

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

RICHARD OTTINGER and JUNE OTTINGER,

Index No. 08/3892

Plaintiffs,

- against -

JOHN DOE 1-100 and JANE DOE 1-100,

Defendants.

**REPLY MEMORANDUM OF LAW OF  
NONPARTY WITNESS *THE JOURNAL NEWS*  
IN SUPPORT OF ITS MOTION TO QUASH**

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Nonparty witness The Journal News respectfully submits this reply memorandum of law in further support of its motion to quash a subpoena, dated February 28, 2008, issued by plaintiffs in this action (the “Subpoena”).

### **PRELIMINARY STATEMENT**

Plaintiffs’ papers in opposition (and in support of their cross-motion) (“Pls.’ Br.”) reveal that there is actually substantial agreement between the parties with respect to many of the issues raised by the Subpoena, including the following:

- Plaintiffs are in agreement that their request for the identities of the anonymous posters (*i.e.*, potential defendants in their defamation action) is properly seen as one for pre-commencement discovery under CPLR 3102(c) and should be brought via special proceeding;<sup>1</sup>
- Plaintiffs agree that the anonymous posters should be given notice and opportunity to respond and defend their First Amendment right to anonymity;
- Plaintiffs concur that the First Amendment implications of their Subpoena require them to make some showing of merit before discovery may be ordered; and
- Plaintiffs have agreed to limit their request solely to identifying information regarding the posters, rather than the plainly overbroad (and improper, for precommencement discovery) request made in the Subpoena.

As discussed herein, important differences do remain. Yet, The Journal News submits that unless the Court is prepared to deny plaintiffs’ request at this juncture for having failed to establish a *prima facie* case of defamation – certainly a supportable conclusion, as discussed below – the only immediate question for determination by this Court is to determine the form and content of notice to be provided to the anonymous posters, and then to provide an appropriate stay of proceedings pending their possible intervention. Determination of the merits of plaintiffs’ motion for discovery may be delayed until after any such intervention, so that the

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<sup>1</sup> The Journal News does not oppose that part of plaintiffs’ cross-motion that seeks to convert this action into a special proceeding and agrees to consider the February 29 service of the Subpoena to suffice in lieu of service of a notice of petition. Pending such conversion, for convenience this brief will continue to refer to the Ottingers as “plaintiffs” and this proceeding as a “motion.”

posters themselves may be heard, if they so desire, in opposition to the infringement on their right to anonymous speech.

## ARGUMENT

### **I. PLAINTIFFS SHOULD BE REQUIRED TO POST NOTICE**

Plaintiffs concede that, consistent with the holdings of the courts in Greenbaum v. Google, Inc., 18 Misc. 3d 185, 845 N.Y.S.2d 695, 698 (Sup. Ct. N.Y. County 2007); Dendrite Int'l, Inc. v. Doe, 775 A.2d 756, 760 (N.J. Super. App. Div. 2001); and Doe v. Cahill, 884 A.2d 451, 461 (Del. 2005), the anonymous posters whose identities the plaintiffs seek should be afforded notice and an opportunity to be heard before the Court takes any action to grant the plaintiffs' request. (Pls.' Br. at 11.) Plaintiffs, however, suggest that the burden of notification should be on The Journal News rather than themselves. The Journal News disagrees with this suggestion.

First, both Dendrite and Cahill make it quite clear that it is the plaintiff (i.e., the person seeking the forced disclosure of the identities) who properly bears the burden of notification.<sup>2</sup> See Dendrite, 775 A.2d at 760 (“[T]he trial court should first require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure . . . . These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP’s pertinent message board.”); Cahill, 884 A.2d at 461 (“[T]o the extent reasonably practicable under the circumstances, the plaintiff must undertake efforts to notify the anonymous poster that he is the

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<sup>2</sup> In Greenbaum, the parties had stipulated that respondent Google would undertake to provide notification to the blogger whose identity was sought, and thus Justice Friedman had no occasion to pass on the question of who bears the burden of notification, although she did state that she agreed with the notification requirements as outlined in Dendrite. See 845 N.Y.S.2d at 697-98. Moreover, Greenbaum involved comments made on a blog, not a public forum like lohud.com; access to a blog is generally controlled by the blogger herself, not the website host, and thus in that case petitioners would likely have been unable to post such a notice without the cooperation of the blogger – who was one of the potential defendants.

subject of a subpoena or application for order of disclosure. . . . Moreover, when a case arises in the internet context, the plaintiff must post a message notifying the anonymous defendant of the plaintiff's discovery request on the same message board where the alleged defamatory statement was originally posted.”). Placing this burden on the plaintiffs is fully justified by the fact that it is the plaintiffs, after all, who are seeking the immediate, irreparable and permanent infringement of the posters' anonymity without having to prove that these posters have engaged in any actionable conduct. Moreover, plaintiffs are in the best position to describe why the information is being sought. If The Journal News were to seek to describe the proceeding, it would likely be put in the position of negotiation with plaintiffs concerning the phrasing of the notice.

Plaintiffs argue that “at this late juncture, it is unlikely that the defamatory bloggers would see such a notice.” (Pls.' Br. at 11.) This unsupported surmise by plaintiffs may or may not prove true, but the ineffectiveness of such a posting should not be presumed. Even if, for example, the original posters themselves do not see the notice, others who know them might. Repeated postings over some time period may increase the chances of notification as well. In any case, it seems beyond question that posting a conspicuous notice on the lohud.com forums would be at least one method that the Ottingers would choose to employ – indeed, would already have employed – if they were behaving as ones “desirous of actually informing the absentee[s].” Beckman v. Greentree Secs., Inc., 87 N.Y.2d 566, 570, 640 N.Y.S.2d 845 (1996) (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950)).<sup>3</sup>

## **II. THE COMMENTS MUST BE ASSESSED IN PROPER CONTEXT**

With respect to the standard for granting the plaintiffs' request for discovery, plaintiffs appear generally to agree that, both as a matter of the standard for pre-commencement discovery

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<sup>3</sup> This is not to say that additional forms of notification would not also be appropriate.

under CPLR 3102(c) and as a matter of First Amendment law, they are required to demonstrate, with evidence, a prima face case of defamation. As stated previously, analysis of whether plaintiffs have or can meet this burden may be deferred until the anonymous posters have had the opportunity to intervene and oppose the identification request. However, it would appear that this determination will turn largely on whether the posts identified by the plaintiffs can, in fact, support a cause of action for defamation.<sup>4</sup>

Preliminarily, the plaintiffs misconstrue The Journal News's arguments with respect to allegations of possible defamatory posts beyond those named in the subpoena and complaint when they assert that "[t]he Journal News would have plaintiffs, at this point, set forth, in haec verba, what those other statements are." (Pls.' Br. at 15.) That is not the point; the issue, rather, is that, both as a matter of the standards set out in Dendrite and Cahill and as a matter of the standards for defamation under New York law (in particular, CPLR 3016(a)), the Ottingers should not be able to rest their demand for discovery as to the posters' identities on their surmise as to the defamatory nature of other, undisclosed postings. If plaintiffs cannot show an entitlement to such discovery based on the statements that they can identify in haec verba, then their request should be denied without any consideration of whether there were possibly other defamatory statements made.

As for the statements plaintiffs do rely upon, the arguments presented in their brief as to the actionable nature of those statements is, with all due respect, precisely the sort of acontextual analysis that the Court of Appeals and Second Department have repeatedly stated is improper. See Gross v New York Times Co., 82 N.Y.2d 146, 155, 603 N.Y.S.2d 813 (1993) ("In all cases,

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<sup>4</sup> The Journal News does not dispute that, for purposes of the discovery sought, plaintiffs are unlikely at this stage to be in a position to provide evidence with respect to the element of actual malice that they will ultimately have to establish (either because one or both of the Ottingers are deemed a public figure or because, as plaintiffs do not seem to contest, their defamation suit falls within the definition of an "action involving public petition and participation under Civ. Rts. L. § 76-a).

whether the challenged remark concerns criminality or some other defamatory category, the courts are obliged to consider the communication as a whole, as well as its immediate and broader social contexts, to determine whether the reasonable listener or reader is likely to understand the remark as an assertion of provable fact.”); Brian v. Richardson, 87 N.Y.2d 46, 51-52, 627 N.Y.S.2d 347 (1995) (noting that courts must take into account context such as whether the statements were made in a forum that “is typically regarded by the public as a vehicle for the expression of individual opinion rather than the rigorous and comprehensive presentation of factual matter” or where “listeners presumably expect to hear vigorous expressions of personal opinion”); Bernard v. Grenci, 48 A.D.3d 722, 853 N.Y.S.2d 168, 170 (2d Dep’t 2008) (“The challenged statements must be viewed in their context to determine whether a reasonable person would view them as conveying any facts about the plaintiff . . .”).

While undoubtedly charges of bribery and fraud (to accept, arguendo, plaintiffs’ characterization of the postings) may, in certain contexts, be deemed actionably defamatory, “there is simply no special rule of law making criminal slurs actionable regardless of whether they are asserted as opinion or fact,” Gross, 82 N.Y.2d at 155, and courts have held that charges of corruption, bribery, and other criminal behavior may not be actionable if, taken in context, a reasonable reader would understand that they were likely the speaker’s opinion rather than “assertions of fact that were proffered for their accuracy.” Brian, 87 N.Y.2d at 53 (affirming dismissal of defamation action based on statements in op-ed suggesting plaintiff had engaged in theft of software and other criminal and morally reprehensible actions); see 600 West 115th St. v. Gutfeld, 80 N.Y.2d 130, 142-45, 589 N.Y.S.2d 825 (1992) (suggestions of fraud, bribery and corruption not actionable); see also Gross, 82 N.Y.2d at 155 (noting that assertions of “‘blackmail,’ ‘fraud,’ ‘bribery’ and ‘corruption’” have been held nonactionable).

Rinaldi v. Holt, Rinehart & Winston, 42 N.Y.2d 369, 397 N.Y.S.2d 943 (1977), on which plaintiffs place significant reliance (Pls.' Br. at 7), involved a much different context: a published book by an investigative journalist (which itself consisted of reprints of previously published newspaper columns). See id. at 373-75. Such a context is one that would likely lead the reader to expect that the statements made are ones of objective reportage. See also Gross, 82 N.Y.2d at 155-56 (accusation of corruption appearing "in the course of a lengthy, copiously documented newspaper series that was written only after what purported to be a thorough investigation" could be actionable). Whatever the Court ultimately determines with respect to the postings challenged here, however, it is indisputable that the context – a public forum on the internet – and the general tenor of the postings present a very different case from Rinaldi or Gross.

In stark contrast to Rinaldi, however, Cahill is directly on-point with respect to this issue. As here, the challenged speech in Cahill involved a public forum run by a local newspaper on which readers could freely post regarding issues affecting their community. See Cahill, 884 A.2d at 454. Plaintiffs, a local councilman and his wife, sought to uncover the identity of a poster who had suggested the councilman suffered from "mental deterioration" and was "paranoid." Id. The Delaware Supreme Court, after laying out the test discussed (and seemingly accepted) by plaintiffs (Pls.' Br. at 11-13), denied discovery of the posters' identities on the ground that no reasonable reader would have understood the comments to be assertions of objective fact. The court, based on the context of the forums – including fact that the forum was "dedicated to opinions about [local issues]" and "the normally (and inherently) unreliable nature of assertions posted in chat rooms and on blogs" – found that "the only supportable conclusion" was that the comments "were no more than unfounded and unconvincing opinion." Id. at 467. Accordingly, plaintiffs had failed to establish a prima facie case of actionable defamation. Id.

The Journal News submits that a similar conclusion is certainly supportable with respect to the instant case.

### **III. THE COURT SHOULD CONSIDER THE PLAINTIFFS' LIKELIHOOD OF SUCCESS AND BALANCE OF HARMS BEFORE ORDERING DISCLOSURE**

Finally, as originally stated, The Journal News believes that, under the fourth prong of Dendrite, a finding that plaintiffs had, in fact, established a prima facie case of defamation should not end the matter. (Plaintiffs state, incorrectly, that “The Journal News asks this court to adopt an even stricter standard than that set forth in Dendrite and Cahill.” (Pls.’ Br. at 18.) Actually, it is plaintiffs who read the fourth prong completely out of Dendrite.) It should be remembered that the plaintiffs ask this Court for a form of immediate relief – the deprivation of the posters’ First Amendment right to anonymity – that will irreparably harm the posters, all before the plaintiffs have proven their case. As where a plaintiff asks for a court to grant a preliminary injunction, *see, e.g., Dav-El Servs., Inc. v. Commonwealth Worldwide Chauffered Transp.*, 21 A.D.3d 928, 928, 800 N.Y.S.2d 642 (2d Dep’t 2005), The Journal News submits that the Court should not only consider the plaintiffs’ actual harm and how it balances versus the harm to the posters, but also the likelihood of success.<sup>5</sup> Keeping in mind the fact that the plaintiffs will have an extremely difficult burden to establish by malice by clear and convincing evidence, the fourth Dendrite prong suggests that this Court should give careful consideration to whether the requested infringement of the posters’ First Amendment rights, if granted, would actually be in the service of an ultimately futile litigation course charted by the plaintiffs. Courts should tread lightly where a right as deeply entrenched in American history and jurisprudence as

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<sup>5</sup> As with a preliminary injunction, the grant or denial of preaction discovery is an exercise of this Court’s discretion. *See Hoffman v. Batridge*, 155 Misc. 2d 862, 865, 590 N.Y.S.2d 676 (Sup. Ct. Nassau County 1992) (“The assessment of the propriety of pre-litigation discovery lies within the broad discretion of the Court.”); *State Farm Ins. Co. v. McManus*, 249 A.D.2d 311, 311, 670 N.Y.S.2d 599 (2d Dep’t 1998) (reviewing grant of preaction discovery for improvident exercise of discretion).

the right to anonymous speech is concerned, see, e.g., McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 358-71 (1995) (Thomas, J., concurring) (attached), and should be loath to intrude upon this tradition absent the firm conviction that it is necessary to redress a significant wrong.

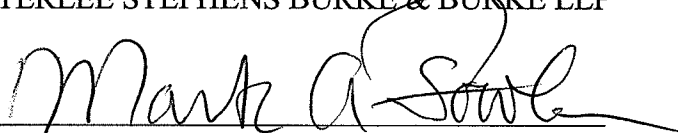
**CONCLUSION**

For the foregoing reasons, The Journal News respectfully requests that the Subpoena be quashed in its entirety (i.e., the petition for pre-commencement discovery be denied) or, in the alternative, that the Court order that notice and an opportunity to intervene be given to the anonymous posters and stay further proceedings for a reasonable length of time to allow such intervention.

Dated: New York, New York  
April 23, 2008

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## Syllabus

MCINTYRE, EXECUTOR OF ESTATE OF MCINTYRE,  
DECEASED *v.* OHIO ELECTIONS COMMISSION

## CERTIORARI TO THE SUPREME COURT OF OHIO

No. 93–986. Argued October 12, 1994—Decided April 19, 1995

After petitioner's decedent distributed leaflets purporting to express the views of "CONCERNED PARENTS AND TAX PAYERS" opposing a proposed school tax levy, she was fined by respondent for violating § 3599.09(A) of the Ohio Code, which prohibits the distribution of campaign literature that does not contain the name and address of the person or campaign official issuing the literature. The Court of Common Pleas reversed, but the Ohio Court of Appeals reinstated the fine. In affirming, the State Supreme Court held that the burdens § 3599.09(A) imposed on voters' First Amendment rights were "reasonable" and "nondiscriminatory" and therefore valid. Declaring that § 3599.09(A) is intended to identify persons who distribute campaign materials containing fraud, libel, or false advertising and to provide voters with a mechanism for evaluating such materials, the court distinguished *Talley v. California*, 362 U. S. 60, in which this Court invalidated an ordinance prohibiting all anonymous leafletting.

*Held:* Section 3599.09(A)'s prohibition of the distribution of anonymous campaign literature abridges the freedom of speech in violation of the First Amendment. Pp. 341–357.

(a) The freedom to publish anonymously is protected by the First Amendment, and, as *Talley* indicates, extends beyond the literary realm to the advocacy of political causes. Pp. 341–343.

(b) This Court's precedents make abundantly clear that the Ohio Supreme Court's reasonableness standard is significantly more lenient than is appropriate in a case of this kind. Although *Talley* concerned a different limitation than § 3599.09(A) and thus does not necessarily control here, the First Amendment's protection of anonymity nevertheless applies. Section 3599.09(A) is not simply an election code provision subject to the "ordinary litigation" test set forth in *Anderson v. Celebrezze*, 460 U. S. 780, and similar cases. Rather, it is a regulation of core political speech. Moreover, the category of documents it covers is defined by their content—only those publications containing speech designed to influence the voters in an election need bear the required information. See, e. g., *First Nat. Bank of Boston v. Bellotti*, 435 U. S. 765, 776–777. When a law burdens such speech, the Court applies "exacting scrutiny,"

## Syllabus

upholding the restriction only if it is narrowly tailored to serve an overriding state interest. See, *e. g., id.*, at 786. Pp. 343–347.

(c) Section 3599.09(A)'s anonymous speech ban is not justified by Ohio's asserted interests in preventing fraudulent and libelous statements and in providing the electorate with relevant information. The claimed informational interest is plainly insufficient to support the statute's disclosure requirement, since the speaker's identity is no different from other components of a document's contents that the author is free to include or exclude, and the author's name and address add little to the reader's ability to evaluate the document in the case of a handbill written by a private citizen unknown to the reader. Moreover, the state interest in preventing fraud and libel (which Ohio vindicates by means of other, more direct prohibitions) does not justify § 3599.09(A)'s extremely broad prohibition of anonymous leaflets. The statute encompasses all documents, regardless of whether they are arguably false or misleading. Although a State might somehow demonstrate that its enforcement interests justify a more limited identification requirement, Ohio has not met that burden here. Pp. 348–353.

(d) This Court's opinions in *Bellotti*, 435 U. S., at 792, n. 32—which commented in dicta on the prophylactic effect of requiring identification of the source of corporate campaign advertising—and *Buckley v. Valeo*, 424 U. S. 1, 75–76—which approved mandatory disclosure of campaign-related expenditures—do not establish the constitutionality of § 3599.09(A), since neither case involved a prohibition of anonymous campaign literature. Pp. 353–356.

67 Ohio St. 3d 391, 618 N. E. 2d 152, reversed.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. GINSBURG, J., filed a concurring opinion, *post*, p. 358. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 358. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, *post*, p. 371.

*David Goldberger* argued the cause for petitioner. With him on the briefs were *George Q. Vaile*, *Steven R. Shapiro*, *Joel M. Gora*, *Barbara P. O'Toole*, and *Louis A. Jacobs*.

*Andrew I. Sutter*, Assistant Attorney General of Ohio, argued the cause for respondent. With him on the briefs were *Lee Fisher*, Attorney General, *Andrew S. Bergman*, *Robert A. Zimmerman*, and *James M. Harrison*, Assistant At-

THOMAS, J., concurring in judgment

JUSTICE GINSBURG, concurring.

The dissent is stirring in its appreciation of democratic values. But I do not see the Court's opinion as unguided by "bedrock principle," tradition, or our case law. See *post*, at 375–378, 378–380. Margaret McIntyre's case, it seems to me, bears a marked resemblance to Margaret Gilleo's case<sup>1</sup> and Mary Grace's.<sup>2</sup> All three decisions, I believe, are sound, and hardly sensational, applications of our First Amendment jurisprudence.

In for a calf is not always in for a cow. The Court's decision finds unnecessary, overintrusive, and inconsistent with American ideals the State's imposition of a fine on an individual leafleteer who, within her local community, spoke her mind, but sometimes not her name. We do not thereby hold that the State may not in other, larger circumstances require the speaker to disclose its interest by disclosing its identity. Appropriately leaving open matters not presented by McIntyre's handbills, the Court recognizes that a State's interest in protecting an election process "might justify a more limited identification requirement." *Ante*, at 353. But the Court has convincingly explained why Ohio lacks "cause for inhibiting the leafletting at issue here." *Ibid*.

JUSTICE THOMAS, concurring in the judgment.

I agree with the majority's conclusion that Ohio's election law, Ohio Rev. Code Ann. § 3599.09(A) (1988), is inconsistent with the First Amendment. I would apply, however, a dif-

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<sup>1</sup>See *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), in which we held that the city of Ladue could not prohibit homeowner Gilleo's display of a small sign, on her lawn or in a window, opposing war in the Persian Gulf.

<sup>2</sup>Grace was the "lone picketer" who stood on the sidewalk in front of this Court with a sign containing the text of the First Amendment, prompting us to exclude public sidewalks from the statutory ban on display of a "flag, banner, or device" on Court grounds. *United States v. Grace*, 461 U.S. 171, 183 (1983).

THOMAS, J., concurring in judgment

ferent methodology to this case. 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. I believe that it did.

## I

The First Amendment states that the government “shall make no law . . . abridging the freedom of speech, or of the press.” U. S. Const., Amdt. 1. When interpreting the Free Speech and Press Clauses, we must be guided by their original meaning, for “[t]he Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now.” *South Carolina v. United States*, 199 U. S. 437, 448 (1905). We have long recognized that the meaning of the Constitution “must necessarily depend on the words of the constitution [and] the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions . . . in the several states.” *Rhode Island v. Massachusetts*, 12 Pet. 657, 721 (1838). See also *INS v. Chadha*, 462 U. S. 919, 959 (1983). We should seek the original understanding when we interpret the Speech and Press Clauses, just as we do when we read the Religion Clauses of the First Amendment. When the Framers did not discuss the precise question at issue, we have turned to “what history reveals was the contemporaneous understanding of [the Establishment Clause’s] guarantees.” *Lynch v. Donnelly*, 465 U. S. 668, 673 (1984). “[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.” *School Dist. of Abington Township v. Schempp*, 374 U. S. 203, 294 (1963) (Brennan, J., concurring); see also *Lee v. Weisman*, 505 U. S. 577, 632–633 (1992) (SCALIA, J., dissenting).

THOMAS, J., concurring in judgment

## II

Unfortunately, we have no record of discussions of anonymous political expression either in the First Congress, which drafted the Bill of Rights, or in the state ratifying conventions. Thus, our analysis must focus on the practices and beliefs held by the Founders concerning anonymous political articles and pamphlets. As an initial matter, we can safely maintain that the leaflets at issue in this case implicate the freedom of the press. When the Framers thought of the press, they did not envision the large, corporate newspaper and television establishments of our modern world. Instead, they employed the term “the press” to refer to the many independent printers who circulated small newspapers or published writers’ pamphlets for a fee. See generally B. Bailyn & J. Hench, *The Press & the American Revolution* (1980); L. Levy, *Emergence of a Free Press* (1985); B. Bailyn, *The Ideological Origins of the American Revolution* (1967). “It was in this form—as pamphlets—that much of the most important and characteristic writing of the American Revolution occurred.” 1 B. Bailyn, *Pamphlets of the American Revolution* 3 (1965). This practice continued during the struggle for ratification. See, e. g., *Pamphlets on the Constitution of the United States* (P. Ford ed. 1888). Regardless of whether one designates the right involved here as one of press or one of speech, however, it makes little difference in terms of our analysis, which seeks to determine only whether the First Amendment, as originally understood, protects anonymous writing.

There is little doubt that the Framers engaged in anonymous political writing. The essays in the *Federalist Papers*, published under the pseudonym of “Publius,” are only the most famous example of the outpouring of anonymous political writing that occurred during the ratification of the Constitution. Of course, the simple fact that the Framers engaged in certain conduct does not necessarily prove that they forbade its prohibition by the government. See *post*, at 373

THOMAS, J., concurring in judgment

(SCALIA, J., dissenting). In this case, however, the historical evidence indicates that Founding-era Americans opposed attempts to require that anonymous authors reveal their identities on the ground that forced disclosure violated the “freedom of the press.”

For example, the earliest and most famous American experience with freedom of the press, the 1735 Zenger trial, centered around anonymous political pamphlets. The case involved a printer, John Peter Zenger, who refused to reveal the anonymous authors of published attacks on the Crown Governor of New York. When the Governor and his council could not discover the identity of the authors, they prosecuted Zenger himself for seditious libel. See J. Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger* 9–19 (S. Katz ed. 1972). Although the case set the Colonies afire for its example of a jury refusing to convict a defendant of seditious libel against Crown authorities, it also signified at an early moment the extent to which anonymity and the freedom of the press were intertwined in the early American mind.

During the Revolutionary and Ratification periods, the Framers’ understanding of the relationship between anonymity and freedom of the press became more explicit. In 1779, for example, the Continental Congress attempted to discover the identity of an anonymous article in the *Pennsylvania Packet* signed by the name “Leonidas.” Leonidas, who actually was Dr. Benjamin Rush, had attacked the Members of Congress for causing inflation throughout the States and for engaging in embezzlement and fraud. *13 Letters of Delegates to Congress 1774–1789*, p. 141, n. 1 (G. Gawalt & R. Gephart eds. 1986). Elbridge Gerry, a delegate from Massachusetts, moved to haul the printer of the newspaper before Congress to answer questions concerning Leonidas. Several Members of Congress then rose to oppose Gerry’s motion on the ground that it invaded the freedom of the press. Merriweather Smith of Virginia rose, quoted from

THOMAS, J., concurring in judgment

the offending article with approval, and then finished with a declaration that “[w]hen the liberty of the Press shall be restrained . . . the liberties of the People will be at an end.” Henry Laurens, Notes of Debates, July 3, 1779, *id.*, at 139. Supporting Smith, John Penn of North Carolina argued that the writer “no doubt had *good designs*,” and that “[t]he liberty of the Press ought not to be restrained.” *Ibid.* In the end, these arguments persuaded the assembled delegates, who “sat mute” in response to Gerry’s motion. *Id.*, at 141. Neither the printer nor Dr. Rush ever appeared before Congress to answer for their publication. D. Teeter, Press Freedom and the Public Printing: Pennsylvania, 1775–83, 45 *Journalism Q.* 445, 451 (1968).

At least one of the state legislatures shared Congress’ view that the freedom of the press protected anonymous writing. Also in 1779, the upper house of the New Jersey State Legislature attempted to punish the author of a satirical attack on the Governor and the College of New Jersey (now Princeton) who had signed his work “Cincinnatus.” R. Hixson, Isaac Collins: A Quaker Printer in 18th Century America 95 (1968). Attempting to enforce the crime of seditious libel, the State Legislative Council ordered Isaac Collins—the printer and editor of the newspaper in which the article had appeared—to reveal the author’s identity. Refusing, Collins declared: “‘Were I to comply . . . I conceive I should betray the trust reposed in me, and be far from acting as a faithful guardian of the Liberty of the Press.’” *Id.*, at 96. Apparently, the State Assembly agreed that anonymity was protected by the freedom of the press, as it voted to support the editor and publisher by frustrating the council’s orders. *Id.*, at 95.

By 1784, the same Governor of New Jersey, William Livingston, was at work writing anonymous articles that defended the right to publish anonymously as part of the freedom of the press. Under the pseudonym “Scipio,”

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Livingston wrote several articles attacking the legislature's failure to lower taxes, and he accused a state officer of stealing or losing state funds during the British invasion of New Jersey. *Id.*, at 107–109; Scipio, Letter to the Printer, Feb. 24, 1784, *The New-Jersey Gazette*. Responding to the allegations, the officer called upon Scipio “to avow your publication, give up your real name.” S. Tucker, To Scipio, Mar. 2, 1784, *The New-Jersey Gazette*. Livingston replied with a four-part series defending “the Liberty of the Press.” Although Livingston at first defended anonymity because it encouraged authors to discuss politics without fear of reprisal, he ultimately invoked the liberty of the press as the guardian for anonymous political writing. “I hope [Tucker] is not seriously bent upon a total subversion of our political system,” Scipio wrote. “And pray may not a man, in a free country, convey thro’ the press his sentiments on publick grievances . . . without being obliged to send a certified copy of the *baptismal register* to prove his name.” Scipio, On the Liberty of the Press IV, Apr. 26, 1784, *The New-Jersey Gazette*.

To be sure, there was some controversy among newspaper editors over publishing anonymous articles and pamphlets. But this controversy was resolved in a manner that indicates that the freedom of the press protected an author's anonymity. The tempest began when a Federalist, writing anonymously himself, expressed fear that “emissaries” of “foreign enemies” would attempt to scuttle the Constitution by “fill[ing] the press with objections” against the proposal. *Boston Independent Chronicle*, Oct. 4, 1787, in 13 *Documentary History of the Ratification of the Constitution* 315 (J. Kaminiski & G. Saladino eds. 1981) (hereinafter *Documentary History*). He called upon printers to refrain from publishing when the author “chooses to remain concealed.” *Ibid.* Benjamin Russell, the editor of the prominent Federalist newspaper the *Massachusetts Centinel*, immediately adopted a policy of refusing to publish Anti-Federalist pieces unless the

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author provided his identity to be “handed to the publick, if required.” *Massachusetts Centinel*, Oct. 10, 1787, *id.*, at 312, 315–316. A few days later, the *Massachusetts Gazette* announced that it would emulate the example set by the *Massachusetts Centinel*. *Massachusetts Gazette*, Oct. 16, 1787, *id.*, at 317. In the same issue, the *Gazette* carried an article claiming that requiring an anonymous writer to leave his name with the printer, so that anyone who wished to know his identity could be informed, “appears perfectly reasonable, and is perfectly consistent with the liberty of the press.” A Citizen, *Massachusetts Gazette*, Oct. 16, 1787, *id.*, at 316. Federalists expressed similar thoughts in Philadelphia. See A Philadelphia Mechanic, *Philadelphia Independent Gazetteer*, Oct. 29, 1787, *id.*, at 318–319; Galba, *Philadelphia Independent Gazetteer*, Oct. 31, 1787, *id.*, at 319. The Jewel, *Philadelphia Independent Gazetteer*, Nov. 2, 1787, *id.*, at 320.

Ordinarily, the fact that some founding-era editors as a matter of policy decided not to publish anonymous articles would seem to shed little light upon what the Framers thought the *government* could do. The widespread criticism raised by the Anti-Federalists, however, who were the driving force behind the demand for a Bill of Rights, indicates that they believed the freedom of the press to include the right to author anonymous political articles and pamphlets.<sup>1</sup> That most other Americans shared this understanding is reflected in the Federalists’ hasty retreat before the withering criticism of their assault on the liberty of the press.

Opposition to Russell’s declaration centered in Philadelphia. Three Philadelphia papers published the “Citizen” piece that had run in the *Massachusetts Gazette*. *Id.*, at

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<sup>1</sup>The Anti-Federalists recognized little difficulty in what today would be a state-action problem, because they considered Federalist conduct in supporting the Constitution as a preview of the tyranny to come under the new Federal Government.

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318–320.<sup>2</sup> In response, one of the leading Anti-Federalist writers, the “Federal Farmer,” attacked Russell’s policy: “What can be the views of those gentlemen in Boston, who countenanced the Printers in shutting up the press against a fair and free investigation of this important system in the usual way?” Letters From the Federal Farmer No. 5, Oct. 13, 1787, in 2 *The Complete Anti-Federalist* 254 (H. Storing ed. 1981). Another Anti-Federalist, “Philadelphiensis,” also launched a substantial attack on Russell and his defenders for undermining the freedom of the press. “In this desperate situation of affairs . . . the friends of this despotic scheme of government, were driven to the last and only alternative from which there was any probability of success; namely, the abolition of *the freedom of the Press*.” Philadelphiensis, Essay I, *Independent Gazetteer*, Nov. 7, 1787, 3 *id.*, at 102. In Philadelphiensis’ eyes, Federalist attempts to suppress the Anti-Federalist press by requiring the disclosure of authors’ identities only foreshadowed the oppression permitted by the new Constitution. “Here we see pretty plainly through [the Federalists’] excellent regulation of the press, how things are to be carried on after the adoption of the new constitution.” *Id.*, at 103. According to Philadelphiensis, Federalist policies had already ruined freedom in Massachusetts: “In Boston the liberty of the press is now completely abolished; and hence all other privileges and rights of the people will in a short time be destroyed.” *Id.*, at 104.

Not limited to Philadelphia, the Anti-Federalist attack was repeated widely throughout the States. In New York, one writer exclaimed that the Federalist effort to suppress ano-

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<sup>2</sup>As noted earlier, several pieces in support appeared in the Federalist newspaper, the Philadelphia *Independent Gazetteer*. They were immediately answered by two Anti-Federalists in the Philadelphia *Freeman’s Journal*. These Anti-Federalists accused the Federalists of “preventing that freedom of enquiry which truth and honour never dreads, but which tyrants and tyranny could never endure.” 13 *Documentary History* 317–318.

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nymity would “REVERSE the important doctrine of *the freedom of the press*,” whose “truth” was “universally acknowledged.” *Detector*, *New York Journal*, Oct. 25, 1787, in 13 *Documentary History* 318. “*Detector*” proceeded to proclaim that Russell’s policy was “the introduction of this first trait of slavery into your country!” *Ibid.* Responding to the Federalist editorial policy, a Rhode Island Anti-Federalist wrote: “The Liberty of the Press, or the Liberty which *every Person* in the United States *at present* enjoys . . . is a Privilege of infinite Importance . . . for which . . . we have fought and bled,” and that the attempt by “our aristocratical Gentry, to have every Person’s Name published who should write against the proposed Federal Constitution, has given many of us a just Alarm.” *Argus*, *Providence United States Chronicle*, Nov. 8, 1787, *id.*, at 320–321. Edward Powars, editor of the Anti-Federalist *Boston American Herald*, proclaimed that *his* pages would remain “FREE and OPEN to all parties.” *Boston American Herald*, Oct. 15, 1787, *id.*, at 316. In the *Boston Independent Chronicle* of Oct. 18, 1787, “Solon” accused Russell of attempting to undermine a “*freedom and independence of sentiments*” which “should never be *checked in a free country*” and was “so *essential to the existance of free Governments.*” *Id.*, at 313.

The controversy over Federalist attempts to prohibit anonymous political speech is significant for several reasons. First, the Anti-Federalists clearly believed the right to author and publish anonymous political articles and pamphlets was protected by the liberty of the press. Second, although printers’ editorial policies did not constitute state action, the Anti-Federalists believed that the Federalists were merely flexing the governmental powers they would fully exercise upon the Constitution’s ratification. Third, and perhaps most significantly, it appears that the Federalists agreed with the Anti-Federalist critique. In Philadelphia, where opposition to the ban was strongest, there is no record that any newspaper adopted the nonanonymity policy, nor that of

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any city or State aside from Russell's Massachusetts Centinel and the Federalist Massachusetts Gazette. Moreover, these two papers' bark was worse than their bite. In the face of widespread criticism, it appears that Russell retreated from his policy and, as he put it, "readily" reprinted several anonymous Federalist and Anti-Federalist essays to show that claims that he had suppressed freedom of the press "had not any foundation in truth." 13 Documentary History 313-314. Likewise, the Massachusetts Gazette refused to release the names of Anti-Federalist writers when requested. *Ibid.* When Federalist attempts to ban anonymity are followed by a sharp, widespread Anti-Federalist defense in the name of the freedom of the press, and then by an open Federalist retreat on the issue, I must conclude that both Anti-Federalists and Federalists believed that the freedom of the press included the right to publish without revealing the author's name.

### III

The historical record is not as complete or as full as I would desire. For example, there is no evidence that, after the adoption of the First Amendment, the Federal Government attempted to require writers to attach their names to political documents. Nor do we have any indication that the federal courts of the early Republic would have squashed such an effort as a violation of the First Amendment. The understanding described above, however, when viewed in light of the Framers' universal practice of publishing anonymous articles and pamphlets, indicates that the Framers shared the belief that such activity was firmly part of the freedom of the press. It is only an innovation of modern times that has permitted the regulation of anonymous speech.

The large quantity of newspapers and pamphlets the Framers produced during the various crises of their generation show the remarkable extent to which the Framers relied upon anonymity. During the break with Great Britain, the

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revolutionaries employed pseudonyms both to conceal their identity from Crown authorities and to impart a message. Often, writers would choose names to signal their point of view or to invoke specific classical and modern “crusaders in an age-long struggle against tyranny.” A. Schlesinger, *Prelude to Independence* 35 (1958). Thus, leaders of the struggle for independence would adopt descriptive names such as “Common Sense,” a “Farmer,” or “A True Patriot,” or historical ones such as “Cato” (a name used by many to refer to the Roman Cato and to Cato’s letters), or “Mucius Scaevola.” *Id.*, at xii–xiii. The practice was even more prevalent during the great outpouring of political argument and commentary that accompanied the ratification of the Constitution. Besides “Publius,” prominent Federalists signed their articles and pamphlets with names such as “An American Citizen,” “Marcus,” “A Landholder,” “Americanus”; Anti-Federalists replied with the pseudonyms “Cato,” “Centinel,” “Brutus,” the “Federal Farmer,” and “The Impartial Examiner.” See generally 1–2 *Debate on the Constitution* (B. Bailyn ed. 1993). The practice of publishing one’s thoughts anonymously or under pseudonym was so widespread that only two major Federalist or Anti-Federalist pieces appear to have been signed by their true authors, and they may have had special reasons to do so.<sup>3</sup>

If the practice of publishing anonymous articles and pamphlets fell into disuse after the Ratification, one might infer that the custom of anonymous political speech arose only in response to the unusual conditions of the 1776–1787 period.

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<sup>3</sup>See Mason, *Objections to the Constitution*, *Virginia Journal*, Nov. 22, 1787, 1 *Debate on the Constitution* 345 (B. Bailyn ed. 1993); Martin, *The Genuine Information*, *Maryland Gazette*, Dec. 28, 1787–Feb. 8, 1788, *id.*, at 631. Both men may have made an exception to the general practice because they both had attended the Philadelphia Convention, but had refused to sign the Constitution. As leaders of the fight against ratification, both men may have believed that they owed a personal explanation to their constituents of their decision not to sign.

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After all, the Revolution and the Ratification were not “elections,” *per se*, either for candidates or for discrete issues. Records from the first federal elections indicate, however, that anonymous political pamphlets and newspaper articles remained the favorite media for expressing views on candidates. In Pennsylvania, for example, writers for or against the Federalist and Anti-Federalist candidates wrote under the names “Numa,” “Pompilius,” “A Friend to Agriculture, Trade, and Good Laws,” “A Federal Centinel,” a “Freeman,” “Centinel,” “A Real Patriot to All True Federalists,” “A Mechanic,” “Justice,” “A German Federalist,” and so on. See generally 1 Documentary History of the First Federal Elections 1788–1790, pp. 246–362 (M. Jensen & R. Becker eds. 1976). This appears to have been the practice in all of the major States of which we have substantial records today. See 1 *id.*, at 446–464 (Massachusetts); 2 *id.*, at 108–122, 175–229 (Maryland); 2 *id.*, at 387–397 (Virginia); 3 *id.*, at 204–216, 436–493 (New York). It seems that actual names were used rarely, and usually only by candidates who wanted to explain their positions to the electorate.

The use of anonymous writing extended to issues as well as candidates. The ratification of the Constitution was not the only issue discussed via anonymous writings in the press. James Madison and Alexander Hamilton, for example, resorted to pseudonyms in the famous “Helvidius” and “Pacificus” debates over President Washington’s declaration of neutrality in the war between the British and French. See Hamilton, Pacificus No. 1, June 29, 1793, in 15 Papers of Alexander Hamilton 33–43 (H. Syrett ed. 1969); Madison, Helvidius No. 1, Aug. 24, 1793, in 15 Papers of James Madison 66–73 (T. Mason, R. Rutland, J. Sisson eds. 1985). Anonymous writings continued in such Republican papers as the *Aurora* and *Federalists* organs such as the *Gazette of the United States* at least until the election of Thomas Jefferson. See generally J. Smith, *Freedom’s Fetters* (1956).

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## IV

This evidence leads me to agree with the majority's result, but not its reasoning. The majority fails to seek the original understanding of the First Amendment, and instead attempts to answer the question in this case by resorting to three approaches. First, the majority recalls the historical practice of anonymous writing from Shakespeare's works to the Federalist Papers to Mark Twain. *Ante*, at 341, and n. 4, 342–343, and n. 6, 357. Second, it finds that anonymous speech has an expressive value both to the speaker and to society that outweighs public interest in disclosure. Third, it finds that § 3599.09(A) cannot survive strict scrutiny because it is a “content-based” restriction on speech.

I cannot join the majority's analysis because it deviates from our settled approach to interpreting the Constitution and because it superimposes its modern theories concerning expression upon the constitutional text. Whether “great works of literature”—by Voltaire or George Eliot have been published anonymously should be irrelevant to our analysis, because it sheds no light on what the phrases “free speech” or “free press” meant to the people who drafted and ratified the First Amendment. Similarly, whether certain types of expression have “value” today has little significance; what *is* important is whether the Framers in 1791 believed anonymous speech sufficiently valuable to deserve the protection of the Bill of Rights. And although the majority faithfully follows our approach to “content-based” speech regulations, we need not undertake this analysis when the original understanding provides the answer.

While, like JUSTICE SCALIA, I am loath to overturn a century of practice shared by almost all of the States, I believe the historical evidence from the framing outweighs recent tradition. When interpreting other provisions of the Constitution, this Court has believed itself bound by the text of the Constitution and by the intent of those who drafted and ratified it. It should hold itself to no less a standard when

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interpreting the Speech and Press Clauses. After reviewing the weight of the historical evidence, it seems that the Framers understood the First Amendment to protect an author's right to express his thoughts on political candidates or issues in an anonymous fashion. Because the majority has adopted an analysis that is largely unconnected to the Constitution's text and history, I concur only in the judgment.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE joins, dissenting.

At a time when both political branches of Government and both political parties reflect a popular desire to leave more decisionmaking authority to the States, today's decision moves in the opposite direction, adding to the legacy of inflexible central mandates (irrevocable even by Congress) imposed by this Court's constitutional jurisprudence. In an opinion which reads as though it is addressing some peculiar law like the Los Angeles municipal ordinance at issue in *Talley v. California*, 362 U. S. 60 (1960), the Court invalidates a species of protection for the election process that exists, in a variety of forms, in every State except California, and that has a pedigree dating back to the end of the 19th century. Preferring the views of the English utilitarian philosopher John Stuart Mill, *ante*, at 357, to the considered judgment of the American people's elected representatives from coast to coast, the Court discovers a hitherto unknown right-to-be-unknown while engaging in electoral politics. I dissent from this imposition of free-speech imperatives that are demonstrably not those of the American people today, and that there is inadequate reason to believe were those of the society that begat the First Amendment or the Fourteenth.

I

The question posed by the present case is not the easiest sort to answer for those who adhere to the Court's (and the