

SUPREME COURT OF THE UNITED STATES

No. 93-986

JOSEPH MCINTYRE, EXECUTOR OF ESTATE OF MARGARET
MCINTYRE, DECEASED, PETITIONER v. OHIO ELECTIONS
COMMISSION

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF OHIO
[April 19, 1995]

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), is inconsistent with the First Amendment. I would apply, however, a different 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.

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.” *Abington School Dist. v. Schempp*, 374 U. S. 203, 294 (1963) (BRENNAN, J., concurring); see also *Lee v. Weisman*, 505 U. S. ___ (1992) (slip op., at 2-3) (SCALIA, J., dissenting).

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 a writer’s 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.

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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 4 (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,

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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 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

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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,” 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

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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, 13 Documentary History of the Ratification of the Constitution 315 (J. Kaminski & 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 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

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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.¹ 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 318-320.² 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?" Letter From the Federal Farmer No. 5, Oct. 13, 1787, 2 The Complete Anti-Federalist 254 (H. Storing ed. 1981). Another Anti-Federalist, "Philadelphensis," 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;

¹The 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.

²As 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, at 317-318.

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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 anonymity would "REVERSE the important doctrine of *the freedom of the press,*" whose "truth" was "universally acknowledged." Detector, New York Journal, Oct. 25, 1787, in Documentary History 318. "Detector" proceeded to proclaim that 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.*,

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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 *existence* 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 non-anonymity policy, nor that of 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

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publish without revealing the author's name.

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 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

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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.³

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. 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 medium 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

³See 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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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, 15 *Papers of Alexander Hamilton* 33-43 (H. Syrett ed. 1969); Madison, *Helvidius No. 1*, Aug. 24, 1793, 15 *Papers of James Madison* 66-73 (T. Mason et al. 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).

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 6-7, 23. Second, it finds that anonymous speech has an expressive value

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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 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.