Policy Analysis
No. 664 June 28, 2010

The DISCLOSE Act, Deliberation, and the First Amendment

by John Samples

Executive Summary

The United States Supreme Court decided in *Citizens United v. Federal Election Commission* that Congress may not prohibit spending on political speech by corporations. President Obama and several members of Congress have sharply criticized *Citizens United*, and Sen. Charles Schumer and Rep. Chris Van Hollen have proposed the DISCLOSE Act in response to the ruling. DISCLOSE mandates disclosure of corporate sources of independent spending on speech, putatively in the interest of shareholders and voters. However, it is unlikely that either shareholders or voters would be made better off by this legislation. Shareholders could demand and receive such disclosure without government mandates, given the efficiency of capital markets. The benefits of such disclosure for voters are likely less than assumed, while the costs are paid in chilled speech and in less rational public deliberation. DISCLOSE also prohibits speech by government contractors, TARP recipients, and companies managed by foreign nationals. The case for prohibiting speech by each of these groups seems flawed. In general, DISCLOSE exploits loopholes in *Citizens United* limits on government control of speech to contravene the spirit of that decision and the letter of the First Amendment.

John Samples is director of the Center for Representative Government at the Cato Institute and the author of The Struggle to Limit Government: A Modern Political History *(Cato Institute, 2010)* and The Fallacy of Campaign Finance Reform *(University of Chicago Press, 2006).*

CATO INSTITUTE

By protecting freedom of speech from government, the Constitution ensures that people can offer ideas and arguments about politics and policy.

Introduction

President Obama and many members of Congress sharply criticized the U.S. Supreme Court's recent decision in *Citizens United v. Federal Election Commission*. Sen. Charles Schumer (D-NY) and Rep. Chris Van Hollen (D-MD) have introduced a bill, the DISCLOSE Act, as a response to *Citizens United*.[1] This policy analysis will evaluate that bill.

I begin with general principles recognized in constitutional doctrine. Court rulings on campaign finance fall at the intersection of free speech and money. The U.S. Constitution states that "Congress shall make no law . . . abridging the freedom of speech." This unqualified language accords freedom of speech great significance compared to other values. This importance seems justified. By protecting freedom of speech from government, the Constitution ensures that people can offer ideas and arguments about politics and policy. Voters can then assess these arguments and cast more informed votes, or just form opinions about politics and policy. The First Amendment thereby protects rational debate and deliberation, individually and collectively. Speakers and their audience, not government officials, decide which ideas are worth a hearing and consideration.

Money is a medium of exchange. Its use has little constitutional protection since "ordinary commercial transactions" may be regulated by Congress with minimal justification.[2] But spending money on speech is not an ordinary commercial transaction. Prohibiting such spending would prohibit speech. The Court has held, however, that giving money to candidates for office (or their parties) has a binary nature. While supporting speech, such contributions may become an "ordinary commercial transaction" in which money is exchanged for public goods. Although protected, Congress may regulate contributions to preclude corruption—the decline of speech into business.

Citizens United involved the direct funding of speech—not campaign contributions—by groups taking the legal form of a corporation. Prior to *Citizens United*, Congress could prohibit such spending, ostensibly to prevent distortion of elections.[3] *Citizens United* ruled that preventing such "distortions" could not justify prohibiting speech (that is, funding of speech) by corporations.

What of corruption? The corporation at issue in *Citizens United* engaged in "independent expenditures" on speech. Its money went to broadcast media rather than a candidate for office. Since "independent expenditures" do not give anything to a candidate for office, nothing can be demanded in return. They cannot corrupt. Without the distortion rationale, Congress lacked a constitutional rationale for banning speech by corporations. Of course, an independent expenditure might serve as a contribution if a donor and a recipient agree the former would fund speech in lieu of a contribution (perhaps because the donor had already reached his legal limit on donations). But such coordination between donors and recipients is already illegal.[4] Given that, independent spending to fund speech should be free of regulation since it poses no danger of corruption.

Citizens United did permit Congress to regulate corporate independent spending by mandating disclosure of its source. The first part of this analysis will examine disclosure in the DISCLOSE Act. Moreover, *Citizens United* did not preclude all congressional prohibitions on spending by corporations. The second and third parts of this analysis look at prohibitions on spending by government contractors and foreign corporations.

The Benefits and Costs of Disclosure

The DISCLOSE bill mandates that groups must disclose independent spending to voters, citizens, and shareholders.[5] Many people might assume that such disclosure requires no justification. The Supreme Court has validated mandated disclosure from *Buckley v. Valeo* onward because the benefits of a mandate are thought to outweigh its costs. But the justification for disclosure accepted in *Buckley* does

not necessarily transfer to disclosure of independent spending, if only because shareholders, as well as citizens, are involved. Do *Buckley*'s arguments for disclosure transfer to the post–*Citizens United* world?

Buckley on Disclosure

Buckley v. Valeo identified three government interests served by disclosure. The first interest merits detailed attention:

> Disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.[6]

Voters are like a principal seeking to hire an agent to represent their interests. A voter wishes to know how a potential agent might act once hired. It is often assumed that knowing a candidate's contributors offers information about the candidate's place in the political spectrum and the interests to which the candidate may respond. But this assumption has not been supported by subsequent research. Knowing contributors does not enable a voter to predict an official's conduct in office.[7]

The *Buckley* Court also argued that information about contributors allows voters to control their agents: "Disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity."[8] Presumably, public knowledge of contributions would deter quid-pro-quo deals tied to campaign finance. Officials would have reasons to represent their voters rather than their contributors. The Court continued: "Recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations."[9] Since contributions were limited to deter corruption, disclosure was ancillary to the law's anti-corruption effort.

The *Buckley* Court recognized limits on mandated disclosure: "We have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment."[10] The harm done to protected rights could outweigh the governmental interests served by disclosure. The *Buckley* Court ruled that the costs of the mandated disclosure in the Federal Election Campaign Act of 1974 did not outweigh its benefits.

DISCLOSE appeals to *Buckley's* anti-corruption rationale for mandating disclosure. The bill states that disclaimers and disclosures "can provide shareholders, voters and citizens with the information needed to evaluate the actions by special interests seeking influence over the democratic process."[11] The vague phrase "influence over the democratic process" suggests corruption, but *Buckley* endorsed a more specific anti-corruption rationale for mandated disclosure. Contributors sought to give money to candidates for office in exchange for political favors. With independent spending, the "special interests" are giving money to media to broadcast political speech; members of Congress are not involved. If they request such spending, existing laws against coordination of independent spending with officeholders are being broken. DISCLOSE's reference to "special interests" has rhetorical, but no legal, weight.

The bill relies on other rationales for disclosure, one for shareholders and another for voters. We treat each in turn.

Disclosure to Shareholders

Citizens United says "prompt disclosure of expenditures can provide shareholders . . . with the information needed to hold corporations . . . accountable for their positions. . . . Shareholders

The *Buckley* Court recognized limits on mandated disclosure.

can determine whether their corporation's political speech advances the corporation's interest in making profits."[12] Similarly, DISCLOSE states that disclosure will ensure "that the shareholders and members of these organizations are aware of their organizations' election-related spending."[13] The Senate version then mandates disclosure of spending in regular reports to shareholders.[14]

Buckley backed disclosure so voters could control their agents—elected officials. DISCLOSE hopes to assist shareholders in controlling the managers of their firm. As agents of shareholders, managers are charged with maximizing shareholder value. The separation of ownership and control in modern corporations indicates the possibility of managers misbehaving by seeking their own self-interest rather than the interest of shareholders. Corporate leaders may use the firm's money to support candidates they favor rather than candidates that maximize shareholder value. If they do, their principals, the shareholders, could benefit from information about political spending as a way to reduce "agency costs."[15]

Should government mandate disclosure on behalf of shareholders? The argument for regulation assumes that corporate independent spending may harm shareholders. But even if managers do shirk by spending corporate money on political speech that does not advance shareholders' interests, such costs do not justify DISCLOSE's mandate. Mandated disclosure may make a firm's political activities less effective, which would harm shareholder interests. Mandated disclosure may also have different effects at different firms across the nation. Some shareholders may benefit, some may lose. Given that unevenness, shareholders would be much better off implementing their own private policies concerning independent expenditures on speech rather than having a blanket disclosure policy imposed upon them by federal lawmakers.

But do shareholders have the power to implement such private policies? Few scholars of the subject doubt "the general efficiency of the securities markets."[16] The contracts that constitute a corporation, including its corporate governance, are subject to these markets. Shareholders in a firm can set up whatever arrangements they wish in a charter and expect them to be enforced. Absent a general mandate to disclose, shareholders in pursuit of value would select charters with different disclosure rules concerning corporate independent spending. If such spending imposes large agency costs, firms choosing not to disclose will find it harder to attract investors. If disclosed spending matters much to shareholders, it will win out in the ruthless competition for corporate charters. But perhaps not. The market for corporate charters may fail in some way now unforeseen. Congress does not know, however, that this market will fail ab initio. We have no experience with private responses to corporate independent spending. At a minimum, Congress might consider not imposing a rule on all corporate charters absent compelling evidence that the benefits of a universal mandate would outweigh its costs to shareholders. Such evidence does not yet exist.

Congress might consider not imposing a rule on all corporate charters absent compelling evidence that the benefits outweigh its costs.

Disclosure to Voters

Citizens United validated disclosure of independent spending using the language of *Buckley*. The government has a compelling interest in "'provid[ing] the electorate with information' about the sources of election-related spending." Why is such information valuable enough to justify mandating disclosure? According to *Citizens United*, disclosure allows voters

- "to evaluate the arguments to which they are being subjected" (quoting *Buckley*),
- to avoid "confusion by making clear that the ads are not funded by a candidate or political party,"
- to identify funders of ads by preventing them from "hiding behind dubious and misleading names,"
- "to... give proper weight to different speakers and messages,"
- to hold "elected officials accountable for their . . . supporters," and
- to see "whether elected officials are 'in the pocket' of so-called moneyed interests."[17]

This is a list of rationales for disclosure. It is not a coherent theory justifying disclosure of independent expenditures.[18] The "in-the-pocket" rationale, for example, seems similar to the anti-corruption rationale for disclosing contributions. But, as argued above, independent spending does not pose the threat of corruption. Moreover, the other justification for disclosing contributions—to help enforce donation limits—also seems irrelevant.[19] Disclosure to enforce such limits would be beside the point.

How might elected officials be held "accountable" for their supporters who spend independently on their behalf? Candidates might ask independent speakers to change their message. Perhaps the speakers would do so. But in law, candidates have no control over such speech. If they do have such control, then coordination strictures have been broached. Absent such control, why is it reasonable for voters to hold candidates responsible for independent speakers? The rationale seems at odds with the defense of independent speech elsewhere in *Citizens United*.

The other rationales suggest, rather than explicate, a justification for disclosing independent spending and its sources. The Court believes disclosed information helps voters "evaluate" arguments in ads. *Buckley* also used the verb "evaluate" regarding disclosure. What might that word mean in this context?

Disclosure does not help voters logically evaluate the content of a message. Suppose a political ad sets out four propositions:

- Trade protection increases American jobs.
- Candidate Jones supports trade protection.
- Vote for Candidate Jones.
- This ad was brought to you by General Motors.

The fourth proposition, about the source of the ad, does not provide a logical reason to believe that "trade protection increases American jobs." Believing it does constitutes the genetic fallacy.[20]

Buckley argued that the disclosure of campaign donors helped voters evaluate a potential agent, a candidate. The candidate accepts a contribution from a donor; they associate together in common cause. With independent spending, the money in question does not go to a candidate. The speaker selects the candidate, but they cannot associate together in support of a candidacy. The information implicit in a donation is more certain than the information provided by an independent expenditure. Indeed, candidates have sometimes resented their lack of control over independent spending by their own parties. Independent spending tells us less about a candidate and more about the speaker's judgment about a candidate. It says that a speaker believes a candidate will represent his ideals or interests better than the alternatives.

Knowledge about a speaker may be of use to a voter. Imagine a voter does not know much about a candidate and lacks the desire to find out more about his positions. A voter could appoint an agent to learn more about the candidate and then advise the voter. More prosaically, a voter could select a well-known individual whom the voter trusts and who has taken a position for or against a candidate. By following the advice of the well-known individual, the voter could take a shortcut around the problem of directly determining whether a candidate will be a good agent for the voter's interests.

Disclosure would facilitate the shortcut for the voter. A simple ad might say "Vote for Jones." After its funder is revealed, the ad would say "Vote for Jones," and "This ad was paid for by General Motors." Voters who trust General Motors would then vote for Jones. Voters use the disclosed link to the corporation as a heuristic to cast a ballot rationally.[21] Surveys show that voters know little about politics or public policy. Their ignorance seems rational: the consequences of a single vote do not justify the costs of learning about candidates and their programs. Scholars conjecture that voters use shortcuts to inform their votes in the absence of information. Shortcuts offer a cheap way of making the rel-

Independent spending tells us less about a candidate and more about the speaker's judgment about a candidate.

atively inconsequential decision of how to vote. In the example, General Motors is a heuristic for the voter.

The bill puts its heuristic eggs in one basket, the opinion leader. As mentioned, voters can take "cues" from a prominent person or organization that they identify with and that they assume will signal the proper response to candidates and to political speech. DISCLOSE requires some opinion leaders to disclose their support for an ad through a disclaimer.[22] Other people or groups who fund a message are disclosed at the end of the ad.[23] Voters are supposed to use these cues to "evaluate" the message in the ad.

As a heuristic, opinion leaders and disclosed funders may offer limited benefits to most voters.

As a heuristic, opinion leaders and disclosed funders may offer limited benefits to most voters. Heuristics work best for people who already have significant political knowledge. Those who know something about political leaders are most likely to benefit from cues. An opinion leader's disclaimer is unlikely to provide much help for relatively ignorant voters.[24] In particular, almost all voters are unlikely to have any knowledge about the head of a corporation, apart from his role in that business. The same could be said of the "Top Five" funders of the speech. Yet DISCLOSE requires these opinion leaders to appear on camera and endorse an ad funded by their firm. The incremental value to the voter of the person's appearance or of the disclosed funders is likely to be nil. However, the people in question may be known to voters not as people, but rather as the heads of institutions like a business corporation or a labor union. The implications of this shift from the personal to the institutional will be explored later.

Other factors lessen the benefits of this disclosure. Opinion leaders are unlike voters in many ways; indeed, the fact they are opinion leaders indicates important differences from most voters. Ilya Somin writes of opinion leaders: "As political activists, their power, prestige, social status, and opportunities for pecuniary gain will tend to rise with the perceived importance of their issue positions to the public; they thus have strong incentives to exaggerate the importance of political problems and to push for political solutions (or at least solutions with a prominent role for activists) in preference to private sector ones."[25] Voters may find that opinion leaders offer advice that serves their own interests rather than those of the voter. The voter must then distinguish trusted cue-givers from the distrusted. Voters may remain rationally ignorant of the information needed to identify trusted cue-givers, again in light of the modest consequences of casting a vote.

Advocates of disclosure might insist we judge the mandate by considering what voters might do in its absence. Possessing only messages from undisclosed funders, some voters might vote for candidates they would vote against *if* the funders of such messages had been disclosed. Mandated disclosure would help citizens vote "correctly."[26] Is "correct" voting a benefit for voters? It may help voters align their prior beliefs about a speaker with their vote. Should we assume that acting on such prior beliefs would benefit a voter?

Consider the logic of mandated disclosure. Absent mandated disclosure, opinion leaders would reveal their support for a message if the benefits of such disclosure exceeded its costs. Popular groups are likely to disclose absent a mandate. Congress must force disclosure by opinion leaders who believe revealing their support involves a net loss to their cause. Groups disdained by voters are unlikely to disclose their spending absent a mandate. A mandate will, at the margin, reveal cue-givers who are disliked and distrusted by many voters. DISCLOSE focuses on forcing disclosure by businesses and labor unions, both of which are distrusted institutions.[27] Indeed, as noted earlier, the people forced to issue disclaimers at the end of a message will be of value to voters as a heuristic only because they are associated with these institutions. Presumably Congress expects voters to react to the disclosed information by rejecting the message of the distrusted source.[28] Voters are likely to use information from mandated disclosure to decide whom to vote against. They will reject a message because of their prior beliefs about the disclosed source.

Disclosure hardly encourages rational voting. It directs attention away from the content of an ad and toward the source of funding for the message. It tells voters that they need not evaluate the content of a message. Instead, voters need only recall what they believe about the disclosed source. Disclosure prompts voters to act on prior beliefs that have not been updated by new information or arguments. Those prior beliefs concern widely unpopular groups whose disdain may or may not have been justified; disclosure may be little more than an acceptance of popular prejudice. DISCLOSE claims that voters are better off if their votes are guided by untested prior beliefs and prejudice against unpopular groups. At the margin, DISCLOSE fosters a political rather than a rational vote. It lessens the deliberative value of freedom of speech.

Cost to Speakers

As noted, *Buckley* weighed the benefits of disclosure against its costs. The court cited the costs to the right of association of disclosing a membership list recognized in *NAACP v. Alabama*. Does DISCLOSE exact a cost in rights? Some experts argue that mandated disclosure chills speech because speakers fear retribution.[29] It is difficult to judge ex ante how often such threats would be made. A decision not to do something does not lend itself to measurement, and identifying the effects of disclosure across state campaign finance regimes poses thorny problems for regression analysis. Some testimony from past elections suggests disclosure has prevented some contributions in recent campaigns.[30] Mandated disclosure has also imposed costs on supporters of ballot referendums.[31] Speech might also be chilled by the costs of compliance with DISCLOSE. Those costs are increased by the possibility of a mistake leading to perjury charges for the head of a business, union, or nonprofit.[32] In general, the extensive reporting requirements in DISCLOSE seem calculated to discourage speech. However, many of the businesses and unions covered by the bill have much at stake in elections and policymaking. The transaction costs associated with speech in the bill may not deter their electoral speech. Groups with less experience in electoral politics may find such costs more daunting and more discouraging.

Disclosure is often assumed to provide many benefits to voters while rarely imposing costs on speakers. Here the link between the mandates in the bill and useful information for most voters seems weaker than with contributions. A few voters who already have a lot of knowledge about politics may find the disclosed information useful. Many other voters may use the information about the funding of ads to act contrary to the message of the ad. At the margin, DISCLOSE 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. While DISCLOSE may chill some speech, its mandates will certainly make American elections less rational and deliberative, a cost easily missed in the partisan struggle. The costs of mandated disclosure may be higher and its benefits lower than most people assume.

If the benefits of disclosure in DISCLOSE are less than expected, Congress might consider limiting its costs as a way to justify the mandate under *Buckley's* test. The requirement of a *personal* disclaimer for an ad imposes costs with few benefits. (Of course, if Congress is trying to discourage speech by imposing costs on speakers, disclosure would be a new way to accomplish the old goal of prohibiting corporate speech, and thus contrary to settled doctrine.) A simple disclosure, noting institutional support for the message, would serve as a heuristic. If suitably brief, such disclosure would also allow more time for substantive speech. This reformed heuristic, while still prompting voters to rely on prior beliefs, would impose fewer costs on speakers and on public deliberation.

"Pay to Play" Legislation

Currently, federal law prohibits campaign contributions from federal contractors as a way

Disclosure hardly encourages rational voting. It directs attention away from content and toward the source of funding. It tells voters that they need not evaluate the content of a message.

The proposed law thus impinges on First Amendment rights without serving any government interest or providing a benefit to society.

of preventing quid-pro-quo deals between officials and recipients of government largesse. Schumer–Van Hollen proposes to prohibit independent campaign expenditures by government contractors and recipients of TARP support.

Who qualifies as a "government contractor"? Previous legislation defined a government contractor as any person who contracts with the government to supply a good or service.[33] Agents of collective bargaining—federal employee unions—would appear to qualify as a government contractor since they provide services to the federal establishment through collective bargaining.[34] However, for purposes of law, such unions are not federal contractors; their political organizations escape the "pay-to-play" strictures. However, if unions fund ads that provide value for candidates for office, might union members expect payback in higher wages or benefits? Isn't the putative anti-corruption interest relevant to public-employee unions? If so, such unions should not be exempt from the "pay-to-play" strictures.

The bill also does not cover organizations that receive federal grants defined as "funds awarded to a non-federal entity for a defined public or private purpose in which services are not rendered to the federal government."[35] Washington spent 22 percent more on grants in 2009 than on government contracts.[36] From 2000 to 2009, spending on federal grants totaled $4.4 trillion, which was 19 percent more than what was spent on federal contracts during the same period.xxxvii For example, the Renewable Fuels Association received $1.6 million in grants in 2009. Why is this association exempt from the prohibition on campaign spending?[38]

Many federal grants go to states and localities, which raises a question: why are state and local political parties permitted to endorse candidates for federal office, since such spending could prompt officials in Washington to reward a state with grant money? Such grants, of course, would be politically valuable to the political party that funded the endorsements. The government contracting section of DISCLOSE appears underinclusive with regard to potential quid-pro-quo deals. Its limits on contractors may be a prohibited distinction "among different speakers, allowing speech by some but not others."[39]

Invidious distinctions aside, DISCLOSE seems constitutionally off track. It prohibits independent expenditures on campaigns, not campaign contributions. Once again, the bill runs up against the missing justification for a prohibition—the anti-corruption rationale. The proposed law thus impinges on First Amendment rights without serving any government interest or providing a benefit to society. The premises of *Citizens United* should lead the courts to invalidate the spread of the federal "pay-to-play" prohibition to independent expenditures.

This conclusion may complicate efforts to limit government, especially federal spending. Government contractors presumably have an interest in increasing or maintaining federal outlays. Protecting their First Amendment rights will enable them to support or oppose candidates who wish to decrease spending going to the contractor. If the "pay-to-play" prohibition were valid, government contractors might be less effective in opposing efforts to restrain government spending. That outcome notwithstanding, *Citizens United* indicates that a ban on independent spending by anyone should not survive constitutional scrutiny. Consequences notwithstanding, the First Amendment precludes abridging speech and the spending to support it.

DISCLOSE also prohibits spending by recipients of government subsidies under the Emergency Economic Stabilization Act of 2008 (i.e., TARP recipients).[40] Apart from the anti-corruption problem, this ban closes the barn door far too late. Almost all of the TARP money was paid out in 2008 and 2009. The ban prevents putative "contributions" that would be exchanged for benefits already received as long as two years ago. It might be thought DISCLOSE would prevent further benefits from going to TARP recipients. However, the Department of Treasury reports, "The major [TARP] programs to support banks are closed" and overall spending under that law has all but ended.[41] Treasury also reports that TARP loans

are rapidly being repaid, suggesting this part of the bill would cover fewer recipients.[42] This part of the bill appears to be about politics rather than policy. The TARP bailouts were unpopular. By prohibiting speech by firms that received bailouts, Congress can take a largely symbolic stand against TARP.

Speech by Foreigners

Citizens United does not deal with the question of whether "the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process."[43] The law defines a "foreign national" as a person who is not a citizen. *Current* federal law makes it illegal for "a foreign national, directly or indirectly, to make . . . an expenditure, independent expenditure, or disbursement for an electioneering communication."[44] Generally, this prohibition means a foreign national may not fund speech that mentions a candidate for federal office within a prescribed time before primaries and general elections.[45]

DISCLOSE extends the term "foreign national" to corporations.[46] Under DISCLOSE, a corporation becomes a foreign national if a noncitizen owns 20 percent or more of the voting shares; if a majority of its board are noncitizens; if a noncitizen "has the power to direct, dictate, or control the decisionmaking process of the corporation with respect to its interests in the United States . . . [or its] activities in connection with a federal, state, or local election." The relevant electoral activities include deciding about contributions or independent spending, and running a political action committee.

Existing law poses a question for the courts: may foreign nationals, in general, be prohibited from making independent expenditures? DISCLOSE poses only a single question: should corporations be defined as a "foreign national" for purposes of federal campaign finance law? This analysis offers some considerations related to this second question.[47]

DISCLOSE states that the federal government "has broad constitutional power to protect American interests and sovereignty from foreign interference and intrusion." Congress itself has "a clear interest in minimizing foreign intervention, and the perception of foreign intervention, in United States elections."[48] Notice what the bill does not say: it does not say Congress is protecting the nation from intervention by a foreign government. Rather, the bill is said to protect Americans from "foreign interference and intrusion," and foreign intervention. Congress draws no distinction between an economic institution like the corporation and a foreign government.

The distinction should be drawn. A leader or board member of a corporation seeks to maximize shareholder value. If a corporation "intervenes" in the United States by, say, trying to liberalize trade laws so as to open the U.S. market to its products, it expects to make a profit by offering a better good or service to consumers in the United States. Satisfying consumer demands should not count as harming Americans.

The bill assumes that foreign business leaders will act as agents of the government where they hold citizenship. That assumption seems questionable. The wealth and prospects of these leaders depends on the success of their corporation. Why would corporate heads have reason to act on behalf of their home nation, absent being employed by it? Congress offers no evidence for this motivation, absent the vague appeal to "foreign intervention."

In contrast, an agent of a foreign government may be assumed to seek the good of that government or its citizens. If the agent of a foreign government intervenes in American elections, the agent would do so on behalf of that nation's citizens, perhaps at a cost to Americans. This principal-agent relationship suggests part of the case for proscribing foreign government spending in American elections. Yet DISCLOSE bans spending by all so-called "foreign" corporations, not just corporations controlled by foreign governments.

Finally, we might ask: how would spending by agents of foreign governments harm Americans? The spending, like other independent spending, would go toward broadcasting electoral messages. Americans would be likely

The bill assumes that foreign business leaders will act as agents of their government. Why would corporate heads have reason to act on behalf of their home nation?

to reject messages funded by foreigners. If not, the message might convince voters to vote for (or against) a candidate. The problem addressed by DISCLOSE seems to be that, absent disclosure, voters are likely to harm themselves.

As noted previously, the bill also applies the "foreign national" term to corporations where "a foreign national" owns 20 percent or more of voting shares. This definition focuses on the principal rather than the agent. The bill assumes that a corporation where a single noncitizen owns at least 20 percent of shares is effectively controlled by a foreign national because "foreign ownership interests and influences are exerted in a perceptible way even when the entity is not majority-foreign-owned."[49] Congress offers no evidence that foreign nationals have controlled corporations in this manner to the detriment of "American interests and sovereignty."[50] Their case appears speculative.

How would such influence be exercised? To form a majority, the 20 percent foreign stake would have to be joined by 30 percent of voting shares owned by U.S. citizens. A majority of the coalition to serve foreign interests would have to be American citizens. Perhaps Congress assumes a foreign national could influence corporate decisions by selling his shares and driving down the price of the stock. To avoid that, corporate managers might accede to the demands of the foreign national holding the 20 percent stake. Imagine that the foreign national acts on this threat and sells the shares. In driving down the price to realize a foreign interest (instead of for economic reasons), the foreign national would transfer wealth to those who bought the shares; the efficient price of the shares would be higher than the selling price, given the reason for the sale. To the extent the shares are bought by U.S. citizens, the situation that concerns Congress would actually redistribute wealth from foreigners to Americans.

The identity questions posed for corporate managers also applies to an owner. Why would a person who owns a substantial stake in a corporation act on behalf of a foreign power rather than on behalf of his economic interests? The costs of choosing the former over the latter might be substantial.

Congress's concern about foreign influence on American politics is limited to independent spending; Congress does not generally prohibit political speech by foreigners.

Congress appears concerned about foreign influence on American politics. But this concern is limited to independent spending. Congress does not generally prohibit political speech by foreigners. Foreign principals (including governments and corporations) may lobby members of Congress and may retain agents to lobby members of Congress.[51] These lobbyists are required to register and provide information about their contacts with officials under the Foreign Agent Registration Act.[52] Many officials of foreign governments, however, are exempt from the registration requirement.[53] Perhaps Congress believes that speech by foreigners (or their agents) directed at Congress poses little danger to "American interests and sovereignty." When foreign nationals speak to voters, however, the bill's authors apparently believe the danger justifies a ban on such speech. Perhaps once again Congress is trying to protect voters from speech—protection that members do not believe they themselves need. On the other hand, if members permit foreigners to speak about policy issues, perhaps the latter offer useful information to the former.[54] If true, might foreign nationals also offer useful information to voters?

Politics, not policymaking, drives the distinction between lobbying and electioneering. Members of Congress concerned about their reelection prospects seek attractive positions. "Big business" is not popular with many voters. Some foreign governments have threatened the nation, and voters may have a bias against all foreigners.[55] Big businesses run by foreigners thus are a demon twice over. A bill that appears to crack down on foreign corporations might attract votes, especially in a difficult election year. It remains questionable, however, whether DISCLOSE offers real benefits to Americans beyond pandering to voters' views of business and noncitizens.

Conclusion

Citizens United precluded prohibiting electoral spending by corporate groups. It denied

such spending could corrupt Congress. The implications of this denial are far-reaching. Campaign contributions by government contractors may corrupt and thus be prohibited; independent expenditures on speech cannot corrupt and must remain largely unregulated. The same could be said of speech funded by foreign nationals.

DISCLOSE seeks to both overturn and transcend *Citizens United*. It tries to overturn the decision by defining most corporations as either government contractors or foreign nationals, and then treating their spending as if it were a contribution. A consistent application of *Citizens United* will preclude both efforts to reestablish control over such speech.

At the same time, *Citizens United* did not proscribe all regulation of campaign finance. Congress may protect the nation from foreign influence in elections. DISCLOSE redefines many businesses as foreign nationals. Yet Congress has hardly made the case—apart from simple bias against foreigners—that the corporations in question threaten American interests. Such a case against foreign influence would presumably extend to the foreign officials and their agents that regularly visit congressional offices—though DISCLOSE's authors seem to have no concern about that influence.

Citizens United also blessed mandated disclosure of independent spending for various reasons, some of which seem contradicted by the Court's broader argument in the case. DISCLOSE does mandate disclosure—lots of it. The benefits of such forced speech seem marginal for the voter. It may be, however, that such publicity will convince some unpopular groups to stay out of elections. The benefits of their silence, however, will not redound to voters.

In deep and unsettling ways, DISCLOSE seeks to overturn *Citizens United*, a decision based on two propositions: "speech is vital to republican government" and "it's only speech." Voters require free speech to hear arguments, reach conclusions, and cast a rational ballot. Congress has no power to decide that corporate speech is of no value to voters. At the same time, speech is a possible benefit, rather than a potential harm, to voters. DISCLOSE denies both propositions. It encourages voters to focus on people rather than arguments and declares speech by government contractors and foreign companies to be dangerous enough to warrant prior restraint.

In short, the authors of DISCLOSE seek to exploit loopholes in *Citizens United*—allowance of a disclosure requirement and limits on foreign nationals—to overturn its broad defense of independent spending and speech. The Court, if not Congress, will close those loopholes on behalf of the American voter.

The authors of DISCLOSE seek to exploit loopholes in *Citizens United* to overturn its broad defense of independent spending and speech.

Notes

1. The House version may be found at http://vanhollen.house.gov/UploadedFiles/DISCLOSE_Act.pdf. The Senate version may be found at http://thomas.loc.gov/cgi-bin/query/z?c111:S.3295. The differences between the two initial versions are not large. The Sunlight Foundation has identified the differences at http://blog.sunlightfoundation.com/2010/05/05/comparing-the-house-and-senate-versions-of-the-disclose-act/.

2. See the text accompanying the famous footnote in *United States v. Carolene Products* 304 U. S. 152 (1938): "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless, in the light of the facts made known or generally assumed, it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."

3. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

4. For a summary of current regulations, see http://www.fec.gov/pages/brochures/indexp.shtml.

5. See DISCLOSE, House, (e)(1), p. 8. The Senate finding c(1) appears on p. 9.

6. *Buckley v. Valeo*, 424 U.S. 1, 66–67.

7. See Stephen Ansolabehere and James M. Snyder Jr., "Why Is There So Little Money in U.S. Politics?" *Journal of Economic Perspectives* 17:1 (Winter 2003): 105–30.

8. *Buckley v. Valeo*, 424 U.S. 1, 66–67

9. *Buckley v. Valeo*, at 68.

10. *Buckley* quotes the following decisions: *Gibson v. Florida Legislative Comm.*, 372 U.S. 539 (1963); *NAACP v. Button*, 371 U.S. 415 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958). See *Buckley v. Valeo,* at 64.

11. House, p. 8, lines 8–13.

12. *Citizens United v Federal Election Commission*, 558 U.S. ___ (2010), slip opinion at 55. Subsequent references will be to the slip opinion.

13. DISCLOSE, House version, p. 9, line 14, and DISCLOSE, Senate version, p. 9, line 13.

14. "A covered organization which submits regular, periodic reports to its shareholders, members, or donors on its finances or activities shall include in each such report the information described in paragraph (2) with respect to the disbursements made by the organization for campaign-related activity during the period covered by the report." DISCLOSE, Senate version, p. 77, line 17.

15. "Agency costs is the name given to the costs associated with managers who are less than perfect agents of the corporation's shareholders." Henry N. Butler and Larry E. Ribstein, *The Corporation and the Constitution* (Washington: AEI Press, 1995), p. 3.

16. Butler and Ribstein, p. 5.

17. *Citizens United*, slip opinion at 51–55.

18. Ibid., p. 53. The Court seems to take the validity of disclosure for granted because it offers a less restrictive approach to campaign finance regulation.

19. See the Court of Appeals decision in *SpeechNow.org v. Federal Election Commission*, decided March 26, 2010, http://pacer.cadc.uscourts.gov/common/opinions/201003/08-5223-1236837.pdf.

20. The genetic fallacy is "an attempt to prove a conclusion false by condemning its source—its genesis. Such arguments are fallacious—because how an idea originated is irrelevant to its viability." S. Morris Engel, *With Good Reason: An Introduction to Informal Fallacies*, 2d ed. (New York: St. Martin's Press, 1982), p. 170. Another authority notes that the genetic fallacy "is committed when an argument asserts that a given claim is either true or false on the basis of its origins." James William Lett, *Science, Reason, and Anthropology: The Principles of Rational Inquiry* (Lanham, MD: Rowman and Littlefield, 1997), p. 65.

21. I have relied on Ilya Somin, *Democracy and Political Ignorance* (Ann Arbor, MI: University of Michigan Press, forthcoming), chap. 4, in this section.

22. DISCLOSE, Senate version, p. 62.

23. DISCLOSE, Senate version, pp. 70–72.

24. The political party heuristic has been shown primarily to assist the knowledgeable. See Richard R. Lau, David J. Andersen and David P. Redlawsk, "An Exploration of Correct Voting in Recent U.S. Presidential Elections," *American Journal of Political Science* 52, no. 2 (April 2008), pp. 395–411.

25. Somin, chap. 4.

26. "Correct voting refers to the likelihood that citizens, under conditions of incomplete information, nonetheless vote for the candidate or party they would have voted for had they had full information about those same candidates and/or parties." Lau et al., p. 396.

27. Surveys in recent years indicate that over 70 percent of the public have only "some" or "very little" confidence in labor unions and "big business." Around 7 or 8 percent of the public, in contrast, has "a great deal" of confidence in the two. The most trusted institution, the military, garners a 45 percent "great deal" of confidence rating, while just over 20 percent have only "some" or "very little" confidence in that institution. See the Gallup Polls reported at http://www.pollingreport.com/institut.htm.

28. Adam Berinsky reports that Democrats opposed the war in Iraq because of cues from the Republican President George W. Bush. See Adam J. Berinsky, *In Time of War: Understanding American Public Opinion from World War II to Iraq* (Chicago: University of Chicago Press, 2009), p. 71. Thanks to Justin Logan for directing my attention to Berinsky's work.

29. See Theodore Olson's testimony before the House Administration Committee on May 6, 2010, at http://cha.house.gov/UserFiles/299_testimony.pdf.

30. See James V. Grimaldi and Thomas B. Edsall, "Super Rich Step into the Political Vacuum" *Washington Post*, October 17, 2004. The financier George Soros pledged $10 million to Democratic groups in 2003. Republicans responded by claiming that Soros had bought the Democratic Party. "'Several people were frightened away,' Soros said. The attacks were 'very effective. I can't quote names. Several people said they do not want to get involved because they can't afford to expose themselves the way I can, particularly people in responsible positions in publicly quoted companies.'" Chief Justice Burger expressed a similar concern about disclosure in his *Buckley* opinion, *Buckley v.*

Valeo, 424 U.S. 1, 237 (1976).

31. See the dissent by Justice Thomas in *Citizens United*.

32. DISCLOSE, Senate version, p. 18, line 3.

33. Specifically, the United States Code defines a government contractor as "any person—(1) who enters into any contract with the United States or any department or agency thereof either for the rendition of personal services or furnishing any material, supplies, or equipment to the United States or any department or agency thereof or for selling any land or building to the United States or any department or agency thereof . . . ," 2 U.S.C. §441c.

34. A brief list of federal employee unions may be found at http://www.federaldaily.com/labor/UnionTradeProGroups.htm.

35. See the data and definition at the official federal government website: http://www.usaspending.gov/explore?&tab=By+Location&overridecook=yes&&carryfilters=on&val=&grants=Y&fiscal_year=2009.

36. Ibid.

37. See http://www.usaspending.gov/trends?trendreport=default&viewreport=yes&&carryfilters=on&tab=Graph%20View&tab=List%20View&Go_x=2&carryfilters=on&trendreport=default&tab=Graph+View&tab=List%20View&fiscal_year=2009&carryfilters=on.

38. See http://www.usaspending.gov/explore?& tab=By+Recipient&overridecook=yes&&carryfilters=on&fromfiscal=yes&grants=Y&fiscal_year2009&val=&recipientid=566909.

39. "Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. . . . Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others." *Citizens United*, slip opinion, p. 24.

40. DISCLOSE, Senate version, p. 14.

41. See U.S. Department of Treasury, Troubled Assets Relief Program (TARP) Monthly 105(a) Report, April 2010, published May 10, 2010, p. 2. The virtual ending of TARP outlays is indicated by the chart on p. 7.

42. Ibid., p 6.

43. *Citizens United*, slip opinion at 46–47.

44. 2. U.S.C. §441(e).

45. 2 U.S.C. §434(f)(3).

46. DISCLOSE, Senate version, pp. 16–17.

47. The former question might be raised anew after *Citizens United*. That decision both raises doubts about the constitutionality of any limits on independent spending and indicates that congressional restraints on political participation by foreign nationals remains an open question.

48. DISCLOSE, Senate version, p. 7, lines 18–23.

49. DISCLOSE, Senate version, p. 13, lines 13–15. This claim is said to be "recognized in many areas of the law."

50. DISCLOSE, Senate version, p. 14, lines 17–19.

51. The information gleaned from these registrations has been helpfully organized at http://foreignlobbying.org/. A cursory review of the activities of these agents reveals that foreigners often speak directly to members of Congress about policy issues.

52. Who must register and how they must register may be found in 22 U.S.C. §611, §612.

53. See 22 U.S.C. §613(b).

54. A scholar remarks, "If we assume, as most of political economy literature assumes, that the politician's objective is reelection (or election to a higher office), then the politician seeks information on how her vote on a given issue will affect the outcome of her next election." See John M. de Figueiredo, "Lobbying and Information in Politics," *Business and Politics* 4 (2002):125. Foreign nationals may provide information about foreign policies, national defense, or international trade, all of which can matter to a member's reelection prospects.

55. See Bryan Caplan, *The Myth of the Rational Voter: Why Democracies Choose Bad Policies* (Princeton, NJ: Princeton University Press, 2007), pp. 36ff.

STUDIES IN THE POLICY ANALYSIS SERIES

663. **Defining Success: The Case against Rail Transit** by Randal O'Toole (March 24, 2010)

662. **They Spend WHAT? The Real Cost of Public Schools** by Adam Schaeffer (March 10, 2010)

661. **Behind the Curtain: Assessing the Case for National Curriculum Standards** by Neal McCluskey (February 17, 2010)

660. **Lawless Policy: TARP as Congressional Failure** by John Samples (February 4, 2010)

659. **Globalization: Curse or Cure? Policies to Harness Global Economic Integration to Solve Our Economic Challenge** by Jagadeesh Gokhale (February 1, 2010)

658. **The Libertarian Vote in the Age of Obama** by David Kirby and David Boaz (January 21, 2010)

657. **The Massachusetts Health Plan: Much Pain, Little Gain** by Aaron Yelowitz and Michael F. Cannon (January 20, 2010)

656. **Obama's Prescription for Low-Wage Workers High Implicit Taxes, Higher Premiums** by Michael F. Cannon (January 13, 2010)

655. **Three Decades of Politics and Failed Policies at HUD** by Tad DeHaven (November 23, 2009)

654. **Bending the Productivity Curve: Why America Leads the World in Medical Innovation** by Glen Whitman and Raymond Raad (November 18, 2009)

653. **The Myth of the Compact City: Why Compact Development Is Not the Way to Reduce Carbon Dioxide Emissions** by Randal O'Toole (November 18, 2009)

652. **Attack of the Utility Monsters: The New Threats to Free Speech** by Jason Kuznicki (November 16, 2009)

651. **Fairness 2.0: Media Content Regulation in the 21st Century** by Robert Corn-Revere (November 10, 2009)

650. **Yes, Mr President: A Free Market Can Fix Health Care** by Michael F. Cannon (October 21, 2009)

649. **Somalia, Redux: A More Hands-Off Approach** by David Axe (October 12, 2009)

648. **Would a Stricter Fed Policy and Financial Regulation Have Averted the Financial Crisis?** by Jagadeesh Gokhale and Peter Van Doren (October 8, 2009)

647. **Why Sustainability Standards for Biofuel Production Make Little Economic Sense** by Harry de Gorter and David R. Just (October 7, 2009)

646. **How Urban Planners Caused the Housing Bubble** by Randal O'Toole (October 1, 2009)

645. **Vallejo Con Dios: Why Public Sector Unionism Is a Bad Deal for Taxpayers and Representative Government** by Don Bellante, David Denholm, and Ivan Osorio (September 28, 2009)

644. **Getting What You Paid For—Paying For What You Get: Proposals for the Next Transportation Reauthorization** by Randal O'Toole (September 15, 2009)

643. **Halfway to Where? Answering the Key Questions of Health Care Reform** by Michael Tanner (September 9, 2009)

642. **Fannie Med? Why a "Public Option" Is Hazardous to Your Health** by Michael F. Cannon (July 27, 2009)

641. **The Poverty of Preschool Promises: Saving Children and Money with the Early Education Tax Credit** by Adam B. Schaeffer (August 3, 2009)

640. **Thinking Clearly about Economic Inequality** by Will Wilkinson (July 14, 2009)

639. **Broadcast Localism and the Lessons of the Fairness Doctrine** by John Samples (May 27, 2009)

638. **Obamacare to Come: Seven Bad Ideas for Health Care Reform** by Michael Tanner (May 21, 2009)

637. **Bright Lines and Bailouts: To Bail or Not To Bail, That Is the Question** by Vern McKinley and Gary Gegenheimer (April 21, 2009)

636. **Pakistan and the Future of U.S. Policy** by Malou Innocent (April 13, 2009)

635. **NATO at 60: A Hollow Alliance** by Ted Galen Carpenter (March 30, 2009)

634. **Financial Crisis and Public Policy** by Jagadeesh Gokhale (March 23, 2009)

633. **Health-Status Insurance: How Markets Can Provide Health Security** by John H. Cochrane (February 18, 2009)

632. **A Better Way to Generate and Use Comparative-Effectiveness Research** by Michael F. Cannon (February 6, 2009)

631. **Troubled Neighbor: Mexico's Drug Violence Poses a Threat to the United States** by Ted Galen Carpenter (February 2, 2009)

630. **A Matter of Trust: Why Congress Should Turn Federal Lands into Fiduciary Trusts** by Randal O'Toole (January 15, 2009)

629. **Unbearable Burden? Living and Paying Student Loans as a First-Year Teacher** by Neal McCluskey (December 15, 2008)

628. **The Case against Government Intervention in Energy Markets: Revisited Once Again** by Richard L. Gordon (December 1, 2008)

627. **A Federal Renewable Electricity Requirement: What's Not to Like?** by Robert J. Michaels (November 13, 2008)

626. **The Durable Internet: Preserving Network Neutrality without Regulation** by Timothy B. Lee (November 12, 2008)

625. **High-Speed Rail: The Wrong Road for America** by Randal O'Toole (October 31, 2008)

624. **Fiscal Policy Report Card on America's Governors: 2008** by Chris Edwards (October 20, 2008)

623. **Two Kinds of Change: Comparing the Candidates on Foreign Policy** by Justin Logan (October 14, 2008)

622. **A Critique of the National Popular Vote Plan for Electing the President** by John Samples (October 13, 2008)

621. **Medical Licensing: An Obstacle to Affordable, Quality Care** by Shirley Svorny (September 17, 2008)

Published by the Cato Institute, Policy Analysis is a regular series evaluating government policies and offering proposals for reform. Nothing in Policy Analysis should be construed as necessarily reflecting the views of the Cato Institute or as an attempt to aid or hinder the passage of any bill before Congress. Contact the Cato Institute for reprint permission. Additional copies of Policy Analysis are $6.00 each ($3.00 each for five or more). To order, or for a complete listing of available studies, write the Cato Institute, 1000 Massachusetts Ave., N.W., Washington, D.C. 20001 or call toll free 1-800-767-1241 (8:30-4:30 eastern time). Fax (202) 842-3490 • www.cato.org

CATO INSTITUTE