INTRODUCTION

Proponents of disclosure cheered, and proponents of broader campaign finance regulation found solace in, the secondary holding in *Citizens United v. Federal Election Commission*¹ that there is “no constitutional impediment” to requiring disclosure of those who fund independent campaign expenditures.² More than merely endorsing the constitutionality of the federal electioneering communication disclosure and disclaimer requirements, the Supreme Court embraced “transparency [that] enables the electorate to make informed decisions and give proper weight to different speakers and messages.”³ Justice Kennedy’s opinion for the Court heralded a new era of “effective disclosure” for campaign spending that “h[ad] not existed before today.”⁴ Modern communications, especially the Internet, promptly “provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”⁵ Unlike the narrowly divided five-to-four primary holding on corporate campaign spending, this vision of a new transparency in politics gained the support of eight justices, with only Justice Thomas dissenting.

Yet the case for campaign finance disclosure is not as clear as *Citizens United* would suggest. A few months later the case of *John Doe #1 v. Reed*⁶ laid bare that holding’s shallow foundations. In that case, the Court splintered on the questions of whether, and how, disclosure of basic political activity burdened speech, and what state interests might justify such a burden. The six-member majority coalesced around a broadly worded holding that, on its face, the disclosure of voter signatures supporting a referendum “would not violate the First Amendment with respect to referendum petitions in general.”⁷ Even so, the Court acknowledged that it was not addressing whether “controversial” petition campaigns—those most likely to give

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¹ 130 S. Ct. 876 (2010).
² Id. at 916.
³ Id.
⁴ Id.
⁵ Id.
⁶ 130 S. Ct. 2811 (2010).
⁷ Id. at 2821.
rise to strong interests for and against disclosure—might be constitutionally protected from disclosure. Only Chief Justice Roberts and Justice Kennedy did not write separately. Knowing that the as-applied challenge still lay before the lower courts, every other Justice signed onto one of six separate opinions, each proposing a different balance between the individual burdens and state interests at issue in the disclosure of political activity. Justice Thomas alone dissented in support of the facial challenge, but Justice Alito suggested he also would side with plaintiffs’ “strong case” in an as-applied challenge.

The constitutional basis for campaign finance disclosure, therefore, remains theoretically underdeveloped. The commonly cited “informational interest,” described in Citizens United simply as “a governmental interest in ‘provid[ing] the electorate with information’ about the sources of election-related spending,” does not itself suggest who should disclose what, or how. The Supreme Court’s modern analysis of campaign finance disclosure tends to assume rather than explain the informational interest. The basis for the informational interest did not occupy more than a paragraph of the Court’s discussion in the leading and exceptionally lengthy cases of Buckley v. Valeo and McConnell v. Federal Election Commission. The short discussion of the informational interest in Citizens United elaborated on citations to Buckley and McConnell, but did so by broadening its application without deepening its justification.

Recent scholarship on campaign finance disclosure has highlighted the informational interest, but done so mostly by considering how well various disclosure regimes fit that interest. In doctrinal terms under the “exacting
scrutiny” applicable to disclosure, these scholars address the question of what type of disclosure might bear a “substantial relationship” to the informational interest more than why that interest is “sufficiently important” to government. Yet as long as disclosure remains under scrutiny, the latter “sufficiently important ends” question will be as critical to the constitutional analysis of the informational interest as the former “substantially related means” question. Without a clear constitutional justification, the informational interest does less than it might to define the means and ends of disclosure policy, and to defend that policy against constitutional challenge.

This Article proposes a deeper answer to the question of what constitutes sufficiently important ends than the Supreme Court or scholars have yet provided for the informational interest. It does so by excavating the existing constitutional foundations for campaign finance disclosure, and rooting the informational interest in a republican idea of corruption that predates the narrow conception of corruption dominant in contemporary political speech debates. That idea is older than the First Amendment itself, and shares the same origin in the republican theory of James Madison. It is the idea of faction discussed in *The Federalist No. 10*, what we now might call a “special interest group” whose common interest is “adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”

Madison’s concern with faction motivates an antifactional informational interest both broader and narrower than presently conceived. It is broader in the sense that informing voters through disclosure of a wide range of interests in political campaigns is critical to the full function of the Constitution’s antifactional machinery. It is narrower in the sense that the interest is in disclosing *interests*—fractions—and not other information that voters may find valuable for other reasons. Rooted in the broad importance and narrow purpose of antifactionalism, a deeper informational interest may defend certain campaign finance disclosure regimes against constitutional attacks in ways a shallower informational interest cannot.

carefully crafted disclosure scheme, reporting selected aggregate data rather than the individual identifying information currently published, can overcome these significant constitutional concerns, while at the same time providing a rich and valuable source of information to aid both voters and policymakers alike”); Ciara Torres-Spelliscy, *Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics After Citizens United and Doe v. Reed*, 27 GA. ST. U. L. REV. 1057, 1102-04 (discussing “[p]olicy [t]ake-[a]ways” for “states that wish to freshen up their disclosure laws to make sure that the laws are capturing the way modern campaigns are waged”). See generally *Campaign Disclosure Project Symposium Part One*, 4 ELEC. L.J. 279 (2005); *Campaign Disclosure Project Symposium Part Two*, 6 ELEC. L.J. 36 (2007).

16 See, e.g., Torres-Spelliscy, *supra* note 15, at 1091.
18 The interest is “antifactional” in the sense of working against factions or counterbalancing factional forces within the system of government, not in the sense of eliminating factions. Madison (and this Article) take factions as a given in governing any pluralist society.
The argument has three parts. Part I considers the existing constitutional foundations of the means and ends of campaign finance disclosure, identifying several doctrinal fissures that may undermine disclosure laws in the future yet have received little attention in the commentary on *Citizens United*. Part II proposes a revised conception of the underdeveloped informational interest as an antifactional interest. Rooted in Madisonian republicanism and translated to the modern practice of politics, it considers campaign finance disclosure as a crucial part of the Constitution’s broader antifactional project. By delegating the task of recognizing and countering factions to the people in election campaigns, disclosure emphasizes informed popular sovereignty as the most effective check on factions consistent with the First Amendment’s republican purpose. So reconceived, an antifactional interest in disclosure can recover the broader, more historically rooted form of the anticorruption interest lost in *Citizens United*. Part III applies the antifactional interest to begin to resolve several persistent controversies arising from campaign finance disclosure. Consistent with several scholars’ recent critiques of the prevailing disclosure system’s benefits and costs, these deeper antifactional ends suggest more focused means of disclosure for individuals, organizations, “foreign” campaign participants, and issue advocacy.

I. THE CONSTITUTIONALITY OF DISCLOSURE

Campaign finance attribution needs a more robust constitutional foundation than it has. Despite the Supreme Court’s announcement that “[a] campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today,” there is little more consensus on what constitutes “effective disclosure” today than there was on the status of corporate campaign speech before *Citizens United*. Reflecting what several scholars have called the “hydraulics” of campaign finance, political spending, like water, has responded to the pressures of new and reformed disclosure regimes by flowing toward pseudonymous shelters and loopholes in the same way contribution limits diverted money from “hard” to “soft” to independent expenditures. At the federal level, independent

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19 For the purposes of this Article, “disclosure” includes the broad array of tools to identify the source of funding for campaign-related communications, including both reports to public agencies for dissemination to the electorate and attribution of funding sources made at the same time as the communication.


21 See generally Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999); Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131 (2005). Adapting the hydraulics theory to securities law, Geoffrey Manne has explained it usefully as follows: “The hydraulic theory of disclosure rules holds that, as disclosure rules impose costs on behavior subject to disclosure, where behavior can be altered at a lower cost than the
expenditures in campaigns have migrated from registered political action committees under the Federal Election Campaign Act, to political advocacy organizations registered under Section 527 of the Internal Revenue Code, to tax-exempt corporations registered under Section 501(c) of the Internal Revenue Code, disclosing less at each step. The disclosure of funding for groups broadcasting the now commonplace “issue ads” targeting candidates during campaign season decreased from 71 percent of issue ad campaign finance reports filed in 2004 to as low as 15 percent in 2010.

In short, “disclosure failed colossally in the 2010 election,” in what one critic of current “upside-down” disclosure rules called an “absurd climax, exposing numerous instances of small-scale citizen participation but concealing the giant influence of financially and politically powerful entities.” Contrary to the Supreme Court’s assumption that its excision of corporate expenditure restrictions had ushered in “[a] campaign finance system that pairs corporate independent expenditures with effective disclosure,” both Congress and many states are responding to Citizens United with revisions to their campaign finance laws that address perceived gaps in their disclosure systems.

Meanwhile, broad attacks on campaign finance laws continue. Advocates who led the charge against expenditure restrictions that eventually ended with Citizens United have turned their focus to disclosure requirements. For example, Professor Bradley Smith, a former Federal Election

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22 See Cory G. Kalanick, Note, Blowing Up the Pipes: The Use of (c)(4) to Dismantle Campaign Finance Reform, 95 MINN. L. REV. 2254, 2257-66 (2011) (explaining the rise of the Section 527 organization and the recent migration of campaign expenditures to Section 501(c)(4) groups).

23 T.W. Farnam, Disclosure of ‘Issue Ad’ Funding Is on the Wane, WASH. POST, Sept. 16, 2010, at A23; see also Human Life of Wash. Inc. v. Brumsickle, 624 F.3d 990, 1008 n.2 (9th Cir. 2010) (“Alarmingly, as levels in political spending rise dramatically, the percentage of independent entities disclosing information about where that political spending comes from has sharply declined.”) (citing Editorial, The Secret Election, N.Y. TIMES, Sept. 19, 2010, at 8 (reporting that “[i]n 2004 and 2006, virtually all independent groups receiving electioneering donations revealed their donors,” while “[i]n 2008, less than half . . . reported their donors” and only 32 percent in 2010)), cert. denied, 131 S. Ct. 1477 (2011).


25 Citizens United, 130 S. Ct. at 916.

26 See, e.g., Democracy is Strengthened by Casting Light on Spending in Elections Act (DISCLOSE Act), H.R. 5175, 111th Cong. (2010); Democracy is Strengthened by Casting Light on Spending in Elections Act (DISCLOSE Act), S. 3295, 111th Cong. (2010); Life After Citizens United, NAT’L CONF. ST. LEGISLATURES (Jan. 4, 2011), http://www.ncsl.org/default.aspx?tabid=19607 #states_respond (showing that ten states have enacted disclosure or disclaimer requirements for corporate political expenditures).

Commission Chair, contends that campaign finance disclosure carries unappreciated costs in terms of privacy invasion, potential government retaliation, and even the quality of public discourse. He argues that of all the various means of campaign finance regulation, “the idea that Americans should report their political activity to the government is, in many ways, the most un-American part of that agenda.” Another leading critic of campaign finance regulation, Cato Scholar John Samples, questions whether disclosure does more harm than good to democratic deliberation. “Disclosure prompts voters to act on prior beliefs that have not been updated by new information or arguments,” he argues, and “will encourage debate about the origins of electoral messages rather than about their truth, which may be counted a cost to society insofar as fostering illogical or irrational debates ill serves a deliberative democracy.” Professor James L. Huffman observed that as a challenger candidate for the U.S. Senate, “public disclosure of contributions in the small amounts permitted by federal law” chills the support of some otherwise sympathetic donors who depend on relationships with the incumbent, making “the mountain to be climbed by most challengers even steeper.” Other scholars raise narrower questions about the privacy costs of disclosure rules in their existing forms, particularly focusing on the impact of campaign finance Internet disclosures. These new critiques, based on the experiences of political actors with reason to question the “effective disclosure” heralded by Citizens United, are likely to sharpen the constitutional arguments against broad disclosure regimes with shallow theoretical roots.

29 Id. at 78.
31 Id. at 7.
33 See, e.g., Deborah G. Johnson et al., Campaign Disclosure, Privacy and Transparency, 19 WM. & MARY BILL RTS. J. 959, 982 (2011) (arguing that the purposes underlying campaign finance “transparency” should be reexamined to “take into account the nature of the Internet and the value of privacy”); McGeveran, supra note 24, at 860 (“The time is ripe to reconsider the Court’s cramped view of privacy in politics. Thanks to the internet, the intrusiveness of disclosure has grown greater than ever before.”); see also James A. Gardner, Anonymity and Democratic Citizenship, 19 WM. & MARY BILL RTS. J. 927, 956 (2011) (arguing that the desirability of anonymity or publicity in political life, including campaign finance disclosure, should be assessed according to their effect on the disclosing citizens’ tendency to “consensus norms of ideal democratic behavior”).

moves-to-disclosure-20100503 (“Disclosure has become ground zero in the campaign finance wars now that the Supreme Court has lifted restrictions on political spending by corporations, unions and activist groups.”); see also Dick M. Carpenter II, Disclosure Costs: Unintended Consequences of Campaign Finance Reform, INST. FOR JUST. 14 (2007), http://www.ij.org/images/pdf_folder/other_pubs/Disclosure Costs.pdf (proposing repeal of all campaign finance disclosure laws in ballot issue elections).
29 Id. at 78.
31 Id. at 7.
33 See, e.g., Deborah G. Johnson et al., Campaign Disclosure, Privacy and Transparency, 19 WM. & MARY BILL RTS. J. 959, 982 (2011) (arguing that the purposes underlying campaign finance “transparency” should be reexamined to “take into account the nature of the Internet and the value of privacy”); McGeveran, supra note 24, at 860 (“The time is ripe to reconsider the Court’s cramped view of privacy in politics. Thanks to the internet, the intrusiveness of disclosure has grown greater than ever before.”); see also James A. Gardner, Anonymity and Democratic Citizenship, 19 WM. & MARY BILL RTS. J. 927, 956 (2011) (arguing that the desirability of anonymity or publicity in political life, including campaign finance disclosure, should be assessed according to their effect on the disclosing citizens’ tendency to “consensus norms of ideal democratic behavior”).
These arguments are propelling a new wave of constitutional challenges to federal and state disclosure laws that are working their way through district and circuit courts. In a survey of judicial responses to the disclosure holding of *Citizens United*, Professor Ciara Torres-Spelliscy declares that the “tide has turned” in favor of disclosure, noting that the first wave of challenges has ebbed with a series of dismissals or other decisions upholding disclosure laws at the state and federal levels. Yet as policy-makers and political actors focus on disclosure as one of the few remaining tools of campaign finance regulation, the tide may turn again. Notwithstanding courts’ recent deference to disclosure in the immediate wake of *Citizens United*, future cases are likely to lead to a judicial reexamination of the informational interest in disclosure for at least three reasons.

First, the special “requiring scrutiny” standard applicable to disclosure is less stable doctrinally than either strict scrutiny or rational basis review. A “substantial relationship” to “a sufficiently important governmental interest” requires courts to find significant justifications for both the means and ends of disclosure. Courts’ assessment of those justifications, as well as the standard itself, may be more subject to change than either strict scrutiny or

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rational basis review because, unlike those standards, “exacting scrutiny”
does not put a thumb on either side of the constitutional scale.36

Second, recent legislation suggests the means of disclosure are likely
to become more sophisticated in response to political campaigns’ increased
use of novel organizational forms beyond the traditional political committee,
and novel media beyond the traditional broadcast communication or 
mailer.37 The conventional disclosure regime is “loophole-ridden,” allowing
“rampant circumvention of disclosure requirements by savvy big donors.”38

Even the dissenting justices in Citizens United, usually deferential to and
optimistic about campaign finance regulation, joined Justice Kagan in a 
more realistic judgment that “[s]imple disclosure fails to prevent shady 
dealing.”39 As new laws expand beyond “simple disclosure,” they will re-
quire courts to measure those laws under the “substantial relationship” test,
and that application will depend on the form of the informational interest
asserted.

Third, in rejecting corporate campaign-expenditure limits in Citizens
United, the Supreme Court also undermined the anticorruption and spend-
ing-limit enforcement interests that, with the informational interest, had
supported disclosure. It considered neither anticorruption nor enforcement
interests in its analysis of Citizens United’s challenge to the disclosure of its
funding.40 Consequently, after Citizens United, heightened scrutiny, more
sophisticated political speakers, and the undermining of other state interests
will demand that the informational interest do most of the work of justifying
disclosure laws.

To understand how a reconceived informational interest might address
these challenges in the post-Citizens United future, it is helpful to turn
briefly to the origins of the informational interest in the pre-Buckley past.
Early in the development of modern political campaigns, courts and com-
mentators recognized disclosure as a basic safeguard to protect the integrity
of government against corruption. The classic formulation of the American
legal tradition of disclosure belongs to (future Justice) Louis Brandeis:
“Publicity is justly commended as a remedy for social and industrial disea-
ses. Sunlight is said to be the best of disinfectants; electric light the most
efficient policeman.”41 Originally a proposition of financial reform, to
“[c]ompel bankers when issuing securities to make public the commissions

scrutiny, “[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legisla-
tive judgments will vary up or down with the novelty and plausibility of the justification raised”).
37 See, e.g., Human Life of Wash. Inc. v. Brumsickle, 624 F.3d 990, 1022 (9th Cir. 2010), cert.
38 McGeveran, supra note 24, at 860-61.
J., dissenting).
or profits they are receiving” from what amounted to “other people’s mon-
42 the publicity remedy also emerged in political reforms. In the Pro-
43 gressive Era, the “National Publicity Law Organization” and similar reform
groups pushed for “publicity laws” or more comprehensive “corrupt prac-
tices acts” in most states.43 These movements emerged in the wake of se-
44 veral state and federal political scandals involving financial industry con-
tributions to elected officials at the turn of the Twentieth Century.44

Louise Overacker, a leading historian and critic of the spending prohibi-
tions at the core of the early corrupt practices acts, favored disclosure
instead. “The real objection” to these turn-of-the-century political party
45 scandals, she argued in 1932, “was not that the money came from corpora-
tions but that the voters did not know who was paying the bills of the par-
46 ty.” For a scandalized public “the remedy is publicity, and more publici-
ty” rather than prohibition, which “simply forces [campaign spending] un-
der cover and out of the clarifying light of publicity.”46

In 1910, federal law first required reporting of congressional political
47 committee contributions of $100 or more and expenditures of $10 or
more. The law also required independent political committees to report
48 expenditures of $50 or more annually.48 The Federal Corrupt Practices Act
49 of 1925 expanded reporting requirements to include presidential elections.49
In Burroughs v. United States,50 a challenge to that Act as interfering with
state legislatures’ Article II, Section 1 powers to direct the manner of ap-
pointing presidential electors, the Supreme Court upheld the law as within
Congress’s power to protect elections against “the improper use of money
to influence the result.”51 The disclosure law, according to the Court, was
no less than an exercise of “the power of self protection. . . . to preserve the
departments and institutions of the general government from impairment or
destruction, whether threatened by force or by corruption.”52

Such strong language came from the Court’s bold analogy to Ex Parte
Yarbrough,53 a Reconstruction Era voting rights case involving a racially
motivated beating intended to prevent the victim from voting in a federal

42 Id. at 10, 12.
44 See generally Adam Winkler, “Other People’s Money”: Corporations, Agency Costs, and
46 Id.
48 Id.
(1925).
50 290 U.S. 534 (1934).
51 Id. at 545.
52 Id.
53 110 U.S. 651 (1884).
congressional election. Quoting Yarbrough, the Court analogized such “lawless violence” to “the free use of money in elections, arising from the vast growth of recent wealth in other quarters.” The soundness of Congress’s conclusion “that public disclosure of political contributions, together with the names of contributors and other details, would tend to prevent the corrupt use of money to affect elections,” according to the Court, “reasonably cannot be denied.”

The Supreme Court’s endorsement notwithstanding, these first-generation disclosure laws left administration to Congress itself and, therefore, “were widely circumvented.” It was not until the Federal Election Campaign Act of 1971 and its post-Watergate amendments that Congress required registration of political committees and reporting to a separate Federal Election Commission of campaign contributions totaling $10 or more and independent expenditures of $100 or more annually. These laws set the stage for the Supreme Court’s modern scrutiny of campaign finance disclosure laws under the First Amendment in Buckley.

Today, First Amendment doctrine sustains two serious objections to disclosure of political campaign participants. Disclosure of certain political actors’ identities or supporters can subject them to retaliation that chills the expression of minority viewpoints. Compliance with disclosure laws also can burden political speech with undue administrative costs. In response to these objections came the traditional justifications that disclosure prevents corruption, enables the enforcement of other substantive campaign finance restrictions, and generally informs voters. The Supreme Court has since narrowed its definition of corruption legitimately subject to campaign finance regulation and has prohibited enforcement of other substantive campaign finance restrictions. Therefore, the informational interest has become the most important remaining justification for generally applicable campaign finance disclosure laws.

A. The Burdens of Disclosure

Coming more than four decades after Burroughs, Buckley reflected the intervening development of the First Amendment as a guarantor of minority rights against majority oppression. Therefore, the primary constitutional concern about disclosure shifted from the scope of Congressional power to

54 Id. at 657.
55 Burroughs, 290 U.S. at 547 (quoting Yarbrough, 110 U.S. at 667).
56 Id. at 548.
57 Buckley v. Valeo, 424 U.S. 1, 62 (1976) (per curiam); see also id. at 62 n.71. Justice Frankfurter summarized the parallel development of contribution and expenditure limits in his opinion for the Court in United States v. UAW-CIO, 352 U.S. 567, 570-84 (1957).
58 Buckley, 424 U.S. at 63-64 (citing 2 U.S.C. §§ 432-434, 438, 441 (Supp. IV 1970)).
protect the processes of self-government against powerful but narrow corrupting interests, to the scope of individual rights to protect powerless political minorities from the government itself.

Although disclosure does not directly restrict speech, the Court in *Buckley* observed that “compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.” This potential infringement triggered judicial review of the burdens imposed by disclosure under heightened scrutiny, although, as discussed below, the precise standard of scrutiny has shifted over time.

In contrast to how the federal government’s efforts to protect civil rights against corruption and violence in *Yarbrough* framed the constitutional powers question in *Burroughs*, a state government’s efforts to undermine civil rights in *NAACP v. Alabama* framed the constitutional rights question in *Buckley*. The Court in *NAACP* considered Alabama’s attempt to oust that organization’s local affiliate under state corporate law, and also considered a state court’s order that the affiliate produce its membership list in the ouster action. It established that “state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny,” even when the deterrent effect comes from non-state actors that receive the disclosed information. Only a “compelling” state interest could subordinate the right of association that protects one’s ability to engage in advocacy.

*Buckley* cited *NAACP* for its standard of review, but loosened the strict “closest scrutiny” standard to the ironically imprecise “exacting scrutiny” standard. While the standard as stated in *Buckley* requires more than “a

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59 Id. at 64.
60 See Human Life of Wash. Inc. v. Brumsickle, 624 F.3d 990, 1003 (9th Cir. 2010) (discussing confusion, prior to *Doe v. Reed*, “as to the level of judicial scrutiny applicable to constitutional challenges to campaign finance disclosure requirements”), cert. denied, 131 S. Ct. 1477 (2011).
62 *Buckley*, 424 U.S. at 64, 66.
63 *NAACP*, 357 U.S. at 451-52.
64 Id. at 460-61.
66 *Buckley*, 424 U.S. at 64. The “exacting” standard is an uncommon formulation that first appeared in footnote four of *United States v. Carolene Products Co.*, 334 U.S. 144, 152 n.4 (1938) (“It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to *more exact-
mere showing of some legitimate governmental interest,” it allows for laws to bear a “substantial relation” to “sufficiently important” interests rather than insisting on strict scrutiny’s narrow tailoring to “compelling” state interests.67 In the contribution and expenditure limit section of the opinion, the Court describes exacting scrutiny as requiring the laws to be “closely drawn” to “a sufficiently important interest.”68 After Buckley, the standard for contribution and expenditure limits bifurcated, with a “less rigorous,” “closely drawn” scrutiny applicable to contribution limits,69 and traditional strict scrutiny applicable to expenditure limits.70 “Exacting scrutiny” appears only as an implication in McConnell, the most comprehensive constitutional analysis of federal campaign finance law since Buckley, which upholds disclosure laws simply as meeting “important state interests.”71

The Court returned to “exacting scrutiny” in Citizens United, with the clarifying reiteration that the standard “requires a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest.”72 Notably, NAACP and its “closest scrutiny” appears nowhere

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68 Buckley, 424 U.S. at 25, 44. As Justice Souter later observed an in opinion for the Court: “Precision about the relative rigor of the standard to review contribution limits was not a pretense of the Buckley per curiam opinion.” Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 386 (2000). These inconsistencies reflect the fact that Buckley was drafted on an expedited basis by a five-justice committee. Justice Stewart authored the contribution and expenditure section and Justice Powell authored the disclosure section. See Richard L. Hasen, The Untold Drafting History of Buckley v. Valeo, 2 ELEC. L.J. 241, 245 (2003).

69 McConnell v. Fed. Election Comm’n, 540 U.S. 93, 137 (2003) (second internal quotation marks omitted), overruled in part by Citizens United v. Fed. Election Comm’n, 130 S. Ct. 876 (2010); see also id. at 231-32 (“When the Government burdens the right to contribute, we apply heightened scrutiny. . . . We ask whether there is a ‘sufficiently important interest’ and whether the statute is ‘closely drawn’ to avoid unnecessary abridgment of First Amendment freedoms.” (quoting id. at 136)).

70 Citizens United, 130 S. Ct. at 898. Even in Citizens United, however, Justice Kennedy suggested an absolute prohibition on “[l]aws that burden political speech,” and described strict scrutiny as only “a sufficient framework for protecting the relevant First Amendment interests in this case.” Id.

71 McConnell, 540 U.S. at 196.

72 Citizens United, 130 S. Ct. at 914 (quoting Buckley, 424 U.S. at 64, 66) (first internal quotation marks omitted); see also John Doe #1 v. Reed, 130 S. Ct. 2811, 2818 (2010).
in the opinion, suggesting that “exacting scrutiny” of disclosure laws has settled, for now, in the gray area between strict scrutiny and deference under rational basis review. Most recently, the Court refused to treat a public-matching-funds trigger as another regulation, like disclosure, that deserves “exacting scrutiny” because it may deter, but does not prevent, campaign speech. Writing that “[t]his analogy is not even close,” the Court missed an opportunity to clarify the doctrinal basis for a standard of scrutiny that apparently applies only to disclosure. When applied, it has validated most campaign disclosure laws on their face, as in *Buckley, Citizens United, and Doe v. Reed.*

In three cases, however, disclosure laws failed the exacting scrutiny standard. In these cases the Court did not question the importance of the State’s interests in disclosure generally, but held that the laws at issue did not substantially advance those interests. In *Buckley v. American Constitutional Law Foundation, Inc.,”* the disclosure law at issue overlapped with other effective disclosure laws, and therefore, was “no more than tenuously related to the substantial interests disclosure serves.” In *Davis v. Federal Election Commission,”* the disclosure law served only to implement the increased contribution limits for opponents to self-funded candidates under the “Millionaire’s Amendment,” which the Court already had invalidated. The third case, *McIntyre v. Ohio Elections Commission,* is addressed in the next Section.

Disclosure imposes two kinds of burdens recognized by the Court. The original concern underlying heightened scrutiny of disclosure requirements is the mandated identification of the speaker or, in the case of an association, its members. Developed in *NAACP* and subsequent cases involving groups historically subject to political oppression, the identification burden is grounds for exemption from a broad range of public disclosure laws, including but not limited to, campaign finance disclosure. More recently, the Court has recognized an organizational burden imposed by administrative requirements intended to make disclosure more effective under campaign finance law reforms.

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74 See id. at 2833-39 (Kagan, J., dissenting).
75 Id. at 18; see also Minn. Citizens Concerned for Life v. Swanson, 640 F.3d 304, 315 (8th Cir. 2011) (applying exacting scrutiny to disclosure requirements), *reh'g en banc granted.* (July 12, 2011).
78 Id. at 204.
80 Id. at 729, 744 (internal quotation marks omitted).
1. The Burden of Identification

As the Court recognized in *NAACP*, disclosure can chill an association’s “collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.” In *Buckley*, however, minor parties and independents failed to win an exemption to disclosure requirements. The interests in disclosure overrode the fact they “usually represent definite and publicized viewpoints” that already were disclosed by a minor party’s title or an independent candidate’s positions and were “more vulnerable to falloffs in contributions.” Given the fact-specific nature of the inquiry into the identification burden, no clear line can be drawn at the point at which a “disclosure will impinge upon protected associational activity.”

The difference between the Libertarian Party, a plaintiff in *Buckley*, and the plaintiff in *NAACP* was uncontroverted evidence that for the NAACP, “revelation of the identity of its rank-and-file members [had] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.” Minor parties could bring an as-applied challenge showing “a reasonable probability that the compelled disclosure of a party’s contributors’ names will subject them to threats, harassment, or reprisals from either Government officials or private parties.” The Socialist Workers Party brought such a challenge on behalf of its sixty members in Ohio, leaving little doubt that it qualified for anonymity on account of past harassment by government officials and private parties. Unanimously, the Supreme Court held that the

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84 *Id.* at 70-71.
85 *Id.* at 73.
86 *Id.* at 69 (alteration in original) (quoting *NAACP*, 357 U.S. at 462) (internal quotation marks omitted).
87 *Id.* at 74.
Appellees introduced proof of specific incidents of private and government hostility toward the SWP and its members within the four years preceding the trial. These incidents, many of which occurred in Ohio and neighboring States, included threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members’ property, police harassment of a party candidate, and the firing of shots at an SWP office. There was also evidence that in the 12-month period before trial 22 SWP members, including 4 in Ohio, were fired because of their party membership. Although appellants contend that two of the Ohio firings were not politically motivated, the evidence amply supports the District Court’s conclusion that “private hostility and harassment toward SWP members make it difficult for them to maintain employment.”

*Id.* at 99. The FBI also conducted surveillance of and interfered with the Party’s activities, including “the dissemination of information designed to impair the ability of the SWP and YSA to function.” *Id.*
disclosure exemption applied to the party and enjoined enforcement of the state candidate campaign expense reporting law. However, only five justices joined in extending the exemption beyond members and contributors to recipients of its expenditures.  

Such successful as-applied challenges are rare due to the burden of proof required for associational anonymity. In the 2008 California Proposition 8 campaign to prohibit same-sex marriage, a federal court denied a preliminary injunction against disclosure of contributors of $100 or more to campaign committees supporting the ballot issue.  

Despite evidence of threats, harassment, and “random acts of violence directed at a very small segment of the supporters of the initiative” in the midst of “the heat of an election battle,” the court held the disclosure exemption would likely not apply “to groups that were successful at the polls, that have evidenced a very minimal effect on their ability to sustain their movement, and that are unable to produce evidence of pervasive animosity even remotely reaching the level of that was present in Brown.”  

One recent survey of similar claims found that, beyond the Communist and Socialist Parties themselves and the historical harassment of the NAACP and similar groups during the civil rights era, “the degree of harm caused by the retaliation is uncertain and may be relatively low.”  

Where a disclosure law sacrifices individual anonymity at extremely low levels of political activity—lower even than a minor party at the fringe of state politics—it may be subject to facial invalidation under “exacting scrutiny” without any showing of retaliation. In the classic case, Margaret McIntyre composed, printed, and distributed leaflets opposing a proposed school tax levy, signed “CONCERNED PARENTS AND TAX PAYERS.” In response to a school official’s complaint, Ohio found Mrs. McIntyre in violation of the campaign disclaimer requirement and fined her $100.

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89 Id. at 98.  
92 ProtectMarriage.com, 599 F. Supp. 2d at 1214; see also Nat’l Org. for Marriage v. McKee, 666 F. Supp. 2d 193, 206 n.74 (D. Me. 2009) (observing that in challenge to disclosure of contributors to similar ballot issue campaign, plaintiffs “have not claimed that disclosure would subject their contributors to danger or harassment, nor is there a record here indicating a pattern of threats or specific manifestations of public hostility towards them or showing that individuals or organizations holding similar views have been threatened or harmed”), aff’d in part, vacated in part, 649 F.3d 34 (2011).  
93 Mayer, supra note 15, at 275.  
95 Id. at 338.
Rejecting the informational interest “in the case of a handbill written by a private citizen who is not known to the recipient,” when “the name and address of the author add little, if anything, to the reader’s ability to evaluate the document’s message,” the Supreme Court invalidated the law on its face.96 The Buckley Court’s approval of independent expenditure disclosure at a level as low as $100 dollars “is a far cry from compelled self-identification on all election-related writings,” which “reveals unmistakably” the speaker’s “thoughts on a controversial issue,” and is more “likely to precipitate retaliation.”97 For similar reasons, the Court later invalidated laws requiring paid ballot issue petitioners to wear name badges and be identified in campaign finance filings.98 Both decisions provide the extraordinary remedy of facial invalidation when the disclosure law’s breadth sweeps in unorganized individuals who in most cases, unlike a minor party or ballot issue campaign, will lack the resources to bring as-applied challenges when there may be a risk of retaliation.

McIntyre also prompted a lengthy historical debate about the role of anonymous political speech in the Founding Era. Justice Thomas, noting that “only two major Federalist or Anti-Federalist pieces appear to have been signed by their true authors,”99 claimed the Framers “believed that the freedom of the press included the right to publish without revealing the author’s name.”100 Due to the nature of disseminating anonymous writing, most of the examples Justice Thomas cited concerned newspapers and other publishers.101 Justice Scalia, conceding that “[t]he question posed by the present case is not the easiest sort to answer for those who adhere” to originalism,102 deferred to “the widespread and longstanding traditions of our people” as incorporated into the disclosure laws of nearly every state.103 Anonymous speech was “at the periphery of the First Amendment,” according to Justice Scalia, and need not be allowed absent proof of probable retaliation.104

These debates continue in the Court’s most recent disclosure case, Doe v. Reed.105 In a case that seemed to present low-level political activity (ballot issue petition signing) similar to the leafleteer and petitioner anonymity

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96 Id. at 348-49.
97 Id. at 355.
99 McIntyre, 514 U.S. at 368 (Thomas, J., concurring).
100 Id. at 367. Justice Thomas also conceded that “there is no evidence that, after the adoption of the First Amendment, the Federal Government attempted to require writers to attach their names to political documents,” or “that the federal courts of the early Republic would have squashed such an effort as a violation of the First Amendment.” Id.
101 See id. at 360-66.
102 Id. at 371-72 (Scalia, J., dissenting).
103 Id. at 375, 376 n.2.
104 McIntyre, 514 U.S. at 378, 385.
105 John Doe #1 v. Reed, 130 S. Ct. 2811 (2010).
cases, the Court rejected a facial challenge to Washington’s public disclosure law to the extent it required disclosure of ballot issue petition signatures. Applying “exacting scrutiny,” the Court held that “the State’s interest in preserving electoral integrity” against fraud and mistake outweighed the “only modest burdens [that] attend the disclosure of a typical petition.” The “electoral integrity” interest did not include an informational interest, but embraced a possibly related interest in “promoting transparency and accountability in the electoral process.”

The “typical petition” is an important qualification to the holding, however, because the Court acknowledged the potential for retaliation against supporters of controversial issues through new media such as internet searchable databases and maps. The same plaintiffs brought a separate as-applied challenge, presenting evidence of retaliation from the Proposition 8 disclosure case, that Justice Alito in concurrence called “a strong argument” for an as-applied exemption to disclosure.

Justice Thomas would not have waited for an as-applied challenge, citing “[s]ignificant practical problems” in the timing of such challenges after a proponent must decide whether to launch a petition campaign and after a voter must decide whether to sign a petition, all without knowing whether particular petition would meet the threshold for an as-applied challenge.

Justice Scalia again responded with a strong critique of political anonymity. “[H]arsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.” No other members of the Court were as categorical as Justice Thomas (and likely Justice Alito) in his opposition to disclosure or Justice Scalia in his opposition to anonymity. As Justice Ginsburg wrote in her McIntyre concurrence, the Court leaves open the question of whether or not a law may “in other, larger circumstances require the

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106 Id. at 2819, 2821.
107 Id. at 2819.
108 Id. at 2820; see also id. at 2825 (Alito, J., concurring) (“If this information is posted on the Internet, then anyone with access to a computer could compile a wealth of information about all of those persons, including in many cases all of the following: the names of their spouses and neighbors, their telephone numbers, directions to their homes, pictures of their homes, information about their homes (such as size, type of construction, purchase price, and mortgage amount), information about any motor vehicles that they own, any court case in which they were parties, any information posted on a social networking site, and newspaper articles in which their names appeared (including such things as wedding announcements, obituaries, and articles in local papers about their children’s school and athletic activities). The potential that such information could be used for harassment is vast.”).
109 Id. at 2823. As Justice Alito noted, the Court cited evidence from the Proposition 8 campaign in its order staying the broadcast of the trial of the constitutional challenge to that ballot issue, but such evidence did not bear on the Court’s procedural grounds for the stay. See Hollingsworth v. Perry, 130 S. Ct. 705, 712-13 (2010).
110 Doe v. Reed, 130 S. Ct. at 2844 (Thomas, J., dissenting).
111 Id. at 2837 (Scalia, J., concurring).
speaker to disclose its interest by disclosing its identity." \(^{112}\) In future cases the record of a potential chilling of political speech, and the importance of countervailing state interests, will determine where the rest of the Court stands on the extent of the identification burden.

2. The Burden of Organization

Although anonymity is the original doctrinal principle opposed to disclosure, the more practical issue of organizational rules is likely to play at least as important a role in determining the constitutionality of new disclosure rules going forward. Organizational rules are a method of designating a political actor as subject to a particular set of campaign finance laws. \(^{113}\) In the original Federal Corrupt Practices Act of 1925, at issue in *Burroughs*, the political actor subject to the law was the “political committee” defined as “any committee, association, or organization which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence the election of candidates or presidential and vice presidential electors.” \(^{114}\) As political activity has grown more complex, the political actor designations have proliferated at the federal level. \(^{115}\) Notably, in both state and federal law the basic definition is common. \(^{116}\)

The burden of organizational rules is an administrative burden, because disclosure requires a political actor to determine its designation and file campaign finance reports consistent with that designation. For a candidate, the designation is clear and the reports are necessary for the campaign’s accountability to the public for the contributions it receives. The organizational rules require a political committee to register, name a treasurer, and keep financial records of contributions and expenditures. \(^{117}\) Political committees then must report contributions and expenditures on a schedule based on the dates of the election. \(^{118}\) The central organizational rule for a political committee fulfills the primary function of campaign finance disclosure: identification of contributors whose donations reach a certain thre-


\(^{114}\) *Burroughs v. United States*, 290 U.S. 534, 540 n.* (1934) (citing 2 U.S.C. § 241(c) (1934)).


\(^{116}\) See, e.g., *Mont. Code Ann.* § 13-1-101(22) (“‘Political committee’ means a combination of two or more individuals or a person other than an individual who makes a contribution or expenditure . . . to support or oppose a candidate or a committee organized to support or oppose a candidate or a petition for nomination . . .’”).


Each of the other organizational rules supports the disclosure function through accountability measures such as a treasurer, recordkeeping, and timely reporting.

A constitutional issue arises when these or similar organizational rules apply to political actors that have not obviously opted into them by declaring a candidacy or formally establishing a political committee. For example, a person triggers disclosure requirements by making an “expenditure” over a certain threshold, which includes a “gift of money or anything of value, made by any person for the purpose of influencing any election.” That definition commonly includes exemptions for volunteer activity, media broadcasts or publications, or communications within a membership organization, but still could apply to a wide range of political advocacy.

The point of a broad “influencing any election” definition, Buckley explains, is to reach “every kind of political activity,” in order to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible,” as well as to capture efforts to evade the law “by routing financial support of candidates through avenues not explicitly covered by the general provisions of the Act.”

To avoid vagueness in the application of independent expenditure laws to advocacy groups uninvolved in campaigns, Buckley narrowed the disclosure trigger in two ways. First, the Court narrowed the political committee organizational rules to “only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.” An organization with “the major purpose” of campaigning should be on notice that the full organizational rules of political committee status apply to it. For other organizations, disclosure must be obtained “in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee.”

Second, the Court limited the definition of “expenditure” for all political actors to cover “only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.” Again, political actors would know disclosure was triggered by “spending that is

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120 2 U.S.C. § 431(9)(A) (first internal quotation marks omitted); see also, e.g., MONT. CODE ANN. § 13-1-101(11)(a).
123 Id. at 79.
125 Buckley, 424 U.S. at 80 (footnote omitted) (first internal quotation marks omitted).
unambiguously related to the campaign of a particular federal candidate.”

Similarly, a more specific definition of an “electioneering communication” clearly identifying a candidate that is broadcast before an election also would be sufficiently definite for disclosure purposes. So construed, disclosure laws function as “a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view.”

These constructions did not fully resolve the organizational burden issue, however. Effective disclosure laws may require an organization to name a treasurer, keep records, and regularly report even when it does not meet the “major purpose” threshold for a political committee. In Federal Election Commission v. Massachusetts Citizens for Life, Inc., the Supreme Court exempted an advocacy group from political committee organizational rules that applied solely by virtue of the group’s incorporation, leaving it subject only to the background independent expenditure disclosure rules. The Court criticized “additional regulations [that] may create a disincentive for such organizations to engage in political speech,” including some of the registration and reporting duties under both political committee and simple independent expenditure disclosure laws, which “impose administrative costs that many small entities may be unable to bear.”

Justice O’Connor saw potential for misapplication of the holding and did not lend her crucial fifth vote in concurrence to that part of the opinion. She clarified that “the significant burden on [Massachusetts Citizens for Life] in this case comes not from the disclosure requirements that it must satisfy, but from the additional organizational restraints imposed upon it by the Act.”

The main organizational restraint was not the registration and reporting duties, but a requirement that as a nonprofit corporation it must raise and spend its political campaign funds exclusively through a separate political committee; the same requirement that Citizens United invalidated for all corporations.

Notwithstanding this clarification, lower courts have struggled to draw the “major purpose” line and have confused the organizational burdens of federal-style political committees with the registration and reporting duties incident to disclosure laws at the state level. Rather than assessing the par-

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126 Id.
128 Buckley, 424 U.S. at 82.
129 479 U.S. 238 (1986) (plurality opinion).
130 See id. at 262-63.
131 Id. at 254.
132 Id. at 265 (O’Connor, J., concurring in part) (comparing id. at 254-55 (majority opinion), with Buckley, 424 U.S. at 81-82).
133 Id. at 266.
ticular organizational burdens imposed by a given disclosure law, as the Supreme Court did in *Buckley* and *Massachusetts Citizens*, some courts have presumed that any designation of political committee status for organizations that do not meet the “major purpose” test is unconstitutional. They have reached this holding even when the law does not impose a particular organizational form, as in *Massachusetts Citizens*, but only serves as a vehicle for disclosure through the registration and reporting requirements the Court endorsed. This broad-brushed approach obscures an important question raised, but not answered, in *Buckley* as to whether the political committee requirement of disclosing the identity of the organization’s contributors, in addition to its campaign expenditures, generally imposes a relevant burden on political speech.

**B. The Benefits of Disclosure**

Since *Buckley*, the Supreme Court has recognized three interests sufficient to justify disclosure laws: “[P]roviding the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions.” After *Citizens United*, the viability of the latter two interests in support of disclosure is in doubt.

1. The Informational Interest

The informational interest in disclosure is currently seen as a kind of inoculation against free speech in campaigns. Justice Kennedy’s formulation for the Court in *Citizens United* set disclosure and free speech against each other: “The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.” On this view, free speech is a constitutionally protected given for the speaker, while disclosure is closer to the level of a policy choice to permit citizens to know who is speaking. What is or is not the “proper way” of reacting to a speaker’s identity is left to later definition. At the extreme in *McIntyre*, the informational interest “means nothing more than the provision of additional information that may either buttress or undermine the argument in a document,” and so understood “the identity of

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134 See infra Part III.B.
137 *Citizens United*, 130 S. Ct. at 916.
the speaker is no different from other components of the document’s content that the author is free to include or exclude.” As Justice Thomas pointed out in his McConnell dissent, the most basic formulation of the informational interest appears to contradict the holding in McIntyre that “[t]he simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit,” which in his view “overturned Buckley to the extent that Buckley upheld a disclosure requirement solely based on the governmental interest in providing information to the voters.”

This “simple” informational interest may be insufficiently important to meet exacting scrutiny for disclosure laws under the First Amendment.

It was not always so. Buckley opened with an expressly republican invocation of the First Amendment’s purpose: “In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.” Disclosure promotes speech because it “increases the fund of information concerning those who support the candidates,” by helping “voters to define more of the candidates’ constituencies.”

Later, Buckley upheld public financing of presidential campaigns as furthering “pertinent First Amendment values” by facilitating “public discussion and participation in the electoral process, goals vital to a self-governing people.”

The central purpose of the First Amendment, the Court noted, citing New York Times Co. v. Sullivan, “was to assure a society in which ‘uninhibited, robust, and wide-open’ public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish.”

The lower court in McConnell, in a passage adopted by the Supreme Court, called “nothing short of surprising” those plaintiffs’ reliance on that same First Amendment principle in their attack on disclosure laws. Noting that the plaintiffs’ intent was “to preserve the ability to run [electioneering] advertisements while hiding behind dubious and misleading names,”

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139 Id.
140 McConnell, 540 U.S. at 276 (Thomas, J., concurring in part and dissenting in part).
142 Id. at 81; see also First Nat’l Bank of Bos. v. Bellotti, 435 U.S. 765, 791-92 (1978) (“[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate.” (footnote omitted)).
143 Buckley, 424 U.S. at 92-93.
the court asked “how ‘uninhibited, robust, and wide-open’ speech can occur when organizations hide themselves from the scrutiny of the voting public.” 147 On this view, not only would invalidation of disclosure laws not reinforce “the precious First Amendment values that Plaintiffs argue are trampled,” but it would also “ignore[] the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.” 148 Justice Breyer summarized this dynamic elsewhere with his observation that “constitutionally protected interests lie on both sides of the legal equation” in campaign finance cases, because the laws at issue “encourag[e] the public participation and open discussion that the First Amendment itself presupposes.” 149

This constitutionally balanced conception of the informational interest, with freedom of speech values on both sides of the disclosure analysis, can be traced back through pre-Buckley campaign finance cases. In United States v. International Union United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), 150 which avoided the corporate speech question answered in Citizens United, Justice Frankfurter included the early publicity laws in a list of laws that continued “to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government.” 151 Three years earlier in United States v. Harriss, 152 the Court linked a lobbying disclosure law to “full realization of the American ideal of government by elected representatives,” because it helped to identify “special interest groups seeking favored treatment while masquerading as proponents of the public weal. . . . who is being hired, who is putting up the money, and how much.” 153 Harriss, in turn, cited Burroughs, which originally linked disclosure to the “vital particular” of the power of self-government. 154

This republican principle of facilitating self-government does not appear in Citizens United’s discussion of the informational interest. Elsewhere, the Court cites a dissent to Automobile Workers and abandons that case’s broader analysis as a “flawed historical account of campaign finance laws.” 155 It nods to “transparency” that “enables the electorate to make informed decisions and give proper weight to different speakers and messag-

147 Id. at 197 (quoting McConnell, 251 F. Supp. 2d at 237).
148 Id. (quoting McConnell, 251 F. Supp. 2d at 237).
151 Id. at 575.
153 Id. at 625.
154 Id. (citing Burroughs v. United States, 290 U.S. 534, 545 (1934) (“To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-protection.”)).
es,” but does not root it in any fundamental American ideal of government. By the time the Court addressed disclosure in Doe v. Reed, the idea of “transparency” had become malleable enough to become a component of “the integrity of the electoral process” and distinguishable from “the State’s ‘informational’ interest.” By casting that interest as less than constitutional, the Court deemphasized the power of disclosure to facilitate self-government. “Speech is an essential mechanism of democracy,” yet according to the Citizens United Court, the First Amendment’s role in that mechanism now is “[p]remised on mistrust of governmental power” rather than helping to constitute government itself. The First Amendment’s libertarian command thus eclipses its republican purpose.

2. The Anticorruption Interest

The republican strand of the state interest in disclosure, now represented by the weak, current form of the informational interest, might be reinforced and extended with the anticorruption interest in disclosure. Buckley suggests how the constitutional law of disclosure might retrace its steps to the origins of modern campaign finance doctrine and take an alternate path guided by a more complete understanding of the First Amendment. Explaining how “the light of publicity. . . . may discourage those who would use money for improper purposes either before or after the election,” Buckley invokes both Brandeis and Burroughs in its statement of the anticorruption interest.

In a footnote to this passage the Court goes further, citing the seminal media case of Grosjean v. American Press Co. to suggest how disclosure protects First Amendment values through the work of the free press. “[I]nformed public opinion is the most potent of all restraints upon misgovernment,” Buckley explains, quoting Grosjean, in a republican counterpoint to the libertarian view of the First Amendment as “[p]remised on mistrust of governmental power” in Citizens United. “A free press stands as one of the great interpreters between the government and the people,” Grosjean v. American Press Co., 297 U.S. 233 (1936).

Grosjean cited Grosjean too, but it did so in a citation to the First Amendment rights of corporations in the context of political speech. Id. at 898 (citing Grosjean, 297 U.S. at 250) (internal quotation marks omitted).

156 Id. at 916.
157 John Doe #1 v. Reed, 130 S. Ct. 2811, 2819 (2010).
158 Citizens United, 130 S. Ct. at 898 (citing Buckley v. Valeo, 424 U.S. 1, 14-15 (1976) (per curiam)).
159 Buckley, 424 U.S. at 67 (footnote omitted) (citing Burroughs, 290 U.S. at 548, and LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY 62 (1933)).
161 Buckley, 424 U.S. at 67 n.79 (quoting Grosjean, 297 U.S. at 250) (internal quotation marks omitted).
162 Citizens United, 130 S. Ct. at 898. Citizens United cited Grosjean too, but it did so in a citation to the First Amendment rights of corporations in the context of political speech. Id. at 900 (citing Grosjean, 297 U.S. at 244).
jean continues, and given its role in facilitating good government, “the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.” From this republican standpoint, the purposes of disclosure and the First Amendment are allied, and an alternative view that suppresses disclosure under the First Amendment also risks suppressing the gravely important work of a free press.

By incorporating these republican ideas into the basis for a broad anti-corruption interest, Buckley grounded campaign finance disclosure in what the Court at the time recognized were “interests of the highest importance.” Recognizing that “laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action,” the corruption interest extended not only to quid pro quo agreements, but also to a subtler form of “undue influence on an officeholder’s judgment, and the appearance of such influence.” This broad statement of the anticorruption interest not only approached the role of money in politics with modest doubt about the possibility that criminal laws could themselves resolve the problem of undue influence, but also suggested that voters rather than legislators or criminal juries may be the better judge of what influence is “undue” when recognizing “the appearance of such influence.” Disclosure thus delegates the question of what appears corrupt to the people themselves, and thus away from legislatures and courts. As Professor Kathleen Sullivan explains, disclosure “places the question of undue influence or preferential access in the hands of voters, who, aided by the institutional press, can follow the money and hold representatives accountable for any trails they don’t like.” This avoids the practical problem Professor David Strauss identifies of legally defining and enforcing the difficult distinction “between interest group politics and the effort to promote some version of the public good.”

The Court recently articulated a definition of corruption that includes Buckley’s concern about undue influence in Caperton v. A.T. Massey Coal Co. In that case, Justice Kennedy’s opinion for the Court held that spending in a judicial campaign by a party interested in a case, including independent expenditures that by definition did not constitute a quid pro quo

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163 Grosjean, 297 U.S. at 250.
168 See David A. Strauss, Corruption, Equality, and Campaign Finance Reform, 94 COLUM. L. REV. 1369, 1378 (1994); see also Sullivan, supra note 167, at 326 (“[Disclosure] enlists government in a recordkeeping and reporting task that entails no danger of partisan bias or discretionary content review.”).
agreement, violated an opposing litigant’s due process rights when that spending has “a significant and disproportionate influence on the electoral outcome” for one of the judges. 170 Again, the Court showed modesty about drawing bright judicial lines between corruption and integrity when it stated that “proving what ultimately drives the electorate to choose a particular candidate is a difficult endeavor, not likely to lend itself to a certain conclusion,” even when undue influence is only perceived and not proven.171

_Citizens United_ rejects the “undue influence” view, and deemphasizes the anticorruption interest in general, by recasting _Buckley_’s “sufficiently important governmental interest in preventing corruption or the appearance of corruption” as “limited to _quid pro quo_ corruption.”172 Under the same pen of Justice Kennedy, the Court adopted something closer to the dissent’s reasoning in _Caperton_ that the absence of a “judicially discernible and manageable standard”173 for undue influence—memorably explored in Chief Justice Roberts’s forty questions—means no meaningful anticorruption lines can be drawn beyond bribery and extortion.174 In the Court’s narrowed view of the anticorruption interest, there is no middle ground between _quid pro quo_ corruption and mere “[i]ngratiation and access.”175 Though “surely there is cause for concern” when “elected officials succumb to improper influences” or otherwise “surrender their best judgment” or “put expediency before principle” due to campaign spending, these are no longer constitutionally compelling concerns about corruption.176 On this strict view, corruption becomes a purely legal, exclusively criminal problem for the courts and not a political problem for citizens.

As far as disclosure is concerned, _Buckley_ described the anticorruption interest as “discourag[ing] those who would use money for improper purposes either before or after the election” because the public would be

170 Id. at 2264.
171 Id.
174 _Cf. Skilling v. United States_, 130 S. Ct. 2896, 2907 (2010) (in vagueness challenge, construing criminal prohibition against fraudulent deprivations of “the intangible right of honest services” to cover “only bribery and kickback schemes” (quoting 18 U.S.C § 1346 (2006)) (first internal quotation marks omitted)).
175 See _Citizens United_, 130 S. Ct. at 910-11.
“armed with information” from campaign finance disclosure. Yet if “improper purposes” means no more than quid pro quo corruption that is already criminal under bribery and extortion laws, then any justification for disclosure under the narrowed anticorruption interest relies on the unrealistic premise that political actors will comply with disclosure laws that may help establish what could be violations of criminal corruption laws. And if “improper purposes,” or “undue influence” broadly, means more than what the Supreme Court now means by “anticorruption,” then disclosure of these improprieties can be justified only by something else, like the informational interest. Not surprisingly, after reducing the scope of the anticorruption interest in its discussion of corporate campaign expenditures, Citizens United relies solely on the informational interest in its discussion of independent expenditure disclosure. It does not mention corruption or even undue influence.

3. The Enforcement Interest

The reduction of permissible limits on campaign spending also has reduced the scope of the interest in disclosure as a means to detect violations of those limits. Buckley itself described disclosure, and associated record-keeping and reporting requirements, as essential to detecting violations of the contribution limits it had upheld. Later cases suggested other restrictions that prevented the circumvention of those contribution limits. Presumably disclosure related to those ancillary restrictions also could be justified. Citizens United, however, took circumvention as an inevitable response to campaign finance laws rather than as an interest sufficient to justify them. Beyond its invalidation of restrictions on corporate campaign expenditures, the rationale, if not the holding, of Citizens United calls into question the justification for remaining limits, including foreign campaign spending restrictions and even contribution limits.

177 Buckley v. Valeo, 424 U.S. 1, 67 (1976) (per curiam).
178 But see Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2827 (2011) (implying that “strict disclosure requirements,” with “ascetic contribution limits” and “the general availability of public funding” might provide more “marginal corruption deterrence” than a public matching funds trigger).
179 Buckley, 424 U.S. at 67-68.
181 See Citizens United, 130 S. Ct. at 912 (“Political speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws. Our Nation’s speech dynamic is changing, and informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights.” (citation omitted)).
182 See id. at 911-13.
In ruling that corporate campaign expenditures are constitutionally protected, the Supreme Court in *Citizens United* found “no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers.”183 This would seem to apply as well to restrictions on campaign spending funded by foreign nationals. Although the Court was careful and correct to say it “need not reach” that question in *Citizens United*,184 it is difficult to conceive of any distinction between the corporate and foreign campaign spending cases that would not result in doctrinal incoherence.185

Even *Buckley*’s central holding as to the constitutionality of contribution limits received little support in *Citizens United*. The Court recited this holding in its narrowing of the anticorruption interest to *quid pro quo* corruption, but otherwise avoided discussing the issue because *Citizens United* did not ask the Court to “reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny.”186 The remainder of the opinion, especially the narrowed anticorruption interest, would undermine rather than reinforce any deference to contribution limits.187 As Professor Richard Hasen has explained, “[i]f access and ingratiation are not corruption and corruption is really limited to *quid pro quo* corruption, then contribution limitations would appear to be in serious danger of being struck down” as unconstitutional, short of further doctrinal incoherence.188

As long as these contribution and foreign expenditure limits stay in place, the enforcement interest should continue to support disclosure as far as these limits go. Within this limited scope, *Doe v. Reed* actually strengthens the enforcement interest by holding that disclosure “promotes transparency and accountability in the electoral process to an extent other measures cannot.”189 In particular, by acknowledging that “disclosure can help cure the inadequacies” of enforcement in the petition process, disclosure should also be “substantially related to the [same] important interest” of enforcing remaining campaign finance limits.190 Like the way disclosure of petitions delegates to the people the responsibility of guarding against fraud

183 Id. at 899.

184 Id. at 911.


186 *Citizens United*, 130 S. Ct. at 909.


188 Hasen, supra note 185, at 616 (footnote omitted).

189 John Doe #1 v. Reed, 130 S. Ct. 2811, 2820 (2010).

190 Id. But see Briffault, supra note 15, at 280-81 (explaining that reporting under campaign finance laws need not entail public disclosure to serve enforcement interests).
and mistake, disclosure of campaign spending delegates to the people the responsibility of detecting corruption or undue influence.

What is left of the enforcement interest also may support ancillary registration, reporting, and recordkeeping requirements necessary to make disclosure itself effective. Aggregation of campaign finance data for public disclosure in any useful form requires basic information as to who is the political actor that is speaking (registration), when and how that political actor is speaking (reporting), and whether the political actor’s disclosure is accurate (recordkeeping). Like the anticorruption interest, however, the primary effect of narrowing the enforcement interest is to increase the importance of some form of informational interest in justifying disclosure laws once supported by enforcement of laws that may now lack justification themselves.

II. DISCLOSURE AND ANTICORRUPTION, RECONCEIVED

As new legal challenges to campaign finance disclosure mount, and the other interests justifying it weaken, the informational interest must do more work. The bare “transparency” view of the informational interest described in Citizens United, “enabl[ing] the electorate to make informed decisions and give proper weight to different speakers and messages,”\(^1\) may not be up to the job.

Doctrinally, an “exacting scrutiny” standard that invites repeated reconsideration of both the means employed and the ends pursued may tend to weaken such an underdeveloped interest. Before Citizens United, Judge Posner noted that resolving the constitutionality of any particular disclosure rule “is difficult because it entails a balancing of imponderables,” between the reduction of campaign speech quantity from funders who “are unwilling to reveal their identity” on the one hand, and the increase in campaign speech quality from “additional information useful to the consumer,” the voter, on the other.\(^2\) In the same case, Judge Easterbrook concurred dubitante noting that “the Justices’ failure [in McConnell] to discuss McIntyre, or even to cite Talley, American Constitutional Law Foundation, or Watchtower, makes it impossible for courts at our level to make an informed decision—for the Supreme Court has not told us what principle to apply.”\(^3\) While Citizens United answered the particular question of campaign advertising attribution “as applied to the ads” proposed by Citizens United,\(^4\) neither the majority in Citizens United nor in Doe v. Reed addressed these

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2. Majors v. Abell, 361 F.3d 349, 352 (7th Cir. 2004).
3. Id. at 356 (Easterbrook, J., dubitante).
precedents or proposed a principle that would answer Judge Posner’s or Judge Easterbrook’s criticism.

Empirically, a recent review concluded that “the Supreme Court’s simple assertion” about the effectiveness of campaign finance disclosure after *Citizens United* “is deeply flawed.” Politically, whatever bipartisan consensus in favor of campaign finance disclosure may have existed at the federal level around the time of *Buckley* and *McConnell* has dissipated in the wake of *Citizens United*, when even modest disclosure reforms have stalled. While these empirical and political dimensions of disclosure are outside the scope of this Article, they intensify attention on the constitutional dimension of disclosure.

In current constitutional doctrine, disclosure enjoys the status of a national tradition of good policy subject to, rather than furthering, First Amendment values. The informational interest contains the faint echo of Brandeis’s commendable publicity, though *Buckley* cited Brandeis and *Broughs* for the anticorruption interest rather than the informational interest. Decades later, the informational interest in disclosure has progressed little beyond *Buckley*’s central three-sentence, one-paragraph discussion, summarized by *McConnell*’s single phrase “providing the electorate with information” and reiterated in a short section at the end of *Citizens United*. These are shallow roots to support what may become the last generally applicable form of campaign finance regulation left standing.

Two steps can deepen the informational interest as the remaining constitutionally cognizable justification for campaign finance disclosure. First, the informational interest should recognize disclosure as part of the solution to the problem of factions in Madison’s republican theory, which serves as the foundation for the Constitution and particularly for the First Amendment. Disclosure facilitates the antifactional machinery of the constitutional system. Thus, we should understand disclosure as furthering the broader republican constitutional principles underlying the informational interest, rather than understanding disclosure as merely needing to be excused from a narrower libertarian reading of the First Amendment alone.

Second, this reconceived informational interest should recognize that disclosure in its antifactional capacity also serves a core anticorruption function. While a narrow sense of corruption has prevailed as a matter of campaign finance restrictions, disclosure still serves to deter corruption in a

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196 See generally *Samples, supra* note 30 (arguing that the DISCLOSE Act would not benefit voters).
198 *Id.* at 66-67.
200 *Citizens United*, 130 S. Ct. at 914-16.
broader and more historically rooted sense. This broader conception of anticorruption is an end served by the Constitution’s antifactional means and those means include the people’s consciousness of faction enabled by disclosure. So understood, the informational interest provides a stronger justification for disclosure as ultimately serving the republican principle of self-government under the Constitution.

A. Disclosure as Antifactionalism

The informational interest in campaign finance has deeper roots than the Supreme Court has so far suggested. Once the modern, primarily libertarian view of the First Amendment is set aside, these roots can be traced back to a broader republican view attributable to the author of the First Amendment, James Madison himself. The problem of factions in politics, and the constitutional solution to that problem as elaborated by Madison in The Federalist No. 10, presupposes an electorate informed about the place of factions in the republican form of government. That problem, and the function the informational interest plays in its solution, may be more critical to self-government as other structural checks against faction have become less effective.

Madison’s first entry as “Publius” in The Federalist No. 10 ostensibly continued Alexander Hamilton’s argument for “The Utility of the Union as a Safeguard Against Domestic Faction and Insurrection.” Actually, he changed the subject from maintaining basic civil order to an argument of

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201 Professor Cass Sunstein provides a contemporary definition of Madisonian republicanism that describes the republican principle discussed in this Article. The framers “tried to make a government that would create [a virtuous] politics without indulging unrealistic assumptions about human nature.” CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 21 (1993). The resulting Constitution is “a complex set of precommitment strategies, through which the citizenry creates institutional arrangements to protect against political self-interest, factionalism, failures in representation, myopia, and other predictable problems in democratic governance.” Id. One court recently provided more Jeffersonian grounds for disclosure, which may be more ambitious than, but are not inconsistent with, the Madisonian principle. See Human Life of Wash. Inc. v. Brumsickle, 624 F.3d 990, 1022 (9th Cir. 2010) (“The diffusion of information and the arraignment of all abuses at the bar of public reason, I deem [one of] the essential principles of our government . . . .” (alteration in original) (quoting Thomas Jefferson, First Inaugural Address (Mar. 4, 1801)) (internal quotation marks omitted)), cert. denied, 131 S. Ct. 1477 (2011).

202 The Federalist No. 9, supra note 17, at 71 (Alexander Hamilton). There is, to be sure, a facial inconsistency in relying on a pseudonymous political commentary to support disclosure of campaign speech. Compared to modern campaign speech, however, Madison’s speech as an individual, mediated through a newspaper’s institutionalized editorial judgment, presents a sufficiently different case under the antifactional interest in disclosure. See infra Parts III.A-B. Justice Scalia has argued, in response to Justice Thomas’s similar point about anonymity in ratification debates and the Founding Era more generally, that “to prove that anonymous electioneering was used frequently is not to establish that it is a constitutional right.” McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 373 (1995) (Scalia, J., dissenting).
political philosophy.\textsuperscript{203} The problem was “that our governments are too unstable,” not in terms of recurring insurrection, but “that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority” then in government.\textsuperscript{204} The cause was “faction,” by which he meant “a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”\textsuperscript{205}

The qualification that Madison’s concern was majorities “then in government” is important because, as the preceding sentence suggests, the problem of faction is not the same as the tyrannical potential of popular majorities. To the contrary, in The Federalist, Madison defined a republic as “a government which derives all its powers directly or indirectly from the great body of the people.”\textsuperscript{206} Therefore the threat to such a government is not primarily democratic but oligarchic in a factional sense. “It is essential to such a government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it,” Madison explained, “otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans and claim for their government the honorable title of republic.”\textsuperscript{207} Republicanism is so opposed to this oligarchic entrenchment of faction in government that Madison offers as “the most decisive” proof of the Constitution’s “republican complexion” its “absolute prohibition of the titles of nobility,” as well as the more obvious “express guaranty of the republican form to each of the [State governments].”\textsuperscript{208}

Factions and The Federalist No. 10 play a small but prominent role in the Supreme Court’s approach to the constitutionality of campaign finance laws. In rejecting limits on corporate independent expenditures in Citizens United, Justice Kennedy invoked Madison’s acknowledgment that

\textsuperscript{203} Although this argument draws on Madison’s understanding of the function of constitutional law, this is not necessarily an originalist argument. There are doubts that Madison’s political philosophy as expressed in The Federalist No. 10 had significant currency among the constitutional ratification conventions at the time. See Larry D. Kramer, Madison’s Audience, 112 Harv. L. Rev. 611, 615-16 (1999). Instead, its value is as an important (perhaps the most important) work of political philosophy from the Founding Era that may be more influential now than it was at the time. See Ian Bartrum, Constructing the Constitutional Canon: The Metonymic Evolution of Federalist 10, 27 Const. Comment. 9, 19 (2010). Of course, its author also carries an impeccable intellectual pedigree for purposes of constitutional law generally, and First Amendment law in particular.

\textsuperscript{204} The Federalist No. 10, supra note 17, at 77.

\textsuperscript{205} Id. at 78.

\textsuperscript{206} The Federalist No. 39, supra note 17, at 241 (James Madison).

\textsuperscript{207} Id.

\textsuperscript{208} Id. at 242; cf. U.S. Const. art. I, § 9, cl. 8; id. art. I, § 10, cl. 1; id. art. IV, § 4.
“[f]actions will necessarily form in our Republic” and his concern that “the remedy of ‘destroying the liberty’ of some factions is ‘worse than the disease.’”\textsuperscript{209} While corporations present the factional concern that Madison contemplated, according to the Court, the remedy could not include prohibition of directly funded corporate speech. “Factions should be checked by permitting them all to speak, and by entrusting the people to judge what is true and what is false.”\textsuperscript{210}

The Court’s diagnosis of the factional concern implicated in campaign finance is true as far as it goes, but its description of the remedy is incomplete. Madison did write that “it could not be a less folly to abolish liberty, which is essential to political life,”\textsuperscript{211} but his essay’s prescription for politics integrated liberty with a subtler virtue: republicanism. Given that “the causes of faction cannot be removed” because they are “sown in the nature of man,” Madison’s central point is that “[a] republic, by which I mean a government in which the scheme of representation takes place . . . promises the cure for which we are seeking.”\textsuperscript{212}

This republican principle for government included, but was not limited to, “the delegation of the government . . . to a small number of citizens elected by the rest.”\textsuperscript{213} In some circumstances “it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good” than in a direct democracy.\textsuperscript{214} But, Madison warned, “the effect may be inverted” because representatives can concentrate as well as dissipate factiousness.\textsuperscript{215} “Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests of the people.”\textsuperscript{216}

For Madison, then, the republican principle requires something more than representative government, lest factious representation replace factious plebiscites. Most notably, Madisonian republicanism requires a scale of competing interests sufficient to diffuse factions. A large republic, enabled by representative government, can “take in a greater variety of parties and interests,” and thereby “make it less probable that a majority of the whole

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\item \textsuperscript{209} Citizens United v. Fed. Election Comm’n, 130 S. Ct. 876, 907 (2010) (quoting THE FEDERALIST NO. 10, \textit{supra} note 17, at 78); \textit{see also} Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 693 (1990) (Scalia, J., dissenting) (“Jefferson and Madison would not have sat at these controls [of corporate campaign expenditures]; but if they did, they would have turned them in the opposite direction.”.), \textit{overruled in part} by \textit{Citizens United}, 130 S. Ct. 876.
\item \textsuperscript{210} \textit{Citizens United}, 130 S. Ct. at 907 (citation omitted).
\item \textsuperscript{211} THE FEDERALIST NO. 10, \textit{supra} note 17, at 78.
\item \textsuperscript{212} \textit{Id.} at 79-81.
\item \textsuperscript{213} \textit{Id.} at 82.
\item \textsuperscript{214} \textit{Id.}
\item \textsuperscript{215} \textit{Id.}
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will have a common motive to invade the rights of other citizens." Even if "such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other." Madison’s “scheme of representation” does not only require the horizontal diffusion of the republic across various factions, however. It also requires the vertical dependence of the representatives on the people, who as principals must be sufficiently informed about their agents in government. More than a scale sufficient to support a variety of interests, then, the republican principle required mechanisms by which self-governing citizens in a republic could recognize the “common impulse of passion, or of interest, adverse to the rights of other citizens” that signified faction. “Besides other impediments,” such as federalism and separation of powers, “it may be remarked that, where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust in proportion to the number whose concurrence is necessary.” A similar theme sounds much later in Madison’s embrace of publicly supported education that “throw[s] that light over the public mind which is the best security against crafty & dangerous encroachments on the public liberty,” in a letter that more famously declares that “[k]nowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.” As Madison put it in The Federalist No. 51, “experience has taught mankind the necessity of auxiliary precautions” like the separation of powers, but “[a] dependence on the people is, no doubt, the primary control on the government.” Thus, in a republic, the people remain the ultimate check against faction.

This is where disclosure matters. In general, “extensive republics are most favorable to the election of proper guardians of the public weal.” Yet even in an extensive republic, Madison understood that the people’s representatives might be “[m]en of factious tempers” rather than those “whose wisdom may best discern the true interest of their country.” Here, the citizens’ consciousness of faction from the disclosure of factious interests behind campaign speech can impede “the concert and accomplishment

217 THE FEDERALIST NO. 10, supra note 17, at 83.
218 Id.
219 Madison himself invokes the language of agency, explaining that “in a republic [the people] assemble and administer [the government] by their representatives and agents.” THE FEDERALIST NO. 14, supra note 17, at 100.
220 THE FEDERALIST NO. 10, supra note 17, at 78.
221 Id. at 83.
223 THE FEDERALIST NO. 51, supra note 17, at 322 (James Madison).
224 THE FEDERALIST NO. 10, supra note 17, at 82.
225 Id.
of the secret wishes of an unjust and interested majority.”

226 In an enlarged and faction-conscious electorate, “it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried.”

227 For the republican principle to work at the most basic level of electing representatives to constitute government, disclosure must unmask faction. The informational interest in disclosure is therefore an interest in disclosing information about interests—factions.

Madison’s republican perspective extends to the First Amendment and, therefore, has an even more direct influence on the constitutionality of campaign finance disclosure than its role in the Constitution as a whole. As Professor Akhil Amar notes, our First Amendment was Madison’s third, coming after an original first amendment that would have set a minimum size for Congress so that representative republicanism was not reduced to an antidemocratic aristocracy of too few representatives, and an original second amendment that would have delayed the effect any salary increases representatives voted for themselves until an election intervened.

228 In this context, the First Amendment “obviously sounds in structure, and focuses (at least in part) on the representational linkage between Congress and its constituents.” Like its structural predecessors, and true to Madison’s concerns about “[m]en of factious tempers . . . [who] betray the interests of the people,” the “[First] Amendment’s historical and structural core was to safeguard the rights of popular majorities . . . against a possibly unrepresentative and self-interested Congress.”

229 According to this republican view of the First Amendment, and of the structure of the Constitution in general, the informational interest should become stronger as some of Madison’s “auxiliary precautions” have become weaker. In modern politics, the weight of deliberation is now borne more heavily by the people than by political institutions. The vastly increased scope and size of the nation and its federal government, as well as the nationalization of political debate, has weakened the effectiveness of federalism as a check by the States. The polarization of political parties has weakened the parties’ mediating role between the electorate and their representatives. It also has weakened the separation of powers as a check between the branches; majority parties are unwilling to check branches of the

226 Id. at 84.
227 Id. at 82.
229 Amar, supra note 228, at 1147.
230 THE FEDERALIST NO. 10, supra note 17, at 82; Amar, supra note 228, at 1147. Madison also proposed an amendment guaranteeing freedom of the press in the states, presaging the incorporation of the First Amendment against the States and, according to Madison’s own model of republicanism, the Fourteenth Amendment’s increased concern about factions gaining power at the expense of minorities in the States. See Amar, supra note 228, at 1148-52.
same party, and minority parties are unable to check branches of the opposite party.231

Making factions more transparent through disclosure is not the ideal republican solution to the diminution of antifactional “refining and enlarging” political institutions. Nor is it even Madison’s own ideal. With Madison, we might hope to succeed in the republican project simply “by passing [the public’s views] through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”232 With some critics of mandatory disclosure, we might also worry about the quality of public discourse and deliberation under a politics that so explicitly relies on the messenger as much or more than the message.233 In this respect, however, disclosure even under an antifactional interest can also counteract the coarseness that anonymity encourages. “The principal impediment” against “innuendo, or demeaning characterization, or mere disclosure of items of personal life that have no bearing upon suitability for office,” Justice Scalia observed in McIntyre, “is the reluctance of most individuals and organizations to be publicly associated with uncharitable and uncivil expression.”234

Yet as The Federalist attests, Madison’s version of republicanism takes the world as it is. “If men were angels no government would be necessary.”235 Therefore, it is fair to call Madisonian the insight that “the design of governmental institutions matters greatly in our second-best world.”236 A world in which the First Amendment’s application to political speech was premised on a libertarian ideal alone might distort constitutional free speech values more than one in which the First Amendment’s absolute “make no law” command was balanced by respect for its republican purpose.237 Campaign finance disclosure may inhibit and, to some minds ab-


232 THE FEDERALIST NO. 10, supra note 17, at 82.

233 See Smith, supra note 28, at 78 (“The decline in the quality of our civic discourse can’t be dumped entirely at the foot of mandatory disclosure, of course. But laws that regard the identity of speakers as fundamental to the public’s ability to judge arguments may well exacerbate a thoughtless, partisan, nasty brand of political debate.”). For a discussion of whether disclosure does more harm than good to democratic deliberation, see generally Samples, supra note 30.


235 THE FEDERALIST NO. 51, supra note 17, at 322.


237 This approach draws on Professor Adrian Vermeule’s “second-best constitutionalism”: Stated abstractly, suppose that at least some of the conditions necessary to produce a given ideal or first-best constitutional order fail to hold. Even if it would be best to achieve full satisfaction of all those conditions, it does not follow that it is best to achieve as many of the conditions as possible, taken one by one. Rather, multiple failures of the ideal can offset one another, producing a closer approximation to the ideal at the level of the overall system.
ridge, the freedom of speech. Yet it also serves the freedom of speech by unmasking the self-interested factions at which the First Amendment (at least in part) is aimed. Even leading critics of disclosure, who base their antidisclosure arguments on an optimistic view of deliberative democracy, generally embrace Madison’s more realistic approach to factions once outside of the campaign finance context. Viewed this way, the informational interest is integral to, not opposed to, the freedom of speech in the campaign finance disclosure context. In Madison’s terms, disclosure enables the citizens’ consciousness of, and opposition to, “the secret wishes of an unjust and interested majority.” An application of the First Amendment that fails to take account of, or is hostile to, the informational interest so understood is substantially and constitutionally incomplete.

B. Antifactionalism as Anticorruption

A deeper, constitutionally rooted informational interest suggests a reconfiguration of Buckley’s original justifications for disclosure. In particular, it revives and relies upon a more meaningful form of the anticorruption interest. What is left of the anticorruption interest—actually, what is left out of the Court’s newly narrowed *quid pro quo* definition of corruption—might be salvaged to strengthen further the informational interest. Together, a revitalized informational interest combined with elements from a revised form of an anticorruption interest can shape a deeper, stronger set of antifactional values motivating disclosure.

This is a semantic argument and an important one. “Corruption” is a loaded term in First Amendment analysis of campaign finance law. The difference between the results in *Austin v. Michigan State Chamber of Commerce* and *Citizens United v. Federal Election Commission* is not in the anticorruption interest, but in the informational interest. The Court erred in *Citizens United* to the extent that it took a semantic argument about the informational interest and treated it as if it were a constitutional principle. In this Article, the semantic argument is revived and used to ground a deeper, stronger set of constitutional principles underlying campaign finance disclosure laws. Moreover, in Madison’s terms, disclosure enables the citizens’ consciousness of, and opposition to, “the secret wishes of an unjust and interested majority.”

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238 See supra Part I.A.

239 Justice Kagan recently expressed a republican view of the First Amendment, criticizing a reading of the First Amendment that did not acknowledge a public campaign funding law’s purpose “to break the stranglehold of special interests on elected officials.” See Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2830 (2011) (Kagan, J., dissenting). Such a reading, she explained, missed the Court’s past recognition that such a law “promotes the values underlying both the First Amendment and our entire Constitution by enhancing the ‘opportunity for free political discussion to the end that government may be responsive to the will of the people.’” Id. (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964)).

240 Compare Samples, supra note 30, at 7 (discussing how disclosure may negatively affect deliberative democracy), with John Samples, The Struggle to Limit Government: A Modern Political History 252 (2010) (“[G]overnment does not internalize its costs and benefits. Instead, it offers benefits to the many at a cost to the few (majoritarian abuse of power) or benefits to the few at a cost to many (special-interest politics).”).

241 The Federalist No. 10, supra note 17, at 84.

242 See supra Part I.B.2.
Commerce and Citizens United, for example, is almost entirely a difference in what the Supreme Court has said corruption means. After Citizens United, corruption means practices that “would be covered by bribery laws if a quid pro quo arrangement were proved,” but that Buckley acknowledged “can never be reliably ascertained.” Under that narrow definition, corruption adds little more to bribery than a recognition that criminal bribery in politics is difficult to prove. Regardless of whether this is a correct reading of Buckley, it is neither useful in framing arguments about the purpose of campaign finance laws (many of which originated as corrupt practices acts that extended beyond bribery laws), nor descriptive of its public meaning.

The narrowed conception of corruption as simply quid pro quo arrangements is also inconsistent with the Constitution’s republican principle as illuminated by antifactionalism. Starting with Madison again, The Fede-
ralist No. 10 did not use “corruption” in the way the Court did in Citizens United. In Madison’s discussion of the dangers of faction, he analogized the problem of self-interested, factious representatives to the principle that “[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.” Compare Madison’s understanding of factionalism as corruption with the Court’s view in Citizens United that “[i]t is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies.” Missing the Madisonian point, the Court embraces factionalism as essential to republicanism rather than understanding it to be a necessary evil opposed to republicanism. Tellingly, Justice Kennedy’s McConnell dissent claims that “[d]emocracy is premised on responsiveness.”

Scholars applying a range of methods have argued that Madison’s antifactional view is closer to what corruption should mean for constitutional purposes. Originally, as Professor Zephyr Teachout summarizes, “[t]he Framers were obsessed with corruption,” and it had little to do with bribery. As Professor Robert Natelson explains, the term was understood at the framing as “the use of government power and assets to benefit localities or other special interests (“factions”),” not merely illegal personal benefits like theft. “[T]he founding generation valued no public trust duty more than impartiality,” and favoritism toward, or undue influence by, factions—“corruption” in their terms—violated the public trust even if “not technically illegal.”

Given that “[c]orruption was among the Constitutional Convention delegates’ greatest concerns,” Professor Teachout continues, “a

249  THE FEDERALIST NO. 10, supra note 17, at 79 (emphasis added).
251  Id. (quoting McConnell, 540 U.S. at 297 (Kennedy, J., dissenting)) (internal quotation marks omitted).
252  See AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 279 (2005) (“When the word ‘democracy’ appeared in the Founding era, it was often associated with, rather than defined against, republicanism—even by Madison himself. . . . [T]he essence of the Article IV guarantee of each state’s ‘Republican’ form of government was not to prohibit . . . direct popular participation. Rather, the big idea was to shore up popular sovereignty.”) (footnote omitted).
First Amendment that breathes at the expense of political integrity is probably not a faithful one."

In equally antifactional terms, updated with the incentives-oriented vocabulary of public choice theory, other scholars have defined corruption as dependence on narrow interests instead of a representative’s constituency of citizens. Professor Lawrence Lessig frames his detailed contemporary political diagnosis of “a corrupt Congress” in explicitly republican terms. He invokes Madison’s vision of government’s proper “dependence on the people” to argue that “a representative democracy that developed a competing dependency, conflicting with the dependency upon the people, would be ‘corrupt.’” Because representatives “depend upon private wealth to secure their tenure, they will become responsive to the concerns of that private wealth, so as to assure its continued supply. . . . But the consequence is a weakening of the integrity of the system.” This definition does not rely on *quid pro quo*; “[n]o one is talking about bribery, or its close cousins.” Professor Lessig distinguishes this corruption of politics, as opposed to corruption of politicians, as “dependence corruption.”

Corruption is, as Professor Daniel Lowenstein describes it, fundamentally a conflict of interest between voters and campaign financiers in which “the consequences of a decision made in the course of a relationship of trust are likely to have an effect, not implicit in the trust relationship, on either the interests of a person with whom the decision-maker has a separate relationship of trust or on the decision-maker’s self-interest.” The incentives for reelection pull at the representative whether the faction doing the campaign spending is a donor or an independent expenditure group. The effects of such spending are corrupting in the factional sense: Professor Samuel Issacharoff explains that at a systemic level, “the electoral system leads the political class to offer private gain from public action to distinct, tightly organized constituencies, which in turn may be mobilized to keep compliant public officials in office.”

These varying views of corruption all align with the antifactional republican principle of the First Amendment, rather than the faction-

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256 Teachout, supra note 253, at 406.
257 Lawrence Lessig, *What Everybody Knows and What Too Few Accept*, 123 HARV. L. REV. 104, 106 (2009) (“The pattern is the increasing dependence of public officials upon private money to secure tenure. The fear is the corruption such dependency breeds.” (footnote omitted)).
259 Id. at 128.
260 Id. at 106-07.
261 Id. at 106.
262 LESSIG, supra note 258, at 226-47 (titling the section “Two Conceptions of Corruption”).
facilitating libertarian principle applied in Citizens United. While Citizens United relied on the libertarian principle in freeing corporations to make unlimited independent campaign expenditures, a realignment of the constitutional doctrine may clear a space for the republican principle to develop in the area of disclosure through a broader informational, and anticorruption, factional interest. By declaring that prohibitions on campaign spending are unconstitutional under strict scrutiny, Citizens United lowers the constitutional stakes for an antifactional interest in disclosure that need not be so compelling as to justify speech prohibitions. But by leaving disclosure as the last generally applicable campaign finance law standing, Citizens United raises the constitutional stakes for how a broader antifactional interest might justify disclosure under exacting scrutiny.

Disclosure in a post-Citizens United system without campaign finance prohibitions, reconceived along antifactional lines, can and should accomplish more than it did as an adjunct to those prohibitions. Now that the only compelling interest in campaign finance regulation has been reduced to something resembling a difficult evidentiary subset of bribery, and direct prohibitions on campaign spending have become unjustifiable, the original anticorruption interest may reemerge in its truer antifactional form. This form should be employed more productively to motivate an ambitious yet targeted model of campaign finance disclosure that aims not simply to inform voters, but also to realize the republican model of self-government.

III. ANTIFACTIONALISM APPLIED

Rooting campaign finance disclosure more deeply in antifactionalism, and more broadly in anticorruption, can help transition campaign finance law from a model of disclosure tailored away from First Amendment threats, to a model of disclosure tailored toward First Amendment values.

A primary contribution of a deeper, broader justification for disclosure is that it would not immediately change much about the constitutionality of particular disclosure laws now on the books. In a period of sweeping realignments elsewhere in the First Amendment doctrine of campaign finance law, such stability has independent value in itself. After Citizens United, scholars, advocates, and policymakers have begun to reassess what constitutes effective disclosure. As the campaign finance debate at the federal

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265 Disclosure may serve these broader interests more effectively than prohibitions, by channeling less visible direct forms of political influence into the public advocacy where voters are not “mere bystanders” but “mediate such influence.” Daniel Winik, Note, Citizens Informed: Broader Disclosure and Disclaimer for Corporate Electoral Advocacy in the Wake of Citizens United, 120 YALE L.J. 622, 643 (2010).

266 See generally, e.g., Briffault, supra note 15; Richard Briffault, Two Challenges for Campaign Finance Disclosure after Citizens United and Doe v. Reed, 19 WM. & MARY BILL RTS. J. 983 (2011); Mayer, supra note 15; Noveck, supra note 15; Winik, supra note 265; Jason Kuznicki, November 2010:
level stagnates due to deadlock in Congress and at the Federal Election Commission, the States continue to serve their role as campaign finance laboratories. The Supreme Court has not stayed this experimentation, and instead has declined recent facial challenges to state disclosure laws in favor of further development of the record through as-applied challenges on remand, as it did in Doe v. Reed. Decentralization of campaign finance debates might allow open constitutional issues “to percolate into a more coherent doctrine,” one that might include a more balanced view of First Amendment interests.

As legislatures enact new disclosure laws, and courts review them, a revised justification for disclosure can clarify the constitutional doctrine in several important and increasingly contested applications. An understanding that the interest in disclosure itself is constitutionally rooted in antifactional concerns refocuses disclosure through a republican lens.

For some disclosure questions, antifactionalism will be more demanding than the current ends of disclosure. Where the informational interest now is neutral about how a speaker is identified, antifactionalism penetrates through political committee smokescreens to unmask the faction and its beneficiaries. Where the informational interest now applies to all speakers generally, antifactionalism accounts for some speakers as greater factional threats to the republican form of government than others. Where existing disclosure laws now might satisfy the informational interest and thereby be


267 Eliza Newlin Carney, FEC Shake Up Long Overdue, NAT’L J. (May 11, 2009, 9:17 AM), http://www.nationaljournal.com/columns/rules-of-the-game/fec-shakeup-long-overdue-20090511 (“In case after case, the six-member FEC, which is evenly divided between Republicans and Democrats, has split 3-3 along party lines. Since the FEC may take no action without a majority, a long list of complaints have been effectively thrown out.”); see also Benjamin Weiser & Bill McCallister, The Little Agency that Can’t: Election-Law Enforcer Is Weak by Design, Paralyzed by Division, WASH. POST, Feb. 12, 1997, at A1.

268 See Life After Citizens United, supra note 26 (explaining that ten states have enacted disclosure or disclaimer requirements for corporate political expenditures since Citizens United; cf. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”)).

269 John Doe #1 v. Reed, 130 S. Ct. 2811, 2821 (2010); see also Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450-51 (2008) (disfavoring facial challenges because they “rest on speculation,” ask for “a rule of constitutional law broader than is required by the precise facts” in a given case, and “prevent[ ] laws embodying the will of the people from being implemented in a manner consistent with the Constitution” (quoting Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)) (second internal quotation marks omitted)).

270 See William P. Marshall, The Last Best Chance for Campaign Finance Reform, 94 NW. U. L. REV. 335, 380, 383 (2000) (“Each state has its own political traditions, structures, and exigencies, and these differences can have profound effects on campaign finance concerns.”).
deemed inoffensive to the First Amendment, the values that motivate antifactionalism make effective disclosure a constitutional imperative of popular sovereignty.

For other disclosure questions, antifactionalism will be more modest about the means of disclosure. By aiming for consciousness of faction rather than some ideal of the informed voter, antifactionalism places disclosure laws within a broader system of public deliberation, but does not attempt to bear the entire weight of that system. Current disclosure laws that focus on name, affiliation, dollar amounts, and any realistic options for reform through repackaging the same basic data points, find a stronger justification as antifactional warning systems than as voter education efforts. Professors Elizabeth Garrett and Daniel Smith have argued an effective system of disclosure should not aim to fully inform voters of candidates’ and their supporters or opponents’ positions, but instead should “structur[e] the information environment to provide citizens with cues or heuristics that will help them vote competently with limited data.” Madison lacked the vocabulary of behavioral economics, but his reliance on an inherent, even virtuous popular distrust of faction is consistent with this modest model of disclosure. As Professors Samuel Issacharoff and Pamela Karlan suggest, in a disclosure-oriented campaign finance system “the normal workings of the political process by competing candidates or parties and by the press” must do the rest of the work of rooting out corruption.

Without incorporating the antifactional insight, the informational interest may also give too much credit to what passes for political advertising. Saying that a coal mining company sponsored a misleading ad about child predators, for example, does not so much inform voters as warn them that factions are at play.

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271 See Robert F. Bauer, Not Just a Private Matter: The Purposes of Disclosure in an Expanded Regulatory System, 6 ELECTION L.J. 38, 38-39 (2007) (“The reliance on the informational interest of voters assumes wide voter use or interest, neither of which is established. There is something almost quaint about this view of the average citizen’s stake in a database described by the Federal Election Commission as ‘staggering,’ unmanageable for even the motivated voter—and which, more generally, is not without its conceptual difficulties. . . . Stated differently, mandatory disclosure is not a self-executing reform, but a measure enacted in aid of subsequent regulatory initiatives built around the information that it produces.” (footnote omitted) (quoting FED. ELECTION COMMISSION, PERFORMANCE AND ACCOUNTABILITY REPORT FISCAL YEAR 2004, at 2 (2004))).


273 Issacharoff & Karlan, supra note 21, at 1737; see also Garrett & Smith, supra note 272, at 297 (“Mandatory disclosure statutes can be crafted so that they provide relevant information in a timely fashion and thereby allow information entrepreneurs to bring data to the voters’ attention.”).

274 See, e.g., Terry Carter, Mud and Money, A.B.A. J., Feb. 2005, at 40, 45 (describing campaign advertising financed primarily by a coal company executive that criticized incumbent state supreme
misguided challenges to robust disclosure laws that, although they may not be as well tailored to voter information as other policies such as voter guides, do precisely target the interest in identifying factions. 275

Along these lines, the antifactional interest may help solve, or at least clarify, several puzzles in the First Amendment doctrine of campaign finance law. Four applications exemplify how an approach guided by the antifactional interest might lead to clarifications where existing interests do not. First, targeting interests instead of individuals for disclosure relieves the latent tension generated by the Court’s embrace of political anonymity in McIntyre. Second, understanding corporations as factions provides a sounder basis on which to distinguish corporate political actors from others after Citizens United. Third, the republican concern about faction offers a coherent rationale for drawing lines between domestic and foreign political speakers, whether the “foreigners” come from a different district, a different state, or a different country. Fourth, by recognizing corruption as the private benefit of factions at the expense of the general welfare, rather than the personal benefit of an officeholder at the expense of a faction, the antifactional interest calls for at least as robust a disclosure system for issue advocacy as it does for express advocacy of candidates.

A. Individuals

There is a world of difference between Mrs. McIntyre’s parking-lot leaflets and a multimillion dollar independent expenditure campaign waged through broadcast advertisements underwritten by corporation-funded political committees. Rather than measuring that difference by speculating about the relative burdens of retaliation (as McIntyre does),276 or by the relative inequality of wealth (as Citizens United suggests the government cannot do),277 the antifactional interest asks for whom Mrs. McIntyre is speaking. As it turns out, she was speaking for herself as a citizen, even though she misleadingly signed some of the leaflets as a “concerned citizens” group probably to bolster her credibility. McIntyre, therefore, is a weak case for disclosure because disclosure of her name did not further the antifactional interest. An individual citizen is a microcosm of Madison’s “greater variety of parties and interests,” because she is never solely an employee, a taxpay-

court justice “of casting the deciding vote to let a sex offender take a job in a school”); cf. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2256-57 (2009) (holding that due process required recusal of justice from case involving the executive’s coal company when the justice benefitted as a candidate from the executive’s campaign expenditures).

275 See Briffault, supra note 15, at 303 (“Disclosure ought to be much more tightly focused on informing the public about the major financial actors who give or bundle major sums and on providing aggregate data about the involvement of interest groups in the political process.”); see also id. at 276.


er, a parent, or a resident. Such a voter is the object, rather than the subject, of antifactionalism. 278

Recognizing and relying on an antifactional view of the informational interest would have avoided confusing dicta in McIntyre about the benefit of anonymity and burden of disclosure regardless of the speaker. 279 For example, the Court construed the law at issue as a “statute that prohibits the distribution of anonymous campaign literature,” and, therefore, as an intrusion into First Amendment rights under the libertarian view, rather than as a basic disclaimer law that in most cases furthers First Amendment values under the republican view. 280 Justice Ginsburg’s concurrence suggests “in other, larger circumstances” a state may “require the speaker to disclose its interest by disclosing its identity,” which does recognize that the disclosure of identity is the means to the end of interest disclosure. 281 But it provides no basis for distinguishing what those “other, larger circumstances” might be.

A holding that antifactionalism is unconcerned with Mrs. McIntyre’s political speech is not the same thing as noting, as the Court did, that “the name and address of the author add little, if anything, to the reader’s ability to evaluate the document’s message.” 282 There are many cases where a name and business address do help a citizen evaluate a campaign speaker’s message, if by “evaluate” the Court is referring to the voter’s consciousness of the faction behind the message. 283 A corporate manager or major shareholder who spends a significant amount of his personal wealth on an independent expenditure might be acting as a voter, but also could be furthering

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278 Professor William McGeveran draws a similar distinction at the individual level in terms of the privacy costs of disclosure. “[P]rivacy theory focuses on individuals, not collectives.” McGeveran, supra note 24, at 881. Unlike organizations, individuals have “interests in their private personae and autonomous development of beliefs.” Id. at 861.

279 See McIntyre, 514 U.S. at 385 (Scalia, J., dissenting) (“I can imagine no reason why an anonymous leaflet is any more honorable, as a general matter, than an anonymous phone call or an anonymous letter. It facilitates wrong by eliminating accountability, which is ordinarily the very purpose of the anonymity. There are of course exceptions, and where anonymity is needed to avoid ‘threats, harassment, or reprisals’ the First Amendment will require an exemption from the Ohio law. But to strike down the Ohio law in its general application—and similar laws of 49 other States and the Federal Government—on the ground that all anonymous communication is in our society traditionally sacrosanct, seems to me a distortion of the past that will lead to a coarsening of the future.” (citation omitted) (citing NAACP v. Alabama, 357 U.S. 449 (1958))).

280 Id. at 336 (majority opinion).

281 Id. at 358 (Ginsburg, J., concurring).

282 Id. at 348-49 (majority opinion).

283 Johnson, Regan, and Wayland argue for tailoring the content of disclosure more narrowly, noting that for most purposes (including, perhaps, antifactional purposes) a supporter’s residential address is not only highly intrusive but also less relevant than, for example, whether the supporter lives inside the district or elsewhere. Johnson et al., supra note 33, at 979. Similarly, information about a supporter’s employer is more useful at the aggregate level (which may still be meaningless for politically heterogeneous workplaces) or at high spending levels. Id.
the factional interests of his corporation. Like Madison, the antifactional interest is skeptical in its outlook on human nature, and errs on the side of assuming there is a faction to be disclosed at some level of financial significance. Similarly, as Professor Richard Briffault observes, when “bundlers” express their exceptional interest in a campaign by aggregating ordinary individual contributions, “[b]undler disclosure will help us to better understand the forces behind a candidate and the individuals likely to have access to an officeholder.”

In general, then, antifactionalism is concerned with interest groups rather than individuals, except when the individuals are likely to be acting on behalf of the interests themselves. Antifactionalism, therefore, supports several recent arguments for increasing the monetary thresholds for disclosure of individual campaign spending. Yet it does so because disclosure of relatively small contributions and expenditures is not substantially related to the antifactional interest, not because of any special burden on the speaker. In fact, such disclosure can be counterproductive, because low-level disclosure “threatens to inundate us in a sea of useless data, while potentially distracting attention from the big donors whose funds play a more meaningful role in understanding a candidate and her likely place in the political arena.” The antifactional argument does not share the same general privacy concerns as some of these other arguments against disclosure of individual donors, because (subject to the Socialist Workers Party exception for retaliation) any countervailing privacy interest presumably extends to all individual political actors without accounting for the factional threat they pose.

284  See, e.g., Adam Nagourney, Showdown on Emissions Attracts Out-of-Staters, N.Y. TIMES, Sept. 17, 2010, at A16 (“[Oil company owners] Charles and David Koch, the billionaires from Kansas who have played a prominent role in financing the Tea Party movement, donated $1 million to the campaign to suspend [California’s] Global Warming Solutions Act, which was passed four years ago, and signaled that they were prepared to invest more in the cause.”).

285  In addition to “demonstrating an intense degree of support” for a particular interest, large individual donor disclosure confers an additional informational benefit “as there is a greater likelihood their names will mean something to some voters,” while imposing a lower privacy cost because they are “less vulnerable to economic reprisals” and in general “more used to public attention.” Briffault, supra note 266, at 1005.

286  Briffault, supra note 15, at 302.


288  As McGeveran argues, a privacy theory consistent with McIntyre’s reading of the First Amendment “would highlight the central importance of scale” both in terms of the political benefits and privacy costs of disclosure. McGeveran, supra note 24, at 880.

289  Briffault, supra note 15, at 300-01.
B. Corporations

A corollary of antifactionalism’s reduced concern for individuals is its increased concern for corporations and other organized interests. A typical corporation exists for factional purposes. Specifically, a corporation focuses on narrowly concentrated private interests rather than the broader and more dispersed interests of individuals. “[I]t is the fiduciary duty to act in the interest of its shareholders.”[293] When it employs those resources to engage in campaign expenditures, it can be assumed that the expenditures have a factional function to benefit the shareholders as shareholders through financial returns rather than as individual citizens through the general welfare.[294]

The corporate form is the most transparent form of faction, and in a post-prohibition campaign finance system disclosure of corporate campaign spending promises to “channel[] corporate influence into public forms of engagement with the electorate,” rather than “forcing the influence into smoke-filled rooms.”[290] But the same form also can be used to conceal factions. Unlike the basic informational interest in identifying “the person or group who is speaking,”[292] an antifactional approach accounts for the different structures and functions of possible political speakers. Just as an individual person might act more or less like a faction in ways that merit different disclosure regimes, organizations might be differentiated for disclosure purposes based on antifactionalism.

Start with the easy case of the business corporation empowered to become a political actor after Citizens United. The corporate form is so valuable in this case because of its efficiency in employing resources to profit its shareholders. By law, its managers have a fiduciary duty to act in the interest of its shareholders.[293] When it employs those resources to engage in campaign expenditures, it can be assumed that the expenditures have a factional function to benefit the shareholders as shareholders through financial returns rather than as individual citizens through the general welfare.[294]

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290 Teachout, supra note 253, at 393 n.245.
291 Winik, supra note 265, at 644.
293 This may be an important limit on corporate campaign spending. See David Schleicher, The Parable of the Fox and the Target, ELECTION L. BLOG (Oct. 17, 2010, 12:31 PM) http://electionlawblog.org/archives/017412.html (comparing the accountability for political spending by Target and News Corp., and concluding that “[i]t is the fiduciary duty to act in the interest of its shareholders”),
294 Because it is the fiduciary duty to the principals that makes the factionalism of the agent clear, the same reasoning would apply to partnerships, LLCs, and similar business associations.
Campaign finance disclosure also can piggyback on securities laws and other noncampaign disclosure regimes to help follow the money if there is any doubt as to the source. In the case of the business corporation, then, disclosure of the corporation discloses the faction with it.295

An understanding of the business corporation as a form of faction also helps resolve difficulties with the common media exemption from campaign finance laws. A telling feature of the corporate speech holding in Citizens United is the Court’s authority for the proposition that “First Amendment protection extends to corporations.”296 Nearly all of the more than two dozen cases cited involve First Amendment protection of media corporations.297 Yet the Court reasoned that nonmedia corporations also “have the need or the motive to communicate their views,” and there is no clear line to be drawn between a corporate conglomerate that owns media property and enjoys the exemption and an otherwise identical business that does not.298 Nor could the Court find any precedent “supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not.”299 As with other corporations, antifactionalism seeks disclosure of the corporation that is funding the speech. For the media, such disclosure is inherent in publication: an endorsement will come under a masthead with a particular editorial tradition, or on a channel reputed to lean a certain way, or from an internet site known to have a particular perspective, all of which can warn of factions in the context of the media outlet’s broader public reputation. Media corporations trade on clearly established editorial interests in a way other businesses do not.

Not all corporations, however, are business corporations. Before Citizens United mooted line drawing exercises among corporations, the Supreme Court developed an exemption from campaign expenditure prohibitions for voluntary associations that are incorporated “for the express purpose of promoting political ideas.”300 For purposes of antifactionalism, the

295 Alternatively, in terms of costs rather than benefits of disclosure, the essential publicity of the corporate form in the marketplace “explains why corporations lack the kind of dignitary privacy interests that justify the protection of individual speech against the risk of retaliation.” Winik, supra note 265, at 661-64.
296 Citizens United, 130 S. Ct. at 899.
297 See id. at 899-900.
298 Id. at 906.
299 Id. at 905.
300 See Fed. Election Comm’n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 263-64 (1986). One confusing legacy of Massachusetts Citizens has not been mooted. There, the Supreme Court prohibited the imposition of “the full panoply of regulations that accompany status as a political committee under the Act,” id. at 262, to a political organization “whose major purpose is not campaign advocacy.” Id. at 252; cf. Buckley v. Valeo, 424 U.S. 1, 79 (1976) (per curiam). As Justice O’Connor predicted, see supra Part I.A.2, courts are split on to what extent the “major purpose” test restricts disclosure of members. Compare Human Life of Wash. Inc. v. Brumsickle, 624 F.3d 990, 1010-11 (9th Cir. 2010) (holding that
business corporation and the political advocacy corporation are actually quite similar. Although they have different primary revenue models (sales for business corporations, memberships for political corporations), they both have associated in a common cause, delegating to management the authority to act on behalf of that cause.\footnote{See Citizens United, 130 S. Ct. at 928 (Scalia, J., concurring).} Again, to the extent the corporation clearly serves “the express purpose of promoting political ideas,” and its managers are bound to act in furtherance of those ideas, disclosure of the political corporation is as transparent from an antifactional perspective as disclosure of the business corporation.

This transparency of corporate faction also suggests that disclosure of ordinary individual members of these political organizations generally adds little to the antifactional interest in information. As with individuals, however, some members who spend a significant amount of resources supporting the organization suggest factional, rather than civic, involvement. For example, a handful of business executives who establish a vaguely named campaign front group with little or no other public support\footnote{See, e.g., Peter Overby, Who Writes the Check? Group Wants Voters to Know, NAT’L PUB. RADIO (Mar. 22, 2011), http://www.npr.org/2011/03/22/134746513/who-writes-the-check-group (describing in a campaign advertising disclaimer that “Concerned Taxpayers of America” actually was funded by “a million-dollar front group financed by just two guys—a Maryland businessman and the head of a New York hedge fund”).} are more likely making an investment in narrow factional interests than the dues paying political organization member or even the individual philanthropist willing to stand by his ad in person. There is another case for membership disclosure, too, when corporations are formed not to more efficiently advance its shareholders or members financial or political interests, but to conceal, or coordinate with, another underlying faction. Professors Garrett and Smith usefully distinguish between “notorious” organizations whose political stances are well known to their political opponents and the public, and “veiled political actors,” which are organizations used to avoid disclosure of the interests—the factions—behind the veil.\footnote{See Garrett & Smith, supra note 272, at 296 (defining “VPAs” as “[c]omplicated arrangements consisting of nonprofit corporations, unregulated entities, and unincorporated groups can lead to structures resembling Russian matryoshka dolls, where each layer is removed only to find another layer obscuring the real source of money”).} While disclosure of individual shareholders or members may in rare instances present threats of retaliation within the Socialist Workers Party exception, the strong faction inherent in the corporate form argues for piercing that veil with rigorous
disclosure laws to unmask corporate or otherwise organized members of political organizations.\textsuperscript{304}

C. "Foreigners"

The most enigmatic question left open by \textit{Citizens United} is “whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process.”\textsuperscript{305} The otherwise valid disclosure laws upheld by \textit{Citizens United} perforce would apply to foreign political actors. But the practicalities of enforcing existing and new disclosure laws, the fact that state and local campaign finance laws must address “foreigners” already, and the prospect that noncitizen individuals or organizations might one day participate in campaigns,\textsuperscript{306} raise novel issues. The Court’s arguably incoherent hesitation to extend the logic of its holding in \textit{Citizens United} to foreign individuals or associations\textsuperscript{307} leads to an important question about how a republican view of the First Amendment, and an antifactional view of campaign finance disclosure, would consider distinctions drawn on the basis of a campaign speaker’s status as a “foreigner” of one kind or another.

A suggestion of an answer may be found in \textit{The Federalist No. 10}. In its penultimate paragraph, Madison explained that under republican government, “[t]he influence of factious leaders may kindle a flame within their particular States but will be unable to spread a general conflagration through the other States.”\textsuperscript{308} Under federalism, any “improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it, in the same proportion as such a malady is more likely to taint a particular county or district than an entire State.”\textsuperscript{309} As the context of the Guarantee Clause suggests, the States’ republican form of government is as important a part of the Constitution’s firewall against dangerous factions as the United States’ protection of each of the States against invasion or domestic violence.\textsuperscript{310} The same republican principle that would sa-

\begin{itemize}
\item \textsuperscript{304} But see Stephen M. Hoersting, \textit{When Capitalists Need Socialist Workers}, NAT’L REV. ONLINE (May 6, 2011 11:32 AM), http://www.nationalreview.com/blogs/print/266623 (arguing that traditional judicial deference to economic legislation was premised on businesses’ access to the political process, and that disclosure of corporate campaign speech threatens to chill that access).
\item \textsuperscript{305} \textit{Citizens United}, 130 S. Ct. at 911.
\item \textsuperscript{307} See Hasen, supra note 185, at 605.
\item \textsuperscript{308} \textit{THE FEDERALIST NO. 10}, supra note 17, at 84.
\item \textsuperscript{309} Id.
\item \textsuperscript{310} U.S. CONST. art. IV, § 4.
\end{itemize}
feguard the United States against foreign influence also would safeguard the States against regional factions. 311 Foreigners, meaning political actors from outside the republic’s commonweal at the national, state, or local level, are, in a word, factions.

Thus understood, an antifactional view of the informational interest need not rely on potentially pernicious classifications of national or regional identity to justify distinctions between disclosure of foreign and domestic individuals or associations. These distinctions have become more salient recently at the state level, where doubly factionous out-of-state political organizations have spent heavily on ballot issues. One court summarized the intuition underlying the distinction in Madisonian terms: “[s]urely California voters are entitled to information as to whether it is even citizens of their own republic who are supporting or opposing a California ballot measure.” 312 There is a deeper republican point: such foreign factions are especially dangerous because it is a direct attack on the federalist immune system against faction. 313 A recent study of a South Dakota ballot measure, where as much as eighty percent of the funding came from “foreign” (out-of-state) sources, concluded that “if the out-of-state money affects the outcome of a referendum in a way that would be different from how South Dakotans alone may have voted, then the whole notion of horizontal federalism and state autonomy may be undermined.” 314 The exact extent of foreign spending in that election was unknown due to weaknesses in the disclosure laws. 315

311 Again, corruption is not too strong a term to call this influence. The Framers’ “obsession with foreign influence derived from a fear that foreign powers and individuals had no basic investment in the well-being of the country.” Teachout, supra note 253, at 393 n.245.


313 For a strong statement of the stakes involved, see Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: In Defense of United States v. Lopez, 94 MICH. L. REV. 752, 769-70 (1995) (“These nationwide crosscutting cleavages make American federalism stable because they give it a Madisonian plurality of interest groups, no one of which is likely to terrorize the others on a permanent basis. . . . There is nothing in the U.S. Constitution that is more important or that has done more to promote peace, prosperity, and freedom than the federal structure of that great document.”).

314 Patrick M. Garry et al., Raising the Question of Whether Out-Of-State Political Contributions May Affect a Small State’s Political Autonomy: A Case Study of the South Dakota Voter Referendum on Abortion, 55 S.D. L. REV. 35, 46 (2010). The Alaska Supreme Court expressed a similar view in considering limits on corporate campaign expenditures:

Alaska has a long history of both support from and exploitation by nonresident interests. Its beauty and resources have long been lightning rods for social, developmental, and environmental interests. More than 100 years of experience, stemming from days when Alaska was only a district and later a territory without an elected governor or voting representation in Congress, have inculcated deep suspicions of the motives and wisdom of those who, from outside its borders, wish to remodel Alaska and its internal policies for dealing with social or resource issues. Outside influence plays a legitimate part in Alaska politics, but it is not one that Alaskans embrace without reservation.


315 Garry et al., supra note 314, at 46. See generally LINDA KING, INDECENT DISCLOSURE: PUBLIC ACCESS TO INDEPENDENT EXPENDITURE INFORMATION AT THE STATE LEVEL (2007).
Antifactionalism provides strong support for taking account of foreign political actors at every level and for disclosure laws that draw clear distinctions based on whether and to what extent political speech is funded from outside the relevant political community. Given the role of the United States in the world, and the role of foreign nationals and corporations in the United States, foreigners have strong interests in American foreign and domestic policy. In a challenge against federal prohibitions on campaign spending from foreign sources, or special state disclosure rules for “foreign” out-of-state corporations or nonresidents, the republican antifactional principle could distinguish disclosure of foreign political actors by acknowledging these interests as the factions they are.

This necessity of federalism to the republican plan suggests another lesson from antifactionalism. The increased susceptibility to faction at successively lower levels of government may argue for a more deferential treatment of campaign finance law at the state and local levels, at least when the law itself does not itself entrench a particular faction. A review of First Amendment challenges in federal courts suggests the opposite is occurring, with state and local laws less likely to survive the same level of scrutiny applied to federal laws. Professor Adam Winkler, the review’s author, suggests “[p]erhaps the linear descent in survival rates as one moves from the national to the local level is a reflection of Madison’s theory of faction,” with courts viewing local laws as more likely “to invade the rights of other citizens.” In the campaign finance area, at least, an antifactional perspective may resist this trend. Where campaign finance laws serve the republican principle of the First Amendment by increasing the citizens’ consciousness of factions in political discourse, a truer Madisonian approach may be more deferential to disclosure at the state and local levels that lack other structural impediments to faction available at the federal level.

D. Issue Advocacy

Finally, antifactionalism requires increased attention to disclosure of “issue advocacy” expenditures. The distinction of “issue advocacy” from “express advocacy” arose in Buckley, when the Court narrowly construed

316 See, e.g., Alaska Civil Liberties Union, 978 P.2d at 617 (rejecting challenge to rules limiting campaign contributions by non-residents); see also Wash. Rev. Code § 42.17.093 (2009) (separate reporting requirements for “[o]ut-of-state political committees”).

317 Adam Winkler, Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts, 59 Vand. L. Rev. 793, 857 (2006) (“In campaign speech cases, where the survival rate was only 24 percent, all of the federal campaign speech laws adjudicated under strict scrutiny were upheld and only a minority of state laws survived.”).

318 Id. at 822 (quoting The Federalist No. 10, supra note 17, at 83) (second internal quotation marks omitted).
the federal disclosure requirement applicable to expenditures "for the purpose of . . . influencing" a candidate election to address vagueness problems.\textsuperscript{319} Under Buckley, independent expenditure disclosure applied only to "communications that expressly advocate the election or defeat of a clearly identified candidate"\textsuperscript{320} and not to "groups engaged purely in issue discussion."\textsuperscript{321} The Court soon expressed the logic implicit in the distinction when it rejected an anticorruption interest in limiting ballot issue campaign expenditures. "The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue."\textsuperscript{322} The disclosure of issue advocacy "rests," according to the skeptical Court in McIntyre, "on different and less powerful state interests" than disclosure of candidate campaign expenditures.\textsuperscript{323}

The Court in Citizens United, by concluding that campaign expenditure limits never can rely on the newly narrowed anticorruption interest, leveled the doctrinal distinction between express advocacy in candidate campaigns and issue advocacy in those campaigns and others. The Court already had weakened the distinction in McConnell through its rejection of "a rigid barrier between express advocacy and so-called issue advocacy."\textsuperscript{324} Although Citizens United overruled McConnell on expenditure limits, it reaffirmed its holding supporting disclosure "having rejected the notion" that issue advocacy is a separate constitutional category.\textsuperscript{325} Yet even after Citizens United, one court has noted "[t]he constitutional basis for this concern with distinguishing between laws that regulate advocacy of a candidate’s election and those that regulate pure issue discussion has never been entirely clear."\textsuperscript{326}

An antifactional approach helps reconcile the treatment of both forms of advocacy. Just as the Court’s reduction of “corruption” to little more than bribery provides an opportunity to reclaim that word’s broader antifactional sense in support of candidate campaign disclosure,\textsuperscript{327} it also opens a

\textsuperscript{320} Id. at 80 (footnote omitted); see also id. at 44 & n.52 (providing examples of express advocacy as containing words such as “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” “reject” (internal quotation marks omitted)).
\textsuperscript{321} Id. at 79.
\textsuperscript{325} Id. at 194; Citizens United, 130 S. Ct. at 915 (“[W]e reject Citizens United’s contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.”).
\textsuperscript{326} Nat’l Org. for Marriage v. McKee, 649 F.3d 34, 53 (1st Cir. 2011).
\textsuperscript{327} See supra Part II.B.
door to rediscovering a similar antifactional interest supporting issue advocacy disclosure. Once again, the antifactional interest is concerned with the problem of private benefit of the faction at the expense of the general welfare, not the private benefit of the officeholder at the expense of the faction. Faction can corrupt politics regardless of whether its vehicle is a public official seeking reelection or a private faction petitioning for legislation or a ballot issue. Thus, the antifactional interest in disclosure is at least as strong for issue advocacy expenditures as it is for candidate advocacy expenditures. Such an interest may have at least two useful applications: ballot issues and lobbying.

Ballot issue advocacy, a form of “pure democracy” that bypasses Madison’s “scheme of representation” cure for faction, supposes a greater concern under the original republican conception of corruption than it does under the transactional conception of corruption that now prevails. First, direct democracy lacks the means “to refine and enlarge the public views by passing them through the medium of a chosen body of citizens.” Instead, the public forum for debate and deliberation consists almost exclusively of campaign speech by the interested parties—the factions themselves. Second, as the preceding discussion of “foreign” political actors suggests, direct democracy is entirely a creature of state and local governments whose lesser number of citizens and extent of territory” make them potentially more susceptible to “factious combinations” than the federal government.

Courts miss these insights when they view campaign finance regulation generally, and disclosure specifically, as policy tools primarily directed at corruption of public officials rather than at corruption of the political process itself. In Buckley v. American Constitutional Law Foundation, Inc., for example, the Court combined “deter[ring] fraud and diminish[ing] corruption” into one important interest. In the same minimalist mode that marked her concurrence in McIntyre, Justice Ginsburg’s opinion notes that “[t]o inform the public ‘where [the] money comes from,’ we reiterate, the State legitimately requires sponsors of ballot initiatives to disclose” payments to petition circulators. Nothing more than a cite to the “informational interest” discussion in Buckley v. Valeo, itself a candidate campaign case, suggests why or how that disclosure requirement is legitimate in the context of a ballot issue campaign.

328 THE FEDERALIST NO. 10, supra note 17, at 81.
329 Id. at 82.
330 See supra Part III.C.
331 THE FEDERALIST NO. 10, supra note 17, at 83.
333 See supra Part I.A.1.
334 Am. Constitutional Law Found., 525 U.S. at 205 (second alteration in original) (citation omitted) (quoting Buckley v. Valeo, 424 U.S. 1, 66 (1976) (per curiam)).
Justice O’Connor, who had previously anticipated the confusion generated by the Court’s inattention to disclosure in *Massachusetts Citizens for Life*, again prodded the Court in *American Constitutional Law Foundation* to more thoroughly consider the interest in disclosure. Dissenting from the Court’s invalidation of petition circulator disclosures required during the petitioning process, Justice O’Connor defended such disclosure in ballot issue campaigns as “more than legitimate . . . they are substantial.”

In an elaboration of the broader anticorruption disclosure rationale expressed in *Buckley*, her dissent invokes earlier republican themes in arguing that disclosure is an “essential cornerstone” of campaign regulation and “fundamental to the political system.” Effective disclosure of an issue’s financial supporters “allows members of the public to evaluate the sincerity or, alternatively, the potential bias of any circulator,” or for that matter any message sponsored by the proposing interest group. Echoing Madison’s system of obstacles “to the concert and accomplishment of the secret wishes of an unjust and interested majority,” the dissent quotes a study describing disclosure as “an automatic regulator, inducing self-discipline among political contenders and arming the electorate with important information.”

Nowhere does Justice O’Connor discount the importance of disclosure in a ballot issue campaign; the same substantial antifactional interest obtains in a campaign where there is no candidate to corrupt, but still a faction to disclose.

One recent note observes that the Court’s reliance on an ambiguous “electoral integrity” interest in *Doe v. Reed* “almost guarantees that there will be a flourishing of litigation in lower courts addressing a range of regulatory issues—including disclosure—in the context of state-organized ballot initiatives and beyond.”

To the extent these cases challenge disclosure of a ballot issue’s financial supporters rather than the separate issue of disclosure of petitioners themselves, the surest footing for courts going forward is found in Justice O’Connor’s partial dissent in *American Constitutional Law Foundation* and the deeper republican view of “electoral integrity” in ballot issue campaigns as disclosing faction rather than just deterring fraud or bribery.

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335 *Id.* at 226 (O’Connor, J., dissenting in part).
336 See supra Part I.B.2.
338 *Id.* at 224.
339 THE FEDERALIST NO. 10, supra note 17, at 84.
A final variation of issue advocacy that the antifactional interest may help clarify is lobbying regulation. The Supreme Court has not often scrutinized lobbying regulation, although laws governing lobbying practices have come under increased scrutiny in lower courts after *Citizens United*. Recent lobbying laws, and courts’ review of them, have focused on the narrow form of *quid pro quo* corruption defined in *Citizens United*. For example, Connecticut recently passed its strict contribution prohibition on contractors and certain lobbyists “in response to a series of scandals in which contractors illegally offered bribes, ‘kick-backs,’ and campaign contributions to state officials in exchange for contracts with the state.” Not only has that background of corruption not saved such strict laws, however, but as this Article has argued in other areas these new prohibitions and the court’s review of them too narrowly define the means and ends of campaign finance regulation. As far as the antifactional interest is concerned, lobbying poses a more significant threat of corrupting politics than lobbyists do of corrupting politicians. “Lobbyists are a key means by which interest groups pursue their goals in the political arena,” Professor Hasen observes, but the methods they use to pursue their goals are the most troubling. Lobbying skews policy toward “those with resources and with narrow (as opposed to diffuse) interests in particular legislation,” because they “can more easily overcome collective action problems and engage in political activity” to seek rents at the expense of the general welfare with demonstrable national economic costs.

While there is a much broader debate about lobbying regulation in general, and about stronger structural prohibitions on lobbyist-politician relations in particular, the antifactional interest, as this Article conceives it, suggests that the debate should not lose sight of disclosure as a means of facilitating public consciousness of lobbying’s factional threat to republican government. Even more than campaign finance disclosure, lobbying disclosure may require significant reconstruction to accomplish its ends under the conditions of modern politics. Here, *Citizens United* sounds an encouraging...

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342 See, e.g., Green Party of Conn. v. Garfield, 616 F.3d 189, 193 (2d Cir. 2010) (invalidating state law prohibiting lobbyists from contributing to candidate campaigns).
343 See, e.g., id. at 206-07.
344 Id. at 200.
345 Id. at 207 (holding that Connecticut’s ban on lobbyist contributions is not closely drawn to the anticorruption interest).
347 Id. (manuscript at 5).
349 See Hasen, supra note 346 (manuscript at 3-5).
note with its comparison of campaign finance disclosure with “registration and disclosure requirements on lobbyists.”

There the Court cites Harriss, which announces the clearest modern statement of the antifactional interest in disclosure both in terms of its broad ends, “full realization of the American ideal of government by elected representatives,” and modest means, “to know who is being hired, who is putting up the money, and how much.” In lobbying law and elsewhere in campaign finance law, effectively pursuing these broad ends through narrow means may best ensure the fullest realization of the First Amendment’s republican purpose consistent with its libertarian command after Citizens United.

CONCLUSION

Citizens United provides an opportunity to reconsider the relationship between campaign finance disclosure and the First Amendment. Unless that relationship is strengthened at a constitutional level, however, this opportunity may be lost beneath an accretion of poorly developed doctrine. New legislation and litigation is already testing the disclosure issue in the lower courts and will arrive at the Supreme Court in due course. Against these challenges, the shallow roots of the informational interest now underlying disclosure may not fully support the kinds of rules necessary to make disclosure of sophisticated political actors effective. One way to deepen those roots is to recover the republican principle that supports the First Amendment and recognize in that principle an antifactional purpose that supports disclosure as a key constitutional protection for our system of self-government.

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