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***McIntyre v. Ohio Elections Comm'n: "A Whole New Boutique of Wonderful First Amendment Litigation Opens Its Doors"*¹**

by

MARK A. WHITT

Please ask for a name to be placed next to the source so I can get mad at the guy who's doing this. It's strange out there. It's strange.²

President George Bush

I. INTRODUCTION

In Alabama, rogue campaign operatives mount an offensive against a competitor by mailing anonymous fliers to the opponent's financial contributors.³ In New Orleans, an aid to a front-running mayoral candidate distributes anonymous fliers alleging that an opponent has fathered several illegitimate children, is a bisexual, uses drugs, surrounds himself with drug dealers, and receives kickbacks.⁴ Anonymous handouts in Los Angeles describe the leader of a political monitoring group as a "bitter man-hating bitch," while another member is referred to as a "former poster child for birth control who starts the day by pouring Jack Daniels over her breakfast."⁵ In Conejo Valley, California, an anonymous mailer describes a local council member as a "proven pervert."⁶ Most states have laws designed to curb such electoral antics.⁷ However, a recent United States Supreme Court ruling calls these laws into serious question on First Amendment grounds.⁸

Disclosure statutes are not a modern legislative invention.⁹ In *McIntyre v. Ohio Elections Commission*,¹⁰ the Court was asked to determine the validity of such statutes, which attempt to regulate the dissemination of anonymous political literature. "The most common explanations given for these statutes are that they deter fraud and libel in the election arena and that they provide valuable information to the voters."¹¹ In *McIntyre*, the Court addressed whether an Ohio statute,¹² banning the distribution of anonymous campaign literature by a private citizen, violates the First Amendment right to free speech.¹³ In a 7-2 decision, the Court held that the First Amendment encompasses the right to publish and distribute anonymous political literature.¹⁴

This Note analyzes the Court's decision in *McIntyre*. Part II defines the issue presented in the case and provides a general background on disclosure statutes, with particular attention drawn to the Supreme Court's decision in *Talley v. California*.¹⁵ A brief discussion of various state court decisions post-*Talley* is also provided.¹⁶ The Statement of the Case in Part III presents the facts, procedural history and holding of the case.¹⁷ Part IV analyzes the Court's holding.¹⁸

This Note disagrees with the Court's holding for three reasons. First, it argues that the Court misinterpreted the history of anonymous political speech and engaged in circular reasoning by assuming that, because the Framers of the Constitution published anonymously, the Constitution must be meant to protect anonymous speech.¹⁹ Second, the Court should not have subjected Ohio's disclosure statute to the strict scrutiny standard of review, because the statute at issue does not severely restrict First Amendment rights.²⁰ Third, assuming *arguendo* that strict scrutiny was the appropriate standard of review, the Court should have acknowledged that Ohio's disclosure statute was narrowly tailored to address the compelling state interests of providing the electorate with relevant information, and identifying those responsible for fraud and libel.²¹

II. BACKGROUND

McIntyre evidences a clash between competing constitutional principles. On the one hand is the general acknowledgment of a state's interest in regulating elections.²² On the other is an individual's right to freely speak and publish on matters of public concern.²³ "Balancing"²⁴ these rights became the central concern of the *McIntyre* Court.

The issue of whether courts should afford anonymous speech a protected status under the First Amendment was not one of first impression for the Court.²⁵ In *Talley v. California*, the Court struck down a Los Angeles City ordinance that placed a wholesale ban on all forms of anonymous handbilling.²⁶ Supporters of the law cited the government interest in preventing fraud, false advertising, and libel as sufficient state interests outweighing any alleged First Amendment claim of individuals.²⁷ However, the Court found the sweeping language of the ordinance to be overbroad and struck it down as violative of the First Amendment right to free speech.²⁸

Justice Black, a seminal First Amendment absolutist,²⁹ authored the opinion of the Court. His opinion provides a historical narrative of anonymous political speech in the United States, within the context of government abuses against political dissidents. Courts have cited his strong language in support of a "right to anonymity" repeatedly³⁰ in similar cases since *Talley*. Justice Black stated:

Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers. John Lilburne was whipped, pilloried, and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan ministers, John Perry and John Udal, were

sentenced to death on charges that they were responsible for writing, printing, or publishing books. Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.³¹

To the extent that Justice Black's opinion recognized a "right to remain anonymous," the Court did not fully define the parameters of this new "right." By an express disclaimer,³² the Court left open the question of whether a more narrowly tailored law directed toward advancing an identifiable state interest might pass constitutional scrutiny.³³

Other members of the *Talley* court were not as enthusiastic about Justice Black's endorsement of the right to remain anonymous. Justice Harlan, concurring, utilized a balancing approach and found the scales tipped in favor of free speech because of the expansiveness of the statute.³⁴ Dissenting Justices Clark, Frankfurter and Whittaker, flatly rejected the majority approach. "I stand second to none in supporting Talley's right of free speech but not his freedom of anonymity. The Constitution says nothing about anonymous speech."³⁵

Despite the *Talley* court's admonition against silencing speech simply because it is anonymous, most states continued to regulate the dissemination of anonymous political literature.³⁶ In light of the "disclaimer" in *Talley*, courts in many states reasoned that more narrowly defined laws could survive the "exacting scrutiny"³⁷ required of legislative prohibitions directed at speech on public issues and elections, as opposed to a general ban on all anonymous literature.³⁸ Other states have been less prone to utilize the *Talley* disclaimer and have embraced the broad holding of the case to invalidate disclosure requirements.³⁹

The federal government also maintains a disclosure statute.⁴⁰ Unlike many of the broad statutes found invalid in state courts,⁴¹ the federal statute limits disclosure to instances in which "Any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate" ⁴² The limitation of the statute to *candidates* not issues, referenda, and the like has apparently been sufficient to sustain the federal disclosure requirement.⁴³

The conflict among jurisdictions in applying *Talley* to more narrowly drawn statutes made the issue of anonymous political speech ripe for review. Of course, Margaret McIntyre was likely impervious to this when she mounted her campaign against a school tax levy.

III. STATEMENT OF THE CASE

A. Facts

On April 27, 1988, Margaret McIntyre distributed leaflets⁴⁴ expressing her opposition to a proposed school tax levy to persons attending a public meeting at Blendon Middle School in Westerville, Ohio.⁴⁵ At this meeting, the superintendent of schools planned to discuss an upcoming referendum on a school tax levy.⁴⁶ Mrs. McIntyre produced the leaflets on her home computer and gave them to a printer to make additional copies.⁴⁷ They were signed "Concerned Parents and Taxpayers."⁴⁸ Mrs. McIntyre, her son, and her son's friend placed the flyers on car windshields in the school parking lot.⁴⁹

While Mrs. McIntyre distributed her leaflets, an official of the school district informed her that the unsigned⁵⁰ leaflets did not conform to the Ohio elections laws.⁵¹ Mrs. McIntyre appeared at another meeting the next evening and handed out more of the flyers.⁵²

The tax levy that Mrs. McIntyre campaigned against failed twice, but passed on its third attempt in November of 1988.⁵³ Five months later, the same school official that had admonished Mrs. McIntyre about the improprieties of her literature filed a complaint with the Ohio Elections Commission.⁵⁴

B. Procedure

At the hearing before the Ohio Elections Commission, Mrs. McIntyre was charged with violating O.R.C. 3599.09(A),⁵⁵ which requires any written communication "designed to promote . . . the adoption or defeat of any issue, or to influence the voters in an election,"⁵⁶ be identified with the name and address of the person who "issues, makes, or is responsible"⁵⁷ for the communication. The Ohio Elections Commission found Mrs. McIntyre in violation of the statute and imposed a \$100 fine.⁵⁸

Mrs. McIntyre instituted an appeal of the decision of the Ohio Elections Commission with the Franklin County Common Pleas Court.⁵⁹ The common pleas court reversed the finding of the Elections Commission, holding that O.R.C. § 3599.09(A) was unconstitutional as applied.⁶⁰ The State appealed, and the Tenth District Court of Appeals of Ohio reversed the trial court.⁶¹ The case then proceeded to the Supreme Court of Ohio on a motion to certify the record.⁶² The Supreme Court of Ohio found the statute constitutional and upheld the original finding of the Ohio Elections Commission, with Justice Craig Wright casting the lone dissenting vote.⁶³

The Ohio Supreme Court reached its decision in a bifurcated fashion. First, the court relied on *Anderson v. Celebrezze*⁶⁴ for the proposition that strict scrutiny does not apply to regulations governing elections,⁶⁵ and that O.R.C. 3599.09 imposed only a "minor requirement"⁶⁶ on would-be anonymous publishers. Second, the Court determined that the Ohio statute was more narrowly tailored than the ordinance involved in *Talley*, and was thus permissible.⁶⁷

Undeterred by the decisions of the Ohio courts, McIntyre petitioned for a writ of *certiorari* with the United States Supreme Court.⁶⁸ The Court granted *certiorari*, but Mrs. McIntyre died during the briefing of the case.⁶⁹

C. Holding

In a 7-2 decision authored by Justice Stevens, the Majority found the Ohio statute to be in derogation of the First Amendment.⁷⁰ First, the Court held that Ohio erred by adopting the relaxed standard of review set forth in *Anderson v. Celebrezze*.⁷¹ Next, in applying strict scrutiny, the Court determined that providing relevant information to voters was not sufficiently compelling to justify the restrictions imposed by the statute.⁷² The Court did find that a state has a compelling interest in preventing fraud, false advertising, and libel, but concluded that Ohio's disclosure statute was not narrowly drawn to serve that interest.⁷³ The Majority embroidered its opinion with references to historic figures who engaged in anonymous political activity, a factor which seemed to weigh heavily in the Court's reasoning.⁷⁴

Justice Ginsberg filed a concurring opinion,⁷⁵ while Justice Thomas filed a separate opinion concurring in the judgment.⁷⁶ Justice Scalia, joined by Justice Rehnquist, filed a spirited dissenting opinion.⁷⁷

IV. ANALYSIS

The Supreme Court in *McIntyre* failed to take into account several factors that should have changed the outcome of its decision. First, the Court misinterpreted the "honorable tradition"⁷⁸ of anonymous pamphleteering.⁷⁹ Second, the Court should have subjected the Ohio statute to the standard of review articulated in *Anderson* instead of strict scrutiny.⁸⁰ Third, even assuming that strict scrutiny was the appropriate standard of review, Ohio's compelling interests in maintaining a disclosure statute outweigh the comparatively minor burdens imposed on free speech rights.⁸¹

A. The Anonymous Framers

McIntyre secures the "right to remain anonymous" for those who wish to promote their views in such a manner, largely due to the Court's analysis of anonymous political activity carried out during our nation's founding.⁸² However, the Court did not fully explore *why* these authors found it necessary to publish anonymously, nor did it explain whether any legitimate reasons for anonymity as they existed two centuries ago are still applicable today.

The *McIntyre* Court hurriedly embraced Justice Black's famous passage in *Talley* to explore the tradition of anonymous pamphleteering.⁸³ From the overall theme of Justice Black's narrative in *Talley*, essentially one reason for safeguarding anonymous speech can be identified.⁸⁴ Simply, anonymous speech allows persons to speak their mind about the government without fear of reprisal.⁸⁵ The Petitioner's argument in *McIntyre* suggests that, because some of the Framers published anonymously prior to ratification of the

Constitution, and other public figures have done so since, one must understand the First Amendment to prohibit any government restrictions on anonymous speech.⁸⁶

The Petitioner's argument rests on a false syllogism.⁸⁷ Petitioner's argument is diagrammed as follows:

Question: Is anonymous political speech constitutionally protected?
Minor Premise: The Framers drafted the Constitution.
Major Premise: The Framers utilized anonymous political speech.
Conclusion: Anonymous speech is constitutional.

However, anonymous writings did not occupy some mystical status during ratification. "Although the use of pseudonyms was commonplace during the debate that preceded ratification of the Constitution, it became a 'hotly contested' issue, as Federalist and Anti-Federalist editors debated the continuing necessity of this practice and its practical impact on the character of public debate over ratification."⁸⁸ This concern led many newspaper editors to require that authors disclose their identity, out of the concern that anonymous or secret publication could be used to conceal the authors' true motives when attempting to influence public opinion."⁸⁹ The fact that some of the Framers may have engaged in anonymous political activity does not establish that it is a constitutional right.⁹⁰

Obviously, the Framers did not enjoy the benefits of First Amendment protection during the Revolutionary Era, when they spoke out against abuses inflicted by the English Crown, because the Constitution did not yet exist.⁹¹ Passage of the First Amendment offered some protection, but it did not fully alleviate their concerns. "Development of national political factions and partisan newspapers during the 1790s provided the backdrop for fierce debates over the proper limitations on political speech and for more frequent use of political libel prosecutions."⁹² It was this fear of widespread political criticism that led the Federalist to pass the Sedition Act of 1798.⁹³

The chief threat against those that published anonymously during the late 1700s no longer exists today. First, there is no longer a fear of reprisal by the English Crown or any other government for that matter. The First Amendment alleviates that concern.⁹⁴ Second, modern First Amendment jurisprudence rejects the validity of the Sedition Act the remaining obstacle to free speech after passage of the First Amendment.⁹⁵ Finally, the Majority of the *McIntyre* Court conspicuously ignored the fact that Mrs. McIntyre never attempted to remain anonymous, nor did she ever fear retaliation for expressing her views.⁹⁶

B. The Standard of Review

The *McIntyre* Court applied strict scrutiny to Ohio's disclosure statute.⁹⁷ A more appropriate standard would have been the test enunciated in *Anderson*.⁹⁸ The *Anderson* standard is essentially a balancing approach.⁹⁹ It rejects "Any litmus-paper test that will separate valid from invalid restrictions,"¹⁰⁰ and requires a statute to be narrowly drawn to advance a compelling interest only when the alleged restriction of First Amendment

rights are "severe."¹⁰¹ "When a state election law provision imposes only reasonable non-discriminatory restrictions upon First and Fourteenth Amendment rights, the state's important regulatory interests are generally sufficient to justify the restrictions."¹⁰²

Under the *Anderson* test, Ohio's statute would clearly be constitutionally permissible. Ohio's disclosure statute does not impose a "severe" restriction on speech because requiring a person to place his or her name on a publication he or she has authored does not "severely restrict" the ability to publish. It only requires that the speaker identify himself on the communication.¹⁰³ Although the disclosure statute regulates the form of the message in limited circumstances,¹⁰⁴ it does not regulate its substance. Thus, the restriction is reasonable and non-discriminatory.

The Court rejected the *Anderson* test, however, reasoning that Ohio's disclosure regulation does more than control the mechanics of the voting process.¹⁰⁵ The Court viewed the disclosure requirement as a content-based regulation of political speech subject to strict scrutiny,¹⁰⁶ because "Only those publications containing speech designed to influence voters in an election need bear the required markings."¹⁰⁷

C. The Court Ignored Ohio's Compelling State Interests

Even when subjected to strict scrutiny, the Court should have upheld Ohio's disclosure statute. The regulation of the electoral process is a compelling state interest.¹⁰⁸ When this interest is balanced against the minimal intrusion on First Amendment rights occasioned by a mandatory disclosure statute, the state interest outweighs any asserted right to anonymous speech.¹⁰⁹ Moreover, the disclosure statute has a "rational basis" because it is causally related to the advancement of compelling state interests.¹¹⁰ Disclosure ensures that the electorate receives only relevant information and, without it, there is no way to identify those who engage in fraud, false authority, and libel. There are no less intrusive means available for the state to advance its interests in an adequate manner.¹¹¹

1. Providing the Electorate With Relevant Information

The Court summarily dismissed Ohio's interests in providing the electorate with relevant information as a compelling interest justifying disclosure.¹¹² This holding seems to conflict with the Court's precedent with respect to disclosure requirements in other contexts.¹¹³

The goal of providing the electorate with relevant information is to promote rational electoral outcomes.¹¹⁴ Rational government is a necessary - precondition for the attainment and preservation of any right. "To place freedom of speech above the rationality of government itself is to ignore the fact that only through intelligent self-government are any freedoms, including freedom of speech, secured."¹¹⁵

There is no shortage of anecdotal evidence concerning the absurdity of anonymous smear campaigns, which disclosure statutes seek to regulate.¹¹⁶ Scholars, journalists, and even politicians have long lamented over the "cheapening" of modern elections.¹¹⁷ Their

discontent is evidenced by the dearth of legislation designed to combat "gutter politics."¹¹⁸ "Such a universal and long established American legislative practice must be given precedence, I think, over historical and academic speculation regarding a restriction that assuredly does not go to the heart of free speech."¹¹⁹

2. Identifying Persons Who Engage in False Advertising and Libel

The *McIntyre* Court agreed that Ohio had a compelling state interest in preventing fraud and libel.¹²⁰ Nonetheless, the Court determined that Ohio's disclosure statute was not narrowly tailored to effectuate its purpose, because legitimate activities fall within the prohibitions outlined in the statute.¹²¹ However, the Court goes on to state: "We recognize that a State's enforcement interest might justify a more limited identification requirement, but Ohio has shown scant cause for inhibiting the leafleting at issue here."¹²²

The Court's holding produces a troubling result. On the one hand, the Court recognizes that a state has a compelling interest in preventing fraud, false advertising and libel.¹²³ This interest having been established, a state should be permitted to promulgate legislation in furtherance of that interest.¹²⁴ The *McIntyre* decision prevents a state from doing so. These laws are meant to be complementary, and to prohibit operation of the former undermines the latter.¹²⁵ Persons who are libeled thus have no recourse against the perpetrators because there is no way of identifying them.

V. CONCLUSION

The *McIntyre* Court was presented with the issue of whether it is constitutionally permissible for a state to prohibit the anonymous communication of political speech within the context of a statute governing elections. The Court should have applied the standard of review articulated in *Anderson* and its progeny to uphold Ohio's disclosure statute as a reasonable means of addressing a compelling state interest. Moreover, the method chosen to effectuate those interests the disclosure statute only minimally affects free speech rights.¹²⁶ Instead, the Court applied strict scrutiny and found no compelling state interest to justify such a "severe restriction" on speech.¹²⁷

Even when strict scrutiny is applied to Ohio's disclosure statute, compelling state interests are served by mandatory disclosure.¹²⁸ First, the state has a compelling interest in providing the electorate with relevant information about candidates and issues.¹²⁹ This serves the legitimate end of promoting rational electoral outcomes. Second, the State has an interest in preventing fraud and libel, and should have a means of identifying perpetrators.¹³⁰ Otherwise, enforcement of prohibitions against disseminating false or misleading information is ineffective.

The parameters of the "right to remain anonymous" will only be ascertained by continued litigation in this field.¹³¹ Fortunately, the life tenure of Supreme Court Justices assures that at least *they* will never be on the receiving end of negative, anonymous election tactics.

1. [McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1535 \(1995\)](#) (Scalia, J., dissenting).
2. John E. Yang, *Anonymous Sources Come Home to Roost*, WASH. POST., Mar. 13, 1992, at A-23. An exasperated President Bush made this plea during a news conference, where he chastised the media's practice of quoting anonymous sources.
3. Kevin Sullivan, *Kid Gloves Come Off in Montgomery*, WASH. POST., Mar. 25, 1994, at C1.
4. Kenneth J. Cooper, *Negative Themes Dominate Contest in New Orleans*, WASH. POST., Feb. 5, 1994, at A8.
5. Barry M. Horstman, *Flyer Uses Vulgarity to Attack GOP Group*, L.A. TIMES, Aug. 12, 1992, at Metro 6.
6. T.W. McGarry, *Schaefer, Stratton Gail Leads in Local Races*, L.A. TIMES, Nov. 5, 1986, at Metro 6.
7. See Erika King, Comment, *Anonymous Campaign Literature and the First Amendment*, 21 N.C. CENT. L.J. 144, 145 n.8 (1995) (listing the disclosure statutes of 48 states); *but see infra* note 35 (noting disagreement about the exact number of states that continue to maintain disclosure statutes). Distinguishing and classifying the disclosure statutes of various states is not addressed in this Note. For such distinction, see King, *supra*.
8. The First Amendment is applicable to the states via the Fourteenth Amendment. *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) ("The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State.").
9. Ohio adopted its first disclosure statute in 1915. Act of May 27, 1915, 1915 Ohio Leg. Acts 350. *See State v. Babst*, 135 N.E. 525 (Ohio 1922) (disclosure statute upheld as neutral and regulatory). By the end of World War I, 24 states had similar laws. *See McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1533 n.1 (1995)* (Scalia, J., dissenting). For a discussion of disclosure statutes written on the eve of *McIntyre*, see King, *supra* note 7. King's Comment outlines the disparity among state courts in resolving the issue presented in this Note. For specific cases discussing disclosure statutes, see John C. Williams, Annotation, *Validity and Construction of State Statute Prohibiting Anonymous Political Advertising*, 4 A.L.R.4th 741. *See also infra* notes 38-39.
10. [115 S. Ct. 1511 \(1995\)](#). *McIntyre* is yet another watershed case in First Amendment jurisprudence originating from Ohio. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444 (1969) (Cincinnati, Ohio); *Debs v. United States*, 249 U.S. 211 (1919) (Canton, Ohio).

11. King, *supra* note 7, at 144.
12. OHIO REV. CODE ANN. § 3599.09(A) (Anderson 1988) (statute reproduced *infra* note 55) *amended and renumbered* by 1995 Ohio Legis. 60 (H.B.99) (renumbered as OHIO REV. CODE ANN. § 3517.20).
13. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of people peaceably to assemble . . ." [US CONST. amend. I](#).
14. [McIntyre, 115 S. Ct. at 1516-17.](#)
15. 362 U.S. 60 (1960). *See infra* notes 25-35 and accompanying text.
16. *See infra* Part II, notes 38, 39 and accompanying text.
17. *See infra* Part III (A), (B) and (C).
18. *See infra* Part IV (A), (B) and (C).
19. *See infra* Part IV (A).
20. *See infra* Part IV (B).
21. *See infra* Part IV (C) (1) and (2).
22. *See, e.g.,* Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 231 (1989) (states have a compelling interest in preserving the integrity and reliability of the elections process).
23. *See, e.g.,* Buckley v. Valeo, 424 U.S. 1, 14-15 (1976) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression . . .").
24. "Balancing" the rights of individuals against the asserted interests of states is a common feature of first amendment jurisprudence. *See, e.g.,* Whitney v. California, 274 U.S. 373 (1927) ("[A]lthough the rights of free speech and assembly are fundamental, they are not in their nature absolute."), *overruled by*, Brandenburg v. Ohio, 395 U.S. 444 (1969) ("[A]lthough . . . absolute."). However, First Amendment purists, such as Justice Black, have rejected any notion of "balancing" First Amendment rights against an asserted state interest:

As I have indicated many times before, I do not subscribe to that [balancing] doctrine for I believe that the First Amendment's unequivocal

command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field.

Konigsberg v. State Bar of California, 366 U.S. 36, 61 (1961) (Black, J., dissenting). *See also* MARK SILVERSTEIN, CONSTITUTIONAL FAITHS: FELIX FRANKFURTER, HUGO BLACK, AND THE PROCESS OF JUDICIAL DECISIONMAKING 90-209 (1984) (discussing Justice Black's judicial philosophy); Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960). Justice Black's philosophy with regard to the First Amendment has never been widely held by other members of the Court. *See, e.g.*, Donald L. Beschle, *An Absolutism that Works: Reviving the Original "Clear and Present Danger" Test*, 1983 S. Ill. U. L.J. 127 (1983) (discussing Justice Black's philosophy concerning the First Amendment as a minority viewpoint).

25. *See* Talley v. California, 362 U.S. 60 (1960) (discussed *infra* notes 26-35 and accompanying text).

26. *Id.* (statute "at issue" was not limited to political advertising, but covered all written communications).

27. *Id.* at 64.

28. *Id.*

29. *See supra* note 24.

30. *See, e.g.*, Wilson v. Stocker, 819 F.2d 943 (10th Cir. 1987); United States v. Insko, 365 F. Supp. 1308 (M.D. Fla. 1973); *In re* Opinion of the Justices, 324 A.2d 211 (Del. 1974); People v. White, 506 N.E.2d 1284 (Ill. 1987); State v. Fulton, 337 So.2d 866 (La. 1976); State v. North Dakota Educ. Ass'n, 262 N.W.2d 731 (N.D. 1978) (each case involving a challenge to disclosure requirements on campaign literature).

31. *Talley*, 362 U.S. at 64, 65 (citations and footnotes omitted). For similar impassioned views, see People v. Duryea, 351 N.Y.S.2d 978, 989 (N.Y. Sup. Ct. 1974) ("Anonymity has been, historically, the medium of dissidents, shielding them from the retaliatory power of the establishment and, whether their fears of reprisal were justified or not, encouraging them to express unpopular views. Anonymous writings have an honored place in our political heritage."); *North Dakota Educ. Ass'n*, 262 N.W.2d at 735 ("It is worth remembering that among the glories of our nation's history are documents written under pseudonyms by men who were to become the second, third and fourth Presidents, the first Chief Justice and the first Secretary of the Treasury and Secretary of State of the United States.").

32. State v. Acey, 633 S.W.2d 306, 307 (Tenn. 1982) (upholding Tennessee disclosure statute based upon the "express disclaimer" of the *Talley* Court). *See infra* note 33.

33. *Talley*, 362 U.S. at 64 ("Counsel has urged that this ordinance is aimed at providing a way to identify those responsible for fraud, false advertising and libel. Yet the ordinance is in no manner so limited, nor have we been referred to any legislative history indicating such a purpose. *Therefore we do not pass on the validity of an ordinance limited to prevent these or any other supposed evils.*") (emphasis added). Courts that have upheld disclosure statutes in the wake of *Talley* have cited this passage as a means of distinguishing their "narrow" statutes with the "broad" one at issue in *Talley*. See *infra* note 38.

One might be left puzzled as to why Justice Black did not seize upon the opportunity in *Talley* to invalidate *all* disclosure laws regardless of any asserted state interest based upon his literal interpretation of the First Amendment's language that "Congress shall make no law. . . ." See *supra* note 24. Might Justice Black have been worried that without the "disclaimer," he would not be able to command a majority to sign on to his opinion? For a discussion of interpersonal relationships of justices and the "politics" of the Supreme Court, see CHRISTOPHER E. SMITH, *POLITICS IN CONSTITUTIONAL LAW* 1-8, 155-68 (1992).

34. *Talley v. California*, 362 U.S. 60, 66 (1960) (Harlan, J., concurring). See also *supra* note 26 (ordinance encompassed all types of speech, political or otherwise).

35. *Id.* at 70 (Clark, Frankfurter and Whittaker, JJ., dissenting).

36. The exact number of states with disclosure statutes is somewhat disputed. One article places the figure at 43 states. *Developments in the Law: Elections*, 88 HARV. L. REV. 1111, 1286-92 (1975). Another author recently placed the figure at 48. King, *supra* note 7, at n.8 (listing the citations to disclosure statutes in 48 states). Still another author asserts that only fourteen states maintain disclosure statutes. Steven Robert Daniels, *Survey of Developments in North Carolina and the Fourth Circuit, 1993*, 72 N.C. L. REV. 1618, 1624 (1994). The source of confusion probably arises from the fact that disclosure statutes vary widely in their scope and application. See King, *supra* note 7, at 146-50 (categorizing disclosure statutes based on four criteria: (1) The type of writing regulated; (2) The type of disclosure required; (3) Whether disclosure is linked to the writing itself or to an expenditure disclosure; or (4) Determining who is made criminally liable for failing to disclose the publisher or disseminator.)

37. [McIntyre v. Ohio Elections Comm'n](#), 115 S. Ct. 1511, 1519 (1995) ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest."). But see *infra* notes 99-107 and accompanying text (arguing that the Court should only apply strict scrutiny when first amendment rights are severely restricted, or where a governmental prohibition directed at speech is content-based and discriminates as to the views of the speaker, *i.e.*, the restriction is not viewpoint-neutral).

38. See, e.g. *United States v. Insko*, 365 F. Supp. 1308 (M.D. Fla. 1973); *Messerli v. State*, 626 P.2d 81 (Alaska 1980); *Griset v. Fair Political Practices Comm'n*, 12 Cal. Rptr.

2d 249 (Cal. Ct. App. 1992), *superseded by*, 15 Cal. Rptr. 2d 893, *aff'd*, 35 Cal. Rptr. 2d 659, *cert. denied*, 115 S. Ct. 1794; *Morefield v. Moore*, 540 S.W.2d 873 (Ky. 1976); *State v. Petersilie*, 432 S.E.2d 832 (N.C. 1993); *State v. Acey*, 633 S.W.2d 306 (Tenn. 1982). In each of these cases, the courts concluded that the disclosure statutes under review were drawn sufficiently narrow in furtherance of compelling governmental interests, as opposed to the broad ordinance involved in *Talley*.

39. *See, e.g.*, *Schuster v. Imperial County Mun. Ct.*, 167 Cal. Rptr. 447 (Cal. Ct. App. 1980), *cert. denied*, 450 U.S. 1042 (mandatory disclosure of identity of person or organization responsible for production of campaign literature violates First Amendment); *In re Opinion of the Justices*, 324 A.2d 211 (Del. 1974) (proposed statute requiring mandatory disclosure of author's name in newspaper editorial would violate First Amendment); *State v. Barney*, 448 P.2d 195, 200 (Idaho 1968) (disclosure statute found void for vagueness); *People v. White*, 506 N.E.2d 1284 (Ill. 1987) (mandatory disclosure violates First Amendment); *State v. Fulton*, 337 So.2d 866 (La. 1976) (declaring unconstitutional a disclosure statute requiring political literature to bear the name of its author); *accord State v. Burgess*, 543 So.2d 1332 (La. 1989); *Commonwealth v. Dennis*, 329 N.E.2d 706 (Mass. 1975) (distributing anonymous circulars protected by First Amendment); *State v. North Dakota Educ. Ass'n*, 262 N.W.2d 731 (N.D. 1978); *People v. Duryea*, 351 N.Y.S.2d 978 (N.Y. Sup. Ct. 1974) (disclosure statute unconstitutionally limits free speech).

40. [2 U.S.C. § 441d \(1988\)](#).

41. *See supra* note 38.

42. [2 U.S.C. § 441d\(a\) \(1988\)](#).

43. *See United States v. Insko*, 365 F. Supp. 1308, 1312 (M.D. Fla. 1973). ("The ordinance [in *Talley*] was a broad one barring distribution of any handbills in any place, under any circumstances, without an attribution statement. Section 612, on the other hand, applies only to statements relating to or concerning a candidate That statute is therefore limited in its coverage to requiring fairness in federal elections and does not preclude anonymous criticism of oppressive practices and laws as referred to by the majority in *Talley*"). The Court's reference to § 612 is the predecessor statute to [2 U.S.C. § 441d \(1988\)](#).

44. A photocopy of one of Mrs. McIntyre's leaflets is reproduced at [McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1514 n.2](#). The main text of the flyer reads in substantially the same form as below:

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

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

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

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

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

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

PLEASE VOTE NO
ISSUE 19

THANK YOU
CONCERNED PARENTS AND TAX PAYERS

45. [McIntyre, 115 S. Ct. at 1514](#). The April 27th meeting marked the beginning of a long and unpleasant battle over the tax levy in Westerville. *See* Hansen v. Westerville City Sch. Dist., Nos. 93-3231, 93-3303, 1994 WL 622153 (6th Cir. Nov. 7, 1994), *cert. denied* 115 S. Ct. 2611 (1995). Mrs. McIntyre and several other individuals subsequently formed a group called "Citizens Against Tax Waste" (CATW). *Id.* At a public meeting over the tax levy in September, 1988, the local police ejected one of the members of this organization for commandeering the meeting. *Id.* At a meeting in October, the police ejected another member of CATW and charged him with resisting arrest. *Id.* At the same meeting, police forcibly escorted several other individuals from the meeting. *Id.* Twelve members of CATW, including Mrs. McIntyre, eventually sued the school board and the police in a civil rights action under [42 U.S.C. § 1983](#). *Id.* The only claims to survive summary judgment were those alleging that CATW members were impermissibly barred from public meetings at the school. *Id.*

46. [McIntyre, 115 S. Ct. at 1514](#).

47. [Id.](#)

48. This was a fictitious organization. *See* Brief of Respondent at 1, [McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511 \(1995\)](#) (No. 93-986) [hereinafter "Brief for Respondent"] *See also supra* note 45 (reference to "Citizens Against Tax Waste").

49. [115 S. Ct. at 1514](#).

50. Some of the leaflets were in fact signed by Mrs. McIntyre. Apparently, Mrs. McIntyre intended to sign all of the flyers but failed to do so. *See* Brief for Respondent, *supra* note 48, at 1.

51. [115 S. Ct. at 1514](#). *See also infra* note 55 (text of OHIO REV. CODE ANN. § 3599.09(A) (Anderson 1988)).

52. [115 S. Ct. at 1514](#).

53. *Id.* *See also supra* note 45 (describing the feud over the tax levy).

54. [115 S. Ct. at 1544](#).

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

No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed to promote the nomination or election or defeat of a candidate or to promote the adoption or defeat of any issue, or to influence the voters in any election, or make an expenditure for the purpose of financing political communications through newspapers, magazines, outdoor advertising facilities, direct mailings, or other similar types of general public political advertising, or through flyers, handbills, or other nonperiodical printed matter, unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor. The disclaimer 'paid political advertisement' is not sufficient to meet the requirements of this division. When such publication is issued by the regularly constituted central or executive committee of a political party, organized as provided in Chapter 3517 of the Revised Code, it shall be sufficiently identified if it bears the name of the committee and its chairman or treasurer. No person, firm, or corporation shall print or reproduce any notice, placard, dodger, advertisement, sample ballot, or any other form of publication in violation of this section. This section does not apply to the transmittal of personal correspondence that is not reproduced by machine for general distribution.

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

name and address of the campaign committee and the appropriate officer of the committee, identified by name and title.

O.R.C. 3599.09 was amended and re-codified at O.R.C. 3517.20. *See* LEXIS, OH-LEGIS 60 (H.B. 99)(eff. Aug. 22, 1995). The revised statute limits the attribution statement to candidates, campaign committees, legislative campaign funds, or other entities. *Id.*

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

57. *Id.*

58. [McIntyre, 115 S. Ct. at 1514](#). Mrs. McIntyre was not beaten or pilloried as was John Lilburn in the example cited by Justice Black in *Talley v. California*. *See supra* note 31 and accompanying text (explaining the fate of John Lilburn for distributing prohibited books). The Ohio Elections Commission could have taken one of any of the following courses of action: (1) Imposed a fine of up to \$1,000; (2) Reported its findings to the appropriate prosecuting authority for civil or criminal prosecution; or (3) Entered a finding that good cause has been shown *not* to impose a fine or refer the matter to the prosecuting authority. *See* OHIO REV. CODE ANN. § 3599.09(C)(1-3) (Anderson 1988). The Court did not mention subsection (C)(3) in its opinion. This provision provides a "safety valve" that should have been sufficient to uphold the statute in its general application. *See infra* note 105 (explaining that the Court has allowed special exemptions from other types of disclosure laws for certain groups, without invalidating the law in its general application).

59. [McIntyre v. Ohio Elections Comm'n](#), No. 90AP-1221, 1992 Ohio App. LEXIS 1951, *aff'd*, 618 N.E.2d 152 (Ohio 1993), *rev'd*, [115 S. Ct. 1511 \(1995\)](#).

60. [McIntyre, 618 N.E.2d at 152, rev'd 115 S. Ct. 1511 \(1995\)](#).

61. *McIntyre*, 1992 Ohio App. LEXIS 1951.

62. [McIntyre, 618 N.E.2d at 152, rev'd, 115 S. Ct. 1511 \(1995\)](#).

63. *Id.* at 156 (Wright, J., dissenting). Justice Wright stated:

[I] do not agree with the majority that R.C. 3599.09(A) imposes a 'minor requirement' that 'persons producing campaign literature identify themselves as the source therefor,' nor do I agree that this requirement 'neither impacts the content of their message nor significantly burdens their ability to have it disseminated.' I am sure that Publius and Cato would have strenuously disagreed with the majority as well.

Id.

64. 460 U.S. 780 (1983). *See also infra* note 99 (explaining the *Anderson* test).

65. *McIntyre*, 618 N.E.2d at 154-55, (citing [Byrdick v. Takushi](#), 112 S. Ct. 2059 (1992)). ("[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of states seeking to assure that elections are operated equitably and efficiently.").

66. *Id.* at 155. ("The minor requirement imposed by R.C. 3599.09 that those persons producing campaign literature identify themselves as the source thereof neither impacts the content of their message nor significantly burdens their ability to have it disseminated."). This reasoning is also relevant to the issue of whether the statute was content based. *See infra* notes 104-5.

67. *McIntyre*, 618 N.E.2d at 154 ("In contrast to the ordinance in *Talley*, [Ohio] can legitimately claim that R.C. 3599.09 has as its purpose the identification of persons who distribute materials containing false statements Accordingly, unlike *Talley*, the disclosure requirement is clearly meant to 'identify those responsible for fraud, false advertising and libel.'").

68. *McIntyre v. Ohio Elections Comm'n*, 114 S. Ct. 1047, *motion to dismiss denied*, 114 S. Ct. 2670 (1994).

69. *McIntyre v. Ohio Elections Comm'n*, 114 S. Ct. 2670, 2670 (1994).

70. [McIntyre v. Ohio Elections Comm'n](#), 115 S. Ct. 1511, 1516-24 (1995). Perhaps this is to state the matter too tactfully. The last line of the Court's opinion paraphrases Ohio's disclosure statute as follows: "One would be hard pressed to think of a better example of the pitfalls of Ohio's blunderbuss approach than the facts of the case before us." *Id.* at 1524. Has "Nino" finally rubbed off on the Majority? *See* Stuart Taylor Jr., *Season of Snarling Justices*, AKRON BEACON J., Apr. 5, 1990, at A11 (describing Justice Scalia's confrontational style with other justices of the Court). *See also* Johnson v. Transp. Agency, 480 U.S. 616 (1987) (Scalia, J., dissenting); Allegheny v. ACLU, 492 U.S. 573 (1989) (Scalia, J., dissenting). Even Justice Scalia's allies have not escaped his wrath. *See, e.g.*, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (Scalia, J., concurring) (chastising Justices O'Connor, Rehnquist, White, and Kennedy for not explicitly overruling *Roe v. Wade*).

71. [McIntyre](#), 115 S. Ct. at 1518 ("[T]his case 'involves a limitation on political expression subject to exacting scrutiny.'" (quoting *Meyer v. Grant*, 486 U.S. 414, 420 (1988))). "[T]he category of speech regulated by the Ohio statute occupies the core of the protection afforded by the First Amendment." *Id.*

72. *Id.* at 1520 ("The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit. Moreover, in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author adds little, if anything, to the reader's ability to evaluate the document's message.").

73. See *id.* at 1520-21. The Court stated:

Ohio's prohibition of anonymous leaflets plainly is not its principal weapon against fraud. Rather, it serves as an aid to enforcement of the specific prohibitions and as a deterrent to the making of false statements by unscrupulous prevaricators. Although these ancillary benefits are assuredly legitimate, we are not persuaded that they justify 3599.09(A)'s extremely broad prohibition.

74. See *id.* at 1524 ("Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent."). "Great works of literature have frequently been produced by authors writing under assumed names." *Id.* at 1516; *but see id.* at 1537 (Scalia, J., dissenting) ("I can imagine no reason why an anonymous leaflet is any more honorable, as a general matter, than an anonymous phone call or an anonymous letter."). See also *id.* at 1516 n.4, 1517 n.6. Footnote 4 lists well-known historical figures who published anonymously, such as Mark Twain, O. Henry, Voltaire, Benjamin Franklin, George Eliot, George Sand, Charles Dickens, and William Shakespeare. Footnote 6 lists prominent Federalist and Anti-Federalists who published under pseudonyms, including James Madison, Alexander Hamilton, and John Jay ("Publius"), and others whose true identities are still subject to speculation, such as "Cato," "Centinel," "The Federal Farmer," "Brutus," and "Junius." The Court also cited Justice Black's historical analysis of anonymous political activity in *Talley v. California*. See *supra* note 31 and accompanying text (Justice Black's defense of anonymous speech).

75. [McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1524 \(1995\)](#). Justice Ginsburg's concurring opinion notes that, "We do not hereby hold that the State may not in other, larger circumstances, require the speaker to disclose its interest by, disclosing its identity." *Id.* Just what these other, larger circumstances might be is anyone's guess. As journalist David Broder notes, "The Court deliberately left in doubt whether the same ruling would apply if 10,000 or 1 million letters were mailed anonymously on the eve of a national election" David S. Broder, *Bungled by the High Court*, WASH. POST, May 7, 1995, at 7. Although the federal counterpart to Ohio's disclosure statute, 2 U.S.C. § 441d, *might* be upheld because of its limitation to *candidates*, Broder's question remains valid because the effect of the Court's ruling on the federal statute was not addressed in the Court's opinion. This is a glaring omission, especially since the subject of the federal disclosure statute did arise during the course of oral argument. See Official Transcript, *available at* WESTLAW 1994 WL 665265.

The Second Circuit recently had occasion to review the federal disclosure requirement in the wake of *McIntyre*. See *Fed. Election Comm'n v. Survival Educ. Fund*, 65 F.3d 285 (2d Cir. 1995). Here, the defendants were charged under [2 U.S.C. § 441d\(a\)\(3\)](#) for failing to identify their organization in a solicitation letter for donations to be used for political causes. *Id.* at 287. The court upheld the statute as a minimally restrictive method of ensuring open electoral competition. *Id.* at 296. The court reached this conclusion by distinguishing *McIntyre*, holding that the regulation of solicitations for campaign

donations is a compelling government interest capable of withstanding strict scrutiny. *Id.* The interests were said to be "more compelling" and the statute "more narrowly tailored." *Id.* at 295.

76. [McIntyre, 115 S. Ct. at 1525](#). Justice Thomas criticized the Majority's reasoning for "Fail[ing] to seek the original understanding of the First Amendment." *Id.* at 1530. Justice Thomas went to great lengths in hypothesizing such understanding, and came to the conclusion that the "historical evidence from the framing" supports the conclusion that the Framers understood anonymous pamphleteering to be protected speech. [See id. at 1525-30](#) (Thomas, J., concurring).

77. [Id. at 1530](#) ("The Court discovers a hitherto unknown right-to-be-unknown while engaging in electoral politics."). Ironically, Justice Scalia also based his conclusion on ascertaining the "original intent" of the Framers. The fact that he and Justice Thomas came to opposite conclusions while employing an original intent analysis plays nicely into the hands of critics of the "original intent" school. For further discussion of "original intent" analysis, see generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 2d Ed. (1988); and Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B. U. L. REV. 204 (1980). The foremost advocate of original intent theory, former Supreme Court nominee Robert Bork, answers critics in ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

78. *See supra* note 74.

79. *See supra* note 74, and *infra* notes 82-96 and accompanying text.

80. *See infra* notes 97-107 and accompanying text.

81. *See infra* notes 108-111 and accompanying text.

82. *See infra* note 74.

83. [McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1516-17 \(1995\)](#) (citing relevant portions of Justice Black's analysis of anonymous political speech).

84. *Cf. infra* note 31 and accompanying text.

85. *Id.*

86. Brief for Petitioner, at 12-15, [McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511 \(1995\)](#) (No. 93-986). *See also* Brief for Respondent, *supra* note 48, at 30-41.

87. A syllogism is the full logical form of a single argument. BLACK'S LAW DICTIONARY 1449 (6th ed. 1990). "It consists of three propositions (two premises and

the conclusion), and these contain three terms, of which the two occurring in the conclusion are brought together in the premises by being referred to a common class." *Id.* The syllogism necessarily fails because the constitution did not yet exist when the framers engaged in anonymous speech. This is not to say that one can reach the opposite conclusion from this syllogism. Rather, it demonstrates that the argument begs the question rather than answers it. This argument also fails to consider that many of the same legislators who ratified the First Amendment also passed the Sedition Act a short time later. *See infra* note 95.

88. Brief for Respondent at 30, 31 (citing SAUL CORNELL, *THE OTHER FOUNDERS. ANTI-FEDERALISM AND THE AMERICAN CONSTITUTIONAL TRADITION* (Forthcoming, 1995)).

89. *See* Editors, *B. IDEP. CHRON.*, Oct. 4, 1787, *reprinted in* XIII *The Documentary History of the Ratification of the Constitution* 315 (John P. Kaminski & Gaspare J. Saladino eds., 1981), *cited in* Brief for Respondent, *supra* note 47, at 31 ("[I]t is submitted to you, gentlemen, and the other Printers in the State, whether it will be best to publish any production, where the author chooses to remain concealed."). *See also* MASS. CENTINEL, Oct. 10, 1787, *reprinted in* DOCUMENTARY HISTORY, *supra* at 315-16, *cited in* Brief for Respondent, *supra* note 47, at 32 (requirement of newspaper that all writers be willing to identify themselves publicly).

90. *See* [McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1531 \(1995\)](#) (Scalia, J., dissenting).

91. Hostilities with England for the most part ceased after the Yorktown campaign in 1781, and peace with England was formally resolved in 1783. The U.S. Constitution was ratified in 1788. Two years later the first ten Amendments were adopted. *See, e.g.*, GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 1-2 (2d ed. 1991).

92. NORMAN L. ROSENBERG, *PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL* 71 (1986).

93. *See* LEONARD LEVY, *EMERGENCE OF A FREE PRESS* ch. 2 (1985) [hereinafter LEVY, *A FREE PRESS*]. *See also* LEONARD LEVY, *LEGACY OF SUPPRESSION* (1960). Levy's earlier work argued that the early American experience with regard to press and speech liberties was marked by widespread intolerance by the government. Levy admits in his later work that he previously overstated his case. He explains that if one looks at American practices instead of American law and theory, there exists not a legacy of suppression but a "legacy of liberty." Levy, *A Free Press*, *supra*, at ch. 10. *See also* LOUIS FISHER, *2 CONSTITUTIONAL RIGHTS: CIVIL RIGHTS AND CIVIL LIBERTIES* ch. 618-20 (1990).

94. *See* *Morefield v. Moore*, 540 S.W.2d 873, 875 (Ky. 1976) ("[I]t does not seem altogether naive to assume that a fundamental objective of the First Amendment was to

obviate the necessity for anonymity. Not only is it unnecessary in the conduct of public elections, it is repulsive." *See also* Commonwealth v. Evans, 40 A.2d 137, 138-39 (PA. 1944) ("[The disclosure statute] is an attempt to raise the ethical standards of political discussion, to promote fair play and fair competition in politics, to banish cowards from the political arena . . .").

95. *New York Times v. Sullivan*, 376 U.S. 254, 276 (1964) ("Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history."). In fact, the Sedition Act expired under its own terms in 1801. 1 Stat. 596 § 2. President Jefferson thereafter pardoned every person convicted under the Act. FISHER, *supra* note 93, at 620. There is general agreement that the Act was a significant factor in leading to the downfall of the Federalist party. *See, e.g.*, FISHER, *supra* note 93; LEVY, FREE PRESS, *supra* note 93; Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661 (1985) (an excellent overview of the law and theory of seditious libel from the sixteenth to early twentieth century).

96. "The record in this case contains not even a hint that Mrs. McIntyre feared 'threats, harassment, or reprisals'; indeed, she placed her name on some of her fliers and meant to place it on all of them." [McIntyre v. Ohio Elections Comm'n, 115 S. Ct. at 1511, 1535 \(1995\)](#) (Scalia, J., dissenting). Mrs. McIntyre thus sought to vindicate a right she never attempted to exercise in the first place. *See also supra* note 45 (Mrs. McIntyre was a prominent figure in the tax levy battle who had little reservation about making her presence known.).

97. *See supra* note 71 (strict scrutiny applied to Ohio's disclosure statute).

98. *Anderson v. Celebrezze*, 460 U.S. 780 (1983). *See infra* note 99 (discussing the *Anderson* test).

99. A court considering a state election law challenge must weigh "the character and magnitude of the asserted injury to the First and Fourteenth Amendment rights that the plaintiff seeks to vindicate" against the precise interests put forward by the State as justification for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789. Strict scrutiny also involves "balancing," but the scales are presumptively tipped against the state. "[I]t is the rare case in which we have held that a law survives strict scrutiny." [Burson v. Freeman, 504 U.S. 191, 211 \(1992\)](#). With strict scrutiny, a state must demonstrate a "compelling" interest and show that its law affecting a fundamental right is narrowly tailored to serve that interest. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). *See also* *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). The lesser *Anderson* standard is more akin to intermediate scrutiny, and presumes that the restriction are valid: "[W]hen a state election law provision imposes only reasonable nondiscriminatory restrictions upon First and Fourteenth Amendment rights, 'the state's *important* [not compelling] regulatory interests are generally sufficient of justify' the restrictions." [McIntyre v. Ohio Elections Comm'n, 618 N.E.2d 152, 155 \(Ohio 1993\), rev'd, 115 S. Ct. 1511 \(1995\)](#) (quoting *Anderson*, 460 U.S. at 788 (emphasis and

brackets added)). See also Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987) (discussing various classes of speech and standards of review with regard to the First Amendment).

100. *Anderson*, 460 U.S. at 789, (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

101. [Burdick v. Tukashi](#), 504 U.S. 428, 434 (1992) ("[A]s we have recognized when those rights are subjected to 'severe restrictions', the regulation must be narrowly drawn to advance a State interest of compelling importance."). In *Burdick*, the Court considered a challenge to Hawaii's prohibition against write-in voting. *Id.* at 430. The Court applied the relaxed *Anderson* standard of review and held that Hawaii's prohibition on write-in voting did not unreasonably infringe upon its citizens' rights under the First and Fourteenth Amendments. *Id.* at 432-42. This was despite the Court's prior acknowledgment that "[V]oting is of the most fundamental significance under our constitutional structure." *Id.* at 433 (citing *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). Although Hawaii effectively eliminated this form of political expression, the Court did not view this as a "severe restriction." *Id.* at 437. See also [Burson v. Freeman](#), 504 U.S. 191 (1992) (upholding statute providing for "campaign free zone" within 100 feet of a voting booth on election day).

102. *Anderson*, 460 U.S. at 788. See also [Burdick](#), 504 U.S. at 433 (1992) ("Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections."); *Storer v. Brown*, 415 U.S. 724, 730 (1974) ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.").

103. The Petitioner argued that governments have used laws requiring compulsory disclosure to subject members of unpopular groups to intimidation, threats, and harassment from adversaries. For example, in *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449 (1958), the Court held that compelled disclosure of NAACP membership lists violated those persons' rights to freely associate and disseminate their views. Similar issues arose in *Bates v. Little Rock*, 361 U.S. 516 (1960), and *Shelton v. Tucker*, 364 U.S. 479 (1960) (both cases involving disclosure laws used as a pretext for racial discrimination). The rule to be learned from these cases is that laws, which are otherwise constitutional on their face, cannot be enforced in such a manner as to violate individuals' constitutional rights. It follows, then, that courts can carve exceptions to disclosure laws for persons who demonstrate specific facts indicating that disclosure of their identities will subject them to harm. *Cf.* *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982) (plaintiff exempted from complying with Ohio election statute requiring disclosure of campaign contributors because of the history of harassment against Socialist party members); *Patterson*, 357 U.S. 449. The Court could have acknowledged this safety mechanism and upheld O.R.C. § 3599.09 in its general application. In fact, such a "safety mechanism" is built into O.R.C. § 3599.09. See *supra* note 57 (statutory provision allowing elections commission to enter a finding that "good cause" exists to forgo the imposition of a fine or punishment for violation of the disclosure requirement).

104. *See* OHIO REV. CODE ANN. § 3599.09(a) (Anderson 1988). The disclosure statute only applies in instances where the speaker seeks to affect the outcome of a candidate or issue-based election. *Id.* It does not require an attribution statement to appear on all types of communication. For example, anonymous leaflets circulated in protest of a government policy, or directed directly against a government official or officeholder, would not be prohibited by the statute. In fact, it would be perfectly permissible to wage an anonymous campaign against the disclosure statute itself.

105. [*McIntyre*, 115 S. Ct. at 1518](#) ("[E]ven though this provision applies evenhandedly to advocates of differing viewpoints, it is a direct regulation on the content of speech.").

106. *Id.* The great weight of authority supports the Court's proposition that the statute in *McIntyre* is "content-based," because the statute regulates a certain topic of speech, i.e. political speech in support of or in opposition to a candidate or issue. *See infra* notes 38-39, 43 (strict scrutiny applied to disclosure statutes, including those states that have upheld the statutes). However, this Note argues that a court reviewing a disclosure statute should apply a two-pronged test. First, the court should determine whether the statute is content-based. If so, the next inquiry should be to determine whether the restriction is viewpoint neutral. Arguably, all disclosure statutes will be content-based by their very nature because of the activity they seek to regulate (speech concerning a political topic). However, if the disclosure statute is viewpoint neutral, the statute should not be subject to strict scrutiny. This test shifts the inquiry to whether the challenged restriction burdens a person's ability to publicize his or her views, which should be the primary concern of the First Amendment. Attribution statements contained in a writing do not impede the ability to publish, nor do they censor the substantive content of the message. *See infra* note 105 (arguing that the disclosure statute is viewpoint-neutral), and 107 (discussing the limitations of the disclosure statute with respect to the class of speech regulated).

The test advocated above bridges the gap between content-based and content-neutral restrictions in cases such as *McIntyre*, where the classification to be given to the speech is not entirely clear. *See* [*Burson v. Freeman*, 504 U.S. 191, 211 \(1992\)](#) (Kennedy, J., concurring) (questioning the content-based/content-neutral distinction and elaborating on the parameters of content-based restrictions). For example, Stone defines "content-neutral" restrictions as those "[L]imit[ing] expression without regard to the content or communicative impact of the message conveyed." Stone, *supra* note 98, at 48. "Content-based" restrictions "[L]imit communication because of the message it conveys." *Id.* at 47. Examples of a content-based restriction include laws that prohibit seditious libel or ban the communication of confidential information. *Id.* Content-neutral restrictions might include laws that restrict noisy speech near a hospital, or laws that limit campaign contributions. *Id.* at 48. The speech at issue in *McIntyre* is not easily pigeonholed into either category. Ohio's disclosure statute operates irrespective of whether the information to be anonymously conveyed is true or false, so in that respect it is content-neutral. *See infra* notes 105, 107. On the other hand, the only speech regulated by the statute is that which one communicates in support of or in opposition to a candidate or issue, so in this respect it is content-based. The two-pronged test outlined above gives effect to the general concern of whether speech on an entire topic is encumbered, as well as the

specific concern of whether an alleged restriction censors the content of a speaker's message.

107. [McIntyre, 115 S. Ct. at 1518](#). A content-based restriction on speech occurs where restrictions are placed on the espousal of a particular viewpoint, or when there is a prohibition of public discourse on an entire topic. [Burson, 504 U.S. at 191](#). See also *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("The principle inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys Government regulation of expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech.'"). Ohio's disclosure statute is viewpoint neutral: it does not discriminate as to the subject matter of the speech nor the topic of the speaker, nor does it censor the speaker's message. See also Stone, *supra* note 99 (identifying seven distinct standards of review the Supreme Court has used in resolving content-neutral restrictions on speech).

108. See *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989) (states have a compelling interest in preserving the integrity and reliability of the elections process). See also *supra* notes 101-02 (cases upholding restrictions on speech in order to preserve the integrity of the elections process).

109. It is conceded that attempting to "balance" competing rights is a perilous enterprise, because the relative weight to be given to an asserted right is incapable of quantification. See generally Stone, *supra* note 99, at 72 (discussing the inherent difficulty of utilizing a balancing approach to claims of First Amendment abridgment). The competing interests at issue with regard to disclosure statutes are the state's interest in maintaining the integrity of elections versus an individual's (asserted) right to disseminate anonymous political literature. See *supra* note 21 and accompanying text (describing the tension between these interests). It does not seem unreasonable to suggest that the long acknowledged right of states regarding elections regulation outweighs the right to anonymous speech, especially since a major tenant of the First Amendment was to obviate the need for anonymity. See *supra* note 94, and *infra* note 116 (questioning the need to protect anonymous speech in light of the protections afforded by the First Amendment).

It should also be noted that a majority of states have chosen to enact disclosure statutes. See *supra* notes 9, 36. This provides additional evidence that the interest being protected by the statutes is in fact compelling. Cf. [Burson, 504 U.S. at 191](#) (citing the fact that all 50 states have laws similar to the one being challenged as evidence that the interests advanced by the state are compelling).

110. That disclosure statutes are related to the advancement of the state interest to be protected is not disputed. What *is* disputed is whether disclosure statutes are sufficiently tailored to advance the state's interest, without infringing on other protected rights. See *supra* note 73 and accompanying text (Court's overbreadth analysis).

A state should also be able to enact a disclosure statute without demonstrating that it has experienced problems of voter fraud or misinformation campaigns in the past. *Cf. Munro v. Socialist Workers Party*, 479 U.S. 189 (1986). In *Munro*, the Court upheld a Washington statute requiring minor candidates to obtain 1% of all votes cast for that office in the state's primary election before the candidates name could appear on the general ballot. *Id.* at 190-99. The basis for the law stemmed from Washington's fear of "voter confusion and ballot overcrowding." *Id.* at 194. However, Washington never demonstrated that these fears had in fact materialized. The Court upheld the statute nonetheless. "Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Id.* at 195-96.

111. Theoretically, a state could adopt a disclosure statute that only requires an attribution statement where the content of the message is false, misleading, or libelous. *See King, supra* note 7. However, the prevention of fraud, false advertising, and libel are not the only interests at issue; the state also has an interest in ensuring that the electorate has access to relevant information in order to make informed decisions. *See infra* notes 113-14 and accompanying text (arguing that the informational interest served by the disclosure statute is "compelling"). A disclosure requirement directly serves this interest. Moreover, Ohio's disclosure statute is an aid to enforcement of a related statute that prohibits the dissemination of knowingly false information. Without the disclosure statute, enforcement of the statute prohibiting false statements would be difficult, if not impossible. *See McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. at 1511, 1536 (Scalia, J., dissenting) (explaining why a prohibition against making false statements is meaningless without a corresponding enforcement mechanism).

112. *McIntyre*, 115 S. Ct. at 1520 ("Ohio's informational interest is plainly insufficient to support the constitutionality of its disclosure requirement."). *Accord* *People v. White*, 506 N.E.2d 1284 (Ill. 1987) (rejecting the argument that ensuring an informed electorate is a sufficient interest to support a disclosure statute). *But see infra* note 101-02 (discussing cases recognizing an informational interest with respect to elections laws).

113. *See, e.g.*, *United States v. Harriss*, 347 U.S. 612, 625 (1954) (upholding disclosure requirement for lobbyists as imposing only a modest burden on First Amendment rights without regulating the content of the speech). Moreover, the modest burdens are outweighed by the state interest in "maintain[ing] the integrity of a basic governmental process." *Id.*; *First Nat'l Bank of Boston v. Belotti*, 435 U.S. 765, 792 n.32 (1978) ("Corporate advertising . . . is likely to be highly visible. Identification of the source of advertising may be required as a means of disclosure, so that people will be able to evaluate the arguments to which they are being subjected."); *Buckley v. Valeo*, 424 U.S. 1 (1976) (upholding portions of the Federal Elections Campaign Act mandating disclosure of campaign contributors). The *McIntyre* Court distinguished *Buckley* and *Belotti* on the basis that neither dealt with the distribution of anonymous campaign literature. *McIntyre*, 115 S. Ct. at 1522-23.

In [Burson, 504 U.S. at 211](#), the Court upheld a Tennessee statute prohibiting the distribution of campaign literature within 100 feet of any voting booth on election day. Applying strict scrutiny, the Court upheld the ban based on Tennessee's compelling interest in "[P]rotecting voters from confusion and undue influence." *Id.* at 14. This raises an interesting question: Had Mrs. McIntyre been in Tennessee and distributed her anonymous flyers within 100 feet of a voting booth, would her speech have lost its protected status? For cases *contra* to the proposition that the First Amendment should serve an informational interest, see, e.g., *NAACP v. Button*, 371 U.S. 415, 445 (1963) (First Amendment protection is not dependent on the "truth, popularity, or social utility of the ideas and beliefs which are offered."); *Thomas v. Collins*, 323 U.S. 516, 545 (1945) ("The very purpose of the First Amendment is to foreclose public authority for assuming a guardianship of the public mind. . . . [T]he forefathers did not trust any government to separate the true from the false for us."); *accord Meyer v. Grant*, 486 U.S. 414, 419 (1988) (citing *Thomas* and *Button*).

114. See generally James A. Gardner, Comment, *Protecting the Rationality of Electoral Outcomes: A Challenge to First Amendment Doctrine*, 51 U. CHI. L. REV. 892, 892 (1984) ("A central though rarely articulated premise of many election laws and much democratic theory is that electoral outcomes should be rational rather than irrational that they should reflect the true, reasoned, and informed choice of the people."). Cf. [Burson v. Freeman, 504 U.S. 191, 199 \(1992\)](#). "[I]t has been recognized that a State has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process." *Id.* at 200-05 (discussing the problems associated with elections fraud since the inception of the paper ballot in American electoral politics).

115. Gardner, *supra* note 114, at 936.

116. See *supra* notes 3-6. See also *Canon v. Justice Ct.*, 393 P.2d 428, 459 (Cal. 1964) ("[A]nonymity all too often lends itself, in the context of attacks upon candidates in the preelection period, to smears, as a result of which the electorate is deceived. Identification permits confrontation and often makes refutation easier and more effective. It tends to reduce irresponsibility. It enables the public to appraise the source."). See also *infra* note 117 (comments regarding "gutter politics").

117. See, e.g., Robert M. O'Neil, *Regulating Speech to Cleanse Political Campaigns*, 21 CAP. U. L. REV. 575, 575-78 (1992) (discussing negative political advertising during 1988 presidential elections); Lance Conn, Comment, *Mississippi Mudslinging: The Search for Truth in Political Advertising*, 63 MISS. L.J. 507, pts. II-III (1994) (discussing the problems of negative political advertising in Mississippi, but arguing that state regulation of such speech would run afoul of the First Amendment); Peter F. May, Note, *State Regulation of Political Broadcast Advertising: Stemming the Tide of Deceptive Negative Attacks*, 72 B. U. L. REV. 179, 181-91, (1992) (explaining the widespread use of negative political advertising in Massachusetts); David S. Broder, *Politicians, Advisers Agonize Over Negative Campaigning; Success of Tactics Discourages Policing*, WASH. POST, Jan. 19, 1989, at A1 (discussing negative campaigning and how politicians and political advisors view it as a "necessary evil"); Bill Kirtz, *How to Handle Negative Ads*,

BROADCASTING & CABLE, Mar. 9, 1992, *available at* WESTLAW 1992 WL 3391959 (recommending that television networks "recap" false political advertisements to alleviate voter confusion: "Displace false content and hold the bums accountable."); Alexandra Marks, *Backlash Grows Against Negative Political Ads*, CHRISTIAN SCIENCE MONITOR, Sept. 28, 1995 (general overview of public sentiment against negative advertising, with related commentary on why such advertising is effective); Matt Truell, *House Advances Ethics Bill*, ASSOC. PRESS POLITICAL SERV., Mar. 24, 1993, *available at* WESTLAW 1993 WL 5587563 (quoting Kansas state congressman Tom Sawyer, D-Wichita, as stating "Our campaigns have continually gotten dirtier, and the public has gotten tired of dirty campaigns."). *See also supra* notes 94, 116 (anonymity used as a shield by those wishing to take advantage of the electoral process), and 36 (explaining that a majority of states have some type of disclosure statute in order to maintain the integrity of the elections process).

118. *See, e.g., supra* note 36 (discussing the fact that most states have some type of disclosure statute). *See also* Gardner, *supra* note 114 (discussing the need for rational election outcomes); *supra* note 117 (discontent with modern election tactics).

119. [McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1533 \(1995\)](#) (Scalia, J., dissenting). *See also supra* note 109 (arguing that the widespread use of disclosure statutes is indicative of the compelling interest served by regulation of anonymous campaign literature, which should assist a disclosure statute in meeting the strict scrutiny standard of review).

120. [McIntyre, 115 S. Ct. at 1520-21](#).

121. [Id. at 1520](#) ("As this case demonstrates, the prohibition encompasses documents that are not even arguably false or misleading."). This critique might be more persuasive were it not for Ohio's related interest in providing the electorate with relevant information. This interest, though related to the issue of false and misleading information, is a separate and distinct issue. *See supra* note 114 and accompanying text (explaining the importance of ensuring that voters have access to relevant information).

122. [McIntyre, 115 S. Ct. at 1522](#). *But see supra* note 111 (arguing that a more limited disclosure requirement would not be effective in identifying those persons who engage in activity legitimately prohibited by the state, i.e. fraud, false advertising, and libel).

123. *See infra* note 73 and accompanying text.

124 *See infra* notes 101-02, 108 (cases explaining the importance of regulating the elections process).

125. *See* Brief for Respondent, *supra* note 48, at 11, 12 (arguing that the disclosure statute is a necessary aid to enforcement of the prohibition against making knowingly false statements). *See also infra* note 111 (explaining that a prohibition against making

false statements is useless without an enforcement mechanism such as a disclosure statute).

126. *See infra* Part IV (B).

127. *Id.*

128. *See* Part IV (C).

129. *See* Part IV (C)(1).

130. *See* Part IV (C)(2).

131. *See* Federal Election Comm'n v. Survival Educ. Fund, 65 F.3d 285 (2d. Cir. 1995). *See also supra* note 75 (discussing the holding of this case and the rationale used to distinguish it from [McIntyre](#)). *See also* [McIntyre v. Ohio Elections Comm'n, 115 S. Ct. at 1511, 1535](#) (Scalia, J., dissenting) ("[A] whole new boutique of wonderful First Amendment litigation opens its doors.").