DISCLOSURE'S LAST STAND? THE NEED TO CLARIFY THE "INFORMATIONAL INTEREST" ADVANCED BY CAMPAIGN FINANCE DISCLOSURE

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Disclosure enjoys a unique position within the spectrum of campaign finance regulation. It is the only regulation that courts have looked upon with consistent approval. Since Buckley v. Valeo*, courts have upheld disclosure requirements as advancing an "informational interest"—very broadly defined as the interest in educating voters about the sponsors behind political messages. Disclosure's informational interest has been deemed sufficient to outweigh its incidental burdens on speech, something that interests advanced by other forms of campaign finance regulation have failed to do. Yet despite the goodwill, after* Citizens United*, disclosure seems to be on the defensive as advocates against campaign finance regulation turn their attention to disclosure.*

This Note argues that since Citizens United*, courts have differed in their application of disclosure's informational interest and that the phrase has been used to embody several different strands of disclosure's informative benefits. This inconsistency, compounded with growing theoretical pressures arguing that disclosure's ability to educate the public is greatly overstated, puts disclosure on shaky First Amendment footing. If left unresolved, this uncertainty presents problems for states seeking to craft campaign-related disclosure statutes. In response, this Note proposes that placing a greater emphasis on disclosure's ability to elevate discourse—both in terms of the volume of speech that is generated and the depth of the discussion that is produced—can provide a more robust justification for future reform.*

INTRODUCTION

During the 2017 nomination of Justice Neil Gorsuch to the Supreme Court, the Judicial Crisis Network (JCN) spent approximately $10 million on television advertisements pushing the Senate to confirm President Donald Trump's nominee.[1] The group had earlier spent $7 million to

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1. Jeremy W. Peters, Conservative Groups Unify to Push Neil Gorsuch's Confirmation, N.Y. Times (Feb. 1, 2017), https://www.nytimes.com/2017/02/01/us/politics/neil-gorsuch-conservative-confirmation.html?_r=0 (on file with the *Columbia Law Review*).

block President Barack Obama's choice, Merrick Garland.[2] Because it was registered as a 501(c)(4) "social welfare" nonprofit, JCN could spend unlimited amounts of money on such advocacy without having to disclose the source of its funding.[3] JCN's mandatory 2015–2016 tax disclosure showed that it received just three donations in total during that period and that 96.6% of its revenue came from a single group that contributed $23.4 million.[4] That group was later revealed to be The Wellspring Committee—itself a 501(c)(4) nonprofit—which in turn received over $32 million in donations in 2016, with $28.5 million coming from a single, anonymous donor.[5] Similar "dark money"[6] organizations spent at

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2. Richard Wolf, Big Money Behind Supreme Court Nominee Neil Gorsuch Shows Little Payoff, USA Today (Mar. 30, 2017), https://www.usatoday.com/story/news/politics/2017/03/30/big-money-behind-supreme-court-nominee-gorsuch-little-payoff/99790864/ [https://perma.cc/ML22-UY9F].

3. See Abby K. Wood, Show Me the Money: "Dark Money" and the Informational Benefit of Campaign Finance Disclosure 2 (Univ. of S. Cal., Legal Studies Working Paper Series, Paper No. 17-23, 2017), https://www.ssrn.com/abstract=3029095 (on file with the *Columbia Law Review*) (noting that 501(c)(4) and 501(c)(6) organizations are able to "make unlimited expenditures in elections" and that "[t]hey can receive unlimited contributions from individuals, corporations, and unions, and they do not have to disclose the sources of their money"); see also Sean Sullivan, What Is a 501(c)(4), Anyway?, Wash. Post (May 13, 2013), https://www.washingtonpost.com/news/the-fix/wp/2013/05/13/what-is-a-501c4-anyway/?utm_term=.875d5a327edb (on file with the *Columbia Law Review*) (explaining that the key difference between "super PACs" and 501(c)(4) organizations is that the latter do not need to disclose their donors to the public).

4. Andrew Perez & Margaret Sessa-Hawkins, Tax Returns Identify Dark Money Organization Source of GOP Supreme Court Attacks, MapLight (Nov. 21, 2017), https://maplight.org/story/tax-returns-identify-dark-money-organization-as-source-of-gop-supreme-court-attacks/ [https://perma.cc/H9L7-ZD48]; Margaret Sessa-Hawkins & Andrew Perez, Dark Money Group Received Massive Donation in Fight Against Obama's Supreme Court Nominee, MapLight (Oct. 24, 2017), https://maplight.org/story/dark-money-group-received-massive-donation-in-fight-against-obamas-supreme-court-nominee/ [https://perma.cc/4YC6-E2VE].

5. See Wellspring Comm. Inc., Return of Organization Exempt from Income Tax (Form 990), at 14 (2016), https://www.documentcloud.org/documents/4255468-Wellspring-Committee-2016.html (on file with the *Columbia Law Review*). Because 501(c)(4)s like JCN do not have to disclose the source of their funding, the source of JCN's revenue might have remained a mystery. The Wellspring Committee was revealed as the previously anonymous donor to JCN only after Wellspring disclosed on its own IRS forms that it had donated to JCN. However, Wellspring's $28.5 million single donor remains anonymous.

6. "Dark money" generally refers to political spending by groups that are funded by undisclosed sources. Richard Briffault, The Supreme Court, Judicial Elections, and Dark Money, 67 DePaul L. Rev. 281, 282 (2018). This type of spending is generally financed through nonprofit 501(c)(4) "social welfare," 501(c)(5) "union," and 501(c)(6) "trade association" groups that can receive unlimited donations and make unlimited expenditures on political advocacy so long as that spending is not more than half of their total spending in a calendar year. Richard Briffault, Super PACs, 96 Minn. L. Rev. 1644, 1648–49 (2012) [hereinafter Briffault, Super PACs]. These groups are distinct from "super PACs" and other political committees in that they are not required to disclose their donors and are regulated by the Internal Revenue Service as opposed to the Federal Election Commission. Id.

least $183 million on television and radio ads in the 2016 election, funding one-third of such ads in House and Senate races.[7] For the 2018 midterm elections, dark money organizations spent around $150 million.[8] Under the current jurisprudential landscape, it seems unlikely that a statute mandating greater campaign finance disclosure from dark money organizations like JCN would be considered presumptively unconstitutional.[9] This makes disclosure unique from other forms of campaign finance regulation, which have received less favorable rulings from the Supreme Court.[10] However, this favorable landscape may be starting to shift as deregulation advocates who originally argued against other forms of campaign finance regulation are now turning their sights against disclosure.[11]

The current jurisprudence centers on an "informational interest" advanced by disclosure that is sufficient to outweigh potential burdens on speech.[12] While this interest is generally understood as the value of publicizing information about the sources of campaign spending,[13] no

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7. Wood, supra note 3, at 2.

8. Julie Bykowicz, Liberals Outpaced Conservatives in "Dark Money" Midterm Spending, Wall St. J. (Jan. 23, 2019), https://www.wsj.com/articles/liberals-outpaced-conservatives-in-dark-money-midterm-spending-11548241201 (on file with the *Columbia Law Review*).

9. See, e.g., Richard Briffault, Two Challenges for Campaign Finance Disclosure After *Citizens United* and *Doe v. Reed*, 19 Wm. & Mary Bill Rts. J. 983, 984 (2011) [hereinafter Briffault, Two Challenges] ("[N]ot only did the Court not restrict the availability of disclosure but both *Citizens United* and *Doe v. Reed* confirmed the preferred position of disclosure in campaign finance regulation."); see also Michael S. Kang, The End of Campaign Finance Law, 98 Va. L. Rev. 1, 49 (2012) ("Disclosure is the lone area of campaign finance regulation that even the Roberts Court appears to support.").

10. See, e.g., McCutcheon v. FEC, 134 S. Ct. 1434, 1462 (2014) (striking down aggregate political contribution limits as against the First Amendment); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 754–55 (2011) (striking down an Arizona public financing program in which a candidate who participated in the system would receive government funds matching the private money raised by the nonparticipating candidate as one that "substantially burdens the speech of privately financed candidates and independent expenditure groups"); Citizens United v. FEC, 558 U.S. 310, 365 (2010) (striking down political expenditure limits on corporations and unions).

11. See Anthony Johnstone, A Madisonian Case for Disclosure, 19 Geo. Mason L. Rev. 413, 417–18 (2012) [hereinafter Johnstone, A Madisonian Case] (noting several prominent critiques of disclosure including the potential for invasion of privacy and harm to useful discourse).

12. See Briffault, Two Challenges, supra note 9, at 990 (noting the constitutional justifications for disclosure stemming from *Buckley v. Valeo* but concluding that "[o]f these, voter information, has proven to be the most significant," and that "[t]he key constitutional justification for campaign finance disclosure is, thus, voter information").

13. See Jennifer A. Heerwig & Katherine Shaw, Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure, 102 Geo. L.J. 1443, 1465 (2014) ("Beginning in *Buckley*, the Supreme Court has recognized an important informational interest in disclosure. According to the Court, the content of disclosure may aid the electorate by informing an analysis of candidate positions that goes beyond explicit party labels and campaign speeches.").

consensus exists over how best to assess the utility of the information disclosed.[14] Courts have at one time or another suggested that the value of disclosure depends on the type of election, the amount of money spent, and the timing and frequency of the disclosure.[15] This has led one commentator to remark that courts tend to "assume rather than explain the informational interest," which "does not itself suggest who should disclose what, or how."[16] Another has noted that the interest "feels more like a workaday technocratic concern than a value with constitutional dimensions."[17]

Yet ever since the Supreme Court's seminal campaign finance decision in *Buckley v. Valeo*,[18] courts have held that disclosure's informational interest is sufficient to justify incidental burdens on political speech.[19] This remains the case even if the overall value of the disclosed information is unclear.[20] The lack of clarity has left lower courts wrestling with how best to evaluate various disclosure regimes nationwide, leading to a disorganized line of cases that stymie legislatures attempting to craft further campaign finance reform.[21] Thus, disclosure proponents could benefit from a clearer—and perhaps more robust—understanding of the constitutional interests advanced by disclosure.

This Note adds to the existing literature in three ways. First, it argues that the most common articulation of disclosure's informational interest—that disclosure can help educate voters—is coming under strain from research across various disciplines that challenges this assertion. Second, it summarizes lower court decisions after *Citizens United v. FEC* and concludes that courts have actually invoked different rationales for *how* disclosure accomplishes its informational interest. Each rationale serves distinct constitutional values, effectively turning the interest into an amorphous umbrella term that is applied with little consistency. This has resulted in inter- and intracircuit discrepancies over which disclosure requirements are constitutional and which are not. Finally, this Note provides a pathway toward clarifying the doctrine by suggesting that placing a greater emphasis on disclosure's ability to generate increased political discourse can provide a more robust defense of future reforms.

Part I explores the development of the informational interest in campaign finance jurisprudence and the implications of the Supreme

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14. See infra section II.B.1.

15. See infra section II.B.2.

16. See Johnstone, A Madisonian Case, supra note 11, at 414.

17. Katherine Shaw, Taking Disclosure Seriously, 34 Yale L. & Pol'y Rev. Inter Alia 18, 25 (2016), https://ylpr.yale.edu/sites/default/files/IA/shaw_interalia_produced_0.pdf [https://perma.cc/ETM5-YCU8].

18. 424 U.S. 1 (1976) (per curiam).

19. See infra section I.B.

20. See infra section II.B.

21. See infra section II.C.

Court's doctrine. Part II analyzes critiques of both disclosure's efficacy and its current jurisprudence that have put disclosure on the defensive. Part II also demonstrates how lower courts have struggled to suggest a consistent understanding of the interest and discusses the problems that will result from this inconsistency. Finally, Part III suggests a way to clarify the ambiguity in the doctrine by providing a more robust understanding of disclosure's informational benefits.

I. THE INFORMATIONAL INTEREST IN CAMPAIGN FINANCE

This Part examines the development of the modern campaign finance landscape and the implications of the Supreme Court's jurisprudence on the informational interest. Part I.A describes the current state of disclosure and highlights some of the slight—yet significant—differences across disclosure regimes. Part I.B then examines the development of the informational interest in campaign finance jurisprudence.

A. *The Current State of Campaign Finance Disclosure*

Disclosure has been a tenet of campaign finance law since states first passed such measures in the late nineteenth century.[22] Congress's first attempt at creating a disclosure requirement was the Publicity Act of 1910, which required political committees in congressional races to keep detailed records of campaign spending.[23] This requirement was expanded to presidential races in 1925.[24] Congress's modern campaign finance regulation began in 1972 with the passage of the Federal Election Campaign Act (FECA).[25] FECA established the Federal Election Commission[26] and required candidates and political committees[27] to publicly report the

22. Richard Briffault, Campaign Finance Disclosure 2.0, 9 Election L.J. 273, 273 (2010) [hereinafter Briffault, Campaign Finance Disclosure 2.0].

23. See Act of June 25, 1910, Pub. L. No. 61-274, ch. 392, 36 Stat. 822 (repealed 1971). The Act, also known as the Federal Corrupt Practices Act, required every political committee to "keep a detailed and exact account of all money or its equivalent received by . . . and of all expenditures . . . made by the committee." Id. § 2. It defined political committee as the "national committees of all political parties and the national congressional campaign committees of all political parties and all committees . . . which shall in two or more States influence the result or attempt to influence the result of an election at which Representatives in Congress are to be elected." Id. § 1.

24. See Federal Corrupt Practices Act, Pub. L. No. 68-506, § 302, 43 Stat. 1070, 1070–71 (1925) (repealed 1971) (expanding the definition of a "political committee" to include those groups that accepted contributions or made expenditures "for the purpose of influencing or attempting to influence the election of candidates or presidential and vice presidential electors").

25. Federal Election Campaign Act, Pub L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431–457 (2012)).

26. 52 U.S.C. § 30106 (Supp. III 2016).

27. Political committees were defined to include any committee, association, or organization that accepts contributions or makes expenditures during a calendar year in

source of any contribution[28] and the recipient of any expenditure over $200.[29] Individuals who spent more than $250 were subject to the same requirements.[30] In 2002, Congress expanded FECA's disclosure regime by passing the Bipartisan Campaign Reform Act (BRCA).[31] BRCA expanded the range of activities that trigger disclosure and required any entity that spent more than $10,000 on "electioneering communications"[32] in a single year to file a more detailed disclosure report.[33] BRCA also mandated that disclaimers detailing the entity responsible for the advertisement be broadcast alongside any electioneering communication.[34] FECA and BRCA remain the two major federal laws guiding campaign finance today.

Currently, all fifty states mandate some form of political disclosure,[35] but regimes vary across the country. While thirty-three states require political action committees (PACs) to disclose at least some information about their electoral involvement,[36] the level at which disclosure is triggered and the type of information disclosed differ depending on the jurisdiction. For example, Alabama requires disclosure of a donor's name and city of residence only when an entity gives more than $100 in a calendar year to any candidate or PAC;[37] Ohio requires *all* entities that

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an aggregate amount exceeding $1,000 to influence any election for federal office. Id. § 30101(4).

28. Id. § 30102(c).

29. Id. § 30104(f)(2)(C).

30. Id. § 30104(c)(1).

31. Bipartisan Campaign Reform Act, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified in scattered titles of the U.S.C.).

32. BRCA defines "electioneering communication" (subject to exceptions) as:

> [A]ny broadcast, cable, or satellite communication which
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> (I) refers to a clearly identified candidate for Federal office;
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> (II) is made within—
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> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
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> (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
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> (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

52 U.S.C. § 30104(f)(3)(A)(i).

33. Id. § 30104(f)(1).

34. Id. § 30120(d).

35. State Campaign Finance Disclosure Requirements 2015-2016 Election Cycle, Nat'l Conference of State Legislatures, http://www.ncsl.org/Portals/1/documents/legismgt/elect/StateCampaignFinanceDisclosureRequirementsChart2015.pdf [https://perma.cc/E82M-MQT5] (last updated July 17, 2015).

36. Id.

37. Ala. Code § 17-5-8 (2018). Alabama defines a political committee as:

donate to candidates and PACs to disclose their name and address and requires donors who give more than $100 in a calendar year to also disclose their principal occupation and employer.[38] Some states also distinguish between committees formed for candidate advocacy, those formed for non-candidate "issue" advocacy, and those formed simply to make independent expenditures.[39] In short, while all states have some form of disclosure requirement, the variance between regimes may create adjudicative difficulties for courts if a consistent doctrine for evaluating disclosure is lacking.[40]

Despite these efforts, dark money has grown in influence. According to one report, the level of dark money spending in federal elections increased thirty-four-fold between 2006 and 2014.[41] The increase was even greater for state and local elections.[42] Under federal and most state

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> Any committee, club, association, political party, or other group of one or more persons, whether in-state or out-of-state, which receives or anticipates receiving contributions and makes or anticipates making expenditures to or on behalf of any Alabama state or local elected official, proposition, candidate, principal campaign committee or other political action committee. For the purposes of this chapter, a person who makes a political contribution shall not be considered a political action committee by virtue of making such contribution.

Id. § 17-5-2(13).

38. Ohio Rev. Code Ann. § 3517.10 (2018). Ohio defines a political action committee as:

> [A] combination of two or more persons, the primary or major purpose of which is to support or oppose any candidate, political party, or issue, or to influence the result of any election through express advocacy, and that is not a political party, a campaign committee, a political contributing entity, or a legislative campaign fund.

Id. § 3517.01(C)(8).

The "major purpose" clause that is common in many states' disclosure statutes has been interpreted by some courts to mean that the organization must spend a majority of its activity on electioneering to trigger disclosure requirements. See Iowa Right to Life Comm., Inc. v. Tooker, 717 F.3d 576, 592–96 (8th Cir. 2013), cert. denied, 134 S. Ct. 1787 (2014) (holding that an organization without a "major purpose" of campaign advocacy could not be subject to "PAC-like" disclosure burdens). This is in contrast to other courts that have held the "major purpose" clause to be irrelevant for disclosure. See, e.g., Ctr. for Individual Freedom v. Madigan, 697 F.3d 464, 487–88 (7th Cir. 2012).

39. See, e.g., Colo. Const. art. XXVIII, § 2.

40. See Christopher Kulesza et al., Reform Interrupted? State Innovation, Court Decision, and the Past and Future of Campaign Finance Reform in the States, 15 Election L.J. 143, 159 app. A (2016) (detailing the range of "stringency scores" by state based on the rigor of their campaign finance disclosure requirements).

41. Chisun Lee et al., Brennan Ctr. for Justice, Secret Spending in the States 7 (2016), https://www.brennancenter.org/sites/default/files/analysis/Secret_Spending_in_the_States.pdf [https://perma.cc/D8Q6-PWL3].

42. See id. at 2. The report analyzed campaign spending in six states representing approximately twenty percent of the nation's population: Alaska, Arizona, California, Colorado, Maine, and Massachusetts. Id. It concluded that dark money spending increased by thirty-eight times between 2006 and 2014 in the states examined. Id.

law,[43] individuals can avoid disclosure if they donate to 501(c)(4) "social welfare," 501(c)(5) "union," and 501(c)(6) "trade association" nonprofit organizations or to anonymous LLCs.[44] These groups can receive unlimited donations and make unlimited expenditures on political advocacy so long as the spending is less than half of the organization's total spending in a calendar year.[45] However, they can still contribute directly to candidates, political parties, or other PACs, meaning that the root source of funding remains unknown.[46] Ultimately, if political spending increases, the amount of money spent anonymously will inevitably also rise.

B. *The Current Jurisprudence of the Informational Interest*

Political speech is at the core of First Amendment protection,[47] and thus courts generally apply heightened scrutiny when examining limits on campaign contributions and expenditures.[48] These limits are often characterized as placing a "ceiling" on potential speech.[49] Courts are more lenient when examining mandatory disclosure requirements, subjecting them to a less stringent "exacting" scrutiny that requires only a

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43. Certain state law requires disclosure of the names and addresses of contributors to conventional dark money organizations like 501(c)(4) nonprofits if the organization spends above a certain threshold in a calendar year. See Ctr. for Individual Freedom, Inc. v. Tennant, 706 F.3d 270, 291 (4th Cir. 2013) (holding disclosure of contributors who had given more than $1,000 to any organization—including 501(c)(4)s—as substantially related to West Virginia's informational interest). New York's ethics reform law also seeks to regulate donor disclosure by requiring any 501(c)(3) organization that contributes more than $2,500 to a 501(c)(4) to disclose the identity of *any* donor who makes a donation in excess of $2,500 to the 501(c)(3). N.Y. Exec. Law § 172-e (McKinney 2018).

44. Richard Briffault, Nonprofits and Disclosure in the Wake of *Citizens United*, 10 Election L.J. 337, 352–56 (2011) [hereinafter Briffault, Nonprofits and Disclosure] (examining the regulatory landscape after *Citizens United* and how nonprofits and anonymous LLCs can aid those wishing to avoid disclosure). 501(c) refers to the portion of the tax code under which these organizations are incorporated. Id.

45. Id.

46. B. Holly Schadler, Bolder Advocacy, Chapter I: Lobbying and Political Activities by 501(c)(4)s, at 13 (2012), https://www.bolderadvocacy.org/wp-content/uploads/2012/10/The_Connection_Ch1_paywall.pdf [https://perma.cc/Z34Z-MZGN].

47. See Citizens United v. FEC, 558 U.S. 310, 340 (2010) ("Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007))).

48. See Cong. Research Serv., R43719, Campaign Finance: Constitutionality of Limits on Contributions and Expenditures 2–3 (2015), https://www.everycrsreport.com/files/20150608_R43719_111ead3fd5d403c3c178b823cfdc1502d83b97cd.pdf [https://perma.cc/44PQ-NHZJ]. Specifically, courts require expenditure limits to survive strict scrutiny and require contribution limits to survive "exacting scrutiny," which mandates that the limit be "closely drawn" to serve a "sufficiently important interest." Id.

49. See Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam) (holding that disclosures "impose no ceiling on campaign-related activities" and are thus not subject to strict scrutiny); see also *Citizens United*, 558 U.S. at 366 (reaffirming the *Buckley* principle).

"substantial relation" to a "sufficiently important" interest.[50] When applying "exacting" scrutiny, the Supreme Court has consistently recognized an "informational interest" that is sufficiently important to outweigh potential burdens on speech.[51] This section analyzes the evolution of this interest and how the Court has failed to define the values it advances with sufficient specificity.

1. Buckley v. Valeo *and the Development of the Informational Interest.* — The Supreme Court's campaign finance jurisprudence began in 1976 with *Buckley v. Valeo*. *Buckley* involved a challenge to FECA's campaign spending limits,[52] as well as its expansive disclosure regime.[53] While the Court struck down FECA's campaign expenditure limits, it left most of the law, including its disclosure requirements, intact.[54] The Court conceded that disclosure could "seriously infringe on [the] privacy of association and belief guaranteed by the First Amendment"[55] and would "undoubtedly . . . deter some individuals [from spending] who otherwise might contribute."[56] Yet this chilling effect did not outweigh the governmental interests served by disclosure. The Court noted that disclosure

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50. *Buckley*, 424 U.S. at 64.

51. The Supreme Court has implied that having an informed citizenry may be a valuable tangential interest advanced by the First Amendment, but it has rarely articulated it as a discrete interest and has seldom used it as the sole justification in striking down or upholding statutes that attempt to govern speech. Such implications generally flow from the greater proposition that "viewpoint discrimination" violates the First Amendment. See R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (holding a city ordinance proscribing bias-motivated disorderly conduct as facially unconstitutional because it discriminates on the basis of unpopular opinions); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 391–92 (1969) (holding that the FCC's "fairness doctrine" requiring equal airtime for competing sides of an issue is constitutional and that the doctrine is not "inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs"); Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

52. Other restrictions also included (1) limits to contributions for candidates for federal office, (2) limits to expenditures by candidates and associated committees, (3) limits to independent expenditures (capped at $1,000), and (4) limits to candidate expenditures from her own personal funds. Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263 (1974) (originally enacted as Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972)). All but the contribution limits were struck down as violations of the First Amendment. *Buckley*, 424 U.S. at 142–43.

53. *Buckley*, 424 U.S. at 11. More specifically, the disclosure regime mandated (1) the disclosure of the name and address of any individual contributing more than $10 to a political committee, (2) the filing of quarterly reports with the FEC disclosing the source of any contribution exceeding $100 and the recipient of any expenditure exceeding $100, and (3) the filing of a statement with the FEC by any noncandidate-affiliated individual or group making contributions or expenditures over $100. See id. at 62–64.

54. Id. at 143.

55. Id. at 64.

56. Id. at 68.

helps deter corruption by publicizing illegal campaign spending and facilitates data gathering to better enforce various campaign finance laws.[57] Finally, "disclosure provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office."[58] This has become known as the "informational interest."[59]

However, the Court dedicated little more than one paragraph out of its 144-page per curiam opinion to explaining the interest,[60] simply holding that disclosure

> allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.[61]

Put simply, disclosure informs voters and helps them make decisions at the ballot box. First, it can send signals as to who is aligned with whom, allowing voters to "piggyback" off of others' assessments.[62] In other words, it offers a form of public endorsement through spending.[63] Second, it allows voters to judge which policies a candidate may actually pursue once in office.[64] Even if a voter already knows a candidate's stated positions

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57. Id. at 67–68.

58. Id. at 66–67 (footnote omitted) (quoting H.R. Rep. No. 92-564 (1971)).

59. See Daniel R. Ortiz, The Informational Interest, 27 J.L. & Pol. 663, 665–66 (2012) ("Originally, three separate and distinct interests supported it. After *Citizens United*, only one, however, the so-called 'informational interest,' can. This interest holds that disclosure provides voters information helpful to figuring out where the different candidates stand and to locating them in an otherwise complex and confusing policy space." (footnote omitted)).

60. Chief Justice Burger dissented from the per curiam opinion's part concerning disclosure and articulated his view that he did not believe the informational interest was absolute, characterizing the interest as a "public right to know." See *Buckley*, 424 U.S. at 235–38 (Burger, C.J., concurring in part and dissenting in part). It is unclear if the per curiam opinion would have viewed its articulation of the "informational interest" as synonymous with Chief Justice Burger's articulation of a "right to know."

61. Id. at 67 (per curiam).

62. See Ortiz, supra note 59, at 675–76.

63. See id.; see also Arthur Lupia, Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections, 88 Am. Pol. Sci. Rev. 63, 63 (1995) ("As an alternative to the costly acquisition of encyclopedic information, voters may choose to employ information shortcuts. For example, voters can acquire information about the preferences or opinions of friends, coworkers, political parties, or other groups, which they may then use to infer how a proposition will affect them."); Abby K. Wood & Douglas M. Spencer, In the Shadows of Sunlight: The Effects of Transparency on State Political Campaigns, 15 Election L.J. 302, 304 (2016) (describing how low-information voters use campaign finance disclosures as a heuristic).

64. Ortiz, supra note 59, at 676 (noting disclosure may reveal which "interests that a candidate, if elected, will favor").

and can place her on the conventional political spectrum, disclosure remains useful in signaling which promises the candidate intends to keep. These two "voter-education" benefits of the informational interest have remained the bulwark for disclosure ever since.[65]

2. *Developments Between* Buckley *and* Citizens United. — *Buckley* upheld FECA's disclosure requirements, but left open the possibility of future as-applied challenges if "the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals."[66] In *Brown v. Socialist Workers '74 Campaign Committee*, the Court exempted the Ohio Socialist Worker's Party from a state statute requiring political parties to disclose the names of its members, because "[m]inor party candidates 'usually represent definite and publicized viewpoints' well known to the public."[67] Put differently, because it was unlikely that any voter was unaware of the views of the Socialist Party, the informational value of disclosure was low. Thus, the Court reasoned that the threat of retaliation against members of the unpopular party outweighed any of disclosure's supposed benefits.

In subsequent challenges, the Court has continued to make implicit judgments on the value of disclosure without articulating its constitutional dimensions. For example, in *First National Bank of Boston v. Bellotti*, the Court struck down a Massachusetts law prohibiting corporations from spending money on any ballot campaigns unless the initiative involved the corporation's business interests.[68] Although no disclosure requirement was directly challenged, the Court suggested that "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected."[69] However, in *McIntyre v. Ohio Elections Commission*, the Court struck down an Ohio prohibition against anonymous leafleting by holding that the state's "informational interest is plainly insufficient" to outweigh the burdens of the measure.[70] The petitioner in the case had distributed leaflets against a proposed increase in the local school tax levy.[71] However, the leaflets did not identify her by name, a violation of

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65. See infra section II.B.

66. *Buckley*, 424 U.S. at 74.

67. Brown v. Socialist Workers '74 Campaign Comm. (Ohio), 459 U.S. 87, 92 (1982) (quoting *Buckley*, 424 U.S. at 70).

68. 435 U.S. 765, 795 (1978).

69. Id. at 792 n.32.

70. 514 U.S. 334, 349, 357 (1995). In striking down the measure, the Court also weighed significant historical evidence of anonymous advocacy being a well-respected and well-utilized form of speech in the American tradition. See id. at 342 ("[E]ven the arguments favoring the ratification of the Constitution advanced in the Federalist Papers were published under fictitious names.").

71. Id. at 337.

Ohio law that resulted in a $100 fine.[72] Importantly, by suggesting that voters may be interested in knowing the source of the speech in *Bellotti*, but not in *McIntyre*, the Court was implicitly judging the value that disclosure provides to the public without fully explaining any of its informational benefits.

3. Citizens United*: The Informational Interest Takes Center Stage.* — *Citizens United* ushered in a new era of campaign finance that replaced spending limits with mandatory disclosure as the preferred mechanism of regulation.[73] While the Court split 5-4 in striking down BRCA's corporate expenditure limits, eight justices reaffirmed the constitutionality of disclosure.[74] Yet the decision continued much of the ambiguity surrounding the informational interest. Notably, the Court did not address disclosure's anticorruption or enforcement interests from *Buckley*, holding instead that "the informational interest *alone* is sufficient to justify application of [the disclosure requirements]."[75] Disclosure's informational benefits included: providing the public with knowledge about who is speaking,[76] aiding the electorate in evaluating arguments being made,[77] and avoiding voter confusion.[78] These benefits were all grouped under the umbrella of the informational interest, yet they represent distinct visions of disclosure, as different pieces of information accomplish the different goals expressed. A simple disclaimer may be sufficient to educate voters on who was speaking about a candidate to avoid confusion, but a more comprehensive financial disclosure revealing the sources of one's funding would likely be needed for voters to fully evaluate the potential biases of each candidate's platform. However, the Court refrained

72. Id. at 338.

73. See Briffault, Two Challenges, supra note 9, at 999 ("[T]he Court has strongly and widely reaffirmed its commitment to disclosure as a constitutionally sound—indeed, constitutionally preferred—mode of regulation.").

74. Citizens United v. FEC, 558 U.S. 310, 366–71 (2010). Only Justice Thomas dissented, arguing that BRCA's disclosure and disclaimer requirements have already had a non-negligible chilling effect on speech. Id. at 484 (Thomas, J., concurring in part and dissenting in part).

75. Id. at 369 (majority opinion) (emphasis added).

76. Id. at 368 ("The disclaimers required by § 311 'provid[e] the electorate with information' and 'insure that the voters are fully informed' about the person or group who is speaking." (citations omitted) (first quoting McConnell v. FEC, 540 U.S. 93, 196 (2003); then quoting Buckley v. Valeo, 424 U.S. 1, 76 (1975) (per curiam))); see also id. at 369 ("Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election.").

77. Id. at 368 ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." (internal quotation marks omitted) (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 792 n.32 (1978))); see also id. at 371 ("[T]ransparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.").

78. Id. at 368 ("At the very least, the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party.").

from articulating how disclosure accomplished these divergent goals, instead characterizing BRCA's disclosure regime as a less onerous *alternative* to BRCA's unconstitutional expenditure limits.[79] Disclosure did not place a "ceiling on campaign-related activities" or "prevent anyone from speaking" and was therefore preferable to more traditional forms of campaign finance regulation.[80]

Decisions after *Citizens United* have continued this uncertainty, with the Court rarely spending more than a paragraph discussing the informational interest. In *Doe v. Reed*, decided the same year as *Citizens United*, the Court upheld a Washington statute that allowed the identities of signatories to state referendums to be revealed[81]—a form of disclosure in direct democracy elections that the Court had been hesitant to embrace in *McIntyre*.[82] Washington advanced an "informational interest" to support the statute, but the Court refused to address it, holding instead that "the State's interest in preserving the integrity of the electoral process" was sufficient alone to justify the statute.[83] It thus remains unclear whether the informational interest can be used to uphold disclosure in the direct advocacy context, and lower courts have since split on the issue.[84] The Court's most recent campaign finance decision, *McCutcheon v. FEC*, resulted in a similarly thin discussion, with the Court again spending less than a page covering the issue with little more than a cursory citation to *Buckley*.[85]

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79. Id. at 369.

80. Id. at 366 (internal quotation marks omitted) (first quoting *Buckley*, 424 U.S. at 64; then quoting *McConnell*, 540 U.S. at 201).

81. 561 U.S. 186, 190–91 (2010).

82. See supra notes 70–72 and accompanying text.

83. *Reed*, 561 U.S. at 197. Indeed, the "electoral integrity" justification for disclosure could be just as amorphous and incomplete as this Note argues is the case for the "informational interest." See Chesa Boudin, Note, Publius and the Petition: *Doe v. Reed* and the History of Anonymous Speech, 120 Yale L.J. 2140, 2175 (2011) ("*Reed* almost guarantees that there will be a flourishing of litigation in lower courts addressing a range of regulatory issues—including disclosure—in the context of state-organized ballot initiatives and beyond. Indeed, some political groups have already filed suit in multiple states to bypass electoral disclosure regulations.").

84. See infra section II.B.

85. See 134 S. Ct. 1434, 1459–60 (2014). *McCutcheon* did not involve a direct challenge to disclosure requirements, but the Court nonetheless took the opportunity to reaffirm its approval of disclosure. Id. However, the discussion consisted of little more than citations to *Citizens United* and *Buckley*, articulating the old goals of deterring corruption and enforcing campaign finance laws. Perhaps most notable was the suggestion that, as technology progresses, disclosure could actually be more effective in achieving these goals. See id. at 1460 ("Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time *Buckley*, or even *McConnell*, was decided.").

Disclosure has thus enjoyed relative success when challenged alongside other forms of campaign finance regulation.[86] However, given that most other regulations are now unconstitutional after *Citizens United*,[87] it is inevitable that individual challenges against disclosure will increase.[88] Indeed, when the Supreme Court has upheld disclosure, it has often been because a larger, more burdensome regulation was challenged alongside it, giving disclosure the appearance of being of being a "less restrictive alternative to more comprehensive regulations of speech."[89] However, given the Court's brief treatment of disclosure's informative value, it will be important to parse out the informational interest's doctrinal implications to better understand its constitutional foundations for future reform.[90]

II. LOWER COURTS' APPLICATION OF THE INFORMATIONAL INTEREST: INCONSISTENT AND VULNERABLE TO CHALLENGE

This Part demonstrates how external theoretical pressures against disclosure and internal inconsistencies surrounding the informational interest have placed disclosure on shaky constitutional footing. Specifically, two problems plague the doctrine. First, the presumption that campaign finance information can competently educate voters is coming under strain from research that has demonstrated the inefficacy of mandatory disclosure regimes. Second, courts' inability to settle on a consistent rationale for *how* disclosure provides useful information has led them to invoke several distinct versions of the informational interest, with disclosure serving divergent roles under each perspective. This has led to both inter- and intracircuit disagreements over which disclosure regimes are constitutional and which ones are not.

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86. See supra section I.B.2.

87. See *McCutcheon*, 134 S. Ct. at 1462 (striking down aggregate contribution limits); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 754–55 (2011) (striking down an Arizona public financing program in which a candidate who participated in the system would receive government funds matching the private money raised by the nonparticipating candidate); SpeechNow.org v. FEC, 599 F.3d 686, 696 (D.C. Cir. 2010) (holding that nonprofit organizations engaged only in independent advocacy can accept unlimited contributions).

88. See Stuart McPhail, Publius, Inc.: Corporate Abuse of Privacy Protections for Electoral Speech, 121 Penn St. L. Rev. 1049, 1057–63 (2017) (summarizing the ways in which dark money organizations have been using a civil rights era privacy case to litigate against disclosure); Robert Yablon, Campaign Finance Reform Without Law, 103 Iowa L. Rev. 185, 204–05 (2017) ("Disclosure opponents are actively pursuing as-applied challenges to disclosure requirements, as well as broader challenges seeking to invalidate provisions as overly intrusive or burdensome. While some of these challenges have been rejected, others have had at least partial or preliminary success.").

89. Citizens United v. FEC, 558 U.S. 310, 369 (2010).

90. See Johnstone, A Madisonian Case, supra note 11, at 417–20.

Section II.A describes how the predominant view of disclosure—that it can effectively educate voters—is coming under strain. Section II.B then summarizes the challenges to disclosure regimes in the lower courts and finds that while most courts continue to uphold disclosure under this unstable "voter-education" framework, they have nevertheless differed in characterizing how disclosure accomplishes that goal. Section II.C identifies the adjudicative problems that arise from this inconsistency. Ultimately, these problems threaten the constitutionality of current laws while hindering the ability of legislatures to craft future reform.

A. *Threats to the Predominant "Voter-Education" Justification for Disclosure*

Although the Supreme Court has not articulated disclosure's "informational interest" with any specificity, the predominant view of scholars and courts is that disclosure educates voters and helps them make better decisions at the ballot box.[91] This section summarizes two growing concerns with this view and argues that any attempt to clarify the informational interest must be able to address these concerns.

1. *Voter Competency.* — If disclosure is intended to enhance voters' ability to make decisions, then their capacity to understand how the disclosed information is relevant to the electoral arena becomes critical in assessing the validity of different legal regimes.[92] However, the rosy conception that disclosure is "capable of creating . . . an informed and competent electorate able to critically evaluate campaign-related speech"[93] is threatened by a growing view that undeserved reliance on disclosure is actually helping facilitate many of the problems it was attempting to prevent.[94]

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91. See, e.g., Richard Briffault, Updating Disclosure for the New Era of Independent Spending, 27 J.L. & Pol. 683, 717 (2012) [hereinafter Briffault, Updating Disclosure].

92. See Michael D. Gilbert, Campaign Finance Disclosure and the Information Tradeoff, 98 Iowa L. Rev. 1847, 1865 (2013) ("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."). It is unclear whether the cases in which courts have viewed the informational interest as "attenuated" to disclosure are based on a belief that the information itself is of little value or that voters will be unable to effectively process the potentially useful information at the ballot box. See Coal. for Secular Gov't v. Williams, 815 F.3d 1267, 1278 (10th Cir. 2016) (noting "the strength of the public's interest in issue-committee disclosure depends, in part, on how much money the issue committee has raised or spent" but not explaining further the foundations of this "sliding scale" analysis); see also Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth, 556 F.3d 1021, 1033 (9th Cir. 2009) (noting that "the value of this *financial* information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level").

93. Heerwig & Shaw, supra note 13, at 1489.

94. See id. at 1447–48 ("[C]ontributor compliance with providing required information . . . is often both inconsistent and partial. Further, the lack of an infrastructure to track individual contributors over time impedes the identification of the most potentially

Even if voters can comprehend the information, courts have not articulated whether that result is inherently valuable[95] or if it is a means to a more tangible end, such as better policy outcomes.[96] Several critiques suggest that mandated disclosure might be unlikely to have any real effect on voter decisionmaking.

First, if the belief is that disclosure will encourage better policies, then voters must actually be capable of using the information to make "good" decisions (however that is defined).[97] Yet voters have been characterized as "rationally ignorant" and often vote against their self-interest.[98] While these assertions are nearly impossible to verify empirically, the sparse evidence that exists suggests that voters are unable to use electoral information effectively.[99] Analyses of protransparency policies in other contexts have suggested that when disclosure is used as a means for

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influential players . . . and, before . . . *McCutcheon v. FEC*, led to routine violations of the aggregate election cycle limits.").

95. The idea that disclosure itself is valuable regardless of any tangible outcome is at least partially supported by decades of doctrine, beginning with Justice Louis Brandeis's view that "[s]unlight is said to be the best of disinfectants." Louis D. Brandeis, What Publicity Can Do, Harper's Wkly., Dec. 20, 1913, at 10, 10, http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1910/1913_12_20_What_Publicity_Ca.pdf [https://perma.cc/LDZ8-7H7E]; see also Alexander Meiklejohn, The First Amendment Is an Absolute, 1961 Sup. Ct. Rev. 245, 252 (arguing that the freedom protected by the First Amendment is not "an absence of regulation" but rather "the presence of self-government").

96. See Stephen Kosack & Archon Fung, Does Transparency Improve Governance?, 17 Ann. Rev. Pol. Sci. 65, 83 (2014) (noting that while the public pressure for transparency began with its association with self-governance, it has now been pushed toward an expectation of "highly tangible and concrete results by resolving specific concerns of governance and government performance").

97. See Lloyd Hitoshi Mayer, Disclosures About Disclosure, 44 Ind. L. Rev. 255, 260 (2010) (noting an assumption that "it is desirable for voters to be well-informed about their electoral choices" but that "[w]ell-informed in this context means voters not only having all relevant information, but also understanding that information").

98. See Anthony Downs, An Economic Theory of Democracy 214–16 (1957) ("[M]any rational citizens obtain practically no information at all before making political decisions . . . ."). See generally Bryan Caplan, The Myth of the Rational Voter: Why Democracies Choose Bad Policies (Cato Inst., Policy Analysis No. 594, 2007), https://object.cato.org/pubs/pas/pa594.pdf [https://perma.cc/Q8CT-84FT] (arguing that voters are irrational and that they vote accordingly).

99. See Michael S. Kang, Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus," 50 UCLA L. Rev. 1141, 1145 (2003) [hereinafter Kang, Democratizing Direct Democracy] (summarizing studies that conclude voters simply do not care much about the information with which they are presented in direct democracy or ballot measure contexts); Lupia, supra note 63, at 72 ("[T]he fact that relatively uninformed voters can emulate [well-informed voters] suggests that the availability of certain types of information cues allows voters to use their limited resources efficiently . . . in ways that they would have if they had taken the time and effort necessary to acquire encyclopedic information."); Wood & Spencer, supra note 63, at 304 (summarizing empirical efforts to verify the effects of disclosure and concluding that "[q]uantifying the information benefit is difficult").

nebulous goals—like better "governance" or increasing trust in government—the effects have been negligible at best.[100]

Second, the amount of disclosed data could overwhelm voters to an extent that it renders disclosure useless.[101] Evidence from other disciplines has demonstrated that the anticipated benefits of ever-greater transparency have largely failed to materialize, as individuals become unable to comprehend the breadth of available information.[102] For example, one aggregate study found that disclosures were effective "only when they provided facts that people wanted in times, places, and ways that enabled them to act."[103] This was true even if there was little information available beforehand.[104] Yet information above a certain amount subjected individuals to an "information overload" that actually *reduced* the effectiveness of previous disclosures.[105] The educational benefits of campaign-related disclosure could be even more attenuated because information about the positions of candidates and ballot issues is already plentiful.[106] When information in the electoral marketplace is already saturated, adding to the glut further could reduce the efficacy of other information that would have been more useful to voters.

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100. See Kosack & Fung, supra note 96, at 83 ("The expectations for consequential transparency are far more ambitious . . . [and they] also come at a time when there is no consensus about whether transparency improves concrete outcomes. The answer, as with so many other questions in political science, seems to be that 'it depends.'"); see also David E. Pozen, Freedom of Information Beyond the Freedom of Information Act, 165 U. Pa. L. Rev. 1097, 1135 (2017) ("The ultimate consequences of these dynamics, it must be said, are hard to pin down. Measures of trust in government declined in the United States and other countries following the adoption of [Freedom of Information] laws.").

101. 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, 683–84 (2002) (suggesting a disclosure regime that "overwhelms voters with information so that unhelpful data threatens to drown out valuable voting cues" would be ineffective and counterproductive); see also Briffault, Updating Disclosure, supra note 91, at 713 ("Even if a voter is troubled about reports concerning a candidate's donors, if the voter thinks that candidate dominates her opponent on experience, character, or the most salient issues, the voter will be unable to act on her campaign finance concerns.").

102. See, e.g., Omri Ben-Shahar & Carl E. Schneider, The Failure of Mandated Disclosure, 159 U. Pa. L. Rev. 647, 687 (2011) (describing the "overload effect" of mandated disclosure and concluding that such policies often bury individuals under an "avalanche of information" from which they are unlikely to derive anything useful).

103. Archon Fung, Mary Graham & David Weil, Full Disclosure: The Perils and Promise of Transparency, at xiv (2007); see also id. at 173–76 (listing six characteristics of successful transparency policies and noting that such "policies are likely to be effective when the new information they generate can be easily embedded into the routines of information users").

104. Id. at xiv (noting that "[e]ffective policies did not simply increase information. They increased knowledge that informed choice").

105. See Ben-Shahar & Schneider, supra note 102, at 687–88.

106. See David M. Primo, Information at the Margin: Campaign Finance Disclosure Laws, Ballot Issues, and Voter Knowledge, 12 Election L.J. 114, 116 (2012).

Commentators discussing mandatory disclosures more generally have suggested that disclosed information must be kept simple if it is to have any effect toward intended objectives.[107] However, this suggestion may be unavailable in the campaign finance context. Campaign spending information is inherently complex: It involves individual contributions to dark money groups, PACs, super PACs, party organizations, or candidates directly. These organizations (with the exception of super PACs) can then contribute to one another or engage in independent spending.[108] This complexity may preclude any disclosure regime from offering simple information without sacrificing something vital.[109] Ultimately, any clarification of the informational interest will need to address how different disclosure regimes may alter the informative effect of each policy.

2. *Distracting Away from Substantive Issues.* — Disclosure could actually distract voters from the substantive issues at stake in the election by "direct[ing] attention away from the *content* of an ad," suggesting to voters that they "need not evaluate the content."[110] If voters are susceptible to certain "informational shortcuts,"[111] then publication of donor sources could render voters unreceptive to new arguments by causing them to rely instead on the confirmation bias created by the disclosed information. This poses especially troubling First Amendment implications, as the Supreme Court has looked unfavorably upon rewarding or disfavoring an opinion based solely on its source.[112] Not only would disclosure distract from the core speech at issue, it may also send a symbolic message that the substantive speech at issue is irrelevant for democratic purposes—in other words, only the identity of the messenger matters, the quality of the message does not. The countervailing interest in remaining

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107. See Ben-Shahar & Schneider, supra note 102, at 743 ("A principal lesson of our review of why mandated disclosure fails is that length, complexity, and difficulty are the enemies of successful mandates. This suggests that brief, simple, easy disclosures are at least preferable.").

108. See Briffault, Super PACs, supra note 6, at 1649–50.

109. See Anthony Johnstone, The System of Campaign Finance Disclosure, 98 Iowa L. Rev. Bull. 143, 155–59 (2013) [hereinafter Johnstone, The System] (discussing the complexities underpinning disclosure regimes that make it burdensome for both disclosing parties and those receiving the information). Importantly, one consideration for "simplifying" the system of campaign finance disclosure is the well documented "hydraulic" effect that may inevitably encourage donors wishing to remain anonymous to continually seek out the least stringent disclosure regimes. This effect has essentially led to the rise of "dark money" organizations following attempts at heightened disclosure after *Citizens United*. See id. at 151–52.

110. John Samples, The DISCLOSE Act, Deliberation, and the First Amendment 7 (Cato Inst., Policy Analysis No. 664, 2010), https://object.cato.org/pubs/pas/pa664.pdf [https://perma.cc/M5F4-HM55].

111. See infra section II.B.2.

112. This was one reason why corporate spending limits were declared unconstitutional in *Citizens United*. See Citizens United v. FEC, 558 U.S. 310, 341 (2010) ("[I]t is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes.").

anonymous would thus "provide[] a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent."[113] If this argument is accepted, it is likely to cripple disclosure regimes nationwide, as it presents an a priori hurdle that prodisclosure advocates need to cross before any substantive discussion about its informative benefits can begin.

While no lower court has expressly endorsed such a rationale in limiting disclosure, the Tenth Circuit has suggested in dicta that "[n]ondisclosure could require the debate to actually be about the merits of the proposition on the ballot."[114] Some studies have suggested that this presumption may be at least partially correct: In the context of candidate endorsements, voters who admit that they assign great weight to endorsements are less likely to consider arguments against the endorsed candidate.[115] Other studies regarding political advertising disclaimers have shown a significant difference in response between candidate-sponsored attack ads and those sponsored by independent advocacy groups.[116] Candidate-sponsored attack ads generally elicited a greater backlash against the candidate doing the attacking than those that were sponsored by outside groups, but that backlash was not necessarily correlated with

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113. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995).

114. Sampson v. Buescher, 625 F.3d 1247, 1257 (10th Cir. 2010). But see Justice v. Hosemann, 829 F. Supp. 2d 504, 515–16 (N.D. Miss. 2011) (considering, but ultimately rejecting, the Tenth Circuit's logic in denying an as-applied challenge against Mississippi's reporting requirements).

115. See Marty Cohen et al., The Party Decides: Presidential Nominations Before and After Reform 311 (2008) (finding that the single best predictor of a party's nominee is the number of endorsements from party elites); see also Wayne P. Steger, Who Wins Nominations and Why? An Updated Forecast of the Presidential Primary Vote, 60 Pol. Res. Q. 91, 97 (2007) (finding that "candidates' shares of party elite endorsements" had a "significant and positive effect on the primary vote"). Of course, this consideration could also work the other way: Voters who know that certain speakers are advocating for a candidate may be less inclined to support that candidate once they know who is behind the speech. This does not detract from the argument against disclosure because all that would need to be proven for this argument to be verified is that voters on balance assign *more weight* to the identity of the speaker than the content of the message.

116. See Deborah Jordan Brooks & Michael Murov, Assessing Accountability in a Post-*Citizens United* Era: The Effects of Attack Ad Sponsorship by Unknown Independent Groups, 40 Am. Pol. Res. 383, 402–03 (2012) (concluding after a controlled experiment that "a trait-based attack ad sponsored by an unknown independent group is more effective than an identical ad sponsored by a candidate in the eyes of the public overall"); Tyler Johnson et al., Consider the Source: Variations in the Effects of Negative Campaign Messages, 2 J. Integrated Soc. Sci. 98, 113 (2011) (concluding after a controlled experiment regarding the credibility of negative campaigning that "[t]he same negative information from different sources has differing effects on the decision-making of individuals when choosing between candidates"). But cf. Michael Pfau et al., Issue-Advocacy Versus Candidate Advertising: Effects on Candidate Preferences and Democratic Process, 52 J. Comm. 301, 308 (2002) (reaching a conclusion that the source of the ad did not matter for issue-advocacy ads versus candidate ads).

the disclaimers that were included in the ad.[117] In sum, not only will disclosure proponents need to demonstrate how voters can comprehend the breadth of data released, but they may also need to clarify how it does not discourage certain forms of democratic participation.

B. *Challenges to Disclosure in the Lower Courts and the Resulting Doctrinal Inconsistency*

This section surveys lower court decisions in the wake of *Citizens United* and demonstrates that courts have continued to rely on a "voter-education" framework for disclosure, even in the face of growing theoretical pressure. A lack of clarity over how disclosure educates voters has led to discrepancies between courts over which types of regulation are constitutional and which ones are not. Section II.B.1 surveys the large discrepancies between lower court decisions, while section II.B.2 draws out how different courts have invoked different rationales for the informational interest in different contexts. This lack of clarity has led to courts discussing the various rationales underlying the informational interest as mutually exclusive—an approach that is unable to capture the full informative benefits of disclosure.

1. *Lower Court Decisions.* — Disclosure opponents currently advance two main arguments: either that disclosure of speakers' identities subjects them to potential harassment or retaliation,[118] or that disclosure's administrative burdens are too onerous and confusing.[119] Both of these harms discourage would-be speakers from entering the political arena, creating a chilling effect on speech that contravenes core First Amendment principles.[120]

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117. See Connor M. Dowling & Amber Wichowsky, Attacks Without Consequence? Candidates, Parties, Groups, and the Changing Face of Negative Advertising, 59 Am. J. Pol. Sci. 19, 33 (2015) (finding that "candidate-sponsored negative ads result in more backlash against the attacking candidate compared to group-sponsored ads" but that "disclaimers work as intended only when they convey useful information").

118. See, e.g., Benjamin Barr & Stephen R. Klein, Publius Was Not a PAC: Reconciling Anonymous Political Speech, the First Amendment, and Campaign Finance Disclosure, 14 Wyo. L. Rev. 253, 255 (2014) ("Protecting anonymity is . . . a principle central to protecting our rich, Western tradition of reasoned, public debate.").

119. See id. at 254 ("Campaign finance disclosure not only eliminates important avenues for anonymous political speech, but replaces such free speech with cumbersome reporting regimes penalizing those who fail to comply and those who do not accurately report the minutest details."); see also Briffault, Campaign Finance Disclosure 2.0, supra note 22, at 276 (noting some disclosure opponents have suggested that "increased disclosure requirements could make the costs of disclosure more burdensome to campaign participants and, hence, more constitutionally suspect").

120. See Shaw, supra note 17, at 25 (noting disclosure critics currently argue that it threatens "the right against government-compelled speech, the individual right to privacy, the collective right of associational privacy, perhaps a right to anonymous speech, and perhaps a right to political privacy").

With regard to the first harm, in the wake of *Citizens United,* courts have required that plaintiffs wishing to enjoin disclosure under a harassment theory must demonstrate that publication of their information will truly subject them to retaliation.[121] But while such challenges were initially unsuccessful, district courts have begun granting injunctions as plaintiffs meet their burden of proof. In *Americans for Prosperity Foundation v. Harris*, the district court held that evidence of protesters showing up to disrupt a super PAC's fundraisers and events was sufficient for an injunction against disclosure of donor identities.[122] In *Thomas More Law Center v. Harris*, the court cited only that the plaintiff organization was "an advocate for issues which arouse intense passions by its supporters and its opponents" and that the organization had received critical emails and phone messages as sufficient evidence of harassment.[123] Although the Ninth Circuit later vacated the injunctions in both cases,[124] these developments at the district court level are unsurprising given that the legal foundations for such challenges have always been grounded in First Amendment doctrine, and that it was the absence of factual context that had doomed earlier challenges.[125]

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121. See Ctr. for Individual Freedom v. Madigan, 697 F.3d 464, 483 (7th Cir. 2012) ("[D]isclosure of the names and addresses of petition signers would not ordinarily create a 'reasonable probability' that they would be harassed." (quoting Buckley v. Valeo, 424 U.S. 1, 74 (1976) (per curiam))); Family PAC v. McKenna, 685 F.3d 800, 807–08 (9th Cir. 2012) (holding that there was no reason to assume the burdens imposed by disclosure of referendum petitions would subject individuals to harassment and that "notwithstanding the possibility of harassment and retaliation in an isolated case, the disclosure rules as a general matter imposed only modest First Amendment burdens"); Nat'l Org. for Marriage v. McKee, 649 F.3d 34, 70–72 (1st Cir. 2011) (finding that while "privacy rights of participants and third parties[] are among those interests which, in appropriate cases, can limit the presumptive right of access to [disclosure of] judicial records," the plaintiffs in the case failed to make any claim as to a reasonable privacy concern (first alteration in original) (internal quotation marks omitted) (quoting FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 410 (1st Cir. 1987))).

122. 182 F. Supp. 3d 1049, 1056 (C.D. Cal. 2016), rev'd sub nom. Ams. for Prosperity Found. v. Becerra, 903 F.3d 1000, 1020 (9th Cir. 2018).

123. No. CV 15-3048-R, 2016 WL 6781090, at *4 (C.D. Cal. Nov. 16, 2016), rev'd sub nom. *Ams. for Prosperity Found.*, 903 F.3d at 1020. The Thomas More Law Center describes itself as an organization which "defends and promotes America's Judeo-Christian heritage and moral values, including the religious freedom of Christians, time-honored family values, and the sanctity of human life. It supports a strong national defense and an independent and sovereign United States . . . [and] accomplishes its mission through litigation, education, and related activities." About, Thomas More L. Ctr., https://www.thomasmore.org/about-the-thomas-more-law-center/ [https://perma.cc/B8EF-VZP3] (last visited Oct. 22, 2018).

124. *Ams. for Prosperity Found.*, 903 F.3d at 1020.

125. Even with recent grants of district court injunctions, the bar for success on such challenges remains high. See Ctr. for Competitive Politics v. Harris, 296 F. Supp. 3d 1219, 1225–26 (E.D. Cal. 2017) (holding that an advocacy group could not be analogized to "historically rejected" groups simply for promoting potentially unpopular or vilified views and thus could not enjoin disclosure without a showing of the actual burdens of

Regarding the second harm, courts appear open to enjoining disclosure when plaintiffs demonstrate that compliance with a requirement is too onerous or confusing. The informational value of disclosure takes on greater significance in these cases as courts often balance this benefit of disclosure against its administrative burdens. Yet the uncertainty surrounding the interest has led to a disorganized line of rulings. Courts currently differ on whether disclosure requirements should vary based on: the amount of money spent, whether the election involves ballot initiatives or candidates, and whether heavier "PAC-like" burdens can be imposed on an organization whose major purpose is not political activity.

Decisions from the Ninth and Tenth Circuits have suggested that the informational value of disclosure depends on the level of money that is being spent. Under this view, the informational benefits gained from disclosing low levels of campaign spending may be too negligible to outweigh its administrative costs. In *Canyon Ferry Road Baptist Church v. Unsworth*, the Ninth Circuit suggested that Montana's "zero dollar" threshold for disclosure was facially unconstitutional.[126] In discussing the state's proffered informational interest, the court held that "[t]he value of this *financial* information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level."[127] Although *Canyon Ferry* was decided before *Citizens United*, later Ninth Circuit rulings have cited to its reasoning when evaluating if other monetary thresholds were unreasonably low.[128]

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harassment); Citizens United v. Schneiderman, 203 F. Supp. 3d 397, 408 (S.D.N.Y. 2016) (holding that donors' "fear [of] public backlash, financial harm, and worse" was insufficient for injunction against disclosure without further evidence of harassment), aff'd in part, rev'd in part on other grounds, 882 F.3d 374 (2d Cir. 2018) .

126. See Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth, 556 F.3d 1021, 1033–34 (9th Cir. 2009). This case involved an as-applied challenge to a Montana statute that required "incidental committees" to disclose the source of their funding and expenditures. Id. at 1023, 1025. An "incidental committee" was defined as "a political committee that is not specifically organized or maintained for the primary purpose of influencing elections but that may incidentally become a political committee by making a contribution or expenditure to support or oppose a candidate and/or issue." Id. at 1026 (internal quotation marks omitted) (quoting Mont. Admin. R. 44.10.327(2)(c) (2009)). The church had allowed its premises to be used as a venue for viewing a film that advocated against same-sex marriage and had also allowed its printers to be used to print pamphlets advertising the event. Id. at 1024. The amount of money it spent on these activities was unknown, but the court held that they were de minimis and thus did not warrant the burdens associated with Montana's reporting requirements. Id. at 1033–34. However, the court's language strongly hinted at the conclusion that the zero-dollar threshold may be facially unconstitutional. See id.

127. Id. at 1033.

128. See Yamada v. Snipes, 786 F.3d 1182, 1199 (9th Cir. 2015) (noting "Hawaii's choice of a $1,000 registration and reporting threshold is also a far cry from the zero dollar threshold invalidated in *Canyon Ferry*" when upholding Hawaii's disclosure threshold (citation omitted)); see also Family PAC v. McKenna, 685 F.3d 800, 809–10 (9th

In *Sampson v. Buescher*, the Tenth Circuit also suggested that the informative value of disclosure correlates with the level of spending.[129] The court refused to impose Colorado's disclosure requirements on individuals who had spent approximately $2,000 opposing a proposed local ordinance and implied that both the low amount of spending and the ballot initiative context of the election limited the informational interest.[130] Notably, *Sampson* implied that spending thresholds triggering disclosure should be different for candidate elections compared to direct democracy ballot initiatives.[131] A subsequent Tenth Circuit decision, *Coalition for Secular Government v. Williams*, affirmed this view when it refused to impose disclosure requirements on an issue committee that had spent $3,500 advocating against a proposed amendment to the Colorado Constitution.[132] Even though Colorado law requires any person who spends more than $200 supporting or opposing a ballot issue to register as an "issue committee" with various disclosure responsibilities,[133] the *Sampson* and *Williams* decisions have essentially raised the necessary spending threshold to over $3,500. Significantly, in another decision, the Tenth Circuit held that the informational benefits derived from a $1,000 spending threshold *were* sufficient to impose disclosure requirements for *candidate* elections.[134] This directly contravenes holdings from other

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Cir. 2012) (noting "the informational interest weakens as the size of the contributions decrease, and at some point contributions are so small that disclosure may provide voters with little relevant information" but nonetheless upholding Washington's $100 threshold).

129. 625 F.3d 1247, 1260 (10th Cir. 2010) (agreeing with the Ninth Circuit that "[a]s a matter of common sense, the value of this *financial* information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level" (internal quotation marks omitted) (quoting *Canyon Ferry*, 556 F.3d at 1033)).

130. See id. at 1260–61.

131. See id. at 1255 (emphasizing that "[w]hen analyzing the governmental interest to disclosure requirements, it is essential to keep in mind that our concern is with ballot issues, not candidates").

132. 815 F.3d 1267, 1277 (10th Cir. 2016) ("We begin our exacting-scrutiny analysis by noting that under *Sampson*'s reasoning we must conclude that the governmental interest in issue-committee disclosures remains minimal where an issue committee raises or spends $3,500.").

133. Colo. Const. art. XXVIII. It defines an "issue committee" as:

> [A]ny person, other than a natural person, or any group of two or more persons, including natural persons: (I) That has a major purpose of supporting or opposing any ballot issue or ballot question; or (II) That has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question.

Id. § 2(10)(a).

134. See Indep. Inst. v. Williams, 812 F.3d 787, 789 (10th Cir. 2016). In *Independence Institute*, the Tenth Circuit held that Colorado's informational interest was strong enough to warrant donor disclosure for all independent advocacy groups that spent or received $1,000 in a calendar year on activity related to candidate elections. Id. at 797–80. Independence Institute was a 501(c)(3) organization that intended to run an ad in 2014 urging voters to call Colorado Governor John Hickenlooper and request him to audit the state's Health Benefit Exchange. Id. at 790. Since Hickenlooper was running for reelection

circuits that have suggested requirements should be the same for both ballot and candidate elections.[135]

Other courts have suggested that the level of individual contributions is irrelevant for whether disclosure requirements should be imposed; rather, it is the *aggregate* amount of money spent that is of informative value.[136] In *National Organization for Marriage v. McKee*, the First Circuit upheld a Maine statute that required filing disclosure reports if an advocacy committee received or spent $100 in aggregate.[137] The court reasoned that the "[t]he issue is . . . not whether voters clamor for information about each 'Hank Jones' who gave $100 to support an initiative," but rather that the "*cumulative effect* of disclosure ensures that the electorate will have access to information regarding the *driving forces* backing and opposing each bill."[138] The Eleventh Circuit cited to this exact passage of *McKee* when it refused to enjoin disclosure requirements imposed on individuals who had spent $600 advocating against a proposed Florida constitutional amendment.[139] The Seventh Circuit has also concurred in this reasoning, holding that "[o]ne of the most useful heuristic cues influencing voter behavior in initiatives and referenda is knowing who favors or opposes a measure," when rejecting an as-applied challenge to a $100 disclosure threshold.[140]

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that year, the court held it was important for voters to know who was speaking about the candidate even though the ad did not mention the election or advocate a vote for or against him. Id. at 790–91, 797. The court suggested that the local nature of the elections justified the $1,000 threshold as compared to the $10,000 threshold in federal law under BRCA, as "[s]maller elections can be influenced by less expensive communications." Id. at 797. Interestingly, when the Tenth Circuit decided *Coalition for Secular Government v. Williams* only one month after *Independence Institute*, it merely noted that the previous decision "involved a different disclosure framework" without elaborating further on why the informational interest may differ in ballot versus candidate elections. *Coal. for Secular Gov't*, 815. F.3d at 1280 n.6.

135. See, e.g., Ctr. for Individual Freedom v. Madigan, 697 F.3d 464, 487–88 (7th Cir. 2012); Nat'l Org. for Marriage v. McKee, 669 F.3d 34, 39–40 (1st Cir. 2012); Human Life of Wash. Inc. v. Brumsickle, 624 F.3d 990, 1006 (9th Cir. 2010).

136. See Worley v. Fla. Sec'y of State, 717 F.3d 1238, 1240 (11th Cir. 2013). In *Worley*, the Eleventh Circuit rejected an as-applied challenge along much of the same factual foundations as in *Coalition for Secular Government*. Id. at 1240–42. Individuals who planned to spend $600 on radio advertisements against a proposed Florida constitutional amendment would have qualified as a "political committee" under state law and thus been subject to disclosure. Id. While the court conceded that the informative value of a single small contribution may be negligible, it found that this was not how the informational interest should be evaluated. Id. at 1251. Instead, it held that "disclosure of a plethora of small contributions could certainly inform voters about the *breadth* of support for a group" even if each single contribution has little informative value. Id. (emphasis added).

137. 669 F.3d at 41.

138. Id. (emphasis added) (internal quotation marks omitted) (quoting Nat'l Org. for Marriage v. McKee, 765 F. Supp. 2d 38, 52 (D. Me. 2011)).

139. *Worley*, 717 F.3d at 1251.

140. *Madigan*, 697 F.3d at 480–81.

Another dispute between courts involves whether the type of organization should matter for disclosure purposes. The Eighth[141] and Fourth[142] Circuits have held that organizations without the express purpose of political advocacy should not be held to the same requirements as those that do. These requirements generally involve filing several disclosure reports per year as opposed to one or two reports filed immediately before an election.[143] Under this view, these "PAC-like" ongoing disclosure burdens can only be assessed to organizations that dedicate more than half of their spending to political activity, regardless of the amount spent by the organization. Most other courts have held that these distinctions are irrelevant.[144]

Still, other decisions have suggested that disclosure can take on various forms that do not publicize the reported data immediately to the electorate. For example, the Second Circuit upheld a Vermont statute that required disclosure of campaign spending to candidates and

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141. See Iowa Right to Life Comm., Inc. v. Tooker, 717 F.3d 576, 592–96 (8th Cir. 2013), cert. denied 134 S. Ct. 1787 (2014). The Eighth Circuit held that Iowa's requirement that an organization must file continuous disclosure reports (up to four a year) until it filed a notice of dissolution should only apply to organizations whose "major purpose" was nominating or electing candidates. Id. at 597–98. Iowa Right to Life Committee was a nonprofit corporation that spent less than half of its annual expenditures on election-related speech. Id. at 581. Thus, the Court concluded that it could not be subject to the "PAC-like" burdens of filing subsequent reports as it would be "'no more than tenuously related' to Iowa's informational interest." Id. at 597 (quoting Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 876 (8th Cir. 2012)); see also *Minn. Citizens Concerned for Life, Inc.*, 692 F.3d at 872 (refusing to apply "PAC-like" burdens on an organization under similar facts as *Tooker*).

142. See N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 287–88 (4th Cir. 2008) (refusing to apply a continuous reporting requirement to an organization that did not have the "major purpose" of campaign activity). In *Leake*, the Fourth Circuit also held that the major purpose requirement was necessary to prevent PAC burdens from "fall[ing] on organizations primarily engaged in speech on political issues unrelated to a particular candidate." Id.

143. Federal law mandates political action committees to file a minimum of five detailed disclosure reports each election year and two reports each nonelection year. FEC, Campaign Guide for Corporations and Labor Organizations 116–20 (2018), https://transition.fec.gov/pdf/colagui.pdf [https://perma.cc/TCQ8-7HSF]. Political action committees must also file less detailed monthly reports each election year. See id.; see also FEC, Campaign Guide for Nonconnected Committees 48–51 (2008), https://www.fec.gov/resources/cms-content/documents/nongui.pdf [https://perma.cc/Q3M3-G5PG].

144. See *Madigan*, 697 F.3d at 487–88 (holding that whether an organization's "major purpose" is electioneering activity is irrelevant for the purposes of evaluating Illinois's campaign finance disclosure laws and requiring a nonprofit 501(c)(4) organization to abide by the state's continuous disclosure requirement of filing up to four reports a year); Nat'l Org. for Marriage v. McKee, 649 F.3d 34, 59 (1st Cir. 2011) ("We find no reason to believe that this so-called 'major purpose' test, like the other narrowing constructions adopted in *Buckley*, is anything more than an artifact of the Court's construction of a federal statute."); Human Life of Wash. Inc. v. Brumsickle, 624 F.3d 990, 1009 (9th Cir. 2010) (rejecting a bright-line prohibition on regulating groups that have only "a" primary purpose of election activity as opposed to election activity being "the" primary purpose).

election officials rather than the public.[145] Without a clearer articulation of how disclosure actually helps advance the flow of information, such discrepancies among courts are likely to continue.

2. *Differing Conceptions of the Informational Interest.* — The differing circumstances under which courts invoke the informational interest—and the divergent conclusions courts have reached—suggest that it is really an umbrella term that incorporates various other values. Even if campaign finance information is valuable, its value depends on who receives the information and the manner in which it is received.[146] This section identifies how lower courts have invoked four distinct views of the informational interest. The first three describe various "voter-education" rationales that differ on *how* disclosure provides valuable information, while the last one discusses a less common view: that disclosure can be used to enhance—rather than dissuade—political discourse. An inability to settle on one specific rationale has led to much of the disorganization described above. Importantly, courts view the rationales as mutually exclusive, often only discussing one view of disclosure while ignoring the others. However, as Part III will demonstrate, a layering of these various approaches and an understanding that they can complement each other may provide a stronger justification for future reform.

First, one prominent view of disclosure is that it acts as an "informational shortcut" that educates voters better than traditional forms of political speech alone.[147] Information on who is spending on behalf of whom signals to the public the types of organizations with which a candidate or issue is aligned.[148] Similar to the effect of party affiliation or public endorsements, the associational inferences drawn from disclosure allow voters to take "shortcuts" in confirming their choices.[149] This rationale is not limited to only candidate elections but also extends to ballot initiatives, referenda, and other forms of direct democracy. For example, if a

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145. See Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118, 134 (2d Cir. 2014). The Second Circuit upheld the provision because it ruled that the organization's intention was to inform candidates about misinformation being spread by misappropriating their names. Id. The disclosure requirement therefore helped ensure that "candidates are aware of and have an opportunity to take a position on the arguments being made in their name." Id.

146. See supra section II.A.

147. See, e.g., Heerwig & Shaw, supra note 13, at 1465 ("Beginning in *Buckley*, the Supreme Court has recognized an important informational interest in disclosure. According to the Court, the content of disclosure may aid the electorate by informing an analysis of candidate positions that goes beyond explicit party labels and campaign speeches.").

148. This view stems from the original *Buckley* passage suggesting that disclosure "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." Buckley v. Valeo, 424 U.S. 1, 67 (1976) (per curiam).

149. See Elizabeth Garrett, Voting with Cues, 37 U. Rich. L. Rev. 1011, 1026 (2003) (describing the effectiveness of different disclosure requirements as tools on which voters can rely); see also Ortiz, supra note 59, at 675–76.

voter is a union member and knows that the union is donating heavily to support a complicated ballot measure, the voter can use this knowledge to cut through the legalese that often accompanies public debate.[150] Disclosure's informative value increases when clear partisan lines on a given issue are difficult to discern,[151] with disclosure data stepping in to fill the gap.[152] Courts that justify imposing disclosure requirements for low levels of spending and for direct democracy elections invoke this rationale by presuming that any amount of public support through spending could provide a useful heuristic to the voter.[153] Ultimately, this represents the broadest version of the informational interest through a "voter-education" perspective, as disclosure's associational benefits can be utilized in all elections.

Second, courts that have refused to impose disclosure requirements for direct democracy elections or for lower spending levels suggest a view of disclosure as only providing informational benefits in candidate elections. This represents a narrower view of the informational interest geared toward gauging candidate integrity as opposed to associational signaling.[154] For example, if two candidates both campaign on a platform of greater financial regulation, but only one receives donations from major investment banks, a voter understands that the candidate who did not receive such contributions may be more inclined to keep her word.[155]

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150. See Justice v. Hosemann, 771 F.3d 285, 298 (5th Cir. 2014) ("The initiatives on a ballot are often numerous, written in legalese, and subject to the modern penchant for labelling laws with terms embodying universally-accepted values. Disclosure laws can provide some clarity amid this murkiness."); Ctr. for Individual Freedom v. Madigan, 697 F.3d 464, 490 (7th Cir. 2012) ("Amidst this cacophony of political voices—super PACs, corporations, unions, advocacy groups, and individuals, not to mention the parties and candidates themselves—campaign finance data can help busy voters sift through the information and make informed political judgments.").

151. See Primo, supra note 106, at 114 (noting that a voter who cannot rely on party identification may instead rely on knowledge that a preferred organization supports or opposes a certain ballot issue).

152. See Jessica Levinson, Full Disclosure: The Next Frontier in Campaign Finance Law, 93 Denv. L. Rev. 431, 458 (2016) ("Hence, disclosure of contributions essentially serves as a voting cue and an indication of a candidate's position as an officeholder, much like party affiliation or the identity of endorsers might.").

153. See supra notes 126–135 and accompanying text.

154. This view of disclosure also stems from the oft-quoted *Buckley* passage: "The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office." Buckley v. Valeo, 424 U.S. 1, 67 (1976) (per curiam).

155. This logic was arguably applied during the 2016 presidential election, when first Senator Bernie Sanders, and then Donald Trump, used money that candidate Hillary Clinton had received from investment banks as evidence that she may not keep her promises if elected. See Amy Chozick et al., Leaked Speech Excerpts Show a Hillary Clinton at Ease with Wall Street, N.Y. Times (Oct. 7, 2016), https://www.nytimes.com/2016/10/08/us/politics/hillary-clinton-speeches-wikileaks.html?_r=0 (on file with the *Columbia Law Review*).

Thus, if voters believe a candidate may be more likely to prioritize the interests of an organization that spent $1 million on her behalf than an organization that spent only $100, then it follows that there may be no value in requiring disclosure from organizations that do not spend above a certain amount.

The value of disclosure for ballot measure advocacy decreases even more under this view. While disclosure can still educate voters, the scope of the informational interest becomes more limited, as it is concerned with only one aspect of an election. The Tenth Circuit has espoused this view, holding that it was "not obvious that there is . . . a public interest" in disclosure of donor information in elections when "[n]o human being is being evaluated,"[156] implying that voters must primarily use campaign finance data as a way to evaluate candidates and not issues. This discrepancy demonstrates that even under the relatively uncontroversial view that voters are the intended audience for disclosure, courts can still view disclosure as serving distinct informational roles.

Third, a less common way in which courts have invoked the informational interest is by suggesting that it can be a gauge for patterns of support for an issue or candidate. Under this view, the timeframe for disclosure extends year-round rather than simply to the weeks preceding an election. As noted earlier, courts disagree over whether "PAC-like" reporting requirements mandating organizations to file multiple disclosure reports a year can be imposed on organizations without the express purpose of electoral advocacy.[157] The courts holding that such requirements can be imposed, regardless of the organization, embody the idea that voters continue to gather valuable information outside of the campaign season. Disclosure grants voters insight into patterns of political spending, which may be useful for future decisionmaking.[158] This suggests that voters are concerned not simply with signaling cues as to who supports whom, but that they also desire knowledge about how organizations spend on politics across time. If disclosure were primarily for providing voters with information about speakers immediately before an election, there would be little need for such reports.

Finally, at least one appellate court's discussion of the informational interest has embodied the view that disclosure may help facilitate political discourse rather than chill it.[159] In *Vermont Right to Life, Inc. v. Sorrell*,

156. Sampson v. Buescher, 625 F.3d 1247, 1256–57 (10th Cir. 2010).

157. See supra section II.B.1.

158. See Human Life of Wash., Inc. v. Brumsickle, 624 F.3d 990, 1018 (9th Cir. 2010) (upholding a Washington statute's requirement that active political committees submit three additional reports a year after the initial spending, and noting in particular that the "timing" of the informational requirements is "substantially related to the government's informational interest").

159. This is opposed to the conventional view that disclosure chills speech. See supra section I.B.

the Second Circuit upheld a "mass media" reporting requirement that mandated any person who engaged in electioneering through activities such as television or radio commercials, mass mailings, or newspaper ads file a report detailing the source of the communication's funding with the Vermont Secretary of State.[160] Notably, the law did not operate under the presumption that the reports were to be made public for voter consideration; rather, it mandated that a copy of the report be sent to the relevant candidate whose "name or likeness was included in the activity."[161] Thus, *candidates* were the intended audience for this disclosure regime rather than voters. Nevertheless, the court held that the law's "public benefit is in line with the informational interest" because the disclosure regime helped bring so-called "'whisper campaigns' into the sunlight and also help[ed] ensure that candidates [were] aware of and [had] an opportunity to take a position on the arguments being made in their name."[162] This allowed candidates "to rapidly address election-related speech in the final weeks of a campaign"[163] and "to more quickly and effectively respond" to any unproven accusation.[164]

Under this view, disclosure increases the quantity and improves the quality of political speech as candidates become better able to respond to negative ads and potential falsehoods directed against them. This suggests a potential broader view of disclosure's informational benefit by demonstrating another way in which disclosure helps voter decisionmaking beyond simply delivering informational cues associated with financial data. As Part III will demonstrate, this is a view of disclosure that has been underappreciated but may provide useful support for future reform.[165]

C. *Problems Arising from the Informational Interest's Inconsistent Jurisprudence*

In addition to the conventional problems associated with an uncertain jurisprudence, courts' inability to settle on a specific rationale for why disclosure information is valuable presents further adjudicative difficulties. Notably, the way that courts have discussed disclosure suggests

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160. Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118, 134 (2d Cir. 2014).

161. Id. at 123 (quoting Vt. Stat. Ann. tit. 17, § 2971(b) (2014)).

162. Id. at 134.

163. Id.

164. Id. at 134 n.14. The full footnote reads:

> As an example of so-called "whisper campaigns," there have been (still unproven) accusations that during the Republican presidential primary race in 2000, groups supporting a candidate arranged for mass phone calls that strongly suggested that John McCain had an illegitimate child. If such conduct occurred in Vermont, the group that arranged the phone calls would be required to report it to the candidate being attacked. This would allow the candidate to more quickly and effectively respond.

Id. (citation omitted).

165. See infra section III.B.

that they see the different rationales of the informational interest described above as *mutually exclusive* rather than *complementary*. This section describes two major issues with this approach that threaten the viability of future reform.

1. *Inability to Adapt to Future Disclosure Reform.* — The differing rationales underlying disclosure's informational interest make it difficult for legislatures to craft—and for states to defend—campaign finance policies that do not slot nicely into any of the specific paradigms described above. For example, many scholars have suggested that future reforms should require dark money groups to disclose their contributors to the public.[166] Others have suggested increasing the level of corporate disclosure as a way to inform shareholders about corporate interests in politics.[167] Unfortunately, these suggestions appear largely incompatible with the current doctrine. This is because courts have consistently discussed disclosure's informative benefits as a binary inquiry that queries simply whether a certain disclosure requirement can accomplish "informational interest X." If the answer is "yes," the requirement is constitutional. If the answer is "no," the requirement is unconstitutional *even if other informational benefits exist*. As it is primarily framed, disclosure provides a way for voters to learn "who is *speaking* about a candidate shortly before an election,"[168]

166. See, e.g., Briffault, Two Challenges, supra note 9, at 1010–11; Briffault, Updating Disclosure, supra note 91, at 693–98; see also Richard L. Hasen, Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age, 27 J.L. & Pol. 557, 570–72 (2012) (noting disclosure of donors can be key in ferreting out deceptive political ads); Trevor Potter & Bryson B. Morgan, The History of Undisclosed Spending in U.S. Elections & How 2012 Became the "Dark Money" Election, 27 Notre Dame J.L. Ethics & Pub. Pol'y 383, 470 (2013) ("The IRS also could more adequately police the disclosure requirements that were enacted in 2000 requiring 527s to publicly disclose their donors, and could decide to apply the gift tax to donations made to 501(c)(4) organizations, thereby further disincentivising large donations to such groups for political purposes." (footnote omitted)).

167. See, e.g., Lucian A. Bebchuk & Robert J. Jackson, Jr., Comment, Corporate Political Speech: Who Decides?, 124 Harv. L. Rev. 83, 107 (2010) ("The approach we propose—a requirement that companies disclose both contributions to intermediary organizations and the ultimate political beneficiaries of these contributions—is essential to providing shareholders with effective disclosures regarding corporate speech decisions."); Sarah C. Haan, Voter Primacy, 83 Fordham L. Rev. 2655, 2671 (2015) (noting that the Supreme Court may have expanded the target audience of disclosure to include shareholders as a way to check against corporate abuse of power).

168. Citizens United v. FEC, 558 U.S. 310, 369 (2010) (emphasis added); see also Lloyd Hitoshi Mayer, Nonprofits, Politics, and Privacy, 62 Case W. Res. L. Rev. 801, 812 (2012) (noting a recommendation in 2000 by the Joint Committee on Taxation that "disclosure of information regarding tax-exempt organizations is appropriate" but that the recommendation was never adopted (quoting II Joint Comm. on Taxation, 106th Cong., Study of Present-Law Taxpayer Confidentiality and Disclosure Provisions as Required by Section 3802 of the Internal Revenue Service Restructuring and Reform Act of 1998, at 80 (2000))); Potter & Morgan, supra note 166, at 462 (noting the FEC's "regulations do not require super PACs (or any other type of political committee) to ensure that they report the original source of the contributions they receive").

but the revelation that an independent expenditure comes from a "Better America LLC" or a "Judicial Crisis Network" likely adds little informative value regardless of the amount of spending.[169] Courts have thus become concerned with evaluating only the specific piece of information at issue, rather than whether the revelation adds value to substantive political discourse. Importantly, this approach cannot account for voters' desire to understand who is attempting to *influence* public policy through spending. However, the way that the current doctrine is framed leads to a fixation on issues like whether thresholds are too low, or whether the electoral context should affect the requirements imposed.[170] Suggestions for greater dark money or corporate disclosure do not fit perfectly within any one conception of the informational interest. These policies may not specifically reveal the direct "speaker" of the communication, and it is unclear how they will help voters decide at the ballot box. Thus, because of the narrow inquiry that currently frames the disclosure debate, it is likely that these laws will face immediate scrutiny if they are ever enacted.

Despite this uncertainty, states have continued to forge ahead with more stringent disclosure laws.[171] One illustrative example is Montana's recently enacted statute mandating political committees exempt from general disclosure requirements to include a disclaimer with any communication that reads: "This communication is funded by anonymous sources. The voter should determine the veracity of its content."[172] If the

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169. See Briffault, Nonprofits and Disclosure, supra note 44, at 356.

170. See Anthony Johnstone, Recalibrating Campaign Finance Law, 32 Yale L. & Pol'y Rev. 217, 232 (2013) (noting that disclosure thresholds have failed to keep pace with changes in the electorate and the cost of campaigning and that a "broad divergence" between "the law and its effects . . . may suggest to skeptics of regulation . . . possible 'danger signs' that such lines 'are not closely drawn'" (quoting Randall v. Sorrell, 548 U.S. 230, 249 (2006) (plurality opinion))).

171. See Kulesza et al., supra note 40, at 150 (noting that between 1992 and 2016, most states have moved to require mandatory online disclosure filings improving ease of access to voters, and that at least twelve states have increased the stringency of their disclosure requirements).

172. Mont. Code Ann. § 13-35-237 (West 2016). The full statute reads:

> If a political committee claims to be exempt from disclosing the name of a person making a contribution to the political committee, the committee shall clearly and conspicuously include in all communications advocating the success or defeat of a candidate, political party, or ballot issue through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, poster, handbill, bumper sticker, internet website, or other form of general political advertising or issue advocacy the following disclaimer: "This communication is funded by anonymous sources. The voter should determine the veracity of its content."

Id.; see also Heather K. Gerken et al., Opinion, Rerouting the Flow of 'Dark Money' into Political Campaigns, Wash. Post (Apr. 3, 2014), https://www.washingtonpost.com/opinions/rerouting-the-flow-of-dark-money-into-political-campaigns/2014/04/03/1517ac6e-

informational interest were strictly concerned with revealing to voters *who* was speaking about a candidate before an election, disclaimers such as this would seemingly add no value. Another example is New York's recent nonprofit disclosure statute, which requires certain charitable organizations—that are prohibited from electioneering spending but can still donate money to dark money 501(c)(4)s—to disclose the identity of donors who gave in excess of $2,500 if that organization also contributed greater than $2,500 to a 501(c)(4).[173] At first blush, it seems difficult to articulate exactly how such a regulation can educate voters, and opponents of the law have already challenged it on First Amendment grounds.[174] If disclosure is to become the mainstay of campaign finance regulation, then legislatures must adapt by enacting policies that actually help educate the populace about the actors influencing public policy. However, such policies may be unable to withstand constitutional scrutiny under the current doctrine.

2. *Inability to Account for Disclosure's Role as a Legal Framework.* — Courts have also yet to discuss whether the structure of disclosure laws can provide informative value beyond simply campaign finance data.[175] This leads to a view of disclosure that is both under- and overinclusive of its true informative value as a legal framework. The voter-education rationale of disclosure compartmentalizes decisionmaking along a strict, left–right political spectrum that may not be reflective of disclosure's complete value. At least one scholar has noted that *voluntary* disclosure above what is legally mandated may help inform voters of a candidate's credibility even more than a candidate's persuasiveness on substantive issues.[176] This creates a form of meta-information that exists regardless of the actual campaign finance data. Put differently, voters in a minimal disclosure regime where every candidate is encouraged, but not required, to disclose may punish dark money more than a heavily regulated regime where voters do not pay attention to the heaps of information being revealed.[177] If disclosure is to act as a signaling device to voters, then courts must account for not just the actual information disclosed but also how the structure of disclosure regimes—in terms of the timing of filings,

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b906-11e3-9a05c739f29ccb08_story.html?utm_term=.62940e6bb09e (on file with the *Columbia Law Review*) (introducing the idea of a "nondisclosure disclosure").

173. N.Y. Exec. Law § 172-e (McKinney 2016). The law also requires disclosure from 501(c)(4)s if they contribute to other 501(c)(4)s. Id. § 172-f.

174. See Citizens Union of New York v. Att'y Gen. of N.Y., 269 F. Supp. 3d 124, 135 (S.D.N.Y. 2017).

175. See supra section II.A.

176. See Wood, supra note 3, at 35 (noting how a study of voters' reactions to voluntary disclosure showed "voters will punish nondisclosure and reward disclosure when they are made aware of the disclosing activities of campaigns and outside groups").

177. Id. at 2–3 (noting how respondents "reward the more transparent candidate and punish the candidate connected to dark money groups" and that "[t]he size of the effect is large enough to swing an election—around 15 percentage points").

the number of reports filed, and other such factors—affects voters' views on an issue. This is unlikely under most current conceptions of the informational interest.

Moreover, some scholars have noted that requiring disclosure from certain organizations may inevitably lead to increased contributions to organizations that do not need to disclose.[178] In other words, the more "burdensome" it is to contribute to an organization, the more likely it is that speakers will turn to dark money groups to stay anonymous, in effect decreasing the flow of information to the public. Yet under the differing rationales of the informational interest currently offered, all seem preoccupied with whether the actual data that are disclosed are of interest to the voter, not the legal regime's effect on political discourse. Instead of focusing on whether disclosure advances political discourse more generally, the inconsistency plaguing disclosure doctrine sets an incorrect baseline of comparison for determining which types of disclosure regimes are too burdensome. This incompatibility must be resolved if attempts at future reforms are to be successful.

III. CLARIFYING DISCLOSURE: TOWARD A MORE ROBUST DEFENSE OF THE INFORMATIONAL INTEREST

As this Note has demonstrated, the perception that disclosure can actually educate voters is under strain.[179] Courts have also been unable to settle on how disclosure actually provides valuable information to the public—often fluctuating between differing rationales for when disclosure is constitutional and when it is not.[180] Effectively, this leaves the informational interest as a broad yet inconsistent justification that is likely unable to support future reforms. This Part outlines ways to clarify the doctrine.

Section III.A discusses how the constitutionality of disclosure can be strengthened if proponents look to informational benefits of disclosure beyond its capacity to educate voters. Specifically, it shows how courts have underappreciated the full breadth of benefits that can flow from disclosure by viewing its various informative roles as mutually exclusive rather than complementary. Placing a greater emphasis on disclosure's ability to elevate political discourse can alleviate many of these tensions. Section III.B then discusses the implications of this approach and provides steps for future reform.

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178. See Johnstone, The System, supra note 109, at 147; Geoffrey A. Manne, The Hydraulic Theory of Disclosure Regulation and Other Costs of Disclosure, 58 Ala. L. Rev. 473, 483 (2007).

179. See supra section II.A.

180. See supra section II.B.

A. *Disclosure's Ability to Elevate Discourse: A Complementary Approach for Future Reform*

The instances in which courts have been dismissive of disclosure have overwhelmingly been cases when courts discussed—and then rejected—only *one* of disclosure's informative benefits while ignoring the rest. For example, when the Tenth Circuit held in *Sampson* that disclosure's informative value was negligible for ballot elections, it implied that the *only* way disclosure could be beneficial was as a predictor of candidate interests.[181] Similarly, when the Ninth Circuit declared Montana's "zero dollar" threshold unconstitutional, it failed to account for disclosure's ability to act as an "informational shortcut" for associational inferences and its ability to elevate political discourse.[182] It is this uncertainty surrounding which rationale a court may choose to discuss that makes disclosure difficult to defend.[183] Proponents wishing to defend disclosure ought to thus advocate for an approach that demonstrates how each of the informational rationales underlying disclosure can complement and strengthen each other.

One way to do this is by placing a greater emphasis on disclosure's ability to elevate political discourse.[184] Demonstrating that disclosure can increase the level of speech *in addition* to its ability to educate voters provides a more robust conception of the informational interest that can withstand many of the critiques leveled against it. This view builds upon the Second Circuit's suggestion in *Vermont Right to Life v. Sorrell* that disclosure can result in *more* speech by "encourag[ing] candidate response" to attack ads and providing "an opportunity to take a position on the arguments being made in their name."[185] By alerting candidates to the financial backers against them, the court hinted at the possibility that both the quantity—and more importantly—the quality of political discourse could be heightened.[186] Put differently, disclosure's informative

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181. See Sampson v. Buescher, 625 F.3d 1247, 1260–61 (10th Cir. 2010); see also supra notes 129–134 and accompanying text.

182. See Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth, 556 F.3d 1021, 1033–34 (9th Cir. 2009). For example, a voter may be more interested in knowing that a leader of the Democratic Party contributed to the reelection fund of President Trump—regardless of the amount—than that a "Joe Smith" contributed $5,000. Thus, it is this discrepancy between the differing rationales underlying the informational interest that has led to much of the doctrinal uncertainty.

183. See Shaw, supra note 17, at 25 ("Opponents of disclosure have articulated with precision the specific values disclosure threatens . . . . The interests that disclosure advances, meanwhile, are . . . more amorphous . . . .").

184. See Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118, 134 (2d Cir. 2014); see also supra notes 159–164 and accompanying text.

185. 758 F.3d at 134.

186. Id. at 134 n.14 (describing how disclosure requirements might have allowed a candidate to respond more quickly and effectively to accusations). For more context, see supra notes 136–140 and accompanying text.

value does not end with the voter but can extend beyond elections to serve democratic interests more generally. For example, if a citizen who is originally indifferent between two candidates in an election observes that a disfavored organization contributed to one of the candidates, she may feel compelled to speak out against that candidate. Disclosure has thus increased speech.[187] If the same citizen saw that the disfavored organization received donations from certain companies, she may feel compelled to advocate against those companies and urge them to cease such contributions. Disclosure has again facilitated greater political discourse, this time *outside the scope of elections*.[188] Voters—and the public at large—are thus given access to not only the information of the disclosure itself but also to any additional information that is generated from the subsequent debate. Perhaps most importantly, this view makes disclosure less susceptible to the critiques described above,[189] as it highlights avenues for disclosure to inform the public beyond voter education. It is this side of disclosure that many courts currently underappreciate.

Such uses of disclosure have arguably already occurred under current laws. In one well-publicized example, progressive activists used disclosure information to highlight Chick-fil-A's financial support for groups advocating against same-sex marriage after the company's chief operating officer made statements that many perceived as homophobic.[190] Advocacy groups then used disclosure information to ensure that the company followed through with a promise to limit its political advocacy.[191] An increase in this type of speech may also be more in line with the "proper way" of reacting to disclosure information envisioned by the *Citizens United* Court.[192] Disclosure thus becomes a mechanism

187. See Gilbert, supra note 92, at 1883–88 (discussing how disclosure can facilitate mechanisms to "lead to a net increase in speech").

188. This view builds upon Gilbert's suggestion by expanding disclosure's possible "thawing" effect on speech outside of the electoral realm. See id.

189. See supra section II.A.

190. See Kim Severson, Chick-fil-A Thrust Back into Spotlight on Gay Rights, N.Y. Times (July 25, 2012), http://www.nytimes.com/2012/07/26/us/gay-rights-uproar-over-chick-fil-a-widens.html (on file with the *Columbia Law Review*). Chick-fil-A donates to the WinShape Foundation, a 501(c)(3) nonprofit established by Chick-fil-A's founders as a way to conduct charitable spending. In 2011, the foundation contributed close to $6 million to groups that opposed same-sex marriage, including the National Institute of Marriage and the Marriage & Family Foundation. WinShape Foundation Inc., Return of Organization Exempt from Income Tax (Form 990), at 23 (2011) (on file with the *Columbia Law Review*).

191. See Seth Adam, Chick-fil-A Shifts Donations Away from Anti-Gay Groups, Tax Forms Confirm, GLAAD (Jan. 28, 2013), https://www.glaad.org/blog/chick-fil-shifts-donations-away-anti-gay-groups-tax-forms-confirm [https://perma.cc/Y3RT-3CNB]. After the backlash, the WinShape Foundation decreased its contributions from close to $6 million in 2011 to less than $600,000 for subsequent years. E.g., WinShape Foundation Inc., Return of Organization Exempt from Income Tax (Form 990), at 11 (2012) (on file with the *Columbia Law Review*).

192. See Citizens United v. FEC, 558 U.S. 310, 371 (2010) ("[D]isclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This

through which citizens can put pressure on both public officials and private actors wishing to influence policy.[193] As one commentator has noted: "Even if campaign finance disclosure has a limited direct effect on voters' decisions, it can still play an important salutary role in informing the public generally about the powerful economic forces that shape our elections, our politics, and ultimately, our public policy."[194] This perspective can facilitate a wider political discussion that extends beyond elections and extends disclosure's informative benefits beyond voter decision-making, adding a new dimension to the disclosure debate that has so far been overlooked.

B. *Implications for Future Reform*

An important aspect of an increased reliance on disclosure's ability to generate speech is that the view does not depend on the ability of voters to actually utilize disclosure data specifically when casting a ballot. Instead, this analysis extends the benefits of disclosure beyond elections, potentially strengthening the constitutionality of future legislative reforms. This section discusses the implications of placing a greater emphasis on disclosure's ability to elevate discourse. Section III.B.1 discusses how two oft-suggested reforms may be more viable under the more expansive view of disclosure, while section III.B.2 examines the continued efficacy of disclosure's more traditional "voter-education" rationales.

1. *Implications for Future Legislative Reforms.* — Two common proposals include increased disclosure of contributors to dark money groups[195] and increased corporate disclosure.[196] As discussed, these proposals do not fit nicely within the voter-education paradigms of the informational

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transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.").

193. Some corporations that have attempted to influence elections through increased spending have seen their candidates rebuked or experienced other forms of public backlash. See Yablon, supra note 88, at 211–12 (noting incidents of public animosity and the resulting backlash toward Target and Chevron after they had donated to unpopular local campaigns).

194. Briffault, Updating Disclosure, supra note 91, at 718.

195. See, e.g., Briffault, Two Challenges, supra note 9, at 1010–11 (advocating for a disclosure regime in which dark money groups must segregate funds used for electioneering and disclose the donors to the electioneering account); Briffault, Updating Disclosure, supra note 91, at 692–99 (same); see also Hasen, supra note 166, at 570–72 (noting that disclosure of donors can reveal deceptive political ads).

196. See Briffault, Updating Disclosure, supra note 91, at 709 ("If disclosure is to successfully inform the public about who is providing the funds . . . then independent committees, when they are required to report their donors, should be required to source all contributions back to a publicly held corporation, a mass membership organization, or to an individual."); see also, e.g., Haan, supra note 167, at 2691 (advocating for the disclosure of corporate political spending to shareholders).

interest.[197] However, they are likely to see greater success if proponents emphasize each proposal's ability to elevate political discourse.

Regarding disclosure of dark money groups, individuals who may disregard the knowledge that a "Better America LLC" is behind an expenditure may be more inclined to discuss a measure if they know the true source of funding. This may facilitate greater discourse around which private actors are attempting to influence policy. Under this view, "disclosure empowers the electorate to monitor the conduct of elected officials to discern whether their behavior while in office reflects the interests of their donors, rather than the interests of their constituents."[198] It educates the public about the influence of money on policy-making and provides a civics lesson by showing "a window onto the interplay of campaign finance, lobbying, legislating, and political action."[199] Dissemination of such information by journalists, watchdog groups, or similar entities suffices to create greater political discussion, allowing voters to react accordingly to such reports.

Increased corporate disclosure can also increase speech by providing a mechanism for shareholders to hold executives accountable for political spending.[200] Shareholders "may have a strong interest in not being associated with political speech they oppose," and those who dislike their company's stance can place pressure on executives to cease such activity.[201] The *Citizens United* majority hinted at such a possibility when it suggested that "disclosure . . . can provide *shareholders* and citizens with the information needed to hold corporations and elected officials accountable," and that "disclosure permits citizens and *shareholders* to react to the speech of corporate entities in a proper way."[202] Shareholder participation in political discourse is already occurring under voluntary disclosure regimes. For example, Intel, which voluntarily discloses some of its political spending, faced pressure from shareholders who questioned its contributions to politicians that had opposed LGBT rights or had denied

197. See supra section II.C.1.

198. Heerwig & Shaw, supra note 13, at 1465.

199. Briffault, Updating Disclosure, supra note 91, at 718.

200. See Lucian A. Bebchuk & Robert J. Jackson, Jr., Shining Light on Corporate Political Spending, 101 Geo. L.J. 923, 942–44 (2013) (noting the frequency of a divergence of interests between corporate political spending and shareholder interests, and that increased transparency is a way to hold executives more accountable).

201. Id. at 943–45.

202. Citizens United v. FEC, 558 U.S. 310, 370–71 (2010) (emphasis added).

climate change.[203] Such instances can be expected to increase if corporate disclosure becomes mandatory.[204]

2. *Continued Viability of Disclosure's Voter-Education Rationales.* — While placing a greater emphasis on disclosure's ability to elevate discourse means less reliance on its ability to educate voters,[205] it does not render such voter-education rationales completely ineffectual. Instead of a "one-size-fits-all" approach in which courts focus on whether a disclosure requirement accomplishes informational interest X (such as predicting candidate interests), proponents must underscore that disclosure can accomplish multiple educational roles—especially in contexts when information is inherently limited. Specifically, disclosure's ability to inform the public likely remains most salient in local elections and direct democracy.

Candidates in local elections are often political newcomers, and thus voters may know very little about their positions or policy preferences. For direct democracy elections—which are often local—the absence of party identification and other heuristic identifiers makes it unlikely for voters to grasp the nuance of certain issues without additional informational cues.[206] In both contexts, campaign-spending data help to fill the gap by revealing the entities attempting to influence the election. For example, California's attempt to pass the Mobile Home Fairness and Rental Assistance Act in the 1990s was publicized as an attempt to achieve

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203. See Kate Conger, Shareholders Pressure Intel over PAC Spending, TechCrunch (May 3, 2017), https://techcrunch.com/2017/05/03/shareholders-pressure-intel-over-pac-spending/ [https://perma.cc/EXR2-QBDP] ("[S]ome of Intel's recent donations . . . have alarmed shareholders, who are now proposing a resolution that would force the chipmaker to publicly explain political donations that don't line up with its stated policy positions.").

204. See Reilly S. Steel, Comment, Corporate Political Spending and the Size Effect, 118 Colum. L. Rev. Online 1, 22 (2017), https://columbialawreview.org/wp-content/uploads/2017/12/Steel_Corporate-Political-Spending-And-The-Size-Effect.pdf [https://perma.cc/JPP6-XMX] (noting a lack of political disclosure from larger companies, and that more disclosure may be necessary to counter shareholder collective-action problems).

205. Effectively, this shifts the focus away from questioning whether disclosed information may be useful to a voter when casting a ballot and instead broadens the query toward which entities are attempting to influence public policy more generally. These types of disclosures are also more likely to generate public debate as they are no longer preoccupied simply with "who supports whom" questions but rather with "who is attempting to enact policy X" questions—incentivizing journalists, watchdog groups, and similar organizations to join the public discourse.

206. See Michael Kang, Campaign Disclosure in Direct Democracy, 97 Minn. L. Rev. 1700, 1713 (2013) ("In the absence of candidates and parties to simplify and bundle issues for voters, voters need to know more to vote competently about a ballot measure than they do when they vote on candidates."); see also Kang, Democratizing Direct Democracy, supra note 99, at 1151 (noting that "party identification is generally unhelpful in issue elections" and that "voters decide on ballot measures without the brand name of a political party to guide their choice").

"fairness" and "rental assistance" for mobile home tenants.[207] However, disclosures revealed that the principal financial backers behind the initiative were two mobile home *landlords* who had wanted to end local efforts at rent control. The measure was subsequently defeated.[208]

Notably, concerns about voter competency are less applicable in these contexts as campaign finance data compete with a smaller pool of information for voters' attention. This helps overcome the concerns regarding an "information overload" that can overwhelm disclosure's more traditional defenses.[209] Under this view, disclosure's constitutionality no longer hinges on whether a court accepts one specific rationale underlying the informational interest, but instead expands to a bevy of potential benefits whose importance shifts depending on the circumstance.

CONCLUSION

In the wake of *Citizens United*, mandatory disclosure has become the preferred method of campaign finance regulation. However, its main constitutional support—the informational interest—remains unclear and unexplained by the Court. In fact, the informational interest has become an umbrella term that incorporates a diverse set of views on the informative role for disclosure. Lower courts have struggled to apply a consistent jurisprudence because it is unclear how disclosure actually brings about the informational benefit to voters that most courts seem to presume. This cramped yet inconsistent view of disclosure is unwieldy and unlikely to sustain more innovative campaign finance regulations in the future. Instead, disclosure proponents need to demonstrate how the informational benefits of disclosure do not end simply at the ballot box. Specifically, a broader appeal to disclosure's ability to elevate political discourse

207. Tara Malloy & Bradley A. Smith, A Debate on Campaign Finance Disclosure, 38 Vt. L. Rev. 933, 943 (2014).

208. Id.; see also No on Mobile Home Rent Measure: Increases Under Prop. 199 Would Hurt Many, Especially the Aged, L.A. Times (Mar. 19, 1996), http://articles.latimes.com/1996-03-19/local/me-48536_1_mobile-home-park [https://perma.cc/AWG3-6NED]. The initiative was defeated despite the landlords outspending opponents of the measure six to one. Malloy & Smith, supra note 207, at 943.

209. See Ben-Shahar & Schneider, supra note 102, at 689 ("Lawmakers evaluate disclosure mandates issue-by-issue, but in disclosees' lives, each disclosure competes for their time and attention with other disclosures, with their investigations into unmandated knowledge, and with everything they do besides collecting information and making decisions . . . ."); Briffault, Campaign Finance Disclosure 2.0, supra note 22, at 289 ("Disclosure may be particularly valuable in ballot proposition elections . . . . Information about the contributions to and expenditures by groups supporting or opposing a measure can be quite helpful in understanding the likely consequences of what may be a difficult-to-parse measure.").

more generally can be useful in sustaining future reform. Regardless of the approach taken, it is apparent that further clarification of campaign finance disclosure's informational benefits is needed to sustain such policies in the future.