cases.[90] And in *HLP*, the Court emphasized that its deference was partially justified by Congress's deliberate care in crafting a limited statute.[91] Ultimately, these patterns suggest that the scope of the Court's generally broad deference in the national security context may constrict or expand depending on the perceived modesty with which the political branches exercise their power vis-à-vis the Court.

4. Public Disclosure of Referendum Petitions. — The Supreme Court has repeatedly recognized the importance of government interests in the integrity of electoral processes and the promotion of an informed electorate.[1] On the basis of these two interests, it has upheld campaign-related disclosure requirements amid otherwise sweepingly successful First Amendment challenges.[2] A controversial state referendum concerning the rights of domestic partners[3] recently presented the Justices with an opportunity to reassert the general constitutionality of disclosure requirements. Last Term, in *Doe v. Reed*,[4] the Supreme Court held that compelled disclosure of referendum petitions does not facially violate the First Amendment.[5] The Court correctly found the government's interest in the integrity of its referendum process sufficient to justify disclosure of petition signatories' identities despite the potential chilling effect on their political participation. However, in declining to address the government's interest in informing the voting public, the Court failed to appreciate the full significance of the disclosure requirement. Had the Court accounted for this interest, it would have confronted competing First Amendment concerns that prove particularly weighty in the direct democracy context — concerns that not only support the Court's decision regarding the facial challenge, but also bear on the outcome of challenges to the disclosure requirement as applied to individual petitions. The Court's failure to address the "informational" interest thus leaves lower courts with insufficient guidance in granting case-specific exemptions to petition disclosure requirements, exemptions that threaten to undermine the very First Amendment values they are designed to protect.

---

[90] *See Boumediene*, 128 S. Ct. at 2275 ("[W]hen habeas corpus jurisdiction applies . . . then proper deference can be accorded to reasonable procedures for screening and initial detention . . . ."); *Hamdi*, 542 U.S. at 533–34 (plurality opinion) (holding that, in constitutionally mandatory factfinding tribunals, normal procedural protections such as placing the burden of proof on the government or the ban on hearsay need not apply).

[91] *See HLP*, 130 S. Ct. at 2728.

[1] *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876, 913–16 (2010); Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 231 (1989); Buckley v. Valeo, 424 U.S. 1, 66–68 (1976) (per curiam).

[2] *See, e.g.*, *Citizens United*, 130 S. Ct. at 913–16; *Buckley*, 424 U.S. at 66–68, 72.

[3] *See* Lornet Turnbull, *137,689 Names Later, Gay Community Asks: How Did They Do It?*, SEATTLE TIMES, Aug. 3, 2009, at A1.

[4] 130 S. Ct. 2811 (2010).

[5] *Id.* at 2821.

In May 2009, Governor Christine Gregoire of Washington signed into law a bill "expanding the rights and responsibilities of state registered domestic partners"[6] to afford them the same treatment as married spouses under state law.[7] Protect Marriage Washington (PMW) organized soon thereafter to collect the requisite number of petition signatures to challenge the bill by referendum.[8] On July 25, 2009, PMW presented the Washington Secretary of State, Sam Reed, with a petition containing a sufficient number of signatures to place Referendum 71 (R-71) on the November 2009 ballot.[9] Secretary Reed subsequently received a number of requests[10] to disclose the R-71 petition under Washington's Public Records Act[11] (PRA), which requires state agencies to make all public records "available for public inspection and copying."[12] Because it viewed referendum petitions as public records under the PRA, the state was prepared to comply with the requests.[13]

Seeking to enjoin public disclosure of the R-71 petition, PMW and R-71 petition signatories filed a complaint in the U.S. District Court for the Western District of Washington.[14] Count I charged that the PRA, "as applied to referendum petitions," facially violated the First Amendment.[15] Count II alleged that the PRA was unconstitutional as applied to the R-71 petition because "there is a reasonable probability that the signatories of the Referendum 71 petition will be subjected to threats, harassment, and reprisals."[16] On September 10, 2009, the district court granted the plaintiffs a preliminary injunction on the ground that they were likely to succeed on the merits of Count I.[17] Having characterized petition signing as core political speech, the

---

6 S.B. 5688, 61st Leg., Reg. Sess., pmbl., 2009 Wash. Sess. Laws 3065, 3065.

7 *Id.* § 1, 2009 Wash. Sess. Laws at 3067.

8 The Washington Constitution grants the people the right to reject any bill by referendum. To place a referendum on the ballot, the state requires a petition with a number of valid signatures equal to or greater than four percent of the votes cast for governor in the last gubernatorial election. WASH. CONST. art. II, § 1(b). A signature is valid if it identifies a registered Washington voter, the voter's address, and the county in which she is registered to vote. WASH. REV. CODE § 29A.72.130 (2008).

9 *Doe*, 130 S. Ct. at 2816.

10 *See* Doe v. Reed, 586 F.3d 671, 675 (9th Cir. 2009).

11 WASH. REV. CODE § 42.56.

12 *Id.* § 42.56.070(1). Washington voters enacted the PRA by initiative and included a liberal rule of construction provision to promote the purpose of the act — to "remain[] informed so that voters may maintain control over the instruments that they have created." *Doe*, 586 F.3d at 674 (quoting WASH. REV. CODE § 42.56.030).

13 *See Doe*, 130 S. Ct. at 2816; Brief of Respondent Sam Reed at 5–6, *Doe*, 130 S. Ct. 2811 (No. 09-559), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/09-10/09-559_RespondentSamReed.pdf.

14 *Doe*, 130 S. Ct. at 2816.

15 *Id.* at 2817 (quoting Joint Appendix at 16, *Doe*, 130 S. Ct. 2811 (No. 09-559), 2010 WL 748271, at *16).

16 *Id.* at 2816 (quoting Joint Appendix, *supra* note 15, at 17, 2010 WL 748271, at *17).

17 *See id.* at 2816–17. The district court did not reach Count II of the complaint.

court applied strict scrutiny to the PRA and found that it was not narrowly tailored to Washington's asserted interests.[18]

The U.S. Court of Appeals for the Ninth Circuit reversed the preliminary injunction, holding that the plaintiffs were unlikely to succeed on the merits of Count I because "the PRA as applied to referendum petitions does not violate the First Amendment."[19] Rejecting the district court's invocation of strict scrutiny, it proceeded to apply intermediate scrutiny to the PRA.[20] Ultimately, the court concluded that "each of the State's asserted interests" — interests in the integrity of the electoral process and in providing voters with information about the petition signatories — "is sufficiently important to justify the PRA's incidental limitations on referendum petition signers' First Amendment freedoms" and that "the incidental effect of the PRA on speech is no greater than necessary."[21]

The Supreme Court affirmed. Writing for the Court, Chief Justice Roberts[22] determined that the government interest in the integrity of the electoral process is substantially related to public disclosure of referendum petitions and sufficiently important to justify the resulting burdens on petition signatories.[23] He first established that petition signing falls within the scope of the First Amendment because it involves "the expression of a political view."[24] He then discussed the significance of the electoral context to the Court's review, emphasizing the "substantial latitude" afforded the states in "implementing their own voting systems."[25] Because "[d]isclosure requirements may burden the ability to speak[] but . . . do not prevent anyone from speaking,"[26] Chief Justice Roberts invoked the "exacting scrutiny" standard articulated in *Buckley v. Valeo*,[27] which "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest"[28] such that the relation "reflect[s] the seriousness of the actual burden on First Amendment rights."[29]

---

[18] Doe v. Reed, 661 F. Supp. 2d 1194, 1202–05 (W.D. Wash. 2009).

[19] Doe v. Reed, 586 F.3d 671, 681 (9th Cir. 2009).

[20] *Id.* at 678.

[21] *Id.* at 680.

[22] Chief Justice Roberts was joined by Justices Kennedy, Ginsburg, Breyer, Alito, and Sotomayor. Justice Stevens concurred in part and concurred in the judgment, and Justice Scalia concurred in the judgment.

[23] *See Doe*, 130 S. Ct. at 2820–21.

[24] *Id.* at 2817.

[25] *Id.* at 2818.

[26] *Id.* (third alteration in original) (quoting Citizens United v. FEC, 130 S. Ct. 876, 914 (2010)) (internal quotation marks omitted).

[27] 424 U.S. 1, 64 (1976) (per curiam).

[28] *Doe*, 130 S. Ct. at 2818 (quoting *Citizens United*, 130 S. Ct. at 914) (internal quotation marks omitted).

[29] *Id.* (quoting Davis v. FEC, 128 S. Ct. 2759, 2775 (2008)) (internal quotation mark omitted).

Chief Justice Roberts found the state's interest in the integrity of its electoral process — in combating fraud, uncovering mistakes, and "promoting transparency and accountability"[30] — sufficient to uphold compelled disclosure of referendum petitions under the PRA.[31] Despite plaintiffs' insistence on the adequacy of alternative means of fraud and mistake prevention, he concluded that "[p]ublic disclosure . . . helps ensure that the only signatures counted are those that should be, and that the only referenda placed on the ballot are those that garner enough valid signatures"; thus, he found a substantial relation between the first of the state's two asserted interests and the public disclosure requirement.[32] Based on the "scant evidence or argument" offered by plaintiffs beyond their claims pertaining to disclosure of the R-71 petition, Chief Justice Roberts concluded that the strength of the government's interest in the integrity of its referendum process justified the "modest burdens attend[ing] the disclosure of a typical petition."[33] Because this interest satisfied the "exacting scrutiny" standard, he did not address the government's second asserted interest: providing voters with information about petition signatories. He upheld the PRA with respect to referendum petitions generally and left the as-applied challenge open for consideration by the district court.[34]

Justice Alito concurred with the Court's conclusion but wrote separately to opine on the "critical role" as-applied exemptions play in "safeguarding First Amendment rights."[35] Reports of "widespread harassment and intimidation suffered by supporters of California's Proposition 8," he argued, "provide[] strong support for an as-applied exemption in the present case."[36] Justice Alito asserted that both government interests are insufficient to justify such burdens. With regard to the informational interest, he expressed serious doubt not only regarding its weight, but also regarding its validity given a reasonable probability of harassment or intimidation.[37] He agreed that the integrity of the referendum process was an important government interest. However, he contended that the short, inconsistent history of petition disclosure,[38] the "experiences of other States,"[39] and the availability of

---

[30] *Id.* at 2819.

[31] *Id.* at 2819–20.

[32] *Id.* at 2820.

[33] *Id.* at 2821.

[34] *See id.*

[35] *Id.* at 2822 (Alito, J., concurring).

[36] *Id.* at 2823. Justice Alito also maintained that the availability of personal information on the internet enhanced the threat of harassment posed by disclosure of petitions. *See id.* at 2825.

[37] *See id.* at 2825 (arguing that, given the probability of harassment, "the State no longer has *any* interest in enabling the public to locate and contact supporters of a particular measure").

[38] *See id.* at 2825–26.

[39] *Id.* at 2826 (referring to California, which prohibits disclosure of petitions).

alternative mechanisms of fraud and mistake detection[40] diminished Washington's interest in employing the PRA as a means to preserve the integrity of the electoral process.

Whereas Justice Alito advocated a low burden of proof on those seeking case-specific exemptions "[t]o give speech the breathing room it needs to flourish,"[41] Justice Sotomayor[42] reasoned in a concurring opinion that "[a]llowing case-specific invalidation under a more forgiving standard would unduly diminish the substantial breathing room States are afforded to adopt and implement reasonable, nondiscriminatory measures like the disclosure requirement now at issue."[43] Because initiatives and referenda are state-created "mechanisms of direct democracy . . . not compelled by the Federal Constitution," the Court defers substantially to the states in regulating these mechanisms[44] and affords their asserted interests in public disclosure of referendum petitions great weight.[45] Moreover, Justice Sotomayor viewed the burdens on speech and associational rights as "minimal in this context."[46] Thus striking the balance in favor of the state, Justice Sotomayor would impose a heavy burden on those who challenge specific applications of initiative and referendum regulations.[47]

Justice Stevens[48] concurred separately to characterize the case as one concerning a limited, indirect burden on First Amendment rights resulting from the application of a "neutral, nondiscriminatory policy" supported by important government interests.[49] Given the importance of the state's interest in fraud prevention and detection, its connection to the PRA sufficed to uphold the law's constitutionality even where more effective means existed to achieve the state's ends.[50] Like Justices Alito and Sotomayor, Justice Stevens speculated on the merits of the claim the Court did not address, averring that, absent strong evidence of a substantial burden on speech, he would deny plaintiffs an exemption from the PRA.[51]

---

[40] *Id.* at 2827.

[41] *Id.*

[42] Justice Sotomayor was joined by Justices Stevens and Ginsburg.

[43] *Doe*, 130 S. Ct. at 2829 (Sotomayor, J., concurring).

[44] *Id.* at 2827.

[45] *See id.* at 2828.

[46] *Id.*

[47] *See id.* at 2829.

[48] Justice Stevens concurred with the majority opinion "to the extent that it is not inconsistent with [his] own." *Id.* at 2832 (Stevens, J., concurring in part and concurring in the judgment). Justice Breyer joined in Justice Stevens's and the majority opinions with the understanding that both engage in a balancing of constitutional interests. *See id.* at 2822 (Breyer, J., concurring).

[49] *Id.* at 2829 (Stevens, J., concurring in part and concurring in the judgment).

[50] *See id.* at 2830–31.

[51] *See id.* at 2831–32.

Concurring only in the judgment, Justice Scalia questioned whether the First Amendment even applied to referendum petitions.[52] He criticized the Court's decision in *McIntyre v. Ohio Elections Commission*,[53] where it recognized a right to distribute anonymous literature about a referendum, and he rejected an extension of that holding that would create a "general right to participate anonymously in the referendum itself."[54] He then proceeded to trace the "Nation's longstanding traditions of legislating and voting in public," which he argued "refute[d] the claim that the First Amendment accords a right to anonymity in the performance of an act with governmental effect."[55] Plaintiffs therefore lacked a constitutional basis for requiring Washington to maintain the privacy of petition signatories.[56] Finally, Justice Scalia commented on the value of public disclosure: "[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."[57]

Justice Thomas alone dissented. In his view, public disclosure of referendum petitions unconstitutionally burdens citizens' rights of political speech and association and chills political participation in any application.[58] "[S]igning a referendum petition amounts to 'political association,'"[59] Justice Thomas argued, and "[t]he Constitution protects against the compelled disclosure of political associations and beliefs,"[60] thus requiring the application of strict scrutiny to the PRA disclosure requirement.[61] He doubted that Washington had a compelling interest in fraud deterrence and detection with regard to referendum petitions.[62] Even assuming Washington's interest was compelling, he identified less restrictive means of serving that interest.[63] He similarly rejected Washington's informational interest on the basis of the Court's holding in *McIntyre*.[64] Thus, Justice Thomas would have held

---

[52] *Id.* at 2832–33 (Scalia, J., concurring in the judgment) ("A voter who signs a referendum petition is . . . exercising legislative power because his signature, somewhat like a vote for or against a bill in the legislature, seeks to affect the legal force of the measure at issue." *Id.* at 2833.).

[53] 514 U.S. 334 (1995).

[54] *Doe*, 130 S. Ct. at 2832 (Scalia, J., concurring in the judgment).

[55] *Id.* at 2832–33.

[56] *See id.* at 2836–37.

[57] *Id.* at 2837.

[58] *See id.* (Thomas, J., dissenting).

[59] *Id.* at 2839 (quoting Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981)) (internal quotation marks omitted).

[60] *Id.* (alteration in original) (quoting Brown v. Socialist Workers '74 Campaign Comm. (Ohio), 459 U.S. 87, 91 (1982)) (internal quotation marks omitted).

[61] *Id.* (citing Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 206, 212 (1999)).

[62] *See id.* at 2839–40.

[63] *See id.* at 2840–42 (providing the example of an electronic referendum database).

[64] *Id.* at 2842–43.

"that on-demand public disclosure of referendum petitions under the PRA is not narrowly tailored for any referendum."[65]

As Justice Stevens expressed in his concurrence, "[t]his is not a hard case."[66] The Court addressed a disfavored kind of constitutional challenge[67] and employed a relatively permissive standard of scrutiny.[68] It relied on precedent mandating deference to states in the regulation of their electoral processes,[69] and it accordingly reached a relatively minimalist conclusion. It did so, however, at the expense of a more comprehensive account of the public interests served by the disclosure requirement. Though it declined to address it here, the Court has previously recognized the importance of the government's interest in promoting an informed electorate in other disclosure cases. Nonetheless, the Court has yet to explore the full significance of this interest,[70] either in light of complementary First Amendment protections or in the context of direct democracy. Robustly construed, the informational interest weighs heavily in favor of disclosure in facial challenges and heightens the barrier to case-specific exemptions such as the one left open to PMW and the R-71 petition signatories.

The importance of the government's informational interest is well established in Supreme Court precedent. The Court has declared that "[t]here can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election."[71] Two decisions the Court relied on for other purposes in *Doe* provide further support for this interest. In *Citizens United*, the Court held the government's informational interest sufficient — absent the "integrity" interest — to justify disclosure requirements pertaining to election advertising, emphasizing that "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[72] There, it drew upon its previous decision upholding campaign finance disclosure requirements in *Buckley*, where it had found that such requirements informed voters about the candidates seeking office, their positions on the political

---

[65] *Id.* at 2844.

[66] *Id.* at 2829 (Stevens, J., concurring in part and concurring in the judgment).

[67] *See, e.g.*, Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184, 1191 (2008) (noting that "[f]acial challenges are disfavored for several reasons," including that they require invalidation in all applications).

[68] *See* Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam) (defining "exacting scrutiny").

[69] *See Doe*, 130 S. Ct. at 2819 (citing Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 191 (1999)).

[70] Former FEC Chairman Trevor Potter's statement in 1999 that the government's informational interest remains "ripe for clarification by the Court," Trevor Potter, Buckley v. Valeo*, Political Disclosure and the First Amendment*, 33 AKRON L. REV. 71, 103–04 (1999), still holds.

[71] Anderson v. Celebrezze, 460 U.S. 780, 796 (1983).

[72] Citizens United v. FEC, 130 S. Ct. 876, 916 (2010).

spectrum, and the interests to which they would likely be responsive.[73] These cases provide an adequate foundation upon which to develop the importance of the informational interest with regard to referendum petitions.[74]

Though the Court properly acknowledged the informational interest in *Buckley* and *Citizens United*, it has yet to appreciate its full import. This government interest outweighs the attenuated burdens on petition signatories' political speech not only despite, but also because of interests protected by the First Amendment, which include the informational interests of listeners as well as the expressive interests of speakers. First Amendment scholar Alexander Meiklejohn ventured so far as to assert that the "ultimate interest is not the words of the speakers, but the minds of the hearers,"[75] a claim echoed in the Court's decision in *Citizens United*.[76] In this view, "audience interests must be given preeminent weight in cases of explicitly political debate because the paramount concern here is that citizens be able to make wise, well-informed choices about matters of shared public concern."[77] The audience implicated in *Doe* is the citizenry of Washington, members of which have requested disclosure of documents containing information they deem relevant to their decision on a referendum,[78] a matter of

---

[73] *See Buckley*, 424 U.S. at 66–67. Though the Court in *Buckley* depicted the informational interest as specific to the election of candidates to office, Justice Kennedy appeared willing to extend the reasoning to initiatives and referenda in oral argument for *Doe*. Transcript of Oral Argument at 16–17, *Doe*, 130 S. Ct. 2811 (No. 09-559), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-559.pdf ("Don't you think it's relevant for the public to know that, say, a public employees union . . . [or] the Chamber of Commerce or the National Association of Manufacturers had paid solicitors to put this on the ballot? Isn't that part of assessing the . . . reasons why this initiative was proposed? And isn't that vital . . . to the voter in making an informed decision?").

[74] Rejecting the importance of this interest in dissent, Justice Thomas cited *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), where the Court held the informational interest insufficient to justify a prohibition on the distribution of anonymous campaign literature. *Doe*, 130 S. Ct. at 2842–43 (Thomas, J., dissenting). Yet in *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), the Court upheld an affidavit requirement akin to a disclosure requirement, "which must be met only after circulators have completed their conversations with electors," as "exemplif[ying] the type of regulation for which *McIntyre* left room." *Id.* at 200.

[75] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (1948).

[76] *See Citizens United*, 130 S. Ct. at 908; *id.* at 973 (Stevens, J., concurring in part and dissenting in part) (characterizing the majority as placing "primary emphasis . . . on the listener's interest in hearing what every possible speaker may have to say"); *see also* Note, *Overbreadth and Listeners' Rights*, 123 HARV. L. REV. 1749, 1762–63 (2010) (reviewing cases and scholarship identifying First Amendment rights of listeners).

[77] Paul G. Stern, *A Pluralistic Reading of the First Amendment and Its Relation to Public Discourse*, 99 YALE L.J. 925, 939 (1990).

[78] At oral argument, Justice Kennedy observed that the identities of petition supporters constitute information "vital . . . to the voter in making an informed decision." Transcript of Oral Argument, *supra* note 73, at 17. The disclosure cases discussed above similarly support the relevance of petition signatories' identities to informed decisionmaking on the referendum at issue.

shared public concern by definition. Therefore, Washington voters ought to enjoy the protection the First Amendment affords recipients of information relevant to public decisionmaking.

Further, the First Amendment embraces the exchange of information and ideas itself: one of "the primary values protected by the First Amendment [is] 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'"[79] The deliberative aim behind the requests for disclosure of the R-71 petition signatures, as evidenced by one group's expressed motivations, accords fully with this principle. That group sought to encourage conversations "between people that already have a personal connection," which "can be uncomfortable for both parties, . . . but [which] are desperately needed to break down stereotypes and to help both sides realize how much they actually have in common."[80] Far from constituting forms of harassment,[81] such conversations are part of the uninhibited, robust, and wide-open public debate protected by the First Amendment. They also serve an important informational function; as Professor Cass Sunstein observes, "an understanding of competing views is likely to weaken the forms of fragmentation and misunderstanding that come from deliberation among the like-minded."[82] The government's informational interest thus encompasses the First Amendment concern for public discourse, contributing additional support for the disclosure requirement at issue here.

The First Amendment and government interests in informing the electorate and promoting public deliberation become particularly pronounced in the context of direct democracy. Elected representatives enjoy information resources and deliberative opportunities that the people do not.[83] Furthermore, while informed representatives can ultimately correct for the mistaken policy judgments that result in their

---

[79] Anderson v. Celebrezze, 460 U.S. 780, 794 (1983) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)); *see also* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978) (noting the First Amendment's "role in affording the public access to discussion, debate, and the dissemination of information and ideas"); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 314 (1992) (arguing that the First Amendment expresses a "concern for ensuring the preconditions for deliberation among the citizenry"). Justice Stevens recognized this interest at oral argument, identifying a "public interest in encouraging debate on the underlying issue" and suggesting it would be "a legitimate public interest to say I'd like to know who signed the petition because I would like to try to persuade them that their views should be modified." Transcript of Oral Argument, *supra* note 73, at 27.

[80] Doe v. Reed, 586 F.3d 671, 675 n.4 (9th Cir. 2009) (internal quotation marks omitted) (quoting the co-director of KnowThyNeighbor.org).

[81] *But see Doe*, 130 S. Ct. at 2825 (Alito, J., concurring).

[82] Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 115–16 (2000).

[83] *See* Alan Hirsch, *Direct Democracy and Civic Maturation*, 29 HASTINGS CONST. L.Q. 185, 205 (2002) ("Indirect lawmaking has major advantages, especially the benefit of specialization of labor. The legislature can set up committees, gather information, and develop expertise.").

election, the mistaken judgments that underlie initiatives and referenda translate into direct policy results.[84] Finally, free of the demand for public justification of policy choices imposed on representatives, anonymous voters may be more likely to "produce short-sighted, selfish legislation."[85] Therefore, the informational interests of voters presented with an initiative or referendum and the deliberative opportunities afforded them are paramount, for "[u]nless citizens develop sufficient knowledge, independence, and public-spiritedness, they cannot handle the responsibilities of self-government."[86] Where the concerns associated with direct democracy extend beyond merely imprudent decisionmaking to minority oppression,[87] the dissemination of information and promotion of public discourse are more, not less, important. Here, "[i]t is total or near-total self-insulation" of like-minded groups "that carries with it the most serious dangers," the "best response" to which is "to ensure that any such enclaves are not walled off from competing views."[88]

The informational interest, robustly construed as encompassing foundational First Amendment principles and concerns associated with direct democracy, presents a strong justification for disclosure requirements — one that warrants a high burden of proof on parties seeking case-specific exemptions. In declining to address this interest in *Doe*, the Court failed to properly instruct lower courts,[89] which may now accord insufficient weight to this interest in granting exemptions to disclosure requirements, thereby undermining the First Amendment value they seek to protect: that of expressive participation in the referendum process.[90] For a case-specific challenge to overcome the informational interest, Justice Stevens argued that "there would have to be a significant threat of harassment . . . that cannot be mitigated by law enforcement measures."[91] Like Justice Stevens, Justice

---

[84] *Cf. Doe*, 130 S. Ct. at 2833 (Scalia, J., concurring in the judgment).

[85] Hirsch, *supra* note 83, at 203; *see also id.* at 203 n.96.

[86] *Id.* at 209–10.

[87] *Cf. id.* at 204 (discussing possible reforms to address the threat that "direct democracy leave[s] minorities — including racial minorities, but also homosexuals, aliens, and other underrepresented groups — at the mercy of majorities").

[88] Sunstein, *supra* note 82, at 113.

[89] The number of concurring opinions arguing for a particular disposition of the as-applied challenge supports an inference that many of the Justices shared this concern.

[90] Justices Thomas and Alito warned of the chilling effect on political participation (through petition signing) resulting from public disclosure. *See Doe*, 130 S. Ct. at 2822–23 (Alito, J., concurring); *id.* at 2845–46 (Thomas, J., dissenting). Justice Sotomayor ably countered this concern by elucidating the partially public nature of petition signing itself, and by arguing that "[f]or persons with the 'civic courage' to participate in this process, the State's decision to make accessible what they voluntarily place in the public sphere should not deter them from engaging in the expressive act of petition signing." *Id.* at 2828–29 (Sotomayor, J., concurring) (quoting *id.* at 2837 (Scalia, J., concurring in the judgment)).

[91] *Id.* at 2831 (Stevens, J., concurring in part and concurring in the judgment).

Sotomayor would also impose a "heavy burden" on challengers to the application of disclosure requirements to specific petitions.[92] Had these Justices, let alone the Court, buttressed such impositions with the full weight of the informational interest, they would have better guarded against the likelihood that lower courts will improvidently grant exemptions not only out of concern for the indirect chilling effect of disclosure on anonymous political participation, but also out of unwitting disregard for the direct chilling effect of exemptions on deliberative political participation.

E. Necessary and Proper Clause

Civil Commitment. — The Adam Walsh Child Protection and Safety Act of 2006[1] has been described as "the most comprehensive child crimes and protection bill in our Nation's history."[2] Section 4248 of the Act authorizes the civil commitment of certain federal prisoners beyond the conclusion of their criminal sentences if they have "engaged or attempted to engage in sexually violent conduct or child molestation"[3] and suffer from a mental illness that makes it difficult to refrain from such conduct.[4] If the state in which such a prisoner is domiciled or was tried will not assume responsibility for him, "the Attorney General shall place the person for treatment in a suitable facility, until (1) such a State will assume such responsibility; or (2) the person's condition is such that he is no longer sexually dangerous to others," including while under treatment.[5] Last Term, in *United States v. Comstock*,[6] the Supreme Court held that section 4248 falls within congressional power under the Necessary and Proper Clause.[7] The Court reached the correct result, but its reasoning rests on the flawed assertion that the federal government has custodial power over prisoners past their terms of imprisonment. A better justification of section 4248 is that it furthers two purposes of punishment — namely, incapacitation and rehabilitation — that remain unfulfilled when the affected prisoners' sentences expire.

---

[92] *Id.* at 2829 (Sotomayor, J., concurring).

[1] Pub. L. No. 109-248, 120 Stat. 587 (2006) (codified as amended in scattered sections of 10, 18, 21, 28, and 42 U.S.C.).

[2] 152 CONG. REC. S8012 (daily ed. July 20, 2006) (statement of Sen. Orrin Hatch).

[3] 18 U.S.C. § 4247(a)(5) (2006) (defining "sexually dangerous person").

[4] *Id.* § 4247(a)(6) (defining "sexually dangerous to others"). Section 4248 covers prisoners who have been convicted of a federal crime or who have been charged with a federal crime and either determined incompetent to stand trial or released from the charges because of their mental condition. *See id.* §§ 4241(d), 4248(a).

[5] *Id.* § 4248(d).

[6] 130 S. Ct. 1949 (2010).

[7] *Id.* at 1954.