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Speech and the Identity Crisis

In terms of assessing speech, it is often helpful for audiences to know who is relaying a message and what, or who, might be influencing the content of the message. But do audiences have a right to know who is sponsoring or otherwise influencing the information they are receiving? Put negatively, when does the First Amendment prohibit the state from forcing speakers to disclose their identities or the identities of those who may have influenced their messages? It may overstate matters to suggest that free speech has an "identity crisis." But identity and sourcing issues seem to be arising in an increasing number of contexts. Consider the following examples:

- Proponents of same-sex marriage in Washington state recently sought to force disclosure of the names of those who signed petitions to place the issue of benefits for same-sex partners on the ballot. (A Ninth Circuit [order](#) to disclose the names was recently [stayed](#) by the Supreme Court.)
- The FCC recently created new [guidelines](#) that require bloggers and others who publish on the Web to disclose any "material connections" they might have with sellers of products or services.
- After the tea party protests and health care town hall events this summer, proposals were again made to regulate so-called "astroturfing." One proposal was to require disclosure of sponsorship or support for these events under lobbying laws.
- Legislators and law enforcement in some states have stepped up efforts to regulate "flogs," bogus product reviews, and other forms of online deception.
- Congress has long prohibited the use of federal funds for propaganda purposes. Notwithstanding this prohibition, in recent years there have been a variety of bogus news accounts and other sourcing problems involving government departments and officials.

There are other examples, such as "ghost-writing" of scientific studies and various bogus lobbying efforts. Some of what we might call speech-sourcing difficulties arise from, or may be [exacerbated by](#), Web-based communication. But sourcing issues are hardly a new concern. Anonymous speech, deceptive trade practices, and government propaganda have all been around for a very long time.

The law of disclosure or speech sourcing is not particularly well developed. In general terms, the First Amendment provides some breathing space for anonymous speech. Associational rights also prohibit the state from mandating disclosure in some circumstances, as when disclosure might lead to violence against a particular group. There is a limited right not to be compelled by the state to speak. And the press possesses a qualified privilege relating to the confidentiality of its sources. Despite this cluster of rights, mandatory disclosure of speakers and sources has long been typical in some areas, such as campaign finance and deceptive trade laws. And the spending prohibition relating to government propaganda is longstanding. As more trade moves online and political records are retained and made publicly available, courts and legislatures will increasingly have to confront a difficult balancing of anonymity, privacy, transparency, and informational authenticity interests. I may develop a paper on this subject in the relatively near future. Some preliminary thoughts on these issues, in the specific context of the Washington state referendum, after the jump.

The move to force disclosure of petition-signers' identities pits the state's interests in transparency and fraud-detection against the signers' interest, if any, in participating in the referendum process anonymously. Assuming, as the courts have, that signing a petition constitutes speech, the question in the

referendum context may boil down to whether petition-signers have any expectation of anonymity when they participate in the referendum process. The district court and Ninth Circuit both identified this as an issue of first impression; but they disagreed on the merits. The district court applied strict scrutiny to the disclosure law, which it viewed as a direct regulation of political speech. The Ninth Circuit applied intermediate scrutiny; it disagreed with the district court's conclusion that the speech was "anonymous political speech."

In the background, of course, is the fact that the identities of the petition-signers, if disclosed, would immediately be broadcast on the Web. Proponents of disclosure argue that this would further critical democratic interests. They argue that civil rights causes sometimes require "shaming" others into supporting the cause and that disclosure would facilitate an honest and transparent debate regarding the merits of the measure. Not surprisingly, the state does not rely on the "shaming" argument. As a factual matter, petition-signers do not necessarily support the measure; the question at the petition stage is whether it ought to be on the ballot. In any event, the state obviously cannot justify a law on the ground that it facilitates shaming. Transparent debate is a much weightier democratic value. But why does one need to know the identity of each individual participant to have a meaningful debate? Interest groups square off in the political arena all the time without having such knowledge. As a practical matter, moreover, it is becoming increasingly difficult to enforce identity- and source-disclosure requirements. If the state has a substantial or compelling interest in this context, it is the narrower, but important, one of ensuring that the referendum machinery functions properly. The Supreme Court may have to decide whether that interest outweighs any interest petition-signers may have in remaining anonymous.

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