The Dying of the Light

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A new "right" has become part of Michigan law. You won't find this right in the federal or state constitution. It hasn't been recognized by the United States Supreme Court, the Michigan Supreme Court, or *any* court for that matter. Even our legislators and our governor only recognized this right tacitly.

This new "right" is a right to fund campaign ads secretly. It is a right to be free from criticism and consequences while participating (at least from the shadows) in the democratic process.

This "right" has no basis in law and, in my view, is fundamentally anti-democratic. For our justice system, the codification of this new right means that people can contribute millions of dollars to judicial campaigns without anyone knowing about the contributions or their reasons.

Public Act 252

First, some background. As I've written before, there was a disturbing amount of anonymous and unaccountable spending in the 2012 judicial campaigns. Voters were left to evaluate most ads without knowing their sources. And unattributed spending may exert a disconcerting influence on upcoming judicial elections.

The State Bar of Michigan sought to remedy the problem in September 2013 by asking Secretary of State Ruth Johnson to declare that "issue advocacy advertisements"—ads that ostensibly focus on issues rather than candidates—are subject to disclosure requirements. Johnson, perhaps as a result of the Bar's request, proposed new rules that, if adopted, would have curbed anonymous funding of issue ads in judicial elections and, for that matter, in all elections. In essence, Johnson proposed that, for all issue ads distributed 60 days before a primary and 90 days before a general election, the persons or corporations contributing to the ads would need to be identified.

When Johnson's proposal was issued, the Michigan Senate was debating amendments to the Michigan Finance Act that would double spending limits on contributions to campaigns. Literally within hours of Johnson's proposal, the Senate added language to the Michigan Finance Act that excluded issue ads from the act.[1]

Specifically, the Senate added a subsection to the pending bill stating that the term "expenditure" does not include "expenditures for a communication if the communication does not in express terms advocate the election or defeat of a clearly identified candidate."[2] This revision restricted the Campaign Finance Act to communications containing terms expressly advocating election or defeat, such as *vote for*, *elect*, *support*, *cast your ballot for*, *Smith for Governor*, *vote against*, *defeat*, or *reject*.

The bill was passed by the Senate and House and was signed by Governor Snyder on December 26, 2013. It is now Public Act 252, and it became effective on December 27, 2013.

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The incoherent "magic words" test

The "magic words" test adopted by this new legislation has been repeatedly rejected as a standard for determining the constitutionality of statutes regulating the disclosure of campaign finance. Raymond Morganti summarized the decline and fall of the "magic words" test in a letter he sent on behalf of the Michigan Defense Trial Council to the House Committee on Elections and Ethics when the House was considering what is now Public Act 252:

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finance. Although the test was initially adopted by the United States Supreme Court in *Buckley v Valeo* as a means of avoiding potential unconstitutionality, the Court subsequently clarified that the magic words test is not a constitutional standard. The Court rejected the premise that "*Buckley* drew a constitutionally mandated line between express advocacy and so-called issue advocacy, and that speakers possess an inviolable First Amendment right to engage in the latter category of speech." Thus the Court "rejected the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy." The Court recognized that any claim of a constitutionally mandated barrier between express advocacy and so-called issue advocacy "cannot be squared with our long-standing recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad." The Court further recognized that it is permissible to regulate not only communications containing the "magic words," but also communications that were "the functional equivalent" of express advocacy.[3]

Mr. Morganti observed that the Supreme Court now finds the magic words test to be "functionally meaningless":

> Not only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election.[4]

Chief Justice Roberts has adopted a more commonsense view, concluding that an ad qualifies as the functional equivalent of express advocacy "if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[5]

Chief Justice Roberts' view has some force. After all, your six- or seven-year-old child or grandchild would have no difficulty knowing which of the "issue ads" from the 2012 judicial campaign were asking voters to vote for or against one of the candidates seeking a judicial position.

For example, suppose an advertisement said, "Judge Jones ruled against tougher penalties for individuals guilty of statutory rape." Under Michigan's new legislation, that would be an "issue ad" exempt from disclosure requirements because the voter is not told to "vote against" Judge Jones. But from a commonsense standpoint—or under the standard now prevailing at the United States Supreme Court—would any reasonable person think this was an issue ad and not an ad about Judge Jones?

What if an ad said, "When Mr. Smith was on the State Board of Education, he voted to allow a teacher back in the classroom who was caught viewing child pornography on a school computer"?[6] Again, this would be an issue ad under Michigan's new legislation. Consequently, its source need not be identified. But this ad is clearly intended to influence voters to vote for or against a specific candidate. The magic words test doesn't lead to meaningful distinctions.

The new "right" behind Public Act 252

According to proponents of the new legislation, Michigan protects the people or corporate entities that finance ads like these because disclosure, in their view, would affect their free speech. How it affects their free speech is beyond me. But one thing is clear: these new protections prevent the persons, corporations, or groups that finance these ads from being criticized or suffering consequences for what might, in fact, be a lie.

Those who support the new legislation and support nondisclosure say things such as, "Issue ads are from people who want to speak and educate the public, and they should have every right to do those issue ads to educate the public on an issue."[7] But no one—not the State Bar of Michigan and not Secretary of State Johnson—wants to *prohibit* issue ads. Both the Bar and Johnson were only seeking to identify the individuals who want to exercise their free speech rights to advocate and "educate" the public.

If an individual or individuals contribute to a political campaign, they must be identified. But the proponents of the new legislation claim that those who contribute to an "issue ad" campaign need protection from people or groups that might "build an 'enemies list' of companies that can then be demonized, disparaged, harassed and intimidated into silence."[8] The anti-disclosure groups often refer to the fact that the Target Corporation supported a pro-business candidate who also opposed same-sex marriage and then faced criticism and calls for a boycott. The Target "call for boycott" is apparently what prompts constitutional concerns. Recalling this incident, Dan Pero wrote, "Neither individuals, independent groups nor corporations who exercise their First Amendment rights to participate in the political process should face threats or suffer intimidation tactics."[9]

This new "right" in historical and legal context

So that's it. The individuals and groups who support keeping donors' names anonymous want a new protection and a new right. They believe the exercise of free speech should come without consequence or criticism.

This kind of legislation would have been utterly foreign to our country's founders. Justice Scalia (a true champion of original intent) noted that the act of voting itself

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"was public until 1888 when the States began to adopt the Australian secret ballot."[10] The notion that the First Amendment countenanced anonymous political activity is "utterly implausible, since the inhabitants of the Colonies, the States, and the United States had found public voting entirely compatible with 'the freedom of speech' for several centuries."[11]

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The theory that the First Amendment protects anonymous political activity has been soundly rejected by the United States Supreme Court. For instance, although *Citizens United v Federal Election Commission*[13] is famous (or perhaps infamous) for its holding on corporations' free-speech rights, the Court also upheld disclosure requirements. The Bipartisan Campaign Reform Act of 2002, which was at issue in *Citizens United*, required disclosure of the parties responsible for electioneering communications.[14] In rejecting the petitioners' challenge to this disclosure requirement, the Court reaffirmed a point it had made in *Buckley v Valeo*[15]: "Disclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities,' and 'do not prevent anyone from speaking.'"[16] Consequently, disclosure laws are subject to exacting scrutiny, "which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."[17]

The Court easily found a "sufficiently important governmental interest" in *Citizens United*: the public's interest "in knowing who is speaking about a candidate shortly before an election."[18] It also noted an interest unique to political speech by corporations: shareholders' interest in knowing the political positions taken by corporate management.[19] Justice Kennedy, joined by every other justice except Justice Thomas, wrote, "The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[20]

The *Citizens United* Court rejected the petitioner's claim that it would be subject to harassment and threats, holding that it presented no credible evidence that there was a reasonable probability of threats.[21]

Civic courage

So much for the legal merits of this new "right." But is it good *policy*? If the law does not prohibit disclosure, should it allow anonymity? Personally, I cannot justify anonymity based on a vague notion that political speakers *might* be subject to threats or harassment. The law already prohibits these illegal actions and offers anonymity to those facing credible threats of harassment or reprisals.[22]

What we are really talking about here is political activity in response to political activity—criticism and calls for boycott that Target allegedly faced when it supported a candidate who opposed same-sex marriage. And if we are interested in free speech, in a healthy democracy, then we ought to embrace any rule that promotes meaningful discussion. Transparency—knowing the source of judicial advertisements—ensures that voters can give messages their "proper weight," as the Supreme Court put it, and advance political discourse with an appropriate response.[23] In other words, transparency promotes free speech.

You may buy into the idea that corporations, like individuals, have constitutional rights and should be able to anonymously hold positions opposing or supporting same-sex marriage or energy policies or bridges from Canada to the United States. But there is absolutely no reason for people or groups to anonymously support issue ads in judicial campaigns.

Undisclosed spending in judicial campaigns is harmful because it can confuse voters about the messages they rely on to assess candidates and it obscures financial contributions that might cause apparent conflicts of interest and require a justice's recusal from a case. Assume a 2014 judicial election issue ad supporting or opposing one of the candidates costs $3 million. The donor or donors are not known. Wouldn't all of us want to know who contributed the $3 million? Does anybody not think there might be a basis to recuse the justice if the donor has a case with the court? Do any of us really think *anonymity* is a form of free speech? Or is anonymity really an attempt to influence an election without the opposition knowing?

There's something else at stake, too—what Justice Scalia calls "civic courage."[24] As Justice Scalia wrote in *John Doe No. 1*, "[H]arsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."[25] It is especially important that those who fund "issue ads" exercise civic courage—and that we expect them to do so—now that the United States Supreme Court has curbed legislatures' ability to limit campaign spending in *McCutcheon v Federal Election Commission*.[26] And so does Justice Roberts, who in his

majority opinion, joined by Kennedy, Alito, and Scalia, reaffirmed the observation they made in *Citizens United* and that was made in *Buckley* about the need for disclosure.[27]

Civic courage and the Michigan bar

Public Act 252 is a crushing blow to free speech and civic courage. But I hold to the hope that civic virtue is not dead in Michigan. As lawyers, we must insist that individuals and corporations embrace the transparency and accountability necessary for a healthy democracy and a fair judiciary. We know the history of our republic too well to accept that anonymity and anonymous money are required by, or even compatible with, the right of free speech.

Some individuals believe that elections are a matter of politics and that the State Bar should not and cannot comment on "political issues." I do not think the Bar is, or should be, precluded by *Keller v State Bar of California*[28] from commenting on judicial campaigns and the integrity of the judicial process. After all, we're talking about the regulation of the judiciary. That's central to the State Bar's mission and, thus, is *Keller*-permissible.

But let's assume that issue ads really are a political issue and that the Bar really is precluded from advocating against them.

There are 43,000 lawyers in Michigan. Most of us vote. Most of us know a legislator. Some of us *are* legislators. Most of us, I hope, appreciate that the "magic words" test has no legal merit and that there is no right to be free from consequences and criticism.

So even if the Bar is prohibited from advocating against issue ads in judicial campaigns, the 43,000 of us individually can and should advocate with our legislators and opinion-makers to correct the folly of eliminating issue ads from campaign finance legislation and adopting the magic words test. We should advocate for transparency. We should advocate that donors to judicial campaign issue ads be identified.

To borrow from Dylan Thomas, the brilliant and tortured Welsh poet, let us not "go gentle into that good night." As lawyers and stewards of our democracy, we must "rage, rage against the dying of the light." ■

NOTE: This column was intended to be included in the February 2014 issue of the *Bar Journal*. Just before publication, the state Senate proposed legislation that, if adopted, would make our Bar voluntary. The legislation was likely spawned by the view of some politicians that the Bar's position regarding financial disclosures in judicial campaigns was a violation of *Keller*. To avoid another such objection, I offered Richard McLellan (one of my appointees to the Bar's Public Policy Committee and a person who objects to the Bar having taken a position on disclosure) an opportunity to offer a counterpoint. Mr. McLellan's article, "No Mandatory Dues for Ideology," immediately follows this page.

ENDNOTES

1. See 2013 PA 252, § 6(2)(j).
2. *Id.*
3. Letter from Raymond W. Morganti to Hon. Lisa Posthumus Lyons, December 6, 2013, at 3 (on file with author) (internal citations omitted).
4. *Id.* at 4, quoting *McConnell v FEC*, 540 US 93, 193; 124 S Ct 619; 157 L Ed 2d 491 (2003).
5. *Id.*, quoting *FEC v Wisconsin Right to Life, Inc*, 551 US 449, 469–470; 127 S Ct 2652; 168 L Ed 2d 329 (2007).
6. That, by the way, was a real "issue ad" from a legislative race in Arizona.
7. See, e.g., Oosting, *Michigan GOP-led Senate moves to exempt issue ads, double individual campaign donation limits*, MLive, November 14, 2013.
8. Pero, *Making the case for keeping political donors' names a secret*, Detroit Free Press, December 19, 2013.
9. *Id.*
10. *Doe v Reed*, 561 US 186; 130 S Ct 2811, 2834; 177 L Ed 2d 493 (2010) (Scalia, J, concurring).
11. *Id.* at 2836.
12. For excellent overviews about the dangers of anonymous donations and their constitutional implications, see Eagan, *Dark money rises: Federal and state attempts to rein in undisclosed campaign-related spending*, 40 Fordham Urb L J 801 (2012); Gilbert, *Campaign finance disclosure and the information trade-off*, 98 Iowa L R 1847 (2013); Potter & Morgan, *The history of undisclosed spending in US elections & how 2012 became the dark money election*, 27 Notre Dame J L Ethics & Pub Pol'y 383 (2013).
13. *Citizens United v FEC*, 558 US 310; 130 S Ct 876; 175 L Ed 2d 753 (2010).
14. *Id.* at 366.
15. *Buckley v Valeo*, 424 US 1; 96 S Ct 612; 46 L Ed 2d 659 (1976).
16. *Citizens United*, 558 US at 366 (citations and internal punctuation omitted).
17. *Id.* at 366–367.
18. *Id.* at 369.
19. *Id.* at 370.
20. *Id.* at 371.
21. *Id.* at 370.
22. Those who champion this new right often cite *NAACP v Alabama*, 357 US 449; 78 S Ct 1163; 2 L Ed 2d 1488 (1958), in which the Supreme Court prevented the State of Alabama from learning the names of donors to the NAACP. The Court did so because of a credible threat that if those persons were identified, their lives might be compromised. Analogizing corporate sponsors of issue ads to those brave men and women who put their lives on the line for civil rights strains credulity, to put it mildly.
23. *Citizens United*, 558 US at 371.
24. *Doe*, 130 S Ct at 2837 (Scalia, J, concurring).
25. *Id.*
26. See *McCutcheon v FEC*, ___ US ___; 134 S Ct 1434; ___ L Ed 2d ___ (2014).
27. Finally, disclosure of contributions minimizes the potential for abuse of the campaign finance system. Disclosure requirements are in part "justified based on a governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending." *Citizens United*, 558 US at 367, quoting *Buckley*, 424 US at 66. They may also "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Buckley*, 424 US at 67. Disclosure requirements burden speech, but—unlike the aggregate limits—they do not impose a ceiling on speech.
28. *Keller v State Bar of California*, 496 US 1; 110 S Ct 2228; 110 L Ed 2d 1 (1990).