

Essay

Donor Disclosure: Undermining the First Amendment

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By way of introduction, let me note that I am an attorney engaged full-time as a practitioner in political law. I spend my days advising people who want to be involved in politics and public policy issues as to how they can do that within the confines of the law.

In my experience, politics is a highly regulated business at the federal, state, and local levels of government. It is an unfortunate truism in the United States today that before one can safely interject one's views into the political arena, one had best identify an attorney practicing in this area and add his or her phone number to speed dial. But how do we square that reality with what George Will calls the "most beautiful five words in the English language"?¹ He is referring, of course, to the first five words of the First Amendment to the United States Constitution—"Congress shall make no law"²

Those of us who take my side of the *Citizens United v. FEC*³ decision—and other recent successes in the constitutional challenges to the substantive restrictions and regulation of po-

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1. George F. Will, *Not a State-Broken People*, CATO POL'Y REP., July/Aug. 2010, at 1, 10, available at http://www.cato.org/pubs/policy_report/v32n4/cp32n4-1.pdf.

2. U.S. CONST. amend. I.

3. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

litical speech⁴—actually believe in *all* the protections specified in the First Amendment. We believe that not only does the press enjoy certain protections from government intrusion into its communications, but that ordinary citizens—even when organized into corporations, LLCs, or partnerships—enjoy the same freedom from government intrusion into, and control over, their political speech and activities.

The media and media corporations love the regulation of everyone else's speech because they have their very own carve-outs from regulations.⁵ Many media corporations have howled loudly about the Supreme Court's decision in *Citizens United* because the Court had the temerity to breathe new life into protections for other kinds of corporations besides the New York Times Company and the Washington Post Company and the company that owns Minnesota's *Star Tribune*.⁶

Have you ever thought about the fact that the largest newspaper in Minnesota⁷ is, in fact, owned by a corporation? It has had an interesting corporate lineage these past few years. New York City-based Avista Capital Partners bought it from the McClatchy newspaper corporation in 2007,⁸ it filed for Chapter 11 bankruptcy in 2009,⁹ and, when it emerged from bankruptcy, the bankruptcy court approved of new ownership consisting of the company's largest secured creditors: Angelo Gordon & Co., Wayzata Investment Partners, Credit Suisse,

4. See, e.g., *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 476–77 (2007) (holding that there is no legitimate interest in regulating political advertisements “that are neither express advocacy nor its functional equivalent”).

5. See e.g., U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom . . . of the press . . .”).

6. See Editorial, *The Court's Blow to Democracy*, N.Y. TIMES, Jan. 22, 2010, at A30 (predicting that *Citizens United* will allow corporations to “overwhelm elections and intimidate elected officials into doing their bidding”); Kent Greenfield, Op-Ed., *Court Got the Answer Wrong in Citizens United but Asked the Right Question*, STAR TRIB. (Minneapolis, Minn.), Jan. 21, 2012, at A9; Editorial, *Judicial Activism Inc.: The Supreme Court Tosses out Reasonable Limits on Campaign Finance*, WASH. POST, Jan. 22, 2010, at A20 (arguing that *Citizens United's* holding was “unnecessary” and made “a mockery of some justices' pretensions to judicial restraint”).

7. *Newspaper Search*, AUDIT BUREAU OF CIRCULATIONS, <http://abcas3.accessabc.com/ecirc/newsform.asp> (under “State Selection” choose “Minnesota,” sort by “Total Circulation—Descending,” and click “State Search”).

8. Press Release, The McClatchy Co., McClatchy Completes Sale of Star Tribune to Avista Capital Partners (Mar. 5, 2007) (on file with *Minnesota Law Review*), available at <http://www.mcclatchy.com/2007/03/05/1843/mcclatchy-completes-sale-of-star.html>.

9. David Phelps, *Star Tribune Files for Chapter 11*, STAR TRIB. (Minneapolis, Minn.), Jan. 16, 2009, at A1.

CIT Bank, and an affiliate of GE Capital.¹⁰ The *Star Tribune* has come a very long way from being devoid of corporate influence.

One of the little discussed parts of *Citizens United* is the Court's recognition that exempting media corporations from the type of regulation, reporting, and *prohibitions* to which other corporations are subjected amounts to Congress conferring a "speech license" to certain corporations, while depriving others of the same.¹¹ That, of course, is anathema to the First Amendment. It seems to me, however, that if one is truly committed to the First Amendment—all of it—then one must be overjoyed by *Citizens United*.

But those who revere, promote, and espouse the need for ever more intricate and complex campaign finance regulation—who are happiest when legislatures and government agencies spew forth metastasizing laws and regulatory schemes that dictate what people can and cannot do or say in the political arena, and who bemoan the cacophony of "too much speech" and fret over too many voices in the political space—have made it clear that they would rather repeal or amend the First Amendment rather than let it serve as a barrier to their clamor for endless government regulation of political speech and activity.

Indeed, the campaign finance "reformers" have persuaded more than one member of Congress over the past two decades to introduce proposed constitutional amendments to change the First Amendment in various ways,¹² and to erase the precious rights that James Madison so carefully sought to protect when writing the First Amendment in the First Congress of the United States.¹³

10. Chris Newmarker, *Star Tribune Emerges from Bankruptcy, No New CEO Yet*, MINNEAPOLIS/ST. PAUL BUS. J. (Sept. 28, 2009), <http://www.bizjournals.com/twincities/stories/2009/09/28/daily4.html?page=all>.

11. See *Citizens United v. FEC*, 130 S. Ct. 876, 906 (2010) (holding that differential regulatory treatment based on whether or not a corporation has a media outlet "cannot be squared with the First Amendment"); see also Cleta Mitchell, *Debating the Disclose Act: It's a Cynical, Selective Muzzle . . .*, WASH. POST, June 17, 2010, at A21 ("In *Citizens United*, the court held that the First Amendment doesn't permit Congress to treat different corporations differently Otherwise, it would be tantamount to a congressional power to license the speech of some while denying it to others.").

12. See, e.g., H.R.J. Res. 90, 112th Cong. (1st Sess. 2011), <http://www.gpo.gov/fdsys/pkg/BILLS-112hjres90ih/pdf/BILLS-112hjres90ih.pdf> (proposing a constitutional amendment expressly prohibiting corporate campaign contributions).

13. See THE FEDERALIST NO. 10, at 48 (James Madison) (Ian Shapiro ed., Yale Univ. Press 2009) (arguing that limiting liberty as a means of curing political friction is a remedy "worse than the disease"); see also *Nixon v. Shrink*

I. RESPONSE TO *CITIZENS UNITED*: REGULATION

So, with *Citizens United*, and a restoration of basic constitutional protections to citizens and citizens groups, what are the political-speech police left to control in order to ensure their place in the regulatory firmament? Disclosure.¹⁴ As the sentiment goes, if we can't outlaw the speech, let's chill it. Or freeze it.

Not too long ago, I attended a legislative hearing in Texas to testify on a term-limits proposal that had been introduced into the Texas House of Representatives.¹⁵ It was the very last day for bills to be voted out of committee during that session of the legislature and since the Texas legislature only meets every other year,¹⁶ any bill that did not make it out of committee that day was dead for two years. The bill I was there to testify on had been moved to the very end of the agenda, so I got to listen to all the bills on the agenda that day.¹⁷

There were several bills of note, but the one I remember best is instructive on this topic. A state representative from Waco, home of the Baylor Bears, had introduced a bill to regulate the prices that ticket scalpers could charge for tickets to the annual Houston Livestock Show and Rodeo.¹⁸ Now, at first glance the Houston Livestock Show and Rodeo may not seem like much. However, the Houston Livestock Show and Rodeo has been happening annually since 1932 and is the largest livestock entertainment event in the world.¹⁹ It lasts for twenty days each spring, attracts over 2 million attendees,²⁰ and gen-

Mo. Gov't PAC, 528 U.S. 377, 424 n.9 (2000) (Thomas, J., dissenting) (employing *The Federalist No. 10* in support for limiting regulatory caps on campaign contributions).

14. See Geoffrey A. Manne, *The Hydraulic Theory of Disclosure Regulation and Other Costs of Disclosure*, 58 ALA. L. REV. 473, 486 (2007) (arguing that disclosure proponents "hope that the regulations will make undesirable conduct too expensive relative to desirable, alternative conduct, thus inducing a shift from the former to the latter").

15. See H.R. 2629, 73d Leg., Reg. Sess. (Tex. 1993).

16. See TEX. CONST. art. III, § 5.

17. See *Hearing Before the H. Comm. on State Affairs*, 73d Leg., Reg. Sess. (Tex. Apr. 13, 1993), available at http://www.lrl.state.tx.us/scanned/legisCmteMinutes/HouseCmtes/73-0/State_Affairs/04131993.pdf.

18. See H.R. 668, 73d Leg., Reg. Sess. (Tex. 1993).

19. See *History*, HOUS. LIVESTOCK SHOW & RODEO, <http://www.rodeohouston.com/about/history.aspx> (last visited Feb. 7, 2012).

20. See *Attendance*, HOUS. LIVESTOCK SHOW & RODEO, <http://www.rodeohouston.com/about/attendance.aspx> (last visited Feb. 7, 2012).

erates revenues of over \$100 million.²¹ It is a *big* deal in Texas.

This legislator was pretty worked up—and apparently had been worked up for several years—over the prices that people were paying to ticket scalpers for tickets to the Houston Livestock Show. So she had introduced a bill to regulate ticket scalping. When she was recognized to offer and explain her bill, she said something I will never forget. It seems that for several years prior to this legislature she had been introducing bills to *prohibit* scalping rodeo tickets.²² Apparently, until then, her bills had never seen the light of day. So when she stood up to explain the latest version, she said something to the effect of, *I've been trying for years to outlaw ticket scalping of Houston Livestock Show tickets. I can't get that bill passed. So if we can't or won't outlaw ticket scalping, then we should do the next best thing . . . we should regulate it.*

II. THE DANGERS OF DISCLOSURE

So if we cannot outlaw corporate independent candidate-related speech because of the Court's decision in *Citizens United*, let's do the next best thing—let's regulate it. And the way we can best regulate—and chill—independent candidate-related speech is through disclosure.

I believe that the Supreme Court is not yet fully apprised of the dangers disclosure poses through the intentional chilling of political speech. Disclosure is the next frontier for those of us who toil in these vineyards—it will constitute the next wave of legal jurisprudence in the campaign finance arena. In the same way litigants challenged the substantive prohibitions on certain kinds of speech, over time we have to make the case and build a record about the threat posed by disclosure.

I attended the oral arguments in *Doe v. Reed*, where the Supreme Court remanded the case based upon evidentiary findings of potential harassment due to the disclosure of the names of petition signers appearing on a marriage protection initiative.²³ On October 17, 2011, the trial court ruled there was insufficient evidence of potential harassment and ordered the disclosure of the names of the petition signers.²⁴ It was not a

21. See *Financial Highlights*, HOUS. LIVESTOCK SHOW & RODEO, <http://www.rodeohouston.com/about/financial-summary.aspx> (last visited Feb. 7, 2012).

22. See, e.g., H.R. 2253, 71st Leg., Reg. Sess. (Tex. 1989).

23. *Doe v. Reed*, 130 S. Ct. 2811, 2815 (2010).

24. *Doe v. Reed*, No. C09-5456BHS, 2011 U.S. Dist. LEXIS 119814, at *50–51 (D. Wash. Oct. 17, 2011).

great decision in my view, but we shall see how that case evolves.

During oral argument, Justice Scalia raised the question: What is the big deal about disclosure?²⁵ He explained that “running a democracy takes a certain amount of civic courage.”²⁶ To date, Justice Scalia has been true to this sentiment: he refuses to recognize that the next best thing to prohibiting certain speech and association is to force disclosure in onerous ways, in an effort to chill speech that otherwise is constitutionally protected.

In theory, I agree with Justice Scalia. I do believe that running a democracy takes a certain amount of civic courage and that we should not fear disclosure of our views. But I also know that there are deliberate, organized, well-funded, and well-orchestrated efforts on the Left to identify donors to conservative causes, candidates, and organizations, and to attack those donors, intimidate them, and, ultimately, to close their checkbooks, silencing those conservative voices.²⁷

All one has to do is look at what happened to donors in California who financially supported Proposition 8, the ballot question adopted by the people of California that legally defines marriage as being between one man and one woman. The evidence of the harassment campaign against donors to Proposition 8 is so extensive, and was so widespread, that it was documented in a report published by the Heritage Foundation—*The Price of Prop 8*.²⁸ All donors who gave \$100 or more (donors who gave certain large amounts had to disclose *their* donors, so

25. See Transcript of Oral Argument at 27–29, *Doe v. Reed*, 130 S. Ct. 2811 (2010) (No. 09-559), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-559.pdf.

26. *Id.* at 12.

27. See, e.g., Theodore B. Olson, *Obama's Enemies List*, WALL ST. J., Feb. 1, 2012, at A15 (arguing that President Obama and his allies have worked to “demonize and stigmatize David and Charles Koch,” private citizens and prolific political donors, and suggesting that the Kochs, although they are not running for any political office, have been singled out as “political punching bag[s]” because they contribute generously to organizations that oppose some of Obama’s policies); see also Jeremy W. Peters, *Obama Fights Back Against Koch Brothers in New Ad*, THE CAUCUS (Jan. 18, 2012, 8:12 PM), <http://thecaucus.blogs.nytimes.com/2012/01/18/obama-fights-back-against-koch-brothers-in-new-ad/> (describing an Obama campaign commercial as “striking” in the way in which it targets the Koch brothers specifically, referring to them as “[s]ecretive oil billionaires”).

28. Thomas M. Messner, *The Price of Prop 8*, HERITAGE FOUND. BACKGROUND (Heritage Found., D.C.), Oct. 22, 2009, available at <http://www.heritage.org/research/reports/2009/10/the-price-of-prop-8>.

we had disclosure of donors to donors)²⁹ were subjected to threats and harassment, their property was vandalized, their jobs were threatened or terminated, and on and on.³⁰ The pro-gay marriage forces shared Google Maps to the residences of donors to Proposition 8, which were then used for attack purposes by those who disagreed with the Proposition 8 donors.³¹ The disclosure of those who make a contribution to a political cause, candidate, or ballot issue is not supposed to result in threats of bodily harm, harassment at home and at work, intimidation, or getting your car keyed and your job threatened. Yet, that is precisely what happened to donors to Proposition 8 in California.

This pattern is appearing regularly across the country. In 2010 in Minnesota, when Target Corp. gave a contribution to

29. The following information must be reported about an individual who contributes \$100 or more to a campaign: his or her full name, street address, occupation, and the name of his or her employer or, if self-employed, the name of the business. CAL. GOV'T CODE § 84211(f) (West 2012). For each person who contributes to donations that total \$500 or more, the following information must be provided: the contributor's full name, his or her street address, the amount of each expenditure, and a brief description of the consideration for which each expenditure was made. *Id.* § 84211(k)(6).

30. See Complaint at 18–25, *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197 (E.D. Cal. 2009) (No. 2:09-cv-00058-MCE-DAD) (describing specific instances of harassment faced by those who supported Proposition 8 and indicating that some donors would not make future contributions because of these threats). For a broader discussion of the chilling effects that may result from strict campaign finance disclosure laws, see William McGeeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1, 20–24 (arguing that contribution disclosure rules impose costs, including “incursions on autonomy and dignity interests,” that might discourage those who are weary about having their political beliefs displayed to the public from contributing).

31. See Messner, *supra* note 28, at 2 (explaining how websites, including Google Maps, have allowed opponents to Proposition 8 to identify the approximate geographic locations of its supporters). For an example of a website that contains donor information within an interactive map, thereby allowing website users to determine the identity and location of Proposition 8 supporters, see *Prop 8 Maps*, EIGHTMAPS, <http://www.eightmaps.com/> (last visited Feb. 7, 2012) (saying in the site's caption that, “Proposition 8 changed the California state constitution to prohibit same-sex marriage. These are the people who donated in order to pass it,” and indicating contributors by flags on a map that, when clicked on, provide donors' names, occupations, and the amount of their contributions). Critics of this map worry that providing opponents to Proposition 8 with so much identifying information regarding its supporters will increase the acts of vandalism and harassment already reported by supporters. See, e.g., Complaint, *supra* note 30, at 21 (describing instances of supporters' windows being broken and other instances of vandalism, including graffiti, property damage, and sign theft).

an entity that made independent expenditures related to the governor's election, the hue and cry against Target by liberals resulted in Target's public apology for exercising its First Amendment right (articulated by the Supreme Court in *Citizens United*).³² Target then, according to press reports, made an equivalent contribution to an opposing group with a promise not to contribute again.³³ Mission accomplished.

The danger with disclosure is that it has ceased to be about information on who supports or opposes which candidate or causes. I have my doubts as to whether it actually ever *was* about that. It is, instead, about identifying political opponents in order to silence them. And that is the cottage industry being spawned by the disclosure provisions not invalidated by the Supreme Court in *Citizens United*.

Since *Citizens United*, regulators are being forced by the Supreme Court to regulate on a narrower and narrower playing field, that of disclosure. It is there where we are now encountering the regulatory excess that practitioners have encountered for more than thirty years with more substantive restrictions. *If we can't prohibit the speech, we will regulate it . . .* Indeed, liberal interest groups and legislators are attempting to regulate disclosure to excess and well beyond the scope of constitutional permissibility, in my view.

III. MINNESOTA: A CASE STUDY

When the Supreme Court ruled in January 2010 that statutes prohibiting corporations—or any other groups of people associated together in whatever form—from making independent candidate-related expenditures were unconstitutional, Minnesota was one of over 20 states with what we referred to in our *amicus brief* as having “Offending State Statutes.”³⁴ Those were laws that prohibited corporations from making independent, candidate-related expenditures.³⁵ Most states re-

32. Jia Lynn Yang & Dan Eggen, *Campaign Spending Puts Target in Bull's-Eye*, WASH. POST, Aug. 19, 2010, at A01; Press Release, Target Corp., A Message to Target Team Members from Gregg Steinhafel, Target Chairman, President & CEO (July 27, 2010) (on file with *Minnesota Law Review*).

33. See Press Release, Target Corp., *supra* note 32.

34. Brief of American Justice Partnership and Let Freedom Ring as Amici Curiae Supporting Petitioner at 3, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205), 2009 WL 2359479 [hereinafter *Citizens United Amicus Brief*]; see also Ian Urbina, *Consequences for State Laws in Court Ruling*, N.Y. TIMES, Jan. 23, 2010, at A1.

35. *Citizens United Amicus Brief*, *supra* note 34; see, e.g., ALASKA STAT.

pealed the statutes,³⁶ or state attorneys general issued opinions of nonenforceability,³⁷ or made similar moves to recognize and comply with the Supreme Court's decision.³⁸

Minnesota, on the other hand, enacted a law which recognized that corporations could not be prohibited from making such expenditures, but—the next best thing—the law now requires any corporation making such expenditures to establish a political fund or PAC in order to do so.³⁹ And for nonprofit entities requiring the disclosure of donors, the allocation of membership dues, fees, and contributions is quite draconian.⁴⁰

As of November 2011, the enacted law has already been challenged in federal court.⁴¹ The Eighth Circuit, for instance, heard argument on the constitutionality of requiring the creation of any kind of separate reporting account or committee as a prior condition of exercising protected constitutional rights of speech and association.⁴² Time will tell what the Eighth Circuit decides.⁴³

What is most disturbing at this time, however, is what the Minnesota Campaign Finance Board has done in the back half of 2011, in a brazen expanse of its jurisdiction and regulatory authority, all in the name of—what else—disclosure. This time the expansion of authority is related not to candidate speech, but to speech and activities concerning ballot questions.

ANN. § 15.13.010 (West 2009); IOWA CODE ANN. § 68A.503 (West 2009).

36. See Act of Apr. 18, 2010, ch. 36, 2010 Alaska Sess. Laws 1 (amending Alaska law to allow campaign expenditures by corporations).

37. See, e.g., Applicability of 130 S. Ct. 876 (2010), 05-10 Wis. Op. Att'y Gen. 1, 12 (2010), available at <http://www.doj.wi.gov/ag/opinions/OAG-05-10.pdf> ("In the present situation, it is my understanding that the Government Accountability Board has already suspended its enforcement of the corporate expenditure prohibition in Wis. Stat. § 11.38(1)(a)1. I agree with that enforcement decision . . .").

38. See, e.g., John Lavelle, Pa. Dep't of State, EFFECT OF CITIZENS UNITED ON PENNSYLVANIA ELECTION LAW STATUTES (2010), available at <http://www.pabar.org/public/committees/statutry/pubs/lavellearticle.pdf>.

39. Minn. Stat. § 10A.12(1a) (2010).

40. *Id.* §§ 10A.12(5), 10A.20.

41. Minn. Citizens Concerned for Life, Inc. v. Swanson, 640 F.3d 304 (8th Cir. 2011), vacated and reh'g en banc granted, No. 10-2136 (8th Cir. July 12, 2011).

42. *Id.*

43. After affirming the district court's finding that the challenge was unlikely to succeed on the merits, the Eighth Circuit granted rehearing en banc and vacated the opinion, but has yet to issue a decision. *Minn. Citizens Concerned for Life*, 640 F.3d 304, 313–19; *id.*, No. 10-2136 (8th Cir. argued Sept. 21, 2011).

The Minnesota Campaign Finance Board has asked the legislature for years to expand certain definitions in the statute to include corporations for purposes of the agency's regulatory authority.⁴⁴ Something the legislature has not seen fit to do.⁴⁵ For many years, going back to 1997, it has been for the Board to determine whether a corporation—any corporation, whether for profit or not-for-profit—can contribute to a ballot question committee and the ballot committee would report the donation from the corporation, disclose the name, the amount, etc.⁴⁶ Beyond that, the Board had previously concluded it did not have further jurisdiction to control corporate contributions to ballot committees.⁴⁷

But with some high profile referenda on the ballot for 2012, there has been a flurry of activity and effort by the Board to change all that, and to totally rewrite the laws governing ballot measure campaigns. As of January 1, 2011, the law was clear and simple. Contributions from corporations—whether for profit or not-for-profit corporations—made to ballot committees were reported to the Board by the ballot committee.⁴⁸ But that wasn't good enough for the Minnesota Campaign Finance Board.

To increase its power over ballot measure campaigns, the Board pursued several avenues. First, the Board tried the legislative route. A bill was introduced that would have statutorily defined a ballot expenditure committee and created a compre-

44. See *Vote Delayed on Corporate Donation Disclosure Change*, Minn. Pub. Radio (June 14, 2011), <http://minnesota.publicradio.org/display/web/2011/06/14/ballot-questions-donations/>.

45. *Id.*

46. *Id.*; see also *Disclosure Related to Ballot Question Committees*, Advisory Op. 419, Campaign Fin. & Pub. Disclosure Bd. 1, 1–7 (Jan. 3, 2012), <http://www.cfboard.state.mn.us/ao/AO419.pdf> (describing disclosure requirements for expenditures to promote or defeat a ballot question); *Contributions from Unregistered Associations to Ballot Committee*, Advisory Op. 257, Minn. Ethical Practices Bd. 1, 2–3 (Jan. 24, 1997), <http://www.cfboard.state.mn.us/ao/AO257.pdf> (establishing that disclosure requirements for unregistered associations do not apply to corporations contributing to ballot initiatives).

47. See *Contributions from Unregistered Associations to Ballot Committee*, Advisory Op. 257, Minn. Ethical Practices Bd. 1, 2–3 (Jan. 24, 1997), <http://www.cfboard.state.mn.us/ao/AO257.pdf> (“Minnesota Statutes, chapter 10A, imposes no requirements on a corporation making a contribution to the Committee. The Committee is required to keep records and report the contribution in the same way it records and reports all other contributions received.”).

48. See *id.* at 1–7.

hensive regulatory scheme for ballot questions mirroring the regulations imposed on independent expenditures related to candidates in 2010.⁴⁹ That bill did *not* pass in the legislature.⁵⁰ The law remains unchanged from the way it has been for fifteen years or more.

So what's a regulator to do? Apparently, the absence of legislative authority isn't an insurmountable problem when you have a determined regulator! All you need to do is ignore the fact that the legislature didn't enact the bill you hoped that they would enact. The Minnesota Campaign Finance Board, for example, in June of 2011, rescinded the advisory opinions that had guided the Board's interpretation of the law since 1997,⁵¹ and issued "guidance" that now purports to subject citizens groups to the same regulatory process for ballot question activities as for candidate-related expenditures.⁵² Strangely enough, these "guidances" provided by the board are *not* rules promulgated under the Administrative Procedures Act.⁵³

How did they get there? By rewriting the law by saying in effect, "this isn't law; it is how we will *apply* the law." And the *guidance* provided actually rewrites statutory definitions and adds definitions that exist nowhere in the laws of Minnesota. Some of the definitions that the Board has unilaterally altered include adding language to statutory definitions of key legal

49. H.R. 1533, 87th Legis. Sess. (Minn. 2011), available at <http://wdoc.house.leg.state.mn.us/leg/LS87/HF1533.0.pdf>; S.F. 1225, 87th Legis. Sess. (Minn. 2011), available at <https://www.revisor.mn.gov/bin/showPDF.php>.

50. See H. JOURNAL, 87-3052, 2011 Supplement, at 5339 (Minn. 2011), available at <http://www.house.leg.state.mn.us/ccojournals/2011-12/Jsupp2011.htm#5339>; S. JOURNAL 87-3052, at 3600 (Minn. 2011), available at https://www.revisor.mn.gov/revisor/pages/search_status/status_detail.php?b=Senate&f=SF1225&ssn=0&y=2011&ls=87; Tammera R. Diehm, *Campaign Finance Alert: Corporate Contributions to Ballot Committees*, INSIDE THE MINNESOTA CAPITAL (June 16, 2011), <http://www.insideminnesotacapitol.com/campaign-finance/campaign-finance-alert-corporate-contributions-to-ballot-committees/> ("While proposed legislative changes to Chapter 10A received hearings in both the House and Senate this spring, they were not adopted.").

51. See MINN. CAMPAIGN FIN. & PUB. DISCLOSURE BD., REGULAR SESSION MINUTES 1, at 3 (June 30, 2011), available at http://www.cfboard.state.mn.us/bdinfo/minutes/Minutes_Reg_6_30_2011_FINAL%20with%20attachments.pdf.

52. MINN. CAMPAIGN FIN. & PUB. DISCLOSURE BD., STATEMENT OF GUIDANCE 1, 1-4 (Oct. 4, 2011), available at http://www.cfboard.state.mn.us/law/Guidance_BQ_Disclosure_10_4_11.pdf; see also *Disclosure Rules Apply, Campaign Finance Board Says*, MINN. PUB. RADIO (Oct. 4, 2011), <http://minnesota.publicradio.org/display/web/2011/10/04/disclosure-rules-apply-votes-campaign-finance-board/>.

53. MINN. STAT. § 14.05 (2010).

terms of art in the campaign finance arena: contribution,⁵⁴ association,⁵⁵ independent expenditures.⁵⁶ There are new definitions that appear nowhere in the Minnesota statutes in this context: solicitation,⁵⁷ among others. Who knows if this new regulatory scheme enforceable? But this scheme is precisely why a citizen or citizens' group, like National Organization for Marriage, is forced to retain a legal expert to try and decipher the meaning and application of these kinds of regulatory schemes.⁵⁸

This particular program is nothing more than government coercion. It is offered under the guise of a safe harbor against government enforcement.⁵⁹ What that means in the event a complaint is filed by political opponents of those who support or oppose a particular point of view is still unclear. So much for the bright lines required under First Amendment jurisprudence.

IV. MEDIA RESPONSES TO OVER-REGULATION

This approach is quite simply lawless. No statute has changed but the entire regulatory scheme for ballot question campaigns in Minnesota is different. Under the guise of disclosure the entire regulatory framework has been rewritten by an agency director and approved by only a handful of people.⁶⁰

How do they get away with such utter disregard for basic principles of due process, administrative law, and legislative

54. MINN. CAMPAIGN FIN. & PUB. DISCLOSURE BD., STATEMENT OF GUIDANCE 2-4 (Oct. 4, 2011), available at http://www.cfboard.state.mn.us/law/Guidance_BQ_Disclosure_10_4_11.pdf.

55. See *id.* at 1.

56. See MINN. CAMPAIGN FIN. & PUB. DISCLOSURE BD., REGULAR SESSION MINUTES 7 (June 30, 2011), available at http://www.cfboard.state.mn.us/bdinfo/minutes/Minutes_Reg_6_30_2011_FINAL%20with%20attachments.pdf.

57. MINN. CAMPAIGN FIN. & PUB. DISCLOSURE BD., STATEMENT OF GUIDANCE 3-4 (Oct. 4, 2011), available at http://www.cfboard.state.mn.us/law/Guidance_BQ_Disclosure_10_4_11.pdf.

58. See, e.g., Advisory Op. No. 419, MINN. CAMPAIGN FIN. & PUB. DISCLOSURE BD. (JAN. 3, 2012), available at <http://www.cfboard.state.mn.us/ao/AO419.pdf>.

59. MINN. CAMPAIGN FIN. & PUB. DISCLOSURE BD., STATEMENT OF GUIDANCE 1 (Oct. 4, 2011), available at http://www.cfboard.state.mn.us/law/Guidance_BQ_Disclosure_10_4_11.pdf.

60. See Sasha Aslanian, *Board: Large Donors on Amendment Campaigns Must Be Disclosed*, MINN. PUB. RADIO (June 30, 2011), <http://minnesota.publicradio.org/display/web/2011/06/30/large-donations-meant-to-influence-amendment-voting-must-be-disclosed-board-says/> ("The board . . . voted 5-1 to require corporations that give at least \$5,000 to a ballot measure[] to name those people who contributed \$1,000 or more.").

prerogative? Where is the watchdog media? In my opinion, the media watchdogs applaud the lawlessness because the media loves campaign finance regulation. In the media's eyes, any means are justified by their revered ends; the more regulation, the better.

Government regulation of political speech is always a big hit with the media, because it is *always* regulation of other people's speech.⁶¹ Every campaign finance statute in the country, federal and state, exempts the media from its application.⁶² So the media can applaud the regulation and they rarely if ever question the constitutional permissibility of regulating political speech. They have no reason to because they are always exempt. Regulators know they can act with impunity in this arena, so long as they are increasing the amount of regulation. Criticism only comes if an agency says there is something it cannot do.⁶³ When an agency concludes that the Constitution doesn't allow a certain kind of regulation, the media pounces on the agency and complains that they are not "doing their jobs."⁶⁴ All this in the name of the new holy grail: disclosure.

V. INFORMATIONAL INTEREST

What does it matter if we know who gave the money to support the Catholic Archdiocese, if the Catholic Archdiocese spends or gives money to support marriage?⁶⁵ What difference does it make for me to know who gives money to the Sierra Club to oppose hydraulic fracturing?⁶⁶ And for that matter, if

61. See Daniel W. Butrymowicz, Note, *Loophole.com: How the FEC's Failure to Fully Regulate the Internet Undermines Campaign Finance Law*, 109 COLUM. L. REV. 1708, 1730–31 (2009) (pointing out that the media is generally exempt from federal campaign finance law).

62. *Id.* (discussing the media exemption from federal campaign finance law); see, e.g., COL. CONST. art. XXVIII §§ 2(8)(b)(I)–(II) (exempting print and broadcast media from the definition of campaign "expenditures").

63. Cf. Nick Timiraos, *Housing Finance Regulator Defends Against Critics*, WSJ.COM (Oct. 29, 2011, 1:58 PM), <http://online.wsj.com/article/SB10001424052970203687504577005873884253542.html> (detailing criticism of housing finance regulator for claiming he lacks statutory authority to reduce mortgage loan balances).

64. *Id.*

65. *But see* Rose French, *Facebook Effort Urges Boycott of Basilica Block Party*, STAR TRIB. (Minneapolis, Minn.), June 16, 2011, at B1 (discussing controversy over Archdiocese's financial support of marriage amendment campaign).

66. *But see* Felicity Barringer, *Donations to Sierra Club Raise Ire*, N.Y. TIMES, Feb. 4, 2012, at A11 (illustrating that the source of donations to the Sierra Club can generate substantial public controversy).

we are going to be consistent, why should a media corporation such as the *Star Tribune* be able to spend corporate dollars promoting or opposing a ballot question without having to have the editorial signed by its author and a filing with the Minnesota Campaign Finance and Public Disclosure Board that discloses the revenues received by the corporation that may have been used to pay for the expenses of writing and disseminating the editorial?⁶⁷

So on the issue of disclosure, we have to drill down: What is the purpose of the disclosure? What is the constitutional justification for the regulation requiring disclosure? Does it comport with First Amendment jurisprudence? Or is it a regulation just for the sake of regulation and because we want to know because we want to know? When does disclosure become mandated government voyeurism or an invasion of privacy? There are balancing tests that have just begun to be applied to disclosure regulations. It is the next frontier of campaign finance regulatory litigation.

CONCLUSION: THE ROLE OF DISCLOSURE

Am I opposed to disclosure? My response is, it depends. Disclosure in the abstract may be a good thing. I hear the arguments: “It is only disclosure . . .” or, “What’s wrong with transparency?” And I respond to those arguments this way: “Box cutters are handy household tools, unless and until they are used as weapons to threaten pilots and flight attendants so jumbo jets can be crashed into the Pentagon and the Twin Towers.” When disclosure is used as a means to chill and freeze protected First Amendment rights, it is simply a box cutter shredding the Constitution. Because in this context we are dealing with rights guaranteed under the First Amendment, we must tread lightly and carefully, and we must remember those blessed and beautiful five words: “Congress shall make no law”⁶⁸

67. Cf. *A “No” Vote on State Referendum*, STAR TRIB. (Minneapolis, Minn.), Oct. 19, 2008, at OP4 (urging readers to vote against a ballot measure without disclosing its funding sources or their potential interests in the outcome).

68. See *supra* notes 1–2.