Learning from campaign finance disclosures

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Abstract. In an age of dark money – the anonymous political spending facilitated by gaps in our campaign finance disclosure laws after Citizens United – the Supreme Court’s campaign finance disclosure jurisprudence may be on a collision course with campaign finance disclosure laws. The collision can be avoided if the court right-sizes its assumptions around the informational benefits of campaign finance disclosure. It is therefore urgent to help the court understand what we learn from campaign finance transparency.

Campaign finance transparency teaches us more than one-dimensional information about how progressive or conservative a candidate is. It also helps us learn about candidate type. As I explain in this Article, social scientists, including myself, have run several studies examining voter learning from campaign finance information. When voters learn about a candidate’s position with regards to dark money, they learn and vote differently than if they did not have that information. And, as I show using experimental methods and using data from the FEC audits in the 1970s, where campaign finance compliance information is available to voters, voters reward over compliance and punish failure to comply. In other words, transparency about campaign finance disclosure and compliance informs voters.

These findings point to useful policy innovations for states and cities while the federal government is unable or unwilling to regulate, such as “disclosure disclaimers” and campaign finance audits. I explain implications for the courts, campaigns, and policymakers, as well as limitations on the argument.

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INTRODUCTION

Lev Parnas and Igor Fruman, the now-infamous political donors who were arrested at National Airport with one-way tickets to Vienna, have been indicted for campaign finance violations. Among other charges, they are alleged to have funneled over $300,000 in foreign money through a limited liability corporation (LLC) into political campaigns, including President Trump’s “official” SuperPAC. The SuperPAC has to disclose its donors, but the LLC does not, and so the public’s ability to “follow the money” ends with the LLC’s name and not the foreign sources of the money behind the LLC. The public is kept in the dark.

Dark money, or anonymous spending in our political campaigns, has accounted for at least $1 billion since Citizens United, a sum that greatly undercounts the actual amount of dark spending, because dark money groups have also run thousands of issue ads over that time period. Expanded disclosure requirements can reduce the amount of undisclosed money in our elections. At the federal level, the FEC passed an anemic disclosure regulation, and the Senate has blocked other regulatory efforts to shed more light on the money in our politics.

Some states have passed laws demanding more transparency in our elections, but the Supreme Court’s disclosure jurisprudence may be on a collision course with these laws. Part of the reason for the pending collision is the court’s limited understanding of the informational benefits of campaign finance disclosure. It’s therefore urgent to help the court right-size its understanding of what we learn from campaign finance disclosures.

The Supreme Court has upheld disclosure regulations that support a combination of government interests, namely combatting corruption or its appearance, informing the electorate, and enabling enforcement. However, its definition of corruption is narrow: it only cares about quid pro quo corruption. Moreover, majority opinions striking campaign finance regulations have repeated the legal fiction that some types of spending cannot corrupt – namely, independent expenditures by outside groups (like SuperPACs and in ballot initiative campaigns). For those types of expenditures, which total hundreds of millions of dollars at the federal level, the main rationale for upholding disclosure regulations is that they inform the voters.

But the Court’s understanding of the informational benefit is incomplete, because it is too narrow. The oft-repeated line from Buckley v. Valeo, that disclosure “allows voters to place each candidate in the political spectrum” is correct, as far as it goes. On this one dimensional understanding of how voters choose a candidate, political scientists have established that yes, disclosures can help predict how a candidate will vote once in office.

But we learn more from campaign finance transparency. We learn about a dimension that the court has not considered: we learn about candidate type. As I explain in this Article, social scientists, including myself, have run several studies examining voter learning from campaign finance information. When
voters learn about a candidate’s position with regards to dark money, they learn and vote differently than if they did not have that information. And, as I show using experimental methods and using data from the FEC audits in the 1970s, where campaign finance compliance information is available to voters, voters reward over compliance and punish failure to comply. In other words, transparency about campaign finance disclosure and compliance informs voters.

These findings point to useful policy innovations for states and cities while the federal government is unable or unwilling to regulate. Disclosure disclaimers are only used in one jurisdiction – Montana – and they require a disclaimer that “this advertisement is funded by anonymous sources” at the end of a video ad or on the face of a still or print ad. These disclaimers can inform voters about the parties involved in a campaign without threatening donor privacy or chilling speech. Another useful innovation is campaign finance audits conducted either comprehensively or randomly – rare in our elections. While the benefits and costs of these audits accrue to incumbents (audits occur after the election has happened), my research, presented below, shows that voters use compliance information in order to guide their choices.

The Court should uphold both of these innovations if presented with a challenge to them. First, it has acknowledged that the informational benefit is a “First Amendment interest”, and if it agrees to consider the fuller scope of this benefit, then the informational benefit is a bigger First Amendment interest than the court has contemplated previously. The biggest threat to disclosure disclaimers is that of compelled speech, but stand-by-your-ad requirements were upheld in McConnell v. FEC against a charge of this nature, so the precedents are not in challengers’ favor. And audits are on even firmer footing.

First of all, they implicate both the informational and enforcement interests. Secondly, they are not related to political speech. It would be hard for challengers to make a First Amendment claim that audits “chill” speech. Finally, in other regulatory contexts, the court has repeatedly upheld both audits and the public’s interest in knowing audit results.

The findings also have implications for campaigns and policymakers. In the absence of regulatory changes, campaigns should make hay about their opponents’ relationship to dark money groups and brag about their own “clean hands” by comparison. Policymakers should understand the tradeoffs between the two dimensions of voter information. On the one hand, voters’ ability to predict policy positions is enhanced with broad mandatory disclosure requirements. On the other hand, voters’ ability to learn about non-policy attributes of campaigns, like trustworthiness, is enabled by voluntary disclosures. The more aggressive a mandatory disclosure regime, the less voters will learn about candidate trustworthiness when it comes to campaign finance transparency. I provide several examples of policy levers beyond disclosure disclaimers and audits, including changing the disclosure threshold,
modifying the amount of donor information made public, and eliminating dark money to the extent possible.

The Article walks through this argument. In Part I, I describe the ways in which disclosure of the sources of campaign financing in our elections is incomplete. I then explain, in Part II, the court’s approach to campaign finance disclosure and how social science can help inform the true scope of the information benefit. In Part III, I explain how the court should address campaign finance transparency efforts aimed at informing voters on the “valence” dimension, as well as limitations to my argument. Part IV describes the implications of the argument for courts, campaigns, and policymakers.

I. INCOMPLETE DISCLOSURE OF MONEY IN AMERICAN POLITICAL CAMPAIGNS

Little by little, the courts have emptied the campaign finance regulatory toolkit, by ruling that campaign finance regulations unconstitutionally infringe on the First Amendment rights to free speech or free association.1 As a result, regulation of money in elections centers more and more heavily on disclosure.2 The Supreme Court has upheld disclosure repeatedly in the past six years. While the existing disclosure regime has significant loopholes, the Court seems generally bullish on disclosure.

Disclosure comes in a few forms. First is run-of-the-mill campaign contribution disclosure. Campaigns for federal office who receive direct contributions, say, at a fundraiser or directly to the campaign online,3 gather information about donors (name, address, amount contributed, and employer). If a donor’s aggregate contributions reach the $200 mandatory disclosure threshold, the donor’s information is reported to the FEC in the periodic filings. Most states follow a similar system, though the mandatory disclosure thresholds vary considerably. Disclaimers are another common type of disclosure. Disclaimers are attached to so-called “electioneering communications”. The “Stand by Your Ad” requirements, with the candidate saying “I’m So and So, and I approve this message” are the most familiar example, but disclaimers are required on many kinds of political messaging, like mailers and some (but far from all) online ads.

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1 Contribution limits and restrictions on contributions from foreign nationals are the final, major substantive limits in campaign finance regulation. Before the death of Justice Scalia, commentators predicted that contribution limits could be the next frontier of deregulation. See, e.g., Michael S. Kang, The End of Campaign Finance Law, 98 VA L. REV. 1, 52-56 (2012); Richard Briffault, Corporations, Corruption, and Complexity: Campaign Finance after Citizens United, 20 CORNELL J.L. & PUB. POL’Y 643 (2011). Now that he has passed, much remains uncertain.


3 Not via an intermediary, like ActBlue, which has a different disclosure process.
In the eyes of the court, disclosure is a less-restrictive means of regulating campaign finance, so “[t]he Government may regulate [ ] political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.” Until deregulation gained steam, its proponents urged the court to adopt this “deregulate and disclose” approach. But after some successes in the courts, some deregulatory groups have turned on disclosure. Rather than defending disclosure as a less restrictive means to achieve important governmental interests, they now argue that, like other campaign finance regulations, disclosure impermissibly burdens First Amendment speech.

The existing regulatory framework for disclosure is imperfect, to be sure. Disclosure requirements are arguably both over- and under-inclusive. Critics argue that the current system is over-inclusive at the federal level because it requires disclosure of relatively small contributions – when a supporter’s aggregate contributions reach $200, the campaign must disclose. The anticorruption benefit to government may not furthered by disclosing such small amounts. Less has been written about whether small contributions contain valuable information that improves voter competence. On the one hand, they may not, because candidates are less likely to respond to small time contributors. On the other hand, they may, insofar as one uses the contributions of friends and neighbors as a heuristic about who to support.

So-called “reformers” argue that the current system is under-inclusive because so much money that supports campaigns and ballot initiatives cannot be traced back to its donors. Indeed, if the goal was full disclosure, the Buckley court did away with the possibility of full disclosure four decades ago. Since that time, clever donors have found other ways to skirt disclosure rules through 501(c) organizations and LLCs. Donors seeking anonymity have found it in the past few elections by donating to “social welfare” organizations created under section 501(c) of the tax code or to LLCs. The groups use the donations to make independent expenditures on behalf of or against candidates – but they are not required to disclose their donors for anything but electioneering.
communications (which they avoid making). These groups also pump money into SuperPACs. The SuperPACs are required to disclose their contributors to the FEC, but when the contributor is an LLC or a 501(c) organization, the public is unable to follow the money to its original source. Reformers see 501(c) disclosure as an obvious next step in regulating campaign finance.

In framing the debate, de-regulation activists focus on donor privacy, and they frame the concern as a First Amendment problem bringing lawsuits to challenge existing laws. First Amendment activists and groups preferring nondisclosure bring challenges to state, local, and federal disclosure requirements, usually without much luck. On the political left, activists attempt to bring sunlight to a process – political spending – that is currently quite dark through the legislative and regulatory process. These “reformers” focus on the benefits to voters of having donor information and of disclosure’s ability to deter corruption.

While loopholes persist, the Supreme Court has almost always upheld existing disclosure laws, and it recently denied certiorari on a disclosure challenge. Indeed, the Court has upheld disclosure laws three times in the past...
decade, but with “reasoning more broad than deep.” No challenge to the post-
Citizens United dark money situation has reached the Supreme Court. The
court’s recent, brief rejections of disclosure challenges should not be
overinterpreted, however, particularly given the changing composition of the
court and this deregulatory political climate.

A. “Dark Money”, “Gray Money”, and other “Veiled Political
Actors”

There are several ways that political money is spent without disclosure. In
this sub-section, I briefly review the main ones here.

1. Dark Money and Gray Money

The category of undisclosed spending that most people are familiar
with is money spent by corporations after Citizens United, which allowed
corporations to make independent expenditures from their general treasuries.
After the case, the FEC did not pass comprehensive disclosure regulations, and
other agencies were prohibited from doing so with appropriations riders or

Strong Families challenged the law, because it did not want to disclose donor information. The
law would have required disclosure of donors who earmarked their donations for the voter guide
and those who gave more than $100 to the nonprofit during the election period. Id. at 2376
(Thomas, J., dissenting).
13 Katherine Shaw, Taking Disclosure Seriously, 34 Yale L. & Pol’y Rev. Inter Alia 18 (Apr. 28
14 Such a challenge would be difficult to win and have an uncertain policy result, anyway.
Agency inaction is usually upheld by the courts, and even if it were not, it would be remanded to
the agency to then act – say, by opening a notice-and-comment rulemaking, at which point a
wide array of policies is available. Van Hollen v. FEC is a challenge by Rep. Chris Van Hollen
(D-MD) to an FEC regulation narrowing the scope of disclosure for outside groups. Under the
regulation, only donors who contribute to a group’s express advocacy must be disclosed. The
D.C. Circuit upheld the regulation under Chevron Step Two. Van Hollen v. FEC, 811 F.3d 486,
492-95 (D.C. Cir. 2016), rehearing en banc denied, ___ F.3d ___ (D.C. Cir. 2016).
15 See Katherine Shaw, Taking Disclosure Seriously, 34 Yale L. & Pol’y Rev. Inter Alia 18, 23-
24 (Apr. 28 2016), available at http://ssrn.com/abstract=2772183. This is particularly true in
light of mixed signals from the court regarding how exacting the “exacting scrutiny” should be
for disclosure, as well as the fact that Justices Ginsburg and Breyer were willing to join Justice
Thomas in striking down a disclosure provision in McIntyre. See Part III, infra.
(“None of the funds made available by this Act shall be used by the Securities and Exchange
Commission to finalize, issue, or implement any rule, regulation, or order regarding the
disclosure of political contributions, contributions to tax exempt organizations, or dues paid to
trade associations.”).
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regulatory decisions.\textsuperscript{17} This means that corporations are able to spend money in campaigns without public disclosure of its source.

A related category of undisclosed political spending is “gray” money, or the money laundered through the donor “daisy chain”. Even if a group is subject to disclosure laws, like a SuperPAC, it can receive money from other sources, like dark money groups. When that happens, the disclosure of the group subject to disclosure laws only contains the dark money group’s name, but the money trail goes cold for people hoping to see who are the actual individuals behind the expenditure.

2. *Other “Veiled Political Actors”*\textsuperscript{18}

There are many other ways that political actors can remain “veiled”. First, we can give directly to campaigns, parties, or PACs below the disclosure threshold. When that happens, our identity is not disclosed.\textsuperscript{19}

Groups actively seeking to delay disclosure can make their expenditures late in the cycle. That way, disclosures appear only after the votes have been cast. A colleague, Stan Oklobdzija calls these “Pop Up PACs”. In recent elections, they have been funded mostly by parties, though future election cycles may feature different sources of Pop Up expenditures.\textsuperscript{20}

It is also very common for online advertisements to lack disclaimers that they should otherwise contain.\textsuperscript{21} Running paid advertisements online without disclaimers violates FEC requirements, but it happens a lot, especially by groups at the fringes of the campaigns.\textsuperscript{22}

Disclosure is therefore far from comprehensive. Its gaps have emerged from the Court’s deregulation – inviting new spenders in – followed by inaction by congress and agencies to close the gaps and demand disclosure from the new


\textsuperscript{19} A key exception is when we give online, through a group like ActBlue, which is considered a conduit by regulators and therefore must disclose all contributions it handles, regardless of how small.


spenders. In the next Part, I explain the way the courts analyze campaign finance disclosure regulations.

II. CONSTITUTIONALIZED CAMPAIGN FINANCE

Buckley v. Valeo constitutionalized campaign finance. The plaintiffs in the case argued that parts of the Federal Election Campaign Act unconstitutionally violated the First Amendment freedom of speech and association. The argument – which won the day – is that money spent in campaigns is inextricably linked to the speech that it funds, and that speech is protected by the First Amendment, therefore the money that facilitates the speech should also be protected by the First Amendment.

Because disclosure is analyzed in a First Amendment framework, we only reach analysis of the benefits of disclosure if the court believes that a regulation infringes upon the First Amendment right to free speech or association. If it does, the Court’s amorphous “exacting scrutiny” standard requires that we identify a “substantially related” (Buckley, Citizens United), or even “narrowly tailored” (McIntyre) state interest sufficient to overcome the burden. Depending on the case, the interest must be “overriding” (McIntyre), “sufficiently important” (Citizens United), or even “compelling” (McCutcheon).

The governmental interests the Court has recognized since Buckley are enforcement, deterring corruption, and providing information to the voters (understood narrowly). The FEC does conduct some enforcement actions based on the information revealed in campaign finance disclosures, but FEC enforcement is both slow and rare. Deterring corruption is important, and it is the most-discussed rationale in the disclosure context. Nevertheless, under Chief Justice Roberts, the Court has narrowed its conception of corruption, undermining states’ efforts to regulate campaign finance. That leaves the governmental interest in informing voters bearing a heavy weight for governments defending their disclosure regulations, particularly in ballot initiative campaigns and with outside spenders. As Daniel Ortiz puts it, “disclosure now hangs on this single thread.”

25For more on the limited and contradictory evidence that disclosure chills speech, see Abby K. Wood, Campaign Finance Disclosure, 14 ANN. REV. L. & SOC. SCI. 11 (2018).
Because disclosure regulations are the last robust tool of campaign finance regulations, it is hardly an overstatement to say that what remains of campaign finance regulation turns, in large part, on the government’s interest in improving voter competence. Accordingly, in this section, I focus on the informational benefit.\footnote{For more on the anticorruption benefit, see Abby K. Wood, \textit{Campaign Finance Disclosure}, 14 ANN. REV. L. & SOC. SCI. 11 (2018).} First, I explain the limited imagination the Court has used to date to describe the informational benefit. Then I argue that voters glean much more information from disclosures than the court envisions. It is not just the information contained in the disclosures that informs voters – the quality of the disclosures themselves, and the amount of information disclosed, provide additional information that can enhance voter competence. I back up my argument with recent social scientific findings.

A. The informational benefit

The informational interest is, essentially, an interest in increasing voter competence. While voter competence – the ability of voters to choose the people and policies that represent their values – is not mentioned explicitly in the constitution, the Supreme Court has called it a “First Amendment” interest.\footnote{McConnell v. FEC, 251 F. Supp. 2d 176, 237 (D.D.C. 2003), aff’d in part, rev’d in part, 540 U.S. 93 (2003).} Scholars have argued that it is a constitutional value,\footnote{Elizabeth Garrett, \textit{The Law and Economics of ‘Informed Voter’ Ballot Notations}, 85 VA. L. REV. 1533 (1999).} and that an “effective accountability” canon or “democracy” canon should be recognized in statutory interpretation.\footnote{Christopher S. Elmendorf, \textit{Refining the Democracy Canon}, 95 CORNELL L. REV., 1051 (2010); Richard L. Hasen, \textit{The Democracy Canon}, 62 STAN. L. REV. 69 (2009).}

To date, the informational interest has only been conceived of on the left-to-right policy spectrum. So, in the current understanding, voter competence exists where a voter is able to vote as she would if she had full information about the extent to which the candidates’ preferred policies are aligned with her own.\footnote{Elizabeth Garrett, \textit{The Law and Economics of ‘Informed Voter’ Ballot Notations}, 85 VA. L. REV. 1533, 1534 (1999) (citing Elisabeth R. Gerber & Arthur Lupia, \textit{Voter Competence in Direct Legislation Elections}, in \textit{Citizen Competence & Democratic Institutions}, 147, 149 (Stephen L. Elkins & Karol Edward Soltan eds., 1999)).} As I will argue in Part III, in limiting its voter competence assumption to a single dimension, the Court sells short the benefits of disclosure.

First, we review the current state of affairs. According to the Buckley majority, the information disclosed pursuant to campaign finance disclosure regulations “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.”

The understanding is so focused on a one-dimensional left-to-right policy line that the Court continued, “the governmental interest in disclosure is diminished when the contribution in question is made to a minor party. As minor parties usually represent definite and publicized viewpoints, there may be less need to inform the voters of the interest that specific candidates represent.”

We will use a running example to illustrate how the *Buckley* majority thinks voters “place each candidate in the political spectrum more precisely”. Suppose I think that a candidate in a Democratic primary is a middle-of-the-road Democrat, say a 5 out of 10, where 1 is perfectly moderate (almost a moderate Republican) and 10 is perfectly progressive. The candidate has given plenty of stump speeches and interviews, and he and his opponent have run ads. Voters therefore have some information on which to base their assessment of him as a 5 out of 10. Then, at the end of the month, the candidate’s FEC disclosures reveal that he has received money from anti-abortion activists and the head of the National Rifle Association.

The candidate’s primary opponent is quick to run an ad publicizing the contributions from these conservatives. If it is a high-profile election, the media may also comb through the FEC disclosures and write about them, meaning that voters will have two opportunities to update their assessments of the primary candidate’s place on the moderate-to-liberal spectrum. As a result of the ads or the news story, voters will revise their understanding of the candidate’s policies. Now they may place him at a 3 out of 10 on the progressivism scale. The new information indicates that the candidate will be more likely to take meetings from anti-abortion and pro-gun lobbyists if he wins the election — and he will be more responsive to those groups in policy making. Access to abortions could be restricted, and gun regulations could be relaxed by policies that result from those meetings. If voters prefer a very progressive candidate, this information will make them less likely to vote for him. If they prefer a middle-of-the-road candidate, this information might make them more likely to vote for him. Voters are better able to choose a candidate that will represent their policy desires — they are more competent as voters — because of the disclosures.

The policy signal from the composition of each candidate’s donor pool has been documented by scholars. First, donor ideology can be estimated with some precision. Political scientist Adam Bonica has used repeat donations to state and federal candidates to estimate donor ideology. In turn, donor ideologies, when aggregated by donee-candidates, can be used to estimate floor

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votes by members of Congress. Indeed, donations are as accurate at predicting floor votes of incumbents as the incumbents’ prior votes.

Even under the policy-only understanding of voter competence, an informational problem exists when so much of campaign financing by outside groups goes undisclosed. Individuals and outside groups, like SuperPACs and 501(c) organizations can spend unlimited amounts to support or oppose a candidate. The Supreme Court has ruled that this independent spending does not corrupt. Nevertheless, disclosure provides a more credible signal of policy preferences than the voter would have in the absence of disclosure, in which case the voter would only have stump speeches, ads and other political messaging as information to guide her vote choice. The absence of disclosure information from outside groups therefore probably makes scholarly estimates of floor votes less precise than they would be if the sources of corporate expenditures were required to be disclosed. This is supported by a recent study of incidentally released data about donors to dark money groups by Stan Oklobdzija. The data, released in the course of litigation, contained the identities of donors to a large, conservative dark money group active in a California ballot initiative campaign. Oklobdzija found that donors to the dark money group were more liberal, as measured by their publicly disclosed spending to other campaigns, than donors who gave directly to the ballot initiative campaign itself (the disclosed donors).

To illustrate further, imagine a wealthy Hollywood producer, known for progressive stances and issues, including direct (disclosed) contributions to progressive candidate and ballot initiative campaigns. Suppose the producer also wants to support a tax cut that is on the ballot, but he would prefer to do so anonymously. He therefore makes this conservative contribution to a dark money group that supports the ballot proposition. His ideology estimate, which is based on his disclosed contributions, would not contain the anonymous contribution. Therefore, if the list of contributors were exposed, as it was in the case that Oklobdzija analyzes, his contribution would appear to come from someone fairly progressive.

If the same ideological mismatch between disclosed and “dark” spending exists in candidate campaigns – and why wouldn’t it? – our estimates of candidate ideology will be less precise than they would be in a world with full disclosure. Moreover, the amount of uncertainty in the contribution data will vary from election to election and seat to seat, depending on how many contributors opt to give to “dark” organizations and corporations. The current


I note here, and explain later (infra, Part IV) that the same effect could be achieved by replacing the donor’s name with a donor ID number, so that the donor’s name does not become public.


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disclosure rules and loopholes therefore leave the amount of uncertainty in the system to the whims of contributors, rather than under the control of regulators. It is almost impossible to consider a regulatory framework in which the uncertainty of a measure is left to the regulated entities, rather than in the hands of the government. The Department of Commerce knows how much uncertainty adding additional questions to the census introduces. The EPA can estimate the uncertainty in measures of PPM of pollutants in the air based on the time of day and location of measures taken. And, sure, these measures are taken by the government, rather than by an intermediary (like Bonica) estimating floor votes, but the intermediary is doing exactly what the Supreme Court says disclosure should do.

In sum, we are able to estimate candidate policy preferences using contributions. However, the little information we have from dark money groups indicates that their donors may differ from direct contributors. That means that our estimates are noisier than they would be if the names of all political donors – including to outside groups – were forced to be disclosed. We do not know the amount of noise that is introduced. At the moment, it may not be much, given how well Bonica’s scores can predict legislative floor votes. But the government has no control over the share of our political contributions that are disclosed and therefore the amount of measurement error in the data that helps us to predict the policies candidates will enact once in office.

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We have established that the contributions themselves allow us to estimate which policies candidates will support, providing information along the left-to-right political spectrum. But do voters actually receive the information and learn from it?

On whether voters receive the information, the answer is that some do, some of the time, as with any other information about political candidates. The media is the key intermediary between the government and the voters, disseminating campaign finance information in campaigns of interest to each outlet’s readers. Of course, the media only picks up a small fraction of possible campaign finance stories. Opposition researchers can also pump out information about the opponent’s campaign finance, emphasizing that the other side is supported by the fossil fuel industry or the preferred candidate of “Hollywood liberals”. These may be picked up by media as well. But aside from the Presidential campaigns, most campaigns’ disclosures will receive patchwork media coverage, at best.

Do voters learn from the information? Improvement in voter competence from disclosures can be difficult to measure, because there are so many intervening variables between the disclosure itself and the information the voter uses to make her choice. In the rest of this subpart, I review the political science literature on voter competence.

Political scientists dispute the baseline level of voter competence upon which campaign finance disclosures may build. Voters are “rationally ignorant”. We are awash in information every day, but we only use the information that helps us make better choices. Information is valuable only where it improves knowledge. Many voters are not undecided – they know for whom or what initiatives they will vote. This is especially true in a general election. Only a fraction of the voting public to be undecided at any point, and among that small fraction, only a subset will view campaign finance information and use it to inform their vote choice.

Voters operate based on heuristics, or informational shortcuts, like a candidate’s party identification. It may not seem like it in the months leading up to the November election season, but most elections in the U.S. are either nonpartisan or feature candidates from the same party. Consider party primary elections, nonpartisan judicial elections, nonpartisan city elections, elections in states dominated by one party that have top-two primaries, and ballot initiatives. Voters cannot use party identification as a heuristic in any of these kinds of elections. Without party identification as an available shortcut, voters look to other heuristics, like endorsements and campaign finance information. In a general election, party identification should be a more powerful heuristic than campaign finance disclosure. Recent work by Rhodes, et al. shows this to be the case, though the informational effects of campaign finance disclosure persist even in the face of partisan cues.

In a seminal study on heuristics, Arthur Lupia showed that voters use campaign finance information as a heuristic in the ballot initiative context. Lupia analyzed voter behavior in a year when there were five competing initiatives on the California ballot, all pertaining to insurance reform. Voters were able to make the choice that best aligned with their preferences if they knew which of the five ballot initiatives was supported by the insurance industry.


40 ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957).

41 “Reasoned choice does not require full information; rather, it requires the ability to predict the consequences of actions. We define this ability as knowledge.” ARTHUR LUPIA & MATHEW D. MCCUBBINS, THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW? (Cambridge Univ. Press,1998).

42 Samuel C. Rhodes et al., The Role of Dark Money Disclosure on Candidate Evaluations and Viability, 18 ELECTION L.J. 175-90 (2019).

More recent research examines the limits of voters’ ability to glean information from heuristics. One study provided respondents with many news articles about a ballot initiative, only two of which contained campaign finance information, and only one of which had an indication of the campaign finance content in the headline, along with two advertisements and one voter guide. Most people viewed only 2 or 3 items, and most of those with access to the disclosure information did not choose to view it. The author was able to observe whether respondents’ vote choices reflected their previously-stated policy preferences and whether access to disclosure information improved their competence to choose the option that approximated their policy preferences. He concluded that the marginal benefit of disclosure information is negligible. The study is high on external validity, in that voters do indeed have access to a lot of information beyond campaign finance information. But by offering so many competing choices to respondents, the effect size was destined to be small. 44

A working paper by Broockman and Lenz presented survey respondents with the names of special interest groups, many of which are involved in campaign financing. Respondents performed poorly in placing the special interest groups on an ideological spectrum across several experiments.45 By naming PACs and 501c4 groups ambiguously, their founders are reducing the heuristic value of these organizations’ names. These findings can be used by reformers to argue for corporate spending disclosures – eliminating “dark money” – because Bonica-style ideology estimation is possible only with disclosure.

So far, the discussion has covered what we know about voters’ ability to place a candidate or campaign on a left-to-right political or ideological spectrum. This is a limited perspective on a multidimensional benefit, and it is one that the court has adopted. Voters can also learn about the candidates and campaigns by learning about campaign finance transparency and compliance by the groups supporting candidates and ballot initiatives. Information about campaign finance transparency can help us predict the kind of public official a candidate will be in office – an informational benefit that goes beyond the left-to-right policy spectrum.

B. The ignored benefit of campaign finance disclosure: candidate “valence” information

Campaign finance disclosure enables voters to evaluate candidates themselves. My research shows that voters make decisions about candidate trustworthiness when they learn that the candidates either embrace or reject

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dark money support, or violate campaign finance laws, for example. Voters may also learn about the candidate’s propensity to operate transparently or to engage in corruption.46

Voters care about more than policy.47 For any given set of proposed policies, voters will prefer a candidate who signals that she will govern openly and that she will comply with the law.48 The quality of a candidate’s campaign finance disclosures is an important signal to voters about how the candidate will govern. If her campaign files her disclosures on time, and if the disclosures do not reveal any prohibited contributions or gaps in required information, voters receive a message of transparency, clean governance, and competence. The logic can be extended to outside groups as well. If outside groups supporting the candidate disclose their contributors, even where the law permits donor anonymity, voters can infer that the candidate’s supporters have nothing to hide. Conversely, if the candidate’s disclosures are a mess, either because they are filed late, contain prohibited contributions, or have gaps in required information, voters can infer that either the candidate is incompetent or does not prioritize transparency – or both. If supporting groups hide their donors –

46 Strictly speaking, disclosure and transparency are not the same thing. Reporting requirements demanded information of persons by government, like individuals or companies in the private sector. The government, which requires the reports, then discloses them to the public. Transparency laws, like FOIA or Open Meetings Laws, force government actors to make decisions publicly. The difference is mostly semantic in the candidate context, where candidates span the public and private sphere. Candidates for elected office are private individuals vying for public office – even when they are running as incumbents. Campaign finance disclosure is, at root, candidate transparency.


Consider the “beer test”, a likeability test in which voters consider which candidate they “would rather have a beer with”. It has appeared formally in polls, as well as informally in talk shows for several cycles now. Likability was front-and-center in the 2016 elections, with both candidates receiving low likeability evaluations by voters. The 2016 presidential campaigns focused on other non-policy factors, as well. Democrats emphasized how “unfit” and “unprepared” Donald Trump was to be commander in chief. Clinton surrogates, and Clinton herself, were sure to emphasize how Trump could not be trusted with the nuclear arsenal. And the media and the Trump campaign made much hay out of President Clinton’s use of a private email address and server during her time as Secretary of State, casting her as “untrustworthy” as a result. Likeability, fitness, preparedness, and trustworthiness are all desirable characteristics in a public official. Both Republicans and Democrats want to maximize these characteristics, conditional on the set of policies the candidate will pursue in office.

48 Obviously, transparency can impede effective governance in some settings, like in the case of national security. I do not argue here that voters prefer transparency in all policy settings, but that they do prefer transparency in most policy settings.
even where they do so lawfully – voters can infer that the supporters, and perhaps the candidate as well, have something to hide.

We continue the example of the moderate Democratic primary candidate who received contributions from anti-abortion and pro-gun activists. If his disclosures included all of this information, contained no illegal contributions, were submitted on time, and had no gaps, then voters should see him as transparent. If his disclosures were missing information, contained illegal contributions, were filed late, or had gaps, then voters should see him as either hiding something and therefore not transparent, incompetent, or both.

Where a voter is indifferent between the sets of policies presented by two candidates and their donors (say one candidate is slightly more liberal than the voter likes, and one candidate slightly more conservative), the voter will choose the candidate who is more transparent. And if transparency is especially important to a voter, then the voter will abandon a candidate who is closer on policy but has low quality disclosures in favor of a candidate who has less desirable policy proposals but high-quality disclosures.49

Disclosures themselves reveal who gave how much, and they help account for spending that occurred without donor disclosure. In order to evaluate the quality and extent of campaign finance disclosures – the information that informs voter evaluations of candidate transparency – most voters require the assistance of information intermediaries and audits. By “information intermediaries”, I mean any entity that digests and disseminates disclosure information, such as the media, transparency advocacy groups, and even the candidates themselves, who might brag about the information contained in their disclosures (like Bernie Sanders’s oft-repeated 2016 claim that his average contribution was $27) or who might use candidates’ campaign disclosures against them. By “audits”, I mean any review of campaign finance disclosures, not necessarily by an accountant or by the government.50

49 Note that it would not require a strong preference for transparency itself to achieve this result. A dislike for uncertainty along the policy dimension alone could lead to the same result. Dark money support of a candidate, voters cannot see all of the interest groups to whom the candidate may be responsive on policy matters if elected. Uncertainty remains. Therefore voters could abandon candidates who are exactly aligned with their political policies (according to stump speeches and disclosed contributors) but potentially responsive to undisclosed groups with whom the voter disagrees, in order to vote for a candidate who is less well aligned with the voter’s policy preferences but a “known quantity” because all of her supporters are disclosed. Put simply, voters might prefer the less politically aligned “sure thing” over the more politically aligned wild card.

50 Audits can range in stringency and invasiveness from a look at what is actually disclosed to a look at the campaign’s books, bank statements, and receipts. Opposition researchers, transparency groups and the media can easily do the former kind of audit and already do in some races. Corporate contributions – which are illegal in many states and for federal candidates –
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Information intermediaries, particularly those who have particular expertise in transparency and disclosure, also audit disclosures. Audits, especially when conducted by a trusted or neutral party, enhance the credibility of the disclosures themselves. Audits can also reveal whether a candidate is a “clean” or “dirty” type, which can lead to scandals that might harm candidate reputations.

Of course, the communication of a “clean” or “dirty” type only matters if two things are true: (1) voters will care, and (2) campaigns realize that voters will care and avoid compliance problems accordingly. Recent research indicates that voters do care, especially in party primaries and non-partisan elections. Candidate behavior indicates that at least some campaigns realize that voters care and structure their behavior accordingly.

Deterrence theory holds the mechanism. As deterrence theory teaches us, when the probability of detection increases, the likelihood of realizing the costs associated with being caught violating the rules also increases. In turn, the net benefits (benefits minus costs) of breaking rules decrease. Random audits, therefore, shift the balance against the marginal fraudulent behavior in campaign financing. “Reputational markets” in campaigns are therefore important.

As Susan Morse describes it in the context of corporate tax compliance disclosure, “[i]f a relevant reputation market assigns reputation demerits to noncompliant taxpayers and can detect compliant and noncompliant taxpayers, then the utility of noncompliance decreases and noncompliant taxpayers will be deterred under the rational actor model.” We know that these reputational markets also exist in the world of environmental information releases, both upward for “superior performance” and downward for revelations of poor and excessive contributions are easily detectible and appear frequently in disclosures. Detailed audits require access and expertise, and they should lend credibility to disclosures beyond the credibility boost given by a look at the disclosures themselves.

51 See, e.g., 2016 Presidential Race, CTR. FOR RESPONSIVE POL., https://www.opensecrets.org/pres16/ (last visited Feb. 16, 2020) (providing a summary of campaign funding by candidate, as well as outside committees, sector and industry totals, SuperPAC donors, and more).

52 Accounting research has established that audits enhance the credibility of disclosures, and that information intermediaries can be useful in communicating with the public (often, shareholders). For a summary, see Paul M. Healy and Krishna G. Paleu, Information asymmetry, corporate disclosure, and the capital markets: A review of the empirical disclosure literature, 31 J. ACCT. & ECON. 405 (2001).


54 See infra, Part III.


56 Susan C. Morse, Tax Compliance and Norm Formation Under High-Penalty Regimes, 44 CONN. L. REV. 675 (2012).
Moreover, we know that there is a market expectation that consumers and investors will lose trust in a company, which through a chain of events involving lower demand for the company’s products and higher demands (better prices) will cut into corporate profits. This is the mechanism by which bad publicity can cost regulated parties in the private sector. Nick Parillo’s empirical work in this area suggests that those costs are highest in areas like fraud and product safety. Similarly, over-compliance is not economically irrational, particularly where reputational markets exist, such as environmental regulatory performance and by analogy, to campaigns.

The Morse and Parillo articles concern reputation markets among consumers and investors. Of course, many consumers and investors are also voters. In the campaign context, the relevant reputation market comprises the voters, the media, opposition candidates, and interest groups. Detection of compliance problems could occur via randomized government audits, as in the example provided below, but it could also emerge without government involvement, as campaigns seek to demonstrate their commitment to good governance and trustworthiness. The end result is that campaigns that would otherwise violate campaign finance laws will be less likely to do so in the face of an audit regime. They may also be more likely to over-comply with campaign finance regulations, by not taking advantage of loopholes permitting “dark money”, by providing additional (aggregate) information about their donors, or by submitting to voluntary audits.

A robust reputation market in campaign finance is important due to the weakness of the governmental enforcement mechanisms. Penalties for campaign finance violations are small and delayed. The small, delayed penalties are by design, and they serve the interests of both the incumbent legislators, whose discount on time is very large and dictated by the election cycle, and regulators, who are overseen by the incumbents whose campaigns they regulate and who have historically been willing to de-fund programs. As a result, without a reputation market facilitated by the informational intermediaries in this domain (media and watchdog groups), campaigns would have little incentive to comply with campaign finance regulations, and voters would know less about the candidates and initiatives on the ballot.

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59 Hope M. Babcock, Corporate Environmental Social Responsibility: Corporate “Greenwashing” or a Corporate Culture Game Changer?”, 21 FORDHAM ENVTL. L. REV. 1, 37-38 (2010).
60 See generally, Abby K. Wood, The FEC’s Institutional Predicament, ADMIN. & REG. L. NEWS, 4-6 (Fall 2019) (on file with author).
Deterrence also holds the key to why a random audit program could be beneficial to our governance. If random audit programs work via reputation-based signaling mechanisms to force would-be noncompliers into compliance or out of the election, then two results should follow. First, our campaign financing will be cleaner than it would be in the absence of the audits, leaving elected officials less vulnerable to untraceable influences. Second, on average, candidates will be perceived as more trustworthy, which can, in turn, lend legitimacy to government.

In sum, campaign finance disclosures signal more than policy. I argue that (1) campaign finance disclosures provide information about candidate transparency, (2) campaign finance disclosures matter to voters, and (3) the reputational market exists such that campaign finance disclosures and compliance information make voters more competent to choose a candidate who represents the voter’s preferred mix of policy and transparency. Because courts engaging the informational benefits of disclosure focus on policy-related information, they have missed the informational benefits provided by the quality and extent of the disclosures entirely. Learning about the quality and extent of campaign finance disclosures makes voters more competent to choose the candidate that best represents their interests.

In addition to the corporate compliance studies cited above, the argument is borne out in several empirical studies in the campaign finance context specifically. I turn to them now.

C. Studies of voter reactions to donor anonymity and legal compliance

A handful of political science papers have established a link between transparency and perceptions of candidate or campaign trustworthiness. Dowling & Wichowsky (2013) showed subjects an ad attacking a state senate candidate. An outside group ran the ad, and the ad included the FEC-required disclaimer. The researchers followed the ad with disclosure information either as a chart of top contributors, a news story about outside groups generally, or a news story that the outside group had anonymous contributors. Anonymity, when exposed as such, reduced the persuasiveness of the message. It also reduced respondents’ confidence in the credibility or trustworthiness of the sender of the message.62

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61 Of course, campaign audits of disclosable contributions and expenditures while a “dark money” regime persists means that untraceable influences can persist, and indeed, the amount of dark money in the system may increase if audits and dark money exist at the same time. To avoid this possibility, audits of the entities making the “dark money” expenditures may need to be paired with campaign audits.

Another research team found that respondents viewed disclaimers by outside groups, including those mentioning the sponsor was funded by small donors, as most credible and trustworthy. Where donors are both large and anonymous donors, respondents saw them as much less credible and trustworthy.63

In recent years, scholars have studied voter reaction to various types of misbehavior and scandal by candidates and public officials. A few of these studies are about campaign finance disclosures specifically – including two that I have written and summarize here. I have run a series of survey experiments in which I present respondents with hypothetical candidates and measure their reactions to the candidates’ campaign finances as well as other characteristics. My experiments are always among candidates running in a party primary for an open set for a state office. These choices are intentional. A party primary lacks party name as a heuristic. A state office is less salient than federal office. And the open seat eliminates the incumbency advantage.

In one study, I presented respondent with two hypothetical candidates with similar policy preferences who differed on whether they were supported by organizations that did not disclose their donors or over-complied with campaign finance rules. The disclosure treatments were randomly assigned to 504 respondents from a nationally representative sample. On average, the net difference in the respondents’ favorability toward the candidates and likelihood of voting for them was around 15 percentage points. Rewards for overcompliance, measured as the increased likelihood of voting for the candidate were around 5 percentage points, about half the size of punishments for noncompliance, around -10 percentage points. I asked respondents about candidate trustworthiness, too, and the results again resulted in around a net 15 percentage point difference, but this time the increase in perception of trustworthiness (~ 10 percentage points) was twice as large as the decrease (~ 5 percentage points). The takeaway is that voters do react to “disclosure disclaimers”: they care about whether a candidate is supported by dark money. They also find candidates who reveal more than the law requires to be particularly trustworthy, and, in turn, they are slightly more likely to vote for them.64

These are interesting results, of course, but how much do voters really care about transparency, when they’re awash in other information about candidates? Will they trade transparency for their preferred policies?

63 Travis N. Ridout et al., Sponsorship, Disclosure and Donors: Limiting the Impact of Outside Group Ads, 68 POL. RES. Q. 154-66 (2015). This research could not distinguish between the effects of donor size and anonymity, however, necessitating follow-up studies to answer this question.

trade transparency for a candidate’s persuasiveness or grasp of the issues? In order to test the limits of the results from the first experiment, I conducted a survey experiment called a “conjoint analysis”. In a conjoint analysis, the researcher randomizes a number of different levels of candidate attributes. Respondents chose their preferred candidate in different “match ups”. Respondents were able to view nine randomly-presented facts about the candidates’ policy positions (immigration and sex ed), campaign financing (percent small donors, amount raised, whether or not supported by anonymous sources), compliance with campaign finance laws, professional background, and campaign skills (persuasiveness and grasp of the issues.).

In the “Relationship to groups with anonymous donors” field, the candidates were randomly assigned one of three characteristics: (1) “Prior to announcing candidacy, raised money for a group with anonymous donors that now supports campaign”; (2) “Supported by groups with anonymous donors”; and (3) “Requested that groups with anonymous donors not support candidacy”. Fundraising for dark money groups before announcing is something that candidates have started to do, most notably Jeb Bush for the 2016 election. Because of the ban on coordination, some campaign finance watchdogs have said that this behavior violates the spirit of the law and should not be permitted.65

Even in the face of candidate policy preferences, respondents were 6 percentage points more likely to select a candidate that discouraged dark money groups from supporting the campaign than one who received dark money support. For compliance with campaign finance rules, the respondents were, on average, 12 percentage points less likely to select a candidate with campaign finance compliance problems compared to one who is “in compliance”. They were around 2 percentage points more likely to select a candidate that provided more information than the law requires, compared to a candidate that is “in compliance”, though the estimate is just shy of statistical significance in many of the analyses. The degree of policy mismatch between the respondent and the candidate seemed to have little impact on the respondents’ reaction to noncompliance and dark money support.

While my studies took place in hypothetical primary elections, a recent study by Sam Rhodes and coauthors compared candidate relationship to dark money groups with and without partisan cues.66 The authors found that voters reacted to candidate support from dark money groups in the absence of party cues – like my primary setting – but when party cues were present, the effects, while still statistically different from zero, were less pronounced.

Compliance information, released in the face of partisan cues, can still result in big voter reactions. Christian Grose and I have found that voters

punish noncompliance. In 1976, the brand-new FEC decided to audit campaigns for the 1976 House elections. Limited resources forced the agency to audit only a subset, and so they randomly selected ten percent of campaigns for audit. Incumbents who were randomly selected for audit after the 1976 campaign lost vote share in the 1978 election compared to the non-audited incumbents. They were also more likely to retire, meaning that we may be under-estimating the true effect. Where the audits revealed violations, the effects were even larger.

The takeaway from these studies is that respondents vote differently when they learn about the candidate’s relationship to nondisclosing groups and when they learn about the candidate’s failure to comply with campaign finance laws. Voters are informed about non-policy characteristics of candidates when they learn about the campaign’s transparency and compliance with campaign finance laws. Yet the court has not yet taken this non-policy dimension into account when it considers the benefits of campaign finance disclosure.

III. TOWARD A JURISPRUDENCE THAT VALUES THE FULL RANGE OF CAMPAIGN FINANCE DISCLOSURE’S INFORMATIONAL BENEFITS

The court can expand its view of the benefits of campaign finance disclosures in a way that is incremental and accords with its jurisprudence in other areas of the law. After all, campaigns, like corporations, are regulated entities. The court has long taken the stance that consumers learn from corporate disclosures and corporate compliance and that corporations’ reputations with consumers as scofflaws are developed after serial compliance problems. The analogy is obvious: consumers are also voters and can learn from candidate disclosures and candidate compliance problems. In this Part, I explain why courts should uphold two policy innovations aimed at improving voter competence on non-policy dimensions: “Disclosure disclaimers” and audits. Disclosure disclaimers are an idea initially proposed by Heather Gerken and coauthors in an op-ed. They inform voters about the role of dark money support for a political ad. Audits inform voters about campaign finance compliance. I take them in turn.

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A. “Disclosure Disclaimers” and Candidate Trustworthiness

The court currently assumes that campaign finance disclosures inform voters of the policies the candidate will support while in office. It is only a half-step to expand its concept of the informational benefit to include voter learning that results from, e.g., seeing whether candidates are supported by ads from outside groups with untraceable donors. As the research shows, respondents to survey experiments make different choices when they learn about candidates’ relationships to dark money groups. On average, they use the information to vote differently in primary elections than they otherwise would. Respondents deem the more transparent candidates to be more trustworthy. In the same way that the justices believe that disclosure informs voters about the policies a candidate might support in office, it also informs voters about non-policy characteristics—especially trustworthiness—that are important to voters.

Importantly, no additional government disclosures are required to expand the court’s conception of the informational benefit from disclosures themselves. Journalists and other intermediaries can continue to highlight the types of support a candidate or ballot initiative receives—including dark money support—and voters can continue to vote accordingly. And of course, intermediaries could systematically produce information in the mode of Heather Gerken’s “disclosure disclaimers” to help inform voters across all campaigns about campaign finance transparency.69

Acknowledgment of the full scope of the informational benefit will help to bolster disclosure regulations against challenges. This is especially helpful for regulations requiring disclosure of donors to ballot initiative campaigns and to outside groups, where the anticorruption benefit is not available.70

Part of the discomfort about disclaimers is that they are speech that the government requires to appear on the face of a political communication. Could “disclosure disclaimers” be struck as compelled speech? A district court struck down a required disclaimer that a recommendation in a slate mailer that was contrary to the “official endorsement” of the state party contain a statement that it was “NOT THE POSITION” of the party in 2002, seven years after McIntyre.71 But BCRA’s stand-by-your-ad requirement was upheld the following year, by the Supreme Court in McConnell v. FEC. Moreover, the McConnell court referred to the voters’ information interest as constitutional in

While the jurisprudence is a slightly murky, the Supreme Court’s decision in *McConnell* suggests that courts would uphold a challenge to a narrowly-tailored disclosure disclaimer.

In the next subsection, I discuss the jurisprudence that relates to campaign finance audits, the best mechanism to reveal compliance information.

### B. Compliance, Consumers, and Voters

My research suggests indicate that information about candidate compliance with campaign finance laws may affect votes even more than information about a candidate’s relationship to dark money. Candidate compliance information is available through campaign finance audit programs.

Some audits involve publicly financed campaigns, such as audits conducted by the New York City Campaign Finance Board. An added justification for these audits is to ensure that the public’s money is not being used fraudulently. But most campaign finance regulators administer programs involving 100% private money. For example, the Fair Political Practices Commission (FPPC) in California does not administer a public financing campaign, yet it still audits 10% of campaigns raising small amounts and 25% of campaigns raising larger amounts. In private money regimes, the justification of ensuring that the public’s money is not misspent is not available.

Put aside the political challenges of getting an audit program through incumbent legislators to whom the reputational damage of noncompliance accrues. If it were to exist, an audit program would be upheld by the courts. This Article is focused primarily on the informational benefits of disclosure and compliance information, which we are able to measure along non-policy dimensions, and so I lead off with the informational links between compliance and performance. I will then discuss the more direct benefits of deterring fraud and corruption.

The courts have long recognized the informational benefits of compliance information in the consumer and watchdog context. For example, the D.C. Circuit has recognized the value of information regarding environmental compliance to investors evaluating the performance of a company, because “the ability to avoid [compliance] problems provides an index to management’s overall quality.”

The courts also assume that compliance problems will create reputational damage, which is a function of information. Because of the assumed information transmission to the reputational market, courts are particularly willing to allow pre-enforcement challenges to regulations in instances where

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72 McConnell v. FEC, 540 U.S. 93, 196 (2003). California’s requirement that political ads be accompanied by a top-five donor disclosure disclaimer has not yet been challenged in court.


Electronic copy available at: https://ssrn.com/abstract=3623512
the damage may be “irreparable” or accrues to a heavily regulated industry. The line of cases begins with *Abbot Labs*, which challenged a regulation that would have required the company to either come into compliance at great cost or be out of compliance while challenging the rule. The court allowed the company to challenge the regulation before it was enforced, noting the difficult situation that the company was in. The corollary in the audit context is not that the court would hold audits to be unconstitutional, but instead would allow a pre-enforcement challenge to the laws structuring the audits themselves.

So, the court assumes that consumers (and by extension, voters) respond to information about regulatory compliance problems, and the studies above show that to be the case. But reputational damage is hardly a reason to strike down a campaign finance audit program. If anything, as in the consumer context, “one purpose of [transparency] is to utilize public opinion as a lever in insuring compliance with the nation's statutory goals.” A challenge claiming reputational damage to political candidates is unlikely to succeed, in light of the jurisprudence. Indeed, the FEC’s disclosure policy around its conciliation agreements, under which the agency discloses the nature of campaign finance violations, including the party that committed the infraction (among other information), was recently upheld by the D.C. Circuit.

In *Doe v. FEC*, plaintiffs filed suit to prevent the FEC from disclosing their identities when it publicly released information pertaining to a closed investigation. The court ruled that disclosure was appropriate despite alleged reputational harm “arising from the fact that they were under investigation”

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75 However, where the reputational damage may not accrue, the courts are less likely to grant an injunction to allow a pre-enforcement challenge. In *Toilet Goods*, the FDA interpreted a provision of the FDCA to require companies to allow inspectors in or potentially suffer suspension of certification services for color additives. The court refused the injunction in this case, because the injury was only speculative. *Toilet Goods Assoc. v. Gardner*, 387 U.S. 158, 165 (1967). In the case of random campaign finance audit, the injury is also only speculative. Assuming limited auditing capacity, audits will be conducted randomly. A subset of campaigns—probably comprising the majority of campaigns—will not be audited. If audited, the audit report can be “clean” (and potentially help the candidate) or show violations of varying degrees of severity. Thus, there are at least two steps between the decision to conduct random audits and the reputational damage of (1) being audited and (2) the audits revealing violations.

“Irreparable” may not be a concept that travels well to the context of political campaigns. A violation that is uncovered late in an electoral cycle is more likely to be “irreparable” when compared to a violation that is uncovered early in a cycle and that the campaign quickly resolves. Campaign finance regulators have several steps in their enforcement processes. In order to actually be fined, a campaign has to fail to come into compliance repeatedly. But reputational damage can attach before the fine itself.

because unlike a reasonable showing that plaintiffs would be subjected to “threats, harassment, or reprisals,” mere reputational harm does not prohibit disclosure of their identities.\textsuperscript{79}

The courts have also invalidated laws demanding the non-disclosure of compliance problems by public officials. In \textit{Stilp v. Contino},\textsuperscript{80} Judge Conner’s order invalidated § 1108(k) of the Pennsylvania Public Official and Employee Ethics Act, which prohibited disclosure of the fact that a complaint was filed with the Commission. The judge ruled that the government’s asserted interest of “preventing damage to the reputation of government officials where the allegations were unfounded” does not justify a blanket prohibition on disclosure. He said that “[a]bsent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech,”\textsuperscript{81} and that “[i]njury to official reputation is an insufficient reason for repressing speech that would otherwise be free.” The latter quote is from an even tougher set of facts for those hoping to keep the public from learning about their campaign finance violations. In \textit{Landmark Commc’ns, Inc v. Virginia}, the Supreme Court held that a statute proscribing criminal penalties for anyone who disclosed the existence of a confidential ethics investigation against a judge – before the outcome was known – violate the First Amendment.\textsuperscript{82}

Challengers could also argue that their political spending (“speech”) is unconstitutionally burdened by the additional compliance costs brought about by the audits. Compliance costs were important to the \textit{Citizens United} court and partly justified the court’s decision to permit corporations to make independent expenditures from their general treasuries, rather than establish separate segregated funds to make the expenditures. However, here, campaigns should already be complying with campaign finance rules, with or without an audit, and they should incur whatever costs are required to comply. Compliance costs are common among regulated entities, and we know that audits do create costs, even for campaigns with perfect books, because campaign staff must spend time with the auditors. But it is hard to imagine a fact pattern in which the court would decide that costs increase enough from audits that the court would flip the switch from “not burdensome” (in a regime without audits) to “burdensome” (with audits). Therefore, the argument that audits raise compliance costs so much that they should be deemed an unconstitutional infringement on free speech would probably fail to persuade a court to strike an audit program.

Campaign finance audits provide benefits to the public aside from improving voter competence. The benefit of aiding in enforcement of the

\textsuperscript{79} Id.
\textsuperscript{80} Stilp v. Contino, 743 F. Supp. 2d 460, 467 (M.D. Pa 2010).
\textsuperscript{81} Id. at 369 (quoting Butterworth v. Smith, 494 U.S. 624, 634 (1990)).
\textsuperscript{82} Landmark Commc’ns, Inc. v. Virginia, 435 U.S. 829, 841 (1978).
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substantive laws, recognized in the campaign finance disclosure cases, clearly applies in the campaign finance audit context. As before, the enforcement rationale has been recognized in other, non campaign finance contexts. For example, when a government contractor resisted an executive order requiring disclosure of statistics about the number of women and minorities employed by the contractor, the resulting court order said “[t]he mere fact that the company may be embarrassed by the public disclosure of the [information] is not sufficient to warrant withholding [the information]… Indeed, it would seem that one purpose of the [requirement] is to utilize public opinion as a lever in insuring compliance with the nation’s statutory goals.”

Most importantly, anti-fraud and anti-corruption rationales attach to audit programs. As long as audits are narrowly tailored to meet these interests, the audit programs and public release of the resulting compliance information, should withstand judicial scrutiny.

C. Limitations of the Argument

The informational benefit is not limitless. Here, I discuss the contexts in which campaign finance and compliance information is particularly helpful to voters, and contexts in which it may matter relatively less (but still matter). I also address slippery slope arguments.

1. Scope Limitations

As discussed above, people often use heuristics to inform their vote choice. So campaign finance information will be most beneficial where heuristics are less available. This includes nonpartisan elections, like local elections and some judicial elections, as well as party primaries. Once we are in the general election, the heuristic of party dominates, though voters still react to information about dark money’s involvement in campaigns and campaign finance compliance even where party cues are present.

Heuristics are also less available when the spending comes from outside groups, which often have confusing or vague names. Most outside groups do not persist across elections, so their prior compliance with campaign finance rules, which could be revealed via audit, is less relevant in this context. However, whether or not they disclose their donors, and whether or not some of

84 An anti-fraud rationale could attach in the ballot initiative context, even where the court has made the anticorruption rationale unavailable by narrowing the definition of corruption to “quid pro quo”. Groups running ballot initiative campaigns
85 Samuel C. Rhodes et al., The Role of Dark Money Disclosure on Candidate Evaluations and Viability, 18 ELECTION L.J. 175-90 (2019).
their donors are dark money groups (making them “gray money” groups), is probably quite informative to voters deciding between candidates and issues the groups support or oppose, and it can be revealed in real time, prior to the election, by informational intermediaries or disclosure disclaimers.

Finally, voters in ballot initiative states can learn from disclosure disclaimers. Understanding who the donors to the groups are is important to helping the voter make a choice that is in line with their policy interests. Understanding whether either side of the ballot initiative contest has benefitted from (or rejected) dark money is probably also helpful to voters. They may make an adverse inference against the side supported by dark money, assuming that the money comes from out-of-state, for example. With ballot initiatives, various features of the campaign combine to make information about dark money more or less helpful. The more confusing the language in the initiative and the vaguer the funding group’s name, the more helpful that “disclosure disclaimers” will be to voters.

The latter two categories – outside groups making independent expenditures, and ballot initiatives – are categories in which the courts do not recognize the government’s interest in preventing corruption as compelling. The informational and enforcement benefits are all that remain to support disclosure regulations should they come under attack from deregulatory groups.

In sum, this theory of an expanded informational benefit has purchase in the majority of elections: primary elections, non-partisan elections, and even non-salient local, county, and state elections. The scope of the informational benefit will be less important where voters are awash in information, like in general elections for federal office. The informational benefit matters most where the courts will not recognize the government’s anticorruption interest.

2. The Slippery Slope

Of course, slippery slope arguments abound. An aggressive court’s interpretation of “non-policy information” could be abusively broad. If it is acceptable to evaluate candidates based on their perceived trustworthiness, as political science research shows that voters do when they learn about dark money support, then what other non-policy information may governments require campaigns to disclose? If voters like trustworthiness, they probably also like generosity. Should the government release candidate tax returns? Voters like conscientiousness and intelligence. Should the government disclose candidates’ college transcripts? Where does the voters’ need for candidate information stop and candidates’ right to privacy start?

As with all government regulations, there are lines to be drawn. Here, congress and the FEC drew the lines long ago, and disclosure information is already available to voters. All that is required to update the court’s
understanding of the informational benefit is to simply recognize that it exists on both the policy and non-policy (trustworthiness) dimensions. “Disclosure disclaimers” can be made without demanding any more information from candidates or campaigns or making public disclosed information that is not currently public.

When it comes to campaign finance audits and disclosure of the audit results, if noncompliance in the campaign finance realm is informative to voters, other legal noncompliance may also inform voters. How is campaign finance compliance different from other kinds of legal compliance (obeying traffic laws, tax laws, labor laws, etc)? My answer is that it is not. They are all legal violations, information about which is available to the public (unless expunged from the candidate’s record).

We are all regulated by the state and subject to periodic audit as to whether we are violating the laws. Random TSA checks at airports, random traffic stops on holiday nights to check for drunk drivers, and tax audits are all ways we, as people engaging with the regulatory state, encounter audits. Corporations are also subject to audits of their environmental or labor practices. Candidates are regulated entities, too. They opt into a regulatory regime – that of campaign financing – and the government can audit their claims in the campaign context. The information that results is helpful to the voters, but that does not mean that the voters are entitled to learn all information that might be helpful to them as they make their choices.

IV. IMPLICATIONS

The findings and interventions discussed here have implications for courts, for political spenders, and for policymakers.

A. For courts

Disclosure supports the “First Amendment interest[] of individual citizens seeking to make informed choices in the political marketplace.” The information that disclosures, disclosure disclaimers, and audits can provide

improves voter competence in more ways that the courts have currently recognized.

1. Policy information

Few of the Court’s assumptions about the costs and benefits of disclosure in Buckley have undergone thorough empirical analysis. The policy dimension of the informational benefit is the most thoroughly analyzed benefit of disclosure. The research to date indicates that the court was correct in assuming that informational benefits of disclosure for placing candidates on the left to right spectrum. It also indicates that the current regime, which allows for some independent spending to go undisclosed, probably adds noise to our estimates of how politicians will vote on the bills before them. The failure to regulate after Citizens United arises from appropriations riders prohibiting the SEC and IRS from acting. The Court would probably call this a problem for the legislature to resolve; however, to the extent that voter information is a constitutional value, an argument could be made that the appropriations riders themselves are unconstitutional. An aggressive stance, to be sure, but a colorable argument, nonetheless.

2. Nonpolicy information

Our research also strongly suggests that voters learn about the candidates themselves – perhaps their management abilities, organization, or tendency toward corruption – from compliance with the campaign finance laws. Similarly, the evidence suggests that at least in some contexts, voters are willing to reward over-compliance. Finally, on average, voters are less likely to vote for candidates that receive support from dark money groups. All of these findings indicate that there is an informational benefit both from the disclosures themselves (or lack thereof, for dark money groups), and that the informational benefit isn’t as much about policy as it is about the candidate herself. The court can embrace “disclosure disclaimers” as well as audits as providing crucial information to voters.

3. Counting noses on the current court

The court should right-size its understanding of the information benefit. But will it? The chances that the court will broaden its understanding of voter competence to encompass this broader understanding of the information voters receive through campaign finance disclosures depends in large part on who is on the court when the issue is next before them. A careful read of earlier cases reveals that the justices who are still on the court and are friendly to disclosure like it for deterring corruption and improving voter competence. Moreover, the
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justices’ ideological commitments do not predict their votes on the information benefit.

Only two disclosure holdings have turned on the information rationale and not the anticorruption rationale. In McIntyre, the liberal wing of the court voted to strike down an Ohio law requiring disclosure on pamphlets. Justice Stevens, writing for the majority and joined by Justices O’Connor, Souter, and Breyer, with Justices Ginsburg and Thomas concurring, ruled that disclaimers on pamphlets are not that informative to voters, and even if they were, the informational interest is “plainly insufficient to support the statute’s disclosure requirement, since the speaker’s identity is no different from other components of a documents’ contents that the author is free to include or exclude, and the author’s name and address add little to the reader’s ability to evaluate the document in the case of a handbill written by a private citizen unknown to the reader.”

Justice Thomas concurred, saying that he would have analyzed the question of disclosure for a pamphleteer using only the original understanding of “freedom of speech, or of the press”, which he believed led to the result in the majority opinion overturning the disclosure mandate. Justice Ginsburg’s concurrence emphasized that “in for a calf is not always in for a cow” and that in other circumstances the state may require a speaker to “disclose its interest by disclosing its identity.” Justices Scalia and Rehnquist, two conservative justices, recognized the importance of disclosure to an informed electorate. They challenged the idea that there has ever existed a “hitherto unknown right-to-be-unknown” when engaging in political speech in a “free, democratic election”.

McIntyre did not start a trend. Since that case, the Court has upheld disclosure requirements in McConnell, Citizens United, and several other cases. In his McConnell dissent, Justice Thomas complained, “[T]he Court now backs away from [McIntyre], allowing the established right to anonymous speech to be stripped away based on the flimsiest of justifications.”

Of the three Justices from the McIntyre era that remain on the court today (Breyer, Thomas, and Ginsburg) all three of them voted to overturn the statute in McIntyre, but only Justice Thomas has continued to insist that disclosure laws are an unconstitutional infringement on the First Amendment right to free speech.

The Citizens United court also supported the idea that the information interest alone can support broad disclosure requirements, saying that “the public has an interest in knowing who is speaking about a candidate shortly before an election” and that “the informational interest alone is sufficient to justify application of” disclosure rules to the ads the group was running.

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90 McConnell v. FEC, 540 U.S. 93, 276 (Thomas, J., dissenting).
91 Citizens United v. FEC, 558 U.S. 310, 480 (Thomas, J., concurring in part and dissenting in part); McConnell v. FEC, 540 U.S. 93, 264 (Thomas, J., concurring in part and dissenting in part).

Electronic copy available at: https://ssrn.com/abstract=3623512
The Court’s composition has changed since Citizens United was decided in 2010. The opinion’s author, Justice Kennedy, has retired. And Justice Scalia died. Justice Scalia was particularly in favor of disclosure, saying that “requiring people to stand up in public for their political acts … fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously…. [A country that allows anonymous campaigning] does not resemble the Home of the Brave.”

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His replacement, Justice Gorsuch, is far more skeptical of campaign finance disclosure. During his confirmation hearing, Justice Gorsuch signaled his willingness to look closely at disclosure laws, saying that the First Amendment contains competing interests. He said that Buckley stands for the notion that Congress can regulate money in politics, and that there “may be limits when it chills expression, as it did in the NAACP case, and we have to be worried about that…. ”

Justice Kennedy’s replacement, Justice Kavanaugh, seems to follow Justice Kennedy’s belief that independent expenditures cannot corrupt. His rulings before he joined the court suggest that he, like Kennedy, will be generally skeptical of campaign finance limits and bans. His position on disclosure is less clear.


93 The entire exchange was fascinating for a student of campaign finance law. It was one of the more revealing exchanges in the three-day hearing. It continued as follows:

Sen. Whitehouse: “If we have to be worried about the chilling of expression, which is a value proposition that you have just enunciated, should we not – am I not also entitled to ask the question about whether we should be worried about the influence of dark money essentially corrupting our politics? It’s taking a long time to get to what I would think would be a simple answer.”

J. Gorsuch: “I’m sorry, Senator, but I don’t think this is simple stuff at all. I think you’ve got First Amendment concerns and precedents in the area that would have to be considered. We’d have to see what law congress enacted. I’d then want to go through the full judicial process…..”

Whitehouse: “But you just asserted right here that the value of ‘not chilling speech’ is something that we should consider, right?”

Gorsuch: “I said that the Supreme Court of the United States in NAACP recognized that the First Amendment protections we all as people in this country enjoy – can be chilled sometimes. It’s a First Amendment right we’re talking about, Senator.”

Whitehouse: “And where does anonymity – lets’ say a billion dollars in anonymous funding into our elections. Where does that fit in, into the values that you bring to this?”

Gorsuch: “In the first instance senator, it’s for this body to legislate. Then it would come to court, and the record would be made.”

Whitehouse: “Of course Citizens United did overrule a law that we had made, so that’s hardly a be all and end all.”


94 For a good summary of J. Kavanaugh’s prior opinions, see Peter Overby, On Appeals Court, Kavanaugh Helped to Loosen Political Money Laws, NAT’L PUB. RADIO (Aug. 8, 2018), Electronic copy available at: https://ssrn.com/abstract=3623512
B. For campaigns

The research cited here suggests that campaigns and so-called “outside groups” stand to gain from four approaches to campaign finance disclosure. First, they should point out when the opposing side is supported by dark-money groups. They should also requesting that any groups who want to support their side disclose information about their donors. Where possible, campaigns should over-comply with disclosure requirements where they can meaningfully inform voters about their sources of support, and brag publicly about having done so. Consider, for example, Senator Elizabeth Warren’s insistence on disclosing her bundlers, and urging other candidates to do the same. Finally, campaigns should undergo voluntary audits in the absence of a government audit program. These steps will be especially helpful in elections in which party is not an available heuristic, like party primaries or nonpartisan elections.

C. For policymakers

Campaign finance disclosure is popular, and most voters say they seek the information at least some of the time. Moreover, despite the fact that disclosure is becoming a polarizing issue among political elites, disclosure is not a particularly partisan issue for voters. Lawmakers looking to score points with their constituents could do so by introducing more disclosure into the existing framework.

As for designing an optimal framework, policymakers must consider the two types of information communicated through campaign finance disclosure regulations. Mandatory disclosure increases the information about the policies that candidates will favor once in office. But where policymakers leave room for voluntary disclosure, the results from the studies described here suggest that voters learn about transparency and trustworthiness of candidates and the groups that support them.

If reformers err too much on the side of voluntary disclosure, voters may receive a suboptimal amount of information about policy. A purely voluntary disclosure regime will under-provide campaign finance information, because many dark money groups will continue to choose not to disclose. If reformers instead err too much on the side of mandatory disclosure, voters will miss out on information about trustworthiness and transparency that comes when candidates and groups voluntarily disclose more than the law requires.


Groups may have good reasons to organize as a 501(c)4 rather than a 527, PAC, or SuperPAC. The 501(c)4 groups can conduct any “social welfare” activity, and in some years they may not engage political campaigning at all. The other organizational forms are campaign focused.

Arguments for changing our disclosure regime in ways that maximize voter policy information have centered on disclosure thresholds, the type of donor information collected and disclosed, forcing mandatory disclosure on 501(c)4 groups, and online advertising. The tradeoffs faced by policymakers for each of these four areas of disclosure are worth a brief discussion, which follows in subpart 3. In subpart 4, I turn to the tradeoffs associated with reforms aimed at increasing voter competence on the non-policy dimension.

1. Policy information
   a) Modifying disclosure thresholds.

Disclosure thresholds vary across jurisdictions. Some states require disclosure of all contributions, and others have thresholds higher than the threshold for federal candidates ($200). Some lawyers and scholars argue that disclosure thresholds should be raised, meaning that more campaign financing would be subject only to voluntary disclosure (Cain 2010, Beckel 2011), while at least one disclosure scoring group rewards thresholds below $200 (Center for Public Integrity & Global Integrity 2015). In a post-McCutcheon world in which individuals can give over $300,000 to “joint victory funds” and unlimited amounts to SuperPACs, the identity of donors of $200 probably does not add much information to voters’ information about policies the candidate is likely to pursue once in office. This is particularly true in expensive federal elections. Raising the threshold would also allow more “space” for candidates to voluntarily disclose.

By how much could reformers raise the thresholds? Voluntary disclosure of small donors might not have salutary benefits for voters’ perceptions of the transparency or trustworthiness of a candidate. Suppose reformers raised threshold modestly, say to $500. Voters may not reward voluntary disclosure of donors between some smaller amount and the new threshold. Relatively speaking, $500 is still not much money in our world of big-money politics. Suppose now that policymakers raise mandatory disclosure thresholds by a lot, say, to the federal contribution limit of $2,700. Candidates

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97 Contributors may feel “protected” from disclosure when they give below a mandatory threshold, and they may feel unfairly “exposed” if the candidate or group discloses their identity when the law does not require it. This happens more often than one might expect: in state-level races between 2000 and 2008, 17% of all contributions that candidates and campaigns reported were below the state’s mandatory threshold. Giving below the threshold is not a safe harbor from being identified. Abby K. Wood & Douglas M. Spencer, In the Shadows of Sunlight: The Effects of Transparency on State Political Campaigns, 15 Election L.J. 302 (2016). And now, with the advent of online donation vehicles like ActBlue, donors may not realize that they are giving to a conduit, which must disclose every contribution, no matter how small. See Alvarez, R. Michael, Jonathan N. Katz, and Seo-young Silvia Kim. Hidden Donors: The Censoring Problem in U.S. Federal Campaign Finance Data, (on file with author) (forthcoming, ELECT. L.J.).
and groups choosing to disclose fairly large donors, such as all donors above $1000 or $2000, might reap transparency and trustworthiness benefits. The extent to which we would lose precision in our estimates of candidate policies is currently not known, but it is knowable, using Bonica’s data. Future researchers – and the campaigns themselves – can estimate where the valence benefits kick in. In general, a modest raise of disclosure thresholds would not do much to affect the mix of information available to the voters, but a larger change in disclosure thresholds could.

b) Expand the types of spenders subject to disclosure to solve the “dark money” problem

What are the informational tradeoffs faced by policymakers considering mandatory disclosure for 501(c) groups and LLCs? In federal campaigns, disclosure by these groups is currently entirely voluntary as long as they are not running political ads 30 days before a primary or 60 days before a general election and where the contribution is earmarked for particular ads – a requirement that is easy to circumvent. As the studies presented here show, respondents reward disclosure where it is not legally required. Respondents evaluated the candidates supported by voluntarily-disclosing groups as more trustworthy. Most politically-active 501(c)4 groups and LLCs do not voluntarily disclose their donors.

If policymakers were to require disclosure of at least some donors (especially large donors) from these non-disclosing groups, voters would gain policy-relevant information. While the political leanings of the biggest dark money groups are already strongly identified with policy positions or ideologies (consider NRA Institute for Legislative Action and US Chamber of Commerce), other groups have names that are not easily identified with a particular ideology or policy platform.\footnote{See David E. Broockman et al., Heuristic Projection (under review, 2019), \url{https://www.ocf.berkeley.edu/~broockma/broockman_kaufman_lenz_heuristics.pdf}; Ciara Torres-Spelliscy, Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics After Citizens United and Doe v. Reed, 27 Ga. St. U.L. Rev. 1057 (2011).} Consider “American Action Network”, “One Nation”, “iAmerica Action” and “America Next”, which spent millions in the 2016 elections, and whose names do not indicate their political leanings.

If disclosure rules change, anonymity-seeking donors might still find nondisclosure within the organization due to the nature of 501(c)4 and 501(c)6 organizations. The organizations can engage in social welfare and policy work outside of election season.\footnote{That is why Our Revolution organized under this organizational form, rather than a PAC, in the first place.} Requiring mandatory disclosure of the donors whose money goes to support campaign-related activities can therefore create the incentive of 501(c)4 groups to segregate their donors into “disclosable” and “non-disclosable” donors. Money from non-disclosable donors could go to overhead or social-welfare improving activities that are not campaign related.
Money from disclosable donors could go to campaign-related activities. The donation form can simply ask contributors whether they are comfortable with their donation being made public. Corporations, or people giving to support a policy that is incongruent with their public persona, in particular, might opt for “nondisclosable” status.

In sum, the hydraulics of campaign finance mean that forcing mandatory disclosure on these “dark money” groups might result in incomplete donor information, because donors who seek anonymity can still have it. The donor information that is revealed is likely to be the least “objectionable” set of donors, from a public opinion perspective – perhaps from the most politically moderate subset of the organization’s donors. Putting aside the ban on coordination between candidates and groups, partial disclosure would provide a biased estimate of the policy pressures on the candidate as a result of expenditures made by the group. However, biased information is better than no information, and researchers can often correct for bias.

The policy information gained by increased disclosure must be weighed against the trustworthiness benefits lost by mandating disclosure. The amount of transparency information we would sacrifice with more disclosure depends on where the mandatory threshold is set. If policymakers require disclosure of only large donations, say above $10,000, disclosure-friendly groups could continue to voluntarily disclosure below the threshold and voters and the voluntarily disclosing groups will benefit accordingly.¹⁰⁰

c) Modifying the Type of Donor Information that is Collected or Disclosed.

Policymakers may consider changing the donor information gathered and reported by candidates in order to optimize the informational tradeoffs. The FEC currently releases contributor name, city, state, zip code, principal place of business, occupation, date of each contribution, and amount contributed each

¹⁰⁰ Policymakers can also force disclosure on all types of spending, by closing the main regulatory gap: online advertising. There are two ways in which online advertising lacks disclaimers. First, the small ads that appear next to search results or on Facebook page are exempt from federal disclaimer requirements under the “small items” exemption for ads so small that including a disclaimer on them is impractical. Second, the FEC exempts from disclaimers any advertising placed “for a fee on another’s website”. This second exemption turns political communication on the Internet into the “wild west.” Nathaniel Persily, Facebook May Soon Have More Power over Elections than the FEC. Are We Ready?, WASH. POST (Aug. 10, 2016), http://wapo.st/2b3yWuH. For more information on ways to fix these gaps, see Abby K. Wood & Ann M. Ravel, Fool Me Once: Regulating “Fake News” and Other Online Advertising, 91 S. CAL. L. REV. 1223, 1248-53 (2018); see also Abby K. Wood, Facilitating Accountability for Online Political Advertisements, (unpublished manuscript) (forthcoming, OHIO ST. TECH. L. J.) (on file with author).
time. All of this information can be informative with regards to the policies that a donor might support.

For example, a contributor’s city and state can help indicate the policies that the candidate’s supporter’s favor. Consider two California contributors. A contributor from Los Angeles and a contributor from San Diego, despite living only 120 miles apart, probably have different policy concerns. The Angeleno lives in a city culturally dominated by the entertainment industry but also deeply involved in international trade and petroleum. The San Diego donor, on the other hand, lives on the Mexican border and near several U.S. military installations. Zip codes within large cities like these can help voters to refine their estimates of donor policy preferences even more closely. The geographic location of a donor can help voters know more about the policy pressures a candidate will face.

Donors and voters alike want to protect their economic interests, which includes their jobs. Disclosing the sector in which a donor is employed is useful for predicting future policy responsiveness of an elected official supported by donors from that sector.101 Similarly, a donor’s general occupation is useful for predicting policy positions. Consider the healthcare sector. Within the sector, or even within one hospital, if nurses support a candidate but hospital management does not, voters can learn about pressures the candidate may face with regards to labor issues.102

Similarly, the date of the contribution provides useful information, insofar as it can help voters (and campaigns) to understand which policy speeches and news stories contributors are reacting to. Famously, the Obama campaign raised $10 million in the 24 hours following Sarah Palin’s speech at the 2008 Republican National Convention. Her speech included policy mentions of energy, state budget surpluses, taxes, and manufacturing. Policy information in the campaign is revealed not only by geography (city, state, zip) and sector, but also over time.103

For any one individual donation, public disclosure of the donor’s name is probably the least informative piece of information available to voters. However, name is probably the most important piece of donor information for

101 Of course, there are corruption-based reasons for wanting to know the more fine-grained information of the employer, so that the public can hold elected officials accountable for working to benefit donors vs. non-donors.
102 Where workers donate is not straightforward, as Alexander Hertel-Fernandez’s work shows. In general, employer political pressure stops short of suggesting where workers should send their money, but some of the workers and employers he surveyed reported it happening. See ALEXANDER HERTEL-FERNANDEZ, POLITICS AT WORK: HOW COMPANIES TURN THEIR WORKERS INTO LOBBYISTS (2018). Of course, revealing employer information can actually help the government detect instances in which employers pressure employees to make political contributions. Too many contributions in too short of a time period from one company might be indicative that something fishy is going on.
predicting the ideologies and roll call votes of candidates across time. Donor name is the main piece of information that can reliably link contributions over time. Donor ideology can be estimated with some precision, as Bonica’s work has shown. The same effect could be achieved by replacing the donor’s name with a donor ID number, so that the donor’s name does not become public (Elmendorf & Wood, 2017). That said, there is probably a threshold above which a contributor plays such an outsized role in a campaign or group expenditure that voters need to know the identity of the contributor. Changing a name like “Sheldon Adelson” or “George Soros” to an ID number would represent a real loss of information, about policy pressures on and preferences of candidates.

Should policymakers make any of this disclosure voluntary, rather than mandatory? The two most sensitive items disclosed are contributor name and place of employment/occupation. Replacing name with an ID number would still allow the ideology-predicting benefits of linked donations over time, so that experts could still provide estimates of candidate ideology. There could be some informational losses to people searching the contributions of respected friends, neighbors, or leaders, in making their voting decisions, but to my knowledge it has not been studied. On net, the informational losses about candidate policy pressures that would result from replacing names with ID numbers seem small, at least below a certain “mega donor” threshold. Candidates might be able to gain valence benefits by voluntarily disclosing the names of donors below a certain (very high) threshold, especially in states with no contribution limits.

The public disclosure of place of employment and occupation provides voters with policy information for the reasons described above. Were these data no longer required, voters might appreciate seeing them, especially in the aggregate (amounts contributed by employees of certain industries, for example). Such voluntary disclosure could promote perceptions of trustworthiness and transparency.

Policymakers might also choose to continue to require the information but de-link the information about employment and occupation from the identity of the individual making the contribution when posting it online. De-linking occupation and employment information from individual identifying information would only marginally reduce voter information about policy – it rarely matters that Person X in Job Y in Company Z donated. It might matter that Person X gave (especially if the person is a mega donor), and it does matter that people doing Job Y support the candidate and that people at Company Z are contributing.

See supra notes 34-35 (refer to the (policy) informational benefit).
2. Nonpolicy information

The over-compliance described and rewarded in the studies above was based on voluntary disclosure. These effects can occur without further action on the part of lawmakers and regulators. Respondents in the studies discussed above reacted in dramatic fashion to candidates’ failure to comply. Detecting such failures requires audits. Audits happen after the campaign; dark money disclosure and, short of that, disclosure disclaimers can also help inform voters.

a) Disclosure Disclaimers

Where political support for demanding mandatory dark money disclosure is lacking, disclosure disclaimers provide a middle ground. The dark money treatments in the experiments presented above provided “disclaimers about disclosures,” as they made clear to would-be voters when candidates received support from non-disclosing groups. Even if voters do not learn the identity of big money donors to outside groups, knowing that outside groups supporting the candidate do not disclose their donors helps voters use policy and non-policy information to make their ballot choices. Therefore, one option for improving information is to require a disclaimer at the end of an ad funded by non-disclosing organizations, saying that the message is provided by a group that does not disclose its donors.

Candidates are legally prohibited from coordinating with outside groups. They cannot prevent outside groups from forming. Moreover, it seems that some outside groups that sprout up spend the vast majority of the money they take in on salaries and consultants, and only a very small percentage (as low as 10%) actually supporting candidates and issues. So it might seem unfair to the candidates to include a disclaimer about anonymity at the end of ads the candidate has no control over, now that we know voters react to that information by punishing the candidate, like they did with Johnson in the experimental vignette. Yet nothing is stopping candidates from campaigning against outside groups and insisting publicly that donors do not fund outside groups who claim to support the candidate. Indeed, Donald Trump did just that in January 2016. Campaigning against outside groups while accepting audits

106 Maggie Haberman, PAC is Backing Donald Trump, Despite Campaign’s Policy, N.Y. TIMES (Feb. 12, 2016), available at http://www.nytimes.com/politics/first-draft/2016/02/12/pac-is-backing-donald-trump-despite-campaigns-policy/ (“Last year, it emerged that a super PAC using the same name as his campaign slogan — Make America Great Again — had ties to officials on his campaign. The person running that group, a Republican operative from Colorado named Mike Ciletti, has a company that has been used by the campaign over the last year for things like bumper stickers. When questions were raised about overlap between the two groups, Mr.
might be the best of both worlds for candidates, helping them to maximize voters’ perceptions of their trustworthiness and ability to comply with campaign finance rules.

As commonly happens in the world of electoral reform, enterprising state governments have led the way, under the assumption that voters will use information about disclosure to form opinions about candidates and issues. For example, the state of Montana requires disclaimers about non-disclosure of funding sources. Montana requires that groups who do not disclose their donors “clearly and conspicuously include in all communications advocating the success or defeat of a candidate… the following disclaimer ‘This communication is funded by anonymous sources. The voter should determine the veracity of its content.’”

b) Mandatory or Voluntary Audits

Mandatory disclosure requirements establish a floor for the amount of information that candidates are required to reveal. Audits can lend credibility to the mandatory disclosures and verify that the candidate did not under-disclose (or that she over-disclosed), revealing candidate attributes and...

Trump’s campaign urged that group and a crop of other super PACs hoping to support him to shut down. Mr. Ciletti complied.”

One year later, he changed his tune, promising at the National Prayer Breakfast to “totally destroy” a part of the U.S. tax code that prohibits political spending by 501c3s. Julie Zauzmer, *Trump Says He’ll Totally Destroy the Johnson Amendment. What Is It and Why Should People Care?*, WASH. POST (Feb. 2, 2017), https://www.washingtonpost.com/news/acts-of-faith/wp/2017/02/02/trump-said-hell-totally-destroy-the-johnson-amendment-what-is-it-and-why-do-people-care/. If Trump were to succeed in convincing Congress to repeal the Johnson Amendment, donating via 501c3 would immediately become very popular, because contributors to 501c3 organizations receive a tax write-off. There is no regulatory framework for 501c3 organizations to report political spending, so in the absence of a new law, it seems that political spending by 501c3 organizations would be at least as “dark” as spending by 501c4 and 501c6 organizations already is.


108 The statute states: “If a political committee claims to be exempt from disclosing the name of a person making a contribution to the political committee, the committee shall clearly and conspicuously include in all communications advocating the success or defeat of a candidate, political party, or ballot issue through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, poster, handbill, bumper sticker, internet website, or other form of general political advertising or issue advocacy the following disclaimer: ‘This communication is funded by anonymous sources. The voter should determine the veracity of its content.’” MONT. CODE ANN. § 13-35-237 (2016).
providing more information to voters. Since voters reward campaign finance transparency, candidates who want to capitalize on transparency’s advantages should welcome voluntary audits. Opting into an audit sends a signal to voters that the candidate has nothing to hide. Voters can infer that candidates who are willing to undergo an audit are earnestly trying to comply with campaign finance laws and are more willing to subject themselves to public scrutiny than candidates who opt against a voluntary audit. In other words, voters can infer that they are a “clean” type. Of course, if the candidate has sloppy bookkeeping or has violated campaign finance regulations, then the candidate should avoid audits, because voters will punish a “dirty” audit more than they reward a clean one.

We would expect to see candidates opt in to voluntary audits of their campaign finances any time that the electoral and favorability benefits are worth the expense and inconvenience. For example, we might observe a candidate opt into a voluntary audit when the race is tight. During primary season, candidates may elect to opt into the audit in order to distinguish themselves and boost voters’ impressions of how much they will embrace transparency in office. In the wake of a scandal affecting the candidate or a member of her party, a candidate might opt to undergo an audit in order to show her “clean hands” or remind voters that she is transparent.

Given my findings, we should not need government action for a voluntary audit program to emerge. If clean types stand to gain from voluntary audits, why have we not already seen them emerge? One reason could be that candidates do not know that voters are willing to reward transparency. Another might be that incumbents have a fundraising advantage and would therefore be less inconvenienced by dedicating resources to an audit, but because incumbent advantage is so large, the additional electoral help that a clean audit could provide is simply not needed. This is particularly true for incumbents who do not face primary opponents.

If voluntary audits are good, are mandatory audits better? Mandatory audits would provide the information that voluntary audits provide without requiring an adverse inference by the voters against candidates who do not undergo a voluntary audit. But, pragmatically, mandatory audits would be a tough sell to elected officials. Mandatory audits are part of some public funding programs, like the New York City campaign finance program, and agreeing to the audits is a condition to receiving public money in these programs. But in the absence of public funding, legislators have shown themselves to be resistant to mandatory audits, even when conducted at random. After the FEC’s random audits in 1977, Congress reduced the budget for the random audit program to $0. Members of Congress did not enjoy being at risk of an audit.

Campaign finance regulations force campaigns to dedicate resources to compliance, rather than campaigning. Mandatory audits would add another cost to campaigning, raising the barrier to entry for challengers, who are generally less well-networked than incumbents. The correct balance between adding
additional barriers to entry for challengers and increasing valuable information to the public is not obvious. Voluntary audits will result in more credible disclosure information reaching voters and will allow clean candidates to signal their cleanliness if they are willing to undergo the cost of the audit, without erecting more barriers to entry.  

If the incentives are such that audits can be voluntary, should disclosure be voluntary, too? No. The credibility-enhancing features of the audit can only exist if disclosures are mandated. Otherwise, audits could be conducted on incomplete information, and a candidate could be said to have a “clean” audit, even though she hid many illegal or excessive contributions that violated campaign finance law.

Institutional details of audits matter, and I consider some of them here. For example, audits’ credibility and type-revealing benefits increase with the amount of access the auditor has. To my knowledge, no study has tested the stringency of audit required for the benefits to kick in. It might be the case that candidates need not be too inconvenienced by audits to reap their benefits. The question remains open to future research.

In order for the audits to be useful, audit reports should be comparable across candidates, allowing voters to compare apples to apples. This does not necessarily require government involvement. Think of it like a certification. Other industries have managed to create voluntary certification programs without the government. Consider the U.S. Green Building Council, which provides the LEED rating system. LEED stands for Leadership in Energy and Environmental Design, and buildings that are LEED certified can credibly boast of energy and water efficiency, use of safe and sustainable materials, and other attractive qualities. In order to obtain LEED certification, an interested party simply contacts the U.S. Green Building Council, invites the inspectors in, pays fees, and receives the certification. Other markets use similar private certification models, like the markets for sustainable wood and for rainforest-

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109 A middle ground, and potentially less expensive mandatory option might be for the campaign finance regulator to require that all campaigns have a certified public accountant on record who signs off on their campaign finance disclosures. The current modus operandi for many candidates is to operate campaign finances (sometimes literally) from a shoebox, and to hire lawyers if they are audited. The FEC tries to convince candidates that hiring an accountant at the outset can save money in the long run, but candidates are reluctant to accept that advice. If regulators required campaigns to hire CPAs, campaign finance violations would probably decrease across the board, and candidate type would not be signaled by campaign finance performance. Existing research indicates that campaigning has a “disciplining” and professionalizing effect on candidates, and so including a CPA on the campaign staff would probably further discipline and professionalize candidates and campaigns. It may also weed out fraudulent or corrupt types, improving our governance by improving the candidate pool.


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protection coffee. Of course, there are government-run certification programs as well, like USDA’s organic certification for produce, and the Energy Star certification for appliances, created jointly by EPA and Department of Energy. These agencies create the standards and require that a party seeking certification bring in an inspector from an approved list to ensure that the standards are met. In the campaign finance context, maintaining a list of approved auditors would require very little regulatory effort.

Either the private or “hands off” public approach could work in the campaign finance context, though if a private group were to create the system, the group would need to have credibility on both sides of the aisle to be of use in general elections. Even in a hyperpartisan age, these groups still exist.

States are innovating with new campaign finance models regularly. For states that embrace campaign finance reform, an audit program could be created by the legislature, which could enable the regulator itself to conduct audits upon request. The legislature would have to provide the funding to hire enough auditors to carry out the requested audits. Under that model, the only cost to candidates is the cost of scheduling and undergoing the audit, but not paying the auditors. As the post-Watergate random audit program at the FEC shows, political will to continue publicly funding the audits might deteriorate rather quickly.

CONCLUSION

Campaigns are regulated entities. Regulated entities are subject to disclosure and audits. In the campaign finance context, the willingness of the court to uphold campaign finance disclosure requirements turns in large part on its understanding of the informational benefit. I argue here that the Court’s current policy-prediction-only conception is unnecessarily limited.

Disclosure aids voter competence in more ways than existing models assume, and that the information provided in disclosure disclaimers and campaign finance audits can help meet the government’s interest in improving


113 The most obvious existing campaign finance groups to inform, if not take on, this project are the Center for Responsive Politics (opensecrets.org) for federal races and National Institute for Money in Politics (followthemoney.org) for state races, though it would be impossible for any one group to provide voluntary audits for all state races. (Note: the author is on the board of directors of the National Institute for Money in Politics.)

114 FEC enforcement procedures are onerous and unpopular with half of the commissioners, so actual enforcement would not be a real threat. The point here is to reap the benefits of transparency, not to aid enforcement.

voter competence. The court should continue to uphold well-tailored disclosure requirements, because the government interest in campaign finance transparency is even stronger than the Court has acknowledged.

The studies presented here do not interrogate the content of campaign finance law. Instead, they suggest that the current framework short-sells the informational benefit of campaign finance disclosure, and that voters punish dark money and reward transparency. Future research can better establish which types of information, and which disclosure thresholds, help to maximize the benefits of campaign finance disclosure while minimizing the risks to contributors. If laws are too lax, over-complying is easy. If they are too stringent, over-complying is difficult. So this experiment bears repeating under different disclosure regimes.

We have a pressing need to right-size campaign finance disclosure in a way that helps the government to actually combat corruption or its appearance and inform the electorate. What would a properly-scoped disclosure regime look like? What thresholds for disclosure minimize the appearance of corruption and maximize informational benefits? What disclosure content achieves the same goal? How much coordination do voters suspect is happening between campaigns and independent groups like SuperPACs? How should we adjust the coordination rules to minimize the appearance of corruption? A series of well-designed experiments should put us on the road toward a better disclosure regime.