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Stand by Your First Amendment Values - Not Your Ad

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Stand by Your First Amendment Values—Not Your Ad: The Court's Wrong Turn in *McConnell v. FEC*

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INTRODUCTION

Few recently passed laws have attracted as much attention as the Bipartisan Campaign Reform Act of 2002 (BCRA), which banned soft money contributions to political candidates and prohibited corporate and union advertising in the weeks leading up to an election. One of the BCRA's most important and novel sections, however—§ 311, Clarity Standards for Identification of Sponsors of Election-Related Advertising[1]—has largely escaped comment, both when the bill was passed and when its constitutionality was adjudicated in the courts. Section 311 makes two major changes to existing law on the disclosure of the sponsor of campaign communication. First, it expands the categories of campaign communication for which it must be disclosed who funded and authorized the communication. Previously, only communications "expressly advocating the election or defeat of a clearly identified candidate" or soliciting contributions were required to reveal their sponsors.[2] Under the BCRA, however, both *electioneering communication*—that is, advertisements referring to a clearly identified candidate for federal office, issued within sixty days of an election—and all advertising by *political committees*, must also follow these disclosure requirements.[3]

Second, the "stand by your ad" provision of § 311 mandates that all political ads on television covered by the expanded source disclosure requirements also include an "unobscured, full-screen view" of the ad's sponsor expressing her approval of the ad.[4] If the ad is paid for or authorized by a candidate or her political committee, the candidate herself must appear on-

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1. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 311, 116 Stat. 81, 105-06 (2002).

2. 2 U.S.C. § 441d(a) (2000).

3. 2 U.S.C.A. § 441d(a) (West Supp. 2004). When I use the term "expanded source disclosure," then, I am referring to *both* of the new categories of campaign communication to which mandatory source disclosure now applies—electioneering communication and advertising by political committees.

4. *Id.* § 441d(d)(1)(B)(i)(I), (2).

screen and state that she "has approved the communication."[5] If the ad is neither paid for nor authorized by a candidate, a representative of the committee or group authorizing the ad must appear on-screen and specifically state that his organization "is responsible for the content of this advertising."[6]

In its mammoth 298-page series of opinions in *McConnell v. Federal Election Commission*,[7] the Supreme Court ruled on the constitutionality of § 311 and the rest of the BCRA. Like the debate swirling around the law, the Justices' opinions emphasized the BCRA's soft money ban and its prohibition on corporation- and union-funded electioneering communication, both of which were held to be constitutional. In contrast to the voluminous treatment accorded to these provisions, the Court affirmed the constitutionality of § 311 in two short paragraphs. Writing for five Justices (with three more concurring), Chief Justice Rehnquist "assum[ed] as we must" that the pre-BCRA campaign communication disclosure scheme "is valid to begin with," and that the scheme "is valid as amended by BCRA § 311's amendments other than the inclusion of electioneering communications."[8] The Court also held that the extension of mandatory source disclosure to electioneering communications was constitutional because the new "disclosure regime bears a sufficient relationship to the important governmental interest of 'shedding the light of publicity' on campaign financing."[9] The only Justice to dissent in this section of *McConnell* was Thomas. Upholding political speakers' right to anonymity, Thomas argued that expanded source disclosure and "stand by your ad" are unconstitutional, since

> [b]y requiring any television or radio advertisement that satisfies the definition of "electioneering communication" to include the identity of the sponsor, and even a "full-screen view of a representative of the political committee or other person making the statement" in the case of a television advertisement . . . § 311 is a virtual carbon copy of the law at issue in *McIntyre v. Ohio*.[10]

The central purpose of this Case Comment is to explore the Court's hasty

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5. *Id.* § 441d(d)(1)(B). Alternatively, the candidate can express his approval of the communication "in voice-over, accompanied by a clearly identifiable photographic or similar image of the candidate." *Id.* § 441d(d)(1)(B)(i)(II).

6. *Id.* § 441d(d)(2). Radio commercials that fall under the aegis of the source disclosure rules, similarly, require either an "audio statement by the candidate that identifies the candidate and states that the candidate has approved the communication," *id.* § 441d(d)(1)(A), or an expression of responsibility by the independent group that funded the ad, *id.* § 441d(d)(1)(A).

7. 124 S. Ct. 619 (2003).

8. *Id.* at 710. The "amendments other than the inclusion of electioneering communications" that Rehnquist presumes to be valid are mandatory source disclosure for all communication by political committees, and "stand by your ad."

9. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 81 (1976)).

10. *Id.* at 736 & n.10 (citations omitted) (Thomas, J., dissenting). In *McIntyre*, 514 U.S. 334 (1995), the Court held that an Ohio statute prohibiting anonymous campaign literature—which had been used to fine Ms. McIntyre after she distributed anonymous pamphlets regarding a proposed school tax levy—violated the First Amendment. The Court stated that "[a]nonymity is a shield from the tyranny of the majority," and is protected by the First Amendment. *Id.* at 357.

and conclusory discussion of expanded source disclosure and "stand by your ad." Both of these provisions have had a significant impact on the few races where they have been applicable, and raise an array of interesting (and largely unanswered) First Amendment questions. Section 311 clearly deserves more attention than the Court bestowed on it in *McConnell*. In Part I, then, I highlight two erroneous assumptions made by the Court that limit the scope of its holding on expanded source disclosure and "stand by your ad," and leave certain crucial questions about the provisions undecided. Parts II and III, the core of the Comment, argue that if the Court had grappled in good faith with the constitutionality of § 311, past precedent and First Amendment doctrine would have strongly suggested that expanded source disclosure and "stand by your ad" are invalid. The Comment concludes, finally, with some comments about First Amendment theory and its fit with doctrine on free speech and campaign communication.

I. INITIAL ODDITIES

Aside from its brevity, there are at least two other oddities in the Court's treatment of § 311—oddities that mean that the Court will, in all likelihood, again need to turn its attention to the section in the future. First, the Court's discussion completely ignores two of § 311's most notable policy changes—the extension of source disclosure requirements to all communication by political committees, and "stand by your ad"—and mentions only "the expansion of th[e] identification regime to include disbursements for 'electioneering communications.'"[11] Rather than explicitly evaluate the other provisions' constitutionality, the Court assumes "as [it] must" that "FECA § 318 is valid as amended by BCRA § 311's amendments other than the inclusion of electioneering communications."[12] Why must the Court assume that the other provisions are valid? Presumably because it believes that the plaintiffs only challenged the portion of § 311 dealing with electioneering communication, thereby tying the Court's hands as to the rest of § 311. But though the plaintiffs dubbed § 311 an "'electioneering communications provision," their brief to the Court clearly attacked the section's constitutionality on much broader grounds: "Section[] . . . 311 of BCRA impose[s] draconian restrictions on the most vital speech in our representative democracy . . . . [I]t is difficult to conceive of a more constitutionally threatening sort of legislative intrusion. . . ."[13] Moreover, one of the questions that the Court presented to the parties in *McConnell* was

11. *McConnell*, 124 S. Ct. at 710. As mentioned earlier, § 311's expansion of mandatory source disclosure applies to both electioneering communication and communication by political committees. *See supra* note 3.

12. *Id.*

13. Brief for Appellants at 38, McConnell v. Fed. Election Comm'n, 124 S. Ct. 619 (2003) (No. 02-1674).

whether the district court erred by upholding § 311 and other related sections "because they violate the First Amendment or the equal protection component of the Fifth Amendment, or are unconstitutionally vague."[14] As indicated by the expansive language of the plaintiffs' brief and the Court's own questions to the parties, the extension of mandatory source disclosure to electioneering communications is not the only constitutionally vexing provision in § 311. In *McConnell*, the Court ignored the section's other important enactments; in the future, they too will need to be addressed.

The second oddity in the Court's discussion of § 311 is its pronouncement that FECA § 318, the statute outlining the original source disclosure requirements, "is valid to begin with."[15] The Court's basis for this statement is, to put it politely, uncertain. The Court never ruled on the constitutionality of mandatory *source* disclosure in the seminal case of *Buckley v. Valeo*,[16] because the U.S. Court of Appeals for the D.C. Circuit nullified the statute's source disclosure requirements, and the circuit court's decision was not appealed by the government.[17] (*Buckley* did find mandated disclosure of *contributions* to candidates and political groups to be constitutional, but this is a different matter than the disclosure of an ad's sponsor or payor.) FECA § 318 was also passed by Congress *after* the Court's decision in *Buckley*, and has never been evaluated by the Supreme Court. Furthermore, lower courts are split on the question of what types of source disclosure requirements are constitutional. *FEC v. Public Citizen*[18] and *Kentucky Right to Life v. Terry*[19] both found that source disclosure can be mandated for "express advocacy" communication. *Majors v. Abell*, on the other hand, directly criticized those earlier decisions, and held that mandatory source disclosure is constitutionally permissible for candidates but not for independent groups, in whose case it constitutes a "blanket prohibition of anonymous campaign-related speech. . . ."[20] This circuit

14. *Id.* at i.

15. *McConnell*, 124 S. Ct. at 710.

16. Buckley v. Valeo, 424 U.S. 1 (1976). In *Buckley*, an assortment of plaintiffs challenged the validity of the Federal Election Campaign Act of 1971 (FECA) on First Amendment grounds. The Court held that ceilings on contributions to candidates were constitutional, but that ceilings on contributions to groups were impermissible if the groups were engaged in "issue advocacy" rather than "express advocacy." Ceilings on *expenditures* by candidates and groups were held unconstitutional, and disclosure requirements for contributions were found to be valid.

17. The provision struck down by the D.C. Circuit imposed disclosure requirements on all material that have the "purpose of influencing the outcome of an election," that "refer[] to a candidate," or that seek "to influence individuals to cast their votes for or against . . . candidate[s]." 2 U.S.C. § 437a (1974) (repealed 1976). The government did not appeal the decision because it "apparently believ[ed] that the vague language of the provision coupled with the virtually unlimited reach of the disclosure requirement to contributions of $10 or more to hundreds of non-political organizations was indefensible." Trevor Potter, Buckley v. Valeo, *Political Disclosure and the First Amendment*, 33 AKRON L. REV. 71, 80 (1999).

18. 268 F.3d 1283 (11th Cir. 2001).

19. 108 F.3d 637 (6th Cir. 1997).

20. 317 F.3d 719, 723 (7th Cir. 2003). This circuit split arguably persists even in the wake of

split confirms what should have been obvious to the *McConnell* Court from the chronology of FECA § 318—that the constitutionality of mandatory source disclosure remained an open question even after *Buckley* and *McIntyre v. Ohio Elections Commission.*

Two erroneous assumptions, then, have the effect of rendering nearly meaningless the Court's holdings on § 311 of the BCRA. Since "stand by your ad" and the extension of source disclosure requirements to all communication by political committees are never mentioned, let alone properly analyzed, they remain in constitutional limbo. And although the expansion of mandatory source disclosure to electioneering communications appears to have been addressed by the Court, even this part of the opinion is suspect since it relies on the incorrect view that FECA § 318 (and mandatory source disclosure in general) have previously been found constitutional. In sum, *McConnell* raises more questions than it answers about § 311—questions that future courts will have to squarely face, and that the next two parts of this Comment seek to address.

II. EXPANDED SOURCE DISCLOSURE

If the Supreme Court had followed the lower court lead and tackled directly the constitutionality of expanded source disclosure and "stand by your ad," it would have used a tailoring approach, applying "exacting" scrutiny to the provisions. Under this test, each provision is constitutionally permissible only if it is "narrowly tailored" to achieve "overriding" governmental interests.[21] What governmental interests might justify § 311's changes to campaign communication disclosure law? The three articulated by the Court in *Buckley* (and invoked anew in *McIntyre and McConnell*) are deterring actual corruption and avoiding the appearance of corruption, providing voters with information about the sources and spending of campaign money, and detecting violations of campaign finance laws.[22] Only the first two warrant discussion here, as there are no—and could not constitutionally be any—laws regulating what different speakers are allowed to say in their campaign communication.[23]

Expanded source disclosure has at best a tenuous relation to the government's first interest: anticorruption. Corruption, in the eyes of the Court, includes both explicit quid pro quos between politicians and their funders and the "broader threat from politicians too compliant with the wishes of large

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McConnell, since the subject of the split is mandatory source disclosure in general (as opposed to mandatory source disclosure for electioneering communications), an issue that the Supreme Court sidestepped through its faulty presumption of FECA § 318's validity.

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

22. *Buckley*, 424 U.S. at 66-68.

23. On the other hand, there *are* laws imposing limits on political contributions, meaning that the governmental interest of detecting lawbreaking applies to the disclosure of contributions.

contributors."[24] The disclosure of campaign *contributions* arguably deters corruption and avoids its appearance by revealing to the public the sources of candidates' campaign money, and allowing the public to detect special favors granted to contributors after the election. In contrast, the mandatory disclosure of an ad's *sponsor* confers none of these benefits. The public learns nothing about a candidate's reliance on contributions when that candidate self-identifies as an ad's authorizer. Nor does the extent of a group's financial ties with a candidate become apparent through source disclosure. In the narrow category of cases where a campaign communication is authorized by a candidate but paid for by another group, the disclosure requirement informs the public about the *existence* of a connection between the candidate and the group, but not about the connection's significance. For these reasons, the anticorruption rationale is rarely invoked in the context of mandatory source disclosure; the defendants in *McIntyre*, notably, did not even cite it as a potential justification for Ohio's prohibition on anonymous pamphleteering.[25]

Source disclosure more clearly serves the government's informational interest. When an ad's payor identifies with an ad, the public can determine quickly what candidate or group is behind a given campaign communication. Source disclosure also avoids the voter frustration that ensues when an ad's content is controversial but its sponsor is unknown. The problem with the government's informational interest in this context is not its relevance, but its strength. In *McIntyre*, the Court evaluated a disclosure requirement similar to that of § 311. The Court ruled that "[t]he simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit. . . . Ohio's informational interest is plainly insufficient to support the constitutionality of its disclosure requirement."[26] On this logic, not only § 311's *expansion* of source disclosure but mandatory source disclosure itself would be unconstitutional. Like Ohio's prohibition on anonymous pamphleteering, mandatory source disclosure forces speakers to identify themselves even when they would rather not do so, solely for the sake of better informing the public.[27]

The only saving grace for mandatory source disclosure is Justice Ginsburg's concurrence in *McIntyre*, where she argues for a narrow reading of the case's holding, and writes that "a State's interest in protecting an election

24. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000).

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

26. *Id.* at 348-49.

27. In the wake of *McIntyre*, several authors have noted that only an anticorruption interest appears strong enough to justify mandatory disclosure provisions. *See, e.g.*, Jan Witold Baran, *Compelled Disclosure of Independent Political Speech and Constitutional Limitations*, 35 IND. L. REV. 769, 772 (2002); Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. REV. 265, 273 (2000).

process might justify a more limited identification requirement."[28] This new interest raised in the concurrence may very well shield the federal source disclosure laws as they stood *before* the passage of the BCRA, when they applied only to "communications expressly advocating the election or defeat of a clearly identified candidate."[29] But it is more doubtful that Ginsburg's aside shields § 311's expansion of source disclosure to also include "electioneering communication" and *all* communication by political committees. In these contexts, the state's interest in protecting the election process is attenuated, since the communication covered by the disclosure requirement is much less closely linked to the election itself. But the disclosure requirement is far more onerous than that in *McIntyre*, mandating disclosure not just of the sponsor's name, but also his address, telephone number, website, and relationship with the candidate. Had the *McConnell* Court applied any serious scrutiny to expanded source disclosure, then, it would likely have found the provision unconstitutional due to its intrusiveness and weak connection to legitimate government interests.

III. "STAND BY YOUR AD"

Compared to expanded source disclosure, the invalidity of § 311's other important provision, "stand by your ad," is even plainer. First, the provision has no plausible relation to the deterrence of corruption or the avoidance of its appearance. A full-screen declaration of responsibility for an ad by a candidate or group representative in no way exposes financial connections between a candidate and his contributors, or dissuades donors from seeking political influence. The only potential argument connecting "stand by your ad" to the government's anticorruption rationale would be that nominally independent groups with illicit links to a candidate face greater public scrutiny under a regime where their sponsorship of ads is more easily discernible. But independent group contributions and expenditures are already subject to disclosure requirements, making any incremental deterrence of corruption from "stand by your ad" small indeed—especially since "stand by your ad," unlike the disclosure of contributions and expenditures, reveals no information about financial ties between groups and the candidates they support.

"Stand by your ad" also provides less new information to voters than the mandatory source disclosure component of § 311. Because of the source disclosure requirement, viewers of a commercial are informed who paid for the ad, what the contact information is for the ad's sponsor, and whether the ad was authorized by a candidate. In contrast, the only new information provided by

28. *McIntyre*, 514 U.S. at 358 (Ginsburg, J., concurring) (internal quotations omitted).

29. 2 U.S.C. § 441d(a) (2000), *amended by* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 311, 116 Stat. 81 (2002).

the "stand by your ad" requirement is that a candidate has "approved" the commercial's message, or that an independent group is "responsible" for the ad's content.[30] If mandatory source disclosure is highly suspect despite providing a good deal of information to voters, "stand by your ad"—which requires a candidate or group representative merely to repeat this information on-screen—is almost necessarily constitutionally impermissible.

Beyond its weaker connection to the government's anticorruption and informational interests, "stand by your ad" also imposes a greater burden on core political speech than mandatory source disclosure. Source disclosure is intrusive to begin with, as it forces political speakers to identify themselves when they would rather not do so, even if their speech is quite temporally and substantively removed from an election.[31] "Stand by your ad" not only forecloses the possibility of anonymity for campaign communication covered by § 311, but also requires an explicit statement of approval or responsibility for the message. This requirement consumes several seconds out of a typical thirty-second commercial, to the detriment of the commercial's effectiveness.[32] "Stand by your ad" also interrupts the flow even of positive political ads, thereby reducing the communicative options of the ads' sponsors.[33] Finally, and perhaps most importantly, "stand by your ad" makes it more difficult for candidates to launch negative advertising against their opponents. Candidates are understandably reluctant to appear personally on-screen in an ad that bashes their political rivals, no matter how informative such an ad might be, or how badly the candidates want to highlight differences with their opponents. As a result, races where "stand by your ad" has been applicable, notably the 2004 Democratic Party presidential primaries, have been remarkable for their "relatively elevated tone" and "debating-society decorum."[34] Such sugary races

30. 2 U.S.C.A. § 441d(d)(1)(B), (d)(2) (West Supp. 2004). In describing the new information provided by "stand by your ad," I am assuming that source disclosure is constitutional and in place. If source disclosure is unconstitutional, there is little point in even discussing the constitutionality of "stand by your ad," as it surely must be invalid.

31. The Supreme Court has generally shown extreme suspicion toward mandated speech of any kind. *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston, 515 U.S. 557, 573 (1995) ("[T]he fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message."); Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 795 (1988) (holding that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech," and is therefore subject to strict scrutiny.).

32. As political strategist Jim Margolis says, "this idea of spending four or five seconds in a 30-second ad declaring 'It's our ad' is a little crazy." Jim Rutenberg, *Fine Print Is Given Full Voice in Campaign Ads*, N.Y. TIMES, Nov. 8, 2003, at A1.

33. In the words of media adviser Molly Grunwald, referring to a commercial she made for former New Hampshire Governor Jeanne Shaheen showing millworkers thanking the governor for saving their jobs, the ad "wouldn't have worked if at the end [the governor] had to come on to say something like 'I'm Jeanne Shaheen, I approve this message because I'm really appreciated.' . . . There are so many different kinds of ads you can't do properly with this language stuck in the middle of it." Rutenberg, *supra* note 32.

34. Paul Farhi, *Candidates' Ads Aim for the High Road: Focus in Iowa Is on Issues, Not Rivals*, WASH. POST, Jan. 10, 2004, at A1.

may please pundits, but only at the expense of the candidates' basic freedom to fashion their messages as they see fit.

On the basis of *Buckley* and *McIntyre*, the two Supreme Court cases dealing with the constitutionality of campaign communication disclosure requirements, it is therefore clear that both expanded source disclosure and "stand by your ad" are unconstitutional.[35] Neither provision is narrowly tailored to achieve the government's anticorruption or informational interests, while both impose heavy burdens on core political speech.[36] There *is* one potential state interest—the prevention of negative advertising—that § 311 may be narrowly tailored to achieve.[37] But this goal runs counter to almost the entire body of modern First Amendment doctrine. In the arena of public discourse, the government's rationale for regulating speech cannot be that it finds the speech distasteful, or that it wishes to sanitize the debate over the issues of the day.

CONCLUSION

This Comment began by noting the relative lack of attention that expanded source disclosure and "stand by your ad" have received, compared to more controversial provisions of BCRA such as its ban on soft money contributions. Regrettably, the Court in *McConnell* seems to have been induced by § 311's low profile into not fully engaging with the constitutional issues raised by the section, and incorrectly assuming that certain questions had been resolved in the past when they actually remained open. The bulk of this Comment explained why, if the Court had directly addressed the constitutionality of § 311, it would probably have found the section inconsistent with precedent on campaign communication and the First Amendment. In brief, expanded source disclosure and "stand by your ad" impose grave burdens on core political speech, while bearing only a tenuous relationship to the government's anticorruption and informational interests. When the Court again considers the constitutionality of § 311, as it will likely need to, the arguments sketched in this Comment may prove a preview (or an attempted rebuttal) of the Court's

35. The argument from precedent, in its simplest terms, is this: *Buckley* imposes exacting scrutiny on statutes that burden core free speech rights. *McIntyre* holds that prohibitions on anonymous political speech are not narrowly tailored to the achievement of the government's anticorruption or informational interests. Section 311 is analogous to the provision at issue in *McIntyre*, and is therefore invalid.

36. As noted above, the unconstitutionality of "stand by your ad" is clearer because it provides less new information than expanded source disclosure and imposes a greater burden on core political speech. *See supra* text accompanying note 30.

37. The drafters of "stand by your ad" clearly had this goal in mind. The provision's author, Representative David Price, stated that its intent was to "require an assumption of personal responsibility on the part of the candidate . . . in a way that, we believe, is likely to discourage . . . irresponsible and distorted kinds of attacks." Rep. David Price (D-NC), Remarks at "Stand by Your Ad": A Conference on Issue Advocacy Advertising (Sept. 16, 1997), *in* ANNENBERG PUBLIC POLICY CENTER, REPORT SERIES NO. 19 (1997), *available at* http://www.annenbergpublicpolicycenter.org/03_political_communication/issueads/REP19.pdf.

decision.

So much for First Amendment doctrine, then. What do the *values* underlying the First Amendment suggest about the fate of expanded source disclosure and "stand by your ad"? In my view, both prominent theoretical accounts of public discourse, the Meiklejohnian and the participatory models, confirm the infirmity of § 311.[38] Under the Meiklejohnian conception, the First Amendment is concerned most with citizens receiving all information relevant to an issue before coming to a decision, even if this process imposes limitations on certain speakers' individual autonomy.[39] Section 311's expansion of source disclosure, it is true, provides potentially valuable information to voters about the identity of a commercial's sponsor or payor. However, as mentioned above, "stand by your ad" has the effect of deterring negative advertising by candidates, since they must broadcast personal statements of responsibility in their commercials. Despite their poor reputation, "attack" ads are actually far more effective than fuzzy positive ads at conveying information to voters about candidates and issues.[40] If they are suppressed by "stand by your ad," voters' decisions necessarily become less informed and presumably less wise. And, though the question cannot be settled without empirical evidence, it is probable that the voters' loss of information from reduced negative advertising more than outweighs their gain in information from knowing the precise identity of the sponsor of a given campaign communication.

According to the participatory model, on the other hand, the First Amendment's primary function is to facilitate citizens' participation in and identification with the process of collective decisionmaking, which alone allow the polity's actions to be regarded as legitimate.[41] To determine § 311's validity pursuant to this account, it is necessary to compare the benefits that the statute provides to citizens in terms of a deeper sense of identification with collective decisions, to the harm that candidates and independent groups suffer along this same dimension. The primary participatory benefit that citizens receive due to § 311 is an alleviation of the frustration that can arise from not knowing who the sponsors of campaign ads are. Against this benefit must be balanced the participatory harm to independent groups forced to reveal their identities before contributing to the national political conversation, and to candidates deterred

38. I examine only accounts of public discourse here, as opposed to broader theories of the First Amendment (such as those focusing on individual autonomy and the marketplace of ideas) because the campaign communication regulated by § 311 falls clearly in the arena of public discourse and hence does not require consideration of other, more problematic domains of speech.

39. *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 24 (1960) (analogizing to a town meeting, where speakers' autonomy is limited in various ways so that the meeting can effectively conduct its business).

40. *See, e.g.*, KATHLEEN HALL JAMIESON, EVERYTHING YOU THINK YOU KNOW ABOUT POLITICS . . . AND WHY YOU'RE WRONG 103-06 (2000).

41. Robert Post is the most important expositor of this approach. *See* Robert C. Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993).

from running the negative ads that often make the difference between victory and defeat. Again, the relative costs and benefits can be calculated only with empirical evidence, but it appears likely that the incremental increase in citizens' identification with collective decisionmaking because of § 311 is swamped by the alienation candidates and independent groups suffer as a result of their inability to make anonymous statements about election-related issues.

First Amendment doctrine and theory therefore point in the same direction vis-à-vis expanded source disclosure and "stand by your ad." The Court shunned both doctrinal analysis and theoretical discussion in *McConnell*, embracing instead a series of slipshod assumptions about the validity of § 311 and its predecessor statute. When the Court reexamines its flawed reasoning, it will find both that its tailoring approach of exacting scrutiny as well as the underlying values of the First Amendment lead inexorably to the same conclusion about § 311's constitutionality. Until that day, Americans will have to make do with reduced information about the candidates among whom they must choose—and candidates and other interested parties will be forced to adjust to the end of "an honorable tradition of [anonymous] advocacy and of dissent."[42]

42. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).