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Senator McConnell "Pounds the Table" in Opposing Campaign Finance Disclosure Long Upheld by Supreme Court

By Fred Wertheimer, Democracy 21 President

There is an old saying in the legal profession that goes like this: "If you don't have the law pound the facts, if you don't have the facts pound the law, if you don't have either the law or the facts pound the table."

Senate Republican Leader Mitch McConnell has been spending a good deal of time "pounding the table" recently in his efforts to ensure that Senate Republicans vote as a block against the DISCLOSE Act of 2012 and to provide cover for the corporations and wealthy individuals that are secretly injecting hundreds of millions of dollars into the national election.

The DISCLOSE Act is expected to come to the Senate floor for consideration in July.

Senator McConnell's latest pronouncement on the issue of campaign finance disclosure came in an op-ed article that ran on June 23, 2012 in *The Washington Post.*

In the op-ed, *McConnell* sets forth a litany of specious arguments about why campaign finance disclosure is bad for America. He concludes, "The First Amendment allows all of us to have a place in the national debate. There can be no retreat from its defense." The implication is that disclosure is a retreat from the First Amendment.

This is an exercise in sophistry and has no place in reality.

Senator McConnell ignores Supreme Court decisions that for decades have upheld campaign finance disclosure laws as consistent with the First Amendment. He fails to make *any mention* in his op-ed of the two leading Supreme Court decisions that have upheld the constitutionality of campaign finance disclosure laws. The decisions were issued thirty-four years apart in 1976 and 2010.

These Supreme Court decisions flat out reject the arguments being made by Senator McConnell – that campaign finance disclosure stifles speech, threatens the First Amendment and is unconstitutional because of the potential for harassment of donors and groups.

In *Buckley v. Valeo* (1976), the Supreme Court upheld the constitutionality of federal campaign finance disclosure laws, stating:

> [D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return.

Thirty four years later, the Supreme Court in *Citizens United v. FEC* (2010) again unequivocally upheld the constitutionality of disclosure requirements and spelled out the importance and value of campaign finance disclosure.

Eight of the nine justices, including Chief Justice Roberts and Justices Kennedy, Scalia and Alito, found that disclosure requirements for independent spending groups "do not prevent anyone from speaking" and serve the important governmental interest of "providing the electorate with information about election-related spending sources " so that voters can "make informed choices in the political marketplace."

The Supreme Court noted that it had earlier upheld disclosure laws to address the problem that "independent groups were running election-related advertisements while hiding behind dubious and misleading names." The Court further stated:

> 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 and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "'in the pocket' of so-called moneyed interests."... The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

In past years, the Supreme Court has *explicitly rejected* the inappropriate argument that Senator McConnell is making, in which he attempts to equate Alabama's unconstitutional requirement in the 1950s for the NAACP to disclose its membership lists with campaign finance disclosure requirements.

The Supreme Court in 1958 declared Alabama's disclosure requirements unconstitutional in *NAACP v. Alabama.*The Court in 1976 in *Buckley* expressly found that the NAACP decision was not applicable to campaign finance disclosure requirements. The Court said:

> The strict test established by NAACP v. Alabama is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights. But we have acknowledged that there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the "free functioning of our national institutions" is involved.
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> The governmental interests sought to be vindicated by the disclosure requirements are of this magnitude.

In a case brought in 2002 by Senator McConnell, the Supreme Court again rejected the argument being made by Senator McConnell. In *McConnell v. FEC* (2003), the Court reaffirmed that campaign finance disclosure is not comparable to the membership disclosure requirements at issue in the *NAACP* case. The Court said, "In *Buckley*, unlike *NAACP*, we found no evidence that any party had been exposed to economic reprisals or physical threats as a result of the compelled disclosure."

Senator McConnell has argued that general concerns about harassment of donors and independent spending groups make the free speech case against campaign finance disclosure laws. However, the Court has repeatedly rejected that view.

In cases ranging from *Buckley* to *Citizens United* that upheld campaign finance disclosure laws, the Court has provided for a narrow exception from disclosure – but *only* in cases where an organization could make a specific showing that there was "a reasonable probability that the group's members could face threats, harassment, or reprisals if their names were disclosed."

Even in those cases the Court has never said that such "a reasonable probability" is grounds for throwing out the disclosure laws, but only that a specific group which makes a showing that it faces a "reasonable probability" of harassment or reprisals would be exempt from the disclosure requirements. Disclosure laws would still constitutionally apply to everyone else.

Nor has the Court ever indicated that public criticisms of a group's campaign finance practices or of its donors would qualify as the kind of "threats, harassment, or reprisals" that justifies an exemption from campaign finance disclosure requirement.

In a concurring opinion in *Doe v. Reed* (2010), which upheld disclosure requirements for ballot measure campaigns, Justice Scalia made a powerful case for the importance of disclosure in a democracy, writing:

> There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed

Senator McConnell doesn't have a constitutional leg on which to stand when he argues against the right of citizens to know the identity of secret donors funding campaign expenditures to influence their votes.

Nevertheless, Senator McConnell espouses the position taken by Justice Thomas – the only dissenter from the *Citizens United* ruling that upheld disclosure laws – as if it represents the views of the Supreme Court. In so doing, Senator McConnell completely ignores the position taken by the other eight justices in favor of disclosure that, in fact, constitutes the Court's view.

We can expect Senator McConnell to keep "pounding the table" in his efforts to maintain unified opposition by Senate Republicans to campaign finance disclosure requirements that are overwhelmingly supported by the American people.

Meanwhile, it may take another Congress, but in the end the DISCLOSE Act will be enacted and citizens will be informed about the donors paying for campaign ads to influence their votes.

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