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McIntyre v. Ohio Elections Commission: Defining the Right to Engage in Anonymous Political Speech

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NOTE

McIntyre v. Ohio Elections Commission: Defining the Right to Engage in Anonymous Political Speech

> *In for a calf is not always in for a cow. . . . We do not . . . hold that the State may not in other, larger circumstances, require the speaker to disclose its interest by disclosing its identity.*[1]

The United States Supreme Court's recent decision in *McIntyre v. Ohio Elections Commission*[2] provides the latest word on the extent to which the First Amendment protects anonymous political speech.[3] The decision struck down as unconstitutional an Ohio statute that required the disclosure of one's identity when distributing election-related pamphlets.[4] In reaching this decision, the majority applied its traditional "exacting scrutiny" test to Ohio's proscription of anonymous speech, while the dissent applied a somewhat reformulated test. Both opinions, nonetheless, employed essentially the same balancing analysis. Despite balancing the same interests, however, the Court split sharply on the appropriate result.[5]

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1. McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1524 (1995) (Ginsburg, J., concurring) (responding to Justice Scalia's dissent).

2. 115 S. Ct. 1511 (1995).

3. The First Amendment affords broad protection to political expression to assure the "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). Through the vehicle of the press, "people receive that free flow of information and ideas essential to intelligent self-government . . . enabling the public to assert meaningful control over the political process . . . [thereby] effecting the societal purpose of the First Amendment." Saxbe v. Washington Post Co., 417 U.S. 843, 863 (1974). In times of turmoil,

> the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means.

De Jonge v. Oregon, 299 U.S. 353, 365 (1937). And particularly "in a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential." Buckley v. Valeo, 424 U.S. 1, 14-15 (1976) (per curiam).

4. *McIntyre*, 115 S. Ct. at 1524.

5. *Compare id.* at 1524 (finding that anonymous political speech is "an honorable tradition of advocacy and of dissent" and that Ohio's statute is unconstitutional because it indiscriminately outlaws such speech "with no necessary relationship to the danger sought to be prevented") *with id.* at 1537 (Scalia, J., dissenting) (replying that striking down Ohio's law "on the ground that all anonymous communication is in our society

Moreover, the majority left the jurisprudential door slightly cracked, suggesting the possibility that some kind of acceptable proscription on anonymous speech exists, but gave no indication of what such a proscription might look like.[6] For these reasons, the decision's legal analysis does not provide a satisfying exposition of the concerns truly driving the debate, nor does it offer a satisfactory guide for predicting how the Court will rule on future anonymous political speech questions.

Instead of looking only at the legal arguments, therefore, a more fruitful approach may be to look also at the normative considerations lurking under the surface.[7] When the opinion is viewed in that light, it appears that *McIntyre* will prove to be dispositive regarding the level of First Amendment protection that anonymous political speech will ultimately enjoy. That is, normative concerns considered, *McIntyre* appears to establish and define a constitutional right to engage in leafletting and other political speech anonymously that is founded on the role anonymity plays as a shield from tyrannical majoritarian power. Moreover, viewed from this perspective, the decision suggests that any state or federal proscription on one's ability to engage in anonymous political speech, whenever anonymity is

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traditionally sacrosanct, seems to me a distortion of the past that will lead to a coarsening of the future").

6. *See id.* at 1522 ("We recognize that a State's enforcement interest might justify a more limited identification requirement . . . ."); *id.* at 1524 (Ginsburg, J., concurring) ("We do not . . . hold that the State may not in other, larger circumstances, require the speaker to disclose its . . . identity.").

7. This Note presents a normative assessment of the Court's *McIntyre* decision, positing several questions that help to define the Court's apparent normative beliefs regarding the role that anonymous political speech plays in our society. These questions are then used to construct a model of the Court's decision-making calculus regarding anonymity that is both descriptive, in that it helps to articulate the compelling concerns underlying the Court's decisions in *McIntyre* and other related case law, and predictive, in that it provides a framework with which to make reasonable predictions regarding the outcome of future decisions on anonymous political speech questions. The assessment presented in this Note is not critically normative; it does not critique whether the Court ought to have ruled the way that it did in *McIntyre*. Also, the normative assessment applied here differs from a more traditional, rule-oriented legal analysis. As discussed *infra* notes 75-109 and accompanying text, such a traditional legal analysis does not appear to offer as powerful an explanation of the Court's reasoning in *McIntyre* as a normative analysis, especially when considering Justice Scalia's dissent.

For another commentary that attempts to draw a larger unifying theme of Supreme Court jurisprudence regarding the "balance between an individual's right to free speech and the community's right to be free of a cacophony of unrestrained voices," based on an assessment of the Court's recent decision in City of Ladue v. Gilleo, 114 S. Ct. 2038 (1994), see Alan Howard, City of Ladue v. Gilleo*: Content Discrimination and the Right to Participate in Public Debate*, 14 ST. LOUIS U. L.J. 349, 352-53 (1995).

necessary as a check against coercion and reprisal, will be struck down as unconstitutional.[8]

This Note first summarizes the facts behind *McIntyre* and the analyses used in the majority, concurring, and dissenting opinions of the Court.[9] It then reviews two distinct lines of foundational case law underlying *McIntyre* and the *McIntyre* Court's treatment of those cases,[10] and more thoroughly assesses the legal analyses used by the majority and dissent in the case.[11] The Note then discusses why these analytical approaches do not serve well as predictive models for anticipating how the Court will decide future anonymous political speech questions and offers as an alternative a normative approach for considering the factors underlying the *McIntyre* decision.[12] To further elucidate and test this alternative approach, the Note then demonstrates the operation of the same normative concerns in the prior case law.[13] In conclusion, the Note uses this normative technique to predict the Court's likely course with regard to anonymous political speech.[14]

In 1988, Margaret McIntyre expressed her opposition to a proposed school tax levy by handing out leaflets at several public meetings in Westerville, Ohio.[15] Acting independently, she composed the leaflet on her home computer and had it copied by a professional printer.[16] Although she identified herself as the author on some of the leaflets, and meant to include her name on all of

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8. For discussions of other current conflicts between anonymous speech and governmental interests in disclosure, see generally A. Michael Froomkin, *The Metaphor is the Key: Cryptography, the Clipper Chip, and the Constitution*, 143 U. PA. L. REV. 709 (1995) (discussing Constitutional concerns regarding people's needs and abilities to keep and selectively disclose secrets in conjunction with the state's interest in, and power to penetrate, those secrets); Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 11 (1991) (discussing constitutional concerns for the protection of sanctuaries of private liberty from state intervention with regard to Justice Brandeis's maxim that "[s]unlight is . . . the best of disinfectants" (citation omitted)); George P. Long, III, Comment, *Who Are You?: Identity and Anonymity in Cyberspace*, 55 U. PITT. L. REV. 1177 (1994) (discussing the problems and debate surrounding anonymity and the various forms of publicly accessible electronic media—cyberspace—such as the Internet).

9. *See infra* notes 15-43 and accompanying text.

10. *See infra* notes 44-74 and accompanying text.

11. *See infra* notes 75-108 and accompanying text.

12. *See infra* notes 109-24 and accompanying text.

13. *See infra* notes 125-62 and accompanying text.

14. *See infra* notes 163-65 and accompanying text.

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

16. *Id.*

them, some carried only the signature "CONCERNED PARENTS AND TAX PAYERS."[17]

Mrs. McIntyre was subsequently charged with a violation of section 3599.09(A) of the Ohio Code for distributing anonymous election-related leaflets.[18] The Ohio Elections Commission fined her $100, and was affirmed on appeal by a divided Ohio Supreme Court.[19] The majority distinguished *McIntyre* from the United States Supreme Court's decision in *Talley v. California*,[20] which had invalidated a city ordinance prohibiting all anonymous leafletting, by finding that the purpose of the Ohio law was to identify persons who distribute materials containing false statements.[21] The Ohio Supreme Court also found that the Ohio law was valid because the burdens it imposed on the First Amendment rights of voters were both "reasonable" and "nondiscriminatory," based on the "ordinary litigation" test articulated by the Supreme Court in *Anderson v. Celebrezze*.[22] Under the "ordinary litigation" test, a court must consider "the relative interests of the State and the injured voters, and [then evaluate] the extent to which the State's interests necessitated the contested restrictions."[23]

The Supreme Court reversed by a vote of seven to two in a decision authored by Justice Stevens.[24] The Court found that, while *Talley* did not necessarily control,[25] the First Amendment protects the freedom to publish anonymously, and that this freedom extends to the advocacy of political causes, including both candidate elections

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17. *Id.* At no time was Mrs. McIntyre accused of making false, misleading, or libelous statements. *Id.*

18. *Id.* The Ohio Code provides, in relevant part, that "[n]o person shall write, print . . . or distribute . . . a notice . . . or any other form of general publication which is designed to . . . influence the voters in any election . . . unless there appears on such form . . . the name and residence . . . of the . . . person who issues, makes or is responsible therefor." OHIO REV. CODE ANN. § 3599.09(A) (Anderson 1988).

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

20. 362 U.S. 60 (1960). *Talley* was of particular concern to the Ohio Supreme Court, and justly so, because it voided a Los Angeles ordinance banning anonymous leafletting that was somewhat broader than, but otherwise notably similar to, Ohio's statute. *See infra* notes 63-74 and accompanying text (discussing *Talley*).

21. *McIntyre*, 618 N.E.2d at 154.

22. *Id.* at 155 (quoting Anderson v. Celebrezze, 460 U.S. 780, 788-89 (1983)).

23. *McIntyre*, 115 S. Ct. at 1518 (citing *Anderson*, 460 U.S. at 789).

24. *Id.* at 1513. Justice Stevens was joined by Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer. Justice Thomas concurred in the judgment only. Justice Ginsburg also wrote a concurring opinion. *Id.*

25. *Id.* at 1517; *see infra* notes 63-74 and accompanying text (discussing the *Talley* Court's reasoning in striking down the Los Angeles prohibition of anonymous leafletting).

and issue-based elections such as the school-tax referendum of concern to Mrs. McIntyre.[26] Repeating a phrase that has become almost pro forma in the relevant case law, the Court noted that its staunch protection of open discussion on governmental affairs arises from a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[27]

The Court also noted that the "ordinary litigation" test articulated in *Anderson* was not appropriately applied under the facts in *McIntyre*.[28] Rather, because Ohio's ban is a regulation of core political speech and because it applies to writings based on their content as election-related speech, the appropriate analysis was to determine whether the ban could survive "exacting scrutiny"; that is, whether the proscription was narrowly tailored to serve an overriding state interest.[29]

The Court acknowledged that while the prevention of fraud might constitute an overriding state interest, Ohio had not, in fact, adopted the statute to further that interest directly.[30] Moreover, even if preventing fraud was the actual end of the legislation, the Court held that the statute adopted was too broad.[31] Finally, the Court distinguished two decisions upon which the State had relied, including *First National Bank of Boston v. Bellotti*[32] and *Buckley v.*

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26. *McIntyre*, 115 S. Ct. at 1519.

27. *Id.* (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

28. *Id.* at 1518-19. Leaving little room for debate, the Court stated that its "precedents ... make abundantly clear that the Ohio Supreme Court applied a significantly more lenient standard than is appropriate for a case of this kind." *Id.* at 1519.

29. *Id.* at 1519. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 798-99 (2d ed. 1988) ("The Court applies the 'most exacting scrutiny' to regulations that discriminate among instances of speech based on its content.") (citations omitted); *infra* notes 57, 82-91 and accompanying text (discussing in more detail the exacting scrutiny test).

Under the "exacting" or "strict" scrutiny test, the State bears the burden of showing that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Burson v. Freeman, 504 U.S. 191, 198 (1992) (plurality opinion) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)). The Court has emphasized that "it is the rare case in which ... a law survives strict scrutiny." *Id.* at 211 (plurality opinion); *see also McIntyre*, 115 S. Ct. at 1535 (Scalia, J., dissenting) (commenting that application of the exacting scrutiny test is "ordinarily the kiss of death").

30. *McIntyre*, 115 S. Ct. at 1519-22.

31. *Id.*

32. 435 U.S. 765, 792 n.32 (1978) (commenting in dicta on the benefits of requiring identification of the source of corporate campaign financing); *see infra* notes 58-62 and accompanying text (discussing *Bellotti*).

Valeo,[33] because "[n]either case involved the prohibition of anonymous campaign materials."[34] The Court then found the law unconstitutional because it was not sufficiently tailored to meet an overriding state interest.[35]

In his opinion concurring in the judgment, Justice Thomas limited his analysis strictly to a detailed historical review of the practice and protection of anonymous political speech.[36] Finding that the "Framers understood the First Amendment to protect an author's right to express his thoughts on political candidates or issues in an anonymous fashion," he concluded that the majority had unnecessarily adopted an analysis largely unconnected to the Constitution's text and history.[37]

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33. 424 U.S. 1, 66-67 (1976) (per curiam) (approving as constitutional the required disclosure of campaign-related expenditures); *see infra* notes 49-50 and accompanying text (discussing *Buckley*).

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

35. *Id.* at 1524.

36. *Id.* at 1525-30 (Thomas, J., concurring in the judgment). The question of what theoretical rationales are appropriate for justifying the modern free speech doctrine, or proposed alternative doctrines, is the subject of considerable debate in the literature. Professor Cass Sunstein asserts that the primary purpose of free speech is to promote democratic deliberation on issues of public policy. CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 241-52 (1993). For a critique of this assertion and Sunstein's other arguments regarding the role of free speech in our democracy, see J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935 (1995) (book review). For a sampling of several expositions of the traditional free speech rationales used to critique and advance several different perspectives on the role of free speech in our society, see David S. Day, *The End of the Public Forum Doctrine*, 78 IOWA L. REV. 143, 147, 200-01 (1992) (surveying four values "generally recognized as undergirding modern free speech doctrine" in the context of arguing that several recent Supreme Court decisions have impoverished the public forum doctrine); Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 11-20 (1990) (surveying the traditional justifications for free speech in the context of arguing that such justifications are unsatisfying when based on the philosophy of individualism and proffering a free speech doctrine that considers the importance of interactions between citizens and government in institutional settings in order to attain civic virtue); Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CAL. L. REV. 267, 272-83 (1991) (discussing political and free speech theory and free speech doctrine in arguing against the evils of civic republic philosophy and championing the "core free speech values" based on individualism).

37. *McIntyre*, 115 S. Ct. at 1525-30 (Thomas, J., concurring in the judgment). This rather narrow approach to constitutional interpretation lies at the core of an ongoing debate. *See generally* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 902-13 (1985) (discussing early views on interpreting the Constitution); *see also McIntyre*, 115 S. Ct. at 1531-32 (Scalia, J., dissenting) (concluding that, despite Justice Thomas's conclusions, an historical analysis could not be used to determine that the Framers had intended that anonymous political speech be considered

In a dissent joined by Chief Justice Rehnquist, Justice Scalia asserted first that "there is inadequate reason to believe [that the imperatives of anonymous free-speech imposed by the concurrence] were those of the society that begat the First Amendment or the Fourteenth."[38] He then described a "universal and long-established American legislative practice" of imposing electioneering-speech restrictions such as Ohio's, and stated that "[a] governmental practice that has become general throughout the United States, and particularly one that has the validation of long, accepted usage, bears a strong presumption of constitutionality."[39]

Stating that the "Court discovers a hitherto unknown right-to-be-unknown while engaging in electoral politics,"[40] Justice Scalia contended that the right to anonymous leafletting is not so prominent a value as to warrant striking down Ohio's law as unconstitutional.[41] He particularly emphasized that this action by an unelected judiciary was contrary to the judgment of elected politicians—who have more practical experience in electoral matters—in forty-nine state legislatures and the federal Congress.[42] Ohio's ban on anonymous

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protected free speech); TRIBE, *supra* note 29, at 785 n.3 ("Attempts to develop a first amendment jurisprudence based on historical evidence regarding the intent of the framers have proven quite manipulable.").

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

39. *Id.* at 1532-33 (Scalia, J., dissenting). Justice Scalia noted that the Ohio statute in question had been enacted almost 80 years ago, that "[n]o less than 24 States had similar laws by the end of World War I, and [that] today every State of the Union except California has one." *Id.* (Scalia, J., dissenting) (footnotes omitted). He also provided, in two separate footnotes, citations to all of the state statutes to which he had alluded. *Id.* at 1533 nn.1-2 (Scalia, J., dissenting).

See Erika King, Comment, *Anonymous Campaign Literature and the First Amendment*, 21 N.C. CENT. L.J. 144, 144-50 (1995), for a thorough survey of different state regulations that require some form of disclosure on political or electoral writings, and for several suggested methods for categorizing those statutes. See also Steven Robert Daniels, Recent Case, 72 N.C. L. REV. 1618, 1624-25 (1994) for a similar review of state statutes and for analysis suggesting that the presumptive constitutionality of such state statutes may not be as strong as suggested by Justice Scalia.

40. *McIntyre*, 115 S. Ct. at 1531 (Scalia, J., dissenting). This assertion has merit to the extent that the Framers had not clearly debated a right to anonymity, *see id.* at 1525 (Thomas, J., concurring in the judgment) (noting that "we have no record of discussions of anonymous political expression either in the First Congress, which drafted the Bill of Rights, or in the state ratifying conventions"), and to the extent that, prior to *McIntyre*, *Talley* was the only Supreme Court case that came close to addressing specifically the issue of anonymous election-related leafletting.

41. *Id.* at 1537 (Scalia, J., dissenting).

42. *Id.* at 1535 (Scalia, J., dissenting). One should note, however, that a concern with legislative tradition was arguably not so clearly contrary to the Court's interest in securing freedom of speech in other cases as it was in *McIntyre*. *See* Burson v. Freeman, 504 U.S. 191, 206 (1992) (plurality opinion) (noting that "all 50 states limit access to areas in or

campaign-related speech, he concluded, should have been found constitutional.[43]

Thus, the majority and dissenting opinions of *McIntyre* encapsulate some of the persistent arguments and theoretical differences on First Amendment interpretation. Although technically authoritative only on the narrow question of the freedom to express election-related speech anonymously, *McIntyre* nonetheless has potentially far-reaching implications regarding the continued viability of many state laws constraining such political speech. Before considering just how the Court's use of those arguments and theoretical differences might serve to predict the course of future adjudication, however, it is helpful to consider first some of the pivotal case law underlying *McIntyre* and the treatment the *McIntyre* Court gave that case law.

Two discernible lines of Supreme Court case law have evolved over the past century to address freedom of speech at its intersection with federal and state restrictions on anonymity. One line upheld restrictions on anonymous speech, while the other struck down such restrictions. The following discussion summarizes several of the cases from these two divergent judicial paths, which were relied upon by the majority, the dissent, or both in *McIntyre*.[44]

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around polling places"); *id.* at 214-16 (Scalia, J., concurring in the judgment) (commenting on the long-standing state tradition of banning election-day speech near polling places, including "public forum" areas such as adjacent streets and sidewalks); Talley v. California, 362 U.S. 60, 70 n.2 (1960) (Clark, J., dissenting) (stating that as of 1960, 36 states had statutes prohibiting the anonymous distribution of materials related to elections); United States v. Harriss, 347 U.S. 612, 625 n.16 (1954) (noting that as of 1954, over 20 states had lobbyist disclosure requirements). *But see Burson*, 504 U.S. at 219-20 (Stevens, J., dissenting) (asserting that history should not be confused with necessity and used to justify restraints on speech).

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

44. Instead of characterizing the case law as two distinct lines of precedent, which implies two different sets of rationales and policies, the body of case law might be characterized as a single set of principles that have led to the invalidation of some state statutes limiting free speech and the approval of others. However, in light of this Note's discussion of the normative concerns displayed by the Court in *McIntyre* and other related decisions, *see infra* notes 110-62 and accompanying text, a good argument can be made that in fact the cases do in some sense represent two lines of distinct rationale.

For Supreme Court decisions that have addressed questions involving First Amendment protections of anonymity, but that were not cited in *McIntyre*, see Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 795-801 (1988) (finding unconstitutional North Carolina's requirement that professional fundraisers disclose to potential donors the percentage of prior contributions actually given to charity); Citizens Against Rent Control/Coalition for Fair Hous. v. City of Berkeley, 454 U.S. 290, 298-99 (1981) (rejecting city's assertion that the prophylactic measure of requiring disclosure of campaign contributors' identities amounted to a compelling governmental interest); Golden v. Zwickler, 394 U.S. 103, 109-10 (1969) (finding that the controversy in question under New

A significant early case in which the Court found a prohibition on anonymous speech to be constitutional was *Lewis Publishing Co. v. Morgan.*[45] This case involved a federal disclosure requirement imposed on newspapers seeking to take advantage of second class postage rates.[46] The *Lewis Publishing* Court found that such newspapers could be required to disclose and publish the names and addresses of editors, managers, and owners.[47] Reasoning that the disclosure requirement was incidental to a validly-exerted control on the use of postal privileges, the Court rejected the argument that the First Amendment prohibited the requirement of such disclosures.[48]

Another case upholding the required disclosure of the identities of parties participating in the electoral-political process was *Buckley v. Valeo.*[49] In *Buckley* the Court found federal requirements that candidates, certain political committees, and individuals making expenditures above an enumerated threshold disclose their contributions and expenditures to the Federal Election Commission were not overbroad, but rather served substantial interests by informing the electorate and preventing the corruption of the political process.[50]

York's statute prohibiting anonymous handbills lacked requisite immediacy and reality to warrant issuance of a declaratory judgment); Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 88-105 (1961) (finding the registration requirements of a federal act addressing subversive groups, as applied, did not constitute a restraint on freedom of expression and association in violation of the First Amendment).

45. 229 U.S. 288 (1913).

46. *Id.* at 296.

47. *Id.* at 299.

48. *Id.* at 314-16. Although arguably more an issue of freedom of the press, this decision was raised by Justice Scalia in his dissent to argue that the Court had long ago rejected "a generalized right of anonymity in speech." *McIntyre*, 115 S. Ct. at 1535 (Scalia, J., dissenting). Justice Scalia also commented that this postal regulation, which is still in effect, might be just "one of several federal laws seemingly invalidated by [*McIntyre*]." *Id.* (Scalia, J., dissenting).

49. 424 U.S. 1 (1976) (per curiam). The State of Ohio relied heavily on *Buckley* as precedent to argue for the validity of its ban on anonymous election speech. *McIntyre*, 115 S. Ct. at 1523-24.

50. *Buckley*, 424 U.S. at 60-67. Chief Justice Burger dissented, arguing that the very low expenditure threshold for individuals was too great a burden. *Id.* at 236-37 (Burger, C.J., dissenting). He concluded that Congress, failing to confine its exercise of governmental power within reasonable limits under the First Amendment, had "used a shotgun to kill wrens as well as hawks." *Id.* at 238-39 (Burger, C.J., dissenting).

The *McIntyre* Court held that *Buckley* did not control, however, because it involved only the receipt and expenditure of money for the purpose of influencing candidates or elected officials, rather than the anonymous distribution of issue-based electoral publications. *McIntyre*, 115 S. Ct. at 1522-24. In distinguishing *Buckley*, the Court noted in a footnote that the same reasoning also served to distinguish *McIntyre* from its earlier

A more recent decision upholding a restraint on campaign-related speech, *Burson v. Freeman*,[51] was handed down in 1992. This case addressed a Tennessee statute prohibiting all campaign-related materials—anonymous or not—within 100 feet of a polling place entrance on election day.[52] Although amounting to a "facially content-based restriction on political speech in a public forum,"[53] the *Burson* Court found it to be a reasonably tailored regulation, appropriately designed to achieve the state's interest in providing a voting environment free from intimidation and fraud.[54]

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decision in United States v. Harriss, 347 U.S. 612 (1954). *McIntyre*, 115 S. Ct. at 1523 n.20. *Harriss* considered a federal act requiring that for-hire lobbyists disclose their identities when they are paid to influence proposed or pending legislation by direct communication with members of Congress. *Harriss*, 347 U.S. at 623. The *Harriss* Court noted that this restriction was enacted to prevent the voices of the people from being "drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal," *id.* at 625, and that any deterrent to the exercise of First Amendment rights would be minimal, at most indirect, and too remote to strike down the otherwise valid statute, *id.* at 626.

The Court went to some length to distinguish *McIntyre* from these two cases and *Bellotti*, *see infra* notes 58-62 and accompanying text, because Ohio had vigorously argued that propositions supported by these cases, including specifically that disclosure requirements can have the "prophylactic effect" of exposing and discouraging campaign corruption, amply supported the constitutionality of its disclosure requirements.

51. 504 U.S. 191 (1992) (plurality opinion). This decision provides an interesting contrast to *McIntyre* because while six Justices heard both cases—Chief Justice Rehnquist and Justices Stevens, O'Connor, Scalia, Kennedy, and Souter—the *McIntyre* decision upheld a state restriction on speech, while the *Burson* decision struck down such a restriction. Only Justice Kennedy sat with the majority in both decisions, and in *Burson* he filed a concurring opinion to voice his reservations with the majority's analysis and to assert his belief that Tennessee's restrictions at the polling place did not amount to a suppression of legitimate expression in the first place. *Id.* at 211-14 (Kennedy, J., concurring). In contrast, Justice Scalia and Chief Justice Rehnquist found both Tennessee's and Ohio's restrictions to be constitutional, siding with the majority in *Burson*, *id.* at 211, 216 (Scalia, J., concurring in judgment), and dissenting in *McIntyre*, 115 S. Ct. at 1537 (Scalia, J., dissenting). Similarly, Justices Stevens, O'Connor, and Souter found both regulations unconstitutional, with the majority in *McIntyre*, *id.* at 1524, and dissenting in *Burson*, 504 U.S. at 228 (Stevens, J., dissenting).

52. TENN. CODE ANN. § 2-7-11(b) (Supp. 1991); *Burson*, 504 U.S. at 193-94 (plurality opinion).

53. *Burson*, 504 U.S. at 198 (plurality opinion).

54. *Id.* at 211 (plurality opinion). The *McIntyre* Court referred to *Burson* only to note that the same "exacting scrutiny" test had been applied in both cases, as required when a law burdens core political speech, *see supra* note 29 and accompanying text (discussing the "exacting scrutiny" test), and to note that Tennessee's regulation was distinguishable from Ohio's in that the former was suitably limited, applying only within a 100-foot perimeter on election day. *McIntyre*, 115 S. Ct. at 1522 n.16. Justice Scalia in his dissent, however, pointed to *Burson* several times to support his argument that tradition should govern when considering the constitutionality of election-related issues of free speech "at the periphery of the First Amendment," and that Ohio's regulation should have

In contrast to this line of decisions allowing proscriptions on anonymity is a second line, relied upon by the majority in *McIntyre*, which supports the proposition that anonymous election-related speech is soundly within First Amendment protection. *Lovell v. Griffin*[55] is an example of an early case providing such protection. The *Lovell* Court held unconstitutional a municipal ordinance requiring any person distributing literature of any kind—anonymous or not—to obtain prior permission from the city manager.[56] Such a requirement, stated the Court, "strikes at the very foundation of the freedom of the press by subjecting it to license and censorship."[57]

A more recent decision providing some theoretical grounding for *McIntyre* was *First National Bank of Boston v. Bellotti*, decided in

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been found constitutional. *Id.* at 1531-34 (Scalia, J., dissenting).

55. 303 U.S. 444 (1938).

56. *Id.* at 450-51.

57. *Id.* at 451. The decision established that the liberty of the "press" is not confined to newspapers and periodicals, but embraces pamphlets and leaflets as well. *Id.* at 452. The *McIntyre* Court referred to *Lovell* and to *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992), in declaring that "the speech in which Mrs. McIntyre engaged—handing out leaflets in the advocacy of a politically controversial viewpoint—is the essence of First Amendment expression." *McIntyre*, 115 S. Ct. at 1519.

Like *Lovell*, the case of NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958), decided some 20 years later, helped to blaze the trail that the Court followed in *McIntyre*. The *Patterson* decision held that an Alabama law requiring the NAACP to disclose its rank-and-file membership was an unconstitutional infringement on First and Fourteenth Amendment rights. *Id.* at 466 (adjudging ALA. CODE §§ 192-98 (1940)). *Patterson* is comparable to *McIntyre* to the extent that it involved a state mandatory disclosure law held unconstitutional as overbroad. *Id.* In fact, since *Patterson* the Court has required that a state restriction burdening some core constitutional right survive the "exacting scrutiny" test, Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam), such that the law in question will be upheld as constitutional only if it is narrowly tailored to serve an overriding state interest. *See supra* note 29 and accompanying text (describing the "exacting scrutiny" test). Unlike *McIntyre*, however, *Patterson* addressed members' rights of association threatened by the potential publication of the NAACP's membership roster, rather than the right of free speech. Although a foundational decision underlying *McIntyre*, and referred to as elemental in much of the case law discussed in this Note, the majority in *McIntyre* did not refer to *Patterson*. Perhaps the majority chose not to rely on *Patterson* because that case does not speak directly to the issue of anonymous free speech. Justice Scalia, on the other hand, pointed to *Patterson*, as well as to Brown v. Socialist Workers, 459 U.S. 87 (1982), and Bates v. City of Little Rock, 361 U.S. 516 (1960), in asserting that the Court has never acknowledged a general right to anonymity, but rather has recognized "a right to an *exemption* from otherwise valid disclosure requirements on the part of someone who could show a 'reasonable probability' that the compelled disclosure would result in 'threats, harassment, or reprisals from either Government officials or private parties.' " *McIntyre*, 115 S. Ct. 1534-35 (Scalia, J., dissenting) (quoting *Buckley*, 424 U.S. at 74).

1978.[58] The *Bellotti* Court found unconstitutional a Massachusetts law that prohibited corporate expenditures designed to influence income tax referenda or, more generally, referenda not related to a given company's corporate interests.[59]

Relevant here are several aspects of *Bellotti* discussed by the *McIntyre* Court. First, the Court referred to *Bellotti* to note that "speech on [an] income-tax referendum 'is at the heart of the First Amendment's protection.' "[60] The *McIntyre* Court also used *Bellotti* to assert that the risk of corruption inherent with candidate elections " 'simply is not present in a popular vote on a public issue.' "[61] Finally, in response to the Ohio Supreme Court's reliance upon *Bellotti* to support its decision, the United States Supreme Court held in *McIntyre* that *Bellotti* in fact did not control and that the "prophylactic" effects of disclosure requirements as discussed in both *Bellotti* and *Buckley* did not amount to an overriding state interest sufficient to allow the prohibition of anonymous electioneering speech.[62]

The case most clearly addressing a right to anonymity in the context of state regulation of speech is *Talley v. California*.[63] In *Talley*, the Court found unconstitutional a Los Angeles ordinance prohibiting the distribution of any handbill, in any place under any circumstance, that failed to identify the name and address of the

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58. 435 U.S. 765, 777 (1978); *see McIntyre*, 115 S. Ct. at 1522. *Bellotti* amplified the scope of the First Amendment in terms of the identity of the speaker protected. This decision established that for some First Amendment protections of free speech, corporations are people, too.

Justice Stevens, who wrote the majority opinion in *McIntyre*, also joined the majority in *Bellotti*. Both decisions recognized great weight and breadth in the First Amendment's protection of free speech. At the same time, Chief Justice Rehnquist, who joined the dissent in *McIntyre*, also dissented in *Bellotti*, 435 U.S. at 822 (Rehnquist, J., dissenting), essentially finding in *Bellotti* that corporations as creatures of state law should be subject to state restrictions on speech and enjoy less First Amendment protection.

In any event, the *Bellotti* Court made it clear that it was not "deciding whether the First Amendment's protection of corporate speech is coextensive with the protection [afforded] to individuals." *McIntyre*, 115 S. Ct. at 1522 (discussing *Bellotti*).

59. *Bellotti*, 435 U.S. at 767 (adjudging MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977)).

60. *McIntyre*, 115 S. Ct. at 1519 (quoting *Bellotti*, 435 U.S. at 776).

61. *Id.* at 1521 n.15 (quoting *Bellotti*, 435 U.S. at 790).

62. *Id.* at 1522-24. *See supra* notes 49-50 and accompanying text (describing *Buckley* and Ohio's reliance on that decision).

63. 362 U.S. 60 (1960). For an analysis of the Court's jurisprudence regarding the constitutional protection of anonymity generally, written in 1961 shortly after the *Talley* decision was handed down, see Comment, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70 YALE L.J. 1084 (1961).

author.[64] The unsigned handbills at issue in *Talley* urged the boycott of certain Los Angeles merchants allegedly engaged in discriminatory employment practices.[65] The State defended the ordinance as necessary to provide "a way to identify those responsible for fraud, false advertising and libel."[66] As in *McIntyre*, however, nothing in the language of the regulation or the legislative history indicated such a purpose, nor limited the regulation's application to such a purpose.[67] Noting that "[t]here can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression,"[68] the *Talley* Court found that the ordinance fell "precisely" under the ban on state prohibitions of speech as articulated in *Lovell*[69] and "that it, like the Griffin, Georgia, ordinance, [was] void on its face."[70]

The Ohio Supreme Court recognized the relevance of *Talley* and specifically distinguished that decision in its disposition of *McIntyre*.[71] The United States Supreme Court in *McIntyre* also conceded that *Talley* did not necessarily control the disposition of its decision because the Los Angeles ordinance extended to all forms of handbills, not just to election-related materials.[72] Nonetheless, the Court found that its reasoning in *Talley* "embraced a respected tradition of anonymity in the advocacy of political causes."[73] The *McIntyre* Court then used essentially the same reasoning as applied in *Talley* to conclude that Ohio's ban on anonymous election-related speech was not sufficiently tailored to meet an overriding state interest.[74]

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64. *Talley*, 362 U.S. at 60-61 (adjudging LOS ANGELES, CAL., MUNICIPAL CODE § 28.06).

65. *Id.* at 61.

66. *Id.* at 64.

67. *Id.*; *McIntyre*, 115 S. Ct. at 1517. The *McIntyre* Court also noted that it had "made clear [in *Talley*] that [it] did 'not pass on the validity of an ordinance limited to prevent these or any other supposed evils.' " *Id.* (quoting *Talley*, 362 U.S. at 64).

68. *Talley*, 362 U.S. at 64.

69. *Id.* at 63, *see supra* notes 55-57 and accompanying text (describing the *Lovell* decision).

70. *Talley*, 362 U.S. at 65.

71. McIntyre v. Ohio Elections Comm'n, 618 N.E.2d 152, 154 (Ohio 1993), *rev'd*, 115 S. Ct. 1511 (1995).

72. *McIntyre*, 115 S. Ct. at 1517.

73. *Id.* (footnote omitted).

74. *Id.* at 1517-22, *see infra* notes 84-93 and accompanying text (discussing the *McIntyre* Court's reasoning in finding Ohio's statute overly broad).

For more discussion of federal and state disclosure requirements imposed on political campaign literature, see FRANKLIN S. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 354-58 (1981).

Given this sampling of the case law underlying the *McIntyre* Court's decision, it is helpful to consider more closely the fundamental legal arguments used in the majority and dissenting opinions to discern the rationales behind those two opinions. Justice Stevens, in his majority opinion, did not follow a clearly delineated approach in reaching the decision to strike down Ohio's ban on anonymous political speech. In order to understand the analytical process used by the majority, however, and to better compare that process to the analysis employed by Justice Scalia in his dissent, it is helpful to consider each opinion's analytical framework in a step-by-step fashion.

As a first step, the *McIntyre* majority considered whether Ohio's statute somehow limited election-related speech, or merely controlled the mechanics of the electoral process itself, such as by setting filing deadlines, limiting ballot access, or prescribing a write-in voting process.[75] As a rule, if only the mechanics are regulated, then the "ordinary litigation" test applies, which asks only whether the State's interests necessitate the contested restrictions and whether those restrictions place more than a "reasonable" and "nondiscriminatory" burden on the rights of the voters.[76] Because it found that the statute amounted to a regulation of "pure speech" and involved " 'a limitation on political expression,' " the Court concluded that the statute was not an " 'ordinary election restriction' " and that the "ordinary litigation" test did not apply.[77]

While addressing whether Ohio's statute was more than a mere regulation of the electoral process, the Court also considered whether the statute abridged a form of speech protected under the First Amendment.[78] When making this determination, the Court generally considers whether the statute in question, although possibly not a complete prohibition on speech, nonetheless amounts to a "regulation of political speech, [a] regulation of speech in a public forum, [or a] regulation based on the content of the speech."[79] In *McIntyre* the

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

76. *Id.* The State of Ohio argued unsuccessfully that its ban on anonymous election literature fell within the purview of "reasonable" and "nondiscriminatory" regulations designed to ensure fair and honest elections, based on its reading of the applicability of the "ordinary litigation" test as articulated in Anderson v. Celebrezze, 460 U.S. 780 (1983). *See supra* notes 21-23 and accompanying text (discussing the Ohio court's use of the ordinary litigation test).

77. *McIntyre*, 115 S. Ct. at 1518 (quoting Meyer v. Grant, 486 U.S. 414, 420 (1988)).

78. *Id.* at 1518.

79. Burson v. Freeman, 504 U.S. 191, 196 (1992) (plurality opinion). Others argue that this assessment should instead focus on whether the speech limited somehow falls within the concept of "speech" to be protected as intended by the original Framers. For example,

Court found that the Ohio statute touched the core of the First Amendment[80] because the amendment "affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' "[81] "No form of speech," the Court concluded, "is entitled to greater constitutional protection than Mrs. McIntyre's."[82]

Secondly, having determined that anonymous political speech is indeed within the realm of First Amendment protections, the Court

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in *McIntyre* Justice Thomas contended that the question of whether anonymous candidate- or issue-related speech is protected under the First Amendment should be analyzed solely through a strict review of the Framers' intent, unless that assessment of "the original understanding" cannot provide the answer. 115 S. Ct. at 1530 (Thomas, J., concurring in judgment). Like the analysis employed by the majority, such a narrow approach is also fraught with difficulty, *see, e.g.*, *id.* at 1532-34 (Scalia, J., dissenting) (arguing that the Framers did not clearly intend to include anonymous election speech within the protective realm of the First Amendment, but that such speech is at its periphery), and is subject to debate, *see supra* note 37 and accompanying text.

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

81. *Id.* at 1518-19 (quoting Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam) (quoting Roth v. United States, 354 U.S. 476, 484 (1957))).

82. *Id.* at 1519. The Court has recognized the proposition that "government may adopt reasonable time, place, and manner regulations, which do not discriminate among speakers or ideas, in order to further an important governmental interest unrelated to the restriction of communication." Buckley v. Valeo, 424 U.S. 1, 18 (1976) (per curiam). In other words, some restrictions, such as prior restraints, Lovell v. City of Griffin, 303 U.S. 444, 450-52 (1938) (striking down city ordinance requiring people to obtain permission before distributing handbills), complete prohibitions on a given form of speech, City of Ladue v. Gilleo, 114 S. Ct. 2038, 2045 (1994) (striking down city ordinance banning signs as a complete and thus unconstitutional foreclosure of a medium of expression), and restrictions on the content of speech, *McIntyre*, 115 S. Ct. at 1518, are presumptively unconstitutional unless there is an overriding state interest and the regulation speaking to that interest is not overbroad. *McIntyre*, 115 S. Ct. at 1519-22; *cf.* Burson v. Freeman, 504 U.S. 191, 212-13 (1992) (Kennedy, J., concurring) (contending that a content-based restriction not grounded in the protection of another constitutionally guaranteed right, such as the right to vote, cannot override the right to free speech); *id.* at 217 (Stevens, J., dissenting) (asserting that polling-place restrictions are content-based restrictions and that Tennessee did not show an overriding state interest justifying their use). Although a daunting standard, it is by no means unheard of for the Court to permit certain proscriptions on speech to stand. *See Burson*, 504 U.S. at 196-97, 210-11 (plurality opinion) (holding that place-of-voting restrictions are not "content-neutral" because they affect political speech only, but are still constitutional because of an overriding state interest); *id.* at 214-15 (Scalia, J., concurring in the judgment) (maintaining that a restriction on speech, though content-based, may still be constitutional if it is a reasonable, viewpoint-neutral regulation of a nonpublic forum); United States v. Harriss, 347 U.S. 612, 626 (1954) (concluding that the side effect of self-censorship was not sufficient to strike down lobbyist disclosure act); Lewis Publishing Co. v. Morgan, 229 U.S. 288, 314-16 (1913) (finding that the required disclosure of editors' identities is an incidental, acceptable burden resulting from regulation of use of the postal system).

then considered whether the state had some overriding interest in need of advancement and, concurrently, whether the state had sufficiently tailored its regulation so that it would restrict speech only to the point necessary to safeguard that overriding interest. This is the "exacting scrutiny" test applied by the Court since *NAACP v. Alabama* ex rel. *Patterson* and discussed at some length in *McIntyre*.[83]

In applying exacting scrutiny to the Ohio statute, the Court responded directly to the Ohio Supreme Court's findings that the statute served two important and legitimate state interests: providing the electorate with relevant information and preventing fraudulent and libelous statements.[84] As to the first, the Court was brief to the point of being dismissive, expending just a single paragraph of text with a single citation.[85] When the author of a handbill is unknown to the handbill recipients, stated the Court, disclosing the author's identity does not necessarily enhance "the reader's ability to evaluate the document's message."[86] Thus, the Court concluded, "Ohio's informational interest is plainly insufficient to support the constitutionality of its disclosure requirement."[87]

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83. *McIntyre*, 115 S. Ct. at 1518-22; *see also supra* note 57 and accompanying text (discussing NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) and the "exacting scrutiny" test).

84. *McIntyre*, 115 S. Ct. at 1519.

85. *Id.* at 1519-20 (citing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)). *Miami Herald* arguably was not even on point; it stood more precisely for the proposition that a newspaper could not be forced to publish replies by a candidate the paper had criticized, as opposed to the more general proposition that a writer could not be forced to "make statements or disclosures she would otherwise omit." *Id.* Requiring a speaker to "put forward the best arguments against himself" is not quite the same thing as requiring a speaker to identify himself. *See id.* at 1536 (Scalia, J., dissenting).

86. *Id.* at 1520. The Court also conceded in a footnote that "the identity of the source is helpful in evaluating ideas. But 'the best test of truth is the power of the thought to get itself accepted in the competition of the market.' " *Id.* at 1519-20 n.11 (quoting New York v. Duryea, 351 N.Y.S.2d 978, 996 (1974) (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting))).

The continued vitality of Justice Holmes's "market-place of ideas" metaphor is not universally accepted. *See, e.g.*, SUNSTEIN, *supra* note 36, at 119 (rejecting Justice Holmes's conception of free speech as "a conception that disserves the aspirations of those who wrote America's founding document").

87. *McIntyre*, 115 S. Ct. at 1520. Such a quick dismissal of the informational value of disclosure for the electorate was not forecast by commentators. For example, Professor Tribe, writing before *McIntyre*, noted that a state's interest in providing voters with information needed to better assess campaign literature, one of the major purposes that disclosure laws advance, is not readily protected by other means. TRIBE, *supra* note 29, at 1132, *see also* James A. Gardner, Comment, *Protecting the Rationality of Electoral Outcomes: A Challenge to First Amendment Doctrine*, 51 U. CHI. L. REV. 892, 897 (1984)

In contrast, the Court agreed that Ohio's asserted interest in preventing fraud and libel is of special concern during election campaigns, when false statements may have serious adverse consequences for the electoral process.[88] Even so, the Court noted that Ohio did not rely solely on its anonymous leafletting ban to prevent fraud, but in fact held in place detailed laws specifically prohibiting false statements during political campaigns.[89] Thus, the Court stated, Ohio's ban on anonymous leafletting was not its principal weapon against fraud, but rather was an aid to the enforcement of its specific prohibitions.[90]

Moreover, the Court found that the statute was not sufficiently tailored because its broad scope applied, in addition to fraudulent and libelous statements, equally to "individuals acting independently" using their own resources, to "ballot issues that present neither a substantial risk of libel nor any potential appearance of corrupt advantage," to leaflets delivered both days and months before an election, and "no matter what the character or strength of the author's interest in anonymity."[91] The Court concluded that "Ohio ha[d] shown scant cause for inhibiting the leafletting at issue here," such that its statute could not survive exacting scrutiny.[92] To drive home his point, Justice Stevens ended his opinion by declaring 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."[93]

In sum, speaking for a majority of six justices, Justice Stevens first concluded that anonymous political speech was, presumptively, protected speech. He then applied exacting scrutiny to Ohio's ban on such speech to conclude that, despite addressing a valid interest in safeguarding the electoral process from fraud and libel, the statute was unconstitutional for overbreadth.

(arguing that one condition necessary to ensure that electoral outcomes are accurate and rational—reflecting a true, reasoned, and informed choice of the people—is that accurate, relevant information must be available to the voters).

88. *McIntyre*, 115 S. Ct. at 1520.

89. *Id.* (citing OHIO REV. CODE ANN. §§ 3599.09.1(B), 3599.09.2(B) (Anderson 1988)).

90. *Id.* at 1521.

91. *Id.* at 1521-22. See King, *supra* note 39, at 152-67, written shortly before *McIntyre* was handed down, for a thorough analysis of the Ohio Supreme Court's decision and the reasoning it used in finding that the statute at issue was not overbroad and that it was sufficiently tailored to meet legitimate state interests. King also considers the potential constitutional viability of more narrowly crafted "campaign falsity statutes." *Id.* at 155-56.

92. *McIntyre*, 115 S. Ct. at 1522, 1524.

93. *Id.* at 1524.

Justice Scalia, in his dissent, took a somewhat different tack. First, in deciding whether anonymous political speech was within the realm of protected speech under the First Amendment, he chose to consider the historical record and Framers' intent, as had Justice Thomas.[94] Unlike Justice Thomas, however, he asserted that "to prove that anonymous electioneering was used frequently is not to establish that it is a constitutional right."[95] He concluded that, given the weakness of the historical record, constitutional protection had not been afforded to anonymous election speech because of another indication "of the most weighty sort: the widespread and longstanding traditions of our people."[96] Stating that such long-established tradition by itself decided the case for him, Justice Scalia then declared that even if he were to ignore such tradition and analyze only the case law, he still would have upheld Ohio's proscription of anonymous speech.[97] In reaching this conclusion, he applied a balancing analysis similar to that required by the majority's exacting scrutiny test, albeit with slightly reformulated questions.

The first two questions Justice Scalia posed were "whether protection of the election process justifies limitations upon speech that cannot constitutionally be imposed generally," and "whether a 'right to anonymity' is such a prominent value in our constitutional system that even protection of the electoral process cannot be purchased at its expense."[98] These questions amount to a somewhat convoluted way of asking simply which one trumps—protection of the electoral process or protection of anonymous free speech. Finding support in case law, Justice Scalia concluded that no justification for regulation is more compelling than protection of the electoral process, and even though "[s]everal of our cases have held that *in peculiar circumstances* the compelled disclosure of a person's identity would unconstitutionally deter the exercise of First Amendment associational rights . . . [t]hose cases did not acknowledge any general right to anonymity."[99]

Contending that "[a]nonymity can still be enjoyed by those who require it, without utterly destroying useful disclosure laws," Justice Scalia noted that the record in *McIntyre* contained no indication that Mrs. McIntyre feared threats, harassment, or reprisals—circumstances

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94. *See supra* notes 36-37 and accompanying text (discussing Justice Thomas's opinion concurring in the judgment).

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

96. *Id.* at 1532 (Scalia, J., dissenting).

97. *Id.* at 1534 (Scalia, J., dissenting).

98. *Id.* (Scalia, J., dissenting).

99. *Id.* (Scalia, J., dissenting) (citations omitted).

previously engendering the Court's protection.[100] Finding no peculiar circumstances here, his third and final question in considering the issue at hand was "whether the prohibition of anonymous campaigning is effective in protecting and enhancing democratic elections."[101] At this point, Justice Scalia argued that the Court should have deferred to the judgment of state and federal elected politicians —as well as the legislative officials of a number of foreign democracies—all of whom had seen the need to enact such statutes.[102] He concluded by arguing that the states do in fact have valid interests—in providing information to the electorate and preventing fraud and libel—that clearly outweigh any interest in anonymity, especially given the recent increase in mudslinging "by political candidates and their supporters to the detriment of the democratic process."[103]

In contrast to the concurrence, therefore, Justice Scalia applied a somewhat different legal analysis. He first adopted Justice Thomas's approach of determining the Framers' intent regarding

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100. *Id.* at 1535 (Scalia, J., dissenting); *see also supra* note 57 (discussing the Court's assessment of these circumstances in *NAACP v. Alabama* ex rel. *Patterson*).

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

102. *Id.* at 1535-36 (Scalia, J., dissenting).

103. *Id.* at 1536 (Scalia, J., dissenting). With regard to the regulation of political campaign speech specifically, Professor Tribe notes:

> The fear that a prevailing government might some day wield its power over political campaigns so as to perpetuate its rule generates a commendable reluctance to invest government with broad control over the conduct of political campaigns. Nonetheless, the countervailing concern that completely unregulated political campaigns would degenerate in such a way that the electorate would be divested of *its* power to make a reasoned choice among the candidates has persuaded state legislatures to enact and courts to uphold some restrictions on campaign practices.

TRIBE, *supra* note 29, at 1129-30. For more discussion of electoral process distortions caused by negative attacks against political candidates, see Jack Winsbro, Comment, *Misrepresentation in Political Advertising: The Role of Legal Sanctions*, 36 EMORY L.J. 853, 864 (1987) (considering whether and how states can permissibly regulate political advertising to ensure that electoral results are "rational . . . and reflect the true, reasoned, and informed choice of the people") (citation omitted). *See also* Peter F. May, Note, *State Regulation of Political Broadcast Advertising: Stemming the Tide of Deceptive Negative Attacks*, 72 B.U. L. REV. 179, 179 (1992) ("Although deceptive attack advertisements may successfully erode voter support for opposing candidates, they also threaten the electoral process by diminishing substantive discussion of important campaign issues by discouraging qualified candidates from seeking public office."); *cf.* Lance Conn, Comment, *Mississippi Mudslinging: The Search for Truth in Political Advertising*, 63 MISS. L.J. 507, 507, 520-21 (1994) (evaluating the problem of "mudslinging, smears, and outright lies" in Mississippi electoral politics, and Mississippi's state code prohibiting anonymous publishing to address that problem, and concluding that the statute would not survive constitutional scrutiny by a Mississippi court).

anonymity, but rejected Justice Thomas's conclusions. He then applied his own three-part test regarding the value of anonymity in the context of the electoral process, responding directly to the majority's use of exacting scrutiny. In doing so, Justice Scalia reached a conclusion opposite that of the majority. Viewed broadly, in other words, Justice Scalia performed essentially the same balancing exercise as had the majority, weighing Ohio's interests in regulating the electoral process against Mrs. McIntyre's interests in remaining anonymous, but used a different legal analysis and, in doing so, reached a different conclusion.

Despite his refusal to recognize Justice Scalia's reformulated analysis in place of the Court's traditional exacting scrutiny test, Justice Stevens in his majority opinion offered few clues as to what would constitute an acceptably tailored proscription, and he certainly did not provide a definitive answer.[104] To confuse things further, the majority left the following loophole: "We recognize that a State's [electoral process protection] interest might justify a more limited identification requirement, but Ohio has shown scant cause for inhibiting the leafletting at issue here."[105] Or, as repeated by Justice Ginsburg in her concurrence, "We do not . . . hold that the State may not in other, larger circumstances, require the speaker to disclose its interest by disclosing its identity."[106]

Justice Scalia pounced on this "soothing" but "unhelpful" proclamation:

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104. The crux of the majority's assessment of whether Ohio's ban was narrowly tailored enough to survive exacting scrutiny consisted of the following:

> [T]he prohibition encompasses documents that are not even arguably false or misleading. It applies not only to the activities of candidates and their organized supporters, but also to individuals acting independently and using only their own modest resources. It applies not only to elections of public officers, but also to ballot issues that present neither a substantial risk of libel nor any potential appearance of corrupt advantage. It applies not only to leaflets distributed on the eve of an election, when the opportunity for reply is limited, but also to those distributed months in advance. It applies no matter what the character or strength of the author's interest in anonymity.

McIntyre, 115 S. Ct. at 1521-22. This analysis offers some hint as to what a sufficiently tailored proscription on anonymity might look like. That is, by opposition to proscriptions clearly repugnant to the majority, proscriptions on activities of candidates and their organized supporters, elections of public officers, and leaflets distributed on the eve of an election might survive exacting scrutiny. Given such brief mention, however, and to the extent that considerable variation could be read into such regulations, the analysis provides no real criteria that could be used to decide whether a given disclosure requirement was sufficiently tailored.

105. *Id.* at 1522.

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

> Perhaps, then, not *all* the State statutes I have alluded to are invalid, but just *some* of them; or indeed maybe *all* of them remain valid in "larger circumstances"! It may take decades to work out the shape of this newly expanded right-to-speak-incognito, even in the elections field.[107]

Formulating a set of hypotheticals to show how a guaranteed right to anonymity would disrupt other, non-election-related government activities, he concluded that "[t]he silliness that follows upon a generalized right to anonymous speech has no end."[108]

This failure to delineate what would constitute a sufficiently tailored proscription on anonymous speech, especially in light of the open jurisprudential door left by the Court, justifies this assertion: The legal analysis offered by *McIntyre*, taken by itself, does not provide a satisfactory basis from which to predict confidently whether a given proscription on anonymous political speech would survive the overbreadth component of the Court's exacting scrutiny test.

Furthermore, given the essential similarities between the legal analyses employed by the majority and dissent in *McIntyre*, and given the obstinate state of ambiguity left by the majority as to what might constitute a sufficiently tailored proscription on anonymous political speech, all legal reasoning and policy debate considered,[109] one is still left with the problem of how to evaluate the decision in *McIntyre* and its long-term consequences. One fruitful alternative is to look beneath the legal and policy arguments, looking instead at the normative concerns driving those arguments.[110] Stepping back from

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107. *Id.* at 1535 (Scalia, J., dissenting).

108. *Id.* (Scalia, J., dissenting).

109. For a brief discussion of the legal and policy arguments for and against disclosure requirements proscribing anonymous speech generally, see HAIMAN, *supra* note 74, at 358-60 (1981).

110. *See supra* note 7 (describing the framework and purpose of the normative analysis employed for this Note). One observer asserts that at least five kinds of valid constitutional arguments are generally recognized to support a judicial decision, including those based on the constitutional text, the intent of the framers, constitutional theory, judicial precedent, and normative or value arguments that assert claims about justice or social policy. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189-90 (1987). In situations where these different categories of argument cannot be synthesized into a single, coherent constitutional calculus, because the outcomes of applying the different arguments would differ, the categories are typically assigned a hierarchical order in which the higher ranked factors, as listed above, prevail over lower ranked factors as the basis for decision. *Id.* at 1193-94. In other words, arguments based on the plain meaning of the constitutional text, for example, generally prevail over arguments based on a postulation of the Framers' intent. But in "hard cases," i.e., where none of the arguments are clearly dispositive and no coherent synthesis of arguments can be developed, the higher ranked factors are arguably least likely to prove

the formal legal arguments, one may perceive two conflicting normative concerns about the weakness of human nature, and one overarching normative question about the attributes of human reason, to be at the core of the debate over state proscriptions of anonymity. It is helpful to consider these three questions initially in an abstract way.

First is the question of how much we should worry about the human tendency to use power to maintain power and, as an extension of that concern, how vigorously we should protect the use of anonymity as a shield from coercion and reprisal. Second is the countervailing question of how much we should concern ourselves with the human tendency to hide behind the shield of anonymity, when it is afforded, in order to "sling mud." Finally, overlying these two concerns is the question of how much faith can be put in the "ordinary voter" to discern truth from mud and discount the sullying effects of dirty tricks and character assassination.

Pursuing this inquiry, we can see that if a court has an abiding fear of the tyranny of those in power, then it will likely be willing to accept some amount of mudslinging, and perhaps even corruption in the form of fraud and libel, to constrain that tyranny. Alternatively, if a court has less fear of the state than it has fear of the power of individuals to corrupt politics anonymously when given the chance, then the threat of coercive harassment on the part of the state becomes less important. Finally, a strong belief in the ability of the voter to discern truth serves to further vitiate concerns with mudslinging, whereas a strong skepticism of such ability in the voter serves to heighten concern with electoral corruption.

Applying this model to *McIntyre*, it can be argued that the majority falls squarely within the first camp described. That is to say, the majority holds steadfastly to the compelling belief that anonymous pamphleteering "is a shield from the tyranny of the majority. . . . [and] exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an

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persuasive or determinate, while the lower ranked factors, including normative, value-based concerns, are likely to exert a very powerful influence in achieving a coherent basis of decision. *Id.* at 1194. Thus, while the precise relevance of normative arguments in judicial analysis may be highly situational, such arguments may sometimes be controlling. The question of the efficacy of protecting anonymous political speech appears to be just such a "hard case," to the extent that the arguments employed by the majority and dissenting opinions, including arguments based on the constitutional text (or lack thereof), the Framers' intent, and judicial precedent, produced sharply divergent results.

intolerant society."[111] One way to see this predisposition is to view the opinion from a distance. Using relative length of discussion as a proxy for importance, it is illuminating to note that Justice Stevens dedicates a substantial portion of his opinion to explicating the practice and need for anonymous literary and political speech generally, and election-related speech particularly.[112] He then devotes even more textual discussion to debunking Ohio's arguments that it had an overriding interest in protecting the electoral process and that it had successfully tailored its anonymous speech ban to do so.[113] At the same time, he expressed a faith in the ability of the "common man" to discern truth in the jumbled "market-place of ideas."[114]

More specifically, the majority asserted that anonymous criticism has been the only manner in which some oppressed groups could criticize public laws and practice.[115] The Court emphasized that the "speech in which Mrs. McIntyre engaged—handing out leaflets in the advocacy of a politically controversial viewpoint—is the essence of First Amendment expression,"[116] and that while "the right to remain anonymous may be abused when it shields fraudulent conduct . . . political speech by its nature will sometimes have unpalatable

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111. *McIntyre*, 115 S. Ct. at 1524 (citing John Stuart Mill, *On Liberty*, *in* ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 1, 3-4 (R.B. McCallum ed., 1947)).

112. *Id.* at 1516-19.

113. *Id.* at 1519-24.

114. *See, e.g.*, *id.* at 1519-20 n.11. In this footnote, Justice Stevens quoted portions of an opinion written by Judge Roberts in a New York case decided after *Talley*, but before *McIntyre*, in which the judge struck down a New York statute proscribing anonymous speech based on the *Talley* decision. In his decision, Judge Roberts, in part quoting Justice Holmes, wrote:

> Of course, the identity of the source is helpful in evaluating ideas. But "the best test of truth is the power of the thought to get itself accepted in the competition of the market" (citation omitted). Don't underestimate the common man. 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 the anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is "reasonable," what is valuable, and what is truth.

New York v. Duryea, 351 N.Y.S.2d 978, 996 (1974); *see also* Redish & Lippman, *supra* note 36, at 273 (asserting that as a "baseline" of free speech theory "the first amendment both reflects and implements a belief in the ability of individuals to judge for themselves the wisdom or persuasiveness of expressed viewpoints").

115. *McIntyre*, 115 S. Ct. at 1516.

116. *Id.* at 1519.

consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse."[117]

Clearly, the Court has an overriding concern with the tyrannical evils that may take control of those in power. And to establish the critical link between that fear of majoritarian tyranny and the Court's perception of the need to ensure a right of anonymity to check that tyranny, Justice Stevens quoted a well-worn statement by Justice Black drawn from *Talley*: " '[P]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.' "[118]

In contrast to the majority, Justice Scalia clearly perceives much less of a need for anonymity, especially in the face of the potential for corruption of the electoral process and the interest of the state in safeguarding that process. "The law at issue here . . . forbids the expression of no idea, but *merely* requires identification of the speaker when the idea is uttered in the electoral context. It is at the periphery of the First Amendment. . . ."[119] Justice Scalia found "no reason why an anonymous leaflet is any more honorable, as a general matter, than an anonymous phone call or an anonymous letter."[120] At the same time, however, he appears convinced that "the usefulness of a signing requirement lies not only in promoting observance of [Ohio's] law against campaign falsehoods . . . . [but] also in promoting a civil and dignified level of campaign debate—which the State has no power to command, but ample power to encourage by such *undemanding* measures as a signature requirement."[121] Finally, although decrying the increased potential for campaign mudslinging and "dirty tricks" that a shield of anonymity will foster,[122] Scalia failed to respond to the majority's reliance on the voter's ability to "decide what is 'responsible,' what is valuable, and what is truth."[123]

Viewed in the context of these normative questions, the crux of the debate between the majority and the dissent in *McIntyre* becomes more discernable as an underlying conflict between the majority's fear of the tyranny of the powerful and the dissent's fear of electoral

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117. *Id.* at 1524 (citing Abrams v. United States, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting)).

118. *Id.* at 1516 (quoting Talley v. California, 362 U.S. 60, 64 (1960)).

119. *Id.* at 1534 (Scalia, J., dissenting) (emphasis added).

120. *Id.* at 1537 (Scalia, J., dissenting).

121. *Id.* at 1536 (Scalia, J., dissenting) (emphasis added).

122. *Id.* (Scalia, J., dissenting).

123. *McIntyre*, 115 S. Ct. at 1519 n.11 (citing New York v. Duryea, 351 N.Y.S.2d 978, 996 (1974)).

distortions.[124] More importantly, however, this assessment of *McIntyre* is also useful as a stepping stone toward a more precise characterization of the role that anonymity plays in our political society, as revealed by the Court's decision in *McIntyre* and the case law underlying that decision. This more precise understanding then supplies the explanatory piece that is missing when one looks only at the various legal arguments employed in the decision. And this more complete characterization, in turn, suggests a sturdier prediction regarding the course of future adjudication of First Amendment protections over anonymity, or conversely the likelihood that other state proscriptions on anonymous political speech will survive exacting scrutiny.

This assertion can be best elucidated and tested by reconsidering the case law underlying *McIntyre*. Because it is more difficult to demonstrate the operation of an important decisional factor, such as the fear of unchecked tyranny, in cases where that factor was not dispositive, consider first the line of decisions allowing proscriptions on anonymity.

Specifically, in *Lewis Publishing* the Court held that a federal law requiring newspapers to disclose employees' identities and to identify paid-for advertisements as such was incidental to a validly-exercised control on the use of postal privileges and was not prohibited by the First Amendment.[125] The appellants in *Lewis* argued that the law in question, "thinly disguised as a regulation of the mails," was in fact an exertion of legislative power that unduly restricted the freedom of the press.[126] Such a restriction, appellants maintained, was contrary to the First Amendment's purpose of preventing censorship "either by anticipation through a licensing system or retrospectively by punishment."[127] The Court rejected this reasoning, finding instead

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124. This conflict between the fear of a tyrannical government and the countervailing fear that completely unregulated political speech would deteriorate and thus deprive the electorate of its power to make reasoned decisions has been long recognized. *See* TRIBE, *supra* note 29, at 1129-30. Until *McIntyre*, however, the precise role that anonymity plays in checking tyrannical power, especially when anonymity is placed directly at odds with state efforts to regulate political speech, has not been thoroughly explored by the Court or by commentators. Professor Tribe in his treatise on constitutional law, for example, discusses this issue only briefly and in a general way, relying on a single Supreme Court decision, that decision being *Talley*. *Id.* at 1132 n.17.

125. Lewis Publishing Co. v. Morgan, 229 U.S. 288, 314-16 (1913); *see also supra* notes 45-48 and accompanying text (discussing the *McIntyre* Court's treatment of *Lewis Publishing*).

126. *Lewis Publishing*, 229 U.S. at 299.

127. *Id.* at 292.

that the provision operated only to regulate second-class mail and that failure to provide the required disclosures did not lead to a punitive exclusion from use of the mail but merely exclusion from the right to enjoy second-class postal rate privileges.[128]

More importantly, the *Lewis Publishing* Court expressly stated that it saw no effort to regulate what should be published in newspapers, and that its decision should not be understood as an assent to the appellant's broad contentions concerning arbitrary governmental power exercised through classification of the mails.[129] In other words, the Court saw in the disclosure requirement no underlying motive by the government to coerce speech or expose dissenting speech to reprisal. On the other hand, the Court recognized the disclosure requirement as a valid means of informing the public of the actual owners of publications, and of enabling the public to determine whether published material was actually in substance a paid advertisement.[130] That is, the Court recognized the need for disclosure in this case as an appropriate correction for potential distortions in the political dialogue caused by misleading representations. This decision is consistent with the normative concerns underlying *McIntyre* in that, absent a fear of tyrannical power and a corresponding need for anonymity, the *Lewis Publishing* Court was willing to allow a limited proscription on anonymity.[131]

Whereas *Lewis Publishing* addressed the acceptability of disclosure requirements as applied to newspaper publishers in exchange for preferred postal rates, *Buckley*[132] addressed disclosure requirements pertaining to the receipt and expenditure of money for the purpose of influencing candidates or elected officials.[133] In *Buckley* the Court upheld as constitutional a federal law requiring that candidates, certain political committees, and individuals disclose campaign contributions and expenditures.[134] These particular requirements had not been challenged as being unconstitutional per

128. *Id.* at 308.

129. *Id.* at 316.

130. *Id.* at 315-16.

131. Justice Scalia's assertion that *Lewis Publishing* represented the Court's long-standing rejection of "a generalized right of anonymity in speech," *McIntyre*, 115 S. Ct. at 1535 (Scalia, J., dissenting), was correct to the extent that a form of disclosure had been allowed, but he failed to acknowledge the normative concerns underlying both the *Lewis Publishing* decision and the majority's opinion in *McIntyre*.

132. Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

133. *Id.* at 12-13.

134. *Id.* at 60-67; *see supra* notes 49-50 and accompanying text (discussing the *Buckley* decision).

se, but rather as unconstitutionally broad in their application.[135] Specifically, appellants contested the statute's reach to minor-party and independent candidates, "contributions as small as $11 or $101," and those who make independent contributions and expenditures.[136]

The *Buckley* Court conceded that it had "repeatedly found that compelled disclosure, in itself, can seriously infringe" on First Amendment rights of association and belief.[137] After that assurance, however, the Court applied exacting scrutiny to the requirements and concluded that those requirements rested upon three compelling interests: first, providing the electorate with information on the sources and expenditures of political campaign contributions; second, deterring actual corruption and the appearance of corruption by the exposure of large contributions to the "light of publicity"; and third, providing an "essential means of gathering the data necessary to detect violations of contribution limitations."[138]

The *Buckley* Court, having found these interests to be compelling, then focussed its attention on appellant's contention that such disclosure requirements could pose substantial burdens on individual rights and potentially even expose minor-party and independent-candidate contributors to harassment or retaliation.[139] Through this assessment, the Court determined that the record provided by appellants regarding the threat of harassment to such contributors[140] was "highly speculative" and showed no potential for a "serious infringement" on First Amendment rights.[141] Although not expressly addressing the threat of retaliation, the Court construed the statute in question narrowly and concluded that the burden of the

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135. *Buckley*, 424 U.S. at 60-61.

136. *Id.* at 61. Chief Justice Burger saw the appellant's concern regarding very small contributions to be persuasive; *see supra* note 50.

137. *Buckley*, 424 U.S. at 64.

138. *Id.* at 66-68.

139. *Id.* at 68.

140. The record consisted at best of the "testimony of several minor-party officials that one or two persons refused to make contributions because of the possibility of disclosure." *Id.* at 71-72.

141. *Id.* at 69-70. The Court specifically compared appellant's alleged threat of harassment and reprisal from these contribution disclosure requirements against the NAACP's " 'uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members [had] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility' " in *NAACP v. Alabama* ex rel. *Patterson*, *id.* (quoting NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958)) (alteration in the original), in which the Court had struck down a state statute requiring membership disclosure for being an unconstitutional infringement on the right of association; *see supra* note 57 (discussing the *Patterson* decision).

requirements reaching even those making small contributions did not amount to an unacceptable restraint on speech.[142] Thus, as with *Lewis Publishing*, this decision also is consistent with the normative model found in *McIntyre* in that, absent a clear showing of the threat of coercion and retaliation, and absent a corresponding need for anonymity, the *Buckley* Court was willing to allow limited proscriptions on anonymity.

In the more recent case of *Burson v. Freeman*,[143] which spoke directly to the conflict between the right of free speech and a state prohibition on speech—anonymous or not—near voting places, the Court upheld a Tennessee statute as a requirement appropriately designed to achieve the state's interest in providing a voting environment free from intimidation and fraud.[144] The Court specifically found that the statute's "minor geographical limitation" did not constitute a "significant impingement" on speech.[145]

The *Burson* decision is somewhat confounding to the extent that Justice Stevens, the author of the majority opinion in *McIntyre*, dissented in *Burson* while Justice Scalia, the author of the dissent in *McIntyre*, concurred in the judgment in *Burson*. The essential elements of Justice Scalia's concurrence in *Burson*—that established state tradition should prevail and that the plurality's categorization of the state's regulation was incorrect[146]—are entirely consistent with his concerns raised in dissent in *McIntyre*, in which he asserted that established state tradition should prevail and that the majority's assessment of the value of anonymous speech was incorrect.[147] Similarly, the essential elements of Justice Steven's dissent in *Burson*—that the Court's analysis deferring to established state tradition was "deeply flawed"[148] and that the minor nuisance of campaign "hubbub" outside a polling place was not a sufficient reason to insulate voters from election-day campaigning and suppress a

142. *Buckley*, 424 U.S. at 74-82.

143. 504 U.S. 191 (1992) (plurality opinion).

144. *Id.* at 211 (plurality opinion); *see supra* notes 51-54 and accompanying text (discussing the *Burson* decision).

145. *Burson*, 540 U.S. at 210 (plurality opinion).

146. *See id.* at 214 (Scalia, J., concurring in the judgment). Specifically, Justice Scalia differed with the plurality's conclusion that the Tennessee law was a facially content-based restriction on political speech in a public forum, asserting instead that the statute was a "reasonable, viewpoint-neutral regulation of a nonpublic forum." *Id.* (Scalia, J., concurring in the judgment).

147. *See McIntyre*, 115 S. Ct. at 1532-37 (Scalia, J., dissenting).

148. *Burson*, 504 U.S. at 220 (Stevens, J., dissenting).

"substantial amount of protected political expression"[149]—were entirely consistent with both his conclusion in *McIntyre* that anonymity is necessary to ensure unfettered political speech[150] and with his failure to address Justice Scalia's "legislative traditions" argument.[151]

Viewing the contending concerns of Justice Scalia and Justice Stevens across these two decisions from this perspective, and bearing in mind that Tennessee's law was a narrowly crafted restraint on all speech—not just anonymous political speech—in areas immediately surrounding voting places, the *Burson* decision can also be seen as consistent with the normative model found in *McIntyre*. That is, in the absence of a clear threat of majoritarian tyranny and a corresponding need for anonymity to check that tyranny, despite Justice Stevens' individual conclusion otherwise, the *Burson* Court was willing to accept as constitutional Tennessee's proscription on political speech at polling places.

In contrast to the chore of divining the role of anonymity in *Lewis Publishing*, *Buckley*, and *Burson*, its operation in *Lovell*,[152] *Bellotti*,[153] *Patterson*,[154] and *Talley*[155]—all of which struck down proscriptions on speech—is more transparent. In *Lovell*, for example, the Court struck down a local ordinance requiring that any person distributing handbills obtain permission to do so first because it was a law aimed "at the very foundation of the freedom of the press."[156] The Court concluded that legislation such as the ordinance in question was unacceptable because it "would restore the system of license and censorship in its baldest form."[157]

Similarly, in *Bellotti* the Court found that a state law prohibiting corporate expenditures designed to influence income-tax referenda—anonymous or not—was unconstitutional because the inherent

149. *Id.* at 227-28 (Stevens, J., dissenting).

150. *McIntyre*, 115 S. Ct. at 1524.

151. *See supra* notes 101-03 and accompanying text (discussing Justice Scalia's treatment of state legislative tradition in *McIntyre*).

152. Lovell v. Griffin, 303 U.S. 444 (1938); *see supra* notes 55-57 and accompanying text (discussing the *Lovell* decision).

153. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978); *see supra* notes 58-62 and accompanying text (discussing *Bellotti*).

154. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958); *see supra* note 57 (discussing the *Patterson* decision).

155. Talley v. California, 362 U.S. 60 (1960); *see supra* notes 63-74 and accompanying text (discussing *Talley*).

156. *Lovell*, 303 U.S. at 450-53.

157. *Id.* at 452.

capacity of speech to inform the public does not depend on the identity of its source.[158] The consistency of this decision with *McIntyre* is visible in the *Bellotti* Court's emphasis on the " 'universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs' "[159] and that the First Amendment embraces " 'the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . . [and] all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' "[160] Thus, while *Bellotti* does not address directly the question of anonymity, it trumpets, as does *McIntyre*, the Court's abiding belief in the sanctity of unfettered political speech in our society.

Finally, in *NAACP v. Alabama* ex rel. *Patterson* and *Talley v. California*, the Court expressly based its decisions on the fear of coercion and reprisal. Specifically, in *Patterson* the Court struck down an Alabama disclosure law because it potentially subjected the NAACP's members to threats, harassment, or reprisal.[161] Similarly, in *Talley* the Court struck down a Los Angeles city ordinance requiring disclosure of the author's identity on any handbill because "anonymity has sometimes been assumed for the most constructive purpose" and because the disclosure Los Angeles required, and the fear of reprisal such identification would engender, "might deter perfectly peaceful discussions of public matters of importance."[162]

In conclusion, careful review of this sampling of the case law underlying *McIntyre*, including both those decisions in which proscriptions on anonymity were allowed and the contrary decisions in which they were not, soundly supports the assertions made in this Note regarding the import of *McIntyre*. First, it has been the Court's underlying normative fear of tyrannical power and the perceived need to safeguard anonymity as a check on that power, rather than debates over methodologies of constitutional interpretation or larger questions of legislative versus judicial policy-making authority, that appear to have consistently driven the Court's decisional calculus whenever a federal or state disclosure law raised the specter of tyranny.

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158. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 771-77 (1978).

159. *Id.* at 776-77 (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)) (alteration in original).

160. *Id.* at 776 (quoting Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940)).

161. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466 (1958); *see also supra* note 57 (discussing *Patterson*).

162. Talley v. California, 362 U.S. 60, 64 (1960).

Second, *McIntyre* also suggests that whenever the Court perceives that a federal or state law raises the specter of tyrannical power, then it will jealously safeguard the right to anonymity as a check against such tyranny by striking the law down, even though it may recognize that the state may have had a compelling reason for enacting that law.[163] Conversely, given the Court's treatment of prior cases that have upheld federal and state disclosure requirements,[164] *McIntyre* suggests that only when the Court perceives that a given law does not compromise the role of anonymity in protecting a society member's entrance to the political dialogue, will it be willing to allow some proscription of anonymity in the name of correcting distortions of that dialogue.

Finally, with this more precise characterization of the role of anonymity in the political dialogue process, a sturdier prediction unfolds regarding the course of future adjudication of questions concerning anonymity, or in other words the likelihood that other state proscriptions on anonymous political speech will survive exacting scrutiny.[165] That prediction is that the Court will almost certainly invalidate any challenged government proscription on the right to conduct political speech anonymously when any discernable and real potential exists for those in power to use disclosure of the author's identity to harass or coerce. This will be true regardless of whether the government restriction is a federal, state, or local regulation or whether the threatening powers arise from government itself or from other members of society. Viewed another way, the key implication for practitioners litigating any of the many state disclosure statutes cited by Justice Scalia in his dissent is that arguments speaking clearly to the threat of coercion and reprisal, and the need for anonymity to guard against such tyranny, will ring most true with the Court.[166]

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163. *See McIntyre*, 115 S. Ct. at 1520-21 (finding that Ohio's interest in regulating false and libelous statements through a ban on anonymous political leafletting was a valid interest before striking down the regulation as overbroad).

164. *See supra* notes 45-54 and accompanying text (describing selected decisions, cited to but distinguished from *McIntyre* by the majority, in which disclosure requirements were upheld).

165. The Court will almost certainly apply strict scrutiny to any future restrictions on political speech. This outcome can be foretold because six current Justices of the Court, supported by much of *McIntyre*'s underlying case law, see the issue thus, and because the seventh member of the concurrence, Justice Thomas, has been satisfied as to the Framers' intent.

166. A good test of this prediction could well unfold here in North Carolina given the North Carolina Supreme Court's 1993 decision in *State v. Petersilie*, 334 N.C. 169, 432 S.E.2d 832 (1993). This decision construed a North Carolina statute, N.C. GEN. STAT.

Ultimately, only time will tell the breadth of *McIntyre*'s sweep. But the view from here suggests that the Court has in effect recognized a *right* to remain anonymous when engaging in electoral and other political speech, and that the sweep of the Court's decision could be nearly as broad and deep as Justice Scalia portends. In other words, at least insofar as anonymous leafletting and similar political speech goes, the Court really did buy "in for a cow," Justice Ginsburg's assurances notwithstanding.

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§ 163-274(7) (1991), which is very similar to the Ohio statute struck down in *McIntyre*. For a thorough summary and assessment of this decision, written before *McIntyre* was handed down, see Steven Robert Daniels, Recent Case, 72 N.C. L. REV. 1618 (1994).

Based on Daniels's analysis, a good argument can be made that *Petersilie* will not remain good law in North Carolina if challenged, whether it is taken to the United States Supreme Court or to the North Carolina Supreme Court, for two reasons. First, this North Carolina statute, by its operation with several other campaign-related statutes, may well in practice end up applying only to "those who publish—in quantities small enough to evade the reporting requirements [of the second disclosure statute]—*true*, but derogatory, statements about a candidate." *Id.* at 1629 (emphasis added). If that argument holds, then the statute almost certainly exceeds the limits of acceptable state proscriptions of anonymous speech as established by *McIntyre*.

Second, the majority and dissenting opinions in *Petersilie* bear a strong resemblance to those filed by the majority and dissent in *McIntyre*, only reverse. That is, Chief Justice Exum's majority opinion in *Petersilie* reads very much like Justice Scalia's dissent, primarily in terms of both opinions' reliance upon other state statutory practice as well as their emphasis on the state's interests in protecting the elections process. Conversely, Justice Stevens' majority opinion in *McIntyre* reads very much like Justice Mitchell's dissent in *Petersilie*, primarily in terms of the emphasis placed on the need to guarantee anonymity as a check against tyranny. When considering this, and the fact that Chief Justice Exum has since retired and been replaced by Chief Justice Mitchell, the viability of *Petersilie* and North Carolina's proscription on anonymous political speech if challenged is doubtful.