

In for a Calf is not Always in for a Cow: An Analysis of the Constitutional Right of Anonymity as Applied to Anonymous E-Commerce

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I. Introduction

The advent of the information age and the expanded use of the Internet have given rise to many interesting legal issues. An issue that courts are sure to explore is the extent to which the United States Constitution protects anonymous Internet communications from state and federal regulation. The United States Supreme Court has already addressed the question of anonymity in connection with political speech, finding that there is a constitutional right to speak anonymously in the political realm.¹ Most recently, the Court addressed the same question in the religious context in a case brought by Jehovah's Witnesses who objected to a law that required them to obtain a permit before engaging in door-to-door activities.² However,

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1. See *Talley v. California*, 362 U.S. 60 (1960); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182 (1999).

2. *Watchtower Bible & Tract Soc'y of N.Y. v. The Vill. of Stratton*, 122 S. Ct. 2080, 2090 n.14 (2002):

as Justice Ginsburg artfully noted in her concurrence in *McIntyre v. Ohio Elections Commission*, “[i]n for a calf is not always in for a cow.”³ Just because the Supreme Court recognized a constitutional right of anonymity related to the distribution of political leaflets and religious tracts does not mean that anonymous speech cannot be regulated in other contexts. One context where the constitutional right of anonymity is sure to arise is in connection with e-commerce⁴ and Internet advertising.⁵

Although the Jehovah’s witnesses do not themselves object to a loss of anonymity, they bring this facial challenge in part on the basis of overbreadth. We may, therefore, consider the impact of this ordinance on the free speech rights of individuals who are deterred from speaking because the registration provision would require them to forgo their right to speak anonymously. See *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

3. 514 U.S. at 358 (Ginsburg, J. concurring). The need for further definition of the right of anonymity is perhaps best explained by the following comment: “No conceptual breakthrough of any importance leads a static existence. This is especially true of conceptual breakthroughs at the constitutional level. The breakthrough, once established, has a tendency to expand until it meets countervailing forces strong enough to arrest it.” G. Sidney Buchanan, *The Right of Privacy: Past, Present and Future*, 16 OHIO N.U. L. REV. 403, 436 (1989). The countervailing force at work here is the fraud and deception that is made possible by anonymity on the Internet.

4. As used in this article, the term “e-commerce” refers to the offering for sale of goods and services over the Internet and is intended to refer to all forms of Internet advertising but does not refer to online discussion groups and chat rooms. See ENCARTA WORLD ENGLISH DICTIONARY, (American ed. 2001), at <http://dictionary.msn.com/find/entry.asp?search=e-commerce> (last visited Dec. 31, 2001) (hereinafter “ENCARTA DICTIONARY”) (“E-commerce is ‘business transacted online: transactions conducted over the Internet, either by consumers purchasing goods and services, or directly between businesses. Also called electronic commerce.’”).

5. Although a number of scholars have explored the issue of the First Amendment’s application to Internet communications generally (see, e.g., articles collected at 104 YALE L.J. 1613–1850), I could not find an article that discusses the issue as it relates to anonymous Internet advertising. In *Flood Control on the Information Ocean; Living With Anonymity, Digital Cash and Distributed Databases* (hereinafter “*Flood Control*”), A. Michael Froomkin discusses the issue in the contexts of political and non-political speech and concludes that “[r]estrictions on anonymity are more likely to be sustained if they focus on types of non-political speech that have tended to receive the lowest protection.” 15 U. PITT. J. of L. & Com. 395, 428-43 (1996); see also A. Michael Froomkin, *The Metaphor is the Key: Cryptography, The Clipper Chip and The Constitution*, 143 U. PA. L. REV. 709, 812-23 (1995) [hereinafter “*Metaphor*”] (discussing First Amendment issues related to efforts to restrict cryptography including the U.S. government’s “Clipper Chip” initiative and the mandatory encryption key escrow provisions thereof); see also Scot M. Graydon, *Much Ado About Spam: Unsolicited Advertising, the Internet, and You*, 32 ST. MARY’S L.J. 77 (discussing the problems of spam from the recipients’ point of view and proposing a federal law to regulate spam); Consuelo Lauda Kertz & Lisa Boardman Burnette, *Telemarketing Tug-O-War: Balancing Telephone Information Technology and the First Amendment with Consumer Protection and Privacy*, 43 SYRACUSE L. REV. 1029 (1992) (discussing First Amendment issues arising from efforts to regulate 900 numbers). See Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J.

As I discuss more fully in Section II of this article, there are several reasons why anonymous commerce is likely to exist on the Internet and why, in order to protect consumers and business owners, Congress and the states should seek to ban such activity. One problem is that while the Internet is a forum for increased political and social discourse, it is also a place where false, unreliable, defamatory, fraudulent and offensive messages can proliferate.⁶ Unfortunately, at the same time consumers can use the benefits of anonymity and pseudonymity⁷ to enhance their privacy, anonymity and pseudonymity can be used to foster criminal activity or shield people from responsibility for their fraudulent statements. By the simple expedient of using a domain name or e-mail address, individuals and companies alike can assume a different and fictitious persona. If an inability to track messages is desired, re-mailing technologies and services are readily available.⁸ As evidence of

877, 894 (1963) (“[T]he theory of freedom of expression is a sophisticated and even complex one. It does not come naturally to the ordinary citizen but needs to be learned. It must be restated and reiterated not only for each generation, but for each new situation.”); see also Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspace*, 104 YALE L.J. 1639, 1647 (1995) (“The critical question is whether ‘new wine can be poured successfully into an old bottle,’ or whether new legal norms must be devised for the governance of the Network.”).

6. For a discussion of the potential for fraud on the Internet, see Federal Trade Commission, *Fighting Consumer Fraud: New Tools of the Trade* (Apr. 1998); Federal Trade Commission, *FTC Names Its Dirty Dozen, 12 Scams Most Likely to Arrive Via Bulk Email* (July 1998); Federal Trade Commission, *Dot Cons* (Oct. 2000) (copies on file with author). See also *Fraud on the Internet: Scams Affecting Consumers: Hearings Before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate*, 105th Cong. (1998) and the “Internet Fraud Watch” website, at <http://www.fraud.org/internet/intset.htm> (last visited March 10, 2002).

For an interesting case study of the inaccuracies of online discussions groups, see LAURA J. GURAK, *PERSUASION AND PRIVACY IN CYBERSPACE* (Yale University Press 1997) (detailing the history of the Lotus Marketplace and Clipper Chip proposals) (“The Market Place and Clipper cases illustrate how closed communities enhance the spread of inaccurate information and how ethos easily becomes dominant in cyberspace.”).

7. “Anonymity” is used herein as it has been used by the U.S. Supreme Court to refer both to anonymous speech (speech without any identity) and pseudonymous speech (speech under a fictitious name). Although some commentators have noted that there are different forms of anonymity, see Noah Levine, Note, *Establishing Legal Accountability For Anonymous Communication in Cyberspace*, 96 COLUM. L. REV. 1526, 1528-37 (1996) (distinguishing between “apparent anonymity” (anonymous or pseudonymous communications that can be traced) and “true anonymity” (anonymous communications that cannot be traced)) and L. Detweiler, *Identity, Privacy and Anonymity on the Internet*, available at <http://www.rewi.hu-berlin.de/jura/proj/dsi/Netze/privint.html> (last visited Oct. 23, 2002), the term is used herein to refer to all forms of anonymity and pseudonymity unless otherwise noted.

8. For a description of various forms of anonymity on the Internet and the

fraudulent activity on the Internet accumulates and unsolicited e-mails become more intrusive, consumer groups and individuals will pressure Congress and the state legislatures to “do something.” A potential solution is to enact a law that requires individuals and companies who engage in Internet advertising⁹ to disclose their correct legal identities and principal place of business.¹⁰ Not only will

technological means of assuring such anonymity, see *Flood Control*, *supra*, note 5 at 414-427; Detweiler, *supra* note 7; the Electronic Privacy Information Center (EPIC), *Guide to Practical Privacy Tools*, at <http://www.epic.org/privacy/tools.html> (last visited Apr. 8, 2002); and Levine, *supra* note 7. As Detweiler explained:

Simply stated, anonymity is the absence of identity, the ultimate in privacy. However, there are several variations on the simple theme. A person may wish to be consistently identified by a certain pseudonym or ‘handle’ and establish a reputation under it in some area, providing pseudo-anonymity. A person may wish to be completely untraceable for a single one-way message (a sort of ‘hit-and-run’). Or, a person may wish to be openly anonymous but carry on a conversation with others (with either known or anonymous identities) via an ‘anonymous return address.’ A user may wish to appear as a ‘regular user’ but actually be untraceable.

Detweiler, *supra* note 7, section 3.1.

Levine described re-mailing technology as follows:

The tool by which true anonymity is achieved in cyberspace is the anonymous remailer A person who wants to send an anonymous e-mail or post an anonymous message to a news group sends it to the anonymous remailer, which strips the message of the identity and digital address of the original sender and then “re-mails” it to the location specified by the sender.

Levine, *supra* note 7, at 1531.

9. For an overview of Internet advertising strategies, see BARBARA K. KAYE & NORMAN J. MEDOFF, *JUST A CLICK AWAY, ADVERTISING ON THE INTERNET* (Allyn and Bacon 2001); THOMAS J. KUEGLER, JR., *WEB ADVERTISING AND MARKETING, MAKE THE WEB WORK FOR YOU* (Prima Tech, 3d ed. 2000); ROBIN ZEFF & BRAD ARONSON, *ADVERTISING ON THE INTERNET* (2d. ed. Wiley 1999); and *ADVERTISING AND THE WORLD WIDE WEB* (David W. Schumann and Esther Thorson eds., Lawrence Erlbaum Associates 1999). The term “Internet” refers to “the linked computer network where information is freely exchanged worldwide,” *Just A Click Away*, *supra* at 2, and for purposes of this article includes all forms of advertising over such network. For a more technical definition, see Internet Society, *All About The Internet: History of the Internet*, at <http://www.isoc.org/internet/history/brief.shtml> (last visited March 10, 2002), wherein it is noted that on October 24, 1995 the Federal Networking Council unanimously passed a resolution defining the term “Internet” as the following:

[T]he global information system that – (i) is logically linked together by a globally unique address space based on the Internet Protocol (IP) or its subsequent extensions/follow-ons; (ii) is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite or its subsequent extensions/follow-ons, and/or other IP-compatible protocols; and (iii) provides, uses or makes accessible, either publicly or privately, high level services layered on the communications and related infrastructure described herein.

Id.

10. Several of the early efforts to regulate unsolicited e-mail have included mandated disclosure requirements. For instance, as originally introduced, the State of Washington’s “Commercial E-Mail Regulation Act,” House Bill 1037, § 2(1)(c), *Pike & Fischer*:

a law of this sort provide consumers with critical information upon which to make better decisions but it will also provide law enforcement with the means to both identify and prosecute Internet con artists.

As with recent Congressional efforts to protect children from pornographic web sites and advertisements¹¹ and a state's attempt to regulate unsolicited e-mails (also known as "spam"),¹² any effort to restrict anonymous Internet speech is likely to be challenged on First Amendment grounds.¹³ Based principally on the U.S. Supreme Court's existing commercial speech jurisprudence, I argue in Section IV of this article that a law that bans anonymous Internet advertising

Internet Law & Regulation, Laws & Policy, IC-665-671, at <http://internetlaw.pf.com/html/newallprimarysourcesdocuments-cr.asp> (last visited Oct. 29, 2002), contained a provision that made it unlawful for anyone who initiated the transmission of a commercial electronic mail message from a computer located in the State of Washington or to a resident of the State of Washington to fail to prominently display prescribed identifying information, including the name and address of the person initiating the message. As adopted and now in effect, however, the law only requires that unsolicited e-mail messages not contain false or misleading information in the subject line and not use a third party's Internet domain without their permission. See WASH. REV. CODE ANN. § 19.190.020(1) (West 2002). A Nevada statute provides, among other things, that it is unlawful to transmit electronic mail if the person knows or has reason to know that it contains false information concerning the identity of the sender or the source of the transmission. 11 NEV. REV. STAT. § 205.49.

The Directive on Distance Contracts of the European Parliament and Council of the European Union, Directive 97/7/EC, May 20, 1997, Article 4, *Pike & Fischer, supra* at IC-587-595, in pertinent part, provides that "in good time prior to the conclusion of any distance contract, the consumer shall be provided with the following information: (a) the identity of the supplier and, in the case of contracts requiring payment in advance, his address . . ."

11. See, e.g., *ACLU v. Reno*, 521 U.S. 844 (1997) (involving the Communications Decency Act of 1996, part of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, specifically 47 U.S.C §§ 223(a) and 223(d) (1994 ed., Supp. II)); *Ashcroft v. ACLU*, 535 U.S. 564 (2002) (involving the Child Online Protection Act of 1998, Pub. L. 105-227, 112 Stat. 2681 (1998) (codified at 47 U.S.C. § 231); *Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999) (involving the Child Pornography Prevention Act of 1996, Pub. L. 104-208, 110 Stat. 3009-26, specifically 18 U.S.C. § 2256(8)).

12. *ACLU of Ga. v. Miller*, 977 F. Supp. 1228 (N.D. Ga. 1997).

13. The First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The guarantees of the First Amendment are made applicable to the States pursuant to the Due Process Clause of the Fourteenth Amendment. See *Gitlow v. N.Y.*, 268 U.S. 652 (1925). See generally, Note, *Developments in the Law - The Law of Cyberspace*, 112 HARV. L. REV. 1574 (1999) and I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U. PITT. L. REV. 993 (1994).

would not be held unconstitutional on free speech grounds.¹⁴ Additional arguments in support of my position are provided by a number of the Supreme Court's "mandated disclosure" and "direct solicitation" cases and by the captive audience doctrine. Finally, using the three methods of analysis employed by the majority, concurring and dissenting opinions in *McIntyre*, I predict that the constitutional right of anonymity will not be extended to commerce and, therefore, that such right will not be an obstacle to a law that bans anonymous Internet advertising.

II. Why is Anonymous E-Commerce an Issue?

Before taking action to curb anonymous e-commerce, Congress and the state legislatures will first have to conclude that it is a problem worthy of a legislative solution. To the casual observer, the notion that an individual or company will engage in anonymous transactions may seem absurd. Rational, intelligent people normally are reluctant to deal with someone they cannot identify, so the impetus for disclosures of identity is strong, at least among reputable businesses. Like their "brick-and-mortar" brethren, most online merchants are reputable business people who have no intent to defraud their customers.¹⁵ For the majority of online transactions then, anonymity will not be an issue. Sellers of goods and services, particularly those that own well-known trademarks and service marks, understand that the disclosure of their identities will often help them to sell their products and services. Despite the obvious value to consumers and merchants of identifying disclosures, there are a number of reasons why anonymous commerce will be more prevalent in cyberspace¹⁶ than in "meatspace."¹⁷ Consequently, it is

14. Efforts by states to regulate Internet activities have also been attacked on the basis of the dormant Commerce Clause. The question raised in such cases is whether the state law is "designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 272-73 (1987). *See also* *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997) (New York state law regulating offensive communications on the Internet struck down on dormant Commerce Clause grounds because it was found to "unduly burden interstate commerce").

15. The term "brick and mortar" is used herein to refer to traditional retail outlets with one or more physical locations.

16. As used herein, "cyberspace" is defined as an "imagined place where electronic data goes; the notional realm in which electronic information exists or is exchanged." *ENCARTA DICTIONARY*, at <http://dictionary.msn.com/find/entry.asp?search=cyberspace> (last visited Dec. 31, 2001).

17. "Meatspace" is a recently coined word that is popular among computer hackers and other aficionados of the Internet and is defined as the "place where people actually

only a matter of time before Congress and the states seek to ban anonymous Internet advertising in one form or another.

In meat space, we tend to undervalue our ability to identify individuals and companies with whom we conduct business. This is mainly due to the many daily interactions that we engage in on a face-to-face basis. When we walk into a store and purchase groceries, we assume that the store will be there the next day, week or month. If we have a problem with the goods we purchased, we can exchange them or return them for a refund. Most of us do not know the exact identities of the individuals or corporations that own our local grocery store, drycleaners or gas station, but we are comfortable conducting business with them because we assume that we can locate the identities of the owners if and when the need arises. We can search local business license records or simply visit the business establishment and ask to speak to the owner. Thus, when it comes to knowing the identities of local business owners, we accept a certain amount of anonymity because their physical presence in our communities gives us a sense of security.

The sense of security that comes from physically seeing and visiting a business establishment does not exist in cyberspace. Indeed, the Internet has eliminated many of the traditional indicia of reliability that business owners and consumers use to determine new business relationships.¹⁸ If you want to conduct business on the

meet: a place where people physically meet and interact, as contrasted with cyberspace.” *Id.* at [http://dictionary.msn.com/find/entry.asp?search=meat space](http://dictionary.msn.com/find/entry.asp?search=meat%20space) (last visited Dec. 31, 2001). The hackers’ definition of meat space is as follows:

“Meatspace” is “the physical world, where the meat lives – as opposed to cyberspace.” “Cyberspace” is “1. Notional ‘information-space’ loaded with visual cues and navigable with brain-computer interfaces called ‘cyberspace-decks’. 2. The Internet or Matrix as a whole, considered a crude cyberspace Although this usage became widely popular in the mainstream press during 1994 when the Internet exploded into public awareness, it is strongly deprecated among hacker’s because the Internet does not meet the high SF-inspired standard they have for true cyberspace technology. Thus, this use of the term usually tags a wannabe or outsider.”

THE JARGON DICTIONARY, at <http://info.astrian.net/jargon> (Jargon File 4.2.2, 20 Aug. 2000) (last visited Dec. 31, 2002).

18. See David B. Whittle’s “Cyberspace: The Human Dimension”:

In the traditional world, we rarely communicate with anyone in a truly anonymous fashion. Although we contact strangers regularly in the course of our daily business, they are almost always clearly associated with the business or organization they represent. We can usually ask for or track down a name or otherwise trace responsibility if we choose to or need to. Visually, we are accustomed to devices such as uniforms, signs, nametags, and labels to reduce levels of uncertainty when we deal with strangers.

In cyberspace, there are fewer signals or devices, and some long-time denizens of

Internet, particularly if your intent is to engage in fraud, there may be no need for a fancy office, retail store, or a large staff.¹⁹ You can establish a sophisticated Internet presence with minimal physical space and few, if any, employees.²⁰

On the Internet, it is also possible to launch online advertising with very little capital.²¹ In meat space, the costs of printing and postage, the expense of maintaining telemarketing facilities and employees, and the time-consuming nature of door-to-door

cyberspace are often reluctant to provide them, believing that individuals should be judged by the quality of their ideas and expression rather than by the more traditional trappings of appellation and association.

DAVID B. WHITTLE, *CYBERSPACE: THE HUMAN DIMENSION*, 117-118 (W.H. Freeman 1997). See also Al Teich, Mark S. Frankel, Rob Kling & Ya-ching Lee, *Anonymous Communication Policies for the Internet: Results and Recommendations of the AAAS Conference*, *The Information Society*, 15:71-77, 72 (1999) ("In face-to-face interaction, we have visual and auditory clues about the person we encounter. In online interaction, however, the text-based content lacks many of the cues on which we normally rely, and our common sense might mislead us.").

19. As noted in a report by the Federal Trade Commission:

With a telephone or an online link, fraudulent marketers can set up shop quickly and cheaply and move without a trace: The fraudulent telemarketer, for example, can use pay phones and obtain payment through wired funds or credit card advances – with no listed or traceable phone, no mailbox, and no office. For the cyber scam artist, it may be even easier to escape detection.

Federal Trade Commission, *Anticipating the 21st Century: Consumer Protection Policy in the New High-Tech Global Marketplace*, Vol. II, at 4 (1996).

20. See *Fighting Consumer Fraud*, *supra* note 6, Executive Summary:

Since the days of snake oil salesmen and medicine shows, fraud operators have appealed to consumers' concerns about health, financial security, and social acceptance. Today's con artists are pitching surefire cures, easy money, and self-improvement, but they're no longer confined to traditional venues to perpetrate frauds. The Internet is now mainstream, and it is allowing fraud promoters to mimic legitimate business more convincingly – and reach potential victims more efficiently – than ever.

In July of 1998 the FTC issued a consumer alert in which it named the twelve most likely e-mail scams. See *FTC Names Its Dirty Dozen*, *supra* note 6. In its publication entitled "DOT CONS" the Federal Trade Commission warns: "[C]on artists have gone high-tech, using the Internet to defraud consumers in a variety of clever ways." *Supra* note 6, at 1.

21. "It doesn't take much to set up a base of operation on the World Wide Web: a personal computer, a modem, a little software – all of which can be bought new for under \$1000 – and an Internet connection, which costs \$30 or less a month." Federal Trade Commission, *Anticipating the 21st Century*, *supra* note 19, at 24. It has been estimated that the cost of Internet advertising can run anywhere from \$1500 to \$1.5 million annually or more. See, KUEGLER, *supra* note 9, Chapter 20. Unlike direct mail advertising where printing and postage are the most expensive costs, the principal costs associated with an e-mail advertising campaign relate to the acquisition and maintenance of e-mail lists. Also, individuals and companies who advertise on the Internet and who are conducting legitimate businesses must make the expenditures that are necessary to establish an infrastructure to fill customer orders in a timely fashion.

solicitations act as natural limits on the extent of potential fraud.²² In contrast, once an Internet sales campaign is developed, the incremental costs to send solicitations to thousands, if not millions, of Internet users is marginal. Moreover, you need not subject the content of your advertising to scrutiny by third parties. Unlike companies who purchase print, radio and television advertisements, if you choose to establish your own web site or engage in e-mail solicitations you can do so without paying someone else for the placement of your advertisements.²³

In addition to enabling a reduced physical presence and otherwise reducing traditional indicia of reliability, the Internet has exponentially increased the ability of individuals and companies to conduct business in ways that reduce direct contact between one

22. The regulatory pressures resulting from an increase in Internet advertising are not unlike the regulatory pressures that state legislatures faced in the late 1940's and early 1950's when society became less rural and more concentrated. As described in *Breard v. Alexandria*, concerns were raised at that time about a new method of business: door-to-door solicitation. *Breard*, 341 U.S. 622 (1951). Then, as now, there was a perceived need to protect the privacy of one's home and concern that door-to-door sales operations would replace brick-and-mortar establishments. *Id.*

23. The involvement of third parties such as traditional media outlets and the U.S. Postal Service in the reduction of advertising fraud in meat space is significant. Although by statute newspapers, magazines, radio stations and television stations often are not responsible for the defamatory or fraudulent statements of their advertisers, they obviously exercise a measure of control over the activities of such advertisers. First, they can refuse to print advertisements that they find inappropriate or offensive. Second, and perhaps more importantly, because they want to get paid for the advertising space they provide they will refuse to conduct business with individuals and companies that do not have the financial means to pay for their services. The U.S. Postal Service is specifically authorized to withhold the delivery of mail under certain circumstances. *See generally* 39 U.S.C. § 3001, *et seq.* Of particular significance to the topic of this article is 39 U.S.C. § 3003(a) which provides, in pertinent part that:

Upon evidence satisfactory to the Postal Service that any person is using a fictitious, false, or assumed name, title, or address in conducting, promoting, or carrying on or assisting therein, by means of the postal services of the United States an activity in violation of sections 1302 [making it a crime to mail lottery tickets or related matter], 1341 [making it a crime to engage in mail fraud], and 1343 [making it a crime to engage in wire fraud] of title 18, it may –

(1) withhold the mail so addressed from delivery; and

(2) require the party claiming the mail to furnish proof to it of the claimant's identity and right to receive the mail.

Unfortunately, although those who engage in fraud on the Internet may be charged with wire fraud pursuant to 18 U.S.C. § 1343, neither the U.S. Postal Service nor any other entity of the U.S. government has practical, direct control over the delivery of Internet messages. The Internet eliminates an important means of controlling advertising fraud by enabling Internet advertisers to act unilaterally without the unofficial oversight of third party vendors or the official oversight of the U.S. Postal Service or a similar government agency.

another. As with the expansion of the railroads, improvements to mail service,²⁴ and the development of the telegraph and the telephone,²⁵ the Internet has enabled the further decentralization of business and a corresponding increase in remote contracting.²⁶ Remote contracting has existed for centuries, but the Internet makes it much easier for individuals and companies to purchase goods and services from businesses that are located around the world.

The Internet also makes it possible for online businesses to exist one day and be gone the next.²⁷ It is no wonder that in advising consumers how to shop safely online, the United States Federal Trade Commission (“FTC”) has said: “Anyone can set up shop online under almost any name. If you’re not familiar with a merchant, ask for a paper catalog or brochure to get a better idea of their merchandise and services.”²⁸ In urging consumers to ask online merchants for a paper brochure, the FTC has expressly recognized the importance of knowing the identities and legitimacy of the individuals and companies with whom one does business. Implicitly, the FTC has recognized that the nature of the Internet is likely to increase the prevalence of anonymous interaction.²⁹

One reason for the increase in anonymous interaction is the Internet custom of encouraging anonymity. From its early days, when the Internet was just a tool for communicating information and ideas

24. For a history of U.S. mail service, see CARL H. SCHEELE, WITH THE COLLABORATION OF CONSTANCE MINKIN, NEITHER SNOW NOR RAIN . . . : THE STORY OF THE UNITED STATES MAILS (Smithsonian Institutional Press 1970).

25. Commenting on the parallels between the Internet and the telegraph in his book, Tom Standage said:

The telegraph . . . made possible new business practices, facilitating the rise of large companies centrally controlled from a head office. Today, the Internet once again promises to redefine the way people work, through emerging trends like teleworking (working from a distant location, with a network connection to one’s office) and virtual corporations (where there is no central office, just a distributed group of employees who communicate over a network).

TOM SANDAGE, *THE VICTORIAN INTERNET*, 210 (Berkeley Books 1998).

26. As used herein, the term “remote contracting” refers to a contractual relationship that is entered into between individuals and companies who do not or cannot meet face-to-face.

27. Commissioner Thomas B. Leary, Federal Trade Commission, Unofficial Remarks to Various Marketing Groups, *The Two Faces of Electronic Commerce* (2000) (“[E]-commerce lends itself so readily to one-time promotions, where inaccurate information is not subject to normal market disciplines.”).

28. Federal Trade Commission, *Shop Safely Online* (2001).

29. *Id.*

among scientists, Internet users have used pseudonymous names.³⁰ This practice has since been adopted by millions of individuals in the selection of e-mail addresses and domain names and has been carried over into e-commerce.³¹ When selecting domain names, established businesses frequently use made-up or shortened names that may bear little resemblance to their legal names.³² Or in order to attract a broader audience to their websites, they may use a generic name such as “www.cars.com.” While identifying information about a company can frequently be found somewhere on its web site, such information is often not obvious and may be outdated. E-mail presents similar but more troubling problems because the “from” or “subject” lines are frequently designed as the “hook” to get recipients to open an e-mail and fictitious names are often utilized in e-mail messages for misleading purposes.³³

Advances in technology are also likely to increase the incidence of anonymous commerce on the Internet. In fact, technologies and businesses have been developed for the specific purpose of allowing

30. For a history of the Internet, see *Reno v. ACLU*, 521 U.S. at 849-853; KAYE & MEDOFF, *supra*, note 9, at 2-4; Harvard Law Review Association *Developments in the Law – The Law of Cyberspace*, 112 HARV. L. REV. 1574 (1999); and PBS, *Life on the Internet: Net Timeline*, at <http://www.pbs.org/internet/timeline/timeline-txt.html> (last visited March 10, 2002). For a summary of the historical use ofonyms and pseudonyms and efforts by bibliographers to discover the true identities of anonymous authors, see ARCHER TAYLOR & FREDRIC J. MOSHER, *THE BIBLIOGRAPHICAL HISTORY OF ANONYMA AND PSEUDONYMA* (University of Chicago Press 1951).

31. Early rules governing the Internet prohibited it from being used for commercial purposes. See *Life on the Internet: Net Timeline*, *supra* note 30 (“1991-1993[:] Corporations wishing to use the Internet face a serious problem; commercial network traffic is banned from the National Science Foundation’s NSFNET, the backbone of the Internet. In 1991 the NSF lifts the restriction on commercial use, clearing the way for the age of electronic commerce.”).

32. I do not mean to suggest that all individuals and companies who use pseudonymous names are engaging in fraud. I suspect that most Internet users, like most people, are law-abiding citizens. But because the use of pseudonyms is so prevalent and accepted on the Internet, those individuals and companies who engage in fraudulent activity on the Internet are not as obvious or as easy to detect as they are in the physical world.

33. ADVERTISING AND THE WORLD WIDE WEB, *supra* note 9, Chapter 13, at 331 (“In general, . . . e-mail marketing is almost always geared to getting some kind of reaction out of the reader. If present at all, branding plays only a limited role in e-mail marketing.”). While writing this article I periodically reviewed many of the e-mail advertisements that I received and found that not only did the “from” and “re” lines of the e-mail fail to identify the advertiser, but when I randomly opened various e-mail messages there was often no identifying information in the form of either a brand name or a trade name.

Internet users to hide their identities.³⁴ Known variously as “anonymizers,” “anonymity service providers,” and “re-mailers,” these services make communication difficult to trace and allow Internet users to visit websites and send e-mail communications without revealing their true identities.³⁵ Moreover, these services are marketed and packaged in a way that makes the available technologies easy to obtain and use. Although these services are a great way to encourage free and open debate on important issues of the day, they can also be used to hide the identities of those who are engaged in fraudulent and criminal activities.

Another reason anonymous commerce is likely to be more prevalent in cyberspace than in meat space is due to the instantaneous nature of the Internet. Low transaction costs and “click-to-agree” transactions have increased opportunities for fraud. Unlike direct mail advertisements that require a buyer to take multiple affirmative steps to conclude a transaction, e-mail and website solicitations both encourage and enable instantaneous action.³⁶ Typically, the recipient of a direct mail solicitation will read the solicitation, fill-out a form if he decides to purchase the goods being offered, write a check or provide a credit card number, put the form in an envelope, put a stamp on the envelope, and mail the envelope. At each step along the way, he can reconsider the wisdom of the transaction. An online purchaser, on the other hand, can place an order in a matter of minutes with little or no time to reconsider the wisdom of the transaction.³⁷ Usually the online purchaser will have fully performed his end of the bargain by using a credit card or other payment method³⁸ to prepay for the goods purchased. Those people

34. For a discussion of the various technological means of protecting one’s identity on the Internet, *see* Detweiler, *supra* note 7; and Teich, Frankel, Kling & Lee, *supra* note 18.

35. *See* the websites Ultimate Anonymity at <http://www.ultimate-anonymity.com> and Anonymizer.com at <http://www.anonymizer.com/#> for details on how easy and inexpensive it is to use re-mailing services.

36. This is undoubtedly one reason why the European Union’s Directive on Distance Contracts provides consumers seven days in which to cancel a remote contract. *See* Council Directive 97/7/EC, art. 6.1, On the Protection of Consumers in Respect of Distance Contracts O.J. (C. 144) 19.22 (hereinafter the “EU’s Distance Directive”).

37. Placing an order via the telephone also lends itself to less circumspection than having to fill out and mail a written form. For this reason, among others, telephone solicitations are highly regulated. *See* Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (2001).

38. Companies like PayPal and BillPoint provide online purchasers with a means of paying for goods without the use a credit card and in some sense may provide such purchasers with anonymity. But even if these alternative advance payment systems are used, it is likely that the online purchaser will have to reveal some identifying information

who engage in fraud through this type of high-speed transaction are unlikely to disclose their correct legal identities.

The prevalence of anonymous commerce on the Internet gains further support from the fact that many industry leaders and commentators tout the importance of anonymity as a means of encouraging the open exchange of ideas and information and as a tool for protecting individual privacy. In a report following a conference on "Anonymous Communication Policies For The Internet," the American Association for the Advancement of Science stated that "[a] fundamental perspective that was shared by virtually all conference participants is that the ability to communicate anonymously is a particularly valuable feature of the Internet and that, as regulatory regimes and policies for Internet communication evolve, efforts should be made to preserve it."³⁹ Without distinguishing the context of various Internet communications, the report stated that "the consensus view of the conference was that the positive value of anonymous communication more than offset [its] dangers" and generally advocated a passive approach to the problems posed by anonymity on the Internet.⁴⁰

Finally, as usage of the Internet expands, it is reasonable to foresee many more unsophisticated and potentially vulnerable individuals getting online and becoming prey for unscrupulous businessmen.⁴¹ Unfortunately, the technological sophistication of computers and the Internet may lead the less sophisticated consumer to believe that the Internet is highly regulated and to assume that transactions that are proposed on the Internet have a high degree of trustworthiness. The negative implications of this perception are exacerbated by the fact that the Internet renders the use of intermediaries unnecessary to publish advertisements, which thereby eliminates a principal reason for society's acceptance of anonymity in meat space. At the same time, the absence of intermediaries on the Internet heightens the potential for fraud by eliminating the filtering that now occurs with respect to print, television, and radio advertising. In this environment, particularly given the absence of face-to-face contact, the threat of fraud is great and anonymity is

such as an address where the goods are to be shipped.

39. Teich, Frankel, Kling & Lee, *supra* note 18, at 72.

40. *Id.* at 72-73.

41. A report of the U.S. Census Bureau issued in September 2001 indicated that as of August 2000, fifty-four million households, or 51%, had one or more computers and that 41.5% of U.S. households had Internet access. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, *HOME COMPUTERS AND INTERNET USE IN THE UNITED STATES* (2001).

likely to be a major tool of the defrauders.

III. The Benefits and Detriments of Anonymity as Applied to E-commerce

Assuming, as I predict, that anonymous commerce will be prevalent in cyberspace and that Congress and the states will act to restrict anonymous Internet advertising, it will not be long before the resulting laws will be challenged on the grounds that they violate the free speech guarantee of the First Amendment. In defense of such actions the governmental interests to be protected must be identified. Obviously, the desire to prevent fraud will be a major motivating factor behind any law that bans anonymous Internet advertising, but in light of the importance of free speech, all of the potential detriments of anonymity should be examined as possible justifications for the challenged laws. In the following sections of this article, the benefits and detriments of anonymity are examined generally, as they apply to commerce, and from the perspective of a consumer.

A. The Benefits and Detriments of Anonymity Generally

Based upon the majority opinions in *Talley v. California*⁴² and *McIntyre v. Ohio Elections Commission*,⁴³ discussed in more detail in Section V *infra*, there can be little doubt that anonymity is a highly valued feature of American life in several contexts. It is highly valued in the political realm as evidenced by the fact that both the *Federalists Papers* and the Anti-Federalists' response thereto were published under pseudonyms.⁴⁴ Anonymity is also highly valued in the literary realm based on a belief, if not a fear, that many great works of literature would not have been published if the authors' true identities were readily known.⁴⁵ But far from being a universally recognized right, anonymity has been both valued and discouraged by American society depending upon the circumstances of its use.⁴⁶ For instance, while anonymity is highly valued in the voting booth, it is not valued when applied to juror votes.⁴⁷ Similarly, while many businesses see value in an anonymous suggestion box, anonymous

42. 362 U.S. 60 (1960).

43. 514 U.S. 334 (1995).

44. *See id.* at 343, n.6.

45. *See id.* at 343, n.4.

46. *See generally* Saul Levmore, *The Anonymity Tool*, 144 U. PA. L. REV. 2191 (1996).

47. *Id.* at 2193.

notes exchanged among neighbors and friends are not as well received.⁴⁸ Politicians routinely view voter rolls for details - including party registration, date of birth and ethnicity - that help them to target their election activities, yet we often insist that teachers be unaware of the identity of the student who wrote the exam they are grading.

There are a number of reasons for the inconsistency in our views toward anonymity.⁴⁹ First, a person's decision to engage in anonymity may be explained by a wide-array of motivations. For instance, using anonymity with the intent to defraud is not acceptable. But, anonymity that is engaged in unconsciously or with an innocent motive, such as a desire to be judged on the merits of a work alone, is more likely to be accepted. Second, we are more willing to accept anonymity in situations where an intermediary is involved.⁵⁰ Under this view, the practice of publishing literary works under pseudonyms is arguably explained as much by society's willingness to allow an intermediary (the publisher) to vouch for the reliability of a work as it is explained by a belief in a fundamental right of anonymity. Related to this point is the observation, made earlier, that we are willing to accept anonymity in situations where we are confident that we can track down the true identity of the anonymous person or company if the need arises. Finally, our views necessarily reflect a balancing of the positive and negative aspects of anonymity.⁵¹ Where the negative aspects of anonymity outweigh the positive aspects, we are more apt to reject anonymity. For instance, it is more important for society to have an accurate record of real property ownership than it is to preserve the anonymity of real property owners.

The main benefit of anonymity, at least based upon the Supreme Court's reasoning in *Talley* and its progeny, is its potential role in promoting unfettered speech. In holding that anonymity is a constitutional right, the Supreme Court in *McIntyre* identified a

48. *Id.*

49. For additional commentary on this topic, see *Flood Control*, *supra* note 5, at 402-09.

50. The central premise of Levmore's article is "that anonymity is a less acceptable social practice where the informer can use an intermediary to avoid confrontation with the recipient and to convey information about the reliability of the source." Levmore, *supra* note 46, at 2199.

51. *Id.* at 2193 ("Anonymity may encourage communication, but nonanonymity, or identifiability, will often raise the value of a communication to its recipient."); see also WHITTLE, *supra* note 18, at 83-84 (listing the benefits and detriments of the Internet). For a discussion of a variety of conflicting issues raised by e-commerce, see Leary, *supra* note 27.

number of justifications for anonymity, including: a fear of economic or official retaliation; a fear of social ostracism; a desire to preserve one's privacy; and a belief that ideas may be more persuasive when anonymous.⁵² Branscomb identified three additional situations in which anonymity seems desirable: the asserted psychological benefits of being able to assume different personae; the need to protect confidential media sources; and the historical phenomenon and benefits of pseudonymous authors.⁵³ The American Association for the Advancement of Science ("AAAS") report cited the "positive value" of anonymous Internet communications as the "freedom from detection, retribution and embarrassment" that anonymity allows and the concomitant belief that "anonymous communication encourages Internet communications."⁵⁴ The later factor relates to the concern that people will not use the Internet unless their privacy is secured.

The view that anonymity is a tool for preserving one's privacy appears to be fueled by a realization that improved computer technologies and the Internet have greatly enhanced the ability of companies to collect, retain and disseminate private information⁵⁵ and the belief that consumers should be empowered to take action to protect their own privacy interests. Both the long-term existence of the Direct Marketing Association⁵⁶ and the mass of junk mail that most Americans receive attest to the fact that personal information about American consumers has been collected and used for a long time, but the Internet enhances the ways in which this information can be collected and used.⁵⁷ There is a concern that as Internet users

52. 514 U.S. at 341-42.

53. Branscomb, *supra* note 5, at 1642.

54. Teich, Frankel, Kling & Lee, *supra* note 18, at 71.

55. Leary, *supra* note 27, at 2:

Internet technology not only provides a record of consumers' actual purchases but information about their decision-making processes as well. It is as if you could follow consumers through a supermarket and record not only the products they actually bought but also the other products that caught their eye. A closer analogy might be close observation of a customer while browsing a bookstore as well as while paying for purchases on the way out.

56. According to its website, the Direct Marketing Association was founded in 1917 and is "the oldest and largest trade association for users and suppliers in the direct database and interactive marketing fields." <http://www.the-dma.org> (last visited March 26, 2002).

57. For a fuller description of the ways in which computer technologies and the Internet enhance the collection and dissemination of information, see Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981 (1996). See also *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044 (non-final version subject to revision) (Sup. Ct. Colo. Apr. 8, 2002) (recognizing a

engage in e-commerce, information about their buying habits will be used in an inappropriate manner.⁵⁸ Many consumers have a compelling interest in keeping details about what they purchase confidential for fear of embarrassment, retaliation, or ostracism.⁵⁹ It is argued that anonymity allows consumers to engage in e-commerce in a way that prevents purchases from being directly attributed to them.

Balanced against the asserted benefits of anonymity on the Internet are society's interest in preventing fraud and other wrongful behavior. The concern is that anonymity enables fraud and eliminates or substantially reduces the amount of information about one's actions and reputation that is available or traceable. As Branscomb explained in the context of anonymous Internet communications: "[d]isguising the sources of messages or postings relieves their authors from responsibility for any harm that may ensue. This often encourages outrageous behavior without any opportunity for recourse to the law for redress of grievances."⁶⁰ Froomkin stated: "Anonymity, like other forms of personal control over information threatens to make access to those 'external facts' on which people rely more difficult" and that the "damage to society's ability to redress legitimate claims is, the strongest moral objection to

constitutional right to read anonymously).

58. *Flood Control*, *supra* note 5, at 407-08.

Ironically, the same anonymity that is blamed for undermining the accountability necessary for the security of the home/fortress may turn out to be the tool that the inhabitants of the home need to level the playing field against corporations and governments that might seek to use new data processing and data collection tools in ways that constrain the citizen's transactional or political freedom.

Id. However, although many believe that providing privacy on the Internet is critical to the future of e-commerce, it can also be argued that e-commerce will not flourish if it is seen as a place of rampant fraud. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 458 (1978) (noting that some forms of speech may actually "disserve the individual and societal interest . . . in facilitating informed and reliable decision making").

Even among consumers, privacy is not the only concern that is posed by the Internet. As noted by Leary in his article:

Polls show that privacy is the number one concern, but large numbers of regular Internet users say they still would not make significant purchases through the medium even if their privacy concerns could be met. They are worried that if they do not know who they are dealing with and do not feel confident that they will get what they have paid for.

Leary, *supra* note 27, at 2.

59. For instance, an employee of Microsoft may not want it known that he recently bought an Apple Computer or a person who suffers from incontinence may not want it known that she buys special undergarments.

60. Branscomb, *supra* note 5, at 1642-1643.

the increase in anonymous interaction.”⁶¹ In an article on the right of privacy that pre-dates the advent of Internet-based e-commerce, Posner observed that secrecy is not a good thing if “it serves to conceal facts about an individual that, if known to others, would cause them to lower their valuation of him as an employee, borrower, friend, spouse, or other transactor.”⁶²

In the above-referenced AAAS report, it is acknowledged that “[w]hile many people believe that anonymous communication on the Internet is not only acceptable but has positive value, others see risk in it because anonymous users are not accountable for their behavior.”⁶³ The challenge, according to the AAAS report is “[t]o address the problem of how to foster socially-desirable uses of anonymous communication online while discouraging undesirable uses.”⁶⁴ This, of course, cannot be done without considering the context and nature of the anonymous communication. For present purposes, we must determine whether anonymity is and should be valued in the commercial realm and the extent to which our interest in improving online privacy outweighs our need to reduce Internet fraud.⁶⁵ For reasons that are explained in the sections that follow, when a ban on anonymity is directed at sellers of goods and services, the public’s interest in preventing fraud and being informed of basic identifying information should prevail over concerns about privacy.

61. *Flood Control*, *supra* note 5, at 405-06.

62. Richard A. Posner, *Privacy, Secrecy & Reputation*, 28 *BUFF. L. REV.* 1, 2 (1979).

63. Teich, Frankel, Kling & Lee, *supra* note 18, at 71.

64. *Id.* at 71-72.

65. As Spiros Simitis noted in *Reviewing Privacy in an Information Society*:

Because the existence of a democratic society depends essentially on an uninhibited proliferation of information, privacy very quickly became one of the main objects of debate. In fact, free speech has been seen, to a substantial extent, as a product of the constant adjustment of boundary between the individual’s right to be let alone and the public’s need to be informed.

Spiros Simitis, *Reviewing Privacy in an Information Society*, 135 *U. PA. L. REV.* 707, 731-732 (Mar. 1987). *See also* Mark S. Nadel, *Rings of Privacy: Unsolicited Telephone Calls and the Right of Privacy*, 4 *YALE J. ON REG.* 99(1986) (making the same point with respect to the regulation of unsolicited telephone calls):

The reasonableness of a restriction on speech to protect privacy depends to a great extent on the strength of the privacy interest involved. Decisions in this area have identified two factors for measuring the strength of the claimed privacy interest: the forum in which the challenged communication is received and the nature of the communication. Privacy interests are strongest in the home.

Id. at 101.

B. The Benefits and Detriments of Anonymity In Commerce

Although the value of anonymity may be clear in the literary and political realms, it is murky in the commercial realm.⁶⁶ The benefits of anonymity identified above do not seem to apply to commercial transactions or, at least, they are not so critical that we should exalt anonymity over traditional notions of contract and commercial law. Although sellers of goods may fear a loss of business for selling unpopular goods or services and may therefore prefer to be anonymous, the messages that naturally flow from the type of goods or services sold are precisely the type of information that consumers need. Thus, a consumer's choice not to frequent a business because he does not know the business or it has a bad reputation is a decision we readily accept in our free market economy.

When engaging in a transaction, the identity of the person or company from whom one purchases goods or services is and always has been an important fact to consider. If you contract to build a house, the identity of the builder allows you to determine if the builder is a licensed contractor. If you contract to purchase a washer and dryer, the identity of the manufacturer and retailer allow you to determine the quality of the goods. If you have a preference for goods made in a particular country or you only want to buy services from local companies, knowledge of the identity of the sellers of such goods and services allows you to exercise your preference. Among other things, the identity and reputation of individuals and companies is often the critical factor in determining the price one is willing to pay for goods and services. In the parlance of economists, the more information that is known about a given transaction, the more likely it is that the parties to the transaction will act efficiently.⁶⁷

Perhaps the only interest that supports anonymity in the commercial realm is our relatively newfound interest in commercial privacy.⁶⁸ Traditionally, as we have gone about our daily lives, we have given little thought to what information about us is collected and how it is used. For years we have purchased goods using credit cards and filled-out warranty registration forms, but we have seldom, if

66. See *infra* Part VI. A. and B. for a discussion of anonymity at the time of the adoption of the Bill of Rights.

67. See George A. Akerlof, *The Market for "Lemons": Quality, Uncertainty and the Market Mechanism*, 84 Q. J. Econ. 488 (1970).

68. A number of consumer groups have been concerned about privacy issues for decades but it seems that it has only recently reached the level of widespread public consciousness.

ever, stopped to wonder what is done with the information we provided. We are rightly concerned about making sure that private information about us is not used inappropriately.⁶⁹ Computer technologies have greatly increased the amount of information that can be collected and stored. The same technology has also improved the means and speed at which such information can be disseminated and searched. But before we conclude that anonymity is a preferred means of securing privacy in e-commerce, we need to balance our interest in privacy against the importance of full disclosure in commercial transactions.⁷⁰ Focusing on the seller of goods and services, the interest in privacy is simply not that strong because corporations and other forms of business (the targets of any law that would ban anonymous Internet advertisements) do not enjoy the same right of privacy that is enjoyed by individuals.⁷¹ In deciding to conduct business online, or elsewhere, businesses should understand

69. Legislative efforts to restrict the use of private information that has been collected legally by individuals and companies may present their own First Amendment problems. See Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implication of a Right to Stop People From Speaking About You*, 52 STAN. L. REV. 1049 (2000). Thus, rather than attempting to regulate the use of such information, a better approach may be to restrict the collection of the information in the first place, for instance by precluding the collection of information unless it is provided voluntarily. At a minimum, and consistent with the "full disclosure" theme of this article, consumers should be provided with advance notice of the information that is being collected and how it will be used and should be able to object to the sale of personally identifiable information to third parties. It has also been suggested that because many online consumers do not have sufficient bargaining power, a default rule should be established forbidding certain activities with respect to collected data unless specific authorization has been obtained. See Pamela Samuelson, *Privacy As Intellectual Property?*, 52 STAN. L. REV. 1125, 1151 (2000); see also Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1409 (2000) (suggesting that "traditional modes of First Amendment review should not apply in the same way, or at all, to regulation of commercial processing of personal information").

70. Commenting on privacy in cyberspace, Epstein has observed that "[j]ust as with the rise of the camera and the parabolic microphone, the law must resolve a permanent tension between two ideals [privacy and full disclosure], each of which seems to be unexceptional until placed in juxtaposition to the other." Richard A. Epstein, *Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism*, 52 STAN. L. REV. 1003, 1004 (2000).

71. *U.S. v. Morton Salt Co.*, 338 U.S. 632 (1950) (internal citations omitted):

Although the 'right to be let alone – the most comprehensive of rights and the right most valued by civilized men,' . . . is not confined literally to searches and seizures as such, but extends as well to the orderly taking under compulsion of process, . . . neither incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret.

Id. at 651-652. See also Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 399 (1978) (discussing the need to differentiate between individual and organizational privacy and the fact that privacy in commerce is not generally tolerated).

that they have little, if any, privacy rights.

Balanced against the legitimate interest of securing privacy on the Internet is the need to curb Internet fraud and criminal activity.⁷² Obviously, to the extent they are the perpetrators of fraud, corporations and other businesses have no legitimate interest in hiding their identities.⁷³ But even if sellers of goods and services are legitimate, anonymity in Internet advertising denies consumers critical information at a significant point in a transaction: before the consumer decides to make a purchase or initiate contact.⁷⁴ Although legitimate businesses that engage in anonymous Internet advertising will presumably reveal their correct identities in the electronic or written documents that are issued as part of a completed sales transaction, consumers need to know the precise identity and location of the individual or company long before they press the “enter” or “submit” button that causes their electronic transaction to be processed. In an environment where courts appear more and more willing to enforce contract terms that were not disclosed to consumers until after an order is placed and payment is made, the need for up-front information about the identity of the seller is particularly compelling.⁷⁵

72. A conflict between free speech and privacy interests has frequently arisen in the First Amendment context. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208 (1975) and cases cited therein. What is interesting about the debate concerning anonymous Internet communications is that the normal free speech/privacy dichotomy is turned on its head. Instead of privacy being used as a justification for the regulation of speech (i.e., the law is needed to protect the sanctity of one's home), it is used as an argument for why anonymous speech should not be regulated (i.e., anonymity on the Internet is needed so individuals can protect their privacy).

73. As noted above, businesses have an obvious incentive to identify themselves. For a variety of reasons, however, even legitimate businesses do not always identify themselves by their correct legal name. First, they may use a trademark or other fictitious name as a shorthand for their legal name (e.g., “IBM” instead of International Business Machines or “3M” instead of Minnesota, Mining and Manufacturing). Second, for tax or other reasons, they may be organized into multiple business entities (e.g., Enron) but present themselves to the public in such a way that consumers do not know that they are dealing with different legal entities.

74. As is discussed in *Buckley v. Am. Const. Law Found., Inc.*, the point in time when one is required to disclose his identity may be critical to the First Amendment analysis. *Buckley*, 525 U.S. 182, 198 (1999). Unlike political speech where early disclosure of identity may chill speech, in the commercial realm, early identification is needed to make fraud prevention efforts effective.

75. See, e.g., *Brower v. Gateway*, 676 N.Y.S. 2d 569 (App. Div. 1998); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); and *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997). See also Jean Braucher, *Delayed Disclosure in Consumer E-commerce as an Unfair and Deceptive Practice*, 46 WAYNE L. REV. 1805 (2000). But see *Specht v. Netscape Communications Corp.*, 306 F. 3d 17 (2nd Cir. 2002) (holding an online “browse-

As noted above, as long as means exist for individuals and businesses to easily trace the correct legal identity of a company – for instance by knowing the physical location of a company and then searching the corporate records, business licenses and fictitious name filings for that locale – we have tolerated a certain degree of anonymity when it comes to the identification of businesses. The further decentralization of business and the potential absence of a physical presence engendered by the Internet heighten the need for more direct identification requirements. Rather than placing the burden on consumers to trace the identities of businesses by searching a web site or scattered government filings,⁷⁶ I think we should require Internet advertisers, if not all advertisers, to clearly and conspicuously identify themselves by their correct legal name and place of business. This is consistent with common sense and traditional business practices, and we should not let a desire to promote e-commerce undermine the basic concept that transactors should be required to correctly and fully identify themselves.

C. The Benefits and Detriments of Anonymity to Consumers

The strongest arguments in favor of anonymity on the Internet arise when anonymity is promoted as a tool for preserving the privacy of online consumers.⁷⁷ But we need to weigh the benefits and detriments of consumer anonymity and determine if there are other, better solutions for securing online privacy for consumers. In this regard, although concerns about online privacy are usually attributed to improved means of collecting and disseminating information, they can also be attributed to improved online search capabilities⁷⁸ and our

wrap” license unenforceable for failure of mutual assent).

76. For instance, if I want to review various government filings for a business located in Sacramento, California, I would have to search the records of the City of Sacramento for a business license, the records of the County of Sacramento for fictitious business name filings, and the records of the California Secretary of State for any corporate or limited liability company filings. *See, e.g.*, the records of the California Secretary of State available at <http://www.ss.ca.gov> (last visited Oct. 25, 2002); the records of the California Franchise Tax Board, available at <http://www.ftb.ca.gov> (last visited Oct. 25, 2002); and the records of the Sacramento County Recorder, available at http://www.co.sacramento.ca.us/ccr/off_rec.html. Online services that make disparate government filings available do exist, but they usually require a fee and, therefore, are not likely to be used by the average consumer.

77. *See supra* notes 58, 65, 68-72.

78. In addition to the privacy concerns that arise due to the collection, use and sale of information by Internet vendors, including the use of “cookies” and other devices that enable individual buying and Internet searching habits to be tracked, we should also be concerned about how search engines are designed and what type of information about us

shifting notions of what constitutes “privacy.” In the past, where discussions of privacy tended to focus on “the right to be let alone,” increasingly it appears to focus on a right to have disclosed information restricted from further dissemination without notice to and consent by the providing party.⁷⁹ In other words, the focus of the privacy debate has shifted from society’s acknowledged interest in preserving the sanctity of one’s home to an interest in protecting specific information that, in many cases, is voluntarily disclosed to others. Viewed from this perspective, it appears that the problem is not a lack of anonymity but the absence of laws restricting the collection, dissemination and use of sensitive (albeit not secret) information.

Currently, if a consumer desires to be left alone, he has the power to effectuate that purpose by withdrawing from the world. He can limit the disclosure of his personal information. He can decline to have a telephone, a credit card and an e-mail account. Like the reclusive character in the recent movie, *Finding Forrester*, he can hire someone to do his shopping for him. If he steps out into the world, however, and chooses to take advantage of the conveniences and benefits that society offers, he necessarily must reveal some information about himself. When he shops in a store he can be seen and his selection of goods witnessed. Thus, when he reaches outside his home, either physically or electronically, his expectation of privacy is diminished.⁸⁰ As long as consumers can withdraw from the world and we otherwise take steps to prevent the collection and

is put on the Internet. Currently, much of what has been written by or about individuals, if posted on the Internet, can be found using a number of widely available search engines. A new verb has even developed concerning this phenomenon based upon the popular search engine “Google.” To be “googled” means that someone, your enemy or your friend, has typed your name into Google to see what pops up. A lot of information about individuals can be derived this way. Most of it is probably harmless or even positive, and if you have a common name it will be difficult to figure out what item attaches to you, but the technology suggests that we should not rush to put every bit of information about people on the Internet. Even if information is open to the public – court records and arrest records come to mind – given the potential lack of reliability and embarrassment of such information, there is some benefit to be gained from not making the search of public records too easy. It also leads me to suggest a new saying: “You can’t judge a person by his Google search.”

79. See Posner, *supra* note 62 (stressing the difference between privacy in the sense of “seclusion” and privacy in the sense of “secrecy”).

80. In an infamous quip, Scott McNealy, chairman and CEO of Sun Microsystems, observed: “You have zero privacy – get over it.” Polly Sprenger, *Sun on Privacy: “Get Over It,”* at <http://www.wired.com/news/politics/0,1283,17538,00.html> (last visited Mar. 10, 2002).

widespread dissemination of sensitive information such as health care information and social security numbers, do we really want people to be anonymous?

Obviously, what we see others do and purchase may color our opinions of them, but the development of such opinions can be very important. It is a truism that everyone has faults that he or she would prefer to conceal, but at the same time, there are many reasons why it is important to disclose certain information. For instance, if you are a non-smoker you have an interest in knowing whether the person you are dating smokes and, if so, how many packs of cigarettes he or she purchases a week. You also have an interest in knowing whether he or she has been married before, has children to support, has a history of spousal or child abuse, or has a drinking problem. The foregoing is just a small sampling of the type of information about others that we collect on a daily basis and which allows us to order our social interactions. Arguably, the more anonymity we accept in our daily lives, the harder it will be for us to accurately judge the reliability, truth and veracity of those with whom we deal, the more we will become isolated from the real world, and the less we will be required to take responsibility for our actions and decisions. In short, too much anonymity is not a good thing if it prevents individuals and companies from being a part of the day-to-day socialization process.

When I know the identity and reputation of the individual or company with whom I am dealing, I am willing to provide basic information about myself in exchange for the convenience of purchasing goods online or from a catalogue. I do not want private information about myself to be used for purposes other than my own transactions, and I object to my private information being shared with undisclosed third parties. However, I do not think I am entitled to any greater privacy online than is available to me in the brick-and-mortar world. Even if online consumers are entitled to greater privacy than their counterparts in the physical world, a law that restricts anonymous Internet advertising will not adversely impact the privacy interests of consumers if they are still allowed to use anonymity as a means of hiding their purchases.

Based upon the foregoing it is clear that there are both benefits and detriments to anonymity on the Internet depending on the context and circumstances of its use. How we balance the benefits and detriments of anonymity depends, in large part, on how we balance our interest in privacy against our interest in full disclosure. However, as discussed in the next section of this article, it also depends on the extent to which we value anonymity as a free speech

right and whether the constitutional right of anonymity tips the balance in favor of anonymity and away from full disclosure.⁸¹ I submit that the constitutional right of anonymity is limited and does not require a different constitutional analysis than the Supreme Court's existing free speech jurisprudence provides.

IV. Analyzing the Regulation of Anonymous E-Commerce Based on Existing Free Speech Jurisprudence

Although some may argue that anonymous speech should be protected as an independent constitutional right, the decisions in *Talley* and *McIntyre* establish that the right of anonymity should be applied in accordance with the context in which it is used, i.e., political, religious, or literary.⁸² Anonymity is not an independent category of speech subject to a specific level of scrutiny, but it is to be judged in accordance with the category of speech to which it attaches. Under current First Amendment jurisprudence, not all categories of speech are treated equally.⁸³ The first step in the analysis is to look at the nature of the speech involved and then determine what level of scrutiny to apply to the challenged regulation. On one extreme is the "core political" speech involved in *McIntyre*, the regulation of which is subject to exacting scrutiny. On the other extreme are certain categories of speech, such as obscenity and "fighting words," that are so devoid of any exposition of ideas that they lack all constitutional protection. Somewhere in between these two extremes is "commercial speech."

A. The Commercial Speech Doctrine

Unlike the speech involved in *McIntyre*, the speech that is

81. For those who tend toward the absolutists' view of free speech, it is unsettling to believe that any sort of balancing occurs but it is difficult to explain the Supreme Court's free speech jurisprudence any other way. The categorical approach that is applied does reflect judgments about what types of speech are more susceptible to regulation. Some may view this as a failure to give sufficient credence to freedom of speech, but it reflects the fact that, often times, free speech is not the only important interest at stake. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES, § 11.1.2 (Aspen Law & Business 1997) ("Line drawing is inevitable as to what speech will be protected under the First Amendment and what can be proscribed or limited.").

82. See also *Watchtower Bible*, where the Court noted that one of the themes that emerges from a number of cases involving door-to-door canvassing and pamphleteering is "the value of the speech involved." *Watchtower Bible*, 122 S. Ct. at 2087 (2002).

83. CHERMERINSKY, *supra* note 81, at § 11.3 ("The categories of unprotected and less protected speech reflect value judgments by the Supreme Court that the justifications for regulating such speech outweigh the value of the expression.").

impacted by a law that requires identifying disclosures in Internet advertisements is not “core political speech.” Also, unlike the speech involved in *Watchtower*, Internet advertising is not “an age-old form of missionary evangelism.” If anything, Internet advertising is commercial speech that is subject to a lower level of scrutiny than was applied in *McIntyre*.⁸⁴ “The Supreme Court has cited three factors to consider in deciding whether speech is commercial: (1) is the speech an advertisement; (2) does the speech refer to a specific product or service; and (3) does the speaker have an economic motivation for the speech.”⁸⁵ In this case, the context of the required disclosure (i.e., an advertisement whereby an online advertiser proposes to engage in a commercial transaction) is what determines the characterization of the speech as commercial speech.⁸⁶

Under current Supreme Court precedent, commercial speech is analyzed under the four-part test set forth in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*:

At the outset, we must determine whether the First

84. Commercial speech has been variously defined as “speech which does ‘no more than propose a commercial transaction,’” *Va. State Bd. of Pharmacy v. Va. Consumer Council*, 425 U.S. 748, 762 (1976) (citing *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 385 (1973)); as “expression related solely to the economic interests of the speaker and its audience,” *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561 (1980); and includes “advertising pure and simple.” *Zauderer v. Office of Disciplinary Counsel of the Superior Ct. of Ohio*, 471 U.S. 626, 637 (1985). See also RONALD D. ROTUNDA ET AL., *TREATISE ON CONSTITUTIONAL LAW, SUBSTANCE AND PROCEDURE*, § 20.26, (3d ed. 1986) (noting that although inconsistently-defined, “commercial speech, for purposes of our discussion, may be understood as speech in any form that advertises a product or service for profit or business purposes”).

In order to be analyzed under the Supreme Court’s commercial speech jurisprudence, discussed in Section V of this article, a law that regulates Internet advertising must be carefully worded so it does not encompass more than commercial speech. This is because commercial speech that is intertwined with other forms of speech will be judged in accordance with “the nature of the speech taken as a whole and the effect of the compelled statement thereon.” *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 796 (1988). See also *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 636 (1995) (Kennedy, J., dissenting) (“It would oversimplify to say that what we consider here is commercial speech and nothing more, for in many instances the banned communications may be vital to the recipients’ right to petition the courts for redress of grievances.”).

85. *U.S. Healthcare v. Blue Cross of Greater Phila.*, 898 F.2d 914, 933 (3d Cir. 1990) (citing *Bolger v. Young’s Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983)).

86. “Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon.” *Riley*, 487 U.S. at 796. See also CHEMERINSKY, *supra* note 81, at 801 § 11.3 (noting that the categories of speech subject to a lower level of scrutiny – including commercial speech – “are defined based on the subject matter of the speech and thus represent an exception to the usual rule that content-based regulation must meet strict scrutiny”).

Amendment protects the expression. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.⁸⁷

As noted in the recent case of *Lorillard Tobacco Company v. Reilly*, the last part of the *Central Hudson* test does not require application of “the least restrictive means” test, but only requires “a ‘reasonable’ fit between the legislature’s ends and the means chosen to accomplish those ends, . . . a means narrowly tailored to achieve the desired objective.”⁸⁸ This test is in contrast to the “strict scrutiny” test applied in *McIntyre* pursuant to which the State of Ohio was required to show that the challenged law was “narrowly tailored to serve an overriding state interest.”⁸⁹

With respect to a law that requires Internet advertisers to disclose their identities and place of business, the first question to ask is whether the law regulates speech at all.⁹⁰ In contrast to a law that proscribes what *can* be said, a law that bans anonymous e-commerce would prescribe what *must* be said. On this point, the court in

87. 447 U.S. at 566. The four-part test of *Central Hudson* has been repeatedly questioned by the court beginning with Justice Stevens’ concurrence in *Central Hudson* itself. *Id.* at 579-82. In *44 Liquormart, Inc. v. R.I.* (1996), a majority of the court expressed concern about how the test is to be applied in certain cases. *44 Liquormart, Inc.*, 517 U.S. 484. Justice Thomas would not apply the test at all in cases “in which the government’s asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the market place.” *Id.* at 518. As explained by Justice Kennedy in his concurring opinion in the recent case of *Lorillard Tobacco Co. v. Reilly*, he is concerned that the *Central Hudson* test “gives insufficient protection to truthful, nonmisleading commercial speech.” *Lorillard Tobacco Co.*, 533 U.S. 525, 571-72 (2001). See also Justice Thomas’ dissent in *Glickman v. Wileman Bros. & Eliot, Inc.*, 521 U.S. 457, 504 (1996) (“ . . . I continue to disagree with the use of the *Central Hudson* balancing test and the discounted weight given to commercial speech generally.”).

Note that in *Fla. Bar v. Went For It, Inc.*, the *Central Hudson* test is described as “a test consisting of three related prongs” made up of the last three of the parts of the *Central Hudson* test. *Went For It, Inc.*, 515 U.S. 618, 623-24 (1995). Of course, whether the speech is non-misleading commercial speech (the first prong of the *Central Hudson* test) is the threshold question.

88. *Lorillard*, 533 U.S. at 556.

89. 514 U.S. at 347.

90. See *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 469-471, 474 (1997) (where a majority of the Supreme Court held that a regulation that requires fruit farmers to contribute to an advertising fund does not compel speech, and therefore, the *Central Hudson* test does not apply to determine the constitutionality of the regulation).

McIntyre noted “an author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.”⁹¹ Or, as stated in an earlier case, “[s]ince all speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide ‘what not to say.’”⁹² Arguably then, the decision of a seller of goods and services to be anonymous is a form of protected speech, albeit commercial speech.⁹³

The second prong of *Central Hudson* instructs us to consider whether the regulation concerns lawful activity that is not misleading. Though misleading speech is not the only type of speech that can be regulated, the regulation of illegal activity and misleading advertising is permissible “without further justification.”⁹⁴ Or, as stated in *In re R.M.J.*:

Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of advertising suggest that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive.⁹⁵

As Justice Stevens discussed in his plurality opinion in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, commercial speech may be: (1) truthful, (2) false, (3) misleading, or

91. 514 U.S. at 342.

92. *Pac. Gas & Elec. Co. v. Pub. Util. Comm’n of Cal.*, 475 U.S. 1, 11 (1986) (holding that a governmental entity cannot dictate the speech content of a private forum). *See also* *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) (holding that a municipality could not require a parade to include a particular message).

93. Query whether all decisions not to speak are properly considered a form of expression protected by the First Amendment or only those decisions not to speak that are coupled with actual speech? In other words, is there a First Amendment right to stay silent in all circumstances? *See* dissenting opinion of Justices Rehnquist, Stevens and White in *Pac. Gas & Elec. Co.*, 475 U.S. at 32 (noting that the right not to speak is a “component of the broader constitutional interest of natural persons in freedom of conscience” and it should not apply to corporations).

94. *Edenfield v. Fane*, 507 U.S. 761, 768 (1993) (“[O]ur cases make clear that the State may ban commercial expression that is fraudulent or deceptive without further justification”)

95. *In re R.M.J.*, 455 U.S. 191, 203 (1982). *See also* *Peel v. Attorney Registration & Disciplinary Comm’n of Ill.*, 496 U.S. 91, 100 (1990) (plurality opinion by Stevens, J.).

(4) potentially misleading.⁹⁶ False and misleading commercial speech may be regulated without having to meet the *Central Hudson* test, but the government bears the burden of establishing that the speech is false or misleading:

The State's burden is not slight; the "free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful."⁹⁷

If a statute proscribes legal activity, accurate speech, or speech that is only potentially misleading, it is subject to the higher standard of *Central Hudson*; namely, "the State must assert a substantial interest and the interference with speech must be in proportion to the interest served."⁹⁸

The "activity" at issue in anonymous Internet advertising is not affirmative speech but rather the non-expression of information about sellers in Internet advertisements. There is nothing inherently illegal about a seller failing to disclose factual information about itself. Thus, it would appear that the regulation of Internet advertising in the manner suggested concerns lawful activity. Whether such lawful activity is "false" or "misleading" is another question. Clearly, if the seller of goods or services wrongly identifies itself in advertisements (e.g., says it is General Motors Company when it is Ford Motor Company), it is engaging in fraudulent activity that can be prohibited as long as the prohibition is rationally related to the fraud the state seeks to prevent.⁹⁹ But is anonymous Internet advertising "inherently misleading" such that it can be regulated

96. 496 U.S. at 100-10.

97. *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 143 (1994) (citing *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 646).

98. *Id.* (citing *In re R.M.J.*, 455 U.S. at 203. *But see Zauderer* discussed, *infra*, in which the Supreme Court applied a less exacting standard to a mandated disclosure requirement in the commercial context).

99. The "rational basis test" is the minimal level of review that is applied to laws challenged under the Due Process and Equal Protection clauses of the U.S. Constitution. *See*, *CHEMERINSKY*, *supra*, note 81, at 415 § 6.5 (citing *Penell v. City of San Jose*, 485 U.S. 1 (1988)); *U.S. R. R. Ret. Bd. v. Fritz*, 449 U.S. 166 (1980); *Allied Stores v. Bowers*, 358 U.S. 522 (1959); *Williamson v. Lee Optical*, 348 U.S. 483 (1955); and *Day-Brite Lighting, Inc. v. Mo.*, 342 U.S. 421 (1952). *See also Ibanez*, 512 U.S. at 142; *NOWAK & ROTUNDA*, *supra* note 84, at 457 (if the government attempts to deter or punish false or misleading advertising, it will not be subjected to overbreadth analysis and therefore will not be required to demonstrate that its law is no more extensive than necessary to achieve that goal).

without invoking the level of scrutiny required by *Central Hudson*?

Although the Supreme Court's commercial speech cases have frequently noted the difference in treatment to be accorded false and misleading speech, those cases do not clearly define what is meant by the term "inherently misleading." Seeds of a definition can be found in a number of Supreme Court cases and in FTC pronouncements on the subject.¹⁰⁰ Initially, it is to be noted that the plurality opinion in *Peel* stated that "[w]hether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law over which Members of this Court should exercise *de novo* review."¹⁰¹

As stated by the Ninth Circuit Court of Appeals in *Ass'n of National Advertisers, Inc. v. Lungren*, the following four factors govern whether commercial speech enjoys the protection of the First Amendment:

(i) whether the speech restricted is devoid of "intrinsic meaning", *Friedman v. Rogers*, 440 U.S. 1, 12 . . . (1978); (ii) the "possibility for deception", *id.* at 13; (iii) whether "experience has proved that in fact such advertising is subject to abuse," *In re R.M.J.*, 455 U.S. 191, 203 . . . (1982); (iv) the "ability of the intended audience to evaluate the claims made."¹⁰²

Courts will also consider whether the speech is "more likely to deceive the public than to inform it,"¹⁰³ and whether it is "incapable of being presented in a way that is not deceptive."¹⁰⁴ According to the FTC, "[a] misleading omission occurs when qualifying information necessary to prevent a practice, claim, representation, or reasonable expectation or belief from being misleading is not disclosed."¹⁰⁵ The fact that certain speech may be potentially misleading to some consumers is not enough to establish that it is inherently misleading.¹⁰⁶

Applying the foregoing analysis, it is clear that anonymous

100. As noted by the Supreme Court in *FTC v. Colgate-Palmolive Co.*, although decisions of the FTC on the issue of deceptive practices are not binding upon the courts, "[the] statutory scheme necessarily gives the commission an influential role in interpreting [the law of false advertising] and in applying it to the facts of particular cases arising out of unprecedented situations." *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965)

101. 496 U.S. at 108.

102. 44 F.3d 726 (9th Cir. 1994).

103. *W. States Med. Ctr. v. Shalala*, 69 F. Supp. 2d.1288, 1298 (D. Nv. 1999).

104. *Revo v. Disciplinary Bd. of the Supreme Court*, 106 F.3d 929, 933 (10th Cir. 1997) (citing *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

105. *FTC Policy Statement on Deceptive Acts and Practices*, reprinted in 4 Trade Regulation Reporter (CCH) 20,911 and 13,205 (Oct. 14, 1983).

106. *Id.* at 109 (citing *In re R.M.J.*, 455 U.S. at 203).

Internet advertising is potentially misleading. Indeed, concerns about the misleading nature of anonymous Internet advertising should be at the heart of any effort to prohibit such speech. Depending largely on our experiences with Internet advertising, which at this point is a little more than eight years,¹⁰⁷ and the particulars of what the advertisement says, what it does not say and what it suggests, it may also be argued that anonymous Internet advertising is inherently misleading. Unless the source of anonymous Internet advertising is easy to trace (e.g., by being able to find identifying information on other pages of a web site), arguably the omission of identifying information on web sites and in e-mail solicitations is misleading because consumers do not have sufficient information to evaluate the claims made.

As in meat space, many online advertisers are reputable businesses that do their best to avoid engaging in false or misleading advertising. But the prevalence of misleading e-mail communications and Internet advertisements cannot be ignored. Indeed, it appears that efforts to trick people into opening e-mail advertisements have become a preferred method of doing business. One trick that is utilized by bulk e-mailers or “spammers”¹⁰⁸ is to send an e-mail with a “from” line that includes either the recipient’s name or a common name that can easily be mistaken for a friend, associate or family member. Internet advertisers have also been known to divert (some would say “hijack”) Internet users from popular websites in a way that forces them to view unwanted advertisements.¹⁰⁹ These tricks may make certain forms of Internet advertising “inherently misleading” and, thus, more easily regulated.

But even if anonymous Internet advertising is not inherently misleading and the last two steps of the *Central Hudson* analysis must be applied to the challenged law, the law should not be declared unconstitutional to the extent the asserted governmental interests are substantial and the law directly advances those interests. Discussing the level of justification needed under *Central Hudson*, the Supreme

107. As noted in *Just A Click Away*, “[o]nline advertising was born on October 27, 1994 when Hotwired (<http://www.hotwired.com>), the online version of *Wired* magazine signed up 14 advertisers for its online debut.” KAYE & MEDOFF, *supra* note 9, at 6.

108. The term “spammers” refers to individuals and companies who send “spam.” “Spam” is defined as “electronic junk mail: an unsolicited often commercial message transmitted through the Internet as a mass mailing to a large number of recipients.” ENCARTA DICTIONARY, *supra* note 16, <http://dictionary.msn.com/find/entry.asp?search=spam>.

109. See FTC Consumer Alert, *Trapped in the Tangled Web: Web Scheme Diverts Consumers from Their Intended Sites* (FTC October 2001).

Court in *Board of Trustees of the State University of New York v. Fox*, explained:

In sum, while we have insisted that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful, we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end.¹¹⁰

It is also not necessary for the relationship between the harm and the governmental interest to be shown by empirical data that is “accompanied by a surfeit of background information.”¹¹¹ Rather, the Supreme Court has “permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and “simple common sense.”¹¹²

Based upon simple common sense, there are several reasons why states may require Internet advertisers to disclose their identities. First is their “general interest in protecting consumers and regulating commercial transactions.”¹¹³ Second is their interest in eliminating fraudulent transactions.¹¹⁴ Third is to give buyers the information they need to pursue any remedies they may have under warranties or for product defects. Like the statute in *Buckley v. Valeo*, discussed *infra*, the law may also be an essential means of gathering data necessary to deter fraud. Altogether, the statute would be designed to ensure that consumers have accurate information upon which to make purchasing decisions. As noted in *Edenfield v. Fane*, a state’s interest in ensuring the accuracy of commercial information in the marketplace is substantial.¹¹⁵

110. 492 U.S. 469, 480 (1989) (citations and internal quotations omitted) (upholding a regulation that banned commercial activities in college dorms).

111. *Went For It, Inc.*, 515 U.S. at 628 (1995).

112. *Id.* (citing *Renton Playtime Theatres, Inc.*, 475 U.S. 41, 50-51 (1986)); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584-585 (1991) (Souter, J., concurring); and *Burson v. Freeman*, 504 U.S. 191, 211 (1992). *See also* *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 533 (2001).

113. *Ohralik*, 436 U.S. at 460 (1978).

114. As noted by Justice O’Connor in *Buckley v. Am. Const. Law Found., Inc.*, a state’s interests in combating fraud is substantial. 525 U.S. 182, 222 (1999) (O’Connor, J. and Breyer, J. concurring in the judgment in part and dissenting in part) (citing *Buckley v. Valeo*, 424 U.S. 1, 67-68 (1976)).

115. 507 U.S. at 769.

As for the last part of the *Central Hudson* test, the actual language of the challenged law will be critical for evaluating the sufficiency of the nexus between the asserted governmental interests and the law's requirements. In general, however, the required disclosure of information in commercial advertising has long been seen as a permissible, unobtrusive and, in fact, preferred means of preventing fraud.¹¹⁶ When given a choice between restricting a certain type of speech and requiring disclosures in order to ameliorate the asserted harms of that speech, the Supreme Court not only often allows, but also frequently recommends, the disclosure route. Indeed, "[t]he prime justification for a system of free speech has long been held to be its value in preventing human error through ignorance."¹¹⁷ Commenting upon the importance of commercial speech in the "marketplace of ideas," the Court in *Bates v. State Bar of Arizona* observed:

Commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking.¹¹⁸

A law that is carefully drafted to give consumers basic identifying information without impeding other, more important, editorial choices should meet the foregoing tests.

B. Mandated Disclosure Cases

In addition to the commercial speech cases discussed above, the Supreme Court has examined the constitutionality of several statutes that mandate the disclosure of information. Applying varying levels of scrutiny based on the context of the disclosures, many statutes were upheld against constitutional challenges. A consistent theme of these cases is that providing individuals with more information is a

116. See 44 *Liquormart Inc.*, 517 U.S. at 498 (1996)("[W]e explained that the State may require commercial messages to 'appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive.'") (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 772, n. 24). See also *Zauderer*, 471 U.S. at 651-52.

117. NOWAK & ROTUNDA, *supra* note 84, at 1060 (quoting Justice Holmes' famous dissent in *Abrams v. U.S.*, 250 U.S. 616, 630 ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.")). In *Va. St. Bd. of Pharmacy*, the Court noted that giving individuals information upon which to make informed decisions is at the very heart of the free speech guarantee. 425 U.S. at 770.

118. 433 U.S. 350, 364 (1977) (internal citation omitted).

desirable outcome of legislation, particularly where disclosure requirements are chosen over direct restrictions on speech.¹¹⁹ Thus, even in a case like *Buckley v. Valeo*¹²⁰ where strict scrutiny was applied to test the constitutionality of the Federal Election Campaign Act of 1971, mandated disclosure requirements will be upheld where “there are governmental interests sufficiently important to outweigh the possibility of infringement [of the exercise of First Amendment rights]”¹²¹ Of potential significance to a law banning anonymous Internet advertising, the governmental interests found sufficient in *Buckley v. Valeo* were: (1) the interest in providing the electorate with information; (2) the interest in deterring actual corruption; and (3) the interest in providing the means of gathering data necessary to detect violations of the provisions of the law.¹²²

In mandated disclosure cases, the key to the free speech analysis is not that an individual is being forced to speak, but the context and nature of what he is required to say. In areas where some regulation is deemed proper, requiring basic identifying information will generally be found constitutional. For instance, in *United States v. Harris*, the Supreme Court examined the mandated disclosure provisions of the Federal Regulation of Lobbying Act.¹²³ Finding that the law did not violate the freedoms guaranteed by the First

119. In upholding the disclosure requirements, the court in *Buckley* quoted the advice of Justice Brandeis: “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” 424 U.S. 1, 67 (1976) (citing L. BRANDEIS, *OTHER PEOPLE’S MONEY*, 62 (National Home Library Foundation ed. 1933) (1914)).

120. *Id.* at 60-84 (citing 2 U.S.C. § 431 *et seq.* (1970 ed., Supp. IV)).

121. *Id.* at 66 (citing *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 97 (1961)).

122. *Id.* at 66-67. In contrast, the government’s interests in *McIntyre* were found insufficient. Comparing the disclosure requirements in *Buckley* with those imposed on Mrs. McIntyre, the court in *McIntyre* noted:

Though such mandatory reporting undeniably impedes protected First Amendment activity, the intrusion is a far cry from compelled self-identification on all election-related writings. A written election-related document – particularly a leaflet – is often a personally crafted statement of a political viewpoint As such, identification of the author against her will is particularly intrusive; it reveals unmistakably the content of her thoughts on a controversial issue. Disclosure of a expenditure and its use, without more, reveals far less information . . . even 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.

514 U.S. 334, 355 (1995). Based upon the foregoing reasoning, it can be argued that Internet advertising reveals even less personal information than campaign spending.

123. 347 U.S. 612 (1954).

Amendment, and consistent with the theme noted above, the Court observed that Congress “has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose.”¹²⁴ Similarly, *Meese v. Keene* concerned the constitutionality of the Foreign Agents Registration Act of 1938 (“FARA”) requiring persons engaging in “political propaganda” on behalf of foreign powers to “file detailed registration statements,” including their name and address.¹²⁵ After first noting that FARA only “required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of propaganda,” the Court upheld the statute, stating: “By compelling some disclosure of information and permitting more, the FARA’s approach recognizes that the best remedy for misleading or inaccurate speech contained within materials subject to the Act is fair, truthful, and accurate speech.”¹²⁶

Another mandated disclosure case, *Buckley v. American Constitutional Law Foundation, Inc.*, principally involved a challenge to a provision of law that required petition circulators to wear identification badges. The Supreme Court affirmed the lower court’s decision to invalidate the badge requirement. However, the Court also affirmed the holding that a requirement that petition circulators submit an affidavit containing their name and address was not an impermissible regulation of speech.¹²⁷ For First Amendment purposes, the critical distinction between the two provisions was the timing and context of the mandated disclosures. The Court held that in the context of political speech, mandated disclosures at the point of direct face-to-face confrontation was too much.¹²⁸ Significantly, the Court’s main concern was not the destruction of anonymity itself, but the adverse impact that the timing of the disclosures might have on the willingness of individuals to participate in petition gathering activities. Unlike the petition gathering process, an identification requirement in the context of commercial speech is unlikely to dissuade lawful and truthful commercial speech.

124. *Id.* at 625.

125. 481 U.S. 465, 469, 471 (1987).

126. *Id.* at 480-81 (citing *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

127. 525 U.S. 182, 189 (1999); *but see Watchtower Bible*, 122 S. Ct. 2080 (2002) (the Supreme Court invalidated a permit requirement but without explicitly overruling its earlier holding in *Buckley*).

128. *See also Meyer v. Grant*, 486 U.S. 414, 420 (1988) (discussing the face-to-face nature of the petition gathering process).

The Supreme Court first considered a mandated disclosure requirement in the context of commercial speech in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*.¹²⁹ In addressing the portion of a disciplinary decision that faulted an attorney for failing to explain in an advertisement that his clients might be liable for significant litigation costs, the Court noted that there are “material differences between disclosure requirements and outright prohibitions on speech.”¹³⁰ The Court also emphasized the reasoning behind the lower standard of scrutiny applicable to commercial speech.

Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, . . . appellant’s constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. Thus, in virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser’s interests than do flat prohibitions on speech, “warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.”¹³¹

Of course, the foregoing statement does not mean that all forms of mandated disclosures are permissible.

In *Glickman v. Wileman Brothers & Elliott, Inc.*, the Supreme Court listed the types of laws that previously have been found to violate the First Amendment: (1) laws that require one to repeat an objectionable message out of his own mouth; (2) laws that require one to use his own property to convey an antagonistic ideological message; (3) laws that compel association among differing groups; and (4) laws that require one to endorse or to finance any political or ideological views.¹³² Unlike the interests that were at stake in the cases of *Wooley v. Maynard*,¹³³ *Miami Herald Publishing Co. v.*

129. 471 U.S. 626 (1985).

130. *Id.* at 650.

131. *Id.* at 651 (quoting *In re R.M.J.*, 455 U.S. 191, 201 (1982) (internal citation omitted)).

132. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469-472 (1997) (citing *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 632 (1943)); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Pac. Gas & Elec. Co. v. Pub. Util. Comm’n of Cal.*, 475 U.S. 1, 18 (1986); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980); *Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995); *Machinists v. State*, 367 U.S. 740 (1961); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977); and *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990). See also *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 796 (1988).

133. 430 U.S. 705 (1977) (involving a statute that required noncommercial motor

*Tornillo*¹³⁴ and *West Virginia State Board of Education v. Barnette*,¹³⁵ however, the *Zauderer* court noted that Ohio did not attempt to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”¹³⁶ Nor was it a case where a private corporation was compelled to provide a forum for views other than its own.¹³⁷ Rather, Ohio attempted only “to prescribe what shall be orthodox in commercial advertising.”¹³⁸

The Court in *Zauderer* went on to explain that it does not mean to suggest that disclosure requirements do not implicate the advertiser’s First Amendment rights at all, but rather that the standard of review for such regulations is less than required by *Central Hudson*.¹³⁹ It specifically rejected the appellant’s contention that disclosure requirements should be subjected to a strict “least restrictive means” test, noting: “[a]lthough we have subjected outright prohibitions of speech to such an analysis, all our discussions of restraints on commercial speech have recommended disclosure requirements as one of the acceptable less restrictive alternatives to actual suppression of speech.”¹⁴⁰ Thus, in the context of commercial speech, the Supreme Court only requires that mandated disclosure requirements be “reasonably related to the State’s interest in preventing deception to consumers” and not “unjustified or unduly burdensome.”¹⁴¹ Under this test, a statute that requires an Internet advertiser to identify himself by his correct legal name and address should survive a constitutional challenge because it is reasonably related to the asserted governmental interests of preventing fraud and improving the information that is available to consumers.

vehicles to bear license plates with the state motto “Live Free or Die”).

134. 418 U.S. 241 (1974) (involving a statute that required newspapers to grant political candidates equal space to reply to criticisms and attacks).

135. 319 U.S. 624 (1943) (involving a statute that compelled public school children to salute the flag of the United States).

136. 471 U.S. at 651.

137. See *Pac. Gas & Elec.*, 475 U.S. at 9-12 (discussing *Tornillo* and *PruneYard*).

138. 471 U.S. at 651.

139. *Id.*

140. *Id.* at 651-52, n.14 (citing *Central Hudson*, 447 U.S. at 565). In a later case, Justice Souter characterized *Zauderer* as a case that “reaffirmed a long-standing preference for disclosure requirements over outright bans, as more narrowly tailored cures for the potential of commercial messages to mislead by saying too little.” 521 U.S. at 490-91 (Souter, J. dissenting). See also *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 796 n.9 (“Purely commercial speech is more susceptible to compelled disclosure requirements.”).

141. *Zauderer*, 471 U.S. at 651-52.

C. Direct Solicitation Cases

Depending upon the nature and invasiveness of Internet advertising, the Supreme Court's decisions in cases involving the regulation of direct solicitations may provide further arguments to support a ban on anonymous Internet advertisements. While many laws regulating direct in-person and mail solicitations have been struck down on First Amendment grounds,¹⁴² others have been upheld. Frequently in these cases, the Court has noted that some advertising and promotional activities are more prone to abuse than others and, therefore, more easily regulated. For instance, in *Breard v. Alexandria*, a case that was decided before the development of the Supreme Court's current commercial speech jurisprudence, the court upheld the constitutionality of a municipal ordinance that restricted door-to-door solicitations.¹⁴³ In so doing, the Court emphasized the invasiveness of door-to-door solicitations and the legitimate interest that society has in protecting the sanctity of one's home.¹⁴⁴

Even in cases where limitations on various modes of direct solicitation have been struck down, the Supreme Court has repeatedly noted that laws that are addressed at eliminating abusive and intrusive advertising practices may pass constitutional muster. In *Shapero v. Kentucky Bar Association*, the Court said:

Our decision in *Ohralik* that a State could categorically ban all in-person solicitation turned on two factors. First was our characterization of face-to-face solicitation as a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence and outright fraud Second, unique . . . difficulties, . . . would frustrate any attempt at state regulation of in-person solicitation short of an absolute ban because such solicitation is not visible or otherwise open to

142. See, e.g., *Watchtower Bible*, 122 S. Ct. 2080 (2002); *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466 (1988) (involving a rule prohibiting targeted direct-mail solicitations by lawyers); *Bolger v. Youngs Drug Prod.*, 463 U.S. 60 (1983) (involving a statute that banned direct-mail advertisements for contraceptives); *Edenfield v. Fane*, 507 U.S. 761 (1993) (involving a ban on in-person solicitation by certified public accountants); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (involving an ordinance that restricted door-to-door solicitations); *Martin v. Struthers*, 319 U.S. 141 (1943) (involving an ordinance that prohibited door-to-door solicitation); and *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976) (involving an ordinance regulating door-to-door solicitations).

143. 341 U.S. 622 (1951).

144. *Id.* at 644:

The issue brings into collision the rights of the hospitable housewife, peering on Monday morning around her chained door, with those of Mr. Breard's courteous, well-trained but possibly persistent solicitor, offering a bargain on culture and information through a joint subscription to the Saturday Evening Post, Pic and Today's Woman.

public scrutiny.¹⁴⁵

Likewise, in *Edenfield*, the Court noted that “[e]ven solicitation that is neither fraudulent nor deceptive may be pressed with such frequency or vehemence as to intimidate, vex or harass the recipient” . . . and provide the “legitimate and important state interest” needed to withstand scrutiny under the First Amendment.¹⁴⁶

In an opinion by Justice Powell, the majority in *Ohralik v. Ohio State Bar Association* observed that “[u]nlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison and reflection.”¹⁴⁷ More generally, the Court noted that “[t]he immediacy of a particular communication and the imminence of harm are factors that have made certain communications less protected than others”¹⁴⁸ and that one of the problems with in-person solicitations is that it “is not visible or otherwise open to public scrutiny . . . rendering it difficult or impossible to obtain reliable proof of what actually took place.”¹⁴⁹ Similar arguments can be applied to Internet advertisements. Many Internet advertisements, particularly those that are in the form of spam, are worded in ways that demand an immediate response and although technically accessible by the public, are not readily visible to the general public. Also, given the growing volume of spam and other forms of invasive Internet advertising, it may be argued that Internet advertising is “pressed with sufficient frequency and vehemence” to justify the proposed limitation on anonymous Internet advertising.¹⁵⁰

145. *Ohralik*, 436 U.S. 447, 475 (1978) (internal quotation marks and citations omitted).

146. 507 U.S. at 769.

147. 436 U.S. 447, 457 (1978).

148. *Id.*, n.13 (citing *Cohen v. California*, 403 U.S. 15 (1971)); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Schenck v. United States*, 249 U.S. 47 (1919). See also *Shapero*, 486 U.S. at 475 (“In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference.”); *FCC v. Pacifica Found.*, 438 U.S. 728, 748 (1978) (“We have long recognized that each medium of expression presents special First Amendment problems.”) (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502- 03 (1952)).

149. *Ohralik*, 436 U.S. at 466.

150. Eugene Volokh has observed:

As the economic constraints on sending tidal waves of unsolicited mail are removed, legal restrictions may have to take their place. Today such restrictions might be seen as unconstitutional, at least as to noncommercial speech. But if indeed e-mailing is next to free, then the assumption that the ‘short, though

The beauty of the Internet, at least from the advertising professional's point of view, is that Internet advertising campaigns can be designed to precisely target the interests of potential consumers.¹⁵¹ Of potential significance to e-mail advertisements, the Court in *Florida Bar v. Went For It, Inc.* noted a difference in invasiveness between untargeted and targeted solicitations.¹⁵² In that case, the Court considered a challenge to a rule of professional conduct that precluded lawyers from mailing targeted solicitations to accident or disaster victims within thirty-days after the accident or disaster. Applying the *Central Hudson* test, the Court had "little trouble crediting the Bar's interest as substantial" and upheld the challenged rule because it "targets a concrete, non-speculative harm."¹⁵³ In doing so, the Court emphasized the state's interest in protecting the privacy of its citizens and its concern that targeted mail is more prone to abuse.¹⁵⁴ Thus, it may be argued that targeted, anonymous e-mail is prone to abuse.

Most recently in the *Watchtower* case, the Court noted that the prevention of fraud, the prevention of crime and the protection of residents' privacy are important governmental interests that may support the regulation of door-to-door solicitations.¹⁵⁵ The problem with the ordinance in that case was its overbreadth and the perceived adverse impact that the ordinance would have on religious speech. The Court, however, telegraphed its view that if the ordinance had been limited in scope to commercial activities and the solicitation of funds, it was more likely to have been upheld against constitutional attack.¹⁵⁶ Indeed, in support of its opinion, the Court cited several cases that contain language supportive of the regulation of

regular journey from mail box to trash can' is 'an acceptable burden, at least so far as the Constitution is concerned' may stop being reasonable.

Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1845 (1995) (quoting *Bolger v. Young's Drug Prod. Corp.*, 463 U.S. 60 (1983)).

151. ZEFF & ARONSON, *supra* note 9, Chapter 6, at 133:

For a long time Internet advertisers dreamed of delivering the right ad to the right person at the right time. In the early days of online advertising, the realization of this dream was touted as the true promise and potential of the industry. What was once just promise is now reality.

152. 515 U.S. 618, 630 (1995) ("[A]n untargeted letter mailed to society at large is different in kind from a targeted solicitation . . .").

153. *Id.* at 625, 628-29.

154. *Id.* at 625-30.

155. 122 S. Ct. 2080, 2089 (2002).

156. *Id.*

commercial solicitation.¹⁵⁷

D. The Captive Audience Doctrine

Although the significance of the “captive audience doctrine” has not been fully defined by the Supreme Court,¹⁵⁸ the case law that exists provides the seeds for further arguments in support of a law banning anonymous Internet advertising. Under the captive audience doctrine “in certain circumstances, the unwillingness of persons to receive a message outweighs another’s right to speak.”¹⁵⁹ Anyone who has had his work online interrupted by an advertisement that pops-up on the screen for no apparent reason can attest to the fact that, in some circumstances, the recipients of Internet advertising are members of a captive audience. The question will be how invasive the advertisements are and how easily they can be avoided.¹⁶⁰

In *Lehman v. City of Shaker Heights*, one of the first cases to apply the captive audience doctrine, the Supreme Court upheld a municipal ordinance that banned political advertisements on city buses due, in part, to the fact that bus riders could not easily avoid the advertisements.¹⁶¹ According to the plurality and concurring opinions, where the recipient of an advertisement is a captive audience there is more leeway to regulate the advertiser. More recently, the Supreme Court applied the captive audience doctrine in the case of *Frisby v. Schultz* when it considered the constitutionality of an ordinance banning residential picketing.¹⁶² Emphasizing the state’s strong interest in protecting the privacy of one’s home, the majority upheld the challenged ordinance because “[t]here is simply no right to force

157. See, e.g., *Hynes*, 425 U.S. 610, 616-17 (1976) (“But in these very cases the court has consistently recognized a municipality’s power to protect its citizens from crime and undue annoyance by regulating soliciting and canvassing.”).

158. See CHEMERINSKY, *supra* note 81, at § 11.3.4.6., n.256 at 845.

159. Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85 (1991) (noting that the captive audience doctrine is ill-defined and attempting to define the appropriate parameters of the doctrine and what is meant by the term “captive”).

160. See *Consol. Edison Co. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 541 (1980) (“[T]o shut off discourse solely to protect others from hearing it [is] dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.”) (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

161. 418 U.S. 298 (1974) (plurality opinion by Blackman, J. in which Chief Justice White and Rehnquist, J. joined) (Douglas, J. concurring in the judgment on the grounds that a city could protect unwilling recipients of political advertisements).

162. 487 U.S. 474 (1988).

speech into the home of an unwilling listener.”¹⁶³ The Court further noted that in ascertaining what limits may be placed on protected speech it has “often focused on the ‘place’ of that speech, considering the nature of the forum the speaker seeks to employ.”¹⁶⁴

The Internet is a place where speech occurs and often such speech occurs in the privacy of one’s home. As with a television set, a person’s Internet connection can be turned off, but arguably the Internet has more of the captive audience features of a bus. Like a bus, when one is surfing the Internet, he is typically online for a purpose other than viewing advertisements and, thus, may not be able to avoid unwanted Internet advertisements without curtailing his other activities. Since, under the captive audience doctrine, laws have been upheld that completely ban certain forms of speech, a law that only requires identifying disclosures should be upheld as a lesser restriction on speech that is delivered in such manner.

Obviously, the complete history of Internet advertising has yet to be written, but the notion that Internet advertising may be easier to regulate than untargeted print and direct mail advertisements is not implausible.¹⁶⁵ In fact, advertising professionals view Internet advertising as a more direct and, therefore, a potentially more successful form of advertising than print advertisements, direct mail or television. This is due to what is known as “social presence” or “telepresence” and the belief that Internet advertisements may be closer on the social presence continuum to face-to-face communication than other forms of electronic advertising.¹⁶⁶ In light

163. *Id.* at 485.

164. *Id.* at 479 (“Our cases have recognized that the standards by which limitations on speech must be evaluated ‘differ depending on the character of the property at issue.’”) (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44 (1983)).

165. For the same argument with respect to unsolicited telephone calls, see Nadel, *supra* note 65, at 103 (“Intrusive communication provides greater justification for regulating the communicator than more passive communication. Since unsolicited phone calls reach the individual in his or her home and are aural rather than visual, they are especially appropriate candidates for regulation.”).

166. See EVERETT M. ROGERS, COMMUNICATION TECHNOLOGY, THE NEW IN MEDIA SOCIETY, 52-54 (The Free Press 1986) (“*Social presence* is the degree to which a communication medium is perceived to be socio-emotionally similar to face-to-face conversation. This quality is called social presence because it indicates the degree to which an individual feels that a communication partner is actually present during their exchange of information.”); see also James R. Coyle & Esther Thorson, *The Effects of Progressive Levels of Interactivity and Vividness in Web Marketing Sites*, *The Journal of Advertising*, American Academy of Advertising, (Fall 2001) Vol 30, No. 3, at 65 (“Attitudes developed through direct experience are more confidently held, more enduring, and more resistant to attack than are those developed through indirect

of such qualities, a law banning anonymous Internet advertising may be upheld against constitutional attack on the further ground that it is needed to curb abusive and invasive advertising techniques and, thereby, secure a measure of privacy for a state's citizens.¹⁶⁷

V. Analyzing Anonymity in E-Commerce Based on *McIntyre v. Ohio Elections Commission*

As noted above, the U.S. Supreme Court has previously addressed the constitutional right of anonymity in four cases.¹⁶⁸ It first recognized such a right in *Talley* when it considered the constitutionality of an ordinance restricting the distribution of any handbill unless it included the name and address of the person who printed, wrote, compiled, manufactured or distributed the same.¹⁶⁹ The ordinance was found to be unconstitutional on its face because, “[t]here can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression.”¹⁷⁰ Writing for the majority, Justice Black emphasized the important role that “anonymous pamphlets, leaflets, brochures and even books have played . . . in the progress of mankind” and the concern that “identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance.”¹⁷¹ Noting that anonymity “has sometimes been assumed for the most constructive purposes,” the Court did not pause to consider whether anonymity is desirable in all contexts.¹⁷²

In its most comprehensive examination of the constitutional right of anonymity to date, the Supreme Court in *McIntyre v. Ohio Elections Commission* considered the constitutionality of a statute that prohibited the distribution of anonymous campaign literature.¹⁷³

experience . . . [P]resence is the direct experience of reality, and telepresence is the simulated perception of direct experience . . .”).

167. If Congress or the states enact a law that enables individuals to exercise greater control over the sanctity of their own home, the Supreme Court's decision in *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728 (1970), stands for the proposition that it is likely to withstand a First Amendment challenge.

168. See cases cited, *supra* notes 1 and 2.

169. *Talley*, 362 U.S. 60, 60-61 (1960).

170. *Id.* at 64 (quoting *Lovell v. Griffin*, 303 U.S. 444 (1938)).

171. *Id.* at 64-65.

172. *Id.* at 63-64.

173. Specifically, the statute provides:

No person shall write, print, post, or distribute, . . . a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is

In that case, Margaret McIntyre had been fined \$100 for distributing handbills in opposition to a proposed school tax levy that did not contain required identifying disclosures.¹⁷⁴ Justice Stevens, writing for a majority of the Court, began by recognizing the importance of anonymity in the literary realm and the reasons individuals may choose to engage in anonymous speech.¹⁷⁵ Whatever the motivation, he reasoned, “at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.” He then noted that “[t]he freedom to publish anonymously extends beyond the literary realm” to the advocacy of political causes.¹⁷⁶

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,” *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) (footnote omitted), the most effective advocates have sometimes opted for anonymity.¹⁷⁷

Concluding that the challenged statute was “a direct regulation of the content of speech,” Justice Stevens next considered the nature of the regulated speech and the level of scrutiny to be applied and found that the statute “involves a limitation on political expression subject to exacting scrutiny” and that “[n]o form of speech is entitled to greater constitutional protection than Mrs. McIntyre’s.”¹⁷⁸ After due consideration of the asserted governmental interests, the Court concluded that the statute was unconstitutional because it was not

designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue . . . unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefore

McIntyre, 514 U.S. 334, 338, n.3 (1995) (quoting OHIO REV., CODE ANN., § 3599.09(A) (1988)).

174. Although some of the handbills identified Mrs. McIntyre as the author, others only bore the legend: “CONCERNED PARENTS AND TAX PAYERS.” *Id.* at 337.

175. *Id.* at 341 (“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.”).

176. *Id.* at 342.

177. *Id.* (citing *Talley*, 362 U.S. at 61).

178. *Id.* at 346 (quoting *Meyer v. Grant*, 486 U.S. 414, 420 (1988)).

properly tailored to prevent the asserted dangers.¹⁷⁹ As in *Talley*, the majority did not consider whether anonymity is a constitutional right in all contexts.

In *Buckley v. American Constitutional Law Foundation*, the Supreme Court again considered the right of anonymity in the context of political speech.¹⁸⁰ The state of Colorado argued that a law that required petition circulators to wear identification badges did not violate the First Amendment. The Supreme Court disagreed. Equating the circulation of a petition with the distribution of a handbill involved in *McIntyre*, the Court applied “exacting scrutiny” to determine the constitutionality of the law.¹⁸¹ The Court affirmed the lower court’s finding that the badge requirement was unconstitutional.¹⁸² The lower court found that the “badge requirement discourages participation in the petition circulation process” because petition gatherers are concerned about harassment.¹⁸³ In so doing, the Court stressed the one-on-one character of the speech and opined that petition gathering was more prone to potential harassment than the speech involved in *McIntyre*.¹⁸⁴

Most recently, in *Watchtower Bible & Tract Society of New York v. Village of Stratton*, the Supreme Court went out of its way to discuss the constitutional right of anonymity as it applies to religious speech.¹⁸⁵ Citing the fear of economic or official retaliation expressed in *McIntyre*, the majority concluded that “[t]he requirement that a canvasser must be identified in a permit application . . . necessarily results in a surrender of . . . anonymity.”¹⁸⁶ Although the Court stated

179. In *McIntyre*, the Court said:

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. The State of Ohio argued that the disclosure requirement was justified by two important state interests: (1) the interest in preventing fraudulent and libelous statements and (2) the interest in providing the electorate with relevant information.

McIntyre, 514 U.S. at 347-57.

180. 525 U.S. 182 (1999).

181. *Id.* at 199.

182. *Id.* at 200.

183. *Id.*

184. *Id.* at 199 (“Petition circulation is the less fleeting encounter, for the circulator must endeavor to persuade electors to sign the petition.”).

185. 122 S. Ct. 2080, 2090 n.14, 2002 U.S. LEXIS 442 (2002).

186. *Id.*

that such a requirement may be permissible to prevent fraudulent commercial transactions, the challenged ordinance swept too broadly to capture the plaintiffs' religious speech.¹⁸⁷

Given the broad statements in favor of anonymity that are contained in *Talley*, *McIntyre*, *Buckley*, and *Watchtower*, some will argue that anonymity should be protected in and of itself without regard to context. This raises the question: Is anonymous speech a separate category of speech that requires its own test or should limitations on such speech be judged in accordance with the underlying context of the speech, e.g., political, literary, religious or commercial? If the latter, should the constitutional right of anonymity apply to commercial speech at all and, if so, what level of scrutiny should apply to anonymous commercial speech? Those who wish to protect all forms of anonymity on the Internet may argue that a higher level of scrutiny than was applied in *Zauderer* or even *Central Hudson* should apply.¹⁸⁸ However, based upon the three methods of analysis used by the majority, concurring and dissenting opinions in *McIntyre*, I believe that the constitutional right of anonymity should not be extended to commercial speech or, if it is, that based on *Zauderer* the regulation of anonymous Internet advertising should be subject to a low level of scrutiny.

A. The Majority Approach: A Classic Free Speech Analysis

The majority in *McIntyre* employed a classic free speech analysis to determine the constitutionality of a law prohibiting anonymous political speech. The same analysis, set forth in section IV of this article, should apply to determine the constitutionality of a law prohibiting anonymous Internet advertising. The majority opinion in *McIntyre* does not compel a different result.¹⁸⁹ To the contrary, the

187. *Id.*

188. In *ACLU v. Miller*, the first case to discuss the Constitutional right of anonymity in connection with an attempt to regulate Internet communications, the U.S. District Court for the Northern District of Georgia examined a Georgia statute that made it a crime for any person to knowingly transmit data through a computer network if such data "uses any individual name . . . to falsely identify the person" or which uses trade names or logos in a manner that falsely states or implies that the sender was legally authorized to use them. *Miller*, 977 F. Supp. 1228, 1230 (1997). Citing the Constitutional right of anonymity and the overbreadth and vagueness of the statute, the court entered a permanent injunction against enforcement of the statute because it was not narrowly tailored to achieve the state's purported compelling interest. Given the expansive language of the Georgia statute, the *Miller* court did not directly address the issue raised above.

189. Although the court in *McIntyre* noted that "mandating speech that a speaker

only contexts to which the constitutional right of anonymity was specifically found to extend were the literary and political realms.¹⁹⁰ According to Justice Ginsburg's concurrence in *McIntyre*, the Supreme Court has yet to determine what "other, larger circumstances" may justify the regulation of anonymous speech.¹⁹¹

Of course, by stating that there may be circumstances where anonymous speech can be regulated without violating the First Amendment, Justice Ginsburg telegraphs her view that a constitutional right of anonymity does not apply to all forms of speech. Similarly, in footnotes 17 and 18 of the *McIntyre* decision, the majority suggests that, at a minimum, restrictions on corporate speech will be treated differently than restrictions placed on the speech of individuals.¹⁹² Quoting a passage from *First National Bank of Boston v. Bellotti*,¹⁹³ Justice Stevens explained: "[C]orporate advertising, unlike some methods of participation in political campaigns, is likely to be highly visible. Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." Citing its opinion in *Buckley v. Valeo*, the majority also noted that mandated disclosure requirements are not improper in all contexts.¹⁹⁴ Both of these statements are consistent with the position that mandated disclosure requirements in the context of commercial speech are

would not otherwise make necessarily alters the content of the speech," a law prohibiting anonymous e-commerce should not be judged by the high level of scrutiny that is applied to content-based regulations for two reasons. 514 U.S. 334 (1994). When evaluating non-speech, it is necessary to consider the context of the speech in order to categorize the speech for purposes of free speech analysis. *See id.* In *McIntyre*, the non-speech was in the context of political discourse and, therefore, was judged by an exacting level of scrutiny. *See id.* In the case of anonymous e-commerce, the context will dictate application of an intermediate level of scrutiny applicable to commercial speech. As noted in *Bolger*, 463 U.S. 60, 65 (1983), "[i]n light of the greater potential for deception or confusion in the context of certain advertising messages, . . . content-based restrictions on commercial speech may be permissible." Or as Justice Souter noted in *Glickman v. Wellman Bros. & Elliott, Inc.*, "[r]egulation of commercial speech necessarily turns on some assessment of content, . . . yet that fact has never been thought sufficient to require a standard of strict scrutiny." 521 U.S. 457, 491, n.6 (1997) (internal citation omitted) (Souter, J., dissenting).

190. *McIntyre*, 514 U.S. at 341-43.

191. *Id.* at 358; *see also* the Court's recent decision in *Watchtower*, 122 S. Ct. at 2090.

192. *Id.* at 353-54.

193. *Id.* at 354 n.18 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 (1978)).

194. 514 U.S. at 355; *see also* *Pac. Gas & Elec. Co.*, 475 U.S. at 32-35 (Rehnquist, J., White J., and Stevens, J., dissenting as to Part I) (questioning the extension of "negative free speech rights" to corporations).

unlikely to violate the constitutional right of anonymity.

Although “commercial speech” is often thought of as one category of speech for purposes of First Amendment analysis, Supreme Court precedent makes clear that there are different gradations of commercial speech that require different analyses.¹⁹⁵ On one extreme is commercial speech that is so intertwined with the exposition of ideas that it is subject to exacting scrutiny.¹⁹⁶ On the other extreme is what the court in *National Federation of the Blind* characterized as “pure commercial speech,” which is “more susceptible to compelled disclosure requirements.”¹⁹⁷ Noting that “the borders of the commercial speech category are not nearly as clear as the court has assumed,” Justice Stevens, in his concurrence in *Rubin v. Coors*, set forth a helpful test for determining where restrictions on commercial speech fall on the commercial speech continuum:

As a matter of common sense, any description of commercial speech that is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech’s potential to mislead.

Any “interest” in restricting the flow of accurate information because of the perceived danger of that knowledge is anathema to the First Amendment; more speech and a better informed citizenry are among the central goals of the Free Speech clause.¹⁹⁸

Using the foregoing test, the conclusion is inescapable that a law that prohibits anonymous Internet advertising relates to “commercial

195. In *44 Liquormart Inc.*, the Court said,

Rhode Island errs in concluding that *all* commercial speech regulations are subject to a similar form of constitutional review simply because they target a similar category of expression When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.

517 U.S. at 501 (1996).

196. See *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 796 (1988) (“[W]e do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech.”).

197. *Id.* at n.9 (citing *Zauderer*, 471 U.S. 626 (1985)).

198. *Rubin v. Coors*, 514 U.S. 476, 494, 497 (1995) (Stevens, J., concurring).

speech's potential to mislead" and should be judged by a level of scrutiny no higher than established in *Central Hudson*. But given the Court's preference for disclosure as a remedy to prevent fraud, it can also be argued that the proposed law should be judged by the lesser standard of *Zauderer*. Additionally, although not involving face-to-face solicitations, a law that prohibits anonymous online advertising seeks to regulate an activity that is more troublesome than the mere receipt of letters involved in *Shapero v. Kentucky Bar Association*.¹⁹⁹ With respect to such a law, the invasiveness of the mode of communication and the atmosphere of immediacy that often accompanies Internet advertising will provide further justification for a law banning anonymous Internet advertising. Further, unlike the statute that was the subject of scrutiny in *McIntyre*, a law that prohibits anonymous Internet advertising will be addressed to a smaller group of potential speakers and will not attempt to restrict all anonymous speech but only anonymous speech engaged in by individuals and companies who choose to sell goods or services over the Internet.

B. Justice Thomas's Approach: Examining the Practices of the Founding-Era Americans

In his concurring opinion in *McIntyre*, Justice Thomas applied "a different methodology" which focused on the freedom of the press prong of the First Amendment and on what he believes was the "original understanding" of the Founding-era Americans.²⁰⁰ "Instead of asking whether 'an honorable tradition' of anonymous speech has existed throughout American history, or what the 'value' of anonymous speech might be, we should determine whether the phrase 'freedom of speech, or of the press,' as originally understood, protected anonymous political leafletting."²⁰¹ After a lengthy analysis of the history of anonymous speech in the late 1700's, Justice Thomas concluded that anonymous speech was a part of the freedom of press

199. In *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988):

Like print advertising, petitioner's letter – and targeted, direct-mail solicitation generally – 'poses much less risk of overreaching or undue influence' than does in-person solicitation. Neither mode of written communication involves 'the coercive force of the personal presence of a trained advocate' or the 'pressure on the potential client for an immediate yes-or-no answer to the offer of representation.'" (citations omitted)

Shapero, 486 U.S. 466 (1988).

200. *McIntyre*, 514 U.S. at 358-71 (Thomas, J., concurring).

201. *Id.* at 359.

because “the Framers in 1791 believed anonymous speech sufficiently valuable to deserve the protection of the Bill of Rights.”²⁰² Although he would not 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,” Justice Thomas concurred in the judgment.²⁰³ Like the majority, he did not consider all of the contexts in which anonymous speech may arise nor how far the constitutional right of anonymity should extend.

While Justice Thomas was alone in his approach in *McIntyre*, it is interesting to consider whether his approach would require that the constitutional right of anonymity be extended to commerce. Under his approach, the question is whether the phrase “freedom of speech, or of the press” as originally understood by the Founding-era Americans, protected anonymous advertising or commerce.²⁰⁴ To answer this question, Justice Thomas would examine historical evidence to determine if the Founding-era Americans opposed attempts to require the sellers of goods and services to disclose their identities. Where no record of discussions on the pertinent issue appear in the First Congress or in state ratifying conventions,²⁰⁵ Justice Thomas instructs us to “focus on the practices and beliefs” of the Founders. In *McIntyre*, the sources that he examined to determine such practices and beliefs included a number of historical treatises, letters by members of Congress during the relevant period, notes from the debates on the Bill of Rights, and newspaper articles of the time.

As with anonymity generally,²⁰⁶ the records of debate on the Bill of Rights and the Fourteenth Amendment do not reveal any discussions about anonymous advertising or anonymous commerce.²⁰⁷

202. *Id.* at 370.

203. *Id.*

204. *Id.* at 358-59.

205. Justice Scalia notes in his dissent that, when analyzing the constitutionality of a state statute, historical evidence from the time of the adoption of the Fourteenth Amendment must also be examined. *See McIntyre*, 514 U.S. at 371 (Scalia, J., dissenting).

206. *See id.* at 360.

207. As to the Bill of Rights, *see* THE COMPLETE BILL OF RIGHTS, THE DRAFT, DEBATES, SOURCES, AND ORIGINS (Neil H. Cogan, ed., Oxford University Press 1997); THE ESSENTIAL BILL OF RIGHTS: ORIGINAL ARGUMENTS AND FUNDAMENTAL DOCUMENTS (Gordon Lloyd & Margie Lloyd eds., University Press of America 1998). As to the Fourteenth Amendment, *see* JAMES E. BOND, NO EASY WALK TO FREEDOM, RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT (Praeger 1997); HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH

While the Founding-era Americans were obviously concerned about commerce at the time of the Bill of Rights, they undoubtedly viewed issues concerning day-to-day commercial practices to be outside the realm of the federal government and, therefore, not worthy of constitutional debate. Instead, the discussions of commerce that occurred during the debates on the Constitution focused on broader national issues such as the need to improve foreign trading opportunities, the imposition of tariffs on imports to help finance the new federal government, and the elimination of trade barriers among the states.²⁰⁸

The absence of discussion of anonymity in commerce at the time of the Bill of Rights and the Fourteenth Amendment naturally follows from the assertion in Section II of this article that concerns about anonymous advertising and anonymous commerce are the result of a convergence of factors related to the Internet. The absence of discussion also follows from the nature of commerce in early America. Until the Industrial Revolution began in the early nineteenth century and the improvements in transportation and communication that marked the later part of the nineteenth century, the United States was largely an agrarian society. Given the limitations on transportation and communication, and the level of education of the average citizen, I think it is fair to assume that most transactions occurring between merchants and consumers at the end of both the eighteenth and nineteenth centuries were conducted directly. To the extent transactions were conducted indirectly (i.e., without the consumer coming face-to-face with the seller), they were likely to be documented in writing.²⁰⁹

Particularly before the United States developed its own domestic manufactures, many goods were imported into the United States from Europe. Thus, remote contracting was not unheard of at either the time of the Bill of Rights or the Fourteenth Amendment. But those transactions were between merchants and were largely governed by

AMENDMENT (John Hopkins Press 1908).

208. See, e.g., *THE FEDERALISTS' PAPERS* (The New American Library of the World ed. 1961), Nos. 11, 12, and 22. The later concern has been characterized as the "demands of personalty over agrarianism" and explains the federal government's exclusive control over paper money and the limitation on the states' ability to impair the obligation of contracts. See CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE UNITED STATES* (MacMillan Company 1960).

209. See, e.g., *THE AGRICULTURAL PAPERS OF GEORGE WASHINGTON* (Walter Edwin Brooke & Richard G. Badger, eds., The Gorham Press 1919).

trade practices and customs that developed among them.²¹⁰ To the extent a merchant engaged in remote contracting with distant places, he was likely to appoint an agent to represent his interests.²¹¹ I found nothing in the historical treatises to suggest that the customs and practices of early American merchants condoned anonymity in commercial transactions.²¹² Nor could I find support for anonymous

210. Discussing contract law in early America, Horwitz explained:

For our purposes, the most important consequence of this hostility was that contract law was insulated from the purposes of commercial transactions. Businessmen settled disputes informally among themselves when they could, referred them to a more formal process of arbitration when they could not, and relied on merchant juries to ameliorate common law rules. And, finally, they endeavored to find legal forms of agreement with which to conduct business transactions free from the equalizing tendencies of the courts.

MORTON J. HORWITZ, *TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 167 (Harvard University Press 1977).

211. In *THE COLONIAL MERCHANT*, it is said,

Regardless of the precise pattern followed, a central fact to be borne in mind is that the merchant himself did not accompany his cargoes to market As a rule, the man to whom he entrusted their execution was either his ship captain or some merchant who resided at the port of destination, and who thus served as his commission agent.

THE COLONIAL MERCHANT Part IV, "The Merchant of the Middle and Northern Colonies," at 169-70 (Stuart Bruchey ed., Harcourt, Brace & World, Inc. 1966). Some may argue that the "undisclosed principal" theory of agency law condones anonymous contracting but there are several things to note about agency law that suggest otherwise. First, whether or not the principal is disclosed, the agent is disclosed and presumably the identity of the principal could be traced through the agent. Indeed, unless an agent wants to be the only one responsible on a contract he has an incentive to disclose the principal either before or at the time a dispute arises. See *RESTATEMENT (SECOND) OF AGENCY* §§ 321, 322 (1959) (providing that an agent is a party to, and therefore liable on, a contract entered into on behalf of a partially disclosed or undisclosed principal). Second, as noted in the Comment to § 186 of the *Restatement of Agency*, the law related to undisclosed principals is based on equitable considerations and was designed to protect the interests of the third party by giving him the option to sue either the agent or the undisclosed principal for breach of contract. In other words, the impetus for the rule was not a desire to sanction anonymous contracting but rather a desire to make certain that an agent could not escape liability on a contract by claiming that he was entering into it for someone else. *RESTATEMENT (SECOND) OF AGENCY* § 189 cmt.

212. In addition to the historical works cited in notes 207-211, 214-215, 219-222, and 225, I reviewed Morris Cohen's seminal work, *BIBLIOGRAPHY OF EARLY AMERICAN LAW* (W.S. Hein & Co. 1998), for any mention of anonymous contracting or advertising. I also reviewed selected documents from the Early American Imprints Collection of the University of California, Berkeley. I, of course, am indebted to the wonderful libraries of the University of California, Berkeley for making accessible hundreds, if not thousands, of books on early American history and commerce. Unfortunately, I could not read them all, but based upon the books and documents I did review I am confident in my position that anonymous contracting and anonymous advertising, if engaged in at all, were not viewed as fundamental rights at the time of either the Bill of Rights or the Fourteenth Amendment.

advertising.

As noted by the Supreme Court in *44 Liquormart*: “[a]dvertising has been a part of our culture throughout our history. Even in Colonial days, the public relied on ‘commercial speech’ for vital information about markets. Early newspapers displayed advertisements for goods and services on their front pages and town criers called out prices in public squares.”²¹³ But I could find no record that anonymous advertising was practiced at the time of the Bill of Rights, let alone that it was valued as a fundamental right. At the time of the Bill of Rights, printed advertisements were a relatively new phenomenon.²¹⁴ Printing was not widespread in America until the late 1700’s²¹⁵ and advertising was only a small part of what was printed.²¹⁶ Those few companies and individuals who went to the expense to purchase print advertising for their goods and wares did so in order to be better known.²¹⁷ And if they failed to identify themselves adequately, their identities could easily be traced through the printer of the advertisement.

Nonetheless, fraud in commercial transactions and advertising was not unknown at the time of either the Bill of Rights or the

213. 517 U.S. at 495 (citing JAMES PLAYSTEAD WOOD, *THE STORY OF ADVERTISING* 21, 45-69, 85 (The Ronald Press Company 1958); J. Smith, *PRINTERS AND PRESS FREEDOM* 49 (1988)).

214. See JAMES PLAYSTEAD WOOD, *THE STORY OF ADVERTISING* (The Ronald Press Company 1958); JAMES D. NORRIS, *ADVERTISING AND THE TRANSFORMATION OF AMERICAN SOCIETY, 1865-1920* (Greenwood Press 1990).

215. According to Isaiah Thomas’ classic work, *THE HISTORY OF PRINTING IN AMERICA*, printing itself was not prevalent in the American Colonies until the later part of the eighteenth century. See 1 ISAIAH THOMAS, *THE HISTORY OF PRINTING IN AMERICA WITH A BIOGRAPHY OF PRINTERS AND AN ACCOUNT OF NEWSPAPERS*, (2d. ed.) (5 TRANSACTIONS AND COLLECTIONS OF THE AMERICAN ANTIQUARIAN SOCIETY, 1874). A printing press was first erected in Massachusetts in 1638 and it was more than forty years before printing commenced in any other Colony. Printing was next begun in Virginia in 1681, Pennsylvania in 1689, New York in 1693, and Connecticut in 1709. Maryland was the next to establish printing in 1726 followed by New Jersey in 1727, South Carolina in 1730, Rhode Island in 1731, North Carolina and New Hampshire in 1755, and Delaware in 1761. Georgia was the last of the original thirteen colonies to establish printing and did so in 1762. After the revolution, Vermont was established as a state and began printing in 1781.

216. WOOD, *supra* note 214, at 45-69.

217. Based on a comprehensive review and analysis of advertisements in the *London Times* from 1788 to 1996, Sabine Gieszinger noted the typical use of a “signature line.” While it is clear that early advertisers were not as sophisticated about setting their identities apart from the text of the advertisement, they did identify themselves somewhere in the advertisement. SABINE GIEZINGER, *THE HISTORY OF ADVERTISING LANGUAGE, THE ADVERTISEMENTS IN THE TIMES FROM 1788 TO 1996* § 3.34, 70 (Peter Lang ed. 2001).

Fourteenth Amendment. Undoubtedly, some individuals and companies - the proverbial "snake-oil salesmen" - would grossly exaggerate the benefits of their goods and may have operated under fictitious names.²¹⁸ But the fact that some salesmen used fictitious names in connection with fraudulent enterprises certainly does not mean the practice was condoned.

One area where anonymity and pseudonymity was common at the time of the Bill of Rights was in the publishing realm. However, the mere fact that publishers and journalists practiced anonymity does not mean that it was valued as a fundamental constitutional right in the commercial realm. Then, as now, "[i]n some settings, anonymity was deemed 'libelous,' but in others, as when Cotton Mather availed himself of the practice (two-thirds of his publications were anonymous), it was acceptable both to authors and readers as a sign of self-renunciation or because contemporaries knew how to recognize the presence of a particular writer."²¹⁹

Additional factors, other than a fear of retaliation, harm or ostracism, explain why printers, such as Benjamin Franklin, adopted the practice of using pseudonyms. First, there is evidence that pseudonymity was simply a social convention of the time; it was thought that the printed word had more legitimacy without identification of the author.²²⁰ Second, many printers of the time adopted the practice of using pseudonyms in order to create the illusion that they were publishing the works of several different

218. It was these types of practices that led to the enactment of false advertising laws in the first place.

219. David E. Hall, *Readers and Writers in Early New England*, in *A HISTORY OF THE BOOK IN AMERICA, VOLUME ONE, THE COLONIAL BOOK IN THE ATLANTIC WORLD*, 558 n.109 (Hugh Amory & David D. Hall eds., Cambridge University Press 2000).

220. CHARLES E. CLARK, *Part One, Early American Journalism: News and Opinion in the Popular Press*, in *A HISTORY OF THE BOOK IN AMERICA*, 350, *supra*, note 218 (citing MICHAEL WARNER, *THE LETTERS OF THE REPUBLIC: PUBLICATION AND THE PUBLIC SPHERE IN EIGHTEENTH CENTURY AMERICA*, 38-39 (Harvard University Press, 1990)):

Michael Warner has suggested that this very 'impersonality' of public conversation in print was assumed by its participants to constitute its validity - that the legitimacy of one's participation in the new 'public sphere' of print, and of the ideas offered to the public in this way, depended upon the absence of any overt identification with a particular author.

In the introduction to *Common Sense*, arguably one of the most famous anonymous pamphlets in history, the later-identified author, Thomas Paine, wrote:

Who the Author of this Publication is, is wholly unnecessary to the Public, as the Object for Attention is the Doctrine *itself*, not the *Man*. Yet it may not be unnecessary to say, That he is unconnected with any Party, and under no sort of Influence public or private, but the influence of reason and principle.

THOMAS PAINE, *COMMON SENSE* 6 (The Library of America, 1995).

authors.²²¹ Even when Founding-era Americans engaged in anonymous speech, the identities of the writers were often known or could easily be traced through the printers, so “true anonymity” was not as prevalent as “apparent anonymity.”²²²

Unlike the evidence that Justice Thomas uncovered with respect to political speech, the historical evidence simply does not indicate “that Founding-era Americans opposed attempts to require that anonymous [advertisers] reveal their identities on the ground that forced disclosure violated the ‘freedom of the press.’”²²³ To the contrary, while the historical evidence reveals little to suggest that anonymous advertising and commerce was considered a fundamental right at the time of the Bill of Rights, contemporaneous writings reflect several of the countervailing policy concerns that are discussed in Section III of this article. Significantly, the Founding-era Americans, while recognizing the importance of free speech, also recognized that free speech could be limited to the extent it invaded the rights of other individuals.²²⁴ Also, the importance of an informed

221. David S. Shields, *Eighteenth-Century Literary Culture*, in *A HISTORY OF THE BOOK IN AMERICA*, 466, *supra*, note 219:

A truism of Grub-Street practice was that persons whose livelihood most depended on print sales needed the flexibility of numbers of persons through which to speak. Multiple pseudonyms (as opposed to single pen-names that belletrists employed in the sociable world) graced the works of journalists in print ‘Diarists’ who could afford the vanity of publishing under their own name usually had a calling that did not depend on vending publications.

222. See, e.g., Letter from Thomas Jefferson to James Madison (November 18, 1788) in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON*, 452 (Adrienne Koch & William Peden eds., Random House 1944) (“[W]ith respect to the Federalist, the three authors had been named to me.”).

223. *McIntyre*, 514 U.S. 334, 361 (1995).

224. Although scholars continue to debate the “original” meaning, intent and origins of the First Amendment, the Founding-era Americans, at a minimum, shared the view that “freedom of expression was limited by the rights of other individuals, especially the right to reputation.” Steven J. Heyman, *Righting the Balance: An Inquiry Into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1282, 1295, 1296 (1998).

Benjamin Franklin, one of America’s earliest and foremost printers and the person who some hail as the father of American advertising, wrote:

If by *Liberty of the Press* were understood merely the Liberty of discussing the Propriety of Public Measures and political opinions, let us have as much of it as you please: But if it means the Liberty of affronting, calumniating, and defaming one another, I, for my part, own myself willing to part with my Share of it when our Legislators shall please so to alter the Law, and shall cheerfully consent to exchange my *Liberty* of Abusing others for the *Privilege* of not being abus’d myself.

Benjamin Franklin, *An Account of the Supremest Court of Judicature in Pennsylvania, viz., the Court of the Press*, September 12, 1789, in *THE COMPLETE BILL OF RIGHTS*, *supra* note 207, at 113.

populace was frequently cited by the Founding-era Americans as a reason for freedom of speech and of the press.²²⁵

Based upon the foregoing, the argument that the right of anonymity is so fundamental a right that it should be extended to commerce cannot be supported by the historical record.

C. Justice Scalia's Approach: Respecting the "Post-Adoption Tradition"

In his dissent in *McIntyre*, Justice Scalia chastised both the majority and Justice Thomas for giving too much credence to the right of anonymity. Although he does not deny the historical use of anonymous speech, Justice Scalia does not believe anonymous speech amounts to a constitutional right.²²⁶ Rather, he views anonymous speech as falling between two extremes of constitutional analysis. On the one hand is the technique of looking to the text of the Constitution itself for its meaning: "That technique is simple of application when government conduct that is claimed to violate the Bill of Rights or the Fourteenth Amendment is shown, upon investigation, to have been engaged in without objection at the very time the Bill of Rights or Fourteenth Amendment was adopted."²²⁷ At the other extreme is "where the government conduct at issue was *not* engaged in at the time of adoption [of the Bill of Rights or Fourteenth Amendment], and there is ample evidence that the *reason* it was not engaged in is that it was thought to violate the right embodied in the constitutional guarantee."²²⁸

225. JEFFERY A. SMITH, *PRINTERS AND PRESS FREEDOM, THE IDEOLOGY OF EARLY AMERICAN JOURNALISM* (Oxford University Press 1988) ("The marketplace of ideas concept – the proposition that truth naturally overcomes falsehood when they are allowed to compete – was used continually during the eighteenth century as a justification of freedom of expression.").

Commenting on the importance of an informed populace, Thomas Jefferson wrote:

I am persuaded myself that the good sense of the people will always be found to be the best army. They may be led astray for a moment, but will soon correct themselves The way to prevent these irregular interpositions of the people is to give them full information of their affairs the channel of the public papers, and to contrive that those papers should penetrate the whole mass of people.

Letter from Thomas Jefferson to Edward Carrington dated January 16, 1787, in *THE COMPLETE BILL OF RIGHTS*, *supra* note 207, at 115.

226. *McIntyre*, 514 U.S. 334, 373 (Scalia, J., dissenting) ("[T]o prove that anonymous electioneering was used frequently is not to establish that it is a constitutional right. Quite obviously, not every restriction upon expression that did not exist in 1791 or in 1868 is *ipso facto* unconstitutional . . .").

227. *Id.* at 372.

228. *Id.*

Because Justice Scalia concluded that the regulation of anonymous speech did not fall into either of the two extremes he described, he argued the case presented “the most difficult case for determining the meaning of the Constitution.”²²⁹ In such a case, “constitutional adjudication necessarily involves not just history but judgment: judgment as to whether the government action under challenge is consonant with the concept of the protected freedom . . . that existed when the constitutional protection was accorded.”²³⁰ To apply the judgment that he thinks is necessary, Justice Scalia asserts that the court must look not only to the beliefs of the Founding-era and Reconstruction-era Americans but to the practices of the states and its citizens.²³¹ In other words, Justice Scalia believes that what he calls the “postadoption tradition” should be examined to determine the meaning of the Constitution in difficult cases and that “long-established American legislative practice must be given precedence . . . over historical and academic speculation regarding a restriction that assuredly does not go to the heart of free speech.”²³² Because the law at issue “forbids the expression of no idea, but merely requires identification of the speaker when the idea is uttered in the electoral context,” he believes the “widespread and long-accepted practices of the American people are the best indication of what fundamental beliefs [the constitutional text] was intended to enshrine.”²³³ He would reach the same result based on an analysis of Supreme Court precedent largely because he does not believe that prior case law established a general right of anonymity.²³⁴

Since Justice Scalia does not view anonymity as a fundamental right when related to political speech, he should have no trouble with the regulation of anonymous speech in the commercial realm. In accordance with the analysis he employed in *McIntyre*, his position is bolstered by the tradition of the states on the issue of anonymous

229. *Id.* at 375.

230. *Id.*

231. *McIntyre*, 514 U.S. 334, 375:

But there *is* other indication, of the most weighty sort: the widespread and longstanding traditions of our people. Principles of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation’s consciousness. . . A governmental practice that has become general throughout the United States, and particularly one that has the validation of long, accepted usage, bears a strong presumption of constitutionality.

232. *Id.* at 377.

233. *Id.* at 378.

234. *Id.* at 379-80.

commerce and the fact that they have long imposed a myriad of disclosure requirements on businesses and sought to prevent false advertising. In the words of Justice Scalia, the existence of state laws that preclude anonymous commerce is of vital significance because “[p]rinciples of liberty fundamental enough to be embodied within constitutional guarantees are not readily erased from the Nation’s consciousness.”²³⁵

If you form a business in this country, there are many ways in which you are required to disclose basic identifying information about yourself.²³⁶ First, even if you are an individual who is conducting business under your own name and in the privacy of your home, you are likely to be required to obtain a business license.²³⁷ Next, the Internal Revenue Service requires you to obtain a taxpayer identification number,²³⁸ and if you collect sales tax, you will typically be required to obtain a sales tax permit.²³⁹ Depending upon the nature of your business, you may also need a special license (e.g., a liquor license, a contractor’s license or a license to practice law) and be subject to inspections by various governmental authorities.²⁴⁰

If you form a corporation, you must file articles of incorporation

235. *Id.* at 334.

236. A lot of this information can be gleaned from databases that are comprised of information collected by both private and public entities from required business filings. Unfortunately, there is no centralized place where information about all companies who conduct business in the United States is stored and made accessible to the public and, thus, multiple databases often must be searched to obtain up-to-date information about companies. Moreover, the services that do exist typically require payment of a fee and, therefore, are not useful to the average consumer. Also, because many businesses in the United States use identical or very similar names, albeit in discrete geographic areas or markets where the likelihood that one company will be confused with another is slight, a national database that lists multiple companies with the same name would be of little practical use to consumers. Thus, given the practical limitations of business databases, laws that require businesses to disclose basic identifying information in direct dealings with consumers should be preferred over those that require separate filings. Only in this way can consumers be given the timely information they need to make informed decisions.

237. *See, e.g.*, Cal. Gov’t Code § 37101 (West 2002) (authorizing cities to impose a business license tax); N.Y. TOWNLAW § 136 (McKinney 2002) (authorizing town boards to license and otherwise regulate retail businesses).

238. I.R.C. § 6109 (West 2002).

239. *See, e.g.*, Cal. Rev. & Tax. Code § 6066 (West 2002) (requiring every person desiring to engage in or conduct business as a seller to obtain a sales tax permit) and N.Y. TOWNLAW, Tax § 1134 (McKinney 2002) (requiring everyone who is required to collect sales tax to register with the State).

240. *See generally* CAL. BUS. & PROF. CODE (West 2002); N.Y. EDUC. LAW § 6500-8500, Title VIII, The Professions (McKinney 2002); 24 DEL. CODE ANN. tit. 24, § 101 (2002).

with the appropriate state authorities and periodically file reports that list the officers of the corporation and its agent for service of process.²⁴¹ If a corporation transacts business in a state without a physical presence, then it is typically required to register as a foreign corporation and, among other things, must designate an agent for service of process within the state.²⁴² If the corporation you form is subject to the securities laws of the United States, a raft of additional disclosure requirements come into play.²⁴³

Generally, and assuming that you are abiding by the laws, you cannot avoid disclosing basic information about your business by conducting business under a fictitious name, a partnership or limited liability company. As with corporations, many states require various documents to be filed with governmental authorities when a limited liability partnership or limited liability company is formed.²⁴⁴ Additionally, most states have long required individuals and companies to regularly file fictitious business name statements if they conduct business under a name other than their legal name.²⁴⁵ “Although their provisions vary, these statutes generally require that individual proprietors and certain business entities file statements containing specified information if the name under which the business

241. For an overview of the corporate name and foreign corporation registration requirements of the fifty states, see Leonard D. DuBoff, *What's in a Name: The Interplay Between the Federal Trademark Registries and State Business Registries*, 6 DEPAUL BUS. L.J. 15, 21 (1994) (“In all states, domestic corporations must file an annual or biennial report and pay a fee or they will be administratively suspended or dissolved. Foreign corporations which do not file their annual or biennial reports and pay their fees will have their authority revoked.”).

Typically, domestic and foreign corporations are required to file a statement of officers that includes the name and address of the officers and identify an agent for the service of process. See, e.g., CAL. CORP. CODE §§ 202, 2102, 2105 (West 2002); N.Y. BUS. CORP. LAW §§ 305, 402, 1304

242. See, e.g., CAL. CORP. CODE §§ 2102, 2105 (West 2002) N.Y. BUS. CORP. LAW §§ 402, 1304 (McKinney 2002); DEL. CODE ANN. tit. 8, § 371 (2002).

243. See The Securities Act of 1933, 15 U.S.C. § 77a et seq.; The Securities Exchange Act of 1934, 15 U.S.C. § 77b et seq.

244. See, e.g., CAL. CORP. CODE § 17000-17005. (West 2002); N.Y. BUS. CORP. LAW §1306 (McKinney 2002); N.Y. PARTNERSHIP LAW § 121-1500 (McKinney 2002); 6 DEL. CODE ANN. tit. 6, §§ 15-111, 17-201 (Michie 2002).

245. For a history of fictitious business name laws in the United States, see Gordon E. McClintock, *Fictitious Business Name Legislation – Modernizing California's Pioneer Statute*, 19 HASTINGS. L.J. 1349 (1968). There it is noted that “[o]ne of the first ‘fictitious business name statutes’ adopted in this country” was adopted by California in 1872. *Id.* at 1349. It is also noted that at common law, a sole proprietor, partnership and corporation could conduct business under a fictitious name provided that such usage did not mislead, perpetuate a fraud, or infringe a trademark or trade name.

is operated does not adequately inform the public as to the ownership of the business.²⁴⁶

Traditional principles of contract law are also consistent with the view that parties to a contract must identify themselves. How else can parties to a contract manifest their mutual assent unless they are known to one another? It has long been understood that contracts are entered into between parties and, although not specifically stated in our laws or the *Restatement (Second) of the Law of Contracts*, the parties to a contract are usually identified in some manner. Typically, by convention if not by legal requirement, parties to a written contract are identified by their correct legal names. Where parties to a contract are identified by a fictitious name or where one or more of the parties is represented by an agent, the contract is usually entered into under circumstances where the correct legal identity of the principals can be identified.

In addition to general rules governing the conduct of businesses, both Congress and the states have passed numerous laws that regulate discrete segments of commerce and that mandate the disclosure of basic identifying information. For instance, the food and drug industries are highly regulated by federal statute, and manufacturers are required to make identifying disclosures on product labels.²⁴⁷ Laws prohibiting fraud and false advertising have long existed on the books of many states and the federal government.²⁴⁸ Additionally, most states have laws that impose registration requirements on charitable solicitors²⁴⁹ and a number of states require door-to-door salesmen to register with government authorities and/or disclose certain basic information.²⁵⁰

246. *Id.* at 1351 (“The purpose of the California statute is to prevent fraud and deceit in business practices by providing a public source of information as to the identity and addresses of the owners of a business operated under a fictitious name.”).

247. *See generally* Fed. Food, Drug & Cosmetic Act, 21 U.S.C. §§ 301-356(c) (1999).

248. For a summary of the law of fraud as it existed at the time of the Fourteenth Amendment, *see* MELVILLE M. BIGELOW, *LAW OF FRAUD AND THE PROCEDURE PERTAINING TO THE REDRESS THEREOF* (Fred B. Rothman & Co. 1981) (1877); including the appendix of state statutes at pp. 535–636. For a summary of unfair trade practices acts, *see* JONATHAN SHELDON, CAROLYN L. CARTER & STEPHEN GARDNER, *UNFAIR AND DECEPTIVE ACTS AND PRACTICES* (National Consumer Law Center 2001).

249. *See* Melissa G. Liazos, Comment, *Can States Impose Registration Requirements on Online Charitable Solicitors?*, 67 U. CHI. L. REV. 1379, 1379 (2000) (noting that “[t]hirty-eight states and the District of Columbia require charities to register in-state and file financial and other information prior to soliciting in those states”).

250. *See, e.g.*, N.Y. PERS. PROP. §§ 425-431 (McKinney 2002); DEL. CODE ANN. tit. 6, §4401-4405 (2002).

Far from indicating a preference for anonymity in commerce, the numerous laws applicable to businesses evince a strong policy in favor of the disclosure of basic information about companies including their name, principal place of business and management. Thus, consistent with Justice Scalia's view, the prevalence of disclosure requirements in the business realm should be enough to ameliorate any concern that the First Amendment requires that anonymity in commerce and advertising be protected. In other words, pursuant to Justice Scalia's approach, a law that bans anonymous Internet advertising would be upheld against constitutional attack because it is consistent with the postadoption tradition of the states.

VI. Conclusion

In many ways, the Internet is a great boon to society. It makes communication more efficient and improves access to important information. It brings the world closer together and makes it possible for online communities to form around issues of common interest. It provides a wonderful forum for increased social and political discourse and enhances educational opportunities for many. It has unleashed a raft of new business opportunities and ideas. Given its benefits, there are many people who advocate that the regulation of the Internet should be limited and that the Internet should remain an open and relatively unrestrained forum.

Unfortunately, while the Internet is a great new forum for information and communication it is also a place where fraud and criminal activity can proliferate. In the same way that the Internet has enhanced the way we communicate, obtain information and conduct business, it has enhanced the ability of con artists to take advantage of the unsuspecting. The further decentralization of business that the Internet enables makes the task of preventing fraud particularly difficult. Con artists can appear one day and be gone the next. As new ways of committing fraud on the Internet are developed we need to develop new ways of combating fraud. These methods need not be complex. In addition to strategies that outlaw specific egregious activities, we can reduce the incidence of fraud on the Internet by helping consumers to make informed decisions

My proposal is modest. In order to decrease the potential for fraud on the Internet and enhance consumers' ability to make informed decisions, Internet advertisers should be required to clearly identify themselves by their correct legal name and principal place of

business. In this way consumers will be given basic information that will allow them to verify the legitimacy of the individuals and businesses with whom they propose to do business. It will also provide law enforcement with another tool to combat fraud that is not subject to definitional problems such as what is “false” or “inherently misleading” advertising. Rather, the law will define what we have apparently always taken for granted: that businesses should clearly and accurately identify themselves. If this means more formality in e-commerce transactions than is needed in face-to-face transactions, so be it.²⁵¹ Increased formality in e-commerce in the form of mandatory identification requirements is needed to act as a substitute for the diminution in traditional indicia of reliability.

Although anonymity has been recognized as a constitutional right in the political, literary, and religious realms, it should not be recognized as a constitutional right in the commercial realm. The same interests that support recognition of a constitutional right of anonymity in other contexts – principally fear of retaliation, harm and ostracism – simply do not apply to the sale of goods and services. To the contrary, we have long insisted that commercial enterprises reveal sufficient facts to enable consumers to make informed decisions and to prevent fraud. As the U.S. Supreme Court’s commercial speech jurisprudence reveals, there are legitimate reasons why commercial speech is subject to a lower level of scrutiny and the advent of e-commerce and Internet advertising does not alter that balance.

251. I do not agree with the view that rules concerning the manifestation of assent in the physical world can be applied to electronic commerce without modification. See, e.g., Holly K. Towle, *Internet Commerce, Pike & Fischer: Internet Law & Regulation, Law & Policy*, IC-A1, A9 (June 2001), at <http://internetlaw.pf.com/html/NewestTopic.asp?Topic=IC> (last visited Oct. 29, 2002). Obviously, when people are not dealing with each other on a face-to-face basis the ways in which they can manifest their assent are limited (for instance, a nod of the head will not work) and more formality (usually in the form of a writing) is required if for no other reason than to communicate each party’s point of view. At a minimum there needs to be a timely exchange of relevant information in the context of the discussion of a particular transaction.