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Trevor Potter

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BUCKLEY V. VALEO

BUCKLEY V. VALEO, POLITICAL DISCLOSURE AND THE FIRST AMENDMENT

by

Trevor Potter*

Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.

-- *Buckley v. Valeo*¹

Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. . . . They can evaluate its anonymity along with its message [O]nce they have done so, it is for them to decide what is responsible, what is valuable, and what is truth.

-- *McIntyre v. Ohio Elections Commission*²

Political disclosure laws have a mixed constitutional record in Supreme Court First Amendment jurisprudence. Generally, disclosure enjoys a favored position, and is said by the Supreme Court to advance, rather than restrict, the information available in the marketplace of ideas. On the other hand, compelled disclosure has been held in some cases to have a chilling effect on political speech, and to constitute an impermissible abridgment of free speech.

Disclosure's constitutional status is more relevant than ever. From a policy standpoint, the importance of the prompt disclosure of campaign finance data and other political information has emerged as one of the few areas of consensus among those favoring both greater and lesser regulation of political

* Trevor Potter, was a Commissioner of the Federal Election Commission from 1991 to 1995, and Chairman of the FEC in 1994. He has served as the Merrill Lecturer at the University of Virginia School of Law, and as Chair of the American Bar Association's Election Law Committee of the Administrative Law Section. He is partner in the Washington, D.C. law firm of Wiley, Rein and Fielding, and a Senior Fellow in Government Studies at the Brookings Institution.

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¹ 424 U.S. 1, 67 n.80 (1976) (quoting L. Brandeis, *OTHER PEOPLE'S MONEY* 62) (Nat'l Home Library Found. ed. 1933).

² 514 U.S. 334, 349 (1995) (quoting *New York v. Duryea*, 351 N.Y.S.2d. 978, 996 (1974)).

finance.³ This consensus dissipates, however, when the specifics of disclosure proposals are discussed. Is it constitutionally permissible to require disclosure of the financing of issue advocacy advertisements when they refer to specific candidates or elections? Here, the combatants disagree, with those in favor of disclosure saying that the Supreme Court would uphold such requirements (citing *Buckley v. Valeo*)⁴ and those opposed to issue advocacy disclosure arguing that it is akin to the Ohio disclosure requirement on anonymous leafletters declared unconstitutional by the Court in *McIntyre v. Ohio Elections Commission*.⁵

Put differently, the reality is that disclosure's constitutional status is unclear. The Supreme Court's jurisprudential framework is often unpredictable. Even when the Court has been consistent in choosing a formal framework with which to approach disclosure laws, it has been inconsistent and unpredictable in applying that framework. To be sure, this issue takes on particular urgency in light of the importance both sides in the campaign finance debate attach to disclosure of campaign spending (however differently defined), and the existence of the Internet as a vehicle for immediate mass dissemination of information required to be reported. Accordingly, providing an overview of the Supreme Court's disclosure jurisprudence under the First Amendment (as it has been applied in several contexts: candidate elections; candidate-specific issue advocacy; ballot initiative or referenda campaigns; and broadcast political advertising), this article then examines disclosure requirements applicable to lobbyists, foreign agents, government officials, and parties or witnesses in litigation or legislative investigations. It concludes by examining what common strains emerge from these disparate cases, and thus what new approaches are most likely to withstand constitutional review.

I. *BUCKLEY* AND DISCLOSURE UNDER THE U.S. CONSTITUTION

*Buckley v. Valeo*⁶ established the campaign and political disclosure framework for campaign finance jurisprudence. In *Buckley*, the Court upheld all

³See, e.g., H.R. 965, 105th Cong., 1st Sess. (1997)(The *Doolittle Bill*); H.R. 3582, 105th Cong., 2nd Sess. (1998)(The revised *Shays-Meehan Bill*). See generally 144 CONG REC. (daily ed., March 30, 1998) (debate on Campaign Reporting and Disclosure Act of 1998). Campaign finance experts favoring a deregulation approach nonetheless favor disclosure, (see, e.g., LARRY J. SABATO & GLENN R. SIMPSON, DIRTY LITTLE SECRETS 230 (1996) as do pro-regulation reformers (see, e.g., Center for Responsive Politics, *Plugging In the Public: A Model for Campaign Finance Disclosure* (1996)).

⁴ *Buckley*, 424 U.S. 1 (1976). See discussion, *infra*.

⁵ 514 U.S. at 357.

⁶ 424 U.S. 1.

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of the disclosure provisions reviewed by the Court, while presaging later decisions which would qualify that holding. More importantly, it constructed the analytical framework which still guides the court over 20 years later.

The Federal Election Campaign Act ("FECA"), enacted in 1971 and 1974, laid out a comprehensive system of federal campaign finance regulations.⁷ The disclosure provisions required political committees, political parties and candidates to register with the Federal Election Commission, and to disclose the identity of contributors and the dollar amount of their contributions, as well as the size and recipients of their expenditures or disbursements. It also required individuals and groups other than political committees or candidates to report independent expenditures over \$100 to the FEC.⁸

In reviewing FECA's disclosure provisions, the Supreme Court in *Buckley* had little precedent to guide it. The one previous Supreme Court case reviewing federal election disclosure requirements was *Burroughs v. United States*,⁹ which reviewed the Federal Corrupt Practices Act of 1925, the first federal campaign finance disclosure law.¹⁰ *Burroughs* included no First Amendment analysis, and applied deferential scrutiny, stating that Congress had broad power to regulate federal elections to combat corruption.¹¹

Buckley, drawing more on the 1958 case *NAACP v. Alabama*¹² than *Burroughs*, found that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment."¹³ Consequently, the Court applied "exacting scrutiny." Under this intermediate scrutiny standard, the government would have to state an important state interest. Moreover, as the Court said, "we also have insisted that there be a 'relevant correlation' or 'substantial relation' between the government interest and the information required to be disclosed."¹⁴

⁷ Federal Election Campaign Act of 1971, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263.

⁸ 2 U.S.C. § 434(c)(1974).

⁹ *Burroughs v. U.S.*, 290 U.S. 534 (1934).

¹⁰ 43 Stat. 1070.

¹¹ *Burroughs*, 290 U.S. at 547.

¹² *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

¹³ *Buckley*, 424 U.S. at 64.

¹⁴ *Id.* In *Patterson*, 357 U.S. at 449, the state's interest in disclosure of rank-and-file membership was held not to have a close correlation to Alabama's state interest in

Under the disclosure framework it had laid out, the Court recognized three state interests justifying disclosure. First, it noted mandatory disclosure diminishes both actual and apparent corruption. Exposing large contributions to the public discourages contributors and politicians from using money for improper purposes both before and after elections, and also enables voters to detect post-election favors. A second, related interest was detecting violations of the Act's contribution limits.¹⁵ Third, the Court also recognized that disclosure better enables the public to evaluate candidates and "to place more precisely each candidate along the political spectrum."¹⁶ Additionally, knowledge of a candidate's financial sources permits voters to predict future performance in office by identifying the interests to which a candidate is most likely to be responsive.¹⁷

Furthermore, in recognizing that government has legitimate interests in requiring disclosure, the appellants in *Buckley* argued that the disclosure provisions should not apply to minor parties on the grounds that disclosure would expose them to harassment and abuse. To address this "speech-chilling" argument, the *Buckley* Court drew on *NAACP v. Alabama*.¹⁸ In that case, Alabama brought suit to bar the NAACP from operating in Alabama due to the organization's failure to comply with the state's foreign corporations registration act. As part of the litigation, the state sought extensive disclosure of NAACP records, including a complete list of all NAACP members in the state, asserting them as necessary to prove that the NAACP engaged in "intrastate business" activities in Alabama.

The NAACP appealed the court order to comply with the discovery orders, and the Supreme Court unanimously blocked the disclosure, stating that the state interest – proving the NAACP was engaged in business – and its correlation to subpoenaing membership lists were not well demonstrated. By contrast, the Court found the NAACP showed it would sustain substantial injury from disclosure. Crucially, the NAACP demonstrated a particularized showing that its rank-and-file members would suffer reprisal should their membership be revealed: "[R]evelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of

regulating intra-state commerce. Thus, unlike many subsequent disclosure cases, *NAACP v. Alabama* truly did apply the intermediate scrutiny standard. *Id.*

¹⁵ *Buckley*, 424 U.S. at 67.

¹⁶ *Id.*

¹⁷ *Id.* at 68.

¹⁸ *Buckley*, 424 U.S. at 67.

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physical coercion, and other manifestations of public hostility.”¹⁹ The Court also stressed that the NAACP had substantially complied with the state’s registration laws and was objecting only to disclosure of “ordinary rank-and-file members.”²⁰

Using the NAACP framework, *Buckley*, while upholding the disclosure requirements as applied to minor parties, said that such parties could get an exemption if they could present specific evidence of hostility, threats, harassment, and reprisals against members or the organization itself.²¹

Notably, the Court applied the minor party exemption a few years later, in *Brown v. Socialist Workers '74 Campaign Committee*.²² The Court held that the *Socialist Workers Party* ("SWP") need not make public financial disclosures because it had shown "a reasonable probability that disclosure of the names of contributors and recipients will subject them to threats, harassment, or reprisals from either Government officials or private parties."²³ SWP met the test by showing that members had been subjected to threatening phone calls, hate mail, destruction of their property, police harassment of a candidate, the firing of shots at an SWP office, and the dismissal of several party members from their jobs because of their membership. Similarly, FBI surveillance of the party and its dissemination of information designed to injure the SWP’s ability to function constituted government harassment of the type contemplated by *Buckley*.²⁴

Socialist Workers therefore illustrates *Buckley*'s observation that disclosure laws could, in some instances, be unconstitutional as applied to independent and minor parties, but that parties claiming an unconstitutional application face the burden of showing specific and concrete examples of retaliation for their activities.²⁵

¹⁹ *Patterson*, 357 U.S. at 462.

²⁰ *Id.* at 464.

²¹ In a footnote, the Court suggested that mere unwillingness of potential donors to give because their names would be disclosed was not sufficient. *Buckley*, 424 U.S. at 72 n.88.

²² *Socialist Workers*, 459 U.S. 87 (1982).

²³ *Id.* at 100.

²⁴ *Id.* at 99.

²⁵ *Socialist Workers* is also significant in that it concluded that *Buckley*'s limits on disclosure requirements should apply to both contributions to as well as expenditures

Furthermore, in *Massachusetts Citizens for Life*, decided a decade after *Buckley*²⁶ the Court recognized disclosure's potential for imposing another burden on speech: the administrative cost and burdensome accounting responsibilities imposed by detailed disclosure and reporting laws. This "administrative burden" concern was a direct consideration in *MCFL*. In that case, a pro-life, non-profit corporation challenged the FECA's absolute ban on corporate political spending.²⁷ The FEC responded that *MCFL* could form a political committee or "PAC" under the FECA to avoid violating the ban on direct corporate spending. *MCFL* replied by protesting that the strict accounting, disclosure, and reporting requirements imposed on PACs were prohibitive for a small organization.

The Court agreed with *MCFL*: "the administrative costs of complying with such increased responsibilities may create a disincentive for the organization itself to speak."²⁸ Further:

Detailed record-keeping and disclosure obligations . . . impose administrative costs that many small entities may be unable to bear. . . . Faced with the need to assume a more sophisticated organization form, to adopt specific accounting procedures, to file periodic detailed reports . . . it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it.²⁹

made by a group, because laws requiring the identification of recipients of campaign disbursements can be just as harmful to First Amendment rights as those that require only the disclosure of campaign contributors. *Id.* at 96. See also *Buckley v. Am. Constitutional Law Found.*, 119 S. Ct. 636 (1999).

²⁶ *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986).

²⁷ 2 U.S.C. § 441b.

²⁸ *MCFL*, 479 U.S. at 255 n.7.

²⁹ *Id.* at 254-55.

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The Court emphasized how burdensome the requirements are when applied to “small entities” and “small groups” whose activities consist predominantly of grassroots activities such as “garage sales, bake sales, and raffles.”³⁰

Significantly, the Supreme Court identified other grounds for invalidating disclosure: overbreadth and vagueness. For example, in *Buckley* the Court considered whether the original FECA’s dollar thresholds were unconstitutionally low. The 1974 Act had two thresholds: political committees were required to keep records of names and addresses of persons making contributions in excess of \$10. For persons making aggregate contributions of more than \$100, the committees also were required to disclose their occupation and place of business.³¹ While *Buckley* upheld these provisions, it noted that the “thresholds are indeed low” – presaging subsequent cases that would find disclosure provisions insufficiently narrowly tailored, and therefore unconstitutionally overbroad.

Buckley articulated another grounds for invalidating disclosure provisions. The Court applied to the FECA the generally applied principle that laws must provide persons with sufficient notice that their actions would be in violation of law in order for that law to be constitutional under the 5th Amendment’s due process clause.³²

Applying this “unconstitutional vagueness” doctrine to the FECA, the Court, in a holding with significant long-term effects on campaign finance law, found the FECA failed the test.³³ The statute as originally drafted and enacted required disclosure of any independent expenditure spent “for the purpose of . . . influencing” an election or nomination.³⁴ The Court ruled that the statutory language was unconstitutionally vague, and may subject many groups to disclosure requirements even if they were not engaged in partisan campaign

³⁰ *Id.* at 255. Compare *Republican National Committee v. FEC*, 76 F.3d 400 (D.C. Cir. 1996). There, the RNC challenged the FEC’s disclosure regulations regarding the duty of political committees to make “best efforts” to collect disclosure information from contributors. The D.C. Circuit rejected the RNC’s assertion that this requirement imposed such large administrative burdens and costs that it constituted an unconstitutionally severe restriction on First Amendment rights, noting in particular the proportionally small financial burden imposed by the regulation.

³¹ *Buckley*, 424 U.S. at 82. The current disclosure threshold under FECA for individual contributions is \$200. 2 U.S.C. 434(b)(3)(A).

³² *Buckley*, 424 U.S. at 79; *see also id.* at 41.

³³ *Id.* at 79.

³⁴ *Id.*

activities. As the court said, the definition “could be interpreted to reach groups engaged purely in issue discussion.”³⁵

The Court, rather than striking the provision altogether, gave the statute a narrowing construction, interpreting the disclosure provisions to apply only to “express advocacy” campaign communications.³⁶ Drawing on similar analysis from an earlier portion of the decision, it narrowed the reach of the independent expenditure disclosure provision to “communications that expressly advocate the election or defeat of a clearly identified candidate.”³⁷ Under the Court’s construction, the requirements apply only to communications containing language such as “*vote for, elect, support, cast your ballot for, vote against, defeat, or reject.*”³⁸ Yet, the Court did not address the question whether disclosure requirements that do not suffer from the vagueness problems present in the original FECA could be applied to “issue advocacy” communications, that is, communications that do not use words which expressly advocate the election or defeat of a candidate, but make explicit reference to a candidate.

In summary, *Buckley*’s framework for analyzing the constitutionality of a disclosure regime consists of four steps. First, under the exacting scrutiny test, the provision must advance substantial state interests. Second, the means chosen must have a close relation to that state interest. Third, the nature and extent of the burden or restriction on speech must be analyzed, usually in a very fact-specific way. Fourth, the statute must be analyzed for overbreadth and vagueness. Moreover, *Buckley*, read alone, suggests that, absent compelling facts that disclosure poses a severe restriction on a litigant, the scale tips toward disclosure. Later cases, however, have brought this “pro-disclosure” leaning into question.

II. ISSUE ADVOCACY DISCLOSURE AND RELATED ISSUES

Candidate-specific issue advocacy -- that is, communications concerning candidates running for elective office, yet which fall short of the express advocacy test -- has emerged as one of the most contentious areas of election law in recent years.³⁹ Yet, since *Buckley* the Supreme Court has

³⁵ *Id.*

³⁶ *Id.* at 80.

³⁷ *Buckley v. Valeo*, 424 U.S. 1, 80 (1995).

³⁸ *Id.* at 44 n.52.

³⁹ See generally, Hearings on *The First Amendment and Restrictions on Issue Advocacy*, before Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong., 1st Sess. (September 19, 1997).

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never addressed this issue.⁴⁰ Lower courts have thus had to confront to what extent *Buckley's* express advocacy/issue advocacy distinction should apply to disclosure – with mixed results. The Court has addressed issue advocacy disclosure in the context of ballot initiative campaigns – also with mixed results.

The Supreme Court has essentially applied the *Buckley* framework in these cases, without consistent results for disclosure statutes. Finally, political broadcast disclosure requirements have been upheld by the lower courts, even in the non-candidate campaign context. This section will examine each of these areas in turn.

Candidate-Specific Issue Advocacy

That the Court has not decided the constitutionality of issue advocacy disclosure is to some extent the result of the parties' litigation strategy in *Buckley*. A notably broad statutory disclosure provision was squarely addressed by the U.S. Court of Appeals for the D.C. Circuit, but that court's decision to strike the provision was not appealed by the government. The provision at issue imposed reporting requirements on any group or individual who engaged in:

Any act directed to the public for the purpose of influencing the outcome of an election, or . . . publishes or broadcasts to the public *any material referring to a candidate* . . . setting forth the candidate's position on any public issue, voting record, or other official acts . . . or otherwise designed to influence individuals to cast their votes for or against such candidates or to withhold their votes for such candidate.⁴¹

⁴⁰ In *MCFL*, 479 U.S. 238, the Court found the communications in question constituted "express advocacy." In a number of other cases involving issue advocacy, the Court has declined certiorari review of lower court decisions raising the issue. In *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996), a case which centered on the question of whether the Colorado Republican Party's political advertising at issue was "express advocacy," the Court vacated the 10th Circuit's decision (which found express advocacy) but never addressed the issue itself in the case.

⁴¹ 2 U.S.C § 437a (1974) (repealed 1976) (emphasis added).

The U.S. Court of Appeals in *Buckley* found this language unconstitutional, because it was vague and violated the constitutional rights of groups engaged in protected speech. The court stated:

As we have said, it [section 437a] may undertake to compel disclosure by groups that do no more than discuss issues of public interest on a wholly non-partisan basis. To be sure, any discussion of important public questions can possibly exert some influence on the outcome of an election preceding which they were campaign issues [sic.] . . . *But unlike contributions and expenditures made solely with a view to influencing the nomination or election of a candidate, issue discussions unwedded to the cause of a particular candidate hardly threaten the purity of the election.* Moreover, and very importantly, such discussions are vital and indispensable to a free society and an informed electorate. Thus the interest group engaging in *nonpartisan discussions* ascends to a high plane, while the governmental interest in disclosure correspondingly diminishes.⁴²

This aspect of the court's decision was not appealed by the statute's challengers (it was the only point upon which the challengers prevailed at the Court of Appeals). Nor did the government appeal, apparently believing that the vague language of the provision coupled with the virtually unlimited reach of the disclosure requirement to contributions of \$10 or more to hundreds of non-political organizations was indefensible. Accordingly, in *Buckley* the Supreme Court was not presented directly with the question whether all campaign speech must contain "express advocacy" to be subject to registration and reporting requirements in disclosure laws, nor when (if ever) issue

⁴² *Buckley v. Valeo*, 519 F.2d 821, 873 (D.C. Cir. 1975) (emphasis added). The D.C. Circuit cited with approval the Second Circuit's 1972 decision in *U.S. v. Nat'l Comm. for Impeachment*, 469 F.2d 1135 (2nd Cir. 1972), in which the Second Circuit held that the 1971 FECA disclosure provision did not cover an advertisement in the *New York Times* by an ad hoc group of citizens urging President Nixon's impeachment.

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discussion might be sufficiently "wedded to the cause of a particular candidate" to warrant disclosure.

Moreover, in *North Carolina Right to Life Inc. v. Bartlett*,⁴³ a non-profit corporation challenged the state's registration and reporting requirements of political committees, broadly defined to include "any person, committee . . . the primary or incidental purpose of which is to support or oppose any candidate or political party or to influence or attempt to influence the result of an election" ⁴⁴ The court stated that this provision meant that "[g]roups engaging only in issue advocacy are thus subject to spending restrictions and reporting requirements. This violates the First Amendment as construed by the Supreme Court in *Buckley v. Valeo*. The court accordingly found the statute fatally overbroad and unconstitutional.⁴⁵

At issue in *West Virginians for Life, Inc. v. Smith*,⁴⁶ was the state of West Virginia's attempts to regulate voter guides by amending into its state law a presumption that any scorecards, voter guides or other analysis of a candidate's positions or votes, published or distributed within 60 days of an election is presumed to be "for the purpose of advocating or opposing the nomination, election or defeat of a candidate."⁴⁷ A right-to-life group challenged this law as a violation of the First Amendment, because it regulated political speech beyond that containing express advocacy.

In the district court's opinion granting the group's motion seeking a preliminary injunction, the court stated that its case was likely to succeed on the merits since the Supreme Court has articulated a bright line standard that separated express advocacy which could be subject to regulation, from issue advocacy, which could not be regulated.⁴⁸ The court specifically criticized the

⁴³ *North Carolina Right to Life Inc.*, 3 F. Supp. 2d 675 (E.D. N.C. 1998) *aff'd in pt.*, *rev'd in pt.*, 168 F.3d 705 (4th Cir. 1999).

⁴⁴ *Id.* at 679.

⁴⁵ *Id.*

⁴⁶ *West Virginians for Life, Inc.*, 919 F. Supp. 954 (S.D. W.Va. 1996) (granting preliminary injunction); *see also* *West Virginians for Life, Inc v. Smith*, 952 F. Supp. 342 (1996) (awarding fees and costs); *West Virginians for Life, Inc v. Smith*, 960 F. Supp. 1036 (1996) (deciding on summary judgment motion).

⁴⁷ W. Va. Code. § 3-8-5(e)(1)(1995).

⁴⁸ *West Virginians for Life, Inc*, 919 F. Supp. at 959. *But see* *Buckley*, 424 U.S. at 79 (refusing to hold issue advocacy can never be subject to disclosure provisions, but rather than statute in question was unconstitutionally vague *as drafted*).

presumption that scorecards or voter guides distributed within 60 days of an election could be regulated as express advocacy.⁴⁹ Furthermore, in its decision awarding attorneys fees and costs, the court justified charging these fees against the state since the statute "attempted to circumvent legal precedent through the transparent device of a presumption that expenditures made within sixty days of an election are express advocacy."⁵⁰

Lower courts have also extended the legal principle beyond "magic words" express advocacy. For instance, the Second Circuit in *FEC v. Survival Education Fund*⁵¹ assessed the validity of 2 U.S.C. § 441d(a). The provision imposes a disclaimer requirement on any person who makes communications expressly advocating election or defeat or solicits any contribution (i.e. money or thing of value for the purpose of influencing a federal election). Such communications or solicitations must include a notice in the communication stating who paid for the mailing and whether or not it is authorized by a candidate. The case concerned a July, 1984 direct mail fundraising appeal by author and political activist Benjamin Spock on behalf of a pro-nuclear freeze group, which read:

Your special election-year contribution today will help us communicate your views to hundreds of thousands of members of the voting public, letting them know why Ronald Reagan and his anti-people policies must be stopped.⁵²

The FEC charged that the solicitation was subject to FECA's contribution solicitation disclosure requirement, even though it did not contain express advocacy. The second circuit agreed. The Second Circuit closely reviewed *Buckley* and the legislative history of the FECA, noting that Congress had enacted the solicitation disclosure requirement, which previously had only applied to solicitations containing express advocacy, specifically to cover to solicitations whether or not they included express advocacy:

Even if a communication does not itself constitute express advocacy, it may still fall within the reach of sec. 441d(a) if it contains solicitations clearly indicating

⁴⁹*West Virginians for Life, Inc.*, 960 F. Supp. at 1039-40.

⁵⁰ *West Virginians for Life, Inc.*, 952 F. Supp. at 348.

⁵¹ *FEC v. Survival Educ. Fund*, 5 F.3d 285 (7th Cir. 1995).

⁵² *Id.* at 289.

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that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office That statement leaves no doubt that the funds contributed would be used to advocate President Reagan's defeat at the polls, not simply to criticize his policies during the election year.⁵³

Survival Education Fund held that the disclosure provision was constitutional, because *Buckley's* express advocacy test was confined to the definition of independent expenditure, and because the disclosure requirement at issue in the case applied only to solicitations that target the election or defeat of a clearly identified candidate.⁵⁴ Moreover, it recognized the governmental interest in ensuring that contributors know whether their money is going directly to a candidate or to independent critics of another candidate so they "are not misled into giving money to candidates or causes they do not support."⁵⁵

Notably, too, in 1997 a lower court in Wisconsin in *Elections Bd. v. Wisconsin Mfrs. & Commerce* went further, explicitly holding that the express advocacy test was not the only possible acceptable constitutional test for permissible disclosure. The state's requirement that groups making contributions and expenditures register as political committees was the basis of an enforcement action against several organizations that sponsored issue advertisements. The advertisements, broadcast in October 1996, discussed a state legislator's vote on specific issues and urged the viewer to call the legislator to protest or express support for the position. For instance, one advertisement asked the viewer to "Call [your state legislator] . . . Tell him not to hike taxes again." The legislators under criticism filed complaints with the Wisconsin Elections Board, and Board staff determined that the advertisements were subject to registration and reporting requirements since they were broadcast for "political purposes." The legislators also filed actions for

⁵³ *Id.* at 295.

⁵⁴ *Id.* at 293.

⁵⁵ *Id.* at 297. While allowing the FEC to insist that a disclaimer be present in the SEF solicitation materials, the Second Circuit refused to prohibit SEF, a non-profit corporation, from engaging in such speech. It held that SEF was the sort of non-profit corporation described by the Supreme Court in *MCFL*, constitutionally permitted to engage in political speech. *Id.* at 292-93.

injunctive relief in state court, which were granted during the final days of the 1996 campaign.⁵⁶

In March of 1997, the Election Board in turn found that the advertisements were express advocacy and thus the sponsors were subject to Wisconsin disclosure laws. When the sponsors still refused to comply on First Amendments grounds, the Election Board filed suit. The trial court concluded that the state could adopt – although it had not done so -- a definition of express advocacy that differed from the one articulated by the Supreme Court in *Buckley* and its progeny, "so long as the definition itself meets constitutional requirements under the First and Fourteenth Amendments." Concluding that the state had failed to provide a clear, advance definition of express advocacy, the court dismissed the state's complaint.⁵⁷

On direct appeal, the Wisconsin Supreme Court affirmed the lower court's ruling.⁵⁸ The court based its rulings on the elections board's retroactive application of a disclosure regulation that was not formulated until after the political advertisements had already been broadcast.⁵⁹ Consequently, the court held that the business groups had not received adequate advanced warning as required by due process provisions of the United States Constitution.⁶⁰ The court declined to make a definite constitutional ruling on the larger on the larger underlying issue in the case – what constitutes express advocacy.⁶¹ In dicta, the court stated that under *Buckley* an express advocacy standard would require "explicit" words of advocacy,⁶² but commented that under *MCFL* such words were not confined to *Buckley's* "magic words." The court also noted that contextual factors of a political communication could be considered in determining whether a communication constitutes express advocacy.⁶³ The court concluded by inviting the Wisconsin legislature or elections board to draft a new standard of express advocacy.⁶⁴ On October 5,

⁵⁶ Elections Bd. v. Wis. Mfrs. & Commerce, No. 97-CV-1729 (Wisc. Cir. Ct., Dane Cty., Jan. 16, 1998), *aff'd*, 597 N.W.2d 721 (Wis. 1999).

⁵⁷ *Id.*

⁵⁸ Election Bd. of Wisconsin v. Wisconsin Mfrs. & Commerce, 597 N.W.2d 721 (Wis. 1999).

⁵⁹ *Id.* at 734-36.

⁶⁰ *Id.*

⁶¹ *Id.* at 736.

⁶² *Id.* at 730-31.

⁶³ *Id.*

⁶⁴ *Id.* at 736. On September 29, the elections board adopted an administrative rule defining express advocacy as statements containing such terms as "elect" or "defeat" or their "functional equivalents with reference to a clearly identified candidate that expressly advocates the election or defeat of the candidate and that unambiguously

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1999, Wisconsin's attorney general petitioned the United States Supreme Court to review the ruling in spite of the elections board's decision, more than two months earlier, not to seek such review.

Ballot Initiatives and Referenda

In contrast to candidate-specific issue advocacy disclosure, where the Supreme Court has remained silent, the Court has reviewed another category of issue advocacy disclosure-- ballot initiative or referenda disclosure. In that area, the Court has moved from the *Buckley* analysis in two regards that have made ballot initiative disclosure more likely to be found unconstitutional; first, it grants a broader interest in completely anonymous communication; and second, it discounts the issue of quid pro quo corruption in a ballot initiative contest.

First National Bank of Boston v. Bellotti,⁶⁵ although not directing concerning disclosure, addressed it in dicta. *Bellotti* asserted that the informational interest first articulated in *Buckley* may justify disclosure in the ballot initiative realm. Citing *Buckley* and *U.S. v. Harriss*, the Court suggested that sponsor identification for referenda campaign communications would be constitutional. "Identification of the source of advertising may be required as a means of disclosure so that the people will be able to evaluate the arguments to which they are being subjected."⁶⁶ The Court indicated a source disclosure requirement would be justified to further the First Amendment's notion that "the people are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider in making their judgment, the source and credibility of the advocate."⁶⁷

*Citizens Against Rent Control v. City of Berkley*⁶⁸ more directly addressed ballot initiative disclosure. In that decision, the Court considered a Berkeley ordinance which limited contributions to committees formed to support or oppose ballot measures. The ordinance also required disclosure by ballot campaign committees of their contributors. The Court determined that the contribution limits were unconstitutional under the *Bellotti* analysis, since the danger of corruption that justified contribution limits to candidates could not be

relates to the campaign of that candidate."

⁶⁵ *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

⁶⁶ *Id.* at 792 n.3.

⁶⁷ *Id.* at 791-92.

⁶⁸ *Citizens Against Rent Control v. City of Berkley*, 454 U.S. 290 (1981).

extended to ballot measure races.⁶⁹ While there was no constitutional challenge to the disclosure requirements, the Court wrote favorably of them, indicating that they facilitate public awareness of the sources of support for committees.⁷⁰

Furthermore, in *McIntyre v. Ohio Elections Commission*,⁷¹ the Court addressed a requirement that all ballot initiative literature include disclaimers disclosing the source of the literature. The Ohio Elections Commission fined Margaret McIntyre \$100 for distributing unsigned leaflets which omitted a identification disclaimer. Mrs. McIntyre distributed the leaflets, which protested a proposed school tax levy, with the help of her son and a friend. Some of the handbills named her as the author; others were signed merely "CONCERNED PARENTS AND TAXPAYERS."⁷²

The Supreme Court ruled the statute unconstitutional as applied by Ohio to Mrs. McIntyre. Extolling the virtues and historical role of anonymous individual speech, the Court noted that the Ohio statute was a direct regulation of pure speech subject to "exacting scrutiny."⁷³

Ohio asserted the interests analogous to *Buckley*: preventing fraud and libelous statements and providing the electorate with relevant information.

⁶⁹ *Id.* at 298.

⁷⁰ *Id.* The Court also noted that political groups may often serve as front groups or subterfuges. "It is true that when individuals or corporations speak through committees, they often adopt seductive names that may tend to conceal the true identity of the source." *Id.* at 298; see also FCC sponsor identification rules, 47 C.F.R. 73.1212(e).

⁷¹ *McIntyre v. Ohio Elections Comm'n.*, 514 U.S. 334 (1995).

⁷² *Id.* at 337.

⁷³ *Id.* at 346. Despite *McIntyre's* assertion the Court was applying exacting scrutiny, its articulation of that standard actually describes strict scrutiny: the statute would be constitutional only if narrowly tailored to serve an overriding state interest. *Id.* at 347. The difference may be explained by the inclusion of the disclaimer in the handbill itself, and the court's consequent judgment that it is a "content-based" regulation. *But compare* *RNC v. FEC*, 76 F.3d 400, 410 (D.C. Cir. 1996) (stating the critical test is whether a regulation is content-neutral, i.e. viewpoint neutral, not whether disclosure requires inclusion of content *per se*) (emphasis added). The Court also seemed to harbor concerns that the requirement would expose Mrs. McIntyre to the type of hostility, threats, harassment, and reprisals at issue in *Socialist Workers*.

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The Court did not find the informational interest persuasive on the facts of the case:

The simple interest in providing voters with additional relevant information does not justify [the disclosure requirement]. Moreover, in the case of a handbill written by a private citizen who is not known to the recipient, [disclosure of the author's name] adds little, if anything, to the reader's ability to evaluate the document's message. Thus Ohio's informational interest is plainly insufficient to support the constitutionality of its disclosure requirement.⁷⁴

Next, the Court addressed the anti-fraud interest. Although the Court recognized that election-time fraud can have serious adverse consequences for the public at large, it noted that, insofar as it was targeted to combat fraud, the provision in question was duplicative of several more specific prohibitions against making or disseminating false statements during political campaigns in Ohio's Election Code.⁷⁵ Therefore the Court found the statute fatally overbroad and not narrowly tailored. The statute applied not only to candidates and their organized supporters but also to individuals acting independently; not only to candidate elections, or to communications made immediately preceding the election, but also ballot issues that present a much smaller risk of libel or the appearance of corruption and to those made weeks in advance. The Court felt that because of the statute's failure to make these distinctions and its breadth, it was not narrowly tailored to alleviate the dangers of fraud or impropriety.⁷⁶ Indeed, the key consideration in the case seems to be the overbreadth issue. In his opinion for the Court, Justice Stevens said, "[a] more limited identification requirement" might have been justified.⁷⁷

⁷⁴ *McIntyre*, 514 U.S. at 348-9.

⁷⁵ *Id.* at 349.

⁷⁶ *Id.* at 352.

⁷⁷ *Id.* at 352. *McIntyre* did not explicitly address whether its analysis extended to contributions. In *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 300 (1981) indicated in dicta that legislatures are capable of enacting a ban on anonymous contributions.

A recently decided case, *Buckley v. American Constitutional Law Foundation*,⁷⁸ also addressed disclosure in the ballot initiative petition context. The Court reviewed two disclosure provisions of the Colorado statute governing the ballot initiative petition process: (1) A provision requiring disclosure of names and addresses of all persons who served as paid initiative ballot qualification petition circulators, and the total dollar amount paid to each circulator; and (2) a provision requiring all circulators to wear name badges while soliciting signatures for the initiative petitions.⁷⁹

First, the Court unanimously struck the name badge requirement. Justice Ginsburg, writing for the Court, reasoned that the provision constituted compelled disclosure likely to chill political speech – in this case, the circulation of the petition – without sufficient compelling state interest to justify such a restriction. In her analysis of the name badge provision, Justice Ginsburg focused largely on the chilling effect the badges would have in discouraging persons from serving as circulators. Justice Ginsburg noted testimony from the district court trial that the name badge requirement exposed circulators to harassment, recrimination and retaliation, “inhibiting participation in the petitioning process.”⁸⁰

Colorado attempted to justify the provision by asserting the state’s interest in deterring fraud. The Court, however, did not find the interest to be convincing. Specifically, the Court noted Colorado already required circulators to submit an affidavit listing their name and address, thereby enabling law enforcers to investigate fraud without exposing the circulators to harassment. Given these alternative means of effecting the same state interest, the Court dismissed the need for the name badge provision, and struck it down.⁸¹

Second, Justice Ginsburg then declared unconstitutional certain of the statute’s reporting provisions in a section of the Court’s opinion joined by only

⁷⁸ *Buckley v. ACLF*, 119 S. Ct. 636 (1999) [hereinafter *ACLF*].

⁷⁹ The Court also reviewed a non-disclosure provision of the statute requiring that all petition circulators be registered Colorado voters. The six justice majority struck down the registration requirement on free speech grounds, with Chief Justice Rehnquist and Justices O’Connor and Breyer dissenting. *Id.* at 644-45. In addition, a portion of the Colorado statute unchallenged by the petitioners in *ACLF* requires persons or groups filing initiative petitions to register with the state, and report the amount they spend to qualify the initiative for the ballot.

⁸⁰ *Id.* at 645.

⁸¹ *Id.* at 646.

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four other justices.⁸² Under the Colorado law, petition sponsors were required to file monthly pre-election reports and a final post-election report disclosing all paid circulators' names and addresses, and the amount of compensation they received for circulating the petition. No such provision applied to volunteer circulators.

The majority upheld the 10th Circuit's holding that the reporting requirement was unconstitutional, concurring in the lower court's reasoning that the anti-fraud and informational interests recognized by *Buckley* were already promoted by disclosure of sponsors who made expenditures.⁸³ Justice Ginsburg wrote, "[t]he added benefit of revealing the names of paid circulators and amounts paid to each circulator, the lower courts fairly determined from the record as a whole is hardly apparent and has not been demonstrated."⁸⁴

Justice Ginsburg concludes her analysis of the reporting requirements by briefly raising other considerations. First, drawing on *Bellotti*, she states that ballot initiatives do not involve the risk of "quid pro quo" corruption like candidate elections, thus undermining the anti-corruption argument. Second, she said that the risk of fraud or corruption is remote at the petition stage of an initiative.⁸⁵ Finally, she disputes and disapproves the assertion – implicit in the statute and explicitly defended by Colorado -- that paid petition circulators are more likely to engage in petition fraud than volunteers. Consequently, she

⁸² Justices Souter, Kennedy, Stevens, and Scalia. Justice Thomas concurred in the holding but not the reasoning of the disclosure decision.

⁸³ *Id.* at 647-49. The Colorado statute does not appear to require disclosure of contributors to the ballot initiative sponsor. Nonetheless, the majority's opinion in this regard injects into the court's disclosure jurisprudence a novel distinction between disclosure of sponsors and contributors, on one hand, and of expenditure or payment recipients on the other. In *Buckley*, disclosure of contributions and expenditures were given both upheld under exacting scrutiny, and both were adjudged to be justified by important state interests. This is in contrast to the limitations on contributions and in expenditures in *Buckley*. The *Buckley* court upheld the former, and struck the latter. In *ACFL*, the Court applies the contribution/expenditure distinction to disclosure for the first time. Chief Justice Rehnquist's dissent implicitly makes powerful arguments against the novel contribution/expenditure disclosure distinction used by the majority in its reporting analysis, noting that expenditure recipients (also called vendors or "payees") are often the key actors in the ballot initiative process.

⁸⁴ *Buckley v. ACLF*, 119 S. Ct. 636, 648 (1999).

⁸⁵ See opinion of Justice O'Connor. Insofar as combating petition qualification fraud is an important state interest, its importance occurs during the petition circulation period – when the fraud can be redressed -- not later in the election process.

deems the circulator disclosure portions of the reporting requirements unconstitutional.⁸⁶

Justice O'Connor, joined by Justice Breyer, wrote a separate opinion, concurring with the majority's holding concerning name badges, but dissenting regarding the disclosure provisions. In a strongly worded opinion, Justice O'Connor termed the majority's opinion a "disturbing" invalidation of "vitaly important" disclosure regulations.⁸⁷

Justice O'Connor's analysis varied from the majority opinion in several ways. First, unlike the majority, she asserted the reporting requirement needed only be justified by a low level scrutiny standard of a legitimate state purpose, not an important or compelling one required by exacting or strict scrutiny. Her analysis of the state interests at issue also differed from the majority. Justice O'Connor said the anti-fraud and informational interests provide a sufficient basis to uphold the reporting requirement. Regarding the fraud argument, she noted the trial testimony of substantial petition fraud in Colorado by paid petition circulators. O'Connor also forcefully argues for the informational interest:

Colorado's disclosure reports provide facts useful to voters who are weighing the options. Member of the public deciding whether to sign a petition or how to vote on a measure can discover who has proposed it, who has provided funds for its circulation, and to whom these funds have been provided. Knowing the names of paid circulators and the amount paid to them also allows members of the public to evaluate the sincerity or, alternatively, the potential bias of any circulator that approaches them.⁸⁸

Concluding, O'Connor says she would uphold the reporting requirement under either exacting scrutiny or a lower standard.

⁸⁶ *Id.* at 649.

⁸⁷ *Id.* at 656 (O'Connor, J., concurring).

⁸⁸ *Id.* at 658 (O'Connor, J., concurring).

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Disclosure of Political Broadcast Advertising (Television and Radio) –
Differing Judicial Perspectives

An issue unaddressed by the Supreme Court, and on which courts have taken a variety of approaches, is whether disclosure requirements may be applied to political broadcast (television and radio) issue advertising. Significantly, *McIntyre* explicitly left this an open question, as Justice Stevens' decision for the court said that that case does not apply to broadcast advertising.⁸⁹

In *Vermont Right to Life v. Sorrell*,⁹⁰ the federal district court for Vermont addressed a campaign finance reform measure which provided disclosure requirements for "political advertisements and reporting requirements for "mass media activities". Political advertisements were defined in the law as "any communication which *expressly or implicitly* advocates the success or defeat of a candidate."⁹¹ "Mass media activities" included communications that included the name or likeness of a candidate for office. Political advertisements were required to carry the name and address of the person sponsoring it, and designate the candidate, party, or committee on whose behalf it was published. Persons spending \$500 or more within 30 days of an election on mass media activities would be required to report the expenditures to the state and to the candidate whose likeness appeared in the spot, within 24 hours of making the expenditure.⁹² The federal district court held that political advertisements and the expenditures for mass media activities must be narrowly construed to apply only to messages containing express advocacy to save the statutes from unconstitutionality.⁹³

In contrast to *Vermont Right to Life*, in *KVUE v. Moore*,⁹⁴ a Texas television station challenged Texas statute broadcast sponsorship regulations, similar to federal regulations discussed below, requiring advertisers to include in advertisements a disclaimer "paid political announcement" and the name and address of the agent who purchased the advertising time. The requirement

⁸⁹ *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 338 n.3 (1995).

⁹⁰ *Vermont Right to Life v. Sorrel*, 19 F. Supp. 2d 204 (D. Vt. 1998).

⁹¹ *Id.* at 208 (quoting VT. STAT. ANN. TIT. 17 sec. 2881) (Supp. 1997).

⁹² *Id.*

⁹³ *Id.* at 213.

⁹⁴ *KVUE v. Moore*, 709 F.2d 922 (5th Cir. 1983).

applied to “any political advertising,” – encompassing candidate advertising and issue advertising.”⁹⁵

The station challenged the statute as an infringement on broadcaster’s First Amendment rights, asserting that it “stripped the broadcaster of absolute editorial control” and penalizing speech based on its political content.⁹⁶ The 5th Circuit summarily dismissed the contention, drawing on *Anderson v. Calabreze*⁹⁷ and *Storer v. Brown*.⁹⁸ The Court stated that that the requirements were generally applicable and even –handed that protect the integrity and reliability of the electoral process itself, terming this state interest “compelling.”⁹⁹ The court said the regulations were content-neutral, and that the burden was of “an extremely limited nature.”¹⁰⁰

Federal regulations, similar to the Texas state regulations, have governed political issue advocacy advertisements broadcast by TV and radio stations since passage of the very earliest versions of the Radio and Communications Acts in the 1920s and 30s.¹⁰¹ FCC regulations promulgated under the Communications Act, provide:

(a) When a broadcast station transmits any matter for which money . . . is . . . paid . . . the station at the time of the broadcast shall announce (1) that such matter is sponsored, paid for, or furnished, either in whole or in part, and (2) by whom or on whose behalf such consideration was supplied.

(b) The licensee of each broadcast station shall exercise reasonable

⁹⁵ *Id.* at 926.

⁹⁶ *Id.* at 937.

⁹⁷ *Anderson v. Calabreze*, 460 U.S. 780 (1983).

⁹⁸ *Storer v. Brown*, 415 U.S. 724 (1974).

⁹⁹ *KVUE v. Moore*, 709 F.2d 922, 937 (5th Cir. 1983).

¹⁰⁰ *Id.*

¹⁰¹ For an excellent discussion about the legislative history and early administration of the political identification statute and regulations, see *Loveday v. FCC*, 707 F.2d 1143, 1449 (D.C. Cir. 1983).

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diligence to obtain from its employees and from other persons with whom it deals directly information to enable such licensee to make the announcement

(e) The announcement required by this section shall . . . fully and fairly disclose the *true identity* of the person or persons, or corporation or other entity by whom or on whose behalf such payment is made. Where the material broadcast is *political matter* or matter involving the discussion of a controversial issue of public importance and a corporation . . . unincorporated group, or other entity is paying for or furnishing the broadcast matter, the station shall . . . [also] require that a list of the chief executive officers or members of the executive committee or of the board of directors... shall be made available for public inspection.¹⁰²

The statute and regulation's scope has been substantially unexplored by the courts, and its constitutionality has not been ruled on.¹⁰³ However, the scope of the phrase "reasonable diligence" was considered in *Loveday v. FCC*.¹⁰⁴ In this case, a group supporting a ballot measure restricting smoking filed a complaint with the FCC asserting that an advertisement against the initiative was sponsored by the Tobacco Industry, rather than the identified sponsor, Californians Against Regulatory Excess. The group claimed that the law required "the exertion of every effort" by licensees to determine the true sponsors of paid material."¹⁰⁵ Instead, the Commission applied, and the court

¹⁰² 47 C.F.R. § 73.1212 (1998) (emphasis added).

¹⁰³ See Hearings on: *The First Amendment and Restrictions on Issue Advocacy, Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 1st Sess. (September 19, 1997)(testimony of James Bopp, conceding broadcast disclosure regulations have never been subject to court challenge). *But see* *KVUE v. Moore*, 709 F.2d at 937 (1983) (upholding requirements against constitutional challenge).

¹⁰⁴ 707 F.2d 1443 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1008 (1983).

¹⁰⁵ *Id.* at 1448.

approved, a standard that permitted broadcasters to accept the apparent sponsor's representations that it is the sponsor, when, as here, faced with undocumented allegations."¹⁰⁶ Requiring broadcasters to investigate would "judicialize the process of being allowed to utter a political statement."¹⁰⁷ The court suggested that such heightened requirements could implicate the First Amendment, and would have the practical effect of discouraging broadcasters to air these advertisements."¹⁰⁸

While the effect of *Loveday* was to suggest that the identification regulations may have become toothless, recent FCC decisions have taken a different approach and announced a greater obligation for broadcasters. The Commission has evidenced a determination to demonstrate that the regulations are enforceable and stations do have real responsibilities under them. In 1996, the FCC found that numerous stations broadcasting issue advertisements had violated the sponsorship identification rules by failing to disclose the true sponsor of advertisements opposing an anti-smoking ballot measure." The advertisements in question identified "Fairness Matters to Oregonians Committee" as the sponsor, even though the Tobacco Institute, a trade association of large tobacco companies, had funded, designed, and implemented the advertisements.¹⁰⁹ In reviewing whether broadcast licensees could be charged with identifying and disclosing such hidden sponsors, the FCC noted preliminarily that broadcast licensees cannot generally be expected to investigate independently whether the persons with whom they deal directly are the true sponsors. The Commission held that where a challenge is made to the legitimacy of sponsorship information and where there is strong evidence that both advertisement funding and editorial direction are controlled by someone other than the listed sponsor, however, broadcast licensees are required to exercise "reasonable diligence" in determining who the actual sponsor of the advertisements is and requiring that the proper information be displayed on the advertisement. Here, the Commission determined that the stations had not identified the true sponsor, the Tobacco Institute, but issued no sanctions against them, because they had not had the information necessary to disclose the true sponsor, and "may have been uncertain how to proceed in the absence of definitive guidance from the Commission."¹¹⁰

¹⁰⁶ *Id.* at 1449.

¹⁰⁷ *Id.* at 1458.

¹⁰⁸ *Id.* at 1457.

¹⁰⁹ 11 F.C.C.R. 20415, 1996 WL 635821 (Oct. 29, 1996).

¹¹⁰ *Id.*

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III. LOBBYIST DISCLOSURE, FINANCIAL DISCLOSURE, LEGISLATIVE
INVESTIGATIONS AND TRIAL DISCLOSURE

In addition to campaign disclosure and issue advocacy and advertising disclosure, lobbyist disclosure, governmental financial disclosure, and disclosure in the course of court proceedings or legislative investigations all implicate First Amendment interests. These areas are considered in turn.

Constitutionality of Requiring Disclosure of Lobbying Activities

In *United States v. Harriss*,¹¹¹ the Supreme Court examined the Federal Regulation of Lobbying Act, which required every person "receiving any contributions or expending any money for the purpose of influencing the passage or defeat of any legislation by Congress" to report contributions (including the name and address of contributors) and expenditures.¹¹² To avoid the constitutional problem of vagueness, the Court construed the Act as applying only to direct communication with members of Congress on pending or proposed federal legislation, including communications directly by lobbyists themselves, their employees, and through letter writing campaigns.¹¹³

The Court held that as construed, the Act did not violate the "freedoms guaranteed by the First Amendment - freedom to speak, publish, and petition the government."¹¹⁴ Although the Court did not state explicitly what level of scrutiny it applied in arriving at this analysis, it did balance possible infringements on First Amendment rights against the government's interests in maintaining the integrity of the governmental process. The statute served Congress's interest in self protection by enabling it to *evaluate* pressures put upon it, such as who is being hired to lobby, who is paying for lobbying activities, and how much money is being spent.¹¹⁵ Thus, the "voice of the people" would not be "drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal."¹¹⁶

¹¹¹ U.S. v. Harriss, 347 U.S. 612 (1954).

¹¹² 2 U.S.C. §§ 261 *et. seq.*

¹¹³ *Harriss*, 347 U.S. at 620-21.

¹¹⁴ *Id.* at 625.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

The Court held that, under these circumstances, Congress had used its power of self-protection in a "manner restricted to its appropriate end" without offending the First Amendment.¹¹⁷ The Court reasoned that any burden on First Amendment rights, such as a person remaining silent out of fear of possible prosecution for failing to comply with the Act, was too remote and hypothetical to justify striking down the statute.¹¹⁸

Several court decisions since *Harriss* have both reaffirmed *Harriss*' holding, requiring disclosure of lobbying expenses is constitutional, and broadened its application.¹¹⁹ In *Florida League of Professional Lobbyists v. Meggs*, for example, the Eleventh Circuit considered a challenge to Florida's lobbying disclosure law, which required disclosure not only of direct lobbying expenditures but also indirect expenses without direct contact with governmental officials.¹²⁰ Although not explicitly stating that strict scrutiny applied, the Florida League court appeared to apply that standard. It determined that the state's interest in illuminating the pressures to be evaluated by voters and officials were "compelling." The court further noted that the government's interest in providing a method for evaluating these pressures was even stronger when those pressures were indirect, since indirect pressures are harder for the public and the government to identify without the aid of disclosure.¹²¹

Like the *Harriss* court, the *Florida League* court noted that the First Amendment burdens posed by the statute's detractors were too hypothetical to justify invalidating the law. In justifying the above analysis with respect to indirect communications, the Florida League court relied on *Harriss*' construction of "direct communication" as including an "artificially stimulated letter writing campaign." This demonstrates that courts tend to interpret *Harriss* broadly to allow a wide range of disclosure requirements of lobbying activities.

¹¹⁷ *Id.* at 626.

¹¹⁸ *U.S. v. Harriss*, 347 U.S. 612, 626 (1954).

¹¹⁹ See *Florida League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457 (11th Cir. 1996); *Minnesota State Ethical Practices v. Nat'l Rifle Ass'n* 761 F.2d 509 (8th Cir. 1995); *Associated Indus. of Kentucky v. Commonwealth*, 912 S.W.2d 947 (Ky. 1995); *Fair Political Practices Comm'n v. Superior Court of Los Angeles*, 599 P.2d 46 (Cal. 1979).

¹²⁰ *Florida League of Prof'l Lobbyists, Inc.*, 87 F.3d. at 460.

¹²¹ *Id.* at 461.

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The Eighth Circuit in *Minnesota State Ethical Practices Board v. Nat'l Rifle Association*¹²² extended the analysis of *Harriss* to permit registration and reporting of lobbying where the only activity was correspondence from a national organization to its members in Minnesota, urging their support for specific state legislation. State law required the individual at the national office making the contacts to register as a lobbyist and file regular reports.¹²³ Applying strict scrutiny, the court concluded that Minnesota's interest in disclosure outweighed any infringement of the group's First Amendment rights.¹²⁴ The court observed that the appellants had argued that their situation deserved protection because the activity occurred between members of a voluntary association, but stated that:

[W]e do not think this distinction is constitutionally significant. The Act does not focus on the group affiliation of a lobbyist, it focuses on lobbying activity. When persons engage in an extensive letter writing campaign for the purpose of influencing specific legislation, the State's interest is the same whether or not those persons are members of an association. The appellants have articulated no reason why their membership in the NRA should give them any greater constitutional protection with respect to lobbying activity than is enjoyed by other citizens.¹²⁵

The Kentucky Supreme Court upheld that state's lobbyist registration, disclosure, and reporting requirements in *Associated Industries of Kentucky v. Commonwealth*.¹²⁶ This court expressly stated that it was applying strict scrutiny to the law to protect the appellant's First Amendment right to petition and freedom of association. The court found the state's law was supported by

¹²² *Minnesota State Ethical Practices Bd. v. Nat'l Rifle Ass'n.*, 761 F.2d 509 (8th Cir. 1985).

¹²³ *Id.* at 511.

¹²⁴ *Id.* at 512.

¹²⁵ *Id.* at 513.

¹²⁶ *Associated Industries of Kentucky v. Commonwealth*, 912 S.W.2d 947 (Ky. 1995).

a compelling interest and was sufficiently narrowly drawn to avoid unnecessary abridgment of association rights.¹²⁷ In particular, the Kentucky court found that the Supreme Court's decisions finding compelled disclosure unconstitutional were not universally applicable. The court noted, however, that the law at issue did not compel "disclosure of membership in organizations engaged in advocacy," suggesting that a law requiring the disclosure of membership could be overbroad.¹²⁸

The Foreign Agents Registration Act and *United States v. Peace Information Center*.

The Foreign Agents Registration Act and its disclosure requirements have also withstood constitutional scrutiny. In *United States v. Peace Information Center*¹²⁹ the court held that mandatory disclosure in this area was within the powers of Congress and identified two separate bases for its conclusion: the inherent authority of Congress to legislate on the subject of foreign relations, and the constitutional authority of Congress to legislate concerning national defense.¹³⁰ The court did not specify a standard of review, but was deferential to the legislative judgment of constitutionality.¹³¹ Specifically addressing First Amendment concerns, the court observed that the statute:

neither limits nor interferes with freedom of speech. It does not regulate expression of ideas. Nor does it preclude the making of any utterances. It merely requires persons carrying on certain activities to identify themselves.¹³²

¹²⁷ *Id.* at 952-53.

¹²⁸ *Id.* at 953 (distinguishing *NAACP v. Alabama*, 357 U.S. 449 (1958); *Bates v. Little Rock*, 362 U.S. 516 (1960)).

¹²⁹ 97 F. Supp. 255.

¹³⁰ *Id.* at 259-63.

¹³¹ *Id.* at 262-263.

¹³² *Id.* at 262. Compare *McIntyre v. Ohio Elections Comm'n.*, 514 U.S. 334, 378 (1995) (Scalia, J., dissenting) ("[Disclosure] forbids . . . the express of no idea, but merely requires identification of the speaker. . .").

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The court therefore concluded that foreign agent disclosure is consistent with the First Amendment, not unlike laws requiring a person to register or procure a license before engaging in certain occupations.¹³³

Disclosure of Personal Finances by Governmental Officials

Courts have upheld statutes requiring personal financial disclosure against challenges that such statutes violate the individual's right to privacy. In *Plante v. Gonzales*,¹³⁴ for example, the Fifth Circuit addressed the constitutionality of Florida's financial disclosure requirements for government officials and candidates for state or local office. Several senators challenged the law as abridging their right to privacy under the 14th Amendment. The court distinguished between this claim and claims that compelled disclosure of members in an organization unconstitutionally burdened constitutional rights.

Here, memberships, associations, and beliefs are revealed, if at all, only tangentially. The Amendment calls for disclosure of assets, debts, and sources of income, each to be identified and valued. Although in some particular situations, rigorous application of the Amendment might implicate First Amendment freedoms, when considering the Amendment on its face this threat is too remote to raise the issue.¹³⁵

Absent a First Amendment element, the court applied a balancing test, rather than strict scrutiny.

The district court found that four important state concerns are significantly advanced by the Amendment: the public's "Right to know" an official's interests, deterrence

¹³³ *Id.* at 262 (distinguishing *Thomas v. Collins*, 323 U.S. 516, 540 (1945) (holding that a "requirement that one must register [for a labor union organizer's card] before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment")).

¹³⁴ 575 F.2d 1119 (5th Cir. 1978).

¹³⁵ *Id.* at 1132-33.

of corruption and conflicting interests, creation of public confidence in Florida's officials, and assistance in detecting and prosecuting officials who have violated the law. The importance of these goals cannot be denied. The question is whether the Sunshine Amendment significantly promotes them.¹³⁶

Balanced against these interests were the Senator's interest in financial confidentiality. The court noted that, as Senators, these litigants were legitimately subject to more scrutiny of their affairs than an ordinary private citizen, making an analogy to libel law decisions.¹³⁷ The court concluded that the disclosure law did not violate the senators' privacy rights.

In *Igneri v. Moore*,¹³⁸ the court sustained provisions of the New York Ethics in Government Act that required annual financial disclosure by a number of government officials as applied to a political party chairman. The court, assessing the disclosure requirement under the [intermediate scrutiny], or balancing, analysis applicable to privacy challenges, found a "substantial state interest in exposing and curbing the improper uses" of the influence possessed by party chairman.¹³⁹ It stated that:

Full disclosure ensures that the financial interests of party chairman -- the interests most susceptible to the corrupting force of political power and influence -- are available for inspection by state regulators and the concerned citizenry. Financial disclosure functions not merely to subject private persons' finances to public scrutiny but as a means to deter those who might unethically capitalize on their political

¹³⁶ *Id.* at 1134.

¹³⁷ *Id.* at 1136.

¹³⁸ 898 F. 2d 870 (2d Cir. 1990).

¹³⁹ *Id.* at 877.

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relationships. Accountability follows
publicity.¹⁴⁰

Similarly, in *Slevin v. City of New York*,¹⁴¹ the court upheld personal financial disclosure by city officials, candidates for city office, and city employees above a specified salary threshold. Rejecting a privacy challenge to the disclosure requirements, the court stated that the city was "constitutionally free [to require disclosure], so long as in doing so it is seeking to achieve a proper objective through a defensible means."¹⁴² It continued:

[T]he objectives sought by financial disclosure laws are in principle unassailable and theoretically justify a broad scope of inquiry. Honest government is so patently a worthy objective, and the capacity for venality in human behavior is so profound and ingenious, that virtually any disclosure law however intrusive might be rationally justifiable. Financial disclosure laws also derive considerable strength from the benefits widely felt to be derived from openness and from an informed public The interest in an informed citizenry also supports a legislature's decision to adopt financial disclosure legislation. An informed public is essential to the nation's success, and a fundamental objective of the First Amendment.¹⁴³

¹⁴⁰ *Id.* (citing *Buckley v. Valeo*, 424 U.S.1, 64-68(1976)).

¹⁴¹ 551 F. Supp. 917 (S.D.N.Y. 1982).

¹⁴² *Id.* at 922.

¹⁴³ *Id.* at 921. See also *Barry v. City of New York*, 712 F.2d 1554 (2d Cir. 1983) (affirming *Slevin* in relevant part and upholding the constitutionality of full public disclosure of the information). In *Barry*, intermediate scrutiny was also applied to the litigants' claim that the law violated their rights under the equal protection clause, by burdening one class of public employees. *Id.* at 1563; see also *Eisenbund v. Suffolk County*, 841 F.2d 42 (2d Cir. 1988).

In *County of Nevada v. MacMillan*,¹⁴⁴ the California Supreme Court upheld a financial disclosure statute redrafted after a previous version had been declared unconstitutional. In noting the differences between the two statutes, the court stated:

[T]he 1973 act appears to accomplish its legitimate aims in a less intrusive, and considerably more limited, fashion. As noted above, the act's 'prohibition' provisions are keyed at enjoining only 'substantial' conflicts of interest and relate only to public agency action or decision having a immaterial economic effect upon the official's economic interests. Thus, the act does not forbid an official to participate in agency matters which could have only an insignificant, de minimus economic effect upon his interests. More importantly, the act's 'disclosure' provisions are aimed at requiring disclosure only if the official's interests could be 'affected materially' by his public service. Moreover, unlike the 1969 act, the 1973 act does not require disclosure of the actual extent of the official's assets and interests, but only whether the value of his investment or real property interest exceeds \$10,000 (and whether the aggregate value of income, loans and gifts during the year exceeded \$1,000). Finally, the disclosure requirements of the 1973 act apply only to certain specified high-level officials and not to every public official throughout the state. Disclosure of the economic interests of other public officials remains a subject for determination by the local boards and agencies involved.¹⁴⁵

The Alaska Supreme Court, in *Falcon v. Alaska Public Offices Commission*,¹⁴⁶ found that state's financial disclosure law was unconstitutional because it would require that official, who also worked as a physician, to

¹⁴⁴ 522 P.2d 1345 (Cal. 1974).

¹⁴⁵ *Id.* at 1350.

¹⁴⁶ 570 P.2d 469 (Ak. 1977).

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identify his patients. The court determined that this violated the physician's and patient's privacy rights.¹⁴⁷

Disclosure Mandated by Courts or Legislative Investigations

As discussed above, in *NAACP v. Alabama*, the Supreme Court found that the NAACP was justified in withholding its membership lists from the State of Alabama.¹⁴⁸ The State had obtained a court order requiring the production of this information as part of an action against the group for failing to qualify before doing business in Alabama. The Court determined that the constitutionally guaranteed rights to free association required that state efforts abridging these rights are subject to strict constitutionally scrutiny.¹⁴⁹

The Court concluded that the State could request some organizational information, including the identity of officials of the NAACP, but was forbidden by the Constitution from requiring the NAACP to provide a list of rank-and-file members, because the NAACP has demonstrated that "on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."¹⁵⁰ The Court observed that such an intrusive request was not justified by the State's specific interest here, which was to establish that the NAACP has been engaged in business in Alabama that required a corporate qualification filing.¹⁵¹

*Barenblatt v. United States*¹⁵² considered the constitutional concerns of compelled disclosure in the course of a congressional investigation. There, the court said, "[T]he Congress, in common with all branches of the Government, must exercise its powers subject to the limitations placed by the Constitution on government action" in particular the Bill of Rights. Not only does this abrogate the witnesses' civil rights, but "Congress may only investigate into those areas in which it may potentially legislate."¹⁵³

¹⁴⁷ *Id.* at 480.

¹⁴⁸ *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449 (1958).

¹⁴⁹ *Id.* at 452.

¹⁵⁰ *Id.* at 462.

¹⁵¹ *Id.* at 460.

¹⁵² *Barenblatt v. United States*, 360 U.S. 109, 112 (1959).

¹⁵³ *Id.* at 111.

In cases where witnesses have raised their First Amendment rights as a defense against a charge of contempt for failing to comply with a Congressional subpoena, the Court has applied a strict scrutiny balancing test.

The First Amendment in some circumstances protects an individual from being compelled to disclose his associational relationships Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing test by the courts of the competing private and public interests at stake in the particular circumstances shown.¹⁵⁴

Gibson v. Florida Legislative Investigative Committee held that balancing tests require that the state "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest."¹⁵⁵ "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."¹⁵⁶

In *Gibson*, the Court noted that this burden is more difficult for the government to carry when a witness is being questioned about the activities of others, than when he is asked about his own activities. In *Barenblatt*, for example, the witness could be asked about his activities in the Communist Party, which the Court said "is not an ordinary or legitimate political party."¹⁵⁷ In *Gibson*, the witness could not be queried about whether certain individuals (who were suspected Communists) were NAACP members.

Congress must demonstrate a compelling state interest in order to overcome the individual's assertion of his First Amendment rights.¹⁵⁸ In

¹⁵⁴ *Id.* at 126.

¹⁵⁵ *Gibson v. Florida Legislative Investigative Committee*, 372 U.S. 539, 546 (1963); see also *DeGregory v. New Hampshire Atty. Gen.*, 383 U.S. 825, 829 (1966).

¹⁵⁶ *Gibson*, 372 U.S. at 546 (quoting *Bates v. Arkansas*, 361 U.S. 516, 524 (1960)).

¹⁵⁷ *Gibson*, 372 U.S. at 547 (distinguishing *Barenblatt v. U.S.*, 360 U.S. 109 (1959)).

¹⁵⁸ *Barenblatt*, 360 U.S. at 128 (citing *Alabama ex. rel. Patterson*, 357 U.S. 449, 463-66).

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Barenblatt, the government was able to show a compelling governmental interest in obtaining information about the infiltration of Communists in American higher education due to the Party's avowed goal of overthrowing the U.S. Government, and the long-respected view that the Communist Party could not avail itself of the protections afforded an ordinary political party.¹⁵⁹

IV. CONCLUSION

The standard of review applied is perhaps the most critical, and least consistent, aspect of the Court's disclosure jurisprudence. The exacting scrutiny standard set forth for disclosure by *Buckley* and *NAACP v. Alabama* usually is specified as the appropriate standard of review, but as a practical matter the Court is inconsistent in its application of the standard. In *McIntyre* and *ACLF* the Court, while saying it is applying exacting scrutiny, appears to apply strict scrutiny, requiring statutes to be narrowly tailored – and non-duplicative – to serve compelling state interests.

The anti-corruption and anti-fraud interests enunciated in *Buckley* remain compelling to the Court. But the informational interest is ripe for clarification by the Court. It was dismissed in *McIntyre* and *ACLF*. But, by contrast, the informational interest was found to be sufficiently compelling to enable litigants to have standing under the FECA in another recent case, *FEC v. Aikens*.

The Court, in one of the arguably most consistent standards running throughout the disclosure case law, appears to give substantial weight to the extent to which a disclosure provision severely burdens or restricts speech. First, *Buckley's* analysis, whereby courts analyze the reasonable probability that disclosure exposes persons to hostility, threats, harassment, or reprisal, was clearly articulated in *Socialist Workers Party*. The "hostility" analysis also is apparent in *McIntyre* and *ACLF*. More generally, the level of scrutiny applied in cases – whether termed exacting or strict scrutiny – appears to directly correlate to the severity of the burden imposed by the disclosure regulation. Thus, where the disclosure provision's burden is perceived as heavy – as was the case in *Socialist Workers*, *McIntyre*, *MCFL*, etc. -- the statutes receive (and generally fail) severe scrutiny. Where the disclosure provision is less burdensome, the standard is more lenient, and the provision is upheld, as in *Buckley*, *Harriss*, and *RNC*.¹⁶⁰

¹⁵⁹ *Barenblatt*, 360 U.S. at 128.

¹⁶⁰ The RNC was denied certiorari by the Supreme Court. *RNC v. FEC*, 117 S. Ct. 682 (1997).

The narrow tailoring of disclosure provisions is a common theme throughout the case law. Specifically, de minimus exceptions and low dollar thresholds, and temporal limitations are often required by the Court. The Court, more specifically, has been especially protective of individuals, and small groups. Thus in *McIntyre*, the Court protected Mrs. McIntyre, a lone individual of “modest” means, and in *MCFL*, a “small group” which engages in small “grassroots” activities. In *Socialist Workers*, the Court noted the comparatively small budget and electoral success of the party. In *ACLF*, the Court similarly, appears concerned about the lack of de minimus exceptions and thresholds of the circulator disclosure, which would expose persons to possible hostility, no matter how limited their involvement, or how small their financial stake in the political activity.

It is noteworthy that all of these cases were brought on behalf of judicially (if not politically) “sympathetic plaintiffs” – Mrs. McIntyre; a “grassroots” local pro-life group; and an unpopular “fringe” party. By contrast, the Court has yet to strike a political disclosure provision claimed to burden a large and/or presumably politically powerful organization. Consequently, the exceptions carved out may be more limited in application than they appear.

Perhaps the least clear and most problematic requirement – if it is a requirement – is that disclosure employ the least restrictive alternative. The Court’s disapproval of disclosure provisions that are duplicative, which appeared a significant factor in *McIntyre* and *ACLF*, threaten to inject substantial uncertainty on legislatures endeavoring to enact disclosure regimes. The Court needs to clarify this part of their jurisprudence.

The Court’s disclosure cases may often be less well explained by any coherent disclosure framework, however, than by the particular facts, and often the collateral legal issues presented, in a given case. For instance, in many of the above cases, the Court has reviewed disclosure statutes as well as other, related statutes. In *Buckley*, the Court’s overall approval of the FECA’s purposes may explain its tendency to approve even the questionably low thresholds in the original Act. In the ballot initiative or issue advocacy cases, the Supreme Court and lower courts’ disapproval of disclosure may owe as much to the courts’ disapproval of contribution or spending limits imposed on the issue advocacy. In *ACLF*, the analysis of the disclosure provisions may have been colored by the Court’s disapproval of Colorado statutes’ generalized disfavoring of professional ballot initiative campaigns. These cases should be viewed in light of the overall statutory scheme reviewed, not merely the disclosure provisions. Other important considerations include whether the disclosure statute is one of general application, as was not the case in *ACLF*, and whether the disclosure provision is content neutral or viewpoint neutral.

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Finally, it must be said that the status of disclosure of issue advocacy remains as unresolved as the day *Buckley* was announced in 1976. Notwithstanding several lower courts' formalistic application of express advocacy/issue advocacy, the Supreme Court, it should be remembered, did not strike the disclosure provisions, but rather applied narrowing constructions in order to leave intact at least a portion of the FECA disclosure regime. In fact, analysis of disclosure provisions generally must begin with the recognition that the Court has addressed campaign disclosure *per se* in only four cases since *Buckley*: *Socialist Workers*, *MCFL*, *McIntyre*, and *ACLF*, and of those, *MCFL* and *ACLF* disclosure was only one of several issues.

Further, only in one case – *Socialist Workers*, with its exceptional facts – did the Court permit candidate-specific activities to occur without any public disclosure. In *MCFL*, the other case involving candidate-specific speech, the Court held that the organization did not need to register as a political committee because the organization was so small, accepted no corporate funds, and was not principally organized for political purposes. However, the Court still required *MCFL* to file reports with the FEC of all independent expenditures over \$200 with the FEC.¹⁶¹

Nonetheless, that all four of these cases either disapproved the disclosure provision at issue or imposed an exception or exemption from existing disclosure provisions indicates that the overall trend in disclosure cases has been skepticism towards the pro-disclosure framework enunciated in *Buckley*. And yet, the *Buckley* framework – which was undeniably favorable towards disclosure – still remains the controlling precedent and constitutional analytic. Like many constitutional questions concerning campaign finance, then, answers are more likely to be announced in the future, than culled from the past.

Based on the jurisprudential framework in place at this point, though, it seems clear that the Court will look more favorably on disclosure of candidate-specific activity by larger organizations than on referenda/ballot issue speech by individual local activists like Mrs. McIntyre. Further, the Court will prefer less intrusive forms of disclosure – of only large contributors, with a minimum of administrative burden, and where there is no evidence that serious threats, harassment, or reprisals will result. Within these boundaries, the Court will still look at the substantial state interest, and evidence that the required disclosure

¹⁶¹ The FECA requires disclosure of all independent expenditures (communications expressly advocating the election or defeat of a candidate) of more than \$250 a year, and the identification of each person who made a contribution in excess of \$200 to the person or organization filing such statement which was made for the purpose of furthering the independent expenditure. 2 U.S.C. § 434(c).

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advances the legitimate government interests of preventing corruption and fraud, and providing information to voters.