Privacy vs Government Interest

By Paul Engel

Most Americans believe they have a right to privacy. Many Americans also want governments to protect them from “bad actors”. So what happens when our right to privacy collides with our desire for government to protect us? A recent Supreme Court case out of California involves the question of how far government can go to protect us. Specifically, is it necessary for governments to collect data about citizens in order to find criminals? As William Pitt (the Younger) said “Necessity is the plea for every infringement of human freedom.” While this case deals with California law, we should be asking a bigger question: Does “government interest” trump our rights, the Constitutions of our states, and of the United States?

If you run a charitable organization and you wish to solicit donations, there are plenty of tax regulations with which you have to comply. If your organization is in California, there’s an extra regulation, one that was challenged by *Americans for Prosperity Foundation* and the *Thomas More Law Center*.

The Attorney General requires charities renewing their registrations to file copies of their Internal Revenue Service Form 990, a form on which tax-exempt organizations provide information about their mission, leadership, and finances. Schedule B to Form 990—the document that gives rise to the present dispute—requires organizations to disclose the names and addresses of their major donors.

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Since 2001, these two charities have submitted the required documentation, though they redacted the donors' information to protect their anonymity. In 2010, California increased their enforcement of the law requiring these disclosures (Cal. Code Regs., tit. 11, §301), and the Attorney General threatened them and other charities with suspension of their registration as a tax-exempt organization. Both *Americans for Prosperity Foundation* and *Thomas More Law Center* sued in District Court, alleging that the disclosure of their Schedule B's violated their First Amendment rights and the rights of their donors. In both cases, the District Court granted a preliminary injunction prohibiting the Attorney General from collecting the plaintiff's Schedule B information. The Circuit court then vacated the injunction and remanded those cases back to the District Court. The District Court held trials in both cases, where they found for the charities. The Ninth Circuit again vacated the District Court's injunction, this time remanding the case back to the District Court in favor of the Attorney General. The cases were eventually merged, and heard by the Supreme Court, which is why the case only carries the name *Americans for Prosperity Foundation*. The Supreme Court reversed the judgment of the Ninth Circuit, but it's worth looking at their reasoning.

Opinion of the Court

THE CHIEF JUSTICE delivered the opinion of the Court with respect to all but Part II–B–1, concluding that California's disclosure requirement is facially invalid because it burdens donors' First Amendment rights and is not narrowly tailored to an important government interest. Pp. 6–7, 9–19.

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The court found that the California law violated the First Amendment rights of the donors. Specifically:

The Court reviews the petitioners' First Amendment challenge to California's compelled disclosure requirement with the understanding 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."

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While disclosing personal information does have a negative effect on freedom of association, as I've said so many times before, this cannot be a First Amendment issue since Congress did not make this law.

Congress shall make no law … abridging … the right of the people peaceably to assemble,

U.S. Constitution, Amendment I

It is, however, a violation of Article I, Section 3 of the California Constitution:

The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.

California Constitution, Article I, Section 3

What the court did focus on is what level of "scrutiny" the court should use in reviewing this case.

NAACP v. Alabama did not phrase in precise terms the standard of review that applies to First Amendment challenges to compelled disclosure. In Buckley v. Valeo, the Court articulated an "exacting scrutiny" standard, which requires "a substantial relation between the disclosure requirement and a sufficiently important governmental interest," Doe v. Reed,

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What is this “standard of review” and “exacting scrutiny” the court is talking about? Basically, it’s a question of how hard the government has to work to infringe on your rights.

Standard of Review

In law, the standard of review is the amount of deference given by one court (or some other appellate tribunal) in reviewing a decision of a lower court or tribunal.

Standard of Review – The Free Legal Dictionary

The standard of review for questions of constitutionality fall under three levels.

Rational Basis: *Generally, the Supreme Court judges legislation based on wheth er it has a reasonable relationship to a legitimate state interest.*

Intermediate Scrutiny: *Under the Equal Protection Clause, when the law targets a “quasi-suspect” classification, such as gender, the courts apply intermediate scrutiny, which requires the law to be substantially related to an important government interest.*

Strict Scrutiny: *If a statute impinges on a fundamental right, such as those listed in the Bill of Rights or the due process rights of the Fourteenth Amendment, then the court will apply strict scrutiny. This means the statute must be “narrowly tailored” to address a “compelling state interest.”*

Standard of Review – The Free Legal Dictionary

Notice what all three of these standards of review have in common? They all place a government or state interest above the Constitution and your rights. In the 1976 Supreme Court case Buckley v. Valeo, the court added a new term called “exacting scrutiny”, which requires “a substantial relation between the disclosure requirement and a sufficiently

important governmental interest,". What does this mean for the law in question?

Congress shall make no law … abridging … the right of the people peaceably to assemble,

U.S. Constitution, Amendment I

The Constitution states that Congress shall make no law abridging your right to peaceably assemble, but the Supreme Court claims that's only true if there isn't a "sufficiently important governmental issue". Put another way, they have said government has the authority to infringe on a right protected by the supreme law of the land.

Reasonable Search

While the lawyers and the courts focused on the question of whether or not California's interest in finding fraud warranted infringing on the rights of charitable organizations and their donors, nobody seemed to pay any attention to the actual violation of the Constitution of the United States.

The Court does not doubt the importance of California's interest in preventing charitable fraud and self-dealing. But the enormous amount of sensitive information collected through Schedule Bs does not form an integral part of California's fraud detection efforts.

Standard of Review – The Free Legal Dictionary

I don't doubt the importance of California's interest in preventing fraud. Unlike the Supreme Court, however, I recognize that the people have a right to be secure against unreasonable searches.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated

U.S. Constitution, Amendment IV

Is it reasonable for the government to search your records without probable cause? Doesn't the idea of searching someone's papers and effects for potential wrongdoing drift dangerously close to a writ of assistance?

a writ used especially in colonial America authorizing a law officer to search in unspecified locations for unspecified illegal goods

Writ of Assistance – Merriam-Webster Dictionary

In effect, California is issuing a writ of assistance, allowing their law enforcement officers to search the records of charitable organizations for some unspecified illegal activity. California is not only interested in the possibility of illegal activity at charities that operate within their state, but also want to know who are the large donors. That means California is effectively claiming the need to search at least some of the records of those donors without any probable cause that they've done anything wrong. Doesn't anyone else see a problem with this?

Dissent

Usually, the dissent in these opinions provides some very interesting insight, not only into dissenting justices, but the way the court views the Constitution and their role in the Republic.

Although this Court is protective of First Amendment rights, it typically requires that plaintiffs demonstrate an actual First Amendment burden before demanding that a law be narrowly tailored to the government's interests, never mind striking the law down in its entirety. Not so today.

Americans for Prosperity Foundation v. Bonta – Dissent

I would question how protective the court is of the First

Amendment. As I've already shown, it seems more interested in protecting the interests of government than the rights of the citizens. This is borne out later in the dissent.

In so holding, the Court discards its decades-long requirement that, to establish a cognizable burden on their associational rights, plaintiffs must plead and prove that disclosure will likely expose them to objective harms, such as threats, harassment, or reprisals. It also departs from the traditional, nuanced approach to First Amendment challenges, whereby the degree of means-end tailoring required is commensurate to the actual burdens on associational rights. Finally, it recklessly holds a state regulation facially invalid despite petitioners' failure to show that a substantial proportion of those affected would prefer anonymity, much less that they are objectively burdened by the loss of it.

Americans for Prosperity Foundation v. Bonta – Dissent

According to justice Sotomayor who wrote the dissent, in order for the court to protect your rights you must first show that you may suffer harm other than the loss of your rights. Justice Sotomayor also notes that the court has traditionally treated infringements of the rights protected by the Constitution as something to be nibbled away at based on how much damage they see. Worst of all, according to Sotomayor, it's the responsibility of the people to prove a burden other than the infringement of their rights, rather than the state having the burden to show why they should be allowed to violate the Constitution.

Conclusion

While we should be happy that the Supreme Court did reverse the judgment of the Ninth Circuit Court, there are plenty of issues with this opinion. Not the least of these problems is the continuing position of the court that your rights are less

important than the interests of government. This case though, should also open an interesting discussion.

We are left to conclude that the Attorney General's disclosure requirement imposes a widespread burden on donors' associational rights. And this burden cannot be justified on the ground that the regime is narrowly tailored to investigating charitable wrongdoing, or that the State's interest in administrative convenience is sufficiently important. We therefore hold that the up-front collection of Schedule Bs is facially unconstitutional, because it fails exacting scrutiny in "a substantial number of its applications . . . judged in relation to [its] plainly legitimate sweep."

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If the up-front collection of Schedule Bs if facially unconstitutional for the State of California, why is it not also for the United States? The answer appears to be less about the Constitution and more federal supremacy.

For one thing, each governmental demand for disclosure brings with it an additional risk of chill.

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Since the federal government is already collecting Schedule Bs, which might have a chilling effect on donors, the court doesn't appear to want another government entity collecting that data. This is where the viewpoint of the court comes into play. If the up-front collection of this data violates the rights of both the donors and the charity to be secure from unreasonable searches, then it's unlawful for a state or the United States to do so either. However, if it merely has a chilling effect on the donors, then all the court wants to do is limit that effect.

This case is just another example of why we need to read and study the Constitution for ourselves, because those who're

supposed to be upholding it are not doing so. Until We the People understand the limits we have placed on governments and require them to abide by those limits, then those governments are not exercising just powers. The Declaration of Independence states that governments receive their just powers from the consent of the governed. Instead, the people today are exercising powers at the consent of government.

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[BIO: Paul Engel founded The Constitution Study in 2014 to help everyday Americans read and study the Constitution. Author and speaker, Paul has spent more than 20 years studying and teaching about both the Bible and the U.S. Constitution. Freely admitting that he "learned more about our Constitution from School House Rock than in 12 years of public school" he proves that anyone can be a constitutional scholar. You can find his books on Amazon and Apple Books. You can also find his books, classes and other products at the Constitution Study website (https://constitutionstudy.com).]