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Voter Primacy

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This Article argues that Citizens United v. FEC *expanded the audience for campaign finance disclosure to include a group that had never before been held relevant to campaign finance disclosure—corporate shareholders—and explores the constitutional, policy, and political consequences of this change. In part IV of* Citizens United, *the U.S. Supreme Court departed from more than thirty years of campaign finance disclosure analysis to treat corporate shareholders as a target audience for corporate electoral spending disclosure, holding that the governmental interest advanced by campaign finance disclosure laws includes an interest in helping corporate shareholders "determine whether their corporation's political speech advances the corporation's interest in making profits." Commentators have failed to appreciate the significance of this part of the opinion, which was joined by eight of the Court's nine Justices.*

The Court's expansion of the audience for compelled corporate campaign finance disclosure is unlikely to lead to expanded disclosure; to the contrary, it is likely to result in less disclosure of corporate political spending, and particularly in less disclosure that is useful to voters. To explain why, this Article compares voters' and shareholders' informational interests in corporate campaign finance disclosure. It then explores potential consequences of the Court's move to repurpose corporate campaign finance disclosure to serve the informational needs and interests of shareholders. After Citizens United, *the main governmental interest that can justify campaign finance disclosure laws is an informational interest, and several Justices on the current Supreme Court believe that voters lack legitimate informational interests in some kinds of electoral spending disclosure. Shareholder informational interests offer an alternative justification for laws that compel disclosure by corporate electoral spenders. In the coming years, the Court's assessment of the relative merits of voters' and shareholders' interests in disclosure information may well determine the form and content of that disclosure. By clarifying the differences between a "voter primacy" and a "shareholder primacy" approach to corporate spending disclosure, this Article lays bare the consequences of choosing one over the other.*

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INTRODUCTION

In corporate law, "shareholder primacy" describes the theory that a corporation best achieves its objectives through mechanisms, like shareholder voting, that ensure the preeminence of shareholder interests.[1] Shareholder primacy began as an economic idea about capital formation and risk[2] and has grown over several decades into a broader ideology about whose interests should dominate the corporate enterprise.[3] Today, virtually

1. *See, e.g.*, Ian B. Lee, *Efficiency and Ethics in the Debate About Shareholder Primacy*, 31 DEL. J. CORP. L. 533, 535 (2006) (defining it as the "view that managers' fiduciary duties require them to maximize the shareholders' wealth and preclude them from giving independent consideration to the interests of other constituencies"); Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1189 (2002) (defining it as "the view that the corporation exists only to make money for its shareholders").

2. *See, e.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 67–70 (1991).

3. For a recent example, see *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (holding that shareholders' religious preferences control the corporation's religious "exercise" under the Religious Freedom Restoration Act).

all questions of corporate and securities law are evaluated by lawmakers, regulators, and courts through a shareholder primacy lens.[4]

An analogous principle exists in the legal framework governing political elections. In this Article, I call this principle "voter primacy." Voter primacy is the idea that representative democracy best achieves its objectives through mechanisms that give primacy to voters' interests.[5] Lawmakers, regulators, and courts have long understood voters to stand at the center of the democratic enterprise and elections to facilitate voters' crucial role in political self-determination. In the same way that corporate law's purpose is to maximize shareholder value, the purpose of election law is, first and foremost, to facilitate and effectuate the sovereignty of the people.

From the very origin of campaign finance disclosure laws, the U.S. Supreme Court's First Amendment analysis took for granted that campaign finance disclosure is for voters. Public disclosure of campaign finance information is justified, the Court has written, because disclosure is useful to voters.[6] It helps voters decide how to vote, and it helps them monitor elected officials for evidence of improper influence after they are elected.

However, in 2010, in *Citizens United v. FEC*,[7] the Supreme Court departed from its longstanding voter primacy approach to campaign finance disclosure. When challenged on First Amendment grounds, campaign finance disclosure laws are subject to "exacting scrutiny," which requires that a disclosure law be justified by a "sufficiently important" governmental interest.[8] Disclosure of outside spending—the only type of federal electoral spending that a corporation can engage in—can be justified mainly by an informational interest, and whether a particular disclosure law serves a sufficiently important informational interest turns, under the Court's approach, on the value of the compelled disclosure to its audience. The identity of the audience for a campaign finance disclosure law is integral to the constitutional analysis of the law. Until *Citizens United*, campaign finance disclosure had only voters as an audience, and thus the essential constitutional question concerned the value of information disclosed to voters, and to voters alone.

In part IV of Justice Kennedy's majority opinion in *Citizens United*, the Court expanded the audience to include a second interest group, corporate shareholders. The majority opinion devoted nearly as much analysis to shareholders' informational interests in corporate electoral spending disclosure as it did to voters' interests. In fact, the passage on this subject mentioned shareholders' and voters' informational interests precisely the

4. Shareholder primacy is not without its critics. *See, e.g.*, LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012).

5. These mechanisms include the First Amendment's protection of a listener-focused marketplace of ideas.

6. Buckley v. Valeo, 424 U.S. 1, 66–67 (1976).

7. 558 U.S. 310 (2010).

8. *Buckley*, 424 U.S. at 65–66.

same number of times, and shareholders' interests were listed ahead of voters' interests twice, while voters' interests were listed ahead of shareholders' interests only once.[9] A careful textual analysis of the Court's language suggests that the *Citizens United* majority viewed shareholders' informational interests in corporate electoral spending disclosure as nearly as important as, if not equal to, those of voters.

The idea that campaign finance disclosure has, as a primary or even a secondary purpose, the provision of a corporation's financial information to its shareholders, is a significant departure from the way that lawmakers, regulators, and courts have long thought about the First Amendment interests at stake in compelled campaign finance disclosure. In fact, in its arguments defending the disclosure laws challenged in *Citizens United*, the government never argued that the disclosure laws were justified in part by shareholder informational interests.[10] Neither of the parties mentioned shareholders as an audience for campaign finance disclosure, probably because the idea had no basis in the Court's prior disclosure jurisprudence. The Court appears to have acted on its own to identify a governmental interest in the use of campaign finance disclosure to inform investors about corporate spending, possibly borrowing selectively and without attribution from an amicus curiae brief submitted in the case.[11]

The Court's expansion of the constitutionally cognizable audience for corporate electoral spending disclosure to include shareholders is a threat to voter primacy and the democratic values that voter primacy embodies. This is because the expansion of the audience for corporate electoral spending disclosure is unlikely to provide a basis for expanding corporate electoral spending disclosure itself; to the contrary, the recognition of shareholder interests in corporate electoral spending disclosure is likely to justify a *decrease* in corporate electoral spending disclosure, and particularly a decrease in corporate disclosure that is useful to voters. Essentially, *Citizens United* has undermined voter primacy by repurposing this type of campaign finance disclosure to serve two competing audiences.

Moreover, because corporate shareholders as a group share certain demographic characteristics that distinguish them from voters as a group, the Court's expansion of the audience for corporate electoral spending disclosure is likely to have political consequences. For instance, it may enhance political power for the very wealthy, since corporate shareholding is strongly concentrated in top income groups. In addition, it may cause geographic effects in state and local elections, because politically active public companies are likely to have many more shareholders who are voting citizens of certain communities than others. These political effects can be predicted because a nexus exists between the identity of those whose interests campaign finance disclosure laws are designed to serve and the

9. *Citizens United*, 558 U.S. at 370–71.
10. *See infra* Part I.B.2.
11. *See infra* Part I.B.2.

identity of those who can use disclosure most effectively to advance their political interests.

What is more, the Court's move to expand the audience for corporate electoral spending disclosure may ultimately undercut the constitutional basis for campaign finance spending disclosure that provides "source revelation" to voters.[12] Source revelation involves public disclosure of the identities of those who provide financial support to a candidate for public office. Since the earliest disclosure laws were written, campaign finance disclosure has been understood to be valuable to voters because it allows them to draw conclusions about a candidate from the identities of those who give her financial support.[13] The Court's endorsement of source revelation in *Buckley v. Valeo*[14] reflected its normative view that voters should draw such conclusions.[15] Today, disclosure opponents reject source revelation and argue that voters should make voting decisions based upon the merits of the candidates' positions rather than upon the identity of their supporters.[16]

In *Citizens United* and subsequent cases, the five-Justice majority has signaled only weak support for voter interests in disclosure based on source revelation, and some of those five Justices have disavowed source revelation altogether.[17] This suggests that shareholder informational interests, which are not based on source revelation, provide the only common basis for justifying corporate campaign finance disclosure, and thus may take on increased analytical importance. Shareholder informational interests are not based on source revelation because shareholders do not care about the identities of a particular candidate's financial backers; they want to know what a specific corporation is doing with its money. Any shift in the balance of interests that justify corporate electoral spending disclosure *away* from voters' interests in source revelation in favor of shareholders' interests in financial oversight has a meaningful consequence. If corporate electoral spending data ever became available through a different disclosure channel—for example, through federal securities regulation—a key governmental interest justifying campaign finance disclosure of corporate expenditures would become vulnerable to challenge as costly and redundant.

The Court's disclosure analysis in *Citizens United* must be understood as part of a broader trend related to corporate disclosure. In this trend, securities disclosure, which traditionally has been investor focused,

12. *See* Michael D. Gilbert, *Campaign Finance Disclosure and the Information Tradeoff*, 98 IOWA L. REV. 1847, 1863 (2013) (coining the phrase "source revelation").

13. *See, e.g.*, *Buckley*, 424 U.S. at 66–67.

14. 424 U.S. 1 (1976).

15. *See id.* at 66–67.

16. *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, 285 (2014) (suggesting that "an organization's desire for the public to focus solely on its message is more important than the public's interest in knowing who is behind it").

17. *See, e.g.*, Doe v. Reed, 561 U.S. 186, 238–39 (2010) (Thomas, J., dissenting).

increasingly is being used to provide information to the general public.[18] Securities law commentators have recently raised concerns about the repurposing of investor-focused disclosure for other audiences,[19] and SEC Chairwoman Mary Jo White has suggested that securities disclosure should not stray from its "core purpose": providing investors with information useful for investment decision making.[20] At the same time, other disclosure laws—like campaign finance disclosure laws—are being reimagined as channels for provision of investor information. In all cases, a change in the disclosure audience has significant implications for the content and manner of disclosure, and ultimately for the value of the disclosure for all potential audiences.

Election-related disclosure laws mandate, among other things, registration and termination filings, recordkeeping, disclaimers, reporting, and public disclosure. Registration and termination requirements obligate a subject to register its identity and/or intentions with the government. Recordkeeping rules require a subject to maintain financial and other records that may be audited or examined by the government. Disclaimer requirements mandate that a subject identify itself as the source or author of an ad in the ad itself. Reporting laws compel the subject to report information about itself or its donors—including contribution and expenditure figures—to the government.

Disclosure of corporate outside spending (independent expenditures and electioneering communications) reveals *how much* a corporation has spent to support or oppose an electoral cause. In some state and local elections, corporations also may make donations directly to candidates ("contributions" in the jargon of election law). This Article uses the term "corporate electoral spending disclosure" to include both categories of corporate spending. By the Supreme Court's logic in *Citizens United*, any sort of campaign finance disclosure that reveals the amount of money spent by a corporation in an electoral contest or ballot initiative would advance the informational interests of the corporation's shareholders.

This Article proceeds in three parts. Part I describes how, in the lead-up to *Citizens United*, the parties in election law disputes and the Supreme Court itself spent more than thirty years analyzing the government's informational interest in campaign finance disclosure as if it involved the provision of information exclusively to *voters*. Part I then shows how the

18. Examples include: the Board Diversity Rule, 17 C.F.R. § 229.407(c)(2)(vi) (2013); the proposed CEO-Pay Ratio Rule, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 953, 124 Stat. 1376, 1903–04 (2010); the Resource Extraction Rule, 17 C.F.R. § 240.13q-1 (2013); the Conflict Minerals Rule, 17 C.F.R. § 240.13p-1 (2013); and the Mining Safety Rule, 17 C.F.R. § 229.104 (2013).

19. *See, e.g.*, Karen E. Woody, *Conflicts Minerals Legislation: The SEC's New Role As Diplomatic and Humanitarian Watchdog*, 81 FORDHAM L. REV. 1315, 1339 (2012) (arguing that the Conflict Minerals Rule "will force companies to provide nonmaterial information to investors and the public," and thus "is problematic from both a securities law standpoint and a public international law standpoint").

20. Mary Jo White, Chair, SEC, The Path Forward on Disclosure, The Harvard Law School Forum on Corporate Governance and Financial Regulation (Oct. 15, 2013), *available at* http://www.sec.gov/News/Speech/Detail/Speech/1370539878806#.VNk0ZVPF9XZ.

Court's controversial 2010 opinion in *Citizens United* broke from this precedent to treat corporate shareholders as a constitutionally cognizable audience for campaign finance disclosure for the first time. It analyzes the key disclosure passage in the majority opinion, and makes some guesses about where the Court's ideas about shareholder informational interests in campaign finance disclosure originated—considering that no party in the case had raised or discussed the idea. It describes how *Citizens United* and subsequent cases have weakened voters' informational interests in source revelation, which is likely to mean that future governmental justifications for corporate electoral spending disclosure will rely more heavily on shareholders' informational interests. Finally, Part I describes how the Court's endorsement of a shareholder audience for campaign finance disclosure in *Citizens United* has influenced legislatures' and courts' views about the purpose of campaign finance disclosure since the case was decided, and argues that this threatens to meaningfully change the way that we understand what corporate campaign finance disclosure is supposed to *do*.

Part II contends that the Court's endorsement of a new shareholder audience for corporate campaign finance disclosure is not likely to lead to *more* disclosure; to the contrary, it is likely to result in *less* corporate disclosure, and particularly less disclosure that is useful to voters. This is true because voters' and shareholders' informational interests in corporate campaign finance disclosure are often in opposition; the two are, essentially, *competing* audiences with conflicting interests in the content and manner of corporate electoral spending disclosure. Part II identifies and explores four specific points of tension between the informational interests of voters and shareholders in corporate electoral spending disclosure.

Part III explores the implications of these conclusions. It unpacks the politics of the audience by outlining the main demographic differences between the typical voter and the typical shareholder. It concludes that even a partial refocusing of disclosure priorities away from the interests of voters toward those of shareholders will have political consequences. First, it is likely to privilege the political interests of the very wealthy—including not only wealthy Americans, but also wealthy foreigners, who own more than 10 percent of U.S. stocks—at the expense of the interests of lower-income Americans. Second, because shareholders of public companies reside in certain geographic areas in greater concentrations than in others, it will lead to geographic effects in state and local elections. Thus corporate political activity will be influenced by shareholders' civic interests in some places but not others. Finally, this part argues that the Court's newfound reliance on shareholder informational interests to justify campaign finance disclosure laws ultimately leaves some types of compelled disclosure—particularly spending disclosure that provides voters (but not shareholders) with source revelation—vulnerable to challenge on First Amendment grounds.

I. *CITIZENS UNITED* REPURPOSES CORPORATE CAMPAIGN FINANCE DISCLOSURE

For most of modern U.S. history, voters were understood as the exclusive audience for compelled campaign finance disclosures. This part briefly traces the informational interest as a constitutional basis for compelled campaign finance disclosure from *Buckley v. Valeo* to *Citizens United v. FEC*, focusing on the question of audience. Before *Citizens United*, the possibility that corporate shareholders might be a separate, constitutionally cognizable audience for compelled corporate disclosure did not occur to the Court, even though Congress had been debating the problem of the dissenting shareholder since the early twentieth century, corporations were parties in election law cases before the Court, and the Court routinely was called upon to analyze the governmental interests served by laws that compelled disclosure by corporations. Potentially strong shareholder informational interests lurked in the shadows of several disclosure-related cases leading up to *Citizens United*, but they were never taken up or analyzed. In fact, the first time the issue of shareholders' informational interests was ever mentioned in a Supreme Court opinion was 1990, in a footnote in Justice Brennan's concurrence in *Austin v. Michigan State Chamber of Commerce*.[21] In that footnote, Justice Brennan took for granted that corporate shareholders received corporate spending information, and merely questioned its usefulness. Thus, when the Court endorsed the idea that shareholders are a constitutionally cognizable audience for compelled corporate spending disclosure in *Citizens United*, it was forging new ground.

A. Buckley v. Valeo *and Its Progeny*

The exacting scrutiny standard—which requires a government to successfully argue that a law challenged on First Amendment grounds serves a "sufficiently important" governmental interest—was first applied by the Supreme Court to compelled campaign finance disclosure in its iconic 1976 opinion, *Buckley v. Valeo*.[22] In *Buckley*, the Court upheld portions of the Federal Election Campaign Act of 1971[23] (FECA), including several recordkeeping and reporting provisions, against a First Amendment challenge.[24]

21. 494 U.S. 652, 674 n.5 (1990) (Brennan, J., concurring).

22. 424 U.S. 1, 66 (1976).

23. Pub. L. No. 92-225, 86 Stat. 3 (codified at 52 U.S.C. §§ 30101–30126, 30141–30145).

24. FECA required "political committees" to maintain records of contributors donating more than $10, and to file quarterly reports with the Federal Election Commission (FEC) that provided the name, mailing address, occupation, and principal place of business of any person who contributed more than $100 in a calendar year. *Buckley*, 424 U.S. at 63–64. Individuals or organizations that spent more than $100 in a calendar year were required to file a report directly with the FEC. *Id.* The parties challenging FECA argued that these provisions were unconstitutionally overbroad insofar as they required recordkeeping and reporting related to minor party and independent candidates, of contributions of as little as $11, and of independent expenditures. *Id.* at 60–61.

In its analysis of FECA's disclosure provisions, the *Buckley* Court acknowledged that compelled campaign finance disclosure can infringe First Amendment rights, but explained that "there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the 'free functioning of our national institutions' is involved."[25] The Court then identified "three categories" of governmental interests "of this magnitude" that supported compelled campaign finance disclosure.[26] The first and, in the Court's analysis, the most important, was the "informational interest."[27] The Court wrote:

> [D]isclosure 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.[28]

The Court's language unambiguously identified "the electorate" and "voters" as the constitutionally cognizable audience for compelled campaign finance disclosure.[29] *Buckley* did *not* acknowledge other audiences for campaign finance disclosure, including corporate stakeholders, the media, scholars, business competitors, or candidates themselves, as relevant to First Amendment analysis.

The critical idea behind *Buckley*'s analysis of FECA's disclosure provisions was that voters use campaign finance information to make voting decisions. The Court's analysis was voter-centric, looking at each disclosure requirement from the perspective of a voter evaluating

25. *Id.* at 66 (quoting Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 97 (1961)).

26. *Id.*

27. *Id.* at 81.

28. *Id.* at 66–67 (quoting H.R. REP. NO. 92-564, at 4 (1971)).

29. *Id.* The second category of governmental interest identified by the Court was an anticorruption interest, but it, too, hinged on the disclosure of information to the citizenry, and on citizens' use of that information. Compelled disclosure "deter[red] actual corruption and avoid[ed] the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id.* at 67. The Court explained that "[a] public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return." *Id.* Although the Court used the word "public" in that sentence, its context makes it clear that the Court meant voters. The third category of governmental interest supporting compelled campaign finance disclosure, according to the Court, was an enforcement interest to detect violations of FECA's contribution limits. *Id.* at 67–68. In contrast to the first two categories of informational interests, which were achieved through the provision of information to voters, this interest did not require public disclosure, because data gathering and the detection of violations could be done by authorities charged with enforcing campaign finance laws, like the FEC, and because those authorities would ultimately enforce FECA. *See* Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 280 (2010).

candidates.[30] The Court upheld the direct reporting requirements of FECA, which required individuals and organizations that engaged in direct independent expenditures to file reports with the FEC, by defining the word "expenditure" in the statute narrowly to cover only communications that "expressly advocate the election or defeat of a clearly identified candidate."[31] With this clarification, the Court held that the law served the sufficiently important governmental interest of "increas[ing] the fund of information concerning those who support the candidates."[32] The Court clarified that the "informational interest can be as strong" with independent expenditures as it is with contributions because "disclosure helps voters to define more of the candidates' constituencies."[33] The point was that source revelation—the revelation of the identities of a candidate's financial supporters—is a key component of the informational interest.

Buckley laid the groundwork for all of the Court's subsequent analysis of the informational interests supporting compelled registration, recordkeeping, disclaimers, and reporting, and it remains today the most detailed elucidation of the informational interest. After *Buckley*, the Supreme Court decided several First Amendment challenges to state and federal laws that compelled election-related disclosures from individuals and organizations. The Court's disclosure-related opinions—including the concurring and dissenting opinions—assumed that voters were the main audience for compelled disclosure, and the exclusive audience from a First Amendment perspective.[34] This assumption made sense, because *Buckley* viewed the main informational purpose of campaign finance disclosure as revealing to voters the identities of a candidate's financial backers. Implicit in *Buckley*'s analysis of disclosure was the idea that information about a

30. For example, the *Buckley* Court observed that since "minor parties usually represent definite and publicized viewpoints, there may be less need to inform the voters of the interests that specific candidates represent." *Buckley*, 424 U.S. at 70. But, the Court noted, a minor party candidate "may be encouraged by major-party interests in order to divert votes from other major-party contenders." *Id.* The Court suggested that a main way that voters could learn about this diversion strategy was through the public disclosure of campaign finance data. *Id.* at 71.

31. *Id.* at 80.

32. *Id.* at 81.

33. *Id.*

34. *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 196, 200 (2003) (quoting at length from the district court's description of how the Bipartisan Campaign Reform Act's (BCRA) enhanced disclosure required corporations and unions "to reveal their identities so that the public is able to identify the source of the funding behind broadcast advertisements influencing certain elections," and describing a "need to make the contents of parties' disclosure statements available to curious voters in advance of elections" (quoting McConnell v. FEC, 251 F. Supp. 2d 176, 237 (D.D.C. 2003) (internal quotation marks omitted)), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010); Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 698 (1990) (Kennedy, J., dissenting) (discussing how Michigan's law "operate[d] to prohibit information essential to the ability of voters to evaluate candidates"); Citizens Against Rent Control/Coal. for Fair Hous. v. Berkeley, 454 U.S. 290, 298 (1981) (assuming that "voters" were the audience for all disclosures required by a Berkeley, California campaign finance ordinance).

candidate's financial backers—the candidate's "constituenc[y]"—is highly valuable to voters in deciding how to vote.[35]

In more than thirty years of post-*Buckley* campaign finance disclosure cases, the Court did not consider the possibility that corporate shareholders might have separate, constitutionally cognizable informational interests in compelled campaign finance registration, recordkeeping, disclaimers, or reporting. This is true even in cases in which corporations were parties.[36] And it was true in cases in which aspects of the disclosure laws in question advanced interests unique to corporate shareholders—such as advance disclosure requirements, which compel disclosure about future corporate expenditures potentially far enough in advance for dissenting shareholders to use the procedures of corporate democracy to stop them.[37] When shareholder informational interests lurked in the background of election law cases, the Supreme Court ignored them,[38] and its analysis revealed that it

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35. *See Buckley*, 424 U.S. at 81.

36. *See, e.g.*, *Citizens Against Rent Control*, 454 U.S. at 298. At least one plaintiff in the case was a for-profit corporation that had violated the Berkeley ordinance by donating more than $250 to an electoral campaign. The corporation's shareholders thus had a strong interest in learning about the company's donation, not only because of its expressive significance but because it was illegal. *See* Brief of Appellants at 8, *Citizens Against Rent Control*, 454 U.S. 290 (No. 80-737), 1980 U.S. S. Ct. LEXIS 1783. The shareholder informational interest went unrecognized in the case.

37. *See McConnell*, 540 U.S. at 321 (Kennedy, J., concurring in part and dissenting in part) (discussing disclosure rules that required corporate spenders to disclose executory contracts to pay for election-related advertisements before the payments were made, thus "revealing where ads are to be run and what their content is likely to be"); *id.* at 362 (Rehnquist, J., dissenting) (discussing disclosure rules that required broadcast licensees to disclose requests for broadcast time from purchasers, even in cases in which a request did not result in an actual purchase). In *Citizens Against Rent Control*, Pacific Gas and Electric Corp. (PG&E), filed an amicus curiae brief with the Supreme Court to oppose the Berkeley campaign finance law on First Amendment grounds. *See* Brief of Pacific Gas and Electric Company as Amicus Curiae at 33, *Citizens Against Rent Control*, 454 U.S. 290 (No. 80-737), 1981 U.S. S. Ct. LEXIS 884. PG&E's brief argued that the law violated voters' right to receive information to help them decide how to vote, but PG&E never acknowledged that the law would have advanced its own shareholders' ability to learn about its political spending activities. *Id.* This was because the law would have prevented PG&E from contributing more than $250 to campaign committees, but would have allowed PG&E to "communicate directly with the electorate," so long as it complied with disclosure laws. Appellees Brief at 13, *Citizens Against Rent Control*, 454 U.S. 290 (No. 80-737), 1981 U.S. S. Ct. LEXIS 881. Because Berkeley's law encouraged direct and fully disclosed independent expenditures by corporations like PG&E and the corporate plaintiff in the case, it potentially advanced *shareholders'* informational interests—but shareholder informational interests were not asserted to justify the law. *See also* FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986) (failing to consider that shareholder informational interests could have provided a more streamlined rule of decision, because shareholders in for-profit corporations possess unique, economically based interests in corporate PAC disclosures that members of nonprofit corporations do not, and which could justify increased administrative burdens for for-profit corporations but not for nonprofit corporations).

38. *See, e.g.*, FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 457 (2007); Wis. Right to Life, Inc. v. FEC, 546 U.S. 410, 411–12 (2006) (taken together, increasing the types of political ads that could be funded directly from corporate treasuries, with no discussion of shareholders' interests); Buckley v. Am. Constitutional Law Found., 525 U.S. 182 (1999) (ignoring how Colorado's campaign finance disclosure law would have compelled the disclosure of corporate spending information when corporations sponsored ballot initiatives); *Austin*, 494 U.S. at 664 (focusing on whether, under the Michigan state law in question, for-

consistently assumed that shareholders already had access to corporate spending information.[39]

Justice Brennan was the first Supreme Court Justice to raise shareholders' informational interests in corporate electoral spending disclosure, in a footnote in a concurring opinion in *Austin*.[40] He noted that "shareholders in a large business corporation may find it prohibitively expensive to monitor the activities of the corporation to determine whether it is making expenditures to which they object."[41] Yet Justice Brennan's choice of words suggests that he believed shareholders had *access* to corporate spending information; he wondered merely if the cost to shareholders of monitoring that spending information was worth it.

The Court's voter primacy approach to campaign finance disclosure was so strong that, in 1998, it held that voters could suffer an actionable "informational injury" if the Federal Election Commission failed to properly enforce campaign finance disclosure laws. In *FEC v. Akins*,[42] the Court held that a group of voters had standing to challenge the FEC's decision not to bring an enforcement action against a nonprofit corporation for its violation of campaign finance disclosure laws, reasoning that the voters' injury "consists of their inability to obtain information" that was subject to compelled disclosure under FECA.[43] *Akins*'s recognition of voters' interest in *receiving* compelled campaign finance disclosure was reciprocal to the government's long-established interest in *providing* voters with this information through compelled campaign finance disclosure.

Thus, in the lead-up to *Citizens United*, the Supreme Court had very consistently, over more than three decades, treated voters as the exclusive audience for compelled electoral disclosure as a matter of First Amendment law. The Court's voter-centric view of disclosure might have led it to conclude that intermediaries, such as the media, constitute an important audience for campaign finance disclosure insofar as they synthesize disclosure data and communicate it to voters. Some election law scholars have argued as much.[44] Other audiences exist for campaign finance disclosure, including academics, candidates and elected officials, and, for

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profit corporations could circumvent campaign finance laws forbidding corporate contributions and expenditures by "funneling money through the Chamber's general treasury," while ignoring how this would hide corporate political expenditures from the corporation's own shareholders).

39. *See, e.g.*, *Austin*, 494 U.S. at 687, 691 (Scalia, J., dissenting).

40. *Id.* at 674 n.5 (Brennan, J. concurring).

41. *Id.* In his concurrence, Justice Brennan also assumed that shareholders would be fully informed about the corporation's political expenditures when he wrote, "the provision in Michigan corporate law authorizing shareholder actions against corporate waste might serve as a remedy for other types of political expenditures that have no legitimate connection to the corporation's business." *Id.* at 678.

42. 524 U.S. 11 (1998).

43. *Id.* at 21. The FEC had argued that the injury to the voters' informational interest was so abstract and widely shared that it could not confer standing, but the Court disagreed, observing that "the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific" that the voters could bring their claim. *Id.* at 24–25.

44. *See* Briffault, *supra* note 29, at 288.

corporate spenders, shareholders, creditors, and business competitors.[45] The Court, however, never so much as hinted that the existence of these other audiences might give rise to constitutionally cognizable informational interests.

B. Citizens United v. FEC

In *Citizens United v. FEC*, the Supreme Court invalidated section 441b[46] of FECA, which prohibited corporations from making "electioneering communications" in connection with federal elections, but upheld disclaimer and disclosure provisions of the same law.[47] The legal analysis of the *Citizens United* opinion comprised two parts: a main, "substantive" part about section 441b's ban on electioneering communications by corporations, and a secondary part addressing disclosure. The Court's majority opinion reflected this division, devoting forty-eight pages to the substantive part of the case, which reflected a contentious five-to-four split among the Justices, overturned key election law precedent, and held section 441b unconstitutional.[48] The disclosure part of the case, part IV, took up only six pages, reflected the agreement of eight Justices, and upheld the challenged disclosure laws.[49] Commentators have treated the first, substantive part of *Citizens United* as the important part of the case, and the last, disclosure-related part as a sidelight lacking significance.[50]

However, part IV of *Citizens United* should be understood as pathbreaking in its own right: it expanded the constitutionally cognizable audience for campaign finance disclosure to include a new group, corporate shareholders. In the first, substantive part of the case, which overturned the corporate electioneering ban, the Court's analysis focused on the value of electioneering speech to "the public" and to "voters."[51] However in part IV, the Court's analysis of the interests advanced by the reporting and disclosure of corporate spending was meaningfully different. The Court analyzed corporate spending disclosures as justified by bivalent informational interests—those of both voters and shareholders. This was a

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45. *See, e.g.*, Scott M. Noveck, *Campaign Finance Disclosure and the Legislative Process*, 47 HARV. J. ON LEGIS. 75, 76 (2010) (discussing legislators as an important audience for campaign finance disclosure).

46. The relevant statutes have since been transferred to 52 U.S.C. § 30101 *et seq.* (West Supp. 2014). Section 441b is now located at 52 U.S.C. § 30118.

47. *See generally* Citizens United v. FEC, 558 U.S. 310 (2010).

48. *Id.* at 319–66. Justices Kennedy, Roberts, Scalia, Alito, and Thomas joined in the majority opinion as to the substantive speech prohibition.

49. *Id.* at 366–71.

50. *See* Ctr. for Individual Freedom v. Madigan, 697 F.3d 464, 469–70 (7th Cir. 2012) ("The Supreme Court's decision in *Citizens United v. FEC* is best known for striking down as an unconstitutional restriction of free speech the federal law that bans corporations and labor unions from running campaign-related advertisements in the lead-up to an election. That holding largely overshadowed another part of the decision upholding the same law's campaign finance disclosure provisions." (citation omitted)).

51. *See, e.g.*, *Citizens United*, 558 U.S. at 354 ("By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.").

departure from the Court's longstanding and well-established view that the informational interest justifying campaign finance disclosure as a matter of First Amendment law is concerned exclusively with voters' informational needs because of the role of voters in American democracy.

Citizens United, Inc. had created a ninety-minute film featuring presidential candidate Hillary Clinton, which it released in the lead-up to the 2008 presidential primaries.[52] The company created two ten-second ads and one thirty-second ad to promote the movie and wanted to distribute the movie to digital cable subscribers via video-on-demand within thirty days of the 2008 Democratic primary election. But the company was prohibited from doing so by the ban on corporate electioneering communications. The company brought suit, challenging both the corporate electioneering ban and disclosure laws that applied to electioneering communications.[53] Citizens United, Inc. lost both challenges in federal district court and, after the Supreme Court noted probable jurisdiction under 28 U.S.C. § 1253, Citizens United, Inc. appealed.[54]

After the first round of briefing and an oral argument before the Supreme Court, which largely focused on the corporate electioneering ban, the Court restored the case to the calendar for reargument and directed the parties to submit new briefs on whether the Court should overrule *Austin*, the relevant part of *McConnell v. FEC*,[55] or both.[56] The Court's move to reframe the case caused the disclosure issue to recede further into the background, where it was overshadowed by the "substantive" question of whether the First Amendment forbids government from prohibiting corporate outside spending.

Justice Kennedy authored the majority opinion. The government had argued that several interests were advanced by the corporate electioneering ban, including an anti-distortion rationale, an anticorruption interest, and a shareholder protection interest.[57] The Court explored the first two interests at length and ultimately rejected both. It then turned to the asserted governmental interest in shareholder protection. Giving the subject a mere two paragraphs, the Court rejected shareholder protection as a basis for prohibiting corporate electioneering communications and other independent expenditures.[58] Instead of a government "regulatory mechanism . . . based on speech," the Court concluded that corporations must regulate themselves, "through the procedures of corporate democracy" imagined in

52. *See* Matthew Mosk, *Now Playing: An Anti-Clinton Ad?*, WASH. POST (Dec. 13, 2007, 10:15 AM), http://voices.washingtonpost.com/44/2007/12/now-playing-a-clinton-attack-a.html.

53. *Citizens United*, 558 U.S. at 319–21.

54. *See* Citizens United v. FEC, 555 U.S. 1028 (2008) (noting probable jurisdiction); Citizens United v. FEC, 530 F. Supp. 2d 274 (D.D.C. 2008).

55. 540 U.S. 93 (2003).

56. Citizens United v. FEC, 557 U.S. 932 (2009) (restoring case for oral argument).

57. *Citizens United*, 558 U.S. at 348–62.

58. The Court did not view the governmental interest in shareholder protection as invalid per se, but suggested that it swept too broadly. It observed that the shareholder protection interest would "allow the Government to ban the political speech even of media corporations," which "[t]he First Amendment does not allow." *Id.* at 361.

First National Bank of Boston v. Bellotti.[59] The "substantive" ban on corporate outside spending was overturned.

Having concluded that corporations may not be prohibited from spending on electioneering communications, the Court addressed the disclosure requirements that would apply to them, which included both disclaimers in the film and its advertisements, and public disclosure of how much money Citizens United, Inc. spent to fund the film and its advertisements. In part IV of the majority opinion, an eight-Justice majority upheld the challenged disclaimer and disclosure provisions, concluding that they satisfied exacting scrutiny.[60] The Court affirmed that campaign finance disclosure laws were subject to the exacting scrutiny standard, which requires the government to identify a "'sufficiently important' governmental interest," and a "substantial relation" between the government interest and the compelled disclosure.[61] The Court then analyzed the disclaimer and disclosure provisions separately and in a way that suggested that the target audiences for each type of requirement were different.

1. The Disclaimers

The disclaimer requirements of section 311 of the Bipartisan Campaign Reform Act of 2002[62] (BCRA) required that any televised electioneering communication include, in a "clearly spoken manner," certain information, including the following statement: "_______ is responsible for the content of this advertising."[63] In approving the constitutionality of the compelled disclaimers, the Court rejected the view that movie ad disclaimers could not promote the government's informational interest because they were "commercial." The Court wrote that the disclaimers "'provid[e] the electorate with information,' and 'insure[s] that the voters are fully informed' about the person or group who is speaking."[64] The Court viewed the disclaimers as targeting voters who watched the ads and did not discuss

59. *Id.* at 361–62 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 794 (1978)) (internal quotation marks omitted). These reasons were "sufficient to reject this shareholder-protection interest," the Court wrote, but it went on to argue that the law was both underinclusive and overinclusive in protecting shareholders because the spending ban applied, at most, sixty days before an election, and because it applied to nonprofit corporations. *Id.* at 362. The Court explained that "a dissenting shareholder's interests would be implicated by speech in any media at any time." *Id.*

60. Only Justice Thomas dissented from part IV of the Court's opinion. Justice Thomas did not address shareholder informational interests in his dissent, and instead based his objection on "the 'right to anonymous speech.'" *Id.* at 480 (Thomas, J., dissenting) (quoting *McConnell*, 540 U.S. at 276 (Thomas, J., concurring in part, concurring in judgment in part, and dissenting in part)).

61. *See id.* at 366–67 (majority opinion) (quoting Buckley v. Valeo, 424 U.S. 1, 64, 66 (1976)).

62. Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 52 U.S.C.).

63. *Citizens United*, 558 U.S. at 366. In addition, section 311 required a communication that the ad "is not authorized by any candidate or candidate's committee," and a display of the name and address or website URL of the individual or organization that paid for the ad. *See id.*; *see also* 52 U.S.C. § 30120 (West Supp. 2014).

64. *Citizens United*, 558 U.S. at 368 (citation omitted) (quoting *McConnell*, 540 U.S. at 196; *Buckley*, 424 U.S. at 76).

the possibility that corporate shareholders also might have viewed the ads and found the disclaimers informative about their corporations' spending. Under the majority's analysis, disclaimers were constitutionally justified solely based on the government's "sufficiently important" interest in providing disclaimer information to *voters*.

2. The Spending Disclosures

The majority's analysis of compelled spending disclosure was different. BCRA section 201 required a person to file a disclosure report with the FEC if its spending on electioneering communications exceeded a certain threshold; the FEC publishes these spending reports on its public website.[65] The disclosure report—FEC Form 9—required the spender to report information about itself, including its name and address, and the identity of anyone who exercised control over the spender, as well as details about its disbursements (to whom it paid money, and how much) and the sources of its funds (who donated money to the spender, and how much).[66]

Citizens United, Inc. had argued that section 201 served no informational purpose as applied to its ads because the ads were "commercial" advertisements, and the Court began its analysis there.[67] The Court observed that this argument was "similar to the argument rejected above with respect to disclaimers," and dismissed it again, observing that "[e]ven if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election."[68] Having rejected Citizens United, Inc.'s contention that no informational interest can attach to a "commercial" advertisement, the Court wrote that "the informational interest alone is sufficient to justify application of § 201 to these ads," and stated that for this reason it would not consider other interests asserted by the government.[69] The Court then briefly considered and rejected Citizens United, Inc.'s argument that the disclosure requirements would chill its donations.[70]

Finally, the Court reached the crux of the matter: the informational purpose of the compelled spending disclosures. In a lengthy passage containing the most oft-quoted language from part IV, the Court provided a

65. *See* 52 U.S.C. § 30104(f). The law requires a spender to file a disclosure report if it spends more than $10,000 on electioneering communications in a calendar year. *See id.* § 30104(f)(1).

66. *See* FEC FORM 9, 24 HOUR NOTICE OF DISBURSEMENT/OBLIGATIONS FOR ELECTIONEERING COMMUNICATIONS, *available at* http://www.fec.gov/pdf/forms/fecfrm9.pdf.

67. *Citizens United*, 558 U.S. at 368.

68. *Id.* at 369. In previous campaign finance disclosure cases, the Court had sometimes used the phrase "the public" to mean voters. *See, e.g.*, *supra* note 34. Here, in light of the Court's discussion of shareholder interests in disclosure information two paragraphs later, it is not clear whether the Court was using the term "the public" to mean the voting public (i.e., citizens) or was, instead, using it in a broader sense to mean the whole public (i.e., participants in the public capital markets).

69. *Citizens United*, 558 U.S. at 369.

70. *Id.* at 370.

detailed and specific view about who is informed by corporate campaign finance disclosure, and for what purpose:

> Shareholder objections raised through the procedures of corporate democracy can be more effective today because modern technology makes disclosures rapid and informative. A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today. It must be noted, furthermore, that many of Congress' findings in passing BCRA were premised on a system without adequate disclosure. With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "'in the pocket' of so-called moneyed interests." The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.[71]

The Court's analysis made it clear that the informational interest supporting compelled campaign finance reporting was no longer just about *voters*. The Court had introduced corporate shareholders as a new, constitutionally cognizable audience for campaign finance disclosure—specifically for corporate *spending* disclosure—and had described shareholders' interests in spending disclosure as nearly as important as the interests of voters.

In a single sentence that followed this passage, the Court wrote that "[f]or the same reasons we uphold the application of [the disclaimer and disclosure provisions] to the ads, we affirm their application to" *Hillary: The Movie*.[72] Thus, the Court's reasoning about shareholder interests was incorporated into its analysis of compelled disclosure relating both to the advertisements and to the film itself.

Justice Kennedy structured the key passage, quoted above, to present shareholders' and voters' interests as if they hold nearly equivalent value in the First Amendment analysis. The passage starts with shareholders' interests, ends with voters' interests, and invokes shareholder interests four times—precisely the same number of times that it uses the word "voter" or "electorate." When the passage describes the informational purposes of corporate electoral spending disclosure—the very heart of governmental interest analysis under exacting scrutiny—it puts shareholders' interests before voters' interests twice, observing first that "prompt disclosure of expenditures can provide *shareholders and citizens* with the information needed to hold corporations and elected officials accountable," and then, in the next sentence, that "[s]hareholders can determine whether their corporation's political speech advances the corporation's interest in making

71. *Id.* at 370–71 (citations omitted) (quoting McConnell v. FEC, 540 U.S. 93, 259 (2003), *overruled by Citizens United*, 558 U.S. 310).

72. *Id.* at 371.

profits, and citizens can see whether elected officials are '"in the pocket" of so-called moneyed interests.'"[73] That sentence is important; it reveals not only the majority's view that shareholders' primary informational interest in corporate spending disclosure is financial rather than expressive, but also its view that voters' primary informational interest in corporate electoral spending disclosure relates to ferreting out influence, rather than to deciding how to vote.[74]

The opinion puts voters' interests ahead of shareholders' interests only *once*, in the next to last sentence in the paragraph, opining broadly that "disclosure permits *citizens and shareholders* to react to the speech of corporate entities in a proper way."[75] The final sentence breaks from the bivalent language used above and seems, as an afterthought, to return voter interests to the center of the disclosure enterprise.

The Court's assertion that campaign finance disclosure serves to help shareholders "determine whether their corporation's political speech advances the corporation's interest in making profits" was the first time the Court has ever suggested either that campaign finance disclosure laws serve a corporate governance function—here, to monitor management and thereby to reduce agency costs—or that campaign finance disclosure laws should advance the private financial interests of a subset of Americans.[76] As is explored in more detail in Part II, state and federal corporate laws already give shareholders default informational rights, and other private law mechanisms exist to enhance transparency and accountability of corporate managers to shareholders. The Court's move to expand the audience for campaign finance disclosure to include shareholders introduced a new, private purpose behind public campaign finance disclosure laws.

The Court's sole focus on shareholders' interest in promoting corporate profit-making embedded in the Court's analysis a particular view about profit maximization as a purpose of corporate law. In this way, the Court was essentially taking sides in a corporate law debate that rages to this day: whether and to what extent the goal of corporate law is to maximize profit for shareholders (including subsidiary questions about short-term profit maximization versus long-term profit maximization).[77]

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73. *Id.* at 370 (emphasis added).

74. The majority's assertion that voters should use corporate spending disclosure to "see whether elected officials are 'in the pocket' of so-called moneyed interests" is perplexing in light of the majority's conclusion, only pages earlier, that independent expenditures can never give rise to corruption. *Id*. at 360 ("[I]ndependent expenditures do not lead to, or create the appearance of, quid pro quo corruption. . . . Ingratiation and access . . . are not corruption.") Read together, these two parts of the opinion acknowledge that elected officials can be "in the pocket" of corporations and suggest there is something wrong with that—why else would voters want to determine if a candidate is in a donor's pocket?—but conclude that voters must use preference satisfaction at the polls, rather than law, to address it.

75. *Id.* at 371 (emphasis added).

76. *See id.* at 370.

77. *See, e.g.*, Stephen E. Ellis & Grant M. Hayden, *The Cult of Efficiency in Corporate Law*, 5 VA. L. & BUS. REV. 239, 240, 249 (2010) (critiquing shareholder wealth maximization for promoting Pareto optimality as a normative value in corporate law).

Strikingly, the government had never argued, in its briefs or at oral argument, that shareholder informational interests were relevant to FECA's disclosure laws. The government's briefs discussed shareholder interests only in the context of the corporate electioneering ban, and the Court rejected all of the government's asserted interests in shareholder protection in the first part of *Citizens United*.

It is possible that the Court's endorsement of shareholder informational interests in campaign finance disclosure was drawn from, or at least influenced by, arguments made in the first of two amici curiae briefs filed jointly by the Center for Political Accountability (CPA) and the Carol and Lawrence Zicklin Center for Business Ethics Research ("Zicklin Center") at the Wharton School of the University of Pennsylvania.[78] This brief argued that campaign finance disclosure serves the informational interests of corporations themselves, as well the informational interests of corporate shareholders and directors, emphasizing the value of campaign finance disclosure for the corporation's compliance program.[79] Much of the brief's discussion concerned the value of disclosures by outside spending organizations that accepted corporate donations and not disclosures made by corporations themselves. The value of such disclosures to corporations is quite different from the shareholder interests endorsed by the *Citizens United* majority; the idea conveyed by the CPA-Zicklin Center brief is that spending disclosures by outside spending groups can inform a corporate donor about how the group has spent the corporation's donation, and thus allow the corporation to monitor the groups to which it donates money. If the Court did borrow ideas about shareholder informational interests in campaign finance disclosure from the CPA-Zicklin Center amicus brief, it did not cite the brief in its opinion, and it offered no other attribution.[80]

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78. In the first phase of *Citizens United*, the CPA and the Zicklin Center filed a joint amicus brief focusing on the disclosure issue. *See* Brief of the Center for Political Accountability and the Carol and Lawrence Zicklin Center for Business Ethics Research As Amici Curiae in Support of Appellee, *Citizens United*, 558 U.S. 310 (No. 08-205), 2009 WL 476569 [hereinafter CPA-Zicklin Center, Original Brief]. After the Supreme Court asked the parties to re-brief the case focusing on whether to overrule *Austin* and *McConnell*, the CPA and the Zicklin Center filed a joint supplemental amicus brief that focused on the corporate electioneering ban. *See* Brief of the Center for Political Accountability and the Carol and Lawrence Zicklin Center for Business Ethics Research at the Wharton School As Amici Curiae in Support of Appellee on Supplemental Question, *Citizens United*, 558 U.S. 310 (No. 08-205), 2009 WL 2349016 [hereinafter CPA-Zicklin Center, Supplemental Brief]. Both CPA-Zicklin Center briefs supported the corporate electioneering ban and the challenged disclaimer and disclosure laws and urged the Court to uphold them.

79. Disclosure serves corporations' informational interests, the CPA-Zicklin Center brief asserted, because it "strengthens a corporation's ability to monitor the use of its funds and supervise employees and agents for compliance with its internal policies," "remind[s] corporations of their legal obligations when they engage with the public on political issues," and "enable[s] them to develop and sustain the compliance programs necessary to safely navigate the terrain of campaign finance law." CPA-Zicklin Center, Original Brief, *supra* note 78, at 5–6.

80. If the majority opinion did derive its shareholder interest theory from the CPA-Zicklin Center brief, it misunderstood that brief. The CPA-Zicklin Center brief argued that corporations, shareholders, and directors all have informational interests in campaign finance disclosure, and asserted it that "[m]andatory disclosure enables shareholders to monitor the

The significance of the Court's reconceived audience for corporate spending disclosure went unrecognized in several long dissents. Justice Stevens critiqued the majority's rejection of the shareholder protection rationale in connection with the corporate electioneering ban, which he said was done "on the ground that abuses of shareholder money can be corrected 'through the procedures of corporate democracy' and, it seems, through Internet-based disclosures."[81] "Modern technology may help make it easier to track corporate activity, including electoral advocacy," he wrote, "but it is utopian to believe that it solves the problem" that dissenting shareholders lack meaningful tools to influence corporate political spending.[82] In other words, Justice Stevens's critique suggested that shareholders' interest in learning about corporate spending is low because shareholders can do little with that information. He explained:

> Most American households that own stock do so through intermediaries such as mutual funds and pension plans, which makes it more difficult both to monitor and to alter particular holdings. . . . Moreover, if the corporation in question operates a PAC, an investor who sees the company's ads may not know whether they are being funded through the PAC or through the general treasury.
>
> If and when shareholders learn that a corporation has been spending general treasury money on objectionable electioneering, they can divest. Even assuming that they reliably learn as much, however, this solution is only partial. The injury to the shareholders' expressive rights has already occurred . . . .[83]

By pointing out that shareholders lack tools to prevent corporate spending "[i]f" or "[e]ven assuming" they learn about it, Justice Stevens was getting

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use of corporate funds for political activity and to exercise their right to object to uses of which they disapprove." *Id.* at 21. This suggests that expressive interests (rather than financial interests) lay at the heart of shareholder interest in corporate political spending data. Later, in language that Justice Kennedy seemed to echo in part IV, the CPA-Zicklin Center brief explained that:

> Disclosure provides shareholders with the information necessary to make informed decisions, without restricting the corporation from engaging in political activity. Shareholders can choose to use this information as they see fit—for example, they may divest, or they may seek change from within. Without disclosure requirements, however, shareholders lack the means to make that choice.

Id. at 22 (citation omitted). Justice Kennedy's assertion that shareholders' interest in disclosure boils down to its use to "determine whether their corporation's political speech advances the corporation's interest in making profits" did not come from the CPA-Zicklin Center brief, however. *Citizens United*, 558 U.S. at 370. The CPA-Zicklin Center brief did not characterize profit maximization as the main purpose of the corporation, and the CPA-Zicklin Center's supplemental brief expressed caution about "the drive to maximize shareholder profit," arguing that it "leads corporations to seek to prevent or reduce competition, to privatize public goods, and to minimize taxation." CPA-Zicklin Center, Supplemental Brief, *supra* note 78, at 8. There was, however, discussion of profit-making as the main corporate objective during oral argument. *See* Transcript of Oral Argument at 53–54, *Citizens United*, 558 U.S. 310 (No. 08-205), 2009 WL 6325467.

81. *Citizens United*, 558 U.S. at 476 (Stevens, J., dissenting) (citation omitted) (quoting *id.* at 370 (majority opinion)).

82. *Id.* at 477 (citation omitted).

83. *Id.*

at the heart of the informational problem: shareholders *might not* learn about objectionable spending. But Justice Stevens did not carry that insight any further, or consider the implications of the Court's view that campaign finance disclosure should have, as a signal purpose, the provision of corporate expenditure information to shareholders.

The majority in *Citizens United* missed something important: the government's interest in providing corporate spending information to shareholders is an interest in shareholder protection, and the Court has historically resisted shareholder protection as a basis for justifying the regulation of elections under the First Amendment. If the Court had recognized its disclosure analysis as endorsing shareholder protection, it might not have been so quick to repurpose campaign finance disclosure for a shareholder audience.

Shareholders in a corporation are essentially sidelined from management and perform a monitoring role. A shareholder's ability to effectively monitor corporate management, and thus to reduce agency costs, depends on the shareholder's access to corporate information. A shareholder may object to corporate political spending because it is wasteful or inefficient, or on ideological grounds, or for some other reason; but to object to corporate political spending the shareholder must first know about it. This requires shareholders to have access to information about the corporation's expenditures. Thus, on a fundamental level, questions about shareholder access to corporate spending information are about the protection of shareholders, typically minority shareholders, from oppressive conduct by other shareholders, or from disloyal conduct by managers.

Two years after *Buckley*, in *First National Bank of Boston v. Bellotti*,[84] the Court addressed for the first time the argument that a state's interest in shareholder protection could justify a law restricting speech protected by the First Amendment. Although the case did not address compelled disclosure—it concerned an outright ban on corporate spending—it considered the interests of corporate shareholders in connection with the corporation's political spending. The *Bellotti* Court discussed at length the problem of the "dissenting shareholder"—the idea that one or more minority shareholders might oppose the corporation's political spending on ideological grounds—but took for granted that all shareholders would be well-informed about the corporation's political spending. *Bellotti* rejected the shareholder protection rationale advanced by the State of Massachusetts, famously opining that, "[u]ltimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues."[85]

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84. 435 U.S. 765 (1978).

85. *Id.* at 794. The Court found the law both underinclusive and overinclusive in the way it purported to protect shareholders, *id.* at 787, which suggested, the Court wrote, that Massachusetts's legislature "may have been concerned with silencing corporations on a particular subject." *Id.* at 793. There was other evidence that Massachusetts's legislature had passed the law to help assure the passage of a specific income tax referendum.

After *Bellotti*, the Supreme Court weakly embraced governmental interests in shareholder protection in only two other election law disputes,[86] and it had rejected a shareholder protection rationale in the first part of *Citizens United* itself.[87] In fact, at oral argument Chief Justice Roberts three times described the government's shareholder protection rationale as one that "we have never accepted."[88] Moreover, the Court's rejection of a shareholder protection rationale to justify the corporate electioneering ban in the first part of *Citizens United* undercut its earlier endorsement of the rationale to justify FECA's corporate contribution ban, because there is little basis for protecting dissenting shareholders from corporate contributions but not from corporate outside spending.[89] Thus, the Court's endorsement of what amounts to a shareholder protection interest in the disclosure of electoral spending information in part IV of *Citizens United* appears out of step with the Court's evolving view on shareholder protection in election law.[90] Because shareholder informational rights are well understood to fall within the scope of state corporate law—at least for companies that are not subject to federal securities law—the Court's endorsement of a disclosure justification turning on the provision of information to shareholders in *Citizens United* embedded a potential federalism problem in its approach.[91]

There was an additional twist to the Court's disclosure analysis in *Citizens United*. Although the Court discussed shareholder informational interests as a primary justification for corporate campaign finance disclosure, Citizens United, Inc. itself was a nonprofit corporation and had

86. *See* FEC v. Beaumont, 539 U.S. 146, 154 (2003); FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 260–61 (1986) (noting that the Supreme Court had "acknowledged the legitimacy" of the shareholder protection rationale "as to the dissenting stockholder and union member" in two earlier cases about union spending, but finding it inapplicable to the plaintiff in the case); FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 207–08 (1982) (endorsing a shareholder protection interest with no discussion); *see also* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 659–60 (1990) (ignoring the government's asserted shareholder-protection interest in its analysis, and subtly disaffirming it by focusing on whether corporate political spending has "little or no correlation to the public's support for the corporation's political ideas" rather than on whether the use of the corporation's treasury funds lacks *shareholder* support).

87. *See supra* notes 57–59 and accompanying text.

88. Oral Argument Transcript, *supra* note 80, at 61–64.

89. *But see* Richard Briffault, *The Uncertain Future of the Corporate Contribution Ban* 43 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Working Paper No. 14-405, 2014), *available at* http://ssrn.com/abstract=2475908.

90. At least one U.S. court of appeals has suggested that, following *Citizens United*, the characterization of an interest as a "corporate governance" or "shareholder protection" interest rather than a "shareholder informational" interest might be outcome-determinative in an election law dispute. *See* Iowa Right to Life Comm., Inc. v. Tooker, 717 F.3d 576, 600 (8th Cir. 2013).

91. The Court's eagerness to embrace shareholder protection in the disclosure context contrasted with the deference it had shown to federalism principles in other First Amendment cases involving election laws. *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 794–96 (1983) (subordinating a state's interest in regulating presidential elections to the "uniquely important national interest" involved).

no shareholders.[92] Moreover, because it earned no profits, the Court's view that the challenged disclosure laws were justified in part based on the government's interest in helping shareholders "determine whether their corporation's political speech advances the corporation's interest in making profits" was irrelevant to Citizens United, Inc.[93] It had no "interest in making profits" to be safeguarded or monitored by any party through the use of public campaign finance disclosure. The Court's endorsement of a governmental interest that would apply to some corporations subject to the law—but not to Citizens United, Inc. specifically—signaled approval of that interest although it probably could not, on its own, have justified the law's application to Citizens United, Inc.[94]

But the Court's discussion of shareholder informational interests in part IV was not surplusage; it was necessary to make the first part of the case—which overturned the corporate electioneering communication ban—workable.[95] The first, substantive part of *Citizens United* had stripped regulatory authority over corporate outside spending from government, holding that only shareholders can regulate this form of corporate speech. However, because shareholders often lack basic information about the corporation's electoral spending, and cannot easily obtain it if they set out to get it, the logic behind *Citizens United*'s theory of corporate political speech was flawed. The key disclosure passage in part IV, and its endorsement of shareholder informational interests in campaign finance disclosure, reflected a patch job on a shaky analytical foundation.

Legal scholarship about *Citizens United* has neglected part IV, and the significance of its discovery of shareholder informational interests in campaign finance disclosure has gone unnoticed. The common insight of legal scholars writing about the Court's disclosure analysis in *Citizens United* is that, by relying only on the informational interest to justify the disclosure laws at issue in the case, *Citizens United* has greatly weakened the other two interests that *Buckley* identified in support of disclosure—the anticorruption interest and the enforcement interest—particularly with regard to outside spending.[96]

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92. *See* Supplemental Reply Brief for Appellant at 2, Citizens United v. FEC, 558 U.S. 310 (2010) (No. 08-205), 2009 WL 2564711.

93. *Citizens United*, 558 U.S. at 370.

94. *See* FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 207–08 (1982) (endorsing a shareholder-protection rationale to justify the application of a campaign finance law to a nonprofit corporation with no shareholders). *See generally* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2844 (2011) (Kagan, J., dissenting).

95. *See* Paul S. Miller, *Shareholder Rights:* Citizens United *and Delaware Corporate Governance Law*, 28 J. LAW & POLITICS 51, 77 (2013) ("The Court upheld the disclosure requirements in BCRA § 203 because it believed those disclosure provisions were necessary for corporate democracy to be effective.").

96. *See, e.g.*, Anthony Johnstone, *Recalibrating Campaign Finance Law*, 32 YALE L. & POL'Y REV. 217, 227 (2014) ("*Citizens United* appears to further narrow the permissible justifications for . . . disclosure requirements."); Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255, 258–59 (2010) (focusing on the informational interest because, among other reasons, "the Court in *Citizens United* chose to rely solely on" it); Daniel R. Ortiz, *The Informational Interest*, 27 J.L. & POL. 663, 665–66, 673 (2012) (arguing that *Citizens United* "undermined two of *Buckley*'s three disclosure interests").

But if legal scholars have failed to notice that something important happened in part IV, lawmakers and lower courts have not. In 2012, the Rhode Island General Assembly amended the state's campaign finance disclosure laws with a declaration that "[d]isclaimer and disclosure" laws can "further the rights of . . . shareholders."[97] A proposed federal law, titled the Democracy Is Strengthened by Casting Light On Spending in Elections ("DISCLOSE") Act has, over several versions, attempted to address shareholders' informational interests, which have been repeatedly cited in testimony in Senate hearings about the proposed law.[98] In litigation, shareholder interests are asserted by government lawyers to justify state campaign finance disclosure laws, and courts are following the lead of *Citizens United* by endorsing those shareholder informational interests.[99]

And while shareholders' informational interests in campaign finance disclosure were expanded in *Citizens United*, post–*Citizens United* cases have continued to undercut *voters*' informational interests in some types of spending disclosure. The Court's repurposing of corporate spending disclosure must be understood in this light. In *Doe v. Reed*,[100] decided several months after *Citizens United*, the Supreme Court upheld the Washington Public Records Act, which authorized public disclosure of referendum petitions, against a First Amendment challenge. The State of Washington had argued that two governmental interests justified the law:

97. Act of June 26, 2012, ch. 12-446, 2012 R.I. Pub. Laws, *available at* http://webserver.rilin.state.ri.us/PublicLaws/law12/law12446.htm.

98. *See, e.g.*, H.R. REP. NO. 111-492, at 28 (2010) ("Requiring real-time, ongoing disclosure of election expenditures, allows shareholders and the public to monitor the use of corporations' capital in the election context, and take whatever actions they want to discipline such corporations if they are found to misuse their funds."); *The DISCLOSE Act (S. 2516) and the Need for Expanded Public Disclosure of Funds Raised and Spent to Influence Federal Elections: Hearing on S. 2516 Before the S. Comm. on Rules & Admin.*, 103rd Cong. (2014) (statement of Heather K. Gerken, J. Skelly Wright Professor of Law, Yale Law School), *available at* http://www.rules.senate.gov/public/?a=Files.Serve&File_id=3383996b-7434-4fb7-a89a-f817400151b2; *Dollars and Sense: How Undisclosed Money and Post-*McCutcheon *Campaign Finance Will Affect 2014 and Beyond: Hearing Before the S. Comm. on Rules & Admin.*, 103rd Cong. (2014) (statement of Trevor Potter, President & General Counsel of the Campaign Legal Center), *available at* http://www.rules.senate.gov/public/?a=Files.Serve&File_id=0b21407e-fffc-4834-a823-d09b56fae344.

99. *See, e.g.*, Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 876 (8th Cir. 2012) (describing "disclosure-related interests" as, inter alia, "providing the electorate and shareholders information concerning the source of corporate political speech"); Nat'l Org. for Marriage v. McKee, 649 F.3d 34, 57 (1st Cir. 2011) ("[I]n the case of corporate or organizational speakers, disclosure allows shareholders and members to 'hold [them] accountable for their positions.'" (quoting Citizens United v. FEC, 558 U.S. 310, 370 (2010)); W. Tradition P'ship v. Att'y Gen., 271 P.3d 1, 14–15 (Mont. 2011) (holding that the challenged disclosure law "when read in the context of Montana's overall campaign finance scheme, expresses the legislature's intent to provide citizens and shareholders with information about sources of funds used in support of candidates and ballot issues"), *rev'd on other grounds sub nom.* W. Tradition P'ship v. Bullock, 132 S. Ct. 2490 (2012); *see also* Iowa Right to Life Comm., Inc. v. Tooker, 717 F.3d 576, 595 (8th Cir. 2013); Ctr. for Individual Freedom v. Madigan, 697 F.3d 464, 470, 490 (7th Cir. 2012); Yamada v. Weaver, 872 F. Supp. 2d 1023, 1028 (D. Haw. 2012); Iowa Right to Life Comm., Inc. v. Smithson, 750 F. Supp. 2d 1020, 1025–26 (S.D. Iowa 2010).

100. 561 U.S. 186 (2010).

(1) an interest in preserving the integrity of the electoral process, and (2) an informational interest.[101] The Court concluded that Washington's interest in preserving the integrity of the electoral process was sufficient to satisfy exacting scrutiny, and it did not analyze Washington's informational interest.[102] Although the majority opinion never discussed Washington's asserted informational interest, both Justices Alito and Thomas, writing separately, criticized voters' informational interests in the disclosures at issue in the case, suggesting that they do not support voters' informational interest in source revelation.[103] In Justice Thomas's view, for example, "People are intelligent enough to evaluate the merits of a referendum without knowing who supported it."[104] Logically, of course, this argument would apply broadly to voters' interest in source revelation in other disclosure areas, including disclosure of independent expenditures and contributions. Because shareholders' informational interests do not turn on the value of source revelation, they lack this vulnerability.

More recently, the same five-member bloc of Justices from *Citizens United* agreed that voters' informational interests in the disclosure of contributions are weak in relation to other interests. In *McCutcheon v. FEC*,[105] a slim five-to-four majority of the Court invalidated federal aggregate contribution limits.[106] Although *McCutcheon* did not involve a challenge to any disclosure laws, the majority opinion discussed the interests justifying compelled disclosure of contributions.[107] Because federal law prohibits corporations from making contributions, this sort of disclosure involves no potential shareholder interests, and the Court did not discuss shareholder interests. But the *McCutcheon* majority made clear that the main governmental interest served by disclosure of contributions is an anticorruption interest, *not* a more general informational interest in providing spending information to voters.[108]

Thus, in just a few years, the Roberts Court has not only repurposed corporate campaign finance disclosure to serve shareholders' informational interests, but has also signaled weakened support for the informational interests of voters that turn on source revelation. Five of the nine Justices agree that voters' informational interest in disclosure of contributions is secondary to their anticorruption interest, and two-fifths of the Court's conservative majority has rejected voters' informational interests in

101. *Id.* at 197.

102. *Id.*

103. *Id.* at 206–08 (Alito, J., concurring); *id.* at 239–40 (Thomas, J., dissenting).

104. *Id.* at 239.

105. 134 S. Ct. 1434 (2014).

106. *Id.* at 1442.

107. *Id.* at 1459–60.

108. The Court observed broadly that "disclosure requirements are *in part* 'justified based on a governmental interest in provid[ing] the electorate with information about the sources of election-related spending.'" *Id.* at 1459 (emphasis added) (quoting Citizens United v. FEC, 558 U.S. 310, 367 (2010)). But the Court emphasized a different rationale when it discussed contribution disclosure specifically, writing that contribution disclosure "minimizes the potential for abuse of the campaign finance system" and deters corruption "by exposing large contributions and expenditures to the light of publicity." *Id.*

referendum spending disclosure. If the Court's five-Justice majority continues to undercut voters' informational interests in campaign finance disclosure, voters' interest in learning the identities of candidates' corporate backers may take a back seat, as a matter of First Amendment doctrine, to shareholders' interest in learning about corporate political spending so as to maximize corporate profits.

II. THE COMPETING INFORMATIONAL INTERESTS OF VOTERS AND SHAREHOLDERS

Voters' informational interests in corporate campaign finance disclosure arise out of the essential role of the voter in a democracy. As *Buckley* put it, "Democracy depends upon a well-informed electorate."[109] Citizens can use disclosure to "give proper weight to different speakers and messages" in the marketplace of ideas, to "make informed decisions" at the polls, and to "hold corporations and elected officials accountable for their positions and supporters" in various ways.[110] Campaign finance disclosure is used by voters to evaluate political arguments in the process of democratic deliberation. It is also used for heuristic cues that, research suggests, are effective shortcuts for helping voters decide how to vote.[111] More broadly, campaign finance disclosure helps voters understand the forces that shape the institutions of our democracy.

The informational interests of corporate shareholders are different; they primarily relate to a shareholder's financial interest in a particular investment. Shareholders care about corporate political spending because it affects the value of their stock and involves the expenditure of money to which shareholders have claim. Shareholders can use corporate spending information to monitor management and reduce agency costs, and to evaluate how effectively the company's election-related expenditures advance the company's political interests, which serve the goal of increasing shareholder value. Shareholders may assert expressive interests in the corporation's political spending, but these are measurable in terms of the shareholders' financial interests in the company.[112] In sum,

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109. Buckley v. Valeo, 424 U.S. 1, 49 n.55 (1976); *see also* Renne v. Geary, 501 U.S. 312, 349 (1991); Forsham v. Harris, 445 U.S. 169, 188 (1980); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36 (1973) ("The electoral process, if reality is to conform to the democratic ideal, depends on an informed electorate . . . .").

110. *Citizens United*, 558 U.S. at 370–71; *see also* Mayer, *supra* note 96, at 260 ("[I]t is desirable for voters to be well-informed about their electoral choices . . . such that voters can accurately determine and apply their personal preferences when making such choices.").

111. *See* Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 UCLA L. REV. 1141, 1157–59 (2003) (discussing interest group support as a heuristic cue).

112. A shareholder who owns half of a politically active corporation may object to all of that company's election-related spending but, under basic corporate law principles, only half of that spending could be attributed in any sense to her financial interest in the company. *See, e.g.*, Grant M. Hayden & Matthew T. Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity*, 30 CARDOZO L. REV. 445, 477 (2008) (adopting this assumption as to corporate costs). Even that attribution is a bit misleading; shareholders are residual claimants of corporate assets, not the "owners" of money spent by the corporation or

shareholders' informational interests in corporate spending disclosure are financial in nature, even when they are influenced by civic-mindedness or political ideology.

More fundamentally, voters want to *limit* the influence of business donors on candidates and elected officials, and shareholders would like to *encourage* that influence. In fact, from the shareholder perspective, it would be optimal for a particular corporation, or even a particular industry, to achieve complete legislative capture. This is because elected officials can use government to create market inefficiencies that are bad for the community as a whole, but that enrich the shareholders of specific corporations. Thus, voters benefit from campaign finance disclosure insofar as it reveals the influence of business donors on candidates and elected officials, assuming voters can take action to limit that influence, while a company's shareholders can, in some circumstances, benefit when a campaign finance disclosure regime functions to hide or obscure that company's political influence.

Because the nature of voters' and shareholders' interests in corporate electoral spending information differ in these ways, their interests in disclosure diverge as well. This part examines four key areas of divergence, relating to both the *content* and *manner* of disclosure, as examples of the competing informational interests at stake. These are only examples; I have not attempted to produce a complete catalog of the competing interests of voters and shareholders in campaign finance disclosure. These four examples, however, clarify what may be gained and what may be lost in campaign finance disclosure by expanding its audience to include shareholders, and thereby enlarging its purpose to include assisting shareholders in monitoring profit-making.

A. The "Materiality" of the Electoral Expenditure

Voters and shareholders are likely to ascribe importance to corporate electoral spending at very different dollar thresholds. A voter cares about corporate expenditure information when it matters to the voting decision, and thus is likely to value disclosure of relatively small amounts of spending. A shareholder's interest in corporate expenditure information is greatest when the expenditure is "material" to the shareholder's investment—that is, when the expenditure affects the value of the shareholder's stockholding on a company-by-company basis. This means that the informational interests of voters and shareholders are of completely different orders of magnitude. The desirable disclosure threshold for voters will usually turn on the total amount of money spent on a specific electoral contest, while the desirable disclosure threshold for shareholders will

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of corporate property. *See* Margaret M. Blair, *Corporate "Ownership": A Misleading Word Muddies the Corporate Governance Debate*, BROOKINGS REV., Winter 1995, at 16–17; Hayden & Bodie, *supra*, at 473; Lynn A. Stout, *The Mythical Benefits of Shareholder Control*, 93 VA. L. REV. 789, 804 (2007).

usually turn on the amount spent by one corporation in proportion to that corporation's overall financial condition.

1. Voter Materiality

Voters' interests in corporate political spending information are determined by the "materiality" of the information to the voting decision and to post-election monitoring of the performance of elected officials. Fundamentally, voters' interests favor public disclosure of most electoral spending, including relatively small expenditures.[113] This is because even small expenditures can serve a useful information-signaling purpose,[114] and because voters may place a high value on the aggregation of spending data, which is more accurate when it accounts for low-dollar spending. Small corporate expenditures are particularly likely to interest voters in state and local elections, where total electoral spending tends to be low, and in states that allow corporations to donate directly to candidates.[115]

By providing source revelation, spending disclosure helps voters evaluate candidates and campaign messages.[116] Source revelation permits voters to "place each candidate in the political spectrum more precisely" than might otherwise be possible;[117] Michael Kang has written that spending information constitutes uniquely "trustworthy" information that cuts through the "cheap talk of campaign rhetoric," in which candidates sometimes benefit from cultivating ambiguity about their positions.[118] Spending disclosure also can serve a simple "informational signaling" function in which it provides voters with heuristic cues that help them identify the interests likely to be served by a candidate or ballot initiative.[119] A voter who knows the political inclinations of a neighbor or a

113. *See* Archon Fung, *Infotopia: Unleashing the Democratic Power of Transparency*, 41 POL. & SOC'Y 183, 194 (2013) (arguing that "citizens must be able to know the identity of social actors who seek to influence governance processes . . . and the character of their political activities," and advocating for "even fuller public disclosure" of political spending by corporations and other organizations than already exists).

114. *See, e.g.*, Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J.L. & POL. 557, 570 (2012) ("[K]nowing a candidate is backed by environmental groups or the gun rights lobby may be all you need to know to cast a ballot consistent with your interests.").

115. As of 2012, twenty-eight states permitted direct contributions to candidates from for-profit companies. Michael M. Franz, *Past As Prologue: The Electoral Influence of Corporations*, *in* INTEREST GROUPS UNLEASHED 101, 121 (Paul S. Herrnson, Christopher J. Deering & Clyde Wilcox eds., 2013).

116. *See* Gilbert, *supra* note 12, at 1862; Anthony Johnstone, *The System of Campaign Finance Disclosure*, 99 IOWA L. REV. BULL. 143, 145 (2014).

117. Buckley v. Valeo, 424 U.S. 1, 67 (1976).

118. *See, e.g.*, Michael Kang, *Campaign Disclosure in Direct Democracy*, 97 MINN. L. REV. 1700, 1703 (2013).

119. *See, e.g.*, Briffault, *supra* note 29, at 297; Kang, *supra* note 118, at 1714; Mayer, *supra* note 96, at 262–63. Some legal scholars question the value of heuristic cues, and disapproval of their use underlies some judicial skepticism about the value of campaign finance disclosure for voters. *See* Kang, *supra* note 118, at 1718 (describing and discussing commentators' critiques).

business can use spending disclosure to determine which candidate or ballot initiative is supported by the neighbor or business, and vote accordingly.

The aggregation of multiple, low-dollar expenditures may be particularly useful to voters. As the Eleventh Circuit recently observed, "disclosure of a plethora of small contributions" is useful to "inform voters about the breadth of support for a group or a cause."[120] Voters may find it difficult—and largely beside the point—to track a particular company's spending activity from year to year, because a company that existed last year may exist this year in another form, or under another name. In many cases, more can be learned by tracking aggregate spending by industry or by other categories. Industry-wide spending is particularly revealing because companies in the same industry are likely to have similar political interests.[121] For these reasons, voters' interests in corporate spending data do not turn exclusively on the *amount* of a particular corporation's expenditures. Rather, voters have strong informational interests in aggregate data, and aggregate data is more accurate, and thus of greater use to voters, when it includes all expenditures, including low-dollar spending.

Corporate spending information also may interest voters insofar as it sheds light on the spending of individuals, such as a corporation's managers or employees. For example, it may interest voters to learn that a company's election-related spending is the same as or different from the election-related spending of its CEO.[122] Such information may be particularly revealing in a federal election, in which corporations are prohibited from making direct candidate contributions, but CEOs are not.[123] It might also interest voters to learn that a corporation has given financial support to a cause its employees oppose. If voters are interested in comparing a corporation's electoral expenditures with the donations of its CEO or employees, the size of the corporate expenditure matters little; an expenditure of any size is a signal about the corporation's political interest.

Voters' interests are also particularly strong in states that allow corporations to donate directly to candidates—i.e., "contributions"—which are prohibited in federal elections. The Roberts Court has endorsed a very narrow view of corruption, holding that only contributions, and not independent expenditures, can give rise to corruption or the appearance of corruption as a matter of First Amendment law.[124] This suggests that voters' interests in contribution disclosures are different, and potentially more significant, than their interests in outside spending disclosures. It follows that voters' interests in public disclosure of corporate spending data is greater in places where corporations may lawfully donate directly to candidates.

120. Worley v. Fla. Sec'y of State, 717 F.3d 1238, 1251 (11th Cir. 2013).

121. *See* Noveck, *supra* note 45, at 107–12.

122. In 2009, in *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 884 (2009), the Supreme Court recognized that the political interests of a company and the election spending of its CEO can be so strongly correlated as to be potentially corrupting.

123. *See* 52 U.S.C. § 30118 (West Supp. 2014).

124. *See* Citizens United v. FEC, 558 U.S. 310, 357 (2010).

Voters' interests in learning about small corporate expenditures are particularly strong in state and local elections, where a few thousand dollars can buy significant influence. We know that even large corporations routinely make small donations to influence state elections. One need look only to the online database of the National Institute on Money in State Politics[125] to find aggregated electoral spending data from all fifty states, and details of thousands of small corporate expenditures in state elections, including donations to candidates as low as $50 from multibillion-dollar, publicly held companies.[126]

For example, in 2012, Chevron, Inc. was one of the top donors to a winning candidate for a seat in the New Mexico House of Representatives, Don L. Tripp, Jr. Chevron gave Mr. Tripp $500 that year.[127] Mr. Tripp received only five other contributions of the same size in that election cycle, and only one larger contribution. Chevron's electoral spending in the New Mexico election that year exemplifies how small amounts of corporate spending at the state and local level—as little as $500—can represent a significant proportion of the candidate's overall financial support, and thus is likely to interest voters.

Congress, state legislatures, and state and federal courts have consistently endorsed campaign finance disclosure of small amounts of spending, revealing a broad and longstanding consensus that spending of small amounts is material to voters. At the state level, the most common contribution threshold is $100,[128] and thresholds in some states are quite low; in Colorado, for example, campaign finance laws compel disclosure of all individual contributions of $20 or more.[129] Disclosure thresholds for outside spending—the type of electoral spending that *Citizens United* addressed, and the only type of electoral spending that corporations can

125. *See* NAT'L INST. ON MONEY IN STATE POLITICS, http://www.followthemoney.org/ (last visited Mar. 25, 2015). The database of the National Institute on Money in State Politics aggregates electoral spending data from all fifty states, making it possible to track a particular corporation's spending across multiple states.

126. *See Chevron Corp. Contributions to Tim Sbranti*, NAT'L INST. ON MONEY IN STATE POLITICS, http://www.followthemoney.org/show-me?f-core=1&c-t-eid=23421183&d-eid=566#[{1|gro=d-id (last visited Mar. 25, 2015) (listing $50 donation from Chevron Corp. on June 24, 2013 to support Tim Sbranti, a candidate for the Assembly of Concord, California). Interestingly, at the original oral argument in *Citizens United*, Citizens United's own lawyer seemed to concede that the film at the center of the case was funded, in part, by many small corporate donations, and that this fact was obscured by the record in the case. *See* Transcript of Oral Argument at 8, *Citizens United*, 558 U.S. 310 (No. 08-205), 2009 WL 760811 (Theodore B. Olson stating that "it's possible that corporations throughout America were giving small amounts of money to [the film]. [The] record doesn't establish one way or the other").

127. *See Chevron Corp. Contributions to Don L. Tripp, Jr.*, NAT'L INST. ON MONEY IN STATE POLITICS, http://www.followthemoney.org/show-me?f-core=1&c-t-eid=13004424&d-eid=566#[{1|gro=d-id (last visited Mar. 25, 2015). According to the National Institute on Money in State Politics, Chevron has given Representative Tripp a total of $1500 over three elections and is currently ranked seventeenth on the list of his top contributors. *Id.*

128. Johnstone, *supra* note 96, at 226.

129. COLO. REV. STAT. ANN. § 1-45-108(1)(a)(I) (West 2013); *see also* ARIZ. REV. STAT. ANN. § 16-915(A)(3)(a) (Supp. 2013) ($50 threshold).

engage in to influence a federal election—are higher, but still low.[130] Although the tide among legal academics has recently turned against disclosure of low-dollar spending,[131] the practice of Congress and state legislatures over many decades has been to provide fairly granular campaign finance information to voters.

2. Shareholder Materiality

In a corporation, the shareholder plays what has been described as a "subordinate" governance role that primarily involves monitoring management—the board of directors and the officers—and then "voting, selling, [or] suing" to prevent managers from neglecting their duties or expropriating corporate resources for their own personal benefit.[132] Shareholders need information about corporate operations to fulfill this monitoring role; if they fail in their efforts to monitor, the return on their investments will be reduced.[133]

The federal securities laws require reporting companies to disclose all material information to investors, including material information about the company's finances and operations. Under SEC rules, information is material if "there is a substantial likelihood that a reasonable investor would attach importance [to the information] in determining whether to purchase" the company's stock.[134] Although the SEC and the Financial Accounting Standards Board have disclaimed a particular quantitative threshold in determining what is material,[135] amounts in the range of 5 percent of net income or total assets are generally understood to be in the materiality

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130. For example, under Colorado law, anyone who donates $1000 or more to an independent expenditure committee (a super PAC) must file an independent expenditure donor report directly with the state. *See* COLO. REV. STAT. ANN. § 1-45-107.5(9).

131. *See, e.g.*, Kang, *supra* note 118, at 1720 (summarizing views of "prominent commentators" and agreeing with them that "there is little or no voter information to be gained from disclosure from average, low-level contributors"); Noveck, *supra* note 45, at 103 ("[R]equiring an overload of information may obscure certain connections and cause important information to go overlooked.").

132. Paul H. Edelman et al., *Shareholder Voting in an Age of Intermediary Capitalism*, 87 S. CAL. REV. 1359, 1366 (2014).

133. *See id.*

134. 17 C.F.R. § 230.405 (2013); *see also* TSC Indus. v. Northway, Inc., 426 U.S. 438, 449 (1976) (stating that information is material if there is "a substantial likelihood that the . . . fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available"); SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45,150, 45,151 (Aug. 19, 1999) (stating that information is material "if there is a substantial likelihood that a reasonable person would consider it important"); FIN. ACCOUNTING STANDARDS BD., STATEMENT OF FINANCIAL ACCOUNTING CONCEPTS NO. 8: CONCEPTUAL FRAMEWORK FOR FINANCIAL REPORTING 17 (2010) [hereinafter FASB 8], *available at* http://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1176157498129&acceptedDisclaimer=true ("Information is material if omitting it or misstating it could influence decisions that users make on the basis of the financial information of a specific reporting entity.").

135. *See* SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. at 45,151; FASB 8, *supra* note 134 ("[T]he Board cannot specify a uniform quantitative threshold for materiality or predetermine what could be material in a particular situation.").

ballpark.[136] The larger an expenditure is, the more likely it is to be material to investors. Thus, very small amounts of spending that lack any other indicia of qualitative materiality[137] are likely not material to shareholders.

This conclusion is strongly corroborated by the disclosure practices of public companies, which generally do not report their electoral expenditures in their filings with the SEC. Some public companies voluntarily disclose their political expenditures on their websites,[138] and in virtually all cases the voluntary disclosures reveal expenditures that fall well below 5 percent of net income or total assets.[139] The widespread practice of not reporting electoral spending in SEC filings, and the low levels of companies' voluntarily disclosed spending, suggest a broad consensus among lawyers, accountants, and the SEC, that expenditures of this size are not material to shareholders.

Shareholder materiality also differs from voter materiality because shareholder interests in corporate spending remain the same regardless of the type or location of the election. This is because shareholder interests turn on the size of the expenditure in proportion to the company's overall financial condition and not on the amount of spending necessary to influence a particular election. Shareholders of a company with $10 billion in annual net income are unlikely to care about a $10,000 corporate expenditure, regardless of whether it constitutes a minor donation to a federal super PAC or the largest donation in a state ballot initiative contest.

The political expenditures of Chevron in 2012 provide an example of how investor materiality plays out for large, politically active, publicly held

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136. *See, e.g.*, SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. at 41,151 ("The use of a percentage as a numerical threshold, such as 5%, may provide the basis for a preliminary assumption that—without considering all relevant circumstances—a deviation of less than the specified percentage with respect to a particular item on the registrant's financial statements is unlikely to be material."). Underscoring this 5 percent rule of thumb, Proxy Rule 14a-8 specifies that a reporting company can exclude a shareholder proposal relating to operations "which account for less than 5 percent of the company's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year," if it is "not otherwise significantly related to the company's business." 17 C.F.R. § 240.14a-8.

137. Information about smaller expenditures also may be material to investors if it sheds light on other aspects of the corporation's business that potentially affect the value of the company—such as information that an expenditure was made intentionally to violate the law. However, lawful and otherwise unremarkable political expenditures that amount to far less than 5 percent of net income are unlikely to significantly alter the "total mix" of information already available to investors.

138. *See*, *e.g.*, *Political Contributions*, GILEAD, http://investors.gilead.com/phoenix.zhtml?c=69964&p=irol-contributions (last visited Mar. 25, 2015) (providing political spending disclosure data of Gilead Sciences, Inc.).

139. In fact, only three publicly held companies made total donations that exceeded $1 million to top-twenty super PACs in 2012. *See* Sarah C. Haan, *Opaque Transparency: Outside Spending and Transparency by Privately-Held Business Entities in 2012 and Beyond*, 82 U. CIN. L. REV. 1149, 1166 (2013). The average total donation by a publicly held firm to top-twenty super PACs in calendar year 2012 was $217,352, and the median total donation was $50,000. *Id.* at 1165 n.51. These figures do not account for election-related contributions to nondisclosing 501(c) nonprofits, however, and thus do not provide a full picture of election-related spending by these companies.

companies. FEC disclosure reports show that Chevron gave the largest super PAC donation in 2012 of all publicly held firms, in the amount of $2.5 million.[140] Chevron also gave $3.16 million to other organizations that were politically active in the federal election that year, including $1 million to the U.S. Chamber of Commerce.[141] Chevron's political spending at the state and local level was even greater. The company spent more than $6 million on state and local elections in California alone.[142] Overall, Chevron spent $6,340,578 on state and local elections in eleven states, and additional funds on elections in Canada and Australia.[143] Chevron's total election-related expenditures for 2012 were just over $12 million.[144]

Although $12 million is a lot of money, this amount falls far short of what most Chevron shareholders were likely to consider material in 2012 in the context of the company's overall financial condition. Chevron's net income for 2012 was $26.179 billion.[145] Five percent of this amount is slightly more than $1.3 billion—an amount *greater* than the *total* amount of reported outside spending in the 2012 federal election.[146] Chevron's $12 million in election-related spending amounted to less than 0.05 percent of net income for the company that year. The company chose not to itemize election-related expenditures in its filings with the SEC, revealing the company's view that its political expenditures were not material to investors.

On a per-share basis, Chevron's political spending in 2012 was miniscule. At year end, Chevron had 1.933 billion stock shares outstanding, meaning it spent less than a hundredth of a cent per share to influence elections in 2012.[147] Most shareholders would likely have considered these expenditures de minimis with respect to their own shareholding.[148]

140. *See id.* at 1166 n.54. To be clear, FEC disclosures do not report corporate money channeled through 501(c) nonprofits.

141. *See* CHEVRON CORP., 2012 CHEVRON CORPORATE POLITICAL CONTRIBUTIONS 4 (2012) (on file with author), *available at* http://www.chevron.com/documents/pdf/Political-Contributions-2012.pdf.

142. *See id.* at 1–4 (disclosing over $6 million in corporate treasury expenditures related to state and local elections in California).

143. Chevron's disclosure report also notes a $20,000 donation to "Better Schools for a Better Midland," which is not linked to any state. *See id.* at 16.

144. The total of all expenditures reported on Chevron's 2012 Chevron Corporate Political Contributions report was $12,020,578. *See generally id.*

145. *See* CHEVRON CORP., 2012 ANNUAL REPORT 4 (2013), *available at* http://www.chevron.com/documents/pdf/annualreport/Chevron2012AnnualReport.pdf.

146. *See* Press Release, Fed. Election Comm'n, FEC Summarizes Campaign Activity of the 2011–2012 Election Cycle (Apr. 19, 2013), *available at* http://www.fec.gov/press/press2013/pdf/20130419release.pdf (reporting nearly $7.13 billion in total spending from January 1, 2011 to December 31, 2012, including nearly $1.27 billion in independent expenditures and electioneering communications).

147. *See* CHEVRON CORP., *supra* note 145, at 57.

148. At Chevron's annual shareholder meeting in May 2013, a shareholder submitted for vote a proposal directing Chevron's board of directors to "refrain from using corporate funds to influence any political election." CHEVRON CORP., NOTICE OF THE 2013 ANNUAL MEETING AND 2013 PROXY STATEMENT 80 (2013), *available at* http://www.chevron.com/documents/pdf/Chevron2013ProxyStatement.pdf. Although the

Nevertheless, Chevron published a separate, voluntary report for 2012 on its website, "Chevron Corporate Political Contributions."[149] The report's sixteen pages disclosed hundreds of individual payments—to super PACs and 501(c) nonprofits, as well as to state and local candidates and committees—but did not total any of the payments, making the document difficult for investors to use. And although the final report was released December 31, 2012, long after the year's elections were decided, Chevron's report did not disclose whether the candidates it supported won or lost—information that might have helped investors understand if the company was using its political cash in a cost-effective way. All of this suggests Chevron believed that information about its political spending held little interest for its shareholders.

Even if a Chevron shareholder had a strong ideological preference that her money not be spent to promote the political interests favored by Chevron's management, she would have to have owned more than $17,000 in Chevron stock before the proportion of the company's election-related expenditures attributable to her investment totaled $1.[150] And this assumes the shareholder objected to *all* of Chevron's election-related spending, rather than just a portion of it.[151]

All of this means that voters are likely to care about thousands or even millions of dollars of corporate spending that shareholders would happily ignore.[152] It is fair to say that, in the 2012 federal election, *all* disclosed spending by publicly held corporations failed to interest the great majority of their shareholders on a company-by-company basis, while at the same time it sparked significant public debate.[153]

For this reason, voters should favor low campaign finance disclosure thresholds, and shareholders should favor high campaign finance disclosure thresholds, particularly for outside spending, which is the main sort of

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company had supported many candidates for federal office who lost—meaning that several million dollars of these expenditures were wasted, and may even have harmed the company's access to the winning candidates—the proposal was defeated by 96.6 percent of votes. *See* CHEVRON CORP., CURRENT REPORT (FORM 8-K) 3 (May 29, 2013), *available at* http://www.chevron.com/documents/pdf/chevron2013proxyvotingresults.pdf.

149. CHEVRON CORP., *supra* note 141. Chevron removed this report from its website sometime in 2014.

150. This calculation uses Chevron's year-end stock price of $108.14 per share. At that price, a shareholder would have needed to own 161 shares of Chevron stock, at a total value of $17,410.54; on a per-share basis, $1 of the company's election-related expenditures were attributable to her investment for 2012.

151. Chevron's 2012 voluntary political spending disclosure shows that it donated to both Democratic and Republican candidates.

152. This is not to say that shareholders never care about small corporate expenditures. For example, a shareholder might desire disclosure of low-dollar spending if such spending serves as a signal that corporate management is engaged in insider expropriation of the firm's political spending. *See* Michael D. Guttentag, *On Requiring Public Companies to Disclose Political Spending*, 2014 COLUM. BUS. L. REV. 593, 642–45.

153. *See, e.g.*, Reity O'Brien & Andrea Fuller, *Citizen United Ruling Opened Door to $933 Million in New Election Spending*, NBC NEWS (Jan. 16, 2013, 2:09 AM), http://investigations.nbcnews.com/_news/2013/01/16/16530772-citizen-united-ruling-opened-door-to-933-million-in-new-election-spending.

electoral spending that corporations engage in. In fact, shareholder informational interests (but *not* voter interests) would justify different disclosure thresholds for corporations than for individuals. In 2013, members of the South Dakota Senate introduced a bill that proposed separate disclosure thresholds for business entities that made independent expenditures in state elections.[154] Under the bill as originally introduced, "[a]ny person or organization which is not a recognized business entity" was required to disclose independent expenditures of $100 or more, but the threshold applicable to a business entity was $2000.[155] The separate corporate disclosure threshold ultimately was deleted from the bill that passed,[156] but the fact that it found its way into the bill at all reveals the competing interests that are influencing the reshaping of disclosure rules at the state level.

B. The Timing of Corporate Spending Disclosure

The timing of campaign finance disclosure affects its usefulness. This section uses disclosure timing to explore how voters' and shareholders' competing informational interests may be served differently by procedural disclosure rules. Voters generally need full disclosure of corporate spending before an election, while most shareholders are not only satisfied with post-election disclosure, but likely prefer it.

Shareholders and voters differ significantly in their ability to use corporate spending disclosure. Voters' main use of campaign finance disclosure is to inform their decision making at the polls. They can also use spending disclosure to monitor relationships of influence between donors and elected officials over time, but voters' primary means of objecting to corruption, or to the appearance of corruption, is to vote the corrupted official out of office in the next election. In their roles as consumers, voters may even be in a position to hold corporate donors accountable at the cash register through boycotts. In contrast, shareholders have little opportunity to hold corporate managers and directors accountable for spending decisions, and these opportunities generally arise after the fact, many months after an election. Shareholders who cannot vote in a jurisdiction in which a company seeks to influence an election have *no* opportunity to hold candidates or elected officials accountable. And shareholders are unlikely to engage in consumer action against their own companies because this cuts against their financial interests. When it comes to holding donors and recipients accountable for corporate spending and the influence it confers, political spending information has many potential uses for voters, and fewer uses for shareholders.

154. *See* S.B. 200, 2013 Leg. Assemb., 88th Sess. § 12-27-16(1)(3)–(4) (S.D. 2013).
155. *See id.*
156. Act of Mar. 20, 2013, 2013 S.D. Sess. Laws ch. 67.

1. Disclosure for Voters: The First Tuesday in November

Voters need to obtain spending disclosure before an election in order to factor it into their voting decisions. In *McConnell*, the Supreme Court specifically endorsed the government's interest in "mak[ing] the contents of parties' disclosure statements available to curious voters in advance of elections."[157] This means that, in an election year, voters generally need up-to-date corporate spending information before the first Tuesday in November.

Disclosure laws have long been designed to provide current campaign finance information to voters in the days before an election, but they tend to require swifter reporting of "direct" outside spending—which corporations rarely engage in[158]—than of "indirect" outside spending. For example, in federal elections, up until the twentieth day before an election, "direct" outside spenders are required to report their expenditures to the FEC within forty-eight hours.[159] During the last twenty days before an election, "direct" outside spenders must report expenditures of $1000 or more to the FEC within twenty-four hours.[160] But super PACs must report contributions (including contributions from corporations) to the FEC either monthly or on a quarterly basis, and in a preelection report that captures all contributions and expenditures within twenty days prior to a general election.[161] Under this regime, corporate donations to super PACs that are made after the twentieth day before the election are not reported until *after* the election, in a thirty day post–general election report.[162] Thus, for the most common type of disclosed corporate electoral spending—donations to super PACs—voters can count on monthly reporting, with a final report twenty days before the election.

Public disclosure can also allow voters (and other members of a community) to boycott companies whose electoral spending they oppose. To the extent that voters seek to use corporate disclosure to engage in consumer action, swift disclosure allows consumers to respond quickly and thereby discourage the company from making additional, similar expenditures in the same election cycle. In some cases, consumer action has caused companies to publicly disclaim their donations or apologize for them,[163] and if corporate apologies are prompted by a boycott, they are most powerful if they come in the midst of a campaign rather than after it.

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157. McConnell v. FEC, 540 U.S. 93, 200 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010).

158. *See* Haan, *supra* note 139, at 1160–61.

159. *See* 11 C.F.R. § 104.4(c) (2013).

160. *See* 11 C.F.R. § 109.10(d).

161. *See* FED. ELECTION COMM'N, REPORT OF RECEIPTS AND DISBURSEMENTS FOR OTHER THAN AN AUTHORIZED COMMITTEE (FEC FORM 3X) 3 (2006), *available at* http://www.fec.gov/pdf/forms/fecfrm3xi.pdf.

162. *See id.*

163. *See, e.g.*, Brody Mullins & Ann Zimmerman, *Target Discovers Downside to Political Contributions*, WALL ST. J., Aug. 7, 2010, at A2.

Thus, timely disclosure not only helps voters make decisions at the polls, but also helps them vote with their wallets.

2. Disclosure for Shareholders: Proxy Season

Shareholders do not need *any* corporate spending information before a public election. Under corporate governance laws, shareholders have no opportunity to approve or object to corporate political expenditures ex ante.[164] Swift, preelection disclosure of expenditures is thus not useful to shareholders because they can do little with it, other than divest completely. Shareholders who want to use the procedures of corporate democracy to regulate the corporation's political spending must do so at the annual shareholder meeting, where they can vote to unseat a director or make a shareholder proposal directing management to change its future spending practices. Thus, shareholders need corporate electoral spending information before the annual shareholder meeting, which at most publicly held companies is held during "proxy season" in the spring following an election. From the point of view of shareholders, the most useful disclosure is not quick disclosure of a series of piecemeal expenditures as an election approaches, but rather comprehensive, post hoc disclosure that makes it easy to compare the company's total electoral spending with its broader financial operations.

Voluntary corporate disclosures, which are directed at shareholders, embody this purpose. The CPA-Zicklin Index, which publishes a list of best practices for corporations regarding political spending, encourages corporations to make spending disclosures only twice a year.[165] Most corporations that publish voluntary disclosures produce semiannual reports or a single, annual report summarizing the entire year's spending activity.[166] This is the practice because this timing of disclosure is user-friendly for shareholders.

Postelection disclosure is most useful to shareholders for another reason: it facilitates the comparison of the corporation's expenditures with electoral outcomes. Even if shareholders care little about the absolute amount of a

164. Iowa's corporate laws provide a partial exception to this rule. Under Iowa law, a corporation must obtain "the authorization of a majority of the entity's board of directors" for "the use of treasury funds for an independent expenditure involving a candidate or ballot issue committee." The board's authorization must occur "in the same calendar year in which the independent expenditure is incurred." IOWA CODE ANN. § 68A.404 (West 2012). Since most corporations chartered in Iowa are non-public, closely held companies, this law probably functions to require shareholder approval in many cases.

165. *See* CTR. FOR POLITICAL ACCOUNTABILITY, THE 2013 CPA-ZICKLIN CENTER INDEX OF CORPORATE POLITICAL ACCOUNTABILITY AND DISCLOSURE 23 app. C (2013), *available at* http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/8047.

166. In practice, corporations that publish voluntary reports often do not make them public until many months after the last date of the period being reported. Thus, it is not unusual to see a company post a voluntary political spending report for the period ending June 30 in December. This practice virtually ensures that, in an election year, shareholders will not learn about *any* of the corporation's electoral spending from the company until *after* the election is decided. The practice makes sense, and has caused little controversy, because shareholders have little interest in preelection disclosure.

corporation's expenditures on an election[167]—as already discussed, shareholders of public companies are likely to consider current levels of corporate electoral spending immaterial because the spending is de minimis on a company-by-company basis—a shareholder may still be interested to learn if management made cost-effective spending decisions and backed winners. This information can only be obtained *after* the election, by a comparison of total candidate-by-candidate expenditures to electoral outcomes.[168]

Although it is probably not what the Supreme Court had in mind when it wrote about the "procedures of corporate democracy," shareholders might also respond to corporate spending disclosure by exiting the corporation—by selling their shares. This is mainly an option for shareholders of publicly held companies, and not for shareholders of privately held companies, because there exists an efficient market for the shares of the former but often not for the latter.[169] There is little evidence that shareholders commonly respond to corporate electoral spending disclosure by selling their shares. However, a shareholder who wanted to do so would probably prefer to learn about the corporation's expenditure soon after it was made, both to send a message to management and to cut ties to the corporation before additional, similar expenditures are made.

All of this suggests that voters' needs favor timely disclosure of expenditures as they are made and up-to-date disclosure before an election, while most shareholders will prefer to receive a single, postelection disclosure of corporate spending for the fiscal year, months *after* voters and the media have lost interest.

C. Other Legal Rights to Corporate Spending Information

Voters depend more heavily upon campaign finance disclosure laws to learn about corporate electoral spending than shareholders do because, under state corporate law, shareholders are likely to enjoy legally enforceable rights to corporate political spending information that voters lack. Most state corporate law statutes give special informational rights to shareholders that make campaign finance disclosure less important from the shareholder perspective. Yet to use these corporate law informational rights, shareholders generally must safeguard the company's financial

167. *See supra* Part III.A.

168. Interestingly, FECA's advance disclosure requirements might be understood to serve shareholders' informational interests uniquely. This is because compelled disclosure of a corporation's plan to engage in future political spending gives dissenting shareholders the opportunity to act ex ante on concerns about that spending, even if it is only by calling corporate management to register a complaint. In effect, advance disclosure provides shareholders with some tool (rather than no tool) to influence, through informal pressure on management, a corporation's political spending.

169. *See* Benjamin Means, *A Voice-Based Framework for Evaluating Claims of Minority Shareholder Oppression in the Close Corporation*, 97 GEO L.J. 1207, 1217–19 (2009). Moreover, privately held entities often impose transfer restrictions on ownership; for many such entities, limited exit is a desired feature of governance. *See* F. HODGE O'NEAL & ROBERT B. THOMPSON, CLOSE CORPORATIONS AND LLCS § 1:9, at 1-36 (3d ed. 2014).

information from non-shareholders. Thus, while voters must rely on campaign finance laws to provide them information about corporate electoral spending, shareholders have other legal rights to the information, and they are unlikely to share the information they obtain by right with the public.

The idea that shareholder informational rights may extend to corporate political spending data that are not otherwise material under federal securities law first came to light after the 2012 election. In January 2013, the New York State Comptroller, a shareholder of Qualcomm, Inc., sued Qualcomm to obtain information about Qualcomm's political spending activities in the 2012 election.[170] The New York State Comptroller advanced a novel legal theory, arguing that section 220 of Delaware's General Corporation Law[171] gave any stockholder the right to inspect the corporation's books and records relating to political expenditures.[172] Qualcomm settled the lawsuit by agreeing to voluntarily disclose its political spending to the public, so the Comptroller's argument remains untested.[173] However, the plain text of section 220, and Qualcomm's quick capitulation, suggest it is likely that Delaware law does give corporate shareholders a right to political spending information, and that similar laws in many states do the same.[174]

State corporate laws that give shareholders an informational right to corporate spending information likely prohibit shareholders from sharing what they learn with people outside the company. This is because state corporate laws generally require shareholders to establish a "proper purpose" to access corporate information and prohibit them from uses of the information that might harm the company.[175] Courts have interpreted the "proper purpose" clause to protect sensitive corporate financial information.[176] Because public disclosure of a company's political spending may subject the company to criticism and so-called economic reprisal,[177] courts are likely to conclude that shareholders who use their informational rights to publicize controversial corporate electoral spending practices are harming the company. Thus, shareholders' information rights, embodied in section 220 of Delaware's General Corporation Law and other

170. Nicholas Confessore, *State Comptroller Sues Qualcomm for Data About Its Political Contributions*, N.Y. TIMES, Jan. 4, 2013, at A18.

171. *See* DEL. CODE ANN. tit. 8, § 220(b) (2011).

172. *See* Confessore, *supra* note 170.

173. *See* Nicholas Confessore, *Qualcomm Reveals Its Donations to Tax-Exempt Groups*, N.Y. TIMES (Feb. 22, 2013, 1:46 PM), http://cityroom.blogs.nytimes.com/2013/02/22/qualcomm-agrees-to-reveal-donations-to-tax-exempt-groups/.

174. *See, e.g.*, FLA. STAT. ANN. § 607.1602(3) (West 2007); MODEL BUS. CORP. ACT § 16.02(c)(1)–(3) (2013).

175. *See* DEL. CODE ANN. tit. 8, § 220(c).

176. *See, e.g.*, Randall S. Thomas, *Improving Shareholder Monitoring of Corporate Management by Expanding Statutory Access to Information*, 38 ARIZ. L. REV. 331, 368 n.205 (1996) ("[E]ven where the shareholder states a proper purpose, the Delaware courts will protect the corporation's sensitive business information by restricting the information produced . . . .").

177. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958).

states' similar laws, may provide shareholders with an enforceable right to obtain political spending information that *must not be* shared generally with voters.

It stands to reason that shareholders will be satisfied with less exacting campaign finance disclosure laws than voters will, because they can obtain corporate spending information from another source. For reasons discussed in the next section, they may prefer that some corporate spending information remain outside the public eye.

D. The Financial Interest in Limiting Disclosure

Voters' and shareholders' interests in corporate spending information differ in a fourth important way: shareholders have a financial interest in *limiting* public disclosure, and voters do not. Voters require public disclosure to obtain corporate spending information. It is certainly possible that onerous disclosure requirements could chill political speech and thereby reduce voters' access to information, but there is little evidence of this. Voters even may be interested in the reaction of the public to corporate spending disclosures and factor such information into their voting decisions.

Shareholders' interests are more complicated. Public disclosure of the corporation's electoral spending is often good for shareholders—when public disclosure serves as a channel for investor information, it allows shareholders to monitor management and reduce agency costs—but it also may lead to a reduction in shareholder value.

A shareholder may reasonably fear that public disclosure could subject the company to controversy or to boycott, leading to a drop in revenues or even to a lower stock price. In its 2010 *Handbook of Corporate Political Activity*, the Conference Board identified political spending as an "area of potential corporate vulnerability" because it involves reputational risk.[178] Ironically, the use of the internet for quick public dissemination of filings and for database synthesis of disclosure information is helpful to voters but poses risks to corporate donors, because it makes it easier for regulators and the public to monitor for violations of campaign finance laws. A corporation's violation of campaign finance regulations can result in fines, as well as reputational harm.[179]

Public disclosure of a company's political expenditures may, in some circumstances, reveal the company's business strategy to competitors.[180] For example, a retailer might not want competitors to know that it has begun spending money to support candidates in an area where it has no stores, because this could indicate the retailer's intention to open a store

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178. CONFERENCE BD., HANDBOOK ON CORPORATE POLITICAL ACTIVITY: EMERGING GOVERNANCE ISSUES 17 (2010), *available at* http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/id/4084.

179. *Id.*

180. *See* HEIDI WELSH & ROBIN YOUNG, CORPORATE GOVERNANCE OF POLITICAL EXPENDITURES: 2011 BENCHMARK REPORT ON S&P 500 COMPANIES 4 (2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1959566.

there. Likewise, disclosure of a corporation's donations to support or oppose a ballot initiative can tip the corporation's hand to competitors about its plans with regard to labor, taxes, or any number of business-related subjects.

Shareholders have a financial interest in limiting the company's expense to comply with disclosure obligations, such as ongoing reporting requirements. The costs of complying with disclosure laws can be high, and involve not only the expense of recordkeeping, but the cost of monitoring disclosure laws in multiple jurisdictions.[181]

The concerns raised about the costs of campaign finance disclosure to businesses in these and other cases are very similar to the concerns raised by businesses, securities regulators, and commentators about the costs of disclosure mandated by the federal securities laws. In a speech to the National Association of Corporate Directors in 2013, SEC Chairwoman Mary Jo White cautioned that when disclosure "strays from its core purpose," investors experience "information overload," and she suggested that disclosure obligations should be pared back.[182] In December 2013, the SEC issued a staff report about disclosure to Congress that raised questions about the usefulness of various types of securities disclosure and concluded that the issue warranted further study.[183] The SEC has continued to raise concerns that companies may be overburdened by disclosure requirements, and in some recent instances it has expressly urged companies to reduce their disclosures to make them easier for investors to use.[184]

* * *

The four examples above highlight specific ways in which voters and shareholders have different informational needs that are satisfied by different kinds of campaign finance disclosure. Taken together, they show that a campaign finance disclosure regime guided by voter primacy is likely to mandate swift, preelection disclosure of corporate electoral spending, with low disclosure thresholds for outside spending as well as for contributions. In contrast, a disclosure regime guided by shareholder primacy would have high disclosure thresholds, particularly for outside

181. For example, in 2013, in *Iowa Right to Life Committee, Inc. v. Tooker*, 717 F.3d 576 (8th Cir. 2013), the Eighth Circuit invalidated "perpetual, ongoing" disclosure obligations that applied to corporations that spent money to influence elections in the state, noting that they could be "particularly difficult . . . for smaller businesses . . . ." *Id.* at 596–97 (quoting Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 874 (8th Cir. 2012)).

182. White, *supra* note 20 ("I am raising the question here and internally at the SEC as to whether investors need and are optimally served by the detailed and lengthy disclosures about all of the topics that companies currently provide in the reports they are required to prepare and file with us.").

183. *See* SEC, REPORT ON REVIEW OF DISCLOSURE REQUIREMENTS IN REGULATION S-K 95–96 (2013), *available at* http://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf.

184. *See, e.g.*, Tammy Whitehouse, *SEC: Trim Excess Data from Financial Reports*, COMPLIANCE WEEK, Mar. 2014, at 33 (reporting that SEC deputy chief accountant Dan Murdock had "called on companies to do what they can . . . to reduce disclosures in the body of the financial statements and in the footnotes").

spending, and summary postelection disclosure. It might even have separate disclosure thresholds for businesses. And it would be highly sensitive to the costs of regular recordkeeping and reporting obligations for businesses large and small.

These competing interests cannot be achieved through the same set of disclosure rules. Because voters' and shareholders' informational interests demand different types of disclosure, optimal disclosure for one audience will be suboptimal for the other. The consequence is that, after *Citizens United*, lawmakers and regulators who draft or amend campaign finance disclosure rules that apply to corporations must compromise. Expanding the audience for campaign finance disclosure to include shareholders is thus unlikely to lead to more disclosure that is helpful to more additional categories of stakeholders. Instead, it is likely to lead to a refocusing of disclosure priorities away from the needs of voters, and ultimately to less disclosure that is helpful to voters.

III. THE IMPLICATIONS OF REPURPOSING CORPORATE CAMPAIGN FINANCE DISCLOSURE

In an election, a nexus exists between whose interests campaign finance disclosure serves and whose political interests are likely to be advanced at the polls. If disclosure laws are well designed to meet voters' informational needs, voters will be able to easily obtain information they find useful in making voting decisions, and they will be more effective at voting in a way that promotes their political interests and policy preferences. Conversely, if voters cannot obtain information that would help them decide among competing candidates, ballot initiatives, or referenda, they will be less effective at advancing their political interests when they vote. Both the content and the manner of disclosures impact the effectiveness with which disclosure serves voters' interests.[185] As we have seen, voters and shareholders have competing interests in the content and manner of corporate electoral spending disclosure, and since *Citizens United* has repurposed this type of disclosure to serve both audiences, campaign finance disclosure laws will be reshaped over time to satisfy shareholders' informational interests at the expense of voters.

In this final part, I argue that the Court's move in *Citizens United* to repurpose campaign finance disclosure is likely to have at least three results. First, it will enhance the political power of a small number of very wealthy individuals at the expense of lower-income Americans. This is because stockholding in U.S. public companies skews strongly toward the very wealthy. Second, in some states but not in others, changes to disclosure will strengthen the power of shareholder groups that lack any ties to the community, enhancing the political influence of exclusively profit-driven interests.

Finally, the move to expand the audience for corporate electoral disclosure may have constitutional consequences for campaign finance.

185. *See* Mayer, *supra* note 96, at 259.

Shareholder interests may increase in importance in the First Amendment analysis justifying compelled campaign finance disclosure by for-profit businesses because the Court has been weakening voters' interests in source revelation. If shareholders' interests take on greater significance in the constitutional analysis and corporate electoral spending disclosure were to become available via another disclosure channel—for example, through securities disclosure rules that the SEC is being pressed to create[186]—the informational interest supporting corporate campaign finance disclosure could be weakened or even eliminated. Corporate electoral spending disclosure could migrate from the authority of the FEC and state election agencies to the authority of securities regulators, furthering the investor-centric focus of rules governing its form and substance.

Fundamentally, voters and corporate shareholders are different interest groups. Not all voters own stock, and not all stockholders vote. Some Americans are both eligible to vote *and* own stock in U.S. companies, but it is difficult to estimate the size of this group with precision.[187] Recent surveys have found that fewer than half of adult Americans are beneficial owners of any corporate stock.[188] This suggests that fewer than 120 million adult Americans were stockholders at the time of the 2012 election. By comparison, almost 222 million Americans were eligible to vote in that election.[189] Although we must paint with a broad brush, these facts suggest that the population of individuals in 2012 who were eligible to vote in the federal election and owned zero corporate stock may have reached as high as 100 million Americans. Most stockholders of U.S. public companies are probably eligible to vote in the United States, but only slightly more than half of eligible voters in the United States probably own at least one share of stock in a U.S. public company.

These observations tell us nothing, however, about the demographics of the typical stockholding voter versus the typical non-stockholding voter. Because anyone who owns even a single share of stock might be placed in the shareholder category, these statistics fail to shed light on other key questions: How many shareholders own enough stock of a particular

186. *See, e.g.*, Petition for Rulemaking from Comm. on Disclosure of Corporate Political Spending to Elizabeth M. Murphy, Sec'y, SEC (Aug. 3, 2011) [hereinafter Petition for Rulemaking], *available at* http://www.sec.gov/rules/petitions/2011/petn4-637.pdf.

187. The author is unaware of any scholarship that has quantified the number of Americans who are both eligible to vote in federal elections and own stock in U.S. public companies.

188. *See* LAWRENCE MISHEL ET AL., THE STATE OF WORKING AMERICA 392 (12th ed. 2012) (finding that, in 2010, 46.9 percent of U.S. households owned any stock); William W. Bratton & Michael L. Wachter, *Shareholders and Social Welfare*, 36 SEATTLE U. L. REV. 489, 515 (2013) ("Stockholding households increased from just over 30% in 1989 to over 53% in 2001 and dropped back to just under 50% by 2010 . . . ."); Alec Tyson, *Economic Recovery Favors the More-Affluent Who Own Stocks*, PEW RESEARCH CTR. (May 31, 2013), http://www.pewresearch.org/fact-tank/2013/05/31/stocks-and-the-recovery-majority-of-americans-not-invested-in-the-market/.

189. *2012 November General Election Turnout Rates*, U.S. ELECTIONS PROJECT, http://www.electproject.org/2012g (last updated Sept. 3, 2014). These figures exclude noncitizen residents of the United States and ineligible felons, and include overseas residents who are eligible to vote.

corporation that they identify with its political interests? How many shareholders have sufficient wealth invested in stock that they identify as part of the investor class? The identification question is important because only a small proportion of stockholders are likely to share the unique political interests of investors, and even fewer are likely to own sufficient stock to actually influence a particular corporation's behavior through the "procedures of corporate democracy."

Since *Citizens United*, disclosure rules have become the main battleground for campaign finance reform.[190] There has been increased legislative activity to enact and amend state disclosure laws, as well as increased litigation challenging campaign finance disclosure. Through this legislative activity and litigation, campaign finance disclosure rules are evolving. Now is the right time to consider critical questions of audience with regard to our campaign finance disclosure regime.

Part IV of *Citizens United* must be understood as part of a broad trend in corporate disclosure that goes well beyond campaign finance law. The trend reflects deep ambivalence about how we regulate corporate activity and particularly about who the audience should be for various types of corporate disclosure. It has emerged because lawmakers are increasingly relying on disclosure to stand in for substantive regulation of corporate activity. Yet there is little clarity about how disclosure is supposed to regulate corporations through private ordering. Does "deregulate and disclose" work through the disclosure of information to people *inside* the corporation—investors—who are then supposed to use the information to regulate corporate behavior? Or does it work through the dissemination of information to people *outside* the corporation—consumers, employees, citizens—who are supposed to use the information in deciding what to buy, where to work, and how to vote? Since disclosure cannot serve all audiences equally well, the substitution of disclosure for regulation of corporate activity raises serious questions of audience.

The Dodd-Frank Wall Street Reform and Consumer Protection Act[191] ("Dodd-Frank Act"), enacted by Congress in 2010, exemplifies the disclosure audience problem in the domain of securities regulation. Securities disclosure, which traditionally has been investor focused, increasingly is being repurposed to provide corporate information to the general public. Among its several reforms, the Dodd-Frank Act requires the SEC to compel public disclosure of corporate information relating to CEO compensation, resource extraction payments, "conflict" minerals, and

190. *See, e.g.*, Mayer, *supra* note 96, at 255 (stating that after *Citizens United*, "supporters of campaign finance regulation are turning more and more to disclosure rules to police campaign fundraising and spending").

191. Pub. L. No. 111-203, 124 Stat. 1376 (2010).

mine safety.[192] The purposes behind these new disclosure requirements have little to do with investor education.[193]

Regulators' and courts' hostility to Dodd-Frank's expanded audience for securities disclosure has led some to conclude that the solution is to *reduce* disclosure.[194] Regulators have asserted that securities disclosure on subjects of primary interest to the general public potentially "overloads" investors with excess information.[195] In 2013, the U.S. District Court for the District of Columbia threw out the public disclosure component of the SEC's Resource Extraction Rule, and the D.C. Circuit held that the Conflict Minerals Rule violated corporations' First Amendment rights against compelled speech.[196] These regulators and courts have succeeded in squelching the disclosure mandated by Dodd-Frank in part because Congress did not clearly define the audience for those disclosures.

Ultimately, the problem of audience for corporate disclosure has been driven by advances in information technology, which make it possible for intermediaries to easily obtain and report on a wide range of corporate disclosures on the internet, where new audiences find and use the information. Thus, campaign finance disclosure reports published on the FEC's website, or environmental disclosures published on the EPA's website, are easily incorporated into reports for investors; financial and environmental disclosure information contextualizes corporate electoral spending information for voters. Information technology advances have dramatically lowered the costs for shareholders to obtain corporate campaign finance disclosure information, but it does not necessarily follow that corporate campaign finance disclosure should be redesigned with the purpose of addressing shareholders' informational needs.

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192. *See, e.g.*, *id.* § 953, 124 Stat. at 1903–04 (proposed CEO-Pay Ratio Rule); 17 C.F.R. § 240.13q-1 (2013) (Resource Extraction Rule); 17 C.F.R. § 240.13p-1 (Conflict Minerals Rule); 17 C.F.R. § 229.104 (Mining Safety Rule).

193. *See, e.g.*, Daniel S. Gallagher, Comm'r, SEC, Remarks at SEC Historical Society 2014 Annual Meeting: On the 80th Anniversary of the SEC (June 5, 2014), *available at* http://www.sec.gov/News/Speech/Detail/Speech/1370542005031#.VNPvllXF9XY (describing the "Dodd-Frank Title XV trifecta of mine safety, extractive resources, and conflict minerals disclosures" as "legislative mandates utterly devoid of any connection to investor protection").

194. More fundamentally, because disclosure audiences must now operate across disclosure regimes to obtain information about corporations, we should expect to observe what Professor Adrian Vermeule has termed "system effects" in corporate disclosure. *See* Adrian Vermeule, *System Effects and the Constitution*, 123 HARV. L. REV. 4, 6 (2009). Put simply, what may appear at first blush to be a beneficial expansion of disclosure for one interest group or in one legal regime may result in a loss of disclosure at the system level. The main contention of this Article—that expanding the audience for campaign finance disclosure to include shareholders is likely to lead to a *decrease* in disclosure useful to voters—describes such a system effect.

195. White, *supra* note 20.

196. *See* Am. Petroleum Inst. v. SEC, 953 F. Supp. 2d 5 (D.D.C. 2013) (vacating the Resource Extraction Rule); *see also* Nat'l Assoc. of Mfrs. v. SEC, No. 13-5252 (D.C. Cir. Apr. 14, 2014), *reh'g granted*, No. 13-5252 (D.C. Cir. Nov. 18, 2014).

A. Wealth and Demographics

Voters and corporate shareholders are likely to have different political interests and policy preferences. Stockholding Americans are more likely to be white, male, and older than non-stockholding Americans, and more likely to identify as Republican.[197] Americans who own stock are also likely to be better educated and wealthier than those who do not. Stock ownership in the United States is highly concentrated in the college educated: 77 percent of college-educated Americans own stock, while only 25 percent of those who have not attended college do.[198]

Stock ownership skews strongly toward the wealthy. Three-quarters of Americans with incomes over $80,000 own stock, while only a very small proportion—15 percent—of those with income less than $30,000 own stock.[199] Wealthier individuals tend to own more stock, particularly stock owned directly rather than in a retirement account. In 2010, the wealthiest 5 percent of U.S. households owned more than 67 percent of U.S. stock, and almost 80 percent of U.S. stock that was not held in retirement accounts.[200] Less than a third of American households owned more than $10,000 in stock, and the great majority of these stockholdings were in retirement accounts.[201]

Demographic differences between stockholding Americans (as a group) and voters (as a group) likely are amplified when we distinguish between all eligible voters and those who actually go to the polls. Commentators have noted that a "strong positive correlation" exists between the likelihood that an individual will go to the polls and her income and education level.[202] The content of disclosure may exacerbate this effect, because eligible voters probably feel more invested in an election when they find the campaign finance disclosure available to them relevant and helpful. They feel confident that they understand the competing interests and have the informational tools to decide among them, and thus are probably more likely to cast a vote at all.

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197. Bratton & Wachter, *supra* note 188, at 521 (reviewing available data and concluding that "the modal shareholder is rich, old, and white"); Tyson, *supra* note 188. Stock ownership is highest among Americans between the ages of fifty and sixty-four (57 percent), and next highest among those between thirty and forty-nine (53 percent). *Id.* Fewer than a quarter of American adults between eighteen and twenty-nine own stock (24 percent). *Id.*

198. *See id.*; *see also* Jesse Bricker et al., *Changes in U.S. Family Finances from 2007 to 2010: Evidence from the Survey of Consumer Finances*, FED. RESERVE BULL., June 2012, at 28 tbl.6 (in 2010, only 2.2 percent of households whose head had not graduated from high school owned stock directly, compared to 27.2 percent of households headed by a college graduate).

199. Tyson, *supra* note 188.

200. MISHEL ET AL., *supra* note 188, at 387–88 (noting that "*[e]xcluding* stocks held in retirement accounts, the typical wealth holder—represented by households in the middle fifth—owns next to nothing in stock, just $1,700").

201. *Id.* at 392; Bricker et al., *supra* note 198, at 41 (finding that, in 2010, the median value of stock owned directly or indirectly by families in the bottom 20 percent of household income was $5300).

202. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1725 (1999).

Ultimately, because shareholders are disproportionately white, male, older, well-educated, and wealthy, we can expect that changes in the content and manner of disclosure that make it easier for shareholders to advance their political interests will disproportionately benefit these interest groups. The most significant advantage is likely to go to the very wealthy, because stockholding skews most strongly by wealth, particularly when we consider the value of stock owned. Very wealthy individuals share an interest in laws and policies that tend to entrench their wealth, for example by lowering tax rates on investment income.[203] It is unfortunate that the Court's move to expand the audience for corporate electoral spending disclosure is likely to empower the rich at the expense of the poor during a time of rising income inequality in the United States. We must therefore consider the politically destabilizing effects of this expansion.

The political empowerment of shareholders of U.S. companies means the political empowerment of wealthy foreigners as well as wealthy Americans. Shareholders are not merely a subset of voters. Foreign ownership of U.S. equity stocks has grown steadily since the 1960s and stands today at more than 10 percent.[204] Although foreign shareholders are ineligible to vote in any federal, state, or local election, their economic interests in corporate profit maximization will be advanced through the American political process in two ways: (1) as disclosure laws evolve to serve their informational needs as shareholders, allowing them to take action within the corporation to promote their interests, and (2) by empowering fellow shareholders who vote to do so in a way that advances the corporation's agenda. Because this is true, we can expect to see a political shift that favors not only the interests of very wealthy Americans, but also those of foreign nationals who own U.S. stocks, at the expense of the interests of lower-income Americans.[205]

B. Geographic Effects

Stock ownership is also concentrated in certain geographic areas of the United States. Direct stockholding is more common among households in the Northeast and the West, and less common among households in the Midwest and South.[206] Stockholding is also much more common among those who live in urban areas than in those who live in rural areas.[207] Even shareholders who *are* eligible voters in a U.S. state cannot vote in more

203. *See* Noveck, *supra* note 45, at 81 ("[W]ealthy citizens often have a strong incentive to push for policies that further entrench their business interests at the expense of others.").

204. Dinah Walker, *Quarterly Update: Foreign Ownership of U.S. Assets*, COUNCIL ON FOREIGN RELATIONS (Jan. 22, 2014), http://www.cfr.org/united-states/quarterly-update-foreign-ownership-us-assets/p25685.

205. For a discussion of the investments of sovereign wealth funds in U.S. public companies and the possible "strategic" motives of foreign governments as corporate shareholders, see Hayden & Bodie, *supra* note 112, at 489–91.

206. Bricker et al., *supra* note 198, at 29 tbl.6.

207. *See id.* (finding that 16.6 percent of households owning stock directly are in Metropolitan Statistical Areas, compared to only 7.9 percent of households outside such areas).

than one state; spending disclosures show that many for-profit companies make expenditures to influence elections in multiple states. When it comes to state and local elections, because of the diffuse stock ownership that characterizes many large companies, it is likely that only a minority of shareholders at a company seeking to influence a state or local election will actually be eligible to vote in that election. In some states this minority may be significantly larger than in others. It is possible, of course, for a corporation to seek to influence an election in a state or locality where it has *no* shareholders eligible to vote (and no employees or operations, for that matter).

This means that some states and local communities are likely to have fewer stockholding citizens than others. In poorer, rural places in the South and Midwest, public companies are likely to have few shareholders who are also citizens or community members. In these places, most shareholders of politically active corporations are likely to care about local political issues only insofar as they affect the corporation's profitability. These corporations have fewer shareholders to object if the corporation seeks to influence elections to pursue profits at the expense of civic goals.

In contrast, in urban jurisdictions, particularly in the Northeast and West, public companies will experience greater shareholder backlash when they spend money to influence elections with the single-minded purpose of maximizing profits, because these companies have a disproportionate number of shareholders who live, work, and vote in these places. In these areas, a high proportion of these corporations' shareholders will view the corporation's political activities in light of other civic and community-based interests, and the corporation's pursuit of profit maximization will be mediated by its shareholders' more broadly based interests. It is also reasonable to assume that shareholders who live, work, and vote in electoral areas where their corporation is politically active will pay greater attention to the corporation's political activity there.

C. The First Amendment and Competing Channels of Disclosure

The Roberts Court's recent campaign finance jurisprudence suggests that the main governmental interest that can justify disclosure laws is an informational interest, and several Justices have expressed skepticism that voters have legitimate informational interests in some kinds of spending disclosure, particularly those that provide source revelation. Shareholder informational interests provide an alternative justification for laws that compel disclosure of corporate independent expenditures. Thus, if the Court's recent opinions are any clue, it is likely that the First Amendment analysis of corporate electoral spending disclosure will evolve to place greater emphasis on shareholders' informational interests.

If this happens, the constitutional basis for compelled corporate spending information may collapse if corporate electoral spending data becomes available through another channel. In fact, the groundwork for this is already being laid. Since 2011, the SEC has received repeated demands that it craft political spending disclosure rules for reporting companies under the federal securities laws.[208] If and when the SEC does mandate corporate political spending disclosure, the important governmental interest in using campaign finance laws to disseminate the same information will disintegrate, and campaign finance disclosure of corporate spending may become vulnerable to constitutional challenge. Challengers will argue that campaign finance law need not mandate corporate spending disclosure if SEC rules already serve this purpose, and may further argue that overlapping disclosure regimes are so burdensome and costly to companies that they violate the First Amendment. Thus, the final result of expanding the constitutionally cognizable audience for corporate spending disclosure in election law to include shareholders may be the *end* of corporate spending disclosure in election law. If corporate electoral spending disclosure were to become the domain of securities regulators rather than election regulators, it would be governed exclusively by laws designed for investor protection, and enforced by regulatory authorities who are experts in, and primarily concerned with, the provision of information to investors.

CONCLUSION

In part IV of *Citizens United*, the Supreme Court did something pathbreaking and, ultimately, something harmful to campaign finance disclosure, and to corporate disclosure at the system level. By suggesting that corporate electoral spending disclosure laws may be justified, at least in part, by a "sufficiently important" governmental interest in providing corporate expenditure data to investors, the Court weakened what I have called "voter primacy." Voter primacy is the idea, less obvious today than it was five years ago, that campaign finance disclosure is *for voters*, and should be designed to serve the exclusive informational needs of the citizenry.

I have argued that the Court's expansion of the audience for corporate campaign finance disclosure is not likely to lead to an expansion of corporate spending disclosure. To the contrary, by pushing disclosure thresholds higher, disclosure deadlines later, and by heightening the sensitivity of lawmakers, regulators, and courts to the costs of disclosure to corporations, this neglected passage of *Citizens United* is likely to lead to *less* useful disclosure for voters. This, in turn, is likely to favor the political interests of wealthy business owners, here and abroad, above the interests of average Americans. For this reason, and because corporate and securities law are the proper domains for investor-focused disclosure, the Supreme Court should retreat from the path of *Citizens United*. Voter primacy has long guided the design of our campaign finance laws, as well as their judicial review under the First Amendment, and it should continue to do so.

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208. *See, e.g.*, Letter from Seventeen U.S. Senators to Mary Jo White, SEC Chair (Jan. 9, 2014), *available at* http://www.demos.org/sites/default/files/publications/Senate%20Letter%20to%20SEC%20on%20Political%20Spending%20Disclosure%20Reg%20Agenda%202014-01-09.pdf; Petition for Rulemaking, *supra* note 186.