



2016

# Disclosure and Public Confidence

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## Recommended Citation

Ann M. Ravel, *Disclosure and Public Confidence*, 34 YALE L. & POL'Y REV. (2016).

Available at: <https://digitalcommons.law.yale.edu/ylpr/vol34/iss2/7>

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## YALE LAW & POLICY REVIEW

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### Disclosure and Public Confidence

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What excites me about today is being here with all of you students, who are so interested in the subject of campaign finance. I believe that this issue is very significant to our country and our democracy. Seeing young people who care about campaign finance gives me hope for the change we really need in this system. So, thank you to the Yale Political Law Society for organizing this conference.

When I first got to the FEC, I did what I usually do when I embark on something new and have little experience in the area. I talk to as many people as I can who are experts or are engaged in the field to get advice and perspective about the job, and what I can accomplish. And I made sure to do it on a bipartisan basis. Some of those people included the notable people that you have on your panels today. I have to admit that I don't remember a lot of the advice that I got, especially now that all this time has passed for me at the FEC. But, what I recall vividly is one campaign lawyer telling me that American people don't really care about campaign finance law. I disagreed with this assertion, and I disagree with it even more now. I actually think that it's something people do seriously care about, they just don't know what to do about it. They just don't know how to change the system.

And, one way to know that this subject is something people care about is to note how campaign finance is addressed in popular media. Heather Gerken, this morning, talked about The Colbert Report. Colbert raised the issue of Super PACs in a way that has never been previously done—by making this complicated and nuanced issue clear.<sup>1</sup> The issue of Super PACs and campaign fi-

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\* Commissioner & Former Chair, Federal Election Commission. This speech was originally delivered as the Keynote Address at *The New Normal in Election and Political Law* Conference at Yale Law School on Saturday, April 11, 2015 (minor modifications have been made to the speech's original text). Many of the predictions made here have since come to pass.

1. See *Colbert Super PAC*, COLBERT REP. <http://www.cc.com/video-collections/8iug7x/the-colbert-report-colbert-super-pac/epwg6t> (last visited June 28, 2016) (compiling Colbert Report Super PAC coverage). See also STEPHEN COLBERT'S COLBERT SUPER PAC, <http://www.colbertsuperpac.com/home.php> (last visited June 28, 2016) (archived website for Stephen Colbert's now-defunct Super PAC).

nance has even been part of drama series. For example, the FEC was the subject of an episode recently on *House of Cards*. While Frank Underwood is still the Vice President and is having a conversation with the President, the President shares that he is upset about Super PACs raising so much money. He asks Frank Underwood how to deal with them, and Frank Underwood says, “I’m not the FEC. I can’t wave a [magic] wand.”<sup>2</sup> Just so you know, as a fact-checker, let me just say that I’m on the FEC and I can’t wave a magic wand either! When Frank Underwood runs for President, just killing people isn’t going to get him elected. He has to raise money—a lot of money. At which point, Underwood says in an aside to the audience that he would rather slit his wrists than listen to a big donor talk about policy.

Going back many years—and I hope you are all avid fans of *The West Wing*—there were a couple of episodes about the FEC. I watched them before I came to the FEC so I would learn everything that there is to know. I kid, but it is a great show. The depth of thought evident in the show was most apparent in their discussion about appointing reformers to vacant positions on the FEC. One of the President’s aides is carrying a book by Gary Wills on American distrust of government.<sup>3</sup> And, that’s what campaign finance law is actually supposed to be about—encouraging trust in government and the political process.

The reason that the FEC was established after the Watergate scandal was that distrust in government was extremely high.<sup>4</sup> Congress had to respond and established an agency to enforce campaign finance law. If there is distrust in government and people don’t believe that their representatives are doing what they elected them to do, our democracy is in peril. When Congress established the FEC, its central mission was to be a disclosure entity.<sup>5</sup> Disclosure was intended to be a way to encourage and ensure trust in government. Now you see a lot of academics and others backing away from disclosure. I know that there’s going to be a panel right after this about disclosure, so I won’t go into too much detail about my views about that, except to say that because of my life-long career in the public sector, I believe that disclosure is really significant. It’s certainly not the solution to all of the campaign finance system’s woes that have been talked about here today, but it’s important to people for a number of reasons.

When I worked in local government—but it’s true at all levels of government—I saw that when people know facts about the political system and have transparency about the workings of their government, they are more confident in government. But, when they are kept out of the loop, when they are in the dark about the facts of politics, there is a negative feeling and a disassociation

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2. *House of Cards: Chapter 20* (Netflix web broadcast Feb. 14, 2014).

3. *The West Wing: Let Bartlet Be Bartlet* (NBC television broadcast Apr. 26, 2000).

4. See Ann Ravel, *People Really Care About Campaign Finance Reform. The FEC Needs to Listen.*, BILL MOYERS & CO. (Feb. 18, 2015), <http://www.billmoyers.com/2015/02/18/opening-doors-fec-letting-light/>.

5. *Id.*

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from government and the system. Additionally, details and information about who's behind campaigns is really important as a way for people to understand how to vote consistent with their views. There's been a lot of evidence about that, and during our question and answer time, I can give you anecdotes about it if you want. I think it's really important, and it strikes me as very odd that, in particular, some discussions, blogs and academics have more concern about the issues of privacy and some retribution to a couple of multi-millionaires than concern about the American public as a whole, and the need for disclosure of large campaign contributions.<sup>6</sup> I'll leave it at that because what I really want to focus on today is what I see as the real emerging scandal in campaign finance.

One of the most significant consequences of the increase of spending by the few, and in particular, large amounts of undisclosed money, is that people don't feel that their participation in government matters. There's a poll that some of you may have seen that has been asked of people since the early 50s, and the question is: "Do you trust your government to do what's right?" When that poll was given to people after Watergate, trust in government was at its lowest point—only 36% of people thought that the government could be trusted to do what was right.<sup>7</sup> That poll was given again last year, and only 24% of the respondents felt that they trusted the government.<sup>8</sup> Additionally, we all know that trust and confidence in Congress is incredibly low. And, this is true whether you are a Republican, a Democrat, or an Independent. Polls consistently indicate that around 22% of people have faith and believe that Congress is doing what is right.<sup>9</sup> One of my favorites—I do love polls—was taken a couple of years ago and found that colonoscopies and cockroaches have higher confidence ratings than members of Congress, which tells you where we are.<sup>10</sup> Most people laugh at that, but we should be ashamed. What the polls have also shown is that people don't feel that there is a reason to vote, because moneyed interests have so much influence that their vote doesn't count. It's really appalling how few people vote, actually.

I know this is a local election, but in Los Angeles a couple of weeks ago, there was an election proposing a city charter change that was a fairly significant

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6. *Cf. Doe v. Reed*, 561 U.S. 186, 202 (2010) (Alito, J., concurring) (expressing concern for the privacy and associational interests threatened by a state disclosure law, and suggesting that the law may be vulnerable to an as-applied challenge).
  7. *See Trust in Government: 1958-2015*, PEW RESEARCH CTR. (Nov. 23, 2015), <http://www.people-press.org/2015/11/23/1-trust-in-government-1958-2015/>.
  8. *Public Trust in Government: 1958-2014*, PEW RESEARCH CTR. (Nov. 13, 2014), <http://www.people-press.org/2014/11/13/public-trust-in-government/>.
  9. *Congressional Favorability*, PEW RESEARCH CTR., <http://www.pewresearch.org/data-trend/political-attitudes/congressional-favorability/> (last visited June 28, 2016).
  10. *See Tom Jensen, Congress Somewhere Below Cockroaches, Traffic Jams, and Nickelback in Americans' Esteem*, PUB. POL'Y POLLING (Jan. 8, 2013, 11:48 AM), <http://www.publicpolicypolling.com/main/2013/01/congress-somewhere-below-cockroaches-traffic-jams-and-nickleback-in-americans-esteem.html>.

matter. Of course, Los Angeles is very important as the second largest city in our country. They have a lot of influence over the lives of many people. Only 9% of the voters went to the polls in that election.<sup>11</sup> Just 8.6%. And in the prior election for mayor of Los Angeles, there was only 23.3% voter turnout.<sup>12</sup>

Another really important aspect of civic participation is contributing to campaigns. There was a really interesting study done by the Pew Center—not about elections—about the Haiti earthquake. The relevance to elections is interesting, though. That was a time, if you all remember, when people were encouraged to contribute to the earthquake relief by text message, and a lot of people gave \$10. There was an enormous amount of money that was raised. But, more importantly, the Pew study found that people then became really invested in the issues. They stayed on top of the news, and made contributions to other disaster recovery efforts.<sup>13</sup> This shows how giving a small amount of money can make people feel invested in the issues.

I think the same is true of political contributions. And that was the case during the Obama 2008 campaign, when there were large numbers of small donors. But, the reality is that this year, in the 2014 midterm, it was the first election in many years where the number of contributors actually declined, yet the large donors made up a really high percentage of the money that was actually given, and more money has been given than has been given previously in a midterm election.<sup>14</sup> There was a decline of 96,000 donors, or 11%, while the average contribution rose to an all-time high.<sup>15</sup> It turned out that, and some of you may have seen this statistic: 1% of 1% of the donors gave most of the money in the 2014 midterm election.<sup>16</sup> The effect of this is not surprising. I know there was a little bit of a colloquy about this trend this morning, and the effect of more wealthy individuals or Super PACs dominating our election spending and how

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11. Alice Walton, *L.A. Dismal Voter Turnout: 8.6% as Ballot Count Continues*, L.A. TIMES (Mar. 4, 2015, 8:52 AM), <http://www.latimes.com/local/lanow/la-me-ln-another-dismal-voter-la-election-20150304-story.html>.
  12. Ben Walsh, *L.A. Mayoral Runoff Another Low Mark in Voter Turnout: 23.3%*, L.A. TIMES (June 11, 2013), <http://articles.latimes.com/2013/jun/11/local/la-me-final-la-vote-20130611>.
  13. Aaron Smith, *Haiti Text Donors and Their Experiences Giving to Earthquake Relief*, PEW RESEARCH CTR. (Jan. 12, 2012), <http://www.pewinternet.org/2012/01/12/haiti-text-donors-and-their-experiences-giving-to-earthquake-relief/>.
  14. Russ Choma, *Final Tally: 2014's Midterm Was Most Expensive, With Fewer Donors*, OPENSECRETS, CTR. FOR RESPONSIVE POLITICS (Feb. 18, 2015), <http://www.opensecrets.org/news/2015/02/final-tally-2014s-midterm-was-most-expensive-with-fewer-donors/>.
  15. *Id.*
  16. Peter Olsen-Phillips et al., *The Political One Percent of the One Percent in 2014: Mega Donors Fuel Rising Cost of Elections*, OPENSECRETS: CTR. FOR RESPONSIVE POLITICS (Apr. 30, 2015), [www.opensecrets.org/news/2015/04/the-political-one-percent-of-the-one-percent-in-2014-mega-donors-fuel-rising-cost-of-elections/](http://www.opensecrets.org/news/2015/04/the-political-one-percent-of-the-one-percent-in-2014-mega-donors-fuel-rising-cost-of-elections/).

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positive it is for women and minorities. I think the opposite is true. Instead what is happening is that women and minorities are significantly underrepresented in our democracy and in elected political office.

Let me focus a little bit on women, because this is a particular interest of mine at the moment. The situation, I think, for women is a particularly egregious example of this underrepresentation because of the disparities between the number of women in the electorate and the number holding elected office at all levels of government. Women are a majority of the voters in this country, yet there is a shocking dearth of women holding office both at the federal and state level. The press recently celebrated that, out of 535 seats in the 114<sup>th</sup> Congress, women are now 19.4% of the composition, but this is hardly a cause for celebration.<sup>17</sup> At the state level, in 2012, more than three-quarters of statewide elected officials were men and there were only now six women governors.<sup>18</sup> More than 50 democratic countries in the world, including countries that we, as Americans, consider to be less advanced, or perhaps more macho, rank much higher in women's representation than the United States.<sup>19</sup> Latin America has had six, and that doesn't count Central America, six women presidents. There are four sitting female presidents right now in Latin America.

Clearly, there are a lot of reasons for the low representation of women, but a large factor—this is where the campaign finance issues are relevant—a large factor is that there are financial barriers for women to run. Those who contribute to campaigns are overwhelmingly wealthy, white and male. Most of them simply do not contribute to women candidates. Over 95% of the Super PACs in this country are run by men, and they do not give to women candidates. Bob Bauer is not here but I am impressed that he seems to write his blog posts in the middle of the night. He wrote one last night, in the middle of the night. It was very interesting because it had to do with something people were talking about earlier today. It was about Super PACs and how they are now dividing up, and a lot of them are trying to get more control over aspects of the campaign.<sup>20</sup> That's what's happening. They're taking greater control and having more influence.

One of the problems with that—and why this matters so much—is that the wealthy donors are the gatekeepers. They make the decision about who can run for office in the first place. It's not about what happens once you get to be the

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17. *Women in U.S. Congress 2015*, RUTGERS UNIV., EAGLETON INST. OF POLITICS, CTR. FOR AM. WOMEN & POLITICS, <http://www.cawp.rutgers.edu/women-us-congress-2015> (last visited June 28, 2016).
  18. JENNIFER L. LAWLESS & RICHARD L. FOX, WOMEN & POLITICS INST., AM. UNIV. SCH. OF PUB. AFFAIRS, MEN RULE: THE CONTINUED UNDER-REPRESENTATION OF WOMEN IN U.S. POLITICS 1 (2012), <https://www.american.edu/spa/wpi/upload/2012-Men-Rule-Report-web.pdf>.
  19. *Id.* at 2 tbl. 2.
  20. Bob Bauer, *Second Fiddles, in a Tribute to Buckley*, MORE SOFT MONEY HARD LAW (Apr. 10, 2015), <http://www.moresoftmoneyhardlaw.com/2015/04/second-fiddles-tribute-buckley/>.

nominee of the party. It's about, who can even be in the race to begin with? This is not a Republican/Democrat thing, but picture what's going to happen next week when all of the Republican candidates are going to be trekking to Las Vegas to talk to Sheldon Adelson to ask for his support. It's not just Sheldon Adelson. The influence of the 1% of donors on who can even be a viable candidate is great. Women and minorities have less access to wealth or the wealthy. There are still very few female senior partners in law firms or CEOs of Fortune 500 companies. Political parties still have some influence in making decisions, especially at the state and local levels, about who gets support to run for office. It's clear that fundraising potential is a very significant aspect of who's going to be getting support. And, most women and minorities simply do not have the financial connections, family connections or other connections to compete in fundraising from large donors.

So our campaign finance system has continued to embed the interests of the same groups. Contributors are citizens who are likely to come into contact with and influence their representatives. If you have a homogeneous group of wealthy contributors, that's who people are going to listen to, and influence our public policy. There's not enough discussion about this problem and it's a really serious issue in this country that people need to start thinking about. We have to all find ways to increase participation in the financing of campaigns, running for office, voting, and involvement in governmental issues.

I have some ideas about solutions and I certainly want to talk to you all about questions you may have. But I want to end with a very moving comment made to me last year. The FEC is a very inward organization; we very rarely allow the public to come to speak about most issues under our purview, even though our role is incredibly important in the democratic process. I believe that our constituency includes the public, who are the people of this country. So, I traveled to various cities to hear from people about their views on campaign finance, and it was very interesting to hear how much people are frustrated about the campaign finance system we now have. But, I want to tell you the story of one speaker, which demonstrates why campaign finance issues are so important. A woman came forward in Atlanta, and she said, "I never intended to come speak. I just wanted to listen to everybody, but I want to tell you about my situation." She was a black woman from South Africa, and she said, "I grew up in South Africa. I lived there most of my life. I was not allowed to vote under Apartheid. Because of that, I was motivated to come to the United States. I was so excited about coming here and having the opportunity to vote, to have a place at the table, and be involved in policy and government." But, she said, "Now, given what I hear about the money in politics and the little influence that we have, I'm really concerned about whether I made the right decision." That was so moving and is enough for all of us to get involved to do something to change the campaign finance system we now have.