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McIntyre v. Ohio Elections Commission: Protecting the Freedom of Speech or Damaging the Electoral Process?

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MCINTYRE v. OHIO ELECTIONS COMMISSION: PROTECTING THE FREEDOM OF SPEECH OR DAMAGING THE ELECTORAL PROCESS?

The First Amendment to the United States Constitution establishes the right to freedom of speech.[1] From its beginning, the United States has encouraged widespread discussion and debate over political issues affecting the lives of all citizens and the future course of the country.[2] Perhaps

1. *See* U.S. CONST. amend. I. The First Amendment to the United States Constitution, ratified in 1791, provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.* The First Amendment is made applicable to the states by the Fourteenth Amendment. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 811 (1975); Mills v. Alabama, 384 U.S. 214, 218 (1966); New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964); Schneider v. New Jersey, 308 U.S. 147, 160 (1939); Gitlow v. New York, 268 U.S. 652, 666 (1925). The Fourteenth Amendment, ratified in 1868, states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

2. *See, e.g.*, *New York Times*, 376 U.S. at 270 (noting the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open") (citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949) and De Jonge v. Oregon, 299 U.S. 353, 365 (1937)); Roth v. United States, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.").

Constitutional theorists often use the metaphor of a "marketplace of ideas" to link the the First Amendment freedom of speech to mankind's "search for truth." RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 6-8 (1992); *see* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 2-7 (1984). Justice Oliver Wendell Holmes embraced the marketplace of ideas theory in his dissenting opinion in *Abrams v. United States*. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Justice Holmes argued that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Id.* According to the marketplace of ideas theory, the clash of competing ideas through a process of vigorous, uninhibited debate will lead to the discovery of truth and distinguish truth from falsehood. *See* Ingber, *supra*, at 3, 6-7. As Rodney Smolla noted, "When conflicting dogmas offer themselves to the market as truth, the modern mind is most comfortable subjecting each to the intellectual acid bath of adversarial con-

the single most important forum for the exercise of this freedom of expression is the electoral process.[3] The freedom to engage in campaign-related speech and to express opinions on political issues furthers our system of participatory democracy.[4] In this way, free speech is inextricably linked with our American system of self-governance.[5]

Although the importance of protecting an individual's freedom of speech during a political campaign is clear, the United States Congress and nearly all state legislatures have determined that some regulations on campaign-related expression are necessary to maintain the integrity of the electoral process.[6] Indeed, by 1995, forty-nine states and the District of Columbia had passed statutes prohibiting the distribution of anonymous campaign literature—literature that does not contain the name of

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test, for our intuition and experience reveal that truth may lie somewhere between them." SMOLLA, *supra*, at 8.

Proponents of this theory emphasize that the search for truth in the marketplace of ideas impacts the political process of our nation. *See* Ingber, *supra*, at 3-4, 8-12. Allowing a multitude of ideas to compete in the marketplace fosters a well-informed electorate that will make sound voting decisions and, thereby, enhance the quality of democratic government. *See id.* Critics of the marketplace theory, on the other hand, contend that government must regulate the marketplace of ideas to correct market failures caused by real world conditions. *See id.* at 5; SMOLLA, *supra*, at 6-7. Alternatively, some critics disagree conceptually with the "marketplace of ideas" metaphor and prefer the metaphor of a "town meeting" run by a moderator. SMOLLA, *supra*, at 221. Thus, the town meeting theory permits more regulation of speech than the marketplace theory. *See id.*

3. *See* Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."); Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) ("[The First Amendment's] constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."); Mills v. Alabama, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.").

4. *See generally* SMOLLA, *supra* note 2, at 3-17 (exploring the relationship between free speech and an "open culture").

5. *See id.* at 12-13. Smolla argues that free speech is related to self-governance in five ways: (1) as a vehicle for political participation; (2) as a tool in the "pursuit of political truth;" (3) as a facilitator of majority rule; (4) as a "restraint on tyranny, corruption, and ineptitude;" (5) as a protector of stability. *Id.*

6. *See* McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1520 (1995) (acknowleging that the Ohio Election Code prohibits making or disseminating false statements in election campaigns because "false statements . . . may have serious adverse consequences for the public at large"); *see also id.* at 1532-33 (Scalia, J., dissenting) (noting the history of statutes requiring identification of an author or a sponsor's name on campaign-related literature); Erika King, Comment, *Anonymous Campaign Literature and the First Amendment*, 21 N.C. CENT. L.J. 144, 144 (1995) (observing that statutes requiring identification of an author or a sponsor's name on campaign-related literature have been passed for the purpose of deterring fraud in the electoral process and providing information to voters); Note, *Gutter Politics and the First Amendment*, 6 VAL. U. L. REV. 185, 198 (1972) (explaining that disclosure statutes are designed to prevent " 'gutter flyers' ").

the person or candidate sponsoring it.[7] Despite wide public support for

7. *See McIntyre*, 115 S. Ct. at 1533 & n.2 (Scalia, J., dissenting) (listing all of the disclosure statutes in effect in 1995). In 1995, there were 49 state disclosure statutes in effect. *See* ALA. CODE § 17-22A-13 (1995); ALASKA STAT. § 15.56.010 (Michie 1988) (current version at ALASKA STAT. § 15.56.014 (Michie 1996)); ARIZ. REV. STAT. ANN. § 16-912 (West Supp. 1994); ARK. CODE ANN. § 7-1-103 (Michie 1993), *amended by* 1995 Ark. Acts 497 and 1085; COLO. REV. STAT. § 1-13-108 (1980 & Supp. 1994); CONN. GEN. STAT. ANN. § 9-333w (West 1989 & Supp. 1994), *repealed and replaced by* 1995 Conn. Acts 188, § 4, and 276, § 2 (Reg. Sess.), *and further amended by* 1996 Conn. Acts 119, § 13 (Reg. Sess.); DEL. CODE ANN. tit. 15, §§ 8021, 8023 (1993); FLA. STAT. chs. 106.143, 106.1437 (1993); GA. CODE ANN. § 21-2-415 (1993); HAW. REV. STAT. § 11-215 (1993), *amended by* 1995 Haw. Sess. Laws 10, § 2; IDAHO CODE § 67-6614A (1989 & Supp. 1994); 10 ILL. COMP. STAT. 5/29-14 (West 1994); IND. CODE ANN. §§ 3-9-3-2; 3-14-1-3; 3-14-1-4 (Michie 1993), *amended by* 1995 Ind. Acts 134 (amending § 3-14-1-4 only); IOWA CODE § 56.14 (1991), *amended by* 1995 Iowa Acts 2062; KAN. STAT. ANN. §§ 25-2407, 25-4156 (1993); KY. REV. STAT. ANN. § 121.190 (Michie 1993 & Supp. 1994), *amended by* 1996 Ky. Acts 153, § 8; LA. REV. STAT. ANN. § 18:1463 (West 1979 & Supp. 1994), *amended by* 1995 La. Acts 300, § 1; ME. REV. STAT. ANN. tit. 21-A, § 1014 (West 1993 & Supp. 1994), *amended by* 1995 Me. Laws 483, § 6; MD. ANN. CODE art. 33, § 26-17 (1993); MASS. GEN. LAWS ch. 56, §§ 39, 41 (1990); MICH. COMP. LAWS ANN. § 169.247 (West 1989), *amended by* 1996 Mich. Pub. Acts 225, § 1; MINN. STAT. § 211B.04 (1992); MISS. CODE ANN. § 23-15-899 (1990); MO. ANN. STAT. § 130.031 (West 1980 & Supp. 1994); MONT. CODE ANN. § 13-35-225 (1993); NEB. REV. STAT. § 49-1474.01 (1993), *amended by* 1995 Neb. Laws 399, § 3; NEV. REV. STAT. ANN. § 294A.320 (Michie 1990); N.H. REV. STAT. ANN. § 664:14 (Supp. 1994), *amended by* 1996 N.H. Laws 88, §§ 6-7; N.J. STAT. ANN. § 19:34-38.1 (West 1989), *repealed by* 1995 N.J. Laws 391, § 4; N.M. STAT. ANN. §§ 1-19-16, 1-19-17 (Michie 1991); N.Y. ELEC. LAW § 14-106 (McKinney 1978); N.C. GEN. STAT. § 163-274 (1991 & Supp. 1994); N.D. CENT. CODE § 16.1-10-04.1 (1991); OHIO REV. CODE ANN. § 3599.09 (Anderson 1988), *amended by* 1995 Ohio Laws 146; OKLA. STAT. tit. 21, § 1840 (1991); OR. REV. STAT. § 260.522 (1993); 25 PA. CONS. STAT. ANN. § 3258 (West 1994); R.I. GEN. LAWS § 17-23-2 (1988); S.C. CODE ANN. § 8-13-1354 (Law. Co-op. Supp. 1993), *amended by* 1995 S.C. Acts 6, § 43; S.D. CODIFIED LAWS § 12-25-4.1 (Michie 1982 & Supp. 1994); TENN. CODE ANN. § 2-19-120 (1994); TEX. ELEC. CODE ANN. § 255.001 (West Supp. 1994); UTAH CODE ANN. § 20-14-24 (Supp. 1994), *repealed by* 1995 Utah Laws ch. 1, § 88; VT. STAT. ANN. tit. 17, § 2022 (1982); VA. CODE ANN. § 24.2-1014 (Michie 1993), *amended by* 1996 Va. Acts ch. 1042; WASH. REV. CODE ANN. § 42.17.510 (West 1991 & Supp. 1994), *amended by* 1995 Wash. Laws 397, § 19; W. VA. CODE § 3-8-12 (1994), *amended by* 1995 W. Va. Acts 101; WIS. STAT. § 11.30 (1991-1992); WYO. STAT. ANN. § 22-25-110 (Michie 1992), *amended by* 1996 Wyo. Sess. Laws 93, § 1. The District of Columbia also had a disclosure statute. *See* D.C. CODE ANN. § 1-1420 (1992). In addition, federal law required disclosure of the name of "any person making an expenditure for the purpose of financing political communications expressly advocating the election or defeat of a clearly identified candidate." 2 U.S.C. § 441d (1994). California also had enacted a statute prohibiting anonymous campaign literature, but it was repealed after a state court declared it to be unconstitutional. *See McIntyre*, 115 S. Ct. at 1533 n.3 (citing Schuster v. Imperial County Mun. Ct., 167 Cal. Rptr. 447, 453 (Cal. Ct. App. 1980), *cert. denied sub nom.* California v. Schuster, 450 U.S. 1042 (1981)).

Disclosure statutes generally apply to all campaign literature, whether it is distributed by official campaign organizations or by individual citizens who are unconnected with any campaign. *See* King, *supra* note 6, at 144-45. Most of the statutes apply to both literature advocating the election of a candidate and literature arguing in favor of a ballot issue. *See id.* & n.4; *McIntyre*, 115 S. Ct. at 1514 n.3. Although most state disclosure statutes are very similar, there are distinctions among them. *See* King, *supra* note 6, at 145-46. For example, some statutes only require disclosure for literature making derogatory references to a

laws of this nature[8] and their long history in the United States,[9] the United States Supreme Court held in *McIntyre v. Ohio Elections Commission*[10] that such laws are an unconstitutional infringement on the freedom of speech.[11]

In 1988, Mrs. Margaret McIntyre, of Westerville, Ohio, distributed leaflets to attendees at a meeting regarding a proposed school tax levy.[12] Mrs. McIntyre made the leaflets on her home computer and passed them out to express her opposition to the tax levy.[13] Only some of the leaflets

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candidate. *See, e.g., id.* at 145-46 (discussing LA. REV. STAT. ANN. § 1463 (West 1996)); Steven Robert Daniels, Survey of Developments, 72 N.C. L. REV. 1618, 1618 (1994) (discussing N.C. GEN. STAT. § 163-247 (1987)).

8. *See McIntyre*, 115 S. Ct. at 1532-33 & n.2 (Scalia, J., dissenting) (noting the widespread acceptance of disclosure statutes and listing the 49 state disclosure statutes in effect in 1995, as well as the District of Columbia statute, and the federal statute). In highlighting the history of the widespread disclosure statutes, Justice Scalia referred to approval of the statutes as "universal." *Id.* at 1533.

9. The first American disclosure statute was enacted in Massachusetts in 1890. *See id.* The Ohio statute was adopted in 1915. *See id.* at 1532. By World War I, 24 states had disclosure statutes, and by 1995, 49 states, the District of Columbia, and the federal government all had such statutes. *See id.* at 1533.

10. 115 S. Ct. 1511 (1995).

11. *See id.* at 1524.

12. *See id.* at 1514. The leaflets read as follows:

VOTE NO
ISSUE 19 SCHOOL TAX LEVY

Last election Westerville Schools, asked us to vote yes for new building and expansions [sic] programs. We gave them what they asked. We knew there was [sic] crowded conditions and new growth in the district.

Now we find out there is a 4 million dollar deficit—WHY?

We are told the 3 middle schools must be split because of over-crowding, and yet we are told 3 schools are being closed—WHY?

A magnet school is not a full operating school, but a specials [sic] school.

Residents were asked to work on a 20 member commission to help formulate the new boundaries. For 4 weeks they worked long and hard and came up with a very workable plan. Their plan was totally disregarded—WHY?

WASTE of tax payers dollars must be stopped. Our children's education and welfare must come first. WASTE CAN NO LONGER BE TOLERATED.

PLEASE VOTE NO
ISSUE 19

THANK YOU.
CONCERNED PARENTS
AND
TAX PAYERS

Id. at n.2.

13. *See id.* at 1514. Although Mrs. McIntyre designed the leaflets on her computer, she paid to have them professionally photocopied. *See id.*

included her name as the author; others were signed, "CONCERNED PARENTS AND TAX PAYERS."[14]

Five months later, Westerville school officials filed a complaint with the Ohio Elections Commission alleging that Mrs. McIntyre violated § 3599.09(A) of the Ohio Code, which prohibited the dissemination of anonymous campaign literature.[15] The Elections Commission fined Mrs. McIntyre one hundred dollars.[16] The Franklin County Court of Common Pleas reversed, holding that the statute was unconstitutional as applied to Mrs. McIntyre's conduct.[17] By a divided vote, the Ohio Court of Appeals reversed the lower court and reinstated the fine.[18] The Ohio Supreme Court, again by a divided vote, affirmed and upheld the statute.[19] The United States Supreme Court reversed, however, and held that the Ohio statute banning anonymous campaign literature was unconstitutional.[20]

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14. *Id.* "Concerned Parents and Tax Payers" was a fictitious organization. *See* Brief of Respondent at 1, McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511 (1995) (No. 93-986). Mrs. McIntyre later swore under oath to the Ohio Elections Commission that she thought she had put her name and address on all of the flyers. *See* Mary Deibel, *High Court to Decide Rights of Pamphleteers*, PLAIN DEALER (Cleveland), Oct. 10, 1994, at 5-B (discussing the history of the *McIntyre* case).

15. *See McIntyre*, 115 S.Ct. at 1514 & n.3. Section 3599.09(A) of the Ohio Revised Code provided:

> 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 nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election, or make an expenditure for the purpose of financing political communications through newspapers, magazines, outdoor advertising facilities, direct mailings, or other similar types of general public political advertising, or through flyers, handbills, or other nonperiodical printed matter, *unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor.*

Id. (citing OHIO REV. CODE ANN. § 3599.09(A) (Anderson 1988)) (emphasis added).

16. *See McIntyre*, 115 S. Ct. at 1514.

17. *See id.* at 1515. The Common Pleas Court found Mrs. McIntyre had not attempted to mislead the public with her flyers. *See id.*

18. *See id.*

19. *See id.* The Ohio Supreme Court held that the identification statute violated neither the First Amendment to the United States Constitution, nor Article I of the Ohio Constitution. *See* McIntyre v. Ohio Elections Comm'n, 618 N.E.2d 152, 156 (Ohio 1993); *see also infra* notes 94-106 and accompanying text (discussing the holding and rationale of the Ohio Supreme Court).

20. *See McIntyre*, 115 S. Ct. at 1524; *see infra* notes 107-45 and accompanying text (discussing the Court's analysis and holding in *McIntyre*).

The Court's decision to hear Mrs. McIntyre's case attracted a great deal of national attention and drew prominent allies on both sides. *See* Deibel, *supra* note 14, at 5-B. The National Conference of State Legislatures and the U.S. Conference of Mayors both expressed support for Ohio's statute, as did 27 other states with similar identification statutes

This Note examines the right to distribute anonymous campaign literature. It begins by considering the history of First Amendment case law stressing the value of anonymous speech and contrasts that with case law highlighting the importance of disclosing an author's identity. Next, this Note examines the conflict between the state's interests in regulating speech and the individual's First Amendment guarantee of freedom of speech. In doing so, this Note evaluates the two competing analytical standards that have been used to review restrictions on campaign-related speech. This Note then considers the varied judicial treatment of anonymous campaign literature by lower courts. After dissecting the Supreme Court's reasoning in *McIntyre*, this Note argues that the majority opinion fails to fully consider Ohio's strong interests in preventing fraudulent campaign-related statements and providing information to its electorate. This Note then asserts that the majority opinion in *McIntyre* leaves unanswered questions about what type of identification statute might survive judicial scrutiny. Finally, this Note concludes that the *McIntyre* decision will hinder the ability of states to prevent fraudulent statements during political campaigns and may lead to dangerous consequences for the electoral process.

I. THE JURISPRUDENCE OF ELECTORAL SPEECH

A. The Link Between Anonymity and First Amendment Freedoms

The Supreme Court first recognized the value of anonymous political speech in *Talley v. California*.[21] In *Talley*, the petitioner distributed flyers

that filed amicus briefs with the Court. *See id.* at 8-B. The American Civil Liberties Union, on the other hand, sponsored Mrs. McIntyre's suit. *See* Brian Doherty, *Outlawing the Federalist Papers: Can Free Speech be Anonymous Too?*, REASON, Apr. 1995, at 14.

The oral arguments before the Supreme Court were very lively. *See* Keith C. Epstein, *Ohio Free Speech Case Shocks Supreme Court*, PLAIN DEALER (Cleveland), Oct. 13, 1994, at 3-A. Justice O'Connor asked Assistant Ohio Attorney General Andrew Sutter whether the State would have fined the authors of the Federalist Papers for writing anonymously, if they were alive and writing in Ohio today. *See id.* Sutter responded that they would indeed be fined because the State has a compelling interest in requiring authors of political literature to identify themselves. *See id.* Justice O'Connor remarked, " 'I would have thought that if the First Amendment stood for anything at all it stands for my right to put out a flier at a school board election on any issue I care about without identifying myself . . . I find it quite remarkable to say Ohio can totally ban this.' " *Id.* Moreover, Justice O'Connor noted that voters may reject anonymous literature as unreliable: " 'I can always say as a voter, 'it's anonymous, so I can toss it in the wastebasket.' ' " *Id.*

Noting that state representatives in the Ohio Legislature had passed the statute, Justice Scalia asked Sutter, " '[C]an't we assume the people of Ohio like this law?' " *Id.* " 'Yes,' " replied Sutter. *Id.* Justice Ginsburg's comment, " 'I'll bet most people in Ohio don't even know about the existence of this law,' " however, caused a stir of laughter from several Justices. *Id.*

21. 362 U.S. 60 (1960).

urging readers to boycott certain merchants.[22] The flyers displayed minimal identifying information.[23] Following the distribution, the petitioner was convicted of violating a Los Angeles City ordinance that prohibited all anonymous leafletting.[24] The Municipal Court convicted the petitioner because the identifying information provided on the flyer was insufficient to satisfy the requirements of the ordinance.[25] In affirming the conviction, the appeals court rejected the petitioner's contention that the ordinance violated his freedoms of speech and press guaranteed by the First and Fourteenth Amendments to the United States Constitution.[26]

When the petitioner appealed to the United States Supreme Court, the City of Los Angeles argued that the ordinance was justified because it was designed to identify proponents of fraud, false advertising, and libel.[27] The Court rejected Los Angeles's argument, however, because the text of the ordinance did not indicate that the anonymous leaflet ban was limited to the purpose of identifying such offenders.[28] Moreover, the Court noted that Los Angeles failed to proffer any legislative history indicating such a limited purpose for the ordinance.[29]

After determining that the goal of the ordinance was not to identify people distributing fraudulent leaflets, the *Talley* Court explicitly stated that its decision did not encompass anonymous leafletting ordinances that were limited to the purpose of preventing fraud, false advertising,

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22. *See id.* at 61. According to the flyers, the merchants carried products made by manufacturers who did not provide equal employment opportunites to members of minority groups. *See id.* In addition, the flyers stated: "'I believe that every man should have an equal opportunity for employment no matter what his race, religion, or place of birth.'" *Id.*

23. *See id.* The only identification provided was: "National Consumers Mobilization, Box 6533, Los Angeles 55, Calif., PLeasant [sic] 9—1576." *Id.* The flyers also included a blank space for readers to register as members of the National Consumers Mobilization organization. *See id.*

24. *See id.* at 60-62. The ordinance stated:

> 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 hand-bill shall also appear thereon.

Id. at 60-61.

25. *See id.* at 61. Although the flyers included the organization's name, "National Consumers Mobilization," they did not include the names and addresses of the group's leaders. *Id.*

26. *See id.* at 61-62.

27. *See id.* at 64.

28. *See id.*

29. *See id.*

or libel.[30] Rather, the Court emphasized that it was ruling on an ordinance that completely banned *all* anonymous leaflets under *any* circumstances[31] and, therefore, unconstitutionally restricted freedom of expression.[32]

The *Talley* Court then went on to discuss the long history of anonymous speech and the value of using anonymity for constructive purposes,

30. *See id.*

31. *See id.* The Court relied on the precedents set by *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Schneider v. New Jersey*, 308 U.S. 147 (1939); and *Jamison v. Texas*, 318 U.S. 413 (1943). *See Talley*, 362 U.S. at 62-62.

In *Lovell*, the Supreme Court reviewed a city ordinance that prohibited the distribution of "circulars, handbooks, advertising, or literature of any kind," without a permit issued by the City Manager. *Lovell*, 303 U.S. at 447. The petitioner was convicted of violating the ordinance by distributing religious literature for the Jehovah's Witnesses. *See id.* at 447-48. The Court determined that the ordinance was void on its face because it was overly broad and prohibited the "distribution of literature of any kind at any time, at any place, and in any manner without a permit." *Id.* at 451. An ordinance such as this, explained the Court, "strikes at the very foundation of the freedom of the press by subjecting it to license and censorship." *Id.*

In *Schneider v. New Jersey*, the Supreme Court examined four different city ordinances prohibiting the distribution of leaflets in Irvington, New Jersey; Los Angeles, California; Milwaukee, Wisconsin; and Worcester, Massachusetts. *See Schneider*, 308 U.S. at 153-58. Each of the municipalities attempted to justify its ordinance, and distinguish it from the one invalidated in *Lovell*, by arguing that its ordinance was aimed at regulating the use of public streets, ensuring public safety, preventing litter in the streets, and regulating solicitation of city residents. *See id.* at 154-62.

Nevertheless, the Court held that the ordinances were invalid, citing the *Lovell* Court's statement that publicly distributed pamphlets are "historical weapons in the defense of liberty." *Id.* at 161-62. The Court concluded that municipalities could enact ordinances regulating the conduct of people on the streets, in order to protect "public safety, health, welfare or convenience," as long as the regulations do not abridge freedom of speech or press. *Id.* at 160. The goal of keeping streets free of litter, the Court explained, is insufficient to justify a city regulation that prohibits the distribution of literature and, thus, burdens the freedom of speech. *See id.* at 162. "Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press." *Id.*

Finally, in *Jamison v. Texas*, the Court reversed the conviction of another member of the Jehovah's Witnesses who distributed handbills in violation of a city ordinance prohibiting such activity. *See* 318 U.S. at 413-14. Although acknowledging that a state may regulate travel on its streets to protect public safety, the Court held that the city ordinance violated the First and Fourteenth Amendments to the Constitution because individuals have a right to freedom of speech on public streets. *See id.* at 414-16. Based on the reasoning of *Lovell*, *Schneider*, and *Jamison*, the *Talley* Court determined that Los Angeles's ordinance was overly broad and, therefore, violated the constitutional right to freedom of speech. *See Talley*, 362 U.S. at 62-65.

32. *See Talley*, 362 U.S. at 64-65. The Court reasoned that an identification requirement for leaflets restricts the freedom to distribute literature and, thus, also restricts overall freedom of expression. *See id.* at 64. Citing *Lovell*, the Court explained that the freedom to distribute and publish information is an essential element of the freedom of expression guarantee because " 'without the circulation, the publication would be of little value.' " *See id.* (quoting *Lovell*, 303 U.S. at 452).

such as criticizing oppressive governments, suggesting political alternatives, or arguing for the adoption of a new Constitution.[33] Finally, the Court referred to two earlier opinions holding that states could not force certain groups that circulated information to release their membership lists.[34] In those cases, the Court stressed that identifying members of a group might cause the members to fear retaliation by others and, thus, discontinue their involvement in the discussion of important public issues.[35] Following this rationale, the *Talley* Court reasoned that the Los

33. *See id.* at 64-65. The Court's opinion noted that many persecuted groups wishing to criticize their oppressors have had to do so anonymously in order to avoid retaliation. *See id.* For example, colonial patriots frequently wrote literature anonymously to avoid prosecution by the British. *See id.* The Court also emphasized that the Federalist Papers were published under fictitious names. *See id.* at 65.

34. *See id.* (citing NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958); Bates v. City of Little Rock, 361 U.S. 516, 527 (1960)).

35. *See id.* at 65. During the Civil Rights Movement, the National Association for the Advancement of Colored People (NAACP) was very active in Alabama, recruiting new members, providing legal assistance to Black students pursuing admission to Alabama's state university, and supporting a boycott of the Montgomery bus lines. *See Patterson*, 357 U.S. at 452. *Patterson* arose after the NAACP, a New York nonprofit corporation, failed to comply with an Alabama statute requiring foreign corporations to qualify to do business within the State by filing their corporate charters with the Secretary of State. *See id.* at 451. The NAACP did not comply with the qualification statute because it considered itself exempt. *See id.* at 452. After John Patterson, the Alabama Attorney General, filed suit to enjoin the NAACP from conducting further activities within the State, an Alabama court issued an order requiring the NAACP to produce certain documents, including its membership lists. *See id.* at 452-53. Although the NAACP provided most of the requested data, it refused to turn over its membership lists and was adjudged in civil contempt and fined for failing to comply with the court order. *See id.* at 454.

The Supreme Court reversed this decision, holding that compulsory disclosure of the membership lists would be a restraint on the NAACP members' right to freedom of association. *See id.* at 466. The Court explained that advocacy of an individual's beliefs and ideas is enhanced by group association and, therefore, freedom of association is linked to freedom of speech. *See id.* at 460 (citing De Jonge v. Oregon, 299 U.S. 353, 364 (1937); Thomas v. Collins, 323 U.S. 516, 530 (1945)). The Court also explained that the freedoms of association, and of speech, are both aspects of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. *Id.* Drawing a link between an individual's privacy and freedom of association, the Court stressed that protection of privacy in group association is necessary for the preservation of the freedom of association, especially when an individual is a member of a group espousing unpopular beliefs. *See id.* at 462.

The Court noted that NAACP members whose identity had been revealed were exposed to "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* Thus, the Court worried that releasing the names of the NAACP members might prompt members to withdraw from the organization or dissuade others from joining the group, in fear of these consequences. *See id.* at 462-63. Finally, the Court considered whether Alabama's reasons for requesting the membership lists were sufficient to justify the chilling effect that the disclosure would have on the exercise of the NAACP members' freedom of association. *See id.* The Alabama Attorney General argued that the State needed the membership lists to determine whether the NAACP was conducting business in violation of the State's foreign corporation registration statute. *See*

Angeles ordinance might have the same chilling effect; therefore, the Court found the ordinance invalid.[36]

B. The Importance of Disclosing an Author's Identity

Although the Supreme Court has found anonymity necessary in some circumstances, the Court also has discussed the value of disclosing an au-

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id. at 464. The Court concluded that because disclosure of the membership lists would not substantially further the State's determination of this matter, the deterrent effect it would have was not justified. *See id.* at 464-65.

Two years later, the Supreme Court examined the same issue in *Bates v. City of Little Rock*, 361 U.S. at 517. *Bates* involved a license tax upon businesses within the city limits of Little Rock and North Little Rock, Arkansas. *See id.* Although charitable organizations were exempt from paying the tax, they still were required to submit certain information to the city. *See id.* at 518. The information required included the name and purpose of the organization, along with a copy of its financial statement listing the amount of dues paid and the names of people who paid those dues. *See id.* at 517-18 & n.3. All of the information provided was to be public and subject to inspection by any interested party. *See id.* at 518. The custodians of records of the Little Rock and North Little Rock chapters of the NAACP supplied the city officials with all of the requested information except the names of their members. *See id.* at 519-21. The NAACP chapters explained to the city officials that they were not providing the membership lists because of the anti-NAACP climate in Arkansas and because they feared that public disclosure of the members' names "might lead to their harassment, economic reprisals, and even bodily harm." *Id.* at 520-21. In addition, the NAACP asserted the right of its members to participate anonymously in the activities of the NAACP and argued that the city was not authorized, under either the United States or Arkansas Constitutions, to request such information. *See id.* During the NAACP chapters' trials for violation of these ordinances, evidence was submitted that former members of the NAACP had chosen not to renew their memberships because they feared that their names would be made public. *See id.* at 521. Additional evidence showed that NAACP members who had been publicly identified had been harassed and physically threatened. *See id.* at 522. Despite this evidence, the records custodians of both NAACP chapters were convicted of violating the ordinances, and the Supreme Court of Arkansas affirmed the convictions. *See id.* at 521-22.

Citing *Patterson*, the United States Supreme Court emphasized that the freedom of association is protected by the Fourteenth Amendment Due Process Clause from invasion by the states. *See id.* at 522-23 (citing *Patterson*, 357 U.S. at 460). The Court explained that mandatory disclosure of the local NAACP membership lists would be a restraint on the members' freedom of association. *See id.* at 523. In such cases, the State would be justified in requesting the membership lists only if it could demonstrate a compelling state interest in the lists and show that the requested action "bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification." *Id.* at 524-25. The Court determined that there was no correlation between the cities' power to impose a license tax and the compulsory disclosure of the membership lists because no showing had been made that the organizations were engaged in an occupation for which a license was required. *See id.* at 525-27. Thus, the Court reversed the convictions. *See id.* at 527.

36. *Talley*, 362 U.S. at 65. The Los Angeles ordinance could have a chilling effect on speech because citizens who feared reprisal might choose not to distribute flyers if they were required to include their name and address on the flyers. *See id.*

thor's identity.[37] In *Lewis Publishing Co. v. Morgan*,[38] the Court upheld a federal law that required all newspapers and periodicals to publish the names and addresses of their editors, publishers, and owners in order to have certain mailing privileges.[39] The Court held that the statute did not violate the First Amendment because it did not deprive the publishers of their right to use the mail system but, rather, impacted only their ability to enjoy the privileges of the second-class mail system.[40]

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37. *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765, 791-92 (1978) (noting, in part, that the identification of an author may assist people in evaluating the author's argument); Buckley v. Valeo, 424 U.S. 1, 66-68, 72, 81-82 (1976) (per curiam) (upholding the mandatory disclosure of the names of campaign contributors); Lewis Publ'g Co. v. Morgan, 229 U.S. 288, 296-97, 308-10, 312-13 (1913) (upholding a federal requirement that newspapers release the names of their editors, publishers, and owners).

38. 229 U.S. 288 (1913).

39. *See id.* at 296-97. The statute stated that any publication failing to comply with its provisions would be "denied the privileges of the mail." *Id.* at 297.

40. *See id.* at 308-10, 312-13; *see infra* note 174 and accompanying text (discussing Justice Scalia's interpretation of the *Lewis Publishing* decision).

In *Lewis Publishing*, two newspaper publishers in New York City challenged the federal disclosure statute, arguing that it abridged the freedom of the press guaranteed by the First Amendment. 229 U.S. at 297. The publishers contended that the statute was intended to regulate journalism and control the freedom of the press, rather than regulate the postal system. *See id.* at 297-98. Reviewing the statute's legislative history, the Supreme Court noted that Congress has the power to classify the mail into different categories and set different mailing rates for each category. *See id.* at 301-02. At the time the statute was enacted, Congress had identified newspapers and periodicals as "second-class" material and had entitled them to lower mailing rates to encourage the widespread " 'dissemination of current intelligence.' " *Id.* at 302-03. Additionally, the Court explained that the Congress has the power to set the standards which publishers must meet in order to qualify for the beneficial, reduced mailing rates. *See id.* at 302. The Court explained that setting standards, such as the disclosure requirement, for receiving the privilege of reduced mailing rates was essential since the reduced rates represented a windfall for the publication and a loss for the Postal Service. *See id.* at 312-13.

The Court further noted that the publication of the names of the editors, publishers, and owners would make the public aware of the people and organizations controlling the publication and alert them to the particular interests the newspaper represented. *See id.* at 312. The Court cited the statute's legislative history, which stated:

> [S]ince the general public bears a large portion of the expense of distribution of second-class matter, and since these publications wield a large influence because of their special concessions in the mails, it is not only equitable but highly desirable that the public should know the individuals who own or control them.

Id.

Furthermore, the Court rejected the publishers' contention that failure to comply with the statute would deprive a publishing company of its right to use the mail system generally. *See id.* at 308. Rather, the Court determined that failure to comply with the statute would only deprive the publishing company of the right to enjoy the privileges of the reduced second-class postage rate. *See id.* Thus, the Court regarded the statute as a supplement to the existing postal legislation concerning second-class mail, rather than a restriction on the freedom of the press and the right to use the mail system. *See id.* at 312-13.

Decades later, in *Buckley v. Valeo*,[41] the Court reviewed various provisions of the Federal Election Campaign Act of 1971.[42] The statute restricted individual contributions to a political campaign[43] and mandated that contributions above a certain amount be reported and publicly disclosed.[44]

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41. 424 U.S. 1 (1976) (per curiam).

42. *See id.* at 6. A group of plaintiffs challenged the constitutionality of the statute and sought an injunction against its enforcement. *See id.* at 8-9. The plaintiffs included a candidate for the U.S. Presidency, a U.S. Senator running for re-election, a potential financial contributor, and several political action committees. *See id.* at 7-8.

43. *See id.* at 7. The statute limited individuals to an annual total of $25,000 in overall contributions and $1,000 for any one candidate per election. *See id.* Additionally, the statute limited the overall amount that candidates for federal offices could spend on their own election campaigns and restricted the candidates' use of their own personal money in their campaigns. *See id.* at 7, 13.

The plaintiffs argued that limiting the amount of money a person could spend for political purposes violated the First Amendment freedoms of speech and political association because "virtually all meaningful political communications in the modern setting involve the expenditure of money." *Id.* at 11. In reviewing the $1,000 limit on individual contributions, the Supreme Court applied an exacting scrutiny standard of review. *See id.* at 25. The Court acknowledged that the $1,000 limit burdened the contributor's freedoms of speech and association. *See id.* Nonetheless, the Court determined that the federal government's interest in preventing corruption, or the appearance of corruption, that may result from large financial contributions made to obtain a political quid pro quo from an elected official, was sufficient justification for the restriction. *See id.* at 29. The Court also upheld the annual $25,000 limit as a corrollary to the individual $1,000 limit, reasoning that it prevented people from evading the $1,000 limit by contributing massive amounts of money to political committees or parties which might donate the money to a particular candidate. *See id.* at 38.

Conversely, the Court found that other parts of the statute were unconstitutional. *See id.* at 52-54. The Court held that the statute's limitation on the amount of personal money a candidate could spend on his or her own campaign was unconstitutional because it restrained the candidate's First Amendment freedom of expression. *See id.* at 52-54. The Court noted that the governmental interest in preventing corruption was not implicated by a candidate's expenditure of his or her own money. *See id.* at 53. Similarly, the Court also determined that the overall limitation on campaign expenditures, from any source, was unconstitutional because it restricted political expression; therefore, no governmental interest was sufficient to justify the restriction. *See id.* at 54-58.

44. *See id.* at 7. The reporting and disclosure requirements of the Federal Election Campaign Act of 1971 mandated that political committees maintain detailed records of contributions and expenditures, including the name and address of people who contributed more than $10, as well as the date and amount of their contribution. *See id.* at 63. The statute also required that if a person's overall contributions totaled more than $100, his or her occupation and principal place of business had to be included in the records. *See id.* In addition, the statute required political committees and candidates to file quarterly reports with the Federal Elections Commission detailing their campaign-related financial information, including the name, address, occupation, and place of business of each person who contributed more than $100 per year, and the date and amount of the contributions. *See id.* Moreover, these reports were to be made available to the public for review. *See id.* Individuals or groups, other than political committees or candidates, also were required to file statements with the Federal Elections Commission if they made contributions or in-

In one section of its extensive opinion, the *Buckley* Court examined the reporting and disclosure requirements of the statute.[45] The Court noted that compelled disclosure, such as that mandated by the statute, infringed on the First Amendment privacy of association and that "significant encroachments on First Amendment rights . . . cannot be justified by a mere showing of some legitimate governmental interest."[46] Rather, the Court stated that the state's interests must pass the test of "exacting scrutiny."[47]

Applying the test to the Federal Election Campaign Act, the *Buckley* Court found that the asserted governmental interests outweighed any possible infringement on First Amendment freedoms.[48] The governmental interests included providing information to the voting public regarding political campaign money.[49] The Court determined that disclosure gave

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dependent expenditures greater than $100 in a year, by means other than contributing to a committee or candidate. *See id.* at 63-64.

The plaintiffs in *Buckley* argued that these reporting and disclosure requirements violated their rights to freedom of association and were overbroad because they applied to independent and minor-party candidates. *See id.* at 11, 61. The plaintiffs contended that the governmental interest in disclosure was slight because independent and third-party candidates have very little chance of winning. *See id.* at 70. The plaintiffs also questioned the statute's application to independent contributions and expenditures, arguing that the statute infringed on the privacy of association rights of individuals. *See id.* at 61, 75.

45. *See id.* at 60-84.

46. *Id.* at 64 (citing Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958)). In *Bates* and *Patterson*, the Supreme Court held that compelled disclosure of NAACP membership lists would be a restraint on the exercise of the NAACP members' right to freedom of association. *Bates*, 361 U.S. at 523; *Patterson*, 357 U.S. at 462-63. In both cases, the Court stressed that the protection of a person's privacy in group association is necessary to the preservation of her freedom of association. *Bates*, 361 U.S. at 523; *Patterson*, 357 U.S. at 462; *see supra* note 35 (discussing the *Bates* and *Patterson* cases).

47. *Buckley*, 424 U.S. at 64. According to the Court, an exacting scrutiny standard was necessary because mandatory disclosure of contribution and expenditure information could potentially infringe on the exercise of First Amendment freedoms. *See id.* at 66. The Court's use of an exacting scrutiny standard was derived from *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), discussed *supra* note 35, in which the Court explained that the infringement on First Amendment freedoms caused by mandatory disclosure of the names of NAACP members could only be justified if the state could show (1) a compelling interest for the disclosure and (2) a reasonable relationship between the disclosure and the governmental purpose it was intended to serve. *See id.* at 463-65; *see also* First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 (1978) (applying a test of exacting scrutiny to review a restriction on corporate speech); *Bates*, 361 U.S. at 524-25 (employing an exacting scrutiny standard to evaluate city ordinances that mandated the disclosure of NAACP membership lists).

48. *See Buckley*, 424 U.S. at 66.

49. *See id.* at 66-67. In addition, the Court identifed two other governmental interests served by the disclosure requirement. *See id.* at 67-68. The Court reasoned that disclosure deters corruption by publicly revealing large contributions and expenditures. *See id.* at 67. Disclosure and reporting also provide the data needed to detect violations of the statute's financial contribution limitations. *See id.* 68.

the electorate information about the source of candidates' political campaign money, which would assist voters in evaluating the candidates.[50] Thus, the Court concluded that the public interest in disclosure outweighed the potential harm to First Amendment freedoms.[51]

Two years later, in *First National Bank v. Bellotti*,[52] the Court considered a Massachusetts criminal statute that prohibited certain corporations and businesses from making expenditures or contributions to express their political views and, thereby, influence voters.[53] The appellants were banking associations and business corporations that wanted to publicize their views concerning a proposed constitutional amendment appearing on the ballot.[54] The Massachusetts Supreme Judicial Court held that the statute was constitutional, reasoning that a corporation's First Amendment right to freedom of speech is restricted to issues materially affecting its business, property, or assets.[55]

The United States Supreme Court reversed and held that corporate speech does not lose its First Amendment protection merely because the

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50. *See id.* at 66-67 & n.77 (citing H.R. Rep. No. 92-564, at 4 (1971)). The Court stated that the source of a candidate's funding is important because it indicates the issues to which the candidate is "most likely to be responsive." *Id.* at 67; *see infra* notes 60-61 and accompanying text (explaining that citizens may consider the identity and credibility of an advocate when evaluating the merits of an argument).

51. *See Buckley*, 424 U.S. at 72.

52. 435 U.S. 765 (1978).

53. *See id.* at 767-68. The statute stated:

> No corporation carrying on the business of a bank . . . shall directly or indirectly give, pay, expend or contribute . . . any money or other valuable thing for the purpose of aiding, promoting or preventing the nomination or election of any person to public office, or aiding, promoting or antagonizing the interests of any political party, or influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation. No question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation.

Id. at 768 n.2 (citing MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977)) (emphasis omitted).

The appellants argued that this statute violated the First Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and provisions of the Massachusetts Constitution. *See id.* at 770.

54. *See id.* at 769. The amendment to the Massachusetts Constitution would have authorized the state legislature to impose a graduated personal income tax. *See id.* The appellants opposed this amendment because they believed that it would lead to an unfavorable tax climate for business corporations and, thus, discourage them from settling in Massachusetts. *See id.* at 770, 770 n.4. The appellants also feared that the tax structure would discourage business executives from moving to or working in Massachusetts. *See id.* at 770 n.4.

55. *See id.* at 767; First Nat'l Bank v. Attorney Gen., 359 N.E.2d 1262, 1270 (Mass. 1977).

subject matter of the speech does not materially affect the corporation's business or property.[56] Using the exacting scrutiny test,[57] the Court determined that the statute was not justified by a compelling state interest.[58] In analyzing this case, the Court also indicated that the identity of an author is valuable information for the public to know.[59] The Court commented that citizens in a democracy must judge and evaluate opposing arguments and, in doing so, may consider the "source and credibility of the advocate."[60] Thus, *Bellotti* also supports the proposition that disclosure of an author's identity may be useful to the public.[61]

C. *The Conflict Between First Amendment Freedoms and the State's Interests in Regulating Elections*

1. *Exacting Scrutiny*

The Supreme Court used a test of exacting scrutiny in *Bellotti* to examine the constitutionality of a state-imposed restriction on speech.[62] Noting that the statute directly prohibited speech pertaining to electoral

56. *See Bellotti*, 435 U.S. at 784. The Court determined that neither the First nor Fourteenth Amendments supported the attorney general's claim that corporate speech is protected only when it concerns the corporation's business or property. *See id.* The Court also noted that its commercial speech cases do not support the argument. *See id.* at 783. Rather, the Court stressed that the First Amendment prohibits the government from limiting the information disseminated to citizens and, thereby, extends beyond protecting the freedoms of press and speech of individuals. *See id.* The Court explained that commercial speech is constitutionally protected "because it furthers the societal interest in the 'free flow of commercial information.' " *Id.* (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 764 (1976)).

57. *See id.* at 786.

58. *See id.* at 795; *see infra* notes 62-72 and accompanying text (explaining the *Bellotti* Court's use of an exacting scrutiny analysis to review Massachusetts's proferred state interests).

59. *See Bellotti*, 435 U.S. at 791-92.

60. *Id.* at 791-92. In a footnote to this discussion, the Court noted:

> Corporate advertising, unlike some methods of participation in political campaigns, is likely to be highly visible. Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected.

Id. at 792 n.32.

61. *Id.* at 791-92, 792 n.32. This footnote became an important part of the argument in *McIntyre v. Ohio Elections Commission*. 115 S. Ct. 1511, 1522 (1995). Ohio used the footnote to draw an analogy between the identity of a corporate author in a political campaign and the identity of an individual who distributes campaign literature. *See id.* at 1522-23; *see infra* notes 134-35 and accompanying text (discussing the significance of the *Bellotti* Court's comment and footnote to the statute at issue in *McIntyre*).

62. *Bellotti*, 435 U.S. at 786; *see supra* note 47 and accompanying text (discussing the origin of an exacting scrutiny standard for free speech cases). The "exacting scrutiny" test later became the basis for the Court's decision in *McIntyre*. *See infra* notes 119-23 and accompanying text (discussing the exacting scrutiny standard used in *McIntyre*).

issues, the Court determined that the State must show that (1) there was a compelling interest for the restrictive statute[63] and (2) the statute was narrowly drawn to impact only that compelling state interest.[64]

In conducting its exacting scrutiny analysis of the statute, the *Bellotti* Court found that neither of the two interests advanced by Massachusetts justified the restriction on corporate speech.[65] First, Massachusetts argued that it had an interest in supporting the active role of citizens in the electoral process and maintaining their confidence in government.[66] The Court explained, however, that the First Amendment forbids a state from restricting the speech of some segments of society to bolster the voice of others.[67] Thus, Massachusetts's interest in sustaining an active electorate and maintaining voter confidence did not justify the prohibition on corporate speech.[68]

Second, Massachusetts contended that it had an interest in protecting the rights of shareholders who disagreed with the viewpoints espoused by the corporation's management.[69] The Supreme Court reasoned that Massachusetts's asserted interest in protecting those shareholders was nullified by provisions of the statute that were both underinclusive and overinclusive.[70] Consequently, the Court concluded that Massachusetts's

63. *See Bellotti*, 435 U.S. at 786 (" '[T]he State may prevail only upon showing a subordinating interest which is compelling . . . .' " (quoting Bates v. City of Little Rock, 361 U.S. 516, 524 (1960) (citing NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 463 (1958)))). The Court noted that the burden is on the State to demonstrate a compelling interest. *See id.* (citing Elrod v. Burns, 427 U.S. 347, 362 (1976)).

64. *See id.* ("[T]he State must employ means 'closely drawn to avoid unnecessary abridgment . . . .' ") (quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam)).

65. *See id.* at 787-88.

66. *See id.* at 787. Massachusetts contended that corporations were so wealthy and powerful that their views would overpower other points of view, leading to a decreased role for individuals in the political system and a decline in voter confidence. *See id.* at 787-89.

67. *See id.* at 790-91 (citing Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (per curiam)). The Court noted that there was no evidence that corporations were overshadowing the role of individual Massachusetts citizens or undermining the citizens' confidence in government. *See id.* at 789-90. Additionally, the Court declared that citizens have the responsibility of evaluating the merits of various arguments and, in doing so, could consider "the source and credibility of the advocate" if this information is disclosed. *Id.* at 791-92; *see also supra* note 50 and accompanying text (explaining the significance of knowing the identity of a candidate's financial contributors).

68. *See Bellotti*, 435 U.S. at 788-92.

69. *See id.* at 787.

70. *See id.* at 792-93. The Court described the statute as underinclusive because it prohibited corporations from making expenditures of corporate resources to further a particular viewpoint for a referendum, while it simultaneously allowed corporations to lobby representatives about legislation on the issue. *See id.* at 791 n.31, 792-93. Therefore, the statute allowed the corporation to make expenditures related to legislation, but not to ballot issues. *See id.* at 793.

interest in protecting shareholders did not warrant the restriction on corporate speech.[71] Thus, because the statute in *Bellotti* was not justified by any compelling state interest, it did not withstand exacting scrutiny analysis, and the Court held that it was unconstitutional.[72]

2. *The "Ordinary Litigation" Test*

In *Anderson v. Celebrezze*,[73] the Supreme Court used a different analytical framework to review an Ohio election provision requiring independent candidates to file a statement of candidacy and a nominating petition seventy-five days before the primary election.[74] The *Anderson* Court recognized that early filing deadlines affect the First Amendment rights of voters.[75] Nevertheless, the Court held that a state may impose some restrictions on candidates' access to the ballot without unconstitutionally burdening voters' associational or voting rights.[76] According to

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The Court described the statute as overinclusive because it prohibited corporations from making expenditures to support or oppose a ballot issue even when the shareholders unanimously authorized such action. *See id.* at 794.

71. *See id.* at 795.

72. *See id.*

73. 460 U.S. 780 (1983).

74. *See id.* at 782-83 & 783 n.1 (reviewing OHIO REV. CODE ANN. § 3513.25.7 (Anderson Supp. 1982)). The deadline for independent candidates to file their materials with the Ohio Secretary of State was March 20, 1980, and the date of the primary election was June 3, 1980. *See id.* at 783 n.1. Failure to submit the statement and petition resulted in exclusion from the November ballot. *See id.* at 783.

When John Anderson, an independent candidate for President of the United States, attempted to file his statement of candidacy and nominating petition on May 16, 1980, the Ohio Secretary of State, Anthony J. Celebrezze, refused to accept Anderson's documents because he had missed the statutory deadlines. *See id.* at 782-83. Anderson then filed suit in the United States District Court for the Southern District of Ohio, challenging the constitutionality of the statute and arguing that it violated the First Amendment's guarantee of freedom of association. *See id.* at 783. The district court agreed with Anderson and ordered his name placed on the ballot. *See id.* The United States Court of Appeals for the Sixth Circuit later reversed, holding that the early filing deadline for independent candidates was valid. *See id.* at 784-85.

Anderson also filed suits challenging early filing deadlines in Maine and Maryland, and both the First Circuit and the Fourth Circuit Courts of Appeals affirmed district court rulings invalidating the early filing deadlines. *See id.* at 786. The Supreme Court granted certiorari to settle the split among circuits on the issue of early filing deadlines. *See id.*

75. *See id.* at 786-87. The Court's primary concern was the interest of voters who wished to associate and work together to support Anderson's candidacy and viewpoints, rather than Anderson's interests as a candidate. *See id.* at 806. The Court explained that early filing deadlines restrict candidates' access to the ballot, thereby limiting the field of candidates from which voters can choose. *See id.* at 786. In addition, ballot restrictions burden voters' freedom of association because they deprive like-minded citizens of an opportunity to work together in support of a particular candidate. *See id.* at 787-88.

76. *See id.* at 788.

the Court, regulating elections is necessary to ensure that the elections are fair, honest, and orderly.[77]

The *Anderson* Court declared that the same analytical method used in "ordinary litigation" must resolve the constitutional challenges to state election laws.[78] Under the ordinary litigation test, the interests of the state in regulating elections are weighed against the potential injury to rights protected by the First and Fourteenth Amendments.[79] Applying the ordinary litigation balancing test to Ohio's early filing deadline,[80] the Court found that the early deadline significantly burdened the availability of political opportunities for Ohio voters and potential candidates, as well as their associational rights.[81] Continuing its analysis, the Court evaluated the three interests that Ohio identified as justifying the early filing deadline: "voter education,[82] equal treatment for partisan and independ-

77. *See id.* (citing Storer v. Brown, 415 U.S. 724, 730 (1974)). The *Anderson* Court noted that state election codes generally govern issues such as voter registration, candidate eligibility, and voting processes and procedures. *See id.* Although these provisions affect voting and associational rights, the Court determined that "the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Id.*

78. *Id.* at 789; *see infra* note 104 and accompanying text (pointing out that the Ohio Supreme Court used the ordinary litigation test to evaluate Ohio's ban on anonymous campaign literature).

79. *See Anderson*, 460 U.S. at 789. The first step in the ordinary litigation test is to consider the nature and extent of the injury to the plaintiff's First and Fourteenth Amendment rights. *See id.* Next, the court must identify and evaluate the interests that the state asserts to justify the burden on the plaintiff's rights. *See id.* The court must then balance the competing interests to determine whether the challenged statute is constitutional. *See id.*

80. *See id.* at 790-806.

81. *See id.* at 790-94. The Court explained that the early filing deadline forced independent candidates to enter the presidential election arena several months before the major political parties have selected their own candidates. *See id.* at 790-91. If the filing deadline was later in the year, independent candidates could enter the race representing the viewpoints of voters who are dissatisfied with the major parties' candidates. *See id.* at 791. Thus, the Court determined that the early filing deadline burdened the First Amendment freedom of association of independent candidates and voters because it limited their opportunities to associate with each other in support of their viewpoints. *See id.* at 793-94.

82. *Id.* at 796. Ohio used the term "voter education" to refer to the process by which the electorate learns about the qualifications and positions of candidates running for President so that they can make a well-informed and reasoned choice about which candidate to support. *See id.* at 796-97. The State argued that the early filing deadline for independent candidates served the interest of voter education because it prompted Ohio voters to pay attention to the candidate. *See id.* at 798.

ent candidates,[83] and political stability."[84] None of those interests, however, justified the burden placed on voters' First Amendment rights by the early filing deadline.[85] Based on its findings using the ordinary litigation test, the *Anderson* Court held that the burdens the Ohio law imposed on the voters' freedom of choice and freedom of association outweighed Ohio's "minimal interest" in imposing an early deadline.[86]

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83. *Id.* at 796. "Equal treatment for partisan and independent candidates" means "treating all candidates alike." *Id.* at 799. The State argued that the early filing deadline for independent candidates furthered this interest because it required independent candidates to file their documents on the same day that partisan candidates were required to file their materials in order to participate in the primary election. *See id.*

84. *Id.* at 796. Ohio explained that it had a strong interest in preventing damaging intraparty feuding within either of the two major political parties, which could result when a partisan candidate decides to withdraw from the party primary and run as an independent. *See id.* at 801. Ostensibly, an early filing deadline for independent candidates would prevent partisan candidates from attempting to run as independents and, therefore, would protect the State's political party structure. *See id.* The State stressed that Anderson's decision to run as an independent candidate for President could splinter the Ohio Republican party by drawing Republican activists away from the party to work for the Anderson campaign. *See id.*

85. *See id.* at 796-806. The Court determined that Ohio's interest in voter education did not justify the burden on First Amendment rights because the advent of nationwide communication systems and the increased literacy of the electorate made it easier for voters to learn about candidates in a short period of time. *See id.* at 796-98.

The Court also determined that Ohio's early filing deadline did not serve the interest of equal treatment for partisan and independent candidates. *See id.* at 799-801. The Court noted that although partisan candidates running in the primary election were required to declare their candidacy on the same day as independent candidates, the benefits and burdens on each group were quite different. *See id.* at 799. For example, partisan candidates who did not run in the primary election still would appear on the general election ballot in November even if they did not declare their candidacy by the March deadline. *See id.* On the other hand, independent candidates who missed the March deadline would not appear on the November ballot. *See id.* Moreover, partisan candidates who meet the March deadline and win the primary election enjoy the benefit of the support and assistance of the major party organizations. *See id.* at 800. Independent candidates, on the other hand, do not gain such organized and powerful support. *See id.*

Finally, the Court concluded that Ohio's interest in maintaining political stability by preventing intraparty feuding did not justify imposing an early filing deadline on independent candidates. *See id.* at 801-06. The Court reasoned that Ohio's actual, unarticulated interest was to protect the major political parties from external competition with independent candidates and concluded that the major parties should not monopolize the political structure. *See id.* at 801-02.

86. *Id.* at 806.

D. Judicial Treatment of Anonymous Campaign Literature by Lower Courts: Conflicting Decisions

Before the *McIntyre* decision, the Supreme Court had addressed issues such as the value of anonymity,[87] the importance of knowing an author's identity,[88] and the relationship between the state's interests and the freedom of speech,[89] but the Court had not directly confronted the issue of anonymous campaign literature. Consequently, there was no clear indication of the constitutional status of prohibitions on anonymous campaign literature.

Due to this lack of clarity, state and federal courts throughout the nation each had their own interpretation of how the Supreme Court's previous rulings applied to state identification statutes; therefore, the lower courts reached different conclusions when reviewing bans on anonymous campaign literature.[90] In several cases, courts concluded that identifica-

87. *See, e.g.*, Talley v. California, 362 U.S. 60, 64-65 (1960); Bates v. City of Little Rock, 361 U.S. 516, 523 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462-63 (1958).

88. *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765, 791-92, 792 n.32 (1978); Buckley v. Valeo, 424 U.S. 1, 62, 66-68 (1976) (per curiam); Lewis Publ'g Co. v. Morgan, 229 U.S. 288, 312 (1913).

89. *See* Anderson v. Celebrezze, 460 U.S. 780, 786-89 (1983); *Bellotti*, 435 U.S. at 786-87.

90. *Compare* Griset v. Fair Political Practices Comm'n, 884 P.2d 116, 123 (Cal. 1994) (upholding a prohibition on anonymous campaign literature by a candidate or candidate-controlled committee in order to aid the electorate in making an informed voting decision), *cert. denied*, 115 S. Ct. 1794 (1995), *and* Canon v. Justice Court, 393 P.2d 428, 436 (Cal. 1964) (maintaining that the state interest in prohibiting anonymous campaign literature outweighs a limitation on freedom of expression but striking down the statute for other reasons), *and* State v. Freeman, 55 P.2d 362, 365 (Kan. 1936) (holding that a statute banning anonymous campaign publications does not offend the First Amendment), *and* Morefield v. Moore, 540 S.W.2d 873, 874 (Ky. 1976) (upholding a statute requiring the identification of the financial supporters of campaign literature), *and* State v. Babst, 135 N.E. 525, 526 (Ohio 1922) (upholding a state statute requiring identification of the author of campaign literature because it was designed to minimize fraudulent campaign literature), *and* Commonwealth v. Acquaviva, 145 A.2d 407, 412 (Pa. Super. Ct. 1959) (sustaining an identification requirement as a regulation designed to preserve the integrity of the electoral process), *and* Commonwealth v. Evans, 40 A.2d 137, 138-39 (Pa. Super. Ct. 1945) (upholding an identification statute as a regulation designed to discourage "character assassination" and to promote fair elections and clean campaigning), *with* Printing Indus. v. Hill, 382 F. Supp. 801, 811 (S.D. Tex. 1974) (holding that a state's interest in disclosing certain information on campaign literature was insufficient to justify a prohibition on anonymous political speech), *vacated*, 422 U.S. 937 (1975), *and* Zwickler v. Koota, 290 F. Supp. 244, 258 (E.D.N.Y. 1968) (invalidating a state statute restricting anonymous political speech because it violated the First Amendment), *rev'd sub nom.* Golden v. Zwickler, 394 U.S. 103 (1969), *and* Schuster v. Imperial County Mun. Court, 167 Cal. Rptr. 447, 453 (Cal. Ct. App. 1980) (holding that California's identification statute was unconstitutionally overbroad), *cert. denied sub nom.* California v. Schuster, 450 U.S. 1042 (1981), *and* People v. Bongiorni, 23 Cal. Rptr. 565, 565-66 (Cal. App. Dep't Super. Ct. 1962) (invalidating a

tion statutes burdened citizens' First Amendment freedom of speech but were valid nonetheless.[91] The primary rationale in those cases was that the state interests in facilitating the flow of information to the public and maintaining the civility and integrity of the electoral process outweighed the burden that identification requirements placed on the First Amendment rights of citizens.[92] In other cases, however, courts invalidated statutes banning anonymous campaign speech as violations of the First Amendment freedom of speech.[93] These conflicting lower court deci-

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statute requiring the name and address of the distributor of campaign literature), *and* State v. Burgess, 543 So. 2d 1332, 1336 (La. 1989) (invalidating an identification statute because the State failed to provide a compelling interest), *and* State v. Fulton, 337 So. 2d 866, 870-71 (La. 1976) (invalidating an identification statute because it was not narrowly tailored to advance the State's interest), *and* Commonwealth v. Dennis, 329 N.E.2d 706, 710 (Mass. 1975) (striking down a prohibition on anonymous campaign literature as a violation of the First Amendment rights of non-voters), *and* People v. Duryea, 354 N.Y.S.2d 129, 130 (N.Y. App. Div. 1974) (invalidating an overly broad identification statute), *and* State v. North Dakota Educ. Ass'n, 262 N.W.2d 731, 733 (N.D. 1978) (holding that a statute banning anonymous political advertisements violates the First Amendment); *see also* Thomas H. Dupree, Jr., Comment, *Exposing the Stealth Candidate: Disclosure Statutes After McIntyre v. Ohio Elections Commission*, 63 U. CHI. L. REV. 1211, 1219-22 (1996) (examining the varying rationales of the lower court opinions).

91. *See, e.g.*, *Griset*, 884 P.2d at 123 (upholding a statute prohibiting anonymous mass mailings by candidates because it furthers the State's compelling interest in an informed electorate); *Freeman*, 55 P.2d at 365 (upholding a ban on anonymous campaign speech and arguing that voters are entitled to know who is responsible for a piece of campaign literature); *Morefield*, 540 S.W.2d at 874 (distinguishing Talley v. California, 362 U.S. 60 (1960), and holding that a disclosure requirement was valid because it was designed to promote honesty and fairness in campaigns); *Babst*, 135 N.E. at 526 (upholding the identification requirement in order to fix responsibility on those who published fraudulent statements); *Acquaviva*, 145 A.2d at 412 (sustaining the identification requirement as a regulation designed to preserve the integrity of the electoral process); *Evans*, 40 A.2d at 138-39 (upholding the identification statute as a regulation designed to discourage "character assassination" and to promote fair elections and clean campaigning); *cf. Canon*, 393 P.2d at 436 (explaining that a ban on anonymous campaign literature is justified because the State's interest in providing information to voters and preventing fraudulent literature outweighs the citizens' interest in anonymous speech, but holding the statute to be unconstitutionally discriminatory for other reasons).

92. *See, e.g.*, *Griset*, 884 P.2d at 122-23; *Canon*, 393 P.2d at 436; *Freeman*, 55 P.2d at 365; *Morefield*, 540 S.W.2d at 874; *Babst*, 135 N.E. at 526; *Acquaviva*, 145 A.2d at 412; *Evans*, 40 A.2d at 138-39.

93. *See, e.g.*, *Printing Indus.*, 382 F. Supp. at 811 (holding that the burdens placed on freedom of speech by a statute requiring political advertisements to include the name and address of the sponsor outweigh any compelling state interest in prohibiting anonymous political speech); *Zwickler*, 290 F. Supp. at 258 (striking down a statute prohibiting anonymous political speech as a violation of the freedom of expression); *Schuster*, 167 Cal. Rptr. at 453 (holding that a ban on anonymous campaign literature was an unconstitutionally overbroad restriction on the freedom of speech); *Bongiorni*, 23 Cal. Rptr. at 565-66 (relying on *Talley* to invalidate a statute that prohibited the distribution of anonymous campaign leaflets); *Burgess*, 543 So. 2d at 1336 (relying on *Talley* to invalidate a statute that prohibited certain anonymous political speech); *Fulton*, 337 So. 2d at 870-71 (invalidating a statute prohibiting anonymous campaign-related expression because it was not narrowly

sions demonstrated the lack of a coherent, nationwide framework for evaluating disclosure statutes when *McIntyre* arose.

II. *McIntyre v. Ohio Elections Commission*: Protecting the Right to Distribute Anonymous Campaign Literature

A. *The Ohio Supreme Court Decision: Upholding the Ohio Statute*

Reasoning that the State's dual interests in providing information to voters and preventing fraud and libel outweighed the burden on authors, the Ohio Supreme Court held that § 3599.09(A), the Ohio identification statute, did not violate the freedom of speech that both the United States and Ohio Constitutions guaranteed.[94] First, the Ohio Supreme Court emphasized the Ohio Court of Appeals' reliance on *State v. Babst*,[95] an Ohio Supreme Court decision upholding the statutory predecessor to § 3599.09(A).[96] Although Mrs. McIntyre argued that the United States Supreme Court's decision in *Talley* superseded *Babst*, the court rejected her argument.[97] Instead, the Ohio Supreme Court distinguished the two

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drawn to protect a compelling state interest); *Dennis*, 329 N.E.2d at 710 (invalidating a statute prohibiting anonymous campaign literature because it violated the precedent set in *Talley*); *Duryea*, 354 N.Y.S.2d at 130 (holding that a statute prohibiting anonymous campaign literature was invalid because it was not narrowly drawn to advance a compelling state interest); *North Dakota Educ. Ass'n*, 262 N.W.2d at 735-36 (relying on the *Talley* decision to strike down a ban on anonymous political leaflets). *See generally* Thomas E. Leggans, Casenote, 12 S. Ill. U. L.J. 677 (1988) (providing an analysis of prior cases that either upheld or invalidated disclosure statutes).

94. *See* McIntyre v. Ohio Elections Comm'n, 618 N.E.2d 152, 156 (Ohio 1993), *rev'd*, 115 S. Ct. 1511 (1995).

95. 135 N.E. 525 (Ohio 1922).

96. *See McIntyre*, 618 N.E.2d at 153. The Ohio Court of Appeals relied heavily on *Babst* in upholding the constitutionality of the Ohio identification statute. *See id. Babst* concerned § 13343-1 of the Ohio General Code, which was the predecessor to § 3599.09(A), the identification statute at issue in *McIntyre*. *See Babst*, 135 N.E. at 525; *McIntyre*, 618 N.E.2d at 153. There were no material differences between the two statutes. *See McIntyre*, 618 N.E.2d at 153.

In *Babst*, the Ohio Supreme Court considered whether the statutory ban on anonymous campaign literature violated the Ohio Constitution's liberty of speech provision. *See Babst*, 135 N.E. at 525. The Bill of Rights of the Ohio Constitution provides that: "Every citizen may freely speak, write, and publish his sentiments on all subjects, *being responsible for the abuse of the right*; and no law shall be passed to restrain or abridge the liberty of speech, or by the press." *Id.* (quoting Ohio Const. art. I, § 11) (emphasis added). The Ohio Supreme Court reasoned that freedom of speech is not an unlimited right because the Ohio Constitution states that people may be held responsible for any abuse of that right. *See id.* at 526. The court concluded that the statutory ban on anonymous campaign literature was designed to prevent fraudulent, anonymous statements and, therefore, comported with the language and intent of the Ohio Constitution. *See id.* at 525-26.

97. *See McIntyre*, 618 N.E.2d at 153-54. Mrs. McIntyre argued that *Babst* was not controlling because the Supreme Court had subsequently addressed the issue of anonymous literature in *Talley*. *See id. Talley* held that an ordinance banning all anonymous

cases, explaining that the purpose of the *Talley* ordinance was merely to disclose the identity of a leaflet's author and was not limited to the prevention of fraud.[98] The Ohio statute, on the other hand, was designed to identify individuals or groups distributing fraudulent campaign literature in violation of §§ 3599.091(B) and 3599.092(B)(2) of the Ohio Election Code.[99]

Next, the Ohio Supreme Court relied on the United States Supreme Court's acknowledgment in *Bellotti* that identification requirements may sometimes be permissible for campaign-related speech.[100] The court found it significant that the United States Supreme Court implicitly supported an identification requirement in a case employing an exacting scrutiny standard.[101]

The Ohio Supreme Court, however, rejected the exacting scrutiny standard used in *Bellotti*.[102] The court reasoned that subjecting all voting regulations to exacting scrutiny "would tie the hands of States seeking to

leaflets unconstitutionally burdened freedom of expression. *See* Talley v. California, 362 U.S. 60, 64-65 (1960); *see supra* notes 27-36 and accompanying text (discussing the reasoning used to invalidate the ordinance in *Talley*).

98. *See McIntyre*, 618 N.E.2d at 154. The Ohio Supreme Court explained that the *Talley* decision was not dispositive in this case and stressed the language the *Talley* Court used to qualify its decision. *See id.* Notably, the *Talley* Court said that it was not deciding on the validity of a statute that was limited to preventing "fraud, false advertising and libel." *Id.* (quoting *Talley*, 362 U.S. at 64). Rather, the *Talley* Court explained that its decision encompassed ordinances prohibiting "*all* handbills" not including the author's name and address. *See id.* (quoting *Talley*, 362 U.S. at 64) (emphasis added). Thus, the *Talley* opinion pertained to blanket prohibitions on anonymous leaflets, rather than restrictions designed to prevent fraud. *See Talley*, 362 U.S. at 64.

99. *See McIntyre*, 618 N.E.2d at 154. These provisions of the Ohio Election Code "prohibit persons from making false statements during campaigns for public office and ballot issues." *Id.*

100. *See id.* The court recalled the discussion and footnote in *Bellotti* in which the Supreme Court stated that citizens could consider a document's source in evaluating the merits of its argument. *See id.* (citing First Nat'l Bank v. Bellotti, 435 U.S. 765, 791-92, 792 n.32 (1978)); *see also supra* notes 60-61 and accompanying text (discussing footnote 32 of *Bellotti*).

101. *See McIntyre*, 618 N.E.2d at 155. The *Bellotti* Court required the State to show a compelling interest to justify any restriction on First Amendment freedoms. *Bellotti*, 435 U.S. at 786. The fact that the Supreme Court approved of an identification requirement in a case employing the very high standard of exacting scrutiny is significant because it implies that such an identification requirement "would survive constitutional scrutiny." *McIntyre*, 618 N.E.2d at 156.

102. *See McIntyre*, 618 N.E.2d at 155. *Bellotti*, and other cases, required that restrictions on speech be "narrowly tailored to advance a compelling state interest." *Id.*; *see Bellotti*, 435 U.S. at 786.

assure that elections are operated equitably and efficiently."[103] Instead, the court adopted *Anderson*'s more flexible ordinary litigation test.[104]

Using that analytical framework, the Ohio Supreme Court held that the identification requirement was only a minor burden on freedom of speech.[105] Moreover, the State's interests in identifying proponents of fraud, false advertising, and libel and providing voters with additional information to evaluate the campaign literature's credibility outweighed the minor burden the statute imposed.[106]

B. The Supreme Court Majority Opinion: Striking Down the Ohio Statute

Determining that Ohio's interests did not outweigh the burden on First Amendment rights, the United States Supreme Court reversed the judgment of the Ohio Supreme Court.[107] The majority opinion, written by Justice Stevens,[108] began by noting that an author's choice to remain anonymous is an aspect of the First Amendment freedom of speech.[109]

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103. *McIntyre*, 618 N.E.2d at 155.

104. *See id.*; *see supra* note 79 and accompanying text (explaining the ordinary litigation test of *Anderson*). The *Anderson* Court had explained that "reasonable, nondiscriminatory restrictions" on voters' First and Fourteenth Amendment rights were justified by the State's interest in protecting the "integrity and reliability of the electoral process." Anderson v. Celebrezze, 460 U.S. 780, 788 & n.9 (1983).

105. *See McIntyre*, 618 N.E.2d at 155-56. The Ohio Supreme Court reasoned that the identification requirement restricted neither the content of the authors' campaign literature, nor their ability to distribute it. *See id.* at 155.

106. *See id.* at 155-56. The burden on authors of campaign literature, therefore, was reasonable, nondiscriminatory, and justified by important state interests. *See id.* at 156; *Anderson*, 460 U.S. at 788 & n.9 (noting that states may impose election restrictions to protect the integrity and reliability of the electoral process). The Ohio Supreme Court also pointed out that regulations on electoral speech, which are based on the State's interest in providing additional information to voters, were acknowledged in *Bellotti* as regulations that would survive constitutional scrutiny. *See McIntyre*, 618 N.E.2d at 156.

107. *See* McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1524 (1995). Mrs. McIntyre died of cancer in May, 1994, before her case reached the Supreme Court, but her family continued the case. *See id.* at 1516; Deibel, *supra* note 14, at 5-B. Although the State of Ohio requested that the Supreme Court dismiss the case because of Mrs. McIntyre's death, the Court refused to do so, showing great interest in the case. *See id.*

108. *See McIntyre*, 115 S. Ct. at 1514. Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer joined in the opinion. *See id.* at 1513. Justice Ginsburg also wrote a concurring opinion. *See id.* at 1524.

109. *See id.* at 1516. The Court also commented that the benefit of having anonymous writings "enter the marketplace of ideas" outweighs the advantages gained by mandatory disclosure of the author's identity. *Id.*; *see* Comment, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70 YALE L.J. 1084, 1084 (1961) (noting that some commentators argue that "disclosure of a source of argument is necessary to an honest evaluation of its truth in the market place [sic] of ideas," while others contend that disclosure deters free expression and defeats the goals of the First Amendment's marketplace of ideas); *supra* note 2 (explaining the "marketplace of ideas" metaphor).

Referring to its earlier decision in *Talley*, the Court emphasized the long tradition of anonymous speech in the United States and explained that the freedom to remain anonymous extends to the political context.[110] Comparing the Ohio statute with the ordinance in *Talley*, the Court determined that both laws were invalid for the same reason: neither law contained language limiting its purpose to preventing fraudulent or false statements.[111] Nevertheless, the Court acknowledged that *Talley* did not necessarily control the decision in *McIntyre* because the *Talley* ordinance prohibited all anonymous handbills, and the statute in *McIntyre* applied only to campaign literature.[112] Thus, the Court narrowed the issue in *McIntyre* to whether the First Amendment's protection of anonymous speech encompasses campaign literature.[113]

Next, the Court considered the applicable level of scrutiny to be applied.[114] Ohio had argued that its statute was a provision of the election code that the Court should review using the same analytical process as in other election-code cases.[115] In *Anderson* and other election-code cases, the Court had used an ordinary litigation balancing test in which the state's interests are weighed against the potential injury to citizens' First Amendment rights.[116] The *McIntyre* Court determined that the ordinary litigation test did not apply, however, because Ohio's statute did not

110. *See McIntyre*, 115 S. Ct. at 1516-17 (citing Talley v. California, 362 U.S. 60, 64-65 (1960)); *see supra* note 33 and accompanying text (noting some historical examples of anonymous speech in the United States). The Court noted that the *Talley* decision incorporated the respected tradition of anonymous political speech. *See McIntyre*, 115 S. Ct. at 1517.

111. *See McIntyre*, 115 S. Ct. at 1517; *supra* text accompanying notes 27-29 (explaining that the *Talley* Court had rejected Los Angeles's claim that the ordinance at issue was designed to prevent fraud and libel because neither the text, nor the legislative history of the ordinance, limited its scope to that purpose). The Court also pointed out that the Ohio statute even applied when no fraudulent statements were included in the literature, as in Mrs. McIntyre's case. *See McIntyre*, 115 S. Ct. at 1517.

112. *See McIntyre*, 115 S. Ct. at 1517.

113. *See id.* at 1518. *Compare id.* (narrowing the issue in the case to campaign literature), *with Talley*, 362 U.S. at 60 (identifying the issue in the case as whether a complete ban on all anonymous handbills violates the First Amendment's freedom of speech).

114. *See McIntyre*, 115 S. Ct. at 1518.

115. *See id.*

116. *See id.*; *supra* note 79 and accompanying text (describing the steps of the ordinary litigation test used in *Anderson*); *see also* Burdick v. Takushi, 504 U.S. 428, 434, 441-42 (1992) (using an ordinary litigation test to uphold Hawaii's prohibition on write-in voting); Tashjian v. Republican Party, 479 U.S. 208, 213-14, 229 (1986) (using an ordinary litigation test to invalidate Connecticut's closed primary law); Anderson v. Celebrezze, 460 U.S. 780, 789, 806 (1983) (using an ordinary litigation test to invalidate Ohio's early filing deadline for independent presidential candidates); Storer v. Brown, 415 U.S. 724, 730, 736 (1974) (noting that there is no "litmus-paper test" for evaluating election laws and upholding California's restrictions on ballot access for independent candidates by weighing the State interests against the individual's interests).

merely control the procedures of the electoral process.[117] Rather, the statute was a content-based restriction on speech.[118]

Concluding that the Ohio Supreme Court had used an inappropriately lenient standard of review,[119] the *McIntyre* Court emphasized that a law burdening core political speech requires exacting scrutiny review.[120] Under that level of review, the Court will uphold a restriction on speech only if it is narrowly tailored to serve an overriding state interest.[121] The Court stressed that the campaign-related speech the Ohio disclosure statute regulated was at the center of the First Amendment's protection of speech.[122] Accordingly, the Court described Mrs. McIntyre's leafletting as the quintessential example of First Amendment expression and declared that no other type of speech deserved greater constitutional protection.[123]

In conducting its exacting scrutiny analysis, the Court evaluated two state interests that Ohio contended were sufficiently compelling to justify the restrictive statute: (1) the interest in providing information to the electorate; and (2) the interest in preventing fraud and libel.[124] The Court rejected Ohio's asserted informational interest as being insufficient to justify the statute.[125] The Court reasoned that providing information to the electorate simply meant furnishing additional details that might

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117. *McIntyre*, 115 S. Ct. at 1518.

118. *See id.* The Court described the statute as a content-based restriction on speech for two reasons. *See id.* First, the statute required specific identifying information—the issuer's name and address—to be included in campaign flyers. *See id.* (citing OHIO REV. CODE ANN. § 3599.09(A) (Anderson 1988)). Second, the statute only applied to leaflets containing campaign-related content. *See id. But see* McIntyre v. Ohio Elections Comm'n, 618 N.E.2d 152, 155 (Ohio 1993), (stating that the Ohio disclosure requirement does not impact the content of an author's message), *rev'd*, 115 S. Ct. 1511 (1995).

119. *See* McIntyre, 115 S. Ct. at 1519.

120. *See id.* (citing First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 (1978)); *supra* text accompanying notes 62-64 (discussing the exacting scrutiny standard applied in *Bellotti*).

121. *See McIntyre*, 115 S. Ct. at 1519 (citing *Bellotti*, 435 U.S. at 786).

122. *See id.* at 1518. Discussing the importance of free speech in the election context, the Court recalled that a major purpose of the First Amendment was to protect political speech regarding issues and candidates. *See id.* at 1519 (citing Buckley v. Valeo, 424 U.S. 1, 14-15 (1976) (per curiam) (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966))). The Court explained that the First Amendment provides the greatest protection to political speech in order to encourage the discussion and debate of important political and social issues. *See id.* at 1518-19 (citing *Buckley*, 424 U.S. at 14-15 (quoting Roth v. United States, 354 U.S. 476, 484 (1957))).

123. *See id.* at 1519. The Court noted that the protection of political speech extends not only to speech regarding a candidate for office, but also to speech concerning issues to be decided in an election. *See id.* (citing *Bellotti*, 435 U.S. at 776-77).

124. *See id.*

125. *See id.* at 1520; *supra also* notes 105-06 and accompanying text (discussing the Ohio Supreme Court's treatment of the State's asserted informational interest).

strengthen or weaken an argument; consequently, the Court considered the identity of an author to be no different from other information which the author chooses to include or exclude.[126] Thus, the State could not compel authors to include information they might otherwise omit.[127]

In evaluating Ohio's asserted interest in preventing fraud and libel, the Court found that the statute was not Ohio's principal weapon against fraudulent or libelous campaign literature.[128] Other sections of the Ohio Election Code directly prohibited making or distributing false statements in political campaigns for candidates or ballot issues.[129] Thus, the Court

126. *See McIntyre*, 115 S. Ct. at 1519. Additionally, the Court noted that the name and address of an author would have little value to readers who did not know the author. *See id.* at 1520.

127. *See id.* at 1520.

128. *See id.* at 1520-21. For the text of § 3599.09(A), the identification statute, see *supra* note 15.

129. *See McIntyre*, 115 S. Ct. at 1520. Ohio's Election Code provisions regarding fraud were found in code §§ 3599.09.1(B) and 3599.09.2(B). OHIO REV. CODE ANN. §§ 3599.09.1(B), 3599.09.2(B) (Anderson 1988) (current versions at OHIO REV. CODE ANN. §§ 3517.21(B), 3517.22(B) (Anderson 1996)). Section 3599.09.1(B) provided:

> No person, during the course of any campaign for nomination or election to *public office or office of a political party*, by means of campaign materials, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, press release, or otherwise, shall knowingly and with intent to affect the outcome of such campaign do any of the following: (1) Use the title of an office not currently held by a candidate in a manner that implies that the candidate does currently hold that office . . . (2) Make a false statement concerning the formal schooling or training completed or attempted by a candidate . . . (3) Make a false statement concerning the professional, occupational, or vocational licenses held by a candidate . . . (4) Make a false statement that a candidate or public official has been indicted or convicted of a theft offense, extortion, or other crime involving financial corruption or moral turpitude; (5) Make a statement that a candidate has been indicted for any crime or has been the subject of a finding by the Ohio elections commission without disclosing the outcome of any legal proceedings resulting from the indictment or finding; (6) Make a false statement that a candidate or official has a record of treatment or confinement for mental disorder; (7) Make a false statement that a candidate or official has been subjected to military discipline for criminal misconduct or dishonorably discharged from the armed services; (8) Falsely identify the source of a statement, issue statements under the name of another person without authorization, or falsely state the endorsement of or opposition to a candidate by a person or publication; (9) Make a false statement concerning the voting record of a candidate or public official; (10) Post, publish, circulate, distribute, or otherwise disseminate a false statement, either knowing the same to be false or with reckless disregard of whether it was false or not, concerning a candidate that is designed to promote the election, nomination, or defeat of the candidate.

Id. § 3599.09.1(B) (emphasis added) (current version at § 3517.21(B)); *see also* Robert M. O'Neil, *Regulating Speech to Cleanse Political Campaigns*, 21 CAP. U. L. REV. 575, 587 (1992) ("[Ohio's] regulation of negative campaign advertisements is more detailed and more extensive than that of perhaps any other state.").

Section 3599.09.2(B) provided:

reasoned that the identification statute was merely a supplement to Ohio's other election fraud laws.[130] The Court further explained that although the anonymity ban aided enforcement of the other fraud provisions[131] and deterred the distribution of false statements, those were only ancillary benefits that did not justify the statute's broad restrictions on speech.[132]

> No person, during the course of any campaign in advocacy of or in opposition to the adoption of any *ballot proposition or issue*, by means of campaign material, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, a press release, or otherwise, shall knowingly and with intent to affect the outcome of such campaign do any of the following: (1) Falsely identify the source of a statement, issue statements under the name of another person without authorization, or falsely state the endorsement of or opposition to a ballot proposition or issue by a person or publication; (2) Post, publish, circulate, distribute, or otherwise disseminate, a false statement, either knowing the same to be false or acting with reckless disregard of whether it was false or not, that is designed to promote the adoption or defeat of any ballot proposition or issue.

OHIO REV. CODE ANN. § 3599.09.2(B) (emphasis added) (current version at § 3517.22(B)).

130. *See McIntyre*, 115 S. Ct. at 1521 & n.12. The Court referred to the other statutes to emphasize that Ohio had already addressed the issue of election fraud. *See id.* at n.12. The Court reasoned that the ban on anonymous campaign literature, found in § 3599.09(A), indirectly sought to meet the same goals as the fraud statutes in §§ 3599.09.1(B) and 3599.09.2(B). *See id.* Therefore, the *McIntyre* Court concluded that the anonymity ban was only a supplement to the fraud provisions. *See id.*

Moreover, the Court also pointed out that Ohio enforces the tort of defamation and, thus, provides a remedy for people who are harmed by libelous campaign literature. *See id.* at 1521 n.13.

131. *See id.* at 1521. The Court acknowledged that the identification statute would assist the State in identifying, locating, and prosecuting violators of the election fraud laws. *See id.* Nevertheless, the Court also pointed out that the facts of Mrs. McIntyre's case demonstrate that violators of the election code may still be caught even when their campaign-related literature is anonymous; thus, the anonymity of a leaflet's author does not necessarily protect the author from prosecution for violating the election code. *See id.* at 1522.

132. *See id.* at 1521. The *McIntyre* Court described the Ohio identification statute as an "extremely broad prohibition" and provided several reasons for this characterization. *Id.* at 1521-22. First, the Court noted that the anonymity ban applied to campaign literature that was not false or misleading, such as Mrs. McIntyre's flyers. *See id.* at 1521. Second, the statute applied not only to candidates and their official campaign organizations, but also to individuals acting independently, like Mrs. McIntyre. *See id.* at 1521 & n.14. Third, the anonymity ban applied to elections of candidates, as well as to ballot issues, which generally do not present a risk of corruption. *See id.* at 1521 & n.15. Fourth, the statute applied to campaign literature distributed on the night before an election, when opponents would have no opportunity to respond, and to literature distributed far in advance, when opponents could easily respond. *See id.* at 1521 & n.16. Finally, the statute applied regardless of the proponent's reason for remaining anonymous or the strength of her interest in anonymity. *See id.* at 1522; *see also supra* note 35 and accompanying text (discussing the value of anonymity).

The Supreme Court also rejected Ohio's argument that the *Bellotti* and *Buckley* decisions supported the Ohio statute, noting that neither case concerned a ban on anonymous campaign literature.[133] The *McIntyre* Court distinguished *Bellotti* but conceded that the decision acknowledged that identification of the source of a political advertisement may be required so that people can better evaluate its message and argument.[134] The Court determined, however, that because *Bellotti* involved corporate advertising, its acknowledgment did not necessarily apply to campaign-related speech by individuals like Mrs. McIntyre.[135]

The Court also distinguished *Buckley*'s conclusion that the governmental interest in disclosing the source of a candidate's funding outweighed any harm to First Amendment freedoms.[136] The Court explained that the conclusion does not apply to independent activities by individuals, such as distributing flyers.[137] The Court stated that mandatory disclosure of campaign contributions to a candidate is justified because it avoids the appearance of corruption.[138] Moreover, the Court further explained that disclosure of campaign expenditures by individuals deters people from providing financial support to a candidate as a quid pro quo for special favors after the candidate is elected.[139] The Court emphasized, however, that these concerns do not apply to an individual distributing leaflets on a ballot issue because ballot issues do not give rise to the same notions of corruption as candidate elections.[140]

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133. *See McIntyre*, 115 S. Ct. at 1522-24. The Court pointed out that *Bellotti* involved corporate speech, and *Buckley* concerned disclosure of campaign expenditures. *See id.* at 1522.

134. *See id.* & n.18; *see supra* notes 60-61 and accompanying text (discussing footnote 32 of *Bellotti*).

135. *See McIntyre*, 115 S. Ct. at 1522. The Court also noted that the *Bellotti* Court had drawn a distinction between corporate speech and individual speech and had stressed that it was not deciding whether corporations have the same level of free speech protections as individuals. *See id.* & n.17 (citing First Nat'l Bank v. Bellotti, 435 U.S. 765, 777-78 & n.13 (1978)).

136. *See id.* at 1523.

137. *See id.*

138. *See id.*; *see supra* notes 44, 49-50 and text accompanying notes 41-51 (discussing the facts and rationale of the *Buckley* decision).

139. *See McIntyre*, 115 S. Ct. at 1523.

140. *See id.* The Court further noted that the Federal Election Campaign Act of 1971, reviewed in *Buckley*, regulated candidate elections, rather than issue-based referenda. *See id.*

In addition, the Court also characterized the Ohio identification statute as more intrusive than the federal disclosure requirement upheld in *Buckley*. *See id.* Ohio's identification requirement was more personal than *Buckley*'s financial disclosure mandate because campaign-related flyers are frequently personal statements of a political viewpoint. *See id.* Thus, the *McIntyre* Court declared that an identification requirement for campaign literature is particularly intrusive because disclosure of the author's name reveals his or her

Finally, the Court described anonymous pamphleteering as an honorable tradition that shields individuals from the "tyranny of the majority"[141] and protects them from retaliation by others who disagree with their ideas.[142] Anonymity ensures that an individual's ideas will not be suppressed by fear of reprisal.[143] The Court noted that although anonymity could be used as a shield for fraud, our society places greater emphasis on the value of free speech than on the risks of its abuse.[144] Thus, because Ohio did not show that its interest in preventing the abuse of anonymous campaign speech was compelling enough to justify the significant infringement on free speech that its identification requirement created, the Supreme Court concluded that the Ohio statute was unconstitutional.[145]

C. The Concurring Opinions

1. Justice Ginsburg: Highlighting Unanswered Questions

In a brief concurrence,[146] Justice Ruth Bader Ginsburg disagreed with the dissent's argument that the majority opinion was unwarranted by existing case law.[147] Justice Ginsburg analogized Mrs. McIntyre's situation to the governmental infringement on First Amendment freedoms found in *City of Ladue v. Gilleo*[148] and *United States v. Grace*.[149] In *Gilleo*, the Court invalidated a city ordinance prohibiting yard and window signs.[150]

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personal opinions on a controversial issue. *See id.* Disclosure of a campaign expenditure, on the other hand, reveals less information, is less personal, and is unlikely to result in retaliation. *See id.*

In sum, the Court reasoned that although *Buckley* allows states to enact statutes that infringe on speech in order to serve a compelling governmental interest, it does not justify the extremely broad restriction of Ohio's identification statute. *See id.* at 1524.

141. *Id.* at 1524 (citing J.S. MILL, *On Liberty*, *in* ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 1, 3-4 (R. McCallum ed., 1947)).

142. *See id.* at 1524; *see also supra* notes 33, 35 and accompanying text (discussing the value of anonymous speech throughout history in preventing retaliation, protecting the freedom of association, and avoiding a chilling effect on speech).

143. *See McIntyre*, 115 S. Ct. at 1524.

144. *See id.*

145. *See id.*

146. *See id.* (Ginsburg, J., concurring). Justice Ginsburg joined in the majority opinion, but also filed a separate concurrence. *See id.*

147. *See id.*; *see infra* note 174 (discussing relevant case law).

148. 114 S. Ct. 2038 (1994).

149. 461 U.S. 171 (1983).

150. *See Gilleo*, 114 S. Ct. at 2040. The City of Ladue, Missouri enacted an ordinance prohibiting homeowners from displaying any signs on their property other than address signs, "'for sale'" signs, and warning signs. *See id.* Margaret Gilleo placed a sign on her front lawn displaying the message, "'Say No to War in the Persian Gulf, Call Congress Now.'" *Id.* Gilleo filed suit against the City, arguing that the ordinance violated her First Amendment freedom of speech. *See id.* After the district court issued a preliminary injunction against the City, Gilleo placed a smaller sign in a window of her house that read,

In *Grace*, the Court held that a statute banning the display of flags or banners on the grounds of the Supreme Court building could not be extended to the surrounding public sidewalks.[151] Thus, Justice Ginsburg found that Mrs. McIntyre's right to hand out leaflets was firmly rooted in case law.[152]

Nonetheless, Justice Ginsburg raised interesting and important questions about the future impact of *McIntyre*. Noting that the Court left open matters not presented by Mrs. McIntyre's leaflets, Justice Ginsburg highlighted the majority's recognition that Ohio's interest in regulating the electoral process might justify some type of identification requirement.[153] Although Justice Ginsburg explained that *McIntyre* would allow a state to require a speaker to disclose his or her identity in "other, larger

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"'For Peace in the Gulf.'" *See id.* The City Council then repealed the ordinance and enacted a new, replacement ordinance. *Id.* The second ordinance prohibited all signs within the City, other than those specifically exempted, such as church signs, commercial signs, and gas station signs. *See id.* at 2040-41 & nn.5-6. After Gilleo amended her complaint to challenge the new ordinance, the district court held that the ordinance was unconstitutional, and the court of appeals affirmed. *See id.* at 2041.

The Supreme Court unanimously affirmed the decision and held that the ordinance violated the First Amendment. *See id.* at 2047. The City argued that the ordinance was necessary because the proliferation of too many signs within the City would create visual clutter, decrease property values, and tarnish the beauty of the community. *See id.* at 2041. The Court reasoned, however, that the ordinance foreclosed an important means of communication and expression for city residents. *See id.* at 2045. The Court noted that although municipal prohibitions on signs might be content-neutral restrictions, they nevertheless endanger the freedom of speech because they are overinclusive, restricting too much speech and limiting the opportunities for free expression. *See id.* & n.13. The Court concluded that the City of Ladue could address the problems associated with the proliferation of signs using other, less restrictive measures that do not violate the First Amendment rights of city residents. *See id.* at 2047; *see also* Alan Howard, City of Ladue v. Gilleo*: Content Discrimination and the Right to Participate in Public Debate*, 14 ST. LOUIS U. PUB. L. REV. 349, 351 (1995) (arguing that the *Ladue* decision is significant because it acknowledges the existence of an individual's right to participate in public debate and discussion).

151. *See Grace*, 461 U.S. at 183. *Grace* concerned a federal law that prohibited the display of flags or banners in the United States Supreme Court building and on its grounds. *See id.* at 172-73. Mary Grace was standing on the sidewalk in front of the Supreme Court building, holding a sign inscribed with the text of the First Amendment, when a Court police officer informed her that her conduct violated the statute and warned her that if she did not leave, she would be arrested. *See id.* at 174. Grace then left the grounds. *See id.* She filed suit in the United States District Court for the District of Columbia, challenging the statute. *See id.* After the district court dismissed her complaint, the court of appeals held that the statute unconstitutionally restricted her First Amendment rights. *See id.* at 174-75. The Supreme Court affirmed the decision, holding that the statute could not be applied to the public sidewalks near the Court because they constituted a "public forum." *See id.* at 179-80.

152. *See McIntyre*, 115 S. Ct. at 1524 (Ginsburg, J., concurring).

153. *See id.*

circumstances," she gave no indication of what "larger circumstances" might justify such a requirement.[154]

2. Justice Thomas: Looking to the Founders

Justice Clarence Thomas agreed with the majority opinion that the Ohio statute was invalid, but he suggested a different analytical approach.[155] Rather than tracing the history of anonymous speech, as the majority opinion had done, Justice Thomas sought to determine the original meaning of the First Amendment's phrase "freedom of speech, or of the press" and to decipher whether it protected anonymous political literature.[156] Finding no official record of discussions or debates about anonymous political expression by the Drafters of the Bill of Rights, or by participants in the state ratifying conventions, Justice Thomas looked to other historical evidence of the practices and beliefs of the Framers regarding anonymous political speech.[157] Examining a wide range of historical evidence from that era,[158] Justice Thomas stressed that the Framers relied extensively on anonymity, publishing anonymous political

154. *Id.*

155. *See id.* at 1525 (Thomas, J., concurring in judgment). Although he did not join the majority opinion, Justice Thomas concurred in the judgment. *See id.*

156. *Id.* Justice Thomas emphasized that constitutional interpretation of the First Amendment must focus on its original meaning because the Constitution is a written document, and its meaning does not change over time. *See id.* (citing South Carolina v. United States, 199 U.S. 437, 448 (1905)).

157. *See id.* Justice Thomas began his analysis by noting that Mrs. McIntyre's leaflets clearly implicated the freedom of the press. *See id.* The Framers of the Constitution, he explained, used the word "press" to refer to independent printers who published small newspapers or pamphlets. *See id.* Justice Thomas noted that the practice of publishing and distributing pamphlets played an important role in the American Revolution and in the ratification process of the Constitution. *See id.* He contended, however, that it did not matter whether the right to distribute anonymous literature was characterized as freedom of the press, or freedom of speech, because the crucial factor in the analysis should be whether the Framers considered the First Amendment to protect anonymous writing. *See id.*

158. *See id.* at 1526-30. Justice Thomas noted that members of the Continental Congress perceived a link between anonymity and the freedom of the press. *See id.* at 1526. He related the story of an attempt by the Continental Congress in 1779 to discover the identity of the author of an anonymous newspaper article criticizing members of Congress. *See id.* After one member of Congress proposed that they force the printer of the newspaper to testify before the Congress to reveal information concerning the author, several other members of Congress objected to the proposal as a violation of the freedom of the press. *See id.* Their arguments prevailed, and the printer was never called to testify. *See id.*

Justice Thomas also pointed out that in the late 1700s, the New Jersey State Legislature believed that anonymous writing was protected. *See id.* In 1779, the New Jersey Legislative Council ordered a newspaper editor to reveal the identity of an anonymous author who had criticized the Governor of New Jersey in a newspaper satire and signed his work with the pseudonym, "Cincinnatus." *See id.* When the editor refused and asserted that the

literature such as the Federalist Papers.[159] After reviewing the historical evidence, Justice Thomas concluded that the Framers understood the First Amendment to protect an individual's right to anonymously express political opinions regarding candidates or issues.[160]

Justice Thomas rebuked the majority for failing to seek the original meaning of the First Amendment[161] and, instead, "superimpos[ing] its modern theories concerning expression upon the constitutional text."[162]

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order violated the freedom of the press, the State Assembly agreed and voted to support him. *See id.*

Another example concerned an anonymous article by "Scipio," who was actually the Governor of New Jersey, accusing a state officer of stealing or losing state money. *See id.* at 1526-27. When the officer challenged Scipio to reveal his true name, the Governor responded with a series of anonymous articles arguing that the freedom of the press protects anonymous political writing. *See id.* at 1527.

Justice Thomas also reviewed the vigorous debate between the Federalists and the Anti-Federalists concerning anonymous writing. *See id.* at 1527-29. Two Federalist newspapers, the *Massachusetts Centinel* and the *Massachusetts Gazette*, instituted policies against publishing anonymous Anti-Federalist articles and urged other newspapers to do the same. *See id.* at 1527. Anti-Federalist authors in Pennsylvania and New York, such as the "Federal Farmer" and "Philadelphiensis," who both wrote anonymously, vehemently criticized these policies as violative of the freedom of the press. *See id.* at 1527-28. Justice Thomas concluded that the Federalists appeared to agree with the Anti-Federalists' rationale. *See id.* at 1528. No other newspapers adopted the anonymity policy, and the original two quickly retreated on their stance and published several anonymous articles by both Federalists and Anti-Federalists. *See id.* Thus, Justice Thomas concluded that both the Federalists and the Anti-Federalists believed that the freedom of the press protected an author's right to publish anonymously. *See id.* at 1528-29.

159. *See id.* at 1525-26. Justice Thomas explained that authors used pseudonyms during the Revolutionary period to conceal their identity from the British. *See id.* at 1529; *see also supra* notes 33, 35 and accompanying text (discussing the value of anonymity). During the ratification process of the Constitution, the use of pseudonyms increased, and authors such as "Publius," "Cato," and the "Federal Farmer" anonymously debated the Constitution in newspaper articles and pamphlets. *See McIntyre*, 115 S. Ct. at 1529. After the Constitution's ratification, anonymous political articles and pamphlets were used to express views on political candidates during elections. *See id.* James Madison and Alexander Hamilton used the pseudonyms "Helvidius" and "Pacificus" to debate President Washington's neutrality in the war between Great Britain and France. *See id.* at 1530.

On the other hand, Justice Scalia, in his dissent, contended that the prevalence of anonymous political expression during this historical period does not necessarily prove that anonymity is a constitutional right. *See id.* at 1531 (Scalia, J., dissenting).

160. *See McIntyre*, 115 S. Ct. at 1530 (Thomas, J., concurring).

161. *See id.* Justice Thomas explained that rather than seeking to find the original meaning of the First Amendment, the majority analyzed the case using three approaches: (1) recalling examples of anonymous writing from literature, as well as politics; (2) determining that the value of anonymous speech to the speaker and to society outweighs the interest in disclosing the author's identity; and (3) finding that the Ohio identification statute, § 3599.09(A), does not meet an exacting scrutiny standard because it is a " 'content-based' restriction on speech." *Id.*

162. *Id.* For example, Justice Thomas argued that the majority opinion's discussion of anonymous *literary* works is irrelevant to the analysis of this case because it does not ex-

Thus, because the majority's analysis was unrelated to the Constitution's text and history, Justice Thomas concurred only in the judgment.[163]

D. The Dissent: Striving to Protect the Electoral Process

Justice Antonin Scalia, in a dissent joined by Chief Justice William Rehnquist, declared that the majority opinion erroneously identified a constitutional right to anonymity in election-related expression.[164] He argued that although anonymous electoral speech was common when the Bill of Rights and the Fourteenth Amendment were debated and adopted, there is very little historical evidence indicating that the Framers regarded anonymity in electoral speech as a constitutional right.[165] Thus, Justice Scalia stressed the difficulty of determining the Constitution's meaning with respect to anonymous election-related speech.[166]

In the absence of illustrative historical evidence on the issue, Justice Scalia relied on an examination of the widespread and traditional practices of the American public.[167] He argued that there is a presumption of constitutionality of governmental policies that have been adopted throughout most of the nation and have been in effect for a long period of time.[168] Justice Scalia observed that the Ohio identification statute had

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plain the Framers' original understanding of the freedom of speech and press. *See id.*; *see also id.* at 1516 & n.4 (discussing anonymous literary works).

163. *See id.* at 1530. Justice Thomas reiterated that when the Court has interpreted other provisions of the Constitution, it has considered itself bound by the Constitution's text and the Framers' intent. *See id.*

Moreover, Justice Thomas also pointed out that he disagreed with Justice Scalia's dissent, which emphasized the widespread and long-standing acceptance of identification statutes throughout the United States. *See id.*; *see also infra* text accompanying notes 167-70 (explaining this portion of Justice Scalia's rationale). Although Justice Thomas indicated that he, too, was reluctant to overturn such long-standing practice, he determined that the historical evidence he surveyed outweighed the modern traditions of the states. *See McIntyre*, 115 S. Ct. at 1530.

164. *See McIntyre*, 115 S. Ct. at 1531 (Scalia, J., dissenting).

165. *See id.* Justice Scalia emphasized that none of the historical evidence that Justice Thomas discussed in his concurrence involved governmental restrictions on electoral speech but, instead, concerned prohibitions on anonymous expression in general. *See id.* at 1532. For example, Justice Scalia contended that the Anti-Federalists' objection to two Federalist newspapers' policies of refusing to publish anonymous Anti-Federalist works was an objection to viewpoint-based restrictions on anonymity and freedom of speech that did not concern any campaign or election-related issue. *See id.* In fact, Justice Scalia observed that governmental regulation of the electoral process is a modern concept that did not take hold until the late 1800s. *See id.*

166. *See id.* at 1532. Justice Scalia mentioned that not only is there no evidence of governmental policies forbidding anonymous campaign literature, but there also is no proof that the nonexistence of such regulations was due to the belief that they were unconstitutional. *See id.*

167. *See id.*

168. *See id.*

been in effect for nearly eighty years and that forty-eight other states and the District of Columbia had similar identification requirements.[169] Thus, Justice Scalia concluded that the "universal" and long-standing practice of prohibiting anonymous campaign literature must prevail over historical "speculation" about the original meaning of the First Amendment.[170]

Although he considered the practices of the American people to be determinative in the case, Justice Scalia asserted that he would reach the same result even if he shifted his analysis to an examination of case law and the practical realities of electoral politics.[171] From this perspective, Justice Scalia based his dissent on three main arguments.[172] First, he argued that the protection of the electoral process justifies restrictions on speech that would otherwise be unconstitutional.[173] Second, he argued that a right to anonymity is not such an important constitutional value that the electoral process cannot be protected at its expense.[174] Third, Justice Scalia contended that the Ohio disclosure statute protects and enhances democratic elections.[175] He asserted that people who are required to include their name on a document are less likely to make

169. *See id.* at 1532-33. Justice Scalia noted that the earliest identification statute was enacted in Massachusetts in 1890, and that at the time *McIntyre* was decided, every state except California had an identification statute. *See id.* at 1533 & n.2.

170. *See id.* at 1533-34 & n.3.

171. *See id.* at 1534-37.

172. *See id.*

173. *See id.* at 1534. Justice Scalia noted that case law suggests that the protection of the electoral process is more compelling than any other justification for regulating speech because " '[o]ther rights . . . are illusory if the right to vote is undermined.' " *Id.* (quoting Wesberry v. Sanders, 376 U.S. 1, 17 (1964)). Thus, Justice Scalia reasoned that Ohio has a " 'compelling interest in preserving the integrity of its election process' " through statutes like the one at issue in *McIntyre*. *Id.* (quoting Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 231 (1989)). Justice Scalia further noted that protection of the electoral process is such an important interest that the Court has prohibited political speech entirely in areas that would impede the electoral process. *See id.* (citing Burson v. Freeman, 504 U.S. 191, 204-06 (1992) (plurality opinion).

174. *See id.* Justice Scalia noted that although several cases held that mandatory disclosure requirements violated an individual's First Amendment associational rights, those cases did not establish a general right to anonymity. *See id.* (citing Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982); Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958)). Instead, the cases acknowledged a right to an exemption from the disclosure requirements for people who could demonstrate that disclosure of their identity would result in " 'threats, harassment, or reprisals.' " *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 74 (1976) (per curiam)). Additionally, Justice Scalia pointed out that *Lewis Publishing Co. v. Morgan* rejected the notion of a general right to anonymity in speech. *See id.* at 1535 (citing Lewis Publ'g Co. v. Morgan, 229 U.S. 288 (1913)); *see also supra* note 40 (discussing *Lewis Publishing*).

175. *See McIntyre*, 115 S. Ct. at 1535-36. Justice Scalia questioned how unelected judges could dispute the real-life experience and practical judgment of elected legislators from 49 states, the District of Columbia, the United States Congress, Australia, Canada, and England who all determined that prohibitions on anonymous election-related speech

fraudulent statements than people who can do so anonymously.[176] Moreover, Justice Scalia argued that a prohibition on anonymous campaign literature encourages a "civil and dignified level of campaign debate" and discourages the type of "mudslinging"[177] that frequently

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were beneficial in protecting democratic elections and improving the quality of campaigns. *See id.*

176. *See id.* at 1536. In addition, Justice Scalia claimed that distributors of anonymous campaign literature are more likely to be detected and punished than distributors of fraudulent campaign literature. *See id.* Therefore, he reasoned that people would be more likely to obey the identification requirement than the election fraud provisions, and, after including their name on a document, would then be less likely to include a fraudulent statement. *See id.*

Justice Scalia also criticized the majority opinion for its attempt to distinguish the *Buckley* decision from *McIntyre*. *See id.* at 1537. He argued that the informational interest of the Ohio statute was much more important than the informational interest of the *Buckley* disclosure requirement. *See id.* at 1536-37. In addition, Justice Scalia considered the *Buckley* disclosure requirement to be far more burdensome than Ohio's requirement that authors include their name on election-related literature. *See id.*

177. *Id.* at 1536. Justice Scalia discussed the increase over the past several years of "character assassination," or "mudslinging," designed to damage a candidate's public image and support. *Id.* He noted that most of these harmful and tasteless attacks on candidates do not contain any actionable fraudulent statements but, rather, consist of innuendo, degrading comments, or disclosures about a candidate's personal life that are irrelevant to the candidate's qualifications for elected office. *See id.* Justice Scalia feared that striking down the ban on anonymous campaign literature would lead to an increase in this type of mudslinging. *See id.*

The term "mudslinging" generally refers to the practice of disclosing private information about the character and personal life of an opponent in order to damage the candidate's chances of being elected. *See* E.J. DIONNE, JR., WHY AMERICANS HATE POLITICS 15 (1991). This process frequently spreads gossip and innuendo about issues such as a candidate's sex life, previous drug use, psychological problems, or marital difficulties. *See id.*; PAUL S. HERRNSON, CONGRESSIONAL ELECTIONS: CAMPAIGNING AT HOME AND IN WASHINGTON 177 (1995); BARBARA G. SALMORE & STEPHEN A. SALMORE, CANDIDATES, PARTIES, AND CAMPAIGNS: ELECTORAL POLITICS IN AMERICA 160 (1989). Mudslinging and other "dirty" campaign tactics have always been a part of American political life. *See* Note, *supra* note 6, at 185 (surveying the history of negative campaign tactics in American elections). For example, opponents of George Washington described him as having "monarchical aspirations," and Thomas Jefferson's detractors claimed that he was "an illegitimate madman and atheist." Jack Winsbro, Comment, *Misrepresentation in Political Advertising: The Role of Legal Sanctions*, 36 EMORY L.J. 853, 853 (1987). Abraham Lincoln was called "an ape, a buffoon, a fiend, a ghoul, a lunatic, a robber, a savage, a traitor, and a weakling." *Id.* at 854. Leaflets distributed by opponents of Andrew Jackson accused him of adultery and murder. *See* HERRNSON, *supra*, at 160. Relying on rumors that Grover Cleveland fathered an illegitimate child, his opponents chanted, " 'Ma, Ma, where's my pa?' " *Id.* Cleveland's supporters responded, " 'Gone to the White House, ha ha ha!' " *Id.*

These types of personal attacks on candidates have continued to the present. During the 1992 campaign, Democratic Congressman James Moran of Virginia attacked his Republican challenger, Kyle McSlarrow, for using illegal drugs in college. *See id.* at 177. Moran's plan to discredit McSlarrow backfired, however, when he was forced to admit that he, too, had used illegal drugs. *See id.* In the 1992 presidential election, President William Clinton

occurs.[178]

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faced charges from his opponents, and from the media, that he committed adultery, dodged the draft, and smoked marijuana. *See* DARRELL M. WEST, AIR WARS: TELEVISION ADVERTISING IN ELECTION CAMPAIGNS, 1952-1992 138 (1993).

Anonymous leaflets often have been the source of a great deal of campaign mudslinging. For example, in Montgomery County, Maryland, an individual distributed anonymous leaflets criticizing a candidate for County Executive, in violation of the Maryland disclosure statute. *See* Kevin Sullivan, *Kid Gloves Come Off in Montgomery*, WASH. POST, Mar. 25, 1994, at C1; *see also* Mark A. Whitt, Note, McIntyre v. Ohio Elections Comm'n: *"A Whole New Boutique of Wonderful First Amendment Litigation Opens Its Doors,"* 29 AKRON L. REV. 423, 423 (1996) (citing the Montgomery County example). The anonymous culprit circulated the leaflets by leaving them on chairs at a campaign debate, distributing them door-to-door in the county, and mailing them to the candidate's financial contributors. *See* Sullivan, *supra*, at C1. The outraged candidate responded, " 'Someone is trying to spend hundreds of dollars to manipulate this election and not take responsibility for it.' " *Id.* In addition, he complained that the culprit had used a copy of his campaign finance report to obtain the names and addresses of his contributors in order to mail them anonymous, negative leaflets. *See id.* " 'I've spent 25 years of my life trying to clean up politics and open up government. If the result of that is that my contributors are going to get a stream of illegal mailings, that adds to my outrage.' " *Id.* County election records indicated that the campaign managers of both of his opponents had made copies of his campaign finance report. *See id.*

During the 1994 mayoral election in New Orleans, Louisiana, the grand jury indicted an aide to one of the candidates for distributing anonymous campaign literature. *See* Kenneth J. Cooper, *Negative Themes Dominate Contest in New Orleans*, WASH. POST, Feb. 5, 1994, at A8; *see also* Whitt, *supra*, at 423 (citing the New Orleans example). The anonymous leaflet accused another candidate of having several out-of-wedlock children and claimed "that he is secretly bisexual, uses drugs, surrounds himself with drug dealers and receives kickbacks." Cooper, *supra*, at A8.

In San Diego County, California, a stack of anonymous leaflets were found outside the front door of an office building where the San Diego County Republican Central Committee was holding its monthly meeting. *See* Barry M. Horstman, *Flyer Uses Vulgarity to Attack [Nonpartisan] Group Campaign: Anonymous Handout Containing Graphic Anatomical References and Coarse Language Is Aimed at an Organization That Monitors Political Extremists*, L.A. TIMES, Aug. 12, 1992, at B6; *Correction*, L.A. TIMES, Aug. 13, 1992, at B2 (correcting an error in the title of the article); *see also* Whitt, *supra*, at 423 (citing the San Diego example). The leaflets villified several women who head the Mainstream Voters Project (MVP), a nonpartisan group that publishes newsletters monitoring political candidates. *See* Horstman, *supra*, at B6; *Correction*, *supra*, at B2. The leaflets described the group's leaders with offensive phrases such as, a " 'bitter man-hating bitch,' " a " 'militant dwarf who uses MVP to meet other women with hairy chests,' " and a " 'former poster child for birth control (who) starts the day by pouring Jack Daniels over her breakfast.' " Horstman, *supra*, at B6. A similar situation also occurred in another part of California, where anonymous campaign leaflets described one of the candidates as a " 'proven pervert.' " *See* T.W. McGarry, *Schaefer, Stratton Gain Leads in Local Races*, L.A. TIMES, Nov. 5, 1986, at Metro 2; *see also* Whitt, *supra*, at 423 (citing the incident).

178. *See McIntyre*, 115 S. Ct. at 1536 (Scalia, J., dissenting).

Commentators have noted that the last several campaign cycles have demonstrated the rise of mudslinging and negative advertising. *See* DIONNE, *supra* note 177, at 15-17, 316-17 (highlighting the general rise in negative campaigning, particularly in the 1988 presidential election); HERRNSON, *supra* note 177, at 176 (noting that in the 1992 elections, 71% of the House elections, and almost all of the Senate elections, used negative advertisements);

SALMORE & SALMORE, *supra* note 177, at 159-63 (discussing the causes and effects of negative political advertising); WEST, *supra* note 177, at 46-52, 140-46 (discussing the negative advertisements of the 1988 and 1992 presidential elections); O'Neil, *supra* note 129, at 575-76 (noting the prominence of negative advertising in the 1988 presidential election); Peter F. May, Note, *State Regulation of Political Broadcast Advertising: Stemming the Tide of Deceptive Negative Attacks*, 72 B.U. L. REV. 179, 182, 186-91 (1992) (exploring the detrimental impact of the rise of negative campaigning); *see also id.* at 182 (noting a *New York Times*/CBS News Poll indicating that voters believe that campaigns have become more negative over the past decade).

Rather than supporting or building up one's own candidacy, the goal of negative advertising, or negative campaigning, is to tear down an opponent and decrease his or her support among voters. *See* HERRNSON, *supra* note 177, at 176; May, *supra*, at 182. Candidates commonly perform "opposition research" on their opponents in order to develop a foundation from which to launch a negative attack. *See* HERRNSON, *supra* note 177, at 177. This may include research into a candidate's personal and professional background including his or her previous employment experience, political experience, legislative votes, political speeches, and illegal or unethical activities. *See id.* at 177-78.

In addition, candidates often distort the record of their opponent's past achievements in order to twist the truth to their advantage. *See* May, *supra*, at 183. Candidates also manipulate facts and play with words to damage their opponent's reputation. *See id.* at 185. For example, an egregiously deceptive distortion occurred during the 1990 Massachusetts Democratic gubernatorial primary. Candidate John Silber's campaign advertisements attacked his opponent, Francis Bellotti, by using a *Boston Globe* headline about Bellotti. *See id.* The headline read, " 'Questions linger over Bellotti's corruption record.' " *Id.* By including this headline, Silber's advertisement implied that Bellotti had engaged in corrupt activities. *See id.* In reality, however, the headline was for an article discussing Bellotti's record prosecuting corruption during his tenure as the Attorney General of Massachusetts. *See id.* In addition, candidates frequently distort their opponent's positions on campaign issues. *See* Dan Balz, *Dropping in Polls, Forbes Lashes Out: Publisher Accuses Opponents of "Sabotage" Phone Campaign*, WASH. POST, Feb. 10, 1996, at A13 (quoting 1996 presidential candidate Steve Forbes's complaint that his opponents were misrepresenting his position on a variety of campaign issues).

Several factors have contributed to the rise in negative campaigning. The diminished role of political parties in structuring campaigns and the increase in candidate-centered elections is partially responsible. *See* SAMUEL L. POPKIN, THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS 235 (1991); SALMORE & SALMORE, *supra* note 177, at 160. Negative advertisements are common because candidates and political consultants believe that they appeal to an alienated electorate and play into the popular cynicism about politics and government. *See* DIONNE, *supra* note 177, at 17.

Perhaps the most important factor, however, is the prominence of television as a means of political communication. *See id.* at 15; May, *supra*, at 179. Negative advertising is frequently used in television commercials promoting candidates for elected office. *See* DIONNE, *supra* note 177, at 15. Since the cost of television time is so expensive, candidates can usually only afford brief spots of approximately 30 seconds. *See id.* at 15-16. Such a short time period forces candidates to appeal to voters' feelings and emotions leaving little time to present an in-depth discussion of issues. *See id.*; HERRNSON, *supra* note 177, at 247. Thus, candidates often resort to making personal attacks against their opponents in order to exploit the viewers' negative emotions. *See* DIONNE, *supra* note 177, at 15.

The most famous example of a negative campaign advertisement is the "Willie Horton" commercial of the 1988 presidential campaign. Willie Horton, a convicted murderer, raped a woman while on a weekend furlough from his Massachusetts prison. *See id.* at 77.

Finally, Justice Scalia disagreed with the majority's characterization of anonymous leafletting as "an honorable tradition of advocacy and dissent."[179] Rather, he contended that anonymity encourages fraud because it eliminates accountability.[180] Thus, Justice Scalia, joined by Chief Justice Rehnquist, dissented from the majority opinion, arguing that it distorts the history of anonymous political speech and that it will lead to even more negative campaigning and electoral fraud in the future.[181]

Although the advertisement was produced and sponsored by an independent group, President George Bush campaigned on the "Willie Horton issue" and benefited from the advertisement. May, *supra*, at 187 n.48. Bush used Willie Horton as a symbol to illustrate that his opponent, Massachusetts Governor Michael Dukakis, was soft on crime. *See* DIONNE, *supra* note 177, at 77. Dukakis failed to respond to the advertisement and fell behind in the race, eventually losing the election. *See id.* at 315; May, *supra*, at 187 & n.49. Based on that lesson, political candidates now respond quickly to their opponents' negative advertisements, for fear of " 'doing a Dukakis.' " May, *supra*, at 187, 193 (footnotes omitted). Consequently, voters are subject to a continuing cycle of negative campaign advertisements. *See id.* at 181, 187. For more information on the subject of political advertisements on television, including statistical data on negative advertising, see WEST, *supra* note 177.

179. *McIntyre*, 115 S. Ct. at 1537 (Scalia, J., dissenting).

180. *See id.*

181. *See id.* ("But to strike down the Ohio law . . . on the ground that all anonymous communication is in our society traditionally sacrosanct, seems to me a distortion of the past that will lead to a coarsening of the future."). Justice Scalia also noted that striking down the Ohio statute would invalidate similar identification requirements of 48 other states and the federal government. *See id.*

Examples from the 1996 presidential election illustrate the harmful effects of negative campaigning and its link to anonymity. During the campaign, the bulk of the advertisements for the Iowa Republican caucuses and the New Hampshire primary were negative in tone. *See* Dan Balz & Edward Walsh, *In Iowa Stretch, GOP's Hot Race Is for 2nd Place*, WASH. POST, Feb. 11, 1996, at A1, A22 (describing the 1996 Iowa caucus campaign as "by far the most negative in history" and pointing out that some Iowa voters are so disgusted with the negativity that they may not even participate in the caucuses); Howard Kurtz, *New Hampshire Voters Buried By Avalanche of Negative Advertisements*, WASH. POST, Feb. 10, 1996, at A11 (chronicling the barrage of negative campaign advertisements in New Hampshire).

Moreover, voters sharply criticized the presidential candidates for their negative campaign tactics. For example, at a town meeting in New Hampshire, a voter commented to presidential candidate Steve Forbes, "'Your positive statements are wonderful, but the negative statements that you and some of the other candidates are putting out demean the process and insult my intelligence.'" *Forbes Grilled over Tough TV Ads*, HAMPTON UNION (New Hampshire), Feb. 6, 1996, at 2.

In addition to voters complaining about the negative advertisements, candidates themselves also have expressed their concern, notwithstanding negative attacks of their own. *See* Balz, *supra* note 178, at A1, A13. Indeed, candidate Forbes alleged that he was the victim of an *anonymous* phone and leaflet campaign in Iowa and New Hampshire, sponsored by his opponents. *See id.* at A13. Speaking at a campaign rally, Forbes remarked,

> 'Unfortunately, some of my opponents are engaging in desperate distortions, making anonymous phone calls . . . . They're sending out anonymous pamphlets. They're misrepresenting my position on the flat tax. They're misrepresenting my position on abortion. They're misrepresenting my position on gays in the military. They're misrepresenting my position on Social Security.'

III. *McIntyre*'s Successes and Failures

The *McIntyre* decision established that an individual has a right to anonymity in campaign-related speech.[182] By applying an exacting scrutiny test to the Ohio statute, the Court determined that the State's proffered interests in preventing fraud in the electoral process and providing information to voters did not justify the restriction that the statute placed on freedom of speech.[183] The decision deserves examination from three perspectives: (1) the Court's analytical framework and narrow holding, (2) the relationship between the Court's decision and prior case law, and (3) the decision's potential impact on the various disclosure statutes of the forty-nine other states, and the District of Columbia, that had similar laws when *McIntyre* reached the Supreme Court.

A. *A Critical Look at* McIntyre

1. *Selection of the Exacting Scrutiny Standard*

The Court's decision to use an exacting scrutiny standard to analyze the constitutionality of the Ohio statute was based on its determination that the statute was a content-based restriction that burdened core political speech, rather than a regulation of the electoral process.[184] In making this choice, however, the Court turned away from a series of earlier cases applying a lower level of scrutiny to state election regulations.[185] After

Id. Voters who reported receiving the anonymous calls said that the callers refused to identify themselves, or to say which campaign they were working for or who was paying them. *See* Thomas B. Edsall & Kevin Merida, *Forbes Says Dole Hired Telemarketer to Wage Anonymous Campaign*, WASH. POST, Feb. 11, 1996, at A24.

When Forbes accused presidential candidate Robert J. Dole of hiring a telemarketing firm to make the calls, the Dole campaign and the telemarketing firm both denied the allegation. *See id.* Dole's campaign manager, Scott Reed, responded that "Forbes was 'attempting to muddy the waters by falsely accusing the Dole campaign and other candidates' of making the calls." *Id.* Ironically, while criticizing the negative campaign tactics of his opponents, Forbes's own campaign advertisements were described as "almost totally negative." Kurtz, *supra*, at A11.

182. *See McIntyre*, 115 S. Ct. at 1516-24.

183. *See id.* at 1519-22.

184. *See id.* at 1518-19; *see also supra* text accompanying notes 119-21 (discussing the Court's rationale for using an exacting scrutiny standard of review).

185. *Compare McIntyre*, 115 S. Ct. at 1518-19 (discounting the ordinary litigation test of *Anderson* as too lenient), *with* Burdick v. Takushi, 504 U.S. 428, 433-34 (1992) (applying the ordinary litigation test to Hawaii's ban on write-in voting), *and* Tashjian v. Republican Party, 479 U.S. 208, 213-14 (1986) (using the ordinary litigation test to scrutinize a Connecticut statute requiring voters in a party primary to be registered members of that party), *and* Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (articulating and applying an ordinary litigation balancing test to Ohio's early filing deadline for independent candidates), *and* Storer v. Brown, 415 U.S. 724, 730 (1974) (using a balancing test to examine California's statute regulating independent candidates' access to the ballot), *and* McDonald v.

McIntyre, most state regulations of the electoral process will continue to be analyzed using the lower-level scrutiny of the ordinary litigation balancing test,[186] but state laws regulating campaign literature will now be subject to exacting scrutiny.[187] Therefore, although states will continue to have a level of discretion in regulating election procedures, they will have less flexibility in regulating campaign literature.[188]

Although campaign literature disclosure requirements may not control the procedures of the electoral process in the same way as regulations on who may vote, or how a candidate's name is placed on the ballot, the purpose of disclosure requirements is sufficiently analogous to justify the same level of judicial scrutiny. In *Storer v. Brown*,[189] a case upholding a California statute restricting potential candidates' placement on the ballot, the Court explained that state election codes regulating electoral procedures are essential to ensure that elections are fair, honest, and orderly.[190] Similarly, state regulations on campaign literature, such as disclosure requirements and prohibitions on fraudulent statements, are also intended to ensure that elections are fair, honest, and orderly.[191] Be-

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Board of Election Comm'rs, 394 U.S. 802, 807-09 (1969) (using a lower level of judicial scrutiny to examine an Illinois statute which omitted prisoners from the list of people eligible to vote by absentee ballot). *But see* Bullock v. Carter, 405 U.S. 134, 141-42 (1972) (applying a close scrutiny standard of review to examine a Texas statute establishing a tiered filing-fee scheme based upon the size of the population in the county in which the candidate is running).

186. *See Burdick*, 504 U.S. at 433-34 (regarding a regulation on write-in voting); *Tashjian*, 479 U.S. at 213-14 (regarding a regulation on voting in party primaries); *Anderson*, 460 U.S. at 789 (regarding a regulation on early filing deadlines); *Storer*, 415 U.S. at 730 (regarding a regulation on ballot access); *McDonald*, 394 U.S. at 807-09 (regarding a regulation on absentee voting for prisoners).

187. *See McIntyre*, 115 S. Ct. at 1518.

188. By establishing that prohibitions on anonymous campaign literature are subject to exacting scrutiny, the Court made it more difficult for states to establish identification requirements that will pass constitutional muster. Thus, the Court effectively hindered the states' ability to regulate electoral speech in order to maintain the integrity of the electoral process. *See id.* at 1535 (Scalia, J., dissenting) (noting that exacting scrutiny review is "ordinarily the kiss of death"); *Burdick*, 504 U.S. at 433 ("[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.").

189. 415 U.S. 724 (1974).

190. *See id.* at 730 ("[T]here must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.").

191. *See McIntyre*, 115 S. Ct. at 1520-21 (acknowledging that the Ohio identification statute aids in the prevention of fraud and libel in the electoral process); Brief of Respondent at 11, *McIntyre* (No. 93-986) (arguing that the Ohio identification statute is an "integral part" of Ohio's "regulatory scheme" of election laws designed to deter fraud and inform the electorate).

cause the Supreme Court has recognized the validity of the states' interests in protecting the integrity of the electoral process, one could reasonably conclude that the distinction between disclosure requirements and regulations on election procedures is not great enough to warrant a higher level of scrutiny for disclosure requirements.[192] As the Ohio

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Other states have also recognized that disclosure requirements are necessary to ensure that elections are fair, honest, and orderly. For example, in 1995, Louisiana's identification statute stated the following:

> The Legislature of Louisiana finds that the state has a compelling interest in taking every necessary step to assure that all elections are held in a fair and ethical manner and finds that an election cannot be held in a fair and ethical manner when any candidate or other person is allowed to print or distribute any material which falsely alleges that a candidate is supported by or affiliated with another candidate, group of candidates, or other person, or a political faction, or to publish *anonymous* statements that make scurrilous, false, or irresponsible adverse comment about a candidate or a proposition. The legislature further finds that the people of this state have a right to know and that, among other things, it is essential to the protection of the electoral process that the people know who is responsible for such publications in order to more properly evaluate the statements contained in them and to informatively exercise their right to vote.

LA. REV. STAT. ANN. § 18:1463(A) (West 1979 & Supp. 1994) (emphasis added), *amended by* 1995 La. Acts 300, § 1. After *McIntyre*, the Louisiana Legislature amended this statute by deleting the word "anonymous" from the statute's language and by adding the additional statement: "The legislature further finds that the state has a compelling interest to protect the electoral process." *See* LA. REV. STAT. ANN. § 18:1463(A) (West Supp. 1996).

192. *See* McIntyre v. Ohio Elections Comm'n, 618 N.E.2d 152, 155 (1993) (citing Burdick v. Takushi, 504 U.S. 428, 433 (1992)), *rev'd*, 115 S. Ct. 1511 (1995). An important factor in reaching this conclusion is that campaign literature may contain false allegations against candidates and, thus, could prevent an election from being fair, honest, and orderly. Clearly, campaign literature containing false statements has the potential to sway voter opinion and unfairly influence the outcome of an election.

Indeed, some commentators have argued that increases in potentially damaging election-related speech threaten to disturb the American electoral process. *See* May, *supra* note 178, at 179-191. Although May focuses on televised political advertisements, his analysis may also be extended to printed campaign literature. May argues that negative political advertising harms the electoral process in a number of ways. *See id.* at 186-90. First, he contends that negative advertising discourages qualified potential candidates from running for public office. *See id.* at 186. He also notes that negative advertising influences the way legislators vote because they fear the impact of their opponents' potential negative campaign advertisements in the next election. *See id.* at 186-87. Second, May argues that negative advertisements appeal to emotion, rather than reason, thereby encouraging an escalating cycle of negativism through attacks and counterattacks, which ultimately diminishes public trust in the electoral process. *See id.* at 187. Third, May observes that the cycle of negative advertisements increases the financial burden on all candidates. *See id.* at 187-89. Fourth, he stresses that negative campaign advertisements prevent voters from accurately assessing candidates because they discourage debate over important public issues and mislead the voters. *See id.* at 189. Thus, negative campaigning creates the potential for election results that do not represent a rational and informed decision by the voting public. *See id.* Finally, May asserts that, although federal law requires political advertisements to identify their candidate or sponsor, candidates shield themselves in a cloak of anonymity and distance themselves from attacks on their opponents by omitting the candi-

Supreme Court noted, subjecting all election regulations to exacting scrutiny would substantially hinder the states' ability to ensure fair elections.[193]

2. Application of the Exacting Scrutiny Standard

Notwithstanding the possibility that the ordinary litigation test may have been more appropriate, the Supreme Court's application of the exacting scrutiny standard deserves examination. The *McIntyre* Court rejected Ohio's interest in preventing fraud, reasoning that Ohio has other laws that pertain more directly to electoral fraud and the prohibition of false statements during campaigns.[194] The majority's conclusion, however, fails to recognize the strength of Ohio's interest because there is no guarantee that Ohio's other election laws actually prevent fraud.[195]

In *McIntyre*, the Court argued that the facts of Mrs. McIntyre's case demonstrate that anonymity of campaign literature does not prevent its author from being held responsible for complying with election laws.[196] Yet Mrs. McIntyre's case is not a true example of anonymous leafletting because she personally passed out her flyers at a public meeting, and some of the flyers included her name.[197] In truly fraudulent or dishonest situations, the anonymous author may be extremely difficult to identify

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date's name, or by including identifying information that is so small that it is difficult to read. *See id.* at 190. In addition, other commentators also have argued that negative campaigning alienates the public and leads to low voter turnout in elections. *See* SALMORE & SALMORE, *supra* note 177, at 162.

On the other hand, some commentators contend that negative campaigning is beneficial to the electoral process. *See* HERRNSON, *supra* note 177, at 176 (1995) (arguing that negative campaigning enhances the electoral process by providing accountability in the political process); POPKIN, *supra* note 178, at 235 (quoting Bush campaign speechwriter Peggy Noonan's assessment of the 1988 presidential election: "There should have been more name-calling, mud-slinging and fun. It should have been rock-'em-sock-'em the way great campaigns have been in the past.").

193. *See McIntyre*, 618 N.E.2d at 155 (citing Burdick v. Takushi, 504 U.S. 428, 433 (1992)); *see also supra* text accompanying notes 102-04 (explaining the Ohio Supreme Court's decision to use an ordinary litigation test, rather than an exacting scrutiny standard).

194. *See McIntyre*, 115 S. Ct. at 1520-22. The Court determined that Ohio's ban on anonymous campaign literature was not the State's principal weapon against fraud. *See id.* at 1521. In other words, if the anonymity ban did not exist, fraud would still be prohibited under other Ohio election laws. *See id.*; *supra* notes 128-32 and accompanying text (discussing the *McIntyre* Court's analysis of Ohio's interest in preventing fraud in the electoral process).

195. *See supra* note 129 (containing the text of Ohio's campaign fraud statutes).

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

197. *See id.* at 1514. Mrs. McIntyre passed out her anonymous literature at a community meeting, where her "opponents," the school officials, saw her passing out the flyers. *See id.* A school official informed her that the flyers violated the Ohio identification statute, but she continued to distribute them. *See id.* Thus, it was easy for the school officials

and would probably escape prosecution or fines. Thus, if distributing anonymous campaign literature is constitutionally protected conduct, candidates and individuals could easily distribute blatantly false, misleading, and harmful campaign literature attacking their opponents, without any fear of prosecution.[198]

Although the *McIntyre* Court reasoned that banning anonymous campaign literature is not necessary to prevent fraud,[199] it is certainly helpful in the fight against it. As Justice Scalia argued in his dissent, the majority failed to recognize that a person who is required to put his or her name on a document is less likely to publish false information than a person who can publish the false information anonymously, knowing that it is unlikely that he or she will be caught.[200]

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to file a complaint against Mrs. McIntyre with the Elections Commission because they witnessed her actions and could identify her. *See id.*

198. It is easy to imagine scenarios in which people may abuse their anonymity and avoid punishment. For example, candidates could have their supporters pass out literature for them, and, depending on the circumstances, it may be very unlikely that anyone would recognize that the anonymous flyers were actually distributed by a "representative" of the candidate. Thus, the candidate may be able to skirt the election fraud laws. Similarly, an individual distributing fraudulent anonymous flyers might be unknown in the community, or might pass out the anonymous literature at night in order to avoid detection and recognition. In this situation, unlike that involving Mrs. McIntyre, no one would be able to establish the identity of the author or the distributor.

This type of situation occurred in *State v. Petersilie*. 432 S.E.2d 832 (N.C. 1993). An unsuccessful candidate anonymously mailed voters derogatory and anti-Semitic literature about his former opponent, who was then in a run-off election. *See id.* at 834. The North Carolina State Bureau of Investigation was unable to identify Mr. Petersilie as the source until they compared the handwriting on the mailings with Mr. Petersilie's handwriting on his notice of candidacy. *See id.* at 835. If Mr. Petersilie had prepared the mailings in a less personal way, such as by mass-producing computer-generated flyers, his identity would have been nearly impossible to determine. Instances such as this demonstrate the tremendous difficulty of identifying the authors of anonymous campaign literature.

199. *See McIntyre*, 115 S. Ct. at 1520-22.

200. *See id.* at 1536 (Scalia, J., dissenting); *see also* Note, *supra* note 6, at 201 (arguing that requiring individuals to include their name on campaign literature will deter "smear attacks").

Commentators have pointed to the relative anonymity of most campaign commercials on television as a reason for their extreme negativity and deceptive information. *See* May, *supra* note 178, at 190, 192-93. Because federal law requires only a brief identification of the sponsoring candidate during the broadcast, television advertisements often use "actors, voice-overs, elaborate set designs, polished imagery, and catchy props" to discredit an opponent. *Id.* at 192-93. Moreover, because most candidates do not even appear in their own negative advertisements, they are able to distance themselves from the deceptive and negative attack and conceal their role as sponsor. *See id.* at 193; *see also supra* note 192 (discussing the detrimental effect of negative campaign commercials that appear to be anonymous). Thus, there is a strong link between anonymity, or relative anonymity, and deceptive, negative advertisements. *See* May, *supra* note 178, at 190, 192-93. This reasoning may be logically extended to anonymous campaign literature, as well.

Additionally, the identification requirement makes it easier for the State to prosecute violators of the election fraud laws.[201] It also assists candidates running for office, who are the subject of libelous campaign literature, in identifying the sponsoring individual or organization for

201. *See McIntyre*, 115 S. Ct. at 1536 (Scalia, J., dissenting). In its Brief to the Supreme Court, the State of Ohio argued:

> Ohio's election laws emphasize the deterrence of fraud and corruption and the disclosure of limited information that is important to assuring an educated and informed electorate. The Disclosure Statute stands as an integral part of this regulatory scheme.
>
> The Disclosure Statute performs the important function of identifying the sponsor of printed campaign literature. If it were to be repealed or otherwise invalidated, the effectiveness of two other important provisions of Ohio elections law designed to deter fraud would be undermined. These provisions prohibit persons from making knowingly false statements during the course of candidate elections, and during the course of issue elections.
>
> In order to commence prosecution for a violation of either statute, a complaint in the form of an affidavit must be filed alleging violations of the provisions. In the absence of any requirement of attribution or disclosure, it often may be difficult, if not impossible, to identify the source of a false statement, particularly if any deliberate effort is made to avoid detection. And without accurate identification of the prevaricator, it is unlikely that anyone will have a sufficient basis to file an affidavit charging such violations. These provisions of Ohio's election laws, therefore, will consist more of "bark" than "bite."

Brief of Respondent at 11-12, *McIntyre* (No. 93-986) (citing OHIO REV. CODE ANN. §§ 3599.09.1(B)-(C), 3599.09.2(B)-(C) (Anderson 1988) (current versions at OHIO REV. CODE ANN. §§ 3517.21(B)-(C), 3517.22(B)-(C) (Anderson 1996))) (citations omitted).

An example from the 1996 Iowa caucuses and New Hampshire presidential primary illustrates the enforcement link between disclosure statutes and prohibitions on false statements in campaigns. While campaigning in Iowa on February 1, 1996, staff members of the "Forbes For President" campaign learned that individuals were distributing anonymous leaflets critical of candidate Forbes. Telephone Interview with James T. Riley, Esq., Deputy General Counsel, Forbes For President (Feb. 8, 1996). The Forbes campaign officials immediately noticed that the leaflets contained no disclaimer indicating whether they had been paid for by a particular candidate, or by an individual on behalf of a candidate. *See id.* Although attorneys for the Forbes campaign sought to file a complaint with the Federal Elections Commission based on this alleged violation of federal law, they were unable to do so because they did not know who was responsible for the the flyer and, thus, did not know whom to file a complaint against. *See id.*

Several days later, on February 3, 1996, the same flyer was distributed in New Hampshire. *See id.* This time, however, the individuals distributing the flyer were identified by direct observation as representatives of the "Dole For President" campaign. *See id.*; *Forbes Grilled over Tough TV Ads*, *supra* note 181, at 2. After learning who was responsible for the leaflet, attorneys for the Forbes campaign drafted a complaint against the Dole campaign, which they intended to file with the Federal Elections Commission. *See* Telephone Interview with James T. Riley, *supra*. Although this example concerns disclaimers related to campaign contributions and expenditures under federal election law, a topic beyond the scope of this Note, the example is relevant to state disclosure statutes and prohibitions on false statements in campaign literature because it illustrates the difficulty in identifying the responsible party for purposes of prosecution.

purposes of a libel suit.[202] Even public officials, who are unlikely to prevail in a libel suit under the burden of proof established in *New York Times Co. v. Sullivan*,[203] benefit from the identification requirement because it facilitates government prosecution.[204]

Finally, the Court underestimated the strength of Ohio's interest in an informed electorate[205] and dismissed *Buckley*'s recognition of that interest without adequate consideration.[206] Although, as the Court noted, the *Buckley* decision concerned financial contributions to candidates, rather than independent leafletting, a similar rationale for disclosure should also be applied to campaign literature.[207] Moreover, as Justice Scalia ex-

202. *See McIntyre*, 115 S. Ct. at 1536 (Scalia, J., dissenting); *see also supra* note 201 (discussing the impact of nondisclosure on the ability to prosecute violators of election fraud statutes).

203. 376 U.S. 254 (1964). To succeed in a libel suit, public officials must show that the offending statement was made with "actual malice," described as knowledge that the statement was false, or reckless disregard of the truth. *Id.* at 279-80; *cf.* O'NEIL, *supra* note 129, at 579 (noting that the "actual malice" standard has caused a decrease in the number of successful libel suits by public officials and candidates).

204. If a public official is unable to show that a statement was made with "actual malice," her only recourse for protection from falsehoods might be the election fraud laws prohibiting false statements in campaign literature. *See, e.g.*, OHIO REV. CODE ANN. § 3517.21 (Anderson 1996). These laws cannot be enforced effectively unless the identity of the author or distributor of the false literature is known. A ban on anonymous campaign literature would provide that mechanism. *See supra* note 201 (discussing the benefit of disclosure statutes in identifying those responsible for fraudulent campaign literature); *cf.* O'NEIL, *supra* note 129, at 579 (explaining that libel suits are not effective remedies for fraudulent campaign literature).

205. *See McIntyre*, 115 S. Ct. at 1519-20; *see also supra* text accompanying notes 125-27 (setting forth the Court's rationale for determining that Ohio's interest in providing information to the electorate was insufficient to justify its disclosure statute); LEGGANS, *supra* note 93, at 689, 692 (arguing that providing information to the electorate is a compelling state interest).

206. *See McIntyre*, 115 S. Ct. at 1523; Buckley v. Valeo, 424 U.S. 1, 66-67 (1976) (per curiam); *see also supra* notes 136-40 and accompanying text (discussing the *McIntyre* Court's treatment of the *Buckley* decision).

In *Buckley*, the Supreme Court reasoned that disclosure of the names of campaign contributors provided valuable information that voters could consider when evaluating candidates. *See Buckley*, 424 U.S. at 66-67. Similarly, the Ohio identification statute serves the State's interest in an informed electorate because it provides voters with the name of the sponsor of campaign literature and, thus, assists them in making an informed judgment while voting. *See McIntyre*, 115 S. Ct. at 1514 n.3; *Bans on Anonymous Political Leafletting*, 109 HARV. L. REV. 180, 187-88 (1995).

207. *See McIntyre*, 115 S. Ct. at 1523. The *McIntyre* Court noted that *Buckley* upheld the disclosure of campaign contributions and expenditures because it furthered the state's interest in preventing corruption. *See id.* Based on this analysis, the Court argued that the *Buckley* rationale did not apply because issue-based elections do not pose the same threat of corruption as candidate elections. *See id.* Nevertheless, the State has a compelling interest in preventing corruption in the electoral process itself. *See Bans on Anonymous Political Leafletting*, *supra* note 206, at 187. As one commentator stated, "The danger that

plained in his dissent, the Ohio statute is actually *less intrusive* than the *Buckley* financial disclosure requirement.[208] Although both requirements reveal an individual's viewpoint, only the *Buckley* requirement details how much money an individual has spent to further a particular cause and, thus, provides personal information about the individual's financial status.[209] Therefore, despite the Court's characterization of the Ohio statute as more intrusive than the *Buckley* disclosure requirement, the Court arguably struck down an even less intrusive statute.[210]

B. McIntyre*'s Attempt to Clarify the Ambiguity of the Prior Law*

Until *McIntyre*, the Supreme Court had not specifically addressed the issue of anonymous campaign literature. Although some of the Court's earlier decisions were relevant to the issue, there was a noticeable lack of clarity in the body of prior law, and the Court's rulings gave no clear indication of whether bans on anonymous campaign literature were constitutional.[211] For example, although some cases stressed the value of anonymity,[212] other cases highlighted the state's interest in disclosing authors' identities.[213] The uncertainty on the Supreme Court level led lower courts reviewing disclosure statutes to interpret the Supreme Court's rulings in different ways, which resulted in constitutional standards that varied from state to state.[214] The greatest source of confusion concerned determining the level of scrutiny appropriate for reviewing disclosure statutes.[215]

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voters in a referendum might be subject to illicit influence is arguably as real as the danger of such influence in a candidate election." *Id.*

208. *See McIntyre*, 115 S. Ct. at 1536-37 (Scalia, J., dissenting).

209. *Compare Buckley*, 424 U.S. at 66, *with McIntyre*, 115 S. Ct. at 1514 n.3; *see also Bans on Anonymous Political Leafletting*, *supra* note 206, at 188-89 (arguing that the Ohio identification statute is less likely to provoke retaliation than the *Buckley* contribution disclosure requirement).

210. *Compare Buckley*, 424 U.S. at 66, *with McIntyre*, 115 S. Ct. at 1514 n.3.

211. *See* Dupree, *supra* note 90, at 1216 (noting that *McIntyre* attempted to "navigate the muddy middle ground between *Talley* and *Buckley*"); *see also supra* notes 87-89 and accompanying text (noting the ambiguity in the prior law related to anonymous campaign literature).

212. *See, e.g.*, Talley v. California, 362 U.S. 60, 64-65 (1960); Bates v. City of Little Rock, 361 U.S. 516, 522-23 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462-63 (1958).

213. *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765, 791-92, 792 n.32 (1973); Buckley v. Valeo, 424 U.S. 1, 66-68, 72, 81-82 (1976) (per curiam); Lewis Publ'g Co. v. Morgan, 229 U.S. 288, 296-97, 308-10, 312-13 (1913).

214. *See supra* note 90 (citing numerous state cases interpreting disclosure statutes).

215. *Compare Bellotti*, 435 U.S. at 786 (using an exacting scrutiny standard to review state-imposed restrictions on corporate speech), *with* Burdick v. Takushi, 504 U.S. 428, 433-34 (1992) (applying the ordinary litigation test of *Anderson* to Hawaii's ban on write-in voting), *and* Tashjian v. Republican Party, 479 U.S. 208, 214 (1986) (using the ordinary

By sifting through the prior decisions, *McIntyre* clarified the Court's previous rulings. Although the Court acknowledged that *Talley* was not controlling because it concerned a blanket prohibition on all anonymous handbills, the *McIntyre* Court nonetheless reaffirmed *Talley*'s recognition of the value of anonymity and extended its rationale by articulating a *right* to anonymous campaign speech in the electoral context.[216] Moreover, the Court used precedent to emphasize that some groups in society require anonymity because of the threat of reprisals by others.[217] Thus, the Court logically extended Constitutional protection precedents to encompass statutes banning anonymous campaign literature.[218]

At the same time, however, the Court diverged from earlier rulings and distinguished two cases previously used to *support* disclosure requirements.[219] By distinguishing *Buckley* and *Bellotti*, both of which stressed the value of disclosure requirements,[220] the Court clearly indicated that those precedents would apply only to financial disclosure requirements and corporate speech, not campaign literature.[221] Thus, the Court seemingly pulled a strong leg of support out from under states' attempts to mandate disclosure of authors' names on campaign literature.

McIntyre, however, leaves some questions unanswered. What if Ohio's disclosure requirement had been narrowly tailored to prevent fraud? In finding that the Ohio statute was not narrowly tailored to prevent fraud and libel in the election process, the Court left open the question of constitutionality if it had been so limited, either in the text of the statute, or

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litigation test to scrutinize a Connecticut statute requiring voters in a party primary to be registered members of that party), *and* Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (articulating and applying an ordinary litigation balancing test to Ohio's early filing deadline for independent candidates), *and* Storer v. Brown, 415 U.S. 724, 730 (1974) (using a balancing test to examine a California statute regulating access to the ballot by independent candidates), *and* McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807-09 (1969) (using a lower level of judicial scrutiny to examine an Illinois statute which omitted prisoners from the list of people eligible to vote by absentee ballot).

216. *See* McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1516-24 (1995); *see also* Richard K. Norton, Note, McIntyre v. Ohio Elections Commission: *Defining the Right to Engage in Anonymous Political Speech*, 74 N.C. L. REV. 553, 565 (1996) (noting *McIntyre*'s use of the *Talley* reasoning to evaluate the Ohio statute); *supra* text accompanying note 111 (noting that neither the statute in *McIntyre*, nor the ordinance in *Talley*, was limited to the purpose of preventing fraud in the electoral process).

The *McIntyre* Court also elaborated on the First Amendment protections offered to anonymous speech and extensively discussed the value of anonymous speech to individuals and to the society at large. *See McIntyre*, 115 S. Ct. at 1516-18.

217. *See McIntyre*, 115 S. Ct. at 1524; *Bates*, 361 U.S. at 523-24; *Patterson*, 357 U.S. at 462-63.

218. *See McIntyre*, 115 S. Ct. at 1524.

219. *See id.* at 1522-24.

220. *See Bellotti*, 435 U.S. at 777 n.13; Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

221. *See McIntyre*, 115 S. Ct. at 1522-24.

in the legislative history.[222] Perhaps the fatal flaw of the Ohio statute was its failure to describe its purpose as a fraud-prevention law that was intended to work in conjunction with the other election fraud provisions of the Ohio Election Code.[223] Alternatively, the Court's heavy reliance on the overbreadth rationale suggests that an identification requirement indeed would be constitutional if it mandated disclosure only for fraudulent or false campaign literature and did not sweep within its grasp truthful and well-founded political advocacy.[224]

C. Predictions for the Future: McIntyre*'s Legacy*

Because some of the Court's language in *McIntyre* is unclear, and the decision leaves unanswered questions, *McIntyre*'s future impact is difficult to predict.[225] Highlighting this uncertainty, Justice Scalia criticized the majority for failing to establish a clear rule of law.[226] He noted that the Court merely signaled that " 'a State's enforcement interest might justify a more limited identification requirement,' "[227] without further clari-

222. *See id.* at 1520-22; *see supra* text accompanying notes 153-54 (discussing Justice Ginsburg's acknowledgment that the State's interest might justify some sort of identification requirement in "other, larger circumstances").

223. *See McIntyre*, 115 S. Ct. at 1520-22.

224. *See* King, *supra* note 6, at 154 (noting that under *Talley*'s "overbreadth" reasoning, a more narrowly drawn statute might have been sustained).

225. *See McIntyre*, 115 S. Ct. at 1522 ("We recognize that a State's enforcement interest *might justify a more limited identification requirement*, but Ohio has shown scant cause for inhibiting the leafletting at issue here.") (emphasis added).

Political analyst David S. Broder argued that *McIntyre* will "screw up the political process in this country." David S. Broder, *Bungled By the High Court*, WASH. POST, May 7, 1995, at C7. He noted that although the Court "deliberately left in doubt whether the same ruling would apply if 10,000 or 1 million letters were mailed anonymously on the eve of a national political election," many campaign operatives are afraid of the decision's potential impact. *Id.* For example, Ralph Murphine, the president of the American Association of Political Consultants, stated, " 'When everybody is talking about the need for civil discourse, not inflammatory rhetoric, here the court says you cannot only say whatever you want, but you can do it anonymously. I'm a real First Amendment man, but I think they have opened Pandora's box.' " *Id.* Hal Malchow, another political strategist, commented, " 'I find it a terrifying prospect. I think there will be a great temptation for individuals and organizations to distort and twist the truth, even beyond what takes place in campaigns today, and to do it with little or no accountability.' " *Id.* Broder emphasized the continual rise in negative campaigning and predicted that individuals and groups will attempt to test the limits of *McIntyre*, leading to an increase in anonymous campaign mailings. *See id.*

226. *See id.* at 1535 (Scalia, J., dissenting).

227. *Id.* (quoting the majority opinion in *McIntyre*, 115 S. Ct. at 1522); *see also* Valerie M. Sercovich, Casenote, State v. Moses*: Louisiana's Prohibition on Anonymous Campaign Literature—Protecting the Electoral Process or the Politicians?*, 41 LOY. L. REV. 559, 576 (1995) (arguing that, based on *McIntyre*'s ambiguity, the Louisiana state legislature will once again revise their identification statute and attempt "to side-step the mandates of the courts in an effort to maintain the protection the statute extends to political candidates");

fying its statement.[228] Continuing, Justice Scalia posited that it was impossible to know whether *McIntyre* invalidated other existing identification statutes and concluded that it would take decades to flesh out the scope of the right to distribute anonymous campaign literature.[229]

Because identification statutes exist in nearly every state,[230] *McIntyre* has the potential to have a far-reaching impact, not only on the laws of many states, but also on the overall issue of campaign reform.[231] Clearly,

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supra note 191 (quoting Louisiana's former identification statute and noting its amendment after *McIntyre*).

228. *See McIntyre*, 115 S. Ct. at 1535 (Scalia, J., dissenting).

229. *See id.*; *see also* S. Douglas Dodd, *Commentary on Free Speech, Pamphleteering and Politics*, 31 TULSA L.J. 503, 507 (1996) (stating that *McIntyre* will affect every state that has a disclosure statute and predicting that the Oklahoma statute "will probably have difficulty standing as a result"); *Anonymous Electioneering*, WASH. POST, Apr. 24, 1995, at A18 (agreeing with Justice Scalia's prediction that the *McIntyre* decision will lead to "decades of litigation testing this ruling"); Linda Greenhouse, *Justices Allow Unsigned Political Fliers*, N.Y. TIMES, Apr. 20, 1995, at A20 (noting that *McIntyre* is likely to initiate a series of challenges to state and federal disclosure statutes).

The State of Ohio already has responded to the *McIntyre* decision. *See* John Matuszak, *Bill Would Allow Anonymous Political Material*, PLAIN DEALER (Cleveland), June 7, 1995, at 5-B. Secretary of State Bob Taft and Attorney General Betty Montgomery have proposed legislation which would preserve the right of individuals to distribute anonymous campaign literature. *See id.* The bill, however, would also make it a fifth degree felony for a person to make anonymous false statements in a campaign and a fourth degree felony to do so within seven days of an election. *See id.*

The Virginia disclosure statute formerly required all writings *concerning a candidate or a ballot issue* to identify the person responsible for the writing. *See* VA. CODE ANN. § 24.2-1014(B) (Michie 1993), *amended by* 1996 Va. Acts ch. 1042. After the *McIntyre* decision, the Attorney General of Virginia noted that the statute's provision requiring identification of those responsible for literature about candidates would survive constitutional review, but the provision for disclosure of the identity of people responsible for writings concerning ballot issues would not survive judicial scrutiny. *See* Claudia T. Salomon, *Campaign and Election Law*, 29 U. RICH. L. REV. 859, 887 n.191 (1995). In a subsequent case construing the Virginia statute, however, a Virginia state court held that the statute was "indistinguishable" from the statute invalidated in *McIntyre* and could not survive exacting scrutiny review. *See id.* at 887-88 (citing Virginia Soc'y for Human Life, Inc. v. Caldwell, 906 F. Supp. 1071 (W.D. Va. 1995)).

230. *See supra* note 7 and accompanying text (citing the identification statutes of 49 states, the District of Columbia, and the federal government and noting that there are distinctions among them). Despite this ruling, the Virginia disclosure statute remains in force, but has been amended to apply only to writings *concerning a candidate*. *See* VA. CODE ANN. § 24.2-1014(B) (Michie Supp. 1996).

231. *See* Dupree, *supra* note 90, at 1229 (recognizing *McIntyre*'s potentially broad impact and arguing that its holding should neither be interpreted nor extended to allow anonymous broadcast communications by political candidates).

Various campaign reform proposals have been made to address, in part, the rise of negative campaigning and mudslinging. *See* DIONNE, *supra* note 177, at 16 (briefly discussing reform proposals aimed at reducing negative campaign advertisements); HERRNSON, *supra* note 177, at 241-59 (providing an overview and analysis of campaign reform proposals). Reforms such as providing candidates with free or subsidized postage, radio time, or televi-

the Court's choice of an exacting scrutiny standard will have broad ramifications because identification statutes will now be reviewed using the highest level of judicial scrutiny. Yet, it remains to be seen exactly how the *McIntyre* decision will impact the laws of states other than Ohio, which have similar disclosure requirements.[232]

Nevertheless, *McIntyre* is likely to have mixed results. On the one hand, individuals will have greater freedom to express their political opinions through anonymous campaign literature.[233] This is an especially important right for individuals and groups that fear reprisal from others who disagree with their opinions.[234] On the other hand, as the dissent noted, it will likely become more difficult for states to maintain the integrity of the electoral process by curbing election fraud and restoring a level of dignity to campaign debate because identification and prosecution of those committing electoral fraud will be substantially more difficult.[235]

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sion time have been proposed to level the playing field among candidates and reduce the exorbitant costs of political campaigns. *See* DIONNE, *supra* note 177, at 16; HERRNSON, *supra* note 177, at 247, 249-51. Free or subsidized campaign communications would provide candidates with better opportunities to explain their positions on issues and to discuss their policy proposals and political objectives. *See* HERRNSON, *supra* note 177, at 249-50. If candidates were entitled to free or reduced postage for campaign newsletters, they could provide more detailed information about their candidacy to voters. *See id.* at 249. Similarly, if candidates had access to free television broadcast time, in segments longer than 30 seconds, they could focus on providing substantive information about their qualifications and positions on campaign issues, rather than having to resort to negative attacks and emotional appeals in the brief advertisements they currently sponsor. *See id.* at 250; DIONNE, *supra* note 177, at 16.

Other reform proposals include reviewing the limits on financial contributions to candidates. *See* DIONNE, *supra* note 177, at 16; HERRNSON, *supra* note 177, at 252-54. Some commentators advocate maintaining the current $1,000 limit on individual contributions and the $5,000 limit on political action committee (PAC) contributions, but raising the aggregate limit on individual contributions to adjust for inflation. *See* HERRNSON, *supra* note 177, at 252. Additionally, proposals for public financing of congressional campaigns have been suggested. *See* DIONNE, *supra* note 177, at 16. For more information on the subject of campaign reform, see Rebecca Arbogast, *Political Campaign Advertising and the First Amendment: A Structural-Functional Analysis of Proposed Reform*, 23 AKRON L. REV. 209 (1989); Archibald Cox, *Constitutional Issues in the Regulation of the Financing of Election Campaigns*, 31 CLEV. ST. L. REV. 395 (1982); John M. Sylvester, Note, *Equalizing Candidates' Opportunities for Expression*, 51 GEO. WASH. L. REV. 113 (1982).

232. *See supra* note 229 (discussing the legislative and judicial responses of Ohio and Virginia to the *McIntyre* decision).

233. *See McIntyre*, 115 S. Ct. at 1524.

234. *See, e.g.*, Talley v. California, 362 U.S. 60 (1960); Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

235. *See McIntyre*, 115 S. Ct. at 1536 (Scalia, J., dissenting).

IV. Conclusion

In *McIntyre*, the Supreme Court defined the right to distribute anonymous campaign literature. The Court ruled that Ohio's interests in preventing electoral fraud and providing information to voters were insufficient to justify the burdens that the identification statute placed on citizens' First Amendment right to freedom of speech. The Court also hinted that a more limited identification requirement might be justified, but the lack of clarity in the Court's opinion leaves open the question of what type of identification requirement would survive judicial scrutiny after *McIntyre*. The full impact of *McIntyre* will not be realized until similar identification statutes are tested on a state-by-state basis. In any event, the Court's decision in *McIntyre* will hamper the ability of states to combat fraudulent statements during the election process and, therefore, may lead to an increase in potentially damaging mudslinging and other negative campaign tactics. Thus, the freedom to engage in anonymous campaign-related speech could lead to dangerous consequences for the American electoral process.

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