# Campaign Finance Disclosure and the Information Tradeoff

*Michael D. Gilbert*

## Introduction

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Background</td>
<td>1854</td>
</tr>
<tr>
<td>A. Law of Disclosure</td>
<td>1854</td>
</tr>
<tr>
<td>B. The Information Interest</td>
<td>1858</td>
</tr>
<tr>
<td>C. Policy and Constitutional Calculus</td>
<td>1861</td>
</tr>
<tr>
<td>II. The Information Tradeoff</td>
<td>1862</td>
</tr>
<tr>
<td>A. Disclosure, Policy, and the First Amendment</td>
<td>1863</td>
</tr>
<tr>
<td>B. The Information Interest Revisited</td>
<td>1866</td>
</tr>
<tr>
<td>C. The Average Voter</td>
<td>1869</td>
</tr>
<tr>
<td>D. Low Thresholds, Technology, and Loopholes</td>
<td>1871</td>
</tr>
<tr>
<td>1. Low Reporting Thresholds</td>
<td>1871</td>
</tr>
<tr>
<td>2. Technology and Disclosure</td>
<td>1873</td>
</tr>
<tr>
<td>3. Disclosure Loopholes</td>
<td>1875</td>
</tr>
<tr>
<td>E. Quality of Speech</td>
<td>1876</td>
</tr>
<tr>
<td>III. Alternative Disclosure Regimes</td>
<td>1878</td>
</tr>
<tr>
<td>A. &quot;Semi-Disclosure&quot;</td>
<td>1878</td>
</tr>
<tr>
<td>B. Coerced Anonymity</td>
<td>1879</td>
</tr>
<tr>
<td>C. Voluntary Disclosure</td>
<td>1881</td>
</tr>
<tr>
<td>IV. Disclosure Thaws Speech</td>
<td>1883</td>
</tr>
<tr>
<td>A. Disclosure and Credibility</td>
<td>1884</td>
</tr>
<tr>
<td>B. Disclosure and Policy Value</td>
<td>1886</td>
</tr>
<tr>
<td>C. Can the Market Fill the Gap?</td>
<td>1888</td>
</tr>
<tr>
<td>D. Implications of the Thawing Effect</td>
<td>1889</td>
</tr>
</tbody>
</table>

---

* Associate Professor, University of Virginia School of Law. For helpful comments I thank Quinn Curtis, Chris Elmendorf, Elizabeth Garrett, John Harrison, Debbie Hellman, Rich Hynes, Leslie Kendrick, Ethan Leib, Caleb Nelson, Dan Ortiz, Fred Schauer, Rich Schragger, Jed Stiglitz, and workshop participants at UVA Law School, the 2013 American Law and Economics Association Annual Meeting, and the 2012 Midwest Law and Economics Association Annual Meeting.
V. NEXT STEPS: DISCLOSURE AS REGULATORY PROBLEM ....................... 1890

CONCLUSION ....................................................................................... 1893
Campaign finance law is in shambles, and many believe that wealthy, shadowy interests dominate American politics. Reformers have rested their hopes on disclosure—mandated, public disclosure of what individuals, corporations, super PACs, and others spend on politics. Reformers argue that disclosure provides valuable information to voters, and the Supreme Court agrees. Opponents, on the other hand, vilify disclosure for chilling speech and infringing the First Amendment rights of speakers. Both positions—disclosure informs voters, disclosure chills speech—have become conventional wisdom.

This Article challenges that wisdom. First, it shows that disclosure does not necessarily inform voters. Rather, it creates an information tradeoff. Revealing sources of speech provides voters with information, but disclosure can also chill speech, and that takes information away—the information contained in the chilled speech. When the second effect outweighs the first, disclosure actually reduces voter information. Second, this Article argues that disclosure does not necessarily chill speech. It can thaw it. By providing potential speakers with information about the positions and credibility of candidates, disclosure can prompt actors to speak when they otherwise would not. When disclosure thaws speech, there is no information tradeoff. Voters gain information in two ways—source revelation and more speech acts—and lose it in none. When disclosure thaws speech, it promotes exactly those First Amendment values it is thought to undermine.

INTRODUCTION

In Citizens United, the Supreme Court struck down prohibitions on independent political expenditures by corporations. President Obama reacted swiftly, stating in his 2010 State of the Union Address that the decision would “open the floodgates for special interests—including foreign corporations—to spend without limit in our elections.” Both President Obama and other policymakers turned to disclosure as an antidote. In 2010, the House of Representatives passed the Disclose Act, which required disclosure of the financers of some political advertisements. The White House contemplated requiring government contractors to disclose some of their political donations. The Federal Election Commission ("FEC") has
come under pressure to require super PACs to disclose their sources of funding. The theory is simple: with disclosure, "the American people can follow the money and see clearly which special interests are funding political campaign activity and trying to buy representation."6

Disclosure does not enjoy universal support. Some question whether it provides useful information and, even if it does, whether voters bother to consult it.7 Others take an even dimmer view. According to Republican Senator Mitch McConnell, current efforts to compel disclosure are just "a cynical effort to muzzle critics of [the Obama] administration."8

Disclosure has moved to the center of the policy debate over campaign finance. It has also revived an important constitutional question: when can the government force actors to make public their political activities? The First Amendment does not look kindly on government policies that chill political speech, and forced disclosure may do exactly that. Recent events illustrate. Contributors to Proposition 8, the California initiative banning same-sex marriage, faced harassment when information from disclosure reports was posted online.9 The Target Corporation faced boycotts after disclosure of a donation to a political group that was interpreted to be anti-gay.10 Decades earlier, in a setting charged with racism, the State of Alabama tried to compel the NAACP to disclose the names of its members.11 Because of experiences like these, citizens, interest groups, and others may "think twice" before engaging in future acts of speech or association.12


Notwithstanding the chilling effect, many disclosure laws have survived constitutional challenge. That is because disclosure ostensibly furthers a trio of government interests: (1) ensuring compliance with political contribution limits, (2) fighting corruption, and (3) providing information to voters. The third interest, the information interest, has become a critical fault line in the debate. The constitutionality of any federal or state disclosure law that applies to independent expenditures, by corporations, by super PACs, or by others, turns entirely on that interest. The constitutionality of disclosure laws that apply to other political activity turns in part on that interest.

What is the information interest? The Supreme Court has never precisely defined it, but Buckley v. Valeo provides hints. The Court wrote: "[D]isclosure provides the electorate with information . . . 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." One reasonable interpretation of Buckley is that disclosure helps voters to align their votes with their political preferences or, in short, to vote more competently. Prominent scholars and judges have embraced that interpretation.


14. See infra Part I.

15. See infra Part I.

16. See infra Part I.


18. Id. at 66-67.

19. See, e.g., Elizabeth Garrett, The William J. Brennan Lecture in Constitutional Law: The Future of Campaign Finance Reform Laws in the Courts and in Congress, 27 OKLA. CITY U. L. REV. 665, 675 (2002) ("Enhancing voter competence is a goal of campaign finance regulation alluded to in the Buckley opinion . . ."); see also Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 224 (1999) (O'Connor, J., concurring in the judgment in part and dissenting in part) ("Such public disclosure of the amounts and sources of political contributions and expenditures assists voters in making intelligent and knowing choices in the election process . . ."); Richard Briffault, Campaign Finance Disclosure 2.0, 9 ELECTION L.J. 273, 290 (2010) ("Buckley was right to give voter information first place in its justifications for disclosure, since disclosure is not likely to do much to advance the anti-corruption goal and is not necessary to the enforcement of other campaign finance rules. The campaign finance information generated by disclosure can play a useful, albeit limited, role in voter decision making . . ."); Garrett, supra, at 683 ("[C]urrent jurisprudence suggests that disclosure statutes are constitutional and can be justified by a state interest similar to the concern of voter competence."); Richard L. Hasen, The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy, 48 UCLA L. REV. 265, 270 (2000) (describing the information interest as follows: "Disclosure provides information helpful to voters. For example, a voter who knows that the insurance industry or the Sierra Club backs a particular . . . candidate may use that information as a proxy for whether a vote for
That logic is flawed. Disclosure does not necessarily make voters more competent. Yes, it exposes the sources of speech, and that provides voters with information, just as \textit{Buckley} and conventional wisdom hold. But it can also chill speech, and that takes information away—the information contained in the chilled speech. Disclosure, then, substitutes one type of information—sources of speech—for another—speech acts. If a disclosure requirement does not stifle much speech (the chilling effect is small), and if it provides a lot of information by revealing the sources of speech (the revelation effect is large), then the requirement increases the available information and should make the average voter more competent. If, however, those magnitudes flip—if the chilling effect outweighs the revelation effect—disclosure will actually be counterproductive. It will reduce information and make the average voter less competent.

To be clear, observers have long recognized that disclosure can chill speech, but they have focused on the cost of that chilling to speakers.\textsuperscript{20} I shift the focus to listeners, and that reveals the information tradeoff.

The tradeoff has important implications. First, and most obviously, it shows that compelled disclosure can make for bad policy—not because it achieves its information objective at too high a cost to other values (for example, speakers' rights), but because it fails to achieve its information objective. Disclosure can even undercut its objective. Disclosure may make voters less competent rather than more.

The tradeoff also has legal implications. In \textit{Citizens United}, the Supreme Court adopted a deferential posture toward compelled disclosure, treating the information interest like a trump card against competing concerns.\textsuperscript{21} But that position may be hard to justify. Perhaps the government should not reflexively claim, and perhaps courts should not reflexively accept, that compelled disclosure informs voters, since it might do the opposite.

Beyond the foundational concerns, the tradeoff informs three particularized issues in modern disclosure law. First, some argue that thresholds are too low. Requiring disclosure of $200 contributions, the argument goes, simply cannot provide much information to voters.\textsuperscript{22} Second, some worry about technology and disclosure. The Internet rapidly disseminates disclosure information, and that facilitates identification—and harassment—of individuals for their speech.\textsuperscript{23} Third, disclosure law is full of loopholes, and actors like 501(c) non-profit organizations have exploited

\begin{footnotes}
\item[20.] See, e.g., \textit{Buckley}, 424 U.S. at 66 (summarizing the constitutional burdens associated with disclosure by stating: "[C]ompelled disclosure has the potential for substantially infringing the exercise of First Amendment rights").
\item[21.] See infra Part I.
\item[22.] See Briffault, supra note 19, at 500; see also infra Part II.D.1.
\item[23.] See, e.g., Briffault, supra note 9, at 1000–05; see also infra Part II.D.2.
\end{footnotes}
them and spent money on politics without disclosing their funding sources. The information tradeoff suggests that all three concerns are exaggerated. With respect to the third, loopholes may actually increase voter information.

Finally, the tradeoff provides insight into institutional design. This Article, like much of the current debate, focuses on compelled disclosure: certain actors spending money on politics must disclose certain information or face penalties. Some have promoted alternative regimes, such as voluntary disclosure or even compelled anonymity. The tradeoff helps us analyze those possibilities. It suggests that voluntary disclosure produces more information for voters than compelled anonymity. Compelled disclosure might produce more information than either alternative, or it might produce less. That final conclusion is surprising. The average voter may be better off with compelled anonymity than with compelled disclosure.

In addition to the information tradeoff, this Article develops a second idea. Everything I have written so far, and the legal and policy debate about disclosure in general, rests on a bedrock assumption: disclosure chills speech. The second idea challenges that assumption. I show that disclosure can thaw speech. By providing information about politicians' credibility and true policy positions, compelled disclosure can increase the value to speakers of their speech acts. That increase in value can outweigh any increased cost that flows from coerced disclosure. That means disclosure, even if it chills the speech of some actors, can increase speech overall.

If disclosure thaws speech, there is no information tradeoff. Voters gain information in two ways, through source revelation and through more speech acts, while losing no information. If disclosure thaws speech, then it promotes exactly those First Amendment values it is thought to undercut. This Article shows that two pillars of conventional wisdom—disclosure informs voters but chills speech—are wrong at least some of the time. They may be wrong more often than not. That does not imply that the inquiry is hopeless or that we can never know the consequences of disclosure. Comparing the small with the great, this analysis is similar to the Hand Rule for determining negligence in torts: it cannot provide exact answers in individual cases, but it organizes the inquiry in ways that clarify concepts and sharpen intuitions. This analysis also suggests that the disclosure question could fruitfully be reframed. Perhaps disclosure is not best understood as an issue to be resolved by courts relying on assertions and constitutional values. Perhaps disclosure is better understood as a regulatory problem that requires the kind of detailed, contextual cost-benefit analysis administrative agencies carry out in other areas of law.

25. See infra Part III.
IOWA LAW REVIEW

I. BACKGROUND

A. LAW OF DISCLOSURE

This Subpart briefly summarizes the law of disclosure.\(^6\) To simplify, I focus on federal disclosure statutes. I do not consider FEC regulations, nor do I consider the many disclosure requirements in the states. Of course, the federal constitutional law I describe applies to all disclosure requirements, federal and state, and that law is most important for my purposes. Readers familiar with the law of disclosure can safely skip this discussion.

The Federal Election Campaign Act of 1971 ("FECA") distinguished between "contributions" and "expenditures."\(^7\) In brief, money that is given either to a candidate for an election campaign or to an organization that channels funds to a candidate for a campaign is a contribution.\(^8\) Money spent "independently of a candidate"—on, for example, a television commercial supporting a candidate or a print, radio, or Internet ad attacking a candidate—is an expenditure.\(^9\)

FECA required candidates for federal office, "political committees,"\(^30\) and other actors\(^31\) to submit reports to the FEC regarding contributions.\(^32\) These reports would "includ[e] the full name, mailing address, occupation," place of business of contributors, and the size of the contributions.\(^33\) FECA also required certain actors to disclose their expenditures on "express advocacy," which meant communications that "advocate the election or defeat of a clearly identified candidate."\(^34\) The FEC was required to make all of that information available to the public.\(^35\) That meant the identities of many actors—powerful organizations and ordinary citizens alike—would be freely available.

In *Buckley*, the Supreme Court considered the constitutionality of the disclosure requirements. The Court acknowledged "that compelled disclosure . . . can seriously infringe on privacy of association and belief guaranteed by the First Amendment."\(^36\) The Court also stated that "the invasion of privacy of belief may be as great when the information sought

---

\(^6\) For a fuller discussion, see, for example, Briffault, *supra* note 19 at 279–86.
\(^7\) *Buckley v. Valeo*, 424 U.S. 1, 23–24, 39–40 (1976) (per curiam).
\(^8\) *Id.* at 23–24.
\(^9\) *Id.* at 37. Expenditures coordinated with a candidate qualify as contributions. *See id.* at 46–47.
\(^30\) Political committees were defined as "group[s] of persons that receive[] 'contributions' or make[] 'expenditures' of over $1,000 in a calendar year." *Id.* at 62 (quoting 2 U.S.C. § 431 (2006 & Supp. V 2011)).
\(^31\) *Id.* at 62–64.
\(^32\) *Id.* at 63–64.
\(^33\) *Id.* at 63.
\(^34\) *See id.* at 47, 74–80.
\(^35\) *Id.* at 63.
\(^36\) *Id.* at 64.
CAMPAIGN FINANCE DISCLOSURE

concerns the giving and spending of money as when it concerns the joining of organizations, for "financial transactions can reveal much about a person's activities, associations, and beliefs." 37

The Court was primarily concerned about the chilling effect. 38 Compelled disclosure of one's political spending can lead to embarrassment, 39 professional harm, 40 and retaliation, either by private actors 41 or by the government. 42 Complying with disclosure requirements also imposes administrative costs. 43 Rather than endure those risks and costs, would-be speakers may choose to remain silent.

37. Id. at 66 (alteration in original) (quoting Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring)).

38. See, e.g., id. at 73-74 (discussing the "chill and harassment" that can flow from disclosure (quoting Buckley v. Valeo, 519 F.2d 821, 909 (D.C. Cir. 1975), aff'd in part, rev'd in part, 424 U.S. 1 (1975)); see also Lillian R. BeVier, Mandatory Disclosure, "Sham Issue Advocacy," and Buckley v. Valeo: A Response to Professor Hasen, 48 UCLA L. REV. 285, 299 (2000) ("[M]andatory disclosure imposes costs on political speakers . . . . Common sense combines with elementary economic theory to tell us that when the cost of an activity goes up, the activity level goes down. Because mandatory disclosure is a cost, there will be less spending on [political speech] if contributions and expenditures are required to be disclosed.").

39. See McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341-42 (1995) (explaining that the decision not to speak may be motivated "merely by a desire to preserve as much of one's privacy as possible"); id. ("The decision in favor of anonymity may be motivated . . . by concern about social ostracism . . .").

40. See Buckley, 424 U.S. at 237 (Burger, C.J., concurring in part and dissenting in part) ("Rank-and-file union members or rising junior executives may now think twice before making even modest contributions to a candidate who is disfavored by the union or management hierarchy."); McGeveran, supra note 39, at 17-18 (arguing that ministers, therapists, educators, and others "who rely on trust and identification with others to do their work . . . may find their roles undermined if congregants, patients, or parents know and judge their personal political activity").

41. To illustrate, supporters of Proposition 8, which banned same-sex marriage in California, reported harassing phone calls and emails, vandalism, and even death threats. Briffault, supra note 9, at 1001. Some resigned from their jobs after their support for Proposition 8 was disclosed. Briffault, supra note 19, at 274-75.

42. In Brown v. Socialist Workers '74 Campaign Committee, the Supreme Court considered whether a state could constitutionally apply its disclosure law to a minor political party, the Socialist Workers Party ("SWP"). Brown v. Socialist Workers '74 Campaign Comm. (Ohio), 459 U.S. 87 (1982). In concluding that it could not, the Court identified instances of government harassment, including FBI surveillance of SWP members, disclosure to the press of the criminal records of certain members, and interference with SWP activities. See id. at 98-101; see also James L. Huffman, Op-Ed., How Donor Disclosure Hurts Democracy, WALL ST. J. (Apr. 11, 2011), online.wsj.com/article/SB10001424052748704415104576250503491062220.html (arguing that "disclosure serves the interests of incumbents running for re-election" because it discourages people who are afraid of crossing an incumbent from supporting challengers).

43. See James Bopp, Jr. & Jared Haynie, The Tyranny of "Reform and Transparency": A Plea to the Supreme Court to Revisit and Overturn Citizens United's "Disclaimer and Disclosure" Holding, 16 NEXUS: CHAP. J.L. & POL'Y 3, 24, 26-29 (2010) (discussing the complexity of the law, potential penalties, and the need for counsel); see also Richard Briffault, Corporations, Corruption, and
Because of the chilling effect, the Court in *Buckley* subjected the disclosure requirements to "exacting scrutiny."\(^4^4\) That meant the government had to show a "substantial relation" between the "information required to be disclosed" and a "sufficiently important" interest.\(^4^5\) The Court rejected the challenges to disclosure on the basis of three government interests: (1) enforcing contribution limits, (2) deterring corruption, and (3) informing voters.\(^4^6\)

The *Buckley* Court held that all three government interests support disclosure of contributions.\(^4^7\) But what about disclosure of expenditures on express advocacy? Unlike contributions, expenditures are not limited.\(^4^8\) Thus, the government has nothing to enforce and, therefore, no enforcement interest. The Court in *Buckley* also concluded that expenditures do not present a risk of corruption, and thus the government cannot justify requiring disclosure of expenditures on anti-corruption grounds.\(^4^9\) Only the information interest remained, and the Court held that that interest was sufficient to sustain disclosure.\(^5^0\)

The Bipartisan Campaign Reform Act of 2002 ("BCRA") broadened the law of disclosure. It defined an "electioneering communication" as "any broadcast, cable, or satellite communication which... refers to a clearly identified candidate for Federal office" within a certain number of days of an election.\(^5^1\) That definition captures a lot of express advocacy as well as other political speech that takes place in the relevant timeframe.\(^5^2\)

---

\(^{4^4}\) *Buckley*, 424 U.S. at 64.

\(^{4^5}\) See id. at 64, 66 (internal quotation marks omitted); see also *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010) (stating that disclosure requirements are subject to "exacting scrutiny," which requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest" (quoting *Buckley*, 424 U.S. at 64, 66)).

\(^{4^6}\) See *Buckley*, 424 U.S. at 66–68, 72, 80–81, 83–84.

\(^{4^7}\) See id. at 66–84.

\(^{4^8}\) The Court in *Buckley* struck down limits on expenditures. See id. at 43–51.

\(^{4^9}\) See id. at 45–47, 80–81.

\(^{5^0}\) See id. at 81–82.


\(^{5^2}\) Cf. Lillian R. BeVier, *McConnell v. FEC: Not Senator Buckley's First Amendment*, 3 ELECTION L.J. 127, 136 (2004) ("It bears emphasis that BCRA's electioneering communications provisions increase the amount of campaign speech that is subject to regulation and restriction by orders of magnitude...Because *Buckley* struck down FECA's restrictions on independent individual expenditures for campaign speech...and because it interpreted FECA's disclosure provisions narrowly to apply only to the 'magic words' of express advocacy, much speech during the course of political campaigns remained free from regulation. It was the explicit aim of BCRA to bring much of that formerly free speech into the regulatory net." (footnote omitted)).
BCRA required actors spending more than $10,000 in a single year on electioneering communications to disclose the expenditures, the election to which they pertained, and, in some cases, the contributors who helped pay for them.\textsuperscript{53} BCRA also required certain televised electioneering communications to state in a "clearly spoken manner" and to display on screen in a "clearly readable manner" who is responsible for them.\textsuperscript{54}

In \textit{Citizens United}, the Supreme Court rejected a challenge to BCRA's disclosure provisions, stating that "the public has an interest in knowing who is speaking about a candidate shortly before an election. Because the informational interest alone is sufficient to justify application of [BCRA's disclosure provision] to these ads, it is not necessary to consider the Government's other asserted interests."\textsuperscript{55}

Those other interests the Court alluded to—enforcement and anti-corruption interests—seem untenable as justifications for BCRA's disclosure provisions. The Court struck down BCRA's prohibition on corporate spending,\textsuperscript{56} and there are no other restrictions on electioneering communications. Thus, there are no restrictions for the government to enforce. Furthermore, the government cannot claim that disclosing expenditures combats corruption because "independent expenditures do not lead to, or create the appearance of, quid pro quo corruption."\textsuperscript{57} Only the information interest remains.\textsuperscript{58}

To summarize, laws requiring disclosure of contributions turn in part on the scope of the information interest. Laws requiring disclosure of independent political expenditures, including all such expenditures by corporations and super PACs in the wake of \textit{Citizens United}, turn entirely on the scope of the information interest.

The information interest is not insuperable. In \textit{McIntyre v. Ohio Elections Commission}, the Supreme Court struck down a statute prohibiting distribution of anonymous political-campaign pamphlets.\textsuperscript{59} The Court rejected the information interest, stating that, at least in that context, "the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude."\textsuperscript{60}

\begin{itemize}
\item \textsuperscript{53} See \textit{Citizens United v. FEC}, 130 S. Ct. 876, 914 (2010).
\item \textsuperscript{54} Id. at 913–14 (quoting 2 U.S.C. § 441d(d)(2) (2006 & Supp. V 2011)). These are sometimes called disclaimer requirements.
\item \textsuperscript{55} Id. at 915–16.
\item \textsuperscript{56} Id. at 913.
\item \textsuperscript{57} Id. at 910.
\item \textsuperscript{58} See Daniel R. Ortiz, \textit{The Informational Interest}, 27 J.L. & POL. 663 (2012) (reaching the same conclusion); see also Briffault, supra note 9, at 990 ("The key constitutional justification for campaign finance disclosure is, thus, voter information.").
\item \textsuperscript{59} McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).
\item \textsuperscript{60} Id. at 348; see also Talley v. California, 362 U.S. 60 (1960) (striking down on free speech grounds an ordinance prohibiting all anonymous pamphleteering).
\end{itemize}
Although it was decided before *Citizens United*, which seemed to broaden the information interest, *McIntyre* has not been overruled.

Finally, even when the information interest sustains a disclosure law on its face, it may yield in an as-applied challenge. As the Supreme Court stated in *Doe v. Reed*, "those resisting disclosure can prevail . . . if they can show 'a reasonable probability that the compelled disclosure [of personal information] will subject them to threats, harassment, or reprisals from either Government officials or private parties.'"

**B. THE INFORMATION INTEREST**

As the last Subpart showed, the justification for compelled disclosure rests largely on the government's information interest. What exactly is that interest? The fullest discussion comes from *Buckley*, where the Court wrote:

> [D]isclosure 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 . . . .

A reasonable and widespread interpretation of that language is that the government has an interest in helping voters to align their political preferences with their votes, and disclosure furthers that goal. In short, disclosure helps voters to vote more competently.

---

61. *Doe v. Reed*, 130 S. Ct. 2811, 2821 (2010) (second alteration in original) (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (per curiam) (citing *Citizens United*, 130 S. Ct. at 915)). The Supreme Court has not clarified who is entitled to this exception. *Doe* involved disclosure of names on petitions in support of a ballot proposition, not disclosure of campaign finance information. *Id.* at 2815. In *Buckley*, the Court considered as-applied exceptions to disclosure requirements only in the context of candidates of minor political parties. *See Buckley*, 424 U.S. at 71–72.


63. *See supra* note 19; *see also* Alaska Right to Life Comm. v. Miles, 441 F.3d 773, 793 (9th Cir. 2006) (upholding a disclosure requirement on the basis of the information interest and stating that "[i]ndividual citizens seeking to make informed choices in the political marketplace have an equal need to know what entity is funding a communication" (alteration in original) (citation omitted) (quoting McConnell v. FEC, 251 F. Supp. 2d 176, 237 (D.D.C. 2003)) (internal quotation marks omitted)); Raymond J. La Raja, *Sunshine Laws and the Press: The Effect of Campaign Disclosure on News Reporting in the American States*, 6 ELECTION L.J. 236, 236 (2007) (stating that many people "embrace the concept of campaign finance disclosure based on the premise that putting such information in the hands of the voters allows them to decide whether to support a candidate at the ballot box"); Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255, 259 (2010) (discussing the information interest and "research regarding how voters obtain information relevant to their election decisions"); McGeveran, *supra* note 39, at
Examples may sharpen the logic. Knowing whether a candidate for office benefitted from the financial support of the National Rifle Association, the Sierra Club, the Chamber of Commerce, the American Federation of Teachers, Citibank, Google, David and Charles Koch, or George Soros could help voters who otherwise lack detailed knowledge of candidates make competent choices at the polls. The logic may be especially strong now because, as Justice Kennedy wrote in *Citizens United*, "modern technology makes disclosures rapid and informative. . . . With the advent of the Internet, prompt disclosure . . . can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable."65

Note that voters themselves need not read or understand disclosure reports to reap the benefit. They need not know that Charles Koch supports conservative causes and George Soros liberal ones. Intermediaries like journalists, the Huffington Post website, OpenSecrets.org, and MapLight.org can filter disclosure information and present it in accessible formats and stories.66 In theory, otherwise unsophisticated voters can learn a lot from that coverage.67

---


66. See LaRaja, supra note 63. For a helpful discussion, see Mayer, supra note 63, at 266–70. Some question whether disclosure improves journalistic reporting of campaign finance. See LaRaja, supra note 63, at 236 (reporting "strong evidence that better disclosure regimes tend to reduce horserace coverage but do not necessarily increase the number of articles that focus on potentially improper political contributions or expenditures").

67. Cf. Briffault, supra note 19, at 299 ("The real benefit from disclosure may be public education . . . . When collected and analyzed by reporters, bloggers, scholars, good government organizations, and competing interest groups and linked by them to similar reports on lobbying activity and to pending legislative and regulatory action (and inaction) both directly and
The extent to which disclosure makes voters more competent is, however, uncertain.\textsuperscript{68} Voters often have access to information about candidates apart from such disclosure, including their political party affiliations,\textsuperscript{69} their endorsements,\textsuperscript{70} and their track records in office.\textsuperscript{7} When those and other cues are available, the marginal benefit of disclosure may be insignificant.\textsuperscript{72} Disclosure may overwhelm voters with information.\textsuperscript{73} Disclosure may send conflicting signals, as many actors support both candidates in a race and their respective political parties.\textsuperscript{74} Disclosure laws may suffer from loopholes. Under current federal law, super PACs and other groups need not always disclose their sources of funding, even when they spend substantial amounts on politics.\textsuperscript{75} Disclosure may be untimely. Many states held their 2012 Republican primary contests before actors who spent

\textsuperscript{68.} Cf Omri Ben-Shahar \& Carl. E. Schneider, \textit{The Failure of Mandated Disclosure}, 159 U. PA. L. REV. 647 (2011) (arguing that mandated disclosure in a variety of areas, including terms of credit and health care, does not necessarily help people make more competent decisions).


\textsuperscript{70.} See Lau \& Redlawsk, \textit{supra} note 69, at 953 (arguing that endorsements provide a strong voting cue); Mayer, \textit{supra} note 63, at 265 (same).


\textsuperscript{72.} Cf. Cheryl Boudreau, \textit{Are Two Cues Better Than One? An Analysis of When Multiple Cues Improve Decisions} 3 (March 25, 2009) (unpublished manuscript), available at http://ssrn.com/abstract=1368562 (finding that multiple Cues are not necessarily more helpful to voters than one cue).

\textsuperscript{73.} Many scholars have raised this point. See, e.g., Garrett, \textit{supra} note 19, at 683; Mayer, \textit{supra} note 63, at 266–67; see also Barry Schwartz, \textit{The Paradox of Choice: Why More is Less} (2004) (summarizing psychology studies showing that too many choices can paralyze decision-making).


\textsuperscript{75.} \textit{See infra} Part II.D.3. For more legal background, see Briffault, \textit{supra} note 9, at 1005–13.
money in those races disclosed. Some argue that disclosure only aids voters who already have a sophisticated understanding of politics.

No one claims that disclosure, in theory or in practice, provides complete information to voters. But the Supreme Court and many other observers have argued that it helps inform voters and helps enough to justify the associated First Amendment harms.

C. POLICY AND CONSTITUTIONAL CALCULUS

A variety of factors, some subjective and others more objective, influence the assessment of a particular disclosure requirement. That is true whether one assesses the requirement as a policy matter or as a legal or constitutional matter. Among the more subjective factors are the weights one places on speaker autonomy and privacy. A person who believes that protecting autonomy and privacy is especially important and that intrusive government policies, whatever short-term benefits they may yield, are harmful in the long-term might oppose many disclosure requirements on policy grounds, on constitutional grounds, or both. A person who believes that transparency is an important value or that speakers in the political arena have a moral obligation to identify themselves might favor many disclosure requirements.

Among the more objective factors that could influence one's assessment of a disclosure requirement are its actual consequences. To what extent does it combat corruption? To what extent does it provide information to voters and help them to vote competently? To what extent does it chill speech? This Article focuses on two of those consequences, voter information and chilled speech. Those consequences are just two pieces of the disclosure puzzle, but they are critical pieces in the contemporary legal and policy debate. As I will show, our intuitions about them are wrong.


77. See CARPENTER II, supra note 7, at 111 ("[T]he benefit of disclosure . . . require[s] an electorate that both knows such information is available and accesses it in the decision-making process . . . ."); McGeveran, supra note 59, at 26–27 (expressing a similar idea); Samples, supra note 63, at 6 ("Heuristics work best for people who already have significant political knowledge."); see also LAU & REDLAWSK, supra note 64, at 252 ("Heuristics often improve the decision quality of experts—who are otherwise interested and engaged in political affairs anyway—but do little to improve (and occasionally hurt) the decision making of novices.").
II. THE INFORMATION TRADEOFF

Disclosure involves a precise and unappreciated tradeoff. On one hand, it exposes the sources of speech. That provides information, directly or through intermediaries, that can help some voters assess candidates and issues and vote more competently, just as the Supreme Court and many disclosure advocates claim. On the other hand, disclosure imposes costs on speech, and that ought to chill speech. That means fewer speech acts will take place, fewer ideas will circulate, and voters will receive less information. Combining those claims reveals the tradeoff. More disclosure should decrease the number of speech acts but make each one more informative for the average voter. Less disclosure should increase the number of speech acts but make each one less informative for the average voter.

An example may help. Imagine two potential speakers. If no disclosure were required, each would fund a television advertisement opposing a candidate’s reelection bid. If disclosure were required, only one speaker would fund an ad, and the other’s speech would be chilled. In the first scenario, voters would gain information contained in two ads but would not have disclosure information. In the second scenario, voters would gain information from just one ad but also gain disclosure information. Sometimes the average voter would be more competent under the first scenario, sometimes under the second.

The information tradeoff involves positive claims about the world: disclosure of sources makes speech more informative for the average voter, and disclosure chills speech. The law as developed by the Supreme Court presupposes that those claims are true. I suspect most legal scholars and observers believe they are true. Whether they are actually true is open to question. If disclosure makes speech more informative for sophisticated voters but less informative for unsophisticated voters (perhaps because unsophisticated voters misinterpret the signals disclosure sends) then disclosure might make speech less informative for the average voter. Regarding the second claim, disclosure might in some circumstances increase speech. I consider that possibility in Part IV. For now, however, I embrace convention and assume both claims are true. That keeps me within the accepted framework of the debate.

I am deliberately agnostic about magnitudes. I assume disclosure makes speech acts more informative for the average voter, but I take no position on how much more informative. I also assume for now that disclosure chills speech, but I take no position on whether it chills a little or a lot. I also do not take a position on how much information the chilled speech would have

78. See supra Part I.
79. Cf. Lau & Redlawsk, supra note 64, at 252 ("Heuristics often improve the decision quality of experts—who are otherwise interested and engaged in political affairs anyway—but do little to improve (and occasionally hurt) the decision making of novices." (emphasis added)).
conveyed. One cannot take a position on those matters in the abstract. Magnitudes will vary based on the details of individual disclosure laws, the characteristics of would-be listeners and speakers, and other contextual factors.

I am also agnostic about the character of speech. Some speech acts—such as a private individual making political pamphlets or volunteering time to a campaign—may strike some people as intrinsically "high quality." Other speech acts, like misleading attack ads funded by interest groups, may strike some as "low quality." Those judgments depend, of course, on one’s philosophy of political speech. To maximize the generality of this Article, I do not and need not take a position on what constitutes high- or low-quality speech. The information tradeoff operates regardless of one's view of those matters. I will say more about that below.

As may be clear already, the information tradeoff is intentionally conceptual and reductionist. My principal objective is to challenge common intuitions about the consequences of disclosure. Stripping away some of the details of individual laws and the legal doctrine and debate surrounding them facilitates that goal. As I will show, the abstractness of the tradeoff should not prevent it from influencing the legal and policy dialogue.

The novelty of the tradeoff grows from the realization that the chilling effect has informational consequences. Conventional wisdom holds that disclosure chills speech, but scholars and judges have only focused on the implications of that chilling for speakers. I switch the focus to listeners. Doing so reveals that disclosure does more than provide information about the sources of speech, it substitutes one type of information (sources) for another (speech acts). Recognizing this phenomenon leads to progress.

A. DISCLOSURE, POLICY, AND THE FIRST AMENDMENT

The information tradeoff identifies two dimensions in the debate about disclosure and voter competence. These dimensions are source revelation and chilled speech. When the information gained from revealing sources is more helpful to the average voter than the information lost through chilled speech, disclosure makes the average voter more competent. When the

80. I am aware of only one paper that comes close to describing the information tradeoff. Fifteen years ago Professor Saul Levmore wrote, “Anonymity may induce communicative activity, but, for a given communication, anonymity is also likely to reduce its value to the recipient.” Saul Levmore, The Anonymity Tool, 144 U. PA. L. REV. 2191, 2194 (1996). Levmore applied his insight to a variety of social and legal practices but did not consider the relationship between voter information and campaign finance disclosure. See generally id.

81. See Briffault, supra note 9, at 1013 (summarizing a core question surrounding disclosure: “how to enable disclosure to perform its voter information function effectively while minimizing the possible burden it may impose on political participation and political privacy”). Briffault wrote this while discussing two specific issues in disclosure law—dissemination of campaign finance information over the Internet and disclosure by super PACs and 501(c) organizations—but I believe his language captures the debate as a whole. See generally id.
balance tips the other way, when the chilling effect outweighs the revelation effect, required disclosure makes the average voter less competent.

That generates a prescription. To maximize voter competence, governments should require more disclosure until the marginal benefit from source revelation equals the marginal loss from chilled speech.

Those ideas clarify—and also expose weaknesses in—standard positions in the debate. As discussed, many observers claim that disclosure informs the electorate. Professor Richard Hasen recently wrote, "In the post-Citizens United era, when the country will be increasingly awash in money flowing through various organizations in order to hide its true sources, mandated disclosure can serve the important interest in... providing valuable information to voters."82 The Philadelphia Inquirer recently opined that Congress should force super PACs and 501 (c) organizations to disclose their donors "so voters have a fighting chance to make clear choices in November."83 The tradeoff shows that those positions rest on critical and untested assumptions. A particular disclosure requirement might make the average voter better informed and more competent, but it might, in fact, have the opposite effect.

Some scholars take an opposing view, arguing that compelled disclosure does not provide information to the electorate. Professor Lillian BeVier may be in that camp. She questions whether mandatory disclosure yields "better information about the issues and where the candidates stand than would emerge from an unregulated process of political competition."84 The information tradeoff lends structure to that position. If a disclosure requirement chills a lot of information-rich speech, and if source revelation provides little information to the average voter, then the requirement may harm the average voter.

Of course, the tradeoff also exposes a weakness in that argument. To oppose disclosure on the ground that it fails to inform the electorate is to assume that the information and competence lost through chilled speech exceeds the information and competence gained from source revelation. That cannot always be true, and it may often be false.

As a policy matter, then, everyone should approach disclosure with caution. A particular disclosure requirement might help inform the average voter, as conventional wisdom holds, or it might have the opposite effect. I do not mean that the issue is indeterminate, that we can never know if a particular disclosure law helps or hurts. I simply mean that there is no universally correct answer.

84. BeVier, supra note 38, at 303. To be clear, BeVier was focused on disclosure of funding behind issue advocacy, not disclosure of money in politics generally. Id.
Those policy ideas connect to law. The freedoms of expression guaranteed by the First Amendment aim, at least in part, to inform the electorate.86 To paraphrase the district court in McConnell v. FEC, citizens have a "First Amendment interest[]" in "mak[ing] informed choices in the political marketplace."86 Opponents of campaign finance regulation may reject the court's language, but at least some of them accept the underlying logic.87 In that regard, compelled disclosure can further a First Amendment value.

The tradeoff adds an important qualification to that line of reasoning. Compelled disclosure furthers a First Amendment value if it actually informs the electorate. When the chilling effect dominates the revelation effect and disclosure makes the average voter less informed and less competent, disclosure not only makes for bad policy, it undermines a First Amendment value. The policy effectiveness and the constitutionality of disclosure go hand in hand.

This leads to a strategy for reviewing a disclosure requirement. Courts could begin by developing an answer to the following question: accounting for the tradeoff, does this requirement, on balance, make the average voter more informed and competent, and if so, by how much? The more competent it makes the average voter, the more weight there is on the constitutional side of the scale. Courts could then measure that weight, along with any other considerations that favor disclosure, against First Amendment values like privacy and autonomy that cut against disclosure. This formula is not objective, of course. Sometimes courts can only speculate about whether and to what degree disclosure informs the average voter. Furthermore, people have different opinions about the meaning and requirements of the First Amendment. Still, this analytical approach could help.

Consider Justice Thomas's dissent in Citizens United, in which he rejected the disclosure requirements in BCRA. After referring to the "right to anonymous speech,"88 he turned to "recent events"89 with "constitutional

87. See, e.g., Lillian R. BeVier, The Issue of Issue Advocacy: An Economic, Political, and Constitutional Analysis, 85 VA. L. REV. 1751, 1792 (1999) ("The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry . . . .") (emphasis added) (quoting Cohen v. California, 403 U.S. 15, 24 (1971))). For evidence that BeVier opposes campaign finance regulation, see, for example, Lillian BeVier, Campaign Finance Regulation: Less, Please, 34 ARIZ. ST. L.J. 1115 (2002).
significance." He described some individual instances of threats and harassment that occurred after the disclosure of Proposition 8 supporters. He then described other anecdotes suggesting that disclosure chills speech. He concluded, "I cannot endorse a view of the First Amendment that subjects citizens of this Nation to death threats, ruined careers, damaged or defaced property, or pre-emptive and threatening warning letters as the price for engaging in core political speech, the primary object of First Amendment protection."

The language soars, but Justice Thomas's position is unclear. Does he believe disclosure chills a lot of speech or only a little? Does he believe disclosure makes the average voter more or less competent? If more, how much more? Does he believe the "right to anonymous speech" is so powerful that the prospect of any chilling effect violates the Constitution? Or is the right to anonymity just powerful enough to outweigh what he assumes to be the minimal informational benefits associated with disclosure? We can only guess. If Justice Thomas and others had structured their analyses in terms of the information tradeoff described above, the law and debate surrounding disclosure would be clearer.

B. THE INFORMATION INTEREST REVISITED

The last Subpart showed, at an abstract level, how the information tradeoff illuminates the policy and constitutional debate about disclosure. This Subpart lowers the level of abstraction. I take the Supreme Court's doctrine as a given and assess the "single thread" that sustains compelled disclosure: the government's information interest.

Laws mandating disclosure draw exacting scrutiny from courts, meaning the government must show a "substantial relation" between a "sufficiently important" interest and the information to be disclosed. The government's information interest appears to be the only interest important enough to sustain disclosure of independent expenditures. It is one of just three interests supporting disclosure of contributions.

---

concurring in part, concurring in judgment in part, and dissenting in part)) (internal quotation marks omitted).
89. Id. (quoting McConnell, 540 U.S. at 276 (Thomas, J., concurring in part, concurring in judgment in part, and dissenting in part)) (internal quotation marks omitted).
90. Id.
91. Id. at 980–81.
92. Id. at 982 (quoting McConnell, 540 U.S. at 264 (Thomas, J., concurring in part, concurring in judgment in part, and dissenting in part)) (internal quotation marks omitted).
93. Ortiz, supra note 58, at 666.
94. Citizens United, 130 S. Ct. at 914 (quoting Buckley v. Valeo, 424 U.S. 1, 64, 66 (1976) (per curiam)) (internal quotation marks omitted).
95. See supra Part I.
96. See supra Part I.
In the most recent case about disclosure, *Citizens United*, the Supreme Court deferred to the government's information interest. Citizens United claimed that application of BCRA's disclosure provisions to advertisements for its politically charged film about Hillary Clinton and to the film itself violated the Constitution. The Court brushed that argument aside. Writing for the majority, Justice Kennedy stated that the Court had found BCRA's disclosure provisions constitutional in *McConnell* and that disclosure helps "insure that the voters are fully informed." Kennedy concluded that "the public has an interest in knowing who is speaking about a candidate shortly before an election."

The information tradeoff points to a flaw in the Court's position. Disclosure might make the average voter more informed, or it might have the opposite effect. Even if voters have an interest in knowing who is speaking shortly before an election, voters may prefer to leave those speakers anonymous. Doing so might make voters more competent. This exposes a frailty at the core of disclosure jurisprudence. The information interest, that single thread, might be too weak to support compelled disclosure. Perhaps the government should not reflexively claim, and perhaps judges should not reflexively accept, that voter information justifies compelled disclosure, since disclosure might, in fact, undermine voter information.

To be clear, I do not mean that compelled disclosure necessarily violates the First Amendment, nor do I mean that the information interest cannot bear any weight. I only mean that the interest is not, as a matter of logic, beyond reproach.

Recall another feature of disclosure jurisprudence: as-applied exceptions. The Supreme Court has held that a disclosure requirement may be unconstitutional as applied to an individual or organization if there is a "reasonable probability" that the individual or the organization's members would face "threats, harassment, or reprisals" if their identities were disclosed. The information interest gives way in such circumstances.

The tradeoff both clarifies and challenges that exception. On the one hand, if there is a reasonable probability that disclosure will result in threats or harassment, speech likely will be chilled and the information available to voters will be reduced. On the other hand, disclosure might lead to threats

97. *Citizens United*, 150 S. Ct. at 913–14. Specifically, the group argued that the information interest could not justify disclosure of "commercial advertisements," that the disclosure requirements were underinclusive, that the disclosure requirements only applied to speech that is "the functional equivalent of express advocacy," and that disclosure of its ads "would not help viewers make informed choices in the political marketplace." *Id.* at 914–15.

98. *Id.* at 914–15 (quoting *Buckley*, 424 U.S. at 76) (internal quotation marks omitted).

99. *Id.* at 915.

100. *Id.* at 916 (quoting *McConnell v. FEC*, 540 U.S. 93, 198 (2003)); see also *Doe v. Reed*, 130 S. Ct. 2811, 2820 (2010); *Buckley*, 424 U.S. at 74.
or harassment precisely because it reveals something surprising or outrageous that voters find especially useful.

To illustrate, suppose that liberal Democrats give financial support to an extremely conservative candidate in a Republican presidential primary election. They do not agree with that candidate's political views, but they hope he will win the primary, thereby improving the odds of their candidate, a centrist Democrat, in the general election. Suppose those Democrats bring an as-applied challenge to laws requiring them to disclose their support. Suppose they can produce evidence that, in the event their names are disclosed, some extremists will harass them for interfering in the Republican race. If courts reject their challenge, speech may be chilled. Those Democrats and others may hesitate to support candidates of the other party or even of their own party in the future. That costs voters information. Nevertheless, disclosure may be preferable. Republicans and other voters may learn a lot about candidates and politics when the Democrats' crossover support gets uncovered, more than enough to compensate for any information loss associated with chilled speech.

This example leads to a few points. First, as-applied exceptions make more sense when the information to be disclosed is not particularly valuable to voters. If the chilling effect grows because of threats and harassment, and if the revelation effect remains constant, then disclosure is less likely to lead to a net increase in voter information and competence. In that case, an exception may be warranted. If the revelation effect also grows, as in my example, the case for an exception weakens.

Second, as-applied exceptions shift focus from disclosure in general to disclosure of particular individuals and groups, but the central inquiry remains unchanged. For purposes of voter competence, the question is still whether the chilling effect outweighs the revelation effect.

Third, and finally, as-applied exceptions may best be explained on principles. To quote Justice Thomas, we simply cannot make "death threats, ruined careers, [and] damaged or defaced property" the price for political speech.101 That sentiment may be right, but it poses problems. How does one decide, on principle, when threats become too great to justify application of a disclosure law? That question seems to collapse into a general one: how does one decide when threats become too great to justify any disclosure? Courts could avoid this slippery slope by refusing to smuggle in a different set of principles for as-applied challenges than that used for facial challenges. It may be better to keep principles constant and focus on particularized informational consequences.

C. THE AVERAGE VOTER

So far I have talked about the implications of disclosure for the average voter. That benchmark is intended to be more precise than what most observers use. It is also contestable. Before addressing those issues it would be helpful to clarify what I have in mind.

Behind my conception of the average voter is a thought experiment. Imagine two possible disclosure regimes. The differences between them could be minor or major. Now imagine two large, randomly selected groups of citizens who will vote in the next election. The first group gathers information only through the first disclosure regime, and the second group gathers information only through the second. Now suppose all citizens in both groups are carefully surveyed to determine the extent to which their policy preferences correspond to their votes. Each citizen is assigned a score, with higher scores implying a greater correspondence between preferences and votes—in short, greater competence. If the average score in the first group is higher than in the second, then the first disclosure regime does a better job of furthering the information interest. It makes the average voter better off.

Note that the average voter is hypothetical. There may not be such a voter. I use "average voter" as shorthand for whether, on average, voters vote more competently under one disclosure regime versus another.

The average voter benchmark is more precise than what other observers use. In Buckley, where the information interest was established, the Court stated that, "disclosure provides the electorate with information... in order to aid the voters." The Court used similar formulations in Citizens United. Scholars have done the same, referring to "voters" or "voter information" or "most voters." That language masks a lot of ambiguity. Does disclosure...
concern, and should it concern, all voters, a super-majority, a bare majority, or a single voter? If it concerns a subset of voters, is that subset non-representative—limited, perhaps, to those who would likely benefit from disclosure? And how do we decide whether voters, or the relevant subset, benefit from disclosure: must all benefit a lot, a majority benefit some, or some benefit a little?

In light of those complications, I have adopted the average voter approach. It is precise, and that carries benefits. The information tradeoff reveals that disclosure both augments (the revelation effect) and detracts from (the chilling effect) voter information. Unless the balance of those competing factors is exactly the same for all voters, which seems unlikely, one cannot answer the question: does disclosure make the electorate more informed and competent? One must first define “the electorate.” The average voter approach does that work.

My approach raises difficult normative questions. Suppose a disclosure regime provides a lot of information to a few voters but detracts from, in a small way, the information of most voters. That regime could make the average voter better off, even as it makes most voters worse off. That scenario might be particularly problematic if those few who benefit are already sophisticated about politics—and perhaps wealthier and better educated and otherwise advantaged—and those who suffer tend be unsophisticated and disadvantaged. It would be troubling for a speech-protecting democracy to compel disclosure in order to benefit the few at the expense of the many.

For that reason, I do not defend at length the average voter approach. Its virtue lies in its simplicity, not its indisputability. I note, however, that whatever benchmark one embraces, difficult distributional concerns will arise: who benefits from disclosure, who suffers, and to what degree? I also note that these inquiries, important though they are, do not derail my analysis. Whatever benchmark one selects, the information tradeoff remains relevant.

107. See Garrett, supra note 19, at 676–77 (discussing “non-civically virtuous citizens” and suggesting they “should be the primary target of campaign finance reform”).

108. Scholars have not ignored these issues entirely. Professor Elizabeth Garrett, for example, has argued that disclosure should not focus on citizens who “live up to the ideal of civic virtue” but rather “the majority of citizens who do not.” Id. at 676. She noted that the latter are not “monolithic but exhibit[] a variety of characteristics relevant to voting and political participation.” Id. More generally, scholars recognize that disclosure may affect different groups of citizens differently. See id.; McGeever, supra note 39, at 26–27 (discussing conditions necessary for disclosure to provide information, not all of which will be satisfied for every voter); see also Daniel R. Ortiz, The Democratic Paradox of Campaign Finance Reform, 50 STAN. L. REV. 893, 901–05 (1998) (discussing the political decision-making of “civic slackers” and “civic smarties”). Nevertheless, there is no consensus on these issues, and most judges and scholars appear to have dedicated little or no time to them.
D. LOW THRESHOLDS, TECHNOLOGY, AND LOOHOLES

This Subpart considers three flashpoints in the disclosure debate: low reporting thresholds, diffusion of campaign finance information over the Internet, and exploitation of legal loopholes. Each of those issues has generated substantial attention, much of it critical. That criticism may not be warranted.

1. Low Reporting Thresholds

Federal law requires disclosure of names and other personal information of persons contributing as little as $200 to a candidate for federal office. Federal law requires disclosure of names and other personal information of persons contributing as little as $200 to a candidate for federal office. Many state laws have even lower thresholds. In Colorado, for example, persons contributing as little as twenty dollars to support or oppose a ballot proposition are subject to disclosure requirements.

With such low thresholds, the disclosure reports for any given candidate or issue can be enormous and can include many names that mean nothing to most voters. This problem has led even supporters of disclosure to call for higher thresholds. According to Professor Richard Briffault, “massive disclosure of small donor information threatens to inundate us in a sea of useless data,” and the “many small fry currently subject to public disclosure should be exempted.” According to Professor Elizabeth Garrett, “[s]mall contributions and expenditures are not generally informative to voters,” and disclosure statutes should “exempt individuals and groups that spend insubstantial amounts.”

Courts have addressed low disclosure thresholds as well. The Ninth Circuit recently held that application of a state disclosure law to small contributions and expenditures violated the First Amendment. The court stated, “As a matter of common sense, the value of this financial information

110. See Sampson v. Buescher, 625 F.3d 1247, 1249–50 (10th Cir. 2010).
111. Briffault, supra note 19, at 300.
112. Garrett, supra note 19, at 683; see also Elizabeth Garrett, Voting with Cues, 37 U. RICH. L. REV. 1011, 1042 (2003) (“[K]nowing the identity of small contributors does not improve competence.”); Hasen, supra note 82, at 566–67 (“[T]he state interest in disclosure of modest contributions is weak . . . .”); id. at 566 (arguing that the ability to access information on friends’ and neighbors’ small contributions is “unseemly and unnecessary”); Mayer, supra note 69, at 866 (expressing the same idea); McGeveran, supra note 99, at 26–29 (same); E. Rebecca Gantt, Note, Toward Recognition of a Monetary Threshold in Campaign Finance Disclosure Law, 97 VA. L. REV. 885, 421 (2011) (“[T]he $100 threshold currently required by many states seems at first blush to be de minimis and not one that advances . . . informational interests.”) (footnote omitted).
113. Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth, 556 F.3d 1021 (9th Cir. 2009).
to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level."\textsuperscript{114}

These claims rest on a weak foundation. As disclosure thresholds get lower, disclosure lists get longer. Most voters will recognize fewer names, and the few they recognize may become harder to find. That does not mean, however, that small-dollar disclosure provides no information to any voter. It suggests instead that such disclosure provides only a little information to some voters. If some voters gain information and no voters lose information, or lose much, then disclosure helps.

This pinpoints a source of ambiguity in the debate. Opponents often argue that small-dollar disclosure does not help "most" voters.\textsuperscript{115} That is not, in my view, a sufficiently precise benchmark, nor is it necessarily correct. As discussed, the benchmark I adopt is the average voter: does disclosure make that hypothetical voter better off? If disclosure helps even a single voter and hurts none, then the answer is yes. Furthermore, even if a particular small-dollar disclosure does not, by itself, help most voters, disclosure of all small-dollar spending may very well help most voters. That last point is less important—again, the benchmark should be the average voter—but worth noting.

An example may clarify. Most voters do not know my neighbor, but my other neighbors and I do. We know he is politically active and has socially conservative views. Learning that he made a modest contribution to a particular candidate may help a few of us to cast more informed votes. If his disclosure helps us and does not hurt others—that is, if the inclusion of his name on the list does not detract from the information available to voters who do not know him—then disclosure provides information to the average voter. If a majority of voters learn something in this way, perhaps recognizing a different neighbor on the list or learning about small-dollar spending by a local personality, then disclosure not only helps the average voter, it helps most voters too.

To this point I have argued that small-dollar disclosure can provide information to the average voter. Whether that information leads to an overall increase in the average voter's competence depends on at least two factors: the manageability of disclosure data and the chilling effect.

\textsuperscript{114} Id. at 1033 (emphasis omitted); see also Sampson, 625 F.3d 1247 (reaching a similar conclusion about a state disclosure law).

\textsuperscript{115} See, e.g., Briffault, supra note 9, at 1004 (discussing disclosure of "individual small donors" and stating, "[t]hese names and addresses will mean little or nothing to most people" (internal quotation marks omitted)); Garrett, supra note 112, at 1042 ("The source and amount of small contributions and expenditures are not generally informative to voters."); Mayer, supra note 69, at 265 ("[T]he vast majority of contributors will not be known to the vast majority of voters, and so the fact of their financial support will not provide any useful information about a candidate to most voters.").
Regarding manageability, disclosure of small amounts can make aggregate lists very long. If that length overwhelms some voters and prevents them from learning about certain spending, then small-dollar disclosure may reduce the information available to the average voter. The informational losses suffered by those who miss important entries may outweigh the informational gains to voters who recognize neighbors or others on the list. I have doubts about the scope of this problem. Many lists are searchable by name, address, city, and employer. Some lists can be sorted by amount. Voters with the savvy to find disclosure lists in the first place likely will be able to make use of them. Still, manageability could, in theory, undermine the usefulness of disclosure.

The chilling effect may pose a greater problem. Small-dollar disclosure may deter individuals and groups from spending money on politics. For all the reasons discussed, they may fear exposure. That fear of exposure combined with the realization that small-dollar spending will not influence most elections may lead them to remain silent. That would deprive voters of information, and that informational loss could outweigh the gains that flow from revealing the identities of some small-dollar spenders.

Of course, the chilling effect could be minor. Ideologically motivated voters may not care about disclosure. In some cases, low disclosure thresholds may mitigate the fear of exposure. One might reason that being exposed with tens of thousands of others is much less problematic than being exposed with only a few others.

Like disclosure in general, then, the desirability of small-dollar disclosure turns on the information tradeoff: does the revelation effect outweigh the chilling effect? Although not expressed in those terms, the consensus is that it does not, but that consensus may be wrong. The question is not whether revelation of small-dollar sources provides information to "most" voters but whether it provides information to the average voter. It might. Furthermore, the question is not whether disclosure chills any speech but whether it chills enough to outweigh the informational gains from source revelation. It might not. If disclosure does not chill much speech, it need not provide much information to constitute good policy.

2. Technology and Disclosure

Gone are the days when campaign finance information rested in dusty tomes that few members of the public bothered to consult. The Internet

---

118. See e.g., Hasen, supra note 82, at 566 ("Professor Louise Overacker[] report[ed] how in the 1930s she literally had to go into the men's room at the House of Representatives to retrieve campaign finance records from dusty, unlabeled bundles above some lockers.").
provides immediate access to disclosure records and tools—such as email and social media—to circulate that information. That improved access and circulation can facilitate harassment, which in turn can magnify the chilling effect. Many scholars have expressed that concern.119

The problem is not hypothetical. Shortly after a divided California electorate approved Proposition 8, banning same-sex marriage, anonymous programmers created the website “eightmaps.com.”120 The site combined information from disclosure reports with Google Maps.121 The result was an online picture of California with markers indicating the location of persons who contributed to Proposition 8.122 The site also indicated the names of contributors, amounts given, and in some cases their employers.123 Some Proposition 8 supporters received harassing emails, “death threats and envelopes containing a powdery white substance,” while others had their businesses boycotted.124 Many blamed eightmaps.com.125 Justice Kennedy may have been right when he argued that “modern technology makes disclosures rapid and informative,” but he failed to acknowledge the problems associated with such technology.126

The Proposition 8 story is troubling, and it illustrates a downside of coupling disclosure with sophisticated technology. Critically, however, it does not weaken the case for disclosure. There are two sides to the equation. The same technology that can magnify the chilling effect can also magnify the revelation effect. Voters surely learn more when disclosure information is readily accessible than when it is hard to find. To assume, then, that technology weakens the case for disclosure is to assume that its effect on chilling outweighs its effect on revelation. That may not be true.

This leads to some important observations. More retaliation does not mean less information for the average voter. More harassment does not necessarily mean a disclosure regime needs reform. The optimal disclosure regime—by which I mean the regime that maximizes the competence of the average voter—may be characterized by a lot of bad behavior that chills speech. I do not mean to condone such behavior, just to show that it may be consistent with effective pursuit of the government’s information interest.

119. See, e.g., DAVID M. PRIMO, INST. FOR JUSTICE, FULL DISCLOSURE: HOW CAMPAIGN FINANCE DISCLOSURE LAWS FAIL TO INFORM VOTERS AND STIFLE PUBLIC DEBATE 6–7 (2011); BRIFFAULT, supra note 9, at 1000–05; BRIFFAULT, supra note 19, at 274–76; HASEN, supra note 82, at 565–67; MAYER, supra note 63, at 276–77.
120. See BRAD STONE, PROP 8 DONOR WEB SITE SHOWS DISCLOSURE LAW IS 2-EDGED SWORD, N.Y. TIMES (Feb. 7, 2009), http://www.nytimes.com/2009/02/08/business/08stream.html?_r=1&.
121. Id.
122. Id.
123. Id.
124. Id.
125. See id. For another discussion of eightmaps.com and other databases, see MAYER, supra note 63, at 276–77.
Disclosure laws are riddled with loopholes. Non-profit groups organized under section 501(c) of the Internal Revenue Code can sometimes avoid disclosing their sources of funding, even as they spend money on politics.\textsuperscript{127} The same may be true for super PACs and even individuals.\textsuperscript{128} Consequently, we see advertisements that excoriate politicians and conclude with something generic like, "paid for by the 'Coalition to Protect Seniors.'"\textsuperscript{129} We also read reports like the following: the super PAC supporting Mitt Romney, a Republican presidential candidate, received a $250,000 contribution... from a company with a post office box for a headquarters and no known employees."\textsuperscript{130} By one count, "202 organizations... engaged in independent spending during the 2010 midterm election[s]," and only ninety-three of them disclosed their donors.\textsuperscript{131}

This has generated criticism from many quarters. Senator John McCain stated that there is a "flood of money into campaigns, not transparent, unaccounted for... and I predict to you that... there will be scandals, because there is too much money washing around political campaigns now that nobody knows where it came from."\textsuperscript{132} Former Pennsylvania Governor Tom Ridge argued that super PACs should be subject to "near instantaneous" disclosure.\textsuperscript{133} The New York Times challenged politicians and

\textsuperscript{127.} See, e.g., Briffault, supra note 9, at 1007–09 (discussing this issue); see also T.W. Farnam, \textit{Mystery Donor Gives $10 Million to Crossroads GPS Group to Run Anti-Obama Ads}, WASH. POST (Apr. 13, 2012), http://articles.washingtonpost.com/2012-04-13/politics/35453282_1_crossroads-gps-mystery-donor-jonathan-collegio ("An anonymous donor gave $10 million to a non-profit organization to run ads attacking President Obama and Democratic policies.").

\textsuperscript{128.} See, e.g., Dan Eggen, \textit{Mystery Pro-Romney Donor Revealed as Former Executive at Private Equity Firm}, WASH. POST (Aug. 6, 2011), http://articles.washingtonpost.com/2011-08-06/politics/35272468_1_pro-romney-paul-s-ryan-mystery-donor (reporting how an individual anonymously gave one million dollars to a super PAC by channeling the money through a shell corporation "which appeared to have no other purpose than making the PAC contribution before dissolving").


\textsuperscript{133.} Sam Stein, \textit{Super PAC Disclosure Requirements Hot Topic of Conversation Among GOP Candidates}, HUFFINGTON POST, http://www.huffingtonpost.com/2012/01/05/2012-election-new-hampshire-supercATS-n_1186413.html (last updated Jan. 5, 2012, 5:32 PM). The quote from the reporter summarizes, accurately, I believe, Ridge's position. Ridge actually said the following: "I think it is within the power of the president and the Congress to say: 'Guess what? Any contribution in excess of
their supporters who protect those loopholes, stating, "They want the right to poison the political atmosphere without being held accountable for their speech."\textsuperscript{134}

In some respects that criticism is warranted. Individuals and organizations are purposely exploiting loopholes to benefit themselves. Sophisticated speakers can take advantage of the loopholes while unsophisticated speakers cannot. All of that may foster corruption.

However, for purposes of voter information, the criticism may be off base. The discovery and widespread use of loopholes to hide identities reduces the magnitude of the revelation effect. The average voter has access to less disclosure information than she would if the loopholes did not exist. Those same loopholes, however, also reduce the chilling effect. It is no coincidence that increased use of loopholes has accompanied an increase in the amount of money spent on politics. According to \textit{The Washington Post}, interest groups spent "five times as much on the 2010 congressional elections as they did on the last midterms, and they [were] more secretive than ever about where that money [came] from."\textsuperscript{135}

Loopholes, then, reduce both the revelation effect and the chilling effect. How those changes net out is unclear. The ability to exploit loopholes in disclosure law may increase speech by enough that, paradoxically, the average voter is left \textit{better} informed. This does not mean that we should leave loopholes in place, but it does mean the informational case for patching them is contestable.

\section*{E. Quality of Speech}

So far, I have argued that because of the revelation and chilling effects, disclosure in the abstract has uncertain implications for the average voter. It may make him more or less competent at the polls. I have done so without taking any position on the quality of speech, a point that deserves explanation.

One may argue that certain forms of speech are of higher quality than others. Not higher in the sense that they convey more information but in an intrinsic sense. A small contribution by an individual to a candidate he sincerely supports, for example, may be of higher quality than an attack ad financed by a narrow interest group. Ideas like that may have influenced the Court in \textit{McIntyre}. The petitioner in that case was a private citizen who composed on her personal computer anonymous leaflets expressing


opposition to a school levy. She was fined for violating a law prohibiting anonymous political pamphleteering. The Supreme Court struck down the law, stating, "No form of speech is entitled to greater constitutional protection than Mrs. McIntyre's." One interpretation of the Court's decision is that speech acts like McIntyre's are of especially high quality and cannot, in most instances, be regulated.

Distinguishing between high- and low-quality speech and the constitutional protection each deserves would be subjective but potentially fruitful. However, I need not take on that challenge because such distinctions do not bear on this Article. The reason is simple: the information tradeoff operates regardless of one's views of high- and low-quality speech. Disclosure ought to provide information by revealing sources and take away information by chilling speech irrespective of the intrinsic quality of the speech at issue.

To be sure, notions of quality could affect the constitutional calculus. The constitutionality of disclosure does not depend exclusively on its informational consequences. A judge who believes the First Amendment prizes speech like McIntyre's might invalidate a disclosure requirement even if it promotes voter competence. Relatedly, notions of quality could affect the reach of the information tradeoff. If one does not care about regulations affecting low-quality speech, however defined, then the tradeoff matters most for high-quality speech. But the tradeoff still matters. Disclosure will chill some high-quality speech and reveal the sources of the rest.

My point, then, is not that notions of quality are entirely unrelated to disclosure. My point is that the information tradeoff does work regardless of one's conceptions of quality.

I conclude on what one colleague called a subversive note. Intrinsic quality and informational content may not overlap. High-quality speech may not make the average voter more competent, and low-quality speech—attack ads, perhaps—may make the average voter much more competent. Even misleading speech could, in the right circumstance, help voters to vote the way they would if they had complete information. I am not condoning

---

137. Id. at 338.
138. See id. at 357.
139. Id. at 347. The Court rejected the government's information interest, stating, "in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the document's message." Id. at 348–49. The Court might have been wrong: forcing McIntyre to disclose her identity might have provided some information to voters, at least to those who knew her and to others who could easily learn about her. See McGeveran, supra note 39, at 26–27 (arguing that disclosure on McIntyre's pamphlets, which after the case was not required, could have provided more information than disclosure of McIntyre's political contributions, which was required).
140. See supra Part II.C.
141. As always, I thank Dan Ortiz for his insight—and for making my work more colorful.
misleading speech, of course. Rather, I am suggesting that a disclosure
regime that maximizes voter competence could be characterized by
surprisingly few high-quality speech acts and many low-quality substitutes.

III. ALTERNATIVE DISCLOSURE REGIMES

Disclosure laws at both federal and state levels rely on coercion.
Individuals and organizations must disclose information about themselves
and their spending or face penalties. Many observers have proposed reforms
to this system. Minor reforms could include changes in the type of
information that must be disclosed. Major reforms involve switching to a
system of coerced anonymity or voluntary disclosure. The information
tradeoff helps us evaluate those options.

A. "SEMI-DISCLOSURE"

Recall that FECA requires contributors to report their name, mailing
address, occupation, and place of business, as well as the size of their
contributions.4- BCRA requires certain electioneering communications to
include the name and address of the person or group that funded them.143
Publicly disclosing some of that information may help the average voter, but
disclosing the rest may not help, or help much. As Professor Bruce Cain
wrote:

While one could imagine the value in knowing that candidate
Jones gets most of his money from oil companies, doctors, or the
SEIU, there is little or no informational gain from knowing the
specific names and home addresses of the company executives,
doctors, or union members who make the contribution.44

If such disclosure provides little information, and "given the potential
dangers of exposing the identities of people exercising fundamental
political rights," it may make sense to embrace what Professor Cain calls
"semi-disclosure."145

Under semi-disclosure, much or all of the information mentioned
above would be reported to the government. That would help ensure
compliance with contribution limits and police corruption. Only some of
that information, however, would be publicly disclosed, and it may be
disclosed in a different form. To illustrate, the names, addresses, and
occupations of most or all individuals could remain private. Voters could,
however, access aggregate information, such as data on how much money

142. See Buckley v. Valeo, 424 U.S. 1, 63–64 (1976) (per curiam).
144. Bruce Cain, Shade from the Glare: The Case for Semi-Disclosure, CATO UNBOUND (Nov. 8,
145. Id.
came from how many speakers in a particular ZIP code, their general occupations (doctor, lawyer) as opposed to specific occupations (doctor at hospital X, partner at firm Y), and maybe even their income brackets.\textsuperscript{146} Several observers have promoted reforms of this nature.\textsuperscript{147}

The information tradeoff helps clarify the logic of semi-disclosure, at least with respect to voter competence. Moving to semi-disclosure may reduce only slightly or even leave unchanged the revelation effect; the failure to disclose specific information about names and addresses may not cost voters much information. Furthermore, semi-disclosure may reduce, perhaps substantially, the chilling effect. Persons and groups whose speech is chilled by current laws may speak under semi-disclosure. That combination could lead to a net increase in the information available to and the competence of the average voter.

This logic is consistent with the general prescription developed in Part II: governments should require more disclosure until the marginal benefit from source revelation is equal to the marginal loss from chilled speech. Achieving that balance may require less disclosure than the law currently mandates, and it may require different forms of disclosure. It is doubtful that the status quo gets the tradeoff just right.

The informational case for semi-disclosure is not certain. Failing to disclose contributor names, for example, may cost a lot of information—not because most voters recognize most contributors' names, but because many voters may recognize some contributors' names. Failing to disclose addresses may have the same effect. Addresses may help voters find friends, neighbors, and others whose political spending sends helpful cues. With respect to the chilling effect, we do not know how many new speech acts would take place if some type of semi-disclosure were adopted or if those new speech acts would convey a lot of information or only a little. Simply put, we cannot say in the abstract whether semi-disclosure—or, perhaps more accurately, what forms of semi-disclosure—would outperform the status quo.

\textbf{B. CoERced ANonymity}

A decade ago Professors Bruce Ackerman and Ian Ayres advocated laws to mandate anonymity in campaign finance.\textsuperscript{148} Under their approach, individuals and organizations could make contributions to candidates for office, and those actors could accept the contributions.\textsuperscript{149} Those actors

\textsuperscript{146} To be clear, Professor Cain does not necessarily support all of these possibilities. \textit{See id.}

\textsuperscript{147} \textit{See, e.g.,} Scott M. Noveck, \textit{Campaign Finance Disclosure and the Legislative Process}, 47 \textit{Harv. J. on Legis.} 75 (2010); David Lourie, Note, \textit{Rethinking Donor Disclosure After the Proposition 8 Campaign}, 83 S. Cal. L. Rev. 133 (2009); Cain, \textit{supra} note 144.


\textsuperscript{149} \textit{See AckerMAN & AyRES, supra note 148, at 6, 25-44.}
could not, however, learn the identities of contributors. Instead, money would flow through a "blind trust." Individuals and organizations could tell political actors they contributed to them, but those actors could never verify such claims. Ackerman and Ayres argued that anonymity would disrupt the market for political influence by making it difficult for politicians to know who supported them and, therefore, who to reward.

Ackerman and Ayres were concerned with corruption, broadly defined, rather than voter information. Nevertheless, their proposal merits attention in this Article. Their ideas continue to attract attention and support and they have implications for voter competence.

At first blush, anonymity would appear to undercut voter information. That is the view of Professor Garrett. She argues that in various circumstances "mandatory disclosure of the source and amount of campaign spending can provide [a] vital voting cue," and that "Ackerman and Ayres would deny voters this information." In the same vein, Professor Briffault writes, "anonymity would deprive the voters of the information they currently obtain from campaign finance reports."

The information tradeoff clarifies this position: anonymity diminishes the revelation effect. Reducing voters' knowledge about the sources of speech reduces their information about candidates and their ability to vote.

150. See id. at 6, 25–30.
151. See id.
152. See id.
153. See id.
154. See id. See also Briffault, supra note 19, at 296 ("Ackerman and Ayres treat disclosure as entirely about promoting the anti-corruption goal and completely ignore its voter-information value ... ."); Garrett, supra note 112, at 1013 ("Ackerman and Ayres spend only one page ... discussing the literature on voter competence and disclosure, and do so in a surprisingly incomplete way.").
156. Garrett, supra note 112, at 1037. Garrett's criticism is about anonymity in general. There are particular features of the Ackerman and Ayres proposal, distinct from anonymity, that she thinks could generate voter information. See id. at 1038 ("In a limited way, however, the Ackerman and Ayres proposal improves voter competence by making certain relevant information available in an especially salient way. Information about the ratio of vouchers to money that each candidate receives may serve as the basis for a voting cue that seems to improve voter competence ... ").
157. Briffault, supra note 19, at 296.
competently. If anonymity works perfectly and there are no cracks in the system, the revelation effect will fall to zero.\textsuperscript{158}

As the tradeoff makes clear, however, there is another side to the equation: the chilling effect. If disclosure chills speech, because would-be speakers fear exposure, then anonymity should thaw it.\textsuperscript{159} Without fear of exposure—serious penalties would attach to anyone who violated the secrecy of the trust—actors could speak freely.

Anonymity, then, should decrease both the revelation effect and the chilling effect. The net effect of those changes is unclear. In the right circumstance, the average voter might prefer an anonymity regime characterized by lots of speech but no disclosure to a different regime with less speech and some disclosure. Paradoxically, anonymity might inform the electorate.

C. VOLUNTARY DISCLOSURE

Rather than coercing speakers to disclose information or to remain anonymous, we might make disclosure voluntary. Speakers who wish to make public information about themselves and their political spending could do so, and speakers who wish to remain anonymous could do so as well.\textsuperscript{161} That approach would allow “campaigns and contributors [to] freely weigh the real costs and benefits of disclosure and anonymity” on a case-by-case basis rather than adhering to a uniform, “government-imposed” system that ignores potentially relevant distinctions among speakers.\textsuperscript{162} By eliminating “burdensome red tape,”\textsuperscript{163} this approach would also reduce the chilling effect.

A skeptic might argue that no one will voluntarily disclose, so in practice this approach will be indistinguishable from a regime of coerced anonymity, but there are two reasons to think otherwise. First, anonymous speech may harm the individuals and causes that it is intended to help.

\textsuperscript{158} Under the Ackerman and Ayres proposal, actors engaging in independent expenditures could identify themselves, and do so credibly, leaving gaps in the anonymity regime. See ACKERMAN & AYRES, supra note 148, at 118–27. They had ideas for mitigating that problem. See id.

\textsuperscript{159} This would seem to follow naturally from the Supreme Court’s doctrine and the surrounding literature, all of which assume that disclosure chills speech. Ackerman and Ayres do not agree. See id. at 30 (arguing that “anonymity will predictably reduce the total amount of private dollar contributions”).

\textsuperscript{160} See id. at 99–100.

\textsuperscript{161} Under Ackerman and Ayres’s proposal, disclosure would be voluntary in the sense that speakers could remain silent or they could choose to tell politicians they had supported them, but politicians could not verify that support. See id. at 25–30. A voluntary disclosure regime would differ in that speakers could tell politicians they had supported them \textit{and prove}, through one mechanism or another, that they had done so.

\textsuperscript{162} CARPENTER II, supra note 7, at 14.

\textsuperscript{163} PRIMO, supra note 119, at 20.
Candidates who receive anonymous contributions may be accused of backroom dealing, of hiding important information, or even of corruption. They may face pressure to disclose their supporters, and their supporters, fearful of tarnishing their candidate, may stop spending anonymously.

Second, some actors welcome publicity. Disclosure might, in the main, chill speech, just as conventional wisdom holds, but that does not mean disclosure chills every actor's speech. Some may benefit from disclosure. Disclosure may “demonstrate[] that big givers are . . . powerful in the political process,” and “disclosure that a candidate has received large donations shows that she is being backed by powerful political forces.” Those are positive signals that disclosure sends. More mundanely, one may welcome disclosure simply because one wishes to associate publicly with a candidate or a set of beliefs.

With those ideas in mind, I apply the information tradeoff to voluntary disclosure. Unlike an anonymity regime, under which the revelation effect would fall to zero, voluntary disclosure would probably come with a positive revelation effect. Some actors would choose to disclose, and that disclosure would produce some information for the average voter.

As for the chilling effect, there are two possibilities. First, voluntary disclosure could eliminate the chilling effect. No one would be forced to disclose, so no one would be deterred from speaking. Thus, voluntary disclosure would produce at least the same number of speech acts as coerced anonymity. It might even produce more; actors who welcome publicity may speak under voluntary disclosure but remain silent under coerced anonymity. In such circumstances, voluntary disclosure would perform better than anonymity. It would produce the same or more speech while revealing more sources.

Second, voluntary disclosure may come with a weak chilling effect. Even if they technically had the option to remain anonymous, some would-be speakers may feel pressure to disclose, and faced with that choice, they may remain silent. In that event, voluntary disclosure and coerced anonymity would be difficult to compare. The former regime would be characterized by more source information but less speech, and the latter would have the opposite virtues and vices.

In the abstract, it is impossible to know whether voluntary disclosure or coerced anonymity would better inform the average voter. The same goes.

164. See Carpenter II, supra note 7, at 14; see also Mike Allen, Obama Campaign to Focus on Romney "Secrecy," POLITICO (Apr. 16, 2012, 7:27 AM), http://www.politico.com/playbook/0412/playbook1758.html (David Axelrod, an adviser to President Obama, publicly stated, “George Bush felt it was appropriate to release the names of his bundlers. John McCain did. But not Mitt Romney. . . . ‘Who is this guy? What does he stand for? What does he believe? What do we know about him?’”).

165. Briffault, supra note 19, at 287.
for the coerced disclosure regime that we currently employ. Coerced disclosure probably reveals more source information but chills more speech than either of the alternatives. That leads to a mix of information that may be better or worse for the average voter.

That conclusion may be more striking than it first appears. We cannot be confident that our current system of coerced disclosure, founded on the information interest, provides more information than a completely voluntary system or even a system of coerced anonymity.

One might react by calling for voluntary disclosure. If we cannot be sure that coercion works better, and given that coercion is costly to administer and enforce, a voluntary system would seem superior. I am not prepared to take that position. My analysis shows that a voluntary approach can perform better, but it does not reveal the probability that it will perform better. One would need information on that probability before calling confidently for the repeal of existing laws and the embrace of a voluntary system.

IV. DISCLOSURE THAWS SPEECH

Conventional wisdom holds that compelled disclosure chills speech. That risk provides the basis for First Amendment challenges to disclosure. It animates the academic and policy debate about disclosure. It provides a linchpin for my analysis thus far and for the analyses of nearly everyone else who has weighed in on the issue, judges included. It also might be wrong.

Wise investors consider at least three factors before committing money to an enterprise: the cost of the investment, the likelihood that it will yield a profit, and the size of that profit. If the probability of a profit multiplied by the size exceeds the cost, then the investment is sound. Individuals, corporations, super PACs, and others might consider analogous factors before investing money in political speech. They might consider the cost of the speech, the probability that the speech will lead to the desired outcome (typically the election of a candidate who will pursue favored policies or exercise judgment in a way that the speakers support), and the value of that outcome to the speakers. If the probability of achieving the desired outcome multiplied by the value exceeds the cost, then investing in political speech makes sense.\footnote{166}

Observers focus on the relationship between disclosure and the first of those factors: the cost of speech. By forcing individuals and groups to learn and comply with regulations, and by forcing them to publicly reveal their identities, compelled disclosure raises the cost of speech. If the cost of investing in a business goes up, the attractiveness of the investment goes

---

\footnote{166. I am simplifying. The focus should be on the marginal increase in the probability of achieving the desired outcome that results from the speech act, and that marginal increase would be hard to calculate because it would depend in part on others' decisions to engage or not in political speech.}
down. So too with investments in politics, and hence the conventional wisdom that disclosure chills speech.

A critical assumption underpins that analysis: disclosure raises the cost of speech while leaving the other factors unchanged. That might be wrong. Disclosure might increase the probability that speech will lead to the realization of the speaker's desired outcomes. It might also increase the value of those outcomes. Either way, disclosure can lead to a net increase in speech.

A. DISCLOSURE AND CREDIBILITY

Presumably, the objective of many speakers is not to elect a particular candidate but rather to further particular policies. Candidates are just means to that end. Consequently, would-be speakers face a question: what is the probability that my contemplated speech act will lead to my desired policy outcome? This question has two components. First, by how much will my speech act improve my preferred candidate's prospects? Second, if that candidate wins, how likely is she to pursue policies or otherwise exercise judgment in a way that I favor?

Would-be speakers usually have some information about that second question. Typically they have statements, speeches, and promises from the candidate. They might have a record of the candidate's past votes or decisions on relevant policy issues. They might see endorsements of a candidate by other, better-known politicians or personalities who share the speaker's policy priorities. This information gives them some sense of how likely the candidate is to pursue favored outcomes.

Disclosure can provide additional information in this regard, at least for candidates with experience in office. By consulting detailed records of contributions and expenditures made on behalf of the candidate, would-be speakers can more accurately assess the candidate's credibility. They can see, for example, if she has routinely pursued policies the speakers who supported her favor. If the answer is yes, would-be speakers may infer that the candidate is more credible than they previously thought. That means engaging in a supportive speech act would be more likely to yield the outcomes they desire, and that may induce them to engage in more speech.

To illustrate with an example, suppose I wish to contribute to a candidate who will enact policies to combat climate change. Two candidates have supported such policies in the past, and both promise to do so in the future. I am not sure, however, if I can trust them. Public sentiment on the
issue has shifted, and they may renege on their commitments. I am hesitant to support either.

Now suppose I can access the disclosure records of both candidates. I see that the first candidate has received more and more support from the coal industry every year he has been in office. The second received support from the coal industry in the past but now receives none. The first candidate looks like a potential flip-flopper; he may change his mind on climate policy anytime. The second candidate, on the other hand, looks like a safe bet. She is not, apparently, under pressure from the coal industry, perhaps because the industry realized over time that her environmental commitments are unshakeable. I am now confident that, if elected, she will pursue the policies I favor. I am so confident, in fact, that my cost-benefit calculation flips and I decide to make a contribution to her. In this scenario, disclosure has facilitated speech.

In that example, disclosure revealed that a candidate was more credible than previously supposed. It could also reveal the opposite. Suppose that I had planned to engage in speech acts on behalf of both of the candidates who promised to combat climate change, only to discover that both have received substantial financial support from coal companies every year. Neither candidate seems as credible on this issue as I had thought, and I choose not to speak. In this scenario, disclosure chilled speech, but it did so for an unconventional reason. The would-be speaker was not deterred by onerous regulations or fear of exposure. He was deterred because disclosure led him to conclude that his speech acts were not worthwhile.

So far I have argued that disclosure can provide information about the credibility of candidates. But it can do more. It can change candidates' credibility. A candidate might, in a private meeting, promise to pursue various policies. Attendees who support those policies may then engage in speech acts on the candidate's behalf. If the candidate wins the election but does not pursue the policies, he suffers some harm. The attendees may not support him again, but others who did not attend the meeting and observe the broken promise might.

Disclosure changes the picture. Now would-be speakers can observe the attendees' support and the support of others by consulting public disclosure records. In many cases, they can also observe the candidate's subsequent actions. If would-be speakers recognize that the candidate's actions did not further the interests of those who supported him in the past, they may infer that the politician is not credible. A disclosure record revealing many one-time speech acts supporting the politician but few repeat acts may give rise to the same inference. That may dissuade would-be speakers from supporting the candidate. Because of that risk, the candidate has a stronger incentive to keep his original promise. That incentive increases his credibility, which increases the expected value of speech acts on his behalf, inducing more speech.
There is another layer of complication. If candidates recognize that disclosure provides information about their credibility, and if a reputation for being credible has value, then candidates may make fewer promises than they would without disclosure. This phenomenon could affect the supply of speech. Because there are fewer promises to go around, speakers might focus on fewer politicians than before but engage in more speech acts on behalf of each one, leading to a net increase in speech.

To this point, I have focused on the relationship between disclosure and the credibility of candidates. Now I consider the credibility of speakers. A candidate can consult disclosure records and see if speakers who have asked the candidate to take certain actions have supported candidates who pursued those speakers’ interests in the past. If the candidate discovers such support, he has a greater incentive to pursue the speakers’ interests because he knows that he will be rewarded. As candidates improve their knowledge of speaker credibility and change their behavior in response, speakers can be expected to respond with changes in speech.

To illustrate with an example, suppose a congresswoman has an opportunity to either vote for or against agriculture subsidies. Farmers’ groups approach her and encourage her to vote in favor. She consults disclosure records and learns that these groups, despite their longevity and resources and the many congressional votes on subsidies over the years, have never made contributions or expenditures to support a candidate. She votes against the subsidies. In the next election, in order to encourage the politician to support future subsidies, the group engages in speech acts on her behalf. Alternatively, or in addition, those groups might engage in speech on behalf of a different politician or a competing candidate for office. Either way, those groups engage in speech acts that may never have materialized but for disclosure.

To conclude, compelled disclosure can reveal—or even induce—greater-than-expected credibility by candidates. It can also reveal or induce greater credibility by speakers. Such information can change the expected value of speech. When it raises that expected value, disclosure can increase speech. It can do so even after factoring in the burdens on speech that flow from disclosure.

B. Disclosure and Policy Value

Recall the third factor in an investor’s cost-benefit calculus: the size of the profit. If the cost of the investment and the probability of earning a profit remain fixed and the size of the hoped-for profit increases, the investment looks more promising. More people should be willing to invest. Similarly, if the cost of speech and the probability of achieving the desired outcome do not change and the value of achieving the outcome increases, more speakers should be willing to speak.
The value to speakers of achieving a particular outcome may increase if their preferences change. It also may increase if speakers discover that the outcome they hope to promote is closer to their ideal outcome than they realized. Disclosure can uncover such information.

I illustrate with an example. Suppose I am a political centrist, and I have to choose from two candidates, one Democrat and one Republican. I believe the former is too liberal and the latter too conservative. Consequently, I do not expect either candidate to deliver my favorite policies. My task is to identify and vote for the candidate who will deliver my second-favorite—as opposed to third-favorite—policies. In pursuing this goal, I take advantage of disclosure: disclaimers on television and Internet ads, records of who contributed to each candidate, and so forth. I discover that a variety of centrist individuals and organizations I trust support the Republican. This changes my priors, and now I believe the Republican will pursue my favorite policies. The value to me of electing the Republican has risen, and the incentive to speak on his behalf has strengthened. Disclosure has facilitated speech.

Note the overlap between these ideas and the government's information interest. As the Court put it in Buckley, disclosure "allows voters to place each candidate in the political spectrum more precisely." That helps voters decide not only whom to support, but also how strongly to support them. That second effect has been overlooked, but it is important to the debate. It can facilitate speech by actors who otherwise would have remained silent. That means disclosure can increase speech.

Of course, disclosure does not necessarily increase speech. In the example, disclosure revealed that the Republican candidate was more centrist than supposed, and that caused a centrist voter to engage in speech on his behalf. That same revelation could cause conservatives who otherwise would have spoken to refrain from speaking on the candidate's behalf. Whether disclosure increases speech overall requires a weighing of those effects. If the disclosure deters more people from speaking than it inspires to speak, disclosure will decrease speech. It will do so for reasons unrelated to the chilling effect.

There are other possibilities. The revelation that the Republican candidate is centrist could cause some strong conservatives to speak more than ever. Their speech might be directed against both candidates rather than just the Democrat. It may take the form of contributions to a more extreme Republican in the primary election. If the primary is over, it may take the form of expenditures on issue ads that try to persuade the centrist Republican to embrace more conservative positions. In any event, it would constitute new speech—speech that would not have happened but for disclosure.

All of the effects I have discussed may operate at once, making it
difficult to determine whether disclosure actually, on balance, increases
speech. That does not undermine my point. I do not claim that disclosure
always increases speech. I simply claim that it can.

C. CAN THE MARKET FILL THE GAP?

To argue that compelled disclosure thaws speech is to argue that a
world with compelled disclosure produces more speech than a world
without it. Thus, I am implicitly comparing compelled disclosure to an
unregulated baseline. Recognizing that begs a question: could the market
fill the gap? In the absence of compelled disclosure, would private
mechanisms arise that would provide the same information that compelled
disclosure can provide?

One impediment to a market solution is enforcement. Compelled
disclosure comes with penalties for noncompliance: if you fail to disclose you
could pay a fine or go to jail. The market cannot impose such concrete
penalties. It may be able to impose reputational penalties, but they may be
less effective. They probably would not apply to all actors. Would a retired
billionaire, for instance, care if his failure to disclose diminished his status?
With hundreds of thousands of potential speakers, it may be difficult to keep
track of reputational effects. This is all to say that a private market probably
would be characterized by less disclosure.

A related impediment relates to verifiability. Compelled disclosure leads
to the dissemination of campaign finance information via a relatively neutral
third party—at the federal level, the FEC. We can have some confidence that
FEC reports are accurate. Without compelled disclosure, information would
be disseminated through private channels, and they would arguably be
subject to greater manipulation.

There is at least one market mechanism that can and likely sometimes
does substitute for disclosure: lobbying. At the federal level, politics is
generally professionalized. Many speakers and candidates are sophisticated
repeat players. They employ or have access to lobbyists and other insiders
who can provide detailed information about speakers’ and candidates’
credibility and positions. In that case, disclosure may not provide much
additional information. Even that, however, is not certain. Lobbyists and
insiders have their own interests, and in a range of circumstances they may
be no more trustworthy or transparent than speakers and candidates
themselves. A thorough disclosure record may be better. That may be
especially true at state and local levels where politics is less professionalized.

I have not considered all potential market mechanisms, and it would be
fruitful to pursue this issue further in future work. For now I argue with
confidence that it is certainly possible, and perhaps likely, that compelled
disclosure provides speech-promoting information that an unregulated
market cannot.
D. IMPLICATIONS OF THE THAWING EFFECT

For the foregoing reasons, I believe that disclosure can increase speech. I do not mean the speech of all actors—though theoretically it could increase everyone’s speech—but rather speech in the aggregate. By thawing the speech of some, even as it chills the speech of others, disclosure can increase speech overall. That has many potential implications for the debate, some of which I outline here.

I begin by focusing on challenges to a disclosure law. The government does not have to defend a disclosure requirement unless someone challenges it. Right now one can challenge such requirements easily. One need only identify a disclosure law and claim that it burdens speech either on its face or as applied to him or her specifically. If disclosure can increase speech, however, then perhaps one should not be able to bring challenges so readily. Perhaps one should not be permitted to claim that disclosure chills speech across the board when it might, in fact, thaw speech across the board.

Interestingly, a challenger may not even be able to show that disclosure chills his own speech—not easily anyway. To convincingly make such a claim, one must do more than argue that disclosure imposes a cost on one’s speech. One must argue that disclosure imposes a net cost on one’s speech. One must explain why the same disclosure law that burdens a contemplated speech act by requiring the speaker to identify himself does not by a greater amount facilitate—that is, bring closer to fruition—that same speech act by revealing information about a politician’s credibility and policy positions.

That reasoning upends legal doctrine and conventional wisdom. It suggests that courts should approach challenges to disclosure with greater skepticism. Given that the thawing effect may dominate, perhaps courts should not reflexively credit arguments about the chilling effect.

Now I consider the relationship between the thawing effect and the information interest. Recall that in *Citizens United* the Supreme Court seemed to treat the information interest as a trump, as if disclosure usually or always helps inform the average voter. The information tradeoff uncovers a problem with that position: by chilling speech, disclosure can actually reduce the information available to the average voter. If disclosure thaws speech, however, the tradeoff disappears. Disclosure provides information by revealing sources and increasing the number of speech acts.

170. It might change the distribution of speech as well. The typical speech act under a no-disclosure regime might look quite different from the typical act under a coerced-disclosure regime. In other words, by chilling some speech acts and thawing others, disclosure might change not only the amount of speech that takes place but also the character and content of the speech. It is difficult to assess the importance of this effect without making explicit assumptions about the character of speech under both regimes and assigning social value to each. That is outside the scope of this Article.

171. *See supra* Part I; *see also supra* notes 97–99 and accompanying text.
The average voter gains information in two ways and loses information in none. The information interest grows stronger.

Not everyone agrees that the information interest justifies disclosure. Some believe coerced disclosure violates the First Amendment regardless of whether it informs voters. They hold that view because they understand the First Amendment to focus on speaker autonomy, not on information for society as a whole.\(^\text{172}\) The thawing effect has implications for that line of reasoning too. If disclosure thaws speech, it does so by helping actors identify their preferred candidates and policies and speak in favor of them with greater certainty and accuracy. That thawing would seem to empower speakers and to help them exercise their autonomy. To oppose a disclosure requirement on the ground that it undercuts speaker autonomy is to prize the autonomy of the speaker bringing the claim over the autonomy of others whose speech disclosure facilitates.

V. NEXT STEPS: DISCLOSURE AS REGULATORY PROBLEM

Thus far I have explained why two pillars of conventional wisdom—disclosure informs voters and disclosure chills speech—are wrong at least some of the time and maybe often. Those arguments scramble our intuitions about disclosure. Where should we go from here?

We could reorient the debate by shifting focus from consequences to values. Perhaps we should not understand the government's information interest to focus on instrumental outcomes like voter information and competence, which disclosure does not necessarily promote, but rather on values like transparency. Conversely, we could frame the problem with coerced disclosure not in terms of the chilling effect but in terms of privacy and autonomy. I do not find that approach satisfactory. Common sense and decades of precedent tell us that consequences, however difficult to ascertain, matter in this debate, and values, though easier to identify, cannot resolve it. Observers would clash over the weight to accord transparency and autonomy, and orienting the debate around them would lead to more disagreement.

A better approach would involve confronting directly the problems I have identified. This Article has shown that disclosure has complicated consequences, but that does not mean they are indeterminate, that we can never know if a given disclosure requirement helps or hurts. It simply means we must take greater care when assessing disclosure.

In *United States v. Carroll Towing Co.*, Judge Learned Hand introduced the famous Hand Rule for determining negligence in torts.\(^\text{173}\) The rule does

---

\(^{172}\) Justice Thomas appears to embrace that position. Dissenting in part in *Citizens United*, he argued that the First Amendment protects “the right to anonymous speech.” *Citizens United v. FEC*, 130 S. Ct. 876, 980 (Thomas, J., concurring in part and dissenting in part) (internal quotation marks omitted).

\(^{173}\) See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).
not provide a concrete answer in any given case, but it does organize the inquiry in conceptually helpful ways—so helpful, in fact, that the rule is enshrined in the American Law Institute’s Restatement of Torts.174 Comparing the great with the small, my analysis cannot determine the consequences of a particular disclosure law, but it can clarify the inquiry in ways that sharpen our intuitions and reveal when we need more information.

Suppose we are given a disclosure law and asked to assess its implications for voter competence. The first question is whether the law chills or thaws speech. That turns on three factors: whether the law, by providing information about credibility, changes speakers’ assessments of the likelihood that their speech acts will translate to their desired outcomes; whether the law, by revealing information about candidates’ positions and policies, changes the value speakers place on achieving their desired outcomes; and to what degree the law imposes costs on speech through administration, compliance, and exposure.

If the law targets high-dollar speakers who are sophisticated repeat players with access to lobbyists and other insiders, it likely does not provide much additional information about credibility or outcomes. It probably does, however, impose costs on speech. On balance, then, it likely chills speech. If the law targets small-dollar speakers who are less sophisticated, then it might provide a lot of information with respect to factors one and two that encourages those actors to speak. If the costs of disclosure to small-dollar speakers are low—campaigns handle disclosure of their contributions, and they do not fear having their identities publicized along with tens of thousands of others—then disclosure probably thaws speech. If the law targets both high- and low-dollar speakers, or if the law affects them in ways different from what I have suggested, then, of course, the inquiry becomes more complicated.

If disclosure thaws speech, then we might presume it improves voter competence, producing more speech acts while revealing the sources of speech.175 If disclosure chills speech, then we must confront the information tradeoff. How does the information and competence gained from source revelation compare to that lost through chilled speech?

If the chilled speech consists entirely of attack ads, and if we believe such ads typically mislead voters, then we might conclude the balance tips in favor of disclosure. The law chills low-information speech while revealing helpful information about sources. If the law chills contributions that campaigns use to produce misleading speech, then the balance again favors

---


175. Even this is contestable, of course. Additional speech acts may undermine competence by confusing voters. See supra note 73 and accompanying text.
disclosure. If the law chills mass-media broadcasts that disseminate general but helpful information about candidates while revealing the identities of largely unknown and thus less helpful small-dollar speakers, then the balance tips against disclosure. All of those intuitions, though necessarily speculative in an abstract discussion, are sharper than the existing intuitions that drive the debate, and they could be further refined with more facts and research about particular disclosure laws.

Social scientists have done some work in this regard. They have shown that simple cues—like knowing the sources of speech—can increase voter competence in certain circumstances. But those studies cannot resolve the issue. If disclosure chills speech, then the question is not whether source revelation provides information to the average voter. The question is whether the gains from that information outweigh the losses from chilled speech. Researchers could get at that question with experiments involving some voters who get lots of speech acts but few sources and others—the treatment group, the group operating under a simulated compelled-disclosure regime—who get fewer speech acts but more sources.

Researchers could also step out of the laboratory. They could compare jurisdictions without disclosure laws to otherwise comparable jurisdictions with disclosure laws. They could gather data on the number and type of speech acts across jurisdictions. They could not do that for all speech acts; many acts in jurisdictions without disclosure would be unobservable. They could, however, gather information on some speech acts like broadcast advertisements. They could survey voters to determine whether the advertisements, with and without source disclosure, contribute to their competence. None of this work would be easy or conclusive, but it could gradually improve our understanding of the effects of disclosure.

My main point is simple. I do not intend in this Article to suggest that the effects of disclosure are necessarily indeterminate and that we should abandon the inquiry. Instead, I intend to advance the debate by moving past conventional and, as I have shown, contestable assertions about those effects. I mean to pinpoint with much greater specificity exactly what we do and do not know about disclosure and, in so doing, to pave the way for future work. Scholars could carry out such work, or it could be carried out by agencies.

Many important and politically charged areas of law, including areas with constitutional dimensions, involve cost-benefit determinations. Those determinations are difficult, and they change with changing circumstances. We often ask administrative agencies to make those determinations, not because they are perfect at it, but because they are better than alternative decision-makers like legislators and judges who lack specialized knowledge and training. To date, disclosure has been largely conceived, at least among

176. For an introduction to this work, see supra note 64.
legal scholars, as a question courts should resolve relying on assertions and constitutional values. But perhaps we should reframe matters. Perhaps disclosure is better understood as a regulatory problem that requires the kind of careful, contextual cost-benefit analysis that characterizes other areas of law.

CONCLUSION

Vast sums were spent on political speech throughout the 2012 election.\(^\text{177}\) The sources of much of that money have not been disclosed, leading to widespread consternation.\(^\text{178}\) A recent editorial by former senators argued that voters “are unable to get the information [they] need to decide who should represent [them] and take on our country’s challenges.”\(^\text{179}\) Opponents of disclosure take a different view. Senator Mitch McConnell, for example, argues that disclosure can “intimidate others from participating in the [political] process.”\(^\text{180}\) As this Article has shown, the core assumptions behind those positions—disclosure informs voters, disclosure chills speech—are wrong at least sometimes, and maybe often.

I conclude by relating my ideas to the arguments made by the partisans, public-spirited ones included, who engage in this debate. For advocates of disclosure—at the moment a position associated mostly with the political left—the information tradeoff suggests that disclosure may not help. The very disclosure they hope will inform voters and clean up American politics could, in certain circumstances, leave voters less competent than before. Blind calls for more disclosure across political contexts are hard to justify. For opponents of disclosure—now a position embraced mostly by the right—this Article suggests that disclosure may not hurt. Disclosure can thaw speech. When it does, it protects and promotes exactly that First Amendment freedom of expression that disclosure’s opponents hold dear.

\(^\text{177}\). See, e.g., Tom Hamburger, Manic Spending Marked End of 2012 Campaigns, FEC Reports Show, WASH. POST (Dec. 6, 2012), http://articles.washingtonpost.com/2012-12-06/politics/35673810_i_fec-reports-show-sheldon-adelson-final-report (reporting that $6 billion was spent on the 2012 election).

\(^\text{178}\). See, e.g., Ron Wyden & Lisa Murkowski, Our States Vouch for Transparent Campaign Financing, WASH. POST (Dec. 27, 2012), http://articles.washingtonpost.com/2012-12-27/opinions/36030576_i_corporations-and-political-organizations-federal-political-activity-campaign (“[U]nregulated political cash stemming from the Supreme Court’s 2010 Citizens United decision spawned a particularly vitriolic political cycle. Groups on both sides dumped some $6 billion into tearing down candidates for public office. The anonymity of much of this spending encourages ads that lower the level of political discourse and makes it harder, not easier, for Americans to make informed decisions.”).


The challenge for all is to dig deeper into the effects of disclosure. It is not a simple, predictable policy instrument. It has complicated consequences that we are only beginning to grasp.