CENTER for COMPETITIVE POLITICS

POLICY PRIMER: Grassroots Lobbying Proposals Ignore Constitutional Protections for Anonymous Speech

By

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Reform organizations are pushing grassroots lobbying disclosure, or what they call "astroturf lobbying disclosure", and disingenuously claiming that "This lobbying disclosure reform would not in any way restrict any lobbying activities." This is not so. For over 60 years, the U.S. Supreme Court has repeatedly recognized that stripping citizens of their rights to speak anonymously to each other about issues, chills their rights of speech and association, and has upheld such compelled disclosure only in narrow circumstances.[1]

***Thomas v. Collins*, 323 U.S. 516 (1945)**

In *Thomas v. Collins*, the Court held that requiring even the most grizzled or politically connected lobbyists to register and report their attempts to solicit citizens on behalf of an organization is constitutionally suspect. In that case, the Supreme Court struck down a Texas statute that required labor organizers—defined as "any person who for . . . financial consideration solicits [citizens] for membership in a labor union"—to register with the Secretary of State, provide their names and union affiliations, and to wear a State-issued organizer's card before soliciting membership in a labor union. The State claimed the statute affected only the right to engage in business as a paid organizer. The Court, however, held there was a "restriction upon the right [of the organizer] to speak and the rights of the workers to hear what he had to say,"[2] and stated that it is "in our tradition to allow the widest room for discussion, and the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly."[3]

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[1] E.g., United States v. Harriss, 347 U.S. 612 (1954), in which the Court upheld provisions of the Federal Regulation of Lobbying Act, but limited their application to organizations whose "main purpose" is to collect contributions and make expenditures to "directly" (not "indirectly") contact Congress for the purpose of passing or defeating legislation, and who actually do so.
[2] 323 U.S. 516, 534.
[3] *Id.* at 530.

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The Court recognized that any theory of the First Amendment that supported registration laws for union organizers would also support similar laws requiring the registration of anyone "who seeks to rally support for any social, business, religious or political cause."[4] Indeed this is the very outcome now being advanced by proponents of grassroots lobbying disclosure, an outcome the Court in *Thomas* described as "quite incompatible with the requirements of the First Amendment."[5]

***NAACP v. Alabama*, 357 U.S. 449 (1958)**

The Court has historically recognized that one of the principal dangers of forced disclosure is the threat of political retribution. There is no doubt that such retribution is real. It is not hard to imagine, for example, why in 1950s Alabama the state might have wanted to know the names of all NAACP members, and why the Supreme Court said in response to Alabama's desire to learn those names that "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action."[6]

It is also easy to imagine the leverage Alabama could have put on the NAACP, and the potential damper on the civil rights movement, if 1950s Alabama knew about the NAACP what the twenty-first century Congress proposes to learn about grassroots organizations. What could Alabama have done had it known: when the NAACP engaged in preparation, planning, research, or background work; when it coordinated activities with like minded organizations; when the organization proposed to engage its fellow citizens with advertising and in what quantity; or the names of the consultants that would assist them in the effort?

***Talley v. California*, 362 U.S. 60 (1960)**

Organizations and individuals need not be subject to threats of reprisal as evident as those in *NAACP v. Alabama* in order to receive constitutional protection for the right to speak anonymously. In *Talley*, a pamphleteer was arrested for violating a Los Angeles ordinance that prohibited the distribution of any handbill that did not identify the name and address of the person who prepared, distributed or sponsored it. The Court struck down the ordinance, holding that "[t]here can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression."[7]

The Court recognized the historical importance of protecting anonymous speech, noting that "[p]ersecuted groups and sects from time to time throughout history have

[4] *Id.* at 540.
[5] *Id.*
[6] 357 U.S. 449, 462 (1956).
[7] 362 U.S. 60, 65 (1960).

been able to criticize oppressive practices and laws *either anonymously or not at all*"[8] and that "[e]ven the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names."[9]

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

Tally was reaffirmed in 1995 by the Court's decision in *McIntyre v. Ohio Elections Comm'n*. In *McIntyre* a school official at a meeting to discuss a proposed school levy warned Margaret McIntyre, a local anti-tax activist, that she had not properly disclosed her identity on flyers she distributed opposing the levy. Undeterred, she continued to distribute her flyers at that meeting and at another the following evening. Five months after the levy was adopted, the same school official—in what one Ohio Justice characterized as "retribution against McIntyre for her opposition"—filed a complaint against Mrs. McIntyre with the Ohio Elections Commission, which ultimately imposed a $100 fine against her.

The Supreme Court invalidated the Ohio statute, specifically rejecting the argument that the ordinance was supported by an interest in providing additional information to the electorate, even if that information was relevant to the decision-making process. That interest, according to the Court, "does not justify a state requirement that a writer make statements or disclosure she would otherwise omit,"[10] a decision that "may be motivated by fear of economic or official retaliation, by concern about social ostracism, or *merely by a desire to preserve as much of one's privacy as possible*."[11]

Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 526 U.S. 150 (2002)

The Court's most recent pronouncement on the protection afforded to anonymous political speech came in *Watchtower Bible and Tract Society*, in which the Court invalidated a local ordinance that prohibited door-to-door canvassing without first obtaining a permit from the mayor's office. Despite the fact that the permits were freely issued at no cost to canvassers, the Court struck down the law, noting that the compelled surrender of anonymity "may preclude such persons from canvassing for unpopular causes."[12] Perversely, this burden is felt most acutely by "citizens holding religious or patriotic views," views traditionally esteemed in our society, but which might also lead a speaker to "prefer silence to speech licensed by a petty official."[13]

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[8] *Id.* (emphasis added).
[9] *Id.*
[10] 514 U.S. 334, 348 (1995).
[11] *Id.* at 341-42 (emphasis added).
[12] 526 U.S. 150, 167 (2002).
[13] *Id.*

Conclusion

In proposals to disclose grassroots lobbying, we are witnessing two canons of political law on an apparent collision course: that government corruption is cured by disclosure; and that the right of individuals to speak and associate freely depends upon their ability to do so anonymously. But the conflict is a false one—a byproduct of fuzzy thinking—because both canons achieve the same purpose when each is applied to its proper context. *Both protect citizens from abusive officeholders*. Disclosure regimes for campaign contributions protect citizens from officeholders who have free will and can confer benefits on large contributors (and pain on opponents) by passing future legislation. Disclosure regimes for true lobbying activities, that is, consultants engaged in face-to-face meetings with officeholders, protects citizens in a similar manner.

Regimes that protect the right to speak anonymously with fellow citizens about issues, even issues of official action or pending legislation, also protect citizens from abusive officeholders by reducing officeholders' ability to visit retribution on those who would oppose their policy preferences. Citizens learn much about the relative merits of individual candidates by knowing who supports them. They learn about the legislative process by knowing who is paying consultants to meet with officeholders directly. But citizens learn little about the relative merits of a clearly presented policy issue by knowing who supports it. Grassroots lobbying registration and disclosure regimes that would provide honest citizens and abusive officeholders alike with knowledge of which groups and individuals support which issues, including the timing and intensity of that support, impose too high a cost for too little benefit in a constitutional democracy.

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