Free Speech & Election Law

Bailey v. Maine Commission on Governmental Ethics: Another Step Toward the End of Political Privacy

By Stephen R. Klein

Note from the Editor:

This article discusses the *Bailey v. Maine Commission on Governmental Ethics* decision in federal district court. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about the issues involved. To this end, we offer links below to the *Bailey* decision and an alternative perspective on *Citizens United*, and we invite responses from our audience. To join the debate, please e-mail us at info@fed-soc.org.

Related Links:

- Bailey v. Maine Commission on Governmental Ethics, 2012 WL 4588564 No. 1:11-CV-00179-NT, (D. Me. Sept. 30, 2012): http://www.gpo.gov/fdsys/pkg/USCOURTS-med-1_11-cv-00179/pdf/USCOURTS-med-1_11-cv-00179-3.pdf
- Monica Youn, *Citizens United*: The Aftermath, American Constitution Society Issue Brief (June 2010): http://www.acslaw.org/Youn%20-%20Citizens%20United.pdf

Introduction

"The Cutler Files" was a blog that existed for two months in late 2010 and cost a total of $91.38 to host on the Internet.[1] The blog contained a home page and nine other posts opposing Eliot Cutler, then-candidate for Governor of Maine.[2] The posts "call[ed] Cutler names, show[ed] unflattering photos of him and use[d] altered photos to poke fun at him."[3] The Cutler campaign called for an investigation by the Maine Commission on Governmental Ethics and Election Practices, claiming the blog qualified as "express advocacy" against Cutler's election under Maine election law.[4] The blog was authored anonymously by Maine resident Dennis Bailey, who revealed himself following the investigation and $200 fine by the Commission.[5] Bailey then brought suit against the Commission for violating his First Amendment right to free speech.

In *Bailey v. Maine Commission on Governmental Ethics*, Judge Nancy Torresen affirmed the $200 fine against resident Dennis Bailey.[6] The blog violated a Maine campaign finance law that requires any expenditure "expressly advocating the election or defeat of a clearly identified candidate through . . . publicly accessible sites on the Internet" to "clearly and conspicuously state that the communication is not authorized by any candidate and state the name and address of the person who made or financed the expenditure for the communication."[7] Judge Torresen rejected each of Bailey's claims in summary judgment. Bailey declined to appeal the decision. In short, a federal court upheld a fine against an anonymous political blogger for blogging politically.

Judge Torresen's reasoning is in one sense just another step toward prying victory from the jaws of defeat in the *Citizens United* decision.[8] Perhaps due to the continued controversy around the case, judges have built a lower-court consensus that allows the Federal Election Commission (FEC) and state election commissions to force speakers to fill out forms, tag on disclaimers and comply with other red tape simply to engage in politics.[9] They call this regime "disclosure," and failure to comply or improper compliance means fines or other penalties, as Bailey discovered.[10] However, the *Bailey* case goes farther than the growing disclosure consensus, and may represent the beginning of the end of political privacy. Once limited to following money in politics, if the *Bailey* ruling catches on, disclosure regimes may reach even the smallest expenditures, effectively negating the political privacy once recognized in First Amendment jurisprudence. This is because *Bailey*'s attempt to resolve the tension between *Citizens United* and *McIntyre v. Ohio Elections Comm'n*—one of the Supreme Court's most celebrated political privacy decisions—is to all but state that *McIntyre* is a dead letter.

Part I of this article discusses the disclosure regime upheld in *Citizens United* and gives a brief overview of how lower courts have recently expanded the Supreme Court's reasoning, applying blanket approval to any "disclosure" regime. Part II analyzes the *Bailey* ruling, and shows that it may go to such lengths as to impose campaign finance disclosure upon any political speech. Finally, Part III offers a way back, with a call to restore the exacting scrutiny standard, limit the government's "informational interest" and, at the very least, raise the financial thresholds for campaign finance law. Ultimately, any efforts at protecting political speech must begin with understanding that despite the weight of *Citizens United*, there are still myriad problems with federal and state campaign finance regimes.

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I. Disclosure Since *Citizens United*

Citizens United v. FEC overturned the prohibition on electioneering communications and independent expenditures by unions and corporations.[11] In the same ruling, the Supreme Court addressed Citizens United's as-applied challenge against the FEC's disclaimer and disclosure regime, and upheld a very narrowly tailored system for electioneering communications. Before discussing this, it's necessary to provide some background about electioneering communications.

Until *Citizens United*, corporations were entirely prohibited from using their own treasury funds to pay for speech supporting the election or defeat of a federal candidate, known as independent expenditures.[12] Electioneering communications, however, are a narrowly defined type of political advertisement introduced in the Bipartisan Campaign Reform Act (BCRA), also known as McCain-Feingold.[13] A reaction to "sham issue advocacy"[14]—ads that discuss federal candidates or convey their positions on issues without specifically calling for their election or defeat—BCRA sought to prohibit corporations and unions from broadcasting any television or radio advertisement that merely *mentioned* a federal candidate within 60 days of a general election or 30 days of a primary. In 2007, however, in *FEC v. Wisconsin Right to Life* the U.S. Supreme Court ruled that corporations could broadcast electioneering communications so long as they were not the "functional equivalent of express advocacy."[15] Thus, going into its case Citizens United could only produce these kinds of electioneering communications or non-express advocacy (i.e., issue advocacy) messages that fell outside of the 30-60 day window, and this was the focus of its as-applied challenge to disclaimer and disclosure requirements.

The Supreme Court affirmed the disclaimer and disclosure requirements of electioneering communications in *Citizens United*.[16] Disclaimer requirements (identification on advertisements) cover "any person [who] makes . . . a disbursement for an electioneering communication . . . ."[17] Disclosure (reporting to the government) is required of any person who spends more than $10,000 on electioneering communications.[18] According to the Court, "[d]isclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities.'"[19] With broad language, the majority opinion (a consensus of 8-1 for this part of the opinion[20]) spoke glowingly about campaign finance disclosure, supporting the government's "informational interest" in informing voters about the person or group who is speaking.[21] It rejected Citizens United's argument that the requirements should only apply to electioneering communications that are the functional equivalent of express advocacy.[22] It acknowledged one exception to disclosure, reiterating *Buckley v. Valeo*'s protection for groups that can "show a reasonable probability that disclosure of its contributors' names will subject them to threats, harassment, or reprisals from either Government or private parties."[23] Citizens United failed to qualify for this exception.[24]

Reading this section of the opinion, the Federal Election Commission, numerous state election commissions and many courts have interpreted *Citizens United*'s affirmation of disclosure requirements for narrowly defined electioneering communications as a stamp of approval on any "disclosure" regimes applied to any groups engaged in political speech.[25] Although the Court was addressing an as-applied challenge to disclosure of electioneering communications, the most exactingly-defined speech regulation in federal campaign finance law for both disclaimers and disclosure, other rulings remove disclosure principles entirely from this context. For example, the Fourth Circuit recently applied *Citizens United*'s disclosure ruling to uphold political committee status, a far more onerous regulatory regime than disclosure of electioneering communications.[26] The Seventh Circuit recently interpreted *Citizens United*'s disclosure discussion so powerfully that it ruled Illinois need not include a major purpose test in laws that define political committees, a test once considered essential to prevent overbreadth.[27] These are both not only expansive definitions, but oppose previous Supreme Court rulings that address political committee status.[28]

Meanwhile, the reprisal exception to disclosure is now little more than a joke in campaign finance law. The Supreme Court granted the Socialist Workers Party an exemption in 1982, and the FEC recently re-affirmed this exemption until 2016.[29] However, cases such as *ProtectMarriage v. Bowen* have narrowed the exemption despite harassment and reprisals,[30] effectively limiting the exemption to the Socialist Workers Party and perhaps the NAACP.[31]

Overbroad application of *Citizens United* and narrowing of the reprisal exemption are very important issues, respectively, but the *Bailey* decision effectively combines them and takes an extra step toward eliminating political privacy entirely.

II. *Bailey*: the Inevitable Conclusion of Modern Disclosure

A number of cases have taken the position that *Citizens United* provided blanket approval for campaign finance disclosure. However, the recent *Bailey* case shows that the broad interests used to justify disclosure, along with the belief that disclosure puts little burdens on speech, may now take "finance" out of "campaign finance" law. There is now precedent to place disclosure on political blogging, with reasoning that effectively overturns *McIntyre v. Ohio Elections Commission*.[32]

A. McIntyre *(1995)*

Since *McIntyre* is a key focus of the *Bailey* decision, it is necessary to provide a brief background. In the late 1980s, Margaret McIntyre distributed leaflets at a public meeting at a school in Ohio.[33] The leaflets, printed on McIntyre's home computer, urged readers to vote against a proposed tax levy for school financing.[34] Some of the leaflets lacked any signature, while others were signed "Concerned Parents and Tax Payers."[35] A school official who supported the tax levy reported McIntyre to the Ohio Elections Commission, which imposed a fine against McIntyre for violating a statute that at the time stated:

> No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed to . . . promote the adoption or defeat of any issue, or to influence the voters in any election . . . unless there appears on such

> form of publication in a conspicuous place or is contained within said statement the name and residence . . . of the . . . person who issues, makes or is responsible therefor.[36]

Ohio argued that the ordinance was justified on the basis that it served to prevent fraudulent and libelous statements, and "provid[ed] the electorate with relevant information."[37] The Court rejected the latter interest, considering it forced speech.[38] For preventing fraud, the Court ruled that more narrowly tailored Ohio law addressed the concern.[39] "[T]he prohibition encompasses documents that are not even arguably false or misleading. It applies not only to the activities of candidates and their organized supporters, but also to individuals acting independently and using only their own modest resources."[40] After rejecting Ohio's prohibition on anonymous speech, the Court distinguished campaign finance disclosure: "even though money may 'talk,' its speech is less specific, less personal, and less provocative than a handbill . . . ."[41]

Nevertheless, the Court reaffirmed the importance of political speech and its ties to anonymity. "[E]ven 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."[42] Extensive footnotes throughout the opinion detail numerous examples of such advocacy, including the *Federalist Papers*.[43] Like *Citizens United*, *McIntyre*'s influence should not be confined to its specific ruling.

But today, following *Bailey*, *McIntyre*'s protection is practically nonexistent.

B. Bailey *(2012)*

Following his $200 fine,[44] Dennis Bailey sued the Maine Commission on Governmental Ethics on numerous counts, including three constitutional claims.[45] This section discusses two of these claims: an as-applied First Amendment claim against Maine Revised Statute 21-A, § 1014 and an as-applied challenge to the "application" of the same statute, a *de minimis* argument.[46] The remaining constitutional claim was an equal protection challenge following the Maine Commission's failure to afford Bailey's blog coverage under the law's press exemption.[47] This is an important discussion, one that the author suspects is stewing beneath the expansion of campaign finance disclosure,[48] but is beyond the scope of this article. Simply, the press exemption would not be an issue if campaign finance regulation were held to its proper scope in the first place.

1. First Amendment Challenge

Because of the close parallels to *McIntyre*, *Bailey* discusses its ramifications following *Citizens United*. Where Ohio imposed campaign finance disclosure laws on leaflets, Maine imposes them on "publicly accessible sites on the Internet."[49] Judge Torresen joins other courts in reading *Citizens United* broadly: "For purposes of the present case, *Citizens United* is important because . . . it revalidated the constitutionality of disclosure requirements by an eight to one vote."[50] Judge Torresen also relies on a previous failed challenge to Maine's disclosure law in the First Circuit, *National Organization for Marriage v. McKee*, and quotes its articulation of the informational interest, which meets the requirements of the exacting scrutiny placed on disclosure laws: "Citizens rely ever more on a message's source as a proxy for reliability and a barometer of political spin. Disclosing the identity and constituency of a speaker engaged in political speech thus 'enables the electorate to make informed decisions and give proper weight to different speakers and messages'"[51]

After making quick work of Bailey's lack of qualification for a retribution exemption,[52] what follows is a distinction of *McIntyre* that is inversely proportional to the broad reading given to *Citizens United*:

> This case is distinguishable from *McIntyre* in several ways. First, section 1014 is not comparable to the Ohio law at issue in *McIntyre.* It is a narrowly drawn expenditure-based law dealing with express advocacy of candidates rather than communications related to ballot initiatives. Second, Bailey was expressly advocating the defeat of a candidate for Governor shortly before an election. Third, the Plaintiff is no Mrs. McIntyre. Bailey is a well-known political figure in Maine who was a paid consultant on two separate campaigns during the 2010 gubernatorial election, and who was working for an opposing candidate when he posted the Cutler Files. Fourth, given his association with the other campaigns, it can hardly be said that Bailey acted independently in the same sense that Mrs. McIntyre acted. He had the assistance of the husband of another candidate from the primary election. Fifth, the Cutler Files's attribution claim that it was created by individuals "not . . . affiliated with any candidate" was false. Finally, during the two months that the Cutler Files was available online, visitors to the site made 46,989 page requests. Although the Plaintiff acted alone to post the site and spent a relatively small amount of money to do so, his message was heard far and wide. The State's interest in an informed electorate is near its zenith where a widely-viewed website falsely claiming to be written by journalists unaffiliated with any campaign expressly advocates the defeat of an opposing candidate shortly before a state-wide election.[53]

At the outset, Judge Torresen suggests that "expenditure-based" laws avoid overbreadth by targeting money spent in politics rather than political speech. This is immediately suspect because the money Bailey expended was below $100, and suggests that so long as Maine tracks one's political spending, *McIntyre*-like results are acceptable. Judge Torresen does not consider the First Amendment chill that arises simply from empowering a government agency to investigate one's political activity in order to tally up such a low number.[54] The threshold itself is far too low, but it's equally troubling that the door is opened to focus in on the cost of ink cartridges, electricity expended to print fliers, or even gas expended to drive to a school to distribute leaflets.

The second point is true, as this was indisputably express advocacy against Eliot Cutler's election. However, the third and fourth points are directly at odds with well-established campaign

finance precedent. Political operatives often wear many hats, and they do not sacrifice the ability to engage in private political endeavors or to hold political opinions independently of their employers. In fact, a "well-known political figure" could have an even greater interest in anonymity per *McIntyre*, since anonymity "provides a way for a writer who may be personally unpopular to ensure that readers will not prejudice her message simply because they do not like its proponent."[55] Coordination, or "shadow campaigns" are a relevant concern in campaign finance law, but, again, there was minimal financing for this endeavor. Despite Judge Torresen's distinction, Maine's law reached "pure speech" in this instance.[56] Even where money is concerned, within established political organizations courts have upheld the use of segregated bank accounts for distinct "soft money" and "hard money" political activities, indicating that political money is not necessarily fungible.[57] The same recognition should be given to the activities of individuals who work for political organizations, large and small: guilt-by-association is as antithetical to free speech as it is criminal law.

Judge Torresen's fifth point is particularly interesting, as it does not actually distinguish *McIntyre*. In addition to anonymous pamphlets, Mrs. McIntyre also signed some of her leaflets with "Concerned Parents and Taxpayers."[58] If indeed McIntyre acted independently—the crux of Judge Torresen's previous two distinctions—then McIntyre's attribution was just as misleading as Bailey's disclaimer stating he was unaffiliated with any candidate. The rest of Bailey's disclaimer included "We are a group of researchers, writers and journalists,"[59] and although Bailey acted largely alone in writing the blog, he "has a degree in journalism from the University of Maine and . . . worked as a reporter for several Maine newspapers and as a freelance reporter for several national publications."[60] Once again, this part of Bailey's life was apparently irrelevant for purposes of his political speech.

Judge Torresen's final point—the effectiveness of Bailey's speech—is perhaps the most chilling of all. The Internet is the most democratic outlet for mass media in world history, where speech can indeed reach 50,000 people (or many, many more) with the barest expenditure of money.[61] To suggest that campaign finance disclosure may reach speech of this kind on the basis of its popularity, which cannot be controlled by a speaker outside of a decision not to speak at all, risks exposing all participants in political discourse to disclosure. This idea may be catching on: an Illinois state senator recently introduced a bill requiring disclosure for anyone seeking to make online comments.[62]

For these reasons, Judge Torresen concludes that "*Citizens United* and *Buckley*, rather than *McIntyre*, are the appropriate precedents to follow in this case."[63] She concludes that fear of reprisal is the only way to be exempt from disclosure, and that Bailey failed to make this showing.[64]

2. *De Minimis* Challenge

Bailey's expenditure of a total of $91.38 to publish The Cutler Files has implications in the first challenge, but since expenditures were not technically at issue in *McIntyre*,[65] Judge Torresen considers a *de minimis* challenge separately. Judge Torresen discusses two cases, *Vote Choice, Inc. v. DiStefano*[66] and *Canyon Ferry Road Baptist Church v. Unsworth*.[67]

Vote Choice involved "first dollar" disclosure requirements for political committees, or PACs.[68] Under Rhode Island law, PACs must disclose every contribution they receive to the Rhode Island Board of Elections, and the First Circuit upheld this as "not, in all cases, constitutionally proscribed."[69] For this reason, Judge Torresen concludes that rational basis review applies to Maine's disclosure threshold, currently $0 for any "expenditure for a qualifying communication."[70] In *Canyon Ferry*, the Ninth Circuit ruled that requiring disclosure of a church's *de minimis* expenditure in support of a ballot initiative was unconstitutional.[71] However, since this was a ballot measure—more akin to issue advocacy—Judge Torresen distinguishes it and dismisses its persuasiveness.[72]

The closing is then brief:

> The Court does not foreclose the possibility that in the appropriate case an expenditure could be so *de minimis* that application of the disclosure requirement would not be constitutional, but this is not that case. The Plaintiff's expenditures for the Cutler Files were over $90. The Plaintiff has failed to establish facts sufficient to support a reasonable inference that the Cutler Files represented a *de minimis* expenditure.[73]

Importantly, a footnote following the second sentence of this excerpt reads:

> Section 1019-B places a significant reporting burden on persons making expenditures over $100. The Plaintiff argues that because § 1019-B has a $100 threshold, an expenditure under § 1014 under $100 is *de minimis*. This argument mixes apples and oranges and completely disregards the State's recordkeeping interest.[74]

There are several problems with this analysis. Judge Torresen's reliance on *Vote Smart* is apples-and-oranges itself, since it discussed PACs. PACs can contribute money directly to candidates, thus justifying a low threshold for disclosure due to the risk of *quid pro quo* corruption. Bailey's speech was, according to this ruling, an "expenditure." *Citizens United* ruled that independent expenditures "do not give rise to corruption or the appearance of corruption."[75] Although the informational interest justified disclosure in *Citizens United*, the case makes it very clear that PAC-style disclosure is not to be placed on grassroots speakers: "The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech."[76] The Court's citation to this reaffirms to *FEC v. Massachusetts Citizens for Life*, specifically the page where the Court previously ruled that narrow, limited disclosure is sufficient for small groups or individuals who are not PACs.[77] Thus, a $0 threshold for PAC contributions should have little to no bearing on a threshold for independent expenditures, especially as loosely as Maine defines the term.

Whether or not ballot measure advocacy or candidate advocacy can maintain a relevant distinction when the money involved is so low, one is left to wonder how expenditures could be less than the current $0 threshold under Maine law,

or at most the $91.38 precedent set by *Bailey*. This also begs the question of whether anyone would dare take a stand like Bailey to try and find this *de minimis* exception. Bailey is likely saddled with attorneys' fees and court costs far higher than his initial expenditure; the fine from the Maine Commission is likely nominal at this point. It is far more likely that political bloggers of all stripes in Maine must comply, risk a $200 fine, or simply not speak.

On so many technicalities, *McIntyre* is distinguished, yet it is hard to believe that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of freedom of speech protected by the First Amendment."[78] Now, according to Judge Torresen's ruling, in the state of Maine it is appropriate to impose burdensome campaign finance regulations to blog posts that cost under $10 apiece.[79] Speaking mildly, this untenable paradigm must end.

III. Restoring Disclosure to its Proper Place

As a practical matter, the broad "disclosure" upheld since *Citizens United* flies in the face of what the case set out to remedy. Like *McIntyre*, the principles reaffirmed in *Citizens United* have been lost in application:

> This regulatory scheme may not be a prior restraint on speech in the strict sense of that term, for prospective speakers are not compelled by law to seek an advisory opinion . . . before the speech takes place. . . . As a practical matter, however, given the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against . . . enforcement must ask a governmental agency for prior permission to speak.[80]

It is possible that other judges may read the *Bailey* decision as narrowly as Judge Torresen read *McIntyre*. Although Bailey's identity should have little to do with his First Amendment rights, he was indeed a particularly well connected (and well paid) political operative whose blog was published for only two months leading up to the election in question.[81] But, at best, this amounts to a balancing test no one can reasonably rely upon.

Political bloggers should not be forced to consider their status in the community, who their friends are, who they're blogging with, how long their blog has existed (and how long it will exist), the cost of web hosting, and the possibility that their speech will be popular before determining whether they must comply with campaign finance disclosure. There is no reliable answer to this test—from ordinary citizens, experienced campaign finance attorneys, or elections commissions. Only after a lawsuit like Bailey's will those affected have a reliable answer, leaving the only meaningful answer as compliance with disclaimer laws and recognition that *McIntyre* is indeed a dead letter.

There are numerous ways to restore disclosure to its proper place, each of which would remedy *Bailey*'s results and restore *McIntyre*'s precedent. Indeed, judges and lawmakers alike should go farther, and expand protections of anonymous speech, but these are more immediate remedies.

First, the exacting scrutiny standard applied to disclosure laws must be clarified by the Supreme Court. Once considered close to strict scrutiny—indeed, sometimes used synonymously[82]—the Federal Election Commission now describes it as "intermediate scrutiny,"[83] which some courts have accepted.[84] Although even the *Bailey* decision describes it as "a *slightly* less rigorous" standard,[85] the results show this is not the case. When disclaimers are required with no expenditure threshold and complex reporting requirements begin at $100, as they do in Maine, government should be required to show a compelling governmental interest that is narrowly tailored.

Second, when considering exacting scrutiny, courts must add contours to the nebulous "informational interest." Though dating back to *Buckley v. Valeo*, the interest has greatly expanded. Once tied closely to dissuading corruption or its appearance, now the interest is practically limitless in some courts.[86] This is especially true since the one way to avoid disclosure—proving threats of retaliation—is impossible to establish.[87] Government has little place serving as a ministry of political information; the First Amendment is a restriction on government power, and this may not be ignored due to calls for government to open avenues for more speech.[88] Although courts almost uniformly reject exemption claims, they must re-affirm *Buckley*'s acknowledgement that "scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure."[89] For nearly five years after the Proposition 8 ballot measure campaign in California, the website Prop 8 Maps maintained a birds-eye view of the homes of donors who contributed as little as $85 to voice support of traditional marriage.[90] This was not disclosure: this was indirect abridgment of speech.

Finally, federal and state legislatures need to take notice of *Bailey*'s absurd result. Although the campaign finance reform community continues to insist such laws enhance our democracy by providing grassroots speakers with information about big money in politics, the current laws impose onerous disclaimer and disclosure requirements on the very people expected to engage in our republican government to counteract this influence. Even some who largely support campaign finance disclosure have acknowledged that thresholds should be raised in the name of privacy.[91] This author proposes that the absolute bare minimum campaign finance threshold for any campaign finance regulations—be it for individuals or groups—should be $50,000 of expenditures. This threshold would provide ample breathing room for grassroots speakers up to a point where, realistically, a group of citizens would take on a more sophisticated organizational form in any event. Ideally, campaign finance law would be entirely removed from political discourse, and focus solely on political contributions, but this proposal is a bare minimum to recognize the burdens disclosure laws place on grassroots advocacy.[92]

Simply because the Supreme Court removed bans on speech in *Citizens United* does not alleviate the burdens of laws that are not blanket prohibitions. At the very least, blogging,

like leafleting, must be left undisturbed by disclosure laws, for "[t]he freedom to publish anonymously extends beyond the literary realm."[93]

Conclusion

In most ways, Dennis Bailey is the modern day version of Mrs. McIntyre. The Internet is the virtual town square, or school board meeting, where one has an unlimited ability to speak and audiences simultaneously enjoy a largely unlimited ability to choose what they read, watch or hear. The *Bailey* decision is from one federal district court in Maine, and it was not even noticed by many in the election law community until about seven months after it was decided.[94] Its influence is far from certain. Nevertheless, its refusal to apply *McIntyre* to the Internet, its creation of a confusing test that could leave all bloggers in doubt, and its casual dismissal of a *de minimis* exception from disclosure is a call for reigning in campaign finance disclosure as powerfully as *Citizens United* overturned speech bans. Political speech, the core of the First Amendment, demands nothing less.

Endnotes

1 900 F.Supp.2d 75, 78–80 (D. Me. 2012).

2 *Id.* at 79.

3 Susan M. Cover, *'Cutler Files' website focus of ethics probe*, Portland Press Herald, Sept. 24, 2010, *available at* http://www.pressherald.com/news/cutler-files-website-focus-of-ethics-probe_2010-09-24.html.

4 *Id.*

5 Beth Quimby, *Moody consultant Dennis Bailey admits to hand in Cutler Files*, BDN Maine, Dec. 24, 2010, *available at* http://bangordailynews.com/2010/12/24/politics/moody-consultant-dennis-bailey-admits-to-hand-in-cutler-files/.

6 *Bailey*, 900 F.Supp.2d at 95.

7 Me. Rev. Stat. tit. 21-A, § 1014 (2012); "In contrast to the reporting requirements of section 1019-B, which has a $100 threshold, section 1014 applies to any expenditure for a qualifying communication." *Bailey*, 900 F.Supp.2d at 91–92.

8 *See* Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010).

9 See, e.g., *Free Speech v. Federal Election Commission*, Wyo. Liberty Grp, http://wyliberty.org/legal-center/free-speech-v-federal-election-commission/.

10 *Bailey*, 900 F.Supp.2d at 95.

11 *Citizens United*, 558 U.S. at 365.

12 Despite being overturned, this law remains in the United States Code. *See* 2 U.S.C. § 441b (2012).

13 (3) Electioneering communication

For purposes of this subsection--

(A) In general

(i) The term "electioneering communication" means any broadcast, cable, or satellite communication which--

(I) refers to a clearly identified candidate for Federal office;

(II) is made within--

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

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(4) Disclosure date

For purposes of this subsection, the term "disclosure date" means--

(A) the first date during any calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000; and

(B) any other date during such calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000 since the most recent disclosure date for such calendar year.

2 U.S.C. § 434(f).

14 *See* S. Rep. No. 105-167, vol. 4, p. 4468–80, 4480–81, 4491–94.

15 551 U.S. 449, 476–82 (2007).

16 130 S.Ct. at 916; *see* 2 U.S.C. § 441d.

17 2 U.S.C. § 441d(a).

18 2 U.S.C. § 434(f).

19 *Citizens United*, 130 S.Ct. at 914.

20 *See id.* at 886.

21 *Id.* at 913–16.

22 *Id.* at 915.

23 *Id.* at 914 (*citing* McConnell v. Federal Election Comm'n, 540 U.S. 93, 198 (2003) (*citing* Buckley v. Valeo, 424 U.S. 1, 74 (1976))).

24 *Id.* at 916 (internal quotations omitted).

25 *See, e.g.*, Nat'l Organization for Marriage v. McKee, 649 F.3d 34, 55–56 (1st Cir. 2011) (citing *Citizens United* in support of Maine's "non-major-purpose PAC" provision, requiring registration and reporting of groups that receive contributions or expend more than $5,000 annually "for the purpose of promoting, defeating or influencing [a candidate's election] *in any way.*" (emphasis added)); Real Truth About Abortion v. Federal Election Comm'n (RTAA), 681 F.3d 544, 549 (4th Cir. 2012) (equating the "disclosure" affirmed in *Citizens United* with federal political committee (PAC) requirements). *But see* Minnesota Citizens Concerned for Life v. Swanson, 692 F.3d 864, 875 (8th Cir. 2012) (en banc) ("We question whether the Supreme Court intended exacting scrutiny to apply to laws such as this, which subject associations that engage in minimal speech to 'the full panoply of regulations that accompany status as a [PAC].'").

26 *RTAA*, 681 F.3d at 548–49. *See infra* notes 68–70 and accompanying text.

27 Center for Individual Freedom v. Madigan, 697 F.3d 464, 486–491 (7th Cir. 2012); *cf.* Federal Election Comm'n v. GOPAC, 917 F.Supp. 851, 861–62 (D.D.C. 1996).

28 *See, e.g.*, Federal Election Comm'n v. Massachusetts Citizens for Life (MCFL), 479 U.S. 238 (1986).

29 Brown v. Socialist Workers '74 Campaign Cmte., 459 U.S. 87, 102–03 (1982); Advisory Opinion 2012-38 (Socialist Workers Party), Federal Election Comm'n, Apr. 25, 2013, at 11, *available at* http://saos.nictusa.com/aodocs/AO%202012-38.pdf ("In sum, based on the record presented, the Commission grants this partial reporting exemption to reports covering through December 31, 2016.")

30 830 F.Supp. 2d 914 (E.D. Cal. 2011).

31 *See* Nat'l Ass'n for the Advancement of Colored People v. Alabama, 357 U.S. 449 (1958).

32 514 U.S. 334 (1995).

33 *Id.* at 337.

34 *Id.*

35 *Id.* at n.2.

36 Ohio Rev. Code. Ann. § 3599.09(A) (1988).

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

38 *Id.* at 348–49.

39 *Id.* at 349.

40 *Id.* at 351.

41 *Id.* at 355.

42 *Id.* at 342–43.

43 *See, e.g.*, *id.* at 343 n.6.

44 *See supra* notes 1–3 and accompanying text.

45 *Bailey*, 900 F.Supp.2d at 80.

46 *Id.* at 81–86, 91–93.

47 *Id.* at 87–92.

48 *See generally* 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). Interestingly, *Bailey* is already having influence in this regard. In *Citizens for Secular Government v. Gessler*, an ongoing challenge against Colorado disclosure laws that is currently moving between the state and federal courts, the Colorado Secretary of State argues that that a lengthy policy paper containing but one line of express advocacy for the defeat of a ballot measure is subject to campaign finance regulation and does not qualify for a press exemption. *See* Coalition for Secular Government Reply Brief, Coalition for Secular Government v. Gessler, Case No. 2012SA312 (Col. 2013) at 14, *available at* http://www.campaignfreedom.org/wp-content/uploads/2013/02/CSGReplyBr.pdf.

49 Me. Rev. Stat. tit. 21-A, § 1014 (2012).

50 *Bailey*, 900 F.Supp.2d at 83.

51 649 F.3d at 57 (*citing Citizens United*, 130 S.Ct. at 916).

52 *Bailey*, 900 F.Supp.2d at 84–85.

53 *Id.* at 86.

54 *See Citizens United*, 558 U.S. at 335 (noting "threats and heavy costs of defending against FEC enforcement . . . function as the equivalent of a prior restraint").

55 514 U.S. at 342. Strangely, Judge Torresen quotes this earlier in the opinion. *Bailey*, 2012 WL 4588564 at *6.

56 *McIntyre*, 514 U.S. at 345.

57 Emily's List v. Federal Election Comm'n, 581 F.3d 1, 15–19 (D.C. Cir. 2009).

58 *See supra* note 30 and accompanying text.

59 Bailey, 900 F.Supp.2d at 79.

60 *Id.* at 78.

61 *See, e.g.*, *Star Wars Kid*, YouTube, http://www.youtube.com/watch?v=HPPj6viIBmU (last visited October 28, 2013, with a recorded view count of 28,528,937).

62 Josh Peterson, *Illinois State Senatore Pushes Anti-Anonymity Bill*, Daily Caller, Feb. 21, 2013, http://dailycaller.com/2013/02/21/illinois-state-senator-pushes-anti-anonymity-bill/.

63 *Bailey*, 900 F.Supp.2d at 86.

64 *Id.*

65 *Id.*

66 4 F.3d 26 (1st Cir. 1993).

67 556 F.3d 1021 (9th Cir. 2009).

68 4 F.3d at 31–40.

69 *Id.* at 33.

70 *Bailey*, 900 F.Supp.2d at 92; *see also* Me. Rev. Stat. tit. 21-A, § 1014 (2012).

71 *Canyon Ferry*, 556 F.3d at 1033.

72 *Bailey*, 900 F.Supp.2d at 92.

73 *Id.*

74 *Id.* at 93 n.29.

75 *Citizens United*, 510 U.S. at 357.

76 *Id.* at 369, *citing MCFL*, 479 U.S. at 262.

77 *MCFL*, 479 U.S. at 262 ("The state interest in disclosure . . . can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee under the Act.")

78 *McIntyre*, 514 U.S. at 342.

79 *Bailey*, 900 F.Supp.2d at 79.

80 *Citizens United*, 558 U.S. at 335 (citations omitted).

81 Bailey, 900 F.Supp.2d at 79.

82 *See, e.g.*, Chandler v. City of Arvada, 292 F.3d 1236, 1241 (10 Cir. 2002) ("[W]e are persuaded Ordinance No. 3590 is subject to *strict* scrutiny. Arvada even acknowledges *exacting* judicial scrutiny is the appropriate legal standard applicable in this case." (emphasis added)); Service Employees Int'l Union v. Fair Political Practices Comm'n, 955 F.2d 1312, 1322 (9th Cir. 1992) ("The Supreme Court has applied a somewhat less stringent test than strict scrutiny to decide the constitutionality of contribution limitations. . . . However, the test is still a 'rigorous' one").

83 *See, e.g.*, Brief for Appellee Federal Election Commission, Free Speech v. Federal Election Comm'n, No. 13-8033 (10th Cir. 2013), at 15, *available at* http://www.fec.gov/law/litigation/freespeech_fec_brief.pdf.

84 *See, e.g.*, *RTAA*, 681 F.3d at 549.

85 *Bailey*, 900 F.Supp.2d at 82 (emphasis added).

86 *See, e.g.*, California Pro-Life Council v. Getman, 328 F.3d 1088, 1100–07 (9th Cir. 2003).

87 *See supra* notes 23–25 and accompanying text.

88 *See* Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 131 S.Ct. 2806, 2821 (2011) ("This sort of 'beggar thy neighbor' approach to free speech—'restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others'—is 'wholly foreign to the First Amendment.'").

89 *Buckley*, 424 U.S. at 65.

90 *See Prop 8 Maps*, http://www.eightmaps.com (active when visited on May 9, 2013; inactive as of September 2013).

91 *See, e.g.*, Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J. L. & Pol. 557, 565 (2012) ("[F]ederal, state, and local governments still should dramatically raise the reporting thresholds for campaign finance contributions.").

92 *See generally* Sampson v. Buescher, 625 F.3d 1247 (10th Cir. 2010).

93 *McIntyre*, 514 U.S. at 342.

94 *See, e.g.*, "U.S. District Court Rules Against Anonymous Blogging About Candidates," Election Law Blog, Apr. 29, 2013, http://electionlawblog.org/?p=49690.