Politics for Professionals Only: Ballot Measures, Campaign Finance "Reform," and the First Amendment

*By Dick M. Carpenter, Ph.D., Jeffrey Milyo, Ph.D., and John K. Ross**

When Scott Eckern donated money to an election committee, little did he know that it would cost him his job of 25 years. Eckern had worked successfully as the artistic director of the California Musical Theatre. In the heat of California's Proposition 8 battle over defining marriage, Eckern donated $1,000 to the "Yes on 8" committee. Consistent with California's campaign finance disclosure laws, Eckern's name, occupation, and employer were posted on a state website. Opponents of Proposition 8 saw his name on the list and called for a boycott of the Theatre, causing a public furor. "To protect the organization and to help the healing in the local theater-going and creative community," Eckern resigned his position.[1]

Eckern's case was not an isolated one as both sides of the heated issue used campaign-finance disclosures to intimidate opponents. A Proposition 8 opposition group used disclosure lists to publish a so-called "Dishonor Roll" of donors to the Yes on 8 campaign.[2] Geoff Kors, a member of the No on 8 campaign committee, said the Yes on 8 campaign sent "blackmail" letters to opponents of the measure demanding equal contributions.[3] According to a lawsuit filed on behalf of Yes on 8, those who gave money to support the ballot measure received menacing phone calls (including death threats), e-mails, and postcards. Another donor had a window broken, one had a flier distributed around his hometown calling him a bigot, and others received envelopes containing suspicious white powder.[4]

The lawsuit was filed to challenge the constitutionality of California laws that require campaign contributors to disclose personal information. But California is not alone. Citizens in all 24 states that allow ballot issues (also called initiatives or propositions) face the same scenario. That is, when citizens join together to speak out on issues (even by something as simple as donating to a campaign), they run the risk of finding themselves mired in the murky world of campaign finance regulation.

Campaign finance regulation was originally meant to prevent corruption and the appearance of corruption in politics—specifically, the trading of political favors for campaign contributions. But in the context of ballot measures, where the people are voting on proposed laws directly, there is no one to corrupt. Nonetheless, the kinds of campaign finance regulations intended for politicians have seeped into the realm of ballot issues.

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These regulations force citizens to register with the government and disclose the names, addresses, and even employers of supporters, simply because they choose to exercise their constitutional rights of association and free speech by joining together and speaking out about political issues. Those disclosures are then made public, typically on state websites.

The forms required to comply with campaign finance regulations are at least as complicated as tax forms, and the sanctions for even small clerical errors can sideline a group and expose them to legal liability in the midst of a campaign. Ostensibly, such strict requirements keep special interests at bay. In reality, however, these rules keep politics an insider's game.

I. Parker North

In 2006, several residents of Parker North, Colorado, a suburb outside Denver, caught wind of a possible ballot issue being put to their neighbors that would have annexed their neighborhood into the nearby town of Parker. These residents opposed the plan on several grounds and did what any citizen in a democracy should do—they spoke out about it. They met informally with other neighbors, wrote letters to the editor, set up an online forum for discussion and debate with proponents, distributed flyers, and put up signs—the essence of grassroots activism.[5]

The two main proponents of annexation—a lawyer and another resident—soon realized that this civic participation was hurting their efforts. So they sued six prominent critics of annexation for violating campaign finance laws. The complaint threatened "investigation, scrutinization," and fines for anyone involved with the matter. Further, the proponents attempted to subpoena the names and addresses of "all persons [who] sold, gifted, or transferred signs, banners or any campaign information" and "all communications amongst the [neighbors] or anyone else" concerning the annexation.

Under Colorado law, when two or more people join together and spend more than $200 on political activities related to a ballot issue, they must register as an "issue committee." Furthermore, any Colorado citizen may bring a private suit to enforce campaign finance laws. While intended as a way to enhance enforcement of campaign finance laws, this merely grants one side of a political issue a method to use government authority to bully political opponents.

Unaware of these laws and unconvinced that their informal and ad hoc activism warranted state attention, the opponents of annexation had failed to comply with the laws' numerous Byzantine mandates. Among them: designate formal officers—they had been meeting on porches and in kitchens and pitching in where they could—open a separate bank account, itemize all monetary and non-monetary transactions of more than $20, and provide the names and employers of supporters to the state for publication on a web site maintained by the Colorado Secretary of State.

Faced with the possibility of fines, the neighbors quickly moved to comply, only to find that the state's 92-page handbook

was confusing and not even authoritative—it was to be used for "reference and training purposes only." Worse, questions directed to the very state employees in charge of compliance did not provide answers to basic questions.[6] For instance, Becky Cornwell, who became the registered agent for the "issue committee," discovered that another resident, who was not involved with the already loosely-affiliated neighbors named in the lawsuit, had begun to sell anti-annexation t-shirts. Did she have to track his activities and file them as contributions or expenditures, or not at all? The neighbors were forced to face these problems, all in order to disclose a dozen or so donors who contributed $2,240 in monetary and non-monetary contributions over a twelve-month period—and most of that was for legal advice.

Even the Secretary of State describes the host of regulations it oversees as "often complex and unclear." State employees could not answer Becky's questions and had one piece of advice: Hire a lawyer.

Once registered, the neighbors asked the proponents to drop their suit but were refused unless they abandoned their advocacy and, among other things, "removed from sight all signs and campaign materials." Unwilling to cave to such opportunistic bullying after months of effort, the neighbors did indeed hire a lawyer to defend themselves. Soon after, the Institute for Justice and the Parker North Six filed a separate lawsuit in federal court challenging the regulations as a violation of the First Amendment.

In February 2007, annexation was soundly rejected 351-21 at the ballot box, but the experience of the Parker North neighbors showed how the very act of being dragged into court deters the political activity the First Amendment was enacted to protect: "[W]e had no clue about these laws or how to navigate through the process," said Karen Sampson, a neighbor named in the complaint. "We spent more defending ourselves than fighting annexation."[7]

Further, regulators possess broad discretion to punish activists for transgressions as harmless as clerical errors. In California, for instance, a grassroots group consisting mainly of two activists—Steve Cicero and Russ Howard—and calling themselves Californians Against Corruption started a petition to recall the president of the state Senate. They were hit with $808,000 in fines for failing to disclose the occupations of 93 donors. State regulators explicitly cited as an aggravating factor the fact that Howard had criticized campaign finance laws to a journalist, saying, "The little guy can't [participate] in politics without running afoul of technical violations."

Indeed, prosecutors cared more about the paperwork than any disclosure. According to Howard, "They have a copy of every check we ever received, and the vast majority have those addresses on the check." "My life should be ruined because I didn't fill out the proper forms in triplicate?" In 2003, a full nine years after the ultimately unsuccessful petition, the California Supreme Court refused to hear their appeals and the two are on the hook for almost $1.1 million plus interest—more than they could ever hope to pay off.

Howard, a former stockbroker, lost his job because of his work on the petition. "[T]he law sets up prerequisites for the exercise of First Amendment rights that are extremely complicated and enforced as selectively as they want," he said.

> I'd have to be an attorney or an accountant to be able to wade my way through [the law]. If I had had to stay up until five in the morning filling out those forms, there never would have been a… recall. We were a grassroots organization. We all had other jobs. We're not like the big parties. [Complying properly] would have taken a huge percentage of our resources.[8]

II. Campaign Finance Reformers

Campaign finance "reformers" argue that any abuse of the system, if indeed they acknowledge it, is insubstantial compared to the benefits society gleans from mandatory disclosure. These benefits allegedly consist of a better-informed electorate and an institutional safeguard against corruption.[9]

It is not clear how the names and addresses of people who donate $20 to an issue campaign are particularly valuable information to anyone. Nor, as we shall see, is it clear that many citizens make any use of this information.

Likewise, "reformers" fail to show how a ballot measure can be corrupted. Unlike a politician, an unchanging text cannot exchange favors. To see donations to an issue campaign as corruption, one must change the definition of "corruption" to mean any attempt to influence the outcome of an election. (And, in particular, to influence that outcome in a direction that one does not like.)

In a free country, citizens appeal to one another in hopes of enacting an array of often mutually exclusive policies. This competition is an essential part of a vibrant, healthy society, and certainly some participants will be more influential than others. Thus, the claims that disclosure unmasks "undue influence" of the political process emanating from campaign finance supporters ring hollow. After all, who is to decide what constitutes "undue influence?"

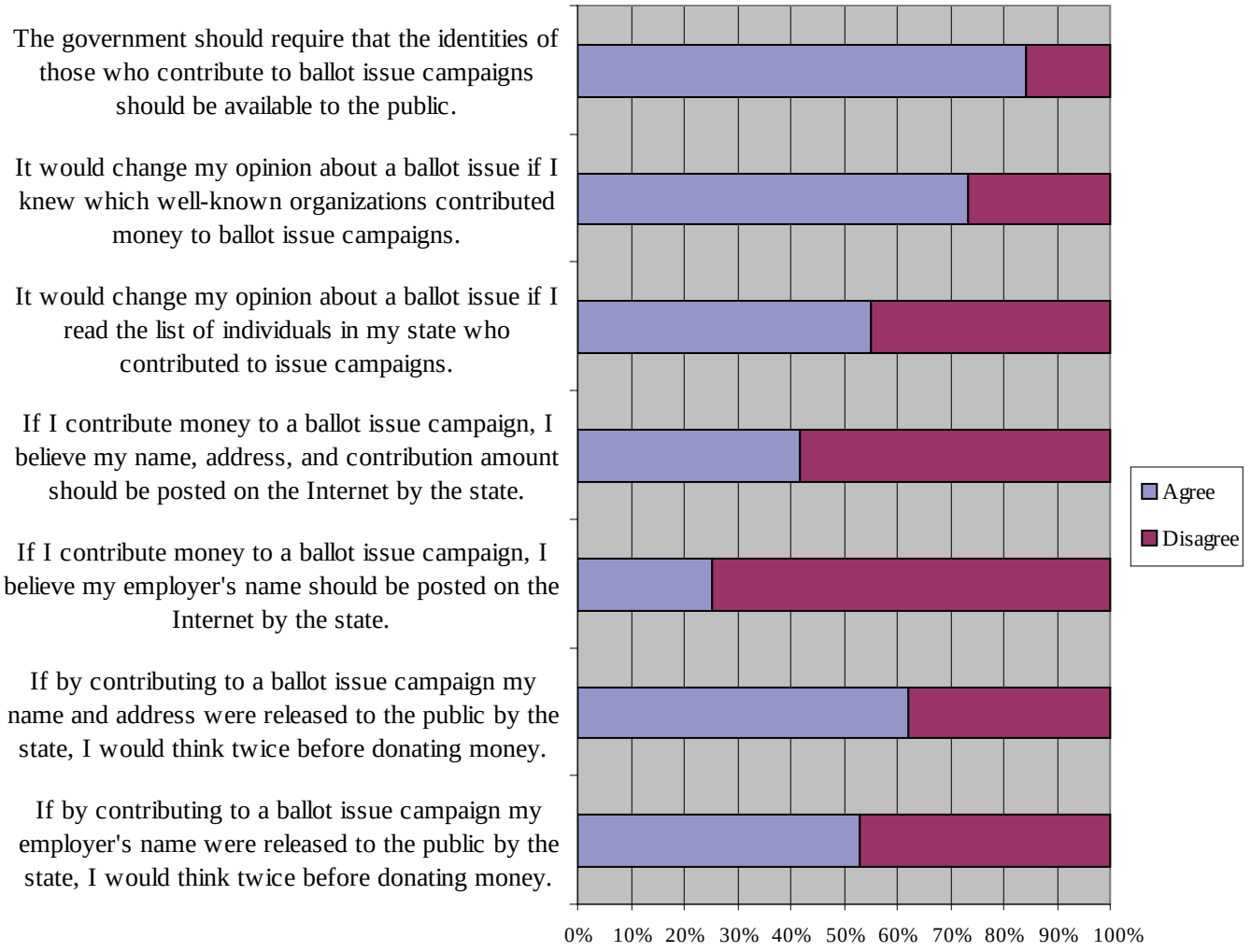
Mandatory disclosure simply allows established and moneyed interests—with professional political experts, accountants, and lawyers who will not get tripped up by reporting requirements—to continue exerting their influence while silencing small ad-hoc groups with little experience running campaigns. It is curious then, that reformers insist that campaign finance regulations *prevent* entrenched interests from subverting the public's will.

III. Disclosure Costs

In spite of the hazards they pose to ordinary citizens, campaign finance rules do enjoy broad support, at least in the abstract. In the months before the November 2006 elections, we (specifically Carpenter) polled voters in six states where citizens vote on ballot issues and found more than 82 percent approve of mandatory disclosure.[10] Moreover, more than 70 percent say information yielded from disclosure about organizations is influential and valuable and more than 50 percent likewise said the same thing about individuals.

However, once we asked voters about whether their own political activities should trigger disclosure, the tables turned.

Figure 1: Support for Mandatory Disclosure for Others, for Respondents



Some 56 percent disagreed that their own information should be publicized—and that grew to 71 percent when that disclosure included their employer. When asked why they did not want their information released, 54 percent cited a desire to remain anonymous. Others expressed concern for their personal safety and a fear of repercussions (particularly when employer information is involved) and harassment.

These fears are not unfounded: the NAACP famously fought attempts to turn its donor lists over to the government for this very reason.[11] Supporters of Californians Against Corruption, who had their home addresses disclosed on a state website, testified to receiving threatening calls and letters, and Russ Howard says some received swastikas in the mail. A local newspaper columnist even printed donors' names and contribution amounts—a step not taken for other ballot measures.[12]

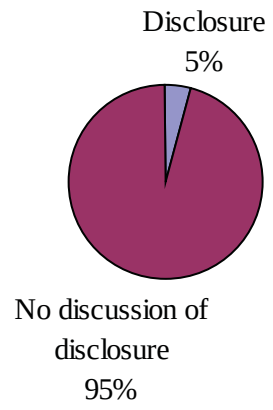
Others we polled said requiring disclosure violated their right to a private vote—as revealing their donations to the public would reveal their electoral choice—or worried about identity theft. These answers clearly indicate that mandatory disclosure foments reluctance to speak or associate in the political arena—where such rights are arguably the most important.

Nevertheless, campaign finance supporters assert that the information garnered from mandatory disclosure is important to the decision-making capabilities of an informed electorate. But the vast majority (nearly two-thirds) of respondents in our poll did not know where to access that information and never actively seek it out. Indeed, about 75 percent of those polled could not name any specific funders of or contributors to issue campaigns in their state.

Journalists and watchdog groups often protest that *they* use the information gleaned from disclosure, which is useful, if not necessary, to their investigations.[13] We examined that claim by analyzing news stories, editorials, letters to the editor, state-produced information, reports from think tanks and non-profits, and campaign-generated materials available to voters about the issues on the November 2006 ballot in Colorado.

We found that Colorado voters enjoy a wealth of information and opinions from a broad range of sources on ballot measures—our sample *undercounted* these points of information, as hardcopy campaign materials, paid

Figure 2: News Stories, Opinion Pieces, Campaign-Materials and State-Produced Information that Utilized Disclosure-Related Data



advertisements, and electronic media, such as radio and television reports and commentary, were not available.

Of the 1,078 points of information we found, only 4.8 percent included any discussion of campaign finance disclosure-related data. The other 95 percent of sources focused on the ballot issues, predicting the effects of the issues' passage or defeat, and generally discussed their merits and demerits without referring to any information generated by disclosure. Voters seeking information free from opinion could easily find it—our sample included many news stories and state ballot summaries on "what it does." Likewise, the views of proponents and opponents were clearly and numerously represented.

As mentioned above, some two-thirds of respondents report they never seek out information resulting from disclosure. It seems the same is true for an even higher percentage of journalists writing about those issues. There is, moreover, absolutely no data confirming—or even suggesting—that this paltry coverage of disclosure-related data made an impact on voters.

IV. Red Tape

Citizens like the neighbors in Parker North who wish to do more than simply donate to a political cause face additional hardships in the name of transparency. In each of the 24 states that put ballot issues to voters, citizens who wish to join together to support or oppose an issue must register as a political committee, track expenditures, and report all contributions. Failure to follow these rules can result in substantial penalties.

Table 1: Selected Tasks for Neighbors United

	Percentage of Participants Completing Task Correctly		
Task	**California**	**Colorado**	**Missouri**
Register as political committee	25%	72%	82%
Statement declaring position on ballot issue	36%	n.a.	n.a.
Reporting initial funds on hand	44%	67%	52%
Record $2,000 check contribution	60%	72%	80%
Record Anonymous $15 cash contribution	69%	51%	77%
Record Illegal Anonymous $1,000 Contribution	2%	3%	8%
Record Non-Monetary Contribution of $8 in refreshments	30%	36%	24%
Record Non-Monetary Contribution of $40 in supplies	18%	46%	26%
Record Non-Monetary Contribution of $500 in t-shirts	0%	6%	14%
Report expenditure of $1,500 for a newspaper advertisement	49%	89%	72%
(No miscellaneous clerical errors on all tasks)	5%	6%	2%

And the rules are especially challenging for ad-hoc, amateur activists who, like the neighbors in Parker North, may not even know to abide by them. To test that hypothesis, we (specifically Milyo) placed 255 experimental subjects—mostly graduate students—in the position of the Parker North neighbors.[14] We gave them a hypothetical campaign issue and asked them to fill out the appropriate paperwork to register a ballot committee, Neighbors United, and comply with reporting requirements of three different, representative states (California, Colorado and Missouri).

Of the 255 participants, not a single one correctly completed each of the 20 tasks on the campaign finance disclosure forms. The participant with the highest score correctly completed only 80 percent of the tasks. The mean score was just 41 percent correct. Had this been a real world exercise, every single participant could have been liable for violating campaign finance laws.

The trouble started early: like the Parker North neighbors, 93 percent of participants had no idea they needed to register as a political committee to speak out in the first place. So without the explicit instructions provided, participants would have done even worse.

While reporting simple contributions proved difficult, subjects had even more trouble with non-monetary contributions—the t-shirts, posters, flyers and other supplies that are typical of a grassroots campaign. Even informed of the fair market value of the objects to be itemized—not always readily available in the real world—participants could only report a gift of $8 in refreshments correctly 30 percent of the time in California, 36 percent in Colorado, and 24 percent in Missouri. Another scenario in which a contributor spent $500 on t-shirts and then donated them to the group was the most formidable. No one in the California group reported this transaction correctly, and only 6 percent in the Colorado and 14 percent in the Missouri group succeeded.

Subjects were also directed to aggregate multiple donations from an individual donor in two separate tasks. The highest score on either task from any state was only 7 percent (California). Participants simply made minor errors in arithmetic that threw off the sum total. This illustrates how fines that are levied per violation can compound.

Participants were given the opportunity to comment in writing on the experience with the disclosure forms and instructions, and 94 of the 255 did so. Of those, 90 out of 94

Table 2: State Disclosure Laws for Ballot Issues – Minimum Thresholds That Trigger Selected Disclosure Requirements

		Contributors		
	Register as Committee	**Name and Address**	**Employer or Occupation**	**Itemize Committee Expenditures**
Alaska	$500	No minimum	$250	$100
Arizona	500	$25	25	No minimum
Arkansas	500	200	n.a.	100
California	1000	No minimum	100	100
Colorado	200	20	100	20
Florida	500	No minimum	100	No minimum
Idaho	500	50	n.a.	25
Illinois	3,000	150	500	150
Maine	1,500	50	50	No minimum
Massachusetts	No minimum	50	200	50
Michigan	500	No minimum	100	50
Mississippi	200	200	200	200
Missouri	500	100	100	100
Montana	No minimum	35	35	No minimum
Nebraska	5,000	250	n.a.	250
Nevada	No minimum	100	n.a.	100
North Dakota	No minimum	100	n.a.	100
Ohio	No minimum	No minimum	100	25
Oklahoma	500	50	50	50
Oregon	No minimum	100	100	100
South Dakota	500	100	n.a.	n.a.
Utah	750	50	50	50
Washington	No minimum	25	100	50
Wyoming	No minimum	No minimum	n.a.	No minimum

expressed frustration with the forms:

Seriously, a person needs a lawyer to do this correctly.

Worse than the IRS!

Good Lord! I would never volunteer to do this for any committee.

These forms make me feel stupid!

Another participant had this to say:

I serve as the Treasurer of a political coordination committee/ political action committee formed within the last year. Even with that limited experience I found this exercise to be complicated and mentally challenging…. The burdensome paper work and fines imposed for errors in reporting proved to be a hurdle that prevented the formation of our PAC (that is affiliated with the non-profit I work for) for a number of years. That being said, in politics it is important to know the major contributors of our elected officials and hold contributors and recipients accountable to the degree possible.

That is, even a political treasurer sympathetic to mandatory disclosure (though notably for contributions to elected officials and not ballot initiatives) failed to comply with the law.

V. Conclusion

These findings point to a serious disconnect between intentions and consequences. Rather than abetting a clean and transparent initiative process, the campaign finance laws that regulate speech about ballot issues discourage political participation. They allow political opponents to drown out speech and grant regulators an enormous amount of power to penalize transgressors—a power that is wielded selectively, if not capriciously.[15]

For grassroots activists, who are often newcomers to the realities of participating in politics, even the threat of prosecution for campaign finance violations is a daunting prospect that distracts from the task at hand. Political insiders know this—even if campaign finance proponents do not—and like the pro-annexation litigants in Parker North, too frequently abuse the law to shut down opposition.

The issue is not likely to disappear. As we found, people perceive that campaign finance regulations apply only to politicians, powerful interest groups, and the wealthy. As new grassroots efforts composed of amateur activists emerge—as they will each election season—many of them will invariably fail to comply, whether they are unaware of the law or simply could not figure out the forms. But in a country that values the First Amendment, speech about issues on the ballot should not be burdened with useless regulation and endless red tape.

Endnotes

1 Crowder, M. (2008, November 13). Theater Official Resigns. *Sacramento Bee,* p. A1.

2 Rojas, A. (2009, January 9). Prop. 8 Harassment Suit Filed. *Sacramento Bee,* p. A3.

3 *Id.*

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6 Cornwell, B. (2008, April 13) Opposition to Annexation Riles Neighbors, Brings Lawsuit Designed to Shut Down Debate. *Rocky Mountain News*, p. 5NEWS.

7 Cardona, F. (2008, April 21) Judge to Rule on Free Speech; A Parker North Group That Fought Annexation Has Filed a Lawsuit. *Denver Post*, p. A13.

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10 For further details, see Carpenter, D. M. (2009). Mandatory Disclosure for Ballot Initiative Campaigns. *Independent Review, 13*(4), 567-583; Carpenter, D. M. (2007). *Disclosure Costs: Unintended Consequences of Campaign Finance Reform.* Arlington, VA: Institute for Justice.

11 NAACP v. Alabama, 377 U.S. 288 (1964).

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13 Deposition of Fred Brown at 12: 4-13, 16:17-17:2, 17:18-19, Sampson v. Coffman, No. 06-CV-01858-RPM-MJW (D. Colo. Oct. 11, 2007) (on file with the Institute for Justice).

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