

ATTACK BALLOT ISSUE DISCLOSURE ROOT AND BRANCH:

COMMENT ON *A COLD BREEZE IN CALIFORNIA: PROTECTMARRIAGE REVEALS THE CHILLING EFFECT OF CAMPAIGN FINANCE DISCLOSURE ON BALLOT ISSUE ADVOCACY*

By Steve Simpson*

For years, the lower federal and many state courts have given short shrift to the First Amendment rights of those who wish to contribute money to groups that advocate the passage or defeat of ballot measures. Twenty-four states allow legislation to be passed in this manner, and in every one, the law requires groups advocating the passage or defeat of ballot measures to disclose the names, addresses, and often employers of their contributors.¹ This not only chills the participation of potential contributors, as Stephen Klein ably demonstrates; it can be an enormous burden on ballot issue groups as well.² Many states treat them like political committees, requiring them to file registration statements, appoint treasurers, and track and report not only contributions but also all expenditures.³

For the most part, lower courts have ignored these burdens on speech and association and have concluded that the same government interests that support candidate disclosure laws apply to ballot issue disclosure laws as well.⁴ Admittedly, the legal landscape in the Supreme Court is not great for opponents of ballot issue disclosure laws. The Court has approved of the idea of ballot issue disclosure in dicta in three cases.⁵ But neither is the law exactly bad for those asserting their First Amendment rights in this context. The Court has made clear in past cases that the interests served by candidate campaign finance laws do not apply to ballot issues;⁶ it has upheld the right of anonymous speech⁷ and the right of association against disclosure laws and efforts to require groups to disclose membership lists;⁸ and it has noted the significant burdens that political committee regulations impose on voluntary groups.⁹ By and large, the lower courts, especially those in the Ninth Circuit, have navigated around these precedents and have upheld disclosure laws in the ballot issue context as they have in the candidate context.

Stephen Klein does a yeoman’s job of criticizing the latest example of poor judicial reasoning in this context in *ProtectMarriage.com v. Bowen*. He recognizes the lawyer’s dilemma in these cases: how to convince the court that all disclosure laws are not created equal, and that those imposed on ballot issue committees pose a greater threat to freedom of speech and are supported by a far less convincing justification than disclosure laws in the candidate context. Unfortunately, Klein’s proposed solution, well-meaning though it is, will not convince courts to uphold rights to anonymous speech and association and will end up doing more harm than good.

Klein proposes a distinction between ballot measures that raise purely “social issues” and those that implicate economic interests. According to Klein, while a compelling interest in disclosure might exist in the latter case, there is no such interest where purely “social” issues are concerned. The reason, as Klein sees it, is that groups with a social agenda, unlike those with

economic interests at stake, have no pecuniary motives and thus no incentive to hide their agendas.

If this sounds a bit circular, that’s because it is. Certainly, many groups and individuals have an economic stake in the outcome of ballot issues, but it is not clear why they have any greater or lesser reason to hide their identities or have “hidden” agendas than groups with a social agenda. Would it not benefit a campaign against gay marriage to cast itself as a grassroots campaign rather than one backed and funded by the “Religious Right”? Certainly no less so than it would benefit a campaign against smoking bans to cast it as one backed by small business rather than “Big Tobacco.”

This circularity is not Klein’s fault, however. At its root, the entire argument for disclosure in the ballot issue context is one big circular argument that begins with the premise that anyone who wishes to conceal their or their supporters’ identities is doing something wrong. Many courts rely on a variant of Justice Brandeis’s famous dictum “Sunlight is said to be the best of disinfectants.”¹⁰ But what, precisely, is disclosure intended to “disinfect” in this context? According to proponents, the laws are intended to prevent people from having “hidden agendas.” But this is ultimately no different from saying that we want to know who supports or opposes ballot issues simply because we want to know.

If we take the right to privacy and anonymous speech seriously—as the Supreme Court has done in past cases—then we must recognize that the “agendas” or motivations of those who wish to remain anonymous is their business, not ours. Keeping one’s views private is, after all, the reason for speaking anonymously.¹¹ If disclosure is justified by the desire to expose “hidden agendas,” then the argument for disclosure is simply that privacy and anonymity themselves are illicit, because the purpose of those rights is to keep agendas, views, motivations—whatever one wishes to call them—private.

Thus, the problem with Klein’s argument is that he accepts the premise of disclosure in part, but then tries to carve out a special exemption for a certain category of speech. Again, this is understandable given the sorry state of the law on ballot issue disclosure in the Ninth Circuit. Klein is describing a strategy for an as-applied constitutional challenge, in which fine distinctions often win the day, and lawyers must take the bad precedent as it comes and do with it what they can.

But Klein’s approach must ultimately fail for two reasons. First, the distinction between social and economic issues is simply untenable. Those speaking out on social issues are just as likely to have, or be seen as having, hidden agendas as those speaking out about issues that affect their pecuniary interests. And it is not at all clear how we are to define social versus economic issues. Is immigration a social or an economic issue? What about global warming and other environmental issues that affect the economic interests of virtually everyone in the nation? Moreover, Klein’s approach would, in effect, create a

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content-based distinction within First Amendment law itself, which would be an approach akin to burning the village in order to save it.

Second, and more importantly, one cannot defeat disclosure laws by accepting them as valid at their very core, as Klein does. Disclosure laws will never be defeated unless we can convince courts that they serve no legitimate purpose in the ballot issue context. Judges have upheld disclosure laws largely because they believe, as many Americans do, that disclosure is just a good idea regardless of the context. Klein does a good job of shooting down many of the arguments that the Ninth Circuit has embraced, but he ultimately accepts the central premise of disclosure: that it is improper to hide one's identity or those of one's supporters in certain contexts. Having accepted that premise, he is left to hope that the courts will leave just a bit of privacy and anonymity for those who promise only to speak about issues in which they have no economic interests.

Admittedly, opposing disclosure in principle, even if only in the ballot issue context, is not an easy row to hoe. One often finds oneself on the side of those accused of outright deception and lying to the public about their agendas. On closer inspection, however, the alleged abuses of anonymity are either largely overblown or simply irrelevant to a proper understanding of the First Amendment.

Take what proponents of disclosure seem to view as their silver bullet—the alleged efforts of “Big Business” to hide their support of or opposition to ballot measures. The Ninth Circuit relied as evidence of the importance of disclosure on the alleged “revelation” that California Proposition 188—which would have overturned smoking bans—was financed in large part by tobacco companies, rather than small businesses as was claimed.¹² But, in fact, Prop. 188 was indeed supported by many small businesses, no doubt because they believed that smoking bans increased costs and lost them business.¹³ It was also supported by tobacco companies, but that is hardly a revelation. Is there anyone in California who could not have figured out for themselves that tobacco companies oppose smoking bans and support their repeal?

Likewise, in another case, the Ninth Circuit claimed disclosure revealed that Proposition 199, which was alleged to assist mobile home park residents with rent, was really a rent control measure supported by park owners.¹⁴ But Proposition 199 in fact did both—it sought to repeal rent control *and* it helped mobile home park residents with rent. This was crystal clear from the language of the measure itself, and it was even revealed in some of the supporters' campaign literature.¹⁵

The claim that advocates in these campaigns were engaged in deception is reminiscent of the claims during every campaign season that each side's opponent is “lying” by taking a different view of the issues. Thus, if small business backs a measure that is also backed by tobacco companies, according to the proponents of disclosure it is deceptive to characterize it as anything but a law that serves the interests of Big Tobacco. And if landlords don't emphasize the aspects of a measure that its opponents believe are most relevant, they are not disclosing the whole truth.

A cardinal principle of the First Amendment is that the speaker gets to choose the content of his message, not the

government or the speaker's critics.¹⁶ Debates will often be heated and contentious; at times, speakers may even make wild and unfounded claims. But outside of narrow contexts like libel law and commercial fraud, the remedy for speech you don't like—even allegedly false speech you don't like—is more speech.¹⁷

Those principles ought to apply with even greater force in the context of debates over ballot issues, for the simple reason that the language of a ballot issue is there for all to read and understand. Ballot issues cannot have hidden agendas. True, the proponents and opponents of a ballot issue themselves can have hidden agendas, but the motivations or agendas of speakers in the ballot issue context cannot be a reason to impose disclosure obligations on them.¹⁸ The desire to discover the thinking behind someone's support for or opposition to a ballot issue is simply a rejection of their right to anonymity and privacy. Again, the whole point of speaking anonymously is to sever the connection between one's views on a particular topic and one's identity, as well as one's other views, motivations, and “agendas.”¹⁹ Anonymity is just another aspect of one's message that one gets to decide for oneself.²⁰

Moreover, the impulse to reveal hidden agendas has no limiting principle. Why, in other words, stop with those who contribute money to ballot issue committees? It is arguably far more important to understand the possible hidden agendas of the media and the various interest groups and think tanks that are constantly cajoling members of the public to think one thing or another on important policy questions. And the disclosure of a bare contribution conveys only one's support for a particular viewpoint. If we truly wish to reveal hidden agendas and uncover information that voters might find useful, why settle for the disclosure of only the identities, addresses, and employers of contributors? Requiring them to disclose their religious, political, and other group affiliations would reveal much more about the possible agendas of the groups to which they contribute. And while we are at it, why not require everyone to disclose which way they vote on issues? Disclosure already accomplishes that for contributors to ballot issue committees anyway, and keeping a database of everyone's voting history would be a wonderful way to assess their possible agendas in future elections.

Certainly, the language of ballot issues can be complicated at times, and it is possible that some voters might be able to use contributor disclosure as a “cue” that helps them understand the issues involved. But if voters are really interested in following the recommendations of others, loads of groups and individuals—from the news media, to interest groups, to politicians, to scholars—stand ready during each election to educate voters about all aspects of the measures on the ballot.²¹

Ultimately, the argument for disclosure boils down to the extraordinary claim that voters are unable or unwilling to understand a ballot initiative by reading the language and considering public information about it, but they can be counted on to divine its meaning by sifting through the disclosure rolls to see who has given money to the groups on each side. According to the district court in *Protectmarriage.com*, it is “naïve” to think that voters will actually take the time to understand a ballot issue,²² so, in effect, we must force contributors to become

unwilling endorsers of the measures they support. The true path to voter education, in other words, is not to encourage voters to understand the issues themselves, but to encourage them to understand what their neighbors think.

In fact, if there is anything naïve about the prevailing view of disclosure laws, it is the view that disclosure is benign and costless. Dick Carpenter, Jeff Milyo, and John Ross illustrate in this issue of Engage the regulatory burdens of disclosure and its impact on rights to privacy.²³ Many people have expressed concerns about having their positions on issues revealed, about identity theft, and about the possible repercussions for their jobs, their businesses, their union memberships, and the like.²⁴ Evidence from the *Protectmarriage.com* case and a case now pending in Washington state²⁵ shows that they have good reason to be concerned.

Even short of being used for outright intimidation and harassment, disclosure laws are very effective political tools for each side of a campaign. Denver-based political consultant Floyd Ciruli testified in a challenge to Colorado's disclosure laws that they are regularly used by campaigns to keep track of and even gain an advantage over their opponents.²⁶ Robert Stern, general counsel of the California-based Center for Governmental Studies agrees. In Stern's view, many people want disclosure laws in order to be able to keep track of the activities of politically unpopular groups.²⁷

This is no doubt true. As the debates over health care have shown, it is always more effective to characterize one's opponent as a mouthpiece for big business or some other special interest. But it is not clear why the state has a compelling interest in arming campaigns with the ability to use each side's contributors as a weapon in this battle.

In *McIntyre v. Ohio Bd. of Elections*, the Supreme Court struck down a state law requiring the disclosure of the authors of political writings, holding that the law violated the right to anonymous speech. In rejecting the claim that disclosure was necessary to allow the public to evaluate the message, the Court stated,

Of course, the identity of the source is helpful in evaluating ideas. But the best test of truth is the power of the thought to get itself accepted in the competition of the market.... People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is responsible, what is valuable, and what is truth.²⁸

This very common-sense point will likely not shake the faith of disclosure's most ardent supporters. But convincing the rest of the public and the courts to think twice about disclosure laws will take more than fine distinctions among types of political speech. Stephen Klein has done a good job advancing some clear thinking in this context, but to defeat the arguments for disclosure once and for all, opponents will need to attack disclosure root and branch.

Endnotes

- 1 Dick M. Carpenter, III, Institute for Justice, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform* 1 (March 2007).
- 2 Carpenter, *supra* note 1, at 1-2; Jeffrey Milyo, Institute for Justice, *Campaign Finance Red Tape: Strangling Free Speech & Political Debate* (October 2007).
- 3 Dick M. Carpenter, III, Jeffrey Milyo and John Ross, Institute for Justice, *Politics for Professionals Only: Ballot Measures, Campaign Finance "Reform" and the First Amendment*, 10 ENGAGE (forthcoming 2009) (manuscript at 5, on file with authors).
- 4 *California Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172 (9th Cir. 2007); *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003); *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197 (E.D. Cal. 2009); *Richey v. Tyson*, 120 F. Supp. 2d 1298 (S.D. Ala. 2000); *Volle v. Webster*, 69 F. Supp. 2d 171 (D.Me. 1999).
- 5 *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 202-03 (1999); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298-300 (1981); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 & n. 32 (1978).
- 6 *Citizens Against Rent Control*, 454 U.S. at 296-97; *Bellotti*, 435 U.S. at 789-92.
- 7 *McIntyre v. Ohio Elections Board*, 514 U.S. 334, 342 (1995).
- 8 *NAACP v. Alabama*, 371 U.S. 415 (1963).
- 9 *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 255-56 (1986).
- 10 *Buckley v. Valeo*, 424 U.S. 1, 67 (1976); *see also Getman*, 328 F.3d at 1106 n. 24 (stating that disclosure "prevents the wolf from masquerading in sheep's clothing").
- 11 *McIntyre*, 514 U.S. at 342-43.
- 12 *Randolph*, 507 F.3d at 1179 n. 8.
- 13 Alan Liddle, *Voters Shoot Down Prop. 188, Uphold Smoking Bans in California*, NATION'S RESTAURANT NEWS, November 21, 1994, at 3.
- 14 *Getman*, 328 F.3d at 1106 n. 24.
- 15 Affidavit of Stephen K. Hopcraft as Expert Witness in Support of Defendants' Motion for Summary Judgment, Exhibit C (filed in proceedings of *Randolph*, 507 F.3d 1172 (9th Cir. 2007)) (on file at Institute for Justice).
- 16 *Wisconsin Right to Life*, 551 U.S. at 477 n. 9; *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 581 (1995); *Cohen v. California*, 403 U.S. 15, 21 (1971).
- 17 *Texas v. Johnson*, 491 U.S. 397, 419 (1989); *Meese v. Keene*, 481 U.S. 465, 481 (1987); *Brown v. Hartlage*, 456 U.S. 45, 61 (1982); *Linmark Associates, Inc. v. Willingboro Township*, 431 U.S. 85, 97 (1977); *Whitney v. California*, 274 U.S. 357, 377 (1927) ("the remedy to be applied is more speech, not enforced silence."); *see also New York Times v. Sullivan*, 376 U.S. 254 (1964).
- 18 *Cf. Wisconsin Right to Life*, 551 U.S. at 468 (rejecting speaker's intent as proper test of what constitutes express advocacy).
- 19 *McIntyre*, 514 U.S. at 342-43.
- 20 *Id.* at 342.
- 21 Carpenter, Milyo and Ross, *supra* note 3. (manuscript at 5, on file with authors).
- 22 *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d at 1209.
- 23 Carpenter, Milyo and Ross, *supra* note 3.
- 24 *Id.* (manuscript at 5, on file with authors); Carpenter, *supra* note 1, at 7.
- 25 *Protect Marriage Washington v. Reed*, No. 0:09-cv-05456-BHS (W.D. Wash. filed July 28, 2009).
- 26 Deposition of Floyd Ciruli at 37:19-39:1 (October 4, 2007) (filed in proceedings of *Sampson v. Dennis*, No. 06-cv-01858-RPM-MJW (D. Colo. 2007) (on file at the Institute for Justice).

