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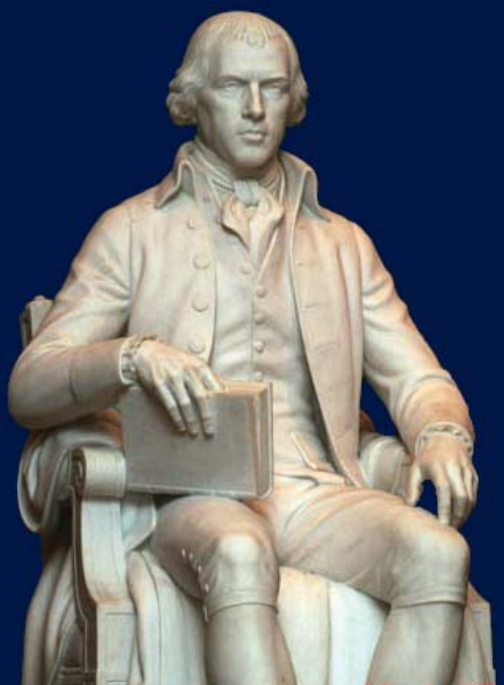

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A Cold Breeze in California: *ProtectMarriage* Reveals the Chilling Effect of Campaign Finance Disclosure on Ballot Measure Issue Advocacy

*By Stephen R. Klein**

On November 4, 2008, the election of President Obama coincided with the passage of Proposition 8, a ballot measure which banned gay marriage in California through amendment of the state's constitution.[1] In the days leading up to and following the passage of the proposition, public access to the names and pertinent information of individual donors supporting the bill led to some interesting results:

> [W]hen it was discovered that Scott Eckern, director of the nonprofit California Musical Theater in Sacramento, had given $1,000 to Yes on 8, the theater was deluged with criticism from prominent artists. Mr. Eckern was forced to resign. Richard Raddon, the director of the L.A. Film Festival, donated $1,500 to Yes on 8. A threatened boycott and picketing of the next festival forced him to resign. Alan Stock, the chief executive of the Cinemark theater chain, gave $9,999. Cinemark is facing a boycott, and so is the gay-friendly Sundance Film Festival because it uses a Cinemark theater to screen some of its films.[2]

More disturbingly, "[s]ome donors to groups supporting the measure... received death threats and envelopes containing powdery white substance...."[3] Many of these threats were possible only because the names and ZIP codes of donors and the amounts of their respective donations are made publicly available and posted on the internet pursuant to California law.[4] However, unlike previous elections, many names were widely circulated elsewhere on the internet and led to the emergence of websites such as eightmaps.com.[5] This website combines the donor list with Google Maps and gives any visitor to the site an aerial view of the donor's home.[6]

In the midst of this fallout, some pro-Prop 8 committees and donors have sued in the Eastern District of California to enjoin the enforcement of semiannual reporting requirements, to enjoin any criminal or civil actions for failure to comply with reporting requirements, and to enjoin the publishing of reports or statements filed previously.[7] The court denied a preliminary injunction and concluded that "in this case... no serious First Amendment questions are raised."[8]

This article argues to the contrary: although a state government may have an interest in disseminating donor information behind some campaigns for or against ballot measures, the Ninth Circuit's interpretation of the "informational interest" from *Buckley v. Valeo* was not a concern in Proposition 8, which implicated a purely social issue. Thus, in light of the use of donor information to abridge free speech, this articulation of the informational interest does not survive strict scrutiny: as applied, California's disclosure law indirectly infringes upon First Amendment rights by facilitating the suppression of political speech.

I. Getman and ProtectMarriage: Ballot Measure Disclosure in the Ninth Circuit

On January 30, 2009, Judge Morrison England, Jr., denied a preliminary injunction in the *ProtectMarriage* case. The Ninth Circuit's current stance (and, as a result, the stance of the Eastern District of California) on compelled disclosure for money spent on direct democratic lawmaking is well-intentioned, but, in light of Proposition 8 and other social-issue ballot measures, provides a tool for chilling political speech. Furthermore, such disclosure is not supported by *Buckley v. Valeo* and its progeny.[9]

The committees bringing the *ProtectMarriage* case include ProtectMarriage.com, the National Organization for Marriage, and John Doe #1, who also represents a class of pro-Proposition 8 donors.[10] The plaintiffs filed a number of anonymous declarations from John Does, nine of which the court describes in its denial for preliminary injunction.[11] Many of these declarations include claims that the John Does will be reluctant to make similar types of donations in the future.[12] The plaintiffs claim that "'California's threshold for compelled disclosure of contributors is not narrowly tailored to serve a compelling government interest in violation of the First Amendment to the United States Constitution.'"[13] For purposes of a preliminary injunction, Judge England rejects this argument.[14]

A. Precedent (Or Lack Thereof)

"Plaintiffs concede... that California has a compelling justification for requiring disclosure of Plaintiffs contributors."[15] However, after stating that this concession "gives short shrift to both the nature and magnitude of the State's actual interest,"[16] Judge England determines that "the Supreme Court has repeatedly emphasized the importance of disclosure as it relates to the passage of initiatives."[17] Rather than address–much less name–these Supreme Court cases, Judge England supports his assertion with a citation to a Slip Opinion from the remand of *California Pro-Life Council v. Getman*.[18] On remand, in "*Getman II*" Judge Frank Damrell, Jr., stated that "the Supreme Court repeatedly has recognized the importance of expenditure and contribution disclosure in the ballot measure context."[19] He cited three cases: *First National Bank of Boston v. Bellotti*,[20] *Citizens Against Rent Control v. City of Berkeley*,[21] and *Buckley v. American Constitutional Law Foundation*.[22] This was a shorter repetition of the Ninth Circuit's decision in *Getman*.[23]

Although Judge Damrell's assertion regarding these cases is not entirely inaccurate, he neglected to mention that these cases are, at best, persuasive authority: *Bellotti* overturned restrictions

** Stephen R. Klein is a member of the Executive Committee of the Free Speech and Election Law Group.* *The author thanks Professor John H. Dudley and Jason C. Miller for their comments.*

on corporate advertising in a public issue election.[24] The Court merely stated in its reasoning that "[the people] may consider, in making their judgment [on how to vote], the source and credibility of the advocate."[25] In a footnote the Court stated that "[i]dentification of the source of advertising may be required as a means of disclosure,"[26] but the Court discussed only corporate sponsorship, not individual contributors, and the extent of disclosure was not before the Court.

In *Citizens Against Rent Control*, the Court overturned a law prohibiting contributions greater than $250 to committees formed to support or oppose ballot measures.[27] The Court stated that "[t]he integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed; if it is thought wise, *legislation can outlaw anonymous contributions*."[28] However, the issue of anonymous contributions was not before the Court, nor was a regulatory scheme that would disclose contributions for issue advocacy. Finally, in *American Constitutional Law Foundation*, the Court upheld "[d]isclosure of the names of [ballot] initiative sponsors, and of the amounts they have spent gathering support for their initiatives" as a substantial state interest.[29] The Court addressed the informational interest of money spent to "get a measure on the ballot," but did not address disclosure of donors behind political speech once initiatives have been placed on a ballot.[30]

The Ninth Circuit and the Eastern District of California declare that disclosure of issue advocacy is a compelling state interest, but offer no specific precedent. Although some dicta in *Bellotti* and *Citizens Against Rent Control* is quite strong, there is otherwise little to support an informational interest in ballot measures. Perhaps aware of this, both the Ninth Circuit in *Getman* and Judge England in *ProtectMarriage* articulate an informational interest for ballot measure campaigns and contend this interest is in step with *Buckley v. Valeo*.

B. The "Informational" Interest

The *ProtectMarriage* case cites *Buckley*'s three categories of disclosure,[31] and recognizes that "unlike the election before the *Buckley* court, which concerned candidates, the instant case bears on a recent ballot-initiative measure."[32] Judge England continues to rely on the Ninth Circuit's *Getman* precedent and reiterates that the "informational interest," the first category of disclosure in *Buckley*,[33] provides a compelling state interest:

> The influx of money [into ballot measures]... produces a cacophony of political communications through which California voters must pick out meaningful and accurate messages. Given the complexity of the issues and the unwillingness of much of the electorate to independently study the propriety of individual ballot measures, ... being able to evaluate who is doing the talking is of great importance.[34]

Judge England then articulates numerous reasons for this informational interest, but throughout his analysis he fails to recognize that these concerns are not raised in the present case.

1. Understanding the Policy Content of a Ballot Measure

Judge England begins with ballot measures themselves:

> While the ballot pamphlet sent to voters by the state contains the text and a summary of ballot measure initiatives, many voters do not have the time or ability to study the full text and make an informed decision. Since voters might not understand in detail the policy content of a particular measure, they often base their decisions to vote for or against it on cognitive cues such as the names of individuals supporting or opposing a measure....[35]

Leaving aside not-so-subtle-hints of a governmental interest in basing disclosure on the lowest common denominator of citizenry, the policy content of Proposition 8 required very little effort to understand.[36] A vote of "yes" supported constitutionally prohibiting gay marriage; a vote of "no" supported the California Supreme Court's ruling in *In re Marriage Cases*.[37] Moreover, disclosure can just as easily detract from discovering the detail of policy content because it shifts focus to the advocates over the advocacy.[38] Rather than promote the discussion of issues, disclosure allows opposing parties to obfuscate issues with accusations of ulterior motives.[39] Assuming this prong of the Ninth Circuit's informational interest is valid to begin with, it was not a concern in the Proposition 8 campaigns.

2. Citizen-Legislators

Judge England continues to describe the informational interest by again quoting the Court of Appeals:

> [V]oters act as legislators in the ballot-measure context, and interest groups and individuals advocating a measure's defeat or passage act as lobbyists.... Californians, as lawmakers, have an interest in knowing who is lobbying for their vote, just as members of Congress may require lobbyists to disclose who is paying for the lobbyists' services and how much.[40]

In *Getman*, the Ninth Circuit drew this principle from *United States v. Harriss*,[41] which upheld the Lobbying Act.[42] The Supreme Court reasoned that without disclosure to Congress of contributions made to lobbyists, "the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal."[43]

Harriss was decided before *Buckley*, and *Buckley* cited the case three times.[44] In pertinent part, the *Harriss* case was used as support not for the informational interest but for the second disclosure interest, corruption or the appearance of corruption: "A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return."[45] Treating citizens as legislators with loose reference to *Harriss* does not withstand this classification. Money paid to lobbyists is (or appears to be) property used in exchange for preferential treatment. With this money, lobbyists are paid to persuade members of Congress to vote on certain issues. Disclosure provides members of Congress with information as to where this persuasion comes from. More importantly, this serves *the electorate* by ensuring them that their respective votes can be entrusted with their legislator.

When the citizen is the legislator, their vote is not entrusted to anyone else, and there is no danger of indirect corruption or the appearance of corruption.

This prong, then, while apparently arising from different authority, is largely the same as the first prong: understanding the policy implications of a measure by understanding who the advocates are. Thus, the same criticisms of that prong in the previous section serve to dispel this prong of the informational interest in light of Proposition 8.[46] Judge England also includes this statement from the Ninth Circuit: "'While we would hope that California voters will independently consider the policy ramifications of their vote, and not render a decision based upon a thirty-second sound bite they hear the day before the election, we are not that idealistic nor that naïve.'"[47] Again, the Ninth Circuit's distrust of the electorate's independent consideration causes the court to recognize a compelling state interest in disclosing information voters will consider *instead* of the actual issues behind each ballot proposition.

3. Accurate Identification of Advocate

The final prong of the Ninth Circuit's informational interest is as follows[48]:

> Knowing which interested parties back or oppose a ballot measure is critical, especially when one considers that ballot-measure language is typically confusing, and the long-term policy ramifications of the ballot measure are often unknown. At least by knowing who supports or opposes a given initiative, voters will have a pretty good idea of who stands to benefit from the legislation.[49]

Furthermore, "because groups supporting and opposing ballot measures frequently give themselves ambiguous or misleading names, reliance on the group, without disclosure of its source of funds, can be a trap for unwary voters."[50] Once again, it is notable that although many ballot measures in California are long and potentially confusing to the average voter,[51] Proposition 8 was not one of those measures.[52] Judge England points to special interest groups; he cites favorably the Ninth Circuit's recent *Randolph* decision, which discussed in its reasoning how disclosure allowed a reporter to discover that an effort promoting the passage of Proposition 188 in 1994 (that would have overturned a workplace smoking ban) was heavily financed by Big Tobacco and not—as was claimed—small businesses.[53] *Getman* provides further support: "At least by knowing who backs or opposes a given initiative, voters will have a pretty good idea of who stands to benefit from the legislation."[54] The opinion then cites Proposition 199 in 1996: disclosure revealed that the measure, alleged to assist mobile home park residents with rent, was actually backed by mobile home park owners who wanted to eliminate local rent control.[55]

However, there were no economic special interests behind Proposition 8. The ballot measure was entirely a social issue, and any interests that stood to gain economically by passage or defeat of the proposition were not the concern of voters. Although the Ninth Circuit is admirably against groups that attempt to mask their agenda by claiming to be a grassroots movement when in reality they are not, these same groups can and will find ways to obfuscate regardless of disclosure.[56] Disclosure did nothing to reveal ulterior motives in the Proposition 8 campaigns. Disclosure did reveal backing by the Church of Jesus Christ of Latter-Day Saints as well as other Christian groups both within California and out-of-state,[57] but this served no purpose in revealing a hidden agenda or deception.

Although there are undoubtedly examples of "ambiguous or misleading names" for committees in ballot proposition campaigns, if "Protect Marriage" (the lead organization for Proposition 8) and "Equality for All" (the lead organization against Proposition 8) meet this definition, then one would be hard pressed to find a committee name that does not. As in most campaigns there was heated debate in the months leading up to the passage of Proposition 8 that often sank below the level of mature discourse, but this could not (and should not) be prevented by disclosure laws.

C. The "Informational" Interest Distinguished

Judge England fails to recognize that even if the government does have an informational interest in disclosing donations for ballot measure issue advocacy, none of those interests were implicated in the Proposition 8 campaigns. The policy content of Proposition 8 was clear,[58] citizen-legislators always control their own vote, and committees were not deceptively titled.[59] While none of the prongs of the Ninth Circuit's informational interest are implicated in ballot measures like Proposition 8, the unintended consequence of disclosure—people using the information to send death threats—deters free speech.

It is interesting to note the treatment Judge England gives to the actions taken against pro-Proposition 8 donors. Judge England casually notes that "[o]nly random acts of violence directed at a very small segment of supporters of the initiative are alleged."[60] He references the Declaration of Sarah E. Troupis and quotes an e-mail she received: "If I had a gun I would have gunned you down along with each and every other supporter..."[61] But because this was an isolated incident, Judge England dismisses the gravity of the situation. He rightly notes that other hardships, such as a boycott of one's business, are rightful exercises of the First Amendment rights of others.[62] This consideration and the apparent impregnability of the informational interest allow Judge England to gloss over an important argument by the plaintiffs: not only boycotts, but in some instances death threats, were made possible only because of governmental disclosure.[63]

The oppression faced by many who did not join the *ProtectMarriage* suit is well-documented.[64] Although there have been threats, it does not appear that anyone has actually acted on these threats. But this does not overcome the immeasurable impact of the message sent by some proponents of gay marriage: if you oppose gay marriage, *be afraid*. In light of disclosure serving no governmental interest in the case of Proposition 8, even the slightest impact on free speech through disclosure is enough cause to re-examine ballot measure disclosure.

II. Disclosure in Issue Advocacy: A Narrower, Economic Interest

The interests articulated by the Ninth Circuit in *Getman* and reiterated in *ProtectMarriage* were not implicated in the Proposition 8 fallout. The question is, then, whether Proposition

8 and pure social-issue ballot measures should be carved out of the informational interest or whether *Buckley* leaves no room at all for disclosure in ballot measure advocacy.

A. Buckley's *Informational Interest*

In *ProtectMarriage*, Judge England acknowledges that *Buckley* only discussed elections involving candidates.[65] Although the Ninth Circuit ruled that ballot measure disclosure can fit into the first informational interest discussed in *Buckley*, this is, at best, a stretch:

> First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.[66]

Because this interest is separate from the interest of preventing corruption or the appearance of corruption,[67] clear-cut statements by the Supreme Court in cases such as *Bellotti* ("The risk of corruption perceived in cases involving candidate elections... simply is not present in a popular vote on a public issue."[68]) do not foreclose disclosure for issue advocacy.

The best support for the Ninth Circuit's position comes from this sentence: "[Disclosure] allows voters to place each candidate in the *political spectrum* more precisely than is often possible solely on the basis of party labels and campaign speeches."[69] This check on honesty, for the Ninth Circuit, easily translates to ballot measures: "the same considerations apply just as forcefully, if not more so, for voter-decided ballot measures."[70] As discussed in the previous section, disclosure allegedly serves to provide the electorate with a better understanding of the policy in a ballot measure by showing who supports it.[71] But while a candidate or an officeholder can make promises to act one way and then act in an entirely different manner, a law is a black letter document. Perhaps it will be enforced in an unexpected manner, but this has more bearing on candidacy disclosure than on a ballot measure. "California's... need to educate its electorate"[72] is high-minded, but it amounts to *protecting* its electorate from the First Amendment, "which was designed 'to secure "the widest possible dissemination of information from diverse and antagonistic sources,"'" and "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[73]

Although the informational interest is distinct from the interest of preventing corruption or the appearance of corruption, the Ninth Circuit appears to not consider it as wholly independent: "At least by knowing who backs or opposes a given initiative, voters will have a pretty good idea of who stands to *benefit* from the legislation."[74] The Ninth Circuit does not explicitly state that this benefit must be monetary, but their support for this statement points to a solely economic interest.[75] The separate example cited in *ProtectMarriage* is also to an economic interest.[76] "Benefit" is to say, then, that supporters are not looking to vindicate a political issue for what they believe is for the good of society as a whole, but are instead seeking economic gain. In such a situation, money is not spent solely for political communication, but in search of (perhaps less corrupt) quid pro quo.[77] When this use predominates over speech, as discussed in the corruption section of *Buckley*, "the integrity of our system of representative democracy is undermined."[78]

B. Carve It Out or Can It

Economic interests were not the driving force for many—if any—donors on either side of Proposition 8: gay marriage is a social issue. Although money "'produces a cacophony of political communications through which California voters must pick out meaningful and accurate messages,'"[79] this is the objective of the First Amendment, not a problem to be solved.[80] The Ninth Circuit's extension of *Buckley*'s informational interest may have merit for disclosure in ballot measures that will primarily benefit and/or deprive different segments of the population *economically*, but as applied to the Proposition 8 fallout it serves no legitimate governmental interest.

Disclosure did not further understanding of Proposition 8, prevent confusion of "citizen-legislators," or expose large interest groups masquerading as something different.[81] Instead, disclosure provided uncivil proponents of gay marriage with the means to scare supporters of traditional marriage from supporting their view politically should the issue ever arise again in the ballot context. Given this result, the Ninth Circuit's articulation needs work. The informational interest for disclosure should be narrowly tailored to exclude predominantly social-issue ballot measures such as Proposition 8. Given that campaign finance law has already given rise to numerous vague standards that put judges in the position of "know[ing] [a violation] when [they] see it,"[82] the Proposition 8 fallout provides further evidence of the wisdom behind the Framers' use of the word "abridge" in the First Amendment.[83]

Conclusion

Given the chilling effect on the speech of pro-Proposition 8 donors and the potential for future campaigns of intimidation facilitated by disclosure laws relating to ballot propositions, the Ninth Circuit should reconsider the *Getman* precedent if the *ProtectMarriage* case ends in the same manner as Judge England's denial of a preliminary injunction. If the Ninth Circuit refuses to do so, the Supreme Court should grant certification and narrow the informational interest, perhaps going even so far as to restrict it to donations made to candidates or candidate-based elections. Advocacy surrounding ballot proposition campaigns is wholly protected by the First Amendment, which plainly states that "Congress shall make no law... abridging the freedom of speech."[84] In the context of issue advocacy, money is spent only as a tool of speech, and this speech is protected whether it is truthful or dishonest, clear or misleading. The California government's desire to have a better-informed electorate is admirable, but its disclosure law has provided a means for opposing parties to intimidate and silence opinions different from their own. At the same time, this campaign implicated none of the prongs of the Ninth Circuit's purported informational interest. In the Proposition 8 fallout the Ninth

Circuit fails to provide a governmental interest that withstands scrutiny for disclosure's "deterrent effect on the exercise of First Amendment rights [that] arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure."[85] In the context of Proposition 8 and other ballot measures involving purely social issues, campaign finance disclosure for issue advocacy is unconstitutional.

Endnotes

1 "Thirty states have now passed bans on same-sex marriage, raising serious questions about the country's support for the rights of gays and lesbians—something that Obama has advocated repeatedly on the campaign trail and in some of his most famous speeches." Christi Parsons, *Gays Find Victory Falls Short; Measures Temper Joy of Obama Win*, Chi. Trib., Nov. 7, 2008, at C4.

2 John R. Lott Jr. and Bradley Smith, *Donor Disclosure Has Its Downsides*, Wall Street J., Dec. 26, 2008, at A13.

3 Brad Stone, *Disclosure, Mangified On the Web*, N.Y. Times, Feb. 8, 2009, at A3.

4 "To implement the Legislature's intent, the Secretary of State... shall do all of the following: ... (d) Make all the data filed available on the Internet in an easily understood format that provides the greatest public access. The data shall be made available free of charge and as soon as possible after receipt.... The data made available on the Internet *shall not contain the street name and building number of the persons*... listed on the electronically filed forms or any bank account number required to be disclosed pursuant to this title." Cal. Code Regs. tit. 2, § 18550 (2006) (emphasis added); *see also* Cal Gov't Code § 84602 (2006).

5 eightmaps, http://www.eightmaps.com (last accessed Apr. 27, 2009).

6 "The site takes the names and ZIP codes of people who donated to the ballot measure... and overlays the data on a Google map. Visitors can see markers indicating a contributor's name, approximate location, amount donated and, if the donor listed it, employer. That is often enough information for interested parties to find the rest–like an e-mail or home address." Stone, *supra* note 3.

7 ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197, 1199 (E.D. Cal. 2009).

8 *Id.* at 1226.

9 *See generally* Buckley v. Valeo, 424 U.S. 1 (1976).

10 *ProtectMarriage.com*, 599 F. Supp. 2d at 1199.

11 *See id.* at 1201–04.

12 *Id.*

13 *Id.* at 1204.

14 *Id.* at 1226.

15 *Id.* at 1207.

16 *Id.*

17 *Id.*

18 California Pro-Life Council, Inc. v. Getman ("*Getman II*"), No. 00-1968, slip op. (E.D.Cal. Feb. 22, 2005).

19 *Getman II*, No. 00-1968, slip op. at 15.

20 435 U.S. 765 (1978).

21 454 U.S. 290 (1981).

22 525 U.S. 182 (1999).

23 *See* California Pro-Life Council v. Getman, 328 F.3d 1088, 1102–04 (9th Cir. 2003).

24 *Bellotti*, 435 U.S. at 795.

25 *Id.* at 791–92.

26 *Id.* at 792 n.32.

27 *Citizens Against Rent Control*, 454 U.S. at 299.

28 *Id.* at 299–300 (emphasis added).

29 *American Constitutional Law Foundation*, 525 U.S. at 202–03.

30 *Id.* at 203. These interests are distinct: Like lobbying, paying people to collect signatures to have a piece of legislation put on a ballot is to spend money as much (if not more so) as currency than as a means of political speech. The Court cites *Bellotti* and reiterates that "ballot initiatives do not involve the risk of '*quid pro quo*' corruption" during the actual balloting stage, but does not make this distinction, which would be wise. *Id.* (citing *Bellotti*, 435 U.S. at 790). *See infra* Part II.B.

31 "First, disclosure provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office.... Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.... Third... recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of... contribution limitations." *Buckley*, 424 U.S. at 66–68, (citing H.R. Rep. No. 92-564, p. 4 (1971)).

32 *ProtectMarriage.com*, 599 F. Supp. 2d at 1207.

33 *See supra* note 31. *But see infra* part II.B.

34 *ProtectMarriage.com*, 599 F. Supp. 2d at 1208 (citing *Getman*, 328 F.3d at 1105).

35 *ProtectMarriage.com*, 599 F. Supp. 2d at 1208 (citing *Getman II*, No. 00-198, slip op. at 17).

36 Proposition 8 read as follows:

> This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8, of the California Constitution. This initiative measure expressly amends the California Constitution by adding a section thereto; therefore, new provisions proposed to be added are printed in *italic type* to indicate that they are new.
>
> SECTION 1. Title
>
> This measure shall be known and may be cited as the "California Marriage Protection Act."
>
> SECTION 2. Section 7.5 is added to Article I of the California Constitution, to read:
>
> *SEC. 7.5. Only marriage between a man and a woman is valid or recognized in California.*

Available at http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop8.

37 183 P.3d 384 (2008).

38 *Compare* "Hello, I'm No On Prop 8," available at http://www.youtube.com/watch?v=b9T7ux8M4Go, *with* "Yes on Proposition 8 (Prop 8) protect marriage," available at http://www.youtube.com/watch?v=Y4nqtDrJI7A.

39 An example of this arose in the Proposition 8 campaign: the Courage Campaign Issues Committee released an advertisement claiming that members of the Mormon Church donated more than $20 million to the passage of Proposition 8. In the commercial, two Mormons invade a married lesbian couple's home, confiscate their wedding rings and tear up their marriage license. The commercial ends with the Mormons leaving the home and one asking, "What should we ban next?" "'Home Invasion': Vote No on Prop 8", available at http://www.youtube.com/watch?v=q28UwAyzUkE.

40 *ProtectMarriage.com*, 599 F. Supp. 2d at 1208 (citing *Getman*, 328 F.3d at 1106).

41 347 U.S. 612 (1954).

42 *Getman*, 328 F.3d at 1106.

43 *Harriss*, 347 U.S. at 625.

44 *Buckley*, 424 U.S. at 67, 77, 78.

45 *Id.* at 67.

46 *See supra* notes 35–39 and accompanying text.

47 *ProtectMarriage.com*, 599 F. Supp. 2d at 1209 (citing *Getman*, 328 F.3d at 1106).

48 I use the term "prong" loosely: neither of the *Getman* opinions, *Randolph* or *ProtectMarriage* attempt to separate these components of the informational interest. Each of these prongs overlaps and ties into the overall alleged interest of disclosing who's behind a message.

49 *ProtectMarriage.com*, 599 F. Supp. 2d at 1209 (citing *Getman*, 328 F.3d at 1105–06).

50 *Getman II*, No. 00-198, slip op. at 17.

51 A good example is Proposition 7, which was on the same ballot as Proposition 8. *See* Proposition 7 – Title and Summary – Voter Information Guide 2008, http://voterguide.sos.ca.gov/past/2008/general/title-sum/prop7-title-sum.htm (last visited Apr. 27, 2009).

52 *See supra* note 36.

53 *ProtectMarriage.com*, 599 F. Supp. 2d at 1209 n. 5 (citing *Randolph*, 507 F.3d at 1179 n. 8).

54 *Getman*, 328 F.3d at 1106.

55 *Id.* at 1106 n. 24.

56 Even if an organization does not obfuscate, it may have to spend a lot of time and money proving it. *See* Tony Semerad, *Leaked Memos: Gay Rights Group Make New Charges Over LDS Prop 8 Role*, Salt Lake Trib., Mar. 19, 2009 ("In new charges filed Thursday with the California Fair Political Practices Commission, the Los Angeles-based Californians Against Hate accuses the church of creating the National Organization for Marriage in California as early as summer 2007 as a front group for its agenda, while failing to report the costs as required by California law.").

57 "As many as 1,025 people and businesses in Utah donated $3.8 million to Proposition 8 efforts, with 70 percent going to campaigns supporting the measure." *Id.*

58 *See supra* note 36.

59 One could argue that it was only because the laws were in place that these did not occur. In such an instance, I re-assert my argument that in non-economically based ballot measures, disclosure provides, at best, material to obfuscate the issue and, at worst, to oppress donors.

60 *Id.* at 1217.

61 *ProtectMarriage.com*, 599 F. Sup. 2d at 1200; *see also* Second Amended Complaint at 35, ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197 (E.D. Cal. Jan. 22, 2009).

62 *Id.* at 1218–20.

63 Contrast the Proposition 8 fallout with part of the boycott at issue in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 903–04 (1982):

> One form of "discipline" of black persons who violated the boycott appears to have been employed with some regularity. Individuals stood outside of boycotted stores and identified those who traded with the merchants. Some of these "store watchers" were members of a group known as the "Black Hats" or the "Deacons." The names of persons who violated the boycott were read at meetings of the Claiborne County NAACP and published in a mimeographed paper entitled the "Black Times." As stated by the chancellor, those persons "were branded as traitors to the black cause, called demeaning names, and socially ostracized for merely trading with whites."

It's one thing to engage in such tough tactics; it's quite another when the government assists.

64 *See, e.g.*, Stone, *supra* note 3; Drake Bennet, *Time for a Muzzle—The Online World of Lies and Rumor Grows Ever More Vicious. Is it Time to Rethink Free Speech?*, Boston Globe, Feb. 15, 2009, at C1 ("A number of... Proposition 8 supporters have since reported threatening e-mails and phone calls."); Eric Fonnesbeck, *Mormon Church Unfairly Attacked During Prop. 8 Campaign*, Contra Costa Times (California), Feb. 3, 2009 ("Numerous physical attacks on members of the Mormon church have been reported in California and many other areas."). *But see* Thomas Elias, *Prop. 8 Backers Seeking the End of Openness in Politics*, San Gabriel Valley Trib. (California), Feb. 13, 2009 ("[A]ll that's been reliably documented are a few examples of gays and their supporters staying away from businesses whose owners were Proposition 8 donors. No physical harm whatsoever.").

65 *See supra* note 32.

66 *Buckley*, 424 U.S. at 66–67 (citation omitted).

67 *See supra* note 31.

68 *Bellotti*, 435 U.S. at 790.

69 *Buckley*, 424 U.S. at 67 (emphasis added).

70 *Getman*, 328 F.3d at 1105.

71 *See supra* Part I.B.

72 *ProtectMarriage.com*, 599 F. Supp. 2d at 1219.

73 *Buckley*, 424 U.S. at 48–49 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (citing Associated Press v. United States, 326 U.S. 1, 20 (1945))).

74 *Getman*, 328 F.3d at 1106 (emphasis added).

75 *See id.* at 1106 n.24.

76 *ProtectMarriage.com*, 599 F. Supp. 2d at 1209 n.5.

77 "[Latin 'something for something'] An action or thing that is exchanged for another action or thing of more or less equal value; a substitute." Black's Law Dictionary 1282 (8th ed. 2004).

78 *Buckley*, 424 U.S. at 26–27.

79 *ProtectMarriage.com*, 599 F. Supp. 2d at 1208 (citing *Getman*, 328 F.3d at 1105).

80 *See supra* note 73 and accompanying text.

81 *See supra* Part I.B–C.

82 This is a paraphrase of Justice Stewart's short concurrence in *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (Stewart, J. concurring) (1964), wherein he states

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hard-core pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

83 *See* U.S. Const. amend. I; Black's Law Dictionary 6 (8th ed. 2004) ("abridge, *vb.* 1. To reduce or diminish <abridge one's civil liberties>").

84 U.S. Const., amend. I. Note that this is the second time throughout this article that I quote the relevant text of the First Amendment. While *ProtectMarriage* quotes the Amendment at its outset, and notes its application to the states, the opinion which follows—like many campaign finance decisions—loses sight of the word "abridge" entirely. *ProtectMarriage.com*, 599 F. Supp. 2d at 1205.

85 *Buckley*, 424 U.S. at 65.

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 speech[7] 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

* *Senior Attorney, Institute for Justice*

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 state[25] 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).

27 Deposition of Robert Stern at 36:4–37:11 (September 26, 2007) (filed in proceedings of Sampson v. Dennis, No. 06-cv-01858-RPM-MJW (D. Colo. 2007) (on file at the Institute for Justice)).

28 *McIntyre*, 514 U.S. at 348 n. 11 (internal quotations omitted).

Rebuttal to Steve Simpson's Response to *A Cold Breeze in California: ProtectMarriage Reveals the Chilling Effect of Campaign Finance Disclosure on Ballot Issue Advocacy*

By Stephen R. Klein

I have had the opportunity to consider First Amendment associational privacy and anonymity in greater detail since writing the article appearing above in this edition of *Engage*.[1] Steve Simpson's observation that my argument takes for granted a governmental interest in ballot measure disclosure where there is plainly none is aptly put. Despite my best intentions, I treated the First Amendment in light of judicial precedent, and, using such a backwards paradigm, called for a visit to the proverbial free speech woodshed.

Nevertheless, while I agree that there is no governmental interest in ballot measure campaign disclosure, this maxim has had little effect in practice. Although the Ninth Circuit is the only Court that has described the so-called "informational interest" in detail,[2] First Amendment challenges against similar concoctions have also failed in Alabama,[3] Maine,[4] Utah,[5] and Colorado.[6] Free speech finally scored a win recently in Wisconsin,[7] and this will hopefully amount to more than but a moment of clarity. But it is up against a large body of careless precedent.

Furthermore, Simpson's assertion that "neither is the law exactly bad for those asserting their First Amendment rights in this context" seems overly optimistic. Though Simpson acknowledges that "lower courts... have navigated around [Supreme Court] precedents," he does not acknowledge that the Supreme Court itself has provided part of the map, and not merely in the *Bellotti/Citizens Against Rent Control/ ACLF* line of dicta.[8] *McConnell v. FEC* also contains ample expansions of *Buckley*, complete with implicit assertions that the government has an interest in restricting political groups from "misleading" names.[9] Even *McIntyre v. Ohio Elections Comm'n*, the quintessential case affirming the First Amendment right to anonymous speech, contains dictum that squelches anonymity in the face of campaign finance law:

> Disclosure of an expenditure and its use, without more, reveals far less information. It may be information that a person prefers to keep secret, and undoubtedly it often gives away something about the spender's political views. Nonetheless, even though money may "talk," its speech is less specific, less personal, and less provocative than a handbill—and as a result, when money supports an unpopular viewpoint it is less likely to precipitate retaliation.[10]

So, despite recent progress in First Amendment campaign finance actions, working to narrow the informational interest may be more effective (albeit far slower and more frustrating) than a root-and-branch attack.

Though Simpson correctly argues that differentiating between economic issues and social issues is unworkable in other contexts,[11] in the *ProtectMarriage* case the distinction would work. I did not argue that a group may have more or less interest in hiding their agenda if their interest is guided by economic or social principles, but rather that government only has an interest in disclosing donors who may appear to be "buying" a law that will enrich them. Again I acknowledge that this argument draws from case law rather than the First Amendment, but the argument would force the Ninth Circuit and/or the Supreme Court to confront the spurious reasoning that superimposes *Buckley* onto ballot measure disclosure and offers a solution that works in the context of *ProtectMarriage*: although there is a powerful gun lobby, tobacco lobby, and other lobbies in the United States looking to protect their industries, the "marriage lobby" is not out to protect marriage parlors or religious service fees. The Proposition 8 campaign was unquestionably driven by morality and morality alone, a social issue distinguishable from any hint of money used as quid pro quo. Simpson argues that this solution would do more harm than good in the long run, but it would vindicate the rights of those who contributed to Proposition 8 and would force courts to at least consider disclosure in future cases rather than sweep aside all arguments with faithful recitations of *Getman*.[12]

Simpson illustrates numerous other social issues, such as gun control, that have economic components, and correctly argues that groups advocating positions in related ballot measures should have no less First Amendment protection than the Proposition 8 donors. But by narrowing the "informational interest" for disclosure with the distinction of social and economic issues, the interest will become a far easier target in future challenges by such organizations. In other hotly contested areas of campaign finance law, such as the "functional equivalent of express advocacy," it is only through a series of as-applied challenges that judges have come to recognize the burdens the law places on political speech, and to finally "err on the side of protecting political speech rather than suppressing it."[13]

The First Amendment's victory over ballot measure disclosure in Wisconsin will, I hope, become a pattern, but, in the meantime, advocates of free speech should—in addition to root-and-branch arguments—work to clarify shoddy precedent to the greatest extent possible. This can lead to exposing the oppressive nature of campaign finance laws. Either way, Simpson and I share the ultimate end of freeing citizenry to engage in constitutionally guaranteed political speech.

Endnotes

1 The author recently co-authored, with attorney Benjamin Barr, an *amicus curiae* brief for certiorari by the United States Supreme Court in the case *Independence Institute v. Coffman*, 209 P.3d 1130 (Colo. Ct. App. 2009). The brief is available at http://www.campaignfreedom.org/news_center/detail/ccp-files-friend-of-the-court-brief-in-colorado-free-speech-case. Institute for Justice is lead counsel on the case.

2 California Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1100–04

(9th Cir. 2003).

3 Richey v. Tyson, 120 F. Supp. 2d 1298, 1310 (S.D. Ala. 2000).

4 Volle v. Webster, 69 F. Supp. 2d 171, 173–74 (D. Maine 1999).

5 Nat'l Right to Work Legal Defense Fund and Educ. Found., Inc. v. Herbert, 581 F. Supp. 2d 1132, 1145 (D. Utah 2008).

6 *Coffman*, 209 P.3d at 1142–43.

7 Swaffer v. Cane, 610 F. Supp. 2d 962, 968 (E.D. Wis. 2009) ("The government's interest in keeping the public informed of where and how the teetotalers of Whitewater are spending their money to rally support against a liquor referendum is not commensurate with the government's interest in knowing which candidates for public office those same teetotalers financially support.").

8 *See* Simpson Response, *supra*, 74 n.5 and accompanying text.

9 McConnell v. FEC, 540 U.S. 93, 128 (2003) (citations omitted) ("Because FECA's disclosure requirements did not apply to so-called issue ads, sponsors of such ads often used misleading names to conceal their identity. 'Citizens for Better Medicare,' for instance, was not a grassroots organization of citizens, as its name might suggest, but was instead a platform for an association of drug manufacturers. And 'Republicans for Clean Air,' which ran ads in the 2000 Republican Presidential primary, was actually an organization consisting of just two individuals- brothers who together spent $25 million on ads supporting their favored candidate."); *id.* at 196 ("'Curiously, Plaintiffs want to preserve the ability to run these advertisements while hiding behind dubious and misleading names like: "The Coalition-Americans Working for Real Change" (funded by business organizations opposed to organized labor), "Citizens for Better Medicare" (funded by the pharmaceutical industry), "Republicans for Clean Air" (funded by brothers Charles and Sam Wyly).... Given these tactics, Plaintiffs never satisfactorily answer the question of how "uninhibited, robust, and wide-open" speech can occur when organizations hide themselves from the scrutiny of the voting public.... Plaintiffs' argument for striking down BCRA's disclosure provisions does not reinforce the precious First Amendment values that Plaintiffs argue are trampled by BCRA, but ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.'") (citing McConnell v. FEC, 251 F. Supp. 2d 176, 237 (D.D.C. 2003) (internal citations omitted)).

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

11 *See* Simpson Response, *supra*, at 74.

12 It is still mind-boggling that after the argument was conceded by counsel, Judge England would go to the trouble of reciting *Getman* and, despite his effort, not realize that not one alleged governmental interest was implicated in the case at hand. *See* ProtectMarriage.com v. Bowen, 599 F.Supp.2d 1197, 1207–11 (E.D. Cal. 2009).

13 FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449, 457 (2007).