Free Speech & Election Law

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

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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.