Cleveland State Law Review

Volume 44 | Issue 4 Note

1996

# Application of U.S. Supreme Court Doctrine to Anonymity in the Networld

George H. Carr

# APPLICATION OF U.S. SUPREME COURT DOCTRINE TO ANONYMITY IN THE NETWORLD



Anonymity is a shield from the tyranny of the majority. It thus 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 intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords

greater weight to the value of free speech than to the dangers of its misuse.[1]

## I. INTRODUCTION

It has been remarked that "[i]f 1994 was the Year of the Internet, 1995 promises to be the Year of Legal Questions About the Internet."[2] Now that 1995 has come and gone, there are still many issues to be resolved about the Internet's unique status as a media technology and its legal status under current law.[3] The Internet provides new opportunities for expression and communication unlike any media previously encountered. Not only is the quantity and quality of information available electronically, both fact and opinion, staggering,[4] but the Internet has opened up new paths of communication, between all kinds of people. The ease with which people can communicate electronically has allowed new groups to form and new issues to enter the public consciousness.[5]

With speech, however, comes friction. As Justice Douglas once said, "[t]he First Amendment was designed 'to invite dispute,' to induce 'a condition of unrest,' to 'create dissatisfaction with conditions as they are,' and even to stir 'people to anger.'"[6] The increased opportunities for speech created by the Internet also increase the opportunities for disagreement and conflict. One tactic some Internet speakers have used to avoid, and sometimes create, conflict has been to speak anonymously. The ensuing debate over the propriety, neces-

---

[1]McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1524 (1995).

[2]Mark Eckenwiler, *Criminal Law and the Internet*, LEGAL TIMES, Jan. 23, 1995, at S32.

[3]The "Internet" refers to the global meta-network which enables data transmission between heterogeneous computers on a global scale. One commentator, Lewis S. Branscomb, has described the Internet "not as a network, but as a remarkably powerful array of internetworking capabilities . . . ." Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639, 1639, n.5.

[4]*See* Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 at 1833-43 (1995); *But see* Joel R. Reidenberg & Francoise Gamet-Pol, *The Fundamental Role of Privacy and Confidence in the Network*, 30 WAKE FOREST L. REV. 105 (1995) (noting that although information has increased in quantity, confidence in its quality has decreased).

[5]For instance, the Usenet, a network which distributes text messages organized by topic, is received at approximately one million sites worldwide, with an estimated four million readers. *See* Philip Elmer-Dewitt, *First Nation in Cyberspace*, TIME, Dec. 6, 1993, at 62. Only through such a massive and distributed system could people who have heretofore been disconnected members of a niche in society gather and discuss uncommon topics.

[6]Miller v. California, 413 U.S. 15, 44 (1973) [hereinafter *Miller*] (Douglas, J., dissenting).

sity, and legality of anonymous speech has been protracted and pervasive.[7] Indeed, this debate has extended to all corners of the Networld.[8]

The main source material for this Note is the recent case of *McIntyre v. Ohio Elections Comm'n*,[9] in which the United States Supreme Court invalidated an Ohio law requiring distributors of political leaflets to print their name and address thereon. In *McIntyre*, the Court confirmed its continuing commitment to preservation of the right to free speech, and interpreted the First Amendment to protect much anonymous speech.[10] This Note will quantify how the Court's stance in *McIntyre* will affect future issues of anonymity as they apply to the Networld, which are likely to arise, given the highly controversial nature of the Networld itself, the ease with which anonymity is obtained there, and the Networld's current position as a center of public debate.

United States law, while not always decisive,[11] is often applied to issues arising in the Networld and its cyberspaces,[12] if only because more access providers[13] are based in the U.S. than in any other geographical nation.[14]

---

[7] *See* George P. Long, III, *Who Are You?: Identity and Anonymity in Cyberspace*, 55 U. PITT. L. REV. 1177 at 1179 (1994).

[8] I take the "Networld" metaphor for the on-line universe from Linda M. Harasim, *Networlds: Networks as Social Space*, in GLOBAL NETWORKS: COMPUTERS AND INTERNATIONAL COMMUNICATION 15 (L. M. Harasim, ed. 1993).

[9] 115 S. Ct. 1511 (1995).

[10] *See infra* notes 64-86 and accompanying text.

[11] One commentator has remarked that "[i]n cyberspace, the First Amendment is nothing more than a local ordinance." John Perry Barlow, co-founder of the Electronic Frontier Foundation, conversation with author, Jan. 1995.

[12] "Cyberspace" generally refers to the metaphysical group hallucination achieved through computer-mediated interaction with the global network through virtual reality. The term's inventor, William Gibson, first described cyberspace as:

> A consensual hallucination experienced daily by billions of legitimate operators, in every nation . . . A graphic representation of data abstracted from the banks of every computer in the human system. Unthinkable complexity. Lines of light ranged in the non-space of the mind, clusters and constellations of data. Like city lights, receding . . . .

WILLIAM GIBSON, NEUROMANCER 51 (1984).

Since the term's origination, it has been adopted to refer to the meta-universe accessible through computer-mediated communication, whether through virtual-reality immersion, or through more common and accessible text and graphic interfaces.

At least one modern commentator has focused the word's meaning still further to refer to individual, discrete virtual locations, such as chat rooms or newsgroups. *See* Branscomb, *supra* note 3, at 1640. *See also* David R. Johnson, *Voluntary Voyagers*, THE RECORDER, May 8, 1995, at S16.

[13] An "access provider," sometimes called a "service provider," is an entity which provides access to the Networld (or various regions of it) to individuals or corporations. Such access is usually provided for a fee, or as an adjunct "perk" for educational users, although some organizations, such as public libraries, offer access as a public service. PAUL GILSTER, THE INTERNET NAVIGATOR 564 (1994).

This Note will first summarize the pre-*McIntyre* status of anonymity law; it will then discuss *McIntyre* itself, and interpret its constitutional effects. It will then address the Networld ramifications of *McIntyre*, showing how the Court's decision will affect various Networld phenomena in three settings: requirement of identification to use government-provided services; requirement of identification to gain access to the Networld through a private access provider; and requirements of identification in specific cases.

## II. A SHORT HISTORY OF THE PRE-MCINTYRE LAW ON ANONYMOUS SPEECH

Anonymous speech has been used for many different reasons in many different eras. In Colonial times, anonymous speech was commonly used to criticize the British government,[15] since the British were known for their harsh treatment of political enemies.[16]

Pseudonymous and anonymous speech was also used during the ratification debates on the Constitution.[17] The Federalist Papers, a series of treatises authored by John Jay, Alexander Hamilton, and James Madison on the proper shape of self-government in the new United States, was written pseudonymously, as were many Anti-Federalist replies.[18] Anonymous and pseudonymous speech was also used after Ratification to comment, sometimes scathingly, on the new government.[19] Anonymous political speech was commonly used in America well into the 19th century.[20]

---

[14] *See* MIDS, *State of the Internet, July 1996*, 304 MATRIX MAPS QUARTERLY 3 (visited January 27, 1997) <http://www3.mids.org//mmq/304/index.html>.

[15] *See* Talley v. California, 362 U.S. 60 at 64 (1960) [hereinafter *Talley*]; B. BAILYN & J. HENCH, THE PRESS & THE AMERICAN REVOLUTION (1980).

[16] The Court cited the following example in *Talley, supra* note 15:

> 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 Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books.

*Id.* at 65 (1960) (*citing* 1 Hallam, *The Constitutional History of England* (1855), 205-06, 232).

[17] It is beyond the scope of this Note to consider the legal ramifications of pseudonymous speech in the Networld. To some extent, of course, almost all speech in the Networld is pseudonymous, due to the current custom of substituting "usernames" for true names. *See*, GILSTER, *supra* note 13, at 32-33. Regardless of this custom, however, it is fairly easy (at least from the perspective of law enforcement agencies and experienced computer users) to ascertain the real-world identity of a Networld citizen given their username, while various methods of "laundering" Internet communications can serve as an impenetrable shield of identity.

[18] *McIntyre*, 115 S. Ct. at 1517, n.6.

[19] *See Id.* at 1529-30. The Court stated that:

> [A]nonymous pamphlets and newspaper articles remained the favorite medium for expressing views on candidates. . . . It seems that actual names were used rarely, and usually only by the can-

Anonymity has also been a shield for various types of non-political speech. Whistleblowers in all sorts of industries and governments have taken advantage of anonymity to expose corruption and scandal. Various dissident movements, such as labor organization and civil rights, were often conducted under shields of anonymity. Exposés of government corruption were often published under pseudonyms,[21] and many literary authors and journalists published anonymously or pseudonymously.[22]

These authors had many motivations for concealing their identities, from fear of retaliation to insistence on separation of the speaker from her message. Some authors have also written pseudonymously to avoid shame at writing what they considered "popular literature", or efforts of which they were not particularly proud.[23]

The line of precedent leading to *McIntyre* comes from two areas of law: the law of anonymity and laws governing handbills and their distribution. Although this Note deals primarily with anonymity, the handbill-related laws are useful, because the handbill may be an appropriate paradigm for understanding some types of speech in cyberspace.

The first major U.S. Supreme Court case regarding government-imposed regulation of private anonymous speech was *Lewis Publishing Co. v. Morgan*,[24] involving government-mandated disclosures of identity and ownership of a newspaper which wished to qualify for second-class postage. In rejecting the argument that such disclosures violated the freedom of the press, the Court characterized the disclosure as 'incidental' to the privilege of second-class status, and therefore a reasonable regulation of the mail system.[25] The Court

---

didates who wanted to explain their positions to the electorate . . . . The use of anonymous writing extended to issues as well as candidates."

*Id.*

20 *See* text accompanying notes 79-81, *infra*, discussing Justice Thomas' concurrence in *McIntyre*.

21 *See, e.g.*, WARD HEELER, THE ELECTION CHICAGO-STYLE (1977).

22 Writers such as Samuel Clemens (Mark Twain), William Syndey Porter (O. Henry), Mary Ann Evans (George Eliot), Benjamin Franklin, Charles Dickens (Boz), and William Shakespeare were cited by the Court in *McIntyre*. *Id.* at 1516, n.4. To this list must also be added Eric Blair (George Orwell).

23 *See, e.g.*, MICHAEL SHELDEN, ORWELL 154 (1991). Upon submission of his manuscript to his agent, Mr. Blair stated: "If by any chance you *do* get it accepted, will you please see that it is published pseudonymously, as I am not proud of it." *Id.*

24 229 U.S. 288 (1913).

25 *Id.* The Court stated:

> [W]e are concerned solely and exclusively with the right on behalf of the publishers to continue to enjoy great privileges and advantages at the public expense, a right given to them by Congress upon condition of compliance with regulations deemed by that body incidental and necessary to the complete fruition of the public policy lying at the foundation of the privileges accorded.

was willing to infringe on the freedom of speakers to remain anonymous only if necessary to qualify for some granted privilege or entitlement. Newspaper publishers which wished to remain anonymous could still use the mails, but could not qualify for less expensive second-class postage rates.

Twenty-five years later, the Court decided its first handbill ban case, *Lovell v. Griffin*.[26] This 1938 case struck down an ordinance in the city of Griffin, Georgia which required anyone wishing to distribute literature of any kind (including newspapers, handbills, or advertisements) to first obtain a permit from the City Manager.[27]

In unanimously overturning the ordinance, the Court noted that "[t]he struggle for the freedom of the press was primarily directed at the power of the licensor."[28] Since "the ordinance in question would restore the system of licence and censorship in its baldest form," the Court held it to violate the First Amendment.[29] The Court examined the Framers' original intent in extending protection to the press, and found that the legislative authors of the First Amendment intended to prevent practices exactly like the ones at issue in *Lovell*.[30]

The Court also noted that "[t]he liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."[31] This showed a commitment by the Court to apply press freedoms to diverse media, not just printed text.

---

*Id.* at 316.

[26] 303 U.S. 444 (1938) [hereinafter *Lovell*].

[27] The ordinance read:

> Section 1. That the practice of distributing, either by hand or otherwise, circulars, handbooks, advertising, or literature of any kind, whether said articles are being delivered free, or whether same are being sold, within the limits of the City of Griffin, without first obtaining written permission from the City Manager of the City of Griffin, such practice shall be deemed a nuisance, and punishable as an offense against the City of Griffin.
>
> Section 2. The Chief of Police of the City of Griffin and the police force of the City of Griffin are hereby required and directed to suppress the same and to abate any nuisance as is described in the first section of this ordinance.

*Id.* at 447-48.

[28] *Id.* at 451.

[29] *Id.* at 452.

[30] *Id.* at 451-52. The Court stated that "the prevention of [prior restraint on publication] was a leading purpose in the adoption of the constitutional provision." 303 U.S. 451-52 (1938).

[31] *Id.* at 452.

The following term, the Court reaffirmed its *Lovell* decision in *Schneider v. State (Town of Irvington)*.[32] This case was brought by four cities who had passed ordinances similar to Griffin's, with the defendant cities arguing that the ordinances were the only way to prevent littering.[33] The Court struck down the statutes on the grounds that no proof existed that banning leafleting would actually deter littering, and that littering was best controlled by statutes directly regulating it.[34] The statutes, therefore, were fatally overbroad, unreasonably impinging on the right to free speech.[35]

The next major case dealing with anonymity was *United States v. Harriss*,[36] a 1954 decision in which the Court upheld a statute which forced lobbyists to register if they solicited or received contributions for the purpose of influencing legislation. The Court acknowledged that the statute "may as a practical matter act as a deterrent to the exercise of [lobbyists'] First Amendment rights,"[37] but upheld it anyway, holding that "[t]he hazard of such restraint is too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional power and is designed to safeguard a vital national interest."[38] The Court also noted that the statute was "restricted to its appropriate end" by its limited registration requirement,[39] but the end itself was sufficiently compelling—preventing special interest groups from drowning out the "voice of the people."[40] This distinguished the statute in *Harriss* from those in *Lovell* and *Schneider*, which the Court thought overbroad and insufficiently related to the purpose for which they were passed.

The Court's principal pre-*McIntyre* statement about anonymous speech was in *Talley v. California*. This 1960 case addressed a Los Angeles ordinance which prevented the distribution of handbills unless the name and address of the

---

[32] 308 U.S. 147 (1939) [hereinafter *Schneider*].

[33] *Id.* at 162.

[34] *Id.* The Court noted that "[t]here are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets." *Id.*

[35] *Schneider* at 160-64 The Court stated:

> Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion.

*Id.* at 160.

[36] 347 U.S. 612 (1954).

[37] *Id.* at 626.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 625.

author or distributor was printed thereon.[41] Los Angeles argued that the statute was intended to identify the authors of, and thereby prevent, fraud, false advertising, and libel.[42]

The *Talley* Court discussed the importance of anonymity in encouraging the free flow of ideas and speech.[43] The Court listed several anonymous and pseudonymous publications which had contributed to American politics,[44] and noted that "[i]t is plain that anonymity has sometimes been used for the most constructive purposes."[45] The Court then overturned the statute, holding that "[t]here are times and circumstances when States may not compel groups engaged in the dissemination of ideas to be publicly identified. . . . [I]dentification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. This broad Los Angeles ordinance is . . . void on its face."[46] The Court had carved out a free-speech interest in anonymity for the first time.

The anonymity issue was revisited in *Buckley v. Valeo*,[47] a 1976 case which challenged the constitutionality of the Federal Election Campaign Act of 1971.[48] The challenge to the Act which involved anonymity was its requirement

---

[41] The statute challenged, § 28.06 of the Municipal Code of Los Angeles, read:

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

*Talley*, 362 U.S. at 60-61. Additionally, the Code, in § 28.00, defined hand-bill as:

> 'HAND-BILL' shall mean any hand-bill, dodger, commercial advertising circular, folder, booklet, letter, card, pamphlet, sheet, poster, sticker, banner, notice or other written, printed or painted matter calculated to attract attention of the public.

*Id.* at 63, footnote 4.

[42] *Id.* at 64.

[43] *Id.* The Court noted:

> 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.

*Id.*

[44] *Talley* at 65 (listing the letters of Junius and the Federalist Papers).

[45] *Id.* at 64-66.

[46] *Id.* at 65.

[47] 424 U.S. 1 (1976) [hereinafter *Buckley*].

[48] 86 Stat. 3, as amended by 88 Stat. 1263.

that candidates disclose the identity of any contributor who gave more than $100 to their campaign. The *Buckley* Court examined the Act under strict scrutiny, which it found necessary because "compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights."[49]

The Court discussed the forced disclosure issue as a serious infringement on free speech:

> We are not unmindful that the damage done by disclosure to the associational interests of the minor parties and their members and to supporters of independents could be significant. These movements are less likely to have a sound financial base and thus are more vulnerable to falloffs in contributions. In some instances fears of reprisal may deter contributions to the point where the movement cannot survive. The public interest also suffers if that result comes to pass, for there is a consequent reduction in the free circulation of ideas both within and without the political arena.[50]

However, the *Buckley* Court found the Act justified by compelling governmental interests. The Court divided the governmental interests into three types: providing information to the electorate about a candidate's funding; deterrence of corruption and the appearance thereof; and the necessity of disclosure as a means of investigating and prosecuting violations of contribution laws. Finding that these interests were sufficiently compelling to justify the disclosures mandated by the Act, and sufficiently narrowly tailored to meet them, the Court upheld the Act's disclosure provisions.[51]

The Court admitted, in rejecting a suggested "minor-party exemption," that "[t]here could well be a case . . . where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act's requirements cannot be constitutionally applied."[52]

These cases failed to present a coherent picture of the status of anonymity under the First Amendment. *Lovell* and *Talley* made it clear that forcing disclosure of the identity of the speaker was an infringement on free speech, and *Lewis Publishing* even held that such identification could not be forced without an attendant unnecessary benefit, but both *Buckley* and *Harriss* seemed to give greater weight to the government's interest in ensuring an election

---

[49] *Buckley*, 424 U.S. at 66.

[50] *Id.* at 71 (citations omitted).

[51] *Id.* at 84.

[52] *Id.* at 71. That case came before the Court some five years later - Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982) [hereinafter *Brown*]. The Socialist Workers Party was able to prove a history of harassment and hostility, and the Court upheld a District Court decision which exempted the Party from an Ohio disclosure law similar to the Act's.

process free from corruption or fraud.[53] Although the Court's *Lewis Publishing* and *Talley* decisions seemed to prevent governments from requiring identification without some justification, the Court's reasoning in these cases gave few clues as to what non-election-related interests would be sufficient to support a disclosure requirement which was not attached to a government-granted privilege. This unstable situation still existed almost twenty years later when *McIntyre* reached the Court.

## III. MCINTYRE v. OHIO ELECTIONS COMM'N

### *A. Background*

On April 27, 1988, Margaret McIntyre distributed leaflets to persons attending a public meeting at the Blendon Middle School in Westerville, Ohio.[54] The leaflets, created on her home computer, conveyed her negative stance on an upcoming school tax levy which was to be discussed at the meeting.[55] Some of the leaflets identified her as the author; others merely purported to express the views of "CONCERNED PARENTS AND TAX PAYERS."[56]

The levy was defeated twice, but finally passed in November 1988.[57] In April 1989, an official of the school district filed a complaint with the Ohio Elections Commission charging Mrs. McIntyre with violating section 3599.09(A) of the Ohio Revised Code, which requires "the person who issues, makes, or is responsible [for]" any publication "which is designed . . . to influence the voters

---

[53] This proved to be the source of Justice Scalia's dissent in *McIntyre* itself. *See infra* text accompanying notes 82-86.

[54] *McIntyre*, 115 S. Ct. at 1514.

[55] *Id.* at 1514 n.2. The leaflet read:

VOTE NO
ISSUE 19 SCHOOL TAX LEVY
Last election Westerville Schools, asked us to vote yes for new buildings and expansions programs. We gave these what they asked. We knew there was crowded conditions and new growth in the district.
Now we find out there is a 4 million dollar deficit - WHY?
We are told the 3 middle schools must be split because of overcrowding, and yet we are told that 3 schools are being closed - WHY?
A magnet school is not a full operating school, but a specials school.
Residents were asked to work on a 20 member commission to help formulate the new boundaries. For 4 weeks they worked long and hard and came up with a very workable plan. Their plan was totally disregarded - WHY?
WASTE of tax payers dollars must be stopped. Our children's education and welfare must come first. WASTE CAN NO LONGER BE TOLERATED.
PLEASE VOTE NO
ISSUE 19
THANK YOU.

[56] *Id.* at 1514.

[57] *Id.*

in any election" to print their name and address "in a conspicuous place" thereon.

The Commission found Mrs. McIntyre in violation of the statute and fined her $100.[58] The Franklin County Court of Common Pleas reversed the commission's decision, finding the statute unconstitutional as applied to Mrs. McIntyre, since she had not "misled the public" or "acted in a surreptitious manner."[59] The Ohio Court of Appeals reversed again, with a majority of the court upholding the statute on *stare decisis* grounds because of a 1922 challenge to the statute's predecessor.[60] Even though the Ohio Supreme Court had decided the previous challenge only on the basis of the Ohio Constitution's Free Speech Clause and had not considered the Federal Constitution, the Appeals Court refused to overturn it.[61]

The Ohio Supreme Court affirmed the Appeals Court, reconsidering the 1922 case, and finding that the "minor requirement" of identification "neither impacts the content of [a speaker's] message nor significantly burdens their ability to have it disseminated."[62] The court continued:

> This burden is more than counterbalanced by the state interest in providing the voters to whom the message is directed with a mechanism by which they may better evaluate its validity. Moreover, the law serves to identify those who engage in fraud, libel or false advertising. Not only are such interests sufficient to overcome the minor burden placed upon such persons, these interests were specifically acknowledged in [*First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)] to be regulations of the sort which survive constitutional scrutiny.[63]

The U.S. Supreme Court disagreed. In a majority opinion authored by Justice Stevens, the Court determined that such laws should be subjected to strict scrutiny, and that Ohio's law failed to survive due to its overbreadth.

### *B. The Opinion*

The Court's opinion stressed the value of anonymous speech and publishing in historical America, detailing many authors, both literary and political, who chose to exercise their "freedom to publish anonymously."[64] The Court noted the multiplicity of reasons for an author's choice not to reveal his or her name:

---

[58] *McIntyre*, 115 S. Ct. at 1514.

[59] *Id.* at 1515.

[60] *Id.* The previous challenge was State v. Babst, 104 Ohio St. 167 (1922).

[61] *Id. See Babst, supra* note 60, 104 Ohio St. at 168.

[62] *McIntyre*, 115 S. Ct. at 1515 (*quoting* McIntyre v. Ohio Elections Comm'n, 67 Ohio St. 3d 391 at 396 (1993)).

[63] *Id.*

[64] *Id.* at 1516.

fear of governmental, personal, or reputational retribution, fear of social ostracism, desire for privacy, or using anonymity as a rhetorical tactic.[65] The Court also acknowledged the political tradition of anonymity, the secret ballot, calling it a "respected tradition of anonymity" and worthy of protection.[66] The Court was clear in its recognition that anonymous speech has often been socially useful.

The Court rejected an intermediate standard of scrutiny, which the Ohio Supreme Court had applied pursuant to the analytical method stated in *Anderson v. Celebrezze*.[67] The Court applied a standard of strict scrutiny,[68] stating that "[o]ur precedents . . . make abundantly clear that the Ohio Supreme Court applied a significantly more lenient standard than is appropriate in a case of this kind."[69] Even election-related speech is speech, said the Court, and laws regulating it must be scrutinized strictly.

Ohio asserted that two governmental interests justified its law: providing the electorate with relevant information, and preventing fraudulent and libelous statements.[70] In summarily rejecting the "informed electorate" interest,

---

[65] *Id.* at 1516-17. On the use of anonymity as a rhetorical tactic, the Court noted:

> Anonymity . . . provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of political rhetoric, where 'the identity of the speaker is an important component of many attempts to persuade,' the most effective advocates have sometimes opted for anonymity.

*Id.* at 1517 (*quoting* City of Ladue v. Gilleo, 114 S. Ct. 2038 at 2046 (1994)).

[66] *McIntyre* at 1517.

[67] 460 U.S. 780 (1983).

[68] *McIntyre*, 115 S. Ct. at 1518. The Court stated:

> [T]he category of speech regulated by the Ohio statute occupies the core of the protection afforded by the First Amendment: "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 in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Although First Amendment protections are not confined to 'the exposition of ideas,' 'there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, . . . of course including discussions of candidates . . . .' This no more than reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation."

*Id.* at 1518-19 (*quoting* Buckley v. Valeo, 424 U.S. 1 at 14-15 (1976)) (citations omitted).

[69] *Id.* at 1519.

[70] *Id.*

the Court noted that "the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude."[71]

The Court gave serious thought, however, to the state's interest in preventing fraud and libel.[72] The Court, however, found that Ohio not only had other statutes geared toward their prevention,[73] but also had failed to use the law in question, either as contemplated or as applied, to actually prevent fraud or libel.[74] Since Ohio was not employing its law to fight fraud or libel, that rationale was not justified.[75] Therefore, under *McIntyre*, a governmental

---

[71] Additionally, the Court stated that:

> The 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.

*McIntyre* at 1519. The Court quoted, in a footnote, from a New York case invalidating a law similar to Ohio's:

> 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.' 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 its 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 'responsible', what is valuable, and what is truth.

*Id.* at 1519 n.11 (*quoting* New York v. Duryea, 351 N.Y.S.2d 978, at 996 (1974)).

[72] *Id.* at 1520 ("We agree with Ohio's submission that this interest carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large.").

[73] *Id.* at 1520-21 ("[Ohio]'s Election Code includes detailed and specific prohibitions against making or disseminating false statements during political campaigns. These regulations apply both to candidate elections and to issue-driven ballot measures. Thus, Ohio's prohibition of anonymous leaflets plainly is not its principal weapon against fraud.") (citations omitted).

[74] *McIntyre* at 1522. The Court stated:

> [Ohio's law] applies no matter what the character or strength of the author's interest in anonymity. Moreover, as this case . . . demonstrates, the absence of the author's name on a document does not necessarily protect either that person or a distributor of a forbidden document from being held responsible for compliance with the election code. Nor has the State explained why it can more easily enforce the direct bans on [fraud] against anonymous authors and distributors than against wrongdoers who might use false names and addresses in an attempt to avoid detection.

*Id.*

[75] The Court also distinguished the requirements upheld in *Buckley*:

> Though [identification to the Federal Election Commission of the amount and use of money expended in support of a candidate]

identification requirement must directly address the problem which it is designed to combat, and cannot simply serve as an aid to other statutes more directly designed to punish wrongdoing.

While conceding that a more narrowly tailored statute might well survive strict scrutiny based on the legitimate interest of the State in preventing fraud relating to elections,[76] the Court found the Ohio law fatally overbroad.[77] The Court ended its majority opinion with the broad statement quoted at the opening of this article,[78] showing its commitment to protecting anonymous speech as an integral part of the free speech tradition.

Justice Thomas filed a lengthy separate concurrence, agreeing with the majority's result, but not its reasoning.[79] Thomas, looking to the original intentions of the Framers, found several strong signs that they embraced anonymous pamphleteering within their conception of freedom of the press. He took note of precedents such as the 1735 trial of Peter Zenger and a transcript of the 1779 Continental Congress, as well as a record of New Jersey Governor William Livingston's defense of anonymous publishing in 1784.[80] He also

---

> undeniably impedes protected First Amendment activity, the intrusion is a far cry from compelled self-identification on all election-related writings. . . . [E]ven though money may "talk," its speech is less specific, less personal, and less provocative than a handbill and as a result, when money supports an unpopular viewpoint it is less likely to precipitate retaliation.

*McIntyre* at 1523.

[76] *Id.* at 1522 ("We recognize that a State's enforcement interest might justify a more limited identification requirement . . . ."); *Id.* at 1524 ("[A]lthough Buckley may permit a more narrowly drawn statute, it surely is not authority for upholding Ohio's open-ended provision."). In her concurrence, Justice Ginsberg also stated: "We do not . . . hold that the State may not, in other, larger circumstances, require the speaker to disclose its interest by disclosing its identity. . . . [T]he Court recognizes that a State's interest in protecting an election process 'might justify a more limited identification requirement' . . . ." *Id.*

[77] *McIntyre* at 1524. In particular, the Court stated that:

> Ohio has not shown that its interest in preventing the misuse of anonymous election-related speech justifies a prohibition of all uses of that speech. The State may, and does, punish fraud directly. But it cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented.

*Id.*

[78] *See* text accompanying note 1, *supra*.

[79] *McIntyre*, 115 S. Ct. at 1530 ("I cannot join the majority's analysis because it deviates from our settled approach to interpreting the Constitution and because it superimposes its modern theories concerning expression upon the constitutional text.") (Thomas, J., dissenting).

[80] *Id.* at 1525-27. *See also* Justice Scalia's dissent, stating that "[t]he practice of anonymous electioneering may have been less general in 1868, when the Fourteenth

recounted debates surrounding the Federalists' early attempt to require anonymous authors published in newspapers to leave their name with the newspaper publisher as representative of the Framers' ideas on anonymity protection.[81]

A dissenting opinion, authored by Justice Scalia and joined by Chief Justice Rehnquist, took issue with Thomas' recounting and interpretation of the historical record,[82] arguing that there is insufficient evidence that anonymity was regarded as a constitutional right by the Framers and their contemporaries.[83] Making the point that general use of anonymous speech does not necessarily prove its status as a constitutional right,[84] Scalia distinguished Ohio's law in *McIntyre* as a reasonable regulation of the electoral process.[85]

Scalia presented *McIntyre* as a decision between the right to free speech and the government's protection of the electoral process. He found precedent for the proposition that protection of the electoral process is sufficiently important justification for the infringement of the right to free speech, such as in *Buckley* and *Harriss*, and noted that a right to anonymous speech has never before been declared by the Court.[86]

### *C. Interpretation*

The Court's decision leaves many questions unanswered. Much import was given to the political, individual nature of Mrs. McIntyre's speech. The question remains how the Court would decide a future case where the anonymous speech at issue was not political, or where it was expressed by an organizational or corporate actor.

---

Amendment was adopted, but at least as late as 1837 it was respectable enough to be engaged in by Abraham Lincoln." *Id.* at 1531.

[81] A massive groundswell of public opinion, under the prodding of the Anti-Federalists, quashed the Federalists' attempt within a few short days. *Id.* at 1527-29.

[82] *McIntyre* at 1532, noting that "The concurrence recounts . . . examples of defense of anonymity in the name of 'freedom of the press,' but not a single one involves the context of restrictions imposed in connection with a free, democratic election . . . ." *Id.*

[83] *Id.* at 1531.

[84] *Id.* at 1531.

[85] *Id.* at 1534. Justice Scalia argued: "[R]elevant to our decision is 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." *McIntyre*, 115 S. Ct. at 1534.

[86] *Id.* at 1535. Justice Scalia noted that "[t]he existence of a generalized right of anonymity in speech was rejected by this Court in [*Lewis Publishing*] . . . ." *Id.*

1. Allowing the 'Value' of Speech to Determine its Protection

American free-speech jurisprudence has long recognized that speech is protected according to the valuation of its content by the government.[87] Following Alexander Meiklejohn's recognition of the activist, Madisonian motivations behind the passage of the First Amendment, courts have gone to greater lengths to protect political speech than any other kind.[88] The Court has also expanded its protection of commercial speech in recent years, finding it worthy of First Amendment protection.[89]

Categories of speech which are not protected based on their content include "fighting words,"[90] defamatory speech,[91] and obscenity.[92] These categories have been the subject of heated argument,[93] especially in the Networld.[94] It is doubtful that this valuation scheme will change in the near future. The Court has amassed a huge body of precedent which rests on the tiered foundation, and has no reason to dismiss it. However, the Court's pre-existing judgments about the valuation of the content of speech are irrelevant to the protection of anonymity in general since *McIntyre* requires that any regulation on anonymity not be content-based.

---

[87] *See, generally,* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM of FREE SPEECH (1993).

[88] *See, generally,* Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1759-65 (1995) (contrasting modern "marketplace" theory of free speech with "Madisonian" theory which takes an activist stance toward promoting political discourse).

[89] *See* Daniel Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372 (1979); Donald Lively, *The Supreme Court and Commercial Speech: New Words with an Old Message*, 72 MINN. L. REV. 289 (1987).

[90] *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 12-18 (2d 1988); KENT GREENAWALT, FIGHTING WORDS 99-123 (1995).

[91] *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250 (1952); Marc Franklin, *Constitutional Libel Law: The Role of Content*, 34 U.C.L.A. L. REV. 1657 (1987).

[92] *See Miller*; TRIBE, *supra* note 90, § 12-16, 12-17 (1988).

[93] *See, e.g.*, in the "obscenity" area alone, Frederick Schauer, *Speech and "Speech" Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1979); CATHARINE MACKINNON, ONLY WORDS (1994); NADINE STROSSEN, DEFENDING PORNOGRAPHY (1994).

[94] The "obscenity" problem has been thoroughly commentated on, after the failure of the modern Court's "community standards" test to protect a cyberspace which was declared only "indecent" by its own geographical community from prosecution under the community standards of another geographical city entirely. *See* Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197 at 203-16; Branscomb, *supra* note 3, at 1652-54; Eckenwiler, *supra* note 2; Johnson, *supra* note 12.

### 2. Speech by Corporate Actors

The Court has also historically given more protection to individuals' speech than that of corporate or organizational speakers.[95] This historical pattern has been recognized by at least one commentator as an outmoded heritage from a less technological age,[96] but it exists nonetheless. Traditional paradigms of speech, however, fail to address new and different technologies. The individual-empowering nature of the Networld itself blurs the distinction between individual and corporate speech. In most cyberspaces, it is difficult, if not impossible, to tell whether a conglomerate or individual is speaking, or whether their speech has been subsidized by a conglomerate. This difficulty will increase as the Networld becomes more and more commercialized and power is redistributed between authors and advertisers.

Even without intentional anonymity, authorship is also difficult to determine in many cyberspaces. With hyperlink technology,[97] where a reader is quickly and easily routed to multiple sources of information, housed at geographically diverse computers, it quickly becomes difficult to distinguish the "author" of any particular material.[98]

It is likely that the Court will be forced to redefine its definitions of commercial speech and specific authorship in the Networld. The distributed nature of digital information is also problematic here, since difficulty in locating a piece of information geographically may contribute to difficulty in establishing authorship.

### 3. Conclusion

*McIntyre* represents a strong statement in favor of anonymous speech as constitutionally protected speech. *McIntyre* requires courts to subject anonymous-speech regulation to the same strict scrutiny they currently apply to any other speech-related right. Government regulation which requires disclosure of identity as a precondition of speech will only be upheld if it is closely related to the enforcement of a compelling government interest.

*McIntyre* does not require the Court to alter the valuation scheme it uses to determine the level of protection which is accorded to speech. However, in the Networld, the distinction between corporate and personal speech is often

---

[95] *See, e.g.*, Valentine v. Chrestensen, 316 U.S. 52 (1942); Ronald D. Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. L. F. 1080.

[96] *See* Owen Fiss, *In Search of a New Paradigm*, 104 YALE L.J. 1613 (1995).

[97] Hyperlink technology refers to a method of information organization whereby information may be (or, in some cases, must be) accessed through non-linear relationships in order to facilitate interactivity. A hyperlink is drawn between two pieces of information, and they are accessible from each other at the touch of a key or the click of a mouse. *See*, GILSTER, *supra* note 13, at 560; BENNETT FALK, THE INTERNET ROADMAP, at 55 (1994).

[98] For example, should author A, who places a hyperlink to author B's site be made somehow responsible for the contents of B's site?

blurred and sometimes completely nonexistent. Decisions which seek to protect personal speech differently from corporate speech will be difficult to apply in the Networld.

## IV. RAMIFICATIONS OF MCINTYRE

*McIntyre* refines the Court's stance on anonymous speech, finding it socially valuable and worthy of constitutional protection. Despite the individual and political nature of Mrs. McIntyre's speech, *McIntyre* is a strong statement in favor of protecting all anonymous speech. This section of the Note will explore potential methods of governmental regulation of anonymity in the Networld and *McIntyre's* impact on them.

Two types of anonymity regulation are readily foreseeable for the purposes of this Note. The government, at whatever level, from federal to municipal, could require identification as a precondition for speech in the Networld, or it could require identification as a precondition for access to the Networld.

### *A. Requiring Identification as a Precondition of Speech*

Requiring identification as a precondition of speech, such as outlawing the transmission of anonymous messages from a particular access provider, from a particular class of access providers, in a particular network, in a particular cyberspace, in a particular class of cyberspaces, or throughout the Networld, seems to violate *McIntyre* entirely. The *McIntyre* decision itself stands for the proposition that the government cannot require identification as a precondition to entering the marketplace of ideas, even when risks of fraud and corruption of the electoral process are present. An identification requirement such as this is a direct regulation of 'pure' speech and is clearly unconstitutional under *Talley* and *McIntyre*. Situations may exist in which such a regulation might withstand strict judicial scrutiny, but such situations would necessarily implicate other overriding constitutional rights, such as voting rights or property rights.[99]

Additionally, such regulation would be impractical. The United States, as stated above, only has jurisdiction over a small segment of the Networld. Those who wished to anonymize their speech could simply use a foreign computer to remove their identities, and preventing such messages from being sent or reaching their destinations would be extremely difficult technologically.

### *B. Requiring Identification as a Precondition for Access*

The effect of *McIntyre* on governmental requirements of identification as a precondition for access to the Networld is less clear, given that access is not a

---

[99] *See, e.g.*, Burson v. Freeman, 504 U.S. 191 (1992) (upholding a ban on speech only because voting rights required protection and ban narrowly tailored in time and place); Society for Krishna Consciousness v. Lee, 505 U.S. 672 (1992) (upholding ban on handbill distribution only because reasonable regulation of conduct in a non-public forum).

right protected from government regulation.[100] This precondition splits into a further three categories: identification requirements as a precondition for access to government-subsidized or government-operated access providers; such requirements as a precondition for access through private providers; and the validity of indirect disclosure requirements, such as those which require a private access provider to disclose the identity of its subscribers once improper conduct or speech has been identified. Each of these methods for anonymity regulation has its advantages and risks.

### 1. Identification as a Precondition of Access Through a Government-Sponsored Access Provider

Prior to *McIntyre*, it would seem supportable that governments could reasonably require identification in order to provide direct access to the Networld through government-operated access providers. Such access is not a right,[101] and a governmental demand for identification would seem to be a reasonable requirement under *Lewis Publishing*.[102] Other common entitlements and public services, such as voting rights and library borrowing privileges, require such identification and have not been constitutionally challenged.

However, *McIntyre* throws this into doubt. As Justice Scalia pointed out in his dissent,[103] the Court's protection of anonymous speech is not clearly delineated by *McIntyre* itself. It seems that governmental agencies which

---

[100] Access to the Networld has been likened to access to the public road system more than once. This argument finds one statement in the words of Professor Arthur R. Miller:

> Society, for example, requires that automobiles have license plates to travel on a public road. This modest deprivation of anonymity is designed to promote accountability. Those who insist on anonymity in placing telephone calls are, in essence, saying they do not want to be accountable on the communications network, which is quite analogous to driving without a license plate.

*Hearing on S. 2030 Before the Subcomm. On Technology and the Law of the Senate Comm. On the Judiciary*, 101st Cong., 2d Sess. 266 (1990) (statement of Professor Arthur R. Miller); *also quoted in* Branscomb, *supra* note 3, at 1643, n.10 (Branscomb notes that "Real highways, however, do not carry the same First Amendment vulnerabilities that electronic superhighways do." *Id.*).

[101] At least, access is not yet a right. Current political reality and the prohibitive cost of such an entitlement makes it unlikely that this entitlement will be granted in the near future. In any case, such developments are beyond the scope of this Note.

[102] An analogy to *Lewis Publishing* is necessarily incomplete, however, since an anonymous speaker who wished access to the mail system still had the option of fourth-class postage in *Lewis Publishing*, while a speaker wishing access to the Networld has no other government-sponsored alternative if an identification requirement is imposed. It is possible that a limited service may be granted to anonymous users (for instance, terminals in public libraries which can access information, but may not post messages or otherwise publish information).

[103] *McIntyre* at 1535. Justice Scalia asked: "Must a government periodical that has a 'letters to the editor' column disavow the policy that most newspapers have against the publication of anonymous letters?" *Id.*

provide a forum for speech may not discriminate against anonymous speakers, and this would extend to Networld access. Public libraries or city-sponsored "Freenets"[104] would be required to grant access to anonymous users under the same terms as named users.[105] This consequence of *McIntyre* does not seem to be fully understood even by the Court,[106] and it will be left for others, presumably the lower courts, to determine the rights granted to speakers under *McIntyre*.

Additionally, it is clear that denying access to users based on probable content of their speech would violate First Amendment principles, as would discontinuing current users for the content of their speech.[107] Such denials may also violate equal protection principles if the denials show an intent to exclude a particular class of persons.[108] This content-based limitation would seem to grant users who obtain access through a government-sponsored access provider the right to "anonymize" their speech through the use of various technologies, as an extension of their right to determine the content of their speech.

How is such user "anonymizing" accomplished? The most common and easily accessible form of identity concealment in cyberspace is the use of anonymous remailing.[109] This technology, which "anonymizes" electronic mail, uses an independent 'middleman' computer to strip away the sender's identity and return address before forwarding the message to its intended address.[110] Some remailer computers keep track of the sender's address so that replies can be forwarded in the opposite direction, and some remailers purposely delete all sender-related information so that the identity of the sender is impossible to trace once the message has been forwarded.[111]

---

[104]Many large cities sponsor or allow public access through such Freenet programs, which provide free or low-cost access to city residents. *See*, GILSTER, *supra* note 13, at 559.

[105]The limited access suggested in note 102, *supra*, would be insufficient under *McIntyre* because it would impermissibly curtail access of anonymous speakers as compared with identified speakers.

[106]It is possible that the Court will interpret *McIntyre* narrowly in future decisions, allowing other anonymity regulations to withstand strict scrutiny. This would be required if the holding of *McIntyre* were misconstrued by the lower courts. However, this questions remains for a future Note.

[107]Content-based regulation of speech was found unconstitutional in, *e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.").

[108]*See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 14.4 (5th ed. 1995); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[109]*See* Andre Bacard, *Frequently Asked Questions About Anonymous Remailers* (last modified November 15, 1996), <http://www.well.com/user/abacard/remail.html>.

[110]*Id.*

[111]A list of currently available remailers is Raph Levien, Remailer List (visited January 21, 1997), <http://www.cs.berkeley.edu/~raph/remailer-list.html>.

With such technology, the sender's access provider does not usually provide, or even know about, its subscribers' use of anonymizing technology; it is external and separate from the sender's access to the Networld.

Would a governmental access provider be engaging in content-based speech discrimination if it refused to send such messages? This is a difficult issue to predict, due to the relative scarcity of government-subsidized access providers and the fact that the use of data encryption, anonymization, or data compression as an aspect of speech has not yet made its way into the law reviews, much less the courts.[112]

Clearly, though, a governmental access provider which engages in any currently identifiable form of content-based discrimination would be violating the First Amendment, and a governmental access provider may not, under *McIntyre*, require identification as a precondition for use of government facilities to gain access to the Networld.

### 2. Requirement of Identification as a Precondition to Access Through a Private Access Provider

On a related topic, could the government require identification or licensing as a precondition to access through a private access provider? This approach would not only leave open the possibility of online "anonymizing",[113] but it would also allow governmental regulation of access to the 'marketplace of ideas' in a particular medium. This was the very reason that the Court struck down the city ordinance in *Griffin*.[114] Additionally, such a system would require equal protection scrutiny, to ensure non-discriminatory conduct by the government in granting licenses.

Given the free-speech rights implicated by government regulation of identity and the *McIntyre* decision itself, government regulations requiring identification in connection with speech are to be subjected to strict scrutiny. The question remains what, if any, state interests would support such a regulation. The interests argued in *McIntyre*, such as prevention of fraud and libel or increasing information to the recipient or recipients, were rejected as insufficient by the Court. However, if identification requirements are the only way to enforce such a state interest in the Networld, the Court might find such requirements sufficiently narrowly tailored to withstand strict scrutiny.

Luckily for libertarians, it is unlikely that identification requirements will be necessary to enforce law in the Networld. Just as in *McIntyre*, other methods exist to punish wrongdoers. Civil remedies are available,[115] as well as a range

---

[112]This issue is one which begs for scholarly writing, but is beyond the scope of this Note.

[113]*See supra* text accompanying notes 109-111.

[114]*See supra* text accompanying notes 26-31.

[115]*See, e.g.*, Krantz v. Air Line Pilots Association, Int'l, 245 Va. 202, 427 S.E.2d 326 (1993) [hereinafter *Krantz*] (allowing action against pilots' union for tortious interference

of criminal statutes.[116] These tools serve many of the same functions as Ohio's anti-fraud election laws, and are more narrowly tailored to combat the harms at issue.[117]

It may be that a Government could analogize an identification requirement in the Networld to an automobile licensing requirement,[118] but such an analogy would not hold, as automobiles are not instruments of "pure" speech and are subject to much greater regulation generally.[119] It is unlikely that this rationale would be compelling enough to require any person who wished to speak in the Networld to register their identity before gaining access at all.[120]

### 3. Indirect Requirement of Identification as a Precondition to Access: Recordkeeping and Warrant Requirements

It is already well-established in practice that an access provider is the master of its subscribers. The default relationship between access provider and subscriber is at will, with each party to the relationship, access provider and subscriber, able to terminate the service for any or no reason. Additionally, most of the current "self-regulation" of which Netizens[121] are so proud takes the form of requests by users to an access provider that a particular subscriber be removed or reprimanded.[122]

Thus, it seems that access providers, not being state actors, have the freedom to terminate or restrict their subscribers without implicating First Amendment rights at all, since the subscriber may always gain access to the Networld

---

with contract after "blacklist" was posted in union's Bulletin Board Service (BBS) cyberspace).

116 *See generally*, Eckenwiler, *supra* note 2. (citing recent uses of, *inter alia*, federal copyright-infringement law, federal law prohibiting interstate transmission of obscenity, and the Electronic Communications Privacy Act of 1986).

117 It has been suggested that access providers "who choose to provide an anonymous service should be held responsible for abusive messages posted on the system, since the real abusers would not be identifiable except through the entrepreneur providing this service." Branscomb, *supra* note 3, at 1661, n.96.

118 *See* note 100, *supra*.

119 *See, e.g.*, O.R.C. § 4549.10 (providing for penalty for operating an automobile on a public road without license plates). This law, if it implicated a genuine free-speech interest, would be unconstitutional as a requirement of speech. *See* Wooley v. Maynard, 430 U.S. 705 (1977) (overturning New Hampshire statute requiring all state license plates to bear the legend "Live Free or Die").

120 As a practical matter, this approach would fail to regulate anonymity entirely, since it leaves open the possibility of online "anonymizing" once access has been gained. *See supra* text accompanying notes 109-111.

121 A "Netizen" is a created term to refer to citizens of the Networld. It usually refers to users with experience and knowledge about the customs and etiquette of Networld conduct and who share their knowledge with others.

122 *See* Long, *supra* note 7, at 1203, n.142 (detailing one newsgroup's response to inappropriate or abusive postings).

through another access provider. This method of control over subscriber conduct seems favored by Netizens, as well as by libertarians.[123]

Still, it is not clear to what extent anonymity rights are protected in this context. If a subscriber has misbehaved fairly harmlessly, other users may not even care about his or her true identity, as long as his or her offensive conduct stops. An access provider which fails to adequately reprimand or control its subscribers becomes the target of scorn or disfavor, but rarely is subject to any tangible penalty.

More serious harms, though, such as libel, solicitation or execution of criminal activity, obscenity, copyright infringement, or national security breach may require more accountability by subscribers. Access providers may be asked to divulge the identity of a subscriber through any of several legal proceedings.[124] If an access provider wishes to protect the identity of its subscriber, on what grounds may it avoid contempt liability if it refuses to divulge its subscriber's identity?

Various legal theories exist to protect such sources, with the bulk resting on two theories: freedom to associate and its attendant rights, or freedom of the press and its attendant rights. The grounds for protecting subscribers' identities from disclosure will be discussed in turn.

### *C. Freedom of Association*

Freedom of association has been used to protect anonymity in several noted U.S. Supreme Court cases. Perhaps the most famous is *NAACP v. Alabama ex rel. Patterson*,[125] in which the Court held that forcing the NAACP to divulge its membership lists was "likely to affect adversely the ability of [the NAACP] to pursue their collective effort to foster beliefs which they admittedly have the right to advocate."[126] The Court also exempted the Socialist Workers' Party from disclosing its membership lists on similar grounds in *Brown v. Socialist Workers '74 Campaign Committee*.[127]

The freedom of association doctrine applies to the Networld because of its nature in encouraging virtual association. There has been some theoretical argument that every action in the Networld, from opening one's e-mail to

---

[123] *See* Johnson, *supra* note 12, stating: "Moreover, the new 'netizens' would prefer to regulate their own affairs and resent intrusions by regulators who do not fully understand or share their enthusiasm for this new medium." *Id. See also* Branscomb, *supra* note 3, at 1665-70.

[124] Such proceedings include civil discovery and criminal grand juries on both the federal and state levels, as well as search warrants. One commentator has urged that warrants requiring an access provider to divulge the identity of a subscriber be issued according to the already-existing standards of the federal Title III wiretap act, 18 U.S.C. 2510 et seq. *See* Long, *supra* note 7, at 1205-07.

[125] 357 U.S. 449 (1958) [hereinafter *NAACP*].

[126] *Id.* at 462-63.

[127] *See* note 52, *supra*.

entering a chatroom or newsgroup, creates some form of cyberspace, and that such spaces are forums jointly created by their members for purposes of association.[128] A private chatroom where particular persons meet or a newsgroup in which particular topics are discussed is a metaphysical 'space' created just for that purpose.[129] Surely, if the government licenses access to that 'space', it is restricting freedom of association.[130]

This theory is perhaps the most logical one for examining the status of assembly rights, since it allows modern courts to use an existing body of precedent in a new technological situation.[131] This resolves, at least in this area, one of the major stumbling blocks in evolving a Networld jurisprudence, since "new relationships strain legal principles and categories that currently direct judicial power over individual action, either civilly or criminally."[132]

A requirement by the government that persons register their identities before entering the Networld is clearly one which abridges the right to peaceable assembly. Like the statutes at issue in *Thomas v. Collins*[133] and *NAACP v. Alabama*, a statute requiring registration would make potential subscribers less likely to join a particular access provider, based on the chance of eventual disclosure of their membership.

This infringement on freedom of association has only been used to overturn registration laws, however, when a history of harassment and social hostility is proven.[134] Without such a showing, therefore, an access provider may be

---

[128] *See* Johnson, *supra* note 12.

[129] *See* M. Ethan Katsh, *Rights, Camera, Action: Cyberspatial Settings and the First Amendment*, 104 YALE L.J. 1681 (1995) (discussing the new challenges to legal doctrine presented by the shift from a linear, textual communication technology to a nonlinear, interactive, self-created communication technology).

[130] This theory poses some interesting equal-protection problems. Unlike public schools, for instance, conversational cyberspaces are interchangeable and infinitely replicable. State actors who provide exclusive cyberspaces for gender or ethnic groups who wish a forum to discuss issues particular to their group may be violating equal-protection principles by attempting to apply the "separate-but-equal" doctrine. *See* Branscomb, *supra* note 3, at 1654-55 (discussing male-only cyberspace provided to students at the Santa Rosa Junior College as a counterpart to previously-established female-only cyberspace); David J. Goldstone, *The Public Forum Doctrine in the Age of the Information Superhighway*, 46 HASTINGS L.J. 335 (1995).

[131] This has been successfully accomplished in some areas of law without significant difficulty. *See, e.g., Krantz.*

[132] Byassee, *supra* note 94, at 199.

[133] 323 U.S. 516 (1945) (striking down state law requiring registration of labor organizers on the grounds that it unduly restricted freedom of association).

[134] *See NAACP*, 357 U.S. at 462. The Court stated that "Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.*; *Brown*, 459 U.S. at 98-99, stating "The District Court found 'substantial evidence of

subject to both criminal contempt (if the government seeks the subscriber's identity in a grand jury proceeding) and civil contempt (if the identity is sought in connection with a civil suit) for refusing to disclose their subscriber's identity.

Also, the right to peaceable association does not protect access providers from direct liability if they participate in criminal or tortious activity or know of its presence in their cyberspace and allow it to continue. Under existing law, a system operator who tacitly allows such activity may be subject to liability herself, either as an aider and abettor, or as a co-participant.[135]

### *D. Freedom of the Press*

Freedom of the press has been used to protect speech more strongly than that of association. For instance, the Court's famous case of *New York Times Co. v. Sullivan*[136] required public figures who were allegedly libelled to prove that the libelous statement was made with "actual malice."[137] This allowed speech which was false and harmful to enjoy protection under the First Amendment. Additionally, anonymity protection has been given to journalistic sources in order to protect the freedom of the press.[138] In a line of cases beginning with *Branzburg v. Hayes*,[139] the Court recognized that requiring journalists to reveal their sources in all situations would act "to the detriment of the free flow of information protected by the First Amendment."[140]

However, the Court's protection of journalistic sources only applies where "legitimate First Amendment interests require protection."[141] This indicates that journalists (or access providers) will not be able to protect the anonymity of their sources in cases of "actual malice" libel or criminal activity, as these do not further "legitimate First Amendment interests."

Therefore, an access provider who attempts to maintain a subscriber's anonymity interest in a criminal proceeding or civil suit must show that their subscriber's speech is protected by a First Amendment interest, or face contempt penalties.

---

both governmental and private hostility toward and harassment of SWP members and supporters.'" *Id.*

135 *See, e.g.*, Stratton Oakmont, Inc. v. Prodigy Services Co., 23 Media L. Rep. 1794, 1995 N.Y. Misc. LEXIS 229 (Nassau Cty. May 26, 1995) (allowing access provider to be held jointly and severally liable for defamation as a "publisher" of their subscriber's defamatory statements).

136 376 U.S. 254 (1964).

137 *Id.* at 279-80.

138 *See* Long, *supra* note 7, at 1195-98.

139 408 U.S. 665 (1972).

140 *Id.* at 680.

141 *Id.* at 710 (Powell, J., concurring).

## V. CONCLUSION

The Court's decision in *McIntyre* protects much anonymous speech and reminds us that anonymous and pseudonymous speech is as much a part of our free-speech heritage as any other kind and is, thus, deserving of appropriate protections.

*McIntyre* requires that any government regulation which requires disclosure of identity as a precondition to speech must be scrutinized strictly, and that governmental interests in informing the electorate or preventing fraud or libel will be insufficient to justify such a law. Even though the facts in *McIntyre* demonstrated political speech by an individual, the Court's rationale demonstrated its willingness to protect a broad range of anonymous speech in the interest of maintaining a marketplace of ideas.

The effects of this decision on the Networld are multiple. Governmental requirements of identity by private access providers are constitutionally suspect, and therefore subject to strict scrutiny as an infringement of the First Amendment. Identification requirements by governmental access providers are invalid after *McIntyre*.

Licensing or registration requirements for access to the Networld through private access providers are only valid if they are narrowly tailored to the end which the government seeks to accomplish. Since other means are available for combatting criminal and tortious conduct in the Networld, it is unlikely that such requirements will withstand strict scrutiny.

Given a system where access providers are required to disclose the identity of their subscribers in case-specific instances, such as search warrants or subpoenas, access providers who wish to protect the anonymity of their users will have to show either that subscribers whose identities are known have suffered a history of past harassment and threats, under the freedom-of-assembly model, or that the content of their users' speech furthers a "legitimate First Amendment interest", under the model of the journalist-source relationship.

*McIntyre* answers only a few of the questions currently undecided about anonymity in the Networld, but its rationale, which favors anonymity over disclosure requirements, is a strong precedent for cases yet to enter the courts.

GEORGE H. CARR