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S. Douglas Dodd

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COMMENTARY ON FREE SPEECH, PAMPHLETEERING AND POLITICS*

S. Douglas Dodd†

I would like to start off by noting that I am not sure this particular term of the Court necessarily gave great comfort to the news media. It probably left the news media with more questions than answers. But in the First Amendment free speech area, there was one decision that does have potentially wide ranging implications, and that is *McIntyre v. Ohio Elections Commission*.¹ First, I want to very briefly give the facts of the case. On April 27, 1988, Margaret McIntyre, who was a private citizen in the state of Ohio, distributed leaflets to persons attending a public meeting at Blendon Middle School in Westerville, Ohio. The leaflets expressed Ms. McIntyre's opposition to an upcoming school tax levy issue. The superintendent of schools was scheduled to discuss the tax levy election at the meeting.²

The tax levy election was defeated. In fact, it was defeated twice. Ultimately, it passed upon its third appearance in an election contest, which occurred in November of 1988. So, six or so months after her leafleteering, her passing out of her own privately created leaflets opposing the tax levy, some school official, who the Court's decision tidily leaves unnamed, complained to the Ohio Election Commission that Ms. McIntyre had violated a provision of the Ohio Election Law by passing out anonymous leaflets. It should be noted that not all of Ms. McIntyre's leaflets were anonymous. Some of them had her name

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† Partner, Doerner, Saunders, Daniel & Anderson, Tulsa, Oklahoma. B.A. University of Tulsa, 1971; J.D. University of Tulsa College of Law, 1981.

1. 115 S. Ct. 1511 (1995).

2. *Id.* at 1514.

on them, and some others purported to present the views of 'Concerned Parents and Taxpayers.'³

The Ohio Election Commission determined that Ms. McIntyre's distribution of anonymous leaflets did in fact violate a portion of the statute and fined her \$100. She appealed the fine and the case was finally overturned by the Franklin County Court of Common Pleas. It probably should have stopped right there but it did not. The Election Commission appealed to the Ohio Court of Appeals, which in a sharply divided vote reinstated the fine based upon its announced understanding that it had to follow precedent set by the Ohio Supreme Court. Ms. McIntyre then appealed to the Ohio Supreme Court and that Court, not surprisingly, affirmed the Court of Appeals. So at this point, she still had the \$100 fine against her.⁴

During this process, Ms. McIntyre died and the trustee of her estate continued the fight, petitioning the United States Supreme Court for writ of certiorari. Certiorari was granted and this opinion ensued.⁵

The legal standards that the Court discussed in the *McIntyre* case include the premise that core political speech is protected by the First Amendment and it need not center on a candidate for office, but also applies to issue-based elections, as this one was. More importantly, however, the Court held that exacting scrutiny must be applied when a law is challenged under the First Amendment as burdening core political speech. The Court also held that restrictions on core political speech can only be upheld if they are narrowly tailored to serve overriding state interests.⁶

The Court found in *McIntyre* that the Ohio statute did not set forth a sufficiently compelling or overriding state interest to justify the burdening of freedom of core political speech. Ohio argued in this case that it had an interest in providing the electorate with relevant information — in fact they argued *more* relevant information (I am not quite sure what that is) and also an interest in preventing fraud and libel in the election process. The Supreme Court of the United States disagreed, saying that the interest in providing the electorate with relevant information was not sufficiently compelling to justify the prohibition against the distribution of anonymous campaign literature. The interest in providing additional relevant information to voters, the

3. *Id.*

4. *Id.* at 1515.

5. *Id.* at 1516.

6. *Id.* at 1519.

Court said, simply did not justify requiring writers to make statements or disclosures that they would not otherwise make, or perhaps that they did not want to make. And the Court viewed this as actually being broader than just a question of anonymity of a political statement. The Court compared it, for example, to a hypothetical law that might require a person to omit or include information in their speech — particularly political speech — that he or she did not want to omit or include. The Court said that the signature or the identity of the writer or the speaker was the type of information that the speaker or writer might very well want to omit and should not be required by the law to include.⁷

A historical look at the importance of allowing anonymity in political speech was taken by Justice Stevens in his majority opinion, and it was pointed out that anonymity in political speech, leaflets and newspaper articles has been a tradition — I am not sure whether it is a proud tradition or some other kind of tradition — but nevertheless a tradition since the beginning of this country. The Court pointed out that during the time leading up to the establishment of the United States as a separate country, many of the arguments that were circulated around the colonies were made under fictitious names because of the writers' fear of reprisals from the Crown. This practice was followed throughout the history of the United States, the Court argued, by the need — the perceived need, perhaps — of some writers not to place their name upon their writing. The Court said the First Amendment absolutely protects that right to anonymity.⁸

The interest that the State of Ohio argued it had in preventing fraud and libel was also not sufficient, since the statutory prohibition against distribution of anonymous campaign literature applied regardless of whether there were even arguably false or misleading statements in the information. Further, the Court found that Ohio had other and more specific statutory protections to guard against and find remedies for the use or distribution of fraudulent or libelous materials. So the two reasons that the State of Ohio said it had for this type of prohibition — one must put one's name on one's campaign literature — the Court said, 'You didn't meet your burden. You didn't show that the interest was either compelling or overriding enough to burden core political speech and the freedom of that speech.' The

7. *Id.* at 1516-17.

8. *Id.* at 1517, 1524.

Court also said that there are other ways to protect those interests without requiring this particular type of burden on speech.

The holding of the Court in *McIntyre* was that § 3599.09(A)⁹ — the relevant statute in Ohio — abridged freedom of speech and was a violation of the First Amendment. The freedom of the public, the Court said, to anonymously campaign for or against a political issue was protected by the First Amendment and, the Court said, as it had previously held in *Talley v. California*,¹⁰ that this freedom extends beyond just the literary realm to the advocacy of political issues. By the way, *Talley v. California*, which was decided some years earlier, struck down an ordinance in the City of Los Angeles which was an absolute prohibition of anonymous leafleteering. It was not limited to political speech, but applied to all leaflets. The speech could have been political or it could have been commercial advertising, but the statute was an absolute ban on anonymous leafleteering. The Supreme Court said in *Talley* that prohibition was not permissible and struck down that ordinance. The *McIntyre* Court did say that a state might somehow demonstrate that its enforcement interest justifies a more limited identification requirement regarding campaign literature, but that the Ohio statute did not meet that burden.¹¹

Now this particular decision by the Supreme Court was a seven-to-two decision. Five members of the Court joined in the majority opinion. One member of the Court, Justice Ginsburg, wrote a concurring opinion, and Justice Thomas concurred in the judgment. Justice Scalia filed a dissenting opinion and Chief Justice Rehnquist joined in that opinion. The dissent is interesting because it takes a very practical approach to this problem. The dissent notes that every state in the union with the exception of California — probably because of *Talley* — has a very similar type of prohibition against anonymous campaign literature. Justice Scalia says, in effect, 'What are all these states going to have to do? Is this going to mean a wholesale reexamination of every statute in the United States that has to do with campaign literature?' He appeared to think that the majority was doing too much reexamination in solving this problem, but two justices in dissent cannot carry the day.

9. OHIO REV. CODE § 3599.09(A) (Anderson 1988).

10. 362 U.S. 60 (1960).

11. *McIntyre*, 115 S. Ct. at 1522.

As previously noted the *McIntyre* decision will impact every state which has such a statute. Indeed, Oklahoma has a statute that is similar to the Ohio statute. The Oklahoma statute is found in Title 21, § 1840,¹² and it is, interestingly enough, headed "Anonymous Campaign Literature." This statute will probably have difficulty standing as a result of this case. It is not, however, as broad as Ohio's statute. In fact, in light of the 1987 10th Circuit decision *Wilson v. Stocker*,¹³ which held the previous Oklahoma anonymous campaign literature violation statute unconstitutional, there seem to have been some changes that were made in the Oklahoma statute to perhaps coat it with the patina of constitutional respectability. It, for example, deals more with identifying who was *responsible for paying for the literature* than with just being responsible for the literature.¹⁴

The Court in *McIntyre* did indicate that its previous decisions that approved restrictions upon information or requirements of information relating to campaign expenditures still stand. *First National Bank of Boston v. Bellotti*¹⁵ is a landmark case in requiring that type of disclosure. The *Valeo*¹⁶ case was another one that fell within that area, and the Supreme Court said both of those cases still stand. It is still possible to have a legitimate overriding state interest in protecting the election process by having those types of financial requirements, but states cannot require individuals, particularly, to place their names upon the writings that they disseminate.

I think that the questions that remain unanswered at this point involve whether this rule that is set down in *McIntyre* is going to apply to political committees, campaign committees, and more expensive campaigns — remember, Ms. McIntyre was writing this at home on her computer and paying a copy shop to print up a few sheets. As in all good Supreme Court decisions, the answer is "we don't know."

12. OKLA. STAT. tit. 21, § 1840(A) (Supp. 1996) provides:

It shall be unlawful for any person . . . to cause to be broadcast, written, printed, posted or distributed a statement, circular, poster, or advertisement which is designed to influence the voters on the nomination or election of a candidate or to influence the voters on any constitutional or statutory amendment or on any other issue in a state, county, city, or school district election, or to influence the vote of any member of the Legislature, unless there appears in a conspicuous place upon such circular, poster, or advertisement, or within a broadcast statement, either the name and address of the person who paid for the communication if an individual, or the name and address of the president, chairman, or secretary, or two officers of the organization, if an organization which paid for the communication.

13. 819 F.2d 943 (10th Cir. 1987).

14. OKLA. STAT. tit. 21, § 1840(A) (Supp. 1996).

15. 435 U.S. 765 (1978).

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

However, this does show at least that the current Supreme Court recognizes that there is a First Amendment, which is something that I appreciate. I hope that in the next term, there will be some decisions that show the Court is just as willing to enforce the rights provided by the First Amendment for people who are involved in non-political speech.