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Taking Disclosure Seriously

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INTRODUCTION

Step into any conversation about campaign finance regulation in 2016, and you're likely to encounter the view that while the Supreme Court is well on its way to dismantling most of the legal framework that has governed money in elections for nearly forty years, disclosure requirements remain on secure constitutional footing. For many advocates of campaign finance regulation, this is a rare source of comfort in a landscape that is otherwise relentlessly bleak. But it is a decidedly second-best alternative to more robust modes of regulation.

I hope in this short piece to strike a cautionary note: to suggest that, for too long, advocates of campaign finance regulation have both taken disclosure for granted and failed to take disclosure sufficiently seriously. This is understandable; until recently, disclosure questions nearly always arose in the context of challenges to other campaign finance regulations, and disclosure has invariably been treated, by both courts and advocates, as something of an afterthought. But in a dramatically shrunken regulatory landscape, there is an increasingly urgent need to develop a stronger and more fully realized set of arguments for the constitutionality of disclosure—not only with an eye to potentially expanding existing disclosure requirements,¹ but also in order to strengthen the constitutional foundations of the existing disclosure regime.

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1. Expansion efforts have spanned both the legislative and the regulatory in the post-*Citizens United* era. See, e.g., Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act, S. 3369, 112th Cong. § 324(a)(2) (2012); Campaign Legal Center & Democracy 21, Comments in Response to Fed. Election Comm'n Notice 2014-12, Advance Notice of Proposed Rulemaking, 79 Fed. Reg. 62361 (Oct. 17, 2014).

TAKING DISCLOSURE SERIOUSLY

I. BACKGROUND

In the last six years, the Supreme Court has directly addressed disclosure on three separate occasions—twice in the context of campaign finance regulation and once in the context of referendum petitions.² Each time, it affirmed the constitutionality of disclosure requirements in strong and sweeping terms, though with reasoning more broad than deep.

Citizens United, of course, is best known for striking down long-standing limits on corporate spending in federal elections.³ But the Court in that case also confronted a First Amendment challenge to federal law’s disclosure and disclaimer provisions. In Part IV of its opinion—a tiny portion of the overall discussion—the Court soundly rejected the petitioners’ arguments. The Court explained that the disclosure and disclaimer provisions advanced the government’s “informational interest”—that is, an “interest in ‘provid[ing] the electorate with information’ about the sources of election-related spending”⁴—and thus easily survived the “exacting scrutiny” the Constitution required.⁵ The Court reasoned that disclosure furthered important democratic values, explaining that “transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”⁶ “[D]isclosure . . . can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.”⁷

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2. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1459-60 (2014); *Doe v. Reed*, 561 U.S. 186 (2010); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 371 (2010).
 3. *Citizens United*, 558 U.S. at 361.
 4. *Citizens United*, 558 U.S. at 367, 369 (citing *Buckley v. Valeo*, 424 U.S. 1, 66 (1976)).
 5. *Citizens United*, 558 U.S. at 368. Because it found that the challenged regulations were justified by the government’s informational interest, the Court did not consider whether they could also be supported by the other two interests the Court has credited in the disclosure realm—an anti-corruption interest and an enforcement interest. See *Buckley*, 64-67 (1976).
 6. *Citizens United*, 558 U.S. at 371.
 7. *Id.* at 370-71. An interesting recent piece tracks the Court’s repeated invocation of shareholders in its discussion of disclosure, arguing that the opinion “expanded the constitutionally cognizable audience for corporate electoral spending disclosure to include a new group, corporate shareholders,” a development the piece contends represents “a threat to voter primacy and the democratic values that voter primacy embodies.” Sarah C. Haan, *Voter Primacy*, 83 *FORDHAM L. REV.* 2655, 2658, 2667 (2015).

Just a few months after *Citizens United*, the Court decided *Doe v. Reed*.⁸ After a successful signature drive led to a Washington state referendum on, and ultimate rejection of, a domestic partnership bill, a number of groups sought access to the referendum petitions under the state's public records law.⁹ The petition's sponsor and certain petition signatories brought a First Amendment challenge to the public-records law. Construing the case as presenting a facial challenge, the Court held that the law, though it did implicate First Amendment interests, was justified by the government's compelling interest in "preserving the integrity of the electoral process."¹⁰ And Justice Scalia wrote separately to question whether petition signatories even possess any protectable First Amendment interests in anonymous speech; without providing a definitive answer, he wrote that the state was not only constitutionally permitted, but also to be lauded, for making its petitions publicly available: "Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."¹¹

Finally, nearly two years ago, the Court in *McCutcheon v. FEC* struck a similarly pro-disclosure note in the course of invalidating the federal aggregate limits on campaign contributions.¹² *McCutcheon* featured no challenge to disclosure, and so its discussion was pure dicta; but the Court's description of the power of disclosure, invoking an informational interest with anti-corruption dimensions, was nonetheless striking. The Court explained that "[w]ith modern technology, disclosure now offers a particularly effective means of arming the voting public with information . . . minimiz[ing] the potential for abuse of the campaign finance system."¹³

Whether relying on an informational interest (in the ordinary election context) or an interest in election integrity (in the context of a referendum), each of these cases represents a significant victory, either legal or merely rhetorical, for disclosure. In each case in which disclosure requirements were actually challenged, however, the Court took care to note that where there is a "reasonable probability" that disclosure will result in "threats, harassment, or reprisals from either Government officials or private parties," as-applied challenges might succeed.¹⁴

8. *Doe v. Reed*, 561 U.S. 186 (2010).

9. *Id.* at 192.

10. *Id.* at 197.

11. *Id.* at 228 (Scalia, J., concurring).

12. Specifically at issue in *McCutcheon* was the aggregate amount any individual could contribute to candidates, PACs, and parties in a single election cycle. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434 (2014).

13. *Id.* at 1459-60.

14. *Doe*, 561 U.S. at 200 (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976)); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 370 (2010).

TAKING DISCLOSURE SERIOUSLY

Lower courts have for the most part followed the Supreme Court's lead, approving the constitutionality of broad disclosure requirements;¹⁵ in just the past year, federal and state courts have upheld a number of campaign finance disclosure requirements. Noteworthy recent federal appellate cases include a Third Circuit decision upholding a Delaware statute requiring third parties that engage in electioneering communications to disclose the names of donors above \$100;¹⁶ a Tenth Circuit decision upholding a similar Colorado statute;¹⁷ and a series of cases from the Ninth Circuit: a pair of unsuccessful challenges, first facial¹⁸ and then as applied,¹⁹ to a California statute authorizing the Attorney General to collect information from charitable organizations, including the identities of "significant donors;"²⁰ and a third case upholding Hawaii's campaign-finance reporting, disclaimer and disclosure requirements.²¹

II. A NOTE OF CAUTION

At first blush, then, the news right now is mostly good if you favor disclosure²²—existing requirements may not go far enough, but they are firmly

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15. Jennifer A. Heerwig & Katherine Shaw, *Through A Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEO. L.J. 1443, 1459-62 (2014) (surveying disclosure challenges in the lower courts from 2010-2014).
 16. *Del. Strong Families v. Att'y Gen. of Del.*, 793 F.3d 304 (3d Cir. 2015).
 17. *Indep. Inst. v. Williams*, 812 F.3d 787 (10th Cir. 2016).
 18. *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1309 (9th Cir. 2015).
 19. *Ams. for Prosperity Found. v. Harris*, 809 F.3d 536 (9th Cir. 2015).
 20. *Ctr. for Competitive Politics*, 784 F.3d at 1310.
 21. *Yamada v. Snipes*, 786 F.3d 1182 (9th Cir. 2015).
 22. There are exceptions, however. The Eighth Circuit has invalidated two state disclosure laws that contained extensive ongoing reporting requirements. *See Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 596-601 (8th Cir. 2013); *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 877 (8th Cir. 2012) (en banc). And several narrow, as-applied challenges have succeeded. *See Coal. for Secular Gov't v. Williams*, No. 14-1469, 2016 WL 814814 (10th Cir. Mar. 2, 2016) (successful as-applied challenge to Colorado's issue-committee registration and disclosure requirements, by group that planned to spend \$3,500 publishing and distributing policy paper); *Sampson v. Buescher*, 625 F.3d 1247, 1249 (10th Cir. 2010) (successful as-applied challenge to same requirement, where the putative issue committee had raised under \$1,000); *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 671 (10th Cir. 2010) (successful as-applied challenge by two New Mexico nonprofits that objected to being required to register as political committees).

Finally, a recent ruling from the Wisconsin Supreme Court appears to suggest that "issue advocacy" is no longer subject to any sort of disclosure under Wisconsin state law. *State ex rel. Two Unnamed Petitioners v. Peterson*, 866 N.W.2d 165, 193 (2015), *dec'n clarified on denial of recons. sub nom. State ex rel.*

grounded in the Constitution under current doctrine. But, notwithstanding the strength of some of the Supreme Court's language and disclosure's track record to date in the lower courts, I think it's a mistake to assume that disclosure, even of core activities like contributions to candidates and parties, is absolutely unassailable, at least as a descriptive matter. This is for three primary reasons, outlined below.

A. *Pairing and Presentation*

In the campaign finance context, disclosure laws have always reached the Court paired with other, more substantive regulations of money in politics. It seems quite possible that this pairing has exerted two kinds of force on the Court's reasoning. First, approving disclosure requirements, which have the look and feel of a less burdensome alternative, may have emboldened the Court to invalidate other regulations. Certainly the existence of disclosure *as an alternative* has shaped the arguments opponents of contribution or spending limits have presented.²³ Second, the implicit (and sometimes explicit) comparison to direct regulation of expenditures and contributions may have made disclosure appear less problematic. Thus, in both *Citizens United* and *McCutcheon*, the Court struck down important campaign finance limitations while approving disclosure requirements; that was also the case in *Buckley v. Valeo*, which featured a cursory affirmation of the constitutionality of disclosure after a lengthy discussion of other regulations.²⁴

This means that we shouldn't assume that the results would be identical if disclosure were confronted on its own.²⁵

Three Unnamed Petitioners v. Peterson, 2015 WI 103, ¶¶ 66-67, 365 Wis. 2d 351 (2015).

23. In *McCutcheon*, for example, the briefing repeatedly invoked the existence of disclosure in describing the aggregate contribution limits as insufficiently tailored. See Brief for Appellant Shaun McCutcheon at 58, 60, *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434 (2013) (No. 12-536) (invoking "BCRA's veritable laundry list of much more direct anti-corruption and anti-circumvention measures" which include "exhaustive disclosure requirements," and arguing that "undisclosed spending can be much more directly addressed by disclosure requirements").

24. *Buckley v. Valeo*, 424 U.S. 1, 81 (1976) (concluding that independent expenditure contribution and expenditure disclosure provisions did advance a substantial governmental interest by "shed[ding] the light of publicity on spending that is unambiguously campaign related but would not otherwise be reported"); see also *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262, 265 (1986) (invalidating FECA's independent corporate expenditure limitations as applied to a nonprofit ideological corporation but also citing with approval disclosure provisions).

25. The dynamic I describe here may bear some relationship to the phenomenon of "anchoring"—that is, the tendency to overweight an initial piece of information about some unknown quantity. See DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 119-22 (2011); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777,

TAKING DISCLOSURE SERIOUSLY

Now, unlike *Citizens United* and *McCutcheon*, *Doe* did feature a stand-alone challenge to a disclosure requirement. And its reasoning is far more developed than the reasoning in the other two cases. But *Doe* is not a campaign finance case, and it is not difficult to see it being recast as narrowly limited to the direct-democracy context. Moreover, *Doe* was a deeply fractured decision, with two Justices essentially accepting the plaintiffs' First Amendment arguments and others remaining non-committal,²⁶ with the strongest endorsement of disclosure coming from Justice Scalia.²⁷

B. Brevity of Treatment

The Court has dispatched quickly with the disclosure challenges it has confronted in the campaign finance context, and this brevity may be a cause for concern, especially given the history in this area. A predecessor to the aggregate limit the Court struck down in *McCutcheon* had been upheld in *Buckley*, but that fact didn't give the *McCutcheon* Court much pause. In fact, *McCutcheon* pointed to the cursory nature of the *Buckley* Court's treatment of the aggregate limit in justifying reaching the opposite conclusion; it noted that "in one paragraph of its 139-page opinion" the *Buckley* Court had "disposed of any constitutional objections to the aggregate limit"²⁸ and elsewhere noted that "*Buckley* spent a total of three sentences analyzing th[e aggregate] limit,"²⁹ which "ha[d] not been separately addressed at length by the parties."³⁰

Although *Citizens United* spent more than one paragraph on disclosure, the discussion is certainly brief in the context of the overall opinion, and by the time of the re-argument, the briefing relegated the disclosure question to decidedly secondary status.³¹ And *McCutcheon*'s brief discussion of disclosure is

788 (2001) ("Anchors affect judgment by changing the standard of reference that people use when making numeric judgments."); see also Nancy Levit, *Confronting Conventional Thinking: The Heuristics Problem in Feminist Legal Theory*, 28 CARDOZO L. REV. 391, 424 (2006) ("The anchoring phenomenon may extend into the non-numeric realm as well.").

26. See *Doe v. Reed*, 561 U.S. 186, 202 (2010) (Breyer, J., concurring) (describing the case as presenting "competing constitutionally protected interests" (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402 (2000)); *id.* at 205 (Alito, J., concurring) ("[T]he plaintiffs in this case have a strong argument that the [records law] violates the First Amendment . . ."); *id.* at 229 (Thomas, J., dissenting) ("Washington's decision to subject all referendum petitions to public disclosure is unconstitutional . . .").

27. See *supra* note 11.

28. *McCutcheon*, 134 S. Ct. at 1445.

29. *Id.* at 1446.

30. *Id.* at 1434 (quoting *Buckley*, 424 U.S. at 38) (alteration in original).

31. Compare Jurisdictional Statement, *Citizens United v. FEC*, 558 U.S. 310 (2010) (No. 08-205) (focusing, in questions one and two, on the applicability of BCRA's

clearly dicta. So there may be less to the Court's approval of disclosure than meets the eye.

C. Campaign Finance Regulation and Legal Instability

Finally, as anyone who studies or advises on the law of campaign finance knows well, this is an area in which the winds can shift quickly. One of the very expenditure limitations at issue in *Citizens United* had been upheld only seven years earlier in *McConnell v. FEC*.³² But the *Citizens United* Court did not hesitate to overrule both that portion of *McConnell*³³ and the entirety of *Austin v. Michigan State Chamber of Commerce*.³⁴ And even before *Citizens United*, the Court in *FEC v. Wisconsin Right to Life, Inc.*³⁵ had all but overruled part of *McConnell*, a mere four years after the opinion was issued.

III. FRAMING AND CONSTITUTIONAL VALUES

If indeed disclosure may be more vulnerable than we often assume, how should advocates proceed? I suggest here one specific area in need of attention. We currently lack a fully-realized set of arguments that emphasize the constitutional values that disclosure advances. In the post-*Citizens United* era, opponents of disclosure have begun to focus on challenging the premises of disclosure laws;³⁶ meanwhile, supporters have lagged behind in building the affirmative case for disclosure.³⁷

disclosure requirements, with questions three and four focused on the corporate-electioneering prohibition), *with* Brief for Appellant at 42-57, *Citizens United v. FEC*, 558 U.S. 310 (2010) (No. 08-205) (reversing order of questions). And disclosure was the subject of a single exchange at the first *Citizens United* oral argument. Transcript of Oral Argument at 49-52, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (No. 08-205). *Cf.* *District of Columbia v. Heller*, 554 U.S. 570, 624 (2008) (concluding that the analysis in the 1939 case *Miller v. United States* was entitled to limited weight, in part because the opinion in *Miller* contained “[n]ot a word (*not a word*) about the history of the Second Amendment”).

32. 540 U.S. 93 (2003).

33. *Citizens United*, 558 U.S. at 365 (overruling both *Austin* and the relevant portion of *McConnell*).

34. 494 U.S. 652 (1990).

35. 551 U.S. 449 (2007).

36. *See, e.g.*, William McGeeveran, *Mrs. McIntyre's Persona: Bringing Privacy Theory to Election Law*, 19 WM. & MARY BILL RTS. J. 859, 860 (2011) (“The time is ripe to reconsider the Court’s cramped view of privacy in politics.”); Cleta Mitchell, *Donor Disclosure: Undermining the First Amendment*, 96 MINN. L. REV. 1755, 1759 (2012) (“Disclosure is the next frontier for those of us who toil in these vineyards—it will constitute the next wave of legal jurisprudence in the campaign finance arena. In the same way litigants challenged these substantive prohibitions

TAKING DISCLOSURE SERIOUSLY

This is an area in which framing matters tremendously.³⁸ Opponents of disclosure have articulated with precision the specific values disclosure threatens, all of which sound in constitutional principles (primarily First Amendment principles, but others as well): the right against government-compelled speech, the individual right to privacy, the collective right of associational privacy, perhaps a right to anonymous speech, and perhaps a right to political privacy.³⁹

The interests that disclosure advances, meanwhile, are both more amorphous and less likely to be discussed in a constitutional register.⁴⁰ Even the very label the Court has used to describe the main interest it has credited in the disclosure realm—an *informational* interest—feels more like a workaday technocratic concern than a value with constitutional dimensions. There is no ques-

on certain kinds of speech, over time we have to make the case and build a record about the threat posed by disclosure.”); Bradley Smith, *Disclosure in a Post-Citizens United Real World*, 6 U. ST. THOMAS J.L. & PUB. POL’Y 257, 284 (2012) (arguing that proposals for enhanced disclosure would “come at a price in political freedom and safety from government and private retaliation”); see also Michael Kang, *Campaign Disclosure in Direct Democracy*, 97 MINN. L. REV. 1700, 1700 (2013) (“[C]ampaign disclosure laws now are under legal and political attack as never before.”).

37. None of this is to suggest that this work should be in lieu of thinking creatively about how to improve or expand disclosure laws in other ways. Indeed, much interesting recent scholarship focuses on improving the design of disclosure. See, e.g., Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 276 (2010) (supporting higher thresholds and arguing for a de-emphasis of individual contributor information in favor of aggregate data); Anthony Johnstone, *Recalibrating Campaign Finance Law*, 32 YALE L. & POL’Y REV. 217, 219 (2013) (arguing that “recalibration of campaign finance laws . . . might bring these regulations into alignment with the constitutional justifications for—and policy goals of—our system of campaign finance”); Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255 (2010) (arguing for higher disclosure thresholds and expanded disclaimer requirements). In addition, there is a pressing need for additional empirical work on the actual effects of disclosure. But the theoretical work should be an important component of any strategy.
38. Cf. Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311 (2002).
39. See, e.g., Benjamin Barr & Stephen R. Klein, *Publius Was Not A PAC: Reconciling Anonymous Political Speech, the First Amendment, and Campaign Finance Disclosure*, 14 WYO. L. REV. 253, 255 (2014) (“Protecting anonymity is . . . a principle central to protecting our rich, Western tradition of reasoned, public debate.”); Jeffrey M. Skopek, *Reasonable Expectations of Anonymity*, 101 VA. L. REV. 691 (2015) (developing general theory of a Fourth Amendment-based right to anonymity).
40. Cf. ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 4* (2014) (arguing, in the context of substantive campaign finance regulations, that “proponents of campaign finance reform have failed to advance justifications for regulation that can be insulated with basic First Amendment principles”).

tion that the interest is linked to important constitutional values; but the connection must be drawn out and better articulated.⁴¹ Indeed, disclosure links up to the very right to vote—if that foundational right is to be exercised in a meaningful way, it must be informed, and effective disclosure promotes informed voting.⁴² Disclosure can also advance important speech values: by eliciting and disseminating high-value information about players in a campaign contest—specifically, about the sources of their support and thus the constituencies to which they are likely to be responsive—disclosure can promote democratic debate and enhance the election process for all of the players in it.⁴³ Disclosure also promotes First Amendment *listener* interests in a way that has to date been underdeveloped⁴⁴—and renewed attention to that interest requires rigorous thinking about the audiences for disclosure, perhaps including not just voters but informational intermediaries, the media, social scientists, candidates and elected officials themselves.⁴⁵

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41. See Anthony Johnstone, *A Madisonian Case for Disclosure*, 19 GEO. MASON L. REV. 413, 415 (2012) (“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.”).
42. This justification could hold under either the “pluralist-protective” vision of voting, which “sees the purpose of politics as the aggregation of individual or group preferences,” or the “republican-communitarian strand,” under which “the purpose of politics is to debate about and decide collectively what the public good requires.” Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1723-24 (1999).
43. *But see* Michael D. Gilbert, *Campaign Finance Disclosure and the Information Tradeoff*, 98 IOWA L. REV. 1847 (2013) (arguing that while disclosure provides information about speakers, it may have the effect of chilling other speech).
44. Helen Norton, *Secrets, Lies & Disclosure*, 27 J.L. & POL. 641, 641 (2012) (defending “disclosure requirements’ potential for enhancing *listeners’* autonomy interests—i.e., listeners’ ability to make choices that maximize their own preferences free from manipulation by others.”). *Cf.* *Red Lion Broad. Co. v. Fed. Comm’n*, 395 U.S. 367, 390 (1969) (“It is the right of the viewers and listeners . . . which is paramount”). Setting aside the status of *Red Lion* under current doctrine, its discussion of the interests at stake is nonetheless instructive: “It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.” *Id.* Note that, although the issue in *Red Lion* was the broadcasting “fairness doctrine,” this interest in *receipt* of information is distinct from the equality interest the Court disapproved in *Citizens United*. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 349-50 (2010) (“[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”) (citations omitted).
45. See generally Pamela S. Karlan, *The “Ambiguous Giving Out”: The Complicated Roles of Disclosure and Anonymity in Political Activity*, 27 J.L. & POL. 655, 656 (2012)

TAKING DISCLOSURE SERIOUSLY

Similarly, the anti-corruption interest, which has been often invoked but largely undertheorized, has constitutional dimensions. To be sure, the present status of this interest is unclear—*Citizens United* and *McCutcheon* have clearly limited it, in the context of expenditures and contributions, to quid pro quo corruption or its appearance—but it does not necessarily follow that the interest is similarly limited in the disclosure context.⁴⁶ And, although much scholarly ink has been devoted to the meaning of corruption in the context of contributions and spending,⁴⁷ the concept remains almost entirely unexplored in the disclosure realm.⁴⁸ There is, however, one conception of the anti-corruption interest that has particular salience in the context of disclosure: accountability.⁴⁹ If we assume that candidates and elected officials are influenced in their decision-making by their supporters—an assumption the Court has credited⁵⁰—disclosure allows us to track those relationships and dynamics, and respond to them. So it is essential to ensuring political accountability in a democracy. In other words, in the disclosure realm, the anti-corruption interest might constructively be recast as an accountability interest.⁵¹

Disclosure may advance other values courts and advocates have not identified. Does knowing about the political activities of our fellow citizens bind us

(“What makes the topic of disclosure in the political process so interesting is that both citizens and the First Amendment play a multiplicity of roles.”).

46. Heerwig & Shaw, *supra* note 15, at 1467.
47. See, e.g., Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENT. 127 (1997); Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1388-89 (2013); Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 121-26 (2010); Dennis F. Thompson, *Two Concepts of Corruption: Making Campaigns Safe for Democracy*, 73 GEO. WASH. L. REV. 1036 (2005).
48. *But see* Johnstone, *supra* note 41, at 416 (suggesting reconceiving the anti-corruption interest as antifactionalism, and arguing that “disclosure emphasizes informed popular sovereignty as the most effective check on factions consistent with the First Amendment’s republican purpose”).
49. Cf. Lloyd Hitoshi Mayer, *Politics and the Public’s Right to Know*, 13 ELECTION L.J. 138, 147 (2014) (arguing that in the context of a potential “right to know,” the “accountability justification is . . . at its strongest when it relies primarily on the apparent linkages between disclosure and reducing corruption and the public’s perception of corruption.”).
50. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 359 (2010) (“The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt.”); *id.* at 360 (“Ingratiation and access . . . are not corruption.”).
51. See also Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385 (2013) (suggesting that the Court’s definitional project with respect to corruption is fundamentally misguided); cf. Kathleen Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 326 (1998) (arguing that mandatory disclosure advances “accountability interests”).

together as a polity? Does taking public credit for our political beliefs make us more engaged citizens? Might our ability to track the sources of election funding allow us to better understand the intersection between our campaign finance laws and broader social and economic trends, including rising economic inequality? What about the applicability of the “electoral integrity” interest the *Doe* Court identified in the referendum context to candidate elections?⁵² Might it be possible to argue that disclosure counters voter apathy—or, put differently, that a lack of disclosure imposes higher information costs on voters, making it costlier to become informed, and thus more rational to be apathetic? All of this may be worth exploring and developing.

CONCLUSION

In a post-*Citizens United* world, disclosure has become a site of increased attention—both of regulatory activity and of constitutional attack. Yet the constitutional law of campaign finance disclosure is surprisingly underdeveloped. Without question, this gap exposes disclosure laws to potential challenge. But it also presents an opportunity to further develop the conceptual apparatus of disclosure—including, potentially, arguments that might have some purchase outside of the disclosure realm.

None of this should be read to suggest that the task identified here should be about defending our current disclosure regime, in all of its specifics.⁵³ That regime has many shortcomings, and the need to address them is pressing.⁵⁴ But preserving the ability of state and federal governments to require a degree of transparency around the financing of elections is an important goal, and one the recommendations sketched here could advance.

52. *Doe v. Reed*, 561 U.S. 186, 198 (2010) (describing the state’s interest in electoral integrity as “extend[ing] more generally to promoting transparency and accountability in the electoral process, which the State argues is ‘essential to the proper functioning of a democracy’”).

53. For example, many scholars contend that the thresholds for public disclosure are too low; raising those thresholds, or setting them at different levels for different races, may well be worth considering. So too might experimenting with partial de-identification of data, the removal of home addresses in favor of zip codes, and other such refinements. But all of this should happen atop a secure constitutional foundation.

54. See Heerwig & Shaw, *supra* note 15, at 1479-85.