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A TEXTUAL ANALYSIS OF THE INFLUENCE OF *MCINTYRE V. OHIO ELECTIONS COMMISSION* IN CASES INVOLVING ANONYMOUS ONLINE COMMENTERS

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ABSTRACT

Internet anonymity and the boundaries of the rights of anonymous Internet speakers is a growing issue. The First Amendment also protects anonymous speech. In *McIntyre v. Ohio Elections Commission*,[1] the U.S. Supreme Court struck down an Ohio law that prohibited the distribution of anonymous campaign material. But the *McIntyre* decision concerned offline communications—fliers. A question remains as to whether the courts have, or are willing, to apply *McIntyre* to anonymous Internet communications, and if so, is that application limited only to political speech. This study examines these questions in an attempt to understand what impact *McIntyre* has had on the protection of online anonymity by presenting a textual analysis of cases in which subpoenas have been issued to identify anonymous online commenters.

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1. 514 U.S. 334 (1995).

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I. INTRODUCTION

Internet anonymity and the boundaries of the rights of anonymous Internet speakers is a growing issue, an issue made interesting by the fascinating cases that spur its discussion. Take, for instance, the 2009 case of *The Sun-News* of Myrtle Beach, which threatened to disclose the identity of an online commenter called "Elmer Fudd," after the newspaper received a subpoena from the Myrtle Beach Chamber of Commerce.[2] In August 2009, "Elmer Fudd" logged on to *The Sun-News* Online site and posted a comment inquiring why no one had covered the raid by the Horry County Sheriff's Department at the Chamber's offices.[3] The Chamber claimed that no such raid ever happened and filed for a subpoena against the paper asking for the true identity of "Elmer" as part of a possible defamation suit.[4] The newspaper gave "Elmer" until October 2, 2009 to reveal himself or else it would turn over the identifying information it had collected to the Chamber's lawyers.[5] Two days before the deadline, "John Doe" filed a motion in the county court asking the judge to hold off enforcing the

2. *See* Joel Allen, *Elmer Fudd Identity Remains a Secret*, CAROLINALIVE.COM (Oct. 2, 2009, 5:49 PM), http://www.carolinalive.com/news/story.aspx?id=358175.

3. *Id.*

4. *See id.*

5. *See id.*

subpoena because it violated the commenter's right to anonymous speech.[6]

In a similar situation, a Cook County, Illinois judge ruled that the Chicago *Daily Herald* and Comcast had to hand over the name of an individual who posted a comment on the *Daily Herald* website directed at the son of local official Lisa Stone.[7] Claiming the commenter posted "defamatory and injurious" statements, Stone demanded the newspaper reveal the commenter's identity.[8] At first the newspaper refused, but after being served with a subpoena, the newspaper turned over the commenter's e-mail address and other identifying information.[9] After finding that the e-mail address had been deactivated, Stone then subpoenaed Comcast, the commenter's Internet Service Provider.[10]

Both the "Elmer Fudd" and *Daily Herald* cases involve anonymous speakers who are alleged to have committed defamation while posting anonymously. But anonymous Internet speakers have also faced suits for violating copyright, invasion of privacy, and other torts.[11] And claims have not been limited solely to anonymous comments on newspaper sites; plaintiffs have also sought the identities of bloggers and those posting on Web forums in order to file claims against them.[12]

Although such claims may appear innocuous, the possible ramifications for freedom of speech, specifically for freedom of speech

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6. *See id.*

7. Jamie Sotonoff, *Judge: Reveal who Posted Comment about Buffalo Grove Official*, DAILYHERALD.COM, (Oct. 2, 2009, 10:25 AM), http://www.dailyherald.com/story/?id=325969.

8. *See id.*

9. *See id.*

10. *See id.*

11. *See e.g.*, Sinclair v. TubeSockTedD, 596 F. Supp. 2d 128 (D.D.C. 2009) (claiming reckless misrepresentation as well as libel); Doe I v. Individuals, 561 F. Supp. 2d 249 (D. Conn. 2008) (claiming invasion of privacy and negligent infliction of emotional distress in addition to a libel claim); Alvis Coatings v. John Does 1-10, 2004 U.S. Dist. LEXIS 30099 (W.D.N.C. Dec. 2, 2004) (claiming that anonymous comments violated the Lanham Act); Matthew Mazzotta, Note, *Balancing Act: Finding Consensus on Standards for Unmasking Anonymous Internet Speakers*, 51 B.C. L. REV. 833 (2010).

12. *See e.g.*, Doe v. Cahill, 884 A.2d 451 (Del. 2005) (suing for posts made on a blog forum); Krinsky v. Doe 6, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008) (suing for posts made on a financial website).

on the Internet, could be severe. It is axiomatic that the First Amendment to the United States Constitution protects freedom of speech and the press.[13] The First Amendment guarantee of free expression constrains laws such as those prohibiting defamation, invasion of privacy, and copyright infringement.[14] The First Amendment also protects anonymous speech. In *McIntyre v. Ohio Elections Commission,*[15] the U.S. Supreme Court struck down an Ohio law that prohibited the distribution of anonymous campaign material.[16] According to the Court, speakers may want to remain anonymous for fear of physical, social, and economic reprisal, as "[a]nonymity is a shield from the tyranny of the majority."[17] The Court seemingly reasserted this position six years later when it ruled that a village ordinance requiring door-to-door solicitors to register with the city was unconstitutional.[18]

But the *McIntyre* decision concerned offline communications—fliers.[19] A question remains as to whether the courts have, or are willing, to apply the *McIntyre* decision to anonymous Internet communications, and if so, whether that application is limited only to political speech. This study examines these questions in an attempt to understand what impact *McIntyre* has had on the protection of online anonymity by presenting a textual analysis of cases in which subpoenas have been issued to identify anonymous online commenters. Section II of this Article recounts the *McIntyre* decision and its influence from a scholarly perspective, as well as provides an overview of the doctrine regarding anonymous speech springing from that case. Section III outlines the methodology employed for this textual analysis. Section IV sets forth the themes that emerged during the analysis of the cases gathered.

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13. The First Amendment reads, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

14. *See* Eugene Volokh, *Tort Liability and the Original Meaning of Freedom of Speech, Press, and Petition*, 96 IOWA L. REV. 249 (2010); *see also* Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 Yale L.J. 1757 (1995).

15. 514 U.S. 334 (1995).

16. *See id.* at 357.

17. *Id.* at 357.

18. *See* Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150 (2002).

19. *McIntyre*, 514 U.S. at 337.

Section V discusses the studies' findings and offers an analysis of how courts deciding whether to unmask anonymous online commenters have used the *McIntyre* decision and what this means for online anonymity.

II. ANONYMITY AND THE SUPREME COURT

Anonymity has been defined as the state of being unidentifiable.[20] Although anonymity is most often linked to names or physical descriptions, there is more than one thing that provides an individual with anonymity.[21] G. T. Marx, for instance, recognized seven types of identity knowledge: name, location, "pseudonyms that can be linked to . . . name and/or locat[ion]—literally a form of pseudo-anonymity," "pseudonyms that can not be linked to other forms of identity knowledge—the equivalent of 'real' anonymity," patterns, "social categorization," and "symbols of eligibility/non-eligibility."[22] With respect to speech, anonymity has been defined as "the condition in which a message source is absent or largely unknown to a message recipient."[23] The absence of information identifying the source of speech has been a cause for concern as well as being viewed as beneficial, particularly with respect to the Internet.[24]

Some scholars predicted that the ability to remain unidentified in cyberspace would allow Internet users to avoid responsibility for their speech.[25] In both the on- and off-line contexts, anonymity was thought

20. *See* G. T. Marx, *What's in a Name? Some Reflections on the Sociology of Anonymity*, 15 INFO. SOC'Y 99, 100 (1999). For the purposes of this paper anonymity includes pseudonymity.

21. *See* Kris M. Markman & Craig R. Scott, *Anonymous Internet? Examining Identity Issues in Email Addresses*, *in* ANNUAL CONVENTION OF THE INT'L COMMC'N ASS'N, NEW YORK, N.Y., 8 (2005).

22. *See* Marx, *supra* note 20.

23. Craig R. Scott, *Benefits and Drawbacks of Anonymous Online Communication: Legal Challenges and Communicative Recommendations*, 41 FREE SPEECH YEARBOOK 127, 128 (2004).

24. *See e.g.*, Andrea Chester & Gillian Gwynne, *Online Teaching: Encouraging Collaboration through Anonymity*, 4 J. COMPUTER MEDIATED COMM. (1998) *available at* http://jcmc.indiana.edu/vol4/issue2/chester.html (examining the advantages of anonymity and pseudonymity in online learning); *see also* A. Michael Froomkin, *Legal Issues in Anonymity and Pseudonymity*, 15 INFO. SOC'Y 113, 114–16 (1999); Scott, *supra* note 23.

25. *See* Froomkin, *supra* note 24, at 114.

to be undesirable because it would allow individuals to act without fear of the consequences for their speech or actions.[26] Further, anonymity is an impediment to trust, which may then lead to "undesirable social institutions."[27] For example, in their study of chat rooms on sensitive issues, Eric Friedman and Paul Resnick noted that many of the individuals taking part in the conversations were in fact frauds.[28] The researchers placed the blame for the chat room deception on the ability of chat room participants to maintain a high level of anonymity.[29] Another frustration with anonymous speech is the inability of those who fall victim to libel to obtain relief from the perpetrators of this false speech.[30] According to Craig Scott, "some individuals are able to successfully hide behind the veil of anonymity and disparage others."[31]

Yet anonymity is not without its recognized benefits. One such benefit is that anonymity may encourage more speech.[32] According to Kris Markman and Craig Scott, anonymity may foster an Internet environment that encourages individuals to be more open with information that they may otherwise never disclose.[33] This may include seeking and posting information related to embarrassing health issues.[34] In addition, anonymity encourages open debate on political and social issues.[35] "Not everyone is so courageous as to wish to be known for everything they say, and some timorous speech deserves encouragement."[36] Speakers who would otherwise fear reprisal from

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26. *See id.*

27. *Id.*

28. *See* Eric J. Friedman & Paul Resnick, *The Social Cost of Cheap Pseudonyms*, 10 J. ECON. & MGMT. STRATEGY 173, 175 (2001) (citing Denise Grady, *Faking Pain and Suffering in Internet Support Groups*, N.Y. TIMES, Apr. 23, 1998, at G1).

29. *See id.*

30. *See* Froomkin, *supra* note 24, at 114.

31. Scott, *supra* note 23, at 130.

32. *See* Froomkin, *supra* note 24, at 115; Scott, *supra* note 23, at 131.

33. Markman & Scott, *supra* note 21, at 7–8 (citing A.N. Joinson, *Self-Disclosure in Computer Mediated Communication*, 31 EUR. J. SOC. PYSCHOL. 177 (2001)).

34. *See* Froomkin, *supra* note 24, at 115.

35. *See* Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639, 1642 (1995).

36. Froomkin, *supra* note 24, at 115.

their employers, members of government, and other private citizens may be more likely to express themselves online if given anonymity.[37] These benefits of anonymity are similar to those found by the U.S. Supreme Court in its decision in *McIntyre*.

A. McIntyre v. Ohio Elections Commission

In the spring of 1988, facing a $4 million budget hole, administrators of schools in the Westerville, Ohio public school district met to discuss a tax levy.[38] While school officials inside Blendon Middle School discussed the upcoming referendum, outside, Margaret McIntyre, assisted by her son and a friend, placed fliers on the windshields of the cars in the parking lot.[39] The fliers, some of which identified McIntyre as the author, urged voters to defeat Issue 19, the tax levy for the school district.[40] While she distributed the fliers, a school official warned her that she was in violation of Ohio election laws that prohibited the distribution of unsigned leaflets.[41] Undeterred, McIntyre returned the next evening to another meeting to distribute fliers.[42]

Voters defeated the tax levy twice before it passed in the fall of the same year, after which, the school official who had warned McIntyre that she was in violation of state law filed a complaint with the Ohio Elections Commission.[43] Agreeing that McIntyre had indeed violated the election law, the Commission fined her $100. McIntyre originally won her appeal to the Franklin County Court of Common Pleas, but the Ohio Court of Appeals then reversed this decision, and the Ohio Supreme Court affirmed.[44]

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37. Branscomb, *supra* note 35, at 1642.

38. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 337 (1995).

39. *See id.*

40. *Id.* Some of the fliers stated, in pertinent part: "PLEASE VOTE NO [ON] ISSUE 19[.] THANK YOU. CONCERNED PARENTS AND TAX PAYERS." *Id.* at 337 n.2.

41. *Id.* at 338.

42. *See id.*

43. *See id.* The Ohio law stated, in pertinent part: "No person shall write, print, post, or distribute... a notice,...or any other form of general publication which is designed to ... promote the adoption or defeat of any issue." OHIO REV. CODE ANN. § 3599.09(A) (1988).

44. *McIntyre*, 514 U.S. at 339.

The U.S. Supreme Court reversed the Ohio high court, holding that the freedom to publish anonymously was protected by the First Amendment.[45] The Court's holding reflected a long history of protection for anonymous speech in the United States. Along with referencing the Federalist Papers,[46] which were written anonymously, as well as taking judicial notice of the many pseudononymously written works of fiction, the Court reflected on its rulings protecting anonymous publications.[47] In *Talley v. California*,[48] the Court held that the First Amendment protected the publication and distribution of pamphlets advocating the boycott of certain California businesses.[49] The Court found that the California city ordinance prohibiting all anonymous leafleting could not pass strict scrutiny[50] in that it was not limited to only anonymously published fraudulent or libelous materials, but was overbroad in prohibiting speech that was otherwise protected under the Constitution.[51]

Applying its *Talley* ruling to the *McIntyre* case, the Court found that like the California ordinance, the Ohio election law was overbroad in that it prohibited otherwise protected speech.[52] In fact, McIntyre had been engaged in political speech, the kind of speech at the core of the First Amendment.[53] Had the Ohio statute prohibited only fraudulent or libelous political speech, the state may have been able to demonstrate the compelling government interest needed to pass strict scrutiny.[54] The Commission, likewise, was unpersuasive in arguing that the state had an interest in providing additional information to those receiving the anonymously authored information.[55]

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45. *Id.* at 341–42.

46. *Id.* at 343 n.6.

47. *See id.* at 341.

48. 362 U.S. 60 (1960).

49. *See id.* at 65.

50. To pass "strict scrutiny" or "exacting scrutiny" a law must be narrowly tailored to serve a compelling state interest. *See* Burston v. Freeman, 504 U.S. 191, 199–208 (1992); First Nat'l Bank of Boston v. Bellotti, 435 U. S. 765, 786 (1978);

51. *See Talley*, 362 U.S. at 64.

52. *See McIntyre*, 514 U.S. at 344.

53. *See id.* at 346.

54. *See id.* at 351–53. Indeed, Ohio already had a law prohibiting fraudulent political speech. *See* OHIO REV. CODE § 3599.09 (A) (1988).

55. *See McIntyre*, 514 U.S. at 348–51.

The reasoning the Court provided for protecting anonymous speech is most pertinent to the discussion in this study. According to the Court, "[a]nonymity is a shield from the tyranny of the majority."[56] The possible motives for speaking anonymously are many: to avoid official or economic retaliation, to avoid ostracism, or to protect personal privacy.[57] Whatever the motivation, the marketplace of ideas welcomes anonymous speech.[58] This is particularly so for controversial political issues. The First Amendment protects these ideas from suppression.

Justice Antonin Scalia, joined by then Chief Justice William Rehnquist, criticized the majority opinion in his dissent.[59] According to Justice Scalia, speaker identity was less deserving of First Amendment protection than political speech because speaker identity did not convey a political idea.[60] Further, the challenged statute did not prohibit the expression of a political idea, but only required that the author of that idea be identified.[61] Because the Ohio statute prohibiting anonymous publication of political speech did not go to the heart of speech protected by the First Amendment, Justice Scalia felt the Court should have given the legislation precedence over McIntyre's constitutional claim.[62] In addition, Justice Scalia found that the state's interest in protecting the electorate was compelling, and therefore outweighed any First Amendment protection for anonymity.[63]

According to Amy Constantine, the different conclusions arrived at by the majority and dissent in *McIntyre* illustrate their fundamental differences in assumptions about human behavior.[64] The majority viewed anonymity as rooted in the heart of democratic governance, whereas the dissent thought that anonymity did not play a significant role in the political process.[65] Further, the dissent viewed a prohibition on

56. *Id.* at 357.
57. *See id.* at 341–42.
58. *See id.* at 342.
59. *See id.* at 371 (Scalia, J., dissenting).
60. *See id.* at 378 (Scalia, J., dissenting).
61. *See id.* (Scalia, J., dissenting).
62. *See id.* at 375–77 (Scalia, J., dissenting).
63. *See id.* at 381–84 (Scalia, J., dissenting).
64. Amy Constantine, *What's in a Name?:* McIntyre v. Ohio Elections Commission*: An Examination of the Protection Afforded to Anonymous Political Speech*, 29 CONN. L. REV. 459, 467 (1996).
65. *See id.* at 469.

requiring identifying information as opening the door for questionable activities including false statements and deceit.[66]

B. Implications of McIntyre *in Cyberspace*

The *McIntyre* decision established two propositions about anonymous speech: legitimate reasons exist in support of anonymity, and identity information could not be compelled without adequate justification.[67] Laws that prohibit anonymity were content regulations and would never pass strict scrutiny because they would regulate protected speech.[68]

More than this, *McIntyre* can be viewed as supporting anonymous online speech. First, the Court concluded that it is the speaker's choice whether to provide identity information.[69] The decision to exclude this information is no different than excluding information from the substance of the speech. The *McIntyre* Court also refused to conflate anonymous speech with speech that is fraudulent or libelous, but instead, the Court held anonymous speech in high esteem using words like "honorable" to describe it.[70] In addition, the Court in *McIntyre* ignored the possibility that anonymous speech could be abhorrent and instead focused on the increase in public debate possible under the promise of anonymity.[71] Online speech, particularly speech of a political nature, and the offline speech in *McIntyre* parallel,[72] and thus, should be provided the same protections as its analog equivalent.

A strong case exists for granting some anonymous online speech First Amendment protection. What about fraudulent or defamatory speech? In *McIntyre*, the Court agreed that the state had a compelling interest in protecting its citizens from libelous or false speech.[73] It is also

66. *See McIntyre*, 514 U.S. at 382–85 (Scalia, J., dissenting)

67. Lee Tien, *Who's Afraid of Anonymous Speech?* McIntyre *and the Internet*, 75 OR. L. REV. 117, 126 (1996).

68. *See id.* at 127–28.

69. *See id.* at 141.

70. *See id.* at 141–42.

71. *See id.* at 142.

72. JONATHAN D. WALLACE, NAMELESS IN CYBERSPACE: ANONYMITY ON THE INTERNET 1, 3 (1999).

73. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 348–49 (1995).

axiomatic that the First Amendment does not extend to libelous speech, and libel law is supposed to have a deterrent effect on false speech.[74] A problem occurs, however, where too much speech is deterred. This chilling effect could influence would-be Internet posters to engage in self-censorship.

As a preliminary issue, libel suits against online speakers usually seek to unmask posters. As a result, Internet users afraid of losing their anonymity may then refuse to discuss controversial issues for fear of being accused of defamation.[75] Further, Internet users might not be able to afford the high costs of litigation associated with defending themselves against a libel claim.[76] The prohibitive cost of litigation could be used as a threat against an Internet speaker even if they have not defamed another individual or company.[77]

Courts have, however, begun to recognize and set standards for deciding whether to unmask anonymous online speakers. These standards are distilled from the various judicial tests recognized in different jurisdictions in which a court has had to determine whether an online speaker's anonymity was protected under the First Amendment.[78] One of the best-known balancing tests was established in *Dendrite International Inc. v. Doe No. 3*.[79] The *Dendrite* test, which has been adopted by the Court of Appeals of Maryland[80] and also used with modifications by a New York appellate court,[81] appears to be the most dominant standard for deciding whether to unmask an online libel defendant.[82]

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74. Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 888 (2000).

75. *See id.* at 889.

76. *See id.* at 890–91.

77. *See id.* at 890.

78. *See* Mobilisa, Inc. v. Doe 1, 170 P.3d 712 (Ariz. Ct. App. 2007); Krinsky v. Doe 6, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008); Doe v. Cahill, 884 A.2d 451 (Del. 2005); Dendrite Int'l Inc. v. Doe No. 3, 775 A.2d 756 (N.J. Super Ct. App. Div. 2001).

79. 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

80. *See* Indep. Newspapers, Inc. v. Brodie, 966 A.2d 432, 456 (Md. 2009).

81. *See* Greenbaum v. Google, Inc., 845 N.Y.S.2d 695, 698–99 (N.Y. Sup. Ct. 2007).

82. *See* Lyrissa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?*, 50 B.C. L. REV. 1373, 1378 n.25 (2009).

The *Dendrite* test requires that the defendant be given notice and an opportunity to file a motion to quash the subpoena for their identity information.[83] The plaintiff is then required to produce evidence of a valid libel claim.[84] The plaintiff must identify, with specificity, the statements within the defendant's control that were allegedly defamatory.[85] The court then makes the determination as to whether the plaintiff has presented a prima facie case of defamation.[86] Finally, the court must balance the defendant's First Amendment right to anonymity against the strength of the plaintiff's evidence of defamation and the necessity of disclosing the defendant's identity.[87] According to Lyrissa Barnett Lidsky, this final component of the *Dendrite* test provides added weight toward preserving anonymity.[88]

Although many courts use the *Dendrite* test, some jurisdictions have established their own standards for online defamation cases involving anonymous speakers. The Supreme Court of Delaware, in *Doe v. Cahill*,[89] for example, established a two-part test that appears to rival *Dendrite* in terms of adoption by other jurisdictions.[90] Courts in California[91] and Arizona[92] have also created multi-component tests for deciding whether to compel the identification of anonymous speakers.[93]

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83. *Brodie*, 966 A.2d at 457.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. Lidsky, *supra* note 82, at 1380 ("An explicit balancing test serves only to tilt the scales further toward the protection of anonymous speech . . . .").

89. 884 A.2d 451 (Del. 2005).

90. The *Doe v. Cahill* test requires that: (1) the plaintiff demonstrate that their claim can survive a motion for summary judgment, and (2) the plaintiff makes reasonable efforts to notify the defendant including posting a message on the same medium the defendant used. *Id.* at 459–61.

91. *See* Krinsky v. Doe 6, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008).

92. *See* Mobilisa, Inc. v. Doe 1, 170 P.3d 712 (Ariz. Ct. App. 2007).

93. The *Krinsky* court noted that *Cahill* required the plaintiff demonstrate that their case could survive a motion for summary judgment in contrast to other courts that required the plaintiff to prove that their case could survive a motion to dismiss. *Krinsky*, 72 Cal. Rptr. 3d at 243–46. The *Krinsky* court declined, however, to place procedural labels on the level of evidence the plaintiff had to produce. *Id.* The *Mobilisa* court, in adopting the two-step *Cahill* analysis, added a third step of balancing the parties' competing interests. *Mobilisa, Inc.*, 170 P.3d at 720–21.

The question remains, however, as to the influence of the *McIntyre* decision in these cases and the standards that have developed in relation to online defamation.

In her 2001 *Washington & Lee Law Review* article, Caroline Strickland argued that key differences exist between the speech at issue in *McIntyre* and the kind of speech involved in "cybersmears," or online defamation.[94] In her view, these differences should make *McIntyre* inapplicable in online defamation cases.[95] First, *McIntyre* involved a content-based restriction on speech and a prior restraint on speech, which is why the Supreme Court used strict scrutiny in evaluating whether the Ohio election law was constitutional.[96] Although the Court ultimately invalidated the Ohio law, it did so based on the fact that the speech at issue was political.[97] Further, the litigation of online defamation is not a prior restraint on speech as was the case in *McIntyre*;[98] online defamation defendants are not facing a prior restraint on their speech.[99]

Another factor that distinguishes cybersmears from the speech at issue in *McIntyre* is the fact that online defamation involves false or libelous speech.[100] This removes the speech from being absolutely protected under the Constitution.[101] Strickland also notes that the speech at issue in online defamation suits usually involves comments on corporations or business practices.[102] This differentiates cybersmears from the anonymous fliers distributed in *McIntyre*, which were critical of the government, and therefore, political speech. Although the publication of truthful information is protected, traditionally the Court has not placed

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94. Caroline E. Strickland, Note, *Applying* McIntyre v. Ohio Elections Commission *to Anonymous Speech on the Internet and the Discovery of John Doe's Identity*, 58 WASH. & LEE L. REV. 1537, 1571 (2001).

95. *See id.* at 1583.

96. *Id.* at 1572–74.

97. *Id.* at 1573.

98. *Id.* at 1574 (noting, in addition, that the *McIntyre* Court did not discuss the issue of prior restraint).

99. *Id.*

100. *See id.*

101. *See* United States v. Alvarez, 567 U.S.___, 132 S. Ct. 2537 (2012) (ruling that false statements were not automatically removed from First Amendment protection).

102. Strickland, *supra* note 94, at 1574–75.

a value on false speech.[103] The *McIntyre* Court recognized that there was no value in fraudulent or libelous speech.[104] "Heavy" reliance on *McIntyre* in cases involving online defamation, according to Strickland, is misplaced.[105] In addition, Strickland argues that the *Dendrite* court, and others, misapplied *McIntyre*, inappropriately balancing the defendant's rights against the rights of the plaintiff to disclosure of the defendant's identity.[106]

Strickland suggests that, because of the differences between *McIntyre* and online defamation cases, *McIntyre* does not extend to "anonymous unlawful speech such as the Internet postings challenged in cybersmear lawsuits."[107] This does not recognize, however, that plaintiffs are asking for the discovery of the defendant's identity before there is an actual adjudication of whether the comments at issue are truly defamatory. As such, a court's use of *McIntyre* may provide a form of shield, then, for innocent anonymous commenters.

III. METHODOLOGY

In the field of law, the influence of a case is determined by the citations to, and the use of, the case in cases following. Under the doctrine of *stare decisis*, like cases are resolved in a like manner.[108] Lower courts are bound by the decisions of the intermediate appellate and high courts within their jurisdiction, as well as the U.S. Supreme Court. To demonstrate adherence to precedent, or a certain specific idea, courts use in text citation to the prior case.

To determine the influence and use of the *McIntyre* case, the researcher began this study with a series of searches of computerized

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103. *Id.* at 1575. *See generally* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1964) (noting that there was no constitutional value in false speech); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 300 (1964) (Goldberg, J., concurring) ("It may be urged that deliberately and maliciously false statements have no conceivable value as free speech.").

104. McIntyre v Ohio Elections Comm'n, 514 U.S. 334, 349 (1995).

105. Strickland, *supra* note 94, at 1576.

106. *Id.* at 1578–79.

107. *Id.* at 1563.

108. *See* Dickerson v. United States, 503 U.S. 428, 443 (2000); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845–46 (1992).

legal databases seeking both court decisions in cases in which a plaintiff made a discovery motion for the identity of a defendant based on the defendant's online expressive activities.[109] The researcher used the common legal databases LexisNexis and WestLaw. First, a search was conducted to find all items that cited the *McIntyre* case. This preliminary search produced 1853 citing works. Of these citing works, 432 were court opinions. To further narrow these cases to only those involving online speech, the researcher used the focus search function in LexisNexis and the focus words "Internet" and "online." This provided a result of thirty-eight cases.[110] The researcher also searched the Citizen Media Law Project's Legal Threat Database to find court filings and cases related to anonymous online commenters.[111] Cases were filtered to include only those involving speech and not conduct or criminal behavior.

To perform an analysis of these cases, the researcher obtained the full text of the court decisions. As a preliminary step, the researcher noted the type of online media at issue, as well as the claim for which the plaintiff filed the lawsuit. The researcher then performed a textual analysis of the decisions to determine how the *McIntyre* opinion has been used in these cases. This involved searching each opinion for the specific citations to *McIntyre*, as well as analyzing the context in which the court cited *McIntyre*. The researcher also noted any direct quotations of the *McIntyre* opinion. Multiple cases citing a specific proposition in *McIntyre* were noted as main themes. Three main themes emerged from these cases. In addition, the researcher noted if the court chose to

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109. For the purpose of this article, the phrase "expressive activities" is defined as comments or postings. The time span for cases searched were those filed between January 1996 and April 1, 2011.

110. For the purpose of this article, the word "case" is defined as a lawsuit involving the same parties, the same claims, and subject matter. All court opinions, no matter the level, relating to the same claim are considered as one case.

111. Harvard University's Berkman Center for Internet & Society is home to the Citizen Media Law Project, which is co-writing an amicus brief supporting the rights of anonymous Internet speakers. *See CMLP Amicus Efforts*, CITIZEN MEDIA LAW PROJECT, http://www.citmedialaw.org/cmlp-amicus-efforts (last visited Oct. 31, 2012). The CMLP also carries the Threat Database, which catalogs legal filings directed at those who engage in online speech. *See Legal Threats Database*, CITIZEN MEDIA LAW PROJECT, http://www.citmedialaw.org/database (last visited Oct. 31, 2012).

employ a judicial test to determine whether to order the discovery of the anonymous speaker's identity, as well as the disposition of the case.

IV. FINDINGS: *MCINTYRE*'S INFLUENCE

In total, the researcher found thirty-eight cases involving anonymous online communications in which the court cited *McIntyre* in deciding whether to require the defendants to disclose their identities. Of the thirty-eight cases found, thirty-two involved claims for false speech. In spite of this, very few cases cited *McIntyre* in relation to the finding that libel and false speech receives no protection under the First Amendment. The online media at the center of the cases included both corporate and personal websites, online newspapers that allowed article comments, blogs, and bulletin boards or forums. The main themes that emerged from the analysis of the citations to *McIntyre* are discussed below.

A. First Amendment Protection for Anonymous Speech

Almost all of the cases found cited *McIntyre* with respect to the idea that the First Amendment protects anonymous speech. The *Dendrite* court, for example, in deciding whether to grant Dendrite International's motion to discover the name of John Doe 3, cited *McIntyre* at the very beginning of its analysis.[112] The case arose after comments about the Dendrite company, in response to the publication and news coverage of the company's quarterly report, appeared on a forum hosted by Yahoo![113] The anonymous forum postings were critical of Dendrite's president and the manner in which the company recognized revenue.[114]

The company claimed that the statements were false, and filed suit against many of the forum posters for breach of contract, defamation, and misappropriation of trade secrets.[115] Because the

112. Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756, 765 (N.J. Sup. Ct. App. Div. 2001) (citing McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995)).

113. *Id.* at 762–63.

114. *Id.* at 763.

115. *Id.*

majority of the forum posters used pseudonyms, Dendrite sought an order to discover the names of the posters.[116] The trial court granted Dendrite's motion for discovery with respect to two of the posters, but denied the company's motion for discovery for two others because the company had not made a prima facie showing that one poster's postings were defamatory and that both of their postings were made in such an unlawful manner that the court should "revoke their constitutional protections.[117] The New Jersey Superior Court, Appellate Division affirmed this ruling on appeal, and set forth the standard by which the lower courts were to decide whether to allow discovery of the identity of anonymous speakers.[118]

In *McIntyre*, the Court asserted that anonymity was not a valid basis for excluding speech from the marketplace of ideas,[119] a conclusion that several subsequent cases reiterated. In *Independent Newspapers Inc. v. Brodie*,[120] for instance, a newspaper sought to quash a subpoena of its records relating to commenters on its online articles.[121] The Court of Appeals of Maryland cited the *McIntyre* majority opinion in ruling that the benefits of allowing anonymous speech in the marketplace outweighed the public interest in knowing the authors.[122]

Though the majority of the courts found that anonymous speech received First Amendment protection, some courts were careful to indicate that this protection was not without limitation. An example of a court applying this limitation is *Solers Inc. v. Doe*,[123] in which a software company subpoenaed a third party seeking the identification information of a poster who reported that the company was involved in copyright infringement.[124] The Software & Information Industry Association (SIIA), an organization focused on preventing piracy in the software industry, allowed individuals to anonymously report alleged misconduct

116. *Id.* at 763–64.
117. *Id.* at 764.
118. *Id.* at 760–61.
119. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341 (1995).
120. 966 A.2d 432 (Md. 2009).
121. *Id.* at 434–35.
122. *Id.* at 440–41 (quoting *McIntyre*, 514 U.S. at 341).
123. 977 A.2d 941 (D.C. 2009).
124. *Id.*

both online and by telephone.[125] After Solers was accused and later cleared of copyright infringement, it filed suit against the anonymous individual claiming defamation and tortious interference with business relations.[126] Solers also served the SIIA with a subpoena for all records dealing with the anonymous individual's identity; SIIA filed a motion to quash.[127] The trial court granted SIIA's motion.[128]

The D.C. Court of Appeals vacated the judgment of the trial court.[129] Although recognizing that the U.S. Supreme Court has extended First Amendment protection to anonymous speech, the *Solers* court noted that this protection was limited to only "*some* anonymous speech."[130] True anonymous speech was not "a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent."[131] The court in *In re Baxter*,[132] and other courts,[133] also noted that there was no First Amendment protection for false or libelous speech. *In re Baxter* arose after a man claimed that anonymous postings about him on a website were defamatory.[134] Baxter sought discovery from the webhosting service for the website.[135] The website owner, identified as John Doe, made a motion to intervene to raise free speech issues before the court.[136]

In discussing whether to allow John Doe to intervene and the protection of anonymous speech, the *In re Baxter* court noted that the *McIntyre* decision was based, in part, on the fact that the speech at issue

125. *Id.* at 945.
126. *Id.* at 946.
127. *Id.*
128. *Id.* at 947.
129. *Id.* at 941.
130. *Id.* at 950 (emphasis added).
131. *Id.* at 951 (citing Doe v. Cahill, 884 A.2d 451, 456 (Del. 2005)); *see also* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).
132. No. 01-00026-M, 2001 U.S. Dist. LEXIS 26001 (W.D. La. Dec. 19, 2001).
133. *See, e.g.*, Best Western Int'l, Inc. v. John Doe, No. CV-06-1537-PHX-DGC, 2006 U.S. Dist. LEXIS 56014, at *9 (citing *Cahill*, 884 A.2d at 456); Greenbaum v. Google, Inc., 845 N.Y.S.2d 695, 698 (N.Y. Sup. Ct. 2007).
134. *In re Baxter*, 2001 U.S. Dist. LEXIS 26001, at *2.
135. *Id.* at *3.
136. *Id.* at *4.

in that case was not libelous or fraudulent.[137] Thus, the ruling in *McIntyre* was narrow:

> [I]t can be concluded that although the First Amendment includes, in some circumstances (at least where truthful political speech is involved (*McIntyre*), . . .) a limited right of anonymity exists . . . such a right does not exist where the statements made are libelous, misleading, conducive to fraud or defamatory.[138]

In *McIntyre*, the U.S. Supreme Court used strict scrutiny to analyze whether the Ohio election law infringed upon the First Amendment right to free speech.[139] Yet, few of the cases found cite the *McIntyre* decision in relation to strict scrutiny. The court in *Sinclair v. TubeSockTedD*,[140] in deciding whether to grant a plaintiff's motion to discover the names of YouTube posters who had made video responses about him, wrote that the U.S. Supreme Court requires "both proof of a compelling interest and a narrowly tailored restriction serving that interest where compelled identification of speakers threatens the First Amendment right to remain anonymous."[141] Likewise in *Sedersten v. Taylor*,[142] a defamation case initiated in response to comments made on an online news article about a local public official, the court stated that restrictions on political speech must be "narrowly tailored to serve an overriding state interest."[143]

B. Motivations for Anonymity

The courts citing *McIntyre* also used the case in the discussion of the motivations for anonymous speech. In *Quixtar Inc. v. Signature Management TEAM LLC*,[144] the U.S. District Court for the District of Nevada noted that there were several motives for speaking

137. *Id.* at *27–32.

138. *Id.* at *33.

139. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995).

140. 596 F. Supp. 2d 128 (D.D.C. 2009).

141. *Id.* at 131 (citing *McIntyre*, 514 U.S. at 347).

142. No. 09-3013-CV-S-GAF, 2009 U.S. Dist. LEXIS 114525 (W.D. Mo. Dec. 9, 2009).

143. *Id.* at *7 (citing *McIntyre*, 515 U.S. at 346–47).

144. 566 F. Supp. 2d 1205 (D. Nev. 2008).

anonymously.[145] "Anonymity can focus the audience on the speech rather than the speaker, and more pragmatically, it is a useful antidote to reprisal and the other potential inconveniences and adversities of publicity."[146] The case arose after a disagreement between Quixtar and its subsidiary Signature Management TEAM, during which an unidentified individual began to make disparaging comments about Quixtar on several websites.[147] In a deposition of one of Signature's employees, Quixtar attempted to question the employee as to whether he was the creator of the websites.[148] The employee refused to answer the questions.[149] Quixtar then filed a motion to compel the employee to answer its questions.[150] The *Quixtar* court, referencing *McIntyre*, found that anonymity was "a shield from the tyranny of the majority."[151]

C. History of Anonymous Speech in the United States

In the *McIntyre* opinion, the U.S. Supreme Court noted the long history of anonymous speech in the United States, particularly with respect to political issues. A number of the cases found in this study cited *McIntyre* in relation to the protection of political speech. The U.S. District Court for the Western District of Washington cited *McIntyre* in *Doe v. 2themart.com Inc.*[152] in relation to its finding that "[w]hen speech touches on matters of public political life, such as debate over the qualifications of candidates, discussion of governmental or political affairs, discussion of political campaigns, and advocacy of controversial points of view, such speech has been described as the 'core' or 'essence' of the First Amendment."[153]

145. *Id.* at 1213.
146. *Id.*
147. *Id.* at 1208–09.
148. *Id.* at 1209.
149. *Id.*
150. *Id.*
151. *Id.* at 1213 (quoting McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995)).
152. 140 F. Supp. 2d 1088 (W.D. Wa. 2001) (citing *McIntyre*, 514 U.S. at 346–47).
153. *Id.* at 1092–93.

The *2themart.com* opinion was based on a motion by John Doe petitioners to quash a subpoena to an Internet Service Provider seeking identity information on individuals who had posted allegedly defamatory statements on an Internet forum.[154] The court used the same examples of the Federalists and the anonymous Anti-Federalists used by the *McIntyre* Court in finding, "[a]nonymous speech is a great tradition that is woven into the fabric of this nation's history."[155]

V. ANALYSIS AND CONCLUSION

In general, the themes that emerged from the cases citing *McIntyre* reflected the issues the U.S. Supreme Court discussed within the *McIntyre* opinion. The cases citing *McIntyre* included discussions of First Amendment protection for anonymity, the historical foundations of anonymity in the United States, the motivations for anonymous speech, as well as the need to use a high level of scrutiny when constitutional rights are at issue. Of the cases found, the vast majority involved claims of false speech. In spite of this distinguishing fact, the courts continued to cite *McIntyre* with respect to the protection of anonymous speech.

The researcher found few cases in which the courts decided to allow the plaintiff's motion to compel discovery of an anonymous defendant's identity or to deny a defendant's motion to quash a subpoena for their identity. It appears, however, that in these cases the court either noted that there was a limitation on First Amendment protection for anonymous speech, or that certain kinds of speech were not protected. In *Maxon v. Ottawa Publishing Co.*,[156] for example, the Appellate Court of Illinois cited *McIntyre* in relation to its finding that "certain types of anonymous speech are constitutionally protected."[157] The *Maxon* court ruled that a newspaper had to disclose the identity information of persons who posted on their online news articles.[158] Some of the posters had made comments that accused Maxon of taking bribes.[159] Also

154. *Id.* at 1089–91.
155. *Id.* at 1092.
156. 929 N.E.2d 666 (Ill. App. Ct. 2010).
157. *Id.* at 674.
158. *Id.* at 677.
159. *Id.* at 670.

compelling with respect to the *Maxon* case is the court's rejection of the procedural protections for anonymous speakers found in *Dendrite*.[160]

In the cases in which the anonymity of the defendant was preserved, the majority of the courts used either the *Dendrite* test or the test from *Cahill*, which modifies the criteria found in *Dendrite*. Both *Cahill* and *Dendrite* cite *McIntyre* for the proposition that the First Amendment protects anonymous speech, even when on the Internet. The major concern in both cases was ensuring that the defendant's right to anonymity was preserved until the plaintiff made a showing of defamation. Anything less would be violating the defendant's right to remain anonymous, and possibly subjecting the defendant to unwarranted harassment at the hands of the plaintiff.

Yet the cases found represent only a fraction of those filed or petitioned for with respect to online anonymous speech.[161] This may demonstrate that *McIntyre* is not as influential to the protection of anonymous speech as scholars thought it could be.[162] Further demonstrating this is the fact that most of the courts citing *McIntyre* used it as a reference citation, and not as a decision that must be followed or explained. What the future holds with respect to the use of *McIntyre* is unknown, but it is instructive to consider how the case was used in a more recent decision on anonymous online speech.

In March 2011, the U.S. Court of Appeals for the Ninth Circuit handed down another decision in the ongoing saga of *Quixtar*. *In re Anonymous Online Speakers*[163] was a motion for a writ of mandamus by certain individuals whose identities Signature TEAM was ordered to disclose.[164] Both the anonymous commenters and Quixtar filed for writs of mandamus.[165] The Ninth Circuit cited *McIntyre* multiple times in deciding to deny both the commenters and Quixtar's motions.[166] Like many of the other courts in the cases mentioned above, the Ninth Circuit used *McIntyre* as a reference citation for the finding that the First Amendment protects anonymous speech, as well as noting the long

160. *Id.* at 675–76.
161. *See supra* Section III.
162. *See supra* notes 67–68, 94–107 and accompanying text.
163. 661 F. 3d.1168 (9th Cir. 2011).
164. *Id.*
165. *Id.* at 1171.
166. *Id.* at 1172–73.

history of anonymous speech in the United States.[167] The court also noted the reasons that speakers would choose to remain anonymous. The citations to *McIntyre* end, however, when the court notes that the freedom of speech is a limited right, and that political speech is given the highest level of protection.[168] To be sure, the court's finding does not conflict with the *McIntyre* ruling. It does however, demonstrate the narrowness of the protection for anonymous speech under *McIntyre* or otherwise.

In sum, the influence of the U.S. Supreme Court's decision in *McIntyre* has not been as significant as thought possible with respect to online anonymous speech. Although cases citing *McIntyre* were found, the use of the Court's reasoning in these cases was sparse. For the most part, *McIntyre* was used as a reference citation. These reference citations fell into three categories that mirrored the issues that the Court discussed in *McIntyre*, but did not provide in depth discussion of these issues. *McIntyre*, then, only appears useful in these cases, the majority of which involved defamation or false speech, for providing the foundation for the court's ruling, and not the basis of the rulings.

167. *Id.*
168. *Id.*