Notre Dame Law Review

Volume 80 | Issue 5 Article 7

5-1-2005

I am Publius, and I Approve This Message: The Faffling and Conflicted State of Anonymous Pamphleterring Post-McConnell

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I AM PUBLIUS, AND I APPROVE THIS MESSAGE: THE BAFFLING AND CONFLICTED STATE OF ANONYMOUS PAMPHLETEERING POST-*MCCONNELL*

*Richard M. Cardillo**

INTRODUCTION

> "Reluctant, without clearer guidance from the Court, to interfere with state experimentation in the baffling and conflicted field of campaign finance law without guidance from authoritative precedent, we hold that the Indiana statute is constitutional."[1]

Hardly the most confident manner in which to end an opinion, this quote is nonetheless the last line of the Seventh Circuit's decision in *Majors v. Abell* (hereinafter *Majors II*), a case concerning the constitutionality of Indiana Code section 3-9-3-2.5. Section 3-9-3-2.5 requires that political advertising that "expressly advocat[es] the election or defeat of a clearly identified candidate" contain "a disclaimer that appears and is presented in a clear and conspicuous manner to give the reader or observer adequate notice of the identity of persons who paid for . . . the communication."[2] The statute has a limited exception for those distributing less than 100 pieces of "mail" that are "substantially similar,"[3] but otherwise effectively requires anyone creating or distributing materials advocating the election or defeat of a political candidate to identify himself or herself on the face of the material.

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1 Majors v. Abell (Majors II), 361 F.3d 349, 355 (7th Cir. 2004) (Posner, J.).

2 *Id.* at 350 (citing IND. CODE ANN. § 3-9-3-2.5(b), (d) (Michie Supp. 2002)).

3 IND. CODE ANN. § 3-9-3-2.5(a)(9) (Michie Supp. 2002).

Four Supreme Court cases have held or strongly implied that the right to speak anonymously is protected by the First Amendment.[4] When a law burdens core political speech, the courts will apply an exacting scrutiny[5] standard and uphold the restriction only if it is narrowly tailored to serve an overriding state interest.[6] In applying this exacting scrutiny test, the Seventh Circuit, like many courts before it, weighed the individual's right to anonymous political speech against the state's interest in having an informed electorate and a corruption-free electoral process. While ultimately siding with the state of Indiana, the Seventh Circuit was nonetheless forced to acknowledge the state of confusion surrounding recent campaign finance legislation and its impact on anonymous political speech. Although he joined with his colleagues' decision, Judge Easterbrook was so unsure of the wisdom of this judgment that he filed an opinion *dubitante*.[7]

Much of this confusion stems from the Supreme Court's recent ruling in *McConnell v. FEC*,[8] where it decided, inter alia, on the constitutionality of a reporting requirement of the Bipartisan Campaign Reform Act of 2002 (commonly known as the McCain-Feingold Act and hereinafter BCRA). This specific provision of BCRA required individuals to report their identity to the Federal Election Commission (FEC) if they spent more than $10,000 to produce "electioneering communications" or donated $1000 to an organization that produced such communications.[9] The Supreme Court found that this provision was constitutional on the grounds that it served "important state interests . . . [in] providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions."[10]

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4 *See* Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150, 166–67 (2002); Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 199–200 (1999); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995); Talley v. California, 362 U.S. 60, 80 (1960).

5 The term "exacting scrutiny" was used by the Court in *Buckley v. Valeo*, 424 U.S. 1, 44 (1976) (per curiam), and in many subsequent cases dealing with government "limitations on core First Amendment rights of political expression." *Id.* at 45. It is similar to the Court's traditional "strict scrutiny" standard.

6 *McIntyre*, 514 U.S. at 347.

7 "The term *dubitante* was usually placed in a law report next to a judge's name, indicating that the judge doubted a legal point but was unwilling to state that it was wrong." BLACK'S LAW DICTIONARY 537 (8th ed. 2004).

8 540 U.S. 93 (2003).

9 2 U.S.C. § 434(f)(1)–(2) (Supp. II 2002).

10 *McConnell*, 540 U.S. at 196.

Noting the similarity between the "disclaimer" requirement in the Indiana statute and the disclosure requirement of BCRA, the Seventh Circuit delayed its decision until the Supreme Court had delivered the *McConnell* decision.[11] Although it expressed a multitude of reservations, most notably the considerable loss of freedom of speech and the press inherent in such a requirement, the Seventh Circuit nonetheless acknowledged that the Supreme Court had "crossed that Rubicon in *McConnell*"[12] and saw no choice but to follow suit. One issue that remains after *McConnell* is to what extent anonymous political literature is protected in light of recent campaign finance reform legislation and specifically whether there remains a distinction between statutes that require the "disclaimer" of information on the source of the material as opposed to "disclosure" to a public agency.

Anonymous political writing was enormously influential in the nation's early history for many of the same reasons that it remains vital today—it encourages the writer to express his ideas without fear of retaliation and with the assurance that the ideas will be judged free of source bias and thus on their merit alone. In a series of cases, the Supreme Court identified anonymous political speech, particularly anonymous pamphleteering, as being firmly protected by the First Amendment. However, anonymous political speech faces much of the same criticism in the twenty-first century that it did in the eighteenth century.[13] The lack of accountability created by anonymity sets the table for potential corruption and abuse of the electoral process.[14] Now that the Supreme Court has again approved disclosure requirements for political "electioneering" communications, it is unclear what protections remain for anonymous political speech at the local and state levels.

In this Note, I will address the distinction between disclosure and disclaimer requirements from a First Amendment standpoint. I will also address some of the practical considerations that demand that such a distinction be drawn. Part I will introduce the current state of confusion surrounding disclosure laws post-*McConnell*. Part II will give a brief history of the development of a constitutional right to anonymous political speech. Part III will discuss *McIntyre v. Ohio Elections Commission*, in which the Supreme Court established the right to anonymous pamphleteering. Part IV will discuss the impact of campaign

11 Majors II, 361 F.3d 349, 352 (7th Cir. 2004).

12 *Id.* at 355.

13 *See* Jonathan Turley, *Registering Publius: The Supreme Court and the Right to Anonymity*, 2002 CATO SUP. CT. REV. 57, 60.

14 *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) ("The right to remain anonymous may be abused when it shields fraudulent conduct.").

finance reform on that constitutional right and in Part V, I will explore the *Majors II*/*Heller* circuit split in greater detail. Part VI will examine the difference between disclosure to a government agency and requirements that a source identify itself on the face of the material, and whether such a distinction should continue to be a legally established principle.

I. DISCLOSURE VS. DISCLAIMER: DOES THE DISTINCTION REMAIN POST-*MCCONNELL*?

> But what must give us considerable pause, in light of the distinction the Supreme Court has drawn between "disclosure" (reporting one's identity to a public agency) and "disclaimer" (placing that identity in the ad itself), is the fact that the Indiana statute requires the latter and not merely the former.[15]
>
> *Judge Richard Posner*

> The majority in McConnell emphasized that the disclosure to the agency did not include the content of the advertisement. In Indiana the disclosure is affixed to the speech; the association is unavoidable; does this make a difference? My colleagues think not; I am not so sure.[16]
>
> *Judge Frank Easterbook*

Is there a difference between requiring the distributor of political material to disclose their identity ("disclosure") to a central government agency (such as the FEC) and revealing their identification on the source of the material ("disclaimer"[17])? As campaign finance reform legislation collides headfirst with the constitutional right to anonymous political speech, courts are asking this very question. To some, the difference may be minimal. Requiring a group or individual to state its identity on the face of political material is likely to be much less of an economic, physical and bureaucratic burden than having to report the same information to a centralized government agency. On the other hand, there is a body of legal precedent in support of such a distinction, in addition to some very practical considerations.

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15 *Majors II*, 361 F.3d at 354.

16 *Id.* at 357 (Easterbrook, J., *dubitante*) (citations omitted).

17 As Judge Posner points out, "disclaimer" is actually a misnomer. The proper word is disclosure, but that word has been appropriated to describe a requirement to report one's identity to a central authority. *Id.* at 350. For the purposes of this Note, I will continue to use the term "disclaimer" consistent with this meaning.

The First Amendment states "Congress shall make no law . . . abridging the freedom of speech."[18] This does not mean, however, that the government can place no restrictions on speech. As often discussed, the First Amendment does not allow a person to falsely shout "fire" in a crowded theater without suffering a penalty.[19] However, speech, and particularly "core speech" such as that concerning political issues, is to be protected against infringement by legislatures if at all possible—even if regulation of such speech is deemed to be wise.[20] To this end, courts will apply the exacting scrutiny standard when evaluating the constitutionality of legislation regulating political speech.[21] The exacting scrutiny standard, as defined in *McIntyre v. Ohio Elections Commission*, allows state restrictions on core speech only when such restrictions are "narrowly tailored to serve an overriding state interest."[22] The burden of this high standard evidences the deference given to political speech and assures that such speech will only be subject to restriction when the state can provide a sufficiently compelling rationale.

It was under this exacting scrutiny test that the Supreme Court evaluated the constitutionality of an Ohio statute that prohibited the anonymous distribution of political pamphlets in *McInytre*. In finding the statute to be an unconstitutional restriction on the First Amendment, the Supreme Court established a constitutional right to anonymous political speech.[23]

This right was to be tested, however, by *McConnell v. FEC*,[24] in which the Supreme Court determined the constitutionality of a provision of BCRA requiring individuals or organizations creating (or contributing to organizations which create) "electioneering communications" to report their identification and other significant information to the FEC.[25] Again, the Court applied the exacting scru-

18 U.S. CONST. amend. I.

19 As Justice Holmes famously stated, "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." Schenck v. United States, 249 U.S. 47, 52 (1919).

20 *Majors II*, 361 F.3d at 356–57 (Easterbrook, J., *dubitante*) (citing multiple sources).

21 McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 345–46 (1995) ("It is a regulation of pure speech. Moreover, even though this provision applies evenhandedly to advocates of differing viewpoints, it is a direct regulation of the content of speech. . . . Consequently . . . this case 'involves a limitation on political expression subject to exacting scrutiny.'" (quoting Meyer v. Grant, 486 U.S. 414, 420 (1988))).

22 *Id.* at 347.

23 *See id.* at 357.

24 540 U.S. 93 (2003).

25 *Id.* at 196.

tiny standard and found the government's interests controlling and the disclosure requirement constitutional.[26]

In making this determination, the Court relied on the same state interests as those presented in *Buckley v. Valeo*,[27] the first Supreme Court case to consider federal campaign disclosure requirements. The *Buckley* Court acknowledged the importance of protecting the electoral process from corruption (or the appearance thereof) and allowed a provision of the Federal Election Campaign Act of 1972 (FECA) that required candidates to report the identity of persons contributing money to a committee on behalf of a political candidate to the FEC.[28] FECA limited this requirement to candidate elections, and not to "referenda or other issue-based ballot measures."[29] The distinction allowed disclosure requirements for political communications, but limited them to those that expressly advocated the election or defeat of a particular candidate.[30] Thus, political communications involving "issue advocacy" were not within the confines of the FECA and presumably not governed by *Buckley*'s holding.

When the *McIntyre* Court then ruled on the constitutionality of Ohio's statute banning all anonymous pamphleteering, it was able to distinguish *Buckley* by showing that the Ohio statute covered issue advocacy as opposed to express advocacy[31] and was thus more intrusive and "rest[ed] on different . . . less powerful state interests."[32]

The Court again considered the issue of express advocacy versus issue advocacy in *McConnell*, but now found that, despite its prior precedents, there was no longer a distinction between the two types of

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26 *Id.*

27 424 U.S. 1 (1976) (per curiam).

28 FECA required the reporting of

> "the identification of each person to whom expenditures have been made by such committee or on behalf of such committee or candidate within the calendar year in an aggregate amount or value in excess of $100, the amount, date, and purpose of each such expenditure and the name and address of, and office sought by, each candidate on whose behalf such expenditure was made."

Id. at 158 (quoting 2 U.S.C. § 434(b)(9) (Supp. II 1973)).

29 McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 356 (1995).

30 Express advocacy is typically understood to mean the use of words or phrases such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," or "reject." *Buckley*, 424 U.S. at 44 n.52.

31 *McIntyre*, 514 U.S. at 356 ("The Federal Election Campaign Act of 1971, at issue in *Buckley*, regulates only candidate elections, not referenda or other issue-based ballot measures.").

32 *Id.*

communications.[33] Without this distinction, a large element of the law used to distinguish *McIntyre* from *Buckley*[34] is seemingly no longer valid, leaving future courts without much guidance as to the legal difference between disclosure and disclaimer requirements. The *McConnell* opinion, at a length of over 200 pages, further compounded the confusion by mentioning *McIntyre* only once (in a footnote, at that) and failing to cite *Talley v. California*,[35] *Buckley v. American Constitutional Law Foundation*,[36] or *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*,[37] cases that had been instrumental in the development of a right to anonymous speech.[38] As Judge Easterbrook laments in *Majors II*, such an opinion "makes it impossible for courts at our level to make an informed decision—for the Supreme Court has not told us what principle to apply."[39] As I will discuss in Part V, the Court's failure to properly reconcile *McIntyre* and *McConnell* has caused a split between the Ninth and Seventh Circuits and confusion over which line of case law to apply.

II. A Brief History of the Development of the Right to Anonymous Speech

As Justice Thomas states in his concurring opinion in *McIntyre*, "[t]here is little doubt that the Framers engaged in anonymous political writing. The essays in the Federalist Papers, published under the pseudonym of 'Publius', are only the most famous example of the outpouring of anonymous political writing that occurred during the ratification of the Constitution."[40] Anonymous discourse on political matters has a long and storied place in the nation's history, especially

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33 McConnell v. FEC, 540 U.S. 93, 193–94 (2003).

> [The notion that] the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy . . . [also] cannot be squared with our longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad. . . . *Buckley*'s express advocacy line . . . has not aided the legislative effort to combat real or apparent corruption, and Congress enacted BCRA to correct the flaws it found . . . .

Id.

34 *See supra* note 31.

35 362 U.S. 60 (1960).

36 525 U.S. 182 (1999).

37 536 U.S. 150 (2002).

38 Majors II, 361 F.3d 349, 356 (7th Cir. 2004) (Easterbrook, J., *dubitante*).

39 *Id.* (Easterbrook, J., *dubitante*).

40 McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 360 (1995) (Thomas, J., concurring in the judgment).

as practiced by the Framers.[41] In acknowledgement of this contribution to the founding of our nation, the Court has, over time, established a constitutional right to anonymously distribute political literature.

This right was preceded by the establishment of a constitutional right to anonymous association. In *NAACP v. Alabama*,[42] the Supreme Court struck down a civil contempt charge levied by the state of Alabama against the NAACP for failure to turn over membership rolls. The right to associate anonymously, free of government interference, was held to be a constitutional right protected by the First Amendment.[43]

Prior to *NAACP*, the Supreme Court decided *Lovell v. City of Griffin*.[44] In *Lovell*, the Supreme Court invalidated a city ordinance that banned the distribution of any literature in the city of Griffin, Georgia, without a permit. Citing the freedom of press provision of the First Amendment, the Court held that "Liberty of the Press" was not confined to newspapers and periodicals, but rather, extended to pamphlets and leaflets as well.[45] Noting the historical importance of anonymous political contributions, the Court declared: "These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest."[46] Although the Court did not go so far as to create a constitutional protection for *anonymous* pamphleteering, it nonetheless acknowledged the historical contributions of such activity and set the stage for later Courts that would directly address that issue.

The next case to consider restrictions on pamphleteering was *Talley v. California*,[47] in which the Supreme Court was asked to determine the constitutionality of a Los Angeles city ordinance that prohibited the distribution, in any place and under any circumstances, of a handbill which did not identify the name and address of the person or persons (in the case of an organization or club) who created, printed, or distributed such a handbill.[48] The Court, citing *Lovell*, again emphasized the important role played by anonymous pamphlets, leaflets, brochures, and books in "the progress of mankind."[49] While acknowl-

41 *Id.* (Thomas, J., concurring in the judgment).
42 357 U.S. 449 (1958).
43 *Id.* at 466.
44 303 U.S. 444 (1938).
45 *Id.* at 452.
46 *Id.*
47 362 U.S. 60 (1960).
48 *Id.* at 60–61.
49 *Id.* at 64.

edging the state of California's interest in protecting its citizenry against fraud,[50] the Court nonetheless felt that there were other, less restrictive means by which the state could accomplish this goal without infringing on the "freedom to distribute information and thereby freedom of expression"[51] and thus ruled the law unconstitutional.

Talley laid the groundwork for what would eventually be the Supreme Court's definitive take on the First Amendment's protection for anonymous pamphleteering. In the seminal case of *McIntyre v. Ohio Elections Commission*,[52] the Supreme Court ruled section 3599.09(A) of the Ohio Code unconstitutional as a violation of the First Amendment. The Ohio statute in question prohibited the distribution of anonymous campaign literature. The question thus presented to the Court was whether such a statute was "'a law . . . abridging the freedom of speech' within the meaning of the First Amendment."[53]

McIntyre raised a number of new legal issues concerning anonymous pamphleteering. First among these issues was "whether and to what extent the First Amendment's protection of anonymity encompasses documents intended to influence the electoral process."[54] After cataloguing a long and storied history of anonymous political discourse,[55] particularly amongst the Framers, the Supreme Court held that the First Amendment did offer such protection. Despite the apparent breadth of its decision, the Court's opinion did leave the potential for legislatures to craft statutes that require identification disclosure and yet remain within the confines of *McIntyre*'s holding by stating that, "a State's enforcement interest *might* justify a more limited identification requirement."[56]

Justice Thomas offered a concurring opinion that emphasized the importance of anonymous speech to our nation's history and which argued for even greater anonymous protection than the majority's decision. Justice Scalia and Chief Justice Rehnquist dissented, with Justice Scalia recognizing the importance of anonymous political speech among the Framers, but emphasizing the lack of a legislative history in support of a constitutional right to such speech as being the

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50 *Id.*

51 *Id.*

52 514 U.S. 334 (1995).

53 *Id.* at 336 (quoting U.S. CONST. amend. I).

54 *Id.* at 344.

55 *Id.* at 341–43.

56 *Id.* at 353 (emphasis added); *see also id.* at 358 (Ginsberg, J., concurring) ("We do not therefore hold that the State may not in other, larger circumstances require the speaker to disclose its interest by disclosing its identity.").

more controlling element.[57] In his dissent, Justice Scalia went on to acknowledge the potential impact that the majority's ruling would have on the forty-nine states with similar statutes, stating: "Perhaps, then, not *all* the state statutes I have alluded to are invalid, but just *some* of them; or indeed maybe *all* of them remain valid in 'larger circumstances'!"[58] In light of the new right to anonymous speech, the Justice worried, "[i]t may take decades to work out the shape of this newly expanded right-to-speak-incognito, even in the elections field."[59] Indeed, Justice Scalia's concern has proven prescient, as many of the election-related issues left unresolved in *McIntyre* continue to this day and particularly now in light of the Court's ruling in *McConnell*.

III. *McIntyre* and the Case for a Right to Anonymous Pamphleteering

Margaret McIntyre was fined under an Ohio law for anonymously distributing leaflets in opposition to a local school tax levy. Mrs. McIntyre brought a claim against the Ohio Elections Commission but passed away prior to seeing its resolution. Litigation was continued by her executor, Joseph McIntyre, who petitioned for and was granted a writ of certiorari before the Supreme Court of the United States. Plaintiff claimed that Ohio's ban on the distribution of anonymous political literature was an unconstitutional infringement of her First Amendment freedom of speech. Although the Court had previously overturned statutes that banned the distribution of all literature or that required identification of its source,[60] it had never before established a constitutional right to anonymously disseminate political literature.[61]

Because the Ohio statute restricted some elements of political speech, it had the effect of burdening core speech and was thus subject to the exacting scrutiny standard.[62] In applying this standard, the Court balanced the state's interest in preventing fraudulent and libelous statements and its interest in providing the electorate with

57 *See id.* at 373–77 (Scalia, J., dissenting).

58 *Id.* at 380–81 (Scalia, J., dissenting).

59 *Id.* at 381 (Scalia, J., dissenting).

60 *See supra* Part I.

61 *McIntyre*, 514 U.S. at 344 ("For that reason, Ohio correctly argues that *Talley* does not necessarily control the disposition of this case. We must, therefore, decide whether and to what extent the First Amendment's protection of anonymity encompasses documents intended to influence the electoral process.").

62 *See supra* note 21.

relevant information against the law's burden on free speech.[63] In a 7-2 decision, the Court held that Ohio's interests were not sufficiently compelling to outweigh its burden on the First Amendment and struck the law down as unconstitutional.[64]

In defense of its statute, Ohio pointed to the Court's earlier decision in *Buckley*, which had allowed mandatory reporting requirements for individual and organizational campaign-related expenditures. The Court distinguished *Buckley*, stating, "the relevant portion of the latter [*Buckley*] concerned mandatory disclosure of campaign-related expenditures. Neither case involved a prohibition of anonymous campaign literature."[65]

A. *Source Identification vs. Reporting Requirement*

In distinguishing *Buckley*, the Court first noted that the Ohio statute's source identification requirement placed a far greater burden on speech than did the reporting requirement at issue in *Buckley*. Secondly, the Court determined that Ohio's interests were far less compelling than those concerned in *Buckley*.

The Ohio statute required the individual or group responsible for the advocacy material to identify itself as the source and mandated that such identification "'appear[ ] on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor.'"[66]

By requiring the creator of the material to identify itself on the face of the material, the state was intruding on the speaker's freedom of speech to a far greater extent than did the reporting requirement of FECA. "[I]dentification of the author against her will is particularly intrusive; it reveals unmistakably the content of her thoughts on a controversial issue. Disclosure of an expenditure and its use, without more, reveals far less information."[67] Moreover, because *Buckley*'s reporting requirement involved the reporting of financial contributions,

63 *McIntyre*, 514 U.S. at 348.

64 *Id.* at 357 (noting that "our society accords greater weight to the value of free speech than to the dangers of its misuse").

65 *Id.* at 353.

66 *Id.* at 338 n.3 (quoting OHIO REV. CODE ANN. § 3599.09(A) (Anderson 1988)).

67 *Id.* at 355.

it was a much less specific, personal, and provocative form of disclosure and much less conducive to retaliation against the identified.[68]

The disparate impact on the author of on-its-face identification versus after-the-fact reporting requirements would prove to be an area of great confusion in *Majors II*, and criticism in *Heller*, and will form a major basis for my analysis in Parts V and VI *infra*.

B. Issue vs. Express Advocacy

The second point the Court used to distinguish *McIntyre* concerned the difference between "issue advocacy" and "express advocacy" as originally defined in FECA. As the Court states: "The Federal Election Campaign Act of 1971, at issue in *Buckley*, regulates only candidate elections, not referenda or other issue-based ballot measures; and we construed 'independent expenditures' to mean only those expenditures that 'expressly advocate the election or defeat of a clearly identified candidate.'"[69] Furthermore, in *First National Bank of Boston v. Bellotti*,[70] the Supreme Court expressly distinguished the threat of corruption in candidate elections from that of referendum, stating that such concerns were a compelling state interest in the former but not the latter.[71]

Under FECA, express advocacy was typically understood to mean the use of words or phrases such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," or "reject."[72] Any other expenditure was considered "issue advocacy" and was not within the confines of FECA unless it was sufficiently related to a particular campaign.[73]

Mrs. McIntyre's leaflets proposed opposition to a school tax levy, but not the election or defeat of a particular candidate. Her activity was therefore best characterized as issue advocacy. Since Ohio Code section 3599.09(A) governed the anonymous expression of both ex-

68 *Id.* ("[E]ven though money may 'talk,' its speech is less specific, less personal, and less provocative than a handbill—and as a result, when money supports an unpopular viewpoint it is less likely to precipitate retaliation.").

69 *Id.* at 356 (quoting Buckley v. Valeo, 424 U.S. 1, 80 (1976) (per curiam)).

70 435 U.S. 765 (1978).

71 *See id.* at 790.

72 Buckley v. Valeo, 424 U.S. 1, 44 n.52 (1976); *see also* FEC v. Furgatch, 807 F.2d 857, 864 (9th Cir. 1987) (defining express advocacy as speech that "must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate").

73 *See* Kathleen M. Sullivan & Pamela S. Karlan, *The Elysian Fields of the Law*, 57 STAN. L. REV. 695, 700 (2004).

press advocacy and issue advocacy, it effectively restricted her ability to speak anonymously on the issue. As discussed earlier, FECA governed only express advocacy. Moreover, its reporting requirements had the effect of deterring quid pro quo corruptive electioneering activity by exposing campaign expenditures to public scrutiny and FEC monitoring.[74] No similar claim could be made regarding Ohio Code section 3599.09(A). As a result, section 3599.09(A)'s source identification requirements served to restrict a far wider range of speech while providing for much less of a compelling state interest.[75]

The distinction between express advocacy and issue advocacy continues to be a source of confusion for courts as they determine the constitutionality of statutes limiting anonymous speech. The Supreme Court's failure to address this distinction in *McConnell* with regard to *McIntyre* has since lead to a great deal of confusion in the lower courts.

IV. The Impact of Campaign Reform on Anonymous Pamphleteering

The emergence of campaign finance reform movements in the early 1970s and again in the early 2000s led to a renewed call for accountability in the electoral process. In the interests of avoiding corruption (or the appearance of corruption) and providing for a more fully informed electorate, both decades saw federal bills passed requiring greater disclosure in both fundraising and political advertising. In ruling on the constitutionality of these statutes, the Supreme Court has largely avoided the many issues presented by the apparent conflict between a right to anonymous political advocacy and the need for greater transparency in the electoral process. As a result, many lower courts have struggled to interpret the constitutionality of state legislative experimentation, with understandable confusion and circuit splits following. Any discussion of campaign finance reform must begin with a discussion of the landmark case of *Buckley v. Valeo.*

A. Buckley v. Valeo

In the 1970s, the developing right to anonymous political speech came into conflict with a movement towards greater accountability in campaign finance. The Federal Election Campaign Act of 1971 required, among other things, that political committees keep detailed records of contributions and expenditures, including the name and address of contributing individuals and groups, and file quarterly re-

74 *McIntyre*, 514 U.S. at 356.

75 *Id.*

ports with the FEC disclosing this information.[76] While the Court did not directly address the implications of reporting requirements on free speech, they acknowledged that such requirements "can seriously infringe on privacy of association and belief guaranteed by the First Amendment."[77] Mindful that the possibility of such encroachment existed, the Court then applied an exacting scrutiny test to the statute.[78] Despite applying this strict standard, the Court held that the government's interest in the reporting requirements outweighed the possible infringement. In making this determination, the Court cited three areas of government interest: (1) reporting helps people evaluate where money comes from and how it is spent by the candidate, (2) it deters "actual corruption and avoid[s] the appearance of corruption,"[79] and finally, (3) it acts as a necessary mechanism for assuring that contribution limits were followed.[80]

The *Buckley* decision concerned the issue of a right to anonymous association and made no mention of a constitutional right to anonymous speech. Although some state courts had found a First Amendment right to anonymous political speech,[81] it was not until the Supreme Court's decision in *McIntyre* that the issue of constitutional protection for anonymous political speech was firmly decided. In keeping with the *Buckley* Court, the Supreme Court again applied the exacting scrutiny[82] standard to the Ohio statute in question, but was able to distinguish the facts from those in *Buckley* and thus achieve a different result. Twenty-six years later the Court would again address reporting and source identification issues in *McConnell v. FEC*,[83] this

76 2 U.S.C. § 432 (Supp. II 1973). At the time it was passed, the statute required "political committees" to keep detailed records of contributions and expenditures, including the name and address of each individual contributing in excess of ten dollars, and his occupation and principal place of business if his contribution exceeded $100, and to file quarterly reports with the FEC disclosing the source of every contribution exceeding $100 and the recipient and purpose of every expenditure over $100, and also required every individual or group, other than a candidate or political committee, making contributions or expenditures exceeding $100 "other than by contribution to a political committee or candidate" to file a statement with the Commission. *See id.*

77 *Buckley*, 424 U.S. at 64.

78 *Id.* ("We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. . . . [T]he subordinating interests of the State must survive exacting scrutiny.").

79 *Id.* at 67.

80 *Id.* at 66–68.

81 *See, e.g.*, People v. Duryea, 351 N.Y.S.2d 978, 996–97 (App. Div. 1974).

82 McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995).

83 540 U.S. 93 (2003).

time presumably mindful of the post-*McIntyre* right to anonymous speech.

B. McConnell v. FEC

The Supreme Court next addressed campaign finance reform in 2003, when it evaluated the constitutionality of certain provisions of the Bipartisan Campaign Reform Act of 2002.[84] While the scope of this case far exceeds the subject of this Note, an element of its findings has great implications in the area of anonymous political literature.

McConnell was seemingly the perfect opportunity to tie together the laws of anonymous pamphleteering and campaign finance and to resolve the many vagaries that remained after *Buckley* and *McIntyre*. The *McConnell* Court considered the constitutionality of a provision in BCRA that required individuals to report their identity to the FEC if they spent more than $10,000 to produce "electioneering communications" or gave $1000 or more to an organization that produced them.[85] In keeping with its prior decision in *Buckley*, the Court found this provision constitutional on the grounds that it served "important state interests . . . [in] providing the electorate with information, deterring actual corruption and avoiding its appearance, and gathering data necessary to enforce more substantive electioneering restrictions."[86] Given the burden on anonymous political speech that such a provision would place, it would seem logical that the Court would implicate *McIntyre*'s holding in its evaluation.[87] However, very little attention was paid to *McIntyre* in the Court's analysis. *McIntyre* warranted but a footnote in the opinion in which the Court stated: "'[P]reservation of the individual citizen's confidence in government,' we added, 'is equally important.' BCRA's fidelity to those imperatives sets it apart from . . . the Ohio statute banning the distribution of anonymous campaign literature, struck down in *McIntyre*."[88]

Justice Scalia's dissent was quick to point out the error in ignoring the overlap in these laws and the confusion it would likely create for lower courts attempting to determine proper legal precedent for

84 Pub. L. No. 107-155, 116 Stat. 81 (codified primarily in scattered sections of 2 and 47 U.S.C.).

85 2 U.S.C. § 434(f)(1)–(2) (Supp. II 2002).

86 *McConnell*, 540 U.S. at 103.

87 *See* Majors II, 361 F.3d 349, 356 (7th Cir. 2004) (Easterbrook, J., *dubitante*).

88 *McConnell*, 540 U.S. at 93 n.84; *see also Majors II*, 361 F.3d at 357 (Easterbrook, J., *dubitante*) ("This footnote—the only place in which a majority opinion discusses *McIntyre* (though not when dealing with § 304!)—says that 'BCRA's fidelity to those imperatives' sets it apart from the law held invalid in *McIntyre*.").

anonymous political issues.[89] The confusion caused by the Court's failure to discuss *McIntyre* (or *Talley*, *Watchtower*, etc.) in *McConnell* has become evident in the apparent circuit court split between *Majors II* and *ACLU v. Heller*.[90]

V. POST-*MCCONNELL* CIRCUIT SPLIT

After the Court's decision in *McIntyre*, a number of states sought to tailor or amend existing electioneering legislation to bring it into conformity with the Court's holding. Many states took notice of the Court's distinction between express advocacy and issue advocacy and its emphasis on the need to protect spontaneous or individual pamphleteering in *McIntyre*. States like Indiana and Nevada then reworked legislation so as to bring it in line with the limited exception hinted at in *McIntyre*.[91]

Since the *McConnell* Court handed down its decision in 2003, two federal appeals courts have ruled on the constitutionality of state political disclosure statutes, with both reaching different results. In *ACLU v. Heller*, the Ninth Circuit decided the constitutionality of Nevada Revised Statutes section 294A.320, which required "persons either paying for 'or responsible for paying for' the publication of 'any material or information relating to an election, candidate or any question on a ballot' to identify their names and addresses on 'any [published] printed or written matter or any photograph.'"[92] The Ninth Circuit recognized that the Nevada statute was nearly identical to the one overturned in *McIntyre* and, following the Supreme Court's precedent, held it to be unconstitutional.[93]

As mentioned in the Introduction and Part I, *Majors v. Abell* concerned an Indiana statute that required a disclaimer be placed in a conspicuous manner on political advertising expressly advocating the election or defeat of a particular candidate so as to identify the person or persons responsible for funding the advertising.[94] After carefully

89 *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 381 (1995) (Scalia, J., dissenting).

90 378 F.3d 979 (9th Cir. 2004).

91 *See* Majors v. Abell, 792 N.E.2d 22, 27 (Ind. 2003) ("Section 2.5 was added to the Indiana Code in 1997 in response to *McIntyre*."); *see also Heller*, 378 F.3d at 982 ("Nevada amended § 294A.320, originally enacted in 1989, in an effort to respond to *McIntyre*.").

92 *Heller*, 378 F.3d at 981 (alteration in original) (quoting NEV. REV. STAT. 294A.320 (1997)).

93 *Id.* at 988.

94 Majors II, 361 F.3d 349, 350 (7th Cir. 2004) (citing IND. CODE ANN. § 3-9-3-2.5(b), (d) (Michie Supp. 2002)).

considering *McIntyre*'s precedent and the possible First Amendment implications of such a statute, the Seventh Circuit relied on the Supreme Court's decision in *McConnell* and reluctantly held that the statute was constitutional.

Both decisions can be seen as being both consistent and at odds with one another, depending on how one interprets the *McConnell* decision. The Nevada statute at issue in *Heller* restricted both issue advocacy and express advocacy, while the Indiana statute in *Majors II* restricted its disclaimer requirement to express advocacy alone. Inasmuch as there remains a distinction between issue advocacy and express advocacy after *McConnell*, these decisions may be seen as being consistent with one another. However, such an interpretation would appear to fly in the face of the majority's opinion in *McConnell*, which seems to explicitly disclaim any such legal difference. Without this distinction, the holdings seem at odds with one another, as both states seek to require a disclaimer containing the author's identity as an element of the political material, a requirement held unconstitutional in *McIntyre*.

Heller follows *McIntyre*'s analysis in finding Nevada's disclosure requirement a burden on free speech. In contrast, the Seventh Circuit interpreted *McConnell* to mean that both disclosure and disclaimer requirements were now constitutional, regardless of whether the source identification information was printed on the material or delivered ex post in the form of a report to a central agency.

A. Majors II

Recognizing the potential constitutional implications of such a restriction on free speech, the Seventh Circuit first certified a question to the Indiana Supreme Court to determine the meaning of the word "person" within the statute. A narrow interpretation, as advocated by the state,[95] would eliminate any further First Amendment considerations, as it would be a "straightforward anti-fraud statute unlikely to present any serious constitutional problems."[96] After considering the state's interpretation, the Indiana Supreme Court returned with a broad reading of the statute, taking the word "persons" to mean all persons.[97] In light of this decision, the *Majors II* court would view the statute with the exacting scrutiny standard and would view the statute with the deference traditionally afforded core speech.

95 The state of Indiana argued that interpretation of the word "person" should be limited to candidates, campaign committees, and the committees' agents. *Id.*

96 *Id.*

97 Majors v. Abell, 792 N.E.2d 22, 30 (Ind. 2003).

Also recognizing the potential implications of *McConnell* on its decision, the Seventh Circuit waited until after the Supreme Court had released that opinion and then gave the parties the opportunity to submit memoranda discussing its implications. It then considered Indiana section 3-9-3-2.5(b) relative to the analogous provision of BCRA, 2 U.S.C. § 434(f)(3)(A)(i), which required the disclosure of persons contributing threshold amounts to produce broadcast advertisements "within 60 days of a general election or 30 days of a primary that refer to a candidate for federal office."[98] Although the court acknowledged the distinction between disclosure, as required by BCRA, and disclaimer, required in the Indiana statute, it took a practical view of the distinction, noting that "the very thing that makes reporting less inhibiting than notice in the ad itself—fewer people are likely to see the report than the notice—makes reporting a less effective method of conveying information that by hypothesis the voting public values."[99] By this logic, the court concluded that both sides of the First Amendment would be depressed by a disclosure requirement—the right to anonymous speech as well as the amount and quality of information available to the voting public.[100]

Finally, the Seventh Circuit expressed some reservation about its inconsistent ruling relative to *McIntyre*'s protection of anonymous pamphleteering and noted that two recent cases had reached conflicting conclusions since *McIntyre*: *Buckley v. American Constitutional Law Foundation*[101] and *FEC v. Public Citizen*.[102] In *Buckley v. American Constitutional Law Foundation*, the Supreme Court invalidated a state law that required people circulating petitions for issue referenda to wear identification badges.[103] However, in *Public Citizen*, the Eleventh Circuit held constitutional a provision of the old finance reform act (FECA) that required the identity of an advertiser to be disclosed in the ad—an assumption similar to that made in *McConnell*.[104] Despite effusive reservations about its decision, the *Majors II* court deferred to *McConnell* and found the Indiana statute constitutional.

98 *Majors II*, 361 F.3d at 352.
99 *Id.* at 353.
100 *Id.*
101 525 U.S. 182 (1999).
102 268 F.3d 1283 (11th Cir. 2001).
103 *Buckley*, 525 U.S. at 204.
104 *Public Citizen*, 268 F.3d at 1291.

B. ACLU v. Heller

In *ACLU v. Heller*,[105] the Ninth Circuit considered the constitutionality of Nevada Revised Statute section 294A.320, which "requires persons either paying for or 'responsible for paying for' the publication of 'any material or information relating to an election, candidate or any question on a ballot' to identify their names and addresses on 'any [published] printed or written matter or any photograph.'"[106] An exception was drawn for political candidates and parties that discussed only the candidate and displayed his or her name prominently.[107] Originally enacted in 1989, Nevada had amended section 294A.320 in a post-*McIntyre* effort to comply with its holding.

The petitioner, the American Civil Liberties Union of Nevada, brought a claim against the state, challenging the statute as being a facially overbroad violation of the First Amendment.[108] Nevada argued for a narrow construction of the statute, interpreted to concern only express advocacy, thus presumably bringing it outside of *McIntyre*'s holding.[109] The Ninth Circuit rejected this narrowed construction[110] and noted the similarities between the Nevada statute and the one held unconstitutional in *McIntyre*.[111] As in *Majors II*, the Ninth Circuit considered the implications of *McConnell* on the statute's disclosure requirements, but in a contrary opinion, distinguished the requirement on the grounds that it restricted the content of an election communication.[112] As the court states, "nothing in *McConnell* undermines *McIntyre*'s understanding that proscribing the content of an election communication is a form of regulation of campaign activity subject to traditional strict scrutiny."[113]

The Ninth Circuit then considered section 294A.320 in light of *McIntyre*, which it considered fully governing law.[114] Applying strict scrutiny to the statute, the court weighed the statute's burden on free speech against the state's interest in regulating campaign-related speech. The Ninth Circuit pointed out that in some regards, Nevada's statute was more intrusive than the statute overturned in *McIntyre* as it restricted communications that *related* to any election, candidate, or

105 378 F.3d 979 (9th Cir. 2004).
106 *Id.* at 981 (alteration in original) (quoting NEV. REV. STAT. § 294A.320 (1997)).
107 *Id.*
108 *Id.* at 983.
109 *Id.* at 985.
110 *Id.* at 986.
111 *Id.* at 987.
112 *Id.*
113 *Id.*
114 *Id.* at 988.

ballot issue.[115] After considering both the burdens on free speech and the government's interest in such restrictions, the court held that section 294A.320 failed to satisfy the strict scrutiny standard and was thus facially unconstitutional.[116]

Heller was decided after *Majors II*, and the opinion makes specific reference to that decision in light of the potential split. As mentioned earlier, *Heller*'s decision can be taken as being either consistent with or at odds with *Majors II* depending on one's interpretation of the law as it exists after *McConnell*.

If one acknowledges the existence of a legal distinction between issue advocacy and express advocacy, the opinions are consistent with one another, as *Majors II* may be considered narrowly tailored to avoid corruption in a candidate election. If, however, that distinction has been removed by the Supreme Court, the rulings seem inconsistent with one another. Both statutes require the person responsible for the creation of political advertising to include a disclaimer on the face of the material containing the identification information of the source, a requirement specifically prohibited in *McIntyre*.

Heller acknowledges both possibilities, stating that "[e]lements of *Majors II* may be inconsistent with our opinion."[117] In particular, the *Heller* court takes issue with the Seventh Circuit's lack of consideration for the disparate impact that disclosure and disclaimer requirements have on freedom of speech.[118] *Heller* pointed to two ways in which the *Majors II* decision had given insufficient consideration to First Amendment protection—namely, that *Majors II* failed to consider the conceptual difference between a regulation that alters communication and one that does not, and secondly, that it did not recognize the difference between a requirement that a speaker identify himself at the time of the communication as opposed to reporting that information at a different time.[119]

VI. POST-*MCCONNELL* PAMPHLETEERING—WHAT NOW?

What Supreme Court case should determine the law going forward—*McIntyre*'s right to anonymous political speech or *McConnell*'s deference to a reformed political process free of corruption and source confusion? Disclaimer requirements, as prohibited in *McIntyre*, create a unique burden on the advocate's right to free speech, in a

115 *Id.* at 986.
116 *Id.* at 1002.
117 *Id.* at 1001.
118 *Id.* at 1001–02.
119 *Id.*

manner and degree far different than disclosures. Given the Court's failure to discuss *McIntyre* in *McConnell* in any significant manner, courts deciding the constitutionality of disclaimer requirements should defer to *McIntyre*, which remains good law.

As the majority writes in *McIntyre*,

> [u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.[120]

Disclaimer requirements increase the potential for immediate retaliation against the speaker. An unpopular speaker or one making unpopular claims must fear not only "social ostracism, some dirty looks, [or] a few snide comments,"[121] but the possibility of economic or official retaliation as well as intrusions into her personal privacy.[122] Furthermore, requiring a writer to include her identification is not only a government-imposed intrusion on the content of speech, but it prevents the speaker from having her ideas stand alone, without regard to their source.[123] These two concerns—fear of retaliation and what I will refer to as source bias—are consistently cited as the major considerations present in protecting the right to anonymous political speech.

In contrast, one must acknowledge the states' legitimate interest in keeping the election process free of corruption and in maintaining a fully informed electorate. As shown by the popularity and history of campaign reform laws, many states have pursued this interest.[124]

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120 McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) (internal citation omitted).

121 Majors II, 361 F.3d 349, 353 (7th Cir. 2004).

122 *Heller*, 378 F.3d at 988.

123 *McIntyre*, 514 U.S. at 342–43.

> [A]n advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of political rhetoric, where 'the identity of the speaker is an important component of many attempts to persuade,' City of Ladue v. Gilleo, 512 U.S. 43, 56, 114 S.Ct. 2038, 2046, 129 L.Ed.2d 36 (1994) (footnote omitted), the most effective advocates have sometimes opted for anonymity.

Id.

124 *Id.* at 371 (Scalia, J., dissenting) (stating that "the Court invalidates a species of protection for the election process that exists, in a variety of forms, in every State

Campaign reform statutes like BCRA illustrate the public's desire for greater accountability and transparency in the campaign process. Legislatures looking to provide the electorate with the origins of political communications should be afforded every constitutional opportunity to do so. However, the distinction between disclosure and disclaimer, believed dead by the *Majors II* court, affords the opportunity to honor both the First Amendment and the states' interests.

In *McIntyre*, the Supreme Court lays out the arguments in favor of a First Amendment right to anonymous political speech. First, anonymity protects the speaker from retaliatory actions, social ostracism, or intrusions into his or her private life.[125] Second, anonymity allows the speaker to present his or her ideas independently from their source, thus allowing the reader to evaluate the merits of the argument without bias.[126]

The justifications for disclosure requirements usually center on the state's desire to avoid quid pro quo corruptive practices; the state's interest in avoiding fraud, libel, and in some circumstances, unattractive campaign practices such as mudslinging; and the importance of providing the electorate with information regarding the source of political communications.

All of these interests can be accommodated by statutes that provide for disclosure while prohibiting the type of disclaimer requirements overturned in *McIntyre* and *Heller*.

A. *Justifications for First Amendment Protection of Anonymous Speech*

Justice Thomas's concurring opinion displays the historical justification for a constitutional right to practice anonymous speech.[127] Although this right was not one specifically enumerated in the Constitution or truly considered in the legislative history of its ratification,[128] the practice itself was popular among the Framers and its impact on the infant nation undeniable. The authors of the *Federalist Papers*—Hamilton, Jay, and Madison—were particularly concerned about both retaliation and source bias. Under the pseudonym Publius, they laid out their argument in favor of a strong central government in the *Federalist Papers*. Anonymity both protected these Federalists from threats of violence and charges of treason, corrup-

except California, and that has a pedigree dating back to the end of the 19th century").

125 *Id.* at 341–42.

126 *Id.* at 341.

127 *Id.* at 359–69 (Thomas, J., concurring).

128 *See supra* note 57 and accompanying text.

tion, and sedition[129] and assured that readers would consider the validity of their arguments without suspicion of the specific motivations of the authors. These rationales are no less compelling today and, in the name of free speech, should be protected whenever possible.

1. Retaliation

There are any number of reasons why a speaker may wish to remain anonymous. He or she may be motivated by fear of economic, political,[130] or even physical retaliation.[131] The proponent of a controversial topic may wish to remain anonymous for fear of social ostracism or simply out of a desire to retain some sense of privacy.[132] For these reasons, labor laws prohibit employers from nosing out union organizers in order to prevent retaliation[133] and our voting system assures that "everyone may vote in secret (our adoption of the Australian ballot came from awareness that disclosure could affect political support)."[134]

The requirement that one identify himself at the moment of the communication opens up the possibility of "heat of the moment" retaliation.[135] In contrast, requiring the speaker to identify himself either before or after the communication is less likely to result in retaliatory action.[136] The circumstances surrounding Margaret McIntyre's advocacy, "an individual passing out leaflets in a school board referendum, which might involve face-to-face contact in some circumstances—are significantly different from the circumstances to which most disclosure statutes apply."[137] By requiring source identification to be included with the material, state statutes like Indiana Code section 3-9-3-2.5 have increased the possibility of immediate harassment or, worse, physical retaliation.

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129 *See* Turley, *supra* note 13, at 58–59.

130 *McIntyre*, 514 U.S. at 341.

131 *See* Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 198 (1999) (describing how those wearing mandatory identification badges feared physical retaliation when circulating controversial petitions).

132 *McIntyre*, 514 U.S. at 342.

133 Majors II, 361 F.3d 349, 356 (7th Cir. 2004) (Easterbrook, J., *dubitante*).

134 *Id.* (Easterbrook, J., *dubitante*).

135 *See Buckley*, 525 U.S. at 199.

136 *Id.* (noting that identification (in this circumstance an affidavit) was not immediately available to the reader and thus less likely to be used for retaliation against the speaker).

137 ELIZABETH GARRETT & DANIEL A. SMITH, VEILED POLITICAL ACTORS: REAL THREAT TO CAMPAIGN DISCLOSURE STATUTES 14 (USC-Caltech Center for the Study of Law and Politics, Working Paper No. 13, 2004), *available at* http://lawweb.usc.edu/cslp/papers/GarrettSmithVPA12.pdf.

Disclaimer laws may also have the effect of increasing the likelihood of political retaliation against grassroots advocates. As *Majors II* notes, "[s]everal cases, signally *McIntyre* itself, expressly or implicitly contrast the fragility of the small, independent participant in political campaigns with large corporations or other organizations."[138] To the extent that we continue to value the protection of small, independent participants against retaliation, we should continue to recognize the disparate impact of disclaimer laws on such individuals.

Throughout history, those in power have attempted to learn the identity of their political opponents in the hopes of using that power to silence opposition. In 1779, the Continental Congress attempted to discover the identity of "Leonidas," an anonymous writer who had criticized the Congress for "causing inflation throughout the States and for engaging in embezzlement and fraud."[139] Justice Thomas's concurring opinion in *McIntyre* recounts numerous examples of early government actions taken to discover the identity of anonymous writers in an attempt to silence political dissent.[140] As the facts of *McIntyre* show, individuals are particularly vulnerable to such attacks. Bradley A. Smith writes that "Margaret McIntyre had been opposing a local school millage: school board officials filed the complaint against her after the election, which suggests their primary aim was retaliation."[141] Disclaimer requirements have a different impact on the free speech of grassroots, individual advocates than do disclosure laws because they allow far more of such advocacy to be regulated.

BCRA requires that an individual spend or contribute a minimum threshold amount towards an "electioneering communication" before having to report his or her identity to the FEC,[142] thus lessening the reporting burden on smaller, individual efforts, as well as the administrative burden on the FEC itself. In contrast, the disclaimer statute in *Majors II* required action only by the advocate and not by the government,[143] thus lessening the bureaucratic burden required of both the government and the speaker. By decreasing the overall

138 *Majors II*, 361 F.3d at 355 (citing multiple sources).

139 *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 361 (1995) (Thomas, J., concurring in the judgment). Leonidas was actually Dr. Benjamin Rush. *Id.* (Thomas, J., concurring in the judgment).

140 *Id.* at 360–67 (Thomas, J., concurring in the judgment).

141 BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 222 (2001).

142 2 U.S.C. § 434(f)(1)–(2) (Supp. II 2002).

143 Section 3-9-3-2.5 of the Indiana Code requires the speaker to identify him or herself in a clear and conspicuous manner within the material being distributed, but requires no further action either in concert with or on behalf of the government. IND. CODE ANN. § 3-9-3-2.5 (Michie Supp. 2002).

burden on both parties, the statute was able to incorporate much smaller advocacy efforts within its scope.

Although the Indiana statute contained a narrow exception for individuals distributing 100 pieces of material or less,[144] such an exception is a far cry from the minimum $1000 threshold set in BCRA and therefore implicates a far greater amount of independent advocacy. By requiring independent and individual advocates to identify themselves, disclaimer statutes increase the potential for political or governmental retaliation against such speakers. This is particularly disturbing because it increases the possibility of retaliation against those who can least afford to defend themselves and are least likely to have corruptive influence.

2. Source Bias

The second justification for anonymous speech protection is the danger of source bias. As stated in *McIntyre*,

> [o]n occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent.[145]

One of the reasons the authors of the *Federalist Papers* wrote under the name Publius was to assure that the reader would evaluate their arguments without consideration of the source.[146] Thus, James Madison, when writing as Publius, could be assured that Northerners reading his ideas would not discount them simply because he was from Virginia.[147]

As Aristotle once wrote,

> persuasion is achieved by the speaker's personal character when the speech is so spoken as to make us think him credible. We believe good men more fully and more readily than others: this is true gen-

144 *Id.* § 3-9-3-2.5(a)(9).

145 *McIntyre*, 514 U.S. at 342.

146 *See* SMITH, *supra* note 141, at 224 ("One reason that the *Federalist Papers* were published anonymously was to force readers to focus on the arguments therein, rather than on attacking the writers.").

147 Majors II, 361 F.3d 349, 357 (7th Cir. 2004) (Easterbrook, J., *dubitante*) ("Instead of having to persuade New Yorkers that his roots in Virginia should be overlooked, Madison could present the arguments and let the reader evaluate them on merit.").

erally whatever the question is, and absolutely true where exact certainty is impossible and opinions are divided.[148]

And so while it is true that we may trust a speech more readily when we know and respect its source, the corollary is also true. When we know the source and, for whatever reason, discount its character, we attribute our own biases and preconceived notions to its message regardless of merit. A student note, for example, carries less authoritative weight than an article by an esteemed law professor; yet the merits of the argument may still be worthy of our attention—after all, the law students of today are the professors of tomorrow.

In our modern political environment, information sources must compete with hundreds of other voices, all jockeying for precious time and attention.[149] Judgments about sources are hastily made and agendas are quickly suspected. Even our most venerated journalistic sources are accused of slanting the news to further their own agendas[150] and sometimes admit as much.[151]

In a similar sense, a pamphlet from the ACLU may be assumed by the reader to espouse a liberal viewpoint, while that very same pamphlet with a different organization's name attached (or no name at all) could be interpreted as being conservative. A speaker wishing to convince his target of his point might then do well to mask his or her identity so as to force the reader to focus on the relative worth of the message alone. In this context, disclaimer requirements form an undue burden on the speaker's First Amendment rights because they intrinsically link the speaker to the message, lessening the chances that some information may be read or properly considered. Disclosure requirements, in contrast, allow the speaker to be separated from the speech to allow the merits of the argument to stand on their own.

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148 ARISTOTLE, *Rhetoric*, in 2 THE COMPLETE WORKS OF ARISTOTLE 2152, 2155 (J. Barnes ed., 1984).

149 In the 2004 presidential election, over $334 million was spent on political television advertising from April 1–September 31, with over 400,000 individual advertisement airings. TNS Media Intelligence, *Findings Memo: Election '04: Issues in Political Advertising* (2004), *available at* http://206.103.228.140/publications/1004_election_findings.pdf; *see also* Nick Anderson, *TV Ad Spending Soars as Messages Turn Shrill*, L.A. TIMES, Oct. 19, 2004, at A14 (reporting that presidential television advertising spending had approached $500 million and broken all previous spending records).

150 *See generally* BERNARD GOLDBERG, BIAS: A CBS INSIDER EXPOSES HOW THE MEDIA DISTORT THE NEWS (2001) (noting the pervasiveness of bias in the mainstream media).

151 *See* Daniel Okrent, Editorial, *Is the* New York Times *a Liberal Paper?*, N.Y. TIMES, July 25, 2004, § 4, at 2.

B. States' Interests in Reporting Requirements

1. Fully Informed Electorate

One justification for disclaimer requirements are that they provide the electorate with information about the source of the communication, thus allowing the reader to better evaluate the credibility of the source. This justification was provided by both Nevada and Indiana in *Heller*[152] and *Majors II*,[153] respectively, in defense of their disclaimer provisions. However, as *McIntyre* states,

> [t]he simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit. Moreover, in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the document's message. Thus, Ohio's informational interest is plainly insufficient to support the constitutionality of its disclosure requirement.[154]

While identification of the author of political advocacy may provide the reader with greater reason to believe or disbelieve her message, there is no reason why the state should mandate the inclusion of such information. Readers understand that anonymous advocacy may have dubious origins and will accord it an appropriate level of skepticism. To hold otherwise is to discredit the ability of the average citizen to evaluate anonymous literature and to determine what role that anonymity plays in the credibility of the information.[155]

Furthermore, although arguments are made that disclaimers increase the information available to the voting public, the exact opposite may be true. Requiring a speaker to reveal his or her identity will, in some cases, discourage the voices of those who would speak their minds but for the requirement. Because of the potential for social ostracism, harassment, or retaliation that identification disclaimers pose, many potential speakers may be dissuaded from speaking their

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152 ACLU v. Heller, 378 F.3d 979, 993 (9th Cir. 2004).

153 361 F.3d 349, 351–52 (7th Cir. 2004).

154 McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 348–49 (1995).

155 New York v. Duryea, 351 N.Y.S.2d 978, 996 (App. Div. 1974).

> Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is 'responsible', what is valuable, and what is truth.

Id.

minds. By discouraging these voices, the state is therefore lessening the dialogue available to the prospective voter, and in such a circumstance, providing the electorate with less information with which to form its political opinions.[156]

2. Preventing Corruption (or the Appearance Thereof)

The electoral process is a sacred institution and one certainly worth protecting from improper influence. Source identification serves two purposes: it assures that a statement will not be falsely attributed to the candidate (which I will call ventriloquism) and prevents quid pro quo corruption.

a. Ventriloquism

In the most recent presidential campaign, a group calling itself the Swift Vets and POWs for Truth ran television ads seeking to discredit many of candidate John Kerry's claims regarding his service in Vietnam. The Swift Vet group was quickly attacked by Senator Kerry's staff as working illegally with the Bush Administration, in violation of FEC laws. Indeed, even when the identification of a speaker is known and the funding made public, there still may be accusations of wrongdoing and the belief that, in fact, the candidate himself is behind the speech. Anonymity, it is argued, increases the likelihood that the audience will mistakenly attribute the words of the anonymous speaker to a particular candidate.[157] Given the number of restrictions and disclaimers candidates must themselves place on advertising and campaign literature, it seems again odd that literature that is without such information would be mistakenly attributed to the candidate. Furthermore, in the same sense that we must trust the electorate in determining the credibility of anonymous sources, we should trust them at least enough to be able to determine what is and what is not sponsored by a particular candidate.

b. Quid Pro Quo Corruption

"The Supreme Court tells us that the purpose of [disclosure] is to 'deter actual corruption' and 'detect any postelection special favors.'"[158] As Chief Justice Burger's opinion in *Buckley* states: "I . . . agree fully with the broad proposition that public disclosure of contributions by individuals and by entities—particularly corporations and

156 *Majors II*, 361 F.3d at 353.
157 *McIntyre*, 514 U.S. at 383–84.
158 SMITH, *supra* note 141, at 223.

labor unions—is an effective means of revealing the type of political support that is sometimes coupled with expectations of special favors or rewards."[159]

Assuming that the state does have a legitimate interest in identifying the source of funding for advocacy for the purposes deterring corruption, how does a disclaimer provide any more protection to the public than a disclosure? If anything, a disclaimer provides less information, as disclosure of identification to a public agency provides that agency with the ability to aggregate the amount and frequency of funding (or ads, communications, etc.).[160] "[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity."[161] Furthermore, disclosure provides "an essential means of gathering the data necessary to detect the violations of the contribution limitations."[162]

In contrast, a flyer with the name and address of the person funding a pamphlet effort does little to inform the general public of potential corruptive elements in their midst. We do not know if that flyer is one of 100 or 100,000. Further, disclaimers do not tell us if this batch of pamphlets is the first of the campaign or the fiftieth. Because disclaimers do not provide any information regarding the scope or size of the electioneering effort, they provide little in the way of information to the general public or to government agencies that would deter or help investigate potential corruptive activities.

3. Prevention of Fraud and Mudslinging

As Justice Scalia points out in his dissent, anonymity may increase the frequency of impropriety in the campaign process.[163] By allowing the author to withhold his identity, and thus remain unaccountable for his statement, there may be an increase in the frequency of fraud, libel, and "character assassination."[164] Justice Scalia states:

> It is not unheard-of for campaign operatives to circulate material over the name of their opponents or their opponents' supporters (a violation of election laws) in order to attract or alienate certain in-

159 Buckley v. Valeo, 424 U.S. 1, 236 (1976) (Burger, C.J., concurring in part and dissenting in part).

160 "Curriers of favor will be deterred by the knowledge that all expenditures will be scrutinized by the Federal Election Commission and by the public for just this sort of abuse." *McIntyre*, 514 U.S. at 356.

161 *Buckley*, 424 U.S. at 67.

162 *Id.* at 68.

163 *McIntyre*, 514 U.S. at 382 (Scalia, J., dissenting).

164 *Id.* (Scalia, J., dissenting).

> terest groups. . . . How much easier—and sanction free!—it would be to circulate anonymous material (for example, a really tasteless, though not actionably false, attack upon one's own candidate) with the hope and expectation that it will be attributed to, and held against, the other side.[165]

What Justice Scalia fails to distinguish, however, is how mudslinging anonymously is any different from doing so vaguely or perhaps mysteriously. If a group deciding to call itself the Action Committee for the Liberal Party is really a group of Republicans,[166] how is the situation any worse if the material contains no identification at all? If nothing else, people will see that the material is anonymous and will be even more skeptical of its source.[167] Granted, an individual advocate might be less willing to distribute false information if he was required to include his real name on the face of the material. However, it also stands to reason that one willing to fraudulently distribute false or libelous information is unlikely to comply with such a requirement to begin with. Moreover, pseudonyms or materially false identifiers could be used in place of the author's real name, leading to perhaps greater confusion among the electorate. Readers of anonymous material are at least put on guard as a result of the source's anonymity—not so for material which contains a disclaimer, but one which is fraudulently or even vaguely created. In such a circumstance, a reader is lulled into a false sense of security in the mistaken belief that the source is who they say they are.

CONCLUSION

The difference between disclaimer requirements and disclosure requirements should not be overlooked. Disclaimer requirements are a far greater intrusion on free speech than disclosure requirements, while offering less benefit to the states' interests. By pointing out these differences, however, I do not mean to suggest that all political advocacy should then be subject to disclosure laws. Such a finding would eliminate all anonymous political speech and completely disregard *McIntyre*'s holding. Moreover, requiring everyone who wished to practice political advocacy to report his or her identity to a centralized agency is impractical and unfair. If taken to its logical conclusion, such a requirement would either create an enormous bureaucracy having to accommodate every single leaflet campaign or would restrict

165 *Id.* at 383 (Scalia, J., dissenting).

166 *Id.* (Scalia, J., dissenting).

167 *See* New York v. Duryea, 351 N.Y.S.2d 978, 996 (App. Div. 1974); *supra* text accompanying note 148.

all political speech to only the largest and most sophisticated campaigns.

Rather, the type of spontaneous, grassroots political activity practiced by Mrs. McIntyre is at the heart of our free speech protections and should be defended whenever possible.[168] What I mean to suggest is that when the states do enact laws requiring the identification of speakers, they should be mindful of the disparate impact on free speech that disclaimer requirements create and should choose disclosure whenever feasible.

With all due respect to the Ninth Circuit, I am not sure that the Supreme Court has crossed any "Rubicon" in *McConnell* concerning disclosure versus disclaimer. As the confusion in *Majors II* shows, the Court should clarify the state of express versus issue advocacy post-*McConnell* and to what extent *McIntyre* remains good law. Until that day, *McIntyre*'s prohibition on issue advocacy disclaimer requirements is and should remain good law.

As the *Heller* court points out, *McIntyre* has not been overturned and remains good law[169]—at least for now. However, the Supreme Court's failure to discuss *McIntyre* in *McConnell* leaves some uncertainty as to the future of anonymous pamphleteering. What remains most uncertain after *McConnell* is the state of express advocacy versus issue advocacy, or better stated, whether there remains any such distinction. To the extent that there remains a difference between the two, *McIntyre*'s prohibition on disclaimer requirements should be given its proper weight as precedent over all issue advocacy communications.

Disclaimer requirements are particularly intrusive because they are a proscription on speech itself, unless the speech conforms to governmental regulations.[170] Disclaimer requirements also have the effect of deterring some speakers from participating in advocacy for fear of immediate retaliation. Disclaimer laws are presumably popular with state legislatures because they are relatively burden free; they require government effort and spending only to the degree necessary for enforcement. Disclosure laws are presumably less popular with legislatures because they require state bureaucratic efforts and funding to execute. However, protecting the First Amendment is not a matter of pragmatism.[171] When less intrusive means are available, the

168 *See McIntyre*, 514 U.S. at 347 (characterizing Mrs. McIntyre's political speech as "the essence of First Amendment expression").

169 ACLU v. Heller, 378 F.3d 979, 987–98 (9th Cir. 2004).

170 *See id.* at 987.

171 *See* Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam).

state should defer to free speech and pursue those avenues whenever possible.