THE DAILY CALLER

DISCLOSE will chill speech

04/27/10 at 12:00 AM

Three months ago, the United States Supreme Court handed down its landmark First Amendment decision in *Citizens United v. Federal Election Commission*. The court decided that Congress may not prohibit funding of political speech by corporations, labor unions, and nonprofit groups. Congress promised a quick response to that decision. That response—the DISCLOSE Act—has one good feature—and several bad ones.

On the good side, Congress has accepted the court's ruling in *Citizens United*. Congress might have simply enacted again the invalidated speech prohibition and dared the court to strike it down. Instead, Congress has decided to propose more subtle constraints on speech.

The DISCLOSE Act, like all campaign finance regulation, presents itself as high-minded concern in the public interest. The truth is uglier. The majority party in Congress fears that free spending on speech will lead to electoral losses in November. Sensing public outrage about bailouts, Democratic leaders like Schumer and Van Hollen hope to scapegoat despised groups like corporations, bailout recipients and foreigners to improve their party's prospects in the coming election.

Let's begin with the DISCLOSE part of the bill, an acronym for "Democracy is Strengthened by Casting Light on Spending in Elections." The light cast here by mandated disclosure would be on group leaders and donors. A corporate chief, union head, or nonprofit leader would be required to say they approved a campaign message. Donors supporting the speech would also be disclosed.

The court said in *Citizens United* that Congress could compel disclosure of spending on speech. Even if they are approved, these disclosure mandates seek to restrict freedom of speech. Congress, especially the Democratic leadership, fears free spending on political speech by businesses and other groups.

Deprived of the power to prohibit such speech, Sen. Charles Schumer and Rep. Chris Van Hollen hope that forcing disclosure will lead to a backlash by customers or shareholders against the relevant businesses or groups. If so, the leaders of the businesses

or groups in question may decide to the costs of speaking out are too high and remain silent. In other words, Schumer and Van Hollen hope to chill the speech of their political opponents. A majority of the court should recognize such abusive mandates for what they are and invalidate them.

Apart from the general disclosure mandate, Schumer and Van Hollen specifically target three types of businesses.

Government contractors and companies that received bailouts in 2008 will be prohibited from spending on campaigns. In the past, courts have sometimes allowed legislatures to ban campaign *contributions* from government contractors. Such donations were thought to corruptly purchase government contracts.

But the DISCLOSE Act does not involve campaign contributions. Instead, it prohibits spending on speech done independently of candidates and campaigns. The Supreme Court has said such "independent spending" poses no threat of corruption and thus cannot be prohibited. How can I corrupt you if I don't give you anything of value?

Moreover, courts have disallowed attaching unconstitutional conditions to government benefits. Congress cannot require you to give up your free speech rights in exchange for a government contract or a bailout. All in all, the court will likely strike down these parts of the bill.

Schumer and Van Hollen would also tightly restrict speech by any company that has 20 percent foreign voting shares. In *Citizens United*, the court refused to rule whether First Amendment protections extended to foreign-owned businesses.

We should keep in mind here the difference between contributions and "independent expenditures." Foreign-owned companies do not and will not have the right to make campaign contributions to candidates or political parties.

Perhaps they should have the right, however, to spend money interjecting ideas and arguments into American political debate. Citizens have the right, of course, to reject the speech of foreign-owned companies. But should Congress have the power to make sure such ideas and arguments are never heard?

This gambit to chill speech may work. But we hope that the American people might recognize the realities of this deeply cynical bill. If not, we might still hope that the Supreme Court will recall the words they are bound by oath to uphold, "Congress may make no law abridging…the freedom of speech."

John Samples is director of the Center for Representative Government at the Cato Institute in Washington DC and the author of the recently published book, "The Struggle to Limit Government."