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### **In Defense of Private Civic Engagement: Why the Assault on “Dark Money” Threatens Free Speech – and How to Stop the Assault**

**by Nick Dranias\***

The right to private civic engagement – the right to participate in politics confidentially as an individual or in association with others – is under assault as “dark money.” The attack is really an effort to suppress opposing ideologies by exposing speakers and their associates to retaliation.

Unfortunately, current Supreme Court precedent enables and emboldens such suppression by sanctioning regulations that do little to prevent corruption or educate voters even as they chill political involvement. Although mandatory disclosure and disclaimer requirements are still subject to exceptions for those who can claim a reasonable probability of retaliation, in today’s polarized political environment it is increasingly apparent this exception should be the rule.

There is hope for a return to our nation’s tradition of respect for private speech and association. A focused litigation strategy can help usher that tradition into wider acceptance by the judiciary.

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States can assist in protecting private civic engagement by enacting a Free Speech Privacy Act, which would codify the right to be free from disclosure and disclaimer mandates that impose a reasonable probability of retaliation. States also can enact a Publius Confidentiality Act, which would guarantee citizens who legitimately fear retaliation the right to secure a confidential identity for use in their political activities. These proposals are fully constitutional under current precedent and will help move the nation toward a renewed recognition of the fundamental importance of private civic engagement in our Republic.

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“Don’t underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is ‘responsible’, what is valuable, and what is truth.”

— *New York v. Duryea*, 351 N.Y.S. 2d 978, 996 (1974)

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## Introduction

In the summer of 2013, evoking echoes of a certain Wisconsin senator from decades ago, U.S. Sen. Dick Durbin (D-IL) famously demanded think tanks that had supported the American Legislative Exchange Council testify about their involvement in the development of model “Stand Your Ground” laws.<sup>1</sup> Labeling center-right public interest groups “stink tanks,” the Center for Media & Democracy and ProgressNow brazenly launched *ad hominem* assaults on private donors and successful advocates of conservative causes.<sup>2</sup>

Around the same time, Wisconsin prosecutors were pursuing secret “John Doe” investigations against legions of center-right political groups and interests who had dared to engage in legal, private political spending. This resulted in the dragnet search and seizure through subpoena of private communications and emails, plus a predawn paramilitary raid on the offices of various conservative groups and the private homes of their principal staff.<sup>3</sup>

To stop the “New McCarthyites” from suppressing their political opposition, we must learn from the past and defend private civic engagement with every tool at our disposal.

More recently, the Attorney General of the State of California sought to compel disclosure of the donors of the social welfare organization Americans for Prosperity, forcing the group to file a defensive lawsuit in federal court.<sup>4</sup> And on February 25, Democratic U.S. Sens. Ed Markey, Barbara Boxer, and Sheldon Whitehouse demanded

the disclosure of funding sources by The Heartland Institute, publisher of this *Policy Study*, and 99 other businesses and nonprofit organizations that question the causes and consequences of global warming.<sup>5</sup>

The banner under which these retaliatory efforts are marching is the supposed threat of “dark money.”

But the “dark money” crusaders have forgotten or disregarded the history on which this nation’s tradition of free speech and association was built. To stop the “New McCarthyites” from suppressing their political opposition, we must learn from the past and defend private civic engagement with every tool at our disposal, including those afforded by the Tenth Amendment working in tandem with the First.

## The Rise and Fall of Private Civic Engagement

Since at least 1590, anonymous speech has been the refuge of dissidents and patriots resisting oppression and tyranny in the Anglo-American tradition.<sup>6</sup> In seventeenth-century Britain, anonymous and pseudonymous speech was commonly used by publishers and authors to avoid the forced disclosure of authorship required by the licensing of printing presses.<sup>7</sup> Decades later, the pseudonyms adopted by the Framers and their political opponents before and after ratification of the Constitution ensured the merits of their arguments stayed front and center.<sup>8</sup> This was important not only to prevent *ad hominem* discounting of the opinions expressed, but also because regional jealousies would have prevented Virginians such as James Madison and New Yorkers like Alexander Hamilton from being persuasive in other regions.<sup>9</sup>

A historical review conducted in 1919 revealed “between 1789 and 1809 no fewer than six presidents, fifteen cabinet members, twenty senators, and thirty-four congressmen published political writings either unsigned or under pen names.”<sup>10</sup> More than 100 years

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later, private and anonymous association protected members of the Socialist Party during the Cold War<sup>11</sup> and the NAACP during the fight against segregation.<sup>12</sup> The Supreme Court did not back down from affording such protection.<sup>13</sup> Even in cases of alleged defamation, contemporary courts have developed and enforced a variety of balancing tests of varying stringency to protect anonymous speakers.<sup>14</sup> Anonymous sourcing in the media has a long and storied history.

In electoral politics, however, the protection of anonymity and pseudonyms for speakers, donors, and their associates is on the verge of disappearing. *Citizens United* appeared to bless<sup>15</sup> the Federal Election Commission’s (FEC) broadcast disclosure and disclaimer mandates after applying a level of judicial review – lawyers might call it “intermediate scrutiny” – lower than what the majority applied when it struck down the restrictions on independent speech for which the case has become known.<sup>16</sup> During the same term, the Court upheld mandatory disclosure of the identities of individuals who sign a ballot-measure petition, in *Doe v. Reed*.<sup>17</sup>

Private speech and association are also under increasing assault in the wider policy world, with calls for publicity mandates to force disclosure of donors to traditional center-right and center-left think tanks.<sup>18</sup> A federal case has been filed by a blogger challenging laws forcing him to disclose his identity – and the blogger lost his case in the first round.<sup>19</sup> Courts have largely sustained such publicity mandates.<sup>20</sup> This is happening despite the cross-ideological majority opinion of Justice John Paul Stevens and powerful concurring opinion of Justice Clarence Thomas in *McIntyre v. Ohio Election Commission*, in which the Court shielded an opponent of a proposed ballot-measure tax levy from being forced to disclose her identity under the First Amendment.<sup>21</sup>

As previously recognized in *McIntyre*, private civic engagement serves a critically important purpose in keeping the marketplace of ideas focused on the message, not the messenger.<sup>22</sup> It also protects the messenger from retaliation when speaking truth to power. More than 30 years before

*McIntyre*, the Supreme Court noted in *Talley v. California*, “Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.”<sup>23</sup> There was a time when that recognition called into question all publicity mandates and bans on anonymous speech.<sup>24</sup>

*Citizens United* and *Doe v. Reed*, however, have clearly limited the reach of *McIntyre*. The Court’s lax application of intermediate scrutiny also put considerable distance between its analysis and that in *Buckley v. Valeo* – the foundational case of modern campaign finance law – which sustained disclosure requirements as the “least restrictive means of curbing the evils of campaign ignorance and corruption.”<sup>25</sup>

As a result, people engaged in politics and political issues face being thrust into the spotlight – which in today’s polarized political environment encourages retaliation, deters civic engagement, and thereby enables those already in the incumbent political class to consolidate their power. To prevent the resulting ossification of existing power structures and to protect individual liberty, this paper seeks to point the way back to our nation’s heritage of private civic engagement.

## Didn’t *Citizens United* Bless “Dark Money?”

One of the greatest misconceptions about the *Citizens United* ruling is that it completely deregulated campaign spending. In fact, although the Court protected the First Amendment right of corporations and unions to spend money on independent political advertising – contrary to popular misbelief, the century-old ban on corporate donations to candidates was not at issue – the Court upheld the disclosure and disclaimer requirements under federal election law.<sup>26</sup> Those mandates apply to any group that spends more than \$1,000 in order to communicate with the public about issues related to candidates.<sup>27</sup>

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Yes, the Court did emphasize the importance of not holding the freedom to engage in campaign spending hostage to fact-intensive, case-by-case tests, to ensure that ordinary people without access to lawyers, accountants, and political scientists can spend their money to promote messages without hesitation. But it rejected the opportunity to

establish a similar universal principle with which to assess the legitimacy of regulations mandating disclosure of speakers and donors. Instead, the Court held fast to the “as applied” or case-by-case rule established in a number of past cases requiring an anonymous speaker or private association to seek an exception from disclosure and disclaimer requirements based on a showing of a “reasonable probability” of political, social, or economic retaliation.<sup>28</sup>

*Citizens United* failed to articulate any clear principles for assessing when the magnitude of the probability of retaliation should be deemed “reasonable.” Nor did the Court articulate any clear principles for discerning what counts as the relevant kind of retaliation that would justify an as-applied exemption from disclosure and disclaimer laws.<sup>29</sup> Likewise, in *Doe v. Reed* the Court refused to protect the identity of ballot-measure petition signers – stating, without articulating

any clear judicially enforceable standard, that the signers' invocation of an as-applied exception was unpersuasive.<sup>30</sup> All we know today about the as-applied exception to disclosure mandates is what the Court in *Buckley* said about it nearly 40 years ago: It might protect speakers from "economic reprisal, loss of employment, threat of physical coercion and other manifestations of public hostility."<sup>31</sup>

The uncertainty in determining when a threat of retaliation is of sufficient likelihood and magnitude to justify an as-applied exception to publicity mandates is further compounded by the fact federal election law appears to allow only "express advocacy" (appeals to vote for or against a particular candidate) to be regulated in this way.<sup>32</sup> Presumably, federal disclosure law does not reach mere "issue advocacy" (discussion of policy matters without reference to candidates). But that caveat is difficult to enforce when, despite clarifying court rulings in recent years, the distinction between issue and express advocacy remains infinitely debatable, with FEC often unable to agree on the proper classification of an election year communication.<sup>33</sup>

In effect, just as individuals, corporations, and unions could never be sure before *Citizens United* when their independent expenditures would be deemed a regulated or banned form of campaign speech, the same people are still left to guess at when they might have a legitimate claim to private speech and association. Other commentators have observed only the most radical, subversive, persecuted, or marginalized people or groups seem able to invoke reliably the as-applied exception to disclosure and disclaimer regulations.<sup>34</sup> This suggests the court-created as-applied exception may itself be regarded as favoring subversive speech and association, which would thereby seem to render the disclosure and disclaimer mandates unconstitutionally content-based and viewpoint-discriminatory because, as applied, their regulatory burden actually falls only on mainstream political discourse and associations.

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Further, in regard to federal disclosure and disclaimer requirements, a recent law review article demonstrated out-of-pocket compliance costs for a bare-bones political action committee likely require a one-time expenditure of approximately \$9,000 on legal and accounting fees and ongoing annual compliance costs of roughly \$2,800.<sup>35</sup> Such costs serve as a high barrier to entry into electoral politics for ordinary citizen groups, but not for the moneyed special interests, the ostensible targets of campaign restrictions, which can afford to retain armies of lawyers and accountants.

One response would naturally be to remind the Court of its ruling in *Citizens United* that ordinary people should have clear rules of the road governing freedom of speech in political discourse.<sup>36</sup> Vague and unpredictable legal standards, in and of themselves, violate the First Amendment.<sup>37</sup> Any regulation that requires the retention of lawyers and accountants to ascertain whether the requisite freedom of speech or association exists violates the First Amendment as a *de facto* prior restraint. And regulatory favoritism for some speakers or groups over others is impermissible.<sup>38</sup> All of these observations stand against the status quo that essentially presumes the constitutionality of disclosure and disclaimer requirements while purporting to recognize a vague and uncertain retaliation exemption which, in reality, favors a select few (typically subversive) speakers and groups.<sup>39</sup>

But that response – even if advanced in a magnificent legal brief joined by P.J. O’Rourke<sup>40</sup> – appears unlikely to prove persuasive to the judiciary any time soon. The Supreme Court’s holdings on disclosure and disclaimer not only deviated from the central rationales of its ruling on independent expenditures, they also solidified the Court’s deviation from general First Amendment principles when dealing with private speech and association in the context of electoral speech.

After all, before *Citizens United*, the Court had established in *McIntyre* the disclosure of the identity of the author implicates the content of the communication because of the impact such identification has on the reliability and weight of the message (either greater or lesser depending on the audience).<sup>41</sup> Forced publicity has been justified for the very reason that it allows an audience to assess the merits of speech based on the reputation and presumed motives of the identified speaker rather than by checking the underlying facts. The Court had also established editorial control over the content of speech is ordinarily protected by the First Amendment, insofar as freedom of speech entails the right to speak as well as not to speak.<sup>42</sup>

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Based on these principles, a law mandating disclosure of speakers and their associates in connection with electoral speech would logically constitute content-based speech regulation. It follows that, far from being a constitutionally salutary justification, the claim that the author’s identity must be made public so the content of his communication

includes otherwise missing reputational and motivational information should have triggered the sort of heightened (“strict”) judicial scrutiny as a content-based speech regulation. Nevertheless, the Court in *Citizens United* upheld the disclosure and disclaimer mandate without applying such scrutiny.<sup>43</sup>

In addition, it is usually impermissible for speech regulations to be overbroad – to capture both properly regulated speech and significant amounts of speech that is not properly regulated.<sup>44</sup> Closely related to this over-breadth rule is the “chilling effect” doctrine. Ordinarily, a speech regulation that causes reasonable people to refrain from freely speaking is suspect. At least six Supreme Court cases have recognized as-applied exceptions to publicity mandates, naturally justifying an inference those mandates encompass a significant amount of speech that is not properly regulated. As a matter of common sense, given the difficulty any case has in reaching the Supreme Court, the existence of so many rulings on the same issue would seem to indicate a systemic problem, one suggesting disclosure and disclaimer mandates are indeed overbroad.

Nevertheless, post-*Citizens United*, courts have treated historical invocations of the as-applied exception to publicity mandates as an insufficiently substantial number to warrant striking down such mandates on their face.<sup>45</sup> This has given rise to the appearance of a self-reinforcing feedback loop: Courts may be refraining from applying the as-applied exemption from publicity mandates because they are conscious that doing so too often might itself jeopardize the facial constitutionality of such mandates. Bizarrely, despite longstanding scholarly observations that “actual instances of the deterrent impact of disclosure laws are legion,”<sup>46</sup> courts have essentially

determined people complaining of a chilling effect from those laws merely lack civic manliness, which apparently disqualifies them from constitutional protection.<sup>47</sup>

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Although now the view of a majority of the court, this bizarre line of analysis ironically appears to originate in recent days from conservative Justice Antonin Scalia, who has long opposed constitutional limits on disclosure and disclaimer mandates. In his dissent to *McIntyre* and his concurring opinion in *Reed*, Scalia argued citizens should have the courage to weather publicity of their political participation, that proof of historical practice of anonymous and pseudonymous speech is not proof of a constitutional right, and that anyone engaging in ballot-measure issues should be subject to transparency mandates for the same reasons we demand transparency in government functions.<sup>48</sup>

Whatever its constitutional merits, Scalia's position is entirely consistent with early Supreme Court case law upholding mandatory publicity for newspaper publishers and forced disclosure of membership in radical groups.<sup>49</sup> Thus, to the extent Scalia's rationale for sustaining publicity mandates has gained currency, there is a real risk constitutional protections for private civic engagement will also be undermined outside the electoral context. Early signs of that threat are already appearing.

## **Forced Disclosure and Retaliation Infect the Marketplace of Ideas**

Although initially limited to electoral politics and ballot-measure petitions, there is growing pressure from interest groups to extend First Amendment precedent upholding forced disclosure into many more areas of political speech and association. Not content with forcing disclosure of donors and associations behind expenditures to influence candidate elections, politicians and interest groups have been increasingly beating the drum for forced disclosure of donors to and associates of charities organized under Sections 501(c)(3) and (c)(4) of the Internal Revenue Code – groups that focus on ballot measures, legislation, and non-election-cycle issue advocacy.<sup>50</sup>

Significantly, little or no pretense is being made by these “dark money” crusaders that the effort aims at preventing corruption. Such a claim is very difficult to make. There is nothing about supporting a ballot measure or advocating a political issue (or legislative advocacy) that intrinsically constitutes an element of a *quid pro quo* with a public official. (How does one corrupt a ballot initiative anyway?) Instead, such efforts represent an ideological dialogue, the very essence of engagement in the marketplace of ideas. That dialogue is being targeted because

proponents of forced disclosure do not like the ideology being discussed and want it silenced. In the words of Arshad Hasan, executive director of ProgressNow, “The next step for us is to take down this network of institutions that are state-based in each and every one of our states.”<sup>51</sup>

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In this atmosphere, it is entirely possible legislation could gain traction in multiple states to force disclosure of donors and associations even for charities and advocacy groups that do not engage in candidate-focused electoral politics. In 2013, for example, the California state legislature

considered bills to force charities organized under I.R.C. § 501(c)(3) to disclose their donors if they spent money supporting or proposing ballot measures.<sup>52</sup> In an age of Internet communications and national dialogues on most topics, this could expose charities and advocacy groups to the risk of forced disclosure even when they operate entirely in a jurisdiction that respects private speech and association. Although those laws would undoubtedly be challenged in court, it is equally possible the judiciary would adopt the same tolerance for forced disclosure in the context of non-electoral advocacy as in electoral communications. More than 30 years ago, a federal court in New Jersey upheld lobbying disclosure regulations that forced the local chapter of the ACLU – a 501(c)(3) charity – to disclose donors supporting legislative and ballot-measure advocacy.<sup>53</sup>

There is a way out, and that is to begin by first recognizing the elements of truth in the dominant approach to publicity mandates, and to limit the reach of publicity mandates to their proper context. In other words, we must reexamine and correct the legal theories animating both sides of the debate over the constitutionality of publicity mandates.

### Theoretical Fix 1:

#### **Stopping the Overreach by Privacy Advocates by Recognizing Government’s Status as a Public Trust Justifies Some Publicity Mandates**

It is clear some advocates of private speech and association have overreached, much as the courts and dark-money-censorship crusaders have. Some free-speech advocates have attempted to secure maximum protection of anonymity even in candidates’ reporting of direct contributions and in the exercise of the mechanisms of direct democracy, such as in signing qualifying petitions for ballot measures.<sup>54</sup>

In so doing, as discussed below, they seek to enforce principles of the First Amendment where they ordinarily have only an attenuated application, and it is not surprising courts have reacted by developing legal analyses that reject those arguments. Nor is it surprising courts have mirrored the confusion and overreach of private-speech advocates by extending legal analyses that ordinarily do not protect private speech and association to contexts where the First Amendment should robustly protect such speech and association. In short, confusion and overreach by one side has caused confusion and overreach by the other side.



It is time to stop the confusion and overreach by returning to first principles. First, advocates of anonymous speech and private association must recognize there really is a fundamental difference between speech and association directly involved in candidate financing and in exercising the mechanisms of government, on the one hand, and other areas of speech and association. The protections of the First Amendment were primarily meant to protect private action from government interference. They do not ordinarily or naturally apply to expressive conduct and association in the direct exercise of the mechanisms of government, such as legislative voting or the exercise of procedural steps involved in activating direct democracy.<sup>55</sup> Because government is meant to perform its functions as a public trust with citizen oversight,<sup>56</sup> the exercise of the mechanisms of government cannot be regarded as implicating personal, private rights of the sort protected by the First Amendment.<sup>57</sup> Consequently, the requirement of public transparency is and should be a paramount interest when it comes to the activities of those directly engaged in the performance of government functions.

Second, advocates of private speech and association should recognize candidates for office are essentially government job applicants. Although candidate contributions are not fairly viewed as bribes as a default assumption, reasonable people must

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acknowledge the only thing separating a campaign contribution from a bribe is *intent* as revealed by *context*.<sup>58</sup> Moreover, a longstanding element in the proof of bribery is secrecy in a direct exchange with a public official.<sup>59</sup> Therefore, with respect to donor relationships that are known to the candidate (or his committee agents) and not to the public at large, the government – as a fiduciary for the public at large – would hardly be doing its job if it refrained from demanding public transparency in such relationships as part of the candidate-qualification process.

In addition, existing elected public officials are already public trustees,<sup>60</sup> and thus their fiduciary obligation to act with the highest degree of care and undivided loyalty to the public naturally entails an obligation to refrain from being led into temptation or the appearance of temptation by receiving large, direct contributions from donors known only to them.<sup>61</sup> After all, a fiduciary could hardly be said to be acting with the highest degree of loyalty and care for his beneficiary if his actions would naturally and foreseeably spark reasonable suspicions about his fidelity.

Consequently, publicity mandates are, in principle, perfectly legitimate from a limited-government perspective with regard to (a) direct candidate contributions that are large enough<sup>62</sup> to be reasonably suspected as intended to buy influence, from contributors known only to the candidate, and (b) the identities of those who exercise the machinery of government itself, such as those who sign ballot-measure petitions. Such mandates do not represent government coercion of independent private activity, but are instead regulations of government conduct to ensure government officials fulfill their fiduciary obligations to the public.

From the perspective of one of the most important first principles of limited government – that the government is a public trust, the powers of which are not privately owned by government officials and which the citizens are entitled to monitor – it is thus entirely appropriate to apply something less than strict scrutiny to the mandated disclosure of the identities of signatories to ballot-measure qualification petitions, as well as the disclosure of the identities and contribution

amounts of candidate donors (including donors acting in association within a corporate entity) who make large contributions of the sort that would be reasonably suspected as intended to solicit a *quid pro quo*, as applied to the participants and candidates themselves. Just as keeping the peace or ensuring the availability of public roads for transportation may require time-place-manner regulations on public protests, so do the integrity and effectiveness of the ballot measure and candidate qualification processes require transparency from those ballot-measure petition signatories and candidates who choose to avail themselves of such processes. Disclosure and disclaimer regulation of such matters are thus properly subject to the kind of intermediate scrutiny reserved for content-neutral regulations with an incidental effect on speech and association.

In short, the courts (and Justice Scalia) have gotten it largely right in striking the balance between transparency and privacy in assessing the legitimacy of transparency mandates applied to ballot-measure participants and candidates for office.

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Of course, it is possible such mandates could be so deliberately or irrationally burdensome or intrusive as to amount to an indirect effort to deter citizens from petitioning their government, associating with others, or expressing themselves. Although that is not the usual case, the First Amendment or general guarantees of substantive due process would clearly be violated by deliberately

oppressive or overly burdensome or irrational disclosure and disclaimer mandates. For instance, a strong case could be made that it is unreasonable to require public disclosure of full contact information for ballot-measure signatories if the goal of such disclosure is supposedly only to verify signature validity, and that the threat of retaliation in the Internet age is so great as to require better tailoring of the law under intermediate scrutiny. Similarly, full public disclosure of small donors likely serves no purpose other than to facilitate harassment and retaliation. But unless the transparency mandates imposed on ballot-measure qualification processes and candidate financing are illegitimate in this regard, such mandates should generally be upheld. Again, this is because the First Amendment is not ordinarily violated by the burdens incidentally imposed by the legitimate workings of the core functions of government itself.<sup>63</sup>

## **Theoretical Fix 2:**

### **Stopping the Overreach by Publicity Advocates by Recognizing Private Civic Engagement Is Protected by the First Amendment**

The same argument does not hold for disclosure and disclaimer requirements for issue or legislative advocacy and truly independent expressions of support or opposition for candidates or ballot measures, much less forcing the disclosure of think tank donors. Such publicity mandates are imposed on citizens who are neither exercising government powers nor applying for or occupying a public office. They cannot be regarded as a regulation of government activities stemming from a public trust obligation of government.

This basic fact differentiates legislative, issue, ballot-measure, and independent-candidate advocacy from petitioning for a ballot measure or direct candidate contributions. Imposing a publicity mandate directly on citizens who engage in such conduct (or who associate with those who do by becoming a member of an interest group) is a direct interference with their individual liberty; it is not equivalent to government maintaining its control over a governmental process as a fiduciary for the public with an incidental burden on individual liberty. Advocates of limited government and natural rights should oppose any such publicity mandates.

This is not only the right perspective as a matter of limited-government philosophy; it is also what following the original meaning of the Constitution requires, especially in regard to federal election laws supposedly authorized by the Constitution. A genuine originalist – one who believes in enforcing the original meaning of constitutional provisions as understood at the time they were ratified – should also oppose federal publicity mandates on those who fund or associate with those who fund legislative advocacy, issue advocacy, ballot-measure advocacy, and independent candidate advocacy.

First, there is no evidence the Elections Clause (Art. I, Sec. 4, Cl. 1), the purported constitutional source of disclaimer/disclosure laws, was ever meant to authorize regulation of campaign finances, much less impose publicity mandates on donors.<sup>64</sup> The promise the Framers made to the ratifiers, as evidenced by statements at the ratification

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conventions, was that congressional power would be narrowly construed.<sup>65</sup> Moreover, the authority for regulating the “manner of election” was not understood to govern how campaigns conducted themselves prior to the election; it was understood to authorize the fixing of candidate qualifications and the establishment of relevant procedures for fairly conducting the election itself.<sup>66</sup> Among the many parades of horribles advanced by opponents of ratification, no opponent of the Constitution ever even remotely suggested the Elections Clause would be construed as authorizing Congress to adopt a comprehensive campaign finance system.<sup>67</sup>

Furthermore, especially in the absence of the requisite regulatory power – and contrary to Scalia’s dissenting analysis in *McIntyre* and concurring analysis in *Reed* – it is not the job of an originalist to prove a particular aspect of a liberty interest was expressly recognized by law as constitutionally exempt from government regulation at the time of the founding in order to establish its status as a constitutional right.

The Bill of Rights was famously *not* intended to suggest protected rights had to be codified explicitly to be recognized as constitutionally protected. The whole point of the Ninth Amendment was to emphasize the express listing of freedoms was intended neither to disparage nor to deny those other freedoms retained by the people. The Founders made this point precisely because they understood it was impossible to articulate and list fully and completely the range of protected rights. In view of such reasoning, the Founders would no more have thought constitutionally protected rights must *necessarily* be rooted in a specific federal, state, or common law codification than that they could not be protected unless they were listed in the Bill of Rights.

Of course, that does not mean constitutional rights – including the right to private speech and association – are whatever anyone claims they are. The listing of rights in the Bill of Rights communicates the Founders’ and ratifiers’ understanding of the nature of constitutionally protected liberty. An originalist is not free to deviate from that understanding without rejecting his claim to adherence to the original meaning of the Constitution. The act of articulating some rights in the Bill of Rights, and not others, must thus be understood as furnishing the outline of an underlying concept of ordered liberty that was meant to be constitutionally protected. Constitutional rights properly extend to the entire range of particular freedoms falling within that concept, not merely those that are expressly articulated; but they go no further.

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It would be incongruous, therefore, with the original understanding of the Bill of Rights, and indeed of constitutionally protected rights in general, to put advocates of the constitutional status of a claimed liberty in the position of having to prove the right was expressly recognized as such at the time of the Founding. For a genuine originalist, to

demonstrate a given freedom is constitutionally protected, it should be enough to show it falls within the same concept of ordered liberty instantiated by the freedoms articulated in the Bill of Rights. The proper originalist question, then, is not so much whether the Founders expressly recognized a constitutional right to private speech and association, but rather whether there is anything fundamentally different about the freedom to engage in private speech and association that might suggest it would not fall within the same concept of ordered liberty as the First Amendment’s general guarantee of free speech and association. As discussed below, there is not.

Scalia is correct to argue the history of robust private speech and association at the time of the Founding does not prove such activities were meant to be constitutionally protected. Nevertheless, the fact that private speech and association were recognized, respected, and exercised in their relevant aspects without legal prohibition at the time of the founding is certainly strong evidence of its inclusion within the concept of ordered liberty meant to be protected by the First Amendment. The essential similarity of such freedom with the core freedoms protected by the First Amendment is further revealed by the structural similarity of disclosure mandates and prior restraints.

It is well-established that the First Amendment’s general guarantee of free speech and freedom of the press was primarily meant to constitutionally prohibit prior restraints on speech – such as the regulatory regimes enforced by the “Printing Acts” of seventeenth-century Britain.<sup>68</sup> That is quite literally what “freedom of the press” meant. But it is often forgotten that the prior restraints to which the Founders objected were not limited to the content-based discretion given to government printing licensors to decide which books, pamphlets, or papers could be printed.

The prior restraints enforced by the 1643 and 1662 Printing Acts also consisted of (a) the compelled registration, and thereby forced disclosure, of publishers and their intended communications with a centralized authority, and (b) the forced, printed disclosure of the identity of the publisher and, on demand, the author, on all communications.<sup>69</sup> Even if a publisher secured a license for printing, it was illegal to publish anything without also complying

with these publicity mandates. At least one powerful British regulator actively tried to stamp out efforts to evade these mandates by publishers who deliberately misattributed authorship or used pseudonyms to identify authors of books.<sup>70</sup>

In short, disclosure mandates affecting both publishers and authors were part and parcel of the hated prior restraints of the Printing Acts of seventeenth-century Britain, which the First Amendment was clearly intended to prohibit. Publicity mandates aimed at forcing disclosure of political speakers and associations function in essentially the same way as these components of the British licensing of printing presses. Simply put, both the British scheme of printing-press licenses and the modern imposition of publicity mandates directly prohibit individuals from freely projecting their messages and associating to project those messages as they please (anonymously or pseudonymously) unless they first fulfill a regulatory mandate requiring identity disclosure. Although the chains do not always rest quite as heavily as a printing press licensing scheme, disclosure and disclaimer mandates undeniably share essential characteristics of the restraints on freedom of speech and the press that the First Amendment was clearly meant to prohibit.

The freedom to engage in private speech and association is thus naturally subsumed within the concept of ordered liberty instantiated by the freedom of the press. Therefore, private speech and association connected to issue or legislative advocacy and independent expressions of support or opposition for candidates or ballot measures must be regarded as constitutionally protected.<sup>71</sup>

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This does not mean forced publicity or disclosure is always foreclosed by the First Amendment. As discussed above, the underlying context of the publicity mandates – such as the transparency requirements of government functioning as a public trust – may justify publicity regulations. Other disclosure or disclaimer mandates may be required in order for government to perform its core functions, such as protecting against fraud. But there can be little doubt the First Amendment was originally meant to protect against laws that restrain and condition communication on the prior disclosure of the identity of authors (and those who associate with them to propagate their ideas, such as donors) when their communications represent nongovernmental, private activities that do not violate or threaten to violate anyone’s rights. This recognition should have force against state publicity mandates, as much as federal, through the application of the Fourteenth Amendment’s guarantee of First Amendment freedoms.

## **How to Move the Law and Culture Toward Respecting Private Civic Engagement**

The real question is how to correct the foregoing theoretical problems and get from current case law back to originalism. The existing as-applied exception to publicity mandates is the key.

As discussed above, current case law is perfectly content with prohibiting anonymous or pseudonymous speech and association during an election season unless disclosure requirements cause a serious threat of political, economic, or social retaliation.<sup>72</sup> However, the Supreme Court’s decisions afford little or no guidance for deciding when such retaliation is sufficient to warrant such an exemption from disclosure mandates.<sup>73</sup> On the one hand, Justice Scalia essentially tells citizens to “man up” and take whatever heat comes with forced disclosure and disclaimers. On the other hand, Justice Thomas underscores the nearly inviolate guarantee of anonymous speech and association. Between the two, Justice Kennedy swings from protecting privacy in seemingly broad terms (joining the majority in *McIntyre*) to downplaying threats of retaliation with little or no analysis (in sustaining disclosure and disclaimer requirements in *Citizens United*).

Following Kennedy’s lead, courts increasingly disregard challenges to disclosure and disclaimer requirements and are fickle in applying exemptions, a reverse course from the direction traveled up until *McIntyre*. Today, no one can know whether anything short of a direct and sustained threat of bodily harm or systematic governmental persecution qualifies for an exemption. The premise of this legal framework seems to be that such participation in the political process does not ordinarily give rise to serious threats of retaliation. That premise warrants reconsideration.

### **Legal Fix 1: Litigate to Turn the “As-Applied” Retaliation Exception Into the Rule**

It has been reported, somewhat incredibly, that it is mathematically impossible for Congress to be more polarized than it is now.

The current state of affairs in U.S. politics has become one of extreme polarization. Research has shown adherents to the major political parties have an unfavorable rating of their counterparts double what it was just 20 years ago.<sup>74</sup> It has even been reported, somewhat incredibly, that it is

mathematically impossible for Congress to be more polarized than it is now.<sup>75</sup> Polarization has been found to drive more than social issues; it characterizes even fiscal disputes over raising the debt limit.<sup>76</sup> Such polarization is undoubtedly related to the very real accumulation of government power to dominate nearly all aspects of life, which has justifiably led many, if not most, Americans to conclude, correctly, that the stakes are very high in any political decision.

After all, no one is immune to the intrusion of government power and coercion. Government power and coercion or the threat of such invades every nook and cranny of social, economic, and personal life. Federal, state, and local governments reach into our lives with a degree of largely unaccountable intrusion unparalleled in the history of the United States.<sup>77</sup>

Since September 11, 2001, for example, the National Security Agency has been intercepting and collecting the metadata and content of millions of phone calls and electronic communications by U.S. citizens without a warrant based on individualized probable cause. The latest report indicates the retained content of non-targeted, ordinary Americans outnumbers the retained content of terrorist suspects by more than nine to one.<sup>78</sup> Additionally, a review of the 469 major

preemption statutes the federal government enacted between 1789 and 1992 revealed nearly 30 percent (130) gave the federal government wide-ranging power to displace state and local policies concerning primarily or wholly local concerns, and most of these were enacted after 1970.<sup>79</sup> Beginning in the early 2000s, bans on fast food, smoking, happy hour, trans fats, *foie gras*, hip-hop clothing, and even dancing appear to have become performance benchmarks in the state and local regulatory portfolio.<sup>80</sup>

Today, government agencies not only dictate what size soft drink is available for purchase, they also shut down businesses virtually on a whim. In September 2010 the Small Business Administration reported economic regulations imposed by the federal government cost \$1.75 trillion per year, or about 14 percent of total national income.<sup>81</sup> The cost of state-imposed regulations in California alone was estimated at “\$492.994 billion, which is almost five times the State’s general fund budget, and almost a third of the State’s gross product.”<sup>82</sup> Around the country, people seeking to join occupations such as barber, cosmetologist, dental hygienist, or even frog farmer are forced to spend thousands of dollars and otherwise productive hours complying with licensing regulations.<sup>83</sup>

Deliberately anticompetitive regulatory regimes giving competitors the right to protest entry by entrepreneurs have been imposed by state legislatures and upheld by the highest courts over markets ranging from automobile and motorcycle dealerships to funeral parlors.<sup>84</sup> And all this is before even mentioning the hot-button social issues into which various interest groups interject government. The aftermath of the Supreme Court’s recent decision in *Burwell v. Hobby Lobby Stores* further illustrates how interest groups expect government to interfere with freedom of conscience, and indeed any niche of civil society with which they disagree.<sup>85</sup>

With factions bludgeoning each other as soon as they attain political power, the political stakes are quite reasonably perceived as high.

With factions bludgeoning each other as soon as they attain political power, the political stakes are quite reasonably perceived as high, and ideological tensions are naturally driven to new heights. Moreover, ideological adversaries are increasingly seeking to force publicity on whoever is financing the other side, primarily to enable economic, political, and social retaliation. This is illustrated by the routine demonization of individual citizens for exercising their First Amendment rights on one side or the other of a given issue.

Mozilla CEO Brendan Eich “voluntarily” resigned from his position in 2014 because he made a \$1,000 contribution to the Proposition 8 campaign in California.<sup>86</sup> Although it had been about six years since he donated the money, political pressure left the company with little choice but to encourage and accept Eich’s resignation.<sup>87</sup>

Tech giant Facebook has been attacked for its political donations in the past. In particular, a Facebook shareholder filed a complaint with SEC protesting the fact Facebook had given money to politicians who did not act in conformity with the company’s “corporate values.”<sup>88</sup> One of the complaints levied against Facebook was that it had given money to politicians who did not support a so-called “green agenda.”<sup>89</sup> There also have been reports of businesses being hesitant to support political candidates and causes because of fear of reprisal by customers.<sup>90</sup> Big Labor

created a blacklist to keep tabs on companies potentially to be punished for exercising constitutional rights in opposition to the unions' perceived interests.<sup>91</sup>

The culture of retaliation in electoral politics has bled into attacks on center-right think tanks and political groups in general, as ideological battles are increasingly waged through ad hominem attacks rather than persuasion. As discussed above, the Center for Media & Democracy and Progress Now have launched *ad hominem* assaults on private donors and successful advocates of conservative causes. Far from being the ranting of fringe left-wing groups who have no impact on government policy, this campaign coincided with efforts by U.S. Sen. Dick Durbin (D-IL) to seek public testimony from ideological opponents and financial supporters of the American Legislative Exchange Council. Meanwhile, the John Doe investigations in Wisconsin secretly authorized prosecutors to pore through the physical and electronic records of dozens of center-right organizations and individuals on the theory that speech and association in support of government union reforms had been illegally funded.

Advocates of private speech and association need to make the case that “transparent but ordinarily safe from retaliation” is now clearly a constitutional contradiction.

Politics has never been beanbag, but now it is an especially dangerous game. With retaliation increasingly par for the course in political discourse, the average donor and her associates have good reason to fear exercising their core constitutional rights in the context of forced publicity. The magnitude of the risk and adverse impact of such retaliation has

been increasingly enhanced and enabled by modern technology, which allows mass movements to arise instantaneously and virally to threaten serious adverse consequences to anyone who deviates from the preferred political line.<sup>92</sup> For example, the hacktivist group Anonymous has already targeted denial-of-service attacks on Koch Industries because of its political engagement, causing serious disruption of its websites.<sup>93</sup> Any individual or donor supporting virtually any cause is only a few clicks away from being discovered and targeted for a similar attack.

In this warlike political context, the as-applied exception to publicity mandates should be regarded as properly swallowing the rule that would otherwise sustain those mandates. In other words, just as “separate but equal” was eventually demonstrated to be a constitutional contradiction, advocates of private speech and association need to make the case that “transparent but ordinarily safe from retaliation” is now clearly a constitutional contradiction.

Making this point will require a commitment to continuously suing for as-applied exemptions from disclosure and disclaimer regulations until it becomes manifestly apparent to the judiciary such mandates are overbroad incursions against protected free speech and association. It may take decades, however, to build up a sufficient body of case law for the courts to reach the equivalent of a *Brown v. Board of Education* moment, in which 50 years of as-applied challenges to discriminatory segregation laws eventually resulted in the Court overturning *Plessy v. Ferguson*, under which it had previously held laws requiring separation of the races were presumptively constitutional.

The problem with this approach is unconstitutional suppression of ideas and associations can persist for decades in the meantime. There is good reason to believe our nation's commitment to



freedom of speech and association is waning in significant respects, whereas the nation's disgust with the ruling in *Plessy* grew over time. Relying on the *Brown* tactic alone would significantly risk the possibility the lifeblood of the marketplace of ideas – the financial resources needed to propagate ideas – could dry up. Fortunately, another tactic is available to advocates of private civic engagement.

## **Legal Fix 2:**

### **Deploy the Federalism Shield by Enacting a Free Speech Privacy Act**

Another response with the potential for furnishing immediate protection is to invoke the police power of the states to put meat on the bones of the constitutional right to private political speech and association, which is already implicit in the Court's as-applied exemption from disclosure and disclaimer regulations and publicity mandates.

Apart from repealing all such laws that fall on ordinary citizens and groups, one recommended approach involves simply passing a state law – call it the Free Speech Privacy Act – prohibiting the enforcement of any law directly or indirectly conditioning the exercise of the rights of free speech and association on the disclosure of the identity of a person or entity who fears a reasonable probability of social, political, or economic retaliation from such disclosure. The law should not only authorize declaratory and injunctive relief but also, to deter abusive prosecutions based on disclosure and disclaimer laws, should couple its prohibition to the right to recover damages and litigation expenses from anyone who is found to violate the law. States could also consider criminalizing violation of the law for additional deterrence.

This Free Speech Privacy Act would be fully constitutional because it would merely codify under state law the current status of constitutional law, which recognizes the First Amendment requires an as-applied exception from disclosure and disclaimer regulations and publicity mandates under the same

circumstances. Thus, not only would the act override contrary state laws, a preemption challenge under the Federal Election Commission Act (FECA) should fail because the Supremacy Clause applies only to constitutional federal regulatory actions. The application of personal liability to a government official violating the law – other than judges and prosecutors who enjoy absolute immunity – would also be constitutional because the foregoing as-applied exception to the constitutionality of disclosure and disclaimer laws is clearly established law, which should overcome any qualified immunity.

This Free Speech Privacy Act would be fully constitutional because it would merely codify under state law the current status of constitutional law.

The law would not be a perfect remedy for regulatory overreach. For example, although a countersuit could be authorized to stop a state-law prosecution under the proposed Free Speech Privacy Act, current case law would largely prevent the act from being leveraged to derail an ongoing federal investigation. Even so, the law would have a positive liberty-enhancing impact. The threat of liability and criminal exposure would undoubtedly cause even federal investigators involved in a disclosure and disclaimer enforcement case to select their targets more carefully.

The “Federalism Shield” of the Free Speech Privacy Act would follow a long line of similar efforts to resist federal overreach through the exertion of state sovereignty, as evidenced by the Health Care Freedom Acts, enacted as constitutional or statutory law in more than a dozen states to resist the individual mandate of the Patient Protection and Affordable Care Act,<sup>94</sup> and state laws that have resisted adoption of REAL ID in a roughly equal number of states.<sup>95</sup> These efforts have sparked judicial reconsideration of longstanding constitutional doctrines, created standing for bringing necessary constitutional challenges, and discouraged the entrenchment in state law of federal policies dangerous to principles of limited government.

Legislators not satisfied with the delay associated with such an incrementalist approach could attempt to advance a more aggressive version of the Free Speech Privacy Act, which would concretely define the sort of retaliatory concerns warranting its protections. For example, the law could state any “reasonably probable” threat to the prospective economic advantage of a business constitutes the sort of economic retaliation triggering its protections.

The significance of political will exerted in a state to advance a given freedom in a novel way has a track record of moving the courts to re-conceptualize related constitutional freedoms.

This formulation may or may not be where the current Supreme Court jurisprudence lands on the issue, so there is a risk the law could be deemed more than a mere codification of such precedent and be subject to preemption by federal law. But by lending the weight and legitimacy of state sovereignty to the formulation, the reluctance of courts to move in this direction would likely be greatly

diminished for at least two reasons. First, courts are generally loath to preempt state laws. The significance of political will exerted in a state to advance a given freedom in a novel way has a track record of moving the courts to re-conceptualize related constitutional freedoms. This is most clearly illustrated by recent court decisions on gay marriage.

Second, even apart from non-preemptive presumptions and dispositions, there is a strong originalist argument that has yet to be fairly considered by the Court, that the Ninth and Tenth Amendments work in tandem to reserve to the states the power to articulate and enforce constitutional rights that would not otherwise be recognized as constraining federal power.<sup>96</sup>

### **Legal Fix 3: Deploy the Federalism Shield by Enacting a Publius Confidentiality Act**

For a more immediate impact, and perhaps in conjunction with the Free Speech Privacy Act, privacy advocates interested in leveraging state law should also consider passing a law establishing a formal index allowing ordinary citizens or entities to claim a unique confidential identifier for use in complying with disclosure and disclaimer regulations. Such a law – call it the “Publius Confidentiality Act” – would expressly state such identifier is, under state law, the equivalent of the citizen or entity’s legal name for purposes of compliance with regulations on donations to political campaigns and advocacy groups.

The use of a formal index, rather than simply state law protection of self-chosen pseudonyms, is recommended because it would be difficult if not impossible to convince banking institutions to allow financial transactions under an informally adopted pseudonym, particularly if there were no means of assigning unique pseudonyms to specific individuals. Such reluctance on banks' part would mean donations to candidates or political organizations made under a pseudonym would almost certainly be cash transactions, which would discourage large donations. In addition, state law authorization of the use of informal pseudonyms would make it practically impossible for treasurers to enforce limits on direct campaign contributions, which either would expose such a law to a stronger preemption argument under FECA or would simply deter committee treasurers from ever accepting such contributions for fear of violating their federal fiduciary duty to enforce the limits.<sup>97</sup>

As a formal registry created by state law, the mechanics of the Publius Confidentiality Act would be similar to those devised to maintain the confidentiality of women fleeing domestic violence.<sup>98</sup> The registry would allow citizens or entities concerned about maintaining privacy in their political advocacy and associations to access a secure central website and obtain a unique identifying number or

As a formal registry created by state law, the mechanics of the Publius Confidentiality Act would be similar to those devised to maintain the confidentiality of women fleeing domestic violence.

combination of numbers and letters – after affirming, under penalties of perjury, they face a reasonable probability of retaliation, have not previously selected a different identifier, intend to preserve the confidentiality of any donation made under the identifier, are not a foreign national nor serving as a conduit for a third party's donations, and have no intention of using the assigned identifier in connection with defamation, fraud, or *quid pro quo* bribery.<sup>99</sup>

To allow for subsequent law enforcement, the process should require the applicant to furnish (and the state to maintain confidentially) sufficient information allowing for the location of the applicant upon a lawfully issued judicial subpoena or a warrant based on probable cause. There should be a range of options for this enforcement requirement, not all of which should rely on the integrity of government confidentiality policies. For maximum privacy, citizens or entities should be permitted to identify a publicly accountable fiduciary, such as an attorney or designated agent, who would be responsible for complying with lawful requests for the disclosure of the applicant's location.<sup>100</sup>

As a state law that can obviously override other state laws and regulations, the Publius Confidentiality Act would certainly be regarded as constitutional if enacted to override a state's disclosure and disclaimer laws. And it would likely be regarded as constitutional under current precedent, even if applied to federal disclosure and disclaimer regulations under FECA.

Although FECA includes an express preemption provision, which purports to displace all state laws regarding federal elections,<sup>101</sup> a significant number of courts have interpreted the preemption provision as not fully occupying the field of campaign-finance law<sup>102</sup> and as reaching only those state laws that directly conflict with the text or objectives of the act.<sup>103</sup> These cases are controlling because FECA clearly anticipates state law will supplement the meaning of its name disclosure mandate for donors, because nothing in FECA or its implementing regulations

defines the “name” that must be used in connection with contribution reporting, disclosures, or disclaimers.<sup>104</sup> Furthermore, deference to state naming law is implicit in the fact the regulations implementing FECA anticipate the possibility of name-changes, without addressing the need for federal legal authority for a name change and without mandating any other procedure for name-changes other than to associate contributions made under the new name with the old, if known.<sup>105</sup> In view of such deference to state naming law, it is reasonable to conclude there is space for the Publius Confidentiality Act to supplement FECA’s disclosure and disclaimer provisions.<sup>106</sup>

This non-preemption analysis is strengthened by reference to the federalism canon of construction, notwithstanding the general unavailability of the doctrine in Elections Clause cases.

The Publius Confidentiality Act would furnish a real, state-law name that renders confidential, but not anonymous, the underlying donor.

The federalism canon of construction requires federal laws that upset the usual constitutional balance to be clearly and unequivocally intended to preempt state law, with all reasonable interpretations to the contrary construed in favor of coexistence of the two laws.<sup>107</sup> The Supreme Court recently

rejected the application of the canon in the context of state laws requiring voter identification on the grounds the regulation of federal elections did not antedate the constitution and is not a traditionally reserved power of the states.<sup>108</sup> That case is distinguishable because the disclosure and disclaimer aspects of federal campaign finance regulation are at the outer edge of the power that was actually delegated to Congress under the Elections Clause, if encompassed by it at all. The best evidence indicates the core of the Elections Clause power had nothing at all to do with financing candidates or issues during an election, but instead was focused on the mechanics of running the election itself.<sup>109</sup> The regulation of financial activities, at most, is swept into the Elections Clause by the Necessary and Proper Clause, which is, itself, subject to limitations based on the principle of state sovereignty.

The principle of state sovereignty would be implicated by any claim FECA preempts the Publius Confidentiality Act. This is because states have traditionally exercised power over the designation of names for citizens<sup>110</sup> and for the naming of businesses.<sup>111</sup> Therefore, the usual constitutional balance would be upset if FECA were construed to preempt the Publius Confidentiality Act, and hence the federalism canon of construction should apply to any assessment of whether FECA would preempt the Publius Confidentiality Act.

The federalism canon of construction would require FECA to be construed consistently with the Publius Confidentiality Act because there would be no clear and unequivocal conflict between them. This is evident from two observations.

First, the act would not conflict with FECA’s prohibition on anonymous donations or contributions “in the name of another” because it would furnish a real, state-law name that renders confidential, but not anonymous, the underlying donor.<sup>112</sup> Likewise, the act would not conflict with FECA’s limit on pseudonymous names because that provision references solely the use of “wholly fictitious” names for the purpose of salting public reporting (deliberately placing

false names in disclosures to make it possible for FEC to identify when contributor reports are being used commercially), in order to enforce FECA’s prohibition on the commercial use of donor disclosures. The implementing regulation states, “For purposes of this section, a pseudonym is a wholly fictitious name which does not represent the name of an actual contributor to a committee.”<sup>113</sup> In contrast, a unique identifier furnished under the Publius Confidentiality Act would not be a fictitious name; it would be a real name under state law for political giving purposes, and the purpose of using the identifier would have nothing to do with enabling commercial use of donor information.

Second, there would be no conflict between the Publius Confidentiality Act and any duty imposed on committee treasurers to enforce contribution limits, because unique identifiers would be used in conjunction with a mechanism for locating applicants; hence, contributions by confidential donors would still be traceable to unique individuals or entities for purposes of calculating compliance with and enforcing contribution limits. This would “furnish all of the indicia of reliability” needed for the public to assess the donor’s influence on candidates – just as knowing a brand name allows consumers to differentiate among products without knowing the legal name of the underlying business.<sup>114</sup>

In short, given the lack of any clear and unequivocal clash between FECA and the Publius Confidentiality Act, the act would likely be sustained under a preemption analysis. But even if FECA were amended or new regulations issued to clearly and unequivocally preempt the Publius Confidentiality Act, strong procedural and substantive arguments under current constitutional law should still protect the act from displacement.

It should be recalled that, like the Free Speech Privacy Act, the use of confidential identifiers would be directly connected to current First Amendment precedent recognizing an as-applied retaliation exception from disclosure and disclaimer

The use of confidential identifiers would be directly connected to current First Amendment precedent.

laws. Whatever the scope of the federal government’s Elections Clause power, the Publius Confidentiality Act would be meant only to codify this established constitutional limitation on such power. For this reason, there would undoubtedly be valid applications of the act and no reason to think most applications of the law would be invalid. Thus, the federal government could not claim a facial clash existed between federal law and the Publius Confidentiality Act.

Without proof of a particular invocation of the law as going beyond the scope of the as-applied retaliation exception, a challenge to the law by the federal government could not even ripen into a genuine case or controversy because there would be no injury to the supremacy of the federal government.<sup>115</sup> Causally attributing greater difficulty to enforcing federal contribution limits to the act would also be difficult, if not impossible, because the source of the enforcement difficulty would not necessarily be state law, but rather the First Amendment itself, which the act merely codified. Absent provable violations of federal contribution limits by confidential contributors who were not entitled to anonymity under as-applied First Amendment precedent, it is difficult to see how the federal government could demonstrate the existence of an actual case and controversy justifying preemption of the Publius Confidentiality Act in federal court.<sup>116</sup>

## Conclusion

With the dark money crusaders laying siege against the privacy of donors and threatening total war against their political opponents, the current course charted by Supreme Court precedent does not bode well for free speech or association. But that does not mean the battle is lost.

Advocates of private speech and association must first recognize their opponents have a point: The right to private civic engagement does not ordinarily apply to large, secretive direct donations to candidates for public office or current public officials. Nor does it ordinarily apply to the workings of government itself. Current precedent is right to sustain transparency mandates in those contexts when they survive intermediate scrutiny. Recognizing this will enable advocates of private civic engagement to focus on protecting private speech and association connected to nominal direct candidate contributions, issue or legislative advocacy, and independent expressions of support for or opposition to candidates or ballot measures.

The Free Speech Privacy Act and the Publius Confidentiality Act would use the sovereign power of the states to open the public forum to private civic engagement in a manner fully consistent with current legal precedent.

Such efforts should entail a litigation strategy aimed at demonstrating the as-applied retaliation exception to mandatory disclosure and disclaimer requirements should become the rule in today's reality of nearly unlimited government and polarized politics. Advocates also should seek to deploy federalism shields in the form of the Free Speech Privacy Act and the Publius Confidentiality Act, which

would use the sovereign power of the states to open the public forum to private civic engagement in a manner fully consistent with current legal precedent. By deploying both angles of attack, the stage can be set for a return to the Court's ruling in *McIntyre* that recognizes a robust right to private civic engagement and the commonsense understanding that "[p]eople are intelligent enough to evaluate the source of an anonymous writing."

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Dranias's writings include "Introducing 'Article V 2.0: The Compact for a Balanced Budget' (Heartland Institute/Federalist Society), "Recognizing Pension Fund Insolvency: A Catalyst for Reform" (with Dr. Byron Schlomach) (Goldwater Institute), "Moving Forward: A Roadmap for Choice and Competition" (with Drs. Andrew Kleit and Byron Schlomach) (Goldwater Institute), and "Save Taxpayers Tens of Billions of Dollars: End Government Sector Collective Bargaining" (with Dr. Byron Schlomach and Steve Slivinski) (Goldwater Institute).

## Appendix – Model Legislation

### FREE SPEECH PRIVACY ACT

REFERENCE TITLE: \_\_\_\_\_

State of \_\_\_\_\_

(Introducing \_\_\_\_\_)

\_\_\_\_\_ Legislature

\_\_\_\_\_ Session

20\_\_\_\_

\_\_\_\_. B. \_\_\_\_\_

Be it enacted by the Legislature of the State of \_\_\_\_\_ Title \_\_\_\_\_, \_\_\_\_\_, is amended by adding chapter \_\_\_\_\_, to read:

Section 1. This Act shall be deemed the “Free Speech Privacy Act.”

Section 2. The State of \_\_\_\_\_ hereby declares that the First Amendment to the United States Constitution guarantees citizens and residents of the United States, both individually and when acting in association with other such citizens and residents, the right to engage in free speech and association without being required to disclose their identity when they fear a reasonable probability of social, political, or economic retaliation from such disclosure.

Section 3. Notwithstanding any law to the contrary, a governmental agent shall not directly or indirectly: (a) compel in connection with the exercise of the rights of free speech and association the disclosure of the identity of the citizen or resident, or association of citizens or residents, engaged in such exercise who fears a reasonable probability of social, political, or economic retaliation from such disclosure; (b) condition the exercise of the rights of free speech and association on the disclosure of the identity of a citizen or resident, or association of citizens or residents, engaged in such exercise who fears a reasonable probability of social, political, or economic retaliation from such disclosure; or (c) penalize, charge, assess, or tax any citizen or resident, or association of citizens or residents, who fails to disclose their identity in connection with the exercise of their rights of free speech and association when they fear a reasonable probability of social, political, or economic retaliation from such disclosure, because of such nondisclosure.

Section 4. Notwithstanding any law to the contrary, proof that a governmental agent has violated this Act shall be a complete defense against any civil or criminal charge brought against any citizen or resident, or association of citizens or residents, who fails to disclose their identity in connection with the exercise of their rights of free speech and association. A citizen, resident, or association of citizens or residents who prevails on this defense shall be paid their litigation expenses in the related proceeding by the offending governmental agent.

Section 5. Any governmental agent knowingly/recklessly/maliciously [strike one or more] violating this Act shall be deemed to have violated the First Amendment to the United States

Constitution and to have committed a Class \_\_\_\_ [insert desired category] Misdemeanor/Felony [strike one].

Section 6. Any state law in conflict with this Act shall be deemed repealed to the extent of such conflict.

Section 7. The State of \_\_\_\_, its agencies, and all of its political subdivisions are hereby prohibited from using any personnel or resources to enforce, administer, or cooperate with any state or federal action or program that purports to enforce any federal law in conflict with this Act.

[Optional Section \_\_\_\_ . For purposes of this Act, “fear of a reasonable probability of social, political, or economic retaliation” from the disclosure of the identity of a citizen or resident, or association of citizens or residents, shall be deemed to exist with respect to the claimant under any of the following circumstances: \_\_\_\_\_ [need to specify compelling circumstances; or integrate with Publius Confidentiality Act.]

Section 8. This Act shall be liberally construed so as to effectuate its purposes.

Section 9. If any phrase, clause, sentence, or provision of this Act, or the applicability of any phrase, clause, sentence, or provision of this Act to any government, agency, person, or circumstance, is declared in a final judgment to be contrary to the United States Constitution, contrary to the constitution of the State of \_\_\_\_, or is otherwise held invalid by a court of competent jurisdiction, such phrase, clause, sentence, or provision shall be severed and held for naught, and the validity of the remainder of this Act and the applicability of the remainder of this Act to any government, agency, person, or circumstance shall not be affected.



PUBLIUS CONFIDENTIALITY ACT

REFERENCE TITLE: \_\_\_\_\_

State of \_\_\_\_\_  
(Introducing \_\_\_\_\_)

\_\_\_\_\_ Legislature  
\_\_\_\_\_ Session

20\_\_

\_\_ . B. \_\_\_\_

Be it enacted by the Legislature of the State of \_\_\_\_\_ Title \_\_\_\_, \_\_\_\_\_, is amended by adding chapter \_\_\_\_, to read:

Section 1. This Act shall be deemed the “Publius Confidentiality Act.”

Section 2. The State of \_\_\_\_\_ hereby declares that the First Amendment to the United States Constitution guarantees citizens and residents of the United States, both individually and when acting in association with other such citizens and residents, the right to engage in free speech and association without being required to disclose their identity when they fear a reasonable probability of social, political, or economic retaliation from such disclosure.

Section 3. As herein provided, citizens, residents, and organizations domiciled in the State of \_\_\_\_\_ may apply for a unique name, which preserves the confidentiality of their given name, exclusively for the limited purpose of exercising their right to free speech and association by way of making candidate contributions; contributions to political committees; contributions to ballot measure, lobbying, or issue advocacy organizations; contributions to political parties; independent expenditures; and expenditures in support of lobbying or issue advocacy. For this limited purpose, and notwithstanding any law to the contrary, a unique name obtained under this Act shall be the legal equivalent of the applicant’s otherwise given name.

A. Within one year of the effective date of this Act, the State of \_\_\_\_\_ shall establish through the Office of the Secretary of State a system for confidentially assigning unique names to citizens, residents, and organizations making application under this Act. The naming system established by the Office of the Secretary of State shall: (1) enable judicial employees to access the system for assigning such names in connection with the adjudication of applications hereunder; (2) enable appropriate and authorized financial institution employees to verify instantly and confidentially by electronic means that a name assigned under this Act corresponds to the federal tax identification number of the applicant; (3) enable civil litigants under judicial subpoena in connection with alleged defamation or fraud to ascertain the given name of the applicant or the applicant’s designated agent for purposes of ascertaining the given name of the applicant; and (4) enable law enforcement under judicial warrant for a criminal offense to ascertain the given name of the applicant or the applicant’s designated agent for purposes of ascertaining the given name of the applicant.

B. Once the naming system contemplated by this Act is established by the Office of the Secretary of State, financial institutions shall have the right and authority to open demand deposit accounts under such names for the limited purposes contemplated by this Act, provided

that the account is traceable to the applicant's current federal tax identification number and otherwise compliant with applicable law.

C. Once the naming system contemplated by this Act is established by the Office of the Secretary of State, citizens, residents, and organizations may file an application with the \_\_\_\_ [lowest level] court in their county of domicile, setting forth facts under oath and penalty of perjury justifying the adoption of a name under this Act.

D. The application under this Act shall be in the applicant's own given name or, alternatively, in the name of an attorney licensed in the State of \_\_\_\_\_ or a bonded notary, acting as the applicant's designated agent, with the applicant's given name retained for confidential in camera disclosure in connection with their application. In either event, the applicant's given name and associated judgment on the application shall subsequently be kept under seal if the application is granted. The information in the application and judgment shall not be disclosed and is not a public record.

E. The application contemplated by this Act shall be granted and a unique name confidentially assigned to the applicant by way of court judgment, if and only if the application is signed by the applicant under oath and penalty of perjury and states: (1) the applicant fears a reasonable probability of social, political, or economic retaliation from exercising the right to free speech and association by way of making candidate and candidate committee contributions; contributions to political committees; contributions to ballot measure, lobbying, or issue advocacy organizations; contributions to political parties; independent expenditures; and expenditures in support of lobbying or issue advocacy if the applicant were to comply with any government-mandated disclosure of the applicant's given name in connection with such activities; (2) the applicant has no intention to disclose the applicant's given name to any candidate or candidate agent in connection with any contribution to a candidate or candidate committee for a period of at least four years after the contribution unless the applicant first discloses the applicant's given name in connection with the contribution as otherwise required by law; (3) the applicant has not previously selected a different name under the Act; (4) the applicant is not a foreign national; (5) the applicant has no intention of serving as a conduit for a third party's political contributions or expenditures; (6) the applicant has no intention of using the assigned name in connection with defamation, fraud, or *quid pro quo* bribery; (7) the applicant is not obtaining the name for the purpose of committing or furthering the commission of any criminal offense or any offense involving false statements; (8) the applicant is making the application solely for its own best interest; (9) the applicant acknowledges that the assigned name will not release the applicant from any obligations incurred or harm caused by the applicant; (10) the applicant has not been convicted of a felony; and (11) felony charges are not pending in any jurisdiction against the applicant for any offense involving false statements or misrepresentations.

F. If the court has probable cause to doubt the credibility of the applicant's attestations, the court may deny the application.

G. If the court subsequently obtains probable cause to doubt the truth of the applicant's attestations, the court may enter an order setting aside its judgment and any order sealing the application and judgment with reasonable prior notice to the applicant or the applicant's

designated agent and an opportunity to be heard in camera.

Section 4. Any state law in conflict with this Act shall be deemed repealed to the extent of such conflict.

Section 5. The State of \_\_\_\_, its agencies, and all of its political subdivisions, are hereby prohibited from using any personnel or resources to enforce, administer, or cooperate with any state or federal action or program that purports to enforce any federal law in conflict with this Act.

[Optional Section \_\_\_\_. For purposes of this Act, “fear of a reasonable probability of social, political, or economic retaliation” from the disclosure of the identity of a citizen or resident, or association of citizens or residents, shall be deemed to exist with respect to the claimant under any of the following circumstances: \_\_\_\_\_.]

Section 6. This Act shall be liberally construed so as to effectuate its purposes.

Section 7. If any phrase, clause, sentence, or provision of this Act, or the applicability of any phrase, clause, sentence, or provision of this Act to any government, agency, person, or circumstance, is declared in a final judgment to be contrary to the United States Constitution, contrary to the constitution of the State of \_\_\_\_, or is otherwise held invalid by a court of competent jurisdiction, such phrase, clause, sentence, or provision shall be severed and held for naught, and the validity of the remainder of this Act and the applicability of the remainder of this Act to any government, agency, person, or circumstance shall not be affected.

## Endnotes

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7. Note, *ibid.*, observing John Udall, an Anglican clergyman with Puritan views, was convicted in 1590 for writing unlicensed pamphlets attacking the bishops under the pen name "Martin Marprelate"; that "[i]n 1637 the licensing laws were amended to require that all books bear the name of the author as well as the printer, and to regulate the importing of books. John Lilburn and John Wharton, working men of Puritan views, were convicted of contempt in 1638 for refusing to say whether they had smuggled books from Holland into England," citing Zechariah Chafee, *ibid.*, pp. 192–97; W.S. Holdsworth, "Press Control and Copyright in the 16th and 17th Centuries," *Yale Law Journal* **29** (1920): 841, 848.

8. Jonathan Turley, "Registering Publius: The Supreme Court and the Right to Anonymity," *Cato Supreme Court Review* **57** (2001–2002), observing the use of anonymity was firmly ingrained in American society at the time of the founding of the federal government, citing John Stevens Jr., *Americanus No. 7*, "A Refutation of Governor Edmund Randolph's Objections," *Daily Advertiser* (New York), January 21, 1788, reprinted in Bernard Bailyn, editor, *The Debate on the Constitution: Federalist and Anti-Federalist Speeches, Articles, and Letters During the Struggle Over Ratification, Vol. 2* (New York, NY: Library of America, 1993), pp. 58, 60; John P. Kaminski and Gaspare J. Saladino, editors, *The Documentary History of the Ratification of the Constitution* (Charlottesville, VA: University of Virginia Press, 1986), p. 290 n.15; *Letters of Fabius*, 1788, reprinted in Paul L. Ford, editor, *Pamphlets on the Constitution of the United States* (Brooklyn, NY: 1888), p. 178; Merrill Jensen, editor, *The Documentary History of the Ratification of the Constitution, Vol. 3* (Williamsburg, VA: Omohundro Institute of Early American History and Culture, 1976), pp. 490, 513; Oliver Ellsworth, *Landholder No. 7*, December 17, 1787, reprinted in Philip Kurland and Ralph Lerner, editors, *The Founders' Constitution, Vol. 4*, (Indianapolis, IN: Liberty Fund, 1987), pp. 639, 639–40; *Essays of Brutus*, in Herbert J. Storing, editor, *The Complete Anti-Federalist, Vol. 2* (Chicago, IL: University of Chicago Press), pp. 214, 358, 369, 379–80; *Letters of Centinel*, in in Herbert J. Storing, editor, *The Complete Anti-Federalist, Vol. 2* (Chicago, IL: University of Chicago Press), pp. 130, 142; Alexander Hamilton, *Pacificus No. 1*, June 29, 1793, in Harold C. Syrett, editor, *Papers of Alexander Hamilton, Vol. 15* (New York, NY: Columbia University Press, 1969), pp. 33–43; James Madison, *Helvidius No. 1*, August 24, 1793, in Thomas A. Mason, Robert A. Rutland, and Jeanne K. Sisson, editors, *Papers of James Madison, Vol. 15* (Charlottesville, VA: University of Virginia Press, 1985), pp. 66–73; James Madison, *Helvidius No. 4*, September 14, 1793, in Gaillard Hunt, editor, *The Writings of James Madison, vol. 6* (New York, NY: G.P. Putnam's Sons, 1906), pp. 171, 174.
9. Benjamin Barr and Stephen R. Klein, "Publius Was Not a PAC: Reconciling Anonymous Political Speech, the First Amendment, and Campaign Finance Disclosure," *Wyoming Law Review* **14** (2014): 253, 256–61, citing Ron Chernow, *Alexander Hamilton* (New York, NY: Penguin Books, 2004), p. 261.
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11. *Brown v. Socialist Workers*, 459 U.S. 89 (1982).
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13. *DeGregory v. Attorney Gen. State of New Hampshire*, 383 U.S. 825 (1966); *Givson v. Fl. Leg. Inv. Comm.*, 372 U.S. 539, 546 (1963).
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16. *Citizens United v. FEC*, 558 U.S. 310, 367 (2010).
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20. See, e.g., *Citizens United*, 558 U.S. 310; *Doe v. Reed*, 561 U.S. 186 (2010); *McConnell v. Federal Election Comm’n*, 540 U.S. 93 (2003); *Davis v. Federal Election Comm’n*, 554 U.S. 724 (2008).

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23. 362 U.S. 60, 64 (1960).

24. See, e.g., *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 166, 168–69 (2002), striking down canvassing permit, in part because it “necessarily results in a surrender of ... anonymity”; *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 187 (1999), holding a Colorado statute requiring initiative-petition circulators wear name-identifying badges violated First Amendment right to anonymous political speech; *Citizens for Responsible Government State Political Action Committee v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *American Civil Liberties Union of Georgia v. Miller*, 977 F. Supp. 1228 (N.D.Ga. 1997), striking down state law criminalizing use of anonymous online identities; Thomas H. Dupree, “Exposing the Stealth Candidate: Disclosure Statutes After *McIntyre v. Ohio Elections Commission*,” *University of Chicago Law Review* **63**: 1211 (1996).

25. *Buckley v. Valeo*, 424 U.S. 1, 68 (1976).

26. *Citizens United*, 558 U.S. at 367.

27. *Buckley*, 424 U.S. at 60, 63 (citing 2 U.S.C. §§ 431(4), 434 (a)(4), (b)).

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30. *Reed*, 561 U.S. at 219-21.

31. *Buckley*, 424 U.S. at 69.

32. *Fed. Election Commission v. Wisconsin Right to Life*, 551 U.S. 449, 457 (2007).

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37. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).
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47. See, e.g., *Citizens United*, 558 U.S. at 367-71; *Reed*, 561 U.S. at 228.
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55. *Nevada Commission on Ethics v. Carrigan*, 131 S.Ct. 2343, 2350 (2011).

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57. *Nevada Commission on Ethics*, 131 S.Ct. at 2350, "But how can it be that restrictions upon legislators' voting are not restrictions upon legislators' protected speech? The answer is that a legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it."

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59. *Ibid.*, page 697.

60. *Ibid.*, page 704–5.

61. Cf. *Twiggs v. Wingfield*, 95 S.E. 711, 712-14 (Ga. 1917), holding "no man who is agent or trustee for another, whether a private or public agent or trustee, shall have the opportunity or be led into the temptation to make profit out of the business of others entrusted to his care, by bargaining with himself, directly or indirectly, in respect to that business."

62. If challenged, the government should have the burden of proving the donation thresholds that trigger disclosure involve amounts that would lead a reasonable person to suspect a secretive donation would be intended to solicit a *quid pro quo*. This burden should be shouldered by the government and not the complainant, because whether a donation is large enough to cause a reasonable suspicion of soliciting a *quid pro quo* is a judgment call based on the nature of a public official's power and position, and, therefore, intrinsically at risk of reaching more broadly than its proper regulatory scope, thereby possibly constraining rightful secretive donations, to which a presumption of liberty should apply.

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88. Helen A.S. Popkin, "Welcome to Silicon Valley: Give Right or Get Out!" CNBC, April 10, 2014, <http://www.cnbc.com/id/101573775#>.
89. *Ibid.*
90. : Laura A. Bischoff, "Mixing business, politics often causes backlash," *Springfield News-Sun* (August 22, 2010), available at <http://www.springfieldnewssun.com/news/news/national-govt-politics/mixing-business-politics-often-cause-s-backlash-1/nNGNm/>; Editorial, "How 'dark money' got that way," *Orange County Register*, November 7, 2013, available at <http://www.oregister.com/articles/political-535239-money-donors.html>.
91. Editorial, "How 'dark money' got that way," *Orange County Register*, November 7, 2013, <http://www.oregister.com/articles/political-535239-money-donors.html>; David Siders, "Former Jerry Brown aide among consultants blacklisted by labor," *Sacramento Bee*, July 6, 2013, <http://blogs.sacbee.com/capitolalertlatest/2013/07/former-jerry-brown-aide-among-consultants-blacklisted-by-labor.html>.
92. Sean Parnell, "Attacks on political donors demonstrate dangers of excessive disclosure," Center for Competitive Politics, July 28, 2011, <http://www.campaignfreedom.org/2011/07/28/attacks-on-political-donors-demonstrate-dangers-of-excessiv>

e-disclosure/. (The article shows how hackers have targeted conservative donors specifically for political donations.)

93. *Ibid.*

94. John Dinan, "How States Talk Back to Washington and Strengthen American Federalism," *Policy Analysis #744*: Cato Institute, December 3, 2013, p. 12.

95. Jim Harper, "Real ID: A State-by-State Update," *Policy Analysis #749*, Cato Institute, May 12, 2014, pp. 11, 12.

96. Far from being an ink blot, the whole point of the Ninth Amendment was to ensure the scope of delegated federal power was – at the very least – bounded by fundamental liberties guaranteed by state law. See Calvin R. Massey, "The Anti-Federalist Ninth Amendment and its Implications for State Constitutional Law," *Wisconsin Law Review* **1990** (1990): 1229, 1232. Moreover, James Madison expected state legislatures and constitutions to furnish the substance of the rights reserved under the Ninth Amendment. See Arthur E. Wilmarth Jr., "The Original Purpose of the Bill of Rights: James Madison and the Founders' Search for a Workable Balance Between Federal and State Power," *American Criminal Law Review* **26** (1989): 1261, 1293, 1302.

97. See generally 2 U.S.C. § 432(c); 11 C.F.R. §§ 102.9, 103.3, 104.8, 104.14.

98. Kristen M. Driskell, "Identity Confidentiality for Women Fleeing Domestic Violence," *Hastings Women's Law Journal* **20** (2008/2009): 129.

99. With respect to direct candidate contributions, the Publius Confidentiality Act would require applicants to attest to their intention of preserving the confidentiality of their donor status, especially from the recipient. After all, the fundamental critique of confidential contributions and associations from an anti-corruption perspective is that the public official remains aware of the source of his political support, but the public does not, thereby enabling the public official possibly to trade favors for cash without anyone in the public ever finding out. Fixing this asymmetrical transparency does not require the total elimination of confidential speech and association. Instead, a more narrowly tailored solution would naturally involve a regulation that requires anyone engaging in confidential speech and association to remain so with respect to the politician or public official they support. That is precisely what the Publius Confidentiality Act seeks to accomplish by requiring the applicant for the unique identifier to attest that he will maintain the confidentiality of his donor status.

100. Although not recommended because of the potential for abuse by political insiders, if passage of the Publius Confidentiality Act is otherwise impossible because of claims it would be utilized for sham applications, the law could provide for random audits of applicant eligibility, in which the applicant would be required to furnish evidence at an expedited judicial hearing to justify the conclusion he faces a reasonable probability of retaliation. To minimize the abuse of this audit process, the burden of proof should be kept at the level of demonstrating a *prima facie* case based on a preponderance of the evidence, and also allow for applicants to appear confidentially and use redacted evidence through legal representatives.

101. 2 U.S.C. § 453; 11 C.F.R. § 108.7.

102. Lisa Babish Forbes, "Federal Election Regulation And The States: An Analysis of The Minnesota and New Hampshire Attempts to Regulate Congressional Elections," *Case Western Reserve Law Review* **42** (1992): 509.

103. *Dewald v. Wriggelsworth*, 748 F.3d 295 (6th Cir. 2014), holding presumption against preemption under FECA applied to allow prosecution under state common law tort theories even though the wrongful conduct involved conversion of presidential campaign contributions governed by FECA; *Karl Rove and Co. v. Thornburgh*, 39 F.3d 1273 (5th Cir. 1994), FECA does not preempt state law governing liability of

candidate for campaign committee debts; *Stern v. General Elec. Co.*, 924 F.2d 472, 475 (2d. Cir.1991), rejecting a FECA preemption challenge to state common law governing claims of breach of fiduciary duty of corporate directors and officers and recovery for corporate waste due to corporate spending on political action committee; *Reeder v. Kansas City Board of Police Commissioners*, 733 F.2d 543, 544-45 (8th Cir.1984), rejecting a FECA preemption challenge to a Missouri statute that barred Kansas City police officers from making contributions to political campaigns; *Pollard v. Board of Police Commissioners*, 665 S.W.2d 333 (Mo. 1984), cert. denied 473 U.S. 907, 105 S.Ct. 3534 (1985), state laws regulating political activities of state or local public employees not preempted by FECA.

104. See, *inter alia*, 2 U.S.C. §§ 431(13), 432(c)(2), 434(b), 439(a), (e), 441d, 441f, 441g; 11 C.F.R. §§ 100.12, 104.3, 110.4, 110.11.

105. 11 C.F.R. § 104.8(a), (e), (f).

106. There are cases indicating FECA's campaign finance provisions broadly displace state law provisions, even when they do not directly conflict; but these rulings were on the basis Congress was not looking for state law supplementation in the relevant context. For example, FECA was held to preempt a Minnesota state law conditioning access to public financing for federal candidates on accepting expenditure limitations. *Weber v. Heaney*, 995 F.2d 872 (8th Cir. 1993).

107. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

108. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013).

109. Robert G. Natelson, "The Original Scope of the Congressional Power to Regulate Elections," *The University of Pennsylvania Journal of Constitutional Law* **13** (November 2010): 1, 17–18.

110. See, e.g., *Miss. State Bd. of Dental Exam'rs v. Mandell*, 21 So. 2d 405, 410 (Miss. 1945); *Ray v. Am. Photo Player Co.*, 46 Cal. App. 311 (Ct. App. 1920); *Luscombe v. Yates*, 5 Barn and Ald. 544 (1822); Julia Shear Kushner, "The Right To Control One's Name," *UCLA Law Review* **57** (October 2009): 313, 329–30, observing near-universality of common law and statutory right to change one's name under state law; Lois B. Gordon, "Pre-Marriage Name Change, Resumption and Reregistration Statutes," *Columbia Law Review* **74** (December 1974): 1508, 1514, observing "[e]very state provides by statute the right to petition a court for a change of name."

111. Congress has been loath to displace state law naming conventions even for national banks – as illustrated by its repeal of a statute regarding the naming of national banks shortly after a series of cases held the law preempted state laws dealing with trade name infringement. Compare 12 U.S.C.A. § 30 (Westlaw 2014) and *Citicorp Vendor Finance, Inc. v. General Services Administration*, 2004 WL 1946164 (G.S.B.C.A. 2004) with *State of N.D. v. Merchants Nat. Bank and Trust Co., Fargo, N.D.*, 466 F. Supp. 953 (D.C.N.D. 1979); *Central Nat. Bank of Miami v. Central Bancorp., Inc.*, 411 So. 2d 358 (Fla. App. 3 Dist. 1982).

112. Quoting 2 U.S.C. § 441f.

113. 11 C.F.R. § 104.3(2).

114. *Supra* note 41. Even if someone improperly utilized the Publius Confidentiality Act to obscure public scrutiny of donors otherwise known to a candidate committee, FECA itself would furnish the necessary regulatory back-up mechanism ensuring both that disclosure was made of that donor and that applicable contribution limits were enforced. See 11 C.F.R. § 104.8(a), (e), (f). Simply put, if a treasurer learned a confidential identifier were actually attributable to a previously known donor, that treasurer would be required to attribute any related contribution and to enforce applicable contribution limits to that donor under existing regulations governing the effect of name changes.

115. See, e.g., *Florida Lime and Avocado Growers*, 373 U.S. 132, holding there was no problem with a state law where there was no inevitable collision between it and the federal law.

116. This would be an especially strong defense against preemption if the state registry included a random audit feature testing the legitimacy of the claims of registrants under the First Amendment to an as-applied exception to mandatory disclosure laws.