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PUBLIUS WAS NOT A PAC: RECONCILING ANONYMOUS POLITICAL SPEECH, THE FIRST AMENDMENT, AND CAMPAIGN FINANCE DISCLOSURE

Benjamin Barr and Stephen R. Klein***

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.¹

I. INTRODUCTION

Anonymous political speech has been the scorn of entrenched powers and the saving balm of emerging voices throughout English and American history. In its simplest terms, anonymous speech is communication that does not identify the speaker or identifies a synonymous persona.² Although for some, anonymous political speech is inherently negative, its value remains of highest constitutional import.

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¹ U.S. CONST. amend. I.

² See BLACK'S LAW DICTIONARY 106 (9th ed. 2009).

Unfortunately, modern campaign finance law eliminated many avenues for anonymous political speech in both federal and state arenas. Under today's disclosure regimes, citizens who band together and spend as little as \$1,000 criticizing or complimenting federal officeholders may be forced to register and report as a political action committee (PAC) with the Federal Election Commission (FEC).³ This includes identifying the group on advertisements and filing reports that include the names and addresses of the group's donors with the FEC, which are then published online.⁴ Some state laws require such reporting from political bloggers who spend as little as \$91.38 for internet hosting.⁵

Ironically, today one of the most important influences on the ratification of the United States Constitution would face civil and possibly criminal penalties if it failed to register and report as a PAC. Publius, the collective author of *The Federalist Papers*, would have to register if they discussed a political issue in numerous states.⁶ As disclosure expands under federal law, Publius might also be ensnared in federal regulations.⁷ Even if this were not burdensome in itself, disclosure would reveal the identities of Alexander Hamilton, James Madison and John Jay as the organization, and risk diminishing Publius's effectiveness.⁸

Disclosure is, however, burdensome. Campaign finance disclosure not only eliminates important avenues for anonymous political speech, but replaces such free speech with cumbersome reporting regimes penalizing those who fail to comply and those who do not accurately report the minutest details.⁹ Often, these complicated and burdensome regulations inhibit free speech.¹⁰ Or as the Supreme Court anticipated, "[f]aced with the need to assume a more sophisticated organizational 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."¹¹

Today's zealous push for all-encompassing disclosure—which replaces political anonymity with complex, detailed reporting—injures our system of self-government and is highly burdensome for average speakers. Disclosure is often

³ See *infra* notes 93–136 and accompanying text.

⁴ See *infra* notes 93–119 and accompanying text.

⁵ See *Bailey v. Maine Comm'n on Gov't Ethics and Election Practices*, 900 F. Supp. 2d 75, 88–93 (D. Me. Sept. 30, 2012).

⁶ See *infra* notes 93–119 and accompanying text.

⁷ See *infra* notes 118–136 and accompanying text.

⁸ See *infra* notes 30–38 and accompanying text.

⁹ See *infra* notes 93–119 and accompanying text.

¹⁰ See *infra* notes 137–172 and accompanying text.

¹¹ *Fed. Election Comm'n v. Mass. Citizens for Life*, 479 U.S. 238, 255 (1986).

treated as an absolute good,¹² with reformers claiming anyone scared off from participating is just a “sissy.”¹³ Protecting anonymity is not an act of cowardice, but a principle central to protecting our rich, Western tradition of reasoned, public debate.¹⁴ We may achieve this protection without eliminating disclosure, instead restoring bright-line standards within campaign finance law and recognizing the need to achieve disclosure through the least restrictive means possible.

This article criticizes federal and state campaign finance disclosure laws on First Amendment and political privacy grounds and offers several suggestions for reform respectful of these concerns. Part II of this article offers a history of anonymous speech and suppression of political speech generally.¹⁵ It also illustrates the benefits of anonymous speech to political discourse and participation in the American experiment. Part III is a political speech primer, laying out the basic principles for protecting it constitutionally, and identifying the schism between free speech and campaign finance reform.¹⁶ Part IV discusses the difficulty and expense of complying with campaign finance disclosure. It also discusses efforts to expand campaign finance disclosure laws to reach practically all political speech.¹⁷ Finally, Part V discusses the paradox surrounding legal protection of anonymous speech, and offers various proposals to bolster political privacy.¹⁸

II. ANONYMOUS POLITICAL SPEECH IN THE AMERICAN TRADITION

Before discussing the burdens of campaign finance disclosure on political speech, it is important to establish the relevance of anonymous political speech. Even when disclosure laws are simple enough for the average citizen to understand, they foreclose most avenues of anonymity. Simply, this is because these laws require political speech to include disclaimers that identify the speaker

¹² Trevor Potter, president of the Campaign Legal Center, recently dismissed Justice Scalia’s concern that “This campaign finance law is so intricate that I can’t figure it out.” Trevor Potter, *The Supreme Court needs to get smarter about politics*, WASH. POST (Oct. 11, 2013), available at http://www.washingtonpost.com/opinions/the-supreme-court-needs-to-get-smarter-about-politics/2013/10/11/806c9c44-31b7-11e3-8627-c5d7de0a046b_story.html.

¹³ See, e.g., Ryan J. Reilly, *Eschoo: Chamber Having ‘Sissy Fit’ Over Campaign Disclosure*, TPM MUCKRAKER (June 3, 2011, 1:20 PM), http://tpmmuckraker.talkingpointsmemo.com/2011/06/eshoo_chamber_having_sissy_fit_over_campaign_discl.php; Gadi Ben-Yehuda, *SCOTUS: US Politics No Place for Sissies*, HUFFPOST POLITICS (June 25, 2010, 4:03 PM) http://www.huffingtonpost.com/gadi-benyehuda/scotus-us-politics-no-pla_b_625221.html (last visited Nov. 26, 2013).

¹⁴ This “institution will be based on the illimitable freedom of the human mind. for [sic] here we are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it.” Letter from Thomas Jefferson to William Roscoe (Dec. 27, 1820), available at <http://www.loc.gov/exhibits/jefferson/75.html>.

¹⁵ See *infra* notes 19–78 and accompanying text.

¹⁶ See *infra* notes 79–92 and accompanying text.

¹⁷ See *infra* notes 93–136 and accompanying text.

¹⁸ See *infra* notes 137–205 and accompanying text.

and for certain organizations to report the names of their contributors to the government.¹⁹ Unlike political corruption, anonymity is not an evil to be cured. In fact, considering the role of anonymous political speech in American history, its benefits to individual speakers and political discourse at large far outweigh its negative effects. This article identifies three liberty interests in anonymity to secure: preventing prejudice, keeping the message central, and preventing retaliation from those in power. This section discusses prominent historical examples of anonymous political speech and describes various legitimate reasons why Americans have elected to voice their political opinions anonymously.

A. *The Federalist Papers*

Anonymous political speech played a defining role in founding the United States. Many citizens anonymously voiced their political opinions throughout the several states. A small sampling includes “An American Citizen” in Pennsylvania,²⁰ “Agrippa” in Massachusetts,²¹ “Cato” in New York,²² “A Landholder” in Connecticut,²³ “Civis Rusticus” in Virginia,²⁴ “Civis” in South Carolina,²⁵ and “A Freeman” in Rhode Island.²⁶ In short, “American opinion writers used so many classical pseudonyms that their bylines read like the dramatis personae of a history play.”²⁷ The most popular explication of the Constitution encouraging its ratification, however, was the joinder of Alexander Hamilton, James Madison, and John Jay under the pen name “Publius” to publish discourses collectively known as *The Federalist Papers*.²⁸ *The Federalist Papers* were published almost exclusively in New York newspapers in 1787 and 1788.²⁹

Anonymity was central to the success of *The Federalist Papers*. “No secret could have been more closely guarded than was the authorship of *The Federalist*

¹⁹ See, e.g., 2 U.S.C. § 434 (2012).

²⁰ See, e.g., *An American Citizen I*, INDEPENDENT GAZETTEER, Sept. 26, 1787, reprinted in 1 THE DEBATE ON THE CONSTITUTION 20–24 (Bernard Bailyn, ed., 1993) [hereinafter DEBATE 1].

²¹ See, e.g., “Agrippa” III, MASS. GAZETTE, Nov. 30, 1787, reprinted in DEBATE 1 at 443–45.

²² See, e.g., “Cato” I, N.Y. JOURNAL, Sept. 27, 1787, reprinted in DEBATE 1 at 31–33.

²³ See, e.g., *Reply to Elbridge Gerry: “A Landholder” IV*, CONNECTICUT COURANT, Nov. 26, 1787, reprinted in DEBATE 1 at 234–38.

²⁴ See, e.g., *Reply to Mason’s “Objections”: “Civis Rusticus,”* VA. IND. CHRON., Jan. 30, 1788, reprinted in DEBATE 1 at 353–62.

²⁵ See, e.g., “Civis” to the Citizens of South Carolina, COLUMBIAN HERALD, Feb. 4, 1788, reprinted in 2 THE DEBATE ON THE CONSTITUTION 147–54 (Bernard Bailyn, ed., 1993) [hereinafter DEBATE 2].

²⁶ See, e.g., “A Freeman” to the Freeholders and Freemen of Rhode Island, NEWPORT HERALD, March 20, 1788, reprinted in DEBATE 2 at 368–71.

²⁷ See generally THE FEDERALIST. John Jay authored only five articles, limiting his participation after coming down with rheumatoid arthritis. RICHARD BROOKHISER, JAMES MADISON 63 (2011).

²⁸ BROOKHISER, *supra* note 27, at 64.

²⁹ “Printed in only a dozen papers outside of New York, [*The Federalist’s*] larger influence was spotty.” RON CHERNOW, ALEXANDER HAMILTON 261 (2004).

Papers. Even Hamilton's best friends did not know what he was doing; if he seemed busier than usual, it was ascribed to the flourishing state of his law practice.³⁰ A 1792 French collection of *The Federalist Papers* named the authors, but did not identify the respective essays of Hamilton, Madison, or Jay; such identification did not occur until 1810, and even today there is still debate over authorship of certain essays.³¹ Many expressed prejudice against Hamilton, thus explaining his use of the name Publius. Hamilton often received attacks "jeering at his foreign birth, his supposed racial identity, his illegitimacy and his putative links to the British Crown—attacks that set a pattern for the rest of Hamilton's career. Since critics found it hard to defeat him on intellectual grounds, they stooped to personal attacks."³² Gouverneur Morris, a fellow Constitutional Convention delegate, considered Hamilton "indiscreet, vain and opinionated."³³ Even years after Hamilton's death following a duel against Aaron Burr—the duel itself an indicator of Hamilton's polarizing nature—John Adams quipped that Hamilton's alleged "[v]ice, folly and villainy are not to be forgotten because the guilty wretch repented in his dying moments."³⁴ Whatever the merit of these criticisms, Hamilton had ample reason to remain anonymous and thereby prevent prejudice against *The Federalist Papers*. The events surrounding the Constitution's inception also explain Hamilton's desire for anonymity. He opposed numerous Constitutional provisions at the drafting convention, and then decided to support its ratification.³⁵ Although media has changed greatly since the founding era, it is quite likely Hamilton would have faced criticism for his "flip flop" had he attached his name to *The Federalist Papers* so soon after opposing the Constitution.³⁶ Hamilton's anonymity meant to avoid prejudice and preclude obfuscation of his message, and these interests are still compelling justifications for speaking anonymously.

Unlike Hamilton, James Madison was not a controversial figure, but nonetheless he benefited from anonymity. Madison was a Virginian and given the localism of the time, his work would not have been as well-received under his own name in New York, nor might it have been published by New York

³⁰ JOHN C. MILLER, *ALEXANDER HAMILTON: PORTRAIT IN PARADOX* 189 (1959). See also CHERNOW, *supra* note 29, at 249 ("Many people knew that Hamilton, Madison, and Jay were the authors, but the trio proclaimed their authorship to only a chosen few and then mostly after the first bound volume was published in March 1788." (emphasis added)).

³¹ See, e.g., FREDERICK MOSTELLER & DAVID L. WALLACE, *INFERENCE AND DISPUTED AUTHORSHIP: THE FEDERALIST* (1964).

³² CHERNOW, *supra* note 29, at 245 (emphasis added).

³³ CHERNOW, *supra* note 29, at 712 (citation omitted).

³⁴ CHERNOW, *supra* note 29, at 714 (citation omitted).

³⁵ See generally CHERNOW, *supra* note 29, at 219–42.

³⁶ See, e.g., *David Zucker- John Kerry Flip Flop Ad*, YOUTUBE (Nov. 21, 2013), <http://www.youtube.com/watch?v=oThH-MNCsYw>.

newspapers.³⁷ Furthermore, in joining with a more controversial figure such as Hamilton, Publius's work might not have been well-received in Virginia either absent anonymity.³⁸ Madison's example is just as compelling as Hamilton's, because it shows that anonymity is not merely a shroud for unpopular people, but is just as relevant for anyone seeking to present a clear message.

The Federalist Papers did not cause a sweeping ratification of the Constitution in New York, but they were a strong philosophical force. All nineteen federalist delegates to the New York ratifying convention came from New York City, including Hamilton himself, and were elected with the help of the papers.³⁹ Entering the convention in June of 1788, however, the federalists were outnumbered by antifederalists two to one.⁴⁰ Nevertheless, on July 26 after weeks of debate the New York convention adopted the Constitution after several antifederalists switched sides.⁴¹ In state ratifying conventions and among the public at large, *The Federalist Papers* advocated under the single voice of Publius, combining two voices from different regions with very different interests. "In the two state conventions where the Constitution was most bitterly contested and where its fate hung most precariously in the balance, 'Publius' was a potent force on the Federalist side."⁴² *The Federalist Papers* must not be ignored when considering anonymous political advocacy, for without its benefit, it is quite likely that neither the First Amendment nor Constitution would exist as we know them, and therefore no legal basis on which to hinge anonymous debate would exist.

³⁷ "Not only was Madison a Southerner and therefore unable to approach the Constitution from the point of view of a New Yorker, but he also contributed a broad philosophical insight that helped to elevate these essays far above the polemical writings of the day." MILLER, *supra* note 30, at 189.

³⁸ In Virginia *The Federalist* was distributed in bound form: "Madison sent hundreds of copies to Virginia delegates, including John Marshall. *The Federalist's* influence was to be especially critical in New York and Virginia, two large states indispensable to the union's long-term viability." CHERNOW, *supra* note 29, at 261.

³⁹ RICHARD BROOKHISER, ALEXANDER HAMILTON, AMERICAN 72 (1999). See also MILLER, *supra* note 30, at 209–10.

⁴⁰ CHERNOW, *supra* note 29, at 262.

⁴¹ *Id.* at 267–68.

[I]n mid-July, the two sides remained unalterably apart . . . Days later, Melancton Smith finally broke the deadlock when he endorsed the Constitution if Congress would promise to consider some amendments. Paying indirect tribute to Hamilton, Smith credited "the reasonings of gentlemen" on the other side for his changed vote. On July 26, Smith and a dozen other antifederalists switched their votes to favor the Constitution, producing a wafer-thin majority . . . the smallest margin of victory at any state convention . . .

CHERNOW, *supra* note 29, at 268. Melancton Smith was "the most capable debater on the [antifederalist] side." BROOKHISER, *supra* note 27, at 73.

⁴² MILLER, *supra* note 30, at 207.

B. *Early American Experiments in Speech Retaliation*

While it is important to avoid prejudice and keep a focused message as Publius did, the ability to carefully speak truth to power is perhaps the most compelling reason for anonymous political speech. As American history illustrates, during the colonial and post-colonial eras, speaking without the protection of anonymity sometimes brought about grave and unfortunate results. In 1753, Daniel Fowle printed the pamphlet *The Monster of Monsters*, in which he shared his strong negative opinions of some members of the Massachusetts Legislature.⁴³ Due to suspicion of his authorship of this publication, Fowle was jailed for two days.⁴⁴ Ten years later in New York, Alexander McDougall spent three months in jail for publishing a handbill criticizing the New York Assembly.⁴⁵ In 1800, David Brown was sentenced to 18 months imprisonment under the Sedition Act for inscribing on a liberty pole in Massachusetts: “May moral virtue be the basis of civil government.”⁴⁶ In the 1830s, James Fenimore Cooper, author of the *Last of the Mohicans*, decried the negative role of the press and brought fourteen libel suits against various newspapers to quell negative discussions of his political views.⁴⁷ One theme remains constant: no one enjoys being criticized and, when given the opportunity, those in power will quell dissent.

In the early years of the United States, the Framers understood, somewhat imperfectly, that laws penalizing speech harmed a free society.⁴⁸ Knowledgeable of the history of Tudor and Stuart England, the Framers sought to entirely forbid freewheeling speech licensing, regulations, and bans that were so common in Britain.⁴⁹ Benjamin Franklin commented that whoever would “overthrow the liberty of a nation must begin by subduing the freeness of speech.”⁵⁰ Richard

⁴³ ISAIAH THOMAS, *THE HISTORY OF PRINTING IN AMERICA* 133–34 (1874).

⁴⁴ *Id.* at 129–32.

⁴⁵ LEONARD WILLIAMS LEVY, *EMERGENCE OF A FREE PRESS* 30 (1985).

⁴⁶ Frederick S. Allis, Jr., *Boston and the Alien Sedition Laws*, in *PROCEEDINGS OF THE BOSTONIAN SOCIETY* 25–51 (1951).

⁴⁷ LOUIS EDWARD INGELHART, *PRESS AND SPEECH, FREEDOMS IN AMERICA, 1619–1995* 80–82 (1995).

⁴⁸ Some who publicly pressed for robust First Amendment protections also helped generate speech-suppressing laws like the Sedition Acts. JAMES GRANT, JOHN ADAMS: PARTY OF ONE 405–06 (2005) (“John Adams had not asked Congress to pass the Sedition Act, but he willingly signed it, believing, along with virtually every other Federalist, in the doctrine of ‘seditious libel.’ That is, he believed that the government could be criminally assaulted with words.”). Human nature and hypocrisy aside, the overall understanding of the Founding Era was in favor of robust speech as a means to keep government in check. Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 465–68 (2012) (citing numerous sources encouraging protection of a free press, many based on the freedom to criticize government).

⁴⁹ *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 800–01 (1978) (Burger, C.J., concurring).

⁵⁰ ROBERT J. WAGMAN, *THE FIRST AMENDMENT* BOOK 28 (1991).

Henry Lee explained that the freedom of press and speech were fundamental rights and that “bad men could easily abuse a law made by good men who believed that freedom of the press should be restrained because it disturbed the operations of new governments.”⁵¹ John Adams reasoned that both speech and the press were integral to freedom because people have a “right, an indisputable, divine right, to that most dreaded and envied kind of knowledge. I mean of the character and conduct of their rulers.”⁵² In sum, Americans generally understood speech might sometimes be disruptive, uninformed and uncouth, but efforts to control it suppressed liberty no matter the parade of good intentions behind such efforts.

To be certain, early aspirations for protecting speech were dashed—sometimes by those promoting its very virtue. For example, John Adams once proclaimed the importance of enabling citizenry to vigorously debate and discuss the qualifications of public servants. However, as president, he signed the Sedition Act,⁵³ largely due to public criticism against the government and Federalists.⁵⁴ Adams’s presidency favored punishing false, scandalous or malicious speech—if it pertained to him or his allies that is. The Sedition Act led to numerous investigations and convictions for controversial speeches attacking the character of John Adams or his administration.⁵⁵

Although “[t]he protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people[,]”⁵⁶ even in the colonial and founding eras around the drafting of the First Amendment the American government failed to respect the principle time and again. Anonymity is one way to hinder retaliation from those in power, and must be considered a component of free speech. This is arguably more important today for “[t]here exists in modern America the necessity for protecting all of us from arbitrary action by governments more powerful and more pervasive than any in our ancestors’ time.”⁵⁷

⁵¹ INGELHART, *supra* note 47, at 47.

⁵² BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 56 (1973).

⁵³ The Sedition Act imposed a prison sentence of up to two years against “any person [who] shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States . . .” 1 Stat. § 596–97 (1798).

⁵⁴ GRANT, *supra* note 48, at 405.

⁵⁵ *Id.*

⁵⁶ *Roth v. United States*, 354 U.S. 476, 484 (1957).

⁵⁷ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

C. *Democracy: An American Novel*

Perhaps the best example of anonymous political speech following ratification of the Constitution came about a century into the American experiment, and it combines all three interests previously discussed—preventing prejudice, keeping the message central, and preventing retaliation from those in power. Henry Adams, great-grandson of President John Adams and grandson of President John Quincy Adams, was a historian and political socialite living in Washington, D.C. Henry Adams wrote the book *Democracy: An American Novel*. It was published anonymously and opened the public's eyes to political change centering upon a conflict of politics and morality, and effectively interrupted the career of a rising political star.⁵⁸

Democracy, though fictional, was aimed at derailing the career of Speaker of the House James G. Blaine.⁵⁹ In 1872, Blaine was accused of accepting \$2 million of stock in Union Pacific railroad.⁶⁰ Though a congressional investigation cleared him, “[o]n the basis of direct acquaintance, data obtained by word of mouth, and information in the public prints, [Adams] had come to think that Speaker Blaine was corruption incarnate”⁶¹ Adams feared Blaine would be nominated for president in 1876 or possibly appointed secretary of state under the nomination winner. Though Adams had been working on his novel for some time,

[t]he Blaine horror had acquired an urgency for Adams that would be hard to exaggerate. With Blaine in mind, Adams re-shaped *Democracy* to meet three requirements. The novel had to be so baited as to attract large crowds of readers. It had to be so barbed that if published in November-December 1876 immediately after a [Republican Rutherford B.] Hayes victory, it would stop Hayes from choosing Blaine to be secretary of state. And it had to be so barbed that if it was withheld while [Democratic candidate Samuel] Tilden served as president but was published in the spring of 1880, it would destroy Blaine's chance of winning the Republican nomination for president in that year.⁶²

Hayes won the 1876 election. However, controversy surrounding the win made publishing *Democracy* unnecessary at that time as the fallout ensured “[Hayes]

⁵⁸ HENRY ADAMS, *DEMOCRACY: AN AMERICAN NOVEL* (1880), *reprinted in* HENRY ADAMS: NOVELS, MONT SAINT MICHEL, *THE EDUCATION* (1983).

⁵⁹ EDWARD CHALFANT, *BETTER IN DARKNESS: A BIOGRAPHY OF HENRY ADAMS, HIS SECOND LIFE 1862–1891* 329 (1994).

⁶⁰ *Id.*

⁶¹ *Id.* at 289.

⁶² *Id.* at 329.

would thus be placed on his best behavior and could not choose Blaine as secretary of state.⁶³ Blaine would cause other controversies in the meantime, but by 1880 he was again in the running for the presidential nomination after Hayes announced he would not seek a second term.

Adams published *Democracy* anonymously on April 1, 1880, two months before the Republican convention in Chicago. The novel's antagonist, Senator Ratcliffe, mirrored Blaine in many respects, emphasized by his ambition and corruption. The novel's theme centered on the importance of preventing Ratcliffe's ascendancy to the Presidency. Although the Ratcliffe character could be associated with persons other than Blaine,⁶⁴ Blaine cut ties with the book's suspected authors soon after its publication.⁶⁵ He also embarked on a quest to find out who was behind the book, and at one point pinned authorship on Adams's wife Clover.⁶⁶ The book was a "publisher's bonanza"⁶⁷ and played a role in forcing Blaine to end his candidacy and support the nomination of James A. Garfield.⁶⁸ Blaine was secretary of state under Garfield and won the Republican presidential nomination in 1884, but never won the Presidency.

Commentators understand that anonymity was necessary for Adams to provide such a biting critique of Blaine: "The men and women he witheringly depicted in his novel, Adams knew, were not well disguised. So it was all the more important that he himself should be."⁶⁹ Not only did Adams protect himself from retaliation, but he elevated the impact of his work. "Adams kept his authorship secret for a reason relating to the novel's power. Once the novel was published, its anonymous author all by himself would have . . . influence . . . and the author would continue to have influence as long as the public remained unsure about

⁶³ *Id.* at 334.

⁶⁴ Some argue that Blaine cannot be easily associated with Senator Ratcliffe, "[t]he parallels are not very close." Gary L. Wills, *Henry Adams: The Historian as Novelist* 579, 597 (2003), available at http://tannerlectures.utah.edu/_documents/a-to-z/w/wills_2003.pdf. Nevertheless, James Blaine certainly considered the parallels close enough.

⁶⁵ CHALFANT, *supra* note 59, at 411.

⁶⁶ *Id.* at 452.

⁶⁷ *Id.* at 399.

⁶⁸ *Id.* at 399–400.

⁶⁹ David Greenberg, *Democracy: Why it's the only lasting anonymous Washington novel*, SLATE (Apr. 20, 2011, 2:28 PM), http://www.slate.com/articles/news_and_politics/history_lesson/2011/04/democracy.html (last visited Nov. 26, 2013). Greenberg also offers praise for the timelessness of *Democracy*, contrasting it to other novels that critique American democracy: "The appeal of most Washington novels rests in their resonance with current events. After Joe Klein was ousted as the author of the *Primary Colors*, popular interest in reading the book plummeted. Klein's sequel, *The Running Mate*, written under his own name, drew little attention. Most Washington novels are not literature but punditry by other means." *Id.*

the authorship.⁷⁰ The public only learned the authorship of *Democracy* long after Blaine's death, thirty-five years after its publication.⁷¹ In addition to avoiding Blaine's powerful influence and protecting his career as a historian, Adams could rest assured that *Democracy's* message spoke for itself.

American history offers many examples of the value and impact of anonymous political speech—whether published in a pamphlet like *The Monster of Monsters*, a series of articles like *The Federalist Papers*, or a full-length novel like *Democracy*. Anonymity serves several interests for free speech, but its widespread presence is equally notable. Indeed, that so many Americans have opted to speak about politics anonymously indicates it is an accepted practice, and one that continues today.

D. Anonymity Today

While rigorous debate continues over the propriety of anonymous speech in the political sphere, its use continues where it is available. American media—television, radio, and newspaper—rely on anonymous sources, while on the Internet anonymous speech is often more prevalent than named authorship.

Although reporters usually identify themselves as authors of articles and editorial boards are easily identified in newspapers, both editorials and articles utilize anonymous opinions, especially in political reporting.⁷² The use of anonymous sources remains a hotly debated topic,⁷³ but there is no serious effort to ban the practice. Indeed, the folly of such an effort is apparent: reporters exposed the most notorious political scandal of the 20th Century, Watergate, with the help of the famous anonymous source, Deep Throat, whose true identity was not revealed until 2005—more than 30 years after Richard Nixon's resignation.⁷⁴ The

⁷⁰ CHALFANT, *supra* note 59, at 328–29.

⁷¹ Greenberg, *supra* note 69.

⁷² See, e.g., Amy Goldstein, Lena H. Sun & Sandhya Somashekhar, *Rush of interest continues on insurance Web sites*, WASH. POST (Oct. 2, 2013), available at http://www.washingtonpost.com/national/health-science/obamacare-site-goes-live-with-some-glitches/2013/10/01/380a4300-2a9d-11e3-8ade-a1f23cda135e_print.html (“‘Very, very few people that we’re aware of have enrolled in the federal exchange,’ said one insurance industry official, who like many in the industry, spoke on the condition of anonymity out of concern for possibly offending the Obama administration.”). See also Sarah Abrams, *Woodward and Bernstein Defend Anonymous Sources*, HARVARD KENNEDY SCHOOL (Dec. 5, 2005), available at <http://www.hks.harvard.edu/news-events/news/articles/woodward-and-bernstein-defend-anonymous-sources>.

⁷³ See, e.g., *Politico's Martin Defends Use of Unnamed Sources*, REAL CLEAR POLITICS (Aug. 19, 2012), http://www.realclearpolitics.com/video/2012/08/19/politicos_martin_defends_use_of_unnamed_sources.html (last visited Nov. 26, 2013).

⁷⁴ David Von Drehle, *FBI's No. 2 Was 'Deep Throat': Mark Felt Ends 30-Year Mystery of The Post's Watergate Source*, WASH. POST (June 1, 2005), available at http://www.washingtonpost.com/politics/fbis-no-2-was-deep-throat-mark-felt-ends-30-year-mystery-of-the-posts-watergate-source/2012/06/04/gjQAwseRIV_story.html.

interest of protecting oneself while speaking truth to—or simply about—those in power remains as strong today as in generations past. Ironically, however, the Watergate scandal played a large role in influencing the creation of the Federal Election Commission,⁷⁵ which began enforcing campaign finance disclosure in earnest, cutting off many forms of anonymous political speech. This problem will be discussed in the following sections.⁷⁶

While institutional media utilizes anonymous sources, the best example of direct anonymous political speech occurs every second on the Internet in chat rooms, message boards, and social media. Internet anonymity is afforded a great deal of protection.⁷⁷ Unlike traditional political speech, anonymity is a presumed facet of free speech on the Internet.⁷⁸ Internet speech is often of questionable value, but its prevalence cannot be denied.

From *The Federalist Papers* to *Democracy* to modern Internet and press practices, the impact of anonymous speech is clear. The value of speech can greatly increase when the message is removed from the speaker. Furthermore, speakers often have a legitimate interest in shielding their identities from those in power and from their neighbors. These benefits of anonymous political speech must not be dismissed when considering campaign finance laws that abridge—or entirely restrict—anonymity.

III. A PRIMER ON POLITICAL SPEECH

Within the context of the First Amendment, many Supreme Court Justices regularly acknowledge the special protection afforded political speech and association. The Court recognizes that the concept of American self-governance is itself dependent on this freedom, for it “fosters the public exchange of ideas that is integral to deliberative democracy.”⁷⁹ This free trade of ideas allows the citizenry to best govern themselves by seeking out information, contributing to debates,

⁷⁵ John W. Dean, *Watergate's Unanswered Questions: 40 Years of Hindsight*, 16 CHAPMAN L. REV. 1, 6 (2012) (“Watergate caused Washington to reexamine the way it did business, and that, in turn, provoked many reforms. . . . Congress adopted a number of new campaign finance and reporting laws and created the Federal Elections [sic] Commission.”).

⁷⁶ See *infra* notes 79–92 and accompanying text.

⁷⁷ See, e.g., Matthew Mazzotta, Note, *Balancing Act: Finding Consensus on Standards for Unmasking Anonymous Internet Speakers*, 51 B.C. L. REV. 833 (2010).

⁷⁸ Even the Campaign Legal Center, which vigorously supports campaign finance laws, once supported unfettered Internet speech. See, e.g., *Comments on Notice 2005–10*, CAMPAIGN LEGAL CENTER 15 (2005), available at http://www.campaignlegalcenter.org/attachments/FEC_PROCEEDINGS/1381.pdf (“This rule would make clear, appropriately so, that individuals engaging in unfettered political discourse over the Internet using their own computer facilities (or those publicly available) would not be subject to regulation under the campaign finance laws . . .”).

⁷⁹ *Duryea Bor. Ct. v. Guarnieri*, 131 S.Ct. 2488, 2495 (2011).

and keeping government accountable. Thus, the right of the citizenry to discourse in a free market of ideas is a “precondition to enlightened self-government and a necessary means to protect it”⁸⁰

Actions destroying political privacy destroy free society. Alexis de Tocqueville understood as much when he explained:

If men living in democratic countries had no right and no inclination to associate for political purposes, their independence would be in great jeopardy, but they might long preserve their wealth and their cultivation: whereas if they never acquired the habit of forming associations in ordinary life, civilization itself would be endangered.⁸¹

The First Amendment vigorously protects both free speech and association because both are the underpinnings of our democratic republic. This freedom stems from the fundamental principle that people are capable of self-governance. Self-governance includes an individual’s ability to receive information, process it, and make subsequent decisions based on their own individual ability and interest.⁸²

Although many members of the Supreme Court recognize the value of political speech and association, others place greater concern on risks associated with exercising those liberties; specifically, the potential for corruption stemming from acts of political speech and association. Perhaps best stated by Justice Brandeis, “[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”⁸³ This schism—valuing the exercise of unabridged First Amendment freedoms or valuing concerns about corruption in the public sphere—is an important factor in understanding how individual justices approach and interpret issues involving political speech and association.

Due to this pronounced schism, the Supreme Court divides political speech and associational rights into four primary categories, each with differing constitutional concerns: (1) money contributions to candidates, (2) express advocacy speech, (3) electioneering communications, and (4) issue advocacy

⁸⁰ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339 (2010).

⁸¹ ALEXIS DE TOCQUEVILLE, 2 *DEMOCRACY IN AMERICA* 115 (Henry Reeve, trans.) (1841).

⁸² *See* *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 792 n.31 (1978) (“Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves.”).

⁸³ Louis D. Brandeis, *What Publicity Can Do*, *HARPER’S WKLY*, Dec. 20, 1913 at 10, available at http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1910/1913_12_20_What_Publicity_Ca.pdf.

speech.⁸⁴ In creating these distinctions, the Supreme Court made two important distinctions in *Buckley v. Valeo*. First, the newly enacted Federal Election Campaign Act involved complicated provisions, but was limited by the Court in its reach so the average individual could comply with it.⁸⁵ Congress can concoct amazingly detailed and lengthy speech regulations where only electoral experts may ensure protection from penalties under the law. However, this is unconstitutional because average speakers cannot comply with such a system.⁸⁶ Second, although laws may be enacted to stem governmental corruption, these statutes must err in favor of permitting speech, rather than restricting it, due to concerns about overbroad and inappropriate application of statutes.⁸⁷ Far-reaching, near-utopian visions of preventing corruption or its appearance are constitutionally unworkable due to their tendency to err on the side of suppressing—rather than valuing—speech.⁸⁸ These two foremost considerations lead the *Buckley* Court to distinguish between the legal terms “express advocacy” (subject to limited regulation) and “issue advocacy” (subject to little or no regulation).⁸⁹

The guiding wisdom of the *Buckley* Court, later reinforced by *Citizens United*, instills binding considerations for any system of campaign finance disclosure. Like other areas of protected First Amendment expression, clarity and precision must be the touchstones of regulation.⁹⁰ Although disclosure may be appropriate in

⁸⁴ The first category of protected political speech and association is contributions, or direct monetary donations to candidates or organizations involved in the political process. Because of the direct monetary exchange and greater risk of corruption, the Supreme Court has protected this category of political speech and association the least. *Buckley v. Valeo*, 424 U.S. 1, 23–38, 74–82 (1976). The second category is express advocacy, also known as “independent expenditures,” which is speech calling for the election or defeat of a clearly identified candidate. Express advocacy may be subject to limited disclosure, but not otherwise limited. *Id.* at 39–59, 74–82. The third category is the ill-defined “functional equivalent of express advocacy,” which will only be discussed in limited reference in this article. *See, e.g.*, *Fed. Election Comm’n v. Wis. Right to Life*, 551 U.S. 449, 469–76 (2007). The last category, and most strongly protected, is issue advocacy, which is speech discussing political or moral issues that might be connected to candidates or elections but rests outside the ambit of government regulation.

⁸⁵ *Buckley*, 424 U.S. at 76–82.

⁸⁶ *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972) (“A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.”).

⁸⁷ *Buckley*, 424 U.S. at 64.

⁸⁸ *See id.* at 26.

⁸⁹ *See id.* at 39–44.

⁹⁰ *See Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 324 (2010) (“The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day.”).

limited instances,⁹¹ all-encompassing or blurry disclosure schemes suffer from the same constitutional maladies as described in *Buckley* and this wisdom must be incorporated in today's programs. These distinctions are, after all, the primary moving purpose behind *Buckley's* formulation of the express advocacy test and the Supreme Court's continued insistence on objective speech guidelines. This approach includes a baseline respect for meaningful boundaries between regulated and non-regulated speech as well as agreed limits to the reach of any such program.⁹²

IV. DISCLOSURE'S OPPRESSIVE NATURE

Campaign finance disclosure can inflict major injuries on speakers. Current campaign finance disclosure laws leave muddled confusion in the wake of attempts to sort out the law's requirements and details. Disclosure laws are rarely simple, thus keeping many average Americans out of the political process entirely. Furthermore, the particular types of political speech these disclosure laws cover is equally confusing.

A. Lost in Disclosure: Confusion upon Confusion Muffles Speech

When supporters of campaign finance laws promote the benefits of disclosure, they often omit or deny the fact that compliance with political registration and reporting requirements is difficult.⁹³ As the Supreme Court explained in *Citizens United v. Federal Election Commission*, the "FEC has adopted 568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1,771 advisory opinions since 1975."⁹⁴ Under federal law, if a group of neighbors, a community coalition, or a nonprofit organization wishes to spend more than \$1,000 addressing political issues possibly related to candidates for

⁹¹ Although the exercise of speech and association has a preferred place over regulation, the Supreme Court permits disclosure in limited instances, specifically when it: (1) deters actual or perceived corruption; (2) provides the electorate with relevant information about who is speaking; or (3) provides information about violations of the law. *Buckley*, 424 U.S. at 66–68.

⁹² The very history of case law leading up to *Buckley* included national arguments over the vagueness and overbreadth contained in emerging federal campaign finance laws, ultimately leading to their circumscription. *See, e.g.*, *United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1139–42 (2d Cir. 1972); *Am. Civil Liberties Union v. Jennings*, 366 F. Supp. 1041, 1055–57 (D.D.C. 1973).

⁹³ *Campaign Finance – Stossel in the Classroom*, YOUTUBE (Nov. 21 2013), <http://www.youtube.com/watch?v=QeHxSW52Hmc> (including a claim by Cecilia Martinez of the Reform Institute that complying with disclosure is "very simple" and that the complexity of Colorado's disclosure system is justified because it was the result of "voter sentiment").

⁹⁴ 558 U.S. 310, 334 (2010).

federal office, they must wade through this morass.⁹⁵ If they can even make sense of the law, they may be required to register and report as a political action committee (PAC).⁹⁶

PAC-style disclosure is not simple. Once forced to report as a PAC, groups must “appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days.”⁹⁷ PACs must detail their receipts in ten different categories, account for all disbursements in twelve different categories, inform the government how much cash on hand they have, and much more.⁹⁸ While the complexity of all this is apparent, some scholars have empirically studied the effect of mandatory disclosure at the state level, unsurprisingly concluding that complicated reporting regimes are difficult to complete for even well-educated citizens.⁹⁹

The following is a typical scenario illustrating how complexity muffles speech. Imagine a small coalition of citizens in rural Wyoming chipping in funds to raise \$10,000 to run a simple message about environmental policy during the 2014 election cycle. Suppose three ranchers contribute \$3,000 each and raise the remaining funds from small contributions in the local community. The group wishes to speak out about the Government Litigation Savings Act and link the issue to each candidate’s stances for office.¹⁰⁰ While the group does not intend to support or oppose these candidates for election, it wants to get its message out provocatively and in its own words. It also knows people pay most attention to political advertising around elections, so it decides to run its advertisements within a month of the general elections.¹⁰¹

To comply with federal election law, the group must understand whether its speech is considered “express advocacy” or an “electioneering communication.” Technically, these areas are the only type of speech subject to federal regulation.¹⁰²

⁹⁵ *Id.* at 337–39.

⁹⁶ *See* 2 U.S.C. § 431(4) (2012).

⁹⁷ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 338 (2010).

⁹⁸ 2 U.S.C. §§ 434(a)(4), (b) (2012).

⁹⁹ *See, e.g.*, Jeffrey Milyo, *Campaign Finance Red Tape: Strangling Free Speech & Political Debate*, Institute for Justice (Oct. 2007), available at http://www.ij.org/images/pdf_folder/other_pubs/CampaignFinanceRedTape.pdf.

¹⁰⁰ *See generally* Government Litigation Savings Act, H.R. 1996, 112th Cong. (2011).

¹⁰¹ This is a modified version of some facts in *Free Speech v. Fed. Election Comm’n*, an ongoing lawsuit. The authors are counsel to Free Speech. *See Free Speech v. Fed. Election Comm’n*, WYO. LIBERTY GRP., <http://wyliberty.org/legal-center/free-speech-v-federal-election-commission/> (last visited Nov. 21, 2013).

¹⁰² *See Fed. Election Comm’n v. Wis. Right to Life (WRTL)*, 551 U.S. 449, 457 (2007) (rejecting restrictions on corporate issue advocacy); *see also Citizens United*, 558 U.S. at 366–71 (upholding disclosure requirements for electioneering communications).

This determination is very difficult given the number of administrative complications created by the FEC and contradictory advice issued over the years. Additionally, the group must determine if it is regulated as a PAC or not. This will be just as difficult due to the extensive complicated policies surrounding PAC status. For guidance, the group must hire an attorney familiar with federal election law who can advise them on complying with at least these two issues. To be diligent, the attorney may need to file an advisory opinion request with the FEC asking for its formal guidance, a process taking up to sixty to ninety days after filing.¹⁰³ Assume the group can find a low-priced, \$200-an-hour election law specialist who can provide initial guidance after ten billable hours.¹⁰⁴ If the attorney drafts a formal advisory opinion request and appears before the Commission, this could easily add an additional thirty billable hours.¹⁰⁵ Once the FEC issues an advisory opinion, the attorney must explain what it means to the group and how to comply with the law going forward. Assuming this requires another five billable hours,¹⁰⁶ the process up to this point totals \$9,000 in legal fees.

Once the group understands the law's reach, and assuming the attorney advises the group to register as a PAC, it must appoint a treasurer to complete its formal bookkeeping.¹⁰⁷ It might find a volunteer for this, but treasurers are personally liable under federal election law for the acts of the PAC, thus discouraging volunteers.¹⁰⁸ The FEC advises that to ensure "best practices" (a way to prevent higher fines and penalties for violations) or create "safe harbors," the group should also hire an assistant treasurer.¹⁰⁹ To comply with other "best practices" suggestions, the group must adopt specified accounting practices and employ professional compliance experts.¹¹⁰ Whether a group takes these extra steps or not, compliance requires regular reporting, additional legal fees, and administrative costs. At this point, the group has already spent \$9,000 of its \$10,000 budget simply attempting to understand the law. The group's remaining \$1,000 is hardly sufficient to cover the ongoing compliance costs let alone fund a message.

¹⁰³ See 2 U.S.C. § 437f (2012).

¹⁰⁴ The authors have a combined experience of fifteen years in federal campaign finance law, and can attest to the veracity of these estimates. Although some campaign finance experts (especially those located in the Capitol Beltway) could provide guidance in less time, their hourly rates could be double or triple the \$200 assumed in this scenario.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ 2 U.S.C. § 432(a) (2012).

¹⁰⁸ See 2 U.S.C. § 437g(d) (2012).

¹⁰⁹ See Statement of Policy; Safe Harbor for Misreporting Due to Embezzlement, 72 Fed. Reg. 16695 (Apr. 5, 2007), available at http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-9.pdf.

¹¹⁰ *Id.*

On the other hand, if the group decides to register as a PAC in the first place, it must still allocate a substantial portion of its meager \$10,000 budget to compliance costs. In the 2012 cycle, that meant filing at least seven compliance reports during the year if the group elected to file quarterly with the FEC.¹¹¹ Assuming an attorney spends two hours per compliance report and bills at \$200 an hour, \$2,800 of the allocated budget is expended. Add bookkeeping services and formal treasurer costs and costs might double. Less than half of the funds raised may remain to fund the group's speech.

Under either of these scenarios, disclosure is still touted as *helping* democracy and *ensuring* grassroots voices are heard in the political process.¹¹² Few reformers consider how many voices have been shut out and how many grassroots coalitions muted in pursuing this lofty goal.¹¹³ Furthermore, these scenarios assume perfect compliance with the law. Failure to comply—be it bookkeeping mistakes, staff scandals, or misunderstanding the law—could result in administrative fines further diminishing available funds. Additionally, the speakers might suffer financial hardship further preventing future participation in the political process.¹¹⁴

States usually follow the FEC's lead, imposing equally onerous and confusing political speech regulations at the local level.¹¹⁵ For example, in Colorado, concerned citizens opposing annexation of their neighborhood into the town of Parker found themselves mired in the machinery of state campaign finance laws.¹¹⁶

¹¹¹ See *2012 Reporting Dates*, FEDERAL ELECTION COMM'N, http://www.fec.gov/info/report_dates_2012.shtml.

¹¹² See generally *2012 Election Spending Will Reach \$6 Billion, Center for Responsive Politics Predicts*, OPENSECRETS.ORG, Oct. 31, 2012, <http://www.opensecrets.org/news/2012/10/2012-election-spending-will-reach-6.html> (last visited Nov. 26, 2013) (“With no requirements to disclose where the money is coming from, voters in 2012 have been left with no real means to judge the credibility of the message or consider any hidden agendas leading those donors to give.”).

¹¹³ The FEC recently argued in a brief that PAC disclosure cannot be burdensome, since “Of the 6,975 PACs that were registered with the Commission as of November 2012, more than 2,670 registered after *Citizens United* was decided in January 2010, and these PACs spent more than \$687 million on independent expenditures to influence federal elections over the past three years.” Brief for Appellee Federal Election Commission at 44, *Free Speech v. Fed. Election Comm'n*, 720 F.3d 788 (2013) (No. 12-8078), available at http://www.fec.gov/law/litigation/freespeech_fec_brief.pdf.

¹¹⁴ See *supra* notes 93–110 and accompanying text; see also MUR 5957 (The Committee to Elect Sekhon for Congress), Statement of Reasons of Vice Chairman Peterson and Commissioners Hunter and McGahn, FEC (June 24, 2009), available at <http://eqs.nictusa.com/eqsdocs/MUR/29044243959.pdf>. But see Fred Wertheimer & Don Simon, *The FEC: The Failure to Enforce Commission*, AM. CONST. SOC'Y at 14–15 (Jan. 2013), available at <http://www.democracy21.org/wp-content/uploads/2013/02/Wertheimer-and-Simon-The-Failure-to-Enforce-Commission-.pdf> (cryptically classifying the Sekhon case as evidence of “the refusal of the Republican [FEC] commissioners to enforce the laws”).

¹¹⁵ See, e.g., Disclosure and Regulation of Campaign Contributions and Expenditures, 9 ILL. COMP. STAT. 5 (2013).

¹¹⁶ See *Sampson v. Buescher*, 625 F.3d 1247, 1251–53 (10th Cir. 2010).

Shortly after they began speaking out, a neighbor with an opposing viewpoint filed a complaint against the six most vocal members, and threatened to file additional complaints against anyone daring to put a yard sign opposing the annexation.¹¹⁷ Fortunately, the Tenth Circuit Federal Court of Appeals deemed the state laws in question unconstitutional as applied, noting that the “average citizen cannot be expected to master on his or her own the many campaign financial-disclosure requirements set forth in Colorado’s constitution, the Campaign Act, and the Secretary of State’s Rules Concerning Campaign and Political Finance.”¹¹⁸

The application of overbroad and onerous disclosure requirements single-handedly prevents grassroots groups from participating vigorously in national and local debate. The Supreme Court recognized as much in *Federal Election Commission v. Massachusetts Citizens for Life*: “[A]dditional regulations may create a disincentive for such organizations to engage in political speech. Detailed record-keeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear.”¹¹⁹ Complex disclosure promotes an interest wholly foreign to the First Amendment: valuing formal compliance with government-mandated disclosure over the constitutional rights of free speech. The examples and scenarios just discussed are but manifestations of what the Supreme Court predicted: Complicated political speech laws render compliance for average Americans difficult and inflict constitutional harms due to the laws’ all-encompassing nature.

B. Disclose What? Even the Experts Get it Wrong

While reformers support meticulous, complex disclosure, they also seek to expand what *type* of speech triggers such burdens. One might consider this a simple issue, but to comply with a vast federal regulatory system requires some agreement over basic legal terms. It is important to provide basic guideposts of objectivity in any system of regulation, especially when the regulations abut constitutional rights such as free speech.¹²⁰ Without clear standards, regulators are free to twist, bend, and mold the meaning of the law, penalizing disfavored speakers, consciously or unconsciously. Unfortunately, today’s relevant standards are far from clear.

The *Buckley* Court went to great lengths to provide objective guidance distinguishing between regulated and unregulated political speech. In doing so, the Court created the “express advocacy formulation,” positing that only words

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1259.

¹¹⁹ Fed. Election Comm’n v. Mass. Citizens for Life 479 U.S. 238, 255 (1986).

¹²⁰ See *Brandenburg v. Ohio*, 395 U.S. 444, 445 (1969).

explicitly advocating the election or defeat of a clearly identified candidate could be subject to minimal regulation.¹²¹ Issue advocacy, all speech outside this definition—even speech mentioning candidates or commenting on their character—is free from nearly all regulation.¹²² The Court’s purpose was to establish bright-line standards thereby ensuring easy comprehension, objective measurement, and advance notice of how the law works while protecting against arbitrary enforcement and confusion.¹²³ After all, it is a basic rule of law that people must be able to understand what is expected of them.¹²⁴

Following *Buckley*, in an anomaly case in 2003, *McConnell v. Federal Election Commission*, the Supreme Court temporarily allowed regulation of a limited class of political speech based on a fuzzy, “functional equivalent of express advocacy.”¹²⁵ However, Supreme Court rulings addressing federal election law challenges after *McConnell* insist on objective standards, clarity, and simplicity in operation.¹²⁶ Indeed, in *Citizens United*, the Court recognized just how convoluted federal election law had become, concluding that it “functions as the equivalent of prior restraint.”¹²⁷ The Court explained that “a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak.”¹²⁸ However, in the wake of *Citizens United*, complexity still plagues the FEC’s regulatory system, making compliance with even some of the most basic elements of federal election law impracticable or impossible.

Moving from the courts to regulatory bodies, agencies often apply more complex and open-ended standards to decide whether speech is regulated. Current FEC regulations, for example, permit the Commission to ask whether speech is too close or too far in time from an election to transform its classification into regulated speech.¹²⁹ The lack of a clear definition of “too close” or “too far” proves problematic for would-be speakers. Similarly, some FEC commissioners regularly consult a hodgepodge of unknown factors such as divining the “electoral nexus”

¹²¹ *Buckley v. Valeo*, 424 U.S. 1, 44 (1976).

¹²² *See* Fed. Election Comm’n v. Wis. Right to Life, 551 U.S. 449, 456–57 (2007).

¹²³ Importantly, this was considered of higher constitutional value than the maintenance of rigorous, broad standards capable of regulating more speech. Regulations affecting speech must often be under-inclusive leading to less rigorous enforcement in order to preserve a broader sphere of speech from improper regulation. *See* Fed. Election Comm’n v. Wis. Right to Life, 551 U.S. 449, 474 (2007).

¹²⁴ *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

¹²⁵ 540 U.S. 93, 206 (2003).

¹²⁶ *See, e.g.*, *Citizens United v. Fed Election Comm’n*, 558 U.S. 310, 333–34 (2010).

¹²⁷ *Id.* at 335.

¹²⁸ *Id.*

¹²⁹ *See* 11 C.F.R. §100.22(b) (2013).

of speech to decide if it is regulated.¹³⁰ No one knows exactly what constitutes an electoral nexus, either.

A recent interaction with the FEC demonstrates the confusion surrounding the FEC's own rules and regulations—even the agency itself could not make sense of its own rules. The Wyoming group Free Speech filed an advisory opinion request with the agency asking, among other things, whether certain advertisements would be considered regulated or not and how to comply with the law.¹³¹ One proposed advertisement criticized President Obama for his stance on the Government Litigation Savings Act and asked citizens to get “engaged” and “educated” “this November,” ending with a request to “call your neighbors” and “talk about ranching.”¹³² Half of the commissioners believed that the advertisement was issue advocacy—thus, unregulated—because different audiences could have reasonably different interpretations of the speech in question. The other half believed it could divine the true intent of the advertisement and understood that the end call of the advertisement—to “talk about ranching”—could not mean what it stated.¹³³ Under this line of reasoning, where election law experts augur the true meaning of speech, the communication in question would have been subject to federal regulation. This fundamental disagreement about the law caused the agency to give little guidance to Free Speech. Ultimately, the Wyoming group Free Speech was left unable to speak during the 2012 election cycle without the risk of violating the mysterious law.¹³⁴

People's need for clarity about disclosure laws mandates that the type of speech subject to regulation be abundantly clear, because the vagueness of the line between express advocacy and issue advocacy leaves few options. These options are to (1) register and report with the FEC, accepting its overbroad authority, (2) remain silent, or (3) take the matter to court. The difficulties of registering and reporting were already discussed.¹³⁵ And remaining silent is far worse in

¹³⁰ See, e.g., Matter Under Review 5842 (Economic Freedom Fund), Statement of Reasons of Commissioners Cynthia L. Bauerly and Ellen L. Weintraub at 4 (FEC 2009), available at <http://eqs.nictusa.com/eqsdocsMUR/29044241152.pdf>.

¹³¹ Advisory Opinion Request on Behalf of Free Speech (Feb. 29, 2012), available at <http://saos.nictusa.com/aodocs/1204965.pdf>.

¹³² *Id.* at 3.

¹³³ Compare Advisory Opinion 2012–11 (Free Speech) (Draft B), available at <http://saos.nictusa.com/aodocs/1206386.pdf>, with Advisory Opinion 2012–11 (Free Speech) (Draft C), available at <http://saos.nictusa.com/aodocs/1207876.pdf>.

¹³⁴ At Free Speech's oral argument seeking preliminary injunction against enforcement of the speech regulation, the FEC's counsel correctly noted that “certainly we can't make any guarantees that plaintiffs could never—that the commission couldn't reach a different conclusion in the context of enforcement. The reality is that's probably very unlikely in this situation, at least with the current makeup of the commission . . . It is not a grant of immunity.” Transcript of Oral Argument at 35, *Free Speech v. Fed. Election Comm'n*, 720 F.3d 788 (2013) (No. 12-CV-127), available at <http://wyliberty.org/wp-content/uploads/2013/04/FreeSpeech9-12-12Hearing.pdf>.

¹³⁵ See *supra* notes 93–101 and accompanying text.

a free republic. More and more groups are simply electing to take matters to the courts, insisting on objective, clear standards.¹³⁶ However, litigation is even more expensive than burdensome compliance costs. The problems with the complexity and overbreadth of campaign finance laws are compelling cause for First Amendment scrutiny, but these considerations must also be combined with a respect for anonymous political speech.

V. ANONYMOUS SPEECH AND THE FIRST AMENDMENT: VARIED PROTECTION

Although courts give passing recognition to the importance of anonymous speech and political privacy in the campaign finance realm, resulting legal protection for anonymous speech is hardly sufficient. Some reformers, including several U.S. senators, defend campaign finance laws with platitudes about limits on speech, equating political speech with slander, libel, obscenity, and the greatest cliché: “scream[ing] ‘fire’ falsely in a crowded theater.”¹³⁷ This is simplistic at best, and at worst, deceptive. However, the Supreme Court’s wide body of First Amendment case law, though largely free speech friendly, provides the reform community with a great deal of material on which to base new models of speech restrictions. More aggressive pushes for all-encompassing disclosure and transparency are the latest restrictions, their expansion has followed the loss of other speech restrictions.

This section summarizes current levels of protection the law affords anonymous speech. It explores how the courts have recognized great protections for associational privacy (or speaking as an organization) and minimally expensive political speech, yet have drastically departed from these presumptions in campaign finance law. Following *Citizens United*, reformers and the FEC say donors should be disclosed (even forced to regularly register and report as a political committee) just to spend more than \$1,000 speaking about political issues.¹³⁸ This section argues in support of new and more rigorous standards to protect the important rights of anonymous speech and political privacy.

A. *Anonymity Recognized: Association and Less-Effective Speech*

At times, the Supreme Court has recognized the importance political privacy and anonymity play in safeguarding fundamental freedoms. This protection has extended to the rights of free speech, association, petitioning, and protection

¹³⁶ See, e.g., *Real Truth About Abortion v. Fed. Election Comm’n*, 681 F.3d 544 (4th Cir. 2012); *Minn. Citizens Concerned for Life v. Swanson*, 692 F.3d 864 (8th Cir. 2012).

¹³⁷ *Schumer: There Ought to be Limits on First Amendment*, REAL CLEAR POLITICS (Jul. 17, 2012), http://www.realclearpolitics.com/video/2012/07/17/schumer_there_ought_to_be_limits_on_first_amendment.html (last visited Nov. 26, 2013).

¹³⁸ See Draft B, *supra* note 133, at 24–25 (concluding that an organization’s major purpose was the support or defeat of candidates because “even its non-express advocacy spending will attack or oppose a clearly identified Federal candidate”).

against government retaliation. But the Court has been hesitant to develop a comprehensive, uniform doctrine protecting these rights.

The courts have recognized the importance in safeguarding the fundamental freedom of association. In *NAACP v. Alabama*, the Court understood that effective “advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.”¹³⁹ As understood by the *NAACP* Court, protection of political privacy in turn protects the right of association given that few people are willing to associate if they know they will be subject to harassment or retaliation.¹⁴⁰ When analyzing whether privacy should attach to a specific organization, the subject matter communicated by a group plays no role in deciding the relevant constitutional protection.¹⁴¹ Organizations focused on laissez-faire economics, same-sex marriage, and Rastafarianism are protected equally. Thus, whenever government action impedes the right of association, it is “subject to the closest scrutiny.”¹⁴²

The Court also recognized the importance of political privacy in vigorously supporting speakers acting alone, with few funds, and addressing a matter of local concern.¹⁴³ In *McIntyre v. Ohio Elections Commission*,¹⁴⁴ the Supreme Court invalidated the Ohio prosecution of a lone pamphleteer anonymously opposing a school tax levy.¹⁴⁵ The *McIntyre* Court understood that throughout history, persecuted groups and dissidents particularly benefited from the protections of anonymity.¹⁴⁶ And in the field of “political rhetoric, where the identity of the speaker is an important component of many attempts to persuade . . . the most effective advocates have sometimes opted for anonymity.”¹⁴⁷

McIntyre illustrates that the Supreme Court understood the historical importance of anonymous speech. “On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity.”¹⁴⁸ In other words, deciding to speak anonymously is as much a way to communicate (preserving the purity of the argument) as it is to protect privacy. In support of this notion, the Court explained:

¹³⁹ 357 U.S. 449, 460 (1958).

¹⁴⁰ *Id.* at 462–63.

¹⁴¹ *Id.* at 460–61.

¹⁴² *Id.* at 461.

¹⁴³ See also *Sampson v. Buescher*, 625 F.3d 1247, 1259–61 (10th Cir. 2010).

¹⁴⁴ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995).

¹⁴⁵ *Id.* at 357.

¹⁴⁶ *Id.* at 342–43.

¹⁴⁷ *Id.* at 343.

¹⁴⁸ *Id.* at 342 (citations omitted).

American names such as Mark Twain (Samuel Langhorne Clemens) and O. Henry (William Sydney Porter) come readily to mind. Benjamin Franklin employed numerous different pseudonyms Distinguished French authors such as Voltaire (Francois Marie Arouet) and George Sand (Amandine Aurore Lucie Dupin), and British authors such as George Eliot (Mary Ann Evans), Charles Lamb (sometimes wrote as “Elia”), and Charles Dickens (sometimes wrote as “Boz”), also published under assumed names. Indeed, some believe the works of Shakespeare were actually written by the Earl of Oxford rather than by William Shaksper of Stratford-on-Avon.¹⁴⁹

The Court protected Ms. McIntyre’s political privacy, reasoning that while unpopular speakers might suffer the greatest burdens, “we assume the statute evenhandedly burdens all speakers who have a legitimate interest in remaining anonymous.”¹⁵⁰ Exactly what constitutes this “legitimate interest” remains unanswered from the Court.

The Supreme Court has also recognized the right of individuals to protect their privacy in sensitive areas of political association. For example, the Court found citizens have the right to refuse answering government officials’ questions regarding their political involvement. In *DeGregory v. Attorney General of the State of New Hampshire*, the Court reaffirmed the damage from forced disclosure of “one’s associational and political past-exposure which is objectionable and damaging in the extreme to one whose associations and political views do not command majority approval.”¹⁵¹ The particular damage at issue is found in forcing individuals who hold unorthodox, unpopular, or dissident views to disclose their identities. From this forced disclosure follows a variety of related injuries—government retaliation through abusive investigation as well as societal or economic injuries by means of boycotts. In *DeGregory*, as in several other similar cases, the Court required the government to show an “overriding and compelling state interest” supporting forced disclosure.¹⁵² Thus, as these cases show, where the government has initiated inappropriate investigations, the Court will uphold political privacy of some groups with fortunate regularity.

Even with the recognition of the import of political privacy, the Court has placed great, but not insurmountable, burdens on speakers hoping to realize this very protection. In *NAACP*, the Court upheld the right of political privacy and

¹⁴⁹ *Id.* at 341 n.4 (citations omitted).

¹⁵⁰ *Id.* at 345 n.8.

¹⁵¹ 383 U.S. 825, 829 (1966).

¹⁵² *Id.* (quoting *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963)). These cases usually involve Communist organizations in the midst of aggressive government persecution. *Id.*; see also *Brown v. Socialist Workers ’74 Campaign Comm.*, 459 U.S. 87 (1982).

invalidated mandated disclosure because of the group's "showing 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."¹⁵³ Thus, in order to establish the right of political privacy, one's views must be so disfavored that others might attack or fire members of the group for espousing such views. Today, some reform advocates suggest *NAACP* applies only to poor people or minorities, based on the "values" of the case, and thus its protections should not be applied "equally to all speakers, regardless of their relative station in society."¹⁵⁴ However, this analysis must be adjusted so future generations of all speakers need not lose their livelihood or be injured in order to enjoy political privacy.

One trend emerges after surveying touchstone cases concerning political privacy and anonymous speech: The Supreme Court understands the historical importance of anonymity and is willing to protect it when an active government campaign of suppression or prosecution is underfoot. While it is certainly commendable the Court has, with some frequency, protected these rights, it is only apt to do so under the most pressing of circumstances.¹⁵⁵ But when government moves more surreptitiously or causes harms that are difficult to detect, little protection is available for speakers. Subtler scenarios present the question whether existing judicial doctrine is sufficiently robust to protect would-be anonymous speakers should they seek to engage in non-disclosed speech. The answer identified by these authors is no. A helpful way to see how existing precedent fails to protect many speakers is detailed below.

Suppose two different hypothetical groups of firearm aficionados gather separately to rally the public about their cause of choice in 2014. The first group, Patriots for a Revolution, believes a coalition of Jewish dissidents control the highest branches of government thus necessitating an immediate revolution. Put mildly, their views could be described as anti-Semitic and radical. Their activities include door-to-door visits, pamphleteering, and infrequent Internet publications. The group has been known to disrupt local Tea Party gatherings, get kicked out of town hall meetings, and is frequently denied parade licenses. The group's most recent campaign focuses on arming elementary children with weapons in protest against the government. In the past year, the group has received two threatening voicemails suggesting their members will be "silenced permanently" if their antics continue. One member's car tires were slashed after petitioning local government about his group's views. Under existing case law, Patriots for a Revolution could

¹⁵³ Dale E. Ho, *NAACP v. Alabama and False Symmetry in the Disclosure Debate*, 15 N.Y.U. J. LEGIS. & PUBLIC. POL'Y 405, 463 (2012).

¹⁵⁴ *Id.* at 407.

¹⁵⁵ *See generally Brown*, 459 U.S. 87.

likely successfully apply for legal protection for political privacy given its extreme views and the threats levied against it.¹⁵⁶

Now consider the fate of a second organization, Patriots for a New Alliance. This group believes the Obama Administration is harming America, supports an aggressive recall campaign of public office-holders nationwide, frequently protests left-of-center organizations, and maintains an active Internet presence. The group secures seed funding from one wealthy donor with active federal and state government business dealings. It also secures minor funding from community participants. In the past year, it has held three roundtable events, inviting progressive think tank leaders and Democrat officeholders to debate their leaders over a number of issues. No one has threatened the organization or its members, nor has any member to date been injured. The primary funder, however, is reticent. He wishes to preserve his political privacy and participation with the organization due, in part, to his business interests. Other members wish to preserve their privacy simply due to their own principles. Under existing case law, and especially under the *NAACP* standard, Patriots for a New Alliance would likely not receive protection for political privacy because the organization's views are closer to majoritarian preferences and no one levied serious threats against the organization.

Examine another variation on this theme. Suppose the National Rifle Association (NRA) decides to aggressively expand its public outreach combatting school violence.¹⁵⁷ Its public messaging campaign involves gruesome images of Holocaust massacres superimposed on a disarmed American public. Two subgroups of the NRA are funding and conveying these messages in very different parts of the United States. The first NRA subgroup spends \$1.25 million on an advertising blitz across rural Alabama where membership lists and donations blossom as a result, even when faced with minor public retaliation. The second NRA subgroup spends an equal amount on advertisements in the urban Portland, Oregon, area. After its first day of advertising, ten billboards are burned, two boycotts develop, and one member receives a death threat. Under existing precedent, the First Amendment would treat speakers in rural Alabama much differently than those situated in Oregon. Alabama speakers would not receive anonymity protection, while those on the other side of the country would receive robust First Amendment protection. Due to the asymmetry of existing doctrine, certain types of speech in some parts of America receive the gold standard of First Amendment protection while others receive very little protection. The First Amendment should be applied no differently in Malibu, California as in

¹⁵⁶ See *Brown*, 459 U.S. at 98–103.

¹⁵⁷ Readers may substitute any organization in place of the NRA. Organizations of all political stripes are equally subject to harassment under existing doctrine.

Casper, Wyoming. Given that current precedent has an asymmetrical bias toward preferring political privacy for the most extreme speakers, a few simple changes could help the courts move toward more symmetrical, uniform protection.

The reason why such disparate results occur under the above example stems from foundational doctrines developed by the Court. The Supreme Court's frequent jurisprudential experiments often result in accordion-like judicial tests for deciding the constitutionality of an issue over time. In many instances, the Court retracts from expansive and intricate tests in favor of simplicity, as most recently seen in *Citizens United*.¹⁵⁸ While the Court had, for a time, signaled that more flexible balancing tests would be appropriate to determine the level of protection given to some forms of political speech, it discontinued this approach in favor of simple and clear benchmarks.¹⁵⁹ This was due to, in part, the unworkability of the previous doctrine the Court had developed.¹⁶⁰

So too may the Court revisit its asymmetrical anonymity doctrine. Courts may simply recognize the inherent First Amendment value of political privacy and anonymity and grant it full, prospective protection.¹⁶¹ This requires eliminating many balancing tests and complicated judicial doctrine. Although these formulas adequately protected anonymity in crisis situations or for the most persecuted or radical organizations, a broader doctrine would afford the same protection for all classes of speakers in all situations. Thus, instead of waiting for an abusive government investigation into the operation of a civil rights group, that group could rest assured in absolute prospective protection. Instead of becoming a marginalized radical group before receiving the protection of anonymity, all classes of speakers would be protected. This approach is tied to a principle endorsed by the Framers and the Supreme Court, chiefly, "the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments."¹⁶²

Evaluating current anonymity doctrine requires asking an implicit value question.¹⁶³ For the *NAACP* Court, protecting the anonymity of disfavored, minority speakers proved important, but only upon a strong showing of serious

¹⁵⁸ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 336 (2010).

¹⁵⁹ *Id.* at 323–34.

¹⁶⁰ *Id.* at 334–35 (detailing that while the Court attempted to develop an objective test, it resulted in the adoption of a "two-part, 11-factor balancing test").

¹⁶¹ Of course, the Court might favor streamlining its current approach, as it did in *Citizens United*, to provide more workable standards, broader protection for the exercise of free speech and associational rights, and clarity for prospective speakers.

¹⁶² *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 791 (1978).

¹⁶³ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856 (1992) ("The Constitution serves human values.").

harm.¹⁶⁴ This only begs the question why must citizens wait to have their lives destroyed, or face serious injury, before their rights are realized? In the context of the Fourth Amendment's protection against unreasonable searches and seizures, we do not afford protection only to disfavored groups that have been harassed by police officers.¹⁶⁵ Nor do we align the Second Amendment's protection to groups who show they are subject to crime or harm.¹⁶⁶ When it comes to the question of protecting political privacy, existing precedent asks citizens to put their livelihoods and reputations on the line before the judiciary will protect them. More uniform and objective protection would proactively prevent much government harassment and would, at a minimum, offer a remedy at law where government did abuse speakers' rights. First Amendment precedent needs to evolve to offer uniform protection like that realized in other areas of constitutional concern to prevent against the harms outlined in this article. As discussed later, an excellent start is found in applying the strict scrutiny standard to all disclosure systems.¹⁶⁷

Courts must seriously question whether existing judicial doctrine is sufficiently robust to protect political privacy and anonymity. Following existing precedent, anonymity may be realized (1) retroactively or during the midst of government abuse, or (2) prospectively for a handful of organizations that can make a showing of serious harm or abuse as a result of exercising First Amendment freedoms.¹⁶⁸ We may simply build on this trend, developing more conditions and sub-conditions where political privacy would be recognized. With the recent tragedy at Sandy Hook,¹⁶⁹ for example, courts might recognize broad privacy interests related to speech and association concerning Second Amendment issues. As new controversies of the day arise, from abortion to international intervention and every point in-between, the courts could create a hodgepodge of balancing tests further protecting various aspects of political privacy. These future controversies might work to protect certain issues and groups on a case-by-case basis.¹⁷⁰ But

¹⁶⁴ NAACP v. Alabama, 357 U.S. 449, 461 (1958).

¹⁶⁵ See, e.g., Graham v. Connor, 490 U.S. 386, 397 (1989) (applying an "objectively reasonable" excessive force analysis); Florida v. Jimeno, 500 U.S. 248, 249 (1991) (applying objective standard for scope of unreasonable search analysis).

¹⁶⁶ See District of Columbia v. Heller, 554 U.S. 570, 602 (2008).

¹⁶⁷ See *infra* notes 197–200 and accompanying text.

¹⁶⁸ See *supra* notes 139–167 and accompanying text.

¹⁶⁹ See generally "Sandy Hook Elementary School Shooting," HUFFINGTON POST, <http://www.huffingtonpost.com/news/sandy-hook-elementary-school-shooting/> (last visited Nov. 26, 2013).

¹⁷⁰ The development of this line of conduct would lead to a modified version of the Heckler's Veto working in the realm of political speech. See, e.g., Forsyth Cnty., Ga. v. Nationalist Movement, 505 U.S. 123 (1992). If organizations wished to secure political privacy under the law they could do so through a campaign of fake death threats, harassment, and public outrage. This would lead to active manipulation of the law, allowing some to secure political privacy through orchestrated campaigns of public nuisance. Unlike traditional Heckler's Veto scenarios, this policy would result in the government promotion of fake public-outrage campaigns to move organizations or issued into the field of protected controversial speech.

this approach would sacrifice the sensibility of protecting political privacy in a broad, uniform manner at the expense of a slow, evolutionary development of complicated balancing tests. Another alternative protects political privacy in a more uniform and meaningful way.

Under the current doctrine, and under the above examples, individuals conveying deeply anti-Semitic messages receive greater First Amendment protection than individuals conveying more mainstream ideas. Consider the type of society you prefer to live in. Is it one where voices of political concern are marginalized and encouraged by government action to become more extreme, loud, and erratic so political privacy is achieved? Or one where everyone's voice is welcome, whether they identify themselves or not, and we trust citizens to engage in responsible civic public debate about these issues? One model of thought—currently subscribed to by the courts—supports hyper-partisanship as a means of securing political privacy and pushes more moderate voices to the wayside. But an emerging model of thought, one espoused in this article, asks why citizens must first be injured, threatened, or believe in the most outlandish causes just to receive adequate First Amendment protection in the first place. This experiment has gone far enough. A free society should protect everyone's political privacy and not leave it as a luxury for the most extreme elements of our society.

The approach suggested by these authors is much more simple, fundamental, and workable than a hodgepodge of judicial doctrines only sometimes protecting political privacy. At the same time, enhanced clamoring about the supposed beneficial consequences of “disclosure” and political pressure for campaign finance reform will likely limit legislative options moving in that direction. This is an unfortunate reality: more speakers must suffer abuse or self-censor due to insufficient First Amendment protection.¹⁷¹ However, as bullying, retaliation, and threats continue in the political process, opportunities to refine existing doctrine will emerge. The chilling facts of these cases will eventually become too much for the law to bear,¹⁷² and courts should afford themselves the opportunity to streamline complicated doctrine toward simpler and more speech-protective tests.

B. Moving Forward: Adopting a Bright Line Approach

As it stands today, serious problems plague the preservation of First Amendment political privacy related to campaign finance disclosure. Mechanically, existing regimes regulate with blurry lines, making compliance difficult and pushing many out of political discourse entirely.¹⁷³ Substantively, the positive value of

¹⁷¹ Buckley v. Valeo, 424 U.S. 1, 43 (1976).

¹⁷² See generally Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

¹⁷³ See, e.g., Jeffrey Milyo, *Campaign Finance Red Tape: Strangling Free Speech & Political Debate*, Institute for Justice (Oct. 2007), available at http://www.ij.org/images/pdf_folder/other_pubs/CampaignFinanceRedTape.pdf.

political privacy has been largely undone, leaving its protection to the most radical elements of our society.¹⁷⁴ At the same time, the relative value of disclosure is viewed positively as to its superficial operation.¹⁷⁵ To rectify these problems and better protect political privacy, a few enhancements to election law are suggested.

Although wholesale protection of political anonymity in any form would provide the most respect for free speech, more immediate, practical steps are available. Toward this end, there are four suggestions to enhance meaningful political privacy:

1. Ensure full protection of anonymity for issue advocacy speech.
2. Eliminate *ad hoc* judicial determinations to uphold political privacy.
3. Require simple disclosure, not PAC burdens, where it is properly invoked and review these regulations with strict scrutiny.
4. Insist on higher aggregate contribution or expenditure thresholds triggering disclosure regimes.

The first suggestion requires courts to recognize that some speech, whatever its boundaries, is entitled to anonymity under the First Amendment. Clear lines and well-distinguished judicial reasoning help guide prospective speakers, ensuring people understand where regulated speech ends and free speech begins. No matter the area of First Amendment jurisprudence, the Supreme Court is stringent on protecting against overzealous and overbroad applications of legitimate laws.¹⁷⁶ This is shown in the context of anti-obscenity measures, torts, and other areas of the law.¹⁷⁷ Anonymous political speech is entitled to at least as much clarity, but the Supreme Court continues its struggle to craft such a formulation. Although issue advocacy was once distinctly distinguished from express advocacy and protected from disclosure, some legislatures, executive bodies, and courts have diligently dismantled that distinction.¹⁷⁸ This includes developing several versions of the express advocacy standard to capture more political speech.¹⁷⁹

¹⁷⁴ *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982).

¹⁷⁵ *See supra* note 12 and accompanying text.

¹⁷⁶ *See, e.g., N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Speiser v. Randall*, 357 U.S. 513 (1958).

¹⁷⁷ *See, e.g., Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *N.Y. Times*, 376 U.S. 254; *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

¹⁷⁸ *See, e.g., Free Speech v. Fed. Election Comm'n*, WYO. LIBERTY GRP., <http://wyliberty.org/legal-center/free-speech-v-federal-election-commission/> (last visited Nov. 26, 2013).

¹⁷⁹ *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 206 (2003); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 324–25 (2010).

Because of this confusion about boundaries when considering disclosure, some courts have gone so far as to make anonymous political speech a dead letter.¹⁸⁰ The *Buckley* Court's express advocacy formulation worked to preserve two goals.¹⁸¹ First, it permitted government regulation of political speech to occur where correct government interests were implicated.¹⁸² Second, it properly cabined the reach of that regulation by demanding upon stringent standards of clarity.¹⁸³ Those advocating reform criticized the *Buckley* approach due to it being easily evaded.¹⁸⁴ Using words just beyond the pale of express advocacy could shield speech from regulation. But it also meant that speakers could easily understand which speech was regulated and prevented substantial overreach.

As identified earlier, today's body of election law implicates regulation for express advocacy, the "functional equivalent" of express advocacy, and electioneering communications. Moreover, the rigor of division between these categories of speech has weakened and no shortage of confusion has erupted as speakers fail to know in advance which category their prospective advertisements fall into. This was the very cause of concern identified in *Buckley*: adopt too fluid of standards and free speech will suffer.¹⁸⁵ Moving the law to cement easily identifiable speech standards that average individuals can understand and which limit tendencies for government abuse is the only known solution to this problem.

In the development of election law following *McConnell v. Federal Election Commission*, it is becoming apparent that the Court is streamlining regulable speech standards in exactly this way. This has not happened without a struggle in the Court. While *McConnell* upheld most new regulations contained in the Bipartisan Campaign Reform Act ("BCRA"),¹⁸⁶ its successor case, *Federal Election Commission v. Wisconsin Right to Life*, narrowed the reach of the law. The *WRTL* Court would not accept a facial challenge to BCRA's ban of electioneering communications by corporations and unions, but it allowed an as-applied challenge to limit the reach of the law.¹⁸⁷ In doing so, it attempted to clarify the "functional equivalent of express advocacy" standard by explaining that "an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific

¹⁸⁰ *Bailey v. Maine Comm'n on Governmental Ethics and Election Practices*, 900 F. Supp. 2d 75 (D. Me. Sept. 30, 2012).

¹⁸¹ *Buckley*, 424 U.S. at 43–45.

¹⁸² *Id.* at 45.

¹⁸³ *Id.* at 43.

¹⁸⁴ See, e.g., Trevor Potter, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the "Dark Money" Election*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 383 (2013).

¹⁸⁵ *Buckley v. Valeo*, 424 U.S. 1, 43 (1976).

¹⁸⁶ See *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003).

¹⁸⁷ *Fed. Election Comm'n v. Wis. Right to Life*, 551 U.S. 449, 456–57 (2007).

candidate.”¹⁸⁸ This included examining factors like whether the communications “focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter.”¹⁸⁹ In stating the test, Chief Justice Roberts went to great lengths to reinforce that the test was objective and did not suffer from many problems of vagueness found in past election law standards.¹⁹⁰

The FEC responded to its loss in *WRTL* by fashioning what the Supreme Court called a “two-part, 11-factor balancing test to implement *WRTL*’s ruling.”¹⁹¹ In seeing just how flexible, open-ended, and far-reaching of standards the FEC would design, the Court allowed a facial challenge to the speech ban contained in the BCRA and eliminated it entirely.¹⁹² In doing so, the Court explained that the sheer size and complexity of the FEC’s standards acted as a prior restraint against speech.¹⁹³ As a result, only speech regulations sounding in objectivity and clarity could survive.

As prior litigation demonstrates, inarticulate and intricate speech standards create a chilling effect against speakers and cause real injury to First Amendment rights. Whatever zeal there may be for aggressive enforcement of campaign finance provisions, the Constitution compels a simple adherence to baseline standards. Because disclosure is a type of campaign finance regulation and because regulatory standards matter very much, it is equally important to ensure that bright line standards (like the *Buckley* formulation) apply.¹⁹⁴

The second suggestion flows from the first: anonymous political speech should not be reserved only for those who can make it to court. Broad, uniform standards eliminate political maneuvering and manipulation of existing disclosure standards. Under current law, only the most extreme, far-flung voices are

¹⁸⁸ *Id.* at 469–70.

¹⁸⁹ *Id.* at 451.

¹⁹⁰ *Id.* at 474 n.7 (explaining that the Court’s test was not vague because “(1) there can be no free-ranging intent-and-effect test; (2) there generally should be no discovery or inquiry into the sort of ‘contextual’ factors highlighted by the FEC and interveners; (3) discussion of issues cannot be banned merely because the issues might be relevant to an election; and (4) in a debatable case, the tie is resolved in favor of protecting speech”).

¹⁹¹ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 335 (2010).

¹⁹² *Id.* at 311.

¹⁹³ *Id.* at 335.

¹⁹⁴ It remains an ongoing point of debate within election law circles about whether disclosure systems are different in kind from other forms of campaign finance and thus subject to less rigorous standards. See, e.g., Anthony Johnstone, *A Madisonian Case for Disclosure*, 19 GEO. MASON L. REV. 413 (2012). This article does not attempt to answer that question, but illustrates the positive benefits of securing bright line standards elsewhere whose benefits would also be felt in the context of disclosure regimes.

protected against disclosure provisions.¹⁹⁵ This creates a haphazard, accordion-like approach to preserving political privacy. Supporters of controversial issues of the day may enjoy complete anonymity while moderate speakers are tasked with full disclosure. This sort of asymmetrical disclosure regime ensures that radical and fringe views are better protected than neighborhood, middle-of-the-road voices. All speakers, regardless of message, deserve prospective protection against government retaliation. Only uniform and equal standards achieve this just result.

Moving toward uniform standards for disclosure would entail a major shift in existing norms weighing the value of speakers' political privacy greater than the government's interest in disclosure. More concretely, litigants would have to make compelling arguments why the three liberty interests identified in this article—preventing prejudice, keeping the message central, and preventing retaliation—are superior to government interests in disclosure, usually identified as keeping the electorate as informed about who is spending money for political messaging. To date, litigation has focused primarily on the retaliation interest and small classes of speakers rightfully become exempt when certain conditions are met. At times, groups like the American Civil Liberties Union and the Chamber of Commerce have argued, in part, about the prejudice issue but not with sizeable effort.¹⁹⁶ Litigation efforts would have to focus on the negative effects of disclosure that have largely been overlooked in campaign finance case law. This would include illustrating why an organization's desire for the public to focus solely on its message is more important than the public's interest in knowing who is behind it. Or it would involve showings by disfavored, but not radical, groups why exposing their names or identities would be so damning. Examples might include Tea Party organizations messaging in Berkley, California or fiery rhetorical campaigns by Earth First! in Cheyenne, Wyoming. Through this slow percolation of cases, the value and strength of these liberty interests might be identified and strengthened, expanding the scope of protection for anonymity.

The third suggestion calls for simple, straightforward disclosure. Existing simple disclosure regimes, triggered each time an organization or individual speak out using a certain amount of money, adequately promote government disclosure

¹⁹⁵ In the midst of writing this article, the National Abortion Rights Action League (“NARAL”) of NY received an exemption to New York’s far-reaching disclosure rules because they “could put its contributors in danger.” Rick Karlin, *Pro-choice lobbyist cites danger to donors in winning exemption*, TIMES UNION (June 26, 2013), <http://www.timesunion.com/local/article/Pro-choice-lobbyist-cites-danger-to-donors-in-4624792.php> (last visited Nov. 26, 2013). Notably, NARAL is the sole group in New York exempt from its disclosure laws.

¹⁹⁶ See, e.g., Brief of Appellant, at 30–33 *McCConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003) (No. 02-1734) 2003 WL 21649664 at *30–33.

interests without imposing complicated, continuing reporting regimes.¹⁹⁷ For too long, popular media and campaign finance reform groups have conflated imposing disclosure requirements with PAC requirements.¹⁹⁸ One or two-page disclosure forms provide information called for by the Supreme Court: (a) who is spending money, (b) given toward what particular candidate race, and (c) in what amount.¹⁹⁹ More detailed PAC requirements impose a heavy and bizarre set of regulations on average speakers, making the exercise of First Amendment freedoms “onerous.”²⁰⁰ Insisting that simplified disclosure is the norm would help achieve reformers’ interests in disclosure while alleviating much of the burdens current disclosure regimes impose.

Finally, the fourth suggestion acts as a buffer against burdensome laws for average speakers. Here, requiring higher aggregate disclosure thresholds ensures grassroots groups are not burdened by intricate, lengthy forms more appropriately required for sophisticated, large political organizations. The core holding of *Mass. Citizens for Life* supports this idea, positing that extensive reporting and organizational requirements should only apply to groups whose major purpose is serious campaign activity.²⁰¹ Increasing aggregate thresholds for difficult compliance regimes (like PAC status) ensures ordinary citizens are not shut out of the political system due to legal intricacies while only leaving sophisticated, better funded political professionals to handle such intricacies. This last set of suggestions is hardly new: reformers and First Amendment advocates have regularly called for increasing threshold campaign finance disclosure limits.²⁰²

Taken as a whole, these suggestions would work in very much the same way other areas of reform have been modified due to constitutional concerns. For example, it used to be commonly accepted that state laws punishing defamatory or libelous statements could be broadly designed and applied. Through concentrated effort, litigants were able to convince the Supreme Court, first in *New York Times Co. v. Sullivan*, that the First Amendment demanded more safeguards apply to

¹⁹⁷ See Fed. Election Comm’n v. Mass. Citizens for Life, 479 U.S. 238, 262–63 (1986).

¹⁹⁸ See Adam Liptak, *A Blockbuster Case Yields an Unexpected Result*, N.Y. TIMES at A13 (Sept. 19, 2011), available at http://www.nytimes.com/2011/09/20/us/disclosure-may-be-real-legacy-of-citizens-united-case.html?_r=0.

¹⁹⁹ See FEC Form Five (2013), available at <http://www.fec.gov/pdf/forms/fecfrm5.pdf>.

²⁰⁰ Citizens United v. Fed. Election Comm’n, 558 U.S. 310, 336–37 (2010).

²⁰¹ *Citizens for Life*, 479 U.S. at 255.

²⁰² See, e.g., Ray La Raja, *The Supreme Court Might Strike Down Overall Contribution Limits. And That’s Okay*, The Monkey Cage (Oct. 9, 2013, 1:26 PM), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/10/09/the-supreme-court-might-strike-down-overall-contribution-limits-and-thats-okay/> (last visited Nov. 26, 2013); George F. Will, *On Political Speech, a (high) Court Opportunity*, (Oct. 7, 2013 11:13 AM), http://www.pennlive.com/opinion/index.ssf/2013/10/on_political_speech_a_high_court_opportunity_george_f_will.html (last visited Nov. 26, 2013).

the liberty interests protected in speech.²⁰³ While weighty interests supported the availability of libel and defamation remedies for aggrieved parties, the Supreme Court ultimately held that the liberty interests supporting the First Amendment carried greater weight. Or, as the Court stated, our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials” carries special consideration.²⁰⁴

Part of the sea change in tort law as it relates to the First Amendment was due to litigants sharply illustrating how cumbersome laws (born out of legitimate concern) damaged their liberty interests. In *New York Times Co.*, the government attempted to paint its system of libel law as being protective of speech because it allowed truth as an ultimate defense. The problem was easy to identify: “Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which ‘steer far wider of the unlawful zone.’”²⁰⁵ Because the litigants could plainly demonstrate just how difficult the law was to comply with and how suppressive it would likely be, the Supreme Court embraced a doctrinal shift toward protecting these types of speech.

Just as so many regulatory programs have shrunken with the application of the First Amendment, so too does the reach of campaign finance reform and disclosure. The recommendations provided in this article would achieve similar results: (1) average speakers would be protected from cumbersome regulatory regimes, (2) more meaningful scrutiny and objective regulatory guideposts would provide quicker remedies to speakers whose rights had been abused, and (3) a greater prospective protection for political privacy would result. All of this would work toward harmony in the law. Streamlined disclosure would remain but overreaching and complicated regulatory regimes would be substantially trimmed.

VI. CONCLUSION

Publius was not a PAC. Rather, it was an association of three people who sought to speak out in favor of a governing document, one that endures today. As campaign finance disclosure expands to require registration and reporting of individuals and groups who wish to merely speak out on a political issue, Publius’s

²⁰³ 376 U.S. 254 (1964).

²⁰⁴ *Id.* at 270.

²⁰⁵ *Id.* at 279 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

example may soon be illegal for such intents and purposes. The end of anonymous political speech and political privacy (for all but the most extreme voices) threatens not only speech itself, but truthfulness and forthrightness from those who do speak. As in *McIntyre*, we must recognize and reaffirm that anonymity is as much a choice of *what* someone is saying as how he or she says it. Such content restrictions must be strictly scrutinized by our courts and narrowly tailored to serve a governmental interest. For issue advocacy, in particular, disclosure serves no compelling governmental interest.

Narrow tailoring also requires simple, understandable disclosure laws. We should not tolerate a system of “reform” that makes participation in the political process and speaking one’s mind arduous. Whatever merit disclosure may have, today’s system is harmful to the First Amendment and these harms outweigh any of disclosure’s benefits. A streamlined, understandable system of political disclosure would reclaim First Amendment protections and ensure the right of average Americans so bold as to spend more than \$1,000 to speak their minds. In time, this nation might reclaim the lost ideal and “assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.”²⁰⁶

²⁰⁶ Va. State Bd. of Pharmacy v. Va. Consumer Council, 425 U.S. 748, 770 (1976).