

THE POST-CITIZENS UNITED FANTASY-LAND

Roy A. Schotland*

First, a bouquet for the illuminating facts presented by Professors Wert, Gaddie, and Bullock.¹ They make dramatically clear how minuscule independent spending by corporate PACs has been (that is, those PACs' direct spending as distinct from support by those PACs or their corporate sponsors for spending by intermediaries like the Chamber of Commerce).² Their showing is borne out by experience this year: corporate support for campaigns is almost all hidden, flowing through intermediaries,³ which is why getting effective disclosure is more important than ever, as the Court clearly recognizes⁴ (We probably owe much to Justice Kennedy for the fact that the opinion treats disclosure as it does.).⁵

* Professor Emeritus, Georgetown Law Center.

¹ See Justin J. Wert, Ronald Keith Gaddie & Charles S. Bullock III, *Of Benedick and Beatrice: Citizens United and the Reign of the Laggard Court*, 20 CORNELL J.L. & PUB. POL'Y 469, 719 (2011).

² See *id.*

³ Independent spending flows more and more through entities with identity-concealing names like "Coalition to Protect Seniors" (unlike, for example, National Rifle Association (NRA) or Chamber of Commerce). For an example of "how hard it is to crack the secrecy," see Mike McIntire, *The Secret Sponsors*, N.Y. TIMES, Oct. 2, 2010, at WK1, available at <http://www.nytimes.com/2010/10/03/weekinreview/03mcintire.html>; see also Matt Viser, *Donor Names Stay Secret as Nonprofits Politick*, BOSTON GLOBE, Oct. 7, 2010, at 1, available at http://www.boston.com/news/politics/articles/2010/10/07/donor_names_stay_secret_as_nonprofits_politick/ ("Sandy Greiner is a 64-year-old grandmother of six, farming corn and soybeans in Iowa while running for the state Senate. She's also . . . president of the American Future Fund, which . . . [is] spending \$7.5 million [on at least twenty congressional races this year, having started early this year with \$650,000 in attack ads against Democrat Martha Coakley, Massachusetts Attorney General, in her] unsuccessful bid for US Senate . . ."). A few days after that story about the American Future Fund, the Fund was the subject of a front-page article. See Jim Rutenberg et al., *Offering Donors Secrecy, and Going on Attack*, N.Y. TIMES, Oct. 12, 2010, at 1, available at <http://www.nytimes.com/2010/10/12/us/politics/12donate.html>.

⁴ See *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

⁵ His opinion (Justice Thomas did not join the treatment of disclosure but the dissenters did join it) noted that "'the sources of funding of political advertising' are disclosed so that 'voters are fully informed about the person or group who is speaking' and the identity of corporations spending funds on election speech so that shareholders may hold them accountable," as summarized in Posting of Trevor Potter, tp@capdale.com, to election-law@mailman.lls.edu (Sept. 23, 2010), available at <http://mailman.lls.edu/pipermail/election-law/2010-September/022947.html> (paraphrasing from *Citizens United*, 130 S. Ct. at 914–16). "A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today." *Citizens United*, 130 S. Ct. at 916. Disclosure enables the public to determine "whether elected officials are 'in the pocket' of so-called moneyed interests." *Id.*

Next, applause for James Gardner's interesting recasting of the Court's approach. As he says, "so much has been written" in "severe criticism" of the decision, that we should turn to views that are not mere "piling on."⁶ But we cannot ignore the extent to which "the decision has been unfairly caricatured and may not have the direct consequences many predict."⁷ Those words opened an article in the Columbia Law School Magazine, presenting the views of "more than a few faculty members," including Professor Briffault.⁸ The Columbia professors made clear that "the central holding . . . was neither as revolutionary nor as consequential as some critics claimed The floodgates . . . [had been] already open."⁹ As an election law professor at another law school wrote to me, the reaction to *Citizens United* has been "disproportionately rabid[,] . . . over-overwrought."¹⁰

None of that denies at all that the decision may well matter mightily. Independent spending by corporations and unions, although it had been extensive and legally so, expanded (in 2010, hugely¹¹) because, as election-law authority Richard Hasen put it orally: "it makes 'the ask' so much easier."¹² I entirely join in deploring the majority opinion; but I believe we must correct the "disproportionately rabid" reaction.¹³ Consider, as an example of the sky-is-falling spin, two articles by Ronald Dworkin, a very (and rightly) highly regarded scholar: *The "Devastat-*

⁶ James A. Gardner, *Anti-Regulatory Absolutism in the Campaign Arena: Citizens United and the Implied Slippery Slope*, 20 CORNELL J.L. & PUB. POL'Y 469, 674–75 (2011).

⁷ Adam Liptak, *A Drop in the Bucket*, COLUM. L. SCH. MAG., Aug. 31, 2010, at 29, available at <http://www.law.columbia.edu/magazine/54665/a-drop-in-the-bucket>.

⁸ *Id.*

⁹ *Id.* at 30.

¹⁰ E-mail from Justin Levitt, Assoc. Professor of Law, Loyola Law School, to Author (Sept. 22, 2010) (on file with author).

¹¹ See *supra* note 3; *infra* note 21.

¹² See E-mail from Richard L. Hasen, William H. Hannon Distinguished Professor of Law, Loyola Law School, to Author (Nov. 23, 2010) (on file with author).

¹³ In a "correction" that is wonderfully upbeat, Columbia Professor John Coffee notes one benefit of the decision: "On the positive side . . . law review note writers will now have topics they can debate endlessly, and this will keep them out of trouble." Liptak, *supra* note 7, at 31. In a strikingly imaginative analysis, Professor Justin Levitt writes that the decision might enrich the political scene by "pric[ing] candidates out of mass media" and into grass-root "methods that rely more on volunteer effort." Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL'Y REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1676108>.

ing” Decision¹⁴ and *The Decision That Threatens Democracy*.¹⁵ Dworkin ignores this: more than half our fifty States allow “spending of the sort endorsed in [this] decision [and] political scientists have not been able to identify differences in corporate influence in the two sets of states.”¹⁶ Are the majority of our States not democracies? “There is absolutely no distinction between those states that have bans on corporate electioneering and those that do not,” says Columbia Professor Nathaniel Persily (an election law authority).¹⁷ Praise is owed to scholars who (unlike those unfairly attacking the new decision by ignoring the majority of our States) have been working on what we may learn from the different States’ different laws.¹⁸

Last, now that we have the decision, the crucial next step is obvious: to enact the newly, acutely needed updating of federal and state disclosure requirements. The majority’s opinion makes unarguably clear that disclosure of funding sources will, even in the new deregulated regime, continue to be constitutional.¹⁹ And given the majority’s approach (not merely the Court’s result on this case’s hard-to-escape facts²⁰), assuring

¹⁴ Ronald Dworkin, *The “Devastating” Decision*, N.Y. REV. BOOKS, Feb. 25, 2010, at 39, available at <http://www.nybooks.com/articles/archives/2010/feb/25/the-devastating-decision/> (“The Court has given lobbyists . . . a nuclear weapon.”).

Democratic Congresswoman of Maryland Donna Edwards gives us a nuclear-weapon-level reaction to the decision: “The Citizens United ruling will go down in history as one of the Supreme Court’s worst decisions—the Dred Scott of our time.” Donna Edwards, *A Call to Bold Action*, Bos. REV., Sept. 1, 2010, at 23–24, available at <http://bostonreview.net/BR35.5/edwards.php>.

“[T]he fury of critics of the opinion and the fierceness of their criticism” was surprising. Floyd Abrams, *Citizens United and Its Critics*, 120 YALE L.J. 77, 78 (forthcoming 2011), available at <http://www.yalelawjournal.org/images/pdfs/902.pdf>.

¹⁵ Ronald Dworkin, *The Decision that Threatens Democracy*, N.Y. REV. BOOKS, May 13, 2010, at 63, available at <http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy/>.

¹⁶ Liptak, *supra* note 7, at 31.

¹⁷ *Id.*

¹⁸ See, e.g., Abby K. Blass, Brian E. Roberts & Daron R. Shaw, ‘Pay to Play’ or ‘Money for Nothing’? *Americans’ Assessment of Money and the Efficacy of the Political System*, (2010 American Political Science Association Annual Meeting, Sept. 2, 2010), available at <http://conference.mpsanet.org/papers/archive.aspx/2010/917873>; Raymond La Raja, *Will Citizens United v. FEC Give More Political Power To Corporations?*, (2010 American Political Science Association Annual Meeting, Sept. 2, 2010), available at <http://ssrn.com/abstract=1642175>; Brian Roberts et al., *Money That Matters: The Role of Money in Campaigns and Elections*, (2010 American Political Science Association Annual Meeting, Sept. 2, 2010), available at <http://ssrn.com/abstract=1642589>.

¹⁹ See *Citizens United v. FEC*, 130 S. Ct. 876, 915–16 (2010).

²⁰ In light of the facts, one wonders why the dissenters did not concur in the result. Unlike the broad (indeed, activist) approach of the majority opinion, the result had been expected to turn on one of several narrow grounds. Even leading campaign-finance reformers urged narrow, traditional grounds that would have resulted in *Citizens United* winning the case. For example, the amicus brief for the Brennan Center for Justice said: “The Court should pull back from the brink of this unwarranted expansion of judicial power and should, instead, resolve the issues using deeply embedded and time-worn distinctions that have allowed politi-

effective disclosure is more important than ever.²¹ Disclosure's four key values have never been more clearly at stake:

- (1) to provide voters with information that goes beyond the candidates' words and past performance and that may in itself be a significant signal of future performance;
- (2) to hold candidates accountable for the direct contributions they accept and to have the candidates' explanation of any indirect, independent support;
- (3) to hold accountable the deep-pocket independent supporters (wealthy individuals, corporations and unions, and special interest organizations) who use their success in the often opaque economic market-

cal speech by all speakers to flourish while reducing the risk of corruption and the appearance thereof." Supplemental Brief of the Center for Independent Media et al. as Amici Curiae in Support of Appellee at 4, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205). Similarly, the Supplemental Brief of Former Officials of the ACLU as Amici Curiae on Behalf of Neither Party at 4, 8, 10, 12, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205), submitted these arguments: (1) "*Hillary: The Movie* does not fall within the coverage of BCRA" because (a) "the communication was not 'targeted to the relevant electorate,'" (b) "the statute contains an implicit *de minimis* exception [for nonprofit advocacy organizations funded mainly by individuals]," and (c) "the Court should follow the statutory construction principles set forth in *Northwest Austin Municipal Utility District No. One v. Holder*, 129 S. Ct. 2504 (2009)"; and (2) "Citizens United is entitled to 'as applied' First Amendment protection under a proper reading of *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)." *Id.*

²¹ The Court's treatment of disclosure completely rejected the Chamber of Commerce's arguments against the constitutionality or value of disclosure. For example, their amicus brief said, "Because voters can appropriately discount speech if those supporting it are not disclosed, there is no important need to compel such disclosures." Brief of Amicus Curiae Chamber of Commerce of the United States of America in Support of Appellant at 9, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205). Contrast the Kennedy opinion: "[T]he public has an interest in knowing who is speaking about a candidate shortly before an election . . . [T]ransparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 130 S. Ct. at 915–16.

As this Article is written, independent spenders' nondisclosure has become a heated campaign issue. Given the attacks on the Chamber for its nondisclosure and for its unsupported denials of the charges against it, we now see a new additional benefit of disclosure: to protect the reputation, for integrity and compliance with law, of organizations engaged in substantial independent spending. See Dan Eggen & Scott Wilson, *Obama Steps Up Attack on Chamber*, WASH. POST, Oct. 11, 2010, at A1; Brooks Jackson, *Foreign Money? Really? Democrats Peddle an Unproven Claim*, FACTCHECK.ORG, Oct. 11, 2010, <http://factcheck.org/2010/10/foreign-money-really/>. (The Chamber of Commerce is somewhat like the Taliban: the Chamber too wants burqas, not for women but for its donors.)

Consider also these subheadings of a lead front-page *Washington Post* article: "Fivefold Rise [in independent spending] from 2006 Midterms; most of the money comes from undisclosed sources." T.W. Farnam & Dan Eggen, *Outside Spending up Sharply for Midterms*, WASH. POST., Sept. 4, 2010, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/03/AR2010100304596.html>; see also TAYLOR LINCOLN & CRAIG HOLMAN, PUBLIC CITIZEN, FADING DISCLOSURE: INCREASING NUMBER OF ELECTIONEERING GROUPS KEEP DONORS' IDENTITIES SECRET (2010), available at <http://www.citizen.org/documents/Disclosure-report-final.pdf>.

place to pursue success in the political marketplace, which must remain open to remain democratic²²; and

- (4) to hold corporations, unions, and other organizations accountable to shareholders and members for the spending of their money on political campaigns.

Briffault adds major value with his examination of the majority's new concern that the "complexity" of campaign finance law may in itself be unconstitutionally burdensome.²³ And he rightly points to the fact that this "complexity concern" may be a substantial hurdle for new disclosure provisions.²⁴

Unfortunately, the leading proposal—the DISCLOSE bill recently offered by Congressional Democrats—faced, in addition to the new "complexity" hurdle, its own severe flaws.²⁵

²² Professor Briffault puts it so well: "A campaign contribution, or an expenditure by an independent committee, is by its nature a public act, not because it will necessarily be made in public but because it is intended to sway the public To that extent, a contribution or expenditure is a public matter and a matter of public concern." Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 293 (2010) [hereinafter Briffault, *Disclosure*].

His pages in this symposium are a jewel-box of memorable comments on campaign finance, like Judge Guido Calabresi's 2005 description of the role of private wealth in campaigns as "the huge elephant—and donkey—in . . . all discussions of campaign finance reform," Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After Citizens United*, 20 CORNELL J.L. & PUB. POL'Y 469, 656 (quoting *Landell v. Sorrell*, 406 F.3d 159, 161 (2d. Cir. 2005) (Calabresi, J., concurring)).

Too few have had Judge Calabresi's insight. But back in 1932, Professor Louise Overacker (the first scholar of campaign finance) noted that issue: "If one refuses to admit defeat and yet believes that whatever improvement is made . . . must be brought about within the existing capitalistic economic structure" LOUISE OVERACKER, *MONEY IN ELECTIONS* 381 (Arno Press 1974) (1932). I drew upon that in lamenting what seemed to me BCRA's bound-to-fail overreach:

Professor Overacker was correct to connect campaign finance problems with our economic system Campaign finance law cannot solve this "American Dilemma." Our commitment to political equality coexists with our acceptance of economic inequality and a commitment against any governmental steps toward reducing economic inequality beyond very modest ones. Given that today we are too far from the Athenian agora for political advocacy to be as low-cost as a soapbox, and that political power has such great potential for altering economic power, we live with a great gap between One Person/One Vote, *versus* One Person/One Voice. If campaign finance law is to bridge that gap, we cannot overload the bridge: trying to build barriers against our economic system's affecting our political system, overloads the bridge. Regulatory *barriers* aimed at stopping flows of funds, are bound to break down.

Roy Schotland, *Act I: BCRA Wins in Congress. Act II: BCRA Wins Big at the Court. Act III: BCRA Loses to Reality*, 3 ELECTION L.J. 335, 343 (2004).

²³ See Briffault, *Disclosure*, *supra* note 22. "[C]ampaign finance is a thorny political issue, but we can say with some certainty that regulators and the Court have underappreciated its complexity." Blass et al., *supra* note 18, at 22.

²⁴ See Briffault, *Disclosure*, *supra* note 22.

²⁵ See *Democracy Is Strengthened by Casting Light on Spending in Elections Act (DISCLOSE Act)*, H.R. 5175, 111th Cong. (2010).

Perhaps the bill's excellent acronym accounted for the all-out support, even enthusiasm, that the bill won from Democrats and other opponents of the Court's new approach.²⁶ Perhaps understandably, Briffault avoids "getting into the merits of . . . DISCLOSE,"²⁷ but the bill's flaws are so significant that they must be noted, even if briefly (only major flaws in the bill's 112 pages are noted here, and they are not listed in order of importance).

The bill is remarkably loophole-laden. It naively (astonishingly so) includes among "covered organizations" only three kinds of 501(c) organizations, ignoring obviously available alternative routes for funds,²⁸ for example, 501(c)(19):

- (1) A post or organization of past or present members of the Armed Forces of the United States, or an auxiliary unit or society of, or a trust or foundation for, any such post or organization²⁹

Imagine how many veterans' organizations will form and at once become conduits for campaign funds. Also, what of readily available *non*-501(c) entities like partnerships and trusts, and even *for*-profit corporations to which contributions could be tax-deductible?³⁰

- (2) The bill flatly *bans* corporations from any independent campaign spending if they have federal government contracts worth \$10,000,000 or more.³¹ By itself, that would bar all sizable corporations but leave unions free to exploit the deregulation brought by *Citizens United*—reversing more than sixty years of treating corporations and unions together for campaign finance purposes. Perhaps such a reversal should occur, but that provision is utterly beyond disclosure. How ironic that a bill aimed at transparency hides behind a false façade, which happened because the bill deviated to pursue partisan goals.

That the non-disclosure provisions were completely separable was made explicit when the sponsors admitted, after the bill had been blocked in the

²⁶ See *id.*; see, e.g., Editorial, *Take That, Supreme Court*, L.A. TIMES, May 10, 2010, at 18.

²⁷ See Briffault, *Disclosure*, *supra* note 22.

²⁸ See 26 U.S.C. § 501(c) (2006); H.R. 5175.

²⁹ 26 U.S.C. § 501(c)(19).

³⁰ See Donald B. Tobin, *Political Advocacy and Taxable Entities*, 6 FIRST AMENDMENT L. REV. 41 (2007); 26 C.F.R. § 1.501(c)(19)-1 (2010).

³¹ See H.R. 5175 § 101(b).

Senate on September 23, that they (the sponsors) had told “Senators Snowe and Collins that they were prepared to change the bill *to strip it down to the disclosure provisions*.”³²

- (3) The sponsors evidently seeking to get a bill whatever the cost infamously exempted the National Rifle Association (NRA) from being covered by the new requirements.³³ That move drew such hostile reactions that the exemption was broadened to include any organization of “at least 500,000 individuals who paid membership dues during the previous calendar year.”³⁴ *But*: Don’t we want voters to know when the NRA or Sierra Club or XYZ funds a campaign ad? On the other hand, if we don’t need disclosure from the major players, do we need—can we even justify—imposing on *smaller* organizations the burdens of reporting? The smaller the organization and the larger the burden, the greater the chill on their participation, i.e., on their speech.
- (4) Where disclosure is required, the requirements are unworkable: for example, requiring reports not merely by spenders but also by the bill’s “deemed” spenders, entities that are actually donors, which will not have the information they are supposed to report.

³² See Fred Wertheimer, *DISCLOSE Act Falls One Vote Short of Reaching Senate Floor for Consideration; Statement by Democracy 21 President Fred Wertheimer*, DEMOCRACY 21, Sept. 3, 2010, http://www.democracy21.org/index.asp?Type=B_PR&SEC={91FCB139-CC82-4DDD-AE4E-3A81E6427C7F}&DE={9E11BB95-A043-45FC-B845-66A9247E3A0F} (emphasis added).

Wertheimer’s statement was candid but unfortunate and again naive. Even if that bill failed, unquestionably the efforts to amend disclosure requirements will continue and that statement will be used by the opposition to show that DISCLOSE itself failed to disclose that it not only went beyond disclosure, but did so in patently partisan terms. That statement was immediately picked up by James Bopp, a leading opponent and litigant. See Posting of James Bopp, <http://mailman.lls.edu/pipermail/election-law/2010-September/022938.html>.

After *Citizens United*, the need for disclosure could not have been greater and the opportunity for enactment could not be greater, but those responsible for the bill’s deviations and flaws could not have fumbled more. Yes, I am upset. “You never want a serious crisis to go to waste.” Gerald Seib, *In Crisis, Opportunity for Obama*, WALL ST. J., Nov. 21, 2008, at A2, available at <http://online.wsj.com/article/SB122721278056345271.html> (quoting Rahm Emanuel).

Our opportunity was wasted.

³³ See, e.g., Dan Eggen, *Disclose Act in Jeopardy After Interest Groups Balk at NRA Deal*, WASH. POST, June 18, 2010, at A11, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/17/AR2010061705859.html>.

³⁴ H.R. 5175 § 211(c)(27)(B).

- (5) Desirable as disclosure is and even if reporting involved no burden at all, there is such a thing as too much disclosure. The bill's threshold for which donors would be required to report started at \$600 "in an aggregate amount . . . in a calendar year."³⁵ Professor Briffault describes perfectly why too much disclosure is counter-productive:

[M]assive 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 The educational value of knowing about [the amount of the support] is tied, albeit loosely, to the fraction of a campaign's war chest attributable to that donor [T]argeted disclosure aimed at the largest [supporters] would sharpen the public's focus [And] the reports come fast and furious as Election Day approaches³⁶

CONCLUSION

Everyone who cares about protecting voters' ability to know who is giving or spending money to sway voters—and also about both the candidates' accountability for their financial support and their supporters' accountability for flood-funding campaigns—must move beyond deploring the Court's decision. For at least several years before *Citizens United* came down, it was clear as could be that we needed to update disclosure laws that were obsolete in limiting coverage to *only* "express advocacy" efforts.³⁷ We need to do, as soon as we can, what democracy needs, free of partisan or interest-group goals.

³⁵ H.R. 5175 § 211(a)(5)(A)(ii)(I). And as that citation surely indicates, this bill is complex!

³⁶ Briffault, *Disclosure*, *supra* note 22, at 299–301.

³⁷ For an excellent analysis, see COMM'N FOR IMPARTIAL COURTS, JUDICIAL COUNCIL OF CAL., FINAL REPORT: RECOMMENDATIONS FOR SAFEGUARDING JUDICIAL QUALITY, IMPARTIALITY, AND ACCOUNTABILITY IN CALIFORNIA 47–52 (2009), available at <http://www.courtinfo.ca.gov/jc/tflists/documents/cic-finalreport-attacha.pdf>.