



1989

The Constitutionality of the Arkansas Ballot Question Disclosure Act

John M.A. DiPippa

University of Arkansas at Little Rock William H. Bowen School of Law, jmdipippa@ualr.edu

Follow this and additional works at: <https://lawrepository.ualr.edu/lawreview>



Part of the [Constitutional Law Commons](#), and the [Election Law Commons](#)

Recommended Citation

John M.A. DiPippa, *The Constitutionality of the Arkansas Ballot Question Disclosure Act*, 12 U. ARK. LITTLE ROCK L. REV. 481 (1990).

Available at: <https://lawrepository.ualr.edu/lawreview/vol12/iss3/2>

This Article is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in University of Arkansas at Little Rock Law Review by an authorized editor of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.

THE CONSTITUTIONALITY OF THE ARKANSAS BALLOT QUESTION DISCLOSURE ACT

John M.A. DiPippa *

I. INTRODUCTION

Ballot initiatives and referenda were Progressive Era innovations conceived to combat the influence of monied interests on the legislative process.¹ Because legislators were often perceived as being "owned" by corporate interests, the initiative and referendum were experiments in direct democracy designed to circumvent the corruption of backroom politics.² Arkansas law allows both initiatives and referenda.³ By far, the initiative is the most frequently used process.⁴

The use of ballot measures nationally is on the rise.⁵ The ballot measure's increased popularity has caused renewed concern over the effect of powerful interests on the process. One researcher found that the financially dominant side won eleven out of fourteen ballot contests studied.⁶ Some individual corporations spent in excess of one million dollars in particular campaigns.⁷ In many instances, the side which received a large amount of corporate support tried to hide this

* Associate Professor of Law, University of Arkansas at Little Rock School of Law. B.A., West Chester University, J.D., Washington & Lee University School of Law.

I wish to thank John Burnett, who first brought this subject to my attention and whose spirited defense of free speech spurred me on to further study, and the students enrolled in my Spring 1990 First Amendment Seminar, whose insights allowed me to knit together my disjointed thoughts. Of course, I accept responsibility for any mistakes of law, fact, or judgment.

1. Mickenberg, *The Constitutionality of Limitations on Contributions to Ballot-Measure Campaigns*, 12 SW. U.L. REV. 527, 545 (1981). For a collection of authorities, see *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 310 (1981) (White, J., dissenting).

2. See generally D. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* (1984).

3. ARK. CONST. art. XIX, § 22 (legislative referral of proposed constitutional amendments to the people for approval); ARK. CONST. amend. 7 (enactment of legislative and constitutional changes by the electoral processes of initiative and referendum).

4. Kennedy, *Initiated Constitutional Amendments In Arkansas: Strolling Through the Mine Field*, 9 U. ARK. LITTLE ROCK L.J. 1, 6-7 (1986-87). Professor Kennedy's article is the most comprehensive treatment of the Arkansas law of initiated amendments.

5. Magleby, *supra* note 2, at app. C.

6. S. LYDENBERG, *BANKROLLING BALLOTS, UPDATE 1980: THE ROLE OF BUSINESS IN FINANCING BALLOT QUESTION CAMPAIGNS 2*.

7. In Missouri an electric utility spent \$1.15 million to oppose a nuclear power initiative while R.J. Reynolds Corp. spent \$1.14 million to fight anti-smoking ordinances in California and Florida. *Id.* at 4.

support by the adoption of names that served to obscure the nature of the group's financial backing.⁸ Disclosure of corporate contributions often occurred late in the campaign when the effect on voters' decision was negligible.⁹

Several states have responded to the threat that well-financed campaigns could distort the ballot process by enacting laws designed to restrict the amount of corporate contributions and to promote full disclosure of a measure's supporters or opponents.¹⁰ Although commentators have generally favored corporate contribution and expenditure limitations,¹¹ courts have not.¹²

In 1988 Arkansans were asked to vote on a number of ballot questions. Two amendments attracted well-financed opposition. Business groups filed court challenges to the "Ethics in Government Act" and Amendment 4, the "Fair Tax Amendment."¹³ On October 12, 1988, the Arkansas Supreme Court rejected both challenges, which cleared the way for placement of both propositions on the November ballot.¹⁴ Shortly thereafter, the *Arkansas Gazette* reported

8. For example, in anti-nuclear campaigns in Maine, Missouri, and Oregon, the opposition styled itself as a "people's" committee even though most of its support came from corporations. *Id.* at 4.

9. The opposition to an anti-smoking question in California, the Committee Against Regulatory Excess (CARE), received \$1.75 million in contributions from four tobacco companies during the last month of the campaign. *Id.* at 46. This information became public only two weeks before the vote. *Id.* Note that prior to this, CARE stressed that it spoke for in-state businesses and emphasized the local nature of its support. In fact, an overwhelming amount of its financing came from out of state tobacco companies. *Id.* at 46-47.

10. See, e.g., *National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981).

11. See, e.g., Shockley, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence be Found?* 39 U. MIAMI L. REV. 377 (1985) [hereinafter Shockley, *Direct Democracy*]; Easley, *Direct Democracy Buying Back the First Amendment: Regulation of Disproportionate Corporate Spending in Ballot Issue Campaigns*, 17 GA. L. REV. 675 (1983); Shockley, *Money in Politics: Judicial Roadblocks to Campaign Finance Reform*, 10 HASTINGS CONST. L.Q. 679 (1983) [hereinafter Shockley, *Money in Politics*]; Mickenberg, *supra* note 1. *But see* Mueller & Partinello, *The Constitutionality of Limits on Ballot Measure Contributions*, 57 N.D.L. REV. 391 (1981); Note, *Statutory Limitations on Corporate Spending in Ballot Measure Campaigns: The Case for Constitutionality*, 36 HASTINGS L.J. 433 (1985); Note, *State and Local Limitations on Ballot Measure Contributions*, 79 MICH. L. REV. 1421 (1981).

12. *Bellotti*, 435 U.S. 765.

13. *Arkansas Gazette*, Oct. 1, 1988, at B1, col. 2. The group which filed the court case, Committee Against Amendment 4, was composed of business and conservative groups. Among its members were the following groups: Family, Life, America, and God (FLAG); the Arkansas Association of Realtors; the Arkansas Farm Bureau; the Arkansas Sheriffs Association. Anti-tax crusader Tom Ferstl headed the group. Although the Committee Against Amendment 4 continued to oppose the amendment, it did not figure in the last minute media blitz which so angered proponents of Amendment 4.

14. *Arkansas Gazette*, Oct. 13, 1988, at A1, col. 2. The lawsuits challenged the ballot

that a poll showed that both amendments enjoyed popular support.¹⁵ One week before the vote, Governor Clinton, apparently confident of victory, formed a committee to push for passage of Amendment 4.¹⁶ The committee intended to engage in only a modest amount of advertising.¹⁷ Clinton brushed off a question about the delay in forming the committee by saying that the opposition had not gone beyond distributing fliers yet.¹⁸

The situation changed almost immediately. The *Arkansas Gazette* reported on November 4 that a well-financed opposition group, the Committee Against Higher Taxes, had recently bought over \$28,000 worth of television advertising from the three major Little Rock stations.¹⁹ Two of their thirty-second ads were scheduled to run until election day.²⁰ The ads accused Governor Clinton of favoring both the Ethics Act and the Fair Tax Amendment as a way to raise taxes for his 1989 proposed \$200 million spending program. They labeled the program a "tax package monster" and concluded that there was "nothing fair or ethical about higher taxes."²¹

Clinton claimed the ads were "absolutely false." He speculated that powerful lobbyists were financing the opposition because of their fear of the public disclosure the proposed act would require.²² Craig Smith, the Governor's aide in charge of the two campaigns, said that "somebody out there is trying to buy this election and we don't know who it is."²³ The only information available about the Committee Against Higher Taxes came from its incorporation papers. A Little Rock lawyer, C.J. Giroir, was listed as the president and two of his employees were listed as the other corporate officers.²⁴ The *Gazette* speculated that wealthy businessman Jack Stephens might be financ-

titles as misleading. For a discussion of the Arkansas law concerning the qualification of ballot titles, see Kennedy, *supra* note 4.

15. *Arkansas Gazette*, Oct. 25, 1988, at B6, col. 3. The *Gazette* poll showed that 54% of the respondents favored the Fair Tax Amendment, 22% opposed it, and 24% were undecided.

16. *Arkansas Gazette*, Nov. 1, 1988, at B2, col. 4. The committee seemingly attempted to show the broad range of support the amendment enjoyed. Among its members were Senators Max Howell and John Miller, Arkansas Education Association President Ed Bullington, ACORN Official Ronnie Sauls, consumer activist Scott Trotter, and the ubiquitous Brownie Ledbetter.

17. *Id.*

18. *Id.*

19. *Arkansas Gazette*, Nov. 4, 1988, at A1, col. 2.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

ing the campaign because of Giroir's prior legal and business connections to Stephens.²⁵

Gazette columnist John Brummett warned that Arkansans were about to be subjected to a lot of "expensive baloney."²⁶ He claimed that powerful interests were mounting last-minute opposition to the Fair Tax Amendment and "doing it with a cynical, obscene, and unethical outpouring of mysterious special interest money for television and radio commercials that are simply dishonest."²⁷ Brummett lamented that voters would not know who financed the ads because Arkansas did not have a law requiring the disclosure of a ballot committee's major financial backers.²⁸

The money poured in on both sides. Governor Clinton declared on November 5 that he had raised almost \$40,000 for the committee favoring the amendment.²⁹ Nevertheless, the *Gazette* indicated that the Giroir-headed committee planned to spend \$100,000 statewide before election day.³⁰ On November 6, Giroir refused to disclose his committee's financial contributors saying that he followed the "long-standing and widely respected tradition of confidentiality afforded supporters of committees like the one I represent."³¹

In spite of the support it enjoyed in the opinion poll conducted just three weeks earlier, the Fair Tax Amendment was soundly defeated at the polls. Next day returns showed the amendment losing by a sixty-one to thirty-nine percent margin.³² Although it is possible that the opinion poll failed to discover the true degree of opposition to the Fair Tax Amendment, the effect of the Committee Against Higher Taxes' media campaign cannot be ignored.³³ The committee's finan-

25. *Arkansas Gazette*, Nov. 5, 1988, at B1, col. 2.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*, Nov. 5, 1988, at B1, col. 5. At the same time, Clinton angrily rebuffed a questioner who pressed him for the names of the people behind the opposition. Clinton said that he had already listed the names of the lobbyists he believed responsible for the "fear and smear" campaign.

30. *Id.*

31. *Id.*, Nov. 6, 1988, at N1, col. 4.

32. *Id.*, Nov. 9, 1988, at A1, col. 3; *Id.*, Nov. 9, 1988, at B8, col. 3. Ironically, the Ethics Act passed by an almost identical margin and is now codified at ARK. CODE ANN. §§ 21-8-401 to 803 (Supp. 1989), as amended by Act of March 21, 1989, No. 719.

33. Professor Shockley argues that money has been more successful when used to defeat a ballot proposal. Shockley, *Direct Democracy*, *supra* note 11, at 393. Moreover, Magleby has pointed out that large shifts in voter sentiment were several times more likely to occur in ballot elections than in candidate elections. D. MAGLEBY, *supra* note 2, at 298. Finally, one comprehensive study has shown that corporate contributions opposing ballot measures were successful 25 out of 32 times, and that the side spending the most money was successful 29 out of 39

cial supporters were never revealed.

Against this background, in March 1989 the Arkansas General Assembly passed the "Disclosure Act for Public Initiatives, Referendums, and Measures Referred to the Voters by the General Assembly."³⁴ This Article will assess the constitutionality of this Act.

II. THE DISCLOSURE ACT

The Act imposes disclosure requirements similar to those imposed on candidates by state and federal law in partisan elections.³⁵ Ballot or legislative question committees are required to file a statement of organization with the Secretary of State within ten days after the committee is formed.³⁶ The statement of organization must include the following:

1. The name, address, and telephone number of the committee;³⁷
2. the name, address, and telephone number of the treasurer and other principal officers;³⁸
3. the name and address of the financial institutions where

times. S. LYDENBURG, *supra* note 6. This describes the situation in Arkansas in 1988. In addition to the \$100,000 spent by the Committee Against Higher Taxes, the independent Committee Against Amendment 4 spent at least \$24,000. Arkansas Gazette, Nov. 4, 1988, at A4, col. 2.

34. Act of March 1, 1989, No. 261; Act of March 17, 1989, No. 634 (both acts codified at ARK. CODE ANN. §§ 7-9-401 to 410 (Supp. 1989)). Arkansas was one of the last states to enact ballot committee disclosure requirements. As of 1985, only Arkansas, Nevada, North Dakota, and Utah did not have disclosure statutes. Shockley, *Direct Democracy*, *supra* note 11, at 392 n.55.

35. Compare 2 U.S.C. §§ 431 to 456 (1982) and ARK. CODE ANN. §§ 7-6-201 to 214 (1987 & Supp. 1989).

36. ARK. CODE ANN. § 7-9-404(a)(1) (Supp. 1989). A "ballot question" is defined as "a question in the form of a statewide initiative or referendum which is submitted or intended to be submitted to a popular vote at an election whether or not it qualifies for the ballot." *Id.* § 7-9-402(1). A "legislative question" is defined as "a question in the form of a measure referred by the Arkansas General Assembly to a popular vote at an election." *Id.* § 7-9-402(6). A "ballot question committee" is "any person, other than an individual, who receives contributions or makes expenditures for the purpose of attempting to influence the qualification, passage, or defeat of any ballot question." *Id.* § 7-9-402(2). A "legislative question committee" is identical to a ballot question committee except that it is concerned with the passage or defeat of a legislative question. *Id.* § 7-9-402(7). The term "person" has a technical meaning in the Act: "any individual, business, proprietorship, firm, partnership, joint venture, syndicate, business trust, labor organization, company, corporation, association, committee, or any other organization or group of persons acting in concert." *Id.* § 7-9-402(8).

Throughout this article I will use the term "ballot committee" to refer to both types of committees. In addition, I will use the term "referenda or referendum" to refer to both types of committees.

37. *Id.* § 7-9-404(2)(b)(1).

38. *Id.* § 7-9-404(2)(b)(2).

the committee "deposits money or anything else of monetary value,"³⁹

4. the names of the committee's members;⁴⁰

5. a statement identifying the ballot or legislative question(s) in which the committee is interested.⁴¹

The Act also limits cash contributions.⁴² Groups subject to the Act may not accept any cash contribution in excess of one hundred dollars.⁴³ Moreover, committees may not spend more than fifty dollars in cash to influence the vote on a ballot question.⁴⁴ Finally, any anonymous contribution in excess of fifty dollars must be paid to the Secretary of State.⁴⁵

Once a committee either receives contributions or makes expenditures totaling more than \$250, it must file financial reports with the Secretary of State.⁴⁶ This filing requirement also applies to an individual who, on his own, spends more than \$250 to influence the vote on one of these measures.⁴⁷

The filing requirements resemble those imposed on election com-

39. *Id.* § 7-9-404(2)(b)(3).

40. *Id.* § 7-9-404(2)(b)(4).

41. *Id.* § 7-9-404(2)(b)(5). The exact words of the statute require "[a] brief statement identifying the substance of each ballot question whose qualification, passage, or defeat the committee seeks to influence or of each legislative question whose passage or defeat the committee seeks to influence." *Id.* This section makes clear that the requirements of the act extend even to those groups who attempt to influence the qualification process. "Qualification of a ballot question" is defined as "any action or process, legal or otherwise, through which a ballot question obtains certification to be on the ballot at an election." *Id.* § 7-9-402(9).

42. "Contributions" are defined broadly:

(A) "Contribution" means, whether direct or indirect, advances, deposits, transfers of funds, contracts, or obligations, whether or not legally enforceable, payments, gifts, subscriptions, assessments, payment for services, dues, advancements, forbearance, loans, pledge or promise of money or anything of value, whether or not legally enforceable, to a person for the purpose of influencing the qualification, passage, or defeat of a ballot question or the passage or defeat of a legislative question;

(B) "Contribution" includes the purchase of tickets for events, such as dinners, luncheons, rallies and similar fund-raising events, and the granting of discounts or rebates by television and radio stations and newspapers, not extended on an equal basis to all persons seeking to influence the qualification, passage, or defeat of a ballot question or the passage or defeat of a legislative question;

(C) "Contribution" shall not include noncompensated, nonreimbursed volunteer personal services or travel.

Id. § 7-9-402(3).

43. *Id.* § 7-9-405(a).

44. *Id.* § 7-9-405(b).

45. *Id.* § 7-9-405(d). By the same token, contributions must be made in the legal name of the contributor. *Id.* § 7-9-405(c).

46. *Id.* § 7-9-406(a).

47. *Id.* § 7-9-406(b). Contributions to a committee would not count as an expenditure for purposes of this section.

mittees. The exact requirements are different for an individual than for a committee. Pursuant to section 7-9-407(2)(A) of the Arkansas Code, a committee must report the following:

(i) The total amount of contributions received during the period covered by the financial report;

(ii) The total amount of expenditures made during the period covered by the financial report;

(iii) The cumulative amount of those totals for each ballot question or legislative question;

(iv) The balance of cash and cash equivalents on hand at the beginning and the end of the period covered by the financial report;

(v) The total amount of contributions received during the period covered by the financial statement from persons who contributed two hundred fifty dollars (\$250) or less, and the cumulative amount of that total for each ballot question or legislative question;

(vi) The total amount of contributions received during the period covered by the financial statement from persons who contributed two hundred fifty dollars (\$250) or more and the cumulative amount of that total for each ballot question or legislative question;

(vii) The name and street address of each person from whom a contribution(s) exceeding two hundred fifty dollars (\$250) was received during the period covered by the financial report, together with the amount contributed, the date of receipt, and the cumulative amount contributed by that person for each ballot question or legislative question.

Subsection B of this statute specifies what an individual must report:

(i) The total amount of expenditures made during the period covered by the financial report;

(ii) The cumulative amount of that total for each ballot question or legislative question.⁴⁸

Both committees and individuals must report the name and address "of each person to whom expenditures totaling two hundred fifty dollars (\$250) or more were made," and the "amount of each separate expenditure to each person" during the covered period.⁴⁹ These reports must be filed every thirty days following the first contribution or the first expenditure.⁵⁰ Knowing noncompliance with any

48. *Id.* § 7-9-407(2)(A).

49. *Id.* § 7-9-407(3).

50. *Id.* § 7-9-409(a)(1). A financial report must be filed no later than four days before an

of the provisions of the Act carries a possible sentence of one year in prison or a one thousand dollar fine, or both.⁵¹ The statement of organization and the financial reports are open to public inspection in the Secretary of State's office.⁵²

The compelled disclosure of contributors' names raises the most serious constitutional questions. It can be argued that such disclosures violate the first amendment guarantee of free speech by chilling both the exercise of speech itself and the right to associate with others to advance one's cause. Even if the Act is constitutional on its face, its application to controversial groups may violate the first amendment. In addition, the scope of the Act may be either vague or overbroad. It may not sufficiently identify those groups subject to the Act; on the other hand, it may include so many groups that it impermissibly intrudes upon the rights of speech and association. In particular, the Act may impermissibly infringe the rights of churches and newspapers to take positions on matters relating to ballot questions.

This Article analyzes these various claims and, with one exception, finds them lacking. Although the Act infringes upon speech, any harm is outweighed by the public benefit of disclosure. Moreover, the Act, on its face, does not burden the right of association. Any group which makes such a claim must be able to show that the required disclosures will subject the group to public or private harassment. Nevertheless, the definition of ballot question and legislative question committees must be narrowed to avoid vagueness and overbreadth problems. Finally, although not required by the Constitution, the Act should be amended to provide an *in camera* administrative or judicial proceeding for groups claiming constitutional exemptions from the Act's requirements.

III. THE FIRST AMENDMENT AND ELECTIONS

The seminal case in this area of law is *Buckley v. Valeo*⁵³ where the United States Supreme Court considered numerous constitutional challenges to the Federal Campaign Practices Act of 1971 (as amended in 1974).⁵⁴ The Court held that limitations on contributions were constitutional because they did not infringe on the quantity of

election with a closing date no later than seven days before the election. *Id.* § 7-9-409(a)(2). A final report must be filed within thirty days after the election. *Id.* § 7-9-409(a)(3).

51. *Id.* § 7-9-403. The act also assesses a penalty for the late filing of the required reports or documents. *See Id.* §§ 7-9-404(a)(2), 404(c) and 409(b).

52. *Id.* § 7-9-410.

53. 424 U.S. 1 (1976) (per curiam).

54. Federal Election Campaign Act, 2 U.S.C. §§ 431 to 456 (1982).

political speech, but that limitations on expenditures were unconstitutional because they directly limited the quantity of political speech.⁵⁵ In addition, the Court upheld the reporting and disclosure requirements of the Act, finding that the requirements were supported by sufficiently important governmental interests to outweigh any infringement on privacy.⁵⁶ Moreover, any minor parties which claimed that disclosure would cause harm must show a reasonable probability that compelled disclosure would lead to harassment.⁵⁷

The Court has considered other challenges to the federal statute in the years since *Buckley*. In *California Medical Association v. Federal Election Commission*⁵⁸ a fragmented Court upheld the Act's limitations on contributions by individuals and by unincorporated associations to multi-party political committees. A plurality of the Court held that the law did not violate the first amendment because the restrictions did not prevent the group's members from spending their own money apart from the group to advocate their point of view.⁵⁹ If limitations on campaign contributions are constitutional, then similar limitations on amounts given to political committees are also constitutional.⁶⁰ Justice Blackmun provided the fifth vote by concurring in part and in the judgment. Although he rejected *Buckley's* contribution/expenditure distinction, he upheld the limitations because they were necessary to preserve the Act's overall contribution limitations.⁶¹ Similarly, in *Federal Election Commission v. National Right to Work Committee*⁶² the Court upheld the Act's requirement that a nonstock corporation can only solicit money from its members when it uses this money in specified ways in federal elections.

Most states regulate elections in a manner similar to the federal model.⁶³ Arkansas has long had candidate disclosure laws.⁶⁴

55. 424 U.S. at 143.

56. *Id.* at 84.

57. *Id.* at 69.

58. 453 U.S. 182 (1981).

59. A majority of the Court held that the limitation did not violate the equal protection clause even though the Act permitted unlimited corporate and union contributions to a segregated fund. *Id.* at 200. The Court found that the Act imposed fewer restrictions on individuals and unincorporated associations than it did on corporations and labor unions. *Id.* These different restrictions reflected Congressional judgment that the differences in structure required different rules to effectuate the purpose of the Act. *Id.* at 201.

60. *Id.* at 197.

61. *Id.* at 293. Chief Justice Burger, Justices Stewart, Powell, and Rehnquist dissenting on jurisdictional grounds.

62. 459 U.S. 197 (1982).

63. For a summary of state laws relating to candidate elections, see PALMER &

IV. LIMITATIONS ON CONTRIBUTIONS AND EXPENDITURES

As previously stated, *Buckley v. Valeo*⁶⁵ is the seminal case in this area of law. In *Buckley* the United States Supreme Court considered numerous constitutional challenges to the Federal Election Campaign Act⁶⁶ raised by a mixture of conservative, liberal, political, and civil rights groups.⁶⁷ The Court held that the contribution limitations were constitutional but the expenditure limitations were not.

The Court clearly established that giving and spending money in political campaigns is protected speech. Discussions of public issues and a candidate's qualifications "are integral to the operation of the system of government established by our Constitution."⁶⁸ The Court noted that "there is practically universal agreement that a major purpose of [the first amendment] was to protect the free discussion of governmental affairs . . . of course includ[ing] discussions of candidates"⁶⁹ The speech's dependence on the expenditure of money does not change its character.⁷⁰

The Court saw a difference between expenditure limitations and contribution limitations. Whereas expenditure limitations reduce "the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached,"⁷¹ contribution limitations "entail[] only a marginal restriction upon the contributor's ability to engage in free communication."⁷² Every form of modern communication needs money and the

FEIGENBAUM, CAMPAIGN FINANCE LAWS 88: A SUMMARY OF STATE CAMPAIGN FINANCE LAWS (National Clearinghouse on Election Administration, Federal Election Commission).

64. ARK. CODE ANN. § 7-6-201 to 214 (1987 & Supp. 1989).

65. 424 U.S. 1 (1976).

66. Federal Election Campaign Act Amendments of 1974, Pub. L. 93-443, 88 Stat. 1263 (1974), amending Federal Election Campaign Act, Pub. L. 92-225, 86 Stat. 3 (1971) (codified as amended at 2 U.S.C. §§ 431 to 456 (1982) and in scattered sections of 26 U.S.C.).

67. The original plaintiffs included: a presidential candidate, a senatorial candidate and his potential contributor, the Committee for a Constitutional Presidency-McCarthy '76, the New York State Conservative Party, the Mississippi Republican Party, the Libertarian Party, the New York Civil Liberties Union, the American Conservative Union, the Conservative Victory Fund, and Human Events, Inc., 424 U.S. at 8. Various other groups and individuals intervened in the lawsuit including Common Cause and the League of Women Voters. *Id.* at 9 n.5.

68. *Id.* at 14.

69. *Id.* (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

70. *Id.* at 16. The *Buckley* case has been extensively analyzed. Among the most critical commentaries have been Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982); Shockley, *Money In Politics*, *supra* note 11.

71. 424 U.S. at 19.

72. *Id.* at 20-21.

increasing dependence on the modern media increases the cost of communicating one's message.⁷³ On the other hand, a contribution is only a "general expression of support" for a candidate without the rationale for the support.⁷⁴ The amount of the communication does not increase with the size of the contribution. Instead, "the expression rests solely on the undifferentiated, symbolic act of contributing."⁷⁵ If contribution limitations prevented a candidate from getting the money necessary to communicate her message, then serious first amendment problems would arise. The limitations imposed by the federal act did not have this effect. Thus, the limitations on expenditures more significantly infringed on protected speech than the limitations on contributions.

The Court concluded that the expenditure limitations violated the Constitution but the contribution limitations did not. The limitation on contributions is justified by the important governmental interest in deterring corruption. The Court said that "[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined."⁷⁶ Moreover, even the appearance of corruption erodes public confidence in government.⁷⁷ Balanced against this important interest were limitations on contributions that did not materially affect "the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties."⁷⁸ Thus, the Court found no constitutional infirmity in the Act's limitations on contributions.

On the other hand, the Court discerned that the expenditure limitations resulted in a much greater infringement on protected speech and that the connection to any important governmental interest was much more tenuous. The Court rejected the argument that the prevention of corruption justified the limitations. Limiting expenditures did not sufficiently relate to the core problem: the elimination of quid pro quo arrangements between the candidate and the contributor.⁷⁹ Moreover, the limitations "heavily burden[ed] core First Amendment

73. *Id.* at 19.

74. *Id.* at 21.

75. *Id.*

76. *Id.* at 26-27.

77. *Id.* at 27.

78. *Id.* at 29.

79. *Id.* at 45.

expression.”⁸⁰ The first amendment interests clearly outweighed the governmental interests.

The Arkansas Act contains some regulations of cash contributions and expenditures.⁸¹ No committee may accept any cash contributions over \$100. Although the *Buckley* Court upheld the contribution limitations in the federal act, it still found contributions to be protected expression. Any limitations must be justified by important governmental interests. While the deterrence of corruption justifies limiting contributions in an election campaign, that interest simply does not exist in a ballot question campaign. Beyond deterrence of corruption, it is not immediately apparent what governmental interest justifies this limitation. It is possible that the record-keeping necessary to prepare for the eventual necessity of reporting contributions could serve as the justification. The difficulty with this contention is that one would assume that large contributions, in cash or by check, would be easier to account for than numerous small cash contributions, yet the Act allows the receipt of cash contributions of less than \$100. It could also be argued that the receipt of large cash contributions would deter state enforcement of the law by making it difficult to trace the finances of an offending committee. There would be some increase in the effectiveness of any investigation because of the ease with which financial records may be obtained from banks.⁸²

The question is whether these interests outweigh the infringement on speech brought about by the limitation on cash contributions. Limiting the size of cash contributions is not a significant infringement on protected speech. As in *Buckley* the limitation does not deter the core expression and symbolic act of contributing to a cause. The infringement is even slighter than in *Buckley* because the absolute size of contributions is not limited at all. Individuals or groups may contribute as much as they like as long as they do so by check. In the modern world, this surely would not amount to a substantial limitation on the freedom of speech. Therefore, the governmental interests would outweigh this rather slight infringement on speech.

Committees may not spend more than fifty dollars in cash. This, too, passes constitutional muster. Any absolute limitation on expend-

80. *Id.* at 48.

81. ARK. CODE ANN. § 7-9-405 (Supp. 1989).

82. *See, e.g.*, 12 U.S.C. §§ 3401 to 3422 (1982) (outlining procedures to follow in government investigations of bank records). Congress passed this law, the Bank Secrecy Act, in response to the Supreme Court's decision in *United States v. Miller*, 425 U.S. 435 (1976), which held that a depositor had no reasonable expectation of privacy in his bank records.

itures would present serious constitutional problems. As with cash contributions, however, there is no absolute limit on the amount a committee may spend as long as it uses a check. Whatever small infringement on speech this creates is outweighed by the governmental interest in enforcement of the law. Once again, investigations of reporting violations would necessarily involve an examination of the committee's financial records. Access to the paper trail left by checks would greatly facilitate both compliance with and enforcement of the law.

Buckley also rejected a challenge to the federal act's monetary thresholds. The law required political committees to keep records of the names and addresses of anyone who made contributions over ten dollars. Once a person's aggregate contributions exceeded \$100, the Act required the committee to record her name, address, occupation, and principal place of business.⁸³ The plaintiffs claimed these limits were overbroad because they lacked a substantial nexus to the governmental interests. In other words, they were so low that contributions in those amounts were unlikely to have a corrupting influence on the candidate.⁸⁴

Although Congress apparently adopted the limits from the 1910 Act, the Court refused to second-guess that decision.⁸⁵ Moreover, the Court underscored the importance of the information and enforcement functions of the Act when it said:

We are mindful that disclosure serves informational functions, as well as the prevention of corruption and the enforcement of the contribution limitations. Congress is not required to set a threshold that is tailored only to the latter goals. In addition, the enforcement goal can never be well served if the threshold is so high that disclosure becomes equivalent to admitting violation of the contribution limitations.⁸⁶

The Court left open the question of whether or not public disclosure of contributions between ten dollars and one hundred dollars was unconstitutional. The Act did not authorize the Federal Election Commission to disclose such amounts and thus there was no basis to decide the issue in the case.

The Arkansas Act uses \$250 as the threshold. Any committee which either receives contributions or makes expenditures over \$250

83. 2 U.S.C. §§ 432(c)(2), 438(a)(8) (1982).

84. 424 U.S. at 82.

85. *Id.* at 83.

86. *Id.* at 83-84.

must file a financial report with the Secretary of State.⁸⁷ Individuals who spend more than \$250 must also file a report.⁸⁸ The committee's report must disclose, among other things, the total amount it received from individuals who contributed \$250 or more, and the name, address, amount contributed, the date of receipt, and the cumulative amount received from each individual who contributed more than \$250.⁸⁹ Both an individual and a committee must disclose the name and address of every person to whom expenditures of more than \$250 were made during the reporting period.⁹⁰

These limits present no constitutional problems. As in *Buckley*, the legislature must be given the latitude to set the amount so that the law's goals may be achieved. Here the goal of the Act is to provide the voters information on the finances of the proponents and opponents of ballot questions. The threshold is located where both the informational purpose may be served and the associational rights of the contributors are respected. Thus, the small, grass-roots contributor need not fear that her ten dollar donation to a cause will become public information.

The Act does not provide any threshold for record-keeping, however. Presumably, ballot committees should keep records of all contributions in case one of the contributors eventually exceeds the \$250 threshold for disclosure. The sheer volume of records for some grass-roots groups may unduly burden the group's speech rights.⁹¹

V. COMPELLED DISCLOSURE: FREE SPEECH

The Arkansas Act also requires ballot committees to disclose the names of their members as well as the names of some contributors and the amounts of their contributions.⁹² This kind of compelled disclosure raises both free speech and free association issues. In this section, I will consider the free speech issues. I will consider the free association issues in the next section.

There are two separate free speech issues: (1) whether or not the required disclosures unnecessarily infringe on the protected speech; and (2) whether or not the required disclosures chill the right of asso-

87. ARK. CODE ANN. § 7-9-406(a) (Supp. 1989).

88. *Id.* § 7-9-406(b).

89. *Id.* § 7-9-407(2)(A).

90. *Id.* § 7-9-407(3).

91. See *infra* notes 217-23 and accompanying text.

92. ARK. CODE ANN. § 7-9-407(2)(A)(vii) (Supp. 1989).

ciation. The law must first be analyzed on its face and then as applied.

In *Burroughs and Cannon v. United States*,⁹³ the Supreme Court upheld an early federal act's disclosure requirements. The plaintiffs did not raise a first amendment challenge; instead they challenged Congress' authority to interfere with state appointment of electors.⁹⁴ Nevertheless, the Court presaged the modern first amendment analysis when it said that "Congress reached the conclusion that public disclosure of political contributions, together with the names of contributors and other details, would tend to prevent the corrupt use of money to affect elections. The verity of this conclusion reasonably cannot be denied."⁹⁵ Later the Court upheld the constitutionality of the Federal Corrupt Practices Act's ban on corporate or union contributions to a federal election campaign in *United States v. International Union United Automobile, Aircraft, and Agricultural Implement Workers of America*.⁹⁶

In *Buckley* the Supreme Court upheld the federal act's reporting and disclosure requirements.⁹⁷ The plaintiffs did not attack the disclosure requirements as per se violations of the first amendment. Indeed, they asserted that "narrowly drawn disclosure requirements are the proper solution to virtually all of the evils Congress sought to remedy."⁹⁸ Instead, plaintiffs attacked the application of the requirements to minor-party and independent candidates and to small contributions.

The Court noted that compelled disclosure can seriously intrude upon first amendment rights.⁹⁹ These rights are not absolute, but any infringement on them must survive exacting scrutiny.¹⁰⁰ This is so

93. 290 U.S. 534 (1934).

94. *Id.* at 536 (citing U.S. CONST. art. II, § 1).

95. *Id.* at 548.

96. 352 U.S. 567 (1957).

97. At the time of this decision the Act required disclosures very similar to those imposed on ballot and legislative question committees. "Political committees" had to maintain detailed records of their contributions and expenditures. These included the names and addresses of everyone making a contribution over ten dollars. 2 U.S.C. § 432(c) (amended 1980). These committees had to file quarterly reports with the commission detailing the names, mailing addresses, occupations, and principal places of business of everyone who contributed more than \$100 in a calendar year and the date of the contributions. *Id.* § 434(b) (amended 1980). Any individual or group who was not a political committee and made contributions or expenditures in excess of \$100 in a calendar year was required to file an abbreviated statement with the commission. *Id.* § 434(e) (amended 1980). [Since *Buckley* was decided, Congress has amended the cited requirement. *Ed. note.*]

98. 424 U.S. 1, 60 (1976) (quoting Brief for Appellants at 171).

99. *Id.* at 64.

100. *Id.* at 64-65.

because group association enhances effective first amendment advocacy by allowing individuals to pool their money and resources.¹⁰¹ Only important government interests can justify any limitations on this right.

The Court found three interests which supported the reporting and disclosure requirements. They were (1) to aid the voter to evaluate candidates, (2) to deter corruption, and (3) to aid in detecting violations of the Act's contribution limitations.¹⁰² The Court held that these interests outweighed the burden compelled disclosure placed on first amendment rights. In this regard, the Court agreed with the idea that "disclosure requirements—certainly in most applications—appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist."¹⁰³

Although the Supreme Court has never addressed the precise issue of the constitutionality of reporting requirements for ballot committees, it has addressed other limitations on the referendum process. In *First National Bank of Boston v. Bellotti*¹⁰⁴ the Court struck down a Massachusetts law which prohibited corporate contributions and expenditures on ballot questions. Although Congress could prevent corporate spending in partisan elections, ballot questions presented a different situation: "The risk of corruption perceived in cases involving candidate election . . . simply is not present in a popular vote on a public issue."¹⁰⁵ The danger of corporate dominance was alleviated by the opportunity of the people to evaluate the source of the speech. The Court commented: "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate."¹⁰⁶

In *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*¹⁰⁷ the Court held that a \$250 limit on contributions to ballot committees violated the first amendment. The *Berkeley* case did not implicate the corruption rationale which supported *Buckley's*

101. *Id.* at 65.

102. *Id.* at 67-68.

103. *Id.* at 68.

104. 435 U.S. 765 (1978).

105. *Id.* at 790.

106. *Id.* at 791-92. The footnote to this passage reads: "Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected. In addition, we emphasized in *Buckley* the prophylactic effect of requiring the source of the communication be disclosed." *Id.* at 792 n.32 (citations omitted).

107. 454 U.S. 290 (1981).

“single narrow exception to the rule that limits on political contributions” violate the first amendment. The Court rejected the argument that the contribution limit was necessary to help identify the supporters of a particular ballot question.

It is true that when individuals or corporations speak through committees they often adopt seductive names that may tend to conceal the true identity of the source. Here, there is no risk that the Berkeley voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since contributors must make their identities known under § 112 of the ordinance, which requires publication of lists of contributors in advance of the voting.¹⁰⁸

The Court also found that the contribution limitation necessarily infringed on the ability of committees to make expenditures. Again the Court spoke approvingly of the disclosure provisions saying 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.”¹⁰⁹

Several federal courts have also addressed state regulation of the ballot process. In *Let's Help Florida v. McCrary*¹¹⁰ the Fifth Circuit struck down a provision limiting the amount of individual contributions to \$3000. Presaging *Berkeley* the court rejected the argument that the limitation was needed to deter corruption. The court noted that in a candidate election the people elect their delegate. In that case, contribution limitations are necessary to forestall the possibility of improper influence.¹¹¹ When people vote on a ballot question, however, “they directly decide the pertinent political issue for themselves. Large contributions for publicity by one group or another do not influence the political decisionmakers—in this case, the voters themselves—except in a manner protected by the First Amendment.”¹¹² Thus, the limitation violated the first amendment.

The court also rejected the argument that the contribution limitation promoted adequate disclosure. While disclosure is an important state interest, contribution limitations are not sufficiently related to that interest.¹¹³ In dicta, the court seemed to approve of disclosure

108. *Id.* at 298.

109. *Id.* at 299-300.

110. 621 F.2d 195 (5th Cir. 1980).

111. *Id.* at 199-200.

112. *Id.* at 200.

113. *Id.*

and reporting requirements.

Florida can and does effectively promote the disclosure of large contributors through measures that are less harmful to first amendment rights. For example, [other sections of the law] require political committees to register with the state and to file information about each contribution and contributor throughout the campaign. This information is available to the public and may be published through newspapers and other media. [Another section of the law] requires the disclosure of the source of payment for all political advertisements and campaign literature. Measures such as these provide adequate disclosure without directly restricting contributions or other important first amendment rights.¹¹⁴

Other circuit courts have struck down laws which prohibited corporate participation in the referendum process. Courts in two cases rejected the corruption rationale and referred to the less restrictive alternative of public disclosure.¹¹⁵ In *Schwartz v. Romnes*¹¹⁶ the Second Circuit noted that public disclosures minimized the risk that the public would be misled on the corporate financed views.¹¹⁷ Similarly, in *Michigan State Chamber of Commerce v. Austin*¹¹⁸ the Sixth Circuit held that a state law limiting the amount corporations could contribute to ballot questions committees infringed the first amendment rights of speech and association. The court pointed out that the limitation was not necessary in view of the law's disclosure requirements.¹¹⁹

State courts addressing the issue have unanimously upheld ballot

114. *Id.* at 200-01. See also *Winn-Dixie Stores, Inc. v. State*, 408 So. 2d 211 (Fla. 1982) where the Florida Supreme Court approvingly cited this quotation in a case involving the same issue.

115. *C & C Plywood Corp. v. Hanson*, 583 F.2d 421 (9th Cir. 1978); *Schwartz v. Romnes*, 495 F.2d 844 (2d Cir. 1974).

116. 495 F.2d 844 (2d Cir. 1974).

117. *Id.* at 851.

118. 856 F.2d 783 (6th Cir.) *reh. den.*, 865 F.2d 716 (1988).

As this article was going to press, the United States Supreme Court issued an opinion reversing the Sixth Circuit's ruling. *Austin v. Michigan Chamber of Commerce*, 58 U.S.L.W. 4371 (Mar. 27, 1990). The majority held that the state had a compelling interest in regulating the distorting effect corporate wealth might have on the ballot process. The ban on the use of general corporate funds is narrowly tailored to achieve that end in light of the availability of a separate corporate political fund which can be used to advance the corporation's position. The Court distinguished *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), on the grounds that the Chamber of Commerce exists for purposes in addition to political expression, its members were more like shareholders, and it is not free from corporate influence. Justices Scalia, Kennedy, and O'Connor dissented.

119. *Id.* at 789.

committee reporting and disclosure laws.¹²⁰ In *Messerli v. State*¹²¹ a person refused to file the required report after running two newspaper advertisements relating to a municipal bond election. On appeal, the Alaska Supreme Court upheld the reporting requirement against a first amendment challenge. The court noted that an expenditure to influence a ballot question is closer to pure political speech than an expenditure in a candidate election because the former is often an expression of the contributor's own personal beliefs.¹²² The individual "exercises the right of free speech directly on his own behalf, addresses whatever he sees as the merits of an issue, expresses his own opinions, and makes his own recommendations to the public."¹²³ Because ballot propositions frequently involve controversial topics, a person advocating an unpopular position could be reluctant to take such a position if his name must be publicly disclosed.¹²⁴ Thus, any disclosure requirements burden important first amendment rights. Nevertheless, the court found that the need for an informed electorate outweighed the burden on first amendment rights.

Proper evaluation of the arguments made on either side [of a ballot issue] can often be assisted by knowing who is backing each proposition [Like the bias of a witness], [s]uch information is no less important to an intelligent evaluation of what is being said during an election campaign. Similarly, a ballot issue is often of great importance financially to its proponents or opponents, or both, and multi-million dollar advertising campaigns have been waged. In such circumstances, the voter may wish to cast his ballot in accordance with his approval, or disapproval, of the sources

120. See, e.g., *Bemis Pentecostal Church v. State*, 731 S.W.2d 897 (Tenn. 1987); *Iowans for Tax Relief v. Campaign Finance Disclosure Comm'n*, 331 N.W.2d 862 (Iowa 1983); *Messerli v. State*, 626 P.2d 81 (Alaska 1981); *Advisory Opinion on Constitutionality of 1975 PA 227*, 396 Mich. 465, 242 N.W.2d 3 (1976); *Brown v. Superior Court of Los Angeles County*, 5 Cal. 3d 509, 487 P.2d 1224, 96 Cal. Rptr. 584 (1971) (Disclosure law does not violate equal protection clause).

Cf. *New Jersey Election Law Enforcement Comm'n v. Citizens to Make Mayor-Council Gov't Work*, 208 N.J. Super. 583, 506 A.2d 773, *certification granted*, 104 N.J. 442, 517 A.2d 432 (1986), *aff'd in part, rev'd in part*, 107 N.J. 380, 526 A.2d 1069 (1987).

But see *Winn-Dixie Stores, Inc. v. State*, 408 So. 2d 211 (Fla. 1982) (striking down an expenditure limitation in referenda elections); *Anderson's Paving, Inc. v. Hayes*, 295 S.E.2d 805 (W. Va. 1982) (prohibition of corporate contribution to ballot campaigns unconstitutional); *Opinion of the Justices*, 461 A.2d 701 (Me. 1983) (statute limiting contributions to ballot campaigns would be unconstitutional).

121. 626 P.2d 81 (Alaska 1981).

122. *Id.* at 85.

123. *Id.*

124. *Id.* at 86.

of financial support.¹²⁵

Finally, in *Bemis Pentecostal Church v. State*,¹²⁶ the Tennessee Supreme Court upheld the facial validity of a ballot disclosure act but interpreted the act so as not to apply to regular church activities. In this case, the plaintiff churches actively opposed a local option liquor-by-the-drink referendum in a variety of ways.¹²⁷ They refused to file a disclosure statement as required by state law, and they filed suit after the state Attorney General notified them that they must comply with the act.

The court upheld the act. Noting the importance of referenda on community life, the court concluded that

the public has the right to know at a minimum how campaigns on public issues are financed and by whom. Large undisclosed contributions can distort public sensibilities and allow confidence in the electoral system to wane as the perception waxes that elections can be unduly influenced by wealthy special interests and well-financed factions.¹²⁸

Moreover, the state's compelling interest in open government also supported the disclosure requirements. By requiring these reports, the state may deter corruption of the process by assuring contributors that their money is being spent in the intended manner. The paper trail left by the reports makes after-the-fact tracing for enforcement purposes easier.¹²⁹ The disclosure requirements give the public a "gauge" by which to evaluate campaign publicity. Groups wishing to influence the outcome of a ballot election should not be allowed to "distort the process by flooding the forum with media campaigns without at least disclosing this fact to the voters."¹³⁰

The Tennessee act only applied to express advocacy in a particular campaign and not to a generalized discussion of issues that may be related to a campaign. The *Buckley* Court limited the federal act to groups that "expressly advocated" the election of a particular candidate in order to avoid potential overbreadth problems. In similar

125. *Id.* at 87.

126. 731 S.W.2d 897 (Tenn. 1987).

127. The churches purchased radio, television, and newspaper advertisements. One of the plaintiff churches contributed money to a political committee which opposed the referendum. In addition, the churches broadcast anti-referendum messages during their regularly broadcast services and published newsletters and church bulletins with messages against the referendum. Together the thirteen plaintiff churches spent \$5150 on the campaign. *Id.* at 899.

128. *Id.* at 903.

129. *Id.* at 904.

130. *Id.*

fashion, the Tennessee court construed the language of their statute to exempt the regular church activities from the act's disclosure requirements. On the other hand, when the churches went beyond their normal activities and began to urge the defeat of the referendum in question, they were required to report as any other ballot committee.¹³¹

It appears that the Arkansas law is also constitutional. Nevertheless, several aspects of the analysis need to be developed. First, the *Bemis* case seems to adopt a discredited rationale. It indicated that the disclosure requirements deter corruption, yet the unanimous consensus of the courts, including the United States Supreme Court, is that corruption is not a problem in referenda because there is no opportunity for a quid pro quo. In addition, the court noted that a well-financed campaign distorts the electoral process by flooding the market with messages. Flooding or not, the messages are protected speech. It is hard to see how an abundance of protected speech "distorts" anything. The *Buckley* Court adamantly rejected such a rationale in connection with expenditure limitations. In response to the argument that such limitations were necessary to equalize electoral speech, the Court said "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"¹³²

Second, although the Supreme Court's dicta seems to favor disclosure, no case has ever explored whether or not the difference in candidate and ballot elections is sufficient to require a different first amendment outcome. *Buckley* advanced three compelling reasons for disclosure in candidate elections. The deterrence of corruption cannot apply in ballot elections. Enhancing enforcement of the statutory scheme arguably applies to ballot elections, but perhaps not so strongly as candidate elections. In a candidate election, enforcement is driven by the necessity to deter corruption. Obviously, there is no such need in ballot elections. The only thing that would need to be enforced would be the disclosures themselves. Infringement on first amendment rights surely requires more than the circular need to enforce the very statute that restricts first amendment rights. Thus, evaluation of the speaker's position is the only rationale that could support ballot question disclosure laws. While it may be necessary for the public to know who "owns" their representatives, the direct democracy of the ballot process obviates that need. Moreover, the posi-

131. *Id.* at 906.

132. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

tion patronizes the voters because it assumes either that they will not be able to perceive a media blitz for what it is or that they are so parochial that they will ignore the merits of any argument and vote on the basis of whether they like or dislike the speaker.

Undoubtedly, knowing the identity of the speaker and his supporters is helpful, but the absence of compelled disclosure does not prevent the press or private citizens from discovering it. Instead, the argument goes, compelling disclosure unnecessarily shifts the first amendment focus from the speaker to the listener. Requiring disclosure puts the power of the government on the listener's side; the absence of disclosure simply makes the government neutral. The public is free to make whatever irrational decisions it chooses. The government should not force others to provide the information to do so.

Nevertheless, the balance ultimately favors the disclosures. *Bemis* is not the only case to consider the issue. The unanimous weight of authority among courts considering the question supports limited compelled disclosures in ballot elections. No court has suggested, either directly or in dicta, that compelled disclosure laws are unconstitutional. Even if the *Bemis* case is ignored, the overwhelming weight of authority supports the law. Surely, when courts manifest this much agreement on an issue, it is difficult to conclude they are all wrong.

First amendment law has come a long way from the time when Justice Black argued that the amendment was an absolute prohibition of any regulations of speech.¹³³ Modern law assumes that there are no absolutes. All speech can be regulated in a limited way. The Supreme Court treats disclosure requirements as the least restrictive way to achieve the state goal.¹³⁴ The question is whether or not the state has good enough reasons for whatever limitations it seeks to impose. Time, place, and manner restrictions and the forum doctrine are two examples of situations where the Court has developed layered balancing tests as alternatives to Justice Black's simple absolutism.¹³⁵

Although the corruption rationale may not support ballot ques-

133. Justice Black once said that the first amendment means that Congress shall make no law "without any 'ifs,' 'buts,' or 'whereases.'" *Beauharnais v. Illinois*, 343 U.S. 250, 275 (1952) (Black, J., dissenting).

134. *Buckley*, 424 U.S. at 68: "In this process, we note . . . that disclosure requirements—certainly in most applications—appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist."

135. *Compare* *United States v. Grace*, 461 U.S. 171 (1983) and *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

tion disclosure laws, the evaluation rationale does. As Professor Shockley points out:

When voting on a ballot proposition, one does not have the orienting devices of party labels or candidate names to serve as anchors. In addition, because some issues present problems of great complexity, the electorate sometimes votes against something for which they actually approve; this possibility of confusion likely increases the use of deception.¹³⁶

Ballot disclosure laws do not patronize voters. In our democracy we must assume that "information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than close them."¹³⁷ Media campaigns long ago abandoned the reasoned argument as an issue approach. Modern campaigns are more style than substance, more flash than fire, rarely presenting an argument in a sequential manner. Mass media techniques play an even greater role in ballot campaigns than in candidate elections.¹³⁸ Given these pervasive advertising techniques, the source of the campaign's funds becomes almost the only neutral factor by which to evaluate a position. Ballot campaign disclosures trust that voters will use the information about contributions to more critically examine the various ballot questions.¹³⁹

The first amendment is not exclusively concerned with the

136. Shockley, *Money In Politics*, *supra* note 11, at 715-16 (footnotes omitted). *But see* Adamany, *PACs and the Democratic Financing of Politics*, 22 ARIZ. L. REV. 569, 598 (1980):

Disclosure laws generate more information than can be mastered by the media, the politicians, or the voters—at least in the short-run of a campaign. Media may show little interest in political financing practices, and their partisan or editorial positions may color their coverage of such practices by competing candidates. Voters, too, are likely to evaluate such information through a "perceptual screen" that is colored by their own partisan allegiances and candidate preferences.

Adamany's article dealt with candidate elections. His observations are important for ballot disclosure laws, however. Nevertheless, even if one assumes that voters and the media are similarly affected by their biases in ballot elections, one can still make the case for ballot election disclosure laws. Put simply, any disclosure is better than no disclosure. If the media is slow to respond to the information available, that hardly justifies not making the information available at all. The governmental interest in disclosure laws is to make information available to the voters and not to skew the results of any particular vote. If the voters choose to ignore the implications of a ballot committee's finances, that is their business.

137. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 770 (1976).

138. Mickenberg, *supra* note 1, at 556.

139. Some scholars argue that after-the-fact disclosures do not provide voters with information when they need it. Adamany, *supra* note 135; Shockley, *Direct Democracy*, *supra* note

speaker side of the equation. The first amendment protects expression which requires both a speaker and a listener.¹⁴⁰ Some think the first amendment encompasses a right to know.¹⁴¹ I am not suggesting that the public interest in knowing who finances a ballot campaign is protected by the first amendment. Rather, I am suggesting that compelled disclosures in this context do not ignore first amendment values. In many ways they enhance those values by ensuring that, in direct democratic processes, the people have enough information available to them to make informed decisions.

More to the point, *Buckley* stands for the proposition that even speech relating to the democratic process can be regulated for sufficiently important governmental reasons. The only qualification is that the limitation cannot directly or indirectly reduce the quantity of protected speech. This is understandable if one takes either a marketplace¹⁴² or a governmental process¹⁴³ position on the purpose of the first amendment. In the marketplace theory, ideas must compete for

11; Note, *State and Local Limitations on Ballot Measure Contributions*, 79 MICH. L. REV. 1421 (1981).

By the time disclosures are made, the voters may have already been subjected to a barrage of advertisements using the most sophisticated techniques. Nicholson, *The Constitutionality of Contribution Limitations in Ballot Measure Elections*, 9 ECOLOGY L.Q. 683, 711 (1981). Cf. Shockley, *Direct Democracy*, *supra* note 11, at 418 n.151 (tobacco company used multiple polling prior to a "No Smoking" initiative to determine how voters might react to tobacco sponsored advertisements, finally deciding on an anti-big government name).

See generally Note, *supra* note 138, at 1443 (supporting more disclosure); Shockley, *Direct Democracy*, *supra* note 11, at 417-18 (supporting disclosure within the advertisement itself by requiring that the names of a committee's principal donors appear in all committee advertising).

140. In *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. at 756, the Court said that the first amendment "presupposes a willing speaker" but protects the recipients of information as well.

141. *See, e.g.*, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (public's right to receive information supports Fairness Doctrine).

142. *See, e.g.*, *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market . . ."); Z. CHAFEE, *THE BLESSINGS OF LIBERTY* (1956); M. NIMMER, *NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT* (1984).

143. The governmental process theory posits that the first amendment protects only speech that is necessary for self-government. A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948). Meiklejohn defined this category broadly to include literary, scientific, and artistic works. Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 263. One of its leading contemporary proponents did not similarly expand the theory. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

Although the Supreme Court has never unambiguously adopted a particular theory for the first amendment, it has often referred to political speech as "core speech." *See, e.g.*, *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (universal agreement that the amendment's purpose "was to protect the free discussion of governmental affairs . . ."); *Roth v. United States*, 354 U.S. 476, 484 (1957) (fullest expression given to political expression); *Monitor Patriot Co. v.*

favor. Through this competition the best idea presumably emerges.¹⁴⁴ The first amendment insures that debate on public issues is robust, open, and uninhibited.¹⁴⁵ Any regulation which reduces the number of "products" in the first amendment marketplace necessarily infringes on the ability of the public to consider all aspects of a question. In the governmental process theory, the first amendment protects speech relating to self-government. Ballot questions are examples of the most direct form of self-government. Thus, the process should allow the widest dissemination of viewpoints and the widest distribution of information about those viewpoints. Disclosures allow both quantity and quality.

It is difficult to see how the compelled disclosures in the Arkansas statute can significantly affect the quantity of protected speech on ballot questions. First, only the names of contributors over \$250 must be revealed. The small-time, grass roots contributor is assured anonymity. Groups should not have a difficult time raising the money needed to spread their message.¹⁴⁶ Many ballot issues appeal to the kind of grass roots fundraising which produces numerous small donations.¹⁴⁷

Second, even if some people will not contribute to groups because of the disclosures, there will not be enough of them to make a significant difference in the quantity of political speech.¹⁴⁸ Moreover, the opportunity for controversial groups to challenge the law as applied to them is the failsafe which ensures that the amount of protected

Roy, 401 U.S. 265, 272 (1971) (amendment has its "fullest and most urgent application" to conduct of political campaigns).

144. *Red Lion Broadcasting Co.*, 395 U.S. at 390 ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . .").

145. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (first amendment evidence of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.").

146. I am somewhat uncomfortable with this assertion. The burden of proof should be on opponents of disclosure, however, I have not found any data to suggest that disclosure limitations have significantly reduced the quantity of speech in either candidate or ballot elections. If a plaintiff can produce evidence to the contrary, the law would be difficult to justify.

147. *Cf. Note, supra* note 138 (author points out that most ballot committees focus on one issue and generally advance their own point of view).

148. Some students in my first amendment seminar believed that a large number of people will now refrain from contributing to ballot committees because of the disclosure requirements. The point awaits empirical validation. It would seem reasonable to place the burden of proof on the opponents of disclosure. The evidence that disclosures deter significant numbers of contributors will more likely be available to ballot committees than to the state. To place the burden on the state to prove that the law does not deter contributors asks the state to prove a negative. The result is like requiring controversial groups to prove a reasonable probability of harassment.

speech will not be significantly diminished.¹⁴⁹

The cases upholding lobbyists' disclosures are analogous to the situation of ballot committee disclosures. As one court pointed out, "[l]obbying is of course a pejorative term, but another name for it is petitioning for the redress of grievances. It is under the express protection of the First Amendment."¹⁵⁰ Nevertheless, some limited regulation of lobbying has always been allowed. In *United States v. Harriss*¹⁵¹ the Supreme Court upheld federal lobbyist registration and disclosure provisions which required, among other things, the disclosure of the lobbyist's employer and source of funds. The Court found a "vital national interest" in the ability of legislators to "properly evaluate" the "myriad pressures to which they are regularly subjected."¹⁵² Unless legislators can do this, "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."¹⁵³ The Court noted that some people may be dissuaded from approaching their legislators by the requirements but "the restraint is at most an indirect one resulting from self-censorship, comparable in many ways to criminal libel laws. The hazard of such restraint is too remote to require striking down a statute which on its face is . . . designed to safeguard a vital national interest."¹⁵⁴

Other courts have upheld similar state laws.¹⁵⁵ In *Minnesota State Ethical Practices Board v. National Rifle Association*¹⁵⁶ the Eighth Circuit Court of Appeals refused to strike down a state law that required groups to disclose their lobbying and political activities and to file periodic reports disclosing the names of certain contributors. Citing *Harriss*, the court noted the importance of allowing legislators to evaluate the information presented to them. The court pointed out that *Buckley v. Valeo* upheld disclosure requirements in candidate elections partially for the same reason.¹⁵⁷

149. See *infra* notes 161-84 and accompanying text.

150. *United States v. Finance Comm. to Re-elect the President*, 507 F.2d 1194, 1201 (D.C. Cir. 1974).

151. 347 U.S. 612 (1954).

152. *Id.* at 625-26.

153. *Id.* at 625.

154. *Id.* at 626.

155. *Young Americans for Freedom, Inc. v. Gorton*, 83 Wash. 2d 728, 522 P.2d 189 (1974); *N.J. State Chamber of Commerce v. N.J. Election Law Enforcement Comm'n*, 82 N.J. 57, 411 A.2d 168 (1980); *Comm'n v. New York Temp. State Comm'n on Regulation of Lobbying*, 534 F. Supp. 489 (N.D.N.Y. 1982); *United States v. Finance Comm. to Re-elect the President*, 507 F.2d 1194 (D.C. Cir. 1974) (interpretation of federal law).

156. 761 F.2d 509 (8th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986).

157. *Id.* at 512. The Arkansas voters adopted a general ethics in government bill in 1988

In a ballot question or referendum the people are in the same position as the legislator considering how to vote on a bill. It is important for them to have as much information as possible so that they can make an informed, intelligent choice. Like elected lawmakers, voters may properly consider the "source and credibility of the advocate."¹⁵⁸ Knowing the source of the communication is like knowing the bias of a witness.¹⁵⁹ The voter can ask whether or not the information being presented is only one side of a more complex issue. Knowing who stands to gain and lose from a particular ballot question can help a voter determine whether or not the speaker or the advertisement is credible.

Referenda and ballot questions are the most direct expressions of the popular will. They should be conducted in an open forum with full debate.¹⁶⁰ Narrow disclosures like the ones adopted by the Arkansas General Assembly help promote full debate and informed voter choices by allowing all of the issues, including the credibility of the proponents or opponents of a measure, to be debated. As the District of Columbia Circuit Court of Appeals said in *Buckley*,

[I]t would be ironic if First Amendment rights were extended so as to prevent the kind of public awareness that is the overreaching objective of the First Amendment.

Disclosure laws are predicated on the proposition that money effectively used can influence voters and that the voters sought to be influenced ought to know where the money is coming from, and be able to take into account the social, economic, and political interests of the contributor. It is pertinent to the political process, as elsewhere in the marketplace of ideas, that meaningful competition depends on openness.¹⁶¹

Only one court has struck down lobbyist registration laws. In *Montana Auto Association v. Greely*¹⁶² the Montana Supreme Court struck down the state's law that required all lobbying groups to disclose each contribution and membership fee whether or not it was paid for lobbying purposes. The court found that although disclosures did not automatically render a law unconstitutional, they had to

which included lobbyist registration provisions. Initiated Measure 1 of 1988, codified at ARK. CODE ANN. §§ 27-8-401 to 803 (Supp. 1989) (lobbyist registration provision codified at ARK. CODE ANN. § 21-8-601 (Supp. 1989)).

158. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 (1978).

159. *Messerli v. State*, 626 P.2d 81, 87 (Alaska 1981).

160. *Bemis Pentecostal Church v. State*, 731 S.W.2d 897, 904 (Tenn. 1987).

161. *Buckley v. Valeo*, 519 F.2d 821, 867 (D.C. Cir. 1975).

162. 632 P.2d 300 (Mont. 1981).

be related to an important governmental purpose. Nonlobbying-related contributions and fees were not sufficiently related to the important government purpose of regulating lobbying. The court said that "[u]nless a compelling interest exists, the State may not put a person in the position of having to reveal or explain his associational ties."¹⁶³ This statement is not intended to be as broad as it seems. Although it is not entirely clear from the opinion, the court seemed to find the law overbroad. Presumably, a narrowly tailored disclosure law which limited disclosures to information relating specifically to lobbying would be constitutional.

The Arkansas law does not have this problem. The law applies to any group which collects or spends money to influence a ballot question. The law limits the definitions of contributions and expenditures to those activities undertaken "for the purpose of influencing the qualification, passage, or defeat of a ballot question or the passage or defeat of a legislative question."¹⁶⁴ This avoids the problem in the Montana legislation because only the money collected and spent for the purpose of the ballot question must be reported. This is directly related to the governmental purpose of providing information to the voters to allow the evaluation of ballot committee's speech and intrudes no more than is necessary upon speech rights to achieve that purpose.¹⁶⁵

VI. COMPELLED DISCLOSURE: ASSOCIATION

Statutes which require groups to disclose the names of their members and contributors seriously infringe on the first amendment right of association.¹⁶⁶ In *NAACP v. Alabama*¹⁶⁷ the United States

163. *Id.* at 310.

164. ARK. CODE ANN. § 7-9-402(3)(A) & (B), and (5) (Supp. 1989).

165. See also *New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n*, 82 N.J. 57, 79, 411 A.2d 168, 179 (New Jersey Supreme Court narrowed the construction of the term "to influence . . . legislation" in a lobbyist registration law to apply only to those people "whose direct, express, and intentional communications with legislators for the purpose of affecting the outcome of legislation are undertaken on a substantial basis.").

166. This right is rich and varied. Professor Tribe has outlined four categories of cases in which a first amendment right to association has been asserted. They are (1) where the government directly punishes the fact of membership, (2) where the government intrudes into the internal organization of a group, (3) where the government withholds a privilege or benefit from the members of a group, and (4) where the government compels disclosure of a group's membership. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1015 (2d ed. 1988).

Tribe's fourth category of cases best fits the compelled disclosure of the Arkansas disclosure statute. According to Tribe, this category is "in some respects the easiest and in others the most difficult" because, while anonymity has long been recognized as an important first

Supreme Court struck down a state law which would have required the NAACP to reveal the names of its members to the state attorney general. The state argued that its interest in eliminating subversives within the NAACP justified the forced disclosure. The Court found that the state interest was only loosely related to the disclosure and was outweighed by the obvious danger to the group's members if their association was revealed.¹⁶⁸

The Court described the right of association in this manner:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.¹⁶⁹

The Court applied this principle in a number of other cases to strike down state disclosure laws which either were not supported by substantial governmental interests or would harm the group or its members.¹⁷⁰ The forced revelation of financial matters also infringes the right of association because “[f]inancial transactions can reveal much about a person’s activities, associations, and beliefs.”¹⁷¹ In *Bates v. City of Little Rock*¹⁷² the Court invalidated a city ordinance that required groups to disclose lists of their dues, disbursements, and members.¹⁷³

The right of association is not absolute. Presumably, a sufficiently strong governmental interest will justify the compelled disclosure of some information. In *Buckley v. Valeo*¹⁷⁴ the Court upheld the requirements of a federal campaign law which required campaign committees to disclose to the federal election commission the names

amendment value, secrecy often disguises dangerous operations. *Id.* at 1019. Compare *Talley v. California*, 362 U.S. 60 (1960); *Buckley v. Valeo*, 424 U.S. 1 (1976).

167. 357 U.S. 449 (1958).

168. *Id.*

169. *Id.* at 460-61.

170. *DeGregory v. Attorney Gen. of N.H.*, 383 U.S. 825 (1966); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961); *Talley v. California*, 362 U.S. 60 (1960).

171. *California Banker's Ass'n v. Shultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring).

172. 361 U.S. 516 (1960).

173. *Id.*

174. 424 U.S. 1 (1976) (per curiam).

of their contributors and required individuals to reveal their contributions and expenditures on behalf of candidates. The Court admitted that disclosure might deter some people from making contributions but found that the purposes behind the law—detering corruption, providing information to enhance voter evaluation of a candidate, and facilitating enforcement of the law—outweighed any adverse effect on speech.¹⁷⁵

The Court distinguished *NAACP v. Alabama* because any harm to the *Buckley* plaintiffs was speculative. The NAACP had “made an uncontroverted showing that on past occasions revelation of identity of its rank-and-file members exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.”¹⁷⁶ In *Buckley*, the plaintiffs relied on “the clearly articulated fears of individuals, well experienced in the political process,”¹⁷⁷ and the testimony of several minor-party officers that a few people had refused to make contributions.¹⁷⁸

The Court rejected the argument that the first amendment required the law to make a blanket exception for minor parties.¹⁷⁹ A definition of a minor party on the front end would only look to the party’s past or present strength and would ignore other important considerations.¹⁸⁰ The critical factor is not the age or strength or success of the party. Instead, the important question is whether or not “disclosure will impinge upon protected associational activity.”¹⁸¹

Therefore, *Buckley* held that groups must be given the opportunity to show that disclosure will harm their right of association. Instead of a blanket exemption,

[m]inor parties must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim. The evidence offered need show only a reasonable probability that the compelled disclosure of a party’s contributors’ names will subject them to threats, harassment, or reprisals from either Government officials or private parties. The proof may include, for example, specific evidence of past or present harassment of members due to their

175. *Id.* at 68.

176. 357 U.S. at 462.

177. 424 U.S. at 71-72 (quoting Brief for Appellants at 173).

178. *Id.* at 72.

179. *Id.* See also 1980 Ill. Socialist Workers Campaign v. State of Ill. Bd. of Elections, 531 F. Supp. 915 (N.D. Ill. 1981) where a federal district court held that the failure to grant a state agency the authority to exempt controversial groups from a campaign law’s disclosure requirements was constitutional.

180. 424 U.S. at 72-73.

181. *Id.* at 73.

associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient. New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views.¹⁸²

The Court later applied this test in *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*.¹⁸³ In *Brown* the Court held that the provisions of an Ohio law which required every candidate to report the names and addresses of campaign contributors and recipients of disbursements could not be applied to the Socialist Workers Party. The record showed that the party had a long history of both private and public harassment¹⁸⁴ which more than satisfied the *Buckley* test.¹⁸⁵ The lower courts have consistently exempted the SWP from numerous state and local disclosure requirements.¹⁸⁶

There is no doubt that the Arkansas act is constitutional on its face in regard to any infringement of associational rights. A first amendment violation requires more than an abstract speculation of harm. Instead, any group seeking an exemption must show a reasonable probability that they will be harmed by the disclosures. *Buckley* forecloses any argument that the law must contain an automatic exemption for minor parties or controversial groups.

On the other hand, the law is quite clear that any group which can satisfy the *Buckley* requirements is entitled to an exemption. This

182. *Id.* at 74.

183. 459 U.S. 87 (1982).

184. Specific examples included threatening phone calls, hate mail, burning of party literature, destruction of party members' property, police harassment of a party candidate, firing of party members, and massive FBI surveillance. *Id.* at 99.

185. *Id.*

186. See, e.g., *McArthur v. Smith*, 716 F. Supp. 592 (S.D. Fla. 1989) (SWP mayoral candidate exempt from disclosure in nonpartisan election); 1980 Ill. Socialist Workers Party v. State of Ill. Bd. of Elections, 531 F. Supp. 915 (N.D. Ill. 1981) (SWP exempt from state disclosure laws); Wisconsin Socialist Workers 1976 Campaign Comm. v. McCann, 433 F. Supp. 540 (D.C. Wis. 1977). *But see* Oregon Socialist Workers 1974 Campaign Comm. v. Paulus, 432 F. Supp. 1255 (D. Or. 1977) (SWP failed to show reasonable probability of harm).

Other courts have exempted the Communist Party. See *FEC v. Hall-Tyner Campaign Comm.*, 678 F.2d 416 (1982).

Courts have been more lenient when the government is investigating possible criminal violations. *In Re Grand Jury Proceedings*, 842 F.2d 1229 (11th Cir. 1988). The government interest in clean elections outweighs any harm to the minor party. *Caucus Distrib. v. Commissioner of Commerce*, 422 N.W.2d 264 (Minn. App. 1988). Other strong governmental interests will also prevail against an associational claim. See *Attorney Gen. v. Irish N. Aid Comm.*, 346 F. Supp. 1384 (S.D.N.Y.), *aff'd*, 465 F.2d 1405 (2d Cir.), *cert. den.*, 409 U.S. 1080 (1972). To thwart disclosure a group must show that the investigation is proceeding in bad faith. *Federal Election Comm'n v. LaRouche Campaign*, 644 F. Supp. 120 (S.D.N.Y. 1986).

is particularly important in ballot elections because the groups which may coalesce for or against an issue may only exist for the duration of the ballot election. They will rarely have a history or a track record. Thus, they must show the probability of harassment by analogy to the treatment of other groups on similar issues. The difficulty a group may have doing this and the length of time it may take for a case to work its way through the courts suggest that the law should be amended. Specifically, the General Assembly should allow groups to make an *in camera* presentation to an administrative officer, perhaps the Secretary of State. If they can show the probability of harm, they should receive an exemption from the disclosure requirements. Any hearing or presentation should be informal with a relaxation of the formal rules of evidence. The group should be allowed to appeal the decision to the courts in an expedited proceeding.

This is not to say that the Constitution requires such an amendment. In *1980 Socialist Workers Campaign v. State of Illinois Board of Elections*¹⁸⁷ a federal district court held that the first amendment does not require a state to empower a state agency with the authority to grant exemptions to campaign disclosure laws. The court found that the limited additional burden of filing a court case instead of an administrative proceeding did not unduly infringe on any first amendment rights in light of the importance of the state interests and the ultimate availability of judicial review.¹⁸⁸

I agree with the court on the constitutional question. Nevertheless, prudence and good policy dictate that an administrative proceeding be made available. This administrative exemption proceeding would ensure that the delicate first amendment right of association would not be fatally harmed by either delay or unnecessary harassment. A more involved procedure would run the risk that the group would wither while awaiting the outcome of its case. As the Second Circuit pointed out,

[minority parties] rarely have a firm financial foundation. If apprehension is bred in the minds of contributors to fringe organizations by fear that their support of an unpopular ideology will be revealed, they may cease to provide financial assistance Society suffers from such a consequence because the free flow of ideas, the lifeblood of the body politic, is necessarily reduced.¹⁸⁹

A quick, easy, and private administrative proceeding provides

187. 531 F. Supp. 915 (N.D. Ill. 1981).

188. *Id.* at 922.

189. *Federal Election Comm'n v. Hall-Tyner Campaign Comm.*, 678 F.2d 416, 420 (1982).

the best balance of individual, group, and governmental interests. Even if the balance tips slightly in favor of the group's interests, this is not a bad result in a society dedicated to free discourse.

VII. VAGUENESS, OVERBREADTH, AND CHILLING EFFECT

The final issues to consider are (1) whether or not the Act is vague or overbroad and (2) whether or not the Act's requirements unduly chill protected speech. Specifically, we must look at whether the definition of groups and activities covered by the Act is sufficiently clear that reasonable people will know how to comply with the Act and whether or not the additional structure and record-keeping will prevent groups from engaging in protected speech.

In general, vagueness relates to the clarity of the statutory language while overbreadth relates to its sweep.¹⁹⁰ The danger is that delicate first amendment freedoms will be lost by the excessive reach of the law. Thus, overbreadth involving first amendment issues is an exception to the general rule of standing because courts will allow a challenge whether or not the challenger has engaged in protected speech.¹⁹¹ Vague statutes, on the other hand, fail to provide enough guidance so that reasonable people can conform their conduct to the law.¹⁹² The actual problem is either that the language of the law allows protected speech to be brought within its ambit or that the language is so unclear that an individual may not know the kind of speech prohibited or regulated by the law. Courts often talk about vagueness and overbreadth together because the effect on speech is the same.¹⁹³ Both tend to suppress protected speech because the speaker fears violating the law. Both require courts to engage in a searching scrutiny of the law.

The plaintiffs in *Buckley* raised vagueness and overbreadth challenges to a provision of the federal law that required an individual

190. See *Zwickler v. Koota*, 389 U.S. 241 (1967). The Court stated that a vague statute defines itself "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Id.* at 249. On the other hand, an overbroad statute uses "means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *Id.* at 250.

Where conduct is also implicated by the state regulation the Court has required "substantial overbreadth." *Broadrick v. Oklahoma*, 413 U.S. 601, 630 (1973). Unlike overbreadth, vagueness is not a unique first amendment doctrine. Rather, it arises out of the imperatives of due process. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). Nevertheless, courts require greater precision when dealing with protected speech. *Smith v. Goguen*, 415 U.S. 566 (1974).

191. *NAACP v. Button*, 371 U.S. 415, 428 (1968).

192. *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

193. See, e.g., *Young v. American Mini Theatres*, 427 U.S. 50 (1967).

who made contributions or expenditures over a certain amount to file a statement with the Federal Election Commission.¹⁹⁴ "Contributions" and "expenditures" were defined as the use of money to "influence" a federal election.¹⁹⁵

The Court expressed its concern that the Act could come to encompass activities concerning issues discussion and "advocacy of a political result."¹⁹⁶ This problem reverberated throughout the Act because the fundamental term "political committee" was defined in terms of annual contributions and expenditures.¹⁹⁷ Lower courts had previously limited the scope of political committees to cover only those groups under the control of a candidate or whose major purpose was the nomination or election of a candidate.¹⁹⁸ This limitation would not help an individual, however, who was engaged in solitary activity. Therefore, the Court construed the Act to reach only money used for activities "that expressly advocate the election or defeat of a clearly identified candidate."¹⁹⁹ So limited, the Act did not extend to all partisan discussions but only to those activities expressly directed to a particular election result.²⁰⁰ This was permissible because of the Act's overall goal to increase the fund of information available to voters to evaluate candidates. The Act would reach not only the conventional activities of national parties but also the election oriented expenditures of individuals.

The language of the Arkansas Act presents almost the same issue. Ballot and legislative question committees are defined by the expenditures they make "for the purpose of attempting to influence" ballot or legislative questions.²⁰¹ The terms "contributions" and "expenditures" are similarly defined by reference to the purpose of influencing ballot or legislative questions.²⁰² In addition, like the Federal Election Act, individuals who make expenditures outside of an organized committee must also file a report.²⁰³

As an initial matter, the Arkansas Act must be given the same kind of limiting construction as the United States Supreme Court gave the Federal Election Act. The Act must be limited to those con-

194. 424 U.S. at 74-75.

195. *Id.* at 77.

196. *Id.* at 79.

197. *Id.*

198. *Id.*

199. *Id.* at 80.

200. *Id.*

201. ARK. CODE ANN. § 7-9-402(2), (7) (Supp. 1989).

202. *Id.* § 7-9-402(3), (5).

203. *Id.* § 7-9-406(b).

tributions and expenditures which expressly advocate the election or defeat of a clearly identified specific ballot or legislative question.²⁰⁴ In the context of the federal law, express advocacy need not be limited to the repetition of key phrases.²⁰⁵ The speech must be considered as a whole, and subjective intent alone will not be determinative.²⁰⁶ Rather, a court must look at the effect, context, and import of the speech and conclude that the words have no other reasonable meaning than as an exhortation to vote for or against a particular candidate.²⁰⁷

Even with this limitation, however, the Act covers a whole range of protected speech by groups and individuals under circumstances which implicate other important first amendment values. Specifically, the express advocacy limitation still brings newspapers and churches within the scope of the Act if they engage in activity directed toward a specific ballot question. The act would still require churches and newspapers to register when the church engages in first amendment activity related to a ballot question or when the newspaper takes a stand on a ballot question. The Act attempts to exempt churches but it is not very successful in doing so. Section 7-9-402(4) states that contributions and expenditures do not include "any communication by a bona fide church or religious denomination to its own members or adherents for the sole purpose of protecting the right to practice the religious tenets of such church or religious denomination."²⁰⁸

This definition is unnecessarily limited. For example, suppose the ballot contains a question concerning the regulation of abortion. Abortion is a question of great concern to many churches whether or not there is a related question on the ballot. If the church continues its regular activities during the election season and also speaks out on the morality of the ballot question, the church would be required to file a report (and perhaps even register as a committee) because the communication attempted to influence the passage of a ballot question and was not solely to protect the right to practice the church's tenets. That is, the ballot question did not threaten the right of the church to engage in any particular religious practice. The church could continue to worship in its accustomed manner and to believe its tradi-

204. This formulation must be modified to also cover those contributions and expenditures which expressly advocate the qualification or not of a legislative question.

205. *Federal Election Comm'n v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987), *appeal after remand*, 869 F.2d 1256 (9th Cir. 1989).

206. *Id.* at 863.

207. *Id.* at 864.

208. ARK. CODE ANN. § 7-9-402(4) (Supp. 1989).

tional doctrine whether or not the ballot measure passed. Even the last clause of the section would not help the church because people do not pay to become members.²⁰⁹

One can also imagine a conflict between a newspaper's editorial stand on an issue and the Act. One or more editorials on a ballot question could easily exceed the amount to bring the law into play. Unless a newspaper's subscribers are considered its "paid members or shareholders," the newspaper must file the required reports. Unlike the federal campaign law, there is no "press exemption."²¹⁰

One solution might be to amend the law to expressly provide a church and press exemption.²¹¹ This would provide in general that the Act did not apply to the regular activities of a church but that ad hoc activities expressly advocating a particular result on a ballot question would require disclosure limited to the financing of that advocacy.

*Bemis Pentecostal Church v. State*²¹² is an example of this approach. In *Bemis* the Tennessee Supreme Court held that the Tennessee Disclosure Act did not apply to the regular activities of a church even if they advocated a particular election result.²¹³ Although the Tennessee Act expressly excluded this kind of activity from the Act's coverage, the court suggested that the first amendment would also dictate the same result.²¹⁴ Nevertheless, the court found that the law did apply to special church activities expressly advocating the defeat of the referendum in question.²¹⁵ Unlike *Bellotti*, the Tennessee Act did not completely prohibit an entire category of speech. Instead, it imposed registration and disclosure requirements on direct attempts to influence the ballot process. The court found implicit support for

209. *Id.* This section says, in part, that "contribution" shall not mean any communication "by a person strictly with the person's paid members or shareholders." *Id.*

210. 2 U.S.C. § 431(9)(B)(i) (Supp. 1989).

211. *See Bemis Pentecostal v. State*, 731 S.W.2d 897 (Tenn. 1987).

212. *Id.*

213. *Id.* at 905.

214. *Id.*

Plaintiffs' regular and continuing programs of broadcasting their religious services on radio or television or of publishing and distributing church newsletters are not and cannot be considered campaign contributions or expenditures, regardless of whether they advocate a particular election result or not in the course of such activities, as these activities are protected by the First Amendment and are expressly excluded from the operation of the Act

Id.

215. *Id.* at 906.

these kinds of requirements in several other supreme court cases.²¹⁶ The Tennessee court concluded:

As enacted, the Campaign Financial Disclosure Act does not and cannot control the quality or content of speech; it does not limit contributions or expenditures made during a campaign; it is neutral in all respects as regards the groups to whom it applies and the types of activities at which it is specifically aimed. The burden placed on election campaign participants is graduated according to the degree of financial involvement and the nature of the office; it does not and cannot interfere with generalized debate or discussions of public issues. . . . The organizational burdens imposed by the Act are minimal, extending only slightly beyond the necessity to appoint or designate a political treasurer, who could be the regular organizational treasurer, if any, serving in Plaintiffs' churches. The burden of records-keeping is certainly no greater than that already imposed by other State and Federal laws with which churches must comply.²¹⁷

There are some troubling aspects of this approach that the Tennessee court did not discuss.²¹⁸ Speech by religious groups implicates both the speech and the religion clauses of the first amendment. Thus, the United States Supreme Court has held that religious speech is also protected by the first amendment and cannot be excluded from a public forum because of its content.²¹⁹ Moreover, the Court has repeatedly struck down state statutes which excessively entangled government and religion, in part because of the fear that government regulation would stifle the free exercise of religion.²²⁰ At the same time, the courts have upheld the imposition of some regulatory rules on secular church activities.²²¹

216. *Id.* (citing *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978), and *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981)).

217. 731 S.W.2d at 907.

218. I am indebted to my First Amendment Seminar students for these insights. In particular, Greg Wallace forcefully raised the question of religious speech and Andy Turner articulated the approach I adopted in this article. Of course, much as I would like to blame them for any flaws, I cannot. Any errors are mine.

219. *Widmar v. Vincent*, 454 U.S. 263, 268-70 (1981).

220. *See Aguilar v. Felton*, 473 U.S. 402, 410 (1985). Professor Tribe lists five first amendment doctrines of which entanglement is a part. They are: 1) where the governmental action creates excessive administrative entanglement; 2) when the government turns over traditional governmental powers to religion; 3) when the action breeds religiously based political divisiveness; 4) when enforcement of a rule would create excessive administrative entanglement; and 5) when court or governmental inquiry invades pervasively religious issues. L. TRIBE, *supra* note 165, at 1226-27. The Arkansas statute implicates the fourth and fifth doctrines.

221. *See Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985) (upheld the application of the Fair Labor Standard Act to religiously based secular activities).

The *Bemis* approach seems to unduly entangle government and religion. To enforce the distinction between a church's regular activities and its express advocacy, someone must examine the church's doctrine, activities, services, literature, etc. This would require either the church to keep detailed records or the government to diligently investigate church activities. Discovering the line between regular worship and ministry and express advocacy would require both Solomonic and Pharisaic wisdom.

The chilling effect on religious speech also must be considered. Suppose during Sunday Mass the priest announces that a special collection will be taken up to fund some advertising on a ballot question. The law would require the church to keep records of its contributions that Sunday for the purpose of possible disclosure. This will potentially deter either the church from engaging in the campaign or parishioners from contributing to the collection.

If the overriding purpose of the law is to provide the voters information to evaluate the speakers, then the law need not apply in those instances when the identity of the speaker and its source of financing are obvious. When a church speaks as a church everyone knows the identity of the speaker and has sufficient general information to assess the church's possible bias. There is no need for recordkeeping, which only supports disclosure anyway, because there is no need for disclosure. If a person wants to vote for or against a ballot question because Catholics, Jews, or Muslims have taken a position on the issue, they will be able to do so. Disclosing the amount the religious groups spent and who in the congregation donated goes beyond the limited purposes of disclosure.

On the other hand, if religious groups contribute money to independent ballot question committees, whether composed exclusively of other religious groups or not, the independent committee must register and disclose just like any other ballot committee. This would insure that unscrupulous individuals would not use church-related groups to skirt the disclosure rules. This solution may not guarantee that the public will always know everyone who is behind a particular committee. The disclosures should provide enough information so that any suspicious activity will be noticed.

Newspapers, on the other hand, should be given a blanket exemption along the lines of the one in the Federal Election Act.²²² After all, the business of a newspaper is to inform the public through its news and editorials. Thus, its regular activities always include core

222. 2 U.S.C. § 431(9)(B)(i) (Supp. 1989).

political speech. Moreover, when the newspaper takes an editorial position, the public can evaluate the source of the opinion. There are no secret speakers. Rather, the on-going editorial policy of the paper will be known to its readers long before an editorial appears on a ballot question. Readers will know, for example, if a newspaper takes a liberal or a conservative position on government affairs and can consider that when assessing the paper's editorial position on a ballot question. Thus, compelled disclosure is not necessary as to newspapers because the Act's purpose of allowing voters to evaluate speech on ballot issues is accomplished by the nature of the newspaper business.

The potential chilling effect of the disclosure requirements goes beyond churches and newspapers. Ballot questions concern important, often fundamental, issues for state and local governments. Unlike candidate elections, where there are permanent national, state, and local organizations, ballot elections often bring together groups of citizens organized more or less for the sole purpose of speaking out in favor of or against the question on the ballot. In addition, other groups who exist for more general purposes, like education or recreation, may mobilize around a particular ballot question that effects their interests. In other words, the Act still intrudes deeply on protected speech.

A fragmented United States Supreme Court addressed this issue in *Federal Election Commission v. Massachusetts Citizens for Life*.²²³ The Massachusetts Committee For Life (MCFL) was incorporated as a nonprofit corporation to "foster respect for human life."²²⁴ To this end, the group engaged in a variety of educational and legislative activities. In September 1978 MCFL published a newsletter which urged its readers to vote pro-life. The newsletter included a list of the pro-life candidates running for office. The paper also included a "scorecard" of the candidates' views on pro-life issues and a picture of the thirteen candidates who scored 100%.

Following the election, a complaint was filed with the Federal Election Commission charging that the group violated the Federal Election Act by spending funds from the corporate treasury on behalf of specific candidates. The Commission eventually filed a complaint in the federal district court against MCFL.

223. 479 U.S. 238 (1986). See generally Boles, *Regulating Newsletters Under the Federal Election Laws and the First Amendment*, 40 ARK. L. REV. 79 (1986).

224. 479 U.S. at 241 (quoting statement of corporate purpose contained in articles of incorporation of Massachusetts Citizens for Life, Inc.).

The Supreme Court affirmed the lower court's holding that the Act covered MCFL's activities but was unconstitutional as applied. A majority of the justices agreed that the Act, as applied, burdened protected speech without a correspondingly strong state interest, but could not agree on the rationale. Three justices joined the section of Justice Brennan's opinion for the Court where he found that the Act's recordkeeping and disclosure requirements unduly burdened speech. Although the additional requirements imposed on corporations could be constitutionally applied in general, Brennan noted that the additional recordkeeping and disclosure requirements could serve as a disincentive for small groups to engage in political speech.²²⁵ The recordkeeping would impose additional cost and complexity that small groups could not afford. He elaborated by saying:

It is not unreasonable to suppose that, as in this case, an incorporated group of like-minded persons might seek donations to support the dissemination of their political ideas, and their occasional endorsement of political candidates, by means of garage sales, bake sales, and raffles. Such persons might well be turned away by the prospect of complying with all the requirements imposed by the Act. Faced with the need to assume a more sophisticated organizational form, to adopt specific accounting procedures, to file periodic detailed reports, and to monitor garage sales lest nonmembers take a fancy to the merchandise on display, it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it.²²⁶

The practical effect of the statute was to burden and reduce protected speech in a manner not supported by important governmental interests.

Justice O'Connor provided the fifth vote to affirm the lower court's ruling. She wrote separately, however, to underscore her concern that the opinion not be seen as diluting *Buckley's* approval of disclosure requirements. In her view, the significant burden on protected speech came "not from the disclosure requirements . . . but from the additional organizational restraints imposed upon"²²⁷ the group. These additional requirements did not further the governmen-

225. *Id.* at 254. Justice Brennan was quick to point out that there is a difference between the recordkeeping and disclosure's effect on contributors and on the protected speech of the group itself. That is, while the government interests supported the Act's requirements even though some people might choose not to contribute to political campaigns, it does not necessarily follow that those same interests support the Act's requirements which deterred the actual political speech of organized groups. *Id.* at 254 n.7.

226. *Id.* at 255.

227. *Id.* at 266.

tal interest in campaign disclosure. Furthermore, the record did not show that groups like MCFL posed any danger that would justify limiting protected speech.²²⁸

The MCFL case quite clearly shows the Court's concern that the quantity of core political speech not be unduly reduced by election law requirements. Several of the federal law's requirements which concerned the Court would also affect groups in Arkansas trying to comply with the Ballot Disclosure Act.²²⁹

The larger problem addressed by the Court in *Massachusetts Citizens For Life* cannot be solved by any limiting construction of the Act's language or any amendment exempting certain groups without also destroying the beneficial effect of disclosure in general. The Act could try to define with particularity the kind of groups which would be constitutionally exempt but, unfortunately, there will be groups near whatever boundary the law draws. A court would still have to consider an "as applied" challenge. The law could also raise the threshold limit for triggering the law's coverage but this would destroy the most beneficial aspect of the law, providing voters with the information to evaluate positions on ballot questions. The higher the threshold the easier it will be to evade the law's purpose.

To resolve these problems the Arkansas law should be amended to provide for an administrative proceeding for small groups to seek an exemption. Just like the proceeding where a controversial group would seek to be exempted, a small group should have a fast, inexpensive procedure available to it to show that the law's requirements unduly burden its ability to engage in protected speech. The group should have to show that the law's specific mandates require such changes or additions to its structure or such additional cost that its ability to engage in protected speech will be significantly reduced or eliminated. Such a procedure, with such an evidentiary showing, adequately balances the state and the voters' interest in maximum disclosure with the speakers' interest in exercising first amendment rights.

VIII. SUMMARY AND CONCLUSION

This Article has argued that, for the most part, the Arkansas

228. See *Federal Election Comm'n v. Nat'l Right to Work Comm.*, 459 U.S. 197 (1982).

229. For example, in Arkansas groups would have to maintain accurate records of most contributions to know when the threshold amounts for both the individual contributor and the group have been reached. They would have to appoint a person to act as the financial officer to maintain the records, file the reports, and be available for inquiry, and they would have to carefully monitor their fundraising efforts.

Ballot Disclosure Act is constitutional. On its face, the law does not violate the first amendment rights of speech or association. Sufficiently important reasons justify the slight limitations imposed on speech and associational rights. Some provisions of the law must be given a particular reading, however, to comply with Supreme Court cases. Finally, this Article recommends that the state provide informal administrative proceedings to allow controversial or grass roots groups to seek exemptions from the disclosure requirements.

It could be, however, that the law and the first amendment will have no effect on the problem of the influence of money on the ballot process. The basic idea behind the law is to provide voters with information about the source of ballot campaign advertisements so as not to be misled by the information contained in them. The specific incident which seemingly prompted the law was the furor surrounding the anonymous massive financing of the Committee Against Higher Taxes. Yet the law as it is written may not cover that situation. The Committee spent all of its money in the last five days of the campaign. The law requires a disclosure no later than four days before the election with a closing date seven days prior to the election. The backers of the Committee could delay any contributions until six days prior to the election, defeating the purpose of the law. Voters would not know who was behind the campaign until thirty days after the election, too late for that information to influence their vote.

To the extent that the Arkansas law provides information too late to be useful, the General Assembly should consider requiring some form of simultaneous disclosure of a group's financial backers.²³⁰ On the other hand, the Arkansas media provided advance notice of the Committee's media blitz, criticized its content, and identified its likely backer. Nevertheless, the voters overwhelmingly rejected Amendment 4. One wonders if simultaneous disclosure would have made any difference. Supporters of simultaneous disclosure and other campaign reforms come perilously close to asserting that they know better than the people. They seem to be saying that if only the people weren't so gullible, they would make better choices. Thus, they seek to make it difficult for viewpoints opposed to their own to influence the voters. If the first amendment teaches us anything, it is that no group holds a monopoly on truth and that in the long run it is best to trust the people.

230. Shockley, *Direct Democracy*, *supra* note 11, 417-18.