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Anonymous Campaign Literature and the First Amendment

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COMMENT

Anonymous Campaign Literature and the First Amendment

I. INTRODUCTION

Presently, forty-eight states and the District of Columbia have statutes that require the disclosure of some party's identity (for example, an author or a sponsor) on political literature pertaining to elections. The most common explanations given for these statutes are that they deter fraud and libel in the election arena and that they provide valuable information to the voters. Because these statutes regulate core political speech, however, they necessarily implicate the First Amendment to the United States Constitution.¹ Although campaign disclosure laws have been both struck down and sustained by state courts reviewing appealed convictions, the decisions have been disappointingly brief given the magnitude of the interests involved. The federal court case law has also been sparse.²

In the two most recent decisions, the supreme courts of North Carolina and Ohio upheld their respective disclosure statutes.³ The United States Supreme Court has granted certiorari on the 1993 Ohio deci-

1. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . ."); see *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966): Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of [the] Amendment was to protect the free discussion of governmental affairs. This of course includes discussion of candidates, structures, and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.

2. Specifically: one court of appeals decision invalidating an earlier version of the Oklahoma disclosure statute, one court of appeals decision reversing a conviction under the predecessor to the current federal provision (on non-constitutional grounds), and one district court decision sustaining the same. See *Wilson v. Stocker*, 819 F.2d 943 (10th Cir. 1987) (striking Law of May 4, 1974, 1974 OKLA. SESS. LAWS ch. 154, § 11 (amended 1976, 1983, 1984, 1986, 1988, 1991)); *United States v. Insko*, 496 F.2d 204 (5th Cir. 1974) (reversing conviction under Act of June 25, 1948, ch. 645, 62 Stat. 724, codified at 18 U.S.C. § 612, amended by Act of August 25, 1950, ch. 784, § 2, 64 Stat. 475, amended by Act of August 12, 1970, § 6(j)(7), 84 Stat. 777 (repealed 1976)); *United States v. Scott*, 195 F. Supp. 440 (D.N.D. 1961) (sustaining the same). There are no rulings on the constitutionality of the current federal provision, 2 U.S.C. § 441d (1988). See Note, Mitchell L. Gaynor, *Curbing Injurious PAC Support Through 2 U.S.C. § 441d*, 35 HASTINGS L.J. 869, 879-88 (1984) (arguing that § 441d is constitutional). See *infra* text accompanying notes 26-32 for a comparison of the old and new federal provisions.

3. *State v. Petersilie*, 334 N.C. 169, 432 S.E.2d 832 (1993) (sustaining N.C. GEN. STAT. § 163-274 (1994)); *McIntyre v. Ohio Election Comm'n*, 618 N.E.2d 152 (Ohio 1993) (sustaining OHIO REV. CODE ANN. § 3599.09 (Anderson 1992)), *cert. granted*, 114 S. Ct. 1047 (No. 93-986), *motion to dismiss denied*, 114 S. Ct. 2670 (1994).

sion and will hear arguments in October 1994. This article discusses the background for the analysis of disclosure statutes, including the statutes and state court holdings as well as the Supreme Court precedent, paying particular attention to both the Ohio statute and the North Carolina provision. The two are sufficiently different such that a ruling sustaining the Ohio statute will not dispose of every issue raised by the North Carolina statute.

II. BACKGROUND

A. Survey of Disclosure Statutes

For the purposes of this article, a "disclosure statute" is any statute requiring identification of party affiliation on political writing relating to elections.⁴ At present, two states (California and Nebraska) have no such statute. Two other states have disclosure statutes which have been held unconstitutional in their present form. Specifically, the Illinois disclosure statute was held unconstitutional by its supreme court in 1987,⁵ and the Massachusetts statute was invalidated by its highest court in 1975.⁶ In addition, the Court of Appeals for the Tenth Circuit has held unconstitutional an earlier version of Oklahoma's disclosure statute, which differed from the present Oklahoma provision only in the inclusion of one sentence immaterial to the finding of unconstitutionality.⁷ Currently, forty-eight states and the District of Columbia have some sort of disclosure provision applicable to campaign literature.⁸ In addition, the United States Code contains a campaign disclo-

4. This includes newspaper editorials endorsing a ballot measure, political advertising ("Vote for Joe"), political pamphlets criticizing the record of an incumbent, and so forth. I refer to these statutes as "disclosure statutes," and to the writing regulated as "campaign literature." Some of the statutes, however, explicitly regulate *more* than just literature pertaining to campaigns. See, e.g., ARK. CODE ANN. § 7-1-103 (Michie 1993) (requiring disclosure on "matter of a political nature"). See *infra* text accompanying notes 11-17.

5. *People v. White*, 506 N.E.2d 1284 (Ill. 1987) (striking down statute currently at ILL. ANN. STAT. ch. 10, para. 5/29-14 (Smith-Hurd 1994)); see also Thomas E. Leggins, *Invalidation of Illinois' Anonymous Political Literature Statute - The Unprotected Interest in an Informed Electorate* — *People v. White*, 116 Ill. 2d 171, 506 N.E.2d 1284 (1987), 12 S. ILL. U. L.J. 677 (1988).

6. *Commonwealth v. Dennis*, 329 N.E.2d 706 (Mass. 1975) (invalidating MASS. GEN. LAWS ANN. ch. 56, § 41 (West 1992)).

7. *Wilson v. Stocker*, 819 F.2d 943 (10th Cir. 1987) (invalidating Law of May 4, 1974, 1974 Okla. Sess. Laws ch. 154, § 11 (amended 1976, 1983, 1984, 1986, 1988, 1991)).

8. ALA. CODE § 17-22A-13 (1993); ALASKA STAT. § 15.56.010 (1993); ARIZ. REV. STAT. ANN. § 16-912 (1993); ARK. CODE ANN. § 7-1-103 (Michie 1993); COLO. REV. STAT. § 1-13-108 (1993); CONN. GEN. STAT. § 9-333w (1993); DEL. CODE ANN. tit. 15, § 8021 (1993); D.C. CODE ANN. § 1-1420 (1993); FLA. STAT. ANN. §§ 106-143, -1437 (West 1993); GA. CODE ANN. § 21-2-415 (1993); HAW. REV. STAT. § 11-215 (1993); ILL. ANN. STAT. ch. 10, para. 5/29-14 (Smith-Hurd 1994); IND. CODE ANN. § 3-14-1-3 (Burns 1993); IOWA CODE ANN. § 56.14 (West 1992); KAN. STAT. ANN. § 25-2407 (1993); KY. REV. STAT. ANN. § 121.190 (Michie/Bobbs-Merrill 1993); LA. REV. STAT. ANN. § 18:1463 (West 1993); ME. REV. STAT. ANN. tit. 21-A, § 1014 (West 1993); MD. CODE ANN., ELEC. § 26-17 (1993); MASS. GEN. LAWS ANN. ch. 56, § 41 (West 1992); MICH. COMP. LAWS ANN. § 169.247 (West 1993); MINN. STAT. ANN. § 211B.04 (West 1994); MISS. CODE

sure provision.⁹ Finally, of course, municipalities may pass disclosure ordinances.¹⁰

One way to categorize disclosure statutes is according to the writing they regulate. Nearly one fourth require disclosure on essentially *any* writing related to elections.¹¹ Perhaps the three most remarkable statutes, at least as to the breadth of the writing to which they apply, are those of Arkansas, Florida, and South Carolina. Arkansas requires disclosure on *all* matters "of a political nature."¹² Florida has passed two statutes, one requiring disclosure of the sponsor on all political

ANN. § 23-15-899 (1991); MO. ANN. STAT. § 130.031 (Vernon 1993); MONT. CODE ANN. § 13-35-225 (1993); NEV. REV. STAT. § 294A.320 (1993); N.H. REV. STAT. ANN. § 664:14 (1992); N.J. STAT. ANN. § 19:34-38.1 (West 1994); N.M. STAT. ANN. §§ 1-19-16, -17 (Michie 1993); N.Y. ELEC. LAW § 14-106 (McKinney 1994); N.C. GEN. STAT. § 163-274(7) (1994); N.D. CENT. CODE § 16.1-10-04.1 (1993); OHIO REV. CODE ANN. § 3599.09 (Anderson 1992); OKLA. STAT. ANN. tit. 21, § 1840 (West 1994); OR. REV. STAT. § 260.522 (1993); 25 PA. CONST. STAT. ANN. § 3258 (1992); R.I. GEN. LAWS § 17-23-2 (1993); S.C. CODE ANN. § 8-13-1354 (Law. Co-op. 1991); S.D. CODIFIED LAWS ANN. § 12-25.4.1 (1993); TENN. CODE ANN. § 2-19-120 (1993); TEX. ELEC. CODE ANN. § 255.004 (West 1994); UTAH CODE ANN. § 20-14-24 (1993); VT. STAT. ANN. tit. 17, § 2022 (1992); VA. CODE ANN. § 24.2-1014 (Michie 1993); WASH. REV. CODE ANN. § 42.17.510 (West 1994); W. VA. CODE § 3-8-12 (1994); WIS. STAT. ANN. § 11.30 (West 1993); WYO. STAT. § 22-25-110 (1992).

9. 2 U.S.C. § 441d (1988) provides:

Whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general public political advertising, such communication . . . if not authorized by the candidate, an authorized political committee of the candidate, or its agents, shall clearly state the name of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.

10. See, e.g., *Talley v. California*, 362 U.S. 60 (1960) (striking Los Angeles ordinance); *Bogalusa v. May*, 212 So.2d 408 (La. 1968) (striking Bogalusa ordinance).

11. See, e.g., DEL. CODE ANN. tit. 15, § 8021 (1993) ("all campaign literature or advertising"); MD. CODE ANN., ELEC. § 26-17 (1993) ("each item of campaign material"); N.H. REV. STAT. ANN. § 664:14 (1992) ("all political advertising"); N.M. STAT. ANN. § 1-19-16 (Michie 1993) ("any campaign advertising or communication"); S.D. CODIFIED LAWS ANN. § 12-25.4.1 (1993) ("printed campaign literature"); WASH. REV. CODE ANN. § 42.17.510 (West 1994) ("all written political advertising, whether relating to candidates or ballot propositions"); W. VA. CODE § 3-8-12 (1994) ("any . . . letter, circular, placard, or other publication tending to influence voting at any election"); WYO. STAT. § 22-25-110 (1992) ("campaign literature or campaign advertising in any communication medium"). See also *State v. North Dakota Educ. Ass'n*, 262 N.W.2d 731 (N.D. 1978) (striking the predecessor to the current North Dakota statute, which had applied to "every political advertisement").

12. ARK. CODE ANN. § 7-1-103 (Michie 1993) provides:

Unless the statement, communication, advertisement, circular, pamphlet, form letter, mimeographed, printed, duplicated, or other similar matter plainly bears the name or names and post office addresses of the individuals, firms, committees, or other group or groups sponsoring and bearing the cost, no statement, communication, or advertisement of a political nature may be published in a newspaper or other periodical within the state of Arkansas, and no circular, pamphlet, letter, form letter, statement, advertisement, or other similar matter of a political nature, may be printed or distributed in this state.

advertisements and campaign literature¹³ and the other requiring identification on any advertisement "intended to influence public policy or the vote of a public official."¹⁴ South Carolina requires disclosure on communications supporting or opposing public officials (not just candidates).¹⁵ Rather than regulating political writing in general, a substantial number of states specify that disclosure is required on materials relating or referring to candidates, election issues, proposed constitutional amendments, or the like. New Jersey, for example, requires disclosure on printed matter "having reference to any election or to any candidate or to the adoption or rejection of any public question at any general, primary for the general, or special election."¹⁶ Despite the variations, most statutes also include a "catch-all" phrase so that all materials relating to elections require disclosure.¹⁷

Three current statutes (and one repealed statute) explicitly require disclosure on *critical* political speech. The Louisiana Supreme Court struck down the predecessor to the current Louisiana statute, which had banned anonymous materials making "scurrilous, false, or irresponsible adverse comment about a candidate."¹⁸ North Carolina currently requires disclosure only on derogatory comments about candidates.¹⁹ In fact, North Carolina is the only state which requires disclosure *only* on derogatory political writings. Rhode Island and Texas, by way of contrast, each require disclosure on critical writing

13. FLA. STAT. ANN. § 106-143 (West 1993) ("Any political advertisement and any campaign literature . . . shall . . . identify the persons or organizations sponsoring the advertisement.").

14. FLA. STAT. ANN. § 106-1437 (West 1993) ("Any advertisement, other than a political advertisement, on billboards, bumper stickers, radio, or television, or in a newspaper, a magazine, or a periodical, intended to influence public policy or the vote of a public official, shall clearly designate the sponsor of such advertisement.").

15. S.C. CODE ANN. § 8-13-1354 (Law. Co-op. 1991) ("A person who makes an independent expenditure in the distribution . . . of a communication to voters supporting or opposing a public official, a candidate, or a ballot measure must place his name and address on the printed matter.").

16. N.J. STAT. ANN. § 19:34-38.1 (West 1994). See also COLO. REV. STAT. § 1-13-108 (1993) (relating to any candidate or issue); D.C. CODE ANN. § 1-1420 (1993) ("with reference to or intended for the support of" a candidate, initiative, or referendum); MICH. COMP. LAWS ANN. § 169.247 (West 1993) ("having reference to an election, a candidate, or ballot question"); MISS. CODE ANN. § 23-15-899 (1991) ("having reference to any election, or to any candidate").

17. See, e.g., OHIO REV. CODE ANN. § 3599.09 (Anderson 1992) (requiring disclosure on any "publication which is designed to promote the nomination or defeat of a candidate . . . [or issue] . . . or to influence the voters . . .") (emphasis added).

18. See *State v. Burgess*, 543 So.2d 1332 (La. 1989) (striking Act of August 5, 1976, 1976 La. Acts No. 697 § 1463 (as amended 1977) (amended 1988, 1991, 1993)).

19. N.C. GEN. STAT. § 163-274(7) (1994) provides:

It shall be unlawful . . . [f]or any person to publish in a newspaper or pamphlet or otherwise, any charge derogatory to any candidate or calculated to affect the candidate's chances of nomination or election, unless such publication be signed by the party giving publicity to and being responsible for such charge.

and then include a catch-all which sweeps in favorable writings to effectively neutralize the statute.²⁰

Another way to categorize disclosure statutes is according to the disclosure required. They are primarily divided into statutes which require disclosure of the payor or sponsor,²¹ disclosure of some party "responsible,"²² and disclosure of the author.²³ There are, however, deviations from this schema. Some states, for instance, require disclosure of more than one party.²⁴ A few states require disclosure of the person "distributing or publishing" the writing.²⁵ The only safe generalization to be made is that the majority of states require disclosure of the party *financing* the writing, and very few require disclosure of the *author*.

A third way of categorizing disclosure statutes is according to whether they link disclosure to the writing or distribution of campaign literature, or to the accompanying expenditure of funds. Some statutes are cast to read "whoever publishes campaign literature must disclose . . ."²⁶ Others follow a different model: "whoever makes an expenditure for the purpose of financing campaign literature must dis-

20. R.I. GEN. LAWS § 17-23-2 (1993) ("a circular, flier, or poster designed or tending to injure or defeat any candidate for nomination or election to any public office, by criticizing the candidate's personal character or political action, or *designed to aid [or] injure any question*") (emphasis added); TEX. ELEC. CODE ANN. § 255.004 (West 1994) ("to injure a candidate or *influence the result of an election*") (emphasis added).

21. See, e.g., ALASKA STAT. § 15.56.010 (1993); ARIZ. REV. STAT. ANN. § 16-912 (1993); ARK. CODE ANN. § 7-1-103 (Michie 1993); DEL. CODE ANN. tit. 15, § 8021 (1993); D.C. CODE ANN. § 1-1420 (1993); FLA. STAT. ANN. §§ 106-143, 106-1437 (West 1993); HAW. REV. STAT. § 11-215 (1993); IND. CODE ANN. § 3-14-1-13 (Burns 1993); KY. REV. STAT. ANN. § 121.190 (Michie / Bobbs-Merrill 1993); MICH. COMP. LAWS ANN. § 169.247 (West 1993); MO. ANN. STAT. § 130.031 (Vernon 1993); MONT. CODE ANN. § 13-35-225 (1993); NEV. REV. STAT. § 294A.320 (1993); N.M. STAT. ANN. § 1-19-16 (Michie 1993); N.D. CENT. CODE § 16.1-10-04.1 (1993); OKLA. STAT. ANN. tit. 21, § 1840 (West 1994); 25 PA. CONS. STAT. ANN. § 3258 (1992); S.C. CODE ANN. § 8-13-1354 (Law. Co-op. 1991); TENN. CODE ANN. § 2-19-120 (1993); UTAH CODE ANN. § 20-14-24 (1993); WASH. REV. CODE ANN. § 42.17.510 (West 1994); WYO. STAT. § 22-25-110 (1992).

22. See, e.g., ALA. CODE § 17-22A-13 (1993); KAN. STAT. ANN. § 25-2407 (1993); ME. REV. STAT. ANN. tit. 21-A, § 1014 (West 1993); MD. CODE ANN., ELEC. § 26-17 (1993); MASS. GEN. LAWS ANN. ch. 56, § 41 (West 1992); N.H. REV. STAT. ANN. § 664:14 (1992); N.C. GEN. STAT. § 163-274(7) (1994); OHIO REV. CODE ANN. § 3599.09 (Anderson 1992); OR. REV. STAT. § 260.522 (1993); VA. CODE ANN. § 24.2-1014 (Michie 1993).

23. See, e.g., ALASKA STAT. § 15.56.010 (1993); MISS. CODE ANN. § 23-15-899 (1991); R.I. GEN. LAWS § 17-23-2 (1993); VT. STAT. ANN. tit. 17, § 2022 (1992); W. VA. CODE § 3-8-12 (1994).

24. See, e.g., S.D. CODIFIED LAWS ANN. § 12-25-4.1 (1993) (requiring disclosure by financial sponsor and person authorizing).

25. See, e.g., GA. CODE ANN. § 21-2-415 (1993); IOWA CODE ANN. § 56.14 (West 1992).

26. See, e.g., GA. CODE ANN. § 21-2-415 (1993), which provides:

No person shall distribute, circulate, disseminate, or publish or cause to be distributed, circulated, disseminated, or published any literature in connection with any political campaign for any public office or question unless such literature shall bear the name and address of the person or organization distributing, circulating, disseminating, publishing, or causing to be distributed, circulated, disseminated, or published.

close . . . ”²⁷ There may be a trend towards rewriting disclosure statutes to link them more explicitly with expenditures. The original Tennessee provision, for example, provided that all circulars referring to candidates had to be signed by the writer.²⁸ The new statute requires disclosure when an expenditure is made to finance a communication advocating the election or defeat of a candidate or measure.²⁹ Precisely the same revision was made to the federal provision.³⁰ A considerable number of statutes do not fall into either category,³¹ and several statutes triggered by writing or publication require disclosure of the payor.³²

Finally, one could categorize disclosure statutes according to the placement of criminal liability. By and large the person whose name must appear is also the person liable.³³ A considerable number of states, however, hold another party liable — most often the party publishing or distributing — if the payor’s name is undisclosed.³⁴ One

See also ALA. CODE § 17-22A-13 (1993); ALASKA STAT. § 15.56.010 (1993); ARK. CODE ANN. § 7-1-103 (Michie 1993); COLO. REV. STAT. § 1-13-108 (1993); IND. CODE ANN. § 3-14-1-3 (Burns 1993); IOWA CODE ANN. § 56.14 (West 1992); MINN. STAT. ANN. § 211B.04 (West 1994); MO. ANN. STAT. § 130.031 (Vernon 1993); NEV. REV. STAT. § 294A.320 (1993); N.J. STAT. ANN. § 19:34-38.1 (West 1994); N.M. STAT. ANN. § 1-19-16 (Michie 1993); N.C. GEN. STAT. § 163.274(7) (1994); OHIO REV. CODE ANN. § 3599.09 (Anderson 1992); OKLA. STAT. ANN. tit. 21, § 1840 (West 1994); OR. REV. STAT. § 260.522 (1993); R.I. GEN. LAWS § 17-23-2 (1993); VT. STAT. ANN. tit. 17, § 2022 (1992); W. VA. CODE § 3-8-12 (1994).

27. *See, e.g.*, MONT. CODE ANN. § 13-35-225 (1993), providing that:

Whenever a person makes an expenditure for the purpose of financing communications advocating the success or defeat of a candidate, political party, or ballot issue through any broadcasting station, newspaper . . . handbill . . . or other form of general political advertising, the communication must clearly and conspicuously state the name and address of the person.

See also ARIZ. REV. STAT. ANN. § 16-912 (1993); CONN. GEN. STAT. § 9-333w (1993); ME. REV. STAT. ANN. tit. 21-A, § 1014 (West 1993); N.Y. ELEC. LAW § 14-106 (McKinney 1994); 25 PA. CONST. STAT. ANN. § 3258 (1992); S.C. CODE ANN. § 2-19-120 (Law. Co-op. 1991); TENN. CODE ANN. § 2-19-120 (1993); UTAH CODE ANN. § 20-14-24 (1993); WIS. STAT. ANN. § 11.30 (West 1993).

28. Act of April 20, 1972, 1972 Tenn. Pub. Acts ch. 740, § 1920 (amended 1987, 1989, 1990, 1991, 1992).

29. TENN. CODE ANN. § 2-19-120 (1993).

30. Compare 2 U.S.C. § 441d (1988) with Act of June 25, 1948, ch. 645, 62 Stat. 724, amended by Act of August 25, 1950, ch. 784, § 2, 64 Stat. 475, amended by Act of August 12, 1970, § 6(j)(7), 84 Stat. 777 (repealed 1976).

31. *See, e.g.*, DEL. CODE ANN. tit. 15, § 8021 (1993) (“all campaign literature . . . shall display. . .”).

32. *See, e.g.*, MO. ANN. STAT. § 130.031 (Vernon 1993) (“Any 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 . . . the person who paid for the printed matter. . .”).

33. *See, e.g.*, GA. CODE ANN. § 21-2-415 (1993) (“No person shall . . . distribute . . . unless such literature shall bear the name . . . of the person distributing . . .”).

34. *See, e.g.*, MO. ANN. STAT. § 130.031 (Vernon 1993) (“Any person publishing, circulating, or distributing . . . shall . . . identify . . . the person who paid . . .”).

state expands liability to essentially anyone involved.³⁵ Usually the infraction is a misdemeanor.³⁶ At least one state, however, has bifurcated the penalty; in New Mexico, it is a felony to publish or print campaign material without the sponsor's name but only a misdemeanor to circulate or distribute the same.³⁷

B. Ohio

The Ohio disclosure statute provides that:

No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election, or make an expenditure for the purpose of financing political communications through newspapers, magazines, outdoor advertising facilities, direct mailings, or other similar types of general public political advertising, or through flyers, handbills, or other nonperiodical printed matter, unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor.³⁸

This statute applies to a broad range of political writings (ultimately any general publication designed to influence the voters); it requires the signature of the person who makes or is responsible for the publication; and criminal liability attaches to both the author and the distributors. The only published decision construing the Ohio statute is *McIntyre v. Ohio Election Commission*.³⁹ In spring 1988, Margaret McIntyre produced unsigned flyers opposing a school levy on an upcoming ballot and handed them to persons attending two meetings about the levy.⁴⁰ Her son and his girlfriend deposited some of the flyers on the windshields of automobiles parked outside one meeting.⁴¹ The Ohio Elections Commission determined that McIntyre had violated the Ohio disclosure statute, and the Ohio Supreme Court af-

35. MINN. STAT. ANN. § 211B.04 (West 1994) ("A person who participates in the preparation or dissemination . . .").

36. See, e.g., MICH. COMP. LAWS ANN. § 169.247 (West 1993) (subjecting offender to fine of as much as \$1000, imprisonment for as many as 90 days, or both).

37. N.M. STAT. ANN. § 1-19-16 (Michie 1993).

38. OHIO REV. CODE ANN. § 3599.09 (Anderson 1992).

39. 618 N.E.2d 152 (Ohio 1993), cert. granted, 114 S. Ct. 1047 (No. 93-986), motion to dismiss denied, 114 S. Ct. 2670 (1994); see also *State v. Babst*, 135 N.E. 525 (Ohio 1922) (affirming the predecessor to the current statute on the grounds that it was "regulatory" in nature); *McIntyre*, 618 N.E. 2d at 153 (noting that *Babst* may be dated).

40. *McIntyre*, 618 N.E.2d at 152.

41. Brief of Petitioner at 4-5, *McIntyre* (No. 93-986).

firmed its decision, rejecting her argument that the statute violated the First Amendment.⁴² The Ohio Supreme Court listed the purposes of this statute as (1) identification of those who distribute false statements;⁴³ (2) identification of persons responsible for libel, false advertising, and fraud;⁴⁴ and (3) the providing of information to voters so they may better evaluate messages they receive.⁴⁵ This case is presently before the United States Supreme Court.⁴⁶

C. North Carolina

The North Carolina disclosure statute provides that:

Any person who shall, in connection with any primary or election in this State, do any of the following acts and things declared in this section to be unlawful, shall be guilty of a misdemeanor. It shall be unlawful: . . . (7) For any person to publish in a newspaper or pamphlet or otherwise, any charge derogatory to any candidate or calculated to affect the candidate's chances of nomination or election, unless such publication be signed by the party giving publicity to and being responsible for such charge.⁴⁷

This statute differs from the Ohio statute in that it does not apply across the board to political writings. Instead it applies only to *derogatory* charges about candidates, and it does not contain a catch-all provision.⁴⁸

*State v. Petersilie*⁴⁹ is the only published North Carolina decision construing this statute. In winter 1989, Frank Petersilie, a defeated candidate for the town council of Boone, distributed anonymous mailings about two candidates in the run-off election.⁵⁰ One mailing was a letter his mother had received, accompanied by a *Washington Post* article written by the wife of one candidate. The candidate's wife ex-

42. *McIntyre*, 618 N.E.2d at 156.

43. *McIntyre*, 618 N.E.2d at 154.

44. *Id.* at 156.

45. *Id.* at 155-56. In its brief before the Supreme Court, the Ohio Elections Commission characterized the state's interests as (1) the *deterrence* of fraud, false advertising, and libel; and (2) the providing of pertinent information to voters. Brief of Respondent at 3, *McIntyre* (No. 93-986).

46. *McIntyre v. Ohio Election Comm'n*, 618 N.E.2d 152 (Ohio 1993), *cert. granted*, 114 S. Ct. 1047 (No. 93-986), *motion to dismiss denied*, 114 S. Ct. 2670 (1994).

47. N.C. GEN. STAT. § 163-274 (1994).

48. The second half of the clause ("or calculated to affect the candidate's chances of nomination or election") could be construed as a catch-all provision to embrace "praise" about candidates, but the North Carolina Supreme Court did not so construe it. Nor did it hold that "affect" means only "decrease." Indeed, the court did not address the statute's limitation to "derogatory" charges. The court's tone in describing the purpose of the statute, however, suggests that "affect" means only "decrease." See *State v. Petersilie*, 334 N.C. 169, 182-83, 432 S.E.2d 832, 839, 840, 843 (1993). See *infra* text accompanying notes 54-56.

49. 334 N.C. 169, 432 S.E.2d 832 (1993).

50. *Id.* at 172, S.E.2d at 834.

pressed displeasure with the religiousness of the people in Boone, concern about the presence of religious items in government offices, and concern about a potentially unconstitutional mixing of church and state.⁵¹ The candidate was Jewish, and the media suggested that Petersilie's mailings were deliberately anti-Semitic in order to manipulate the voters.⁵² The other mailing was a flyer advertising the two candidates on the strength of their being "pro-liquor candidates."⁵³ After the North Carolina State Bureau of Investigation identified Petersilie by comparing the handwriting on his notice of candidacy with handwriting on the mailings, he was convicted of violating the North Carolina disclosure statute. The North Carolina Supreme Court identified its purpose as "prohibiting anonymous pejorative campaign material,"⁵⁴ thereby both "protecting the integrity of the electoral process"⁵⁵ and "insuring as far as possible fair elections."⁵⁶ The North Carolina Supreme Court affirmed the lower court's decision, rejecting Petersilie's contention that the statute was overbroad.⁵⁷

III. ANALYSIS

A. Overbreadth

Analysis of disclosure statutes begins with *Talley v. California*,⁵⁸ in which the Supreme Court invalidated a Los Angeles ordinance banning the distribution of anonymous handbills. *Talley* involved a section of the Municipal Code of Los Angeles which provided that "[n]o person shall distribute any hand-bill in any place under any circumstances, which does not have printed on the cover, or the face thereof, the name and address of . . . [t]he person who printed, wrote, compiled or manufactured the same."⁵⁹ *Talley* had distributed handbills urging a boycott of local merchants who carried the products of manufacturers suspected of racist hiring practices, and he argued on appeal of his conviction that the ordinance violated his freedom of speech.⁶⁰

The Court first noted that a flat ban on the distribution of literature would be unconstitutional.⁶¹ Indeed, such a ban would not necessarily be saved simply by virtue of having a legitimate purpose, such as the

51. *Id.* at 173-74, S.E.2d at 834-35.

52. *Boone Landlord Faces Smear Charge in Town Council Election*, UPI, Jan. 11, 1990, available in LEXIS, News Library, UPI File.

53. *Petersilie*, 334 N.C. at 174, 432 S.E.2d at 835.

54. *Id.* at 182, 432 S.E.2d at 839.

55. *Id.* at 187, 432 S.E.2d at 843.

56. *Id.* at 182, 432 S.E.2d at 840.

57. *Id.* at 191, 432 S.E.2d at 845.

58. 362 U.S. 60 (1960).

59. *Id.* at 60.

60. *Id.* at 61-62.

61. *Id.* at 62 (citing *Lovell v. Griffin*, 303 U.S. 444 (1937)).

prevention of fraud, disorder, or littering.⁶² The First Amendment compels the State to use a narrower remedy, for example, a statute preventing littering itself.⁶³ This said, the Court turned to the Los Angeles ordinance, which it construed as a flat ban on distribution, with an exception for signed materials. Although the City of Los Angeles argued that its ordinance provided a way to identify persons responsible for fraud, false advertising, and libel, the Court concluded that "the ordinance is in no manner so limited."⁶⁴ Indeed, neither the statute nor its legislative history lent credence to the asserted purpose.⁶⁵ Moreover, such an identification requirement would almost certainly suppress the flow of information,⁶⁶ information that has historically been of tremendous value.⁶⁷ The government may not compel identification when fear of reprisal might in this way deter discussion of important public matters.⁶⁸

Talley's importance lies in the strong words used by the Court to describe anonymous political speech:

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. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers. John Lilburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books. Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have

62. *Id.* at 63 (citing *Schneider v. State*, 308 U.S. 147 (1939)).

63. *Schneider v. State*, 308 U.S. 147, 164 (1939) ("If it is said that these means are less efficient and convenient . . . the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.").

64. *Talley*, 362 U.S. at 64.

65. *Id.*

66. *Id.* ("There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression.").

67. *Id.* ("Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.").

68. *Id.* at 65 ("[T]here are times and circumstances when States may not compel members of groups engaged in dissemination of ideas to be publicly identified. The reason . . . [is] that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." (citing *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958)).)

brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.⁶⁹

The decision is also important for the precedent it sets with respect to anonymity and overbreadth. Admittedly, the *Talley* Court declined to pass on the validity of "an ordinance limited to prevent [fraud, false advertising, or libel] or any other supposed evils."⁷⁰ An ordinance narrowly designed to achieve these goals — prevention of fraud, false advertising, and libel — might have been sustained. Equally, an ordinance narrowly tailored to achieve different goals might have been sustained. But the *Talley* test is whether such a statute *also* sweeps in highly protected speech, and in particular, anonymous political speech.⁷¹

In its overbreadth analysis in *McIntyre*, the Ohio Supreme Court found the purpose of the Ohio statute to be to identify persons responsible for false statements.⁷² Because prosecutions for failure to disclose necessarily begin with identification of the party in question, the statute will achieve its goal and a good deal more. It identifies parties responsible for *all* statements, including false statements, either through compliance or through prosecution. More to the point, however (and perhaps this is what the court meant to write), the statute may eliminate *negligent* false statements from the election arena since *deliberate* false statements would be tantamount to libel. Specifically, it may prompt the writer to verify his information prior to publication. As a practical matter, he will only do so if the likelihood of prosecution, stiffness of penalty, and accompanying embarrassment outweigh the inconvenience of additional research.

Even though a disclosure statute may eliminate false statements, it is overbroad insofar as it may also eliminate true statements as well. Imagine, for example, a city employee who anonymously distributes information given to him by informants claiming to have seen the in-

69. *Talley*, 362 U.S. at 64-65 (citations omitted).

70. *Id.* at 64. Here the Court interchanged the state interest in *identifying* libelers and the state interest in *preventing* libel.

71. The North Carolina and Ohio disclosure statutes completely invert the *Talley* test by explicitly banning precisely this (and *only* this) highly protected anonymous political speech. N.C. GEN. STAT. § 163-274 (1994); OHIO REV. CODE ANN. § 3599.09 (Anderson 1992). In 1980, the Court invalidated a similarly inverted scheme whereby commercial speech was afforded more protection than noncommercial speech. *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1980). The City of San Diego had permitted on-site advertising on billboards, *but not* political or social messages. *Id.* at 495-96.

72. *McIntyre v. Ohio Election Comm'n*, 618 N.E.2d 152, 154 (Ohio 1993), *cert. granted*, 114 S. Ct. 1047 (No. 93-986), *motion to dismiss denied*, 114 S. Ct. 2670 (1994).

cumbent mayoral candidate accept a bribe, and assume that he has no reason to doubt the informants. On the one hand, the Ohio disclosure statute might not prompt him to verify his information since a misdemeanor prosecution for failure to sign would ensue regardless of the accuracy of the statement *and* since there are no civil repercussions for such false statements.⁷³ On the other hand, it might silence him if significant extralegal repercussions would follow the exposure attendant to a misdemeanor conviction. Thus, a disclosure statute may silence someone whose informants were correct. The extent to which false statements are particularly in need of attribution is unclear. In any event, to the extent that the purpose of a disclosure statute is *prevention* of false statements, a narrower solution is available: a ban on the false statements themselves, a "campaign falsity statute."⁷⁴

Nor is it clear that a surgically precise ban on false statements about candidates would necessarily be constitutional. One constraint on such a statute would stem from *New York Times v. Sullivan*,⁷⁵ in which the *New York Times* published a full page advertisement containing what turned out to be false statements which could reasonably be linked to an elected commissioner in Montgomery, Alabama.⁷⁶ Rather than verifying the accuracy of the statements contained in the advertisement, the *Times* relied on the reputations of the persons listed as sponsors. The rule of *Sullivan* is that false statements of fact about public figures are not actionable as libel unless made with actual malice (actual knowledge of their falsity or reckless disregard as to their falsity).⁷⁷ The driving force of *Sullivan* is neither that false statements contribute to the debate about public officials,⁷⁸ nor that false statements are especially deserving of protection as opposed to, for example, dissenting political writing. Rather, the specter of damages might silence a person who is not willing to stake everything on the accuracy of valuable truthful information that he wishes to impart.

73. *New York Times v. Sullivan*, 376 U.S. 254 (1964) (holding that false statements of fact about public officials are not actionable libel unless made with actual malice).

74. See, e.g., N.D. CENT. CODE § 16.1-10-04 (1993) ("No person may knowingly sponsor any political advertisement or news release that contains any assertion, representation, or statement of fact . . . which the sponsor knows to be untrue, deceptive, or misleading . . .").

75. 376 U.S. 254 (1964).

76. *Id.* at 256.

77. See also *Hustler v. Falwell*, 485 U.S. 46 (1988) (holding that a public figure cannot recover for intentional infliction of emotional distress without showing that the publication contains a false statement of fact made with actual malice); *Dun and Bradstreet v. Greenmoss*, 472 U.S. 749 (1985) (holding that actual malice need not be shown if the issue is not a matter of public concern); *Gertz v. Robert Welch*, 418 U.S. 323 (1974) (holding that a private individual may recover damages for defamation with a showing of negligence).

78. But see *Sullivan*, 376 U.S. at 279 n.19 ("[E]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" (citing JOHN STUART MILL, *ON LIBERTY* 15 (1947))).

The First Amendment places a high burden on the libel plaintiff so that the speaker may feel relatively secure about contributing to the public debate.⁷⁹ Society's need for the debate to be "uninhibited, robust, and wide open"⁸⁰ outweighs the defamed public figure's need for compensation.⁸¹ So with respect to the first purpose articulated by the Ohio Supreme Court, which is the identification of persons responsible for false statements, not only is there the narrower alternative of a campaign falsity statute, but *Sullivan* also suggests that this sort of statute might require an actual malice standard.⁸²

Another purpose allegedly served by the Ohio disclosure statute is the identification and deterrence of persons responsible for fraud, false advertising, and libel. Plainly, the Ohio statute will accomplish both. For example, by prosecuting for the misdemeanor, the State identifies the libeler for the private plaintiff. By thus making libel suits easier, the State deters libel in the election arena. Such deterrence might serve some sort of societal interest in an election free of libel. Deterrence might also benefit the individual candidate, as well as, or better than, would simple facilitation of libel suits.⁸³ The Ohio statute is considerably narrower than the Los Angeles ordinance in *Talley*. But while a disclosure statute may silence libelers, it also silences those who have chosen the shield of anonymity to avoid harassment or embarrassment and whose purposes would be frustrated by the exposure accompanying a misdemeanor conviction. The disclosure statute still falls squarely under the overbreadth rulings in *Schnei-*

79. Cf. *United States v. Harriss*, 347 U.S. 612 (1954) (upholding statute which requires registration of paid lobbyists, because it provides members of Congress with valuable information). Although the *Harriss* Court sustained disclosure despite arguments about deterrence, the holding pertains to the peculiarly narrow context of lobbyists influencing Congress, rather than contributing to the public debate.

80. *Sullivan*, 376 U.S. at 270.

81. *See Monitor v. Roy*, 401 U.S. 265, 272 n.3 (1971):

The importance to the state and to society of such discussions is so vast and the advantages derived are so great that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great and the chance of injury to private character is so small that such discussion must be privileged.

(quoting *Coleman v. MacLennan*, 98 P. 281, 286 (Kan. 1908)).

82. *See also Brown v. Hartlage*, 456 U.S. 45, 61 (1981) ("The chilling effect of . . . absolute accountability for factual misstatements in the course of political debate is incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns."); *Petrask v. Ohio Elections Comm'n*, 926 F.2d 573, 577 (6th Cir. 1991) (finding Ohio campaign falsity statute with actual malice standard consistent with *New York Times v. Sullivan*).

83. Libel of a candidate may be a harm which money damages cannot adequately redress since a libel suit will end well after the election and rebuttal may exacerbate the problem by drawing attention to the original libel. *See Jack Winsbro, Misrepresentation in Political Advertising: The Role of Legal Sanctions*, 36 EMORY L.J. 853, 889-91 (1987).

der and Talley.⁸⁴ It sweeps in highly protected speech, and the narrower alternative of the criminal libel statute is available.⁸⁵

One might argue in reply that the *Sullivan* burden on the libel plaintiff sufficiently protects the distributor of political literature and sufficiently ensures the debate that he does not need the additional protection of a right to anonymity. In other words, while a disclosure statute makes a libel suit "easier," the First Amendment still makes the libel suit "difficult" by placing an actual malice standard on the plaintiff. An additional right to anonymity will provide further protection to the libeler. Indeed, the Court has sustained forced disclosure of the sources of a newspaper story pursuant to a discovery order in a civil defamation suit with roughly this reasoning.⁸⁶ The knowledge that a discovery order will outweigh any right to anonymity will deter those libelers unwilling to rely solely on the protection of the actual malice burden. It will not necessarily, however, deter writers who fear extrajudicial harassment, economic harassment, physical violence, or embarrassment⁸⁷ rather than a libel suit. This is because a discovery order in a civil defamation suit very likely follows a motion to dismiss for failure to state a claim; in other words, non-libelers are not really threatened by such discovery orders. This result, deterrence of libelers without affecting other writers, will not follow a flat disclosure statute. Rather, a flat disclosure requirement unquestionably ex-

84. See *Talley v. California*, 362 U.S. 60 (1960) (banning distribution of anonymous handbills overbroad for alleged purpose of identifying persons responsible for fraud, false advertising, and libel); *Schneider v. State*, 308 U.S. 147 (1939) (banning leafletting to prevent fraud, disorder, or littering unconstitutional when those can be punished instead).

85. See *Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n*, 114 S. Ct. 2445, 2479 (1994) (O'Connor, J., concurring in part and dissenting in part) (citations omitted):

That some speech within a broad category causes harm, however, does not justify restricting the whole category . . . If the government wants to avoid littering, it may ban littering, but it may not ban leafletting . . . If the government wants to avoid fraudulent political fundraising, it may bar the fraud, but it may not in the process prohibit legitimate fundraising.

86. *Herbert v. Lando*, 441 U.S. 153, 169 (1979) ("[A]ccording to an absolute privilege to the editorial process of a media defendant in a libel case . . . would substantially enhance the burden of proving actual malice, contrary to the expectations of *New York Times* . . .") (emphasis added). Several state courts have used similar reasoning to sustain disclosure statutes. See, e.g., *Morefield v. Moore*, 540 S.W.2d 873, 874-75 (Ky. 1976) ("While the right to publish anonymous material may exist to some degree, it does not seem altogether naive to assume that a fundamental objective of the First Amendment was to obviate the necessity for anonymity."); see also *State v. North Dakota Educ. Ass'n*, 262 N.W.2d 731, 737 (N.D. 1978) (Sand, J., concurring): [B]ecause of the harsh [seditious] libel laws of England, a violation of which could subject the offender to the death penalty or the loss of all property plus a long jail sentence, there was a need for anonymity at the time the Colonies were formulating and struggling for their independence from England . . . [but] the inhabitants of the Colonies in the pre-Independence days [did not] experience[] 'our' free open elections and for this reason I cannot agree that the First Amendment was adopted and designed to assure or protect anonymity in the election process.

87. See Seth Kreimer, *Sunlight, Secrets and Scarlet Letters: The Tension Between Privacy and Disclosure on Constitutional Law*, 140 U. PA. L. REV. 1, 39-54 (1991) (providing examples of violence, economic sanctions, and social sanctions).

poses non-libelers, and its deterrent effect is certain. In short, while the *Sullivan* burden might replace anonymity for those fearing civil litigation on account of their speech, it cannot do so for those fearing extrajudicial repercussions.

Indeed, it is precisely the risk of intimidation and extrajudicial repercussions which necessitates a guarantee of anonymity, as the Court recognized thirty years ago in a series of cases involving the NAACP. In *NAACP v. Alabama*,⁸⁸ the State of Alabama attempted to oust the NAACP for failure to comply with a qualification statute for corporations doing business in the state. As part of its civil ouster suit, Alabama obtained a court order for the organization's membership list.⁸⁹ In *Bates v. City of Little Rock*,⁹⁰ the City of Little Rock sought a list of contributors to the NAACP pursuant to a municipal licensing scheme.⁹¹ And in *Gibson v. Florida Legislative Investigative Committee*,⁹² the Committee sought the membership list of the Miami branch of the NAACP in order to determine if certain suspected Communists were members.⁹³ In all three cases, the NAACP argued that disclosure would subject members to harassment and would deter potential members from joining. Although the abridgment of protected freedoms was indirect — deterrence of the exercise of a constitutional right (association) on account of private action (harassment) facilitated by unrelated state interests (for example, municipal licensing)⁹⁴ — the Court found that the First Amendment precluded forced disclosure.⁹⁵ And although these cases are grounded in the importance of political association and the obvious Southern hostility to the NAACP, together they stand for the notion that the First Amendment shields unpopular groups espousing unpopular ideas from harassment both by hostile states *and* by private parties.⁹⁶ *Herbert v. Lando*⁹⁷

88. 357 U.S. 449 (1958).

89. *Id.* at 451.

90. 361 U.S. 516 (1960).

91. *Id.* at 517-18.

92. 372 U.S. 539 (1963).

93. *Id.* at 541.

94. In a more recent case, the Court relied on *Bates* to again confirm that the State cannot require information from an organization and thereby indirectly infringe on First Amendment associational freedoms, absent a connection between the information sought and the State's interest. *Dawson v. Delaware*, 112 S. Ct. 1093 (1992) (finding it constitutional error to admit stipulation of criminal defendant's membership in white supremacist gang).

95. See, e.g., *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960) ("Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."); *NAACP v. Alabama*, 357 U.S. 449, 461 (1958) ("In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action.").

96. In contrast, many writers extolling "responsibility" dismiss First Amendment arguments premised on private harassment. Some, for example, describe anonymity as "cowardly." See,

may be distinguished from these cases in that the newspaper claimed anonymity on behalf of would-be libel defendants (in some sense, "wrongdoers"⁹⁸) who would, in any event, still receive the protection of the *Sullivan* actual malice burden. By way of contrast, the NAACP members were pursuing protected activities and would receive no additional protection from the repercussions of disclosure. Many anonymous pamphleteers could be similarly situated.

The first two interests served by the Ohio statute (identification of persons making false statements, and identification of persons responsible for libel, false advertising, and fraud) are thus insufficient to sustain it. The statute deters anonymous political speech unrelated to these stated interests, *and* it facilitates harassment of those speakers. By and large, state court decisions since *Talley* have been in accord with this assessment, striking disclosure statutes as overbroad.⁹⁹ In

e.g., *Commonwealth v. Evans*, 40 A.2d 137, 139 (Penn. 1944) ("[The statute] is an attempt to raise the ethical standards of political discussion, to promote fair play and fair competition in politics, to banish cowards from the political arena, and to extirpate the dirty business of surreptitious character assassination."); see also Comment, *Gutter Politics and the First Amendment*, 6 VAL. U. L. REV. 185, 201 (1972) ("It is difficult to imagine why an individual would object to putting his name on a legitimate piece of campaign literature."). Some extol the taking of responsibility. See, e.g., *University of Pa. v. EEOC*, 493 U.S. 182, 201 (1990) ("Not all academics will hesitate to stand up and be counted when they evaluate their peers."). And some argue that the First Amendment guarantee of "free speech" *permits* precisely this taking of responsibility. See, e.g., *Morefield v. Moore*, 540 S.W.2d 873, 874-75 (Ky. 1976) ("[I]t does not seem altogether naive to assume that a fundamental objective of the First Amendment was to obviate the necessity for anonymity."). The argument for anonymity on the grounds of intimidation finds substantial support, however, in our adoption of the secret ballot. See *Burson v. Freeman*, 112 S. Ct. 1846, 1852-54 (1992). In reviewing adoption of polling booths to alleviate problems of voter intimidation and election fraud, the Court stated, "The opportunities that the *viva voce* [showing of hands] system gave for bribery *and intimidation* gradually led to its repeal." (emphasis added). *Id.* at 1852. Related to the arguments from responsibility is the argument that disseminators of the written word are not entitled by the First Amendment to more protection than is available to speakers. See, e.g., *Bogalusa v. May*, 212 So.2d 408, 408 (La. 1968) (holding that constitutional guarantees protecting written speech and the press do not include anonymity, but rather require identification "just as one who would speak from a speaker's rostrum would identify himself"). Anonymity is, however, available to the speaker; for instance, the informant on a television news program who is filmed in shadow or whose facial features are disguised by computer. See *Ghafari v. Municipal Court*, 150 Cal. Rptr. 813, 815 (Cal. Ct. App. 1978) (striking, for overbreadth, statute which prohibited the wearing of masks in public and noting that "under certain circumstances, anonymity is essential to the exercise of constitutional rights").

97. 441 U.S. 153 (permitting forced disclosure pursuant to a discovery order in private libel suit); see *supra* note 86.

98. Compare *NAACP v. Alabama*, 357 U.S. 449, 466 (1958) ("[T]he immunity from state scrutiny of membership lists which the Association claims on behalf of its members is so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment.") with *Bryant v. Zimmerman*, 278 U.S. 63, 75-77 (1928) (upholding as applied to the Ku Klux Klan a New York statute requiring disclosure of members of any unincorporated association demanding an oath as a condition of membership, and resting its decision on the nature of Klan activities, specifically, unlawful intimidation and violence).

99. Compare *Schuster v. Imperial County Municipal Court*, 167 Cal. Rptr. 447 (Cal. Ct. App. 1980) (striking California statute) and *People v. Drake*, 159 Cal. Rptr. 161 (Cal. App.

Schuster v. Imperial County Municipal Court,¹⁰⁰ for example, the California Court of Appeal invalidated a disclosure statute because it embraced more speech than necessary to achieve the asserted goals of assisting the voters to distinguish truth from falsity, facilitating redress for libel, and discouraging campaign falsity. Specifically, noted the court, "such state interests can be furthered through more narrowly constructed statutes without the criminalization of anonymously uttering the truth."¹⁰¹ Similarly, the North Dakota Supreme Court held that a statute which applied "to all political advertisements, 'whether on behalf of or in opposition to' candidates or measures, and . . . to all types of advertisements, whether true or false," was overbroad for any interest in avoiding "political smears," "character assassinations," and "baseless, anonymous slanders . . . during the last few hours before an election."¹⁰²

Dep't. Super. Ct. 1979) (striking California statute) and *People v. Bongiorno*, 23 Cal. Rptr. 565 (Cal. App. Dep't. Super. Ct. 1962) (striking California statute) and *People v. White*, 506 N.E. 2d 1284 (Ill. 1987) (striking Illinois statute) and *State v. Burgess*, 543 So.2d 1332 (La. 1989) (striking Louisiana statute) and *State v. Fulton*, 337 So.2d 866 (La. 1976) (striking Louisiana statute) and *People v. Duryea*, 351 N.Y.S.2d 978 (N.Y. Sup. Ct. 1974) (striking New York statute) and *State v. North Dakota Educ. Ass'n*, 262 N.W.2d 731 (N.D. 1978) (striking North Dakota statute) with *State v. Acey*, 633 S.W.2d 306 (Tenn. 1982) (sustaining Tennessee statute) and *Morefield v. Moore*, 540 S.W.2d 873 (Ky. 1976) (sustaining Kentucky statute). See also *In re Opinion of the Justices*, 324 A.2d 211 (Del. 1974) (proposed statute requiring every newspaper editorial to be signed by the writer would be unconstitutional under *Talley*); *Opinion of the Justices*, 306 A.2d 18 (Me. 1973) (proposed legislation making it a crime for a paper to publish an editorial without the author's name would be unconstitutionally overbroad). But see *State v. Petersilie*, 334 N.C. 169, 432 S.E.2d 832 (1993) (sustaining North Carolina statute); *McIntyre v. Ohio Election Comm'n*, 618 N.E.2d 152 (Ohio 1993), cert. granted, 114 S. Ct. 1047 (No. 93-986), motion to dismiss denied, 114 S. Ct. 2670 (1994) (sustaining Ohio statute).

100. 167 Cal. Rptr. 447 (Cal. Ct. App. 1980).

101. *Id.* at 452. See also *People v. White*, 506 N.E.2d 1284, 1289 (Ill. 1987) ("The State has an interest in preventing the intentional deception of the voters, but that interest cannot be served by a statute that sweeps too broadly, and in so doing stifles speech which has little or no tendency to misinform, let alone deceive."); *People v. Drake*, 159 Cal. Rptr. 161, 163 (Cal. App. Dep't. Super. Ct. 1979) (finding that statute banning anonymous material regardless of the "innocence of the motive [and] the truth of the . . . material" sweeps too broadly for an interest in an "undeceived" electorate); *People v. Duryea*, 351 N.Y.S.2d 978 (N.Y. Sup. Ct. 1974) (statute banning any anonymous handbills connected to any election overbroad for state interests in deterring defamation and helping enforcement of contribution and expenditure provisions).

102. *State v. North Dakota Educ. Ass'n*, 262 N.W.2d 731, 736 (N.D. 1978). Several disclosure statute decisions do not rest on First Amendment grounds. See, e.g., *Canon v. Justice Court*, 393 P.2d 428 (Cal. 1964) (striking a statute which prohibited writing or distributing circulars without the name of a responsible voter as "unconstitutionally discriminatory"); *State v. Barney*, 448 P.2d 195 (Idaho 1968) (striking on due process grounds a statute which made it unlawful to publish or distribute and to transport campaign literature of a candidate without the name of the group responsible); *Commonwealth v. Dennis*, 329 N.E.2d 706 (Mass. 1975) (striking a statute, on equal protection grounds, which made it a crime to write or distribute any circular designed to aid or defeat any candidate or any question submitted to the voters unless it contained the name of a voter responsible); *People v. Clappitt*, 222 N.Y.S.2d 23 (N.Y. Ct. Spec. Sess. 1961) (striking a statute which prohibited printing or reproducing in quantity any anonymous handbills about candidates, because of the indefiniteness of the expression "in quantity"); *State v. Babst*, 135 N.E. 525 (Ohio 1922) (affirming a conviction on the grounds that the statute was neutral and

B. *Balancing*

Perhaps the most troubling state court decision before *McIntyre* and *Petersilie*, however, is a 1982 case from Tennessee sustaining a disclosure statute as perfectly tailored.¹⁰³ The Tennessee disclosure law provided that "[a]ll written or printed . . . statements with reference to any . . . candidate . . . shall be signed by the writer thereof."¹⁰⁴ This statute, noted the Tennessee Supreme Court, enables voters to assess the "bias, interest, and credibility of the person or organization disseminating information about political candidates."¹⁰⁵ (According to the Ohio Supreme Court, the Ohio statute also serves this interest.) The Tennessee court concluded that there was no more narrow way to provide this information to the voter and, on the strength of this conclusion, affirmed the statute. While correct that the statute was not overbroad,¹⁰⁶ the Tennessee court did not address whether a disclosure statute perfectly tailored to inform the electorate in this way can be squared with the First Amendment.¹⁰⁷

In short, once overbreadth is put aside, what remains is a perfectly tailored election law clearly abridging some rights guaranteed by the First Amendment. Balancing must follow,¹⁰⁸ but balancing is inherently dangerous, particularly since explicit infringement of political speech necessitates especially rigorous scrutiny. In *Anderson v. Celebrezze*,¹⁰⁹ the Court invalidated an Ohio statute which required independent candidates for President to adhere to an early filing deadline. The Court held that the state's interest in voter education was insufficient justification for the statute's burden on the associational rights of independent voters and candidates, seven months being clearly longer than necessary for voters to learn about a candidate.¹¹⁰ In so reasoning, the *Anderson* Court endorsed careful

regulatory). See generally John C. Williams, Annotation, *Validity and Construction of State Statute Prohibiting Anonymous Political Advertising*, 4 A.L.R. 4th 741 (1981).

103. *State v. Acey*, 633 S.W.2d 306 (Tenn. 1982).

104. *Id.* at 306.

105. *Id.* at 307.

106. The statute is not overbroad because its purpose is to identify the source, on the basis of which the voters may draw inferences about bias, interest, and credibility.

107. Other courts have struck down statutes despite perfect tailoring for information gathering. See, e.g., *People v. White*, 506 N.E.2d 1284, 1288 (Ill. 1987) (rejecting argument from "informed electorate"). This more basic question was *not* addressed by the North Carolina court, which rested its decision purely on overbreadth. *State v. Petersilie*, 334 N.C. 169, 179, 432 S.E.2d 832, 848 (1993) (Mitchell, J., dissenting) ("I have grave reservations as to whether, consistent with the First Amendment, any public purpose can justify such a limitation on pure political expression . . .").

108. See *Storer v. Brown*, 415 U.S. 724, 730 (1974) ("[A]s a practical matter, there must be 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 process.").

109. 460 U.S. 780 (1982).

110. *Id.* at 795-97.

and thorough balancing when an election statute treads on First Amendment prerogatives.¹¹¹ At the same time, the *Anderson* Court noted that "the State's important . . . interests [in regulation of elections] are generally sufficient to justify reasonable, nondiscriminatory restrictions [on the individual's right to vote and right to associate],"¹¹² dicta which became the linchpin of the Ohio decision in *McIntyre*. Specifically, the Ohio Supreme Court found its disclosure law to have no impact on the content of campaign literature,¹¹³ and then sustained it on the strength of *Anderson*, which it took to endorse "lower" scrutiny in such a situation,¹¹⁴ and on the strength of the state's interest in voter education.¹¹⁵

Disclosure statutes do, however, affect the content of campaign literature, and lower scrutiny is not appropriate simply on account of the state's having articulated an election interest.¹¹⁶ Rather, the added strength of the state's interest increases the chances the statute will survive strict scrutiny. While on its face a disclosure law simply requires the inclusion of objective data on written campaign literature,

111. The Court stated:

[A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. . . . The results of this evaluation will not be automatic . . . there is 'no substitute for the hard judgments that must be made.'

Id. at 789 (citations omitted) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

112. *Anderson*, 460 U.S. at 788. The Court stated further, "We have upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process." *Id.* at 788, n. 9.

113. *McIntyre v. Ohio Election Comm'n*, 618 N.E.2d 152, 155 (Ohio 1993), *cert. granted*, 114 S. Ct. 1047 (No. 93-986), *motion to dismiss denied*, 114 S. Ct. 2670 (1994) ("The minor requirement . . . that those persons producing campaign literature identify themselves . . . neither impacts the content of their message nor significantly burdens their ability to have it disseminated."). In a similar vein, several state courts have taken pains to construe disclosure statutes as neither prohibitions of anonymous political speech nor regulation of political speech, but instead as disclosure requirements. The *malum prohibitum*, these courts write, is anonymity. See, e.g., *Commonwealth v. Dennis*, 404 A.2d 137, 138 (Mass. 1944) ("[T]he essence of the crime is anonymity . . . [A]nonymity is the core of the offense, and it is committed whether the content is true or false."); *Commonwealth v. Acquavia*, 145 A.2d 407, 410 (Pa. 1944) ("It is the anonymity of the publication which is forbidden and which is the essence of the offense.").

114. *McIntyre*, 618 N.E.2d at 155 ("[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to ensure that elections are operated equitably and efficiently.") (quoting *Burdick v. Takushi*, 112 S. Ct. 2059, 2063 (1992)).

115. *McIntyre*, 618 N.E.2d at 156.

116. In other situations, the Court has lowered its scrutiny on account of a state interest related to elections. See e.g., *Mills v. Alabama*, 384 U.S. 214 (1965) (striking state statute which made it a crime for a newspaper editor to publish an editorial on election day urging people to vote in a particular way); *Burson v. Freeman*, 112 S. Ct. 1846 (1992) (applying strict scrutiny to statute prohibiting election day solicitation of voters within 100 feet of polls).

the NAACP cases teach us that unconstitutional abridgment of rights may be worked by *privately* imposed harassment following disclosure mandated by the government.¹¹⁷ The mechanics of the disclosure statutes are the same. By virtue of a campaign disclosure law, writers of political literature disclose their names to the public, thereby facilitating extrajudicial harassment and reprisal, which might in turn discourage others from writing.¹¹⁸ This leads to an abridgment of speech. Because reprisal (and thus deterrence) is necessarily wedded to the content of the speech, an entire body of political speech, speech critical of the government, of those in power, and of the status quo, is lost (for example, speech which is nonconforming, sometimes reactionary, sometimes revolutionary; speech which is unpopular and crucial to our process of government). This speech is anonymous for a reason.¹¹⁹

The historical record testifies to the distinct content and role of anonymous political writing. The political arena of early modern Britain and colonial (and early Republic) America was clogged with anonymous and pseudonymous political writings.¹²⁰ One contemporary writer commented, anonymously, that "[the] requirement that authors fix their names to their publications . . . would put an end to many worthwhile contributions which could only be made anonymously."¹²¹ In America, "between 1789 and 1809 . . . six presidents, fifteen cabinet members, twenty senators, and thirty-four congressmen published political writings either unsigned or under pen names."¹²² At the

117. See *supra* text accompanying notes 88-98.

118. Arguably, the guarantee of anonymity encourages candor to the benefit of the electoral process. See *People v. Duryea*, 351 N.Y.S.2d 978, 979 (N.Y. Sup. Ct. 1974) ("Anonymity has been, historically, the medium of dissidents, shielding them from the retaliatory power of the established 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.") (emphasis added).

119. Disclosure statutes are necessarily content-based. The disclosure requirement is triggered by the particular content of the expression; specifically, political speech about candidates or issues. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (compelling newspaper to print a reply "exact[s] a penalty on the basis of the content of a newspaper"). Moreover, the statutes dictate the content of the compelled speech. See *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795 (1987) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech.").

120. See, e.g., *Talley v. California*, 362 U.S. 60, 63 n.3 (1960) (mentioning Thomas Paine); LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 155 (1985) (discussing Junius letter in *London Evening Post*); Note, *Constitutional Right to Anonymity*, 70 YALE L.J. 1084, 1085 (1961) (discussing Daniel Defoe, Jonathan Swift, and Samuel Johnson, among others).

121. LEVY, *supra* note 120, at 107 (citing "Tory Author"). See generally *id.* at 89-118 (discussing Daniel Defoe's anonymous publication of *A Vindication of the Press*, the pro-restraint response by "A Young Gentleman of the Temple," and the moderate position of "Tory Author").

122. Note, *supra* note 120, at 1085 (citing 4 BEVERIDGE, *THE LIFE OF MARSHALL* 313-19 (1919)). See e.g., LEVY, *supra* note 120, at 62 (letters of Cato); *id.* at 160 (Judge William Smith's criticism of special verdicts in libel trials); Note, *supra* note 120, at 1085 (listing *THE FEDERALIST*

same time, the British and American governments tried to suppress this speech; for example, Star Chamber's licensing laws of 1590 limited the number of printers and required that every book be licensed before sale.¹²³ Both governments prosecuted for seditious libel¹²⁴ and used other tactics to harass their critics.¹²⁵ Nor were violence and harassment inflicted only by government; the record also contains examples of privately imposed violence for unpopular views.¹²⁶ And despite arguments to the contrary,¹²⁷ both physical violence and informal economic sanctions clearly continue in modern times.¹²⁸ The need for anonymity thus persists to this day.¹²⁹ Campaign disclosure laws, then, are not even-handed; they result in the complete loss of a valuable and unique subset of political speech.

PAPERS; the *Letters of Pacificus* by Alexander Hamilton, which defended Washington's proclamation of neutrality; Madison's response in the *Letters of Helvidius*; and Chief Justice Marshall's anonymous defense of Supreme Court decisions).

123. See *Talley*, 362 U.S. at 65 ("The . . . press licensing law . . . was due in part to the knowledge that exposure of the names of printers, writers, and distributors would lessen the circulation of literature critical of the government."). See also ZECHARIAH CHAFEE, JR., *THE BLESSINGS OF LIBERTY* 192-206 (1956).

124. See e.g., *Talley*, 362 U.S. at 65 (harassment of John Lilburne for sending "factious and scandalous" books from Holland to Scotland); CHAFEE, *supra* note 123, at 192-97 (trial of John Udall in 1590 for authoring slanderous libel against the Queen); LEVY, *supra* note 120, at 145-47 (Wilkes trial in Britain), 124-33 (Zenger trial in America). See generally LEVY, *supra* note 120, at 3-16; William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91 (1984). The North Carolina statute skates dangerously close to the functional equivalent of a seditious libel statute. See *infra* text accompanying notes 138-140.

125. See LEVY, *supra* note 120, at 64 (New York legislature asks governor to offer reward for discovery of author of seditious letter); *id.* at 48-50 (harassment of Andrew Bradford for aspersive anonymous pamphlet he printed); *id.* at 72-73 (jailing of leader of Regulators on suspicion of authoring article which attacked the North Carolina assembly); see also *Grosjean v. American Press Co.*, 297 U.S. 233, 245-49 (1936) (containing historical review of press restraint in England including a tax imposed in 1712 to suppress criticism).

126. See, e.g., LEVY, *supra* note 120, at 85 (publisher of loyalist paper had his windows smashed and received threats of further violence during Revolution), 175 (publisher of loyalist tract hauled out of bed by vigilantes and forced both to burn his manuscript and to destroy the plates).

127. See, e.g., *People v. Duryea*, 351 N.Y.S.2d 978, 996 (N.Y. Sup. Ct. 1974) ("Fear of reprisals are [sic] largely illusory now.").

128. See, e.g., Kreimer, *supra* note 87, at 39 n.108 (beating of farm worker circulating petition at union rally), 42 (in the 1950s, "public registration as a member of the Communist Party was economic suicide").

129. See Brief of Petitioner at 13-14, *McIntyre* (No. 93-986) (State Department official George Kennan publishes article on foreign policy under pseudonym "X"). The Court has recognized the harassment of persons with unpopular political beliefs in the context of modern elections. See *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (upholding the reporting and disclosure requirements of the Federal Election Campaign Act but conceding that the First Amendment exempts minor parties who show "a reasonable probability that the compelled disclosure of a party's contributors' names [would] subject them to threats, harassment, or reprisals"); *Brown v. Socialist Workers '74 Campaign*, 459 U.S. 87 (1982) (granting the Socialist Party an exemption to the Ohio Campaign Expense Reporting Law on the strength of a *Buckley* showing). See also *Fed. Election Comm'n v. Hall-Tyner Election Campaign Comm'n*, 678 F.2d 416 (2d Cir. 1982) (exempting the Communist party from disclosure requirement).

On the other side of the equation is the electoral process, specifically the state's interest in "election integrity." "Election integrity" means, at the least, the absence of corruption and the prevention of physical intimidation and harassment of voters. These interests will, in some situations, outweigh a First Amendment prerogative.¹³⁰ But campaign disclosure laws do not further this sort of election integrity.¹³¹ Rather, it is alleged that they ensure a "rational" vote and a "more informed" vote as opposed to a vote reflecting misinformation or appeals to prejudice.

This is not to say that disclosure statutes actually further a rational or more informed vote. Nor is it to say that these interests are as compelling as prevention of physical intimidation and harassment. Certainly, simply labelling them "election integrity" is no answer. Insofar as disclosure laws deter criticism and smear campaigns,¹³² they will reduce the amount of misinformation and inflammatory material reaching the voters, and will further a rational vote. However, this rational vote may not be a particularly compelling state interest when measured against a First Amendment interest.¹³³ A disclosure statute does, in one sense, result in a more informed vote: all the campaign

130. See, e.g., *Burson v. Freeman*, 112 S. Ct. 1846 (1992) (upholding, by a narrow majority, ban on electioneering within 100 feet of a polling site in the interest of preventing voter intimidation and voter fraud). An abundance of federal election reform measures (and cases sustaining them) testifies to our continuing concern about the effects of undue influence, bribery, and financial quid pro quo in the election arena. See, e.g., Federal Corrupt Practices Act, Act of Feb. 28, 1925, ch. 368, title III, 43 Stat. 1070-74 (repealed 1972) (responding to Teapot Dome Scandal, in which President Harding's Secretary of the Interior granted noncompetitive oil leases to a substantial backer of the Republican Party); *Burroughs v. United States*, 290 U.S. 534 (1934) (sustaining the same); 1974 Amendments to the Federal Election Campaign Act, Pub. L. No. 93-443, 88 Stat. 1263 (codified in scattered sections of 2, 5, 18, 26, and 47 U.S.C.) (responding in part to the laundering of contributions to the Committee to Re-elect the President uncovered during the Watergate hearings); *Buckley v. Valeo*, 424 U.S. 1 (1976) (sustaining portions of the same).

131. The Ohio statute is overbroad for the purposes of preventing corruption and financial quid pro quo. Specifically, it requires disclosure on publications regarding ballot issues, in addition to publications regarding candidates. The threat of corruption is greatly reduced in referenda pertaining to elections. See *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296-97 (1981) ("*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a candidate . . . *Buckley* does not support limitations on contributions to committees formed to favor or oppose *ballot measures*."); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1977) ("The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue."). See also *Mills v. Alabama*, 384 U.S. 214, 218 (1965) (drawing distinction between statute regulating editorials on election day and statute regulating "conduct in and around the polls in order to maintain peace, order, and decorum").

132. See *supra* text accompanying notes 83-87.

133. See *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) ("The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech.").

literature which reaches the public identifies its source.¹³⁴ There is, however, a certain illogic to disclosure requirements in the name of voter education: to the extent that disclosure laws deter speech, the volume, or at least the diversity, of information reaching voters may actually decrease.¹³⁵ Arguably, the exclusion from the pre-election debate of a distinct body of political speech decreases the ability of the voters to make a fully informed choice.¹³⁶ Moreover, knowledge of a message's source may not be necessary information, since voters are capable of discounting for anonymity. Finally, at some point voter education is not even a legitimate interest. Some information will be too irrelevant (for example, the medical history of the author) or too protected (for example, the religious beliefs of the candidate) for "voter education" to be a successful disclosure argument.¹³⁷

The North Carolina Supreme Court did not justify the North Carolina disclosure statute on the grounds of "voter education." Nor could it have; insofar as the statute requires disclosure *only* on publications containing "derogatory" charges about candidates, it would be vastly underinclusive for the purposes of voter education. Presumably voters need to know the source of praise as much as they need to know the source of criticism. Moreover, even if a flat disclosure requirement was constitutional on the basis of voter education, the distinction

134. See *Meese v. Keene*, 481 U.S. 465, 480, 481 (1987) (sustaining portions of the Foreign Agents Registration Act of 1938, 22 U.S.C. §§ 611-21 (1988), which requires disclosure on political propaganda of foreign origin and labelling of it as "political propaganda" because such disclosure "would better enable the public to evaluate the import of propaganda" and "the best remedy for misleading or inaccurate speech contained within the materials subject to the Act is fair, truthful, and accurate speech."); *Vierick v. United States*, 318 U.S. 236, 251 (1943) (Black, J., dissenting) (statute labelling information "of foreign origin so that . . . readers may not be deceived by the belief that the information comes from a disinterested source . . . implements rather than detracts from the prized freedoms of the First Amendment.").

135. See *Anderson v. Celebrezze*, 460 U.S. 780, 798 (1982):

A State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism. As we observed in another First Amendment context, it is often true 'that the best means to that end is to open the channels of communication rather than to close them.'

(quoting *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976)). See also *Wilson v. Stocker*, 819 F.2d 943 (10th Cir. 1987) (finding government interest in informed electorate insufficient to sustain statute because it was more likely to impede than to inform).

136. See *State v. Petersilie*, 334 N.C. 169, 204, 432 S.E.2d 832, 852-53 (1993) (Mitchell, J., dissenting) ("Rather than being necessary to encourage openness, honesty, and fairness in the electoral process, the criminal statute at issue here frustrates these goals by reducing the amount of relevant truthful information about candidates for public office that will reach the voting public.").

137. See *Anderson v. Martin*, 375 U.S. 399 (1963) (striking on equal protection grounds Louisiana statute which required that ballots designate the race of each candidate). The court wrote: "[T]he attached provision [cannot] be deemed to be reasonably designed to meet legitimate governmental interests in informing the electorate as to candidates. We see no relevance in the state's pointing up the race of the candidate as bearing upon his qualification for office." *Id.* at 403.

between derogatory publications and their alternative (neutral or praising publications) works an additional discrimination on the basis of content (a basis apparently unrelated to voter education). Accordingly, some additional justification is required.¹³⁸ The scope of the statute (derogatory charges, whether true or false) and the court's explanation of the statute's purpose (prohibiting pejorative material to insure a fair election¹³⁹) suggest that the State has passed the functional equivalent of a seditious libel statute.¹⁴⁰ By proscribing a species of criticism (anonymous criticism) *without regard to its truthfulness*, North Carolina effectively silences the critics of incumbents or forces their public exposure. There is, in this statute, the whiff of official suppression of ideas. It is for this reason that the Court's holding in *McIntyre* will *not* be dispositive with respect to the North Carolina statute.

IV. CONCLUSION

Without question, the state has an interest in preserving the integrity of the electoral process. Reflecting this interest, Congress and state legislatures have passed a substantial number of laws regulating the election arena. Many of these laws have been sustained by the United States Supreme Court. Particularly in the context of campaign finance reform, the Court has upheld laws relatively invasive of First Amendment prerogatives.

Statutes banning anonymous campaign literature serve several purposes in the election arena. First, few would dispute that last minute anonymous smears create an undignified political arena. Disclosure statutes provide a deterrent effect which arguably reduces the amount of "mudslinging." Second, knowing the identity of the author of a piece of writing can shed light on its credibility. There is, however, a fundamental logical flaw in a scheme which only slightly increases the information about some campaign literature, at the expense of an entire segment of political speech.

Despite their usefulness, disclosure statutes tread heavily on First Amendment interests and raise serious concerns of overbreadth.

138. See *R.A.V. v. City of St. Paul, Minn.*, 112 S. Ct. 2538, 2543 (1992) ("these areas of speech can . . . be regulated *because of their constitutionally proscribable content* . . . [but not] made the vehicles for content discrimination unrelated to their distinctively proscribable content.").

139. See *supra* text accompanying notes 48-51.

140. Compare *State v. Petersilie*, 334 N.C. 169, 204, 432 S.E.2d 832, 853 (1993) (Mitchell, J., dissenting) ("disparaging and belittling material about a particular candidate may often be true; its very truthfulness can make it more derogatory and hurtful than lies") (quoting State's brief with the maxim "the greater the truth, the greater the libel." See Richard Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 B.U. L. REV. 699, 724 n.84 (1992) (explaining history of the maxim).

Both the North Carolina and the Ohio statutes, for example, are overbroad to protect the state interest in preventing or deterring libel of candidates. While the Ohio statute is perhaps perfectly tailored to inform the electorate, it raises the more complicated question of how we are to weigh a rational and informed electorate against the loss of a distinct body of political speech.

It is in this context that the metaphor of a marketplace of free speech is most compelling.¹⁴¹ The First Amendment protects a marketplace in which ideas freely clash and compete, the public evaluates, and the truth eventually triumphs. While anonymity may weigh against the credibility of a particular piece of campaign literature, the First Amendment leaves this judgment to the voters.¹⁴² With the government staying its hand, the voters may weigh anonymous speech for themselves. The First Amendment stakes everything on the integrity of this process.¹⁴³

ERIKA KING*

141. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market.").

142. See *Good v. Roy*, 459 F. Supp. 403, 406 (D. Kan. 1978) ("[I]t is the prerogative of the voters . . . to weigh, balance, sift, and sort the words and actions of political candidates.").

143. See *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring):

But it cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The 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. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.

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