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ePublius: Anonymous Speech Rights Online

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The First Amendment to the U.S. Constitution prohibits Congress from abridging the freedom of speech,[1] yet the text of the Amendment does not expressly address the issue of anonymous speech rights.[2] Historical records from state ratifying conventions and from the First Congress do not discuss anonymous expression.[3] Still, anonymous speakers and their works played an immensely important role in the founding era and throughout American history.[4] This essay explores the interplay between the right to speak anonymously and the freedom of speech on the Internet. It concludes that the First Amendment also protects the right of individuals to speak anonymously online.

I. A BRIEF HISTORY OF ANONYMOUS SPEECH RIGHTS

During the founding era Alexander Hamilton, James Madison, and John Jay authored the Federalist Papers, a series of essays advocating the adoption of the Constitution, under the pseudonym Publius.[5] Their critics, the Anti-Federalists, also published anonymously.[6] Thomas

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[1] U.S. CONST. amend. I.

[2] *See* Talley v. California, 362 U.S. 60, 70-71 (1960) (Clark, J., dissenting) ("The Constitution says nothing about freedom of anonymous speech.").

[3] *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 360 (1995) (Thomas, J., concurring in the judgment) (noting that "we have no record of discussions of anonymous political expression either in the First Congress, which drafted the Bill of Rights, or in the state ratifying conventions.").

[4] *See Talley*, 362 U.S. at 64 ("Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind."); Jennifer B. Wieland, *Death of Publius: Toward a World Without Anonymous Speech*, 17 J. L. & POLITICS 589, 590-94 (2001) (discussing the history of anonymous speech in colonial America); Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801, 811 (2007) (noting that the use of a pseudonym by the authors of the Federalist Papers "probably did not stand out as unusual; political writers of the time commonly used pseudonyms in essays published in newspapers.").

[5] *See* Note, *Defending Federalism: Realizing Publius's Vision*, 122 HARV. L. REV. 745, n.2 (2008) ("'Publius' is the collective pseudonym used by Alexander Hamilton, John Jay, and James Madison."). The name Publius was a reference to Publius Valerius Publicola, an early supporter of the Roman Republic. Maggs, *supra* note 4, at 811.

[6] *McIntyre*, 514 U.S. at 343, n.6 ("[T]he Anti-Federalists, also tended to publish under pseudonyms: prominent among

Paine published many of his popular pamphlets pseudonymously, including Common Sense.

But anonymously authored publications were not confined to the political issues of the early Republic. Indeed, many great literary volumes were produced under assumed identities.[7] Authors such as Charles Lutwidge Dodgson (better known as Lewis Carroll) chose to write under pen names. Some have even argued that the works of William Shakespeare were actually authored by the Earl of Oxford, instead of the man from Stratford-upon-Avon.[8]

Anonymity also has its place in our legal system. In civil litigation for instance, one may use the pseudonym John Doe or an equivalent to protect a litigant's true identity.[9] The John Doe pseudonym, like the common law itself, was brought to the United States from England where civil plaintiffs sought to avoid the technicalities associated with common law writ pleading.[10]

More recently, federal courts have allowed parties to file complaints pseudonymously when they can provide sufficient justification for their secrecy.[11] The Supreme Court has also allowed the use of pseudonyms to protect a plaintiff's privacy, thereby implicitly endorsing its use.[12] Some scholars have even called for changes to the federal rules to make it easier for plaintiffs to bring anonymous suits.[13]

Plaintiffs may have sincere privacy concerns, especially in the realm of civil rights litigation.[14] Litigants who wish to vindicate their constitutional rights might be deterred if they fear physical harm or damage to their reputation. The judiciary's acceptance of the John Doe litigant is demonstrative of its increasing willingness to protect plaintiffs with privacy concerns over the public's curiosity.

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them were 'Cato,' believed to be New York Governor George Clinton").

[7] *Id.* at 342, n.4 (discussing the pseudonyms of various American authors).

[8] *See* John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. PA. L. REV. 1373 (1992) (discussing competing theories of Shakespearean authorship).

[9] Carol M. Rice, *Meet John Doe: It Is Time For Federal Civil Procedure to Recognize John Doe Parties*, 57 U. PITT. L. REV. 883, 885 (1996) ("John Doe has evolved from a purely fictional character to a pseudonym for actual persons.").

[10] *Id.* at 885.

[11] *See*, *e.g.*, Doe v. Advanced Textile Corp., 214 F.3d 1058, 1062 (9th Cir. 2000); James v. Jacobson, 6 F.3d 233 (4th Cir. 1993); Doe v. INS, 867 F.2d 285 (6th Cir. 1989); Doe v. Stegall, 653 F.2d 180 (5th Cir. 1981). *See also* Nixon v. Warner Communications, Inc., 435 U.S. 589, 597-99 (1978) (discussing the history of the common law right of access to judicial records).

[12] *See* Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003); John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989); Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973); Poe v. Ullman, 367 U.S. 497 (1961). While John Doe litigants were rare before 1969, today they are quite common. *See* Joan Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential?*, 37 HASTINGS L.J. 1, n.2 (1985).

[13] *See* Rice, *supra* note 9, at 889 (suggesting that the Supreme Court "incorporate John Doe parties into the procedural rules."); Jayne Ressler, *Privacy, Plaintiffs, and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age*, 53 KAN. L. REV. 195, 198 (2004) ("I propose changes to the existing criteria courts use to determine which plaintiffs should be permitted to bring their actions pseudonymously").

[14] *See* Rice, *supra* note 9, at 884-85 ("[F]ictitiously named parties are often crucial to a plaintiff's pursuit of privacy and civil rights litigation."); *McIntyre*, 514 U.S. at 341-42 ("The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible.").

II. Supreme Court Opinions Concerning Anonymous Speech Rights

Because the First Amendment says nothing explicit about the right to speak anonymously, our interpretation of this right may properly derive from historical sources and precedent. Unfortunately, the Supreme Court has decided relatively few anonymous speech cases over the years. The two most significant cases, *Talley v. California* and *McIntyre v. Ohio Elections Commission*, show how the Court views this right and how the right is weighed against competing interests.

A. *Talley v. California*

On March 22, 1958, Manuel Talley was arrested in Los Angeles, California and charged with violating a local ordinance, which prohibited the distribution of anonymous "hand-bills" or pamphlets.[15] Specifically, the ordinance required that the names and addresses of any author, distributor, and sponsor be placed on the cover or face of the pamphlet.[16] Talley's pamphlets, which advocated a boycott of certain businesses and merchants who sold products from manufacturers that refused to offer equal employment opportunities to minority ethnic groups, did not meet this requirement.[17] He was found guilty of violating the ordinance and fined ten dollars.[18] He appealed his conviction challenging the constitutionality of the ordinance.[19] The appellate court, in a divided opinion, affirmed the conviction.[20] The U.S. Supreme Court subsequently granted certiorari and appointed counsel on Talley's behalf.

In a split decision, the Supreme Court in *Talley* reversed the California appellate court's ruling and held that the local ordinance was facially invalid.[21] The majority opinion, written by Justice Black, held that identification requirement in the Los Angeles ordinance "would tend to restrict freedom to distribute information and thereby freedom of expression."[22] Much of the majority's opinion relied on the Court's 1938 decision in *Lovell v. Griffin*.[23]

In *Lovell*, the Court struck down a city ordinance that prohibited the distribution of literature without a license as a violation of the First Amendment freedom of speech and of the press.[24] In that case, the Court unanimously upheld the right of a pamphleteer noting that freedom of the press extended beyond simply newspapers and periodicals.[25] The freedom of the press, Chief Justice Hughes wrote, "necessarily embraces pamphlets and leaflets."[26] One year after the decision in *Lovell*, the Court struck down four city ordinances prohibiting the distribution of pamphlets altogether in *Schneider v. State*.[27] Four years later, in *Jamison v. Texas*, the Court struck down an ordinance, which again prohibited the distribution of pamphlets.[28] Given the decision in *Lovell* and subsequent cases,

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15 *Talley*, 362 U.S. at 60.
16 *Id.*
17 *Id.* at 61.
18 *Id.*
19 *Id.*
20 *Id.* at 805.
21 *Talley*, 362 U.S. at 60.
22 *Id.* at 64.
23 303 U.S. 444 (1938).
24 *Id.*
25 *Id.* at 452.
26 *Id.*
27 308 U.S. 147 (1939).
28 318 U.S. 413 (1943).

the Court struck down the Los Angeles ordinance in *Talley*.[29] In fact, much of the *Talley* opinion is simply a chronology of ordinances held to be invalid by the Court throughout the years.

The dissenting opinion, written by Justice Clark, made mention of the difference between the ordinances in *Lovell* and *Talley*, noting that the *Lovell* ordinance prohibited the unlicensed distribution of any pamphlets, whereas the ordinance in *Talley* prohibited only the distribution of unsigned pamphlets.[30] Thus, the dissent distinguished *Lovell* and found the ordinance in *Talley* to be valid, as the prevention of fraud and libel is a compelling reason for the identification requirement.[31] Moreover, the dissent declared that there is no "freedom of anonymity," because the First Amendment does not mention the right to speak anonymously.[32] At the time of the *Talley* decision, the dissent noted, the majority of states had statutes prohibiting the distribution of anonymous publications concerning political candidates.[33]

The majority opinion in *Talley* is notably concise, yet its discussion of the history of anonymous speech is quite persuasive. It noted that anonymous literature has played a significant role throughout the founding of our Nation. Historically, the opinion noted, marginalized minority groups were able to criticize the majority "either anonymously or not at all."[34] Some of our greatest patriots, who simply wished to discuss the freedoms we now take for granted, were forced to conceal their identity to avoid prosecution by the English. The *Talley* majority therefore found that the right to remain anonymous is protected under the First Amendment.[35]

Before the *Talley* decision, lower courts struggled to define the boundaries of the right of anonymous speech.[36] Today, however, laws infringing upon the right to speak anonymously cannot be easily reconciled with the Court's more recent decisions.

B. *McIntyre v. Ohio Elections Commission*

On April 27, 1988, Margaret McIntyre distributed pamphlets at a local public school meeting in Westerville, Ohio expressing her opposition to an upcoming referendum.[37] Despite a state election statute, which required political literature to contain the name and address of the person or persons responsible for its publication, some of McIntyre's leaflets were signed under the name 'Concerned Parents and Tax Payers.'[38] During her distribution of the leaflets, a school official notified McIntyre that her literature violated state law, yet she continued to hand them out at a meeting the following evening.[39] The school official subsequently filed a complaint with the Ohio Elections Commission, alleging that McIntyre's leaflets were distributed in violation of state law. The state election commission agreed and McIntyre was subsequently fined $100.

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[29] *Talley*, 362 U.S. at 60 (majority opinion).
[30] *Id.* at 67 (Clark, J., dissenting).
[31] *Id.*
[32] *Id.* at 70. ("I stand second to none in supporting Talley's right of free speech -- but not his freedom of anonymity.").
[33] 362 U.S. at 70, n.2 (Clark, J., dissenting).
[34] *Id.* at 64 (majority opinion).
[35] *Id.*
[36] *See* People v. Talley, 332 P.2d 447, 450-51 (Cal. Super. Ct. App. Dept. 1958) (noting conflicting decisions by the Supreme Court on the issue of anonymous speech rights).
[37] *McIntyre*, 514 U.S. at 337. The text of the leaflet is reproduced in a footnote of the opinion. *Id.* at 337, n.2.
[38] *Id.* at 337-38, n.3.
[39] *Id.* at 338.

But her case trudged on however, even after her death.[40] A local court reversed, the state appellate court reinstated the fine by a split vote, and the Supreme Court of Ohio affirmed, (also by a split vote) on the basis that it was bound by earlier state precedent.[41] Although the dissent noted that an intervening U.S. Supreme Court decision struck down a similar ordinance prohibiting the distribution of anonymous leaflets, the majority distinguished the subsequent Supreme Court decision on the basis that the Ohio's law only seeks to identify persons who distributed materials which include false statements, and upheld the law as the burdens it imposed upon the rights of voters were simply "reasonable" and "nondiscriminatory."[42] The U.S. Supreme Court granted certiorari.

In a split decision, the Court in *McIntyre* reversed the Ohio Supreme Court's ruling and held that Ohio's provision prohibiting certain anonymous works violated McIntyre's First Amendment right to free speech and was not justified by any state interest (including the prevention of libel or fraud).[43] The majority, through Justice Stevens, wrote that a speaker's wish to remain anonymous could be explained by a variety of reasons, including those that serve important First Amendment values, such as protecting the rights of unpopular groups to criticize what they view as injustice.[44] Much of the decision in *McIntyre* relied on the Court's 1960 decision in *Talley*. The Court re-affirmed the right to anonymous pamphleteering, calling it "an honorable tradition of advocacy and of dissent."[45]

Justice Scalia dissented, along with Chief Justice Rehnquist, characterizing the majority's opinion an intrusion by the judiciary into "electoral politics."[46] A vast majority of states, Justice Scalia explained, have long restricted anonymous speech in the political realm and that its frequent use at the time of the founding does not establish that it is a constitutional right.[47] For Justice Scalia, state laws prohibiting anonymous electioneering promote both the "observance of the law against campaign falsehoods" and "a civil and dignified level of campaign debate."[48]

Ultimately, Justice Scalia's dissent relies on the same reasoning as Justice Clark's dissent in *Talley*, namely that Ohio's public policy, as enacted by elected legislators, demands disclosure of the authorship of political literature. Still, it is remarkable that the Supreme Court's two most outspoken originalists – Justice Thomas and Justice Scalia – differ so drastically in *McIntyre* despite such a clear

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[40] *Id.* at 340. *See also* Linda Greenhouse, *Justices Allow Unsigned Political Fliers*, N.Y. TIMES, Apr. 20, 1995, at A20.
[41] *McIntyre*, 514 U.S. at 339.
[42] *Id.* at 340 (quoting McIntyre v. Ohio Elections Comm'n, 618 N.E.2d 152, 155 (Ohio 1993)).
[43] *Id.* at 334. Justice Stevens wrote the majority opinion, joined by Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer, while Justice Thomas concurred in the result. Justice Ginsburg concurred and wrote separately to defend against Justice Scalia's dissent, which accused the majority of adopting the views of philosopher John Stuart Mill over elected officials. *Compare id.* at 358 (Ginsburg, J., concurring), *with id.* at 371 (Scalia, J., dissenting). In Justice Scalia's view, the majority opinion represented the discovery of "a hitherto unknown right-to-be-unknown while engaging in electoral politics." *Id.* at 371 (Scalia, J., dissenting). Justice Thomas wrote separately concurring only in the judgment, as he believed that the majority's opinion did not adequately address the historical evidence surrounding the First Amendment. *Id.* at 358 (Thomas, J., concurring in the judgment).
[44] *Id.* at 342 (quoting *Talley*, 362 U.S. at 64) ("[P]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.").
[45] *Id.* at 357.
[46] *Id.* at 371 (Scalia, J., dissenting).
[47] *See Id.* at 371-73.
[48] *Id.* at 382.

history of anonymous pamphleteering by the Framers.[49] Presumably the framers had no intention of making themselves financially or criminally liable for their popular publications. Nevertheless, Justice Scalia would simply argue that its prevalence alone would not make anonymous publication a constitutional right.[50]

III. LOWER FEDERAL COURT REVIEW OF ANONYMOUS SPEECH RIGHTS

Lower federal courts also provide some guidance on the interpretation of online anonymous speech rights. In *ACLU v. Johnson*, for example, plaintiffs representing a broad swath of Internet users brought suit to enjoin the enforcement of a New Mexico statute prohibiting the distribution of material "that is harmful to minors by computer."[51] The statute required that websites with sexual content, including those with information about sexual health, verify the ages of their visitors. The district court issued an injunction against the statute's enforcement, finding that there was a substantial likelihood that it would be held to be unconstitutional as it "prevents people from communicating and accessing information anonymously."[52]

In *ACLU v. Miller*, several plaintiffs sued to enjoin a Georgia law criminalizing the use false names by individuals on the Internet.[53] The plaintiffs argued that the statute restricted their right "to communicate anonymously and pseudonymously over the internet."[54] The district court, relying on *McIntyre* for the proposition that a speaker's identify is "no different from other components of [a] document's contents that the author is free to include or exclude,"[55] found that the plaintiffs were substantially likely to prevail on their claim that the statute was unconstitutional.[56]

Lower federal courts have extended the protection of anonymous speech online in other contexts, such as civil discovery. In *Doe v. 2themart.com*, an anonymous plaintiff sought to quash a subpoena issued by 2themart.com to an Internet service provider (ISP).[57] The court in *2themart.com* noted that if users were concerned that their anonymity might be uncovered via subpoena, the once free exchange of ideas would be significantly chilled.[58] The district court thus imposed a higher burden for the authorization of subpoenas seeking to unmask anonymous online speakers.[59] Other courts, both state and federal, have imposed similar requirements.[60]

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[49] I use the term originalist in the conservative originalist sense; a theory of legal interpretation that relies "on the Framers' specific language and intent." *Book Note: Justice Thomas's Inconsistent Originalism*, 121 HARV. L. REV. 1431, 1435 (2008).

[50] *McIntyre*, 514 U.S. at 373 (Scalia, J., dissenting) ("[T]o prove that anonymous electioneering was used frequently is not to establish that it is a constitutional right.").

[51] 4 F. Supp. 2d 1029, 1031 (D.N.M. 1998).

[52] *Id.* at 1033-34 (citing *McIntyre*, 514 U.S. at 357 and *Talley*, 362 U.S. at 65).

[53] 977 F. Supp. 1228, 1230 (N.D. Ga. 1997).

[54] *Id.*

[55] *Id.* at 1232 (quoting *McIntyre*, 514 U.S. at 340-42).

[56] *Id.* at 1234-35.

[57] 140 F. Supp. 2d 1089 (W.D. Wash. 2001).

[58] *Id.*

[59] *Id.* at 1097.

[60] *See, e.g.*, Mobilisa, Inc. v. Doe, 170 P.3d 712, 721 (Ariz. Ct. App. 2007); *In re* Verizon Internet Servs., Inc., 257 F. Supp. 2d 244 (D. D.C. 2003); America Online, Inc. v. Anonymous Publicly Traded Co., 261 Va. 350 (2001); Dendrite Int'l. Inc. v. Doe, 342 N.J. Super. 134 (2001); Columbia Insurance Company v. Seescandy.com, 185 F.R.D. 573, 577 (N.D. Cal. 1999).

IV. ANONYMOUS SPEECH RIGHTS ONLINE

The U.S. Supreme Court has held that anonymous speech is protected under the First Amendment, and that online speech receives no less constitutional protection than any other speech.[61] Courts have explicitly combined these two concepts – the right to speak anonymously and the free speech rights of those who use the Internet – to find a First Amendment right to speak anonymously online.[62] Put simply, courts have recognized that anonymous speech merits protection regardless of the medium.

Increasing attempts by governmental agencies or private parties to identify particular Internet users will likely hamper innocuous online speech. Users who fear that their online identities are public knowledge will be more hesitant to contribute to the marketplace of ideas. Historically, laws infringing upon the right to engage in anonymous speech were largely ignored, including by the founding fathers, because they understood that intellectual freedom necessarily constricts when the deliverer of a message is forcibly identified.

The role of the Internet in our lives cannot be understated. With the possible exception of the printing press before it, no other invention has done more to democratize the distribution of ideas than the Internet.[63] Any person may, with minimal expense, speak freely to an international audience of millions.[64] Also, like the anonymous pamphlets of the past, the acceptance of online pseudonyms has contributed to the robust nature of Internet discussions by allowing speakers to freely experiment with unpopular or unconventional ideas.[65]

CONCLUSION

The Internet is an incredible innovation comparable with the printing press. Early, strict restrictions on publications failed to prevent the spread of unorthodox ideas. The Framers knew this well, as many of them distributed their controversial thoughts in the form of anonymous pamphlets. Had the Internet been available in 1791, they likely would have taken advantage of its ability to rapidly distribute information anonymously.

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[61] *Id.* at 341-51 (majority opinion); *Talley*, 362 U.S. at 64-65; Reno v. ACLU, 521 U.S. 844, 870 (1997).

[62] *See Mobilisa, Inc.*, 170 P.3d at 717; John Doe No. 1 v. Cahill, 884 A.2d 451, 456 (Del. 2005) ("Anonymous internet speech in blogs or chat rooms in some instances can become the modern equivalent of political pamphleteering."); Doe v. 2themart.com, 140 F. Supp. 2d 1089, 1097 (W.D. Wash. 2001) ("The constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded."); ACLU v. Johnson, 4 F. Supp. 2d 1029 (D.N.M. 1998) (striking down a New Mexico statute requiring age verification before providing Internet access as an unconstitutional violation of the right to communicate anonymously); ACLU v. Miller, 977 F. Supp. 1228, 1230 (N.D. Ga. 1997) (striking down a Georgia statute criminalizing the use of fictitious names on the Internet).

[63] *See* Edward Lee, *Freedom of the Press 2.0*, 42 GA. L. REV. 309, 345 (2008) (noting that "the printing press was the Internet of its day."); Zack Kertcher, *Challenges to Authority, Burdens of Legitimization: The Printing Press and the Internet*, 8 YALE J.L. & TECH. 1, 33 n.30 (2005) ("Many have compared the Internet with the printing press.").

[64] *See Reno*, 521 U.S. at 870 ("Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer."); John Spence, *Pennsylvania and Pornography:* Cdt v. Pappert *Offers a New Approach to Criminal Liability Online*, 23 J. MARSHALL J. COMPUTER & INFO. L. 411, 445-46 (2005) ("Just as Johannes Gutenberg's innovations with the movable type printing press lowered the cost of printing and made it affordable to the masses, so has the Internet.") (footnote omitted).

[65] *See* Lyrissa Barnett Lidsky*, Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L. J. 855, 896 (2000) (arguing that online pseudonyms force the audience to evaluate a speaker's idea based on content rather than identity) .

The right to speak anonymously is a protected and cherished right. Anonymous speech played a large role in American history and still contributes immensely to the marketplace of ideas. Our society cannot tolerate a system of First Amendment protection that varies based on the type of media used. Today's weblog post merits the same protection as yesterday's pamphlet.

Although some courts have specifically held that First Amendment anonymous speech rights extend to the Internet, the Supreme Court has yet to precisely rule on the matter. When the Court is presented with the opportunity, it should acknowledge a robust right to speak anonymously online.