The Informational Interest

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In Citizens United v. FEC, the Supreme Court substantially restructured the constitutional architecture of campaign finance regulation. In addition to striking down any limits on corporate independent expenditures—what to many was the "bottom line"—it threw out several conceptions of corruption that had previously served to justify many different forms of campaign finance regulation. Its results were both immediate and far-reaching and, for reformers, it represented an undeniable and crushing defeat.

If reformers saw any hope, it was a small one. Although the Court rejected limits on corporate independent expenditures, it upheld by a vote of 8-to-1 mandatory disclosure of such spending. Only Justice Thomas would have held the disclosure requirements unconstitutional. Indeed, the Court's almost breathless rhetoric suggests that it sees disclosure in the age of the Internet as a silver bullet:

A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today. It must be noted, furthermore, that many of Congress' findings in passing BCRA were premised on a system without adequate disclosure. With

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1 130 S. Ct. 876 (2010).
2 Id. at 913.
3 See Michael S. Kang, The End of Campaign Finance Law, 98 VA. L. REV. 1, 2 (2012) ("Almost all the public excitement about Citizens United focused on the question whether corporations could be restricted from drawing on treasury funds to pay for political campaigning in the form of independent expenditures."); see also id. (canvassing content of "public outcry" about the court's decision).
4 130 S. Ct. at 910 ("The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt... The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.").
5 Kang, supra note 3 (manuscript at 14-18) (explaining how rejection of prior corruption theories narrows constitutionally permissible forms of campaign finance regulation).
6 130 S. Ct. at 914-16; id. at 931 (Stevens, J., concurring in part and dissenting in part).
7 Id. at 980 (Thomas, J., concurring in part and dissenting in part).
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.  

No need to worry about limiting money, the Court seems to think: disclosure will take care of everything.  

Controversy has, of course, followed where the Court has led. For most of the post-*Buckley* history of campaign finance regulation, reformers and deregulationists alike viewed disclosure as an uncontroversial regulatory technique. Reformers thought it a proper part of the regulatory package but, I think it fair to say, one of the less consequential parts. On the other side, deregulationists viewed it as about the only permissible regulatory technique. The Court noted in *Buckley* itself, for example, that the appellants challenging the Federal Election Campaign Act's major provisions "argue[d] that 'narrowly drawn disclosure requirements [we]re the proper solution to virtually all the evils Congress sought to remedy.'" They felt that disclosure was not only the lone constitutionally permissible

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8 130 S. Ct. at 916 (internal citations omitted).
9 Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 274 (2010) ("Disclosure generally gets high marks from the public, academics, and the courts. Opinion polls find very high levels of public support for campaign finance disclosure. Among academics, both campaign finance reformers and campaign finance skeptics have endorsed disclosure.").
10 Id. ("[D]isclosure has been popular even with some reform critics. Former Stanford law School Dean Kathleen Sullivan, who has strongly opposed most campaign finance reform proposals, enthusiastically praises disclosure for generating 'massive gains in democratic accountability.'") (quoting Kathleen Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 326-27 (1998)); Briffault, *supra* note 9, at 286 ("[A]dvocates of 'deregulate and disclose' have given the greatest weight to disclosure's benefits. Advanced by a host of reform skeptics . . . 'deregulate and disclose' has a long and distinguished pedigree.").
regulatory technique but also the only necessary one. Like the Court in *Citizens United*, they claimed that adequate disclosure would take care of any problems.

*Citizens United*, however, realigned the players' positions. Left with few other tools, reformers embraced disclosure and placed it full front and center in their efforts. Deregulationists, on the other hand, attacked what they had claimed to support before. Many of them now argue that by mandating disclosure government enables powerful political groups to attack and harass outsiders and minority interests. Instead of throwing sunlight on politics and disinfecting corruption, disclosure, in their view, makes it more difficult for people to express unpopular opinions, a concern at the core of the Free Speech Clause. As the debate stands today, reformers defend disclosure as one of the few means left to discipline money in politics and help police against corruption, while deregulationists attack it as undermining the democracy its supporters claim it protects.

As important and interesting as this particular debate is, I don't plan to join in it. It has many able participants and the rumble is already loud. Instead, I want to trace how the theory of disclosure, particularly its constitutional justifications, has changed. Originally, three separate and distinct interests supported it. After *Citizens United*, only one, however, the so-called "informational interest," can. This interest holds that disclosure

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12 See Briffault, supra note 9, at 274 (describing "deregulate and disclose" position).


14 Briffault, supra note 9, at 290 ("Recent developments suggest that for at least some disclosure-only proponents, their endorsement of disclosure was more tactical than sincere. Some of the prominent advocates of the disclosure-only approach . . . are now strong opponents of new disclosure legislation that would respond to the *Citizens United* decision. So, too, recent litigation challenges to campaign finance laws increasingly target disclosure requirements in addition to rules limiting or barring certain finance activities.") (footnotes omitted).


16 See Buckley, 540 U.S. at 67 (per curiam) ("Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.") (quoting LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 62 (Nat'l Home Libr. Found. ed., 1933)).

17 See *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.") (citations omitted).

18 See Briffault, supra note 9, at 273-75, 287-91 (referencing major participants).

provides voters information helpful to figuring out where the different candidates stand and to locating them in an otherwise complex and confusing policy space. Disclosure now hangs on this single thread. Can this interest continue to support the only remaining technique available to regulate independent corporate expenditures and much other spending? And, even if it can, will Congress enact meaningful disclosure requirements and will the Federal Election Commission ("FEC") then enforce them? So far, the record has not been good.

Next, I describe how the informational interest sits with the rest of the framework of constitutional campaign finance regulation. A paradox quickly emerges. The Court and disclosure’s proponents defend disclosure as providing voters very useful information. Deregulationists claim, on the other hand, that disclosure helps voters very little. Ordinary voters, they argue, are not interested in such information and could not helpfully process it even if they were. And knowing who said something, they maintain, can actually distract a listener from fairly evaluating the content of political communication. Although I suggest a way of bridging these two opposed positions, I am less interested in who is right than in uncovering the assumptions behind each position and what those assumptions say about each side in the debate. Interestingly, the Supreme Court defends its position on this issue by committing itself to assumptions about individual political decision-making that contradict those it makes in striking down more substantive campaign finance regulations, like the ban on independent corporate expenditures struck down in Citizens United. I conclude with some speculation about what the Court’s self-contradiction might mean for the future.

21 Congress has failed to pass any of the disclosure legislation proposed in the wake of Citizens United, such as the DISCLOSE Act. See Democracy Is Strengthened by Casting Light On Spending in Elections Act, H.R. 5175, 111th Cong. (2010). In addition, the FEC has after Citizens United interpreted existing disclosure requirements weakly. See Richard L. Hasen, Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in The Internet Age, 27 J.L. & POL. 557, 557 (noting that "Republican Commissioners on the Federal Election Commission [have] worsened things by embracing an interpretation of existing federal disclosure law making it child’s play for political groups to shield the identity of their donors").
22 Primo, supra note 15, at 7-19.
23 See, e.g., Primo, supra note 15, at 8, 9, 13. Other scholars, for example Lloyd H. Mayer, Disclosures About Disclosure, 44 IND. L. REV. 255, 257-71 (2010), including some who support reform, for example Briffault, supra note 9, at 288-90, have argued that disclosure’s asserted informational benefits rest on debatable assumptions.
24 Primo, supra note 15, at 14 ("A focus on the messenger may distract from the message.")
A. Before Citizens United

The Supreme Court first systematically considered the constitutionality of compelled disclosure of campaign spending in *Buckley v. Valeo*. Curiously, it left the controlling constitutional test somewhat unclear. In the space of two sentences, it held that disclosure requirements "must survive exacting scrutiny" and "insisted that there be a relevant correlation or substantial relation between the governmental interest and the information required to be disclosed." The former requirement sounds close to strict scrutiny, the most difficult type of constitutional review to satisfy, while the latter sounds far from it. The latter's "relevant correlation" condition sounds much like reduced scrutiny's "rational relationship" test while its "substantial relation" test sounds closer to less traditional formulations of reduced scrutiny or to intermediate scrutiny than to strict scrutiny, which traditionally requires that the statute be

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25 The Court had considered the constitutionality of disclosure in related contexts earlier. In *United States v. Harriss*, 347 U.S. 612 (1954), for example, it upheld the disclosure provisions of the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-70. It found that without disclosure:

> present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. . . . Under these circumstances, we believe that Congress . . . is not constitutionally forbidden to require the disclosure of lobbying activities. To do so would be to deny Congress in large measure the power of self-protection.

347 U.S. at 625.


28 See Bd. of Trs. v. Garrett, 531 U.S. 356, 366-67 (2001) ("Under rational-basis review . . . a classification cannot run afool of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some governmental purpose.").


"narrowly tailored" to achieve "a compelling interest." In *Buckley*, moreover, the Court never actually held that the interests supporting disclosure were "compelling." The Court found them rather to be "substantial governmental interests," which was apparently all it believed that the First Amendment required.

Luckily, the Court did identify the individual interests supporting disclosure and held that they were of "sufficiently important . . . magnitude" to pass required constitutional scrutiny. It identified three: (1) providing information to voters, (2) deterring corruption and avoiding the appearance of corruption, and (3) gathering data to help enforce the campaign finance laws' contribution limitations. As it described the first interest:

> Disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows 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.

In this view, disclosure gives voters not only additional information about candidates, but also information often superior to that they receive from "party labels and campaign speeches." Unlike those types of speech, which the Court has identified as lying at the First Amendment's core, disclosure of contributions' sources enable voters to engage in a different kind of political analysis. Instead of hearing directly where the candidate

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33 Id. at 66.

34 Id. at 66-68.

35 Id. at 66-67 (internal citations and quotation marks omitted).

stands on various issues or understanding which political party the candidate has identified herself as closer to, the voter can identify where a candidate stands by tying her to those who support her. Seeing the Club for Growth or a major labor union as a candidate’s major backer, for example, may tell a voter more than numerous campaign policy statements or political party identification could in two different ways. From an ex-ante perspective, a voter could believe that a particular organization would support a candidate only if it strongly believed that the candidate supported its policy agenda. The voter would, in a sense, piggyback on the organization’s research and view the contributions much as an endorsement. From an ex-post perspective, a voter could think that a candidate once elected would likely be responsive to those who had contributed to him and vote their way even if the candidate had been inclined to support others’ interests before the election.

The Court’s second interest is quite different. The Court believed that:

[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. And, . . . Congress could reasonably conclude that full disclosure during an election campaign tends to prevent the corrupt use of money to affect elections.37

As the Court’s discussion makes clear, this interest is parasitic on the Court’s conception of corruption. To the extent that “special favors” count as a form of corruption (rather than as an acceptable form of political responsiveness), disclosure may help to prevent corruption by allowing better detection after the fact, which could both lead to more effective enforcement of any substantive corruption provisions and cause candidates fearing detection to avoid compromising themselves initially. If “undue influence” over public officials and special access count as corruption, disclosure would presumably regulate those forms both prospectively and retrospectively. But the amount of work disclosure can do to combat

37 Buckley, 424 U.S. at 67 (internal citation omitted).
corruption and its appearance depends critically on the Court’s theory of corruption. The broader our conception of corruption, the more work disclosure can do.

In *Buckley* itself, however, the Court did not lay out a comprehensive theory of corruption. It did uphold some contribution limitations on the ground that they prevented the narrowest and most traditional form of quid pro quo corruption — trading a vote or set of votes for campaign cash — and suggested that fear of the appearance of corruption might reach much further and justify regulation designed to curb “improper influence.” It stated:

> Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. In *CSC v. Letter Carriers*, the Court found that the danger to fair and effective government posed by partisan political conduct on the part of federal employees charged with administering the law was a sufficiently important concern to justify broad restrictions on the employees’ right of partisan political association. Here, as there, Congress could legitimately conclude that the avoidance of the appearance of improper influence is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.

As the single example of federal employees acting in an inappropriately partisan fashion while performing their official duties suggests, this appearance interest stretched far beyond the quid pro quo theory of corruption itself. But the Court never actually defined the extent of its reach.

The third interest the Court identified supporting disclosure was narrower and more specific. The Court found that “recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations

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38 See, e.g., *id.* at 26 (upholding $1000 limit on contributions from an individual to a specific candidate).

39 *Id.* at 27.

40 *Id.* at 27 (internal citations and quotation marks omitted).
Although the Court did not elaborate its thinking, it presumably was thinking about situations where an individual contributes several small checks to a candidate, each one under the overall limit, which together exceed what he can contribute or where an individual makes contributions to different candidates in excess of her aggregate contribution limit. Disclosure in these contexts would help police the underlying restrictions. But this interest, as specifically defined, does not support disclosure of spending other than contributions.

By the time it decided *McConnell v. FEC*,42 the case upholding against facial challenge the central provisions of the Bipartisan Campaign Reform Act (BCRA) of 2002,43 the Court had expanded the interests supporting disclosure in two significant ways. First, in reaffirming the three *Buckley* interests, it recharacterized the third interest more broadly. “We agree,” it stated, “that the important state interests that prompted the *Buckley* Court to uphold FECA’s disclosure requirements—providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions—apply in full to BCRA.”44 It broadened the third interest from enforcing “contribution limitations,”45 as it had narrowly characterized it in *Buckley*, to “enforc[ing] more substantive electioneering restrictions,”46 which presumably could include, in addition to limits on contributions, bans on corporate “electioneering communications,”47 one of the law’s central provisions.

Second, the Court had expanded the scope of the second interest quite dramatically, although indirectly. As previously noted, this interest in preventing corruption and the appearance of corruption depends parasitically on the Court’s notion of corruption. In a series of cases ending with *McConnell*, the Court had broadened the notion of corruption and its appearance upon which this interest depended. It firmly rejected Justice Kennedy’s view in *McConnell* that *Buckley* recognized only traditional

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41 *Id.* at 67-68.  
44 *McConnell*, 540 U.S. at 196.  
45 *Buckley*, 424 U.S. at 68.  
46 *McConnell*, 540 U.S. at 196.  
47 2 U.S.C. § 441b(b)(2) (2006). These consisted of broadcast, cable, and satellite ads appearing within thirty days before a primary or sixty days before a general election that referenced a clearly identified federal candidate and that were targeted to that candidate’s electorate. *Id.* § 434(f)(3)(A). Federal law permitted individuals to fund such ads but required disclosure whenever a person spent more than $10,000 on them in any calendar year. *Id.* §§ 434(f)(1)-(2). By so regulating “electioneering communications,” Congress hoped to mute direct corporate and union influence in federal elections.
quid pro quo corruption as a "crabbed view of corruption, and particularly of the appearance of corruption, [that] ignores precedent, common sense, and the realities of political fundraising . . ." Instead, the Court recognized three forms of corruption beyond traditional quid pro quo.

First, it noted, "in speaking of improper influence and opportunities for abuse in addition to quid pro quo arrangements, we have recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors." This "undue influence" corruption, it thought, bore even more heavily on the appearance of corruption: "Take away Congress’ authority to regulate the appearance of undue influence and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." And even when, as in the case of so-called "soft money," the spending was mediated through a political party, the Court thought, "[i]t is not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude."

Second, the Court was very concerned with "national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations." "[T]he manner in which parties have sold access to federal candidates and officeholders . . . has given rise to the appearance of undue influence [and i]t is no surprise," the Court stated, "that purchasers of such access unabashedly admit that they are seeking to purchase just such influence." As the last statement suggests, preferred

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48 Justice Kennedy argued:

*Buckley* made clear, by its express language and its context, that the corruption interest only justifies regulating candidates' and officeholders' receipt of what we can call the "quids" in the *quid pro quo* formulation. The Court rested its decision on the principle that campaign finance regulation that restricts speech without requiring proof of particular corrupt action withstands constitutional challenge only if it regulates conduct posing a demonstrable quid pro quo danger.

540 U.S. at 292 (Kennedy, J., concurring in part and dissenting in part).

49 *Id.* at 152.

50 *Id.* at 143 (internal citations and quotation marks omitted).

51 *Id.* at 144.

52 Soft money represented contributions given to political party committees but not subject to FECA's requirements. For a discussion of how it could be raised, spent, and abused, see *id.* at 146-52.

53 *Id.* at 145.

54 *Id.* at 150.

55 *Id.* at 153-54.
access is closely related to "undue influence," but it rose to such
importance in the Court's mind that it seems fair to consider it a separate
form of corruption.

Third, the Court suggested that since "candidates, donors, and parties
test the limits of current law . . . laws preventing the circumvention of such
limits" are justified too.\textsuperscript{56} As it then noted, "[a]ll members of the Court
agree that circumvention is a valid theory of corruption."\textsuperscript{57} The Court did
not develop this "circumvention" theory of corruption at any length,
however, and since it is derivative of whatever theory of corruption
supports the limitation sought to be circumvented in the first place, perhaps
it is better viewed as a kind of "booster" rather than as separate,
independent interest; that is, it more heightens the government interest in
forestalling already recognized types of corruption than defines a new type
of corruption itself.

Whether the Court recognized three additional forms of corruption or
only one, "undue influence," and elaborated it into discrete subforms
ultimately matters not. The important point is that the Court made clear in
one way or another that corruption stretched far beyond traditional
conceptions of quid pro quo.

\textbf{B. Citizens United}

\textit{Citizens United} undermined two of \textit{Buckley}'s three disclosure interests
— indirectly but effectively. In finding that Congress could not ban
corporations from spending for "electioneering communications" or
making independent expenditures (the decision's central holding), the
Court eviscerated both the corruption and the enforcement interests. It
undercut the former by drastically limiting what counted as corruption.
Justice Kennedy's opinion for the Court, largely following his partial
dissent in \textit{McConnell},\textsuperscript{58} took undue influence and access corruption off the
table. He first argued that post-\textit{Buckley} cases, most notably \textit{McConnell},
had misread \textit{Buckley}'s corruption theory. "[T]hat interest," he argued, "was
limited to quid pro quo corruption."\textsuperscript{59} To his mind, "that speakers may
have influence over or access to elected officials does not mean that these
officials are corrupt."\textsuperscript{60} "Favoritism and influence," he explained:

\begin{footnotesize}
\begin{enumerate}
\item Id. at 144 (citations and internal quotation marks omitted).
\item Id.
\item S. 540 U.S. at 286-98 (Kennedy, J., dissenting in part and concurring in part).
\item Citizens United v. FEC, 130 S. Ct. 876, 909 (2010).
\item Id. at 910.
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are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.61

In the course of a short paragraph, “favoritism and influence” turned from corruption to healthy “responsiveness.”

The Court’s limitation of corruption to quid pro quo also limited the enforcement interest supporting disclosure. If only contributions could corrupt, as the Court made clear in finding that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption,” then Congress could not invoke the enforcement interest to justify requiring disclosure of forms of spending other than contributions unless those other forms of spending effectively circumvented contribution limitations. Independent expenditures, in the Court’s view, clearly did not. From the beginning, the Court has viewed them as a robust substitute for contributions, not a way of circumventing any limitations on them.63 After Citizens United, the corruption interest would seem to support disclosure of only contributions to entities that themselves make contributions to candidates or to other entities that make such contributions. In particular, this interest should offer no support for requiring so-called “Super-PACs,” political committees that make only independent expenditures, to disclose contributions made to them and spending they make.

Citizens United, then, despite celebrating disclosure,64 both narrows its application and weakens its constitutional support. In many cases now, only the informational interest, which Citizens United’s reasoning did not
touch, can support it. It is therefore not surprising that when the Court upheld the requirements that Citizens United disclose its own spending on electioneering communications and the sources of its funding, the Court invoked only the informational interest as justification. Although the Court asserted confidently that “[b]ecause the informational interest alone is sufficient to justify application of [the disclosure requirements] to these ads, it is not necessary to consider the Government's other asserted interests,”65 one could be forgiven for wondering whether the Court was instead avoiding the embarrassment of rejecting them entirely.

II. THE CONFLICT AT THE HEART OF CITIZENS UNITED

Citizens United 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. It is, however, a slender reed. Consider first an odd paradox. The Supreme Court originally found the informational interest “sufficiently important to outweigh the possibility of infring[ing free speech]” because:

Disclosure provides the electorate with information “as to where political campaign money comes from and how it is spent by the candidate” in order to aid the voters in evaluating those who seek federal office. It allows 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.66

In other words, disclosure helps locate the candidate in the political spectrum in two different ways. By identifying those who support the candidate the voter can tell first what types of people find the candidate attractive. In this way, disclosure transforms spending into a kind of public endorsement by the spending group. Those who agree with the group can piggyback off its investments in identifying candidates who support those

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65 Id. at 915-16.
voters' views while those who disagree with it can quickly reject from consideration those candidates it supports. Other voters who partially agree or disagree receive weaker but still helpful information. Only those who cannot identify the disclosed source or do not have any view about it are not helped. But they are not hurt either. In this view, disclosure provides many voters an informational shortcut without harming anyone's decision-making.

If one believes, as the Court does, that "[d]emocracy is premised on responsiveness" to political contributors, then disclosure serves another informational function. It helps the voter identify those interests that a candidate, if elected, will favor, even if the candidate were not initially disposed to favor them. Even if a voter understands, for example, that an investment bank would not ordinarily support a socialist running for office and so disregards the first kind of signal disclosure of spending sends, she would understand that a socialist running for office on whose behalf investment banks had made many independent expenditures might pursue some parts of the socialist agenda less energetically than otherwise expected. In this way, disclosure does not function to make implicit endorsements visible but to reveal whose interests a candidate will be inclined to serve once elected — whatever the candidate's own substantive views.

This highly positive view of disclosure sits uneasily with a quite different one. To some, disclosure's endorsement and responsiveness functions represent very low-value political speech. To many deregulationists in particular, disclosure offers the voter little helpful information. They argue that any benefits extend to the more, not less, politically informed and thus fail to help those voters who most need it; that many voters do not even have enough political knowledge to use shortcuts effectively; and that focusing on a speaker's identity rather than its message may impair, not improve, voter decision-making. John Samples captures this last argument well. He believes that disclosure "constitutes the genetic fallacy," which is "an attempt to prove a conclusion false by condemning its source—its genesis. Such arguments are fallacious—because how an idea originated is irrelevant to its

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67 *Citizens United*, 130 S. Ct. at 910.
viability." Worse yet, he argues, disclosure undercuts rationality in voting:

Disclosure hardly encourages rational voting. It directs attention away from the content of an ad and toward the source of funding for the message. It tells voters that they need not evaluate the content of a message. Instead, voters need only recall what they believe about the disclosed source. Disclosure prompts voters to act on prior beliefs that have not been updated by new information or arguments. Those prior beliefs concern widely unpopular groups whose disdain may or may not have been justified; disclosure may be little more than an acceptance of popular prejudice. [Disclosure proposals] claim[] that voters are better off if their votes are guided by untested prior beliefs and prejudice against unpopular groups. At the margin, [such proposals] foster[] a political rather than a rational vote. It lessens the deliberative value of freedom of speech.72

Far from creating helpful shortcuts to more informed political decision-making, disclosure, in this view, encourages voters to rely on their pre-existing prejudices and effectively discourages them from trying to evaluate the content of the message itself. Instead of providing a shortcut, it creates a dead end.

Can we reconcile these two views? Each side, of course, believes not. The other is simply mistaken. But what if both views were, in a sense, right? That is, could we not believe that disclosure allows voters — or at least some of them — to make better choices and that at the same time it represents low-value political speech? In this view, disclosure would be of relatively higher value than much other campaign speech but still of little absolute value and perhaps even misleading.

Two possibilities appear. First, source disclosure could improve decision-making and at the same time have little intrinsic value if other campaign speech has even less value than it. In this view, speakers communicate what they think will persuade voters to their position. They

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71 Id. at 12 n.20 (quoting S. Morris Engel, With Good Reason: An Introduction to Informal Fallacies 170 (1982)).

72 Id. at 7.
pitch their speech to their audience. If “high-value” speech describing policy positions is what will persuade people to support them, that is what speakers will produce. If very “low-value” speech containing little policy content does, that is what they will communicate. Thus, it is perfectly possible to reconcile these two seemingly opposed positions if voters demand speech of low value in traditional policy terms. Forcing disclosure would produce information that might be richer than that ordinarily produced by the market. In this pessimistic view, voter demand is the problem. Voters are simply not making decisions in the informed way democratic theory insists that they should. They may be capable of it but prefer to make their decisions on a different basis.

Second, source disclosure could improve individual political decision-making even if it is of less intrinsic value than ordinary campaign speech if voters were incapable of properly evaluating ordinary campaign speech properly. In this view, voter demand is not the problem. Rather, voter competency is. Voters may want sophisticated policy analysis but, if they are incapable of evaluating it, speech of less value, like source disclosure, that they can more properly evaluate may improve their decision-making even if it is genetically fallacious.

These are two very pessimistic stories, but they are pessimistic in different ways. The first says people are civically capable but uninterested; the second that they are civically incapable but perhaps interested. For my purposes, it is not necessary to adopt one over the other. If either is true, however — and one would need to be to think that disclosure improves decision-making despite its low value in absolute terms — a troubling conflict appears in the constitutional law of campaign finance regulation.

As I have discussed elsewhere, the constitutional case against many forms of campaign finance regulation rests at bottom on a particular view of individual political decision-making. If people are civically engaged and robust, regulating speech makes little sense. They are perfectly capable of evaluating it themselves and more of it can only be better — or at least not worse. Under this view, the voter can be counted on to sort good argument from bad and the exercise may even hone his civic capabilities. And this is largely the view of deregulationists on the Court. As Justice Scalia concluded his dissent in Austin v. Michigan Chamber of Commerce, the

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case *Citizens United* formally overruled in which the Court had first upheld bans on corporate expenditures:

The premise of our system is that there is no such thing as too much speech—that the people are not foolish but intelligent, and will separate the wheat from the chaff. As conceded in Lincoln's aphorism about fooling “all of the people some of the time,” that premise will not invariably accord with reality; but it will assuredly do so much more frequently than the premise the Court today embraces: that a healthy democratic system can survive the legislative power to prescribe how much political speech is too much, who may speak, and who may not.

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Because today's decision is ... incompatible with the unrepealable political wisdom of our First Amendment, I dissent. 74

This view largely underpins as well much of the Court’s rejection of bans on corporate independent expenditures in *Citizens United*. The Court there described the central evil of these bans as depriving a thoughtful and rational “electorate . . . of information, knowledge and opinion vital to its function”:

The censorship we now confront is vast in its reach. The Government has “muffle[d] the voices that best represent the most significant segments of the economy.” . . . By suppressing the speech of manifold corporations, both for profit and non-profit, the Government prevents their voices and viewpoints from reaching the public and advising voters. . . . 75

The constitutional case in favor of regulating many forms of campaign spending, by contrast, rests on quite a different view of individual, political decision-making. It holds that most people are rationally ignorant of

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politics and civically disengaged.\textsuperscript{76} Since they do not possess or seek much "information, knowledge and opinion" and do not energetically "judge what is true and false," advertising appeals can impair proper democratic decision-making.\textsuperscript{77} This view underpins the thinking of those on the Court who would have upheld the law's ban on corporate independent expenditures in candidate elections. Thus, Justice Stevens, in writing for all four dissenters in \textit{Citizens United}, argued that corporate expenditures "make a corporation a formidable, political presence, even though [its] power . . . may be no reflection of the power of its ideas"\textsuperscript{78} — a position impossible to maintain if voters carefully consider and test every piece of information. He straightforwardly rejected the majority's conception of political personality when he argued that unlimited corporate speech "may diminish citizens' willingness and capacity to participate in the democratic process":

All of the majority's theoretical arguments turn on a proposition with undeniable surface appeal but little grounding in evidence or experience, "that there is no such thing as too much speech." If individuals in our society had infinite free time to listen to and contemplate every last bit of speech uttered by anyone, anywhere; and if broadcast advertisements had no special ability to influence elections apart from the merits of their arguments (to the extent they make any); and if legislators always operated with nothing less than perfect virtue; then I suppose the majority's premise would be sound. In the real world, we have seen, corporate domination of the airwaves prior to an election may decrease the average listener's exposure to relevant viewpoints, and it may diminish citizens' willingness and capacity to participate in the democratic process.\textsuperscript{79}

The Court's rejection of bans on corporate independent expenditures and simultaneous embrace of disclosure create deep instability at the

\textsuperscript{76} See Daniel R. Ortiz, \textit{The Engaged and the Inert: Theorizing Political Personality Under the First Amendment}, 81 VA. L. REV. 1, 26-29 (1995) (laying out this view of individual political decisionmaking).

\textsuperscript{77} \textit{Id.}

\textsuperscript{78} 130 S. Ct. at 971 (Stevens, J., concurring in part and dissenting in part).

\textsuperscript{79} \textit{Id.} at 975-76.
bottom of campaign finance doctrine. These moves combine two incompatible notions of how individuals make political decisions. On the one hand, voters are civically engaged enough “to separate the wheat from the chaff” in whatever speech they hear but, on the other, civically inert or incompetent enough to need the protection of disclosure. Justice Thomas’s rejection of both disclosure and bans on corporate independent expenditures is logically consistent, as is the four dissenters’ embrace of both. The majority’s embrace of the former and rejection of the latter is not. It is deeply inconsistent.

What does this deep inconsistency portend? The Court may muddle through. It has, after all, achieved doctrine despite logical and theoretical inconsistency. And previously, in this area and others, it has operated in this condition. I am hopeful, however, that this instability in justification may lead the Court — although not this Court certainly — to revisit and revise its view of the constitutionality of corporate independent expenditures and broader areas of campaign finance regulation. It was, after all, exactly this same kind of instability and contradiction that led the majority in Citizens United to overrule Austin. In Citizens United, in other words, the Court merely substituted one form of logical inconsistency with another and one might hope that the new inconsistency will prove just as destabilizing as the old.

The Court could, it is true, work doctrine pure by adopting Justice Thomas’s logically consistent position. I think that possibility unlikely, however, given the widespread public support for disclosure. The political costs to the Court would be very high and the increased risk of corporate overreaching and election scandal absent disclosure might ultimately place great pressure on the Court’s decision in Citizens United itself. Even if Justice Thomas’s view were to prevail, however, how much worse would that be than the existing regime? Not so much, I would think, as to make the gamble foolish. Practically speaking, a world where corporate independent expenditure bans are constitutionally permissible is far more superior to the present regime than a world where source disclosure requirements are constitutionally impermissible would be worse.

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81 130 S. Ct. at 912.

I am hopeful, then, that the doctrine’s theoretical incoherence may ultimately bear reformers’ fruit. That, of course, may take time. It will require appointment of one additional Justice on the side of reform, a scandal like Watergate or Enron to mobilize the electorate to the importance of reform, and the election of representatives to Congress or to the state legislatures to enact reform measures in response. Such alignment is difficult but, as the passage of the 1974 amendments to the Federal Election Campaign Act\(^3\) after Watergate and enactment of the Bipartisan Campaign Reform Act of 2002\(^4\) after the collapse of Enron show, not impossible.

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