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**THEORETICAL SPLITS AND CONSISTENT RESULTS ON
ANONYMOUS POLITICAL SPEECH: *MAJORS v. ABELL* AND *ACLU
OF NEVADA v. HELLER***

I. INTRODUCTION

In August of 2005, the citizens of Missouri voted to amend their state constitution to define marriage as a union between a man and a woman.¹ While the amendment was passed by a wide margin,² the months preceding the vote were ones of lively debate on the issue.³ Organizations like churches and civil rights groups advanced their stances through television commercials and billboards. Private individuals also found themselves especially active in the political discourse surrounding the issue, expressing their views on bumper stickers, around the water cooler, and at the corner tavern.

About two weeks before the election, when it seemed that the political debate was at its height, the residents of my neighborhood found, on the windshield of their cars, small white pamphlets that appeared to have been printed on a home computer. The fliers urged all to vote against gay marriage for the sake of protecting their souls on Judgment Day, because, as the flier argued, “homosexuality is an abominable sin that attaches even to those who support it.” The small white paper listed several rather extreme rationales for supporting the amendment, most unmentioned by any large groups that were advocating through traditional media. The pamphlet was unquestionably provocative and incited debates and speculations among neighbors. It did not, however, provide any indication as to the identity of its author or distributor.

Under Missouri law, this mystery pamphleteer’s conduct subjected her to prosecution for committing a class A misdemeanor—Missouri, along with nearly every other state, criminalizes this form of anonymity.⁴ While the regulations vary in their breadth, these campaign statutes generally require that

1. Matthew Franck, *Foes of Gay Marriage Hope Vote is Catalyst*, ST. LOUIS POST-DISPATCH, Aug. 5, 2004, at A1. The measure drew more votes than any other issue or race on the ballot. *Id.*

2. The constitutional amendment defining marriage as “only between a man and a woman” passed with seventy-one percent support. *Id.*

3. Matthew Franck, *Friends and Foes Mobilize on Gay Marriage Measure*, ST. LOUIS POST-DISPATCH, July 26, 2004, at A9 (describing the large-scale grass-roots efforts by local groups supporting and opposing the amendment).

4. In 1995, forty-nine states had passed statutes like those described *infra*. *McIntyre v. Ohio Election Comm’n*, 514 U.S. 334, 377 n.2 (1995) (Scalia, J., dissenting).

an author or sponsor disclose his or her identity on political literature pertaining to elections or ballot initiatives.⁵ However, several of these statutes have also been declared unenforceable as unconstitutional encroachments on First Amendment rights.⁶ So, while the mystery pamphleteer would be committing a crime, some courts would protect her actions, as she is exercising one of her most fundamental freedoms under the Bill of Rights.

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”⁷ The text of the Amendment is deceptively simple. Justice Hugo Black was fond of the phrase “no law means no law.”⁸ Still, Congress has repeatedly regulated free speech, and the courts, along with Justice Black himself, have found many of those regulations to be justified.⁹ On its face, the clause may appear to regulate only spoken and

5. For example, Missouri Revised Statute section 130.031(8) states that [a]ny person publishing, circulating, or distributing any printed matter relative to any candidate for public office or any ballot measure shall on the face of the printed matter identify in a clear and conspicuous manner the person who paid for the printed matter with the words “Paid for by” followed by the proper identification of the sponsor pursuant to this section.

MO. REV. STAT. § 130.031(8) (2004). The section goes on to exempt several articles, including personally created signs displayed at the home and articles and commentaries published in newspapers and periodicals. *Id.* It is also a violation of the statute to purposely provide false, misleading, or incomplete information in complying with the statute. *Id.* § 130.031(11). Any person who purposely violates these sections is guilty of a class A misdemeanor, which subjects her to up to one year of imprisonment. *Id.* §§ 130.081(1), 558.011(1)(5) (2004). There is also a federal campaign disclaimer statute. 2 U.S.C. § 441(d) (2000).

6. See *ACLU of Nev. v. Heller*, 378 F.3d 979 (9th Cir. 2004) (discussed *infra* note 92). Other state disclosure statutes have also been declared unconstitutional, but not as First Amendment violations. For example, in *Commonwealth v. Dennis*, 329 N.E.2d 706 (Mass. 1975), the Supreme Judicial Court of Massachusetts considered a statute that made it a crime to write or distribute any circular designed to aid or defeat any candidate or any question submitted to the votes unless it contained the name of the voter responsible. *Id.* at 707. The court struck down the statute on equal protections ground. *Id.* at 707–10. See Erika King, Comment, *Anonymous Campaign Literature and the First Amendment*, 21 N.C. CENT. L.J. 144, 160 n.102 (1995), for a description of similar court decisions.

7. U.S. CONST. amend. I.

8. DANIEL A. FARBER, *THE FIRST AMENDMENT* 1 (1998). Justice Black was an absolutist free speech supporter, who regarded the First Amendment as crucial to the survival of democracy.

For the Judge, the “important thing was that the people have an opportunity to hear all sides of [an issue] and to decide freely what laws they want to live by. . . . It was this view that led [him] to place such heavy emphasis upon the First Amendment as the basic law guaranteeing the right of the people to open discussion of public issues.” The underlying premise of the First Amendment was that, if the people heard all sides of an issue, however controversial or heretical the ideas might be, they would choose “the better, wiser, more beneficial of alternative courses.”

HOWARD BALL, *HUGO L. BLACK: COLD STEEL WARRIOR* 189 (1996) (alterations in original) (footnotes omitted).

9. FARBER, *supra* note 8, at 1.

written expression, but other forms of expression, like symbolic expression, have fallen within the purview of First Amendment protection.¹⁰ The First Amendment even extends protection to some particular “absences of expression”—anonymous speech.

The right to anonymous speech is closely tied to the topic of political expression, where a speaker’s identity can have an exceptional influence on the message’s recipients.¹¹ As the Supreme Court has recognized, “[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind,”¹² and, despite the growing prevalence of consumer registration procedures and heightened security measures that demand self-identification, anonymity has remained a meaningful aspect of the day-to-day life of most ordinary citizens.¹³

In 1995 the Supreme Court decided the controlling case on anonymous political speech, *McIntyre v. Ohio Elections Commission*.¹⁴ In *McIntyre* the Supreme Court considered a challenge to an Ohio statute that required any written communication designed to influence voters in an election to contain the name and address of the party responsible for paying for or producing the communication.¹⁵ The Court held that the statute was an unconstitutional abridgement of the right to engage in anonymous political speech.¹⁶ The *McIntyre* decision left open several issues regarding political speech and anonymity, and lower courts have struggled over what factual distinctions might produce a different outcome on the constitutionality of this type of statute.

This Note examines the link between anonymous speech and political expression by analyzing two recent federal court of appeals decisions, *Majors*

10. *Id.*; see, e.g., *Spence v. Washington*, 418 U.S. 405, 414–15 (1974) (holding that a college student’s display of an American Flag upside down with a peace sign on it was protected symbolic expression under the First Amendment). The development of the Courts’ jurisprudence on anonymous speech will be analyzed *infra*.

11. “[I]n the field of political rhetoric . . . ‘the identity of the speaker is an important component of many attempts to persuade.’” *ACLU of Nev. v. Heller*, 378 F.3d 979, 988 (9th Cir. 2004) (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994)).

12. *Talley v. California*, 362 U.S. 60, 64 (1960).

13. See Lee Tien, *Who’s Afraid of Anonymous Speech? McIntyre and the Internet*, 75 OR. L. REV. 117, 117 (1996) (“Unless you’re a celebrity, you’re effectively unknown as you schlepp through the big city. Suicide hotlines, Alcoholics Anonymous, and the secret ballot are conventional examples of socially legitimate, institutionalized anonymity practices.”). The everyday experience of anonymity is especially relevant in most law schools, where the practice of blind grading is meant to ensure, at least in part, that a student’s actual performance on the exam, and not any improper influence, is the exclusive factor in determining her final score.

14. 514 U.S. 334 (1995).

15. *Id.* at 338.

16. *Id.* at 357.

*v. Abell*¹⁷ and *ACLU of Nevada v. Heller*.¹⁸ Both decide the constitutionality of state statutes that limit an individual's or group's right to engage in anonymous political speech by requiring those parties to include their identity on any political advertising materials they produce.¹⁹ In *Majors*, the Seventh Circuit upheld an Indiana statute requiring political advertising to identify the people who paid for the advertising.²⁰ Six months later, in *Heller*, the Ninth Circuit struck down a similar Nevada statute.²¹ The Ninth Circuit did make some attempt to distinguish its ruling from that of *Majors*,²² but the two opinions are openly at odds with each other in several ways.²³

To lay a foundation for analyzing *Majors* and *Heller*, this Note first describes the significant role of anonymity in the formation and early history of this country. It then provides a brief overview of the modern Supreme Court case law on anonymous political speech, with a more thorough explanation and analysis of *McIntyre*. This Note next reviews some lower court decisions on anonymous political speech since *McIntyre*, which illustrate some of the questions and problems that *McIntyre* left unresolved.

The remainder of the Note will focus on the Seventh Circuit's decision in *Majors* and the Ninth Circuit's decision in *Heller*. First, it will summarize the facts and holdings of the cases, as well as the analyses used by the two courts. The Note will then contrast the courts' approaches to resolving their similar cases and will argue that, while the outcomes of the two cases are reconcilable, the courts' decisions were driven by contrasting legal and theoretical presumptions, illustrating two very different approaches to state statutes that regulate political communications by requiring the messenger to disclose her identity on the communication. After drawing out the more significant distinctions between the decisions, this Note concludes by arguing that upon the Supreme Court's re-confrontation with the issue, it should follow the Ninth Circuit's preferable approach to anonymous political speech.

II. BACKGROUND

A. *History of Anonymous Speech Under the First Amendment*

In cases questioning anonymity and the First Amendment, the historical use of anonymity, especially by the Constitution's framers, has been

17. 361 F.3d 349 (7th Cir. 2004).

18. 378 F.3d 979 (9th Cir. 2004).

19. *Majors*, 361 F.3d at 350; *Heller*, 378 F.3d at 981.

20. 361 F.3d at 355.

21. 378 F.3d at 1002.

22. *Id.* at 1000–02.

23. *See infra* notes 174–222 and accompanying text.

persuasive to and regularly referenced by modern courts.²⁴ The framers' exact intent regarding the meaning and importance of the First Amendment is unclear.²⁵ However, the Supreme Court has interpreted the purpose of the First Amendment as closely tied to the political process, ensuring a lively marketplace of ideas: “[It was intended] ‘to secure the widest possible dissemination of information from diverse and antagonistic sources’ and ‘to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”²⁶

Judging from the history of the Framers' own actions when forming the union, it is likely that their notions of free speech were meant to include anonymous speech.²⁷ “[T]he early political climate of the United States was replete with anonymous writings.”²⁸ For example, perhaps the most famous lone pamphleteer, Thomas Paine, published his *Common Sense*—known as the work that first inspired many Americans to consider separating from Great Britain—under the pseudonym of “An Englishman.”²⁹ Alexander Hamilton, John Jay, and James Madison originally published the Federalist Papers under

24. See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 343 (1995) (referring to the “respected tradition of anonymity in the advocacy of political causes”) (footnote omitted); *Talley v. California*, 362 U.S. 60, 64 (1960) (“Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.”); *State v. N.D. Educ. Ass'n*, 262 N.W.2d 731, 735 (N.D. 1978) (“It is worth remembering that among the glories of our nation’s history are documents written under pseudonyms by men who were to become the second, third and fourth Presidents . . . the first Chief Justice and the first Secretary of the Treasury and Secretary of State of the United States.”); *People v. Duryea*, 351 N.Y.S.2d 978, 989 (N.Y. App. Div. 1974) (“Anonymity has been, historically, the medium of dissidents, shielding them from the retaliatory power of the establishment and, whether their fears of reprisal were justified or not, encouraging them to express unpopular views. Anonymous writings have an honored place in our political heritage.”).

25. The legislative record surrounding the adoption of the First Amendment is unhelpful. FARBER, *supra* note 8, at 9–10.

26. *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (citations omitted); see also *McIntyre*, 514 U.S. at 346 (“[A] major purpose of [the] Amendment was to protect the free discussion of governmental affairs.”).

27. For a persuasive argument that history almost certainly proves that the Framers originally viewed anonymity as a vital part of free speech, see Jonathan Turley, *Registering Publius: The Supreme Court and the Right to Anonymity*, CATO SUP. CT. REV. 57, 58–61 (2001–2002). But see the dissenting opinion of Justice Scalia in *McIntyre*, 514 U.S. at 371–85. There, Justice Scalia concluded that historical evidence was inconclusive as to whether anonymous political speech merited constitutional protection. *Id.* at 373–76; see also Amy Constantine, Note, *What’s in a Name? McIntyre v. Ohio Elections Commission: An Examination of the Protection Afforded to Anonymous Political Speech*, 29 CONN. L. REV. 459, 466–67 (1996).

28. Jennifer B. Wieland, Note, *Death of Publius: Toward a World Without Anonymous Speech*, 17 J.L. & POL. 589, 591 (2001).

29. *Id.* at 591–92.

the joint pseudonym of “Publius.”³⁰ Their opponents in discourse also published under various pseudonyms.³¹ Benjamin Franklin regularly wrote under assumed names.³² This tradition of using anonymity when attempting to persuade the public continued into the early years of this country.³³

However, even the earliest use of anonymity had its controversies. While the use of anonymity in the country’s formational years is now regarded as heroic,³⁴ it was met with its fair share of opposition at the time.³⁵ For example, “[t]he Continental Congress tried to uncover the identity of the writer known as ‘Leonidas’ after he accused Congress of corruption and ineptitude.”³⁶ In New Jersey, early legislators sought out the identity of “Cincinnatus” to charge him with sedition.³⁷ The printer of “Cincinnatus” would not reveal the author’s identity, declaring: “Were I to comply . . . I conceive I should betray the trust reposed in me, and be far from acting as a faithful guardian of the Liberty of the Press.”³⁸

B. *Modern Supreme Court Decisions on Anonymous Political Speech*

Despite attacks, the tool of anonymity has continued to be a regular choice of those wishing to express their opinions and persuade others.³⁹ Despite the continuous use of anonymity, it was more than 170 years after the first Federalist Papers were published before the Supreme Court recognized a right to anonymity. In 1958, the Court tentatively affirmed a right to anonymous group membership in *NAACP v. Alabama ex rel. Patterson*.⁴⁰ There, the Court held that the state could not compel the NAACP to turn over its membership lists because it would violate the members’ rights to freely associate in

30. *Id.* at 592.

31. *Id.*

32. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341 n.4 (1995) (citing 2 W. BRUCE, BENJAMIN FRANKLIN SELF-REVEALED: A BIOGRAPHICAL AND CRITICAL STUDY BASED MAINLY ON HIS OWN WRITINGS ch. 5 (2d ed. 1923)).

33. “It has been asserted that, between 1789 and 1809, six presidents, fifteen cabinet members, twenty senators, and thirty-four congressmen published anonymous political writings.” Wieland, *supra* note 28, at 592 (citing Comment, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70 YALE L.J. 1084, 1085 (1961)).

34. “Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.” *McIntyre*, 514 U.S. at 357.

35. *See* Turley, *supra* note 27, at 60.

36. *Id.* (citing Justice Thomas’ concurrence in *McIntyre*, 514 U.S. at 361–62).

37. *Id.*

38. *Id.* (quoting R. HIXON & ISAAC COLLINS, A QUAKER PRINTER IN 18TH CENTURY AMERICA 95 (1968)).

39. For example, Samuel Clemens (Mark Twain), Mary Ann Evans (George Eliot), and Eric Blair (George Orwell) are among the many who have chosen, for various reasons, to publish under pseudonyms. *See, e.g.*, Turley, *supra* note 27, at 57.

40. 357 U.S. 449, 466 (1958); *see also* Wieland, *supra* note 28, at 594–95. The first of the Federalist Papers was printed in 1787. THE FEDERALIST NO. 1 (Alexander Hamilton).

privacy.⁴¹ In 1960, the Court addressed anonymous speech directly in *Talley v. California*,⁴² discussed below. Since then, the Court has gradually begun to fill in gaps by defining what guarantees the First Amendment provides with respect to anonymous speech.

1. *Talley v. California*

In *Talley v. California*, the Court considered the constitutionality of a city ordinance that forbade any person from distributing any handbill that did not have printed on it the name of the person who “printed, wrote, compiled or manufactured the same” and the name of the person who “caused the same to be distributed.”⁴³ Justice Hugo Black, an unapologetic supporter of free speech, wrote for the majority.⁴⁴ The Court held that the statute was unconstitutional, reasoning that it was an overbroad method of achieving the state’s purported interests of protecting against fraud, false advertising, and libel.⁴⁵ The Court recognized the historical importance of anonymous speech⁴⁶ and rationalized that the ordinance would greatly hinder freedom of expression because the “fear of reprisal might deter perfectly peaceful discussions of public matters of importance.”⁴⁷

2. *Buckley v. Valeo*

In the highly complex *Buckley v. Valeo*,⁴⁸ the Court ruled that some rights to anonymity could be sacrificed for compelling state interests. In *Buckley*, the Court confronted various challenges to the Federal Election Campaign Act of 1974.⁴⁹ The Act, passed after the Watergate scandal, was motivated by concerns about corruption during the Nixon Administration and a general belief that the rising costs of campaigns forced politicians to spend more time fundraising than tending to their official duties.⁵⁰ One set of provisions regulated contribution and expenditure limits, a second set imposed disclosure and reporting requirements, and a third set established a system of public funding for presidential campaigns.⁵¹

41. *Patterson*, 357 U.S. at 466.

42. 362 U.S. 60 (1960).

43. *Id.* at 60–61 (quoting LOS ANGELES, CAL., CODE § 28.06 (1960)).

44. *Id.* at 60.

45. *Id.* at 63–65.

46. See *id.* at 64–65, for a lengthy discussion of significant anonymous writings throughout England and the United States during colonial times.

47. *Talley*, 362 U.S. at 65.

48. 424 U.S. 1 (1976).

49. *Id.* at 7; Pub. L. No. 93-443, 88 Stat. 1263.

50. See FARBER, *supra* note 8, at 234.

51. *Buckley*, 424 U.S. at 10–11.

The Court's treatment of the disclosure and reporting requirements was "an important step in anonymous speech jurisprudence."⁵² While the Court observed that contributing to a campaign is a form of expression and that a requirement forcing disclosure of contributions might deter some from contributing if they could not do so anonymously,⁵³ it nevertheless upheld the disclosure requirements of the statute because the governmental interests were sufficient to pass the test of "exacting scrutiny."⁵⁴

The *Buckley* decision did recognize expenditures and contributions as political speech and did allow for certain state abridgement of that political speech.⁵⁵ Still, as the Supreme Court would later make clear, it is not this type of "symbolic expression" that is closest to the heart of the rationale for First Amendment protection for anonymous speech because "even 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."⁵⁶

3. *McIntyre v. Ohio Elections Commission*

Almost twenty years after *Buckley*, the Supreme Court faced a different type of election regulation, but this time the government's interests were insufficient to justify the restrictions on free speech. In the landmark case of *McIntyre v. Ohio Elections Commission*,⁵⁷ the Court dealt with the issue of whether an Ohio statute that prohibited the distribution of anonymous campaign literature abridged the First Amendment right to freedom of speech.⁵⁸

a. Facts and Holding

In 1988, Margaret McIntyre appeared at a public meeting regarding a proposed school tax levy.⁵⁹ McIntyre, acting almost completely independently, distributed leaflets expressing her opposition to the tax levy.⁶⁰ While some of the leaflets identified McIntyre as the author, others were merely signed by "CONCERNED PARENTS AND TAXPAYERS."⁶¹ Several

52. Wieland, *supra* note 28, at 597.

53. *Buckley*, 424 U.S. at 68.

54. *Id.* at 60–84.

55. *Id.* at 64–69.

56. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 355 (1995).

57. *Id.* at 334. Justice Stevens delivered the opinion of the Court. *Id.* at 335. Justices Ginsburg and Thomas both concurred and filed separate opinions. *Id.* Justice Scalia filed a dissenting opinion, which Chief Justice Rehnquist joined. *Id.*

58. *Id.* at 336.

59. *Id.* at 337.

60. *Id.*

61. *McIntyre*, 514 U.S. at 337.

months later, a school official filed a complaint with the Ohio Elections Commission charging that McIntyre's distribution of the anonymous leaflets violated the Ohio statute at issue.⁶² The Commission imposed a fine of \$100.00.⁶³

The Supreme Court recognized that the actual monetary stakes in the case were quite low, but granted certiorari regarding the constitutionality of the statute because of the issue's great importance.⁶⁴ Unlike the city statute under fire in *Talley*, which prohibited all anonymous hand billing "in any place under any circumstances,"⁶⁵ Ohio's statute applied only "to unsigned documents designed to influence voters in an election."⁶⁶ Despite the Ohio statute's narrower scope, the Court decided that the reasoning of *Talley* supported its ultimate conclusion that the state's interests in protecting the electoral process—specifically, providing the electorate with relevant information and preventing fraudulent and libelous statements—did not justify the state's attempt to limit free speech.⁶⁷

The Court quickly disposed of Ohio's purported state interest of fostering an informed electorate by likening an author's identity to any other content that the author may choose to include or exclude.⁶⁸ "The 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."⁶⁹ Overall, the Court's rejection of this purported state interest revealed its stance that the electorate was fully capable of taking into consideration the anonymity of the message when evaluating the significance of that message.⁷⁰

b. Unfinished Business

While the Court made clear that it was extending protection to anonymous political speech under the First Amendment, and that Ohio's statute was certainly not narrowly tailored, it left a great deal unsaid about what might tip the constitutional scales for similar statutes.

The opinion implies an extensive list of factors that might cause a different outcome: a statutory exception for "individuals acting independently and using their own modest resources," regulatory coverage of exclusively candidate-

62. *Id.* at 338.

63. *Id.*

64. *See id.* at 340–41.

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

66. *McIntyre*, 514 U.S. at 344.

67. *Id.* at 348–51, 357. "[P]olitical speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse." *Id.* at 357.

68. *Id.* at 348–49.

69. *Id.* at 348.

70. Constantine, *supra* note 27, at 463.

related speech (and not ballot issues), a stronger temporal relationship between the election and the release of the message, an exception for speakers who fear reprisal, “a dollar threshold that would track campaign expenditure laws,” language tailored to regulate only false or misleading messages, and the “type of information the speaker must provide.”⁷¹ The Court’s shortcomings on clarity did not go unnoticed by the dissent or scholarly critics.⁷²

C. *Early Aftermath of McIntyre*

Justice Scalia, joined by Chief Justice Rehnquist, wrote a highly critical dissent in *McIntyre*, attacking several of the majority’s assumptions and conclusions.⁷³ Near the conclusion of his opinion, Justice Scalia scolded the majority for the practical problem of failing to announce a clear rule of law and forecasted an inevitable era of judicial uncertainty regarding anonymous political speech:

[A]fter having announced that this statute, because it “burdens core political speech,” requires “‘exacting scrutiny’” and must be “narrowly tailored to serve an overriding state interest,” (ordinarily the kiss of death), the opinion goes on to proclaim soothingly (and unhelpfully) that “a State’s enforcement interest might justify a more limited identification requirement.” . . . 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”! It may take decades to work out the shape of this newly expanded right-to-speak-incognito, even in the elections field.⁷⁴

71. *Id.* at 477, 477 nn.104–07.

72. *See id.* at 477–81; Richard L. Hasen, *The Surprisingly Easy Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 3 ELECTION L.J. 251, 252 (2004) (“Was the right to anonymous speech recognized in *McIntyre* limited to those persons engaging in face-to-face communications, leaving laws requiring disclosure in separately-filed reports constitutionally sound? Did it matter that the *McIntyre* plaintiff was a lone pamphleteer using modest personal resources, in which case *McIntyre* left undisturbed laws requiring disclosure in ‘other, larger circumstances?’ Did the *McIntyre* right to anonymity extend only to ballot measure elections and not to candidate elections?”).

73. *McIntyre*, 514 U.S. at 371–85. Justice Scalia challenged the majority’s conclusion that because the Framers engaged in anonymous political speech, it is clear that anonymous political speech was meant to fall within First Amendment protections. *Id.* at 372–73 (“But to prove that anonymous electioneering was used frequently is not to establish that it is a constitutional right.”). Instead, Justice Scalia put forth an ongoing history argument of constitutional interpretation, citing the forty-nine state statutes very similar to Ohio’s. *Id.* at 375–77 (“Such a universal and long-established American legislative practice must be given precedence, I think, over historical and academic speculation regarding a restriction that assuredly does not go to the heart of free speech.”).

74. *McIntyre*, 514 U.S. at 380–81 (citations omitted). Justice Scalia was especially critical of Justice Ginsburg’s concurring opinion, which stressed that “[i]n for a calf is not always in for a cow. . . . We do not thereby hold that the State may not in other, larger circumstances require the speaker to disclose its interest by disclosing its identity.” *Id.* at 358.

Nearly one decade has passed, and it appears that Justice Scalia's forecast is coming true. Legislatures have struggled with what to make of *McIntyre*,⁷⁵ as have the courts.

For example, in *State v. Doe*,⁷⁶ the Texas Court of Appeals held that a section of the state's election code, similar to that of Ohio in *McIntyre*, was an unconstitutional burden on free speech.⁷⁷ While the Texas statute would not apply to individuals acting independently with their own modest resources, the court did not find this factual difference worthy of distinguishing it from *McIntyre*.⁷⁸ In its analysis, the court found the statute to be a burden on core political speech,⁷⁹ subjected it to "exacting scrutiny,"⁸⁰ and recognized the

75. In his May 5, 1999 testimony before the House Subcommittee on the Constitution of the Committee on the Judiciary, David M. Mason, Commissioner of the Federal Election Commission, reviewed several of the lower court decisions applying *McIntyre*, advising Congress that it "would be well served to consider carefully how (if at all) to expand disclosure requirements, rather than simply treating more disclosure as automatically better. The trend in court decisions indicates that we face at least some risk of having even current disclosure requirements struck down or narrowed." *First Amendment and Restrictions on Political Speech: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 31 (1999) (statement of David M. Mason, Commissioner, Federal Election Commission). For a discussion of the variance in several state legislative responses to *McIntyre*'s holding, see Constantine, *supra* note 27, at 478–81.

76. 61 S.W.3d 99 (Tex. App. 2001).

77. *Id.* at 101. Section 255.001 of the Texas Election Code provided that a person may not enter into an agreement to publish political advertising that does not indicate in the advertising:

(1) that it is political advertising; (2) the full name of either the individual who personally entered into the contract or agreement with the printer . . . and (3) . . . the address of either the individual who personally entered into the agreement with the printer or publisher or the person that individual represents.

TEX. ELEC. CODE ANN. § 255.001 (2003).

78. *Doe*, 61 S.W.3d at 103.

A person's decision to [publish a political advertisement alone, without the involvement of another] severely limits his or her opportunity to engage meaningfully in the anonymous dissemination of political ideas to any significant portion of the electorate. . . .

At best, the statute prevents all but the most resourceful individuals from engaging in the publication of political advertising without revealing their identity.

Id.

79. *Id.* Exactly what type of speech is properly categorized as "core political speech" is a matter of controversy. Cass Sunstein has argued that speech that lies at the "core" of First Amendment protection is overtly "political speech"; that is, speech that is "both intended and received as a contribution to public deliberation about some issue." CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 130 (1993). Speech that is not "self-consciously political" lies outside the core. *Id.* at 152–54. For a criticism that Sunstein's conception of core political speech is far too narrow, see William Marshall, *Free Speech and the "Problem" of Democracy*, 89 NW. U. L. REV. 191, 194 (1994).

80. *Id.* (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995)).

state's interest in regulating elections as significant,⁸¹ but ultimately held that the statute was not "narrowly tailored" because each of the state's interests was already addressed in other legislation, stating that "[a] state cannot significantly infringe upon an individual's freedom of speech simply to obtain the ancillary benefit of detecting violations of other laws."⁸²

But, in *Seymour v. Elections Enforcement Commission*,⁸³ the Connecticut Supreme Court upheld the state's disclosure statute, even under the ordinary "kiss of death" of exacting scrutiny.⁸⁴ The court conducted the same balancing of the individual's right to engage in free speech and the state's interest in ensuring fair and honest elections.⁸⁵ Affording a significant deference to the state's interest in regulating elections,⁸⁶ the court found that all of the state interests—the "big three" of preventing fraud and corruption, assisting with the enforcement of other campaign laws, and informing voters—were compelling, and that the statute was narrowly tailored to meet those interests.⁸⁷ Grasping on to some of the factors left open in *McIntyre*, the Connecticut court found the statute was permissible because it did not regulate individuals acting independently⁸⁸ and because it pertained only to "communication discussing candidates for election or the solicitation of funds for political parties."⁸⁹

III. 2004 CIRCUIT SPLIT

A. Background

Seymour and *Doe*, discussed above, are only two examples of several lower court struggles to interpret *McIntyre*.⁹⁰ The struggle continued into

81. *Id.* at 103–04. The state put forth three main interests: the statute deterred and punished political corruption, served to notify the public of any allegiance a particular candidate might have with another publisher, and provided a method for detecting expenditures that appeared to be from individuals but actually came from corporations or Political Action Committees. *Id.* at 103; *see also* Wieland, *supra* note 28, at 611–12.

82. *Doe*, 61 S.W.3d at 106.

83. 762 A.2d 880 (Conn. 2000).

84. *Id.* at 884, 892. In his *McIntyre* dissent, Justice Scalia labeled the exacting scrutiny standard as "ordinarily the kiss of death." *McIntyre*, 514 U.S. at 380.

85. *Seymour*, 762 A.2d at 885.

86. *Id.* "Indeed, 'there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Id.* (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

87. *Id.* at 885–94.

88. *Id.* at 891.

89. *Id.* at 892. For a more extensive discussion of the difference between the regulations of candidate-related communications and issue-related communications, see discussion *infra* at notes 165–68 and accompanying text.

90. Compare *Doe v. Mortham*, 708 So. 2d 929, 934–35 (Fla. 1998) (interpreting a statute requiring any independent political advertisement to indicate the name and address of the person

2004, when *Majors v. Abell*,⁹¹ in the Seventh Circuit, and *ACLU of Nevada v. Heller*,⁹² in the Ninth Circuit, were decided six months apart. These two cases are clearly not the first decisions to contemplate state statutes that abridge citizens' rights to engage in anonymous political speech. *Majors* and *Heller* merit close analysis, however, because they highlight two prevalent post-*McIntyre* perspectives on anonymous political speech, as well as the major issues surrounding the topic.

The two courts conducted their analyses in light of a 2003 Supreme Court decision, *McConnell v. Federal Election Commission*⁹³ and differed in their conclusions on its import to the current body of jurisprudence on anonymous political speech. *McConnell* considered constitutional challenges to new disclosure rules in the Bipartisan Campaign Reform Act of 2002 (BCRA)⁹⁴ and will be explained further below.

B. Facts and Holdings of the Cases

1. *Majors v. Abell*

A group of candidates and individuals brought a constitutional challenge to a provision of the Indiana election laws that required any political advertising expressly advocating for the election or defeat of a candidate to include

who paid for the advertisement as content-neutral and distinguishing it from *McIntyre* because the Florida court interpreted the statute as not applying to lone individuals), and *Gable v. Patton*, 142 F.3d 940, 944–45 (6th Cir. 1998) (finding a statute requiring all advertisements advocating for a particular candidate to identify their sponsor, when subjected to strict scrutiny, was narrowly tailored for governmental interest in preventing corruption and providing state with method of detecting expenditures that are not truly independent), and *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 646–48 (6th Cir. 1997) (holding a state statute requiring on-communication identification disclaimers only for independent expenditures narrowly tailored because it did not regulate issue advocacy), with *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1198–99 (10th Cir. 2000) (recognizing a “constitutionally significant difference” between on-communication identification and disclosure requirements and striking down a section of campaign statute requiring donors who make independent expenditures in excess of \$1,000 to include identifying information in any political message produced by the expenditure because the section was not narrowly tailored to any state interests), and *Stewart v. Taylor*, 953 F. Supp. 1047, 1054–55 (S.D. Ind. 1997) (holding that state election campaign statute which prohibited anonymous electoral campaign literature was not narrowly tailored to meet a compelling state interest and thus violated candidate’s right to freedom of speech because “[t]he statute burden[ed] dissemination of campaign literature that [was] informative as well as misleading”; also arguing that the Court’s “discussion of anonymous political expression specifically finds its value to campaigns for political office as great if not greater than its value to referenda”).

91. 361 F.3d 349 (7th Cir. 2004).

92. 378 F.3d 979 (9th Cir. 2004).

93. 540 U.S. 93 (2003).

94. *McConnell*, 540 U.S. at 93–94; Pub. L. No. 107-155, 116 Stat. 81.

adequate notice of the identity of persons who paid for the advertising.⁹⁵ Violation of the statute constituted a misdemeanor.⁹⁶ While the text of the statute required that a “disclaimer” appear on the political advertising materials, the Court correctly pointed out that “disclaimer” is a misnomer.⁹⁷ What the statute actually required would be more appropriately named a “disclosure”; however, that term “has been appropriated to describe a reporting requirement,” commonly used when referring to the requirements of campaign finance laws that mandate the registering of financial amounts spent on political advertising.⁹⁸

There was controversy in the state supreme court about the statutory meaning of “persons” to whom the statute was applicable.⁹⁹ The state argued that the statute only applied to candidates and certain party and political action committees.¹⁰⁰ On practical grounds,¹⁰¹ the Indiana Supreme Court held that the statute applied to “any individual or organization.”¹⁰²

a. Majority Opinion

In deciding upon the constitutionality of the Indiana statute, Judge Posner, writing for the majority, described the Seventh Circuit’s difficult task as entailing a “balancing of imponderables.”¹⁰³ In one respect, disallowing anonymous political advertising might reduce the *quantity* of political advertising because some advertisers may be unwilling to reveal their identities.¹⁰⁴ On the other hand, requiring political advertisers to include their

95. *Majors*, 361 F.3d at 350. The challenge was brought against Indiana Code §3-9-3-2.5, which is a rather lengthy provision. *Majors v. Abell*, 792 N.E.2d 22, 24 & n.1 (Ind. 2003). In summary, the section required that “any ‘person’ must include a ‘disclaimer’ in ‘general public political advertising’ if the person either ‘solicits a contribution’ or finances ‘communications expressly advocating the election or defeat of a clearly identified candidate.’” *Id.* at 24. The section also included special requirements for different disclosures “depending on whether the material is authorized and/or financed by a candidate, a candidate’s committee . . . or a party organization.” *Id.*

96. IND. CODE ANN. § 3-14-1-3 (2002).

97. *Majors*, 361 F.3d at 350.

98. *Id.*

99. *Majors*, 792 N.E.2d at 24.

100. *Id.* at 24–25.

101. The court recognized that, in application, it would make very little sense if “persons” subject to the statute were limited to just candidates or committees:

If a message is such that the candidate would not be willing to be identified with it, presumably if its authorship leaked the effect of the leak would be to brand the candidate a sneak as well as a fool. We think the statute is primarily concerned with anonymous advertising by third parties.

Id. at 29.

102. *Id.* at 30.

103. *Majors v. Abell*, 361 F.3d 349, 352 (7th Cir. 2004).

104. *Id.*

names on their materials, the court reasoned, would increase the *quality* of the political advertising because the additional information will be useful to voters.¹⁰⁵

At the outset, the court distinguished the Indiana statute from the Ohio statute invalidated in *McIntyre*.¹⁰⁶ While the Ohio statute's identification requirements applied to issue ads, the Indiana statute applied only to candidate ads.¹⁰⁷

The court next considered what impact, if any, the Supreme Court's ruling in *McConnell v. Federal Election Commission* might have on *McIntyre*'s rule that the government may not forbid the distribution of anonymous campaign literature.¹⁰⁸ The *Majors* court likened the Indiana statute to the BCRA regulation of "electioneering communications."¹⁰⁹ In *McConnell*, the Supreme Court upheld the BCRA's requirement that individuals who spend more than \$10,000 producing electioneering communications or contribute at least \$1,000 to an organization that produces them must report their identities to the Federal Election Commission.¹¹⁰ Following the reasoning of *Buckley v. Valeo*, the Supreme Court upheld the reporting requirement because it served the state interests of providing the electorate with information, deterring actual corruption or the appearance of corruption, and gathering the data necessary to enforce some of the substantive electioneering restrictions.¹¹¹

The court likened the Indiana statute to the regulation of electioneering communication in the BCRA because both provided identity information to the public.¹¹² Compared with a reporting requirement, an on-communication identification requirement like Indiana's had the same effect of destroying anonymity, making would-be advertisers more susceptible to retaliation, should they garner unpopular viewpoints. But, as the *Majors* court recognized, "having to identify [oneself] to the entire audience for the ad has as a practical

105. *Id.*

106. *Id.* at 351.

107. *Id.* The significance of this distinction lies in the state's justified interest in the regulation. "In candidate elections, [the state] can identify a compelling state interest in avoiding the corruption that might result from campaign expenditures." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 356 (1995). While corruption concerns are arguably a compelling state interest in candidate elections, they are not significant in the context of an issue referendum. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978). Still, the public interest in knowing the source of a message is likely as great in one case as in the other. See *infra* discussion in text accompanying notes 207–08.

108. *Majors*, 361 F.3d at 352–54.

109. *Id.* at 352–53. The act defines electioneering communications as advertisements broadcast within 60 days of a general election or 30 days of a primary that refer to a candidate for federal office. 2 U.S.C. § 434(f)(3)(A)(i) (2004).

110. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 194–96 (2003).

111. *Id.*

112. *Majors*, 361 F.3d at 353.

matter a greater inhibiting effect than just a reporting requirement does because it broadcasts the advertiser's name to the entire electoral community."¹¹³ In turn, the Court also acknowledged that the state interest of informing the public was less served by a reporting requirement than by an on-communication identification requirement because fewer people are likely to see a report registered with the FEC.¹¹⁴

The court also considered the argument that *McConnell* regarded campaign financing (rather than those who paid for political ads themselves), and was therefore inapplicable to the analysis of the Indiana statute.¹¹⁵ The court rejected this argument, however, heavily persuaded that both types of laws were intended to serve the same state interest of informing the public.¹¹⁶ The court admitted its reluctance to disturb the state's judgment without stronger guidance from the Supreme Court, and concluded that despite the differences between the BCRA and the Indiana disclaimer statute, the Supreme Court's holding in *McConnell* sanctioned the Indiana statute's infringement on the right to anonymous speech.¹¹⁷

b. Dubitante Opinion

Judge Easterbrook filed a dubitante opinion¹¹⁸ to express his uncertainty with several of the majority's assertions, especially its interpretation of *McConnell*'s implications on *McIntyre*.¹¹⁹ Easterbrook was similarly frustrated with a lack of a clear standard from the Supreme Court.¹²⁰ But, unlike the majority, Easterbrook is highly suspicious that *McConnell* actually provided any controlling authority on this particular set of facts.

First, Easterbrook noted that Indiana's statute was markedly different from the federal BCRA statute in *McConnell*. The Indiana statute "start[ed] from a lower threshold," by affecting those producing as little as 101 sheets of paper, and required immediate self-identification to the public, rather than reporting to an agency.¹²¹ Second, Easterbrook questioned whether *McConnell* could

113. *Id.*

114. *Id.*

115. *Id.* at 354.

116. *Id.*

117. *Majors*, 361 F.3d at 355. "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." *Id.*

118. Literally, "dubitante" means doubting. A writing judge will usually label his opinion as dubitante if he or she doubted a legal point, but not the extent to be willing to state that it was wrong. BLACK'S LAW DICTIONARY 537 (8th ed. 2004).

119. *Majors*, 361 F.3d at 356–58 (Easterbrook, J. dubitante).

120. *Id.* at 356.

121. *Id.* Later in the opinion, Easterbrook stressed that the importance of the BCRA's regulations was greater, as they imposed requirements on major expenditures for nationwide

rightly be said to bear on *McIntyre*, when *McConnell* did not discuss the *McIntyre* case or even mention any of the other leading cases on anonymous political speech.¹²²

Third, in Easterbrook's interpretation of *McConnell*, the Supreme Court's decision to uphold the disclosure requirements of the BCRA was highly dependent on the statute's "fidelity" to the imperatives of curtailing public corruption while allowing room for expression.¹²³ But, Indiana's statute did not seem to display a similar level of "fidelity" to these imperatives, and failed to attach any "weight to the risks borne by supporters of unpopular candidates."¹²⁴

While the majority's opinion in *Majors* implies that potential voters are best served by knowing the source behind their communication, the dubitante opinion sponsors the opposite perspective on forced disclosure—that the public may ultimately be better served by an anonymous message:

Anyway, we must consider the possibility that anonymity promotes a focus on the strength of the argument rather than the identity of the speaker; this is a reason why Madison, Hamilton, and Jay chose to publish *The Federalist* anonymously. 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.¹²⁵

Further, people who may choose to publish anonymously—perhaps for fear of retaliation or desire to protect their privacy—realize that the consumers of the message "discount" it because they do not know the source.¹²⁶ To Easterbrook, it is possible to allow a greater right to anonymous speech without imposing serious burdens on those evaluating the message.

2. *ACLU of Nevada v. Heller*

The challenged Nevada statute required any person responsible for paying for the publication of any material or information relating to an election, candidate, or any question on a ballot to identify her name and address on any published printed or written matter or any photograph.¹²⁷ The American Civil

elections, while Indiana's statute placed great burdens in the much less significant setting. *Id.* at 358.

122. *Id.* at 357.

123. *Id.*

124. *Majors*, 361 F.3d at 357.

125. *Id.*

126. *Id.* This perception contributed to the *McIntyre* rule. 514 U.S. 334, 348 n.11 (1995) ("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.").

127. NEV. REV. STAT. § 294A.320(1)(a) (2003). The statute imposed different requirements for advertising by the candidates themselves.

Liberties Union (ACLU) and its executive director brought a First Amendment facial overbreadth challenge to the statute.¹²⁸ The district court granted summary judgment in favor of the defendants, finding that the state's interests of promoting truthfulness in campaign advertising, increasing the wealth of information available to the electorate, and preserving the integrity of the election process by preventing actual and perceived corruption were sufficiently compelling.¹²⁹

Before analyzing the ACLU's First Amendment concerns, the Ninth Circuit considered the state's argument for a narrowing construction, construing the statute to apply only to "express advocacy," that is, to communications expressly advocating for or against a particular outcome in a candidate election or ballot measure referenda.¹³⁰ At first, the court stated that a narrowing construction would have little import in light of *McConnell*, because that case, at least as interpreted by the Ninth Circuit, clarified that "the line between 'express' and all other election-related speech is not constitutionally material."¹³¹ Nevertheless, the court entertained Nevada's narrowing construction arguments, but concluded that even if the distinction were still relevant after *McConnell*, the language of the Nevada statute was not fairly susceptible to the state's proposed limitation.¹³²

As a starting point to its First Amendment analysis, the court made clear that Nevada's statute involved the direct regulation of content of political speech, thus meriting strict scrutiny analysis.¹³³ The court stated that the *McIntyre* decision would control the determination of this case, noting the many similarities between the Nevada statute and the Ohio statute in *McIntyre*.¹³⁴ As in *McIntyre*, the state legislature had made a "serious, direct intrusion on First Amendment values."¹³⁵ As part of its rationale, the court

128. *ACLU of Nev. v. Heller*, 378 F.3d 979, 983 (9th Cir. 2004).

129. *Id.*

130. *Id.* at 985–87.

131. *Id.* at 985 (citing *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 193–94 (2003) (rejecting "the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy")). In 1987 the Ninth Circuit defined "express advocacy" as "that speech which is directed to influence a particular outcome of an election, as opposed to issue advocacy that focuses on the merits of a particular issue without regard for an election outcome." *Id.* (citing *Fed. Election Comm'n v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987)).

132. *Id.* at 987.

133. *Heller*, 378 F.3d at 987–88. "The most exacting scrutiny test is applied to regulations that suppress, disadvantage, or impose different burdens upon speech on the basis of its content, and to laws that compel speakers to utter or distribute speech bearing a particular message." 16A AM. JUR. 2D *Constitutional Law* § 460 (1998). Under exacting scrutiny, a statute will be upheld only if it serves an overriding state interest and is narrowly tailored to serve that state interest. *Id.*

134. *Id.* at 987–89.

135. *Id.* at 988.

highlighted several of the arguments for anonymity: it protects an advocate from retaliation, protects her privacy, and allows her to express her arguments without the potentially distracting mark of her identity.¹³⁶

The court next considered the state's purported compelling interests in making such a direct intrusion on First Amendment values. The state's primary argument was that its statute was distinguishable from the one the Supreme Court found unconstitutional in *McIntyre* because Nevada's statute contained an exception for a natural person acting without cooperation of any business or social organization.¹³⁷ The Ninth Circuit acknowledged that *McIntyre* was especially sympathetic to the individual, but was unconvinced that excluding a lone actor from the statute's coverage would save it from constitutional peril.¹³⁸ Because of the wording of various provisions of the statute, the exception was actually quite narrow,¹³⁹ and none of the rationales for protecting an individual anonymous speaker are less pertinent to an anonymous business or organization.¹⁴⁰

In the alternative, Nevada argued that its interests were more compelling than those advanced by Ohio in *McIntyre* and that the post-*McIntyre* case law demanded the upholding of the statute.¹⁴¹ Each of Nevada's three proffered state interests was unequivocally rejected by the Ninth Circuit.

The state first argued that the statute was justified because of the state's interest in fostering an informed electorate.¹⁴² The court quickly pointed out that this exact state interest was found insufficient in *McIntyre*¹⁴³ and Nevada had set forth no persuasive factual distinction between its statute and the one at

136. *Id.*

137. *Id.* at 989; see NEV. REV. STAT. § 294A.320(2)(c) (2003).

138. *Heller*, 378 F.3d at 989.

139. For example, the exception applied to only “a natural person who acts *independently*,” so even two individuals, working together but uninvolved with any organization, would be required to disclose their identities under the statute. § 294A.320(2)(c) (emphasis added); see also *Heller*, 378 F.3d at 989.

140. A group is just as likely as an individual to believe its ideas are more persuasive without their identification immediately attached to them. *Heller*, 378 F.3d. at 989–90. Also, “[l]ike other choice-of-word and format decisions, the presence or absence of information identifying the speaker is no less a content choice for a group or an individual cooperating with a group than it is for an individual speaking alone.” *Id.* at 990.

141. *Id.* at 991.

142. *Id.* at 993. This purported state interest is labeled by many as the “voter competence rationale.” See Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors: The Real Threat to Campaign Disclosure Statutes* 3 (June 2004) (Univ. Southern Cal. Public Policy Research Paper No. 03-13), <http://ssrn.com/abstract=424603> (arguing that improving competence is among the most persuasive rationales for requiring campaign disclosures). “Disclosure laws can . . . make relevant and credible information available to voters—or to informational entrepreneurs like the media and challengers in elections who act as intermediaries—at a time it can be helpful in the voting decision.” *Id.* at 8.

143. *Heller*, 378 F.3d at 993.

issue in that case.¹⁴⁴ The court opined that the actual effect of Nevada's statute could just as likely have been a "worse-informed, not a better-informed" electorate because if anonymous speech were banned, then some valuable viewpoints may go entirely unrepresented.¹⁴⁵ Further, the court made the practical point that adding the name and address of the organization to the communication—the requirements for compliance with the Nevada statute—will in many cases not provide truly useful information.¹⁴⁶

The court did recognize that the informational rationale has been found legitimate by the Supreme Court in ruling on campaign regulations that require off-communication reporting of expenditures made to finance those communications, like the regulations at issue in *Buckley v. Valeo* and *McConnell*.¹⁴⁷ These rulings were easily distinguished because off-communication reporting does not involve the direct regulation of a communication's content.¹⁴⁸ The Ninth Circuit reasoned that the Supreme Court's upholding of the off-communication reporting statutes, which are less intrusive on free speech rights, established that an on-communication identification was inappropriate in this setting.¹⁴⁹

The state's second justification for the statute was its interest in preventing fraud.¹⁵⁰ The court rejected this argument because the statute was overly broad to serve this interest in that it regulated both true and false speech the same.¹⁵¹ The statute was also ill-fitted to prevent fraud because it contained an exception for communication by candidates and political parties.¹⁵² In the court's view, there was no reason for the state to think that candidates or political committees would be *less* likely to engage in fraud; "if anything, one would expect the opposite to be the case."¹⁵³

The state's final argument for the statute's legitimacy was that the statute directly advanced "the state's ability to investigate and enforce other campaign finance laws that are, in fact, constitutional."¹⁵⁴ The court found the self-identification requirement to be a poor fit with Nevada's campaign finance laws, because the statute did not require any statement of how much money

144. *Id.*

145. *Id.*

146. *Id.* at 994.

147. *Id.* at 994–95.

148. *Heller*, 378 F.3d at 994.

149. *Id.* at 994–95. To the *Heller* court, the availability of the alternative requirement was very persuasive. The Court reasoned that with off-communication reporting regulations, the imposition on First Amendment rights is less onerous *and* the fit between the regulations and the interests they serve is superior. *Id.* at 994.

150. *Id.* at 995.

151. *Id.* at 995–97.

152. *Id.* at 996–97.

153. *Heller*, 378 F.3d at 996–97.

154. *Id.* at 997.

was contributed to make the publication.¹⁵⁵ Once again, the Nevada statute failed to survive the narrow tailoring requirement of strict scrutiny analysis, as the statute reached a substantial quantity of speech not subject to the reporting and disclosure requirements it purportedly helped to enforce.¹⁵⁶

C. Analysis

1. Are *Majors* and *Heller* Reconcilable?

Ultimately, the Ninth Circuit held that Nevada's statute was not well tailored to meet any of the State's proffered interests.¹⁵⁷ Still, the Ninth Circuit did not foreclose the possibility that an on-publication identification requirement could survive constitutional muster.¹⁵⁸ Is it possible that these two circuit court decisions are actually in harmony—or at least not in discord—with one another?

As a starting point, it is important to recognize that the Nevada statute was significantly more broad than the Indiana statute. Indiana's statute only regulated communications related to candidate elections, and further, only those election communications that “expressly advocate” for the election or defeat of a clearly identified candidate.¹⁵⁹ The statute required that the persons who paid for the communication disclose their identities on the face of the communication.¹⁶⁰

Likewise, the Nevada statute required the disclosure of the person or persons paying for the communication, but also required that their addresses be included.¹⁶¹ In addition, the Nevada statute regulated many more *types* of communications, placing requirements on “*any* material or information relating to an election.”¹⁶² As the Ninth Circuit noted, the broad language of this statute “reache[d] objective publications that concern any aspect of an election . . . for example, discussions of election procedures, analyses of

155. *Id.* at 998.

156. *Id.* at 999.

157. *Id.* at 1000.

158. *Heller*, 378 F.3d at 1000.

Our conclusion that the Nevada statute at issue here is not narrowly tailored to assist the state in enforcing other campaign finance laws should not in any way suggest that an on-publication identification requirement could never be narrowly tailored to achieve this goal. As we have developed, Nevada's statute is particularly ill-designed for this purpose.

Id.

159. IND. CODE § 3-9-3-2.5(b)(1) (2002).

160. *Id.* at § 3-9-3-2.5(d).

161. NEV. REV. STAT. § 294A.320(1)(a) (2003).

162. *Id.* As explained above in notes 130–31 and the accompanying text, the “express advocacy” difference between the Indiana and Nevada statutes is likely insignificant in light of *McConnell*.

polling results, and nonpartisan get-out-the vote drives . . .”¹⁶³ The Nevada statute also regulated speech relating to both candidates and ballot issues, where Indiana’s statute was limited to candidate-related communications.¹⁶⁴

It is this final distinction, between candidate and issue advocacy, that has been a constitutionally significant dividing point for courts deciding on the validity of identity disclosure statutes.¹⁶⁵ The chief difference between regulations of candidate-related speech and issue-related speech is the strength of the state interests behind the regulations. With candidate elections, the state has an interest in preventing libel and other fraudulent statements.¹⁶⁶ These concerns are significantly diminished with respect to issues on ballot measures.¹⁶⁷ With candidate elections, the state also has an interest in avoiding the risk and appearance of corruption.¹⁶⁸

While these state interests have been given legitimacy by the courts, especially in the context of financial reporting requirements like those under the Federal Election Campaign Act,¹⁶⁹ they are far from ironclad with respect to on-communication disclosure. For one, states are able to prevent defamation through the enforcement of general fraud and libel statutes as well as common law torts.¹⁷⁰ These laws, coupled with state financial contribution reporting requirements, are arguably sufficient to serve the state interest directly, rather than doing so indirectly by “indiscriminately outlawing a category of speech.”¹⁷¹

163. *Heller*, 378 F.3d at 986.

164. *Id.* at 986, 1002.

165. *See, e.g.*, *Seymour v. Elections Enforcement Comm’n*, 762 A.2d 880, 892 (Conn. 2000).

166. *See* Sherri L. Eyer, Comment, *From Whence it Comes—Is the Message More Revealing Than the Messenger?* *McIntyre v. Ohio Elections Comm’n*, 115 S. Ct. 1511 (1995), 100 DICK. L. REV. 1051, 1069 (1996).

167. *See Heller*, 378 F.3d at 997 (acknowledging that *McIntyre* did recognize a legitimate state concern for fraud and libel prevention during election campaigns, but refusing to defer to that state interest with respect to the Nevada statute because “[i]t covers ballot proposition elections, in which libel is a remote concern”).

168. In *Buckley v. Valeo*, the Supreme Court fully endorsed this rationale as justification for imposing reporting requirements for financial contributions to candidates. 424 U.S. 1, 66–67 (1976). The reporting requirements “deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.” *Id.* at 67. The exposure might deter candidates and contributors from misusing the funds, and “[a] public armed with information about a candidate’s most generous supporters is better able to detect any post-election special favors that may be given in return.” *Id.*

169. *See, e.g., id.* at 66–68; Pub. L. No. 93-443, 88 Stat. 1263.

170. For example, in *McIntyre*, the Court struck down the disclosure statute at issue, at least in part, because other provisions of Ohio’s statutory and common law prohibited the making or disseminating of false statements. 514 U.S. 334, 349, 350 n.13 (1995).

171. *Id.* at 357. Also, in *Heller*, the Ninth Circuit relied on *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988), which struck down a state statute that imposed disclosure

If one were to accept the differences in candidate and issue communications, then the two holdings probably can be reconciled. It is on this distinction that the Ninth Circuit in *Heller* conceded that the *result* in its case is not technically at odds with *Majors* in the Seventh Circuit.¹⁷² However, the *Heller* opinion implied that if the Ninth Circuit were to actually evaluate the Indiana statute, it would not have reached the same conclusion as the Seventh Circuit. The balancing scale of the Seventh Circuit decision tipped on the distinction between issue referenda and candidate elections, arguing that *McIntyre*'s protections only extended to issue communications.¹⁷³ While the Ninth Circuit was willing to accept, *arguendo*, such a reading of *McIntyre*, the court did not appear at all convinced that the distinction is dispositive on the constitutionality of these types of regulations of campaign speech. In a half-hearted effort to distinguish the *Majors* decision, the *Heller* court reasoned that “[*Majors*] posited that after *McConnell*, *McIntyre* is limited to statutes precluding anonymous speech regarding ballot questions,” yet “we are not convinced that *McConnell* so narrowed *McIntyre*, [but] if it did, the Nevada Statute falls on the *McIntyre* side of the line and, even on [*Majors*’] analysis, is invalid.”¹⁷⁴

2. Underlying Disagreements

So yes, the two decisions do not technically “clash” with each other. But to end the analysis of these opinions here would be unsatisfying, as the two courts vary in their paths to these conclusions, with these variances exemplifying much of the ambiguous and unsettled law surrounding anonymous campaign literature.

a. Difference Between On-Communication Disclosure of Identity and Later Reporting of Identity

One of the more glaring differences in the two courts’ approaches is their opinions on the significance of a statute’s requiring that a political advertiser

requirements designed to prevent corruption among professional fundraisers soliciting on behalf of charitable organizations. 378 F.3d at 995. In *Riley*, the Court stated:

In striking down this portion of the Act, we do not suggest that States must sit idly by and allow their citizens to be defrauded. North Carolina has an antifraud law, and we presume that law enforcement officers are ready and able to enforce it. Further North Carolina may constitutionally require fundraisers to disclose certain financial information to the State If this is not the most efficient means of preventing fraud, we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency.

487 U.S. at 795.

172. See *Heller*, 378 F.3d at 1002.

173. *Majors v. Abell*, 361 F.3d 349, 353–54 (7th Cir. 2004).

174. *Heller*, 378 F.3d at 1002.

disclose her name *on* her communication, as opposed to some off-communication reporting requirement. In *Majors*, the Seventh Circuit did not regard this distinction as constitutionally determinative when evaluating past precedent. The *Majors* court did claim to take “considerable pause” of the distinction,¹⁷⁵ citing the Supreme Court’s decision in *Buckley v. American Constitutional Law Foundation*.¹⁷⁶

In *Buckley v. ACLF*, the Supreme Court invalidated a Colorado law that required circulators petitioning regarding issue initiatives to wear identification badges.¹⁷⁷ One part of the challenged Colorado regulation required paid circulators to wear a badge indicating their name, employer, and the employer’s telephone number.¹⁷⁸ Another section of the regulation, which was not challenged in the case, required each circulator to submit with the petition and file with the secretary of state’s office an affidavit that included the circulator’s name and address.¹⁷⁹ The Supreme Court struck down the badge requirement, in part because the affidavit requirement served the state’s interests while imposing a lesser risk of retaliation or judgment on the circulators, and imposing a lesser imposition on the individual’s rights.¹⁸⁰

Despite *Buckley v. ACLF*’s implication that a reporting requirement will sufficiently serve a state’s interests, the *Majors* court distinguished the Supreme Court’s reasoning in *Buckley v. ACLF* because Colorado’s requirement was “inapplicable to elections of candidates,” the only category of speech that the Indiana statute covered.¹⁸¹ *Majors* placed negligible reliance on *Buckley v. ACLF*, primarily relying instead on *McConnell*, a case that pertained only to reporting requirements.¹⁸²

The Ninth Circuit in *Heller* concluded, though, that “it is not just *that* a speaker’s identity is revealed, but how and when that identity is revealed, that matters in a First Amendment analysis of a state’s regulation of political speech.”¹⁸³ The court drew a hard line between on-communication self-identification requirements and later-reporting requirements, labeling this distinction as “constitutionally determinative.”¹⁸⁴ Not only did *McIntyre* draw

175. *Majors*, 361 F.3d at 354.

176. 525 U.S. 182 (1999).

177. *Id.* at 197–200.

178. *Id.* at 188 n.5.

179. *Id.* at 188–89 nn.6–8.

180. *Id.* at 198–200. “While the affidavit reveals the name of the petition circulator and is a public record, it is tuned to the speaker’s interest as well as the State’s,” while the badge requirement “operates when reaction to the circulator’s message is immediate and ‘may be the most intense, emotional, and unreasoned.’ The affidavit, in contrast, does not expose the circulator to the risk of ‘heat of the moment’ harassment.” *Id.* (citations omitted).

181. *Majors*, 361 F.3d at 354.

182. *See supra* notes 121–22 and accompanying text.

183. *ACLU of Nev. v. Heller*, 378 F.3d 979, 991 (9th Cir. 2004).

184. *Id.*

upon this distinction to set it apart from *Buckley v. Valeo*,¹⁸⁵ but *Buckley v. ACLF* also provides considerable support for the argument that the two types of regulations are in fact very different.¹⁸⁶

Further, *Heller*'s emphasis on this distinction was tied to concern over privacy interests and the argument that anonymity must be preserved for those who risk retaliation for their ideas.¹⁸⁷ *Heller* also concluded that a requirement of on-communication disclosure is a content restriction, while reporting requirements are not, and that this difference determines the appropriate level of scrutiny:¹⁸⁸

Statutes like the one here at issue . . . must be, and have been, viewed as serious, content-based, direct proscription of political speech: If certain content appears on the communication, it may be circulated; if the content is absent, the communication is illegal and may not be circulated.

As a content-based limitation on core political speech, the Nevada Statute must receive the most "exacting scrutiny" under the First Amendment.¹⁸⁹

As the Ninth Circuit criticized, the Seventh Circuit never made a meaningful distinction between on-communication disclosure requirements and reporting requirements. Oddly, while *Majors* did make some recognition of a difference between the two types of regulations,¹⁹⁰ it did not pay heed to the distinction, and it allowed *McConnell* to dictate the outcome of its decision, despite the fact that the *McConnell* majority emphasized that disclosure to an agency did *not* include the content of the message.¹⁹¹

b. Legitimacy of the Informational Rationale

In defending legislation that unarguably infringes on free speech rights, like the Indiana and Nevada statutes, states often justify these regulations with

185. "Though such mandatory reporting undeniably impedes protected First Amendment activity, the intrusion is a far cry from compelled self-identification on all election-related writings." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 355 (1995).

186. *See supra* notes 177–80 and accompanying text.

187. *See Heller*, 378 F.3d at 991–93. For an argument that privacy concerns go largely unnoticed in analysis of disclosure requirements, especially financial disclosures, see William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1, 17–20 (2003).

188. *Heller*, 378 F.3d at 992.

189. *Id.* The *Majors* opinion never made clear what level of scrutiny it was applying to the Indiana statute.

190. *See supra* notes 181–82.

191. *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 201–02 (2003); *see also* *Majors v. Abell*, 361 F.3d 349, 357 (7th Cir. 2004) (Easterbrook, J., dubitante). Judge Easterbrook could not commit to what import the distinction carried: "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." *Id.*

a state interest in fostering an informed electorate.¹⁹² This justification is often referred to as “the informational rationale,” or the “voter competence rationale.”¹⁹³ The legitimacy and proper role of this state interest in a court’s decision-making process is a matter of some scholarly contention.¹⁹⁴ In *Buckley v. Valeo*, the informational rationale was one of three primary state interests that justified the financial disclosure requirements.¹⁹⁵ However, in *McIntyre*, the Court treated the informational rationale with suspicion, finding that “[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 . . . Ohio’s informational interest is plainly insufficient to support the constitutionality of its disclosure requirement.”¹⁹⁶

Despite *McIntyre*’s seeming rejection of legitimacy of a state’s interest in voter competence as justifying a statute that requires a political advertiser to disclose her identity on her communication, the representatives of Indiana and

192. See Raleigh Hannah Levine, *The (Un)informed Electorate: Insights into the Supreme Court’s Electoral Speech Cases*, 54 CASE W. RES. L. REV. 225, 227 (2003).

193. *Id.* at 226 n.2. To some political scientists, voters are “competent” if they cast the same votes they would have had they possessed all available knowledge about the policy consequences of their decision. Elisabeth R. Gerber & Arthur Lupia, *Voter Competence in Direct Legislation Elections*, in CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS 147, 149 (Stephen L. Elkin & Karol Edward Soltan eds., 1999). Gerber and Lupia argue that information about campaign spending can increase voter competence. *Id.* at 152–59.

194. Compare Levine, *supra* note 192, at 290–93 (criticizing the Supreme Court’s willingness to infringe on political speech rights in order to advance the informed voting interest), with Garrett & Smith, *supra* note 142, at “Abstract” (arguing for well-formed disclosure statutes that can improve voter competence in elections because “[v]oters have limited time and attention, so they should be provided the information most crucial to improving their ability to vote consistently with their preferences”).

195. 424 U.S. 1, 66–68 (1976).

196. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 348–49 (1995). It is possible that the Court was so willing to discount the voter competence rationale in *McIntyre* because it believed that the speech in that case was practically of minimal consequence to voters. See Levine, *supra* note 192, at 254.

[O]ne plausible way to read to read *McIntyre* is to say that the *McIntyre* Court believed that the anonymity itself was most informative because it signaled the reader to assign little or no weight to the position stated—opposition to a proposed school tax levy—and that, because voters would give it little credence, an anonymous campaign leaflet was unlikely to unduly influence a voter by causing her to vote against her personal conception of her own best interests and thus differently than she would with different information. That is, while . . . the Court has often been willing to allow speech restrictions that it believes will promote informed voting, it saw no reason to restrict anonymous campaign leaflets. It believed that voters would not pay them much mind precisely because they were anonymous and therefore that they would not have any significant effect on voter choice.

Id.

Nevada both presented it as a compelling state interest that justified the regulations in *Majors* and *Heller*.¹⁹⁷ However, the Seventh and Ninth Circuits weighed this interest differently.

The Seventh Circuit's opinion in *Heller* never made explicit its stance on the merits of the rationale up against the imposition of the on-communication disclosure requirement of the Indiana statute. Through its analysis of *McConnell*'s implications on *McIntyre* and the immediate facts before it, though, the Seventh Circuit implied that the state's interest in informing the electorate may be even more compelling when justifying on-communication disclosure requirements than when justifying reporting requirements. *McConnell* upheld the portions of the BCRA that required any person who contributes to the making of an ad to make certain disclosures to the Federal Election Commission.¹⁹⁸ While on-communication disclosures may impose a greater intrusion on the freedom of political advocacy than later reporting, the court in *Majors* was persuaded that on-communication disclosures actually *better fulfill* the state's informational interest, perhaps creating "a wash" in the balancing of individual rights and state interests: "But of course 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."¹⁹⁹

Ultimately, it was in reliance on *McConnell* that *Majors* deferred to the state's interest of informing its voters in sanctioning the intrusion of the Indiana statute, all the while recognizing the imperfections of its own conclusion.²⁰⁰

As an original matter it could be objected that speech and the press would no longer be free if the government could insist that every speaker and every writer add to his message information that the government deems useful to the intended audience for the message, and that it is arbitrary for the government to single out the identity of the writer or speaker and decree that that information, though no other that potential voters might value as much or

197. See Brief of State Commissioner Appellees and Supplemental Appendix at 14–19, *Majors v. Abell*, 361 F.3d 349 (7th Cir. 2004) (No. 02-2204), 2002 WL 32172589; Defendants–Appellees' Dean Heller, Secretary of State, Frankie Sue Del Papa, Attorney General, and State of Nevada Answering Brief at 27–29, *ACLU v. Heller*, 378 F.3d 979 (9th Cir. 2004) (No. 01-15462), 2001 WL 34098271.

198. *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 96 (2003).

199. *Majors v. Abell*, 361 F.3d 349, 353 (7th Cir. 2004). The Ninth Circuit did not buy into this line of reasoning. "Compared to communication-altering requirements such as the one imposed by the Nevada Statute, the imposition on freedom of speech of such reporting requirements is less, while the *fit* between the regulation and the interest it serves *is superior*." *ACLU of Nev. v. Heller*, 378 F.3d 979, 994 (9th Cir. 2004) (emphasis added).

200. 361 F.3d at 355.

more, must be disclosed. But the Supreme Court crossed that Rubicon in *McConnell*.²⁰¹

Much different than in *Majors*, the Ninth Circuit in *Heller* directly confronted Nevada's purported interest in informing its electorate. Closely following *McIntyre*, *Heller* thoroughly disposed of the informational rationale.²⁰² *Heller* not only concluded that Nevada's informational interest was not sufficiently strong to support the constitutionality of its disclosure requirement,²⁰³ but it also speculated that, whether justified or not, the statute simply would not bring about a better-informed electorate.²⁰⁴

Also, rather than assigning any import to the fact that on-communication disclosure requirements may serve the state informational interest *better* than later-reporting requirements, as the *Majors* opinion implied,²⁰⁵ *Heller* drew a much different inference from the Supreme Court's recognition that reporting requirements serve the informational interest. That a later-reporting requirement would serve the informational interest *at all* goes to proving that the on-communication identification requirement is not narrowly tailored:

That reporting and disclosure requirements have been consistently upheld as comporting with the First Amendment based on the importance of providing information to the electorate therefore supports rather than detracts from our conclusion that *McIntyre*'s rejection of the additional information rationale remains binding on us. . . . The availability of the less speech-restrictive reporting and disclosure requirement confirms that a statute like the one here at issue cannot survive the applicable narrow tailoring standard.²⁰⁶

The Ninth Circuit's approach to the state interest of informing the electorate is more persuasive for a variety of reasons. *Heller* adheres to *McIntyre*, which seems completely on point for the issue. In *McIntyre*, the Supreme Court made clear that the state's interest in fostering an informed electorate does not justify the serious intrusion on First Amendment rights that would be caused by requiring political advocates to disclose their identities *on* their communications.²⁰⁷ Even if the *Majors* court could distinguish certain

201. *Id.* It is easy to imagine that the legitimacy of the voter competence rationale may have been a sticking point among the judges deciding *Majors*. Judge Easterbrook wrote in his dubitative opinion that "[a]rguments that speech may be regulated to protect the audience from misunderstanding should fare poorly and outside of electioneering *have* fared poorly." *Id.* at 357.

202. *Heller*, 378 F.3d at 993–95.

203. *Id.* at 993.

204. *Id.* The thrust of the court's argument was that if anonymous communications were banned, especially as much as the broad Nevada statute banned, some useful ideas would go unsaid, and "[t]he result could be a worse-informed, not a better-informed, electorate." *Id.*

205. *Majors*, 361 F.3d at 351–52; *see infra* note 208 and accompanying text.

206. *Heller*, 378 F.3d at 994–95.

207. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348 (1995).

aspects of its analysis of the Indiana statute from *McIntyre* because of the differences between issue and candidate speech, the validity of the state informational interest as justification for on-communication disclosure would be the same for candidate or issue publications because, as the *Majors* court itself recognized, “the public interest in knowing the source of an anonymous contribution to the debate” is probably as great in one case as in the other.²⁰⁸ *McIntyre* rejected the informational interest when it came to on-communication identification requirements.²⁰⁹ Why the Seventh Circuit broke from *McIntyre*’s analysis—even after implying that the state interest in informing the electorate is probably the same for candidate and issue publications—is not entirely clear.

The Seventh Circuit’s deference to the state’s informational rationale is unsettling for other reasons. There is an underlying paternalism in the “informational interest,” because regulations at its hands imply what voters should and should not be considering in informing themselves, and what might or might not unduly influence them. The Supreme Court has spoken out against such paternalistic measures in other contexts, stating that “[t]he very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.”²¹⁰

Further, it is disconcerting that a court is willing to restrict such a fundamental right as free speech at the hands of a state’s informational interest, without any empirical proof that there is any actual increase in voter competence because of these disclosures.²¹¹ Instead, the *Majors* court only made reference to a speaker’s identity as being information “that *by hypothesis* the voting public values.”²¹² Yes, the Supreme Court has recognized that a state has an interest in ensuring fair elections.²¹³ But, when considering a statute that hinders the exceptional right of free speech with a content proscription of author identification, it seems that a court should demand more

208. *Majors*, 361 F.3d at 351–52.

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

210. *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring); *see also* *Riley v. Nat’l Federation of the Blind*, 487 U.S. 781, 793 (1988) (“[T]he government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government.”).

211. For a highly critical review of the Supreme Court’s recognition of the informational interest, see Levine, *supra* note 192. Professor Levine cites many criticisms of the Court’s deference to a state’s informational interest, including the lack of any evidence about voter confusion. “[T]he Court has allowed these restrictions on the basis of mere speculation and intuition as to their effects on informed voting, rather than properly requiring empirical evidence.” *Id.* at 289.

212. *Majors*, 361 F.3d at 353 (emphasis added).

213. *See supra* note 168 and accompanying text.

evidence before conceding that the state's interest in informing its electorate is sufficiently compelling.

c. Theoretical Differences on Societal Value of Anonymity

Embedded in the two circuits' approaches in *Majors* and *Hellers* are certain, apparently driving assumptions about anonymity in general, and how people are or are not served by it.

In *Majors*, the majority's assumption seemed to be that people are "better served" by knowing who is speaking—that this is information that people desire in order to evaluate the message. The court cited the "avidity with which candidates for public office seek endorsements" as proof that "the identity of a candidate's supporters—and opponents—is information that the voting public values highly."²¹⁴ Disclosure is favored because it produces more information, and society is better able to judge an idea the more information it has.²¹⁵

In contrast, the *Heller* opinion approached the problem with an understanding that people may actually be better served by anonymity. Immediate author identification may effect a disservice to a message's recipient: "[F]ar from enhancing the reader's evaluation of a message, identifying the publisher can interfere with that evaluation by requiring the introduction of potentially extraneous information at the very time the reader encounters the substance of the message."²¹⁶ The requirement of disclosure may deter communication, especially from the margins, where the risk of social judgment and retaliation may be at the greatest.²¹⁷ Anonymity may not only produce *better* information, as explained above, but it may also produce *more* information.²¹⁸

There may be no real resolution to this debate.²¹⁹ Both approaches ultimately rest on the rationale that a democracy thrives if people have a meaningful, informed choice to exercise.²²⁰ The fact remains, though, that even if political advocates are able to publish their ideas anonymously, it does not mean that they all will. Anonymity is just as much a part of a message as a statement of its author's identity, and people can and will recognize that.²²¹

214. *Majors*, 361 F.3d at 352.

215. A speaker's identity is "additional information useful to the consumer." *Id.* "[T]o require only the reporting of the advertiser's name to a public agency . . . would . . . reduce the amount of information possessed by voters." *Id.* at 355.

216. *ACLU of Nev. v. Heller*, 378 F.3d 979, 994 (9th Cir. 2004).

217. *Id.* at 988.

218. *See id.*

219. *See* Wieland, *supra* note 28, at 627 ("The problem is that both arguments—that anonymity tends to promote truth, and that disclosure tends to promote truth—are correct.").

220. *See id.*

221. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 348 n.11 (1995).

People can evaluate anonymity along with the message and discount that message to whatever degree they deem appropriate. If the First Amendment is truly meant to foster a “marketplace of ideas” and “the best test of truth is the power of the thought to get itself accepted in the competition of the market,”²²² then the best approach affords greater protection for anonymous political speech and allows citizens to make the choice about whether anonymity will sink or swim in the marketplace of ideas.

IV. CONCLUSION

The Supreme Court should again confront the problem of anonymous political speech and state regulations that require political advocates to include their identities on their publications. Until it does, lower courts are almost certain to take widely varying approaches to evaluating constitutionality of these statutes, such as those taken by the Seventh and Ninth Circuits in their *Majors* and *Heller* decisions. As *Majors* and *Heller* prove, even after the Supreme Court’s 2003 ruling in *McConnell*, it remains unclear what variances in a statute requiring on-communication identification might make it sufficiently narrowly tailored under *McIntyre*. Perhaps there is a constitutionally determinative distinction between candidate speech and issue speech, a distinction that keeps the technical holdings of *Majors* and *Heller* from being a true Circuit split. But, the soundness of this distinction is far from certain. As Judge Easterbrook lamented in *Majors*, “How can legislators or the judges of other courts determine what is apt to tip the balance?”²²³

After all, the Seventh and Ninth Circuit analyses differed on the significance of requiring someone to attach his identity to his communication, as opposed to reporting his identity to an agency. The courts also afforded much different weight to the state’s interest in informing the electorate, and were steered by different value judgments on the goods and evils of anonymity in political speech.

When the Supreme Court again confronts the issue, it should heed the approach of the Ninth Circuit in making clear that the intrusion of requiring a speaker to attach his identity to his publication is much more significant than financial reporting, and demands a much stronger state interest—or at least some showing that reporting requirements are an inadequate means of informing the electorate—in order to uphold an on-communication identification requirement.

Of course anonymity has not always been used for noble purposes. It is impossible to know why my neighborhood’s mystery pamphleteer did not attach her name to her viewpoints on the Missouri constitutional amendment. Perhaps she knew that her opinions were controversial, and she did not want to

222. *Id.*

223. *Majors v. Abell*, 361 F.3d 349, 357 (7th Cir. 2004) (Easterbrook, J. dubitante).

subject herself to the harassment of her neighbors. Most probably did not agree with the pamphleteer's specific viewpoints. Some were probably deeply offended by them. But, it is this very type of challenge to the mainstream for which the right to anonymity should be safeguarded. The expression of even outrageous views can be productive—even if all of the neighbors emphatically disagreed with the pamphlet's position, it likely at least encouraged them to process their own views, maybe changing those views or solidifying them along the way. Or, perhaps the neighbors chose to discount the pamphlet completely because they did not know where it came from. But, at least there was an opportunity to consider it. It is this opportunity that is central to the marketplace of ideas concept of the First Amendment and crucial to the survival of a healthy democracy.

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