

# Proposition 8 and the Mormon Church: A Case Study in Donor Disclosure

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## ABSTRACT

*Disclosure of campaign contributions and other political activities will always involve a tradeoff in which the benefits of disclosure are weighed against its costs to contributors and campaigns. Numerous recent papers have attempted to establish the extent and significance of the costs of disclosure—especially whether disclosure creates an unacceptable “chilling effect” on political participation. But little countervailing attention has been paid to the benefit side of the equation—specifically whether and how disclosure generates informational benefits that might outweigh its costs.*

*This Article provides a case study of a recent well-known episode in campaign finance disclosure: the extent to which members of the Church of Jesus Christ of Latter-Day Saints provided financial support for Proposition 8. The Article provides a detailed account of how this information came to public notice—through the work of two activists and an investigative journalist—and tracks the dissemination of this information through subsequent press reports.*

*The Proposition 8 case study complicates three commonly held assumptions regarding how voters make use of campaign finance data: (1) that only disclosures regarding interest group involvement or large contributions have significant informational value but that disclosure of modest individual contributions provides little useful information; (2) that once an interest group’s position is disclosed, additional disclosures regarding that interest group’s financial support for a candidate or cause are of little additional informational value; and (3) that the informational salience of campaign finance data is largely limited to a particular election cycle. The Article concludes by evaluating four categories of options for disclosure policy: full disclosure, no disclosure, aggregate disclosure, and “anonymized” disclosure.*

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## INTRODUCTION

The current scholarly and policy debate over campaign finance disclosure has become repetitive, almost ritualized, as disclosure supporters and opponents advance well-rehearsed arguments and counterarguments in a predictable four-step sequence. Often, supporters of robust disclosure requirements will make the initial move, arguing that the unprecedented levels of so-called “dark money”<sup>1</sup> in

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<sup>1</sup> According to some estimates, over \$300 million in electoral spending in the 2012 election cycles came from entities that did not disclose their donors. Andy Kroll, *You Need to See These 5 Shocking Facts About Money in the 2012 Elections*, MOTHER JONES (Jan. 17, 2013, 12:17 PM), <http://www.motherjones.com/mojo/2013/01/2012-super-pac-dark-money-adelson-demos>; see also Editorial Memorandum, Sunlight Found., This Election Proves We Need Campaign Fi-

recent elections require an overhaul of our disclosure regulations in order for voters to be adequately informed in making their choices at the ballot box.<sup>2</sup> In response, opponents of disclosure will typically counter that mandatory disclosure requirements “chill” campaign contributions and other forms of political activities,<sup>3</sup> often invoking *NAACP v. Alabama*,<sup>4</sup> a classic civil rights era decision in which the NAACP was exempted from a state subpoena for its membership lists.<sup>5</sup> The rationale for the decision was that such disclosure would burden the NAACP’s freedom of association, given the violent retaliation against its members that was sure to result from such disclosure.<sup>6</sup> As a rejoinder, disclosure advocates will respond that empirical evidence of such a “chilling effect” in the modern era is weak or nonexistent and that the informational benefits of disclosure outweigh such speculative and subjective harms.<sup>7</sup> Finally, in surrepley, disclosure

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nance Transparency Now (Nov. 8, 2012), available at <http://sunlightfoundation.com/press-releases/2012/11/08/edit-memo-election-proves-need-DISCLOSE-Act/>.

<sup>2</sup> See, e.g., Michael Bennett, Letter to the Editor, *Transparency in Campaign Donations*, WASH. POST, Dec. 17, 2012, at A22; Ronald Campbell, ‘Dark Money’ Dominates Airwaves, ORANGE COUNTY REG., Aug. 23, 2012, at Local 1; Editorial, *A Broken Election System*, N.Y. TIMES, Nov. 21, 2012, at A26; Editorial, *DISCLOSE Act Deserved to Pass*, CLEVELAND PLAIN DEALER, July 18, 2012, at A9; Ron Wyden & Lisa Murkowski, Op-Ed., *Campaign Disclosure ‘In Real Time’*, WASH. POST, Dec. 28, 2012, at A21; Ruth Marcus, Op-Ed., *It’s Hard to Follow the Election Money*, OREGON LIVE (Nov. 6, 2012), [http://www.oregonlive.com/opinion/index.ssf/2012/11/its\\_hard\\_to\\_follow\\_the\\_electio.html](http://www.oregonlive.com/opinion/index.ssf/2012/11/its_hard_to_follow_the_electio.html); Darrel Rowl, *Who Paid for That Ad? It’s a Secret This Election*, COLUMBUS DISPATCH (Oct. 28, 2012, 11:08 AM), <http://www.dispatch.com/content/stories/local/2012/10/28/who-paid-for-that-ad-its-a-secret-this-election.html>.

<sup>3</sup> See, e.g., Mitch McConnell, Op-Ed., *When Disclosure Threatens Free Speech*, WASH. POST, June 23, 2012, at A15; Letter from American Civil Liberties Union to U.S. Senate (July 23, 2010), available at [https://www.aclu.org/files/assets/Ltr\\_to\\_Senate\\_re\\_ACLU\\_opposes\\_DISCLOSE\\_Act.pdf](https://www.aclu.org/files/assets/Ltr_to_Senate_re_ACLU_opposes_DISCLOSE_Act.pdf); *Conservatives Invoke NAACP Case in Fight for Secret Donors* (NPR radio broadcast Dec. 30, 2012), available at <http://www.npr.org/player/v2/mediaPlayer.html?action=1&t=1&islist=false&id=168216783&m=168292504>; Ryan J. Reilly, *Karl Rove: They’re Trying to Intimidate Us, Just Like They Did With the NAACP*, TPM (Apr. 2, 2012, 3:05 PM), [http://tpm.muckraker.talkingpointsmemo.com/2012/04/karl\\_rove\\_compares\\_american\\_crossroads\\_to\\_naacp\\_video.php](http://tpm.muckraker.talkingpointsmemo.com/2012/04/karl_rove_compares_american_crossroads_to_naacp_video.php); see also Debra J. Saunders, Op-Ed., *Disclose Act Would Stifle Free Speech*, S.F. CHRON., July 17, 2012, at A12.

<sup>4</sup> *NAACP v. Alabama*, 357 U.S. 449 (1958).

<sup>5</sup> *Id.* at 466.

<sup>6</sup> *Id.* at 462–63.

<sup>7</sup> See, e.g., Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J.L. & POL. 557, 560 (2012); Dahlia Lithwick & Raymond Vasvari, *The GOP’s War Against Facts*, SLATE (July 23, 2012, 3:42 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/07/mitt\\_romney\\_and\\_the\\_republican\\_party\\_do\\_not\\_want\\_to\\_disclose\\_basic\\_truths\\_for\\_fear\\_that\\_someone\\_will\\_use\\_these\\_facts\\_against\\_them\\_some\\_day.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/07/mitt_romney_and_the_republican_party_do_not_want_to_disclose_basic_truths_for_fear_that_someone_will_use_these_facts_against_them_some_day.html); Meredith McGehee, Op-Ed., *Current Disclosure Laws Fail the American People*, U.S. NEWS & WORLD REP. (June 21, 2012), <http://www.usnews.com/debate-club/should-there-be-less-disclosure-in-campaign-finance/current-disclosure-laws-fail-the-american-people>;

skeptics will argue that the informational benefits of disclosure are often overstated<sup>8</sup>—that although voters may derive useful heuristic cues from interest group involvement in political campaigns, voters derive little valuable information from campaign finance data, particularly with respect to the donation records of individual contributors.<sup>9</sup>

The end result of all of this sound and fury is depressingly close to stalemate. Even if mandatory disclosure creates only marginal burdens on political participation and privacy, if the anticorruption and informational benefits of such disclosure are themselves merely marginal, then it is difficult to understand why the balance should tilt strongly in favor of or against disclosure.<sup>10</sup>

In the hopes of moving past this impasse, this Article attempts to inject a dose of ground-level reality into what is often a debate conducted at a high degree of generality. In particular, this Article examines the campaign finance history of one of the best known and hotly contested ballot measure battles of our time, California's Proposition 8, which amended the California Constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California."<sup>11</sup>

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*see also* Brief for Direct Democracy Scholars as Amici Curiae Supporting Respondents at 12, *Doe v. Reed*, 130 S. Ct. 2811 (2010) (No. 09-559).

<sup>8</sup> RICHARD R. LAU & DAVID P. REDLAWSK, *HOW VOTERS DECIDE: INFORMATION PROCESSING DURING ELECTION CAMPAIGNS* 251–53 (2006); James H. Kuklinski & Paul J. Quirk, *Reconsidering the Rational Public: Cognition, Heuristics, and Mass Opinion*, in *ELEMENTS OF REASON: COGNITION, CHOICE, AND THE BOUNDS OF RATIONALITY* 153 (Arthur Lupia et al. eds., 2000); David M. Primo, *Information at the Margin: Campaign Finance Disclosure Laws, Ballot Issues, and Voter Knowledge* 4 (Oct. 2011) (unpublished manuscript), available at [www.rochester.edu/College/PSC/primo/experimentdisclosure.pdf](http://www.rochester.edu/College/PSC/primo/experimentdisclosure.pdf).

<sup>9</sup> Jacob Gardener, *Sunlight Without Sunburns: Balancing Public Access and Privacy in Ballot Measure Disclosure Laws*, 18 B.U. J. SCI. & TECH. L. 262, 270 (2012); William McGeeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1, 28 (2003); John Samples, *The DISCLOSE Act, Deliberation, and the First Amendment*, CATO INST. POL'Y ANALYSIS, no. 664, June 28, 2010, at 6, available at <http://www.cato.org/pubs/pas/pa664.pdf>; Bruce Cain, *Shade from the Glare: The Case for Semi-Disclosure*, CATO UNBOUND (Nov. 8, 2010), <http://www.cato-unbound.org/2010/11/08/bruce-cain/shade-from-the-glare-the-case-for-semi-disclosure>.

<sup>10</sup> *See* Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255, 270, 280 (2010) (noting lack of strong evidentiary support for either voter information rationale or retaliation fears).

<sup>11</sup> CAL. SEC'Y OF STATE, *Text of Proposed Laws*, in CALIFORNIA GENERAL ELECTION TUESDAY NOVEMBER 4, 2008: OFFICIAL VOTER INFORMATION GUIDE 128 (2008), <http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop8>. Proposition 8 passed by 52.3% to 47.7%. CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOVEMBER 4, 2008, GENERAL ELECTION 7 (2008), available at [http://www.sos.ca.gov/elections/sov/2008-general/sov\\_complete.pdf](http://www.sos.ca.gov/elections/sov/2008-general/sov_complete.pdf).

More than four years after the measure's original passage—and in the wake of a high profile, high stakes Supreme Court decision refusing to overturn a lower court ruling invalidating the measure—one would think that there would be nothing new to say about Proposition 8.<sup>12</sup> But oddly, considering that Proposition 8 sparked the highest spending on any social issue ballot measure in history,<sup>13</sup> the campaign finance history of the initiative has attracted little attention in scholarly literature, and the story available in press accounts is substantially incomplete.

Put simply, we know that the Church of Jesus Christ of Latter-Day Saints (“LDS”)<sup>14</sup> and individual Mormons provided much, if not most, of the financial backing for Proposition 8; this connection has been referenced in nearly 1,900 news articles<sup>15</sup> and has become a commonly referenced fact of recent political history. But far less widely understood is *how we know* that the LDS backed Proposition 8—after all, contributor disclosure forms do not require an individual contributor to list her religious affiliation, and the LDS gave no direct monetary contributions in support of the measure.<sup>16</sup> Drawing on interviews with the activists who discovered the financial patterns, the investigative journalist who broke the story, and the campaign managers for the “Yes on 8” and “No on 8” campaigns,<sup>17</sup> as well as quantitative analyses of news reports and campaign finance data, this Article fleshes out that story.

My aim is not to use this case study to advocate for particular answers or solutions to the complex academic and policy questions

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12 *Hollingsworth v. Perry*, 133 S. Ct. 1521 (2013).

13 Justin Ewers, *California Same-Sex Marriage Initiative Campaigns Shatter Spending Records*, U.S. NEWS & WORLD REP. (Oct. 29, 2008), <http://www.usnews.com/news/national/articles/2008/10/29/california-same-sex-marriage-initiative-campaigns-shatter-spending-records>.

14 Although there is obviously substantial overlap between these terms, for purposes of clarity, this Article will generally use the term “LDS” to refer to the official Church of Jesus Christ of Latter-Day Saints organization and the term “Mormon” for individual members of that Church, whether or not such individuals consider themselves to be aligned with official LDS policy.

15 The query used in Westlaw's ALLNEWS database was: (mormon! “lds” “latter day saints”) /p (“proposition 8” “prop. 8”).

16 Even the LDS's reported in-kind contributions of staff time, travel, and facilities usage comprised less than one percent of the more than \$20 million that members of the Mormon Church contributed to the Proposition 8 campaign. *See infra* Part I.B.1.

17 For this Article, I conducted telephone and email interviews with same-sex marriage activist Fred Karger, Mormon activist Nadine Hansen, “Yes on 8” campaign manager Frank Schubert, “No on 8” campaign manager Steve Smith, former *Wall Street Journal* reporter Mark Schoofs, and Center for Responsive Politics Executive Director Sheila Krumholz. Despite repeated phone calls and emails, the LDS did not reply to my requests for interviews.

surrounding the issue of disclosure.<sup>18</sup> In particular, I do not mean this Article to be a plea for “disclosure all the way down,” or an argument against modifying existing disclosure thresholds—in my personal opinion, there may well be intermediate disclosure regimes that better balance the burdens and benefits of disclosure than the current system. Instead, I hope that this case study suggests some potential directions for future research, especially regarding the informational salience of campaign finance data.

In particular, the Proposition 8 story complicates three commonly held assumptions regarding how voters make use of campaign finance data: (1) that only disclosures regarding interest group involvement or large contributions have significant informational value but that disclosure of modest individual contributions provides little useful information;<sup>19</sup> (2) that once an interest group’s position is disclosed, additional disclosures regarding that interest group’s financial support for a candidate or cause are of little additional informational value;<sup>20</sup> and (3) that the informational salience of campaign finance data is largely limited to a particular election cycle.<sup>21</sup>

First, the case study suggests that while it may be true that, as a general matter, the disclosure of individual contributions is less useful as a heuristic cue than the disclosure of interest group involvement, as a matter of policy such a line may be harder to draw. The Proposition 8 story suggests, and other recent examples indicate, that in some cases, evidence of group involvement only comes to light when informational intermediaries such as activists and journalists are able to trace patterns among individual contributor data.<sup>22</sup> Second, the Proposition 8 story suggests that it is not merely the *fact* of interest group involvement that is salient to voters, but also the *extent* of such involvement. The mere fact that the LDS and individual Mormons supported Proposition 8 raised few eyebrows in California and nationally—it was only the revelation that Mormons had contributed as much as half of the financial backing for the measure that attracted

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18 Indeed, because of the measure’s very notoriety, the “lessons” to be derived from the Proposition 8 scenario may resist generalization to other political contexts.

19 See, e.g., McGeveran, *supra* note 9, at 28.

20 See, e.g., Mayer, *supra* note 10, at 265; Primo, *supra* note 8, at 4.

21 See, e.g., Richard Briffault, *Updating Disclosure for the New Era of Independent Spending*, 27 J.L. & POL. 683, 711 (2012); Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295, 324 (2005).

22 See Mark Schoofs, *Mormons Boost Antigay Marriage Effort*, WALL ST. J., Sept. 20–21, 2008, at A8.

both state and national attention.<sup>23</sup> Finally, the Proposition 8 story may cause us to consider informational salience over a longer time frame than an individual election. Although, as many commentators have recognized,<sup>24</sup> it may well be optimal for salient information to be available to voters in advance of an election, such information may still possess value to voters in other elections, especially where contributors involve themselves in multiple jurisdictions and where the issue in question, like same-sex marriage, is a topic of national debate.

This Article proceeds as follows: Part I provides a detailed case study of Proposition 8 and the LDS, focusing on the means by which the LDS/Mormon financial involvement in the ballot initiative was discovered and brought to the public's attention. Part II briefly summarizes the current debate over disclosure, discussing the burdens that mandatory disclosure may impose on speech, associational, and privacy rights as well as the countervailing benefits that disclosure purports to provide. Part III surveys the political science literature regarding campaign finance information, explaining the role of informational intermediaries and how information regarding interest group involvement can function as a heuristic cue for voters. Part IV explains three assumptions that feature in current discussions of disclosure policy and explain how the Proposition 8 case study casts doubt on these assumptions. Finally, the Conclusion explains four options for disclosure policy: full disclosure, no disclosure, aggregate disclosure, and "anonymized" disclosure. It then explains how the lessons of Proposition 8 should inform our understanding of the informational salience of any of these systems.

## I. PROPOSITION 8 AND THE LDS: A CASE STUDY

### A. *The Investigators*

#### 1. *Mark Schoofs*

In September 2008, Mark Schoofs, a Pulitzer Prize-winning investigative reporter then working for the *Wall Street Journal*, received a tip.<sup>25</sup> His source alleged that members of the Mormon Church, both in California and out-of-state, were responsible for a substantial fraction of the money being contributed and spent in support of Proposition 8.<sup>26</sup> The article, which was published in the *Wall Street Journal* on

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<sup>23</sup> See *id.*

<sup>24</sup> See Briffault, *supra* note 21, at 711; Garrett & Smith, *supra* note 21, at 324.

<sup>25</sup> Telephone Interview with Mark Schoofs, Senior Editor, ProPublica (Dec. 5, 2012) (notes on file with author).

<sup>26</sup> *Id.*

September 20, 2008, eventually reported that more than one-third of total contributions in support of the initiative came from members of the Mormon Church.<sup>27</sup>

Now, the mere fact that the Mormon Church supported Proposition 8 was hardly news; the LDS—along with a number of other religious organizations, including the Roman Catholic Church and Orthodox Judaism—had openly declared its support of Proposition 8, as the press had already reported.<sup>28</sup> Moreover, in California and other states, the LDS had often involved itself in ballot measures opposing same-sex marriage;<sup>29</sup> in 2000, the LDS aroused little public comment<sup>30</sup> when it threw its support behind Proposition 22, a successful California initiative that instituted a statutory ban on same-sex marriage, only to be invalidated by the California Supreme Court (which in turn would be overruled by Proposition 8).<sup>31</sup> Similarly, with Proposition 8, just weeks after the measure qualified for the statewide ballot, the First Presidency (the three-person governing body of the LDS) issued a letter to church leaders with instructions that it be read in “sacrament meeting” on June 29th.<sup>32</sup> The letter requested that Mormons “do all [they] can to support the proposed constitutional amendment by donating of [their] means and time to assure that marriage in California is legally defined as being between a man and a woman.”<sup>33</sup> The

<sup>27</sup> Schoofs, *supra* note 22.

<sup>28</sup> See Jennifer Dobner, *Pro-Gay Mormons Take Fight to Internet*, ORLANDO SENTINEL, Aug. 24, 2008, at A18; Sandi Dolbee, *Ministers Define Marriage at Forum*, SAN DIEGO UNION-TRIB., Sept. 15, 2008, at B4; Carrie A. Moore, *LDS Church Issues Statement on Same-Sex Marriage*, DESERET MORNING NEWS, Sept. 10, 2008, at B2; John Wildermuth, *Big Funds in Ballot Fight Over Gay Marriage*, S.F. CHRON., July 28, 2008, at B1. This position was consistent with LDS’s open endorsement of Proposition 22 as well as the LDS’s previous position on same-sex marriage laws in other jurisdictions, such as Hawaii and Alaska. See *infra* notes 29–30 and accompanying text.

<sup>29</sup> See Don Lattin, *Powerful Force Behind Proposition 22*, S.F. CHRON., Feb. 6, 2000, at 4; Liz Ruskin, *Same-Sex Marriage Foes Given \$500,000*, ANCHORAGE DAILY NEWS, Oct. 3, 1998, at A1; Rebecca Walsh, *LDS Elders Showed Seasoned Political Savvy on California’s Prop. 8*, SALT LAKE TRIB., Mar. 26, 2009, at B1.

<sup>30</sup> A Westlaw query for (“proposition 22” “prop 22”) /p (lds “latter day saints” mormon) in the ALLNEWS database generates only 114 hits, 53 of which predate the passage of Proposition 22.

<sup>31</sup> See Wildermuth, *supra* note 28.

<sup>32</sup> Letter from Thomas S. Monson, Henry B. Eyring & Dieter F. Uchtdorf to General Authorities, Area Seventies, and the following in California: State and Mission Presidents; Bishops and Branch Presidents (June 20, 2008) (copy on file with author) [hereinafter Letter from Thomas S. Monson et al.]. Previously, in 2000, then-LDS President Gordon Hinkley had directed that a similar letter be read to Mormon congregants in support of Proposition 22, which successfully enacted a statutory ban on same-sex marriage (as opposed to the state constitutional amendment later at issue in Proposition 8). Lattin, *supra* note 29.

<sup>33</sup> Letter from Thomas S. Monson et al., *supra* note 32.



LDS posted this letter on its website,<sup>34</sup> but few major news sources then noted its existence.

What was newsworthy, according to Schoofs, was not the mere *fact* of LDS support for Proposition 8.<sup>35</sup> Instead, the newsworthy aspect of the story was the *extent* of Mormon financial support for Proposition 8: Mormons (who comprised a mere two percent of California's population)<sup>36</sup> had provided more than one-third of the financial backing for the initiative.<sup>37</sup> By the time of the election, this estimate had been revised upwards. Protectmarriage.com's Yes on 8 Campaign, the initiative's proponent, estimated that as much as half of the \$40 million raised in support of Proposition 8 had been given by Mormons.<sup>38</sup>

But how was the "newsworthy" one-third figure in Schoofs's breaking news story calculated? After all, contribution forms do not require contributors to disclose their religious affiliation. Nor did the LDS initially volunteer or publicly disclose this information. The answer lies in the work of two activists, working separately—one a gay Republican activist who would later seek the 2012 Republican nomination for President,<sup>39</sup> and one a lawyer who was a longtime member—and critic—of the Mormon Church.

## 2. Fred Karger

The original source for Schoofs's tip was Fred Karger, a political activist with a long and colorful history in state and national politics.<sup>40</sup> Formerly one of the "GOP's top dark-arts operators,"<sup>41</sup> Karger had spent several decades as a political operative with the Dolphin Group, a Republican consultancy with close ties to controversial strategist Lee Atwater and clients that included Ronald Reagan, George H.W.

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<sup>34</sup> Press Release, Church of Jesus Christ of Latter-Day Saints, California and Same-Sex Marriage (June 30, 2008), available at <http://www.mormonnewsroom.org/article/california-and-same-sex-marriage>.

<sup>35</sup> Telephone Interview with Mark Schoofs, *supra* note 25.

<sup>36</sup> Michelle Beaver, *LDS Church Push Benefited Prop. 8, but Mormons Say They've Been Unfairly Targeted*, MERCURYNEWS.COM (Mar. 13, 2011, 12:00 AM), [http://www.mercurynews.com/faith/ci\\_17598236](http://www.mercurynews.com/faith/ci_17598236).

<sup>37</sup> Schoofs, *supra* note 22.

<sup>38</sup> Jesse McKinley & Kirk Johnson, *Mormons Tipped Scale in Ban on Gay Marriage*, N.Y. TIMES, Nov. 15, 2008, at A1.

<sup>39</sup> Seema Mehta, *Fred Karger Ends Presidential Bid*, L.A. TIMES (June 29, 2012), <http://articles.latimes.com/2012/jun/29/news/la-pn-fred-karger-ends-presidential-bid-20120629>.

<sup>40</sup> Telephone Interview with Mark Schoofs, *supra* note 25.

<sup>41</sup> Stephanie Mencimer, *Game Changer*, MOTHER JONES, Mar.-Apr. 2010, at 77-78.

Bush, and tobacco company Phillip Morris.<sup>42</sup> In his most famous campaign, he helped organize the families of victims of Willie Horton, “the murderer who committed a rape while on furlough from a Massachusetts prison during Michael Dukakis’s tenure as governor.”<sup>43</sup> At the Dolphin Group, Karger specialized in so-called “Astroturf”<sup>44</sup> campaigns—setting up supposedly “grassroots” coalitions and movements that acted as unacknowledged proxies for a hidden, often corporate, financial backer with undisclosed motives.<sup>45</sup> After leaving the Dolphin Group in 2004, Karger began to involve himself openly with gay causes,<sup>46</sup> using the skills he had developed as a political hired gun to advance a more personal political agenda.

As the Proposition 8 campaign got underway, Karger created an organization and website, Californians Against Hate, seeking to publicize major donors to Proposition 8 in order to facilitate boycotts and other public reactions.<sup>47</sup> At the time, the California Secretary of State’s website (the “SOS Website”) published the names and addresses of contributors to ballot initiative campaigns on an ongoing basis.<sup>48</sup> Using this information, Californians Against Hate published a

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<sup>42</sup> *Id.* at 78–79.

<sup>43</sup> Dan Morain, *An Operative Comes Out of the Shadows*, SACRAMENTO BEE, Jan. 17, 2010, at E1.

<sup>44</sup> “‘Astroturfing’ is ‘[a]n artificially-manufactured political movement designed to give the appearance of grass roots activism.’” Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 200 n.32 (2012) (alteration in original) (quoting *Astroturfing*, TAEGEN GODDARD’S POL. DICTIONARY, <http://politicaldictionary.com/words/astroturf> (last visited Sep. 3, 2013)); see also Jonathan C. Zellner, Note, *Artificial Grassroots Advocacy and the Constitutionality of Legislative Identification and Control Measures*, 43 CONN. L. REV. 357, 361 (2010) (“Astroturfing refers to the efforts of paid lobbyists to conduct a political or public relations campaign on behalf of a client, typically an interest group, designed in such a way as to mask its origins and create the impression that it is spur-of-the-moment grassroots behavior.”). Former Texas Senator Lloyd Benson is credited with coining the term. In 1985, “describing a ‘mountain of cards and letters’” he received that seemed to reflect the interests of insurance companies, he stated, “A fellow from Texas can tell the difference between grass roots and Astroturf . . . . [T]his is generated mail.” Zellner, *supra* at 362 (quoting Ryan Sager, Op-Ed., *Keep Off the Astroturf*, N.Y. TIMES, Aug. 19, 2009, at A27). For further examples of alleged Astroturf campaigns, see *id.*

<sup>45</sup> See Mencimer, *supra* note 41, at 78; Morain, *supra* note 43.

<sup>46</sup> See Mencimer, *supra* note 41, at 78.

<sup>47</sup> *Id.* at 78–79; Morain, *supra* note 43.

<sup>48</sup> California’s Political Reform Act of 1974, as amended, provides that all campaign donations of \$100 or more must be published on the Secretary of State’s website, allowing the public to easily search for the names of campaign donors online. CAL. GOV’T CODE §§ 84601, 84602, 84606 (West 2005). Required information includes the donor’s name and amount of contribution, street address, occupation, an employer’s name or, if self-employed, the name of the business. CAL. GOV’T CODE § 84211 (West 2005). At the time, information regarding contributors of \$1000 or more was instantly available on the SOS Website, while information regarding con-

“Dishonor Roll” listing the names and, in some cases, the home addresses of Proposition 8 donors who had contributed between \$5000 and \$20,000.<sup>49</sup> Californians Against Hate also organized boycotts of “megadonors” to Proposition 8, including a San Diego hotel owner and a Central Valley health food company.<sup>50</sup> Karger noted that because of the publicity surrounding the boycotts, Proposition 8 donors began to become more “stealthy;” for example, they often made contributions in the name of their spouse, whose occupation would be listed as “homemaker.”<sup>51</sup>

While searching the SOS Website for Proposition 8 “megadonors” in the summer of 2008, Karger began to become suspicious that some unknown entity was driving and coordinating a number of contributions—a strategy reminiscent of his own former “Astroturf” campaigns.<sup>52</sup> Until midsummer, Proposition 8’s opponents had been substantially outraising its proponents, and public polling indicated that the initiative was likely to fail.<sup>53</sup> But in July and August 2008, money in support of Proposition 8 began pouring in, reaching the rate of \$500,000 per day, much of it in increments of \$25,000.<sup>54</sup> Karger was intrigued. From his background in California politics, he was familiar with many of the major conservative donors in the state, but he didn’t recognize any of the names in this sudden influx of Proposition 8 funds.<sup>55</sup> Many of the new crop of donors, he realized, were residents of Utah.<sup>56</sup> Digging deeper, using Google and other tools, he realized that many of the donors had formerly contributed to Massachusetts Governor Mitt Romney’s campaign, and many were also graduates of Brigham Young University.<sup>57</sup>

Clearly a large number of individual Mormons were contributing to Proposition 8, and the timing and identical amounts suggested that

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tributors of smaller amounts would be periodically updated, depending on the filing of campaign finance reports. Telephone Interview with Fred Karger (Nov. 23, 2012) (notes on file with author). Currently forty-nine states disclose campaign finance information on the Internet. See *Disclosure Content Accessibility*, CAMPAIGNDISCLOSURE.ORG (Sep. 17, 2008), <http://www.campaigndisclosure.org/gradingstate/accessfindings.html>. Forty states and the federal government currently post the information within forty-eight hours of receiving it.

<sup>49</sup> See *The Californians Against Hate Dishonor Roll*, CALIFORNIANS AGAINST HATE, <http://www.californiansagainsthate.com/dishonor-roll/> (last visited Sep. 3, 2013).

<sup>50</sup> Morain, *supra* note 43.

<sup>51</sup> Telephone Interview with Fred Karger, *supra* note 48.

<sup>52</sup> *Id.*; see also Mencimer, *supra* note 41, at 77.

<sup>53</sup> Mencimer, *supra* note 41, at 77.

<sup>54</sup> *Id.* at 77; Telephone Interview with Fred Karger, *supra* note 48.

<sup>55</sup> Telephone Interview with Fred Karger, *supra* note 48.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*; see also Mencimer, *supra* note 41, at 77.

the LDS or some other organization was soliciting these contributions. Through online research, Karger learned of the LDS First Presidency's letter.<sup>58</sup> He also discovered that the National Organization for Marriage, one of Proposition 8's principal proponents, had strong ties to the LDS, as well as to other religious organizations.<sup>59</sup> It was at this point that he contacted the *Wall Street Journal* and was routed to Mark Schoofs.<sup>60</sup>

### 3. Nadine Hansen

At the *Wall Street Journal*, Schoofs followed up on Karger's tip by attempting to ascertain the extent of Mormon financial involvement in Proposition 8. He learned of the work of a second activist, a Mormon lawyer named Nadine Hansen, who had started a website, "Mormonsfor8.com."<sup>61</sup> Hansen had long been critical of LDS involvement in political issues, starting with the LDS's active opposition to the Equal Rights Amendment ("ERA") in the 1970s.<sup>62</sup> At that time, she had started a list called "Mormons for ERA," in which she attempted to determine which contributors to anti-ERA political committees from certain key states were Mormons.<sup>63</sup> In order to make these determinations, she used Mormon "ward" or "stake" church directories, which listed members of the Mormon congregations for particular geographic subdivisions.<sup>64</sup> With limited information, however, she was unable to verify active LDS coordination of the anti-ERA campaign.<sup>65</sup>

With Proposition 8, Hansen adopted a similar strategy to the one she had pursued for the ERA. This time, however, she was aided by the growth of the Internet, which enabled her to take advantage of crowdsourcing, in which individuals who had become aware of her website volunteered information about themselves or others.<sup>66</sup> Multiple contributors came forward to identify themselves as Mormons and

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58 Telephone Interview with Fred Karger, *supra* note 48.

59 Mencimer, *supra* note 41, at 77.

60 Telephone Interview with Fred Karger, *supra* note 48.

61 *Mormons for Proposition 8 Donors*, MORMONS FOR PROPOSITION 8, <http://web.archive.org/web/20081119142431/http://mormonsfor8.com/> (last visited Sep. 3, 2013).

62 Telephone Interview with Nadine Hansen (Dec. 17, 2012) (notes on file with author).

63 *Id.*

64 *Id.* A Mormon congregation is called a ward or branch. A group of wards or branches forms a stake. *Frequently Asked Questions*, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <http://mormon.org/faq/topic/church/question/ward-stake-branch> (last visited Sep. 3, 2013).

65 Telephone Interview with Nadine Hansen, *supra* note 62.

66 *Id.*

to add their names to the list.<sup>67</sup> For other contributors, she relied upon ward and stake directories in order to determine whether a particular individual was a member of the Mormon Church.<sup>68</sup> In some instances, she relied upon Google searches to look for indicators of Mormon Church membership.<sup>69</sup>

Hansen argues that her interest in launching the website was “in tracking the extent of Mormon contributions, not in singling out particular donors.”<sup>70</sup> Indeed, she states that once a particular donor had been identified as Mormon, she would change his or her surname to an initial on the list, in order to allay concerns about potential retaliation.<sup>71</sup>

Hansen’s task was daunting—eventually, there would be more than 46,000 individual contributors to the Yes on 8<sup>72</sup> campaign alone. In order to make the task more manageable, she focused her efforts on contributions of \$1000 or more.<sup>73</sup> As of September 17, 2008, she had determined that one-third of these donors were Mormons, and the *Salt Lake Tribune* reported her estimate.<sup>74</sup> Eventually, she generated a list of 6585 donations in excess of \$1000.<sup>75</sup> She ultimately identified fifty-one percent of those (3365) as Mormon or likely

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67 *Id.* The message boards and blog posts on the “Mormons for 8” website also generated substantial discussion, from Mormons both opposing and defending Proposition 8. Through these posts, Hansen received reports that LDS leadership had solicited particular Mormon members to give particular sums of money, ranging from \$10,000 to \$25,000. *Id.*; see also David, *The My Girl Bill*, NINE MOONS (Aug. 7, 2008), <http://www.nine-moons.com/?p=830>. In particular, Hansen was informed that the LDS General Authority held a conference call with major Mormon donors requesting large contributions. Telephone Interview with Nadine Hansen, *supra* note 62.

68 Telephone Interview with Nadine Hansen, *supra* note 62 62.

69 *Id.*

70 E-mail from Nadine Hansen to author (Dec. 18, 2012) (on file with author).

71 *Id.*; see also *Mormons for 8 Donors: Prop 8 Donors*, MORMONS FOR PROPOSITION 8, <http://web.archive.org/web/20100825091439/http://spreadsheets.google.com/pub?key=pe2023SzWXxE8wYX5qWeoIw> (last visited Sep. 3, 2013). *But see* Matthai Kuruvila, *Mormons Face Flak for Backing Prop. 8*, S.F. CHRON., Oct. 27, 2008, at B1 (“One Web site run by a Prop. 8 opponent, [mormonsfor8.com](http://mormonsfor8.com), identifies the name and hometown of every Mormon donor.”).

72 [Protectmarriage.com](http://protectmarriage.com)’s Yes on 8 campaign was the initiative’s proponent and the primary committee supporting Proposition 8.

73 Of over 46,000 reported contributions to [Protectmarriage.com](http://protectmarriage.com), more than 39,500 contributions were of less than \$1000. *Campaign Finance: Protectmarriage.com—Yes on 8, A Project of California Renewal*, CAL. SECRETARY OF ST., <http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1302592&session=2007> (last visited Sep. 3, 2013).

74 See Rosemary Winters, *Utah Philanthropist Kicks in \$1M to Fight California Gay-Marriage Ban*, SALT LAKE TRIB. (Sept. 17, 2008 2:08 PM), [http://www.sltrib.com/News/ci\\_10489514](http://www.sltrib.com/News/ci_10489514).

75 Telephone Interview with Nadine Hansen, *supra* note 62.

Mormon.<sup>76</sup> According to Hansen, those donations represented forty-eight percent of total contributions in support of Proposition 8.<sup>77</sup>

#### 4. Further Investigation

Upon learning of Hansen's website, Schoofs attempted to verify the accuracy of the figures on the Mormonsfor8.com list by calling a sample of the identified individuals to determine whether they actually were members of the Mormon Church and by doing his own independent internet research.<sup>78</sup> According to Schoofs, the *Wall Street Journal* would not have reported the one-third figure had such verification not been possible.<sup>79</sup>

In verifying the identity of the Mormon donors, Schoofs learned other information regarding the LDS's coordination of the contributions of individual Mormons. For example, Schoofs learned that a high LDS official had held a conference call of forty to sixty Mormon potential donors suggesting that they each contribute \$25,000.<sup>80</sup> This information corroborated Hansen's account of similar solicitation of targeted contributions by LDS officials.<sup>81</sup>

After spot checking Hansen's results, Schoofs contacted Frank Schubert, the campaign manager for ProtectMarriage.com, and Elder L. Whitney Clayton, a senior LDS official. Schubert disclosed that the campaign had been keeping an internal tally of Mormon contributions by asking Mormons to "bundle" their donations to a separate post office box set up by the Church.<sup>82</sup> Using this tally, Schubert confirmed that thirty-five to forty percent of total contributions to Yes on 8 were from LDS members.<sup>83</sup> By the time of the election, ProtectMarriage.com estimated that as much as half of the total raised in support of the measure was contributed by Mormons.<sup>84</sup>

While not the first news outlet to break the story that Mormons had contributed heavily to support Proposition 8,<sup>85</sup> Schoofs's *Wall Street Journal* article was the first national news story to provide more

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<sup>76</sup> *Id.*

<sup>77</sup> *Mormon Individual Donations Dwarf All Others*, MORMONS FOR PROPOSITION 8 (Nov. 9, 2008), <http://web.archive.org/web/20090101174548/http://mormonsfor8.com/?p=242>.

<sup>78</sup> Email from Mark Schoofs to author (Dec. 7, 2012) (on file with author).

<sup>79</sup> *Id.*

<sup>80</sup> Schoofs, *supra* note 22, at A8.

<sup>81</sup> See Telephone Interview with Nadine Hansen, *supra* note 62.

<sup>82</sup> Schoofs, *supra* note 22, at A8.

<sup>83</sup> *Id.*

<sup>84</sup> McKinley & Johnson, *supra* note 38, at A1.

<sup>85</sup> Winters, *supra* note 74.

than unverified estimates regarding the extent of Mormon financial support for the measure. By confirming Hansen's estimate regarding the percentage of Mormon contributions with the LDS, Protectmarriage.com, and individual Mormons, and by reporting the LDS' solicitation and bundling of Mormon contributions, Schoofs was able to establish a firm foundation of verified facts upon which further journalists and investigators could build.

## B. *The Fuller Story*

### 1. *LDS Coordination and Solicitation*

Only after Proposition 8 had passed did facts come to light regarding "the extraordinary role Mormons played in helping to pass it with money, institutional support, and dedicated volunteers."<sup>86</sup> The picture that emerged after the election was of a highly coordinated fundraising effort in which LDS leaders had set specific fundraising targets for the Mormon community and for specific Mormon individuals. According to church documents that later emerged in the Proposition 8 constitutional litigation, LDS leadership held a teleconference with all but two of the 161 Mormon leaders in California.<sup>87</sup> The leaders were instructed to encourage church members to contribute at least thirty dollars each for Proposition 8.<sup>88</sup> LDS leaders followed up with specific contribution requests for individual high-net-worth Mormon donors based on church tithing records.<sup>89</sup>

This fundraising effort complemented a sophisticated and well-organized canvassing and get-out-the-vote campaign, complete with targeted talking point scripts, specific ward assignments, and transportation to the polls on Election Day.<sup>90</sup> Mormons made up eighty to ninety percent of early volunteers who canvassed door-to-door in election precincts and they used phone banks, direct mail, and lawn signs to sway potential supporters.<sup>91</sup> In addition to the First Presidency letter, LDS leadership sent follow-up letters with titles such as

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<sup>86</sup> McKinley & Johnson, *supra* note 38, at A1.

<sup>87</sup> Maura Dolan, *Prop. 8 Challengers Link Campaign and Church Leaders*, L.A. TIMES, Jan. 21, 2010, at A7.

<sup>88</sup> *Id.*

<sup>89</sup> Peggy Fletcher Stack, *LDS Wards Feeling Toll of Conflict*, SALT LAKE TRIB. (Oct. 26, 2008, 2:22 AM), [http://www.sltrib.com/ci\\_10819792](http://www.sltrib.com/ci_10819792).

<sup>90</sup> Jesse McKinley, *Inquiry Set on Mormon Aid for California Marriage Vote*, N.Y. TIMES, Nov. 26, 2008, at A21; McKinley & Johnson, *supra* note 38, at A11.

<sup>91</sup> McKinley & Johnson, *supra* note 38, at A11; Carrie A. Moore & Jared Page, *Prop. 8 Foes File Complaint Against LDS*, DESERET NEWS (Nov. 14, 2008 10:36 AM), <http://www.deseretnews.com/article/705262980/Prop-8-foes-file-complaint-against-LDS.html?pg=all>.

“Thirty People in Each Ward” and “More than Four Hours per Week,” to each congregation soliciting volunteers.<sup>92</sup>

At the same time, it appeared that LDS leadership was concerned with keeping the Church’s active role “low profile,” though without being “secretive.”<sup>93</sup> Training documents provided to Mormon volunteers instructed, “No work will take place at the church, including no meeting there to hand out precinct walking assignments so as to not even give the appearance of politicking at the church.”<sup>94</sup> Similarly, the minutes of a Mormon Church meeting introduced into evidence in the Proposition 8 constitutional litigation instructed church members not to take a direct role in promoting the measure, but instead to work through the Protectmarriage.com coalition.<sup>95</sup>

In previous same-sex marriage ballot initiatives in Alaska and Hawaii in 1998, LDS had made significant six-figure contributions in its own name: \$500,000 in Alaska and \$400,000 in Hawaii.<sup>96</sup> But after substantial public criticism of LDS’s direct role in those elections,<sup>97</sup> LDS pursued a different strategy in California, eschewing direct contributions in favor of solicitation of contributions from individual Mormons,<sup>98</sup> as well as in-kind contributions of staff, facilities, and media resources. As Utah State University Professor Richley Crapo, who authored a document titled “Chronology of Mormon/LDS Involvement in Same-Sex Marriage Politics,”<sup>99</sup> stated, “After Hawaii, there was more of an attempt from the top to not be in the newspaper as much.”<sup>100</sup> Because of this indirect strategy, it became difficult to quantify the extent of Mormon financial involvement in opposing same-sex marriage.<sup>101</sup>

In 2000, the LDS employed this indirect strategy in its support for Proposition 22, exhorting individual Mormons to support the measure

<sup>92</sup> Beaver, *supra* note 36.

<sup>93</sup> Telephone Interview with Mark Schoofs, *supra* note 25.

<sup>94</sup> McKinley & Johnson, *supra* note 38, at A1.

<sup>95</sup> Dolan, *supra* note 87, at A7.

<sup>96</sup> Lattin, *supra* note 29, at 4; Ruskin, *supra* note 29; Walsh, *supra* note 29, at B2.

<sup>97</sup> See Aurelio Rojas, *Mormons’ Prop. 22 Role Cited*, SACRAMENTO BEE, Jan. 6, 2000, at A3; Ruskin, *supra* note 29, at A1.

<sup>98</sup> Walsh, *supra* note 29, at B1.

<sup>99</sup> Richley H. Crapo, *Chronology of Mormon/LDS Involvement in Same-Sex Marriage Politics*, MORMON SOC. SCI. ASS’N (Jan. 4, 2008, 7:19 PM), <http://www.mormonsocialscience.org/2008/01/04/richley-crapo-chronology-of-mormon-lds-involvement-in-same-sex-marriage-politics/>.

<sup>100</sup> Dan Aiello, *The Mormon Factor in Marriage Fight*, BAY AREA REP. (Feb. 5, 2009), [http://www.ebar.com/common/inc/article\\_print.php?sec=news&article=3689](http://www.ebar.com/common/inc/article_print.php?sec=news&article=3689).

<sup>101</sup> Rojas, *supra* note 97, at A3.



rather than directly contributing itself.<sup>102</sup> According to Steve Smith, campaign manager for the No on 8 campaign, the LDS openly based in thousands of out-of-state volunteers for Proposition 22, a strategy it eschewed for Proposition 8.<sup>103</sup> For Proposition 8 in 2008, although individual Mormons were active contributors and volunteers, the LDS—in its role as solicitor, bundler, and coordinator—for the most part avoided the spotlight.<sup>104</sup>

Of course, indirect encouragement of political activities on the part of religious institutions is commonplace—the Obama campaign’s “Souls to the Polls” initiative, in which church vehicles transported voters from African-American churches to early-voting locations, is but one recent example.<sup>105</sup> As Smith admitted, “Churches all the time go to their membership and ask them to vote one way or another.”<sup>106</sup> But the unusual feature of Mormon involvement in Proposition 8, according to Smith, was for the LDS “to ask for this level of involvement or contribution.”<sup>107</sup>

After the election, Don Eaton, an LDS spokesperson, told television reporters that parishioners had contributed on their own initiative and that “[t]he Church of Jesus Christ of Latter Day Saints put zero money into this.”<sup>108</sup> This was technically true—the LDS’s direct contributions appear to have been entirely in the form of in-kind contributions, such as compensated staff time and travel costs.<sup>109</sup> Similarly, Elder Clayton told a Utah paper that the LDS, as an institution, did not contribute directly but only paid for travel expenses for church leaders who participated in the effort.<sup>110</sup>

As it was later reported, the LDS had contributed nearly \$190,000 in in-kind contributions, including compensated staff time, use of facilities, video production and broadcasting costs, and travel

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<sup>102</sup> See Lattin, *supra* note 29, at 4.

<sup>103</sup> Dan Aiello, *Prop 8 Foes Slow to Pick up on Mormon Involvement*, BAY AREA REP. (Feb. 12, 2009), [www.ebar.com/common/inc/article\\_print.php?sec=news&article=3713](http://www.ebar.com/common/inc/article_print.php?sec=news&article=3713).

<sup>104</sup> See *id.*

<sup>105</sup> Ed O’Keefe, ‘Souls to the Polls’ Aims to Turn Out Early Voters in Ohio, WASH. POST (Nov. 4, 2012, 6:02 PM), <http://www.washingtonpost.com/blogs/post-politics/wp/2012/11/04/souls-to-the-polls-aims-to-turn-out-early-voters-in-ohio/>.

<sup>106</sup> See Aiello, *supra* note 103.

<sup>107</sup> *Id.*

<sup>108</sup> Tomas Roman, *Prop. 8 Opponents Organizing to Overturn Ban*, ABC7 (Nov. 9, 2008), <http://abclocal.go.com/kgostory?section=news/politics&id=6496949>.

<sup>109</sup> See Aiello, *supra* note 103.

<sup>110</sup> Carrie A. Moore, *LDS Official Lauds Work for California’s Prop. 8*, DESERET NEWS (Nov. 6, 2008, 12:07 AM), <http://www.deseretnews.com/article/705260852/LDS-official-lauds-work-for-Californias-Prop-8.html?pg=all>.

expenses.<sup>111</sup> Only about thirteen percent of the LDS's nearly \$190,000 of in-kind expenditures was reported prior to the election,<sup>112</sup> although California law at the time required that both in-kind and monetary contributions of more than \$1000 be disclosed within forty-eight hours.<sup>113</sup> The bulk of the LDS's in-kind expenditures were not reported until two months after the election, only after Karger had filed a complaint with California's Fair Political Practices Commission ("FPPC").<sup>114</sup> After a nineteen-month-long investigation of Karger's complaint,<sup>115</sup> the FPPC found that the LDS failed to timely report making late nonmonetary contributions totaling \$36,928, and levied a \$5539 fine.<sup>116</sup>

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<sup>111</sup> Jessica Garrison, *Church Reports Prop. 8 Donations*, L.A. TIMES, Jan. 31, 2009, at B2; Neil Munro, *Proposition 8's Embers Smolder*, NAT'L J., Feb. 14, 2009, at 51, 52; Tony Semerad, *Utahns, LDS Church Spent More on Prop. 8 than Previously Known*, SALT LAKE TRIB. (Feb. 9, 2009, 7:51 PM), <http://archive.sltrib.com/printfriendly.php?id=11666895&itype=NGPSID>.

<sup>112</sup> Prior to the election, the LDS reported \$24,774.57 in in-kind contributions. *Media Reports on Proposition 8 Filing Uninformed*, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (Feb. 4, 2009), <http://www.mormonnewsroom.org/ldsnewsroom/eng/commentary/media-reports-on-proposition-8-filing-uninformed>. On January 15, 2009 the LDS reported an additional \$30,354.85 in in-kind contributions. *Id.* On January 30, 2009, the LDS reported an additional \$134,774.16 in in-kind contributions, including travel expenses for church officials as well as nearly \$117,424 in "compensated staff time" for church employees and use of church facilities. *Id.*; Semerad, *supra* note 111. Church officials disclosed that last round of expenditures one day "after U.S. District Judge Morrison C. England, Jr. rejected a federal lawsuit filed by Prop. 8 backers that sought to block requirements for disclosure of late campaign donations." Semerad, *supra* note 111.

<sup>113</sup> CAL. GOV'T CODE § 84203.3 (West 2013).

<sup>114</sup> See Dan Aiello, *Mormons Found Guilty on 13 Counts of Political Malfeasance*, SAYS FPPC, EXAMINER (June 11, 2010), <http://www.examiner.com/article/mormons-found-guilty-on-13-counts-of-political-malfeasance-says-fppc> (the complaint was filed November 13, 2008).

<sup>115</sup> *Id.*

<sup>116</sup> Press Release, Cal. Fair Political Practices Comm'n, FPPC Enforcement Decisions (June 10, 2010), available at [http://www.fppc.ca.gov/releasespdf/EnforcementRelease\\_061010.pdf](http://www.fppc.ca.gov/releasespdf/EnforcementRelease_061010.pdf). Responding to the ruling, LDS spokesperson Scott Trotter stated, "In the last two weeks leading up to the election, the church mistakenly overlooked the daily reporting requirement and instead reported those contributions together in a later filing." Rosemary Winters, *LDS Church Fined for Tardy Financial Reports During Prop 8*, SALT LAKE TRIB. (June 9, 2010, 9:57 AM), <http://archive.sltrib.com/article.php?id=9635051&itype=storyID>. This explanation, however, is somewhat inconsistent with LDS's previous releases, which had stated that the \$134,774.16 in-kind expenditure report, filed on January 30, 2009, represented expenditures "cover[ing] the time period from 1 July 2008 to 31 December 2008," not merely the two weeks prior to the election. See *Media Reports on Proposition 8 Filing Uninformed*, *supra* note 112.

Responding to the ruling, Joe Solmonese, president of the Human Rights Campaign, a national gay-rights organization, cast doubt on the LDS's explanation:

It's just not credible that a multibillion-dollar, sophisticated organization like the LDS Church didn't know or understand the election-law requirements . . . California requires early disclosure so voters know who's behind these referendum fights

The \$190,000 in-kind contribution did not make LDS one of Proposition 8's largest contributors, or even its largest religious contributor; the Knights of Columbus, a Catholic organization, had made a direct monetary contribution of \$1 million, while the U.S. Conference of Catholic Bishops made a \$200,000 monetary contribution.<sup>117</sup> The National Organization for Marriage, a coalition of religious organizations including LDS, contributed \$1.8 million to support the measure.<sup>118</sup>

Instead, the LDS's \$190,000 in-kind contribution only takes on true significance when viewed in light of the nearly \$20 million in individual Mormon contributions that the LDS funds were used to solicit and coordinate. The LDS's in-kind expenditure of time, resources, and personnel generated more than a hundredfold return on the investment.

## 2. *Post-Election Backlash*

After the election, as the news coverage of the Mormon/LDS financial backing of Proposition 8 peaked, the LDS as well as individual Mormons experienced a high degree of hostility and criticism, especially from members of the gay community who blamed Mormons for the measure's passage. Even prior to the election, Proposition 8 opponents singled out Mormons for their role in backing the initiative.<sup>119</sup> Proposition 8 opponents picketed Mormon Church services and boycotted prominent Mormon donors.<sup>120</sup> Activist Dante Atkins, posting on the liberal blog *Daily Kos*, published a link to a list of Mormon donors and encouraged readers to "use OpenSecrets to see if these donors have contributed to . . . shall we say . . . less than honorable causes, or if any one of these big donors has done something otherwise egregious."<sup>121</sup> Karger's organization aired a controversial commercial showing LDS missionaries entering the home of a lesbian

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and, clearly, the Mormon Church worked overtime to keep their full involvement hidden from the people of California.

Winters, *supra*.

<sup>117</sup> *Campaign Finance: Protectmarriage.com—Yes on 8, A Project of California Renewal*, *supra* note 73.

<sup>118</sup> *Campaign Finance: National Organization for Marriage California—Yes on 8, Sponsored by National Organization for Marriage*, CAL. SECRETARY OF ST., <http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1303282&session=2007> (last visited Sep. 3, 2013).

<sup>119</sup> Peggy Fletcher Stack, *Accusations Fly As Battle Over Prop. 8 Nears Finish*, SALT LAKE TRIB. (Oct. 24, 2008, 8:00 PM), <http://archive.sltrib.com/printfriendly.php?id=10798324&itype=ngpsid> [hereinafter Stack, *Accusations Fly*].

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*; Kuruwila, *supra* note 71.

couple, confiscating their wedding rings, and tearing up their marriage certificates.<sup>122</sup>

To be fair, in the heated atmosphere prior to the election, both sides engaged in questionable tactics. In television advertisements, billboards, and phone banks, Proposition 8 supporters claimed that if the measure failed to pass, churches that refused to perform same-sex marriages would lose their tax-exempt status and that ministers would be jailed for preaching against homosexuality.<sup>123</sup> Supporters of the Protectmarriage.com campaign also contacted businesses that had contributed to the “No on 8” campaign, threatening to “out” these businesses as supporters of gay marriage unless they made equivalent contributions to the “Yes on 8” campaign.<sup>124</sup>

But public hostility—particularly targeting Mormons—reached its peak in the weeks after the election, as same-sex marriage supporters sought to place blame for their unexpected loss. Same-sex marriage advocates staged protests and rallies at Mormon temples, often disrupting services.<sup>125</sup> Individual Mormons were the targets of public hostility, boycotts, and economic reprisals.<sup>126</sup> In some instances, such hostility escalated into death threats or physical assaults.<sup>127</sup> There were also multiple incidents of broken windows, graffiti, and other vandalism to LDS temples.<sup>128</sup> In one particularly disturbing incident, envelopes containing a powdery white substance (which the FBI later determined to be nontoxic) were sent to two LDS temples and to a Knights of Columbus facility.<sup>129</sup> Additionally, although a direct link to Proposition 8 was not established, fires were set at Mormon churches in Washington, Utah, and Colorado, and a man was prevented from starting a fire at a Los Angeles temple.<sup>130</sup>

Non-Mormon supporters of Proposition 8 also faced backlash and retaliation. A number of businesses were boycotted after their own or their employees’ contributions to Proposition 8 were publi-

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<sup>122</sup> Moore & Page, *supra* note 91.

<sup>123</sup> Laurie Goodstein, *A Line in the Sand for Same-Sex Marriage Foes*, N.Y. Times, Oct. 27, 2008, at A12.

<sup>124</sup> Michelle Quinn, *Anti-Prop. 8 Campaign Gets a Boost from Apple*, L.A. TIMES, Oct. 25, 2008, at C1; Stack, *Accusations Fly*, *supra* note 119.

<sup>125</sup> Protectmarriage.com v. Bowen, 830 F. Supp. 2d 914, 919–20 (E.D. Cal. 2011).

<sup>126</sup> *Id.* The court later found that “[m]ost of the incidents alleged above were responses to public shows of support the declarants had made in favor of Proposition 8,” rather than being specifically attributable to disclosure of contributions. *Id.* at 918.

<sup>127</sup> *Id.* at 919.

<sup>128</sup> *Id.* at 918, 921.

<sup>129</sup> *Id.* at 921.

<sup>130</sup> *Id.*

cized.<sup>131</sup> The artistic director of Sacramento's California Musical Theater and the director of the Los Angeles Film Festival both resigned after opponents of Proposition 8 learned of their monetary contributions to the Yes on 8 campaign.<sup>132</sup> Additionally, anonymous activists created a website called "eightmaps.com," which combined the SOS Website Proposition 8 contributor lists with Google Maps information, creating markers indicating a contributor's name, approximate location, contribution amount, and employer.<sup>133</sup> A number of donors reported receiving hostile emails as a result of the site, and other high-profile supporters of Proposition 8 reported death threats.<sup>134</sup>

But amidst the hostility, some valuable dialogue emerged. The Proposition 8 controversy sparked widespread dialogue within the Mormon community regarding the church's stance toward gays and lesbians.<sup>135</sup> Since the Proposition 8 controversy, LDS has initiated active outreach to the gay community, supporting antidiscrimination ordinances in Utah jurisdictions and recently launching a website: "mormonsandgays.org."<sup>136</sup> According to Karger, these efforts are indicators of a change in attitude on the part of LDS: "If ever there is an indication that the pendulum has swung, it's what the Mormons did in that new website . . . . They had refused to even mention that word, gay."<sup>137</sup> The LDS also took no visible part in opposing the legalization of same-sex marriage in Maine, Maryland, and Washington, nor in the 2012 same-sex marriage ballot initiatives in four other states.<sup>138</sup>

### C. *The Informational Impact*

#### 1. *Press Coverage*

At first, other news outlets were slow to pick up and develop the story of the Mormon involvement in backing Proposition 8. In order to get a rough sense of the extent of the news coverage of this story, I ran searches in Westlaw's ALLNEWS database for mentions of

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.* It may be worth noting that both of these individuals had also received signals of support from the community, and the board of the Los Angeles Film Festival initially attempted to block the director's resignation. *Id.*

<sup>133</sup> Brad Stone, *Disclosure, Magnified On the Web*, N.Y. TIMES, Feb. 8, 2009, at BU3.

<sup>134</sup> *Id.*

<sup>135</sup> Carolyn Lochhead, *Struggle in GOP Over Gay Marriage*, S.F. CHRON., Jan. 7, 2013, at A1; Peggy Fletcher Stack, *Tolerance on the March in Utah*, WASH. POST, Jan. 5, 2013, at B2 [hereinafter Stack, *Tolerance*].

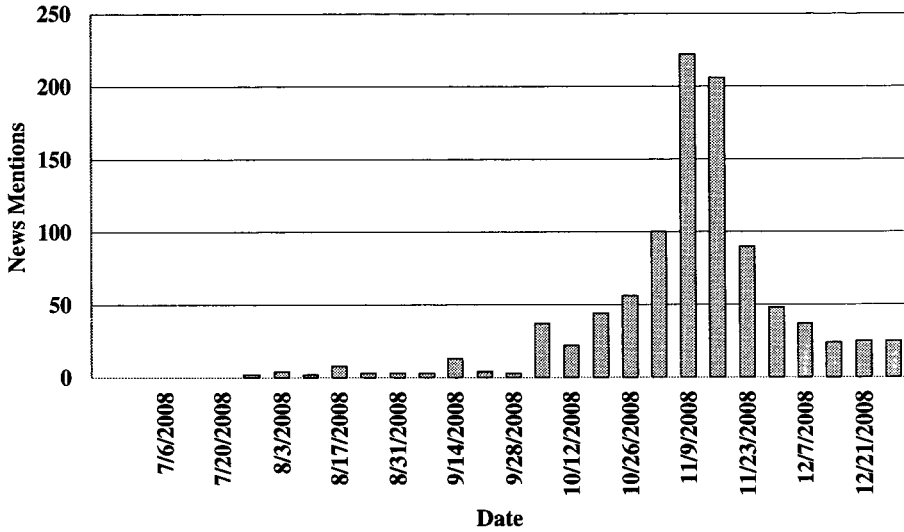
<sup>136</sup> Stack, *Tolerance*, *supra* note 135, at B2.

<sup>137</sup> Lochhead, *supra* note 135, at A7.

<sup>138</sup> Michelle Boorstein, *Mormon Church Sidesteps Question 6*, WASH. POST, Oct. 29, 2012, at B1; Stack, *Tolerance*, *supra* note 135, at B2.

Mormons or LDS in the same paragraph as Proposition 8.<sup>139</sup> Figure 1 provides a week-by-week count of the number of hits for the last half of 2008.

FIGURE 1. 2008 NEWS MENTIONS OF LDS/MORMON INVOLVEMENT IN PROPOSITION 8



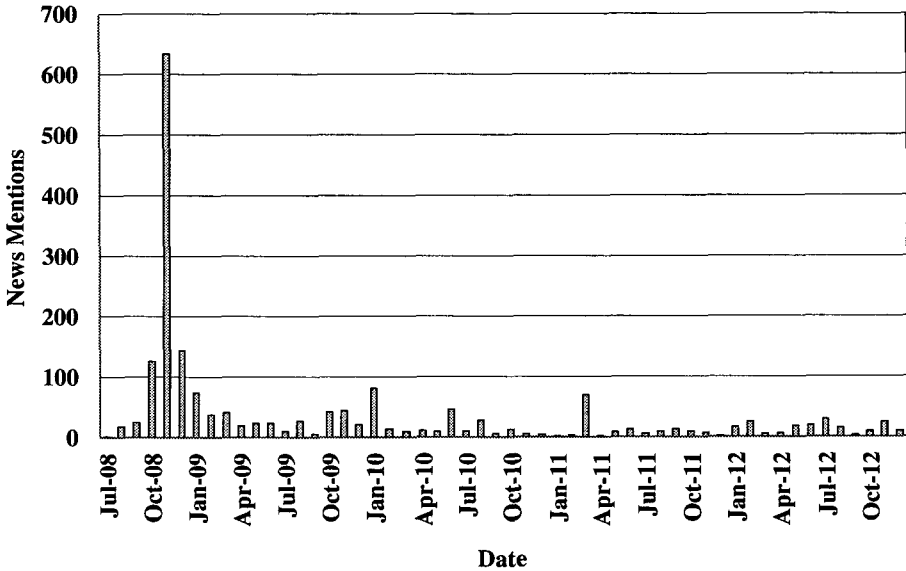
As is evident from this chart, news momentum did not really start to build until early October, a month before the election—hardly surprising given the more intensive attention and coverage of election-related issues in the weeks immediately preceding the election. But, somewhat surprisingly, coverage of Mormon/LDS involvement peaks only after the election, in a series of electoral post mortems punctuated by coverage of anti-Mormon reactions by same-sex marriage advocates.

Indeed, only a small fraction of news stories referencing Mormon/LDS involvement in Proposition 8 were published prior to or on the day of the election: 205 out of a total of 1,876 news articles, or less than eleven percent. This pattern plays out in coverage by major California newspapers. Of these articles, only eight of the fifty-five published in the *Los Angeles Times* were published before November 5, 2008, only four of the twenty-one articles in the *San Francisco Chronicle*, only three of the twenty-eight articles in the *Sacramento Bee*, and only five of fourteen articles in the *San Diego Union Tribune*.

<sup>139</sup> Westlaw ALLNEWS (mormon! "lds" "latter day saints") /p ("proposition 8" "prop. 8").

News mentions of Mormon/LDS involvement in Proposition 8 also seem to have a surprisingly long tail, continuing at a slow but steady rate through multiple news cycles. Figure 2 shows the same Westlaw search performed on a monthly basis from the last half of 2008 through the end of 2012.<sup>140</sup>

FIGURE 2. 2008–2012 NEWS MENTIONS OF LDS/MORMON INVOLVEMENT IN PROPOSITION 8



Such news mentions continue in a steady stream, punctuated by increases in coverage spurred by ongoing events, such as same-sex marriage initiatives in other jurisdictions,<sup>141</sup> developments in the Proposition 8 constitutional litigation,<sup>142</sup> coverage of Mitt Romney’s presidential campaign,<sup>143</sup> and even the opening of *Book of Mormon* the musical.<sup>144</sup> LDS/Mormon involvement in Proposition 8 became a fact of recent political history, referenced by news media when such background information seemed relevant to current events. Even years after the passage of Proposition 8, in certain months as many as sev-

<sup>140</sup> Westlaw ALLNEWS (mormon! “lds” “latter day saints”) /p (“proposition 8” “prop. 8”).

<sup>141</sup> See, e.g., Joe Garofoli, *Maine Measure Rerun of Prop. 8*, S.F. CHRON., Oct. 8, 2009, at A1.

<sup>142</sup> See, e.g., Dolan, *supra* note 87, at A7.

<sup>143</sup> See, e.g., Josh Richman, *Romney’s Mormon Faith Helps Shape His Life, Policies*, CONTRA COSTA TIMES, July 29, 2012, at B2.

<sup>144</sup> See, e.g., Peggy Fletcher Stack, *‘Book of Mormon’ Musical Called Surprisingly Sweet*, SALT LAKE TRIB. (Mar. 25, 2011, 8:12 AM), <http://archive.sltrib.com/article.php?id=13746996&i type=storyID>.

enty or eighty news articles would reference its LDS/Mormon financial backing.<sup>145</sup>

## 2. *Salience*

The salience of LDS/Mormon involvement in Proposition 8, whether to the Proposition 8 electorate or to the national public, is more difficult to quantify or assess. Not surprisingly, no exit polling appears to have been done on the issue. Reportedly, the No on 8 campaign did some relatively early internal polling on the issue, in late summer and early October of 2008, but it never released the questions or results of that polling publicly. Although Steve Smith later recalled that “[t]here were a significant number of people who were bothered by it, a percentage . . . very much so,” he also stated that “it was never determinative.”<sup>146</sup> Similarly, Kate Kendall, executive director of the National Center for Lesbian Rights and a member of the No on 8 Executive Committee, recalled that “the results were pretty underwhelming in terms of the percentage of voters for whom it was an issue.”<sup>147</sup> Smith pointed out, however, that at the time the polling was undertaken, the extent of Mormon/LDS involvement was not fully understood by either the campaign or voters.<sup>148</sup> Indeed, press coverage of the issue at the time was relatively sparse. Smith argues that had the full extent of Mormon/LDS involvement been known at the time, the effect may have been vote-determinative.<sup>149</sup> But Frank Schubert of Protectmarriage.com argues that although the Yes on 8 campaign never did polling on the salience of LDS involvement, “[i]t was never much of an issue other than among gay activists . . . . Certainly the outcome of Prop 8 would suggest that this was not a determinative factor.”<sup>150</sup>

Of course, such counterfactual speculation is not susceptible of proof. It is worth noting that in Hawaii and Alaska, and with California’s Proposition 22, the LDS had been more open about their financial support for the initiatives without the issue of Mormon involvement being at all vote dispositive.<sup>151</sup> Those initiatives, however, were passed by much larger margins than Proposition 8, and—absent the sort of analysis done by Karger and Hansen—it is impossi-

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145 See *supra* note 140.

146 Aiello, *supra* note 103.

147 *Id.*

148 *Id.*

149 *Id.*

150 Email from Frank Schubert to author (Jan. 18, 2013) (on file with author).

151 See *supra* note 96 and accompanying text.



ble to determine whether Mormon contributions constituted as significant a percentage of total fundraising in those initiatives as with Proposition 8.

## II. THE DISCLOSURE DEBATE

Whether assessed at the level of constitutional law or at the level of optimal policy, disclosure of campaign contributions and other political activities always involves tradeoffs in which the benefits of disclosure are weighed against its costs to contributors and campaigns.<sup>152</sup> Many commentators have discussed these costs and benefits in great depth, thus I will treat these issues only briefly here.

### A. *Costs*

On the cost side of the ledger, one must assess the burden that disclosure laws may impose upon a contributor's exercise of constitutional rights. As Pam Karlan recently noted, disclosure laws potentially implicate constitutional concerns at the heart of political and personal identity: "The rights to communicate about political issues, to associate with like-minded people, and to retain one's decisional and informational privacy touch core constitutional values."<sup>153</sup> In addition to the administrative burdens of disclosure (which may be non-trivial, especially for smaller groups) disclosure may affect a contributor's willingness to engage in protected speech and association, as well as implicating a contributor's sense of personal privacy.<sup>154</sup>

First, disclosure of contributions to controversial causes or candidates exposes donors to a range of potential responses, as we saw in the Proposition 8 case study. Some of those responses—such as discussion, criticism, or protest—we may view as tolerable or even desirable, in terms of catalyzing public information and debate. But some of those responses—including violence or threats of violence, vandalism, bigotry, and employment retaliation—are deplorable or even illegal in themselves and add little or nothing to public discourse writ large. As a matter of First Amendment doctrine, courts, in a few isolated instances, have been willing to grant a "harassment exemption" to disclosure laws to groups who have been able to demonstrate a pattern of serious governmental and private retaliation for political

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<sup>152</sup> Mayer, *supra* note 10, at 271.

<sup>153</sup> Pamela S. Karlan, *The Gay and the Angry: The Supreme Court and the Battles Surrounding Same-Sex Marriage*, 2010 SUP. CT. REV. 159, 165.

<sup>154</sup> Mayer, *supra* note 10, at 271.

activity.<sup>155</sup> But such exemptions are almost never available,<sup>156</sup> and as an empirical matter, such serious harassment—especially as a response to run-of-the-mill campaign contributions—appears to be rare.<sup>157</sup>

Concerns over harassment and backlash, however, are not limited to documented instances of serious wrongdoing. Even relatively minor and innocuous responses—social opprobrium and criticism, for example—can potentially deter individuals from engaging in various forms of political activity, creating a “chilling effect.”<sup>158</sup> Although such responses may not be sufficiently threatening to entitle an individual or group to the benefit of the harassment exemption, they still may loom large enough in an individual’s consciousness to deter political participation under certain circumstances.<sup>159</sup> As an empirical matter, it is questionable whether such deterrence effects are significant enough to result in decreased political participation.<sup>160</sup>

Moreover, taking public discourse as a whole, it is important to balance the effects of such marginal deterrence against the responsive

<sup>155</sup> See *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 88, 91–93 (1982); *NAACP v. Alabama*, 357 U.S. 449, 460–63 (1958).

<sup>156</sup> *Doe v. Reed*, 130 S. Ct. 2811, 2829 (2010) (harassment exemption standard requires evidence of “serious and widespread harassment that the State is unwilling or unable to control”).

<sup>157</sup> Hasen, *supra* note 7, at 559 (“[T]here is virtually no record of harassment of donors outside the context of the most hot-button social issue, gay marriage, and even there, much of the evidence is weak.”). Although, as discussed in Part I, the LDS involvement in Proposition 8 sparked substantial public backlash, including documented instances of vandalism, threats, and violence, the targets of more serious forms of illegal harassment were not mere contributors, but instead were those who had taken public leadership roles in the Proposition 8 campaign. See Hasen, *supra* note 7, at 563–64; Mayer, *supra* note 10, at 275.

<sup>158</sup> Mayer, *supra* note 10, at 270–72.

<sup>159</sup> For example, in a forthcoming paper, Raymond La Raja designed an experiment to determine whether potential contributors’ willingness to donate to a political candidate was affected by a statement that their names would be “made public on the Internet” at various disclosure thresholds. Raymond J. La Raja, *Political Participation and Civic Courage: The Negative Effect of Transparency on Making Campaign Contributions* (Nov. 29, 2012) (unpublished manuscript), available at <http://ssrn.com/abstract=2202405>. Although La Raja found no statistically significant difference in contributors’ overall willingness to make a contribution, *id.* at 13, it appeared that such publicity did result in increased reluctance to contribute for a subset of voters who felt that they are surrounded by people with different views, *id.* at 14. Similarly, the experiment suggested that low (fifty dollars or less) disclosure thresholds seemed to influence potential contributors to give amounts that were lower than the threshold, although this result did not appear to obtain for higher disclosure thresholds. *Id.* at 15.

<sup>160</sup> See Brief for Direct Democracy Scholars as Amici Curiae Supporting Respondents at 12, *Doe v. Reed*, 130 S. Ct. 2811 (2010) (No. 09-559) (noting that although over one million citizens have signed ballot referendum petitions, there is no record of harassment or intimidation as the result of these signatures).

speech—such as news reporting, criticism, protest, and dialogue—that disclosure may catalyze. As Pam Karlan puts it in a recent article, First Amendment considerations in disclosure laws require us to strike a balance between two different levels of information:

Information providers might be more likely to provide what we might call “first order information”—arguments about policy issues or candidates, for example—if they can speak anonymously. But anonymity reduces what we might call “second order information”—the cues that a speaker’s identity provides to his listener that enable the listener to gauge the quality of the information.<sup>161</sup>

The next Section discusses the informational rationale more fully.<sup>162</sup>

But even apart from potential effects on speech and association, disclosure imposes privacy costs that are conceptually distinct from its speech effects and should not be taken lightly. Whether or not disclosure has a measurable impact on an individual’s willingness to contribute to a candidate or cause, an individual may often experience such disclosure to be an intrusion on her sense of personal privacy.<sup>163</sup> Candidates and causes are often closely aligned with aspects of an individual’s personal identity—political, religious, sexual, or economic—that the individual might prefer not to be publicly known, especially if those aspects are not widely shared in the relevant community.<sup>164</sup>

Moreover, increased accessibility and aggregation of personal information may increase the perceived intrusion on personal privacy,

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<sup>161</sup> Pamela S. Karlan, *The “Ambiguous Giving Out”: The Complicated Roles Of Disclosure And Anonymity in Political Activity*, 27 J.L. & POL. 655, 657 (2012).

<sup>162</sup> See *infra* Part II.B.

<sup>163</sup> See, e.g., William McGeeveran, *Mrs. McIntyre’s Persona: Bringing Privacy Theory to Election Law*, 19 WM. & MARY BILL RTS. J. 859, 861 (2011). As Daniel Solove has noted, “[p]rivacy is a concept in disarray,” and this paper does not attempt to define the elusive concept of personal privacy. Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 477 (2006). Jerry Kang has provided an overall account of privacy that may be helpful here—he describes privacy as the union of three overlapping clusters of ideas: (1) physical space (“the extent to which an individual’s territorial solitude is shielded from invasion by unwanted objects or signals”); (2) choice (“an individual’s ability to make certain significant decisions without interference”); and (3) flow of personal information (“an individual’s control over the processing—i.e., the acquisition, disclosure, and use—of personal information”). Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1202–03 (1998).

<sup>164</sup> La Raja, *supra* note 159, at 5–6 (describing social science research regarding social influence and social accountability, especially for those who experience interpersonal cross-pressures); see also McGeeveran, *supra* note 9, at 17 (“Those who rely on trust and identification with others to do their work—such as ministers, psychotherapists, or schoolteachers—may find their roles undermined if congregants, patients, or parents know and judge their personal political activity.”).

even where such information is already in the public domain.<sup>165</sup> Where campaign finance information was once only available in hard copy files, accessed by only the most diligent of investigators, such information is now available to the most casual Web surfer.<sup>166</sup> Indeed, as of 2008, forty-nine states posted campaign finance disclosure data online, and thirty-nine states provide searchable databases of contributions online.<sup>167</sup> And even where jurisdictions do not themselves publish information relating to political participation, where such information is a matter of public record, a determined individual could easily obtain the information through a public records request and post the information on the Internet herself.<sup>168</sup>

Although an individual might overcome this reluctance in order to support her cause or candidate, this decision should not be treated as costless. “Civic courage,” like any other form of courage, is required only under conditions of adversity, whether objective or subjective. Certainly, it makes eminent sense to attempt to lessen such conditions of adversity and to encourage more political participation, if speech and privacy costs can be reduced while still reaping the benefits of disclosure.<sup>169</sup> As privacy scholar William McGeeveran has argued, “[e]ven if we are not constitutionally compelled to do so, a new awareness of privacy costs should spur us to think creatively about ways to minimize intrusion on information privacy but preserve the perceived benefits of disclosure.”<sup>170</sup>

## B. Benefits

Turning to the benefits of disclosure, there are three well-recognized benefits to disclosure of political contributions: informational benefits, anticorruption benefits, and anticircumvention benefits.<sup>171</sup>

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<sup>165</sup> Solove, *supra* note 163, at 559, 563 (“Aggregation creates problems even when all of the data is already available in the public domain. The same is true of increased accessibility.”).

<sup>166</sup> McGeeveran, *supra* note 9, at 10 (“Before the rise of the Internet, data on these disclosed contributions was available to the public in theory, but difficult to obtain in practice. A curious journalist or voter needed to travel in person to an election agency office and rummage through piles of paper reports arranged in filing cabinets.”).

<sup>167</sup> CAL. VOTER FOUND. ET AL., GRADING STATE DISCLOSURE 2008: EVALUATING STATES’ EFFORTS TO BRING SUNLIGHT TO POLITICAL MONEY 2–3 (2008), available at <http://campaigndisclosure.org/gradingstate/GSD08.pdf?>

<sup>168</sup> See, e.g., *Doe v. Reed*, 130 S. Ct. 2811, 2811 (2010) (petition information available as part of state public records statute was requested by activists who announced the intention of making the information publicly available on the Internet).

<sup>169</sup> McGeeveran, *supra* note 9, at 50.

<sup>170</sup> *Id.*

<sup>171</sup> *Buckley v. Valeo*, 424 U.S. 1, 66–68 (1976).

Here, the Article's primary focus will be on the informational rationale for disclosure. Given the Supreme Court's increasingly narrow conception of corruption,<sup>172</sup> the anticorruption and anticircumvention rationales tend to be less applicable in initiative campaigns such as Proposition 8, where—at least in theory<sup>173</sup>—there is no candidate or political party who can be the beneficiary of a quid pro quo exchange. Moreover, anticorruption and anticircumvention concerns are diminished for relatively modest contributions that raise no risk of political favoritism.<sup>174</sup>

With respect to the informational benefits of disclosure, the Supreme Court has been consistently optimistic with regard to the capacity of disclosure laws to provide an informed and empowered electorate. Disclosure, according to the *Buckley* Court:

[A]llows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.<sup>175</sup>

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<sup>172</sup> As Daniel Ortiz explains in a recent article, in *Citizens United v. FEC*, 558 U.S. 310 (2010), the Supreme Court, while upholding existing disclosure laws by an 8–1 vote, undercut both the anticorruption and anticircumvention rationales “by drastically limiting what counted as corruption” to encompass only quid pro quo corruption. Daniel R. Ortiz, *The Informational Interest*, 27 J.L. & POL. 663, 673 (2012). Ortiz argues that this weakening of the other two rationales “put the informational interest full front and center. For many types of spending, it is the only interest of the original three that can now possibly justify disclosure.” *Id.* at 675.

<sup>173</sup> In actuality, some ballot-measure committees are partially or primarily controlled by candidates, so that contributions to such a committee may function as end runs around source and amount restrictions on direct contributions to candidates. See Elizabeth Garrett, *Hybrid Democracy*, 73 GEO. WASH. L. REV. 1096, 1105–10 (2005); Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 885, 894–903 (2005).

<sup>174</sup> See *Buckley*, 424 U.S. at 82 (acknowledging that many small contributions “are too low even to attract the attention of the candidate, much less have a corrupting influence”); McGeveran, *supra* note 9, at 30. Various commentators offer widely disparate contribution thresholds at which they believe anticorruption concerns begin to come into play. See, e.g., Richard Briffault, *Two Challenges for Campaign Finance Disclosure After Citizens United and Doe v. Reed*, 19 WM. & MARY BILL RTS. J. 983, 1004 (2011); Spencer Overton, *The Participation Interest*, 100 GEO. L.J. 1259, 1300 (2012) (suggesting that contributions of less than \$500 raise no corruption risk); Letter from American Civil Liberties Union to U.S. Senate, *supra* note 3 (suggesting that no corruption risk attaches to contributions within current federal limits—i.e., \$2400). Of course, even assuming such an anticorruption threshold is empirically identifiable, one would expect it to vary widely depending on the candidate and race at issue.

<sup>175</sup> *Buckley*, 424 U.S. at 67.

Thus, even recognizing that mandatory disclosure may have a chilling effect on rights of speech and association,<sup>176</sup> the Court held that the interests advanced by mandatory disclosure law outweighed such burdens. Likewise, in *Citizens United v. FEC*,<sup>177</sup> Justice Kennedy's majority opinion took a similarly sunny view of disclosure:

With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions . . . . This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.<sup>178</sup>

Similarly, in the 2010 decision *Doe v. Reed*,<sup>179</sup> Chief Justice Roberts wrote for the Court that disclosure "promotes transparency and accountability in the electoral process to an extent other measures cannot."<sup>180</sup> The Court, however, has been less specific about the process by which it expects the disclosure of campaign finance data to generate transparency and accountability benefits.

### III. CAMPAIGN FINANCE DISCLOSURE AND VOTER INFORMATION

There is a significant gap between simply making campaign finance data available to the public and having that information be useful to the average voter. One does not expect the average voter to spend scarce time and resources accessing, reviewing, and digesting vast quantities of raw campaign finance data.<sup>181</sup> Instead, two factors

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<sup>176</sup> As the Court explained,

It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute. In some instances, disclosure may even expose contributors to harassment or retaliation. These are not insignificant burdens on individual rights, and they must be weighed carefully against the interests which Congress has sought to promote by this legislation.

*Id.* at 68.

<sup>177</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>178</sup> *Id.* at 370–71.

<sup>179</sup> *Doe v. Reed*, 130 S. Ct. 2811 (2010).

<sup>180</sup> *Id.* at 2820. However, in *Reed*, the Supreme Court rejected only a facial challenge to the disclosure of petition signatories, leaving the door open for an as-applied challenge for "particularly controversial petitions" if the petition signers can demonstrate "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id.* at 2821 (quoting *Buckley*, 424 U.S. at 74).

<sup>181</sup> BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* 27 (2002); DICK M. CARPENTER II, INST. FOR JUSTICE, *DISCLOSURE COSTS: UNINTENDED CONSEQUENCES OF CAMPAIGN FINANCE REFORM* 11 (2007), available at [http://www.ij.org/images/pdf\\_folder/other\\_pubs/DisclosureCosts.pdf](http://www.ij.org/images/pdf_folder/other_pubs/DisclosureCosts.pdf) (reporting results of 2006 Insti-

help bridge the gap between campaign finance information and the average voter: the role of “information intermediaries” and the role of heuristic cues.

### A. *Informational Intermediaries*

“Informational intermediaries”<sup>182</sup>—journalists, political researchers, activists, and campaign finance groups—sift and filter campaign finance data in order to bring salient information to the attention of voters.<sup>183</sup> As Elizabeth Garrett has explained, “[o]rdinary citizens rely on a system of fire alarms to bring important information to their attention. Thus, the key question in assessing disclosure is whether the source of these alarms—journalists and other political actors—can find the information and understand it.”<sup>184</sup>

In order to assist journalists, academics, advocates, and ordinary citizens in using campaign finance data, independent advocacy groups recently have generated online shareable databases of campaign finance information. For example, on its website OpenSecrets.org, the Center for Responsive Politics allows visitors to view the top contributors, industries, and interest groups supporting particular candidates<sup>185</sup> and provides downloadable data and coding protocols that allow visitors to classify and analyze contributors by occupation and other characteristics.<sup>186</sup> In 2010, OpenSecrets.org recorded nearly 30 million pageviews from 4.8 million unique visitors.<sup>187</sup> The National Institute

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tute for Justice survey of voters in a ballot measure campaign in which seventy-two percent of voters said they had not sought out information about the campaign and sixty percent said they did not know where to go to access this information); Scott M. Noveck, *Campaign Finance Disclosure and the Legislative Process*, 47 HARV. J. ON LEGIS. 75, 102 (2010). Indeed, some commentators have suggested that the sheer volume of campaign finance data that is available to voters may increase search costs, disincentivizing the average voter from researching campaign finance data. See, e.g., Elizabeth Garrett, *Voting with Cues*, 37 U. RICH. L. REV. 1011, 1045 (2003) [hereinafter Garrett, *Voting with Cues*]; Mayer, *supra* note 10, at 266.

<sup>182</sup> Garrett, *Voting with Cues*, *supra* note 181, at 1027–33; Mayer, *supra* note 10, at 266–67.

<sup>183</sup> *But see McGeveran*, *supra* note 163, at 863 (expressing concern that information intermediaries may “shape the narrative about disclosed data to suit their own purposes and agendas”).

<sup>184</sup> Garrett, *Voting with Cues*, *supra* note 181, at 1045. *But see* Raymond J. La Raja, *Sunshine Laws and the Press: The Effect of Campaign Disclosure on News Reporting in the American States*, 6 ELECTION L.J. 236, 242 (2007) (finding that only a small number of news reports mention campaign finance information).

<sup>185</sup> See, e.g., John Boehner, OPENSECRETS.ORG, <https://www.opensecrets.org/politicians/summary.php?cid=N00003675> (last visited Sep. 3, 2013).

<sup>186</sup> *OpenData Initiative*, OPENSECRETS.ORG, <https://www.opensecrets.org/resources/create/data.php> (last visited Sep. 3, 2013).

<sup>187</sup> *About the Site*, OPENSECRETS.ORG, <https://www.opensecrets.org/about/tour.php> (last visited Sep. 3, 2013).

for Money in State Politics, through its website “followthemoney.org,” provides similar resources for state level races.<sup>188</sup> A Westlaw search for these two organizations in the ALLNEWS database in 2012 generated over 4200 hits.<sup>189</sup>

### B. *Heuristic Cues and Voting*

Even where informational intermediaries make campaign finance information more readily accessible, such information—like other detailed information regarding candidates and policies—may be of little interest to the average voter. Instead, as Anthony Downs explained a generation ago, most voters can be deemed to be “rationally ignorant,”<sup>190</sup> giving other needs and desires priority over informed political decisionmaking. Given the miniscule chance that her vote would actually affect the outcome of a given election, the average voter has little incentive to vote, much less to seek out information that would allow her to make better informed choices.<sup>191</sup>

But, as a growing body of political science literature demonstrates, the rational ignorance of the average voter does not necessarily translate into incompetent voter decisionmaking at the ballot box. Instead, voters use informational shortcuts—heuristic cues—to aid them in their decisionmaking.<sup>192</sup> Such heuristic shortcuts may include

<sup>188</sup> *Mission & History*, FOLLOWTHEMONEY.ORG, [www.followthemoney.org/Institute/index.phtml](http://www.followthemoney.org/Institute/index.phtml) (last visited Sep. 3, 2013).

<sup>189</sup> The query used was (“national institute on money in state politics” “followthemoney.org” “center for responsive politics” “opensecrets.org”) & da(2012) in Westlaw’s ALLNEWS database.

<sup>190</sup> ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 33, 42–43 (1957); see also Daniel R. Ortiz, *The Engaged and the Inert: Theorizing Political Personality Under the First Amendment*, 81 VA. L. REV. 1, 4 (1995) (contrasting two views of individual political decisionmakers taken by the Supreme Court: the “civic smarty” and the “civic slob”).

<sup>191</sup> William H. Riker & Peter C. Ordeshook, *A Theory of the Calculus of Voting*, 62 AM. POL. SCI. REV. 25, 41–42 (1968).

<sup>192</sup> See, e.g., SHAUN BOWLER & TODD DONOVAN, *DEMANDING CHOICES: OPINION, VOTING, AND DIRECT DEMOCRACY* 1 (2001); LAU & REDLAWSK, *supra* note 8, at 252; ARTHUR LUPIA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* 29 n.22 (1998); SAMUEL L. POPKIN, *THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS* 44–45 (1994); Larry M. Bartels, *Uninformed Votes: Information Effects in Presidential Elections*, 40 AM. J. POL. SCI. 194, 217 (1996); Craig M. Burnett, Elizabeth Garrett & Mathew D. McCubbins, *The Dilemma of Direct Democracy*, 9 ELECTION L.J. 305 (2010); Garrett, *Voting with Cues*, *supra* note 181, at 1023; Garrett & Smith, *supra* note 21, at 296; Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and “Disclosure Plus,”* 50 UCLA L. REV. 1141, 1145 (2003); Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63, 63 (1994); Mayer, *supra* note 10, at 262–65.



“party affiliation, endorsements by interest groups, newspapers, celebrities, politicians, and other opinion leaders, [or] a candidate’s personal characteristics” and biography.<sup>193</sup> As Michael Kang has explained, “[a]lthough heuristic cues are not a substitute for full information or wisdom, even politically ignorant voters can efficiently achieve ‘voter competence’ by using heuristic cues, in the sense that they will reach the same choices that they would have reached if they were far better informed.”<sup>194</sup> Using such shortcuts, political scientists have found that even low-information voters are able to vote “competently”—that is, “they cast the same votes they would have cast had they possessed all available knowledge about the policy consequences of their decision.”<sup>195</sup>

In ballot initiative elections, such commonly used heuristic cues as party affiliation and candidate record are not available, so these elections are particularly low-information environments for voters.<sup>196</sup> Ballot questions are often complicated and may be confusingly worded. As Julian Eule once noted, on one rent control proposition in California, over three quarters of the electorate either wrongly voted for rent control when they intended to oppose it or wrongly voted against rent control when they intended to support it.<sup>197</sup>

### 1. Interest Groups

Especially for voters on ballot initiatives, the political science literature on heuristic voting cues has demonstrated that interest group involvement serves as a particularly useful heuristic.<sup>198</sup> Arthur Lupia’s seminal 1994 study found that relatively uninformed voters who knew the insurance industry’s official position on the ballot measure voted similarly to voters who were well informed about the policy implications of the proposition.<sup>199</sup> Lupia concluded that by using in-

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<sup>193</sup> Mayer, *supra* note 10, at 263.

<sup>194</sup> Kang, *supra* note 192, at 1160.

<sup>195</sup> Garrett & Smith, *supra* note 21, at 296 (quoting Elisabeth R. Gerber & Arthur Lupia, *Voter Competence in Direct Legislation Elections*, in *CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS* 147, 149 (Stephen L. Elkin & Karol E. Soltan eds., 1999)); Kang, *supra* note 192, at 1160.

<sup>196</sup> Garrett & Smith, *supra* note 21, at 297; *see also* Kang, *supra* note 192, at 1167; Mayer, *supra* note 10, at 265.

<sup>197</sup> Julian N. Eule, *Judicial Review of Direct Democracy*, 99 *YALE L.J.* 1503, 1555–56 (1990); *see also* Kang, *supra* note 192, at 1145 (“In a 1998 survey, 79 percent of Californians agreed that ballot measures are often too complicated and confusing for voters to understand what happens if the initiative passes.” (internal quotation marks omitted)).

<sup>198</sup> *See* Lupia, *supra* note 192, at 63–64.

<sup>199</sup> *Id.* at 63.

terest group positions as a heuristic, under certain circumstances, “voters who have not acquired encyclopedic knowledge can vote as though they had.”<sup>200</sup> For example, in a 1994 initiative campaign, many voters decided to oppose a so-called ‘antismoking’ measure when they learned that Phillip Morris had spent \$13 million in support of it.<sup>201</sup>

In subsequent years, other political scientists have built upon and qualified Lupia’s core insight.<sup>202</sup> In particular, political scientists have attempted to define the conditions under which information regarding interest group involvement can serve as a useful heuristic cue. Lupia and Mathew McCubbins attempted to create a framework to define such conditions. They found that, under some circumstances, endorsements by knowledgeable and trustworthy groups or individuals can provide effective heuristic cues for initiatives and referenda.<sup>203</sup> They also found that disclosure policies and institutions help facilitate the determination of trustworthiness, for example, by imposing penalties for lying, by providing credible methods of verification, or by disclosing the expenditures of groups seeking to communicate their positions.<sup>204</sup>

Elizabeth Garrett has also articulated three conditions that must be present in order for interest group involvement to function as a heuristic cue.<sup>205</sup> First, the group must be sufficiently well-known that voters can correctly associate the group with a particular ideology or policy position that allows them to draw inferences about the candi-

<sup>200</sup> *Id.* at 63–64.

<sup>201</sup> See Elizabeth Garrett, *Direct Democracy*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 137, 153 (Farber & O’Connell eds., 2010) [hereinafter Garrett, *Direct Democracy*].

<sup>202</sup> For example, Richard Lau and David Redlawsk have demonstrated that politically sophisticated voters are better able to make use of heuristic cues in candidate campaigns than less well-informed voters. LAU & REDLAWSK, *supra* note 8, at 250. In a 2010 paper, Craig Burnett, Elizabeth Garrett, and Mathew McCubbins confirmed Lupia’s basic finding that voters who could remember endorsements for or against a ballot measure voted similarly to voters who could recall certain basic facts about the initiative. Burnett, Garrett & McCubbins, *supra* note 192, at 316. However, their research also demonstrated that such information may have little effect on voters’ choices where voters express stated policy preferences. They found that better informed voters—whether through actual knowledge or heuristic shortcuts—were no more likely to depart from their stated policy preferences, that is, to make “reasoned decisions,” than uninformed voters. See *id.* at 305; see also BOWLER & DONOVAN, *supra* note 192, at 28 (“People probably do not need large amounts of information to make rational voting choices. Cues from like-minded citizens and groups . . . may be sufficient, in an environment where accurate information is available, to permit voters to act as if they had all the available information.”).

<sup>203</sup> LUPIA & MCCUBBINS, *supra* note 192, at 10.

<sup>204</sup> *Id.*

<sup>205</sup> Garrett, *Voting with Cues*, *supra* note 181, at 1027.

date's ideology and likely behavior in office.<sup>206</sup> Second, the voters must have confidence that the group actually supports the candidate or cause, and is not acting strategically to mislead voters.<sup>207</sup> Third, the group's support must be sufficiently publicized to reach voters, hopefully in time to affect their voting choices.<sup>208</sup>

## 2. *Individual Contributors/Small Donors*

Even as a consensus is developing in the political science literature regarding the value of interest group involvement as a heuristic cue, a similar consensus is emerging regarding the relatively low informational value of the identities of individual contributors.<sup>209</sup> Although a voter can be expected to derive useful information from knowing the positions of well-known groups—such as labor unions, major corporations, or advocacy groups—on a particular candidate or measure, it is less obvious that a voter derives useful information from the simple fact that an obscure individual has given \$100 in support of a candidate or cause. As Michael Kang puts it, “[k]nowledge about where a well-known political actor stands on an issue neatly summarizes salient information in an accessible way. Conversely, knowledge about the stances of those who are not well-known does not produce useful heuristic cues.”<sup>210</sup> Accordingly, in recent articles, even those scholars who have generally favored many forms of campaign finance regulation have suggested a higher threshold for disclosure of the campaign contributions of individual citizens.<sup>211</sup>

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*; see also Kang, *supra* note 192, at 1169.

<sup>209</sup> Cain, *supra* note 9, at 2; Gardener, *supra* note 9, at 271; Garrett & Smith, *supra* note 21, at 325; McGeeveran, *supra* note 9, at 26–28.

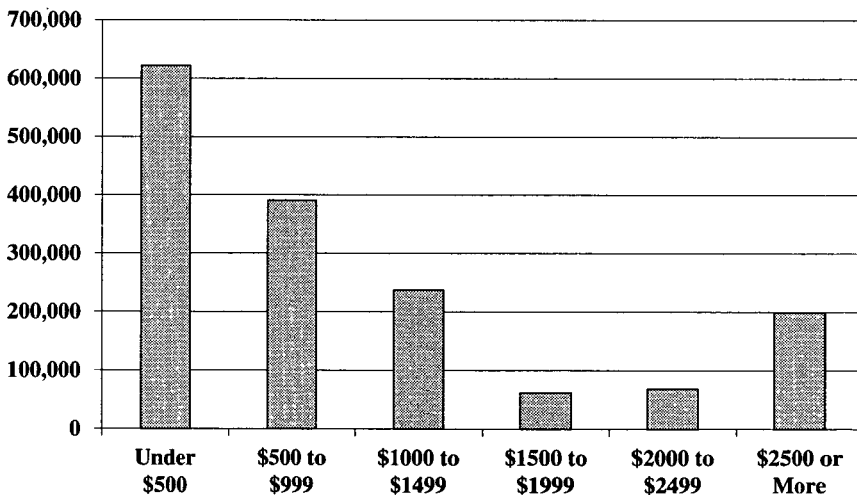
<sup>210</sup> Kang, *supra* note 192, at 1178–79.

<sup>211</sup> See, e.g., Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 298–99 (2010) (arguing that disclosure of small donors bears little benefit in preventing undue influence but creates high costs in increased administrative costs to campaigns and the potential of discouraging small donors from participating); Garrett, *Voting with Cues*, *supra* note 181, at 1044 (“The best solution may be to adopt an exemption for small and moderate-sized expenditures by individuals, but still to require disclosure of large amounts of political spending by individuals.”); Hasen, *supra* note 7, at 572 (“Disclosure thresholds should be raised significantly, not because of the danger of harassment, but because disclosure of those making modest contributions interferes with informational privacy while serving no important government interest.”); Kang, *supra* note 192, at 1177 (advocating that disclosure requirements attach to only the most prolific campaign contributors in an election); Overton, *supra* note 174, at 1300–01 (“[D]isclosure of contributions of less than \$500 does little to prevent quid-pro-quo corruption, the appearance of such corruption, or to inform voters which special interests support a candidate.”). As I will discuss *infra*, Briffault, Hasen, and McGeeveran, among others, have suggested a two-tiered disclosure regime in which information regarding smaller contributions is aggre-

It is worth noting, as an empirical matter, that because the vast majority of donors are small donors, even relatively modest changes in disclosure thresholds would result in the loss of substantial amounts of information (of course, whether this information is useful is a separate question, which I will discuss more fully in the next Part). With respect to Proposition 8, for example, disclosed donors giving less than \$1000 to the Yes on 8 campaign comprised more than eighty-five percent of the more than 46,000 individual donors to the campaign.<sup>212</sup> However, such “small” donors only accounted for about nineteen percent of the more than \$38 million contributed to the campaign.<sup>213</sup>

Similar patterns obtain at the federal level. Figure 3 represents a data breakdown provided by the Center for Responsive Politics regarding the aggregated contributions of individual donors to any single federal candidate committee, party committee, or political action committee (“PAC”).<sup>214</sup>

FIGURE 3. NUMBER OF DONORS WHO GAVE CONTRIBUTIONS (IN AGGREGATE) TO FEDERAL CANDIDATE COMMITTEES, PARTY COMMITTEES, OR PACS IN THE 2012 ELECTION CYCLE



gated, but personal information about contributors is not disclosed unless the contributor makes a larger contribution.

<sup>212</sup> For underlying data, *see supra* note 73.

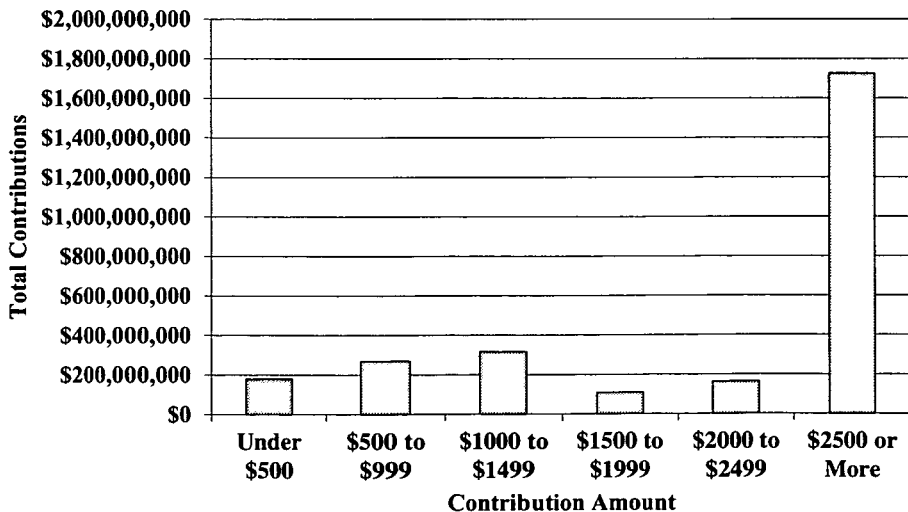
<sup>213</sup> In calculating this figure, I excluded those recorded contributions that were for negative amounts, so that the percentage is based on gross contributions. *See supra* note 73.

<sup>214</sup> Email from Doug Weber to author, Jan. 22, 2013 (on file with author). The underlying data is available at [OPENSECRETS.ORG](http://www.opensecrets.org), <http://www.opensecrets.org/MyOS/bulk.php> (last visited Sep. 3, 2013). Note that these contributions represent only “hard money” contributions, and do not include contributions to so-called “Super PACs” or other independent expenditure organizations.

As the chart shows, in the 2012 election, disclosed donors<sup>215</sup> who gave a total of less than \$500 to a federal candidate, party, or PAC comprised more than thirty-nine percent of federal hard money donors. Disclosed donors who gave a total of less than \$1000 to a federal candidate, party, or PAC comprised more than sixty-four percent of federal hard money donors.<sup>216</sup> And disclosed donors who gave a total of less than \$2500 to a federal candidate, party, or PAC represented eighty-seven percent of federal hard money donors.

Of course, one could point out that what really matters in terms of disclosure policy is not the amount of sheer information available regarding contributors, but instead the amount of money that corresponds with particular categories of information. And, indeed, although small donors may have been large in number, they were relatively insignificant in terms of monetary clout, even if one ignores the vast amounts of independent spending that were a significant feature of the past election. Figure 4, also based on data provided by the Center for Responsive Politics, represents a similar breakdown of donors showing the total amounts each category of donors contributed in the 2012 election.

FIGURE 4. TOTAL AMOUNT OF CONTRIBUTIONS BY DONORS GIVING AGGREGATE HARD MONEY CONTRIBUTIONS TO FEDERAL CANDIDATE COMMITTEES, PARTY COMMITTEES, OR PACS IN THE 2012 ELECTION CYCLE



<sup>215</sup> Because the federal disclosure threshold is less than \$200, this figure does not include donors who gave less than \$200. Briffault, *supra* note 174, at 1003.

<sup>216</sup> See *id.*

The thirty-nine percent of hard money donors who gave less than \$500 to a federal candidate, party, or PAC accounted for only six percent of total federal hard money contributions. The sixty-four percent of hard money donors who gave less than \$1000 to a federal candidate, party, or PAC accounted for only twenty-eight percent of total federal hard money contributions. And the eighty-five percent of hard money donors who gave less than \$2500 to a federal candidate, party, or PAC accounted for only thirty-seven percent of total federal hard money contributions. Or, to put it another way, the thirteen percent of donors who gave more than \$2500 to a federal candidate, party, or PAC accounted for sixty-three percent of hard money contributions in the 2012 election.

Thus, recent proposals to raise disclosure thresholds—whether to \$500, \$1000, \$2500, or more—would result in the loss of personal information regarding a large number of individual donors, but only a relatively small percentage of the funds flowing into political campaigns. The Conclusion discusses such proposals in greater detail.

#### IV. POLICY ASSUMPTIONS AND THE LESSONS OF PROPOSITION 8

By explaining how and when interest group involvement can function as a heuristic cue for voters, the political science literature has substantially advanced our understanding of how voters make use of campaign finance data. However, much empirical and analytical work remains to be done regarding campaign finance information and its salience to voters in a particular election and the public at large. In particular, this Part examines three assumptions—based on the literature regarding heuristic cues canvassed above—that have featured in recent discussions of disclosure policy and explains how the Proposition 8 story significantly complicates these assumptions.

##### *A. The Interest Group vs. Individual Contributor Assumption*

As explained above, the political science literature draws a distinction between the generally recognized heuristic value of information regarding interest group involvement in political campaigns and the far lesser heuristic value of information regarding the identities of individual low-dollar contributors.<sup>217</sup>

However, as the Proposition 8 example suggests, although the distinction between interest group disclosure and individual contributor disclosure may be apparent as a matter of political science theory,

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<sup>217</sup> See *supra* Part III.B.

such a line is much harder to draw as a matter of policy. This is because in some cases, interest group involvement may only become apparent from tracing patterns among individual contributor data.

The difficulty of unearthing evidence of group involvement may be exacerbated by interest groups' own awareness that their apparent involvement can spur voter backlash. As Elizabeth Garrett has explained, certain notorious groups are quite aware that disclosure of their support for a candidate or cause may cause certain ideologically opposed voters to vote against it:

Some groups know that their endorsements of initiatives provide shortcuts for voters who disagree with them, as well as to those who share their interests. Ideological groups such as the National Rifle Association or NARAL Pro-Choice America and economic groups like cigarette manufacturers and the gambling industry understand that publicizing their positions beyond their members may work counter to their goals.<sup>218</sup>

Even as disclosure of Philip Morris' financial support of a supposedly antismoking ballot initiative was fatal to the success of the measure,<sup>219</sup> disclosure of a teachers union's support for a school reform initiative or of the petroleum industry's support for an environmental measure could potentially derail, or at least damage, a campaign. Similarly, an interest group could wish to avoid criticism and adverse publicity regarding its support for a particular candidate or cause.<sup>220</sup>

Interest groups that wish to conceal—or at least to downplay—their support for a political campaign can choose from a number of strategies. One such strategy has attracted a great deal of scholarly and press attention in recent elections: the use of various organizations that do not disclose their donors as conduits for political contributions.<sup>221</sup> Another well-known variation on the conduit strategy is for an interest group to create and fund an innocuously, or even mis-

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218 Garrett, *Direct Democracy*, *supra* note 201, at 154.

219 See *supra* note 201 and accompanying text.

220 Well-known examples include the previously discussed backlash against the LDS's involvement in Proposition 8 and other same-sex ballot initiative campaigns, see *supra* Part I.B.2, and Target Corporation's contribution to a PAC supporting a candidate who opposed gay rights, see, e.g., Jennifer Martinez & Tom Hamburger, *Target Faces Investor Backlash*, L.A. TIMES, Aug. 20, 2010, at A1.

221 See, e.g., Ellen P. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations After Citizens United*, 10 ELECTION L.J. 363, 398–99 (2011); Richard Briffault, *Nonprofits and Disclosure in the Wake of Citizens United*, 10 ELECTION L.J. 337, 341–42 (2011); Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1652 (2012); Briffault, *supra* note 21, at 687–88; see also *supra* note 2.

leadingly, named entity to serve as its political surrogate for a particular campaign.<sup>222</sup>

In addition to the conduit strategy, interest groups also engage in a lesser-known, but equally well-established, strategy that can be thought of as a dispersion mechanism, or financial astroturfing.<sup>223</sup> Rather than making a large direct contribution under its own—or another’s—auspices, an interest group instead attempts to coordinate contributions from among its membership, employees, or other affiliated individuals. As Garrett explains, “[t]hose who control notorious groups . . . that fear a negative voter reaction will use any exemption to send their financial support through individuals.”<sup>224</sup> This dispersion strategy has several potential advantages. First, it allows an interest group to disclaim direct involvement in a particular campaign, and instead to suggest that financial support arose spontaneously from the initiative of its individual members.<sup>225</sup> It also allows an interest group to avoid disclosure requirements by using primarily internal communication channels to its members and employees.<sup>226</sup> For example, the LDS was not required to disclose any in-kind expenditures it made for communications to its membership and staff.<sup>227</sup> Finally, it allows an interest group to provide the appearance of widespread, seemingly spontaneous grassroots support for a candidate or cause.<sup>228</sup>

The Proposition 8 example provides a dramatic illustration of a dynamic that a number of commentators have noted: although personal information of individual contributors may have little informational value as such, the patterns generated by aggregating such

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<sup>222</sup> Garrett & Smith, *supra* note 21, at 299; Kang, *supra* note 192, at 1159. For example, in a 2007 Littleton, Colorado campaign regarding a zoning initiative favorable to Wal-Mart, disclosure reports showed that a political committee named “‘Littleton Neighbors Voting No’ was not actually a committee of local neighbors but was instead a committee funded through contributions from Wal-Mart totaling \$170,000.” Angela Migally, Op-Ed, *Coloradans’ Right to Know*, DENVER POST (Nov. 20, 2009, 12:01 PM), [http://www.denverpost.com/headlines/ci\\_13827296](http://www.denverpost.com/headlines/ci_13827296).

<sup>223</sup> See *supra* note 44; see also Zellner, *supra* note 44, at 359–61 (discussing recent examples of political astroturf campaigns).

<sup>224</sup> Garrett, *Voting with Cues*, *supra* note 181, at 1044.

<sup>225</sup> See *supra* note 108 and accompanying text.

<sup>226</sup> Garrett, *Direct Democracy*, *supra* note 201, at 154 (“[Groups fearing voter backlash] may seek to target their endorsements so that the information reaches only supporters, perhaps by publicizing support mainly in member newsletters or in targeted emails.”).

<sup>227</sup> CAL. GOV’T CODE § 85312 (West 2012). Similarly, under federal election law, for corporations, unions, and membership organizations, certain employee and member communications are exempted from the definition of electioneering communications, so that these entities are not required to disclose expenditures on such communications. See 11 C.F.R. § 114.1(c), (e) & (j) (2012).

<sup>228</sup> See Alec MacGillis, *Coal Miner’s Donor*, NEW REPUBLIC, Oct. 25, 2012, at 18, 19.



information may have substantial heuristic value.<sup>229</sup> Although the LDS had endorsed Proposition 8 from the pulpit, its extensive role in soliciting and coordinating financial support for the measure only came to light when Karger, Hansen, and others mined individual contributor information for indicia of Mormon Church membership.<sup>230</sup>

But the Proposition 8 example also suggests that it may not be easy to identify in advance what personal identifying information will be relevant once aggregated.<sup>231</sup> Other than name and address, the categories of information typically available on campaign finance disclosure forms—employer and occupation—would have been of little assistance to Karger and Hansen in their efforts to uncover the extent of Mormon financial backing for Proposition 8. Even information regarding ZIP code would only have allowed them to calculate that residents of Utah had given \$2,770,000 in support of the measure—a substantial figure, but only a small fraction of the amount that Mormons gave to the campaign in California and nationwide.<sup>232</sup>

It is clear that we are just at the beginning of understanding what type of interest group information will be salient to voters, and further research and analysis should inform any efforts to have interest group or aggregated information function as an informational substitute for individual contributor information.

### B. *The Redundant Disclosure Assumption*

Another often unstated assumption underlies some recent discussions of disclosure policy: that is, that campaign finance disclosure data is frequently redundant, given the availability of other heuristic cues, including interest group endorsements. David Primo has perhaps articulated this position most directly, arguing:

[D]isclosure data may simply overlap with what is available without recourse to disclosure. For instance, if real estate agents hold a public rally to oppose a ballot measure, there is little benefit from knowing that they are financially involved

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<sup>229</sup> Briffault, *supra* note 21, at 655; Cain, *supra* note 9, at 1; Gardener, *supra* note 9, at 270; McGeveran, *supra* note 9, at 53; Noveck, *supra* note 181, at 107–10.

<sup>230</sup> See *supra* Part I.

<sup>231</sup> Mayer, *supra* note 10, at 268 (“Choosing what patterns should be disclosed might not be a simple task; therefore, private parties should experiment with what the public finds useful to know.”).

<sup>232</sup> See Dan Levine & Peter Henderson, *Gay Marriage Foes Suffer from Fundraising Shortfall*, REUTERS (Jan. 29, 2013, 6:17 PM), <http://www.reuters.com/article/2013/01/29/us-usa-gaymarriage-money-idUSBRE90S15820130129>.

in opposing the measure. In other words, there may be no *marginal* benefits from such information.<sup>233</sup>

Primo contends, “[t]he views of corporate interests, labor unions, and advocacy groups on a ballot issue are . . . typically well-publicized, either by the groups themselves or by their opponents.”<sup>234</sup> Similarly, Lloyd Mayer has argued, “it is not clear what cues [campaign finance] information provides that [are] not already provided by other existing and readily accessible heuristic cues such as party affiliation and endorsements.”<sup>235</sup>

The existing scholarly literature provides some pushback against the superfluous disclosure assumption. For example, as discussed in the previous subsection, although many interest groups do publicize their positions on ballot initiatives, well-known interest groups may take steps to cloak or deemphasize their involvement in an initiative in order to avoid adverse publicity or backlash.<sup>236</sup> The political science literature has also made some preliminary attempts to demonstrate the salience of the *amount* of interest group spending, not just the mere fact of interest group involvement. For example, Lupia and McCubbins have attempted to demonstrate that the amount of interest group spending in support of an initiative can serve as a cue regarding the initiative’s departure from the status quo.<sup>237</sup> Similarly, Elizabeth Garrett and Bruce Smith have argued that the amount of interest group spending provides a useful cue for voters regarding the intensity of a group’s support for a ballot initiative.<sup>238</sup> Additionally, in a 2000 poll of 600 California voters, seventy-one percent of those polled stated that it is important to know the source and amount of contributions on ballot measure propositions, but only fifty-seven per-

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<sup>233</sup> PRIMO, *supra* note 8, at 1–2. In a recent study for the Institute for Justice, Primo provides the results of an experiment purporting to demonstrate the “marginality” of campaign finance data. Primo’s study found that when voters were given access to a range of simulated sources of information (including articles, advertisements, and a voter guide) about a hypothetical ballot initiative, articles which mentioned campaign finance information seemed to have little marginal effect on assisting voters in identifying the interest groups supporting the initiative. *Id.* at 15.

<sup>234</sup> *Id.* at 4–5; see also *id.* at 15 (“Much of the information in disclosure reports duplicates information voluntarily released by interest groups, and even new information is rarely informative once all the other information available in an initiative campaign is taken into account.”).

<sup>235</sup> Mayer, *supra* note 10, at 265.

<sup>236</sup> See *supra* text accompanying notes 218–29.

<sup>237</sup> LUPIA & MCCUBBINS, *supra* note 192, at 209.

<sup>238</sup> Garrett & Smith, *supra* note 21, at 297.

cent of respondents indicated that interest group or politician endorsements were important.<sup>239</sup>

But the Proposition 8 story suggests that the potential salience of campaign finance information has an additional facet: it may not merely be the fact of interest group involvement for a particular proposition that is salient—instead, the extent of an interest group’s financial support may be separately relevant. In other words, the fact of an interest group’s support and the extent of an interest group’s financial backing may need to be separately considered as heuristic cues.

As we saw with Proposition 8, the mere fact that the LDS supported Proposition 8 was far from newsworthy.<sup>240</sup> Instead, it was only once it came to light that Mormons had contributed a major percentage of the campaign’s funds that the story gained traction—and notoriety—in the local and national press. Of course, five years later, and without the benefit of contemporaneous exit polling, it is impossible to tell whether this information would have caused voters to change their vote or would have affected voter turnout or vote drop-off on the measure. But other studies have suggested that where a group provides a major portion of the financial support for a measure, this fact could cause a decline in voter support for a measure. For example, after a sample of California voters was informed that more than sixty percent of the funds used to place Proposition 226 on the 1998 ballot came from out-of-state interests, support for the measure declined by fifteen to twenty percent.<sup>241</sup>

This insight seems to comport with our intuitions. For example, the fact that the teachers union (or the petroleum industry) had endorsed a particular candidate or measure might not affect a voter’s decisionmaking, but a voter might well be swayed by the revelation that the teachers union (or the petroleum industry) had contributed a majority of the funds backing the candidate or cause.<sup>242</sup> The latter fact does not make the former fact redundant; an interest group endorsement is conceptually distinct from information suggesting that a politician or campaign is “in the pocket” of a particular interest group. But more empirical work is clearly needed to elucidate the relationship between the heuristic value of interest group involvement and the heuristic value of the extent of financial support.

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239 Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1106 n.25 (9th Cir. 2003).

240 See *supra* note 25 and accompanying text.

241 *Getman*, 328 F.3d at 1106 n.25.

242 See *supra* notes 219–20 and accompanying text.

### C. *The Time-Limited Salience Assumption*

A final feature of the discussion regarding the salience of campaign finance data deserves mention. It is unquestionably true that campaign finance data is most useful when it is disclosed in time to be publicized to voters in advance of a particular election.<sup>243</sup> However, this insight does not necessarily mean that the salience of campaign finance information is necessarily limited to a particular election. It may be time to take a broader view of informational salience.

As we saw with Proposition 8, the fact of LDS/Mormon financial support for the initiative continued to generate news coverage even years after the election. The story shaped electoral discourse surrounding same-sex ballot initiatives in other states and in other elections, including the 2012 presidential election.<sup>244</sup> Beyond the electoral context, the story sparked dialogue—some hurtful, some helpful—within and between the Mormon community and the gay community. The story also featured in the litigation over the constitutionality of Proposition 8, warranting mention in six appellate and amicus briefs in the *Hollingsworth v. Perry*<sup>245</sup> case recently decided by the Supreme Court.<sup>246</sup>

Interest groups and other political actors are repeat players—their view of what is at stake with regard to a particular issue is not limited to a particular election. Instead, their view of political influence extends across multiple jurisdictions, elected officials, campaigns, and time periods. In order to offer voters useful information regarding their influence, we may need to take a similarly broad view.

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<sup>243</sup> See, e.g., Briffault, *supra* note 21, at 711; Garrett & Smith, *supra* note 21, at 324.

<sup>244</sup> See, e.g., Wayne Barrett, *Biographer Recounts Romney's Many Trips to Mormon Church to Discuss Social Issues*, DAILY BEAST (May 11, 2012, 6:25 PM), <http://www.thedailybeast.com/articles/2012/05/11/biographer-recounts-romney-s-many-trips-to-mormon-church-to-discuss-social-issues.html> (mentioning extensive Mormon support for Prop 8, and Romney's personal involvement in those efforts, in context of discussing the source and evolution of Romney's stance on social issues like gay marriage).

<sup>245</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

<sup>246</sup> See, e.g., Brief for Catholic Answers, Christian Legal Society, & Catholic Vote Education Fund as Amici Curiae Supporting Petitioner *Hollingsworth* & Respondent Bipartisan Legal Advisory Group Addressing the Merits & Supporting Reversal at 21, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144, 12-307); Brief for Marriage Anti-Defamation Alliance as Amicus Curiae Supporting Petitioners & Supporting Reversal at 11–13, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144); Brief for Catholics for the Common Good as Amicus Curiae Supporting Defendant-Intervenors-Appellants at 24–26, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2010) (No. 10-16696).

## CONCLUSION

After *Citizens United*, the rise of the Super PAC and dark-money nonprofits,<sup>247</sup> and record undisclosed spending in the 2012 elections, proposals for overhauling federal and state campaign finance disclosure regimes abound. Many of these proposals include adjustment of the thresholds for disclosure of the information of individual contributors, which is quite reasonable considering that current federal disclosure thresholds date from 1979.<sup>248</sup>

These proposals can be ranked on a spectrum in terms of the amount of informational content disclosure would provide. At one end of the spectrum, multiple commentators have suggested no disclosure below certain thresholds, although there is wide variance as to what an appropriate disclosure threshold might be.<sup>249</sup> At the other end of the spectrum would be full disclosure, above the appropriate threshold.

Commentators have also proposed two intermediate alternatives to an “all or nothing” disclosure regime. For purposes of clarity, I will call these two intermediate alternatives “aggregate” and “anonymized” disclosure. In aggregate disclosure,<sup>250</sup> a contributor is required to report personal information to the state, but the state only discloses such data in the aggregate and redacts such personal identifying information as name or street address.<sup>251</sup> Using aggregate disclosure, for example, users of campaign finance data would be able to see how many employees of a particular company or how many residents of a particular ZIP code contributed to a particular candidate or cause, and in what aggregate amounts. The informational content of aggregate disclosure could also be enhanced by adding to the categories of information that contributions are required to provide; for example, such information as political party or other affiliation and income bracket could be disclosed on an aggregate basis.

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<sup>247</sup> See *supra* note 221 and accompanying text.

<sup>248</sup> Briffault, *supra* note 174, at 1003. As Richard Briffault points out, if federal disclosure thresholds for individual contributions to candidates “had been adjusted for inflation, the disclosure threshold in 2010 would have been \$601.” *Id.*

<sup>249</sup> See, e.g., Garrett, *Voting with Cues*, *supra* note 181, at 1027; Hasen, *supra* note 7, at 572; Kang, *supra* note 192, at 1177; Overton, *supra* note 174, at 1300.

<sup>250</sup> Briffault, *supra* note 21, at 712–13; McGeeveran, *supra* note 9, at 53; Noveck, *supra* note 181, at 107–10.

<sup>251</sup> *But see* Paul M. Schwartz & Daniel J. Solove, *The PII Problem: Privacy and a New Concept of Personally Identifiable Information*, 86 N.Y.U. L. REV. 1814 (2011) (questioning whether a workable distinction between personal identifying information and other information can be drawn, given the ability of researchers to derive personal identifying information from generalized information).

Closely related to aggregate disclosure is what I call “anonymized” disclosure. This option has not been extensively discussed in the literature.<sup>252</sup> In anonymized disclosure, each donor is assigned a unique identifier, which would correspond to an anonymous “data profile.”<sup>253</sup> This data profile would include the campaign finance history of the individual past elections and committees to which she had contributed. For example, under an anonymized disclosure system, a researcher such as Fred Karger would be able to tell that an anonymous contributor to Proposition 8 had also contributed to Mitt Romney’s gubernatorial campaign. Like aggregate disclosure, anonymized disclosure could also be enhanced by adding additional categories of information—for example, contributions to groups that engage in electoral advocacy, such as labor unions, Super PACs, etc. In this way, anonymized disclosure offers the potential for richer informational content than either a nondisclosure or aggregate disclosure regime. The story of Proposition 8, however, should cause us to ask certain questions of various disclosure proposals. Opinions may certainly differ regarding the value of the information discovered by Hansen and Karger and verified by Schoofs. Some might well argue that, given the backlash and hostility that resulted from this revelation, we would have been better off as a society not knowing of the Mormon Church’s heavy financial support for the initiative. But if we do believe that the fact that the Mormons contributed nearly half of the financial support for Proposition 8 is a fact worth knowing, then in assessing future disclosure proposals, we should take account of the informational losses that may be at stake in the elimination of categories of disclosure.

First, we should pay attention to the kinds of individual contributor information that have proven helpful in discerning patterns of interest group influence. Personal identifying information such as name and street address is the category of information associated with the highest speech and privacy costs. For aggregate or anonymized disclo-

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<sup>252</sup> Although in referring to his concept of semi-disclosure, see Cain, *supra* note 9, at 1, Bruce Cain seemingly is describing an aggregate disclosure proposal, in conversation he has informed me that what he advocates is, in fact, an anonymized disclosure system, in which each donor would have a unique identifying number. Similarly, Jacob Gardener, in referring to what he calls “enhanced redacted disclosure,” is referring to something like anonymized disclosure, in that it would provide a historical profile of an individual donor. Gardener, *supra* note 9, at 299.

<sup>253</sup> Although this concept is relatively novel in the world of election law, it is a common phenomenon in Internet law, where social networking sites commonly allow users to create and maintain data profiles under a pseudonym. See, e.g., Daniel H. Kahn, *Social Intermediaries: Creating a More Responsible Web Through Portable Identity, Cross-Web Reputation, and Code-Backed Norms*, 11 COLUM. SCI. & TECH. L. REV. 176, 182 (2010).

sure regimes, it makes sense to see whether less sensitive categories of data can serve as informational substitutes. But we should not be quick to assume that it is easy to make an *ex ante* determination of the relevance of various types of information for future elections that may implicate a wide variety of issues and interests. Certainly, a great deal of further empirical and historical research would be helpful here.

Second, we should be cognizant of potential informational losses not just regarding the fact of interest group involvement but also the extent of such involvement. The total amount of spending associated with a particular interest group may itself be a fact of great salience, whether such spending is direct, or whether it is dispersed among a group's members or supporters. Here again, an appropriate threshold must be drawn between disproportionately burdening low-dollar contributors and losing substantial amounts of aggregate information. It may be worth recalling that in tabulating the aggregate amount of Mormon contributions to the Proposition 8 campaign, Nadine Hansen did not think it worthwhile to include the nearly 40,000 "small-fry" donors who had contributed less than \$1000,<sup>254</sup> but she still was able to calculate the "newsworthy" statistic that more than one-third of the measure's financial support came from Mormons.

Finally, we should take cognizance of the fact that interest group involvement often extends past a particular election cycle and may provide useful information for future cycles. This may, for example, cause us to rework our reporting and disclosure structures to make historical information more readily available and usable, even across different reporting regimes and jurisdictions.

Ultimately, the challenges of crafting appropriate disclosure policy are daunting, especially in an age of fast-evolving technological possibility, legal frameworks, and political actors. Much attention has been focused on the problems of disclosure—on its loopholes, its piecemeal coverage, and its potential to impose unwarranted burdens on political actors and entities. My hope is that by offering a detailed examination of what might be considered a qualified success story for disclosure—the story of Proposition 8—we can attempt to preserve what works about our current disclosure regimes while we turn our attention to fixing their manifest problems.

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254 Telephone Interview with Nadine Hansen, *supra* note 62.

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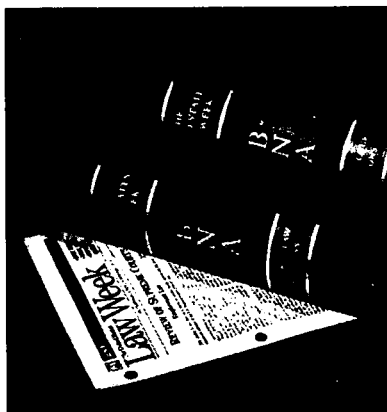
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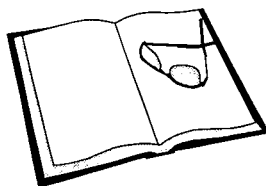
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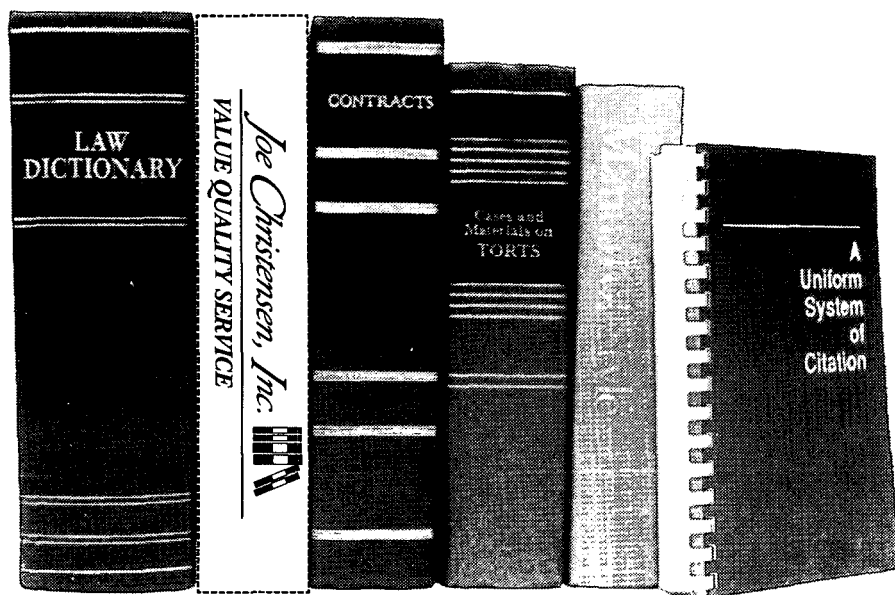
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