CONSTITUTIONAL LAW—FIRST AMENDMENT—A STATE STATUTE BANNING ANONYMOUS POLITICAL LEAFLETS VIOLATES FIRST AMENDMENT PROTECTION OF POLITICAL SPEECH—*McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511 (1995).

Speech designed to influence the electoral process is political speech.[1] The United States Supreme Court has determined that

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[1] Burson v. Freeman, 504 U.S. 191, 193-94, 196 (1992) (plurality opinion) (stating that "the solicitation of votes and the display or distribution of campaign materials" was political speech). The Supreme Court has also stated that political speech, or "'speech concerning public affairs[,] is more than self-expression; it is the essence of self-government.'" *Id.* at 196 (quoting Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)). *See also* McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1519 (1995) (describing political speech as advocating a political viewpoint). Political speech deals "explicitly, specifically and directly with politics and government." Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26 (1971).

The Supreme Court has explained the importance of political speech by describing its function as "to invite dispute." Terminiello v. Chicago, 337 U.S. 1, 4 (1949). The *Terminiello* Court further described political speech as most effective "when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Id.* The Court noted that because of the "often provocative and challenging" nature of speech "[i]t may strike at prejudices and preconceptions and have profound unsettling effects . . . ." *Id.* The Court concluded by stating that the Constitution protects speech "against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Id.* Otherwise, the Court warned, "the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." *Id.* at 4-5.

The Supreme Court often uses the term "core" political speech. *See, e.g.*, *McIntyre*, 115 S. Ct. at 1518 (defining "core" political speech as speech involving the "[d]iscussion of public issues and debate on the qualifications of candidates . . . integral to the operation of the system of government established by our Constitution") (quoting Buckley v. Valeo, 424 U.S. 1, 14 (1976)); Meyer v. Grant, 486 U.S. 414, 421-22 (1988) (describing "the circulation of a petition [as involving] the type of interactive communication concerning political change that is appropriately described as 'core political speech'") (footnote omitted). The *McIntyre* Court also characterized core political speech as speech that "occupies the core of the protection afforded by the First Amendment . . . ." *Id.* Additionally, the Court has stated that the First Amendment protection of core political speech "'has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Buckley*, 424 U.S. at 15 (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).

The Court appears to make a distinction between political speech and "core" political speech. This distinction, however, is not definitively or clearly delineated by the Court. The Court's inexact usage of the term "core," however, has caused little reaction by commentators. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, §§ 13-1 to 13-31, at 1062-1153 (2d ed. 1988) (discussing "Rights of Political Participation" without addressing the Court's usage of the term "core") and Bork, *supra*, at 29 (stating that "criticisms of public officials and policies, proposals for the adoption or repeal of legislation or constitutional provisions and speech addressed to the conduct of any governmental unit in the country" is "explicitly political" speech that is the "core of the [f]irst [a]mendment"). While Professor Tribe does not discuss the dichotomy between political speech and "core" political speech, he does address the

political speech extends beyond mere discussions of candidates.[2] More particularly, the Court has explained that political speech is speech discussing public issues, candidates' qualifications, and issue-based elections.[3]

The Court has recognized that the Free Speech and Press Clause of the First Amendment[4] protects various forms of political

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practical distinctions between types of restrictions on speech. TRIBE, *supra*, § 12-3, at 803-04 (concluding that the distinctions may "prove arbitrary and easily manipulable") (footnote omitted). The Court's focus on the distinction appears to depend on the speaker. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 789, *reh'g denied*, 438 U.S. 907 (1978) (noting that the Court would have considered the state's allegations if the state's legislature had made a finding supporting the claim that corporate advocacy harmed the democratic process). Professor Tribe suggests that individuals have a more established freedom of speech than groups or corporations, TRIBE, *supra*, § 13-29, at 1146 (noting that the Court's rationale in *First Nat'l Bank* "left open the possibility that, if this had been an election for public office [instead of a referendum vote], a legislature could reasonably conclude that corporate speech corrupts or appears to corrupt candidates, and could thus constitutionally place restrictions on corporate speech that would be impermissible if applied to speech by individuals") and, therefore, such speech is to be considered "core."

In addition to whether the speaker is an individual or a group, the distinction between political speech and "core" political speech also appears to hinge upon the form of the speech. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376 (1968) (stating that the Court can regulate elements of conduct amounting to "nonspeech" even when other elements of the same conduct are "speech" protected by the First Amendment upon a showing of an important governmental interest). As Tribe notes, laws restricting verbal or written speech are more closely scrutinized than laws regulating communicative speech. TRIBE, *supra*, § 13-27, at 1134 (stating that there is "a dichotomy between regulation of pure speech—which would be upheld, if at all, only upon a showing of dire necessity—and regulation of non-speech harms arising from speech-related conduct, which was subject to considerably less exacting scrutiny"). A complete exploration of the Court's distinction between "core" and regular political speech is not possible within the confines of a casenote.

[2] Mills v. Alabama, 384 U.S. 214, 218-19 (1966) (stating that First Amendment protections include "all such matters relating to political processes"). *See also First Nat'l Bank*, 435 U.S. at 776-77 (noting that speech designed to influence referendum issues "is at the heart of the First Amendment's protection").

[3] *McIntyre*, 115 S. Ct. at 1519 (expanding on the definition of political speech). *See also* Bork, *supra* note 1, at 28 (stating that "[e]xplicitly political speech is about how we are governed, and the category therefore includes a wide range of evaluation, criticism, electioneering and propaganda"); Erika King, Comment, *Anonymous Campaign Literature and the First Amendment*, 21 N.C. CENT. L.J. 144, 144 n.1 (1995) (noting that core political speech "'includes discussion of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes'") (quoting *Mills*, 384 U.S. at 218-19). "[T]he consequences of chilling free expression by attempting to purge speech of false charges are peculiarly pronounced in the context of political elections, which are absolutely dependent upon the free exchange of ideas that lies at the core of the first amendment." TRIBE, *supra* note 1, § 13-26, at 1131-32.

[4] U.S. CONST. amend. I. The First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." *Id.* Although the First Amendment was adopted in 1791

speech.[5] In particular, protected speech includes not only verbal communication, but also nonverbal methods of communication.[6]

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as part of the Bill of Rights, the first 10 amendments originally applied to the federal government only. TRIBE, *supra* note 1, § 18-1, at 1688 n.1. The Fourteenth Amendment is the vehicle by which the first 10 amendments are applied to the several states. *Id.* The Fourteenth Amendment to the United States Constitution was adopted in 1868. *Id.* § 1-2, at 5 n.10. The Fourteenth Amendment reads, in part, as follows: "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 . . . ." U.S. CONST. amend. XIV § 1. The Supreme Court has elaborated on the effect of the Fourteenth Amendment. Schneider v. Town of Irvington, 308 U.S. 147, 160 (1939). In *Schneider*, the Court stated that "[t]he freedom of speech and of the press secured by the First Amendment . . . is similarly secured to all persons by the Fourteenth [Amendment] against abridgment by a state." *Id.* (footnote omitted).

Although the Supreme Court has never fully incorporated the entire Bill of Rights within the Fourteenth Amendment's applicability, the Court has used the Bill of Rights as a guide for defining the Due Process Clause. TRIBE, *supra* note 1, § 11-2, at 772 (citing Duncan v. Louisiana, 391 U.S. 145, 148 (1968)). The Supreme Court has held that the Due Process Clause protects the freedoms guaranteed by the first eight amendments. *Id.* The First Amendment's protection of the freedom of speech and press was made applicable to the states by the Supreme Court. Lovell v. City of Griffin, 303 U.S. 444, 450 (1938) (citing Gitlow v. New York, 268 U.S. 652, 666 (1925)). More specifically, "'[t]he freedom of speech . . . secured by the First Amendment against abridgment by the United States, [is] among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State.'" *Burson*, 504 U.S. at 196 (quoting Thornhill v. Alabama, 310 U.S. 88, 95 (1940) (citation omitted)).

[5] Michael J. Garrison, *Corporate Political Speech, Campaign Speech, and First Amendment Doctrine*, 27 AM. BUS. L.J. 163, 172 n.52 (1989) (stating that "[t]he Court has consistently recognized that speech on issues of public importance lies at the heart of the first amendment guarantee of free speech"). *See Mills*, 384 U.S. at 218 (stating that "[w]hatever 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"); Talley v. California, 362 U.S. 60, 65 (1960) (recognizing that the First Amendment protects "peaceful discussions of public matters of importance"); *Schneider*, 308 U.S. at 160 (stating that municipalities may "not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature").

The primary goal of the First Amendment's protections of free speech is to ensure a free marketplace of ideas to preserve the democratic form of government. 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, 353 (1995). *See, e.g.*, *Mills*, 384 U.S. at 219-20 (striking down a state law banning newspaper editorial directing votes on the day of election as prohibiting speech when it would be "most effective"); New York Times Co. v. Sullivan, 376 U.S. 254, 271-73 (1964) (discussing the requirement that a public official prove actual malice for libel, and emphasizing the importance of encouraging speech even when "erroneous statement[s are] inevitable"); Roth v. United States, 354 U.S. 476, 484 (1957) (stating that the protection of speech is "to assure unfettered interchange of ideas for the bringing about of political and social changes"). *See generally* Bork, *supra* note 1 (discussing the problem of interpreting the First Amendment's protections of speech).

[6] *See, e.g.*, City of Ladue v. Gilleo, 114 S. Ct. 2038, 2041-43 (1994) (explaining that the right of free speech includes the use of residential signs); *Schneider*, 308 U.S. at

Further, the Supreme Court has determined that even certain forms of *anonymous* political speech fall within the protections of the First Amendment.[7] The Court protects political speech by applying the "strict scrutiny" test[8] to laws that infringe upon such speech.[9] To survive strict scrutiny, the law must be narrowly tailored and serve a compelling interest.[10]

The Supreme Court afforded core political speech this level of protection in *McIntyre v. Ohio Elections Commission.*[11] There, the Court reviewed Ohio's statutory prohibition of distributing anony-

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164-65 (finding that municipal authorities may not abridge the right to distribute literature); *Lovell*, 303 U.S. at 452 (holding that pamphlets and leaflets are protected speech).

7 *Talley*, 362 U.S. at 64-65 (holding that identification disclosure requirements unconstitutionally restrict the freedom of speech). Protection of anonymous political speech is necessary because "anonymity has long been recognized as absolutely essential" to protect "unpopular groups or beliefs." TRIBE, *supra* note 1, § 12-26, at 1019. "[T]he risk of intimidation . . . necessitates a guarantee of anonymity . . . ." King, *supra* note 3, at 158-59 (discussing cases involving various disclosures required by states that were struck down by the United States Supreme Court because the threat of reprisals after disclosure would deter the exercise of free speech and association rights). "Anonymity is the only sure defense." Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 40 (1991) (discussing past and current arguments for and against, and effects of, disclosures). *See generally* Comment, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70 YALE L.J. 1084 (1961) (discussing the virtues of disclosure and anonymity).

8 Burson v. Freeman, 504 U.S. 191, 198 (1992) (plurality opinion). The Court applies "strict-scrutiny" to laws unduly burdening fundamental rights. Howard, *supra* note 5, at 381. More specifically, in the context of the First Amendment, the Court first presumes that any content-based law is unconstitutional. *Id.* at 378. Then, the Government must show that its law serves a compelling governmental interest and is narrowly tailored to that interest. *Id.* When applying strict scrutiny, the Court weighs a state's interests with the burdens placed on the fundamental freedom of speech. Meyer v. Grant, 486 U.S. 414, 422-25 (stating that the First Amendment protection of political speech is so great that a state is likely not able to justify a law criminalizing the payment of petition circulators).

9 First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786, *reh'g denied*, 438 U.S. 907 (1978) (noting that strict scrutiny should be applied "[e]specially where . . . a prohibition is directed at speech itself, and the speech is intimately related to the process of governing") (footnote omitted). *See generally* King, *supra* note 3 (discussing protections afforded political speech). The strict scrutiny standard is also applied to laws that regulate speech based on its content. TRIBE, *supra* note 1, § 12-3, at 798.

10 *First Nat'l Bank*, 435 U.S. at 786 (explaining that the state must show " 'a subordinating interest which is compelling' ") (quoting Bates v. City of Little Rock, 361 U.S. 516, 524 (1960)); Elrod v. Burns, 427 U.S. 347, 362 (1976) (finding that the Government has the burden "to show the existence of such an interest") (citing Buckley v. Valeo, 424 U.S. 1, 94 (1976)); *Buckley*, 424 U.S. at 25 (noting that the state must "employ means closely drawn to avoid unnecessary abridgment"); TRIBE, *supra* note 1, § 12-3, at 799 (stating that "[s]uch restrictions are valid only if 'necessary to serve a compelling state interest . . . narrowly drawn to that end' ") (quotation omitted).

11 115 S. Ct. 1511 (1995).

mous political leaflets.[12] The Court determined that the statute was violative of the First Amendment's protection of free speech because the leaflets addressed a referendum issue, making the speech political in nature.[13]

Margaret McIntyre, a resident of the Westerville, Ohio school district,[14] was concerned with the school district's spending.[15] Mrs. McIntyre distributed leaflets opposing a proposed school tax levy to persons attending a public school meeting on April 27, 1988.[16] Some of the leaflets identified her as the author, while others were signed "CONCERNED PARENTS AND TAXPAYERS."[17] A school district official who supported the proposed levy advised Mrs. McIntyre that the unsigned leaflets did not comply with the Ohio election laws.[18]

In March 1989, the same school official filed a complaint with the Ohio Elections Commission against Mrs. McIntyre, charging that her distribution of the unsigned leaflets violated section 3599.09(A) of the Ohio Revised Code.[19] The school official did

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12 *Id.* at 1514.

13 *Id.* at 1519. The Court noted that the First Amendment, as applied to the states by the Fourteenth Amendment, was violated by the Ohio statute. *Id.* at 1514 n.1. *See supra* note 4 and accompanying text (discussing the effect of the Fourteenth Amendment on the First Amendment).

14 Brief for Petitioner at 19, McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511 (1995) (No. 93-986).

15 *McIntyre*, 115 S. Ct. at 1514.

16 *Id.* The meeting was being held at the school to consider an upcoming proposed school tax levy referendum. *Id.* Mrs. McIntyre drafted the leaflets on her home computer and paid to have additional copies professionally reproduced. *Id.* Her son and a friend helped distribute the leaflets in the school parking lot on car windshields. *Id.* Otherwise, Mrs. McIntyre acted independently. *Id.*

17 *Id.*

18 *Id.* Mrs. McIntyre distributed additional leaflets at a meeting on the following evening. *Id.* After being defeated at the first two elections, the proposed levy was passed in November 1988. *Id.*

19 McIntyre v. Ohio Elections Comm'n, 618 N.E.2d 152, 152 (Ohio 1993) (stating that the complaint was filed on March 30, 1989); *McIntyre*, 115 S. Ct. at 1514 (explaining that the same school official who warned Mrs. McIntyre that her actions were in violation of the Ohio statute filed the complaint).

Section 3599.09(A) of the Ohio Revised Code provides:

> 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 non-periodical printed matter, unless there appears on such form

not claim, nor did the Commission find, that the leaflets were false, misleading, or libelous.[20] The Ohio Elections Commission imposed a fine of $100 against Mrs. McIntyre and agreed with the school official that the distribution of the unsigned leaflets violated

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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. The disclaimer "paid political advertisement" is not sufficient to meet the requirements of this division. When such publication is issued by the regularly constituted central or executive committee of a political party, organized as provided in Chapter 3517 of the Revised Code, it shall be sufficiently identified if it bears the name of the committee and its chairman or treasurer. No person, firm, or corporation shall print or reproduce any notice, placard, dodger, advertisement, sample ballot, or any other form of publication in violation of this section. This section does not apply to the transmittal of personal correspondence that is not reproduced by machine for general distribution.

The secretary of state may, by rule, exempt, from the requirements of this division, printed matter and certain other kinds of printed communications such as campaign buttons, balloons, pencils, or like items, the size or nature of which makes it unreasonable to add an identification or disclaimer. The disclaimer or identification, when paid for by a campaign committee, shall be identified by the words "paid for by" followed by the name and address of the campaign committee and the appropriate officer of the committee, identified by name and title.

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

[20] *McIntyre*, 115 S. Ct. at 1514 (explaining that the school official complained that the distribution was a violation of the Ohio code because the leaflets were unsigned; the Commission agreed).

One of the leaflets, in original typeface, is as follows:

VOTE NO
ISSUE 19 SCHOOL TAX LEVY

Last election Westerville Schools, asked us to vote yes for new buildings and expansions programs. We gave them what they asked. We knew there was 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 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 1514 n.2.

the Ohio law.[21]

On review, the Franklin County Court of Common Pleas reversed the decision of the Ohio Elections Commission, concluding that the statute was unconstitutional as applied to Mrs. McIntyre's conduct because her actions were not misleading or deceptive.[22] The trial court noted that the disclosures required by the statute unconstitutionally infringed upon Mrs. McIntyre's right to free speech.[23] Accordingly, the trial court limited the application of the statute, explaining that the statute would not apply in situations where the author personally distributed written communications designed to express the author's personal views.[24]

A divided Ohio Court of Appeals reinstated the fine, reasoning that the Ohio Supreme Court's decision in *State v. Babst*[25] was controlling.[26] In *Babst*, the Ohio Supreme Court considered the constitutionality of a similar statute that required the disclosure of the name and address of the voter responsible for a political circular or advertisement.[27] The *Babst* court found the statute to be constitutional.[28]

A majority of the *McIntyre* appellate court noted that a more recent United States Supreme Court decision cast doubt on the continued validity of *Babst*.[29] In *Talley v. California*,[30] the Supreme

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21 *Id.* at 1514. The Ohio Elections Commission is authorized to impose fines for violations of section A of the applicable Ohio Revised Code section. OHIO REV. CODE ANN. § 3599.09(C) (Anderson 1988).

22 McIntyre v. Ohio Elections Comm'n, No. 90AP-1221, 1992 WL 230505 at *1, *4 (Ohio App. April 7, 1992) (Whiteside, J., dissenting) (quoting from the opinion of the trial court).

23 *Id.*

24 *Id.*

25 135 N.E. 525, 525, 526 (Ohio 1922) (upholding the statutory predecessor of § 3599.09(A)).

26 *McIntyre*, No. 90AP-1221, 1992 WL 230505, at *3 (explaining that *Babst* was binding on the court); *McIntyre*, 115 S. Ct. at 1515 (stating that the court of appeals reinstated the fine).

27 *Babst*, 135 N.E. at 525. The court determined that the required disclosures did not impair the right of free speech because the statute was "not a restraint or abridgment of the right of free speech, but merely a regulation to prevent anonymous statements that might easily result in fraudulent and corrupt practices." *Id.* at 526.

28 *Id.* Although the court determined the constitutionality of the statute under the Ohio Constitution, the free speech clauses of both the Ohio Constitution and the United States Constitution provide the same guarantees. *McIntyre*, No. 90AP-1221, 1992 WL 230505, at *3 n.1. The Ohio Constitution provides, in relevant part, that: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuses of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press." OHIO CONST. art. 1, § 11.

29 *McIntyre*, No. 90AP-1221, 1992 WL 230505, at *3.

30 362 U.S. 60 (1960). See *infra* notes 51-53 and accompanying text for an analysis of the *Talley* decision.

Court considered a municipal statute requiring the disclosure of the name and address of the person responsible for all handbills.[31] The *Talley* Court struck down the statute after finding that the municipality was attempting to prohibit all anonymous speech.[32] The Ohio Court of Appeals, however, distinguished *Talley* from Mrs. McIntyre's situation, asserting that Ohio's interest in protecting against fraud and elections corruption was stronger than California's interest in avoiding anonymous speech generally.[33] The dissenting judge, in contrast, reasoned that *Talley* required a more narrow interpretation of the Ohio statute to protect the statute's constitutionality.[34]

A divided Ohio Supreme Court affirmed the decision of the court of appeals, determining that the burdens placed on the First Amendment rights of voters were "reasonable" and "nondiscriminatory."[35] The majority reasoned that the minor burden of author identification was outweighed by the state's interests of informing voters and preventing fraud.[36] The sole dissenting justice argued that strict scrutiny was the appropriate test to apply to the statute and concluded that the statute did not meet the test.[37]

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31 *Id.* at 60-61. After explaining the importance of anonymous political speech, the *Talley* Court stated that the ordinance's broad reach would undoubtedly restrict the freedom of expression. *Id.* at 64-65. The Court also rejected the municipality's claim that the statute was intended to provide a means to identify the sources of fraudulent statements absent any proof, such as legislative history or a limitation in the ordinance. *Id.* at 64.

32 *Id.* at 64, 65.

33 *McIntyre*, No. 90AP-1221, 1992 WL 230505 at *3.

34 *Id.* at *8-*9 (Whiteside, J., dissenting). The dissenting judge responded to one of the state's second assignment of errors. *Id.* at *7 (Whiteside, J., dissenting). The assignment of errors complained that the lower court erred by holding that the statute was unconstitutional as applied to Mrs. McIntyre. *Id.* at *2. The dissenting judge concluded that following the *Talley* decision would require the court to determine that the statute was unconstitutional. *Id.* at *8 (Whiteside, J., dissenting). Continuing, the dissenting judge determined that only by narrowing the construction of the statute could the statute be found constitutional. *Id.* at *9 (Whiteside, J., dissenting). Therefore, the dissenting judge concluded, even if the lower court erred in finding the statute unconstitutional as applied to Mrs. McIntyre, the statute would still have been found unconstitutional under *Talley*, absent a more narrow interpretation. *Id.*

35 McIntyre v. Ohio Elections Comm'n, 618 N.E.2d 152, 155, 156 (Ohio 1993) (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)). The majority distinguished *Talley* because the purpose of the Ohio statute was "the identification of persons who distribute materials containing false statements." *Id.* at 154.

36 *Id.* at 155-56. The Ohio Supreme Court relied on dicta in *Anderson v. Celebrezze*, in which the United States Supreme Court used a lower level of scrutiny that compares a state's "'important'" interest of regulating elections with the freedom of speech as represented by Mrs. McIntyre's leaflet distribution. King, *supra* note 3, at 162 (citing *McIntyre*, 618 N.E.2d at 155, and quoting *Anderson*, 460 U.S. at 788).

37 *Id.* at 158, 159 (Wright, J., dissenting). The dissenting justice reasoned that a

The United States Supreme Court granted certiorari[38] to determine whether laws banning anonymous leaflets, which discuss political issues, violate the First Amendment's protection of the freedom of speech.[39] Upon analyzing the Ohio statute, the Court recounted the protection historically afforded political speech.[40] In accordance with that traditional protection, the Court held that Ohio's statute prohibiting anonymous political leaflets violated the First Amendment.[41]

One important decision concerning the First Amendment's protection of the dissemination of ideas through the written word is *Lovell v. City of Griffin*.[42] In *Lovell*, the Court ruled on the constitutionality of a municipal ordinance prohibiting the distribution of

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more severe standard was appropriate because of the statute's significant effect on individual citizens' ability "to freely express their views in writing on political issues." *Id.* at 156-57 (Wright, J., dissenting).

38 McIntyre v. Ohio Elections Comm'n, 114 S. Ct. 1047 (1994). The executor of Mrs. McIntyre's estate pursued her claim because Mrs. McIntyre died during the litigation. McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1516 (1995).

39 *McIntyre*, 115 S. Ct. at 1514.

40 *Id.* at 1516-17. After its analysis of the political and literary protections historically given to anonymous speech, the Court reviewed its previous decisions that addressed the protection of political speech. *Id.* at 1518-19.

41 *Id.* at 1524. The Court concluded by stating that Ohio "cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented." *Id.* In reaching that conclusion, Justice Stevens applied the strict scrutiny test of *Meyer v. Grant* to determine that the prohibition of anonymous political leaflets is not narrowly tailored to the state's interest in preventing fraud and informing the electorate. *Id.* at 1519-21.

In *Meyer*, the Court unanimously applied the strict scrutiny test to a state law which criminalized paying petition circulators. Meyer v. Grant 486 U.S. 414, 420-21 (1988). The *Meyer* Court stated that circulating an initiative petition necessarily "involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Id.* at 421.

42 303 U.S. 444 (1938). There have been many notable Supreme Court decisions on First Amendment issues. *See, e.g.*, United States v. Grace, 461 U.S. 171, 183 (1983) (striking down a statute prohibiting the display of flags or banners at the premises of the United States Supreme Court); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) (declaring unconstitutional a state law requiring the right of reply in newspaper speech); Mills v. Alabama, 384 U.S. 214, 220 (1966) (invalidating a state law imposing criminal penalties for the publication of a newspaper editorial urging votes on election day); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466 (1958) (striking down a state order to produce an organization membership list); Abrams v. United States, 250 U.S. 616, 631 (1919) (Holmes, J., dissenting) (arguing that convictions under the Espionage Act were unconstitutional).

The protection given speech and press is provided "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484 (1957). *See supra* notes 1-3 and accompanying text (discussing some of the Court's decisions addressing political speech).

all literature unless a permit had been obtained from the city manager.[43] In striking down the ordinance, Chief Justice Hughes noted that the freedom of the press is an "essential liberty" that includes the distribution of pamphlets and leaflets.[44] Further, the Chief Justice emphasized that both publishing and distributing are protected.[45]

The next year, the Court decided *Schneider v. Town of Irvington*,[46] which addressed the goals of municipal ordinances that limited the distribution of leaflets.[47] The towns—Irvington, New Jersey; Los Angeles, California; Milwaukee, Wisconsin; and Worcester, Massachusetts—all enacted ordinances limiting the distribution of leaflets through licensing requirements or complete bans on leaflet distribution.[48] The municipalities' purported goals were the prevention of fraud, disorder, and/or littering.[49] After consid-

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[43] *Id.* at 445. The Court held that the ordinance was void on its face. *Id.* at 451. Alma Lovell was convicted of being in violation of the city ordinance and sentenced to 50 days in jail in default of a $50 fine. *Id.* at 447. Ms. Lovell's violation consisted of distributing pamphlets and magazines espousing the gospel of the "Kingdom of Jehovah" without obtaining the required permit. *Id.* at 448.

The Court stated that the issue of whether the ordinance violated the Free Exercise Clause of the First Amendment was presented in *Coleman v. City of Griffin. Lovell*, 303 U.S. at 449 (citing Coleman v. City of Griffin, 302 U.S. 636, 636 (1937) (dismissing the appeal for lack of a federal question)).

[44] *Id.* at 452. Chief Justice Hughes, writing for a unanimous Court, stated that "[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Id.*

[45] *Id.* "'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.'" *Id.* (quoting *Ex parte* Jackson, 96 U.S. 727, 733 (1877)).

[46] 308 U.S. 147 (1939). For a general discussion of the Court's decision in *Schneider*, see TRIBE, *supra* note 1, § 12-23, at 984-85.

[47] *Id.* at 162-64.

[48] *Id.* at 154, 155, 156, 157-58. The Court granted certiorari in the Irvington and Milwaukee cases and noted jurisdiction in the Los Angeles and Worcester cases. *Id.* at 154 n.1. The appellant from Los Angeles distributed handbills advertising a meeting about the war in Spain. *Id.* at 154. The petitioner from Milwaukee distributed handbills in front of a meat market discussing a labor dispute with the market. *Id.* at 155. Some of the persons who received the handbills threw them into the Milwaukee street. *Id.* The appellants from Worcester distributed leaflets advertising a meeting protesting unemployment insurance policies. *Id.* at 156. Some of the persons who received the leaflets also threw them into the Worcester streets. *Id.* at 157. The petitioner from Irvington visited houses as one of "Jehovah's Witnesses." *Id.* at 158.

[49] *Id.* at 162-64. The Court rejected the municipalities' efforts to distinguish their ordinances from the one voided in *Griffin* because of their goals of preventing fraud and litter. *Id.* at 162, 164. Justice Roberts observed that "the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution." *Id.* at 163. The Court noted that municipal authorities "may lawfully regulate the conduct of those using the streets" only if the legislation "does not abridge the constitutional liberty of one rightfully upon the street to impart informa-

ering the issue, the Court held that these goals could be accomplished by legitimate means other than restricting the freedom of speech and press.[50]

The Supreme Court first considered the issue of a municipal ordinance requiring the disclosure of the name and address of a publication's sponsor in *Talley v. California*.[51] The *Talley* Court noted the important role that anonymous publications have played in shaping the history of the United States.[52] The Court held that the ordinance was void on its face because its required disclosures could inhibit peaceful discourse of important public matters.[53]

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tion through speech or the distribution of literature." *Id.* at 160. Tribe notes that "[i]t is not a sufficient justification that the only alternatives available to government would be 'less efficient and convenient.'" TRIBE, *supra* note 1, § 12-23, at 980 n.6 (quoting *Schneider*, 308 U.S. at 164)). Continuing, Tribe states that "a governmental action that excludes a communication from such a public forum cannot be defended by pointing to the availability of alternative ways to transmit the same message . . . ." *Id.* § 12-23, at 981.

50 *Schneider*, 308 U.S. at 162, 164. Justice Roberts stated that any resulting litter in town streets from the distribution of leaflets was "an indirect consequence . . . from the constitutional protection of the freedom of speech and press" and could not justify abridging the freedom of speech. *Id.* at 162. Justice Roberts further stated that "[t]here are obvious methods of preventing littering" and suggested that the towns simply punish those people who actually litter. *Id.* Similarly, Justice Roberts suggested that the goal of preventing fraud could be achieved by punishing fraudulent statements and trespassing. *Id.* at 164. Further, the Court may find an otherwise permissible statute "invalid if it leaves too little breathing space for . . . would-be speakers or would-be listeners." TRIBE, *supra* note 1, §12-23, at 978-79.

51 362 U.S. 60 (1960). The Los Angeles, California ordinance required that the name and address of the handbill's author, printer, or distributor be printed on its face. *Id.* at 60-61. The handbills distributed by Mr. Talley urged a boycott of certain named merchants because of alleged discriminatory employment practices. *Id.* at 61. *See also* King, *supra* note 3, at 152-54 (providing an analysis of the *Talley* case).

52 *Talley*, 362 U.S. at 64-65. The Court noted that the press licensing laws of England and Colonial America were enforced largely because the governments knew that the publications criticizing the governments would be lessened if the names of the authors and distributors were exposed. *Id.* at 64. The Court also noted that the Federalist Papers had been published under fictitious names. *Id.* at 65. The importance of *Talley* "lies in the strong words used by the Court to describe anonymous political speech." King, *supra* note 3, at 153 (quotation omitted). *See also* Comment, *The Constitutional Right to Anonymity*, *supra* note 7, at 1084-1104 (discussing the historical role and cases addressing anonymous speech).

See generally Kreimer, *supra* note 7 (discussing past and current arguments for and against and effects of disclosures).

53 *Talley*, 362 U.S. at 65. The Court noted that this potential deterrence of political speech was the same problem as with statutes previously struck down by the Court that required groups to publicly identify their members. *Id.* (citing Bates v. City of Little Rock, 361 U.S. 516, 527 (1960) (striking down municipal ordinance requiring local branch of the NAACP to disclose its membership list in order to maintain its tax-exempt status) and NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466 (1958) (striking down state order compelling disclosure of the organization's membership list)).

The Court also has considered the First Amendment's protections of political speech in the area of election laws.[54] In *Buckley v. Valeo*,[55] the Court considered the constitutionality of the Federal Election Campaign Act of 1971, as amended in 1974.[56] The Court upheld provisions of the Act that limited campaign contributions by individuals[57] and required disclosures of such contributions.[58] The Court struck down certain spending restrictions that substan-

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The test resulting from *Talley* is whether anonymous political speech, as a form of highly protected speech, is covered by the statute at issue. King, *supra* note 3, at 154. "*Talley* is right, not because disclosure is valueless, but because anonymity is more valuable." Kreimer, *supra* note 7, at 88.

54 *See* McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1518 (1995). In the *McIntyre* opinion, Justice Stevens noted that the Court had previously reviewed statutes that governed the voting process itself. *Id.* In such situations, a state's interests must be carefully compared with the burdens placed on political speech. Anderson v. Celebrezze, 460 U.S. 780, 789 (1983). The Court stated that "'even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty.'" *Id.* at 806 (quoting Kusper v. Pontikes, 414 U.S. 51, 58-59 (1973) (citing Dunn v. Blumstein, 405 U.S. 330, 343 (1972))). *See* Burson v. Freeman, 504 U.S. 191, 198-99, 210 (1992) (plurality opinion) (applying strict scrutiny to uphold law prohibiting campaign-related speech within certain distance from polling places); Meyer v. Grant, 486 U.S. 414, 422-25 (1988) (applying strict scrutiny to invalidate law prohibiting payment of petition circulators); *Anderson*, 460 U.S. at 806 (striking down filing deadlines for independent candidates for President). *See also* TRIBE, *supra* note 1, §§ 13-18 to 13-31, at 1097-1153 (discussing the Court's decisions addressing state and federal regulation of various aspects of elections). *See generally* Note, *Gutter Politics and the First Amendment*, 6 VAL. U.L. REV. 185 (1972) (discussing election laws designed to regulate conduct during campaigns and elections).

55 424 U.S. 1 (1976) (per curiam). *See generally* Garrison, *supra* note 5 (discussing corporate participation in the political process).

56 *Buckley*, 424 U.S. at 6. *See also* TRIBE, *supra* note 1, § 13-27, at 1132-33 (describing the motivation behind and goals of the 1974 amendment to the Federal Election Campaign Act of 1971).

57 *Buckley*, 424 U.S. at 35. Individual contributions to political committees and candidates were limited to $1000. *Id.* at 23. The Court observed that contributions by individuals to candidates were merely "symbolic" acts of general support of candidates. *Id.* at 21. Accordingly, the Court reasoned that any limitations on contributions by individuals only marginally restricted the individual's freedom of speech. *Id.* at 20-21. Continuing, the Court noted that individuals were free to discuss and communicate support of the candidates and issues. *Id.* at 21. *See also* TRIBE, *supra* note 1, § 13-28, at 1136-38 (discussing the Court's reasoning for upholding the contribution limitations).

58 *Buckley*, 424 U.S. at 84. The disclosure requirements imposed upon political committees and candidates required that detailed records of contributions be maintained; those records were subject to periodic audits and were required to be reported on a quarterly basis. *Id.* at 63. Other individuals or groups making contributions in excess of $100 to other than political committees or candidates were also subject to reporting requirements. *Id.* at 63-64. The Court determined that the disclosure requirements met the strict scrutiny test. *Id.* at 68. The Court found that the governmental interests of voter education, corruption deterrence, and violations detection were substantial. *Id.* at 66-68. Further, the Court found that the disclosure requirements "directly serve[d the] substantial governmental interests." *Id.* at 68. *See*

tially limited protected political expression.[59] The Court reasoned that the surviving provisions furnished the means of campaign reform least offensive to First Amendment freedoms.[60]

Two years later, the Supreme Court considered the constitutionality of a state criminal statute restricting political expression by corporations in *First National Bank of Boston v. Bellotti*.[61] In that case, the Court struck down a Massachusetts criminal statute prohibiting corporate contributions and expenditures designed to influence any vote unless the vote materially affected the corporation's assets, business, or property.[62] In so ruling, the Court reasoned that discussing governmental affairs was an indispensable form of speech regardless of the speaker.[63]

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also TRIBE, *supra* note 1, § 13-31, at 1151-52 (discussing the Court's rationale for upholding the disclosure requirements).

59 *Buckley*, 424 U.S. at 58-59. *See also* TRIBE, *supra* note 1, § 13-29, at 1141-43 (discussing the Court's analysis supporting its decision to strike down the expenditure limitations).

For example, the Court struck down the sections providing a ceiling on independent expenditures, a limitation on expenditures from a candidate's own personal funds, and a ceiling on overall campaign expenditures. *Buckley*, 424 U.S. at 58. The Court determined that those sections imposed substantial and direct restrictions on protected political expression exercised by candidates, citizens, and associations. *Id.* at 58-59. The Court "distinguished between limits on campaign *expenditures*, considered to be at the core of the first amendment, and restrictions on campaign *contributions*, which the Court found to involve little direct restraint on speech." TRIBE, *supra* note 1, § 13-27, at 1136.

60 *Buckley*, 424 U.S. at 28-29, 68. The Court observed that the limitations on contributions "do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues. . . ." *Id.* at 28-29. Although "the Court has consistently recognized the state's interest in preventing actual or perceived corruption *of elected officials* arising from their indebtedness to large campaign donors, it has never accepted as legitimate any asserted interest in preventing actual or perceived corruption *of the electoral system itself*. . . ." TRIBE, *supra* note 1, § 13-28, at 1136. The *Buckley* Court further observed that the disclosure requirements afforded "the least restrictive means of curbing the evils of campaign ignorance and corruption . . . ." *Buckley*, 424 U.S. at 68.

61 435 U.S. 765, 767-68, *reh'g denied*, 438 U.S. 907 (1978). *See also* TRIBE, *supra* note 1, § 12-3, at 795-96 (discussing the Court's rationale in *First Nat'l Bank*) and Garrison, *supra* note 5, at 178-81 (discussing *First Nat'l Bank*).

62 *First Nat'l Bank*, 435 U.S. at 795. The appellants, national banking associations and business corporations, planned to make expenditures to publicize their position on a vote on a proposed state constitutional amendment. *Id.* at 769. The proposed amendment would permit a graduated income tax on individuals. *Id.* Although the vote on the referendum was held and the proposed amendment defeated, the Court decided that the case was not moot because it was "'capable of repetition, yet evading review . . . .'" *Id.* at 774 (quoting Southern Pacific Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498, 515 (1911)).

63 *Id.* at 777. The Court explained that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source . . . ." *Id.* Speech is protected, not the speaker. TRIBE, *supra* note 1, § 12-3, at

Recently, the Court revisited the issue of a municipal ordinance restricting political speech in *City of Ladue v. Gilleo*.[64] There, the Court struck down an ordinance prohibiting most residential signs, reasoning that the ordinance nearly foreclosed an important medium of political speech.[65] The Court reasoned that although

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796 (discussing the Court's First Amendment analysis in *First Nat'l Bank* that focuses on the speech and not just on the speaker, and that "speaker-based restrictions on speech may amount to impermissible censorship of the flow of ideas and information regarding the relevant set of listeners even if the speakers subject to restriction cannot complain that *their* rights as speakers have been violated"). Continuing, the Court noted that First Amendment freedoms, including the freedom of speech, are encompassed by the liberty protected by the Due Process Clause. *First Nat'l Bank*, 435 U.S. at 780. *See supra* note 4 and accompanying text (discussing the application of the Bill of Rights to the states through the Due Process Clause and the Fourteenth Amendment).

The Court further noted that the source of such rights, even when the rights are asserted by corporations, is the same for corporations as it is for individuals. *First Nat'l Bank*, 435 U.S. at 780. Additionally, the Court stated that the role of the First Amendment encompasses fostering speech by individuals and advancing the public's access to the discussion and communication of ideas. *Id.* at 783. Accordingly, the Court's opinion emphasized that speech is protected by the First Amendment whether or not the particular speaker is protected. TRIBE, *supra* note 1, § 12-3, at 795.

64 114 S. Ct. 2038, 2040 (1994). The ordinance and the subsequent variance denial by the city council prohibited Ms. Gilleo from displaying a sign protesting the war in the Persian Gulf in a window in her home. *Id.* After the District Court issued a preliminary injunction prohibiting the enforcement of the ordinance, Ms. Gilleo hung an 8.5 by 11-inch sign in a window on the second floor of her home. *Id.* Then, the city council repealed the original ordinance, enacting a replacement ordinance with the same restrictions. *Id.* The replacement ordinance, however, included an extensive statement of purposes detailing the city's findings resulting in its goal of minimizing visual clutter. *Id.* at 2041. *See also* Howard, *supra* note 5, at 366-68 (discussing the Court's rationales in the *Gilleo* decision).

65 *Gilleo*, 114 S. Ct. at 2045, 2047. Both the original and the replacement ordinances prohibited all residential signs, with 10 exemptions. *Id.* at 2040-41. The exemptions permitted signs, subject to size limitations, for identification purposes, advertising property for sale or rent, for not-for-profit institutions, and commercially zoned districts. *Id.* at 2041.

The Court noted the importance and distinctive nature of residential signs during the course of political campaigns. *Id.* at 2045. Residential signs, because of their convenience and low cost, are a form of political expression easily accessed by most members of society. *Id.* at 2046. The Court also noted that its prior decisions had invalidated laws foreclosing an entire medium of expression. *Id.* at 2045 (citing Jamison v. Texas, 318 U.S. 413, 415-17 (1943) (handbills on public streets); Martin v. City of Struthers, 319 U.S. 141, 143-44 (1943) (door-to-door distribution of literature); Lovell v. City of Griffin, 303 U.S. 444, 451 (1938) (pamphlets within a municipality)).

Formerly, the Court had carefully scrutinized seemingly neutral statutes, foreclosing methods of communication, which disproportionately affected the poor. TRIBE, *supra* note 1, § 12-23, at 979. Recently, however, the Court has been reluctant to apply a higher amount of scrutiny to laws which disadvantage the poor when conveying their political speech. *Id.* § 12-23, at 979 n.5. The importance of the *Gilleo* Court's approach, however, is that the Court recognized an individual's right to "participate effectively in public debate" and the political process. Howard, *supra* note 5, at 357-58.

the municipality was permitted to regulate the physical qualities of a sign, the prohibition of certain signs necessarily resulted in the prohibition of certain messages, which violates the Constitution.[66]

In accordance with these past decisions protecting political speech,[67] the Court similarly protected anonymous political speech in *McIntyre v. Ohio Elections Commission*.[68] Justice Stevens, writing for the majority, addressed the extent of First Amendment protection afforded to anonymous leaflets designed to influence the vot-

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66 *Gilleo*, 114 S. Ct. at 2041-42. The Court noted that residents and property owners have strong incentives to minimize "visual clutter" to maintain property values. *Id.* at 2047. The Court further noted that "mere regulations" of signs may be a permissible alternative to the city's almost total ban of residential signs. *Id.* at 2047 n.17. The Court's decision provides a "map for courts navigating the difficult road between" an individual's right to political speech and a state's right to regulate property usage. Howard, *supra* note 5, at 349.

The Court stated that it could decide the case without determining whether the ordinance's exemptions amounted to content or viewpoint discrimination. *Gilleo*, 114 S. Ct. at 2044, 2044 n.11. Accordingly, the Court commented that the first question to be determined was whether the city might properly prohibit Ms. Gilleo from displaying her sign. *Id.* at 2044. The Court noted that a secondary issue involved deciding whether "it was improper for the City simultaneously to *permit* certain other signs." *Id.*

Regarding the first issue, the Court reasoned that residential signs are an inexpensive and convenient medium of political speech. *Id.* at 2046. The Court further noted that residential signs are distinctive from other forms of communication because their location provides the additional information of the speaker's identity. *Id.* The Court noted that "the identity of the speaker is an important component of many attempts to persuade." *Id.* (footnote omitted). Therefore, the Court held that the city could not prohibit Ms. Gilleo from displaying her sign. *Id.* at 2047.

With regard to the second issue—prohibiting some signs while permitting others—the Court briefly commented that its holding did not require "that every kind of sign must be permitted in residential areas." *Id.* at 2047 n.17.

67 *See id.* at 2046 (stating that residential signs are important vehicles for political speech); Anderson v. Celebrezze, 460 U.S. 780, 805-06 (1983) (holding that an early filing deadline for candidacy was an unconstitutional burden on political speech); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (stating that political speech is "indispensable to decisionmaking in a democracy"), *reh'g denied*, 438 U.S. 907 (1978); Buckley v. Valeo, 424 U.S. 1, 28-29, 58-59 (1976) (noting that limitations on political contributions and expenditures necessarily limit political speech). These cases demonstrate that the Supreme Court has determined the extent of the First Amendment's protection of political speech by examining a variety of laws, including federal and state statutes which range from election laws to zoning ordinances. *See infra* note 68 (discussing the historical protection of political speech as noted by the *McIntyre* Court).

68 115 S. Ct. 1511, 1524 (1995). Justice Stevens noted that the *Talley* Court's reasoning followed a "respected tradition of anonymity in the advocacy of political causes." *Id.* at 1517 (footnote omitted). Continuing, Justice Stevens identified the anonymously authored Federalist Papers as the embodiment of this tradition. *Id.* at 1517 n.6. The Court also noted that the most effective advocates in the field of political rhetoric have occasionally opted for anonymity, even though "'the identity of the speaker is an important component of many attempts to persuade' . . . ." *Id.* at 1517 (quoting *Gilleo*, 114 S. Ct. at 2046 (footnote omitted)).

ing process.[69] The Court answered that the First Amendment provides the broadest protection to anonymous core political speech.[70]

The majority began its analysis by recounting the historical importance of anonymous writings.[71] Justice Stevens stated that the Court in *Talley* recognized and accepted the long history of advocating political causes anonymously.[72] An anonymous message can be evaluated on its own merits, the Justice explained, free from the prejudice that may attach when the author's identity is known.[73]

Next, the majority discussed the appropriate level of constitutional scrutiny to be applied to the statute.[74] Justice Stevens concluded that strict scrutiny was the appropriate level of review because the statute regulated pure speech.[75] The Justice determined that the statute was a regulation of pure speech for two rea-

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69 *Id.* at 1518-19. Because "a ban on anonymous pamphleteering falls with much greater force upon individuals and groups who fear majoritarian disapproval and reprisal . . . than upon those with widely approved messages to deliver," the Court demands "more than minimal justification" for this type of a ban. TRIBE, *supra* note 1, § 12-23, at 980.

70 *McIntyre*, 115 S. Ct. at 1518-19 (citing *Buckley*, 424 U.S. at 14-15 (citing Roth v. United States, 354 U.S. 476, 484 (1957))). *See supra* notes 1-3 and accompanying text (discussing the protection afforded political speech).

71 *McIntyre*, 115 S. Ct. at 1516 (quoting Talley v. California, 362 U.S. 60, 64 (1960)). Justice Stevens noted that the *Talley* Court recognized the value of anonymous publications that allow oppressed groups to criticize government practices and laws. *Id.* (citing *Talley*, 362 U.S. at 64). Further, the Justice stated that anonymous publications ensure that a reader will not be biased by the author's name. *Id.* at 1517. *See also* King, *supra* note 3, at 163-64 (reviewing the historical role of anonymous political writings).

72 *McIntyre*, 115 S. Ct. at 1517. Specifically, Justice Stevens discussed the use of anonymous writings during the pre-Revolutionary and Colonial years in America. *Id.* at 1517 n.6. The Justice stated that advocating political causes anonymously is most famously represented by the Federalist Papers, which were "authored by James Madison, Alexander Hamilton, and John Jay, but signed 'Publius.'" *Id.*

73 *Id.* at 1517. Justice Stevens emphasized this point by stating that "even in the field of political rhetoric, where 'the identity of the speaker is an important component of many attempts to persuade,' the most effective advocates have sometimes opted for anonymity." *Id.* (quoting *Gilleo*, 114 S. Ct. at 2046 (footnote omitted)). To help illustrate this point, Justice Stevens cited the use of assumed names by many famous American, French, and British authors. *Id.* at 1516 n.4.

74 *Id.* at 1518.

75 *Id.* at 1519. Justice Stevens stated that the Ohio Supreme Court's application of a "significantly more lenient standard" was in contradiction to the United States Supreme Court's decisions applying strict scrutiny to laws burdening core political speech. *Id.* The "exacting scrutiny" level of review requires that a statute's burden on free speech be narrowly tailored to serve a compelling state interest in order to be constitutional. *Id.* Justice Stevens uses the term "exacting scrutiny" rather than "strict scrutiny." *See supra* notes 8-10 and accompanying text (discussing "strict scrutiny").

sons.[76] First, Justice Stevens specified that the statute regulated the content of speech because it required certain disclosures of identity in all documents covered by the statute.[77] Second, the Justice determined that the statute was a content-based restriction because it regulated only documents containing speech designed to influence the electoral process.[78] Justice Stevens noted that political speech that advocated a politically-controversial viewpoint during a referendum vote is entitled to the highest level of protection.[79]

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[76] *Id.* at 1518. The Court opined that the state was controlling the content of the message by requiring the disclosure of information that the author would otherwise omit. *Id.* at 1518, 1520. The Court explained that the required disclosures facilitate extrajudicial harassment that may discourage other authors from writing, thereby abridging speech. King, *supra* note 3, at 158 (discussing the benefits of anonymous political speech).

Justice Stevens reported that the Ohio Elections Commission relied on previous Supreme Court decisions that dealt with election code provisions regulating the voting process itself. *McIntyre*, 115 S. Ct. at 1518 (citing Burdick v. Takushi, 504 U.S. 428, 430 (1992) (write-in voting); Anderson v. Celebrezze, 460 U.S. 780, 786 (1983) (filing deadlines); Storer v. Brown, 415 U.S. 724, 726-27 (1974) (ballot access)). In contrast, Justice Stevens observed that the Ohio statute does not control the workings of the voting process. *Id.*

[77] *Id.* Justice Stevens noted that the statute required the disclosure of "'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.* (quoting OHIO REV. CODE ANN. § 3599.09(A) (Anderson 1988)). By requiring the disclosure that might not otherwise be in the publication, the Court recognized that the statute was controlling the content of the message. *Id.*; *see also* King, *supra* note 3, at 162 ("Disclosure statutes do . . . affect the content of campaign literature . . . .").

[78] *McIntyre*, 115 S. Ct. at 1518. Justice Stevens noted that only documents "'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'" were within the statute's coverage. *Id.* at 1518 n.9. (quoting OHIO REV. CODE ANN. § 3599.09(A) (Anderson 1988)).

[79] *Id.* at 1519. Justice Stevens identified Mrs. McIntyre's leaflets as core political speech. *Id.* Justice Stevens emphasized that "[n]o form of speech is entitled to greater constitutional protection" than "urgent, important, and effective speech . . . lest the right to speak be relegated to those instances when it is least needed." *Id.*

Nearly half a century ago, the Supreme Court described the importance of political speech, in Terminiello v. Chicago, 337 U.S. 1 (1949). The Court explained that:

> a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would

To pass the strict scrutiny test, a statute must serve a compelling interest and be narrowly tailored to that interest.[80] In applying the strict scrutiny test to the Ohio statute, Justice Stevens identified Ohio's interests as informing the electorate and preventing fraud.[81] The Justice found that the interest of informing the electorate was not a compelling state interest because the required disclosures provided information that would be of little or no value to the reader.[82] Justice Stevens next determined that Ohio's interest in preventing fraud was a compelling state interest.[83] The Justice explained, however, that this statute was not narrowly tailored to serve this interest and that the state had other statutes to prevent fraud.[84] Justice Stevens concluded, therefore, that the Ohio statute

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lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

Id. at 4-5 (citations omitted).

In *McIntyre*, Justice Stevens discussed the Court's rationale for recognizing the First Amendment's broad protection of political speech. *McIntyre*, 115 S. Ct. at 1518-19. Justice Stevens reiterated the *First Nat'l Bank* Court's acknowledgment that political speech extended beyond speech about candidates, but also included discourse during issue-based elections. *Id.* at 1519. The Justice also reiterated previous decisions acknowledging the distribution of leaflets as a protected medium of political speech. *Id.* (citing Int'l Soc'y for Krishna Consciousness v. Lee, 112 S. Ct. 2701, 2705 (1992); Lovell v. Griffin, 303 U.S. 444, 452 (1938)). "[H]anding out leaflets in the advocacy of a politically controversial viewpoint—is the essence of First Amendment expression." *Id.*

80 *See supra* notes 8-10 and accompanying text (discussing strict scrutiny).

81 *McIntyre*, 115 S. Ct. at 1519. Justice Stevens noted that although Ohio's stated interests overlapped to a certain extent, the Court would address them separately. *Id.*

Although Ohio identified one of its interests supporting the statute as "preventing fraudulent and libelous statements," the Court refers to this interest as an interest in preventing "fraud," *id.* at 1521, "false statements," *id.* at 1520, 1521, "libel," *id.* at 1521, and "false documents," *id.* at 1522.

82 *Id.* at 1520. The Court judged Ohio's "informational interest . . . [as] plainly insufficient to support the constitutionality of its disclosure requirement." *Id.* Justice Stevens agreed with the New York Supreme Court's findings in a similar case when that court stated: "People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message." *Id.* at 1520 n.11 (quoting New York v. Duryea, 351 N.Y.S.2d 978, 996 (1974)). Tribe, however, would likely disagree stating that because this state interest helps the electorate better assess campaign literature and "is not so readily protected by other means[,] . . . carefully drafted campaign literature disclosure laws should probably be deemed constitutionally permissible." TRIBE, *supra* note 1, § 13-27, at 1132 (footnote omitted).

83 *McIntyre*, 115 S. Ct. at 1520. Justice Stevens agreed with Ohio that "this interest carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large." *Id.*

84 *Id.* at 1520-21. Justice Stevens noted that the Ohio Election Code has other sections specifically prohibiting false statements during campaigns. *Id.* at 1520 (referring to OHIO REV. CODE ANN. §§ 3599.09.1(B) and 3599.09.2(B)). "To the extent that the purpose of a disclosure statute is prevention of false statements, a narrower solu-

was unconstitutional.[85]

Finally, the Court addressed Ohio's claim that the Court's precedents adequately support the disclosure requirement.[86] The Court stated that neither *First National Bank of Boston v. Bellotti*[87] nor *Buckley v. Valeo*[88] was controlling.[89] Justice Stevens reasoned that the Ohio statute's burdens on speech were more intrusive than those of the Massachusetts statute in *Bellotti* or the federal act at issue in *Buckley*.[90]

In a brief concurring opinion, Justice Ginsburg expressed agreement with the Court's holding that the First Amendment pro-

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tion is available: a ban on the false statements themselves . . . ." King, *supra* note 3, at 155 (footnote omitted). In accord, Professor Tribe notes that although "[t]he interest in preventing candidate defamation is certainly significant . . . it seems achievable by the less restrictive alternative of enforcing anti-fraud campaign falsity statutes." TRIBE, *supra* note 1, § 13-26, at 1132. Finally, Justice Stevens found that because the prohibition against anonymous leafletting was not the primary means of preventing fraud, these secondary benefits did not justify the statute's "extremely broad prohibition." *McIntyre*, 115 S. Ct. at 1521.

85 *McIntyre*, 115 S. Ct. at 1521. Justice Stevens noted that the statute applies to "documents that are not even arguably false or misleading." *Id.* Further, Justice Stevens found that Ohio's enforcement interest was unsubstantiated because the state had not shown how it could address falsified names or that the absence of an author's name necessarily permitted the author from escaping compliance with the statute, as was the case with Mrs. McIntyre. *Id.* at 1522. Additionally, Justice Stevens commented that the ban applied without regard to the "strength of the author's interest in anonymity." *Id.* Accordingly, the Justice noted that Ohio's enforcement interest may be appropriately served by a more limited disclosure requirement. *Id.*

86 *Id.*

87 435 U.S. 765, 792 n.32 (explaining that "[i]dentification 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"), *reh'g denied*, 438 U.S. 907 (1978). *See supra* notes 61-63 and accompanying text (discussing *First Nat'l Bank of Boston*).

88 424 U.S. 1, 66-67 (1976) (sustaining disclosure requirements in part due to the information that would be provided to voters). *See supra* notes 55-60 and accompanying text (discussing the *Buckley* decision).

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

90 *Id.* at 1522, 1523. Justice Stevens noted that the *First Nat'l Bank* Court recognized that the "'inherent worth of the speech in terms of its capacity for informing the public'" was not dependent upon the identification of its source. *Id.* at 1522 (quoting *First Nat'l Bank*, 435 U.S. at 777). Justice Stevens further noted that while dicta in the *First Nat'l Bank* opinion commented on the beneficial effects of source identification of corporate advertising, such comments were not necessarily applicable to independent speech by individuals like Mrs. McIntyre. *Id.*

Justice Stevens observed that the expenditure disclosures required under the federal act in *Buckley* revealed far less specific information than the authorship of a statement on a controversial issue like that contained in Mrs. McIntyre's leaflets. *Id.* at 1523. Justice Stevens also stated that the disclosures at issue in *Buckley* were in support of a compelling state interest of avoiding corruption resulting from campaign expenditures which was not a concern during the referendum vote commented on by Mrs. McIntyre. *Id.*

hibited a state ban on anonymous political leaflets.[91] The Justice wrote separately to defend the majority's analysis and conclusion.[92] Specifically, Justice Ginsburg emphasized that the Court's holding would not preclude a more narrow identification requirement.[93]

Justice Thomas also concurred with the majority's holding, but wrote separately to explain why the majority's analysis was improper.[94] The Justice emphasized that the proper analysis involved determining the Founders's original understanding of the Free Press clause of the First Amendment.[95] Justice Thomas opined that the historical view on constitutional interpretation was dependent upon the original meanings of the words and the Founders' understanding of those words at the time when the Constitution was adopted.[96] After a considerable review of the customs and beliefs held by the Founders regarding anonymous political writings,[97] the Justice concluded that the Founders believed that the right to publish anonymous writings on political issues was included in the freedom of the press.[98]

In dissent, Justice Scalia, joined by Chief Justice Rehnquist, argued that the majority should have followed the traditional method of constitutional interpretation, which is to analyze the Constitution's original meaning.[99] Under that method of analysis, Justice Scalia found that there is no right to be anonymous while participating in the electoral process.[100] Further, the dissenting

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91 *Id.* at 1524 (Ginsburg, J., concurring).

92 *Id.* Justice Ginsburg found the majority's application of First Amendment jurisprudence "hardly sensational" in contrast to the charges by the dissent. *Id.*

93 *Id.* Justice Ginsburg stated that "[i]n for a calf is not always in for a cow." *Id.* The Justice explained that the Court's holding does not mean "that the State may not in other, larger circumstances, require the speaker to disclose its interests by disclosing its identity." *Id.*

94 *Id.* at 1525 (Thomas, J., concurring). Justice Thomas criticized that the majority was not following the "settled approach" of interpreting the Constitution by exploring the intent of the Founders. *Id.* at 1530 (Thomas, J., concurring).

95 *Id.*

96 *Id.* at 1525. Justice Thomas cited to Supreme Court decisions supporting his position of discerning the Constitutional guarantees' original meanings and the Founders' contemporaneous understanding of those guarantees to properly analyze the First Amendment. *Id.* (quoting Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721 (1838); South Carolina v. United States, 199 U.S. 437, 448 (1905); citing Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 958-59 (1983)).

97 *Id.* at 1525-29 (Thomas, J., concurring).

98 *Id.* at 1530 (Thomas, J., concurring).

99 *Id.* at 1531 (Scalia, J., dissenting).

100 *Id.* at 1531-32 (Scalia, J., dissenting). Justice Scalia rejected Justice Thomas's determination that historical evidence supported a right to anonymous political communications. *Id.* at 1532 (Scalia, J., dissenting). Justice Scalia argued that the historical evidence examined by Justice Thomas did not specifically address anonymous

Justice observed that the widespread and longstanding nature of the governmental practice of prohibiting anonymous political communications provides additional support for finding the practice constitutional.[101]

Justice Scalia further asserted that an analysis of the Supreme Court's precedent would result in the same conclusion.[102] The Justice advanced that the Court's prior decisions authorized the protections of the electoral process at the expense of a "right to anonymity."[103] Justice Scalia stated that, contrary to the majority's assertion, democratic elections are protected and enhanced by the prohibition of anonymous campaigning.[104]

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electioneering. *Id.* Justice Scalia further noted that the issue of anonymous electioneering never arose because the idea of government regulation of the voting process was a modern phenomenon. *Id.*

101 *Id.* at 1532-34 (Scalia, J., dissenting).

After determining that the original meaning of the Free Speech and Press Clauses was not dispositive, Justice Scalia examined the governmental traditions. *Id.* Justice Scalia opined that the fundamental constitutional guarantees become embodied in the widespread and longstanding traditions and practices imparting them with the "strong presumption of constitutionality." *Id.* at 1532 (Scalia, J., dissenting). *But see* Kreimer, *supra* note 7, at 13 n.30. Kreimer argues that "[h]istory functions best as a warning, rather than a stamp of approval[,]" asserting that Justice Scalia's theory that "traditions of tacit toleration for government practices constitutionally validate those practices" is "misguided and misleading . . . ." *Id.*

The Justice noted that when the Ohio statute was enacted in 1915 it joined a similar statute enacted by Massachusetts in 1890. *McIntyre*, 115 S. Ct. at 1532-33 (Scalia, J., dissenting). The Justice further noted that by the end of World War I, 24 states had enacted similar laws and that today the District of Columbia and every state, except California, have enacted similar laws. *Id.* at 1533 (Scalia, J., dissenting).

102 *McIntyre*, 115 S. Ct. at 1534 (Scalia, J., dissenting).

103 *Id.* at 1534-35 (Scalia, J., dissenting). First, Justice Scalia stated that the case law established that the state's protection of the electoral process is the most compelling justification for regulation. *Id.* at 1534 (Scalia, J., dissenting). The Justice explained that "[t]he State has a 'compelling interest in preserving the integrity of its election process.'" *Id.* (quoting Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 231 (1989)). Second, Justice Scalia noted that several cases have provided exemptions from otherwise valid disclosure requirements but have not recognized a general right to anonymity in speech. *Id.* at 1534-35 (Scalia, J., dissenting) (citing Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 101-02 (1982) (prohibiting a state from compelling disclosure of minor political parties' membership lists when such disclosure would subject those persons to a reasonable probability of threats or reprisals); Bates v. City of Little Rock, 361 U.S. 516, 523-24 (1960) (striking down a municipal ordinance requiring the furnishing of a membership list as a prerequisite to maintaining tax-exempt status to protect members from harassment and bodily harm); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462-63, 466 (1958) (striking down a state order to produce an organization membership list because of reprisals against members following previous disclosures)).

104 *Id.* at 1535-36 (Scalia, J., dissenting). Justice Scalia argued that the disclosure requirements work to protect against campaign falsehoods and promote "a civil and dignified level of campaign debate . . . ." *Id.* at 1536 (Scalia, J., dissenting). The Justice noted that the Court "approved much more onerous disclosure requirements"

In *McIntyre*, the Supreme Court continued its tradition of protecting political speech.[105] The Court's focus, however, has begun to encompass the protection of an individual's right to participate in the political process.[106] Although the Court's focus is on the protection of political speech, the protection of the speaker's ability to speak is an indirect result of recent decisions.

In the Court's recent decision in *Meyer*, for example, the Court focused on an individual's ability to discuss political change with others.[107] The *Meyer* Court struck down the law criminalizing payments to petition circulators because the petition circulators, by persuading people to sign petitions, engage in political discussion and because the petitions provide a greater audience for the discussion through ballot access.[108] In another example from the year before *McIntyre*, the *Gilleo* Court was concerned with the individual's ability to publicly comment on the political process.[109] The *Gilleo* Court rejected the near total ban on residential signs because of their unique ability to communicate a resident's message.[110] In *McIntyre*, the Court similarly continued to emphasize the protection of political speech while mentioning concern for Mrs. McIntyre's right to distribute her leaflets without the

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for the protection and enhancement of elections in *Buckley v. Valeo*. *Id.* *See supra* note 58 and accompanying text (discussing disclosure requirements upheld in *Buckley*).

Lastly, Justice Scalia noted that the governments of 49 states, Australia, Canada, and England have determined that the prohibition of anonymous electioneering is an effective protection of the electoral process. *McIntyre*, 115 S. Ct. at 1535 (Scalia, J., dissenting).

105 *See supra* notes 1-7, 54-90 and accompanying text (discussing the Court's decisions protecting political speech).

106 *McIntyre*, 115 S. Ct. at 1535 (Scalia, J., dissenting) (describing the implications of "this newly expanded right-to-speak incognito"). *See also* Howard, *supra* note 5, at 353-82, 396-98 (discussing the Court's move towards formally announcing an individual's right to participate in public debate); TRIBE, *supra* note 1, §§ 13-1 to 13-31, at 1062-1153 (discussing the Court's decisions affecting an individual's right to participate in the political process).

107 Meyer v. Grant, 486 U.S. 414, 421 (1988). *See supra* note 41 (discussing further the Court's reasoning in *Meyer*).

108 *Id.* at 421-22. The Court determined that the law restricted political expression by limiting the number of people who could convey the message and by lessening the likelihood that the issue would be placed on the ballot. *Id.* at 422-23.

109 City of Ladue v. Gilleo, 114 S. Ct. 2038, 2045 (1994). *See also* Howard, *supra* note 5, at 351 (stating that the *Gilleo* Court's concern was "not only with a citizen's right to receive undistorted political information, but also with the citizen's right to personally and effectively participate in public debate"). *See supra* notes 64-66 and accompanying text (discussing *Gilleo*).

110 *Gilleo*, 114 S. Ct. at 2046. The *Gilleo* Court was concerned with the foreclosure of residential signs as a medium for political communication for the poor because of its low cost and for the rich because of its relative ease and cost effectiveness. *Id.*

threat of reprisals.[111] Although the *McIntyre* Court did not foreclose the constitutionality of identification requirements for certain groups or corporations, the Court definitively prohibited identification requirements for individuals.[112]

The Court has long recognized the right of an individual to participate within the context of groups.[113] Similar to the Court's expansion of the definition of the Due Process Clause to include most of the Bill of Rights, the Court is effectively enlarging the individual's protection under the First Amendment. Following this reasoning, First Amendment jurisprudence may ultimately explicitly include the individual's ability to participate in the political process.

It is not only the dissent, however, that has voiced a concern with recognizing an individual's right to anonymous political speech.[114] Justice Stevens argued that society places a greater value on free speech than in preventing the possible result of its abuse shielding fraudulent conduct.[115] In accordance with the Court's decision in *McIntyre*, the New Jersey Legislature recently amended the state law to permit individuals to legally distribute anonymous political leaflets.[116] One of the bill's sponsors, however, was quick

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111 *McIntyre*, 115 S. Ct. at 1519. The *McIntyre* Court continued to emphasize the protection afforded the speech and, necessarily, its speaker. *Id.* at 1524. The Court explained that the First Amendment protects "individuals from retaliation—and their ideas from suppression . . . ." *Id.* Continuing, the Court stated that "our society accords greater weight to the value of free speech than to the dangers of its misuse." *Id.* The Court noted that the Ohio statute in fact applied to "individuals acting independently and using only their own modest resources." *Id.* at 1521. The Court also noted that the intrusive nature of the Ohio statute revealed "unmistakably the content of [an individual's] thoughts on a controversial issue." *Id.* at 1523.

112 *Id.* at 1522, 1524. The majority concluded that "[o]ne would be hard pressed to think of a better example of the pitfalls of Ohio's blunderbuss approach than the facts of the case before us." *Id.* at 1524.

113 *See, e.g.*, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462-63 (1958) (striking down the state's requirement of disclosing the group's membership list because the threat of reprisals restricted members' right to associate). Justice Scalia, however, argued that the Court's rationale in the groups cases did not extend to Mrs. McIntyre because the record did not show that she feared any threats or reprisals. *McIntyre*, 115 S. Ct. at 1535 (Scalia, J., dissenting) (citing Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 101-02 (1982); Bates v. City of Little Rock, 361 U.S. 516, 524-34 (1960); *Patterson*, 357 U.S. at 466)).

114 Justice Scalia predicted that the level of civility in elections would decrease as he envisioned the increasing incidents of "mudslinging" under the cloak of anonymity. *McIntyre*, 115 S. Ct. at 1536 (Scalia, J., dissenting).

115 *Id.* at 1524. Although Justice Stevens acknowledged that there may be "unpalatable consequences" from permitting anonymous political speech, the Justice concluded that value of free speech was much greater in this case. *Id.*

116 Michael Booth, *Legislature Eases Route for Lone Pamphleteer*, 143 N.J.L.J., January 8, 1996, at 8 (reporting that a bill requiring a name and address disclosure by anyone

to warn individual who would distribute anonymous leaflets under the new law against using the law to make false statements.[117]

Under the guise of protecting the right to free speech as encompassed by the First Amendment, the Legislature has effectively enhanced the individual's ability to participate in the political process. Thus, this law not only articulates the legality of writing anonymously, but in fact provides a greater ability for the individual to participate generally. Nonetheless, it remains to be seen how the political process will be affected by the individual's new "right."

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spending $500 or more producing political literature passed both houses of the state legislature).

117 *Id.* (reporting that the sponsor stated that "[t]his legislation serves notice to groups or individuals who may now be tempted to disseminate deliberately false and damaging advertisements under the cloak of the U.S. Constitution"). Continuing, the sponsor urged "New Jersey to take a pre-emptive strike against those who would exploit the Supreme Court decision by engaging in covert and anonymous campaign tactics." *Id.* Clearly, the bill's sponsor had concerns similar to those of Justice Scalia in *McIntyre*. *See McIntyre*, 115 S. Ct. at 1537 (Scalia, J., dissenting). In fact, Justice Scalia concluded his dissent by stating that anonymous writing "facilitates wrong by eliminating accountability, which is ordinarily the very purpose of the anonymity." *Id.*