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Constitutional Law - Particular Expressions and Limitations - North Dakota Statute Requiring Disclosure of the Identity of Sponsors of Campaign Literature Regarding Initiated Measures Is Unconstitutional

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CONSTITUTIONAL LAW—PARTICULAR EXPRESSIONS AND LIMITATIONS—NORTH DAKOTA STATUTE REQUIRING DISCLOSURE OF THE IDENTITY OF SPONSORS OF CAMPAIGN LITERATURE REGARDING INITIATED MEASURES IS UNCONSTITUTIONAL.

The North Dakota Education Association (NDEA)[1] was convicted of violating a statutory requirement which required sponsors of political advertisements to identify themselves.[2] The conviction was the result of an advertisement in a NDEA publication asking voters to vote "no" on an initiated measure.[3] The publication did not contain "the name or names of the sponsor of such advertisement."[4] The primary sponsor of the initiated measure signed a complaint against the NDEA alleging a violation of the North Dakota statute.[5] The case went to trial before a jury

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1. State v. North Dakota Educ. Ass'n., 262 N.W.2d 731 (N.D. 1978). The North Dakota Education Association (NDEA) is an association of a great majority of the classroom teachers in North Dakota. *Id.* at 732.

2. *Id.* The statute under which the NDEA was convicted was N.D. CENT. CODE § 16-20-17.1 (1969) which provides as follows:

> Each and every political advertisement, whether on behalf of or in opposition to any candadate for public office, initiated measure, referred measure or constitutional amendment, and whether such advertisement shall be by newspaper, pamphlet, or folder, display cards, signs, posters or billboard advertisements, or by any other public means, shall disclose at the bottom of same the name or names of the sponsors of such advertisement, and the name or names of the person, persons, associations, partnerships or corporations paying for such advertisement, except however, this section shall not apply to campaign buttons. At the close of every radio or television broadcast containing any advertising announcements or talk for or against any candidate for public office, any initiated measure, referred measure, or constitutional amendment to be voted on by the people, there shall be a announced at the close of said broadcast the name or names of the person, persons, associations, partnerships or corporations paying for such radio or television broadcast.

N.D. CENT. CODE § 16-20-17.1 (Supp. 1975) is exactly like the 1969 provision under which NDEA was convicted, except that the latter version required the sponsors to put their addresses on the publication in addition to their names.

3. 262 N.W.2d at 732. The measure to be voted on Initiated Measure No. 1, would have limited the state's total expenditures in each biennium. The NDEA distributes a publication known as the "North Dakota Education News" six times a year to its members and to other associations on its exchange list, to newspapers, radio and television stations, to all legislators, and to all libraries throughout the state. The publication involved in this case was an additional one distributed once a year to all classroom teachers in North Dakota, members and nonmembers alike. *Id.*

4. N.D. CENT. CODE § 16-20-17.1 (1969).

5. 262 N.W.2d at 732. Mr. Robert McCarney, the primary sponsor of Initiated Measure No. 1, signed the complaint alleging a violation of N.D. CENT. CODE § 16-20-17.1. (1969). *Id.*

and resulted in a conviction.[6] The NDEA contended that the statute violated its constitutional right to freedom of speech.[7] Three justices of the North Dakota Supreme Court *held* the statute which required sponsors of political advertisements to disclose their identity violated the constitutional guarantee of freedom of speech.[8] *State v. North Dakota Education Association, (NDEA)* 262 N.W.2d 731 (N.D. 1978).

The constitutional guarantee of freedom of speech was adopted by the framers of the Constitution in reaction to the restraints placed by England on publications of the colonists.[9] There had been a persistent effort on the part of the British for more than a century prior to the adoption of the free speech amendment to curtail any opinion criticizing the government.[10] One of the methods employed by the British to quash expressions of this sort was a tax on the material.[11] The colonists' revolt began when a tax of this type, stamps for newspaper duties, was sent to the American colonies.[12] The aim of these taxes was not to relieve the taxpayers from a burden, but to curtail the circulation of newspapers.[13]

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6. *Id.* Sentencing, however, was deferred until June 21, 1978, subject to the condition that the NDEA not violate the law for one year. *Id.*

7. *Id.* at 733.

8. *Id.* The majority in NDEA found that N.D. CENT. CODE § 16-20-17.1 (1969) violated both the first amendment of the United States Constitution and Section 9 of the North Dakota Constitution. U.S. CONST. amend. I provides as follows: "Congress shall make no law respecting 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 redress of grievances." N. D. CONST. art. I § 9 (1889) provides in part as follows: "Every man may freely write, speak and publish his opinions on all subjects, being responsible for the abuse of that privilege."

In North Dakota, four justices of the Supreme Court must agree in order to declare a statute unconstitutional. N. D. CONST. art IV § 88 (1975) provides as follows: "A majority of the supreme court shall be necessary to constitute a quorum or to pronounce a decision, provided that the supreme court shall not declare a legislative enactment unconstitutional unless at least four of the members of the court so decide." In NDEA, the majority of the court consisted of Justice Vogel, who wrote the opinion, Chief Justice Erickstad, and Justice Pederson. Justice Sand, who was joined by Justice Paulson, wrote a separate opinion, concurring in part and dissenting in part. This meant that Justice Sand's opinion had the effect of declaring N. D. CENT. CODE § 16-20-17.1 (1969) unconstitutional where it concurred and constitutional where it dissented. *See, infra* note 61-65.

9. Lovell v. Griffin, 303 U.S. 444, 451-52 (1938). *See* Near v. Minnesota, 283 U.S. 697, 714 (1931), Patterson v. Colorado, 205 U.S. 454, 462 (1907).

10. Grosjean v. American Press Co., 297 U.S. 233, 245 (1936). The struggle between the proponents of suppression of antigovernment expression, and those who asserted the right of freedom of expression was evidenced as early as 1644. In that year John Milton attacked an act of Parliament providing for censorship of the press previous to publication, in an article entitled "Appeal for the Liberty of Unlicensed Printing." *Id.*

11. *Id.* at 246. A tax was imposed by Parliament on all newspapers and advertisements in 1712. The major purpose of this "tax was to suppress the publication of comments and criticisms objectionable to the Crown." *Id.*

12. *Id.* at 246. England sent these stamps for newspaper duties to the American colonies in 1765. *Id.*

13. *Id.* at 246-48. The majority of newspapers curtailed were the less expensive ones, read by the masses of the people. The opponents of these "taxes on knowledge as they were called, wanted "to

Violent opposition met the taxes imposed by England and an attempt by one American colony to follow the English example of taxation.[14] Due to these past experiences, the framers of the Constitution were determined to preclude both the federal and state governments from imposing a restraint on the printing or circulation of publications.[15] The framer's major purpose was to preserve the press as a vital source of information, as a free press is "one of the great interpreters between the government and the people."[16] Not all restraints on expression, however, are expressly forbidden by the first amendment.[17] Courts, faced with the problem, must weigh the circumstances of each case and determine whether the reasons in support of the regulation or the detrimental effect of the regulation is weightier.[18]

The United States Supreme Court weighed the interests of the state against the right of freedom of speech in *Talley v. California.*[19] This case involved a statute which required the person who distributed the printed any handbill to disclose his name and address.[20] The issue presented to the *Talley* Court was whether or not this statute abridged the freedom of speech and press provided for under the United States Constitution.[21] In holding that this statute was void on its face, the *Talley* Court based much of its decision on historical reasoning.[22] The historical justifications used

establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government." *Id.* at 246-47.

14. *Id.* at 248. Four years before Congress proposed the first amendment, Massachusetts imposed a tax on all newspapers and magazines, and one year later imposed a tax on advertisement. Because of the opposition which these acts were met with, the tax on newspapers and magazines imposed in 1785 was repealed in 1786, and the tax imposed on advertisement in 1787 was repealed in 1788. *Id.*

15. *Id.* at 249. The federal government was prohibited from imposing these restraints on publications by the first amendment. This guarantee was extended to the states by the adoption of the fourteenth amendment. *Id.*

16. *Id.* at 249. Newspapers and magazines shed more light on public and business affairs than any other "instrumentality of publicity" which is necessary because an informed public is "the most potent of all restraints upon misgovernment." *Id.* at 250.

17. Schneider v. State, 308 U. S. 147, 161 (1939). It is left up to the courts to decide whether restraints on expression should be allowed or forbidden by the first amendment. *Id.* In addition to restrictions on expression there may also be "time, place and manner" restriction placed upon certain speech, e.g., commercial speech, which will not offend first amendment rights. Bates v. State Bar of Arizona, ____U. S. ____, 97 S. Ct. 2691, 2709 (1977).

18. 308 U.S. at 161. This weighing of the interests of the parties has been referred to as a balancing test. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-20, at 683 (1st ed. 1978).

19. 362 U.S. 60 (1960).

20. Talley v. California, 362 U.S. 60, 61 (1960). The statute provided as follows:

> No person shall distribute any hand-bill in any place under any circumstances, which does not have printed on the cover, or the face thereof, the name and address of the following:
>
> (a) The person who printed, wrote, compiled or manufactured the same
> (b) The person who caused the same to be distributed; provided, however, that in the case of a fictitious person or club, in addition to such fictitious name, the true names and addresses of the owners, managers or agents of the person sponsoring said handbill shall also appear thereon.

MUNICIPAL CODE OF THE CITY OF LOS ANGELES§ 28.06.

21. 362 U.S. at 60.

22. *Id.* at 64-65. If an author or distributor of a publication was forced to identify himself a fear

by the Court in *Talley* were similar to those used by the Constitution's framers in adopting provisions necessary to protect free speech.[23] The *Talley* Court held that the campaign literature disclosure statute was invalid because anonymity has been used "for the most constructive purposes."[24]

The question of the validity of the campaign literature disclosure statute was addressed in *Canon v. Justice Court for the Lake Valley Judicial District.*[25] The California court in this case held that the statute was not an unconstitutional violation of free speech.[26] The statute in *Canon,* however, was limited to writings which reflected upon the character of a political candidate instead of all writings in general.[27] Although the *Canon* court felt, as the Court in *Talley* did, that anonymity sometimes has useful purposes,[28] they concluded that this anonymity all too often lends itself to "smears" upon the candidates.[29] The California Court in *Canon* balanced the public interest of having complete information and clean elections with the loss of freedom of expression where the statute applied.[30] The court concluded that the public interest outweighed the loss in freedom of expression.[31]

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of reprisal would be created which would very well deter perfectly peaceful discussions of public matters of importance. *Id.* at 65.

23. *Id.* at 64-65. Anonymous writings have played an important role in the progress of mankind and have also allowed persecuted groups to criticize oppressive practices. England forced the colonies to disclose the names of printers, writers and distributors because it would lessen the circulation of literature critical of the English government. The Federalist Papers, written anonymously in favor of the adoption of the Constitution, is an example of an instance when anonymity was used. *Id. See supra* notes 10-16.

24. 326 U.S. at 65.

25. 61 Cal.2d 446, 393 P.2d 428, 39 Cal. Rptr. 228 (1964). The statute involved in *Canon* provided as follows:

> Every person is guilty of a misdemeanor who writes or causes to be written, printed, posted. or distributed any circular, pamphlet, letter, or poster which is designed to injure or defeat any candidate for nomination or election to any public office by reflecting upon his personal character or political action, unless there appears upon the circular, pamphlet, letter, or poster, in a conspicuous place, the name and address of the printer and either:
>
> > (a) the name and address of the chairman and secretary or the names and addresses of at least two officers of the political or other organization issuing it; or (b) the name and residence address, with the street and number, if any, of some voter of this State, who is responsible for it.

CAL. ELEC. CODE § 12047 (West 1961) (repealed).

26. Crown v. Justice Court for the Lake Valley Judicial Dist., 61 Cal.2d 446, ____, 393 P.2d 428, 39 Cal. Rptr. 228 ____ (1964). Although this statute was held by the *canon* court not to violate the guarantee of free speech, it was found to be unconstitutional in that the statute was discriminatory because it applied only to voters. *Id.* at 436.

27. *Id.* at ____, 393 P.2d at 431, 39 Cal. Rptr. at ____.

28. *Id.* at ____, 393 P.2d at 435, 39 Cal. Rptr. at ____. *See* Talley v. California, 362 U. S. 60, 65 (1960).

29. 61 Cal.2d at ____, 393 P.2d at 435, 39 Cal. Rptr. at ____. The *Canon* court also felt that requiring the disclosure of the sponsors reduced irresponsibility and also enables the public to appraise the source. *Id.*

30. *Id.* at ____, 393 P.2d at 436, 39 Cal. Rptr. at ____. The *Canon* court held that in the instance where the statute was applicable, the marginal decrease in freedom of expression was exceeded by the public interest in complete information and clean elections. *Id.*

31. *Id.*

Generally, courts faced with the issue of the constitutionality of campaign literature disclosure laws balance the competing interests.[32] A federal law which required the disclosure of campaign material sponsors was upheld in *United States v. Scott.*[33] The defendant in the *Scott* case argued the fear of reprisal if he was required to identify himself, but this argument failed to persuade the court.[34] The court in *Scott* concluded that the value of the statute to the public outweighed the infringement on the defendant's rights.[35] Not all public interests in disclosure of the source of a communication, however, will be sufficient to uphold all campaign literature disclosure laws.[36] In fact, any statute which requires the author of a publication to reveal his/her identity will create problems of its constitutionality under the first amendment.[37] When a compelling state interest is found to be sufficient to uphold a disclosure statute, the limitations imposed by that statute "must be no greater than is necessary to protect the compelling interest."[38]

In *People v. Duryea*,[39] the court balanced the state's interest against the infringement on the first amendment rights.[40] The

32. *See* United States v. Scott, 195 F. Supp. 440 (D.N.D. 1961); Canon v. Justice Court for the Lake Valley Judicial Dist., 61 Cal.2d 446, 393 P.2d 428, 39 Cal. Rptr. 228 (1964); State v. Fulton, 337 So.2d 886 (La. 1976); Commonwealth v. Dennis, 368 Mass. 92, 329 N.E.2d 706 (1975); People v. Duryea, 76 Misc.2d 948, 351 N.Y.S.2d 978 (1974), *aff'd,* 44 A.D.2d 663, 354 N.Y.S.2d 129 (1974).

33. 195 F. Supp. 440 (D.N.D. 1961). The federal statute in question in *Scott* was 18 U.S.C. § 612 (1950) (repealed 1976) which provided as follows:

> Whoever willfully publishes or distributes or causes to be published or distributed, or for the purpose of publishing or distributing the same, knowingly deposits for mailing or delivery or causes to be deposited for mailing or delivery, or, except in cases of employees of the Post Office Department in the official discharge of their duties, knowingly transports or causes to be transported in interstate commerce any card, pamphlet, circular, poster, dodger, advertisement, writing, or other statement relating to or concerning any person who has publicly declared his intention to seek the office of President, or Vice President of the United States, or Senator or Representative in, or Delegate or Resident Commissioner to Congress, in a primary, general or special election, or convention of a political party, or has caused or permitted his intention to do so to be publicly declared, which does not contain the names of the persons, associations, committees, and corporations responsible for the publication or distribution of the same, and the names of the officers of each such association, committee, or corporation, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Provisions similar to those formerly found at 18 U.S.C. § 612 were enacted as part of the Federal Election Campaign Act of 1971 § 323 (current version at 2 S. S. C. § 441(d) (1971)).

34. United States v. Scott, 195 F. Supp. 440, 443 (D.N.D. 1961). The *Scott* court felt that this fear was "highly speculative and conjectural" and if reprisal did happen to occur there were courts to "protect the intimidated from the intimdators." *Id.*

35. *Id.* at 444.

36. Commonwealth v. Dennis, 368 Mass. 92, ____, 329 N.E.2d 706, 709 (1975).

37. *Id.* at 708.

38. *Id.* at 710.

39. 76 Misc.2d 948, 351 N.Y.S.2d 978 (1974), *aff'd,* 44 A.D.2d 663, 354 N.Y.S.2d 129 (1974).

40. People v. Duryea, 76 Misc.2d 948, ____, 351 N.Y.S.2d 978, 984 (1974), *aff'd,* A.D.2d 663, 354 N.Y.S.2d 129 (1974). The statute in question in *Duryea* provided as follows:

> No person shall print, publish, reproduce or distribute in quantity, nor order to be printed, published, reproduced or distributed by any method any handbill, pamphlet, circular, postcard, placard or letter for another which contains any statement, notice, information, allegation or other material concerning any political party, candidate, committee, person, proposition or amendment to the state constitution, whether in

Duryea court stated that the state's interest must be compelling because the scales were preweighted "by virtue of the importance of the [f]irst [a]mendment."[41] It was felt by the *Duryea* court that the statute requiring the sponsors of political publications to identify themselves was too narrow,[42] and that alternatives existed which would alleviate the problem.[43] In upholding the right to publish anonymous writings, however, the court in *Duryea* put faith in the common man to look at the anonymity together with the message and then decide "what is 'responsible,' what is valuable, and what is truth."[44]

The courts faced with statutes that compel the disclosure of sponsors of campaign literature, generally, will weigh the interests of public policy in having such a statute against the extent which the statute infringes upon the freedom of speech.[45] This balancing

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favor of or against a political party, candidate, committee, person, proposition or amendment to the state constitution, in connection with any election of public officers, party officials, candidates for nomination for public office, party position, proposition or amendment to the state constitution without also printing or reproducing thereon legibly and in the English language the name and post-office address of the printer thereof and of the person or committee at whose instance or request such handbill, pamphlet, circular, postcard, placard or letter is so printed, published, reproduced or distributed, and of the person who ordered such printing, publishing, reproduction or distribution, and no person nor committee shall so print, publish, reproduce or distribute or order to be printed, published, reproduced or distributed any such handbill, pamphlet, circular, post card, placecard or letter without also printing, publishing or reproducing his or its name and post-office address thereon. A violation of the provisions of this section shall constitute a misdemeanor.

The term "printer" as used in this section means the principal who or which by independent contractual relationship is responsible directly to the person or committee at whose instance or request a handbill, pamphlet, circular, post card, placard or letter is printed, published, reproduced or distributed by such principal, and does not include a person working for or employed by such a principal.

ELECTION LAW OF THE STATE OF NEW YORK § 457 (1967).

41. 76 Misc. 2d at ____, 351 N. Y. S. 2d at 984.

42. *Id.* at ____, 351 N.Y.S.2d at 995. The *Duryea* court concluded that the statute was "not narrowly enough drawn to further the [s]tate's legitimate interest" because "it is in no way limited to deterring compaign defamation and financing violations." The statute was held too broad by the *Duryea* court because anonymity was a crime when anyone printed or distributed anything dealing with any candidate or issue connected with any party or government election. *Id.*

43. *Id.* at ____, 351 N.Y.S.2d at 993. The *Duryea* case suggested three alternatives that could be used, but did not rule on any of them because they were not questions before the court. The first alternative was a statute strictly limited to the activities of campaign organizations justified by the same interests that the laws dealing with contributions and expenditures had. A statute of this type may not otherwise infringe on first amendment rights, however. The second alternative given by the *Duryea* court was "a statute strictly limited to preventing ethnic, racial or religious slurs." The third alternative statute was one "strictly limited to attacks on the purely personal character of a candidate." *Id.*

44. *Id.* at ____, 351 N. Y. S. 2d at 996.

45. *See supra* note 32. There are generally four public policy reasons given for having campaign literature disclosure statutes. These justifications were stated in Printing Industries of Golf Coast v. Hill, 382 F. Supp. 801 (S.D. Tex. 1974). The *Hill* court stated the reasons as follows:

1. Responsibility for fraudulent, deceitful, libelous, or falsely attributed statements in political advertisements can be ascertained.
2. The informed voter is entitled to know who is supporting particular candidates or positions and what 'media companies' are molding the image of the candidate.
3. The opposing candidates are in a better position to reply to campaign accusations.
4. The actual advertising expenditures of candidates are more easily determined by both the [s]tate and the public.

Id. at 811.

test was undertaken by the North Dakota Supreme Court in *NDEA*.[46] The North Dakota court began its discussion of the constitutionality of the statute, requiring the disclosure of the sponsors of campaign literature, by deciding that the statute did apply to this case.[47] In holding the campaign literature disclosure statute unconstitutional, the majority in *NDEA* found *Talley*[48] to be controlling.[49] Although the appellee tried to distinguish the *Talley* case from *NDEA*, the majority rejected the argument and *Talley* was considered applicable.[50] As in *Talley,* the *NDEA* majority relied on the historical basis for the adoption of the first amendment.[51]

The majority in *NDEA* considered cases in which *Talley* had been successfully distinguished and campaign literature disclosure statutes were held constitutional; however, these cases failed to persuade the *NDEA* majority.[52] *Canon* was felt, by the majority of the North Dakota court, as being correct in its distinguishing the

46. 262 N. W.2d at 736.

47. *Id.* at 733-34. In deciding that N.D. CENT. CODE § 16-20-17.1 (1969) applied to this case, the first issue that the *NDEA* court faced was whether or not the publication was a newspaper. The court found this to be immaterial because even if the publication was not a newspaper it fell "within the description 'any other public means' forbidden by the statute." 262 N.W.2d at 733.

The second issue that faced the North Dakota court was whether the appeal to vote "no" was an advertisement. The court concluded that the appeal was "no different from the advertisements of the commercial advertisers" which placed an advertisement within the means of the statute. *Id.*

The third issue in *NDEA* was whether there was a public distribution of the publication. The court found there was because the publication was distributed to "a considerable number of people" and "was intended to be read by a substantial segment of the public, including library patrons." *Id.*

In the fourth issue of whether the trial court erred in failing to instruct the jury as to culpability, the *NDEA* court held there was no error because the statute "contain[ed] no requirement as to the degree of culpability." *Id.* at 733-34.

The fifth issue was whether or not the trial court erred in failing to define "newspaper." The North Dakota Supreme Court concluded that because "newspaper" was a common term, readily understood, it need not be defined in the absence of a request for a definition. *Id.* at 734.

48. *See supra* notes 19-24.

49. 262 N.W.2d at 735.

50. *Id.* The argument made by the States Attorney to distinguish *Talley* was that the statute in *Talley* "applied to all pamphlets, while our statute applie[d] only to publications relating to political matters." This distinction did not persuade the majority because the publications referred to in *Talley* included political material. *Id.*

51. *Id.* The majority pointed out that anonymity has been very important. As an example, the majority in *NDEA* mentioned men who wrote documents under pseudonyms such as "the second, third and fourth Presidents as well as the first Vice President, the first Chief Justice and the first Secretary of the Treasury and Secretary of State of the United States." The majority went on to also mention *Common Sense,* written by Thomas Paine under the pseudonym "An Englishman." The importance of these anonymous writings, as the *NDEA* majority saw them, was without these documents the "Revolutionary War would not have been won." *Id.*

Justice Sand, however, did not agree with the historical reasoning used by the majority. He contended that annonymity may have been necessary at the time of the Revolutionary War, but it was not necessary today. *Id.* at 737 (Sand, J., concurring and dissenting).

Justice Sand also felt that the holding in *Talley* was too broad because it covered any handbill and not just election and compaign literature. He agreed that if the statute in *Talley* had been limited to only campaigns then the statute probably would have been upheld. This was based on the statement in *Talley* that a disclosure law would be upheld if there was a legitimate evil that was to be prevented. Justice Sand distinguished between anonymous criticism of the government, which he thought should be permitted, and anonymous criticism of candidates, which should not be permitted. *Id.* at 737-38. In other words, Justice Sand felt the campaign literature disclosure statute was "invalid, but only as it applie[d] to measures, as distinguished from candidates." *Id.* at 741.

52. *Id.* at 735-36.

statute in question in that case from the one in *Talley,* but it was not persuasive because *Canon* was not directly on point with the *NDEA* case.[53] The distinguishing factor in the campaign literature disclosure statute involved in *Canon* was the state's interest in avoiding political "smears."[54] This factor, however, did not extend to the *NDEA* case as North Dakota has a separate statute dealing with political smears.[55] Along with *Talley*, the majority placed reliance in people to judge the anonymous writings themselves for what the publications are worth.[56] It was felt by the majority in *NDEA* that the weight of the freedom of speech should prevail over the weight given to the state's interest.[57] The majority left it up to the people to judge the writings for themselves, and also for the anonymous writers or sponsors who make the campaign literature to act decently.[58] As an alternative, the majority suggested "the passage of a more carefully drawn statute designed to meet the specific evil."[59] However, under the present statutory provisions the "constitutional imperatives must prevail."[60]

The North Dakota Constitution requires that in order for a statute to be declared unconstitutional there must be at least four members of the court in agreement.[61] The majority of the court in *NDEA* consisted of three justices, and there was a separate opinion with the remaining two justices concurring in part and dissenting in part.[62] The separate opinion concurred in declaring the campaign

53. *Id.* at 734. *Canon* successfully distinguished *Talley* because the campaign literature disclosure statute in *Canon* showed the necessary compelling interest which outbalanced the effect on freedom of speech. The statute in *Canon* did impair the freedom of expression to some extent, but it was outweighed by the public interest of avoiding political smears and character assassination. *Id.* at 735-36.

54. Canon v. Justice Court for the lake Valley Judicial Dist., 393 P.2d 428, 435 (1964). *See supra* note 30.

55. 262 N.W.2d at 736. N.D. CENT. CODE § 16-20-17.3 (Supp. 1975) provides as follows:

> No person shall knowingly sponsor any political advertisement containing false information, whether on behalf of or in opposition to any candidate for public office, initiated measure, referred measure, or constitutional amendment, and whether such publication shall be by radio, television, newspaper, pamphlet, folder, display cards, signs, posters or billboard advertisements, or by any other public means. Any person who shall violate the provisions of this section shall be guilty of a Class A misdemeanor.

56. 262 N.W.2d at 736.

57. *Id.*

58. *Id.*

59. *Id. See supra* note 43.

60. *Id.*

61. N.D. CONST. art. IV § 88 (1975). *See supra* note 8.

62. 262 N.W.2d 731. *See supra* note 8. Justice Sand, concurring and dissenting, agreed with the majority insofar as there was a need for anonymity in political publications at the time of the American Revolution. He did not agree, however, that "the [f]irst [a]mendment was adopted and designed to assure or protect anonymity in the election process." What Justice Sand felt was that there was justification for the anonymous ciriticizing of the government, but no justification existed for the anonymous criticism of candidates. 262 N.W.2d at 737. Justice Sand stated that it was wrong "to rely upon the pre-independence condition of our Nation to justify anonymity." His reasoning was the changes in the electoral system since colonial time. *Id.* at 741.

In balancing the rights of the public to publish anonymous campaign literature against the benefits the public would receive in being able to identify the sponsors of these publications, Justice

literature statute unconstitutional as it applied to initiated measures, but valid as to candidates.[63] Because of the constitutional provision that four judges must agree to find a statute unconstitutional, this separate opinion resulted in the campaign literature disclosure statute being unconstitutional in part and valid in part.[64] Therefore, the campaign literature disclosure statute is unconstitutional as it applies to initiated measures, but constitutional as it applies to candidates.[65]

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Sand felt that N.D. CENT. CODE § 16-20-17.1 (1969) was unconstitutional as it applied to measures, but valid as it applied to candidates. In deciding the campaign literature disclosure statute constitutional as it applied to candidates, Justice Sand reasoned first, the candidate had "a right to be informed who [was] criticizing him;" second, "[t]he need for anonymity. . . [was] not as great as it was at the time of the pre-independence of our Nation;" third, "the people [had] a right to know who [was] sponsoring. . . . which candidate." *Id.*

63. *Id. See supra* note 62.

64. N.D. CONST. art. IV § 88 (1975). *See supra* note 8.

65. *Id.* The required number of justices agreeing was met for declaring the campaign literature disclosure statute unconstitutional as it applied to initiated measures, but not as it applied to candidates. 262 N.W.2d at 741.