable people might reject the donation booth because of the likely increase in issue advocacy. If mandated anonymity induces even a partial shift of contributions toward this form of reckless and unaccountable speech, we might not want to extend the voting booth rationale to campaign finance. But mandated disclosure regimes - if effective - should give rise to similar hydraulic effects. The visceral sense that mandated disclosure would not create a similar shift probably stems from the sense that few corrupt donations would in fact be deterred by a disclosure requirement. For the CATO institute which favors the move to a pure disclosure regime largely on libertarian grounds, a pure anonymity regime foster arguably even more donor freedom. It is difficult to advance a priori arguments against mandated anonymity while at the same time advancing a priori arguments in favor of mandated disclosure.<sup>53</sup>

The donation booth is not a panacea, but it keeps faith with the simple and widely held belief that the size

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<sup>52</sup>See Moses Ben Maimon, *The Laws of Hebrews Relating to the Poor and the Stranger* 67-68 (James W. Peppercorne trans., Pelham Richardson 1840)

<sup>53</sup> At a minimum, Congress should change the law to give individual candidates the option of using blind trusts to finance their campaigns. The first question candidates should be asked when they announce their candidacy is whether they will commit to donor anonymity. We hope that candidates would voluntarily comply in order to avoid explaining why they need to know the identity of their donors. But we fear the issue can be demagogued. Opponents of mandated anonymity are likely to respond, "What do the proponents have to hide? Why aren't they willing to reveal who their contributors are?" Of course, these same questions were asked of those early proponents of the secret ballot.



of your purse should not determine your access to government.

7. What details are required in campaign financial disclosure statements? Short Form. PACs are exempt from filing a detailed disclosure statement if neither contributions received nor expenditures made during a reporting period for which a statement is submitted exceed one thousand dollars (\$1,000). Whenever a due date for a campaign financial disclosure statements falls on a weekend day or holiday, such report is due to be filed with the Registry of Election Finance or the county election commission, whichever is required, on the next business day. Rule 0530-1-1-.05(5).