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The System of Campaign Finance Disclosure

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The Supreme Court's decision in *Citizens United v. Federal Election Commission* has focused legal analysts and lawmakers on campaign finance disclosure for at least two reasons.[1] First, the constitutional invalidity of campaign expenditure restrictions, and the limited efficacy of campaign contribution limits, has left campaign finance disclosure as one of the few generally applicable tools available to regulate money in politics. Second, the Court's broad opinion, as sweeping in its approval of campaign finance disclosure as it is in its disapproval of campaign expenditure restrictions, conceals disclosure's surprisingly weak doctrinal and policy foundations. Prompted by a new wave of reforms and legal challenges, analysts are reexamining the practical costs and benefits of, and the constitutional basis for, campaign finance disclosure.[2]

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1. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010). The author served as counsel of record for 26 states as *amici curiae* in the case.

2. *See, e.g.*, Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 303 (2010) (arguing that disclosure "needs to be reformulated in light of modern communications technology, the extremist strain in contemporary political discourse, and a better understanding of just how disclosed information is used by the voters and can be used to educate the public"); Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J.L. & POL. 557, 572–73 (2012) ("In the *post-Citizens United* era . . . mandated disclosure can serve the important interest in deterring corruption and providing valuable information to voters."); Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255, 257 (2010) (addressing, in part, "whether the existing disclosure and

Michael Gilbert's article, *Campaign Finance Disclosure and the Information Tradeoff*,[3] is a productive contribution to this recent reconsideration of campaign finance disclosure. The article reevaluates the net informational consequences of campaign finance disclosure. This reevaluation balances both the *Citizens United* majority's confidence that "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages,"[4] and the fear in Justice Thomas's dissent that "disclosure requirements enable private citizens and elected officials to . . . prevent the lawful, peaceful exercise of First Amendment rights."[5] As Professor Gilbert observes, this balancing approach is necessary now because the underdeveloped state interest in informing the electorate "has become a critical fault line in the debate" over campaign finance disclosure.[6] Shifts in the informational consequences of a disclosure rule may determine the rule's practical efficacy and constitutional validity. As the Court in *Citizens United* suggested, the relative strength of that informational interest turns on whether or not disclosure would help voters "make informed choices in the political marketplace."[7] The question is more difficult than it seems, and Professor Gilbert's "information tradeoff" model proposes a better way to answer it.

This Essay considers Professor Gilbert's model as the core element in a dynamic system of campaign finance disclosure. First, it recognizes several useful contributions of the model's framework of informational costs and benefits. In the simplest analysis, disclosure increases the information available to voters by adding source revelation to campaign speech. However, the reality is more complicated. Disclosure can have a chilling effect that decreases the amount of campaign speech by imposing administrative and exposure burdens on speakers. As Professor Gilbert shows, this cannot end the analysis. What matters is not just the magnitude of the chilling effect on speech, but the net "information tradeoff" between the decrease in campaign speech and the increase in source revelation, both of which are informative to voters.[8] Moreover, disclosure can "thaw" speech because source revelation sometimes increases the expected value of speech

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disclaimer rules result in more informed voters and if they do not, whether any disclosure and disclaimer regime would be more likely to accomplish this goal"). For the author's examination of these issues in more depth, see Anthony Johnstone, *A Madisonian Case for Disclosure*, 19 GEO. MASON L. REV. 413, 416 (2012) (suggesting several "more focused means of disclosure for individuals, organizations, 'foreign' campaign participants, and issue advocacy").

    3.   Michael D. Gilbert, *Campaign Finance Disclosure and the Information Tradeoff*, 98 IOWA L. REV. 1847 (2013).

    4.   *Citizens United*, 558 U.S. at 371.

    5.   *Id.* at 483.

    6.   Gilbert, *supra* note 3, at 1851.

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

    8.   Gilbert, *supra* note 3, at 1852.

to a speaker, thereby encouraging some speech that would not otherwise occur.[9]

Second, this Essay builds upon the information tradeoff in several directions, drawing on other scholars' perspectives of campaign finance as a complex system of dynamic interactions. It refines the speaker's cost-benefit function in the information tradeoff at the level of the individual disclosure rule, extends the information tradeoff analysis to dynamics involving multiple individual disclosure rules at the regime level, and considers the aggregate information tradeoff from multiple interacting regimes at the system level. The Essay concludes by suggesting that, given the difficulty of determining the information tradeoff at the rule, regime, and system levels, analysts, policymakers, and courts should more often recognize the value of second-best solutions to campaign finance disclosure.

I.   THE INFORMATIONAL COSTS AND BENEFITS OF DISCLOSURE

Professor Gilbert focuses on the informational costs and benefits of campaign finance disclosure from the listener's perspective. He takes into account the speaker's calculation of whether or not to speak under a particular disclosure rule.[10]   Gilbert's model makes three critical and contestable assumptions about what kind of information matters most in politics. Each assumption takes a strongly democratic, voter-centered view of political discourse.

First, the model assumes the total amount of information available to individual voters is the proper object of maximization in the information tradeoff. This does not deny the importance of intermediaries and other elites. It does, however, discount the value of information available only to those elites, using a simple approximation of the overall level of information available to both voters and elites. Second, Gilbert's model assumes that from a voter's perspective, source revelation serves as an imperfect informational substitute for campaign speech itself. Because of simplification and distortions, the substantive importance of campaign speech can be overstated. Meanwhile, cues such as source revelation are significantly informative to the extent that voters can consider the source of speech and discount the value of the message based on the identity of the messenger. Third, it equates contributions and expenditures as "speech acts," which are similarly valued in terms of the speaker's expression of campaign speech and the listener's interest in source disclosure.

Based on these assumptions, the article makes two primary claims challenging conventional wisdom that campaign finance disclosure informs voters and chills speech. First, any disclosure rule can create an "information tradeoff" between the source information revealed by the disclosure and the

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9.   *Id.* at 1853.
10.   *Id.* at 1852.

substantive message communicated by the speaker. This occurs whenever the disclosure rule chills speech by a speaker for whom the administration and exposure costs of revealing source information outweigh the policy benefits of communicating the substantive message. Second, some disclosure rules can "thaw speech" by marginally increasing speakers' expected benefits relative to the cost of disclosure. This may occur either by increasing the value of the intended policy benefits, or by increasing the probability that the speech will result in those benefits. Disclosure can increase the probability of a benefit to a speaker by revealing to the speaker the supporters of a candidate, which may facilitate an assessment of the candidate's credibility on the issue relevant to those supporters.

This same assessment could be performed by a speaker deciding whether to oppose a candidate based on disclosure of a candidate's supporters. For example, a candidate's promise to adopt a policy addressing climate change may be more credible if disclosed supporters are environmental advocates and less credible if disclosed supporters are coal producers. The credibility assessment runs both ways and can create a feedback loop in which the candidate uses disclosure to assess the credibility of supporters' promises to support the candidate or opponents' threats to oppose the candidate. This can encourage the supporters or opponents to speak and ensure the candidate delivers or takes back the promised policy. In these ways campaign finance disclosure that increases candidate or speaker credibility can encourage campaign speech. It also can decrease candidate or speaker credibility and thereby discourage campaign speech, but for a reason unrelated to any "chilling" effect from disclosure.

In addition to credibility, disclosure also can clarify the substance of a candidate's policies. For example, a candidate that has made no promise on climate change policy may still have disclosed supporters or opponents that indicate the candidate's likely policy. Here, disclosure increases the *perceived* probability or value of a benefit to the speaker. It facilitates the speaker's discovery of a candidate's credibility or policies but not an actual change in the candidate's inherent credibility or policies. Still, the expected benefit materializes, and the campaign speech occurs, only when it exceeds the speaker's cost of disclosure. If the speaker's cost of disclosure exceeds the speaker's perceived benefit from speech, that speaker's speech is chilled. In economic terms, disclosure can make campaign finance more efficient, for better or worse.[11] It can provide information about candidate credibility and policy that encourages campaign speech (or other analogous campaign transactions like contributions) from speakers that recognize an expected benefit only because of the information campaign finance disclosure reveals.

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11.   Disclosure might also facilitate a candidate's corruption by clarifying the stakes presented by a threat of bribery or extortion. This might enable coercion of a candidate to change policy. Yet transparency also increases the likelihood that corruption will be discovered.

II.   DISCLOSURE AS A SYSTEM

Examining system effects can help to illuminate and extend Professor Gilbert's analysis. Whether a given disclosure rule results in a net increase or decrease in campaign speech from the listener's perspective is a function of the aggregated decisions of all potential campaign speakers under the rule. A regime that increases the disclosure of information at the level of individual actors might lead to a reduction in the overall information available, or vice versa. In the analogous setting of mandatory financial disclosure, Geoffrey Manne explains how disclosure laws can have the perverse effect of reducing the overall level of disclosure.[12] There is more than a simple tradeoff in the decision to engage in an act subject to disclosure. Instead, actors in both financial markets and campaign finance face a range of transactional options among various informational channels, each subject to different disclosure rules. When the flow of information becomes too constricted by the costs of disclosure, and the barriers between channels are permeable, speakers will divert information flows like water from more constricted to less constricted channels. This is what Professor Manne terms the hydraulic theory of disclosure, which "holds that, as disclosure rules impose costs on behavior subject to disclosure, where behavior can be altered at a lower cost than the cost of disclosure, disclosure rules will induce behavioral changes rather than increased information flow."[13]

The terminology echoes the campaign finance literature, wherein Samuel Issacharoff and Pamela Karlan describe the "hydraulics of campaign finance reform": they explain that "[m]oney, like water, will seek its own level. The price of apparent containment may be uncontrolled flood damage elsewhere . . . . The money that reform squeezes out of the formal campaign process must go somewhere."[14] Like the money that purchases campaign speech, campaign speech itself is subject to hydraulic effects across a regime of disclosure rules. More broadly, the interaction of costs and benefits accruing to different actors gives rise to a complex system in which the aggregate effects of the regime on the whole may differ from the individual effects of the regime on any component.[15]

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12.   Geoffrey A. Manne, *The Hydraulic Theory of Disclosure Regulation and Other Costs of Disclosure*, 58 ALA. L. REV. 473, 483 (2007) (arguing that "imposing restrictions on the manner and content of disclosures may, perversely, have the effect of reducing the overall amount of disclosure, assuming firms would have disclosed voluntarily anyway," a warranted assumption according to Manne).

13.   *Id.* at 485.

14.   Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1713 (1999).

15.   *See generally* ADRIAN VERMEULE, THE SYSTEM OF THE CONSTITUTION (2011); Adrian Vermeule, *System Effects and the Constitution*, 123 HARV. L. REV. 4, 7 (2009).

This model is worth extending beyond the speaker's decision whether or not to speak. Under most campaign finance laws, speakers have more options than simply a choice of whether to speak. Speakers also can choose how and what to speak. Professor Gilbert hints at these effects when he notes that some disclosure rules, "by chilling some speech acts and thawing others, . . . might change not only the amount of speech that takes place but also the character and content of the speech."[16] Yet he disclaims any analysis of such distributional shifts because they may require "making explicit assumptions about the character of speech under both regimes and assigning social value to each."[17] However, some analysis of shifts in the sources and types of information is possible while remaining neutral as to the relative social value of those sources and types.[18] Beyond the interactions of speakers with a particular disclosure rule, the analysis also could consider the interaction of disclosure rules across a campaign finance regime and the interaction of several regimes within a broader system.

With this in mind, the cost-benefit model of disclosure might be extended into a systems model of campaign finance disclosure. At the core of this system-level analysis is Professor Gilbert's tradeoff model. A rule may set a dollar threshold for contribution disclosure, or a definition for express advocacy disclosure. At the rule level the information tradeoff between speech and source revelation occurs *within the channel subject to that rule.* On balance the tradeoff dynamic produces a particular amount of information for voters within that channel. For example, a rule establishing a low dollar disclosure threshold for campaign contributions may produce more source revelation information but fewer campaign contribution speech acts, subject to potential thawing effects. Beyond the rule-level tradeoff dynamic is the hydraulic dynamic at the regime level, which describes the diversion of information within the campaign finance system *from a channel subject to one rule to another channel subject to another rule (or no rule at all).* A regime may include a set of rules for different disclosure of contributions and expenditures, or issue and express advocacy. For example, a disclosure regime that includes rules establishing a low dollar disclosure threshold for campaign contributions and a high dollar disclosure threshold for independent campaign expenditures may divert speech acts (and related disclosure) from campaign contributions to independent expenditures and

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16.   Gilbert, *supra* note 3, at 1889 n.170.

17.   *Id.*

18.   After all, the "information tradeoff" makes explicit a substitution of one type of information (source revelation) for another (speech), and presumes that the substitution is material to an evaluation of the total amount of speech. The substitution may be imperfect. Sometimes a single source revelation produced by a disclosure rule may offset fully the information lost to chilled speech. Other times it may take ten or more source revelations to offset the information loss. The informational balance depends on the context of the tradeoff. Thanks to Professor Gilbert for clarifying this point.

result in more or less information overall. Above the rule-level tradeoff and regime-level hydraulic dynamics is the system-level dynamic, which describes information effects on the overall campaign finance regime resulting from the interaction *among a system of channels subject to different rules.* A system may take in the interaction of disclosure regimes for contributions and expenditures, and issue and express advocacy. For example, from a disclosure system that includes different regimes governing express advocacy supporting or opposing candidates, and issue advocacy supporting or opposing specific legislation, may emerge complex and surprising dynamics that produce more or less information than the component regimes might suggest. Together, each of these models can facilitate additional analysis along the lines of, but beyond, what Professor Gilbert suggests.

A. *RULE-LEVEL TRADEOFFS*

At the base of the system of campaign finance disclosure is the information tradeoff that occurs under individual disclosure rules. Consider the climate change policy example Professor Gilbert uses to introduce the potential speech-thawing effects of disclosure. In it, a potential speaker who supports policies to combat climate change is trying to decide which of two candidates to support. One candidate has not spoken to the issue either way. In the absence of a public commitment, the speaker seeks to clarify which policy the candidate will support if elected. The other candidate has promised to support such policies in the past. Given changes in public sentiment, however, the speaker is unsure of the candidate's credibility in terms of the probability that if elected the candidate will in fact support the policy. Through disclosure of campaign contribution records, the potential speaker might be able to verify candidate's implicit policy commitment, or the credibility of an expressed policy commitment, using contributors as a proxy for the candidate's likely policy position. In cases where disclosure enables potential contributors to gain enough confidence in a candidate's credibility, the increased expected value of the contribution "flips" the cost-benefit calculation and the contribution occurs.[19] Similarly, disclosure can change a potential contributor's assessment of the magnitude of a candidate's policy value.[20] These effects can reiterate and combine to complicate the resulting disclosure calculus for speakers.[21]

In each case the level of speech or contributions is a function of the expected benefit of the speech or contribution (the underlying policy value discounted by the credibility of a candidate acting on the policy) and the

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19.   Gilbert, *supra* note 3, at 1885.

20.   *Id.* at 1886–87.

21.   *See* Michael D. Gilbert, *Disclosure, Credibility, and Speech*, 27 J.L. & POL. 627, 636 (2012) ("Game theory can help untangle strategic interactions like the ones I have described, and perhaps in the future I or someone else will apply it to this topic.").

cost of disclosure. When, due to a disclosure rule, the cost of disclosure exceeds the expected benefit, the speech is chilled and there is an information tradeoff, with source revelation by non-marginal speakers coming at the expense of speech by marginal speakers. Conversely, when the expected benefit exceeds the cost of disclosure, the speech is thawed, and there is an information increase; the increase includes the required disclosure plus the speech that would not have occurred but for the disclosure occurring under the rule.

Professor Gilbert's analysis of information tradeoffs draws an analogy to Judge Learned Hand's formula for determining liability in negligence.[22] Indeed, the three proposed factors to determine whether a disclosure rule chills or thaws speech roughly parallel the Hand Formula's probability, injury, and burden of precaution variables, with candidate credibility, policy value, and costs of disclosure doing similar work. In a point he raises but does not develop, Professor Gilbert acknowledges that the cost of disclosure is risky in terms of the probability that such cost will materialize. As he explains the basic chilling effect, "[r]ather than endure those risks and costs [of disclosure], would-be speakers may choose to remain silent."[23] These risks require that, like the benefit side of the equation, the costs of disclosure should be discounted. This suggests a minor, but illuminating, amendment to the basic information tradeoff model at the rule level.

Unlike Professor Gilbert's novel point that a candidate's credibility enters a speaker's campaign speech function as a discount to the value of the speech, the doctrine already recognizes the probabilistic nature of disclosure costs. While administrative and compliance costs are predictable, what he calls "the fear of exposure"[24] is just that—a fear rather than a certainty. The Supreme Court appears to conduct just such a risk assessment of probability when it asks, as it does in weighing the constitutionality of a disclosure rule in *Citizens United*, "if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if [donors'] names were disclosed."[25] Given how serious an injury exposure can pose to expressive association, it must be the probability of such injury, and not the unquestionable gravity of the injury itself, that determines the cost side of the chilling equation.

This helps explain why the Court discounts the chilling effect claims of a corporation like Citizens United that "has been disclosing its donors for years and has identified no instance of harassment or retaliation,"[26] while fully crediting the "specific incidents of private and government hostility"

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22.   Gilbert, *supra* note 3, at 1890 (citing United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947)).

23.   *Id.* at 1855.

24.   *Id.* at 1873.

25.   Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 367 (2010).

26.   *Id.*

reflecting pervasive harassment of the Socialist Workers Party.[27] More importantly, the discounted cost analysis lends further structure to the distinctions between a case like the Proposition 8 supporters who suffered "random acts of violence directed at a very small segment of the supporters of the initiative" that did not amount to a cognizable chill,[28] and Margaret McIntyre who suffered no violence but as a lone pamphleteer "on a controversial issue" was more likely "to precipitate retaliation" than a group of campaign donors.[29] A very small risk of reprisal against any one member of a large organizational speaker is heavily discounted relative to a more significant (although unrealized) risk of reprisal against a lone individual speaker because the latter risk is more likely to have a decisive chilling effect on the speaker than the former. The different tradeoffs between source revelation and chilled speech for Proposition 8 supporters and Mrs. McIntyre are a function of this risk differential.

B.   *REGIME-LEVEL HYDRAULICS*

The aggregation of individual disclosure rules, each governing a single channel of campaign speech acts, forms a regime that gives rise to hydraulic effects across channels. In their fruitful critique, *The Hydraulics of Campaign Finance Reform*, Samuel Issacharoff and Pamela Karlan argue the futility of campaign spending limits but generally support disclosure as a means to promote "vigilance from within the political process."[30] They suggest "[i]f disclosure is unadorned with the heavy regulatory baggage of limitations, it might be far less likely to produce evasion" through the kind of hydraulic processes they describe.[31] This reflects an optimism similar to the Supreme Court in *Citizens United*, which concluded "[a] campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today."[32] Both views rely on the simple static model of disclosure that Professor Gilbert successfully complicates with a more dynamic model. Campaign speakers can engage in the same cost-benefit weighing of disclosure as campaign spenders use in responding to contribution and spending limits. Just as spenders in a regime of diverse spending rules governing different channels will factor diversion of spending from one channel to another in their cost-benefit calculation, so too will speakers. This suggests that Professor Issacharoff's and Professor Karlan's hydraulic model too narrowly focuses on spending limits to the

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27.   Brown v. Socialist Workers '74 Campaign Comm. (Ohio), 459 U.S. 87, 99 (1982).

28.   ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197, 1217 (E.D. Cal. 2009).

29.   McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 355 (1995).

30.   Issacharoff & Karlan, *supra* note 14, at 1737.

31.   *Id.*

32.   Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 370 (2010).

exclusion of source disclosure,[33] and that Professor Gilbert's tradeoff model could be extended to account for hydraulic effects of disclosure rules.

Recent debates and reform proposals surrounding "dark money" respond to the hydraulics of campaign finance disclosure. After *Citizens United* invalidated corporate expenditure limits, all of the most sophisticated political players faced no regulatory obstacle to spending unlimited amounts of funds on campaign speech, at least in terms of spending restrictions. Money flowed back into previously regulated channels in response to the Court's deregulation of campaign finance, a response Professor Michael Kang calls "reverse hydraulics."[34] Spending rules drive part of this reverse-hydraulic effect, since some of the new inflow of funding into corporate campaign actors results from the diversion of limited campaign contributions to unlimited independent expenditures, as the Issacharoff–Karlan model predicts. But this account is incomplete without the regime-level dynamic of differential disclosure rules that divert speech from the more transparent campaign or political committee contribution channel to the less transparent independent expenditure channel.

In Professor Gilbert's model, speakers weigh the costs and benefits of speech, and will choose to speak when the expected policy benefits outweigh the expected disclosure costs under a given rule. When the campaign finance disclosure regime regulates several different speech channels under several different rules, speakers face more than a binary decision. Instead of choosing only *whether* to speak and disclose, a speaker can choose *how* to speak and disclose. Choosing among sources of speech, a speaker can contribute to a candidate's campaign as a proxy for the speaker's own speech, or contribute to a political action committee or other advocacy organization, or speak directly through an independent expenditure. From any of these sources, a speaker can expressly support or oppose a particular candidate or political party, or instead advocate for a particular issue or specific legislation. Because the benefits from the speech, as well as the costs of disclosure, vary across these channels of campaign speech, the speaker may optimize the costs and benefits. A speaker may be able to factor both the source and the speech as variables in the cost-benefit calculation. Just as a single disclosure rule influences the amount and mix of information produced, the regime of disclosure rules influences the amount and mix of information the regime produces. As the scale of analysis increases from a rule to a regime of rules, the information tradeoff should take account of hydraulic effects.

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33.   In an earlier critique of Professors Issacharoff and Karlan, Michael Kang suggests more broadly that "[t]he real hydraulics problem is more profound and rises above the fungibility of money or the specifics of campaign finance," which "are most often just a subset category of the hydraulics of party regulation." Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 149 (2005).

34.   Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 40–52 (2012).

For example, a rule-based analysis of the information tradeoff from express advocacy disclosure asks whether voters will be more or less informed by a rule establishing a low reporting threshold.[35] A regime-based analysis takes account of the contributors' choice of not just whether to spend on speech, but also how to spend on speech. Assume that low-dollar contributions for express advocacy (to a candidate's campaign, for example) are moderately valuable to most contributors in terms of expected policy benefits. In that case, the costs of small-dollar disclosure to most contributors are slightly less than those benefits, and that disclosure of small-dollar contributors to express advocacy is modestly informative. Most contributors will not be chilled, and the information tradeoff from the rule will be positive in terms of both the substantive message of express advocacy and the source revelation from small-dollar disclosure.

Introduce another rule to the regime for non-disclosure of issue advocacy, however, and both the speakers' cost-benefit calculations and the listeners' information tradeoff may change. Express advocacy and issue advocacy are substitutes, even if imperfectly so. The same small-dollar contribution for issue advocacy (to a politically engaged social welfare organization, for example) may be less valuable to most contributors in terms of expected policy benefits. This is because even an issue-based campaign directly targeted to the relevant policy may be less effective at achieving the policy than a candidate-based campaign targeted to the relevant policy maker. Meanwhile, the disclosure costs of such issue advocacy may fall to zero. A contributor's net benefit from issue advocacy is greater than from express advocacy, and the contributor will choose issue advocacy. Alone, the non-disclosure rule for issue advocacy likely will result in a positive information tradeoff by avoiding any chill on such speech. This seems to be the assumption of First Amendment doctrine: robust discussion of issues provides a big information payoff to the political process that is easily chilled due to line-drawing and other regulatory problems.[36]

Taken together as a regime in which hydraulic effects operate, and maintaining Professor Gilbert's agnosticism among types of speech for voter competency purposes, the information tradeoff poses a more complex question: Does the marginal increase in issue advocacy (speech without source revelation) offset the marginal reduction in express advocacy (both speech and source revelation) in a regime containing an issue advocacy-express advocacy distinction for disclosure purposes? Maybe it does, because

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35. Gilbert, *supra* note 3, at 127 (arguing that small-dollar disclosure is valuable, and the chilling effect could be minor).

36. *See, e.g.*, Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 467 (2007) ("After noting the difficulty of distinguishing between discussion of issues on the one hand and advocacy of election or defeat of candidates on the other, the *Buckley* Court explained that analyzing the question in terms 'of intent and of effect' would afford 'no security for free discussion.'" (quoting Buckley v. Valeo, 424 U.S. 1, 43 (1976))).

issue advocacy is nearly as informative to voters as express advocacy, and source revelation of at least small-dollar contributors is relatively uninformative. Maybe it does not, because thawing might have a multiplier effect on express advocacy due to disclosure's enhancements of credibility or policy value of a named candidate, such that there is a nonlinear reduction of speech through the express advocacy channel due to diversion to the issue advocacy channel.

To elaborate, consider the information tradeoff from introducing a new disclosure rule for electioneering communications such as the federal law at issue in *Citizens United*.[37] At the rule level the question is whether the revelation of sources through disclosure produces a net increase of information over the expected loss of information through chilling effects.[38] The category of electioneering communications is a hybrid of issue and express advocacy definitions, so the calculations would borrow elements of both analyses. Electioneering may be more influential than issue advocacy but less influential than express advocacy, and associated disclosure rules may produce more source revelation than issue advocacy but less source revelation than express advocacy.

At the regime level, however, the question becomes whether the overall mix of information increases as speakers recalculate their cost-benefit functions and divert speech from some channels to others. As Professor Kang has argued in a similar context, "[w]hat matters is the regulatory differential between alternate channels."[39] An electioneering disclosure rule might be predicted to divert some speech away from express advocacy due to lower disclosure costs, which might increase the amount of speech but decrease the amount of source revelation. It might also divert some speech away from issue advocacy due to its broader coverage that captures previously undisclosed campaign speech, which might increase the amount of source revelation but chill speech from issue advocates who wish to remain undisclosed. As the electioneering channel opens to existing flows of information (both speech and disclosure) from express and issue advocacy channels, as well as new inflows of thawed speech and outflows of chilled

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37.   *See* 2 U.S.C. § 434(f)(3)(A) ("The term 'electioneering communication' means any broadcast, cable, or satellite communication which—refers to a clearly identified candidate for Federal office; is made within—60 days before a general, special, or runoff election for the office sought by the candidate . . . and in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.").

38.   The analysis could also incorporate the expected gain of information through thawing effects.

39.   Kang, *supra* note 344, at 43. Professor Kang's analysis emphasizes money more than the overall amount of information, and disclosure costs more than speech benefits, but the dynamic is similar. As he suggests, "[t]his [hydraulic] effect occurs whether the differential results from increased regulation of one channel relative to another (hydraulics) or from decreased regulation of one channel relative to another (reverse hydraulics)." *Id.*

speech, the total level of information reaches a new equilibrium, distributed differently across the reconfigured channels. Whether that equilibrium contains more or less information is a function of the hydraulic information tradeoff dynamics across rules in the regime.

Acknowledging hydraulic effects at the regime level makes the information tradeoff model more complex than a rule-level analysis, but also more useful. A regime-based analysis can get at better answers than asking about rules alone. Beyond speech-based diversions, hydraulic effects also produce speaker-based diversions, or even listener-based diversions such as lobbying.[40] These include the diversion of campaign funds from directly attributed speech by wealthy corporations and individuals into unattributed proxy speech by 501(c)(4) social welfare organizations and 501(c)(6) trade organizations, what Professor Gilbert discusses as "disclosure loopholes."[41] These diversions pose the question of whether, in a regime with different disclosure rules for different speech and different speakers the net effect on voter information is positive or negative. That is a hard question to answer, but it is the right question to ask.

C. *System-Level Effects*

Information tradeoffs and the hydraulic metaphor help explain why a disclosure rule that does increase the production of information at an individual rule level does not necessarily increase the production of information when combined with other disclosure rules in a regime. System effects extend the analysis one step further and help explain why a disclosure regime that does increase the production of information in isolation does not necessarily increase the production of information when combined with other disclosure regimes.

"System effects," a concept introduced into constitutional analysis by Professor Adrian Vermeule, "arise either when what is true of the members of an aggregate is not true of the aggregate, or when what is true of the aggregate is not true of the members."[42] The information tradeoff reflects system effects at each level. A rule requiring more information from each speaker may lead to less information from all speakers. Conversely, requiring less information from each speaker might produce more information overall. Here, however, system effects refer to the tertiary information tradeoffs that occur when rules aggregate to regimes, and regimes aggregate to an overall campaign finance system. Professor Vermeule calls this "a system of systems."[43]

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40.   *See* Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 STAN. L. & POL'Y REV. 105 (2008) (discussing the linkages and interactions between campaign finance and lobbying as means of influencing the political process).

41.   Gilbert, *supra* note 3, at 1875–76.

42.   VERMEULE, *supra* note 15, at 23.

43.   *Id.* at 27.

To summarize these dynamics to this point, consider the typical campaign finance distinction between issue and express advocacy. From a rule-based perspective, disclosure within each category or channel of speech suggests a particular information tradeoff. As Professor Gilbert explains, a rule requiring more disclosure of express advocacy in terms of dollar threshold, source identification, or manner of reporting will not necessarily produce more information. Under each rule, considered on its own, speakers will perform a cost-benefit calculation and will choose to speak only when the expected benefit exceeds the expected cost. If the benefit exceeds the cost, the speaker speaks and discloses; if the cost exceeds the benefit, the speaker is chilled from speaking and does not disclose. Across speakers, disclosure of other speakers' campaign activities may thaw speech by making clearer the benefits (or costs) of supporting or opposing a candidate. We cannot know if a rule requiring more disclosure produces more or less information in equilibrium, in terms of the combination of campaign speech from speakers and source revelation from disclosure, without understanding the aggregate effect of the information tradeoff resulting from each speaker's individual calculation under the rule. Conversely, we cannot know if a rule requiring less disclosure of issue advocacy produces less speech without understanding the information tradeoff.

When a regime contains more than one rule, hydraulic effects arise. Now the speaker's calculation takes account of how to speak, rather than just whether to speak. At the regime level, we cannot know whether a particular set of disclosure rules produces more or less information in equilibrium without understanding the information tradeoff among all the rules, as well as within each rule. Speakers will divert their speech between different channels depending on their individual cost-benefit functions: between contributions and expenditures, between issue and express advocacy, or between campaign speech independent of, or coordinated with, candidates. In a regime that contains one disclosure rule for express advocacy and another disclosure rule for issue advocacy, understanding the information tradeoff requires consideration of both rules, including the hydraulic effects of diversion between the different channels of speech and disclosure.

However, the picture of the information tradeoff is still incomplete. Campaign finance law is more than a rule or a regime. It is a system—a system of regimes, regimes of rules. Speakers do not only choose whether to engage in campaign speech under an express advocacy disclosure rule, for example. Speakers are not even limited to choosing how to engage in campaign speech under a regime of different rules for express or issue advocacy, for example. That disclosure regime interacts with other regimes, such as those governing contributions and expenditures, and independent and coordinated campaign speech. We might expand the system to include other systems like corporate shareholder disclosure under federal securities

law[44] or tax-exempt organization status under federal tax law[45] (themselves each regimes of different rules), or even include the interaction of federal campaign finance disclosure with state campaign finance disclosure.[46] This suggests both the utility and complexity of the analysis.

Campaign finance law establishes a system of rules for contributions and expenditures, express and issue advocacy, and independent and coordinated campaign speech. In such a system, speakers face campaign speech options ranging from candidate campaign contributions for express advocacy, to independent expenditures for issue advocacy, and everything in between. The current federal campaign finance disclosure system, for example, requires more disclosure for contributions and less for expenditures, more disclosure for express advocacy and less for issue advocacy, and more disclosure for coordinated campaign speech and less for independent campaign speech. In such a system, the speaker will first calculate the expected policy benefit. For example, the benefit could be greater for candidate contributions because of increased credibility and policy value that comes from direct access to the candidate and a clear message of support. Or the benefit could be greater for independent expenditures because of more precise issue messaging and the speaker credibility that comes from the option to threaten opposition as well as promise support to the candidate. Additionally, each disclosure rule presents its own administrative and exposure costs, with some channels presenting easier opportunities to conceal sources than others. Across the regime, the speaker will divert speech to the set of rules that maximize the net benefit of the speech to the speaker, assuming it is not chilled. Only the disclosure required by rules governing the speaker's chosen speech will be provided. Due to rule-level chilling and thawing effects, the total information tradeoff will differ from the sum of the individual speakers' calculations. Due to regime-level hydraulic effects, the total tradeoff will differ from the sum of the tradeoffs for each disclosure rule independently. Due to system-level effects, the total tradeoff may differ from the sum of equilibria under the regimes.

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44. *See* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923 (2013) (proposing increased campaign finance disclosure by corporations under federal securities law); *see also* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010) (arguing for special rules to govern who may make political speech decisions on behalf of shareholders).

45. *See* Ellen P. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations After Citizens United*, 10 ELECTION L.J. 363 (2011) (examining disclosure and other campaign finance regulations of tax-exempt organizations under federal tax law).

46. *See* Ciara Torres-Spelliscy, *The $500 Million Question: Are the Democratic and Republican Governors Associations Really State PACs Under Buckley's Major Purpose Test?*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 485 (2012) (examining potential state campaign finance disclosure of political organizations organized under federal tax law, I.R.C. § 527).

Assume the ideal policymaker setting the rules within the system has a sophisticated view of the information tradeoff and carefully calibrates the disclosure rules and regimes. Each of the rules produces a net gain of information, because for most speakers the cost of disclosure is less than the benefit of speech. Further, each of the regimes produces a net gain of information, because the net benefits from the disclosure rules for the more informative types of speech exceed the net benefits from the disclosure rules for the less informative types of speech. Under this assumption, there would be little incentive for most speakers to divert speech from one channel to another to avoid disclosure. The information tradeoff is positive at both the rule and regime level. Does this system produce more information than a system that does not comprise regimes and rules with positive information tradeoffs? In this perfect world, it might. But we cannot be sure without close examination of the system effects.

At a system level, each rule at each level of the campaign finance disclosure system must be precisely calibrated to permit any confidence that the information tradeoff of this system is positive compared to other possible systems. Any change in a component role by legislative or judicial action, or any change in the speakers' evaluation of speech benefits or disclosure costs, could surprisingly and significantly flip the information tradeoff. The efficacy of any particular campaign finance disclosure system is contingent on multiple variables inside and outside the policymaking scope of government. Any optimal information tradeoff is likely to be elusive and short-lived given the dynamism of political actors and the inertia of policymakers.

In reality, the information tradeoffs are mixed and far from optimal. For example, a court invalidates expenditure limits but upholds contribution limits, so for some (wealthy) speakers speech through unlimited expenditures becomes far more valuable than speech through limited contributions.[47] A legislature fails to strengthen disclosure to keep up with innovations of political actors, so for some (sophisticated) speakers disclosure of issue advocacy becomes far less costly than disclosure of express advocacy.[48] An agency fails to update coordination rules for contribution limit and disclosure purposes,[49] so for some (connected) speakers quasi-coordinated "SuperPAC" and 501(c)(4) speech becomes far more valuable in terms of unlimited contributions and far less costly in terms of limited disclosure. Hydraulic effects predominate as wealthy, sophisticated, and

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47. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 364–66 (2010); Buckley v. Valeo, 424 U.S. 1, 58–59 (1976).

48. *See Citizens United*, 558 U.S. at 365; *Buckley*, 424 U.S. at 58–59.

49. *See* Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88, 97 (2013) ("[I]t is not surprising that despite the close structural relationship between candidates' campaigns and their supportive Super PACs there was apparently little or no coordination within the meaning of the FEC's regulations in the last election cycle.").

connected speakers divert speech into more valuable, less costly channels. Most other speakers are either chilled or ineffective relative to the high-value, low-cost diverted speech, and there is relatively little thawing effect because the diversion results in a lack of disclosure by the most informative supporters and opponents. The total information tradeoff produces far less total information than would be produced by the previous system, because while there is some more speech, there is much less disclosure.

What does a policymaker do to improve the total information tradeoff? Systems analysis cautions the policymaker who seeks to improve the system-level information tradeoff by improving as many regime-level and rule-level information tradeoffs as is possible. In a system the policymaker should beware of two fallacies.[50] The fallacy of composition is that increasing the amount of information produced under the various rules necessarily increases the amount of information produced across the regime or by the system as a whole.[51] The fallacy of division is that increasing the amount of information produced by the system requires increasing the amount of information produced under various rules or regimes within the system.[52] These fallacies lead to the theory of the second best: "where it is not possible to satisfy all the conditions necessary for an economic system to reach an overall optimum, it is not generally desirable to satisfy as many of those conditions as possible."[53] This means a legislator who seeks to increase the production of information by requiring more disclosure wherever possible may decrease the overall production of information. Conversely, a judge who seeks to increase the production of information by permitting more speech wherever possible also may decrease the overall production of information.

Take the campaign finance reformer seeking to improve the information tradeoff in the post-*Citizens United* regime of unlimited independent expenditures by corporations. There is plenty of speech, but a significant amount of it comes from concealed sources. At the rule level, the reformer might produce more information under the rule by requiring more disclosure from corporate speakers who may be less susceptible to chilling effects than other speakers. At the regime level, the reformer still may achieve a positive information tradeoff because, even under a reform increasing disclosure costs, the law prohibits corporations from diverting speech through coordinated expenditures or contributions, so no hydraulic effects will occur.[54]

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50.   Vermeule, *supra* note 15, at 9.

51.   *Id.*

52.   *Id.*

53.   *Id.* at 29–30.

54.   *See, e.g.*, United States v. Danielczyk, 683 F.3d 611 (4th Cir. 2012) (upholding a 2 U.S.C. § 441b prohibition on corporate contributions in federal elections); *see also* 2 U.S.C. § 441b(a) (2006), *invalidated by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

At the system level, however, the reformer might discover unintended consequences that result in a net loss of information overall despite the net gains at the rule and regime level. It may turn out, for example, that much of the corporate speech comes from individuals who otherwise would support candidates directly. However, because of the chilling effect of the disclosure of campaign contributions, they use organizational proxies that additional disclosure may not reveal except at great cost in informational tradeoff terms. For example, some of the individuals funding corporate speech could be relatively wealthy and sufficiently sophisticated to conceal themselves in a series of corporate shells like so many nested dolls. Others could be of relatively modest means and are chilled from source disclosure and therefore choose to contribute to the proxy rather than a candidate. In such a situation, the reformer might actually improve the information tradeoff by decreasing disclosure for candidate contributions through increased thresholds or semi-disclosure,[55] rather than by increasing disclosure for corporate expenditures. The gain in information would be particularly likely under the plausible assumption that one reason individuals prefer to contribute to candidates rather than to corporations making independent expenditures is that a dollar goes farther in funding candidate speech; candidate campaigns may be more effective at express advocacy, more efficient at using media, and more credible in delivering a valued policy benefit.[56]

This model also has implications for judicial review. Take the judge seeking to improve the information tradeoff consistent with a view that one purpose of the First Amendment is to maximize the amount of information available to speakers.[57] The information tradeoff means, at least, that a judge cannot necessarily expect that minimizing the chill of disclosure will maximize the amount of information produced. Yet this position seems close to that taken by Justice Thomas in his lone dissent from the disclosure holding of *Citizens United*, in which he would have invalidated the Bipartisan Campaign Reform Act's (BCRA) disclosure requirements for electioneering communications on their face.[58] Conversely, a judge cannot necessarily

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55.   *See* Bruce Cain, *Shade from the Glare: The Case for Semi-Disclosure*, CATO UNBOUND (Nov. 8, 2010),   http://www.cato-unbound.org/2010/11/08/bruce-cain/shade-glare-case-semi-disclosure (arguing for disclosure of sector-based information, but not personally identifying information, from campaign contributors).

56.   *See* Kang, *supra* note 34, at 44 ("Candidates and parties are likely to prefer contributions over expenditures because contributions give them more control over the money and the resulting speech. Even if independent expenditures are valuable to candidates and parties, contributions are better dollar for dollar."); *see also id.* at 47 ("[C]andidates and parties ought to be the best spokespeople (or at least have the best incentives to enlist the best spokespeople) for their candidacies.").

57.   Gilbert, *supra* note 3, at 1889–90.

58.   *Id.* (criticizing Justice Thomas's argument for facial invalidation of electioneering communication disclosure requirements).

expect that an attempt to maximize the amount of speech through invalidation of campaign finance restrictions will necessarily increase the amount of information available to voters. Less information may be an unanticipated system effect of *Citizens United*, in which the majority expressed a naïve faith in the "campaign finance system that pairs corporate independent expenditures with effective disclosure" it thought it was creating.59 The Court, in other words, saw its first-best constitutional ruling undermined by its effects in a second-best campaign finance system.

Contrast both of these views with an earlier view adopted by the Court in *McConnell v. Federal Election Commission*. There, the majority rooted disclosure in traditional First Amendment values, asking "how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public."60 The Court found that rather than reinforcing "precious First Amendment values," invalidating disclosure simply on the grounds that it may chill speech "ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace."61 In another case representing a sophisticated view of the system of campaign finance disclosure, Justice Breyer explained a related tradeoff in the context of campaign contributions: "this is a case where constitutionally protected interests lie on both sides of the legal equation," he argued, because some laws can encourage, rather than chill, "the public participation and open discussion that the First Amendment itself presupposes."62 In the same case, Justice Kennedy expressed a skeptical but similarly sophisticated recognition of "the artificial system we have imposed."63 This sensitivity to system effects and the problem of adjudicating in a second-best world was notably absent from his opinion for the majority in *Citizens United*.64

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

60. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 196 (2003) (quoting McConnell v. Fed. Election Comm'n, 251 F. Supp. 2d 176, 237 (D.D.C. 2003) (per curiam)), *overruled in part by* Citizens United v. Fed. Electon Comm'n, 558 U.S. 310 (2010).

61. *Id.* at 97.

62. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 400–01 (2000) (Breyer, J., concurring).

63. *Id.* at 410 (Kennedy, J., dissenting).

64. A related debate over the system effects of public campaign financing recently took place in the footnotes of *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011) (invalidating state public campaign finance law that matched candidate financing to the private campaign expenditures of opposing candidates and independent groups). *Compare id.* at 2821 n.7 ("If the matching funds provision achieves its professed goal and causes candidates to switch to public financing, there will be less speech: no spending above the initial state-set amount by formerly privately financed candidates, and no associated matching funds for anyone." (internal citation omitted)), *with id.* at 2835 n.4 (Kagan, J., dissenting) ("The majority argues that more speech will quickly become 'less speech,' as candidates switch to public funding. But that claim misunderstands how a voluntary public financing system works. Candidates with significant financial resources will likely decline public funds, so that they can spend in excess of the system's expenditure caps. Other candidates accept public financing

CONCLUSION

The current federal campaign finance system is nothing if not second-best. It is rife with compromises and constraints emerging from decades of interactions among Congress, the courts, enforcement agencies, and increasingly sophisticated political players. Each actor's strategy typically seeks to maximize accrued net benefits in isolation. Even when all actors agree on the maximand—here, plausibly, every actor may be said to seek to make more information available to voters according to the logic of the information tradeoff—system effects will complicate and potentially undermine any one actor's strategy across rules and regimes. Extended across multiple actors with multiple strategies in a reiterative game of legislation, innovation, enforcement, and invalidation, getting the information tradeoff right may be next to impossible. Yet, as Professor Gilbert urges, these complicated consequences are not necessarily indeterminate, and careful assessment of disclosure's dynamic effects can move the debate forward.[65] In the increasingly complex system of campaign finance disclosure, precision in such an assessment will be critical but elusive. Short of that assessment, everyone implicated in the information tradeoff, especially legislators proposing campaign finance reform and judges questioning it, might benefit by maximizing less. They should consider settling for second best.

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because they believe it will enhance their communication with voters. So the system continually pushes toward more speech." (internal citation omitted)).

    65.   Gilbert, *supra* note 3, at 1851.