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DANIEL WINIK

## Citizens Informed: Broader Disclosure and Disclaimer for Corporate Electoral Advocacy in the Wake of *Citizens United*

**ABSTRACT.** This Note proposes a new direction for the regulation of corporate electoral advocacy in the wake of *Citizens United*. Rather than examining whether *Citizens United* was rightly decided, it argues that broad disclosure and disclaimer regulations for corporate electoral speech are constitutionally sound and may be normatively superior to outright prohibitions. After surveying state and federal disclosure and disclaimer requirements, the Note proposes a broader scope for such mandates than existing doctrine permits for individual speech. It argues that regulations of corporate-funded electoral speech should be neither strictly limited to express candidate advocacy nor balanced against a right to anonymity.

**AUTHOR.** Yale Law School, J.D. expected 2011; Yale College, B.A. 2007. I owe the greatest debt of gratitude to Heather Gerken, who advised this project over the course of several semesters, including while she was on leave. Thanks also to Lisa Larrimore Ouellette, Sonja Ralston, and Brian Soucek for insightful comments; to Cameron Kistler and the editors of *The Yale Law Journal*; to Bob Bauer, who cotaught (with Professor Gerken) the seminar in which this paper was born; and to the students in that seminar and the Fall 2010 *Yale Law Journal* reading group. Thanks, finally, to my family.



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**INTRODUCTION**

Until the Supreme Court's decision in *Citizens United v. FEC*,<sup>1</sup> the effort to prohibit electoral advocacy by corporations had been central to campaign finance reform, most recently in § 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA).<sup>2</sup> The legal foundation of this initiative was the Supreme Court's 1990 decision in *Austin v. Michigan Chamber of Commerce*,<sup>3</sup> which *Citizens United* overruled.<sup>4</sup> The premise of *Austin* was that corporations distort the public sphere when they spend general treasury funds on electoral advocacy.

From the start, *Austin* stood awkwardly alongside the Court's other recent precedents on corporate speech—namely, *FEC v. Massachusetts Citizens for Life*<sup>5</sup> and *First National Bank of Boston v. Bellotti*.<sup>6</sup> The *Austin* Court also had to contend with one of the central dictates of *Buckley v. Valeo*<sup>7</sup>: that equality is not a permissible rationale for curtailing speech rights in the electoral sphere. Whatever the wisdom of that pronouncement, Justice Marshall's attempt to distinguish it in *Austin* was tortuous.<sup>8</sup> When the Supreme Court ordered reargument in *Citizens United* at the end of the 2008 Term, it became clear that *Austin* would not survive as precedent.<sup>9</sup>

This Note does not ask whether *Citizens United* was rightly decided. Rather, it takes the decision as a starting point to propose a new beginning for

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1. 130 S. Ct. 876 (2010).
  2. Pub. L. No. 107-155, 116 Stat. 81 (codified at 18 U.S.C. § 607, 36 U.S.C. § 510, 47 U.S.C. § 315, and in scattered sections of 2 U.S.C. (2006)).
  3. 494 U.S. 652 (1990).
  4. *Citizens United*, 130 S. Ct. at 913.
  5. 479 U.S. 238 (1986).
  6. 435 U.S. 765 (1978); see Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 WM. & MARY L. REV. 587 (1991).
  7. 424 U.S. 1 (1976) (per curiam).
  8. See, e.g., Julian N. Eule, *Promoting Speaker Diversity: Austin and Metro Broadcasting*, 1990 SUP. CT. REV. 105, 109 (calling the *Austin* Court's rationale "simply a repackaging of the equalization goal" that *Buckley* had rejected); Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CALIF. L. REV. 1, 41 (1996); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1369 n.1 (1994) ("[T]he Court asserted that the [Michigan] restriction was concerned with 'corruption' but defined 'corruption' in a way that made it essentially equivalent to inequality.").
  9. See Lyle Denniston, *Argument Preview: Corporations in Politics*, SCOTUSBLOG (Sept. 4, 2009, 5:48 PM), <http://www.scotusblog.com/2009/09/argument-preview-corporations-in-politics/>.

the regulation of corporate electoral advocacy—one that recognizes incognito speech as the real source of problems. Corporations may contribute to public discourse on issues of economic growth and job creation, but when they speak without disclosing their identities, they not only misrepresent public support for their positions<sup>10</sup>—the danger on which *Austin* focused—but they also breach duties to their shareholders and vitiate the informational value of their speech. Instead of curtailing corporate speech rights in narrowly defined domains of electoral advocacy, legislators who aim to reform campaign finance should turn their attention to disclosure and disclaimer rules across a broader range of corporate political speech. Such rules are not just second-best options in the wake of *Citizens United*; there are reasons to believe that they might be more effective than outright prohibitions of corporate speech in preventing corruption (or the appearance of corruption) and informing the electorate.

Many disclosure and disclaimer provisions already cover the narrow territory of electioneering communications and express candidate advocacy. Even as *Citizens United* struck down BCRA § 203,<sup>11</sup> § 201’s disclosure requirement for electioneering communications and § 311’s disclaimer provisions remain in effect,<sup>12</sup> and most states provide their own disclosure and disclaimer requirements.<sup>13</sup> After *Citizens United*, the House of Representatives passed the DISCLOSE Act, which would have applied additional disclosure and disclaimer requirements to certain forms of corporate political spending.<sup>14</sup> But the bill died in the Senate,<sup>15</sup> and even had it passed, its scope would have been limited to electioneering communications and express candidate advocacy or its functional equivalent.<sup>16</sup> The Act would have broadened slightly the definitions of those activities<sup>17</sup> but done nothing to address the wider array of

10. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990), *overruled by Citizens United v. FEC*, 130 S. Ct. 876 (2010).

11. *Citizens United*, 130 S. Ct. at 913.

12. *Id.* at 916. Only Justice Thomas voted in *Citizens United* to hold them unconstitutional. *Id.* at 980-82 (Thomas, J., concurring in part and dissenting in part).

13. Thirty-eight states currently require disclosure for all or some independent expenditures or electioneering communications, regardless of whether the speaker is a corporation, *see infra* notes 38, 44-46 and accompanying text, and thirty-two have laws requiring disclaimer in such communications, *see infra* notes 58-64 and accompanying text.

14. H.R. 5175, 111th Cong. (2010). The acronym stands for “Democracy Is Strengthened by Casting Light on Spending in Elections.” *Id.* § 1(a).

15. 156 CONG. REC. S6285 (daily ed. July 27, 2010).

16. H.R. 5175 §§ 201-202, 211, 214 (applying new rules to independent expenditures or electioneering communications).

17. *Id.* §§ 201-202.

corporate political speech that neither “expressly advocat[es] the election or defeat of a clearly identified candidate”<sup>18</sup> nor “refers to a clearly identified candidate”<sup>19</sup> in such a way as to be “susceptible of no reasonable interpretation other than as an appeal to vote for or against” that candidate.<sup>20</sup> Provisions of that limited scope do not adequately serve the public interest in an informed electorate.

This Note, which proceeds in three Parts, proposes that legislators consider a more sweeping regime of disclosure and disclaimer for corporate-funded speech. Part I describes disclosure and disclaimer laws currently in place at both the federal and state levels. Part II seeks to justify broad disclosure and disclaimer laws. It argues that such laws further two critical objectives of campaign finance reform: informing the electorate and preventing corruption (or the appearance of corruption). Part III defends the constitutional validity of broader disclosure and disclaimer requirements for corporate speakers in the electoral sphere.

## I. CURRENT DISCLOSURE AND DISCLAIMER LAWS

It is helpful to begin with taxonomies—both of speech that may be subject to disclosure and disclaimer requirements and of the requirements themselves.<sup>21</sup> Two relevant categories of speech are independent expenditures and electioneering communications.<sup>22</sup> The former label generally applies to speech that “expressly advocates” for or against a “clearly identified” candidate.<sup>23</sup> (Some provisions apply to advocacy for and against ballot measures as well as candidates.)

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18. Bipartisan Campaign Reform Act of 2002 § 211, 2 U.S.C. § 431(17) (2006).

19. *Id.* § 201, 2 U.S.C. § 434(f)(3)(A)(i)(II).

20. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007).

21. Because these broad categories apply to both state and federal statutes, the following paragraphs discuss them interchangeably.

22. This Note considers laws applicable to all persons (or, in a few cases, only to corporations), rather than laws pertaining only to political committees, such as 2 U.S.C. § 434(a).

23. See *infra* Subsection III.A.1 for an explanation of how this formula arose from *Buckley v. Valeo*, 424 U.S. 1, 80 (1976) (per curiam). The DISCLOSE Act would have expanded the definition of independent expenditures to cover any communication

that, when taken as a whole, expressly advocates the election or defeat of a clearly identified candidate, or is the functional equivalent of express advocacy because it can be interpreted by a reasonable person only as advocating the election or defeat of a candidate, taking into account whether the communication involved

Arkansas law offers a typical definition of independent expenditures:

An “independent expenditure” is any expenditure which is not a contribution and:

(A) Expressly advocates the election or defeat of a clearly identified candidate for office;

(B) Is made without arrangement, cooperation, or consultation between any candidate or any authorized committee or agent of the candidate and the person making the expenditure or any authorized agent of that person; and

(C) Is not made in concert with or at the request or suggestion of any candidate or any authorized committee or agent of the candidate.<sup>24</sup>

An “electioneering communication” is speech that references a candidate within a specified time prior to an election. The first criterion, in theory, sweeps more broadly than that of independent expenditures: whereas independent expenditures must expressly advocate for or against a candidate, electioneering communications need only refer to the candidate.<sup>25</sup> But *Wisconsin Right to Life* more or less eviscerated this distinction by construing the term “refer” to cover only communications “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”<sup>26</sup> The time criterion cuts more narrowly: the “electioneering communications” label applies only within a specified period prior to an election.<sup>27</sup> Jurisdictions may also apply a targeting criterion, regulating messages as electioneering communications only when they reach a given population.

Federal law defines an electioneering communication as “any broadcast, cable, or satellite communication” that meets three standards.<sup>28</sup> It must “refer[] to a clearly identified candidate for Federal office”<sup>29</sup> and, after *Wisconsin Right to Life*, must be “susceptible of no reasonable interpretation other than as an

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mentions a candidacy, a political party, or a challenger to a candidate, or takes a position on a candidate’s character, qualifications, or fitness for office.

H.R. 5175, 111th Cong. § 201(a) (2010). Still, this definition is fundamentally limited to direct candidate advocacy.

24. ARK. CODE ANN. § 7-6-201(11) (Supp. 2009).

25. See 2 U.S.C. § 434(f)(3)(A)(i)(I).

26. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007).

27. See, e.g., 2 U.S.C. § 434(f)(3)(A)(i)(II).

28. *Id.* § 434(f)(3)(A)(i).

29. *Id.* § 434(f)(3)(A)(i)(I).

appeal to vote for or against a specific candidate.”<sup>30</sup> It must occur “within . . . 60 days before a general, special, or runoff election for the office sought by the candidate; or . . . 30 days before a primary or preference election, or a convention or caucus.”<sup>31</sup> And in a congressional race, it must be capable of being “received by 50,000 or more persons”<sup>32</sup> in the relevant jurisdiction.

A second taxonomy is of the regulations themselves. Disclosure regulations require speakers to file with the government a public accounting of the money they have spent to support a given candidate.<sup>33</sup> Disclosure permits any interested party to discover the source of candidates’ support. Disclaimer regulations, by contrast, require that speakers identify themselves in their communications rather than merely in filings with an agency. Disclaimers convey less information than disclosures—a few seconds in a television spot, rather than a detailed form—but they are more vivid and accessible. Disclosure and disclaimer regulations are complements in a thorough regime of transparency for campaign finance.

#### A. *What Expenditures Must Be Disclosed?*

Federal law requires disclosure by “[e]very person . . . who makes independent expenditures . . . in excess of \$250 during a calendar year,”<sup>34</sup> as well as disclosure of “disbursement[s] for the direct costs of producing and airing electioneering communications in . . . excess of \$10,000 during any calendar year.”<sup>35</sup> The DISCLOSE Act would have required immediate disclosure of independent expenditures in excess of \$10,000 by any person,<sup>36</sup> and it would have imposed additional requirements for the disclosure of

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30. 551 U.S. at 470. *Wisconsin Right to Life* presented an as-applied challenge to the corporate spending regulation of BCRA § 203, not the disclosure requirement of § 201. Because both sections draw on the definition of electioneering communications in § 201, the Court’s construction presumably governs § 201 as well as § 203.

31. 2 U.S.C. § 434(f)(3)(A)(i)(II). Again, the DISCLOSE Act would have expanded the preelection window to 120 days for a general election. H.R. 5175, 111th Cong. § 202(a) (2010).

32. 2 U.S.C. § 434(f)(3)(C).

33. For an insightful discussion of disclosure requirements and how they might work better, see Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273 (2010).

34. 2 U.S.C. § 434(c).

35. *Id.* § 434(f)(1).

36. H.R. 5175 § 201(b).

independent expenditures and electioneering communications by corporations.<sup>37</sup>

In the states, independent expenditures commonly trigger disclosure requirements. Thirty-four states require disclosure of independent expenditures.<sup>38</sup> They generally hew to the definition of independent expenditures outlined above, though some do not make explicit the requirement that advocacy be “express,”<sup>39</sup> and others do not mandate that the candidate in question be “clearly identified.”<sup>40</sup> A few definitions do not use the

37. *Id.* § 211.

38. They include Alaska, ALASKA STAT. § 15.13.135 (LEXIS through 2010 Sess.); Arkansas, ARK. CODE ANN. § 7-6-220 (2007); California, CAL. GOV'T CODE § 85500 (West 2005); Colorado, COLO. CONST. art. XXVIII, § 5; Connecticut, CONN. GEN. STAT. § 9-612(e)(1) (LEXIS through 2010 Supp.); Delaware, DEL. CODE ANN. tit. 15, § 8031(a) (2007); Florida, FLA. STAT. ANN. § 106.071(1) (LexisNexis, LEXIS through 2010 Sess.); Idaho, IDAHO CODE ANN. § 67-6611 (2010); Illinois, 10 ILL. COMP. STAT. ANN. 5/9-8.6 (LexisNexis, LEXIS through 2010 Sess.); Iowa, IOWA CODE ANN. § 68A.404(3) (West Supp. 2010); Kansas, KAN. STAT. ANN. § 25-4150 (2009); Kentucky, KY. REV. STAT. ANN. § 121.150 (LexisNexis Supp. 2009); Louisiana, LA. REV. STAT. ANN. § 18:1501.1 (Supp. 2010), *construed in* *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006); Maine, ME. REV. STAT. ANN. tit. 21-A, § 1019-B (Supp. 2009); Massachusetts, MASS. GEN. LAWS ANN. ch. 55, § 18A (West Supp. 2010); Michigan, MICH. COMP. LAWS ANN. § 169.251 (West 2009); Minnesota, MINN. STAT. ANN. § 10A.20 (West Supp. 2010); Mississippi, MISS. CODE ANN. § 23-15-809 (2007); Missouri, MO. ANN. STAT. § 130.047 (West 2010); Montana, MONT. ADMIN. R. 44.10.531 (Westlaw through 2010); Nebraska, NEB. REV. STAT. § 49-1467 (Supp. 2008); Nevada, NEV. REV. STAT. ANN. § 294A.210 (LexisNexis 2008); New Jersey, N.J. ADMIN. CODE § 19:25-12.8 (2010); North Carolina, N.C. GEN. STAT. § 163-278.12 (2009); Ohio, OHIO REV. CODE ANN. § 3517.105(B)(2) (LexisNexis 2005); Oregon, OR. REV. STAT. ANN. § 260.044 (West, Westlaw through 2010 Spec. Sess.); Pennsylvania, 25 PA. CONS. STAT. ANN. § 3246(g) (West 2010); Rhode Island, R.I. GEN. LAWS § 17-25-10(b) (Supp. 2009); South Dakota, S.D. CODIFIED LAWS § 12-27-16 (Supp. 2010); Texas, TEX. ELEC. CODE ANN. § 253.062 (West 2010), *construed in* *Osterberg v. Peca*, 12 S.W.3d 31, 43 (Tex. 2000) (“Though complexly phrased and structured, the Election Code has an unambiguous intended effect: an individual must report direct expenditures that total over \$100 . . . .”); Virginia, VA. CODE ANN. § 24.2-945.2 (Supp. 2009); Washington, WASH. REV. CODE ANN. § 42.17.100 (West, Westlaw through 2010 legislation); West Virginia, W. VA. CODE ANN. § 3-8-2(b) (West, Westlaw through 2010 2d Extraordinary Sess.); and Wisconsin, WIS. STAT. ANN. § 11.06(2) (West Supp. 2009).

39. These include Michigan, MICH. COMP. LAWS ANN. §169.251; Nebraska, NEB. REV. STAT. § 49-1467; North Carolina, N.C. GEN. STAT. § 163-278.12; Ohio, OHIO REV. CODE ANN. § 3517.105(B)(2); Oregon, OR. REV. STAT. § 260.044; and Washington, WASH. REV. CODE ANN. § 42.17.100.

40. These include Florida, FLA. STAT. ANN § 106.071(1); Michigan, MICH. COMP. LAWS. ANN. § 169.251; and Nebraska, NEB. REV. STAT. § 49-1467.



term “advocacy” at all.<sup>41</sup> Of the thirty-four states that require disclosure for independent expenditures, ten also require disclosure for electioneering communications.<sup>42</sup> North Carolina requires disclosure for a third category of speech, which it dubs “candidate-specific communications.”<sup>43</sup> Arizona<sup>44</sup> and Utah<sup>45</sup> impose disclosure requirements specific to corporate independent expenditures. And Hawaii and Vermont require disclosure for electioneering communications but not independent expenditures.<sup>46</sup>

Under this regime, a great deal of electoral advocacy carries no disclosure requirement. At the federal level, disclosure is required only for express advocacy,<sup>47</sup> except during the brief preelection window—sixty days for a general election, thirty days for a primary<sup>48</sup>—when it is required for speech “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”<sup>49</sup> The DISCLOSE Act would have expanded this regime, requiring more rapid disclosure of certain independent expenditures<sup>50</sup> and additional disclosure for independent expenditures and electioneering communications by corporations.<sup>51</sup> But even these mandates

41. See ALASKA STAT. § 15.13.135; *id.* § 15.13.400(10); CONN. GEN. STAT. § 9-612(e)(1); *id.* § 9-601(18); LA. REV. STAT. ANN. §§ 18:1483, :1501.1, construed in *Ctr. for Individual Freedom*, 449 F.3d at 665 (“We . . . conclude that the statute reaches only communications that expressly advocate the election or defeat of a clearly identified candidate.”); MO. ANN. STAT. § 130.047; N.J. ADMIN. CODE §19:25-12.7; TEX. ELEC. CODE ANN. § 251.001.

42. These include California, CAL. GOV'T CODE § 85310; Colorado, COLO. REV. STAT. § 1-45-108(1)(a)(III) (LEXIS through 2010 Sess.); Florida, FLA. STAT. ANN. § 106.071(1); Idaho, IDAHO CODE ANN. § 67-6630; Illinois, 10 ILL. COMP. STAT. 5/9-1.15, -8.6; Massachusetts, MASS. GEN. LAWS ANN. ch. 55, § 18F; North Carolina, N.C. GEN. STAT. § 163-278.81; Ohio, OHIO REV. CODE ANN. § 3517.1011(D) (LexisNexis Supp. 2010); South Dakota, S.D. CODIFIED LAWS § 12-27-16; and West Virginia, W. VA. CODE ANN. § 3-8-2b (LexisNexis 2009).

43. N.C. GEN. STAT. § 163-278.101.

44. ARIZ. REV. STAT. ANN. § 16-914.02 (West, Westlaw through 2d Reg. Sess. 2010).

45. UTAH CODE ANN. § 20A-11-701 (LexisNexis Supp. 2010). Utah will, as of January 1, 2011, also impose a general disclosure requirement for electioneering communications. 2010 Utah Laws ch. 389.

46. 2010 Haw. Legis. Serv. 211 (West 2010); VT. STAT. ANN. tit. 17, § 2893 (Supp. 2009).

47. 2 U.S.C. §§ 431(17), 434(c) (2006).

48. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007); see 2 U.S.C. § 434(f)(3)(A)(i)(II).

49. 2 U.S.C. § 434(f)(3)(A)(i)(I).

50. H.R. 5175, 111th Cong. § 203 (2010).

51. *Id.* § 211.

would have taken effect only within the realm of direct candidate advocacy.<sup>52</sup> The state requirements, too, extend only to speech that advocates for or against a particular candidate.<sup>53</sup>

*B. What Communications Must Carry Disclaimers?*

Federal law requires disclaimers for both electioneering communications and communications funded by independent expenditures.<sup>54</sup> The DISCLOSE Act would have required more robust disclaimer statements but would not have expanded the scope of coverage.<sup>55</sup> Among the states, Illinois,<sup>56</sup> South Dakota,<sup>57</sup> and West Virginia<sup>58</sup> require disclaimers both for express advocacy and for electioneering communications. Louisiana<sup>59</sup> and Vermont<sup>60</sup> require disclaimers only for electioneering communications, while twelve states require

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52. See *id.* § 201 (slightly broadening the definition of independent expenditures to include speech “that, when taken as a whole, expressly advocates the election or defeat of a clearly identified candidate, or is the functional equivalent of express advocacy because it can be interpreted by a reasonable person only as advocating the election or defeat of a candidate, taking into account whether the communication involved mentions a candidacy, a political party, or a challenger to a candidate, or takes a position on a candidate’s character, qualifications, or fitness for office”); *id.* § 202 (slightly broadening the definition of electioneering communications to include speech within 120 days of a general election); *id.* § 211 (applying new rules for corporate disclosures to “campaign-related activity”); *id.* § 212 (defining “campaign-related activity” to cover independent expenditures and electioneering communications).
53. See, e.g., *supra* note 24 and accompanying text. A few states’ requirements do purport to cover a broader range of speech. See *supra* note 41 and accompanying text. But because *Buckley* narrowed the construction of “expenditure” in the Federal Election Campaign Act “to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate,” holding that a broader construction would render the statute unconstitutionally vague, *Buckley v. Valeo*, 424 U.S. 1, 80 (1976) (per curiam) (footnote omitted), this limitation should apply to any broader state definition. The Florida Supreme Court, for instance, narrowed the construction of “independent expenditure with respect to any candidate or issue,” FLA. STAT. ANN. § 106.071(1) (LexisNexis, LEXIS through 2010 Sess.), so as “to reach only those funds used for communications that expressly advocate the election or defeat of a clearly identified candidate or referendum issue.” *Doe v. Mortham*, 708 So. 2d 929, 933 (Fla. 1998) (citing *Buckley*, 424 U.S. at 80).
54. 2 U.S.C. § 441d(a). For details of the required disclosures, see *id.* § 441d(c), (d)(2).
55. H.R. 5175 §214 .
56. 10 ILL. COMP. STAT. 5/9-1.15, -9.5 (LexisNexis, LEXIS through 2010 Sess).
57. S.D. CODIFIED LAWS § 12-27-16 (Supp. 2010).
58. W. VA. CODE ANN. §§ 3-8-2(e), -2b (West, Westlaw through 2010 2d Extraordinary Sess.).
59. LA. REV. STAT. ANN. § 18:1463(C)(2) (Supp. 2010).
60. VT. STAT. ANN. tit. 17, § 2892 (Supp. 2009).

disclaimers only for express advocacy.<sup>61</sup> An additional nine states require disclaimers for all independent advocacy regardless of whether the advocacy is “express.”<sup>62</sup> Five states purport to impose a much broader disclaimer requirement, covering even nonadvocacy communications.<sup>63</sup> Washington applies a hybrid scheme, requiring basic disclaimers for all “political advertising” but imposing more detailed requirements for independent expenditures (advocacy) or electioneering communications.<sup>64</sup> And Arizona applies a disclaimer requirement only to corporate independent expenditures.<sup>65</sup>

Like the disclosure provisions discussed earlier, these regulations leave much electoral advocacy untouched. Five states mandate disclaimers for the broad category of political advertising.<sup>66</sup> But in the vast majority of states, and at the federal level, electoral communications that stay outside the bounds of direct advocacy or the narrow strictures of electioneering communications carry no disclaimer requirement at all.

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61. These include California, CAL. GOV'T CODE § 84506 (West 2005); Colorado, COLO. CONST. art. XXVIII, § 5, cl. 2; Delaware, DEL. CODE ANN. tit. 15, § 8023(a) (2007); Kansas, KAN. STAT. ANN. § 25-4156(B) (2009); Idaho, IDAHO CODE ANN. §67-6614A (2010); Indiana, IND. CODE ANN. § 3-9-3-2.5 (LexisNexis 2002); Iowa, IOWA CODE ANN. § 68A.404(5), .405 (West Supp. 2010); Kentucky, KY. REV. STAT. ANN. § 121.190 (LexisNexis Supp. 2009); Pennsylvania, 25 PA. CONS. STAT. ANN. § 3258(a) (West 2010); Utah, UTAH CODE ANN. § 20A-11-901 (LexisNexis 2007 & Supp. 2010); Virginia, VA. CODE ANN. § 24.2-956.1, -957.3, -958.3, -959.1 (2006); and Wisconsin, WIS. STAT. ANN. § 11.30 (West 2004). The Wisconsin statute was held unconstitutional as applied in *Swaffar v. Cane*, 610 F. Supp. 2d 962 (E.D. Wis. 2009).

62. These include Alaska, ALASKA STAT. § 15.13.135(b) (2008); Hawaii, 2010 Haw. Legis. Serv. 211 (West 2010); Maryland, MD. CODE ANN., ELEC. LAW §13-401 (LexisNexis 2002); Montana, MONT. CODE ANN. § 13-35-225 (2009); New Hampshire, N.H. REV. STAT. ANN. § 664:14 (LexisNexis 2007); New Jersey, N.J. STAT. ANN. § 19:44A-22.3 (West Supp. 2010); North Carolina, N.C. GEN. STAT. §163-278.39 (2009); Ohio, OHIO REV. CODE ANN. §3517.105(B)(1) (LexisNexis 2005); and South Carolina, S.C. CODE ANN. §8-13-1354 (Supp. 2009).

63. Alabama's disclaimer requirement applies to “[a]ny paid political advertisement.” ALA. CODE § 17-5-12 (LexisNexis 2007). Florida's does the same. FLA. STAT. ANN. § 106.143 (LexisNexis, LEXIS through 2010 Sess.). Michigan law uses even broader terms, requiring disclaimers for any “billboard, placard, poster, pamphlet, or other printed matter,” or “radio or television paid advertisement[,] having reference to an election, a candidate, or a ballot question.” MICH. COMP. LAWS ANN. § 169.247 (West 2009). Nebraska similarly requires disclaimers for communications “relating to a candidate or ballot question,” NEB. REV. STAT. § 49-1474.01 (2004), and Missouri requires them for communications “relative to any candidate for public office or any ballot measure,” MO. ANN. STAT. § 130.031(8) (West 2010).

64. WASH. REV. CODE ANN. § 42.17.510 (West, Westlaw through 2010 legislation).

65. ARIZ. REV. STAT. ANN. § 16-914.02(F) (West, Westlaw through 2d Reg. Sess. 2010).

66. See *supra* note 63.

## II. MOTIVATIONS FOR BROADER DISCLOSURE AND DISCLAIMER LAWS

This Part argues for broader disclosure and disclaimer of corporate electoral communications, extending to speech beyond direct advocacy. A weak version of this argument would be that broad disclosure and disclaimer requirements are better than nothing—that they are second-best options now that the government can no longer ban corporations from speaking in particular circumstances.<sup>67</sup> But I press a stronger claim: that disclosure and disclaimer requirements might actually do *better* than outright prohibition in achieving the informational and anticorruption objectives that have long been central to reform efforts.<sup>68</sup>

A few caveats are in order. First, this argument does not endorse the unleashing of corporate electoral speech absent provisions for disclosure and disclaimer. Whether corporations will in fact use their new rights under *Citizens United* to flood the airwaves with political speech remains unclear,<sup>69</sup>

67. This sort of argument has predominated among reform-minded scholars in the immediate wake of *Citizens United*. See, e.g., *Corporate America vs. The Voter: Examining the Supreme Court's Decision To Allow Unlimited Corporate Spending in Elections: Hearing Before the S. Comm. on Rules & Admin.*, 111th Cong. (2010) (statement of Heather K. Gerken, J. Skelly Wright Professor of Law, Yale Law School), available at [http://rules.senate.gov/public/index.cfm?a=Files.Serve&File\\_id=46b20c68-8e8b-44ba-a206-32703e280a4e](http://rules.senate.gov/public/index.cfm?a=Files.Serve&File_id=46b20c68-8e8b-44ba-a206-32703e280a4e) [hereinafter *Gerken Statement*]; *The First Amendment and Campaign Finance Reform After Citizens United: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 11, 26 (2010) (statement of Laurence H. Tribe, Carl M. Loeb University Professor and Professor of Constitutional Law, Harvard Law School) [hereinafter *Tribe Statement*]; Lloyd H. Mayer, *Disclosures About Disclosure: Reward and Risk*, 45 IND. L. REV. (forthcoming 2010) (manuscript at 2 & nn.6-8), available at <http://papers.ssrn.com/sol3/abstract=1622760>; Eric Lichtblau, *Democrats Pushing To Require Campaign Disclosure of Corporate Roles in Campaigns*, N.Y. TIMES, Apr. 13, 2010, at A16; Laurence H. Tribe, *What Should Congress Do About Citizens United?*, SCOTUSBLOG (Jan. 24, 2010, 10:30 PM) <http://www.scotusblog.com/2010/01/what-should-congress-do-about-citizens-united/>.

68. My argument differs from that of reform opponents, some of whom view disclosure and disclaimer begrudgingly as better options than prohibition or content regulation, but who generally do not believe that our government should manage the marketplace of electoral speech. One of the most prominent opponents of reform, Bradley Smith, has written that “disclosure laws raise serious First Amendment questions.” Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1071 n.139 (1996). At least one notable opponent of reform, Kathleen Sullivan, has endorsed disclosure. See Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 326-27.

69. See, e.g., Carol D. Leonnig, *Political Ads Are Tough Sell for Image-Conscious Corporations*, WASH. POST, June 1, 2010, at A3.

but the prospect that they might do so without identifying themselves or their interests is troubling.<sup>70</sup> Second, the argument takes account only of the interests that the Supreme Court has deemed constitutionally legitimate in this field, which notably do not include equality. Among *Buckley*'s central dictates is that the government may not constitutionally "restrict the speech of some elements of our society in order to enhance the relative voice of others."<sup>71</sup> One can argue that *Buckley* was wrongly decided in this regard—that democracy commands equal voices just as it commands equal votes. But that is not the law. I therefore argue that disclaimer and disclosure help to foster the permissible objectives of reform, not that they are panaceas for an inequitable system.

### A. *Distortion and the Marketplace of Ideas*

In considering Michigan's law against corporate expenditures on electoral advocacy, the *Austin* Court had to contend with *Buckley*'s holding that equality is not a permissible reason to regulate electoral speech.<sup>72</sup> Adhering to this precedent, the *Austin* majority framed its decision to uphold the Michigan law as a vindication of *Buckley*'s anticorruption rationale. Justice Marshall, writing for the Court, argued that Michigan had restricted corporate speech to combat "a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."<sup>73</sup> Although some see the Court's rationale as "simply a repackaging of the equalization goal" that *Buckley* had rejected,<sup>74</sup> the antidistortion formula at least claims to address a different value: the integrity of the public sphere. Under the *Austin* Court's theory, the public support that an idea commands should dictate its effect on the public sphere; an idea without public support should not shape public discourse.<sup>75</sup>

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70. Some recent evidence does suggest that large corporations have embraced the opportunity for incognito political advocacy. See Eric Lipton, Mike McIntyre & Don Van Natta, Jr., *Large Donations Aid U.S. Chamber in Election Drive*, N.Y. TIMES, Oct. 22, 2010, at A1.

71. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam).

72. *Id.*

73. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990), *overruled by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

74. Eule, *supra* note 8, at 109.

75. In that case, the Michigan Chamber of Commerce's ability to place the ad had nothing to do with "the public's support for the [Chamber's] political ideas." *Austin*, 494 U.S. at 660.

Under the *Austin* Court's framing, speech by for-profit corporations is different from speech by individuals or by the kind of ideological nonprofit identified in *Massachusetts Citizens for Life*<sup>76</sup> (*MCFL*), because for-profit corporations build their "immense aggregations of wealth" through "the corporate form."<sup>77</sup> Whereas speech by an *MCFL* group reflects the support of its members, and speech by a wealthy individual reflects at least the individual's own political autonomy, corporate speech reflects only the license of a charter to maximize profits.

Embedded in this argument is an important assumption: that the *ex ante* level of public support is what qualifies speech as legitimate. In the *Austin* Court's conception, the public sphere is a static receptacle of ideas. Rather than considering how ideas accrue support after their introduction to public discourse, *Austin* seems to envision that the legitimating marketplace of political ideas precedes the public airing of those ideas. A speaker distorts the public sphere, in this view, by introducing ideas that have not already won support. In practice, the proving ground is financial. What makes the speech of an *MCFL* organization legitimate, in the *Austin* Court's eyes, is that the ideological nonprofit has already raised funds from people who believe in what it has to say. Funding by for-profit corporations confers no such legitimacy.

But public support for a given idea is not, as the *Austin* Court seems to have imagined, isolated from interchange within the public sphere. The effect of an idea on public discourse is proportional not to the preliminary level of support for that idea but to its eventual support—to the extent to which it sways opinions. No matter how loudly an idea is expressed, and no matter its initial popularity, it lives or dies according to how many people ultimately believe it. If corporate-funded expression convinces no one, then it distorts nothing.

A better way to conceive of distortion is this: speech distorts the public sphere if its effect on public discourse surpasses its true level of public support, which is to say the support that it would command after full, fair, and rational evaluation by the public.<sup>78</sup> In a realm of imperfect information, the public

76. 479 U.S. 238 (1986). *MCFL* held that certain nonprofit corporations could not constitutionally be bound by the bar on corporate independent expenditures under 2 U.S.C. § 441b (2006). The Court exempted from the bar corporations that were "formed for the express purpose of promoting political ideas" rather than to "engage in business activities," that "ha[d] no shareholders or other persons affiliated so as to have a claim on [their] assets or earnings," that were not "established by a business corporation or a labor union," and that did not "accept contributions from such entities." *Id.* at 264.

77. *Austin*, 494 U.S. at 660.

78. Scholars have described this ideal capacity for civic thought as "voter competence." See, e.g., Elizabeth Garrett, *Voting with Cues*, 37 U. RICH. L. REV. 1011 (2003); Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4

cannot always evaluate ideas rationally.<sup>79</sup> When the public's knowledge is limited, an idea may command more support and thus greater influence than it would in a realm of perfect information. The purpose of disclosure and disclaimer provisions is to facilitate the full and fair consideration of electoral advocacy after its entry into public discourse. If, as Justice Holmes wrote, "the best test of truth is the power of the thought to get itself accepted in the competition of the market,"<sup>80</sup> then disclosure and disclaimer help the market to function.

The importance of complete information in the public sphere is central to Alexander Meiklejohn's theory of the First Amendment, which has profoundly influenced First Amendment jurisprudence.<sup>81</sup> The purpose of the First Amendment, Meiklejohn writes, "is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal."<sup>82</sup> To ensure "that all the citizens shall, so far as possible, understand the issues which bear upon our common life," the First Amendment provides that "no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them."<sup>83</sup>

The proposition that disclosure and disclaimer help to inform the electorate is not uncontroversial. The most cogent critique of this idea is that limited and superficial forms of information add little to the deliberative quality of public discourse. In his influential treatment of democracy and the First Amendment, Ronald Dworkin writes of "the degradation of our public discourse by moronic political commercials that make no arguments beyond repetitive slogans and

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ELECTION L.J. 295, 296 (2005) ("Voters are competent 'if they cast the same votes they would have cast had they possessed all available knowledge about the policy consequences of their decision.'" (quoting Elisabeth R. Gerber & Arthur Lupia, *Voter Competence in Direct Legislation Elections*, in CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS 147, 149 (S.L. Elkin & K.E. Soltan eds., 1999))); Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 UCLA L. REV. 1141 (2003).

79. For a detailed treatment of voter rationality, see James A. Gardner, Comment, *Protecting the Rationality of Electoral Outcomes: A Challenge to First Amendment Doctrine*, 51 U. CHI. L. REV. 892 (1984).

80. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

81. See William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Brian K. Pinaire, *A Funny Thing Happened on the Way to the Market: The Supreme Court and Political Speech in the Electoral Process*, 17 J.L. & POL. 489, 498-501 (2001).

82. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 88 (Lawbook Exchange 2000) (1948).

83. *Id.* at 88-89.

jingles.”<sup>84</sup> Dworkin observes that a system of “[c]onditional public funding,” under which candidates would agree to air not “ordinary campaign commercials” but only “longer, more substantive political broadcasts,” could “help to arrest that damage.”<sup>85</sup> Under Dworkin’s understanding, anonymity is the least of the problems with the bulk of political communications in the United States, and requiring political ads to include the speaker’s name will do little to improve their informational value.

But social science literature suggests that even “sound-bite[s],”<sup>86</sup> to use Dworkin’s pejorative term, may have an important informational role as heuristics. Voters most commonly “refer[] to the heuristic cue of party identification to figure out which candidate is most likely to match [their] values and share [their] interests.”<sup>87</sup> Most voters lack the time or inclination to “consider[] all relevant information about the candidates,” but they “leverage their knowledge about the major political parties as an organizing heuristic for understanding who the candidates are, whether the candidates are credible, and which candidate best represents them.”<sup>88</sup> Interest group affiliations can serve a similar function.<sup>89</sup> Notwithstanding any idealized vision of deliberative discourse, voters do weigh identity heuristics in determining their preferences. Knowing that a given corporation supports or opposes a candidate can mean a great deal.<sup>90</sup>

84. RONALD DWORIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 367 (2000).

85. *Id.* at 355-56, 367.

86. *Id.* at 356.

87. Kang, *supra* note 78, at 1150; see David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419, 454 (2007); Heather Gerken, *The Mismatch Problem: Why Election Law Isn’t Always Built for the Electorate*, JOTWELL (Jan. 25, 2010), <http://conlaw.jotwell.com/the-mismatch-problem-why-election-law-isnt-always-built-for-the-electorate/>.

88. Kang, *supra* note 78, at 1150.

89. See *id.* Elizabeth Garrett and Daniel Smith, in a study of ballot initiatives and referenda, cite empirical work showing “that the position of an economic group with known preferences on an issue can serve as an effective shortcut for ordinary voters, substituting for encyclopedic information about the electoral choice.” Garrett & Smith, *supra* note 78, at 298 (citing Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63, 72 (1994)).

90. It is possible that voters, never having been exposed to corporate communications of the nature that *Citizens United* permits, might not initially know whether endorsement by a given corporation should increase or decrease their support for a candidate. This is true just as for party labels: when a new party forms, voters may not know right away whether to support that party’s candidates. Voters learn these associations over time. If candidates endorsed by Nike tend to act in a way that a given voter likes, that voter will be more likely



Whether it should is open for debate. Daniel Ortiz writes that “Dworkin’s complaint . . . is, at bottom, a complaint about the way many of us evaluate political candidates. Many of us, he thinks, simply do not exercise political choice in the informed, deliberate, reasoned way he believes democracy requires.”<sup>91</sup> Ortiz coins the term “civic slackers” to refer to this set of participants in democracy,<sup>92</sup> and he frames reform proposals like Dworkin’s as efforts to save civic slackers from themselves—to shield them from “certain political stimuli,” like sound-bite advertising, that are likely to provoke them to act in an irrational or incompetent way.<sup>93</sup> But he rightly points out that such reform “disrespects these voters’ evaluative autonomy” by “frustrat[ing] their ability to judge candidates in the way they would otherwise judge.”<sup>94</sup> Even if reformers disrespect the way in which many voters evaluate candidates, that disapprobation cannot stand in the way of policy responses to the epidemic of civic disinterest. As long as civic slackers exist, any information that brings them closer to the ideal of competence benefits our democracy.

If disclosure and disclaimer help foster a well-informed public sphere, the question remains whether they do so better than a prohibition on corporate electoral advocacy. There are at least two reasons why they might—one having to do with the positive informational value of corporate speech and the other concerning the myth that prohibiting corporate expenditures on electoral advocacy can meaningfully insulate politics from corporate influence.

The majority opinion in *Citizens United* confronts the idea that corporate speech is less valuable to public discourse than is individual speech. It refers to the prohibition of corporate spending on electoral advocacy as “censorship . . . vast in its reach”<sup>95</sup> and casts corporations as protectors of the people. “By suppressing the speech of manifold corporations,” the Court writes, “the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.”<sup>96</sup> This paean to corporate speech is excessive in its faith that profit-seeking

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to support Nike’s candidates in the future. (I owe this idea, like many others, to a conversation with Brian Soucek.)

91. Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 905 (1998).

92. *Id.* at 903.

93. *Id.* at 905.

94. *Id.*

95. *Citizens United v. FEC*, 130 S. Ct. 876, 907 (2010).

96. *Id.*

entities will speak for the common good.<sup>97</sup> But corporate self-interest does to some degree align with the general welfare; successful private enterprise generates jobs and national income. Even Justice Stevens's vigorous dissent in *Citizens United* observes that corporations "make enormous contributions to our society."<sup>98</sup> So corporate voices can be informative, even when they reflect only profit motives.<sup>99</sup>

Illustrative in this regard is the advocacy at issue in *Austin*: a proposed advertisement by the Michigan Chamber of Commerce in support of Richard Bandstra's candidacy for the state legislature. The Court noted the Chamber's efforts "to place in a local newspaper an advertisement supporting a specific candidate,"<sup>100</sup> without detailing the content of the proposed ad. But the message itself, printed in an appendix to Justice Kennedy's dissent,<sup>101</sup> is no picture of corporate cabalism. The Chamber of Commerce not only disclosed its corporate interests but explained, in seven paragraphs of reasoned prose, why its proposals (in Mr. Bandstra's hands) would benefit all Michiganders by "making Michigan more competitive for business investment and job creation."<sup>102</sup> It stated outright that its proposals would reduce worker's compensation.<sup>103</sup> A Michigan voter could read this ad and agree or disagree with its conclusion but could hardly be fooled by its premises.

To take the Bandstra ad as representative of corporate political speech would be naïve. Most of the political communications that fill airwaves in the days before an election are less elaborately informative, less measured, and less honest than the one proposed by the Michigan Chamber of Commerce.<sup>104</sup> The

97. See, e.g., Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235 (1998).

98. 130 S. Ct. at 930 (Stevens, J., concurring in part and dissenting in part).

99. Corporate voices can be more informative when they represent motives beyond profit—namely, when they represent groups of individuals who choose the corporate form to join in support of public causes. As Justice Scalia wrote in *McConnell v. FEC*, "with increasing frequency, incorporation is chosen by those who associate to defend and promote particular ideas—such as the American Civil Liberties Union and the National Rifle Association . . ." 540 U.S. 93, 258 (2003) (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part).

100. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 656 (1990), overruled by *Citizens United*, 130 S. Ct. 876.

101. *Id.* at 714 app. (Kennedy, J., dissenting).

102. *Id.*

103. *Id.*

104. See, e.g., STEPHEN ANSOLABEHRE & SHANTO IYENGAR, *GOING NEGATIVE: HOW ATTACK ADS SHRINK AND POLARIZE THE ELECTORATE* (1995).

important question is not whether something like the Bandstra ad helps to inform the public but whether its cruder cousins do as well.

I submit that even crude ads do play some role in informing the public. As noted earlier, the affiliation of a candidate with particular interest groups—just like the candidate’s party affiliation—can be a powerful heuristic for voters.<sup>105</sup> The very fact that the Chamber of Commerce endorses Richard Bandstra means something to voters, regardless of what the Chamber says about him. The same goes for even the least reasoned forms of political communication, as long as they carry the name of the corporation for which they speak. Scholars may condemn such ads for impoverishing public discourse, but time-starved voters really do inform themselves by such basic cues as which corporation stands behind which candidate.<sup>106</sup>

A second reason why disclosure and disclaimer might inform the public sphere better than would a prohibition on corporate electoral advocacy is that the latter provides a deceptive sense of insulation from corporate influence.<sup>107</sup> Before *Citizens United*, corporations could speak through political action committees funded by contributions from their shareholders and employees. They could fund electoral speech beyond the narrow categories of express advocacy or electioneering communications. And they could influence political actors in nonpublic ways. As *Citizens United* observes, “lobbying and corporate communications [between corporations and] elected officials occur on a regular basis.”<sup>108</sup> Officials may wield “authority, influence, and power to threaten corporations to support the Government’s policies.”<sup>109</sup> But corporations may pressure officials in much the same way, and a ban on their doing so overtly can hardly stop them from applying pressure; it only drives their actions away from the public eye. Hence one of the potential benefits of a more open regime: when corporations contribute to public discourse through mass advertising, rather than back-channel influence, “all can judge” the “content and purpose” of their speech.<sup>110</sup> Corporations may maintain covert influence even as they engage in public advocacy, but to the extent that their public priorities align with those they communicate in private, the electorate

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105. See *supra* notes 87-90 and accompanying text.

106. See *supra* notes 89-90 and accompanying text.

107. For a discussion of the hydraulic problem in regulating influence over politics—that “political money, like water, has to go somewhere”—see Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999).

108. *Citizens United v. FEC*, 130 S. Ct. 876, 907 (2010).

109. *Id.*

110. *Id.*

will at least glimpse what its representatives are seeing behind closed doors. In short, proponents of an open political discourse should want to channel corporate influence into public communications that can inform the electorate.

### *B. Preventing Corruption*

Disclosure and disclaimer may also be more effective than a ban on corporate electoral advocacy in the battle against corruption—which has, since *Buckley*, been the lodestar of the Court’s campaign finance jurisprudence.<sup>111</sup>

In concluding that “[i]ngratiation and access . . . are not corruption,”<sup>112</sup> the *Citizens United* majority broke with a line of cases that had envisioned a broader reach for the anticorruption rationale.<sup>113</sup> For the *Buckley* Court, “the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions” was “[o]f almost equal concern as the danger of actual quid pro quo arrangements.”<sup>114</sup> In *Nixon v. Shrink Missouri Government PAC*,<sup>115</sup> the Court explained that *Buckley* had “recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors.”<sup>116</sup> It warned that if “the perception of impropriety” were to go “unanswered, . . . the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.”<sup>117</sup> Heather Gerken writes that *Citizens United* effectively overrules these holdings and that having done so may prove its greatest impact.<sup>118</sup> But even quid pro quo corruption need not “take the form of outright vote buying or bribes”; it includes “the myriad ways in which outside parties may induce an officeholder to confer a legislative benefit in direct

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111. See *Buckley v. Valeo*, 424 U.S. 1, 26 (1976) (per curiam) (“It is unnecessary to look beyond the Act’s primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the [Federal Election Campaign Act’s] \$1,000 contribution limitation.”).

112. *Citizens United*, 130 S. Ct. at 910.

113. *Id.* at 961 (Stevens, J., concurring in part and dissenting in part); see Heather K. Gerken, *The Real Problem with Citizens United*, AM. PROSPECT, Jan. 22, 2010, [http://www.prospect.org/cs/articles?article=the\\_real\\_problem\\_with\\_citizens\\_united](http://www.prospect.org/cs/articles?article=the_real_problem_with_citizens_united).

114. 424 U.S. at 27.

115. 528 U.S. 377 (2000).

116. *Id.* at 389.

117. *Id.* at 390.

118. See Gerken, *supra* note 113.

response to, or anticipation of, some outlay of money the parties have made or will make on behalf of the officeholder.”<sup>119</sup>

As political scientist Donald Green wrote in an expert report submitted as evidence to the district court in *McConnell v. FEC*, scholars have identified three “conditions that give rise to corruption,” including “(1) large payoffs to those involved, (2) small probabilities of detection and punishment, and (3) enduring relationships between donors and politicians so that informal deals can be monitored and enforced.”<sup>120</sup> The most relevant of these conditions, for our purposes, is the second: the probability that anyone who expends or contributes money on behalf of a candidate will be held to account.

Disclosure and disclaimer regulations increase this probability, whereas an outright prohibition on certain forms of corporate electoral advocacy might decrease the probability that voters perceive dealings between corporate and political interests. The reason is that corporations seek to influence politics and politicians even when they cannot spend treasury funds on certain forms of advocacy.<sup>121</sup> Consider what sort of corporate conduct the pre-*Citizens United* regime fostered. If a defense contractor wanted to support a pro-defense candidate, it could not (in the sixty days prior to the general election) run an ad encouraging voters to elect that candidate. But it could run an ad designed to increase the salience of national security issues in voters’ minds, subtly encouraging them to favor the preferred candidate, without ever mentioning the candidate’s name. The candidate would undoubtedly be grateful for both ads, even if he or she might prefer the more explicit advocacy of the first to the indirection of the second.<sup>122</sup> But the first is more susceptible to “detection and punishment” by the electorate. Legislators concerned with preventing quid pro quo corruption should not want to discourage corporations from tying themselves explicitly to the names of particular candidates, parties, or causes.

Disclosure and disclaimer can also ameliorate the broader form of corruption that the Court no longer recognizes as a constitutionally legitimate basis for regulation. Much of the negative commentary in the wake of *Citizens United* argued that the Court’s decision “thrust politics back to the robber-

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119. *Citizens United v. FEC*, 130 S. Ct. 876, 964 (2010) (Stevens, J., concurring in part and dissenting in part).

120. Report on the Bipartisan Campaign Reform Act at 28, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (No. 02-CV-582), 2000 WL 34863981 (citing HANDBOOK OF CRIMINOLOGY 1062 (Daniel Glaser ed., 1974)). *McConnell*, as ultimately decided by the Supreme Court, 540 U.S. 93 (2003), upheld most provisions of BCRA as constitutional.

121. See *supra* text accompanying notes 105-109.

122. This is by no means a foregone conclusion. Plenty of candidates might not want to be associated directly with corporate interests in the minds of voters.

baron era of the 19th century,” enabling “corporations to use their vast treasuries to overwhelm elections and intimidate elected officials into doing their bidding.”<sup>123</sup> These concerns reflect not so much a specific fear of quid pro quo corruption as a general anxiety that corporate speech will drown out the voice of the people. That anxiety makes sense; the vigor of our democracy depends on the belief that individual citizens can make their voices heard.

But prohibiting corporate electoral advocacy may not be the most effective way to address the anxiety, because that solution focuses only on the visible portion of the sphere of political influence, to the exclusion of a broader range of less visible contacts between politicians and corporate interests. Corporations and corporate executives have constant opportunities for “[i]ngratiation and access”<sup>124</sup> in American politics. Such opportunities may result from social or professional relationships,<sup>125</sup> from regulators’ genuine need for information about regulated industries, from campaign fundraising, or from sub rosa promises or threats. When corporations gain access to political actors through any of these mechanisms, they apply their influence in a direct way; the voters are mere bystanders.

When corporations seek to influence politics through public advocacy, by contrast, the voters mediate such influence. *Citizens United* observes:

The fact that a corporation . . . is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent with any suggestion that the electorate will refuse “to take part in democratic governance” because of additional political speech made by a corporation or any other speaker.<sup>126</sup>

The Court overstates the latter proposition. Voters may ignore the corporate speech that reaches them, or they may turn out to vote even as they lament corporate participation in politics—but they may also participate in smaller numbers, having lost faith in the system. What matters, though, is that the influence of corporate electoral advocacy on politics is proportional to its ability

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123. See, e.g., Editorial, *The Court’s Blow to Democracy*, N.Y. TIMES, Jan. 22, 2010, at A30.

124. *Citizens United*, 130 S. Ct. at 910 (majority opinion).

125. See, e.g., SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 185–88 (2010) (discussing the many relationships between Bush and Obama Administration economic officials and their former colleagues on Wall Street, and the access that these relationships produced).

126. *Citizens United*, 130 S. Ct. at 910 (internal quotation marks omitted) (quoting *McConnell v. FEC*, 540 U.S. 93, 144 (2003)).

to persuade voters. If corporate speech alienates the very voters that it hopes to persuade, causing them to bow out of civic participation, then the speech may be useless to political actors. Voters may even punish corporate-endorsed politicians for their ties to special interests. Whereas a ban on electoral advocacy steers corporations toward modes of political engagement that sideline voters, disclosure and disclaimer rules induce them to engage with voters.

Given the unavoidable force of corporate interests in political life, therefore, legislators who hope to reform campaign finance can more effectively prevent corruption (both broadly and narrowly conceived) by channeling corporate influence into public forms of engagement with the electorate than by forcing the influence into smoke-filled rooms.

### III. THE CONSTITUTIONAL VIABILITY OF BROAD DISCLOSURE AND DISCLAIMER LAWS

This Note has argued that if they cannot forbid corporate electoral advocacy, legislators should turn their attention to regulating it through more extensive disclosure and disclaimer provisions. This Part examines the constitutional dimensions of such a move. Section A describes two lines of jurisprudence that govern this field. One, rooted in *Buckley*, confines expenditure regulations to the domain of express advocacy. Another, developed most fully in *McIntyre v. Ohio Elections Commission*,<sup>127</sup> recognizes the constitutional value of anonymity. Section B sketches the components of a broader regulatory scheme, with attention to policy choices that would raise greater or lesser constitutional concerns under current doctrine. Sections C and D explain why neither *Buckley* and its progeny nor the line of right-to-anonymity cases should forbid expansive disclosure and disclaimer regulations for corporate electoral advocacy.

#### A. *The Existing Jurisprudence*

This Section surveys two lines of doctrine that govern restrictions on electoral advocacy by individuals. Sections C and D will argue that the assumptions underlying these doctrines do not extend to corporate speech.

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127. 514 U.S. 334 (1995).

### 1. *Buckley and Express Advocacy*

The limitation of expenditure regulations to the zone of express advocacy began with *Buckley*. Before reaching the question whether the government’s anticorruption interest could sustain expenditure limits under the Federal Election Campaign Act (FECA), the *Buckley* Court examined FECA § 608(e)(1) under the void-for-vagueness doctrine. Although “[t]he key operative language of th[at] provision limit[ed] ‘any expenditure . . . relative to a clearly identified candidate,’” the Court found “no definition clarifying what expenditures are ‘relative to’ a candidate.”<sup>128</sup> It concluded “that in order to preserve the provision against invalidation on vagueness grounds, § 608(e)(1) must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.”<sup>129</sup> Later in its opinion, the Court applied similar reasoning to the disclosure rule of FECA § 434(e).<sup>130</sup>

These acts of statutory construction were closely related to the Court’s constitutional analysis, which sought to protect “the contributor’s freedom to discuss candidates and issues”<sup>131</sup> and “the ability of independent associations and candidate campaign organizations to expend resources on political expression.”<sup>132</sup> These principles dictated the Court’s decision to uphold FECA’s contribution limits while striking down its expenditure limits, which it found to “impose significantly more severe restrictions on protected freedoms of political expression and association than [did] its limitations on financial contributions.”<sup>133</sup> And the same principles dictated the Court’s conclusion that §§ 608(e)(1) and 434(e) were unconstitutionally vague because they could be read to “encompass[] both issue discussion and advocacy of a political

128. *Buckley v. Valeo*, 424 U.S. 1, 41 (1976) (per curiam) (alterations in original).

129. *Id.* at 44. The Court held this section unconstitutional. *Id.* at 45.

130. Finding ambiguity in the provision’s coverage of contributions and expenditures “‘for the purpose of . . . influencing’ the nomination or election of candidates for federal office,” *id.* at 77 (alteration in original) (quoting 2 U.S.C. § 431(e) (Supp. IV 1975); *see id.* § 431(f)), the Court extended the express advocacy construction, *see id.* at 80 (“To insure that the reach of § 434(e) is not impermissibly broad, we construe ‘expenditure’ for purposes of that section in the same way we construed the terms of § 608(e)—to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.” (footnote omitted)). The Court ultimately upheld this section. *Id.* at 61.

131. *Buckley*, 424 U.S. at 21.

132. *Id.* at 22.

133. *Id.* at 23.



result.”<sup>134</sup> The “express advocacy” formulation thus arises from the idea that the regulation of a broader domain of political speech could chill protected forms of political expression, rather than only those forms of speech that pose a sufficient risk of corruption.<sup>135</sup>

The *McConnell* Court extended the realm of constitutionally permissible regulation from express advocacy to “the functional equivalent of express advocacy,” holding that “[t]he justifications for the regulation of express advocacy apply equally to ads aired during” the limited windows for electioneering communications “if the ads are intended to influence the voters’ decisions and have that effect.”<sup>136</sup> But the Court acknowledged “that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads.”<sup>137</sup> And after only a few years, the Court indeed narrowed its construction of the “functional equivalent” term in response to an as-applied challenge, holding “that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”<sup>138</sup> This line of doctrine, in short, limits the regulation of electoral communications to direct advocacy for or against candidates.

## 2. McIntyre and the Right to Anonymity

As Jonathan Turley has written, “[T]he right to anonymity is a subject that the Supreme Court has treated with almost coquettish regard, neither formally establishing the right nor allowing its abrogation.”<sup>139</sup> Anonymous political speech has long influenced—often contentiously—the relationship between individuals and governments.<sup>140</sup> A series of early cases in the Supreme Court

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134. *Id.* at 79.

135. The theoretical basis of the Court’s solicitude for the “freedom to discuss candidates and issues” will be critical to Section III.C’s discussion of whether the “express advocacy” limitation applies to electoral speech by corporations as well as individuals. See *infra* text accompanying notes 199-204.

136. *McConnell v. FEC*, 540 U.S. 93, 206 (2003).

137. *Id.* at 206 n.88.

138. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469-70 (2007).

139. Jonathan Turley, *Registering Publius: The Supreme Court and the Right to Anonymity*, 2001-2002 CATO SUP. CT. REV. 57, 61 (2002).

140. See Note, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70 YALE L.J. 1084, 1084-88 (1961) [hereinafter *Right to Anonymity*]. That note presents an exhaustive history of the early case law, and this Note draws on it heavily throughout this Section.

generally tolerated limits on the right to anonymity.<sup>141</sup> That trend began to ebb in 1945, when the Court in *Thomas v. Collins*<sup>142</sup> struck down a Texas statute requiring that union organizers disclose their identity to the state.<sup>143</sup> A dozen years later, in *Sweezy v. New Hampshire*<sup>144</sup> and *Watkins v. United States*,<sup>145</sup> the Court invalidated laws that would have required the disclosure of members of the Progressive and Communist parties.<sup>146</sup> And by the late 1950s – when it was not Communists but civil rights activists who found themselves in need of protection – the Court’s determination to protect anonymity as an instrument of free association was clear. In *NAACP v. Alabama ex rel. Patterson*<sup>147</sup> and *Bates v. City of Little Rock*,<sup>148</sup> the Court prevented states from compelling individuals to disclose their associations with the NAACP, as either members (*Patterson*) or contributors (*Bates*).<sup>149</sup> These cases reflect the Court’s view that the danger of reprisal may justify anonymity as a means to prevent the chilling of controversial speech.<sup>150</sup>

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141. See *id.* at 1088-93.

142. 323 U.S. 516 (1945).

143. See *Right to Anonymity*, *supra* note 140, at 1093-94.

144. 354 U.S. 234 (1957).

145. 354 U.S. 178 (1957).

146. See *Right to Anonymity*, *supra* note 140, at 1098-99. This theme of protection for dissident outsiders continues throughout the line of case law. See *id.* at 1100 (“A comparison of the reason given by Justices Frankfurter and Harlan for concurring in *Sweezy* with the position taken by them in *Barenblatt [v. United States]*, 360 U.S. 109 (1959),] seems to indicate that to them the critical factor in determining whether an investigative committee may compel disclosure of the names of members of an association is the extent to which the group in question has been linked with the Communist Party.”).

147. 357 U.S. 449 (1958).

148. 361 U.S. 516 (1960).

149. See *Right to Anonymity*, *supra* note 140, at 1101-02.

150. In *Patterson*, for instance, the Court found “an uncontroverted showing that on past occasions revelation of the identity of [the NAACP’s] rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.” 357 U.S. at 462. In light of that history, the Court found it “apparent that compelled disclosure of [the NAACP’s] Alabama membership is likely to affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate.” 357 U.S. at 462-63; see also *Bates*, 361 U.S. at 523 (“On this record it sufficiently appears that compulsory disclosure of the membership lists of the local branches of the National Association for the Advancement of Colored People would work a significant interference with the freedom of association of their members.”).

The next major case in this line, *Talley v. California*,<sup>151</sup> directly tested the validity of a disclaimer regulation—an ordinance that barred the circulation of handbills unless they bore “the name and address of . . . [t]he person who printed, wrote, compiled or manufactured the same [and] . . . [t]he person who caused the same to be distributed.”<sup>152</sup> Acknowledging the “important role” played by anonymous publications “in the progress of mankind,”<sup>153</sup> the Court extended *Patterson* and *Bates* beyond the civil rights context: “The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. This broad . . . ordinance is subject to the same infirmity.”<sup>154</sup>

*Buckley* applied this line of cases to FECA’s disclosure requirement. Although the Court “recognized that . . . compelled disclosure can always conceivably chill association or speech,” it found that “the First Amendment provides even greater protection for anonymity when a group or individual demonstrates a ‘reasonable probability that the compelled disclosure . . . will subject them to threats, harassment, or reprisals from either Government officials or private parties.’”<sup>155</sup> The Court therefore formulated the “exacting” requirement “that there be a ‘relevant correlation’ or ‘substantial relation’ between the governmental interest [supporting a regulation] and the information required to be disclosed.”<sup>156</sup> Identifying three strong governmental interests against anonymity—informing the electorate, preventing corruption, and enforcing other regulations<sup>157</sup>—it held “that, except in instances of probable reprisal, the federal government’s specific disclosure interests in FECA outweighed the inherent right to anonymity.”<sup>158</sup>

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151. 362 U.S. 60 (1960).

152. 362 U.S. at 61 (quoting the Los Angeles ordinance in question).

153. *Id.* at 64; *see id.* at 64–65.

154. *Id.* at 65.

155. Malcolm A. Heinicke, Note, *A Political Reformer’s Guide to McIntyre and Source Disclosure Laws for Political Advertising*, STAN. L. & POL’Y REV., Summer 1997, at 133, 136 (alteration in original) (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (per curiam)).

156. *Buckley*, 424 U.S. at 64 (quoting *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963), and *Bates v. Little Rock*, 361 U.S. 516, 525 (1960)).

157. *See Buckley*, 424 U.S. at 66–68; *see also* Heinicke, *supra* note 155, at 136–37 (discussing the governmental interests identified in *Buckley*).

158. Heinicke, *supra* note 155, at 136 (citing *Buckley*, 424 U.S. at 68–74). The Court observed such an “instance[] of probable reprisal” a few Terms later, finding an Ohio disclosure law unconstitutional as applied to the Socialist Workers Party. *Brown v. Socialist Workers ’74 Campaign Comm.*, 459 U.S. 87 (1982).

The *Buckley* Court left open the question whether any one of the three governmental interests identified there would suffice to sustain a disclosure or disclaimer regulation independently of the others, or with stronger countervailing privacy concerns. The Court confronted some of these open questions in *McIntyre v. Ohio Elections Commission*,<sup>159</sup> which concerned a prototypical example of speech devoid of corruption or enforcement concerns:

On April 27, 1988, Margaret McIntyre distributed leaflets to persons attending a public meeting at the Blendon Middle School in Westerville, Ohio. At this meeting, the superintendent of schools planned to discuss an imminent referendum on a proposed school tax levy. The leaflets expressed Mrs. McIntyre's opposition to the levy. . . . She had composed and printed [them] on her home computer and had paid a professional printer to make additional copies.<sup>160</sup>

Mrs. McIntyre was charged with violating an Ohio law against anonymous political publications (narrower than *Talley's* general ban on anonymous handbills).<sup>161</sup>

The Court concluded that the state's "interest in providing the electorate with relevant information" did not "justify a state requirement that a writer make statements or disclosures she would otherwise omit."<sup>162</sup> It added that "in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the document's message."<sup>163</sup> The differing scope of these two statements helps to explain the subsequent confusion over *McIntyre's* reach. While the first is unequivocal, the second seems to condition the right to anonymity on the facts in question: "a handbill written by a private citizen who is not known to the recipient."<sup>164</sup> As Justice Ginsburg wrote in her concurring

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159. 514 U.S. 334 (1995).

160. *Id.* at 337 (footnote omitted).

161. The Ohio statute prohibited the production or distribution of any "notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election," without identifying the speaker's "name and residence or business address." *Id.* at 338 n.3 (quoting OHIO REV. CODE ANN. § 3599.09(A) (1988)).

162. *Id.* at 348.

163. *Id.* at 348-49.

164. *Id.* at 348; see Thomas H. Dupree, Jr., Comment, *Exposing the Stealth Candidate: Disclosure Statutes After McIntyre v Ohio Elections Commission*, 63 U. CHI. L. REV. 1211, 1224 (1996) ("[T]he Court's careful language and qualified reasoning—measuring the value of the

opinion, while the Court found “unnecessary, overintrusive, and inconsistent with American ideals the State’s imposition of a fine on an individual leafleteer who, within her local community, spoke her mind,” it did “not thereby hold that the State may not in other, larger circumstances require the speaker to disclose its interest by disclosing its identity.”<sup>165</sup>

The Court spoke about anonymity most recently in *Doe v. Reed*, in which it considered the use of Washington’s Public Records Act to reveal the signers of petitions for a referendum against same-sex civil unions.<sup>166</sup> *Doe* does little to clarify how far the right to anonymity extends because the sort of political activity with which it dealt fell within the state’s prerogative to regulate elections.<sup>167</sup> As Justice Stevens wrote in an opinion concurring in part and concurring in the judgment, Washington’s law was “not ‘a regulation of pure speech,’” and it did not “prohibit expression, nor . . . require that any person signing a petition disclose or say anything at all,” or “alter the content of a speaker’s message.”<sup>168</sup> But *Doe* may be notable for its 8-1 margin, with only Justice Thomas writing—as in *Citizens United*—to defend a broad right against disclosure.<sup>169</sup> Justice Scalia’s concurrence in the judgment, asserting an absolute mandate for disclosure regulations, suggests that he retains his position from *McIntyre* as a staunch defender of the government’s power to force publicity in public affairs.<sup>170</sup>

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writer’s name to the document’s recipient—suggests that under different circumstances, perhaps involving a different class of writers or recipients, the Court might find a state’s informational interest sufficient, and its disclosure statute constitutional.” (footnote omitted)).

165. *McIntyre*, 514 U.S. at 358 (Ginsburg, J., concurring). Justice Ginsburg’s use of the pronoun “it” is probably not coincidental; that pronoun seems more easily to imply a corporate speaker than an individual.
166. *Doe v. Reed*, 130 S. Ct. 2811 (2010). The Court has made clear that it sees a connection between the issues in *Reed* and those in *Citizens United*. See *Hollingsworth v. Perry*, 130 S. Ct. 705, 707 (2010) (per curiam) (citing the appellant’s reply brief from *Citizens United* in a decision to stay the broadcast of a trial regarding California’s anti-marriage-equality referendum.). For an insightful treatment of *Reed*, see Chesa Boudin, Note, *Publius and the Petition: Doe v. Reed and the History of Anonymous Speech*, 120 YALE L.J. (forthcoming 2011).
167. See *Doe*, 130 S. Ct. at 2818 (citing *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992)).
168. *Id.* at 2829-30 (Stevens, J., concurring in part and concurring in the judgment) (quoting *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 345 (1995)).
169. *Id.* at 2837 (Thomas, J., dissenting); see *Citizens United v. FEC*, 130 S. Ct. 876, 979-82 (2010) (Thomas, J., concurring in part and dissenting in part).
170. *Doe*, 130 S. Ct. at 2832-37 (Scalia, J., concurring in the judgment); see *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 371-85 (1995) (Scalia, J., dissenting).

*B. Outlining a Broader Disclosure and Disclaimer Standard for Corporations*

This Section's purpose is to outline the relevant parameters of a broad mandate for disclosure and disclaimer and to identify those that stand in tension with the doctrine outlined above. Consider, as a starting point for the discussion, a standard that would cover all (1) public communications that (2) any corporation (3) funds and that (4) can reasonably be expected to (5) influence an election. Rather than advocating this formulation as a matter of policy, I use it to frame the legal analysis of a range of possible standards, observing how legislators could adjust its parameters to account for substantive preferences or constitutional concerns. This Section examines in order each of the five parameters.

The first parameter concerns whether a regulation covers all corporate speech or only public speech. Corporations may communicate their political preferences internally to employees, directors, and shareholders,<sup>171</sup> and these groups may be quite large.<sup>172</sup> But if the government were to regulate those internal communications, it would raise more serious First Amendment concerns than by regulating public communications, because the government's interests in the area of internal corporate speech are less compelling. The same is true for private external communications, such as when corporations (through trade associations) share information as to the effect of political trends on prospective agency action.

A second parameter concerns whether a regulation covers all corporations<sup>173</sup> or exempts ideological nonprofits under the *MCFL* standard.<sup>174</sup> To qualify for *MCFL* treatment, a corporation must be "formed for the express purpose of promoting political ideas" rather than to "engage in business activities," must "ha[ve] no shareholders or other persons affiliated so as to have a claim on its

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171. See Paul M. Secunda, *Addressing Political Captive Audience Workplace Meetings in the Post-Citizens United Environment*, 120 *YALE L.J. ONLINE* 17 (2010), <http://www.yalelawjournal.org/images/pdfs/887.pdf>.

172. Wal-Mart, for instance, employs over 1.4 million people in its U.S. locations—more than the population of eleven states. *WALMART, CORPORATE FACTS: WALMART BY THE NUMBERS 1* (2010), available at <http://www.walmartstores.com/download/2230.pdf>; see *National and State Population Estimates*, U.S. CENSUS BUREAU, <http://www.census.gov/popest/states/NST-ann-est.html> (last visited Aug. 27, 2010).

173. I set aside the question of labor unions, which were likely the other beneficiaries of the *Citizens United* decision. See Lyle Denniston, *Analysis: A Few Open, or Not So Open, Questions*, *SCOTUSBLOG* (Jan. 21, 2010, 1:19 PM), <http://www.scotusblog.com/2010/01/analysis-a-few-open-or-not-so-open-questions/>. Unions differ from corporations in enough ways that they lie beyond the scope of my analysis.

174. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986).

assets or earnings,” must not have been “established by a business corporation or a labor union,” and must not “accept contributions from such entities.”<sup>175</sup> Although the main benefit of *MCFL* treatment for qualifying corporations is the ability to spend their own treasury funds on electoral advocacy<sup>176</sup>—no longer a unique advantage—such corporations still can claim at least partial exemption from the anticorruption and shareholder protection concerns that create the need to regulate electoral advocacy by for-profit corporations. Legislators could include an *MCFL* exemption for reasons of policy or constitutional avoidance.<sup>177</sup> But few ideological nonprofits are likely to feel burdened by a requirement that they conduct their political activity in the open—after all, such organizations exist to engage in public affairs. And insofar as they do want to wield power covertly, they are not immune from corruption concerns. Their motives may be ideological rather than pecuniary, but if they seek to influence the political sphere, they are no more entitled to use the corporate veil as a shield from political accountability than are their for-profit counterparts.

A third parameter concerns whether a regulation covers communications funded by corporations or only those “spoken” by corporations in the most immediate sense. Legislators interested in broad coverage will likely favor the former option. If a regulation covers only the immediate transmitters of electoral advocacy, then corporations will inevitably create and fund other shell organizations to speak for them or aggregate their speech so that no one speaker can be identified.<sup>178</sup> A reasonable standard might require disclosure and disclaimer of the ultimate source of corporate funding for electoral advocacy, beyond some *de minimis* threshold. If Walmart were to fund ten percent of a Chamber of Commerce ad, for example, such a standard would require that the ad carry the Walmart name. The same would be true if Walmart were to pay some little-known affiliate to run the ad. Various regulatory schemes already implement some version of this standard.<sup>179</sup>

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175. *Id.* at 264.

176. *See id.* at 263–64 (holding 2 U.S.C. § 441b (1982) unconstitutional as applied to Massachusetts Citizens for Life).

177. The DISCLOSE Act would have excluded 501(c)(3) organizations and a number of others. H.R. 5175, 111th Cong. § 212 (2010).

178. *See* Issacharoff & Karlan, *supra* note 107.

179. The State of Washington offers a useful model, requiring disclaimer for the five largest contributors to the funding of an ad sponsored by a political committee. *See* WASH. REV. CODE ANN. § 42.17.510(2) (West, Westlaw through 2010 legislation). California requires the disclosure of contributions to multipurpose organizations (such as the Chamber of Commerce) so long as “the donor knows or has reason to know that the payment, or funds

A fourth parameter concerns whether a regulation is enforced objectively or subjectively. An objective rule would cover communications reasonably calculated to achieve some political effect—communications that could reasonably be construed as an attempt to achieve that effect—whereas a subjective rule would cover only communications actually intended to achieve the effect. An objective standard is not only more administrable but also preferable as a matter of policy. Whether a corporation subjectively means to influence an electoral outcome, rather than merely to air its opinions on public issues, seems irrelevant to the potential that its speech will corrupt politicians, misinform voters, or harm shareholders. And an objective standard would help to forestall efforts to circumvent the requirements. Any corporation can invent an innocuous motive for its political speech, and allowing corporations to do so without regard for the objective reasonableness of such explanations would vitiate the regulatory scheme.

The final parameter of a regulation, and the most important, is the definition of what political communications are covered. As I have suggested, disclosure and disclaimer rules might apply to communications reasonably calculated to influence an election. But one could substitute for “election” any number of alternatives: public opinion (not tied to any election), candidate elections but not issue elections, and so on. And one could define “influence” to include only direct advocacy of electoral outcomes or to cover mere reference to electoral outcomes. These are the most consequential choices in the design of legislation and in its constitutionality.

The Supreme Court has “long recognized that the distinction between campaign advocacy and issue advocacy ‘may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions.’”<sup>180</sup> But the Court has sought to maintain the distinction, emphasizing in *McConnell* “that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads.”<sup>181</sup> For that reason, legislators would court constitutional peril by intruding in the domain of corporate speech not tied to

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with which the payment will be commingled, will be used to make contributions or expenditures.” CAL. CODE REGS. tit. 2, § 18215(b)(1) (2010). The Ninth Circuit upheld this standard in *California Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172 (9th Cir. 2007). See *Gerken Statement*, *supra* note 67. The DISCLOSE Act would have included several similar provisions, including a requirement that corporations include in advertising a list of the top five funders of such communications. H.R. 5175 § 214(b)(2). And most broadly, 2 U.S.C. § 434(b) (2006) requires political committees to identify their donors in disclosure reports.

180. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 456–57 (2007) (quoting *Buckley v. Valeo*, 424 U.S. 1, 42 (1976) (per curiam)).

181. *McConnell v. FEC*, 540 U.S. 93, 206 n.88 (2003).



any electoral consequence. The state has interests in regulating advocacy in elections—whether candidate elections or issue elections<sup>182</sup>—that it does not have in regulating advocacy to shape public opinion writ large.

The question, then, is where legislators constitutionally may focus their efforts in the gray area between express candidate advocacy (which they clearly can regulate through disclosure and disclaimer requirements) and communications that influence public opinion in a purely nonelectoral context (which they probably cannot). The next two Sections do not presume to pinpoint the constitutional boundary—a predictive exercise that would be both difficult and unproductive. Their purpose is more limited: to show that disclosure and disclaimer requirements are constitutionally permissible across a broader range of political communications by corporations than by individuals, because neither the express advocacy doctrine nor the right to anonymity extends naturally or necessarily from individuals to corporations. Legislators and judges should be open to disclosure and disclaimer regimes that cover political speech beyond express candidate advocacy.

### C. Distinguishing Corporations from the Express Advocacy Rationale

The *Buckley-McConnell-WRTL* line of doctrine would, if applied to corporate electoral communications, bar the expansion of disclosure and disclaimer requirements beyond express advocacy.<sup>183</sup> This Section, drawing largely on *First National Bank of Boston v. Bellotti*,<sup>184</sup> explains why corporate speech ought not to be accorded the same scope of freedom from regulation.

The question here is not so much whether disclosure and disclaimer regulations are valid as applied to clearly regulable forms of speech but whether the domain of regulable speech is *larger* for corporations than for individuals. If legislatures can regulate a particular genre of speech—such as express advocacy

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182. Although *Austin* distinguished *Bellotti* partly by adverting to “a vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other,” *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 678 (1990) (Stevens, J., concurring), *overruled by Citizens United v. FEC*, 130 S. Ct. 876 (2010), Justice Kennedy has more recently observed “a general recognition . . . that discussions of candidates and issues are quite often intertwined in practical terms,” *McConnell*, 540 U.S. at 327 (Kennedy, J., concurring in the judgment in part and dissenting in part). Given the heightened potential for corruption when individual candidates’ interests are at stake, a regulation that applies only to candidate elections may be more likely to withstand constitutional scrutiny than one that applies to both candidate and issue elections. This is not to say, however, that issue elections are off-limits to regulators.

183. See *supra* Subsection III.A.1.

184. 435 U.S. 765 (1978).

or acts with “legal effect in the electoral process”<sup>185</sup>—then courts apply “exacting scrutiny” to disclosure mandates for that speech, requiring “a ‘substantial relation’ between the requirement and a ‘sufficiently important’ governmental interest.”<sup>186</sup> But whether a genre of speech can be regulated at all is a more basic question. As Lillian BeVier writes, under *Buckley*, “[w]hile independent expenditures for [express advocacy] . . . may not be limited in amount, such spending may be subjected to disclosure requirements. Expenditures for speech that does not expressly advocate the election or defeat of a candidate,” by contrast, “may neither be limited in amount nor subjected to disclosure requirements.”<sup>187</sup> This Section suggests that the express advocacy line—the boundary that delimits regulable from nonregulable electoral advocacy by individuals—should not apply to corporate electoral advocacy.

*Bellotti*, which extended First Amendment protection to corporations, is not an obvious precedent for limiting this protection. But in striking down a Massachusetts statute that barred corporations from attempting to influence a referendum campaign,<sup>188</sup> the *Bellotti* Court spoke in carefully limited terms.

One distinction is especially important: the purpose of allowing corporations to speak, under *Bellotti*’s rationale, is to benefit the listeners rather than to preserve a liberty intrinsic to the corporations themselves. Recognizing “‘practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs,’”<sup>189</sup> the *Bellotti* Court held that the speech at issue was of “the type . . . indispensable to decisionmaking in a democracy,” in that “its capacity for informing the public” was not lessened by its corporate sources.<sup>190</sup> The Court identified the question before it as “not whether corporations ‘have’ First Amendment rights” but whether Massachusetts had “abridge[d] expression that the First Amendment

185. *Doe v. Reed*, 130 S. Ct. 2811, 2818 (2010) (citing *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992)).

186. *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 64, 66 (1976) (per curiam)).

187. Lillian R. BeVier, *The Issue of Issue Advocacy: An Economic, Political, and Constitutional Analysis*, 85 VA. L. REV. 1761, 1769 (1999). Judge Henderson’s opinion in *McConnell* cited this analysis in viewing the application of exacting scrutiny to BCRA’s disclosure requirements as secondary to the more basic question whether they touched pure issue advocacy or only express candidate advocacy. *McConnell v. FEC*, 251 F. Supp. 2d 176, 376-77 (D.D.C. 2003) (Henderson, J., concurring in the judgment in part and dissenting in part).

188. See *Bellotti*, 435 U.S. at 767-68.

189. *Id.* at 776-77 (alteration in original) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

190. *Id.* at 777.

was meant to protect.”<sup>191</sup> As Adam Winkler writes, “Commentators have thus appropriately remarked that *Bellotti* rests on a First Amendment theory of hearers’ rights, rather than speakers’ rights. Corporate initiative speech is protected because it serves the listeners’ ability to govern themselves.”<sup>192</sup> *Citizens United* quoted *Bellotti* and echoed its rationale, finding that the government could not prevent corporate “voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.”<sup>193</sup>

This instrumentalist rationale stands in opposition to what Winkler calls “constitutive conception[s] of free speech”: the idea that “free speech is essential not merely for helping sustain democratic self-governance, but because of the intrinsic value of speech to the individual.”<sup>194</sup> Prominent academics and jurists have advanced this view in the context of individual speech.<sup>195</sup> But at least one such scholar, C. Edwin Baker, has disavowed its extension to corporate speech,<sup>196</sup> and his is the right view.<sup>197</sup> In the words of then-Justice Rehnquist, “To ascribe to [corporations] an ‘intellect’ or ‘mind’ for freedom of conscience purposes is to confuse metaphor with reality.”<sup>198</sup>

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191. *Id.* at 776.

192. Adam Winkler, *Beyond Bellotti*, 32 LOY. L.A. L. REV. 133, 196 (1998) (citing Carl E. Schneider, *Free Speech and Corporate Freedom: A Comment on First National Bank of Boston v. Bellotti*, 59 S. CAL. L. REV. 1227, 1234-35 (1986)).

193. *Citizens United v. FEC*, 130 S. Ct. 876, 904, 907 (2010).

194. Winkler, *supra* note 192, at 198.

195. See *id.* at 197-98 (citing *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)); C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 47-69 (1989); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 990-1009 (1978); Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 43-47 (1990); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974)).

196. C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646, 646 (1982); see Winkler, *supra* note 192, at 198.

197. But see Redish & Wasserman, *supra* note 97.

198. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 33 (1986) (Rehnquist, J., dissenting); see Tom Bennigson, *Nike Revisited: Can Commercial Corporations Engage in Non-Commercial Speech?*, 39 CONN. L. REV. 379, 397 (2006); Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2646 (2008) (“Corporations do not have a ‘self’ to be actualized or affirmed. Their employees may have them. Their shareholders may have them. But corporations themselves do not. When a corporation’s agents speak on its behalf they are not expressing themselves, they are acting as agents to advance the corporation’s ends.” (footnote omitted)).

A constitutive understanding of the First Amendment was central to *Buckley*'s contribution/expenditure distinction and to the broader determination of individual speech rights in the electoral context. As noted above, *Buckley* sought to protect "the contributor's freedom to discuss candidates and issues"<sup>199</sup> and "the ability of independent associations and candidate campaign organizations to expend resources on political expression."<sup>200</sup> It was this solicitude for true issue advocacy that caused the Court to adopt the express advocacy formulation in the first place, in order to prevent the statute's vagueness from chilling such protected speech.<sup>201</sup> But the "freedom to discuss candidates and issues"<sup>202</sup> and to "expend resources on political expression"<sup>203</sup> are constitutive rights of the individual speaker, not instrumental rights that benefit listeners. *Buckley* and its progeny bar the government from regulating political speech by individuals, other than express advocacy, not because the government lacks any interest in regulating that speech but because its constitutive value outweighs the government's interest. The *absence* of constitutive value for corporate political speech, by contrast, tips the balance of constitutional interests toward greater allowance for regulation.<sup>204</sup>

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The most compelling argument for a constitutive view of corporate speech is that of Martin Redish and Howard Wasserman. See Redish & Wasserman, *supra* note 97. Winkler rebuts their thesis convincingly enough, see Winkler, *supra* note 192, at 199-201, that I need only qualify one point. Redish and Wasserman may be right that "the corporate form performs an important democratic function in facilitating the personal self-realization of the *individuals* who have made the voluntary choice to make use of it," Redish & Wasserman, *supra* note 97, at 237 (emphasis added), but this rationale is compelling only for the sort of ideological nonprofit that the Court denoted in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986). It is tough to argue that Nike shareholders are expressing some essential part of their identity through Nike's corporate advertisements.

199. *Buckley v. Valeo*, 424 U.S. 1, 21 (1976) (per curiam).

200. *Id.* at 22.

201. See *supra* note 134 and accompanying text.

202. *Buckley*, 424 U.S. at 21.

203. *Id.* at 22.

204. An analogy to the commercial speech doctrine may illustrate the importance of theoretical foundations here. Robert Post has observed that the "doctrine closely tracks Meiklejohn's analysis. The Court has been quite explicit that commercial speech should be constitutionally protected so as to safeguard the circulation of information." Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 14 (2000). As Post writes, this Meiklejohnian orientation explains the Court's holding in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), that states may require certain disclosures in advertising by attorneys: the "constitutional value" of particular kinds of speech determines how the government may (or may not) permissibly regulate them. See Post, *supra*, at 26-28.

### D. Distinguishing Corporations from the Anonymity Rationale

If legislators can regulate a broader range of speech by corporations than by individuals, as the prior Section suggests, the question remains whether disclosure or disclaimer mandates on such speech can survive exacting scrutiny—the requirement of “a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest.”<sup>205</sup> The anonymity jurisprudence enters the picture as a factor in this balancing. This Section argues that anonymity values ought not weigh against disclosure requirements for corporate speech as they do for individual speech.

Section C’s arguments against the application of the *Buckley* line apply to rebut *McIntyre* as well, but a closer focus on the theoretical basis of the right to anonymity brings to view more specific distinctions. This Section focuses on two such distinctions—the less compelling nature of chilling concerns for corporations and the inherent publicity of corporate conduct—and an additional factor weighing against anonymity in this context: disclosure and disclaimer are essential to protect shareholders against the waste of their assets.

#### 1. Corporations and the Danger of Chilling

As Subsection III.A.2 explained, the fear of chilling expression by subjecting speakers to reprisal is central to the right of anonymity. A (fittingly) anonymous student author in this law journal, surveying the anonymity case law through 1961, wrote that “the scope of the right is limited by its rationale—deterrence. Unless a disclosure provision is likely to deter the expression of ideas either because a potential advocate fears reprisals or desires to avoid publicity, it does not infringe the constitutional right.”<sup>206</sup> Neither *McIntyre* nor other recent case law<sup>207</sup> has disturbed that assessment. The First Amendment logic of anonymity is clear: a right to anonymity enables speakers to express themselves without fear of retaliation.

The sorts of retaliation concerns that have so far animated the Supreme Court’s anonymity jurisprudence bear an unclear relation to the potential forms of reprisal for corporate speech. Seth Kreimer identifies three genres of

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205. *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010) (quoting *Buckley*, 424 U.S. at 64, 66).

206. *Right to Anonymity*, *supra* note 140, at 1124.

207. See, e.g., *Doe v. Reed*, 130 S. Ct. 2811 (2010); *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999).

such concerns.<sup>208</sup> First, “publicity by one agency can form the basis for actions by other government entities,” such that “[w]here there is a history of governmental hostility or a plausible threat of future official retaliation, the memories of the McCarthy era suggest protection against involuntary disclosure of protected activities.”<sup>209</sup> Second, “government disclosure can trigger concrete private actions against the object of publicity”<sup>210</sup> – actions that may include physical violence<sup>211</sup> or economic retaliation.<sup>212</sup> Third, “disclosure can lay the basis for social stigma and expose to public view information the victim wishes to remain private.”<sup>213</sup>

The first mechanism is inapposite here. A particular legislator or regulator might disfavor some corporation and even act on that disfavor. But it is one thing to suggest that government actors wielding temporary power could punish a corporation for its political speech. It is another to suggest that the government as a whole would do so, as with the Communist Party or other perceived threats to national security.

The second and third mechanisms are more plausible in the context of corporate speech, but not much more compelling. Consider first the prospect of “concrete private actions” – direct retaliation by individuals against a corporation that speaks in a way they do not like. Such retaliation has been the focus of most of the Supreme Court’s anonymity jurisprudence subsequent to the early cases dealing with official retaliation against Communism. Some form of private retaliatory action is possible in the context of corporate speech: consumers who do not like what a corporation says may boycott its products.<sup>214</sup> But that sort of market activity differs from what seems to have animated most of the Supreme Court’s anonymity jurisprudence: the danger of interpersonal retaliation.

The Court has often framed its solicitude for anonymity as a way to prevent the sort of direct, face-to-face repudiation by one’s neighbors that most severely chills individuals’ speech. In *Bates v. City of Little Rock*, for instance, the

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208. Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 34 (1991).

209. *Id.*; see *id.* at 35-39.

210. *Id.* at 34; see *id.* at 39-50.

211. *Id.* at 39-42.

212. *Id.* at 42-50.

213. *Id.* at 35; see *id.* at 51-54; see also *Right to Anonymity*, *supra* note 140, at 1108 (“The high regard the American people have for their privacy, suggests the possibility that its denial may deter expression and association.”).

214. See Kreimer, *supra* note 208, at 44-46.

Court cited evidence from witnesses who spoke to the communal retaliation that a person would incur by joining the NAACP. One testified that “the people are afraid to join, afraid to join because the people—they don’t want their names exposed and they are afraid their names will be exposed and they might lose their jobs.”<sup>215</sup> *McIntyre* reflected similar (if less intense) concerns, distinguishing *Buckley* by noting that speech through the mere expenditure of funds is “less specific, less personal, and less provocative than a handbill—and as a result, . . . less likely to precipitate retaliation.”<sup>216</sup> So did *Buckley v. ACLF* and *Watchtower Society v. Village of Stratton*, more recent cases protecting the anonymity of door-to-door canvassers.<sup>217</sup> These cases have focused on the immediate risks to individuals who stand up for unpopular views. Their reasoning does not extend obviously or necessarily to the more attenuated form of economic reprisal—the diminution of profits—that a corporation might face.

Similar arguments apply to the third retaliatory mechanism: “social stigma.”<sup>218</sup> Stigma has force only because the speaker considers herself part of a community of other individuals whose approbation or disapprobation matters to her.<sup>219</sup> The associational character of the corporate form makes external stigma less effective: as Kreimer observes, “[t]he opportunity to cluster with like-minded members of a political minority makes the threat of majority disapprobation less fearsome, and the knowledge of the existence of other dissenters may be sufficient to resist the tyranny of the majority.”<sup>220</sup> Corporations might in principle care about the opinions of fellow corporations. But even if interfirm stigmatization did occur, it would be a different phenomenon, with different constitutional valence, than in the interpersonal context. The threat of stigma is, moreover, less problematic than the threat of

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215. 361 U.S. 516, 522 n.6 (1960).

216. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 355 (1995); see Heinicke, *supra* note 155, at 138. But see *McIntyre*, 514 U.S. at 380 (Scalia, J., dissenting) (“The record in this case contains not even a hint that Mrs. McIntyre feared ‘threats, harassment, or reprisals’; indeed, she placed her name on some of her fliers and meant to place it on all of them.”).

217. See *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 167 (2002) (“The fact that circulators revealed their physical identities did not foreclose our consideration of the circulators’ interest in maintaining their anonymity. In the Village, strangers to the resident certainly maintain their anonymity, and the ordinance may preclude such persons from canvassing for unpopular causes.”); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 198 (1999) (citing testimony “to the reluctance of potential circulators to face the recrimination and retaliation that bearers of petitions on ‘volatile’ issues sometimes encounter”).

218. Kreimer, *supra* note 208, at 35.

219. See *id.* at 51-54.

220. *Id.* at 53.

concrete retaliatory action. “In approaching the prospect of stigma,” Kreimer writes, “courts must establish the degree to which particular constitutional rights carry an immunity from public scrutiny.”<sup>221</sup>

None of this is to say that the potential for boycotts is irrelevant to the constitutional protection of corporate speech. As Kreimer writes, the threat of boycotts has historically deterred corporations from controversial behavior.<sup>222</sup> Why, then, should the chilling of corporate speech through the threat of boycotts be any more constitutionally legitimate than the chilling of individual speech through the threat of violence or ostracism? The answer—or at least one answer—comes in the next Subsection, which explains why corporations lack the kind of dignitary privacy interests that justify the protection of individual speech against the risk of retaliation. By entering into the marketplace as public actors, corporations voluntarily subject their speech to public pressures in a way that individuals do not.

## 2. *The Public Nature of Corporate Conduct*

Corporations are inherently public entities. This is true not just for publicly owned firms but for all corporations—from closely held family businesses to *MCFL* nonprofits to publicly held, for-profit multinationals—because of the means by which any corporation comes into being: the decision by a state to grant it the privilege of limited liability. As Justice Brandeis wrote in 1933, “The prevalence of the corporation in America has led men of this generation to act, at times, as if the privilege of doing business in corporate form were inherent in the citizen . . . . Throughout the greater part of our history a different view prevailed.”<sup>223</sup> Well before Brandeis’s writing, the process of incorporation as a discretionary privilege (conferred first by the English monarch, then by Parliament, then by state legislatures) had been abolished in favor of general incorporation statutes.<sup>224</sup> But it remains true that “[w]hether the corporate privilege shall be granted or withheld is always a matter of state policy.”<sup>225</sup> At the most basic level, corporations are public actors because they exist only through a publicly granted privilege.

Corporate anonymity is a contradiction in terms in a further sense as well. Under the doctrine of corporate veil-piercing, a corporation’s attempt to hide

221. *Id.* at 35.

222. See Kreimer, *supra* note 208, at 44.

223. *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548 (1933) (Brandeis, J., dissenting).

224. See, e.g., ROBERT W. HAMILTON & JONATHAN R. MACEY, *CORPORATIONS* 193 (10th ed. 2007).

225. *Liggett*, 288 U.S. at 545 (Brandeis, J., dissenting).



its identity as a corporation will jeopardize its core privilege of limited liability. Although veil-piercing doctrine is notoriously ill-defined,<sup>226</sup> its basic rationale is that the corporate veil cannot be an instrument of “fraud or misrepresentation,” which Stephen Bainbridge identifies as one of “only two classes of cases in which personal liability ought to be in play.”<sup>227</sup> If a corporation tries to hide its corporate identity from the public, then it may lose that identity entirely.

One might argue that the requirement for corporations to act publicly in the economic marketplace does not, on its own, legitimate market pressures on their political speech. This argument implies that corporations deserve privacy as political actors even though they lack privacy as economic actors. But that argument has at least two flaws.

First, the concept of privacy has historically been bound up with personhood and the trappings of personhood. As Jonathan Turley writes, one way in which “[p]rivacy is often perceived” is “as the security of a home from invasion.”<sup>228</sup> People who canvass, attend NAACP meetings, or pass out leaflets in a school parking lot are acting publicly, in a transient sense, when they do these things. But because they are private individuals, they can retreat from those periods of public action to the private sphere of their homes, and that retreat insulates them from reprisal. For civil rights activists in the midcentury South, “the security of a home from invasion” was no abstract concept. The home is, for individuals, a physical locus of privacy—a safe harbor from public life. The corporate equivalent to that safe harbor is unclear. Individuals associated with a corporation may require some zone of privacy,<sup>229</sup> but that does not imply a historically protected right for the corporation itself to remain anonymous. If corporations are to have a constitutional safe harbor from public disapproval, that safe harbor must be—like corporate personhood itself—a legal fiction.

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226. Then-Judge Cardozo once wrote that it was “enveloped in the mists of metaphor,” *Berkey v. Third Ave. Ry.*, 155 N.E. 58, 61 (N.Y. 1926), and Stephen Bainbridge calls it “[d]ysfunctional,” Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479, 506 (2001).

227. Bainbridge, *supra* note 226, at 517.

228. Turley, *supra* note 139, at 77.

229. CEOs today may justifiably worry about picketers at their headquarters or mobs at their front doors. See, e.g., James Barron & Russ Buettner, *Scorn Trails A.I.G. Executives, Even in Their Own Driveways*, N.Y. TIMES, Mar. 20, 2009, at A1. This is an argument against CEO stand-by-your-ad provisions of the sort that the DISCLOSE Act would have created. See H.R. 5175, 111th Cong. § 214(b) (2010). But such concerns, even if valid, are unmoored from the privacy of the corporation as an entity. They pertain to individuals who are associated with the corporation, rather than to the corporation itself.

Second, corporations lack the kind of dignitary interests that justify privacy for individuals. Scott Hartman writes of “a widely shared consensus that privacy claims are potent for the very reason that they are so tightly bound up with what it means to be a freestanding and autonomous individual.”<sup>230</sup> In other words, privacy—like free expression<sup>231</sup>—helps to constitute individual identity. Corporations have no constitutive interest in privacy, just as they have no constitutive interest in speech.<sup>232</sup> We may hold them publicly to account for their conduct in a way that would be illegitimate for individuals.

These are all negative reasons to deny corporations the right to anonymity in political speech, but there are positive reasons, too. One is that “the government’s interest in disclosure may increase with the listener’s ability to judge a message by its source.”<sup>233</sup> In dismissing the government’s interest in forcing Mrs. McIntyre to disclose her name, the Court noted that “in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader’s ability to evaluate the document’s message.”<sup>234</sup> This statement “implies that the state’s disclosure interest may be greater when the reader or listener probably does know the speaker.”<sup>235</sup> Whereas “Ohio voters who did not know Ms. McIntyre . . . would have gained little from knowing that she wrote the leaflets,” voters in California “better evaluated campaign ads for [pro-tobacco] Proposition 188 upon learning that the tobacco industry had sponsored these ads and the ballot initiative itself.”<sup>236</sup> This is not to say that any speaker should lose her right to anonymity merely because people might care what she has to say. But the

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230. Scott Hartman, Comment, *Privacy, Personhood, and the Courts: FOIA Exemption 7(C) in Context*, 120 YALE L.J. 379, 392 (2010) (analyzing, with regard to the Freedom of Information Act and other areas of law, whether corporations can sensibly be considered to have “personal privacy” interests). Hartman also observes that Congress excluded corporations from the reach of the Privacy Act of 1974 and that corporations cannot sue under the common law privacy torts. *Id.*; see RESTATEMENT (SECOND) OF TORTS § 652I cmt. c (1977) (“A corporation, partnership or unincorporated association has no personal right of privacy.”). Although the Third Circuit has held that a corporation could invoke FOIA’s “personal privacy” exemption, *AT&T Inc. v. FCC*, 582 F.3d 490 (3d Cir. 2009), the Supreme Court will review that decision during its 2010 Term, 2010 WL 1623772 (U.S. Sept. 28, 2010).

231. See *supra* notes 192–193 and accompanying text.

232. See *supra* notes 194–196 and accompanying text.

233. Heinicke, *supra* note 155, at 141.

234. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 348–49 (1995).

235. Heinicke, *supra* note 155, at 141.

236. *Id.*

informational value of her speech is higher, and that weighs in the constitutional balance.

### 3. *The Right of Shareholders To Be Informed*

A final reason to exclude corporations from the right to anonymous political speech is that without disclosure and disclaimer rules, shareholder protections are useless.<sup>237</sup> The rationale of shareholder protection was not central to *Austin*, but then-Solicitor General Elena Kagan pressed it at oral argument in *Citizens United*,<sup>238</sup> and it has been the subject of scholarship both before *Citizens United* and after.<sup>239</sup>

The premise of this argument is that when corporations engage in political advocacy with general treasury funds, they are spending “other people’s money”<sup>240</sup>—shareholder equity—on speech with which shareholders may disagree. As Adam Winkler has shown, the shareholder protection rationale, rather than an egalitarian desire to limit the volume of corporate speech in the political marketplace, has long been the central engine of regulation in this domain<sup>241</sup> and is critical to explaining the Court’s post-*Bellotti* decisions.<sup>242</sup>

In both *Bellotti* and *Citizens United*, however, the Court gave short shrift to concerns of shareholder protection. *Bellotti* observes two types of protection that shareholders enjoy. First, shareholders may “decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues.”<sup>243</sup> Such procedures include the “power to elect the board of directors or to insist upon protective provisions in the corporation’s

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237. The reasoning of this Subsection does not apply to closely held or non-profit corporations.

238. See Transcript of Oral Reargument at 45-46, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205) (“[W]hat the Court articulated in *Austin* was essentially a concern about corporations using the corporate form to appropriate other people’s money for expressive purposes.”).

239. See Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010); Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 YALE L.J. ONLINE 53 (2009), <http://www.yalelawjournal.org/images/pdfs/823.pdf>; Winkler, *supra* note 192; Adam Winkler, “Other People’s Money”: *Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO. L.J. 871 (2004).

240. This nomenclature originated with a series of articles by Louis Brandeis, published two years before his ascension to the Supreme Court. See Winkler, *supra* note 239, at 873 n.14 (citing LOUIS BRANDEIS, OTHER PEOPLE’S MONEY—AND HOW THE BANKERS USE IT (1914)).

241. See Winkler, *supra* note 239.

242. See Winkler, *supra* note 192.

243. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 794 (1977).

charter,” and failing that, “the judicial remedy of a derivative suit to challenge corporate disbursements.”<sup>244</sup> Second, any shareholder may “withdraw his investment at any time and for any reason.”<sup>245</sup> *Citizens United* cites the same observations in finding “little evidence of abuse that cannot be corrected by shareholders ‘through the procedures of corporate democracy.’”<sup>246</sup>

There are reasons to doubt the efficacy of these remedies under any circumstances.<sup>247</sup> But at the bare minimum, they require that shareholders know when a corporation is making political expenditures.<sup>248</sup> If corporations can keep their political expenditures secret, then shareholders are powerless to protect themselves in any of the ways that *Bellotti* and *Citizens United* envision. Legislators might in theory compel corporations to disclose expenditures only to their shareholders, but it would be impossible to keep such disclosures private; interested parties would simply invest in a range of corporations to gain access to their records for this purpose. General disclosure and disclaimer rules are therefore the most sensible means to force corporations to disclose political expenditures to their shareholders.

One might argue that shareholders have only as much right to know about political expenditures as they do to know about other corporate expenditures. After all, shareholders lack the power to inquire into the routine decisions made by corporate officers and directors—the hiring and firing of employees, market strategy, and so forth.<sup>249</sup> But such indifference to the particular nature of political speech misses the point of both the case law and the history of regulation.<sup>250</sup> Whereas shareholders have only weak rights to control the use of their funds for ordinary corporate business, they have a stronger claim of conscience to prevent the use of their money to support political causes with which they disagree.<sup>251</sup> *Bellotti* and *Citizens United* took care to explain the importance of shareholder protections, even if they did not fully recognize the prerequisites for such protections to be effective.

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244. *Id.* at 794-95.

245. *Id.* at 794 n.34.

246. *Citizens United v. FEC*, 130 S. Ct. 876, 911 (2010).

247. See, e.g., Pollman, *supra* note 239, at 56-58.

248. See Winkler, *supra* note 192, at 167-68.

249. SEC Rule 14a-8 allows corporations to exclude from proxy materials shareholder proposals “relating to the company’s ordinary business operations.” 17 C.F.R. § 240.14a-8(i)(7) (2010).

250. See Winkler, *supra* note 192; Winkler, *supra* note 239.

251. See Winkler, *supra* note 239, at 896-98.

**CONCLUSION**

On the day when *Citizens United* came down, many scholars and advocates of campaign finance reform condemned it as a “political tsunami” launched by an “activist court.”<sup>252</sup> Others doubted the extent of its practical influence.<sup>253</sup> What is clear is that the decision fundamentally changed the terrain of campaign finance—and as that new terrain settles from its present state of flux, legislators have already begun to shape its features.<sup>254</sup>

This Note suggests that they set their sights on a different path, not only reinforcing disclosure and disclaimer regulations within the previously regulated sphere but expanding those regulations beyond direct candidate advocacy to a broader range of corporate political speech. That approach not only would be constitutionally legitimate; it also might turn out to be more effective than the pre-*Citizens United* regime in informing the electorate, preventing corruption or the appearance of corruption, and protecting shareholders.

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252. Richard L. Hasen, *Money Grubbers: The Supreme Court Kills Campaign Finance Reform*, SLATE (Jan. 21, 2010), <http://www.slate.com/id/2242209/>. For a survey of similar reactions, see Floyd Abrams, *Citizens United and Its Critics*, 120 YALE L.J. ONLINE 77 (2010), <http://yalelawjournal.org/images/pdfs/902.pdf>.

253. See, e.g., *Tribe Statement*, *supra* note 67. Anecdotal evidence is beginning to emerge that Tribe and others may be right, at least under some sort of disclosure regime; corporations are not likely to jeopardize consumer or political goodwill by waging open political warfare. See Leonnig, *supra* note 69.

254. See H.R. 5175, 111th Cong. (2010).