



## DOES “THE FREEDOM OF THE PRESS” INCLUDE A RIGHT TO ANONYMITY? THE ORIGINAL MEANING

Robert G. Natelson\*

### ABSTRACT

This Article examines relevant evidence to determine whether, as some have argued, the original legal force of the First Amendment’s “freedom of the press” included a per se right to anonymous authorship. The Article concludes that, except in cases in which freedom of the press had been abused, it did. Thus, from an originalist point of view, Supreme Court cases such as *Buckley v. Valeo* and *Citizens United v. Federal Election Commission*, which up-

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\*Robert G. Natelson, the author of *The Original Constitution: What It Actually Said and Meant* (2d ed., 2011), is Senior Fellow in Constitutional Jurisprudence at the Independence Institute in Denver, Colorado and at the Montana Policy Institute in Bozeman, Montana. He was a professor of law for 25 years at three different universities, most recently at The University of Montana. His works are listed at <http://constitution.i2i.org/about>.

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held statutes requiring disclosure of donors to political advertising, were erroneously decided.

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<sup>1</sup>*Bibliographical Note:* This footnote collects secondary sources cited more than once, including prior published research by the author.

JOHN ALMON, BOOKSELLER OF PICCADILLY (1790) [hereinafter ALMON, BOOKSELLER]

ANONYMOUS, ACCOUNT OF THE VIEWS AND PRINCIPLES OF THAT CONNEXION OF WHIGS COMMONLY CALLED THE ROCKINGHAM PARTY (1782) [hereinafter ROCKINGHAM]

Anonymous, *Thoughts on the Liberty of the Press*, THE TOWN AND COUNTRY MAGAZINE, Feb. 1789 [hereinafter *Thoughts on the Liberty of the Press*]

4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1st ed. 1765) [hereinafter 4 WILLIAM BLACKSTONE COMMENTARIES]

3 JAMES BURGH, POLITICAL DISQUISITIONS (1775) [hereinafter BURGH]

Comment, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70 YALE L.J. 1084 (1961) [hereinafter *Yale Comment*]

THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Merrill Jensen, John P. Kaminski, & Gaspare J. Saladino eds., 2009) [hereinafter DOCUMENTARY HISTORY]

## I. INTRODUCTION

In *Citizens United v. Federal Election Commission*,<sup>2</sup> the Supreme Court, by a margin of 5-4, confirmed for citizens operating under the corporate form a constitutional right to make independent expenditures in political campaigns. In doing so, the Court voided restrictions on such expenditures imposed by the federal Bipartisan Campaign Reform Act of 2002 (BCRA).<sup>3</sup> Although that decision has provoked a great deal of controversy,<sup>4</sup> there has been little attention focused on another *Citizens United* holding that should be just as controversial: the Court's decision, despite privacy concerns, to sustain the BCRA's provisions for mandatory disclosure of financial contributors.<sup>5</sup>

The portion of the BCRA sustained by the Court, over the dissent of Justice Thomas,<sup>6</sup> requires that political advertisements, even if independent of candidates' campaigns, disclose the names of the sponsors of that advertising.<sup>7</sup> When an association is the sponsor, this would not seem to be an intrusive requirement, since most associations sponsoring political advertisements have unin-

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George du Pont, *The Criminalization of True Anonymity in Cyberspace*, 7 MICH. TELECOMM. TECH. L. REV. 191 (2001) [hereinafter *du Pont*]

ROBERT G. NATELSON, *THE ORIGINAL CONSTITUTION: WHAT IT ACTUALLY SAID AND MEANT* (2d ed., 2011) [hereinafter NATELSON, TOC].

A NEW AND IMPARTIAL COLLECTION OF INTERESTING LETTERS FROM THE PUBLIC PAPERS (J. Almon, 1767) (2 vols.) [hereinafter NEW AND IMPARTIAL].

<sup>2</sup> 558 U.S. 310 (2010).

<sup>3</sup> 116 Stat. 81 (2002).

<sup>4</sup> A Westlaw search performed in the "jlr" (journals and law reviews) database on May 16, 2014 with the query *ti("citizens united")* resulted in a list of 207 articles.

<sup>5</sup> Thus, refining the Westlaw search, *supra* note 4, to be *ti("citizens united") & thomas & dissent! & anonym!* revealed that at least 163 of the 207 articles entitled with the name of the case did not so much as *mention* the right of anonymous speech claimed in the dissent.

<sup>6</sup> *Infra* notes 9 and accompanying text.

<sup>7</sup> BCRA of 2002 § 202(a).

formative names like “Citizens for Good Government.” However, the BCRA further mandates that any sponsor spending more than \$10,000 per year on political advertisements (a pittance, in today’s media markets) also disclose the *names of all contributors* donating more than \$1,000 since the beginning of the prior calendar year.<sup>8</sup> By sustaining this mandate, the Court denied contributors constitutional protection for anonymity. The sole dissenter in this part of the case was Justice Thomas, who recited evidence that disclosure requirements chilled expression more seriously than the majority seemed to recognize.<sup>9</sup>

Disclosure requirements in First Amendment cases have had a mixed record in the Supreme Court. The Court generally applies a case-by-case balancing test,<sup>10</sup> weighing the extent to which a disclosure requirement chills expression<sup>11</sup> against the government’s

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<sup>8</sup> *Citizens United*, 558 U.S. at 367; BCRA of 2002, § 202(a).

<sup>9</sup> *Id.* at 480-83 (Thomas, J., concurring in part and dissenting in part).

<sup>10</sup> Thus, in *Watkins v. United States*, 354 U.S. 178 (1957), the Court explicitly used the language of balance to describe its method:

The critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness. We cannot simply assume, however, that every congressional investigation is justified by a public need that overbalances any private rights affected.

354 U.S. at 198.

See also *Buckley v. Valeo*, 424 U.S. 1, 68 (1976) (weighing governmental interests against the burdens imposed on First Amendment rights); *Yale Comment*, *supra* note 1, at 1088-1104 (summarizing cases before 1960).

<sup>11</sup> *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 545 (1963) (stating, “[w]hen . . . the claim is made that particular legislative inquiries and demands infringe substantially upon First and Fourteenth Amendment associational rights of individuals, the courts are called upon to, and must, determine the permissibility of the challenged actions”); *Nat’l Ass’n for the Advancement of Colored People v. Alabama*, 357 U.S. 449, 462 (1958) (state disclosure requirement of organization’s members held to be a “substantial restraint upon the exercise by petitioner’s members of their right to freedom of association”). See also *Bates v. City of Little*

interest in that disclosure.<sup>12</sup> Relevant to both sides of the balance has been the additional requirement that the disclosure mandate be narrowly drafted.<sup>13</sup>

The effect of the Court's methodology is to eliminate any right to anonymity *per se*. Whether donor privacy is protected in any particular case depends on how much the Court thinks disclosure will chill expression, how worthy the Court thinks disclosure is, and how broadly the statute is drafted.<sup>14</sup> In *Citizens United*, the majority found governmental interests to outweigh any chilling effect.<sup>15</sup>

There are several objections to this "balancing" approach. Since neither chilling nor governmental interests have "weight" of the kind that can be measured on a physical scale, the "balancing"

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Rock, 361 U.S. 516 (1960) (extending anonymity protection to organization's contributors); *Talley v. State of California*, 362 U.S. 60, 63 (1960) (explaining prior cases voiding disclosure requirements because of their chilling effect on First Amendment rights, and voiding a Los Angeles municipal ordinance for the same reason).

<sup>12</sup>*McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (voiding state law requiring author to sign leaflet because state's interest in the law was not sufficiently compelling).

<sup>13</sup>*Shelton v. Tucker*, 364 U.S. 479 (1960) (striking down as excessively broad a statute interfering with First Amendment rights of association). The "narrowly drafted" requirement is relevant to the "burden" side, because broadly drafted requirements increase the burden on expression. It is relevant to the "governmental interest" side, because broadly drafted requirements may promote only governmental interests the Court considers relatively unimportant.

<sup>14</sup>*E.g., Buckley* 424 U.S. 1 (1976) (upholding disclosure requirements of federal campaign law after weighing governmental interests against burden on rights).

<sup>15</sup>Thus, the Court held as follows:

Disclaimer and disclosure requirements may burden the ability to speak, but they "impose no ceiling on campaign-related activities," . . . and "do not prevent anyone from speaking," . . . The Court has subjected these requirements to "exacting scrutiny," which requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest. . . . For the reasons stated below, we find the statute valid as applied to the ads for the movie and to the movie itself.  
558 U.S. at 366-67.

is purely metaphorical. It also is unavoidably subjective, since the Court can only guess at the level of probability that disclosure will chill the exercise of First Amendment rights and, if there is a chill, its extent. Moreover, whether a judge deems a particular governmental interest to be “important” (and how “important”) rests in significant part the judge’s political views—that is, on personal priorities that have little to do with legal standards of judging.

Another objection to the balancing approach is that it is anachronistic: It relies on debatable twentieth century notions, such as the “marketplace of ideas” concept,<sup>16</sup> quite different from those actually embodied in the constitutional language. Like much modern First Amendment jurisprudence, balancing tests have little connection with what the American people understood the First Amendment to mean when they ratified it,<sup>17</sup> and therefore little connection with the First Amendment’s original legal force as founding-era courts would have applied it.<sup>18</sup>

In his *Citizens United* dissent, Justice Thomas marshaled evidence relevant to balancing, but also cited his concurring opinion in

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<sup>16</sup> On some problems with the “marketplace of ideas” approach, see *Yale Comment*, *supra* note 1, at 1116 (stating that whether correct ideas actually win in free competition is unverifiable). On the actual policies underlying freedom of the press, see *infra* Part V.

<sup>17</sup> Modern First Amendment jurisprudence takes the form of a legal code built up during the twentieth century with little attention to the Amendment’s historical meaning. NATELSON, *TOC*, *supra* note 1, at 173. Cf. John Paul Stevens, *The Freedom of Speech*, 102 *YALE L.J.* 1293, 1301 (1993) (stating that “the development of First Amendment law during the twentieth century is entirely the product of judicial lawmaking”).

<sup>18</sup> The “original legal force,” a term I coined to mean how courts would have applied a constitutional provision immediately after its adoption, is not quite the same as “original meaning” or “original understanding.” It is, rather, derivative of those terms, since during the founding era, a court might consider one or the other to control, depending on circumstances. See generally Robert G. Natelson, *The Founders’ Hermeneutic: The Real Original Understanding of Original Intent*, 68 *OHIO ST. L.J.* 1239 (2007).

*McIntyre v. Ohio Elections Commission*.<sup>19</sup> In *McIntyre*, he argued for an entirely different, more nearly originalist, approach to issues of disclosure and anonymity. Under that approach, anonymity is not merely a factor to be considered in assessing whether disclosure statutes burdened speech. Rather, protection for anonymity is *inherent* in the phrase “freedom of speech, or of the press,” as the founding generation understood that phrase.<sup>20</sup> Thus, according to Justice Thomas, the right to express one’s opinion, at least in reproducible form, includes the right to do so anonymously. According to this view, donor privacy does not depend on judicial balancing; it is an independent right. Several commentators, including a leading scholar clearly not identified with originalism, have taken similar positions.<sup>21</sup>

Was Justice Thomas correct about the original legal force of the First Amendment? When the American Founders drafted and adopted an amendment providing that “Congress shall make no law . . . abridging the freedom of speech, or of the press,” did they

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<sup>19</sup> 514 U.S. 334, 358 (1995) (Thomas, J., concurring).

<sup>20</sup> *Id.* at 358-59;

I agree with the majority’s conclusion that Ohio’s election law . . . 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.

<sup>21</sup> Jonathan Turley, *Registering Publius: The Supreme Court and the Right to Anonymity*, 2001-02 CATO SUP. CT. REV. 57 (2002); *Yale Comment*, *supra* note 1 (advocating a distinct right of anonymity based on a theory of free expression not discussed at the Founding); Miguel E. Larios, *Epublius: Anonymous Speech Rights Online*, 37 RUTGERS L. RECORD 36 (2010) (advocating constitutional protection for anonymity over the Internet). *Cf. du Pont*, *supra* note 1 (generally favoring protection for anonymity where the writer’s identity is ultimately available in cases of abuse). *But see* Stevens, *supra* note 17 (generally opposing First Amendment categories).



understand anonymity to be an independent part of those rights? If so, under what circumstances, if any, could the government require disclosure? This Article explores the legal and historical evidence pertaining to those questions.<sup>22</sup>

## II. PRELIMINARY CONSIDERATIONS

Because this Article reconstructs the legal force of the First Amendment as a court would have applied it immediately after its ratification on December 15, 1791, it focuses on statements made and events occurring before that time. Subsequent statements and events were as yet unknown, and therefore were not part of the ratification bargain.<sup>23</sup>

It may be helpful to review briefly the relevant chronology. The Constitution was signed on September 17, 1787 and transmitted to the Confederation Congress.<sup>24</sup> From that time, the document was the focus of intense public debate. That debate raged in public and in the state ratifying conventions. On June 21, 1788, New Hampshire became the ninth state to ratify, thereby meeting the Constitution's minimum requirement for formation of the new federal government.<sup>25</sup> The government began to operate in the spring of 1789.

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<sup>22</sup> Because this Article discusses the First Amendment, it necessarily assumes that Congress enjoys, among its enumerated powers, authority to regulate the conduct of federal election campaigns. I doubt whether, from an originalist standpoint, Congress has such authority. Supervision of political campaigns seems to have been left to state administration of criminal and defamation law. *See generally* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1 (2010).

<sup>23</sup> NATELSON, TOC, *supra* note 1, at 40 (discussing the reasons for avoiding post-ratification evidence when attempting to re-create the Constitution's original understanding or original meaning).

<sup>24</sup> For the chronology followed in this Part II, *see* 13 DOCUMENTARY HISTORY, *supra* note 1, at xl - xlii.

<sup>25</sup> U.S. CONST. art. VII. ("The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the same").

Yet intense debate on the merits of the Constitution continued until Rhode Island became the thirteenth state to ratify on May 29, 1789.

Much of this debate centered on whether the Constitution should be amended to include a bill of rights. Although there was a widespread expectation that a bill of rights would protect freedom of speech and of the press, there was little discussion about what those phrases meant.

On June 8, 1789, Representative James Madison proposed a draft bill of rights in the new federal Congress, and on September 25 of that year Congress proposed twelve new amendments for ratification by the state legislatures. The third through twelfth of these amendments were declared ratified on December 15, 1791.<sup>26</sup> The first-listed amendment was never approved and the second was not ratified until 1992,<sup>27</sup> so the provision listed originally as the third amendment became the First.

Because substantial materials from the legislative debates over the First Amendment have not survived, some commentators have assumed that the First Amendment was hastily drafted with little understanding of its meaning.<sup>28</sup> In fact, however, most of that provision's operative wording was composed of phrases then in common use.<sup>29</sup> Although their precise scope sometimes was a matter of dispute, they did convey understood core meanings.<sup>30</sup>

For purposes of this Article, however, there is no need to examine the role of anonymity in "the freedom of speech." This is be-

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<sup>26</sup> See Maeva Marcus, *The Adoption of the Bill of Rights*, 1 WM. & MARY BILL RTS J. 115 (1992) (providing a short history of the Bill).

<sup>27</sup> U.S. CONST. amend. XXVII, available with annotations about ratification at [http://www.archives.gov/exhibits/charters/constitution\\_amendments\\_11-27.html](http://www.archives.gov/exhibits/charters/constitution_amendments_11-27.html).

<sup>28</sup> See, e.g., Robert H. Bork, *Neutral Principles and some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971) (stating that "[t]he First Amendment . . . appears to have been a hastily drafted document upon which little thought was expended. . . . We are, then, forced to construct our own theory of the constitutional protection of speech").

<sup>29</sup> See generally *infra* Parts II, V-VIII.

<sup>30</sup> NATELSON, TOC, *supra* note 1, at 173-82 (citing the core meanings).

cause the Founders would have placed the area of political advertising within the scope of “the freedom . . . of the press” – or, to use a then-common synonym, “liberty of the press.”

There are several reasons for placing anonymous political advertising within the category of the press rather than speech. First, as a matter of technological necessity, during the founding era anonymity was predominantly a feature of the press rather than of speech. Although anonymous speech frequently occurs today (as when radio talk shows broadcast the voices of unnamed callers), during the eighteenth century it was difficult for a speaker to remain anonymous. One generally thought of “speech” as attributed: Even when orations were re-printed, their authors typically were identified.<sup>31</sup> Modern political advertisements have far more in common with the eighteenth-century press than with eighteenth-century speech. Modern political advertisements are often printed. When they are broadcast, they generally are broadcast in a recorded form that can be, and usually is, replayed again and again over a span of time and in remote locations.<sup>32</sup> In addition, modern political advertisements, like founding-era press items, usually are presented through media independent of their authors.

Indeed, one can draw close equivalencies between forms of modern political broadcasting and forms of founding-era press production. The short political advertisement broadcast by a radio or television station is closely analogous to the founding-era opinion article or letter to the editor. The advertisement presented over the Internet or distributed in disk form is akin to the eighteenth-century broadside.<sup>33</sup> Longer productions, such as the documentary

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<sup>31</sup> *Infra* note 63 and accompanying text (providing examples of attribution of re-printed oral discourses).

<sup>32</sup> During the founding era, the permanent and reproducible nature of the press was frequently commented upon. NATELSON TOC, *supra* note 1, at 174-75.

<sup>33</sup> A “broadside” was a single large sheet or poster, generally advertising a cause, product, or event.

at issue in *Citizens United*, are the functional equivalents of Founding-Era political pamphlets. During the eighteenth century, opinion articles, letters to the editor, broadsides, and pamphlets all were protected under the legal doctrine known as “freedom (or liberty) of the press.”<sup>34</sup>

Allowing for some peripheral uncertainties, during the founding era freedom of the press was a doctrine of recognized content. English and American writers thought of it as having arisen in Britain in 1694, with the expiration of the licensing statutes and of most prior restraints.<sup>35</sup> Freedom of the press included a proscription on prior restraints, but it did not encompass *merely* protection from prior restraints.<sup>36</sup> It also included crucial protections from liability for matter already published.<sup>37</sup> For example, in Britain truth was a defense against a claimed libel of a public official,<sup>38</sup> and in America it was a defense in all cases.<sup>39</sup> Trial in libel cases was by jury; and in cases where treason was not alleged, no felony charge was possible.<sup>40</sup> A jury enjoyed the prerogative of freeing a defendant even if

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<sup>34</sup> Cf. John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1296 (1993) (stating that freedom of the press protects “newspapers, periodicals, and political pamphlets”).

<sup>35</sup> NATELSON, TOC, *supra* note 1, at 175. See also *Yale Comment*, *supra* note 1, at 1085 (reporting the date of 1694).

<sup>36</sup> The common impression that “freedom of the press” meant only the absence of prior restraint may be due to a narrow reading of Blackstone’s statement on the matter: “The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published.” 4 WILLIAM BLACKSTONE, COMMENTARIES \*151.

<sup>37</sup> NATELSON, TOC, *supra* note 1, at 177.

<sup>38</sup> *Id.* Truth was not made a defense in private defamation suits, so that those suits could serve as an alternative to feuds and duels. BURGH, *supra* note 1, at 248. Moreover, one knowing of criminal activity was expected to inform the public prosecutor rather than spread possibly erroneous information in the press. *Id.* at 176. In political discourse, one was expected to criticize measures, not men. *Id.* at 250.

<sup>39</sup> NATELSON, TOC, *supra* note 1, at 133.

<sup>40</sup> NATELSON, TOC, *supra* note 1, at 177.

guilty, but it had no prerogative of convicting one who was innocent.<sup>41</sup>

In some ways, the scope of freedom of the press during the founding era was greater than it is today. There was no “compelling governmental interest” standard to authorize suppression of political statements. Outside the designated exceptions, there was no hierarchy by which some kinds of writings obtained more legal protection than others. Press freedom protected commercial, scientific, artistic,<sup>42</sup> and religious writings every bit as much as it protected political writings.<sup>43</sup>

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<sup>41</sup> NATELSON, TOC, *supra* note 1, at 177.

<sup>42</sup> JOHN ALMAN, A REVIEW OF THE REIGN OF GEORGE THE SECOND 47 (1737) (reproducing an uncontradicted 1737 claim that a licensing requirement for drama violated freedom of the press, although Parliament adopted a licensing statute anyway).

<sup>43</sup> Illustrative of the scope of the right to freedom of the press is the discussion in the First Continental Congress’s *Letter to the Inhabitants of the Province of Quebec*, CONT’L JOURNAL, 1st Cong., 108 (1774):

The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science [i.e. knowledge], morality, and arts [i.e., both *belle artes* and practical skills] in general, in its diffusion of liberal sentiments [i.e., tolerance] on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable, and just modes of conducting affairs.

This formulation was endorsed by at least one prominent American Tory as well. THOMAS BRADBURY CHANDLER, WHAT THINK YE OF CONGRESS NOW? 1-2 (1775). *See also* THE FEDERAL FARMER, LETTER XVI (1788), *reprinted in* 17 DOCUMENTARY HISTORY, *supra* note 1, at 350. (“A free press is the channel of communication as to mercantile and public affairs; by means of it the people in large countries ascertain each others [sic] sentiments; are enabled to unite, and become formidable to those rulers who adopt improper measures”).

*Cf.* Charles James Fox, *Debate in the House of Commons*, THE WORLD (LONDON), May 21, 1791 (crediting freedom of the press with improvements “in arts, in sciences, in liberty of sentiment, and in liberty”). (Another version of this extraordinary speech, which does not include these comments, is quoted *infra* note 82.)

On the other hand, the legal doctrine of freedom of the press was never unlimited.<sup>44</sup> There was widespread recognition that the press could be abused, and that the law should prescribe remedies for abuse.<sup>45</sup> Thus, an author, and sometimes a printer, could face unpleasant legal consequences if responsible for breach of parliamentary privilege,<sup>46</sup> defamation,<sup>47</sup> blasphemy,<sup>48</sup> obsceni-

Thus, a tax making it more expensive for people to advertise commercially was seen as violating freedom of the press. JOHN FOTHERGILL, *CONSIDERATIONS RELATIVE TO THE NORTH AMERICAN COLONIES* 21 (1765). Dr. Fothergill, an English Quaker physician, was another friend of Benjamin Franklin.

<sup>44</sup> NATELSON, TOC, *supra* note 1 at 175-77. Cf. 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*152 [stating, "A man (says a fine writer on this subject) may be allowed to keep poisons in his closet, but not publicly to vend them as cordials"].

<sup>45</sup> For complaints about abuse, *see, e.g.*, ALEXANDER CARLYLE, *THE JUSTICE AND NECESSITY OF THE WAR WITH OUR AMERICAN COLONIES EXAMINED* 38-39 (1777) (stating that abuses of the press have impaired the respect due to Crown and government); MABLY, ABBÉ DE, *OBSERVATIONS ON THE GOVERNMENT AND LAWS OF THE UNITED STATES OF AMERICA* 66-67 (1784) (suggesting that the United States limited freedom of the press to the learned professions at least until it had established a Senate); Mably, Abbé de, *Remarks Concerning the Government of the Laws of the United States of America*, in *FOUR LETTERS* 140-41 (1784) (same thesis); "Serious," *Against the Liberty of the Press*, in 2 *NEW AND IMPARTIAL*, *supra* note 1, at 277-79 (blaming it for arrogance, fear, loss of religion, scurrility, and prejudice of juries).

<sup>46</sup> Incidents of breach of parliamentary privilege were rare in America, but they did occur. *See* MARY PATTERSON CLARKE, *PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES* 124-27 (1943) (detailing various incidents).

When Gunning Bedford, Sr., the muster-master general of the continental army, challenged congressional delegate John Dickinson Sergeant to a duel because of Sergeant's remarks in the House, several members of the Continental Congress wanted Bedford severely punished. However, Congress was satisfied with an apology. 8 J. CONT. CONG. 458-61 & 466-67 (June 12-14, 1777). A speech and debate clause was added to the existing draft of the Articles of Confederation a few months after this incident. 9 *id.* at 885, 887 & 893-94 (Nov. 10 & 12, 1777).

Bedford should not be confused with his cousin, Gunning Bedford, Jr., who served as a federal convention delegate and likewise offended the house with intemperate expression. 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* at 492 (Max Farrand, ed., 1937).

<sup>47</sup> On defamation, *see* NATELSON, TOC, *supra* note 1, at 176-77. However, libel was not punishable if appearing in a petition to Parliament, a bill in chancery, or a proceeding at law. 3 BURGH, *supra* note 1, at 247 (1775). Burgh was a favorite author among the American Founders, *see, e.g.*, *THE FEDERALIST* NO. 56 (James Madison), *in*

ty,<sup>49</sup> perjury, sedition, or treason.<sup>50</sup> Such limitations sometimes were summarized with the statement that writings in the press must be “decent.”<sup>51</sup>

### III. JUSTICE THOMAS’ EVIDENCE

In his *McIntyre* concurrence, Justice Thomas acknowledged that “[t]he historical record is not as complete or as full as I would desire.”<sup>52</sup> The evidence he did cite was of three kinds. The first was contemporaneous practice: “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.”<sup>53</sup> The essays in *The Federal-*

ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, *THE FEDERALIST* 294n (Gideon edition, Liberty Fund reprint, 2001).

<sup>48</sup> On the offense of blasphemy, see NATELSON, *TOC*, *supra* note 1, at 175.

<sup>49</sup> On “lewdness”, *see id.* at 175-76.

<sup>50</sup> On the last three (as well as some of the others), *see* the following: Anonymous, *On the Liberty of the Press*, in 1 *NEW AND IMPARTIAL*, *supra* note 1, at 248 (excluding from liberty of the press treason, slander, “obscenity which may be corruptive of morals” and “all impiety which may tend to subvert religion”); *Extract from Bishop Hayter’s Essay on Liberty of the Press*, in 2 *NEW AND IMPARTIAL*, *supra* note 1, at 282-83 (excluding blasphemy, perjury, treason, and slander); John Almon, in ALMON, BOOKSELLER, *supra* note 1, at 151 (excluding blasphemy, perjury, treason, and slander); *id.* at 155 (stating that lawmakers must restrain impious and immoral abuse of speech); *Printer’s Answer to Against the Liberty of the Press*, in 2 *NEW AND IMPARTIAL*, *supra* note 1, at 282 (excluding “blasphemy, perjury, treason, and personal slander”); 4 BLACKSTONE’S COMMENTARIES \*151 (excluding unprotected “blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels”). Apparently in Britain one had to avoid personal criticism of the king. Anonymous, *Queries, with Their Answers, on the Constitutional Office of King, Confined to His Speeches to Parliament*, 1 *NEW AND IMPARTIAL*, *supra* note 1, at 182.

<sup>51</sup> *E.g.*, AM. HERALD, Dec. 17, 1787, *reprinted* in 4 *DOCUMENTARY HISTORY*, *supra* note 1, at 48 (reporting editor as saying “he will never refuse any DECENT speculation a place”).

<sup>52</sup> *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 367 (1995) (Thomas, J., concurring).

<sup>53</sup> *Id.* at 360.

*ist* were, of course, composed by Alexander Hamilton, James Madison, and John Jay. It might be more accurate to refer to “Founders” than “Framers,” both because Jay was not a Framer and because the Constitution’s original legal force was fixed at the ratification rather than at the framing.<sup>54</sup>

Justice Thomas’ second class of evidence consisted of a handful of historical events, such as the famous libel case against Peter Zenger and a 1779 incident in the Continental Congress.<sup>55</sup> His third was a continuing public debate during the years 1787-88 over access to the press.<sup>56</sup>

It can be argued that this collection of evidence, while certainly relevant, is not sufficient to demonstrate a common understanding that “freedom of the press” included protection from disclosure of an author’s identity. The fact that the authors of *The Federalist* were pseudonymous—or even that most written pieces on the Constitution were so—does not prove that the practice of hiding one’s identity was prevalent in discussion of public affairs generally. Further, as Justice Thomas acknowledged, “[T]he simple fact that the Framers engaged in certain conduct does not necessarily prove that they forbade its prohibition by the government.”<sup>57</sup>

Moreover, one could contend that several of the incidents he cited were not particularly probative. For example, as Justice Scalia pointed out in his *McIntyre* dissent, in the Zenger trial “the issue of anonymity was incidental to the . . . issue of whether criti-

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<sup>54</sup> Jay was not a delegate to the 1787 drafting convention, although he was prominent during the ratification fight. Further, Justice Thomas deduced the “Framers’ understanding” in part from comments made by non-Framers in the Continental Congress. *Id.* at 361. For the difference between the terms “Framer” and “Founder,” see NATELSON, TOC, *supra* note 1, at 10-11. See also Natelson, *Hermeneutic*, *supra* note 18 (discussing the rules of legal interpretation prevailing during the founding era).

<sup>55</sup> *McIntyre*, 514 U.S. at 361.

<sup>56</sup> *Id.* at 363-66. This debate is discussed *infra* Part VII.

<sup>57</sup> *Id.* at 360.



cism of the government could be *punished* by the state.”<sup>58</sup> An incident in the Continental Congress cited by Justice Thomas does indeed suggest that some members of Congress believed freedom of the press included a right to anonymity, but it also suggests that Elbridge Gerry—a very prominent Framers—likely held the opposing view.<sup>59</sup>

Justice Thomas’ most significant evidence was the 1787-88 public debate, which arose when some Boston newspaper editors declined to publish anonymous or pseudonymous commentary on the proposed Constitution. As explained further in Part VII, the Boston editors’ decision to require disclosure of authors’ names biased public discussion of the Constitution’s merits and shortcomings because many Anti-Federalists feared retaliation if their identities were known.<sup>60</sup> Anti-Federalists accused the offending editors of violating freedom of the press and leveraged the editors’ conduct into a prediction that once the document was ratified, the new federal government would act in a similarly oppressive manner.<sup>61</sup>

The discussion of the Boston newspaper controversy in Justice Thomas’ *McIntyre* concurrence appears to rely principally on a summary of the controversy composed by the editors of the *Documentary History of the Ratification of the Constitution of the United States*.<sup>62</sup> That summary, while useful, is only a summary, and does

<sup>58</sup> *Id.* at 374 (Scalia, J., dissenting).

<sup>59</sup> *Id.* at 361-62 (Thomas, J., concurring).

<sup>60</sup> 13 DOCUMENTARY HISTORY, *supra* note 1, at 312, 313 (editor’s note) stating that Massachusetts Anti-Federalists feared for their safety, and that if the Constitution were adopted they might be barred from future political office); PHILA. FREEMAN’S J., Oct. 24, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 1, at 317-19 (stating that in Boston one must be brave to oppose the Constitution).

<sup>61</sup> 13 DOCUMENTARY HISTORY, *supra* note 1, at 314 (editor’s note) (reporting Richard Henry Lee’s view that “occlusion” of the press in Boston was evidence of the effect of the Constitution); *Philadelphensis I* (Benjamin Workman), INDEP. GAZETTEER, Nov. 7, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 1, at 574, 578 (predicting abolition of the press if the Constitution were adopted).

<sup>62</sup> *McIntyre*, 514 U.S. at 363-66 (Thomas, J., concurring) (citing the summary).

not discuss all the underlying documents and does not offer enough detail to clarify whether anonymity was an understood component of press freedom.<sup>63</sup> In fairness to Justice Thomas, one should not expect exhaustive history in a single concurring opinion—not even in a Supreme Court concurring opinion. Moreover, as shown below, a wider review of the historical and legal evidence, including the surviving records of the Boston dispute, corroborates his conclusion.

#### IV. EXTENT OF THE PRACTICE OF ANONYMOUS AND PSEUDONYMOUS WRITING

It certainly is true that during the founding era most writing *about the Constitution* was pseudonymous or anonymous. Although published orations on the subject, such as James Wilson's State House Yard speech of October 6, 1787, usually were attributed to the speaker, pamphlets, essays, and newspaper letters usually were not. *Friends of the Constitution*,<sup>64</sup> a single volume collection of pro-Constitution writings, contains over 30 pamphlets and essays, and all were pseudonymous when first published. Just as Madison, Hamilton, and Jay wrote *The Federalist* under an assumed name ("Publius"), so did the Constitution's other advocates.<sup>65</sup>

The second public commentary volume of the *Documentary History of the Ratification of the Constitution* offers a larger and more representative sample.<sup>66</sup> The principal portion of that volume (that is,

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<sup>63</sup> See *infra* Part VII for an analysis of the underlying documents, including several not discussed in the summary.

<sup>64</sup> FRIENDS OF THE CONSTITUTION: WRITINGS OF THE "OTHER" FEDERALISTS, 1787-1788 (Colleen A. Sheehan & Gary L. McDowell eds., 1998).

<sup>65</sup> For example, Tench Coxe wrote as "A Freeman" and "An American Citizen." Noah Webster wrote as "An American Citizen." John Dickinson, who before the Revolution earned fame as "A Pennsylvania Farmer," wrote ratification essays as "Fabius."

<sup>66</sup> 14 DOCUMENTARY HISTORY, *supra* note 1. I chose the second of six volumes devoted exclusively to "Commentaries on the Constitution" (volume 14 of the entire

the portion before the appendices) contains 113 entries, and encompasses writings by both Federalists and Anti-Federalists. Of those, 57 of the 113 entries reproduce third party essays and letters appearing in the newspapers.<sup>67</sup> One entry consists of five separate essays,<sup>68</sup> yielding a total count of 61 items. Sixty of the 61 – the exception was a reproduction of George Mason’s objections to the Constitution – were pseudonymous. Featured pseudonyms included some borrowed from ancient Greece and Rome (Brutus, Cincinnatus, Cato, Timoleon, etc.), some reflective of the writer’s home (A Citizen of Philadelphia, Philadelphiensis, An American), and some communicating other characteristics (A Landholder, A Federal Republican, A True Friend, The Federal Farmer).<sup>69</sup>

Of course, the fact that most writing about the Constitution was unattributed is not conclusive as to *other* political writings. However, an examination of the Gale database *Eighteenth Century Collections Online* reveals that the overwhelming bulk of published American and British commentary *on all political subjects* was anonymous or pseudonymous. I have not been able to quantify this conclusion from that particular database, but another source may serve the same purpose. The two-volume publication entitled *American Politi-*

set) because, unlike the prior volume, it encompasses only time during which the Constitution’s text was publicly known and debated. The second “commentary” volume covers November 8 through December 17, 1787.

<sup>67</sup> *Id.* at vii – x.

<sup>68</sup> These are the five essays of the “Federal Farmer.” *Id.* at 14-54.

<sup>69</sup> Determining the identity of these authors is what passes for sport among historians. As noted *infra* note 133 and accompanying text, “Philadelphiensis” was Benjamin Workman. The identity of “Brutus” is not certain, but is widely believed to be Robert Yates, who had served as a Constitutional Convention delegate from New York. “Cato” was Governor George Clinton of New York, and the “Landholder” was Judge Oliver Ellsworth of Connecticut, who had been a delegate at the Constitutional Convention and was later Chief Justice of the U. S. Supreme Court. Tradition has it that the “Federal Farmer” was Richard Henry Lee of Virginia, but this claim has been sharply disputed. 14 DOCUMENTARY HISTORY, *supra* note 1, at 15-16 (editors’ note); EMPIRE AND NATION: LETTERS FROM A FARMER IN PENNSYLVANIA vii-viii (editor’s note) (2d ed., 1999).

*cal Writing During the Founding-Era: 1760-1805*<sup>70</sup> is made up of period opinion pieces, most unrelated to the Constitution. The first volume consists entirely of material published before the First Amendment was ratified. It contains 48 separate divisions containing 61 separate publications. Four of the 61 are pronouncements by legislatures or conventions. Eleven of the remaining 57 were originally oral – that is, they were sermons and other discourses printed for publication. All of these were signed.

Of the 46 productions prepared exclusively for publication, 25 were letters-to-the editor and essays of the kind we today call “op-eds.” All of these were anonymous or pseudonymous. The other 21 were pamphlets. Twenty of these were anonymous or pseudonymous; only one of the pamphlets revealed the author’s true name. The editors of the collection observed of that pamphlet, written by Virginia’s Richard Bland, that it “was unique for the period in having the author’s name boldly listed on the title page.”<sup>71</sup>

It may not have been “unique,” but it was unusual. The second volume of *American Political Writing During the Founding-Era: 1760-1805* includes, among its six pre-1791 writings, excerpts from a book and a nearly-book-long pamphlet that were both attributed. However, it also reproduces four essays, two pseudonymous and at least one anonymous. It is not clear from the reproduced version of the fourth (apparently by Benjamin Franklin) whether it originally bore the author’s name.

In other words, non-disclosure of one’s identity was a nearly-universal practice in letters, essays, and pamphlets dealing with political subjects. To be sure, as Justice Thomas conceded, the prevalence of author privacy does not, by itself, prove that author priva-

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<sup>70</sup> AMERICAN POLITICAL WRITING DURING THE FOUNDING-ERA: 1760-1805 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

<sup>71</sup> *Id.* at 67.

cy was considered a component of press freedom.<sup>72</sup> But it does point in that direction. We therefore inquire further.

#### V. REASONS FOR FREEDOM OF THE PRESS AND NON-DISCLOSURE OF IDENTITY

The First Amendment prohibited only *congressional* restrictions on press freedom, but in founding-era discourse the phrase “freedom [or liberty] of the press” could refer to freedom from private as well as public restraints.<sup>73</sup> In that sense, “freedom of the press” was akin to the phrases “freedom of inquiry,” “free discussion,” and “free investigation” – terms with which it was sometimes associated.<sup>74</sup> The values underlying the phrase “freedom of the press” offer clues as to the extent to which anonymity was an understood part of the phrase.

Eighteenth-century commentators, both in Britain and America, offered various justifications for press freedom. One was that the right to speak one’s mind was a natural right,<sup>75</sup> of which writing for

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<sup>72</sup> *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 363-66 (1995).

<sup>73</sup> E.g., JOHN DRINKER, OBSERVATIONS ON THE LATE POPULAR MEASURES 5 (1774) (referring to interruptions of freedom of the press by “the illegal menaces and arbitrary frowns of a prevailing party.”); THOMAS BRADBURY CHANDLER, WHAT THINK YE OF CONGRESS NOW? 2-3 (1775) (complaining of violations by the Sons of Liberty).

<sup>74</sup> 13 DOCUMENTARY HISTORY, *supra* note 1, at 313 (editor’s note, quoting newspaper’s report of Massachusetts legislative debate) (“free discussion”); *id.* at 314 (editor’s note, quoting Anti-Federalist letter to newspaper) & BOSTON AM. HERALD, Oct. 15, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 1, at 316 (“freedom of enquiry”); PHILA. FREEMAN’S J., Oct. 24, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 1, at 317-19 (same); “Philadelphensis” (Benjamin Workman), *Letter I*, INDEPENDENT GAZETTEER, Nov. 7, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 1, at 574 (“free and thorough investigation”); FEDERAL FARMER, LETTER V, Oct. 13, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 48, 52 (“fair and free investigation”); “Philadelphensis,” *Letter VIII*, PHILA. FREEMAN’S J., Jan. 23, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 458, 460 (“free enquiry”).

<sup>75</sup> *Yale Comment*, *supra* note 1, at 1113 (stating that during the founding era, freedom of speech was widely considered to be a natural right).

publication was but a more extended version.<sup>76</sup> To be sure, some commentators referred to liberty of the press as a mere “privilege”—a product of society, albeit a very important one<sup>77</sup>—rather than a natural right, but that was not the dominant view.<sup>78</sup>

Another justification for freedom of the press was that it was a key to disseminating and advancing human learning of all kinds.<sup>79</sup> Related to this was the view that, by facilitating the exchange of mutual sentiments, press freedom promoted tolerance,<sup>80</sup> human virtue,<sup>81</sup> and public spirit.<sup>82</sup>

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<sup>76</sup> Extract from Bishop Hayter’s *Essay on Liberty of the Press*, in 2 NEW AND IMPARTIAL, *supra* note 1, at 282 (noting the natural right of speech and referring to the press as “a more extensive and improved kind of speech”). See also John Almon in ALMON, BOOKSELLER, *supra* note 1, at 149-50 (stating that freedom of the press is connected to the natural liberty of speech); Anonymous, *On the Liberty of the Press*, in 1 NEW AND IMPARTIAL, *supra* note 1, at 248 (establishing the scope of freedom of the press as “whatever a man ought justly to have liberty to say”); THOMAS BRADBURY CHANDLER, WHAT THINK YE OF CONGRESS NOW? 1 (1775) (referring to freedom of the press as an inalienable right); Philadelphiensis VIII, PHILA. FREEMAN’S J., Jan. 23, 1788, reprinted in 15 DOCUMENTARY HISTORY, *supra* note 1, at 458, 459 (claiming press freedom is an inalienable right).

<sup>77</sup> Thus, some authors referred to it as “that inestimable privilege.” E.g., “Philadelphiensis” (Benjamin Workman), *Letter II*, PHILA. FREEMAN’S J., Nov. 28, 1787, reprinted in 14 DOCUMENTARY HISTORY, *supra* note 1, at 251, 255.

<sup>78</sup> On the varying characterizations of press freedom as a “right” or “privilege,” see Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117, 1141-42 n.127 (2009).

<sup>79</sup> 1 JOHN MOORE, A VIEW OF SOCIETY AND MANNERS IN FRANCE, SWITZERLAND, AND GERMANY 400 (3d ed., 1780) (referring to the diffusion of knowledge); MABLY, ABBÉ DE, *Remarks Concerning the Government of the Laws of the United States of America*, in FOUR LETTERS 140 (1784) (stating “[i]t cannot be denied, that to restrain the liberty of the press is to confine the liberty of thinking; and that, consequently, neither the understanding nor the morals can make even the most trivial progress”). On the scope of freedom of the press, see *supra* notes 41-50 and accompanying text.

<sup>80</sup> *Letter from the Continental Congress to the Inhabitants of Quebec*, *supra* note 43 (crediting freedom of the press with spreading “liberal sentiments”).

<sup>81</sup> ROCKINGHAM, *supra* note 1, at 13 (stating that “to extend the community of sentiment will prove to be an encouragement of virtue”); MABLY, ABBÉ DE, *Remarks Concerning the Government of the Laws of the United States of America*, in FOUR LETTERS 140 (1784) (crediting liberty of the press, in a generally critical passage, with promoting human morals).

Finally, liberty of the press was seen as promoting good political values, including freedom and good government. By publicizing abuses, authors could help shame the abusers and point out better ways of doing things.<sup>83</sup> Jean Louis DeLolme's popular book, *The Constitution of England*, argued that freedom of the press enabled the people to exercise the "censorial power."<sup>84</sup> This was a corrective power reminiscent of that exercised by the *censores* of the Roman republic—officials charged with assuring the balance of the constitution. Freedom of the press was a key to self-government and to good government, in that it assured that even "the Cobler in his Stall [*sic*]" could participate in public life, pointing out problems that might not otherwise come to the attention of the great and

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<sup>82</sup> *Printer's Answer to "Against the Liberty of the Press,"* in 2 NEW AND IMPARTIAL, *supra* note 1, at 280; Charles James Fox, *Debate in the House of Commons*, May 20, 1791, reported in THE WORLD (LONDON), May 21, 1791 (crediting freedom of the press with improvements "in arts, in sciences, in liberty of sentiment, and in liberty").

<sup>83</sup> 1 JOHN MOORE, A VIEW OF SOCIETY AND MANNERS IN FRANCE, SWITZERLAND, AND GERMANY 401 (3d. ed., 1780) (referring to liberty of the press as a way to punish abusers and as a bulwark "in defence of the unprotected"); 8 RAYNAL, ABBÉ DE (GUILLAUME-THOMAS-FRANCOIS), A PHILOSOPHICAL AND POLITICAL HISTORY OF THE SETTLEMENTS AND TRADE OF THE EUROPEANS IN THE EAST AND WEST INDIES 63 (1783) (pointing out that the freedom of the press protected against oppression and abuses); "Philadelphiensis" (Benjamin Workman), *Letter VIII*, PHILA. FREEMAN'S J., Jan. 23, 1788, reprinted in 15 DOCUMENTARY HISTORY, *supra* note 1, at 458, 459 (arguing that press freedom is a remedy against the "knave of power and his cringing sycophants"). See also the statements by the First Continental Congress and the "Federal Farmer," *supra* note 42. Cf. Charles James Fox, *Debate in the House of Commons*, May 20, 1791, 29 THE PARLIAMENTARY HISTORY OF ENGLAND 551, 553 ("Whoever saw what the world was now, and compared it with what if formerly had been, must be sensible that it had greatly improved in the science of government, and that that improvement was entirely owing to the liberty of the press."). This last source, commonly referred to as "Cobbett's Parliamentary History," provides a different report of the same speech from the version cited *supra* note 18.

<sup>84</sup> JEAN LOUIS DE LOLME, THE CONSTITUTION OF ENGLAND 201 (French ed., 1771), (English ed., 1775) (Liberty Fund reissue, 2007); see also John Almon in ALMON, BOOKSELLER, *supra* note 1, at 154-55 (stating that liberty of the press should be used to guard against threats to the British constitution).

powerful, and suggesting solutions to them.<sup>85</sup> Thus, “a simple individual who hath not a means of access to the great, may start a thought, which, if seconded by the power and wisdom of an able and honest statesman, may be productive of general good.”<sup>86</sup>

Eighteenth-century writers advanced several reasons why an author might wish to conceal his or her own identity, and these were, in fact, consonant with the proffered justifications for freedom of the press itself. An author might seek to avoid reprisals from, or intimidation by, private parties or government officials.<sup>87</sup> Thus, a Philadelphia editor opined that requiring a writer who expressed

<sup>85</sup> ROCKINGHAM, *supra* note 1, at 13. See also Anonymous, *On the Liberty of the Press*, in 1 NEW AND IMPARTIAL, *supra* note 1, at 246 (stating that by freedom of the press “the prince may learn when the people are oppressed”); *id.* at 247-48 (reciting benefits to the Crown and to good ministers); *Printer’s Answer to Against the Liberty of the Press*, in 2 NEW AND IMPARTIAL, *supra* note 1, at 280 (crediting the liberty with providing information to magistrates); *Thoughts on the Liberty of the Press*, *supra* note 1, at 74 (“By this mode of address to the understanding and the judgment of his fellow-citizens, an unknown author may act the splendid part in which the Grecian orators, and even the Roman emperors, were ambitious to shine; and an anonymous pamphlet may open the eyes of the nation”); Philadelphiensis VIII, PHILA. FREEMAN’S J., Jan. 23, 1788, reprinted in 15 DOCUMENTARY HISTORY, *supra* note 1, at 458, 459 (arguing that freedom of the press provides a redress for the people when a continent-wide conspiracy threatens rights and freedoms).

<sup>86</sup> Anonymous, *On the Liberty of the Press*, in 1 NEW AND IMPARTIAL, *supra* note 1, at 248.

<sup>87</sup> E.g., JOHN DRINKER, OBSERVATIONS ON THE LATE POPULAR MEASURES 5 (1774) (referring to interruptions of freedom of the press by “the illegal menaces and arbitrary frowns of a prevailing party.”); 3 BURGHE, *supra* note 1, at 247 (noting that if writers are intimidated, a principal security for liberty is lost); “Philadelphiensis” (Benjamin Workman), *Letter VIII*, PHILA. FREEMAN’S J., Jan. 23, 1788, reprinted in 15 DOCUMENTARY HISTORY, *supra* note 1, at 458, 460 (arguing that attributing an author exposes him to “a revengeful, and probably a powerful party” and that “the despots and their parasites . . . by threats and by withholding subscriptions, stopt [*sic*] the publication of the debates of the Convention in the [Anti-Federalist] Pennsylvania Herald, and otherwise injured that paper so far, that the printer must cease publishing.”). See also N.Y.J., Oct. 4, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 1, at 315 (stating “that servile fetters for the FREE PRESSES of this country would be the inevitable consequence, were printers easily terrified into a rejection of free and decent discussions upon public topics”). On the justification of freedom from reprisal, see also *Yale Comment*, *supra* note 1, at 1107.



an unpopular opinion to reveal his name was like saying to the writer, "Give me a stick, and I will break your head."<sup>88</sup> If anonymity were not secured, timid or vulnerable authors who otherwise might have much to contribute might well remain silent.<sup>89</sup> This would bias public debate against views that were either unpopular or most likely to be stated by the less powerful.<sup>90</sup>

Another reason for non-disclosure was privacy: a citizen might wish to participate in public life in some minimal way (e.g., by writing a letter or helping to publish a pamphlet) without exposing himself and his family to full "public figure" status.<sup>91</sup> Thus, a Philadelphia author referenced the need to protect one's "friends, family and endearing connections in life."<sup>92</sup> Today, of course, a writer might have an additional reason: to retain the protection that non-public figures enjoy under the Supreme Court's modern defamation jurisprudence.<sup>93</sup>

The full benefits of press freedom required that arguments be considered on their merits, free from discredit by *ad hominem* response. As the same Philadelphia author asserted, arguments

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<sup>88</sup> PHILA. FREEMAN'S J., Oct. 31, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 1, at 319.

<sup>89</sup> "Philadelphiensis" (Benjamin Workman), *Letter I*, INDEPENDENT GAZETTEER, Nov. 7, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 1, at 574, 577 (arguing that a requirement of attribution deters able but timid men). Cf. ANONYMOUS, A LETTER TO THE RIGHT HONORABLE THE EARLS OF EGREMONT AND HALIFAX 27 (1763) (stating that printers are easily intimidated, and that it is another question of how consistent such intimidation is with liberty of the press).

<sup>90</sup> Cf. *Yale Comment*, *supra* note 1, at 1108 (noting the "selective deterrence" created by disclosure laws).

<sup>91</sup> Cf. *Yale Comment*, *supra* note 1, at 1107-08 (discussing the privacy reason).

<sup>92</sup> "Philadelphiensis" (Benjamin Workman), *Letter VIII*, PHILA. FREEMAN'S J., Jan. 23, 1788, reprinted in 15 DOCUMENTARY HISTORY, *supra* note 1, at 458, 460 (citing need for anonymity to protect an author's "friends, family and endearing connections in life").

<sup>93</sup> See generally, JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1269-70 (7th ed., 2004) (outlining diminished protection for "public figures").

should be assessed on the principle of *non quis sed quid*.<sup>94</sup> This, therefore, was another stated reason for anonymity.<sup>95</sup> Consider, for example, the position of the Anti-Federalist essayist, Mercy Otis Warren. Under the pseudonym, "A Columbian Patriot,"<sup>96</sup> her ideas might merit attention. Under her own name, she might have been dismissed as "just a woman."

#### VI. EXPLICIT STATEMENTS THAT PRESS RIGHTS INCLUDED ANONYMITY

Explicit assertions that anonymity was part of press freedom are not plentiful in the historical records. Nevertheless, as this Part VI demonstrates, the record does contain them, and they are largely uncontradicted.

Dr. John Moore is little-remembered today, but he was prominent during his lifetime. Moore was an Englishman who became famous as a physician and academic. He also was a best-

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<sup>94</sup> "Philadelphiensis" (Benjamin Workman), *Letter I*, INDEP. GAZETTEER, Nov. 7, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 1, at 574, 577. The Latin expression means "not who but what."

<sup>95</sup> "Philadelphiensis," *Letter I* (Benjamin Workman), INDEP. GAZETTEER, Nov. 7, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 1, at 574, 577 (stating that a name diverts from concentrating on the proffered illustrations and arguments); "Philadelphiensis" to Eleazer Oswald, INDEPENDENT GAZETTEER, Dec. 5, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 1, at 580-81 (arguing that reasons, not identities, are important); "Philadelphiensis," *Letter VIII*, PHILA. FREEMAN'S J., Jan. 23, 1788, reprinted in 15 DOCUMENTARY HISTORY, *supra* note 1, at 458, 460 (stating that when names are revealed "reason and argument must give place to personal invective and scurrility").

<sup>96</sup> Cheryl Z. Oreovicz, *Mercy Otis Warren (1728-1814)*, 13 LEGACY 54, 59 (1996) (stating that although it was once believed that Elbridge Gerry was "A Columbian Patriot," it is now known that Warren was).

selling popular author, both of fiction and non-fiction.<sup>97</sup> In discussing freedom of the press, he wrote:

And though this liberty produces much silly advice and malignant censors without number, it likewise opens the door to some of a different character, who give useful hints to ministers, which would have been lost without the freedom of *anonymous* publication.<sup>98</sup>

Observe how Moore relates anonymity to one of the justifications for press freedom: promotion of good government.

Dr. Moore's reference to "silly advice and malignant censors" exemplifies the general understanding that liberty of the press came with a price. Most thought it was a price worth paying. John Hawkesworth was another noted English author and a friend of Benjamin Franklin.<sup>99</sup> After acknowledging that he, like other authors, had come under attack, Hawkesworth nevertheless affirmed that he would willingly "pay . . . the tax which is continually levied for liberty of the press" by "continu[ing] to be the favourite topic of *anonymous* defamation."<sup>100</sup>

The historical record contains other affirmations that press freedom included anonymous authorship within its ambit. The au-

<sup>97</sup> H.L. Fulton, *John Moore (1720-1802)*, OXFORD DICTIONARY OF NAT'L BIOGRAPHY, available at <http://www.oxforddnb.com.weblib.lib.umt.edu:8080/view/article/19130?docPos=14>.

<sup>98</sup> 1 JOHN MOORE, A VIEW OF SOCIETY AND MANNERS IN FRANCE, SWITZERLAND, AND GERMANY 402 (3d. ed., 1780) (emphasis added).

<sup>99</sup> On Hawkesworth, see Karina Williamson, *John Hawkesworth (bap. 1720, d. 1773)*, OXFORD DICTIONARY OF NAT'L BIOGRAPHY, available at <http://www.oxforddnb.com.weblib.lib.umt.edu:8080/view/article/12658?docPos=2>.

<sup>100</sup> John Hawkesworth, *Preface to the Second Edition (1773)*, reprinted in 1 JOHN HAWKESWORTH, AN ACCOUNT OF THE VOYAGES UNDERTAKEN BY ORDER OF HIS PRESENT MAJESTY FOR MAKING DISCOVERIES IN THE SOUTHERN HEMISPHERE (unpaginated) (1785) (emphasis added).

thor of an essay on liberty of the press (himself anonymous) celebrated his subject thus:

By this mode of address to the understanding and the judgment of his fellow-citizens, an unknown author may act the splendid part in which the Grecian orators, and even the Roman emperors, were ambitious to shine; and *an anonymous pamphlet* may open the eyes of the nation."<sup>101</sup>

Similarly, early in the ratification battle, a New York editor announced his devotion to freedom of the press by stating that his own paper afforded "spacious ground for the rencounter of a CATO and a CAESAR—for a REPUBLICAN and ANONIMOUS [*sic*—for a SIDNEY and — & c. & c. & c." Cato, Caesar, Republican, and Sidney were all common pseudonyms.<sup>102</sup>

Some writers considered a printer to be a public trustee, owing the fiduciary duty of promoting free inquiry. As one American editor phrased it, a free press was not "his own, but public property."<sup>103</sup> Part of this fiduciary duty, apparently, was to respect the privacy of an author who had not signed his (or her) name, *even when the author had not specifically requested anonymity*. Some contended that whether the printer disclosed a name was ultimately a matter of conscience<sup>104</sup>—a standard that by itself would seem to preclude government disclosure mandates. But in practice the presumption against disclosure was a powerful one, as this arresting story demonstrates:

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<sup>101</sup> *Thoughts on the Liberty of the Press*, *supra* note 1, at 74 (emphasis added).

<sup>102</sup> N.Y. J., Oct. 4, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 1, at 315. The abbreviation "&c." meant "et cetera."

<sup>103</sup> E.g., AMERICAN HERALD, Dec. 17, 1787, reprinted in 4 DOCUMENTARY HISTORY, *supra* note 1, at 48.

<sup>104</sup> *American Intelligence*, in THE ARGUS (Boston), Aug. 26, 1791 (stating that whether printer prints article or reveals author's name is a matter for printer's conscience).

In 1782, the editor of the *Freeman's Journal* of Philadelphia revealed an author's name to his state's governor, thereby sparking an angry retort from another contributor to the paper. The contributor contended that "[A printer] should scrupulously detach himself from all party connections with, and dependence on those characters who preside over the helm of state"<sup>105</sup> and that therefore:

The man who attempts to extort from him his authors [*sic*] name, offers indignity to his character, infringes the authority of our constitutional code, and insult to the aggregate body of his fellow citizens whose stamp he bears; but to give up his author is treachery, too base for any term in language hitherto known to be sufficiently significant of.<sup>106</sup>

In the editor's rejoinder, he did not quarrel with the contributor's characterization of his duty. Rather, he explained that the governor had not extorted the name from him, but merely asked him for the author's identity "if you are at liberty to mention his name."<sup>107</sup> The editor added "[t]hat although the author had not enjoined me to secrecy, yet I never considered myself at liberty to give up any author, without his concurrence."<sup>108</sup> He continued:

His excellency requested me to inform myself, and afterwards him, whether the author had any objections to being known. I accordingly took the first opportunity of asking the gentleman; who replied, "I have none; you are at liberty to give my name to his excellency." I did so.<sup>109</sup>

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<sup>105</sup> "By a Constitutionalist," FREEMAN'S J. (Philadelphia), Jan. 20, 1782, p. 2.

<sup>106</sup> *Id.*

<sup>107</sup> *The Printer, in id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

*In other words, the default rule for political writing was anonymity, not disclosure.* In the absence of wrongdoing,<sup>110</sup> disclosure was appropriate only when the writer had signed his or her article or had specifically authorized release of his or her name. Of course, the possibility of wrongdoing did induce some printers to conclude it prudent to ascertain the names of contributors before reproducing their work: but not with an eye to publishing them.<sup>111</sup>

In addition to explicit statements on the subject, the Founding-Era record contains definitions of press freedom that suggest protection against disclosure. Some illustrations include:

- Aside from exceptions discussed *infra* Part VIII, “a full and uncontroverted liberty to *print*; [without seeking any permission] whatever a man ought justly to have liberty to *say*. . .”<sup>112</sup>
- “printing what [one] chuses [sic] to print;”<sup>113</sup>
- “the liberty of publishing, by means of the press, remarks upon, objections to, and discussions of, all public transactions, whether relating to religion or government;”<sup>114</sup> and
- the liberty which *every Person* in the United States *at present* enjoys, of exhibiting his Sentiments on all public Measures to his Fellow-Citizens, through the Medium of the News-Papers.”<sup>115</sup>

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<sup>110</sup> *Infra* Part VIII.

<sup>111</sup> Anonymous, *Proposals For Publishing, and Continuing, Under the Auspices of a Free People*, INDEP.GAZETTEER (Phila.), Apr. 13, 1782 at 1.

<sup>112</sup> Anonymous, *On the Liberty of the Press*, in 1 NEW AND IMPARTIAL, *supra* note 1, at 246 (alteration added).

<sup>113</sup> RICHARD HEY, OBSERVATIONS ON THE NATURE OF CIVIL LIBERTY 16 (1776).

<sup>114</sup> THOMAS BRADBURY CHANDLER, WHAT THINK YE OF CONGRESS NOW? 1 (1775) (Chandler, an American Tory, was complaining of non-official intimidation of the press).

<sup>115</sup> “M. Argus,” PROVIDENCE UNITED STATES CHRON., Nov. 8, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 1, at 320-21.

Such examples suggest that the reason the historical record does not include additional references to the connection between author privacy and press freedom is that the practice of non-disclosure was so prevalent that protection was taken for granted.

#### VII. EXPLICIT STATEMENTS FROM THE BOSTON DEBATE ON PRESS FREEDOM

Another source of founding-era statements about the relationship between anonymity and freedom of the press is the Boston newspaper debate referenced by Justice Thomas in his *McIntyre* concurrence. The controversy apparently began on October 4, 1787, when a Federalist author in the Boston *Independent Chronicle* suggested that agents for foreign governments would oppose the Constitution with anonymous writings. He added:

But as every American has a right to his own sentiments on the subject, so he must have liberty to publish them. The press ought to be free. Yet he cannot be a true friend to his country, who upon a production on the subject, will conceal his name. Therefore, it is submitted to you, gentlemen, and the other Printers in the State, whether it will be best to publish any production, where the author chooses to remain concealed.<sup>116</sup>

This author asserted both that (1) every American enjoyed liberty to publish his (or her) own sentiments, and (2) as a matter of discretion newspaper editors ought to insist that contributors furnish their own names. The way these assertions can be reconciled is to assume the editor meant that (a) anonymous publication is protect-

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<sup>116</sup> BOSTON INDEP.CHRON., Oct. 4, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 1, at 315 & 4 DOCUMENTARY HIST., *supra* note 1, at 44.

ed from the government by liberty of the press, but (b) individual papers can, and sometimes should, insist that names be revealed.

On October 10, 1787, *Massachusetts Centinel* editor Benjamin Russell announced that he would not publish an Anti-Federalist submission written under the name of "Lucius," because the author had not revealed his identity to the editor.<sup>117</sup> In form at least, Russell was not engaging in viewpoint discrimination because all other contributors had submitted their names, and Russell did not suggest that disclosure applied only to the Constitution's opponents. Russell did not address the issue of liberty of the press.

Five days later, in response to the foregoing, Edward E. Powars, editor of the *Boston American Herald*, announced that his paper would remain "free and open" because "the cause of truth and good government, will never be injured by the most perfect [i.e., complete] freedom of inquiry."<sup>118</sup> As noted above, the phrase "freedom of inquiry" sometimes was associated with "freedom of the press."<sup>119</sup>

The very next day, however, the *Massachusetts Gazette* published the most explicit challenge to the general understanding of "freedom of the press." A contributor who called himself "A Citizen" asserted that all who wrote *in opposition to* the Constitution should leave their names with the printer, so "that anyone, who may be desirous of knowing the author, should be informed."<sup>120</sup> This, "A Citizen" claimed, was necessary so that readers could deduce writers' true motives. He contended that this policy was "perfectly consistent with the liberty of the press."<sup>121</sup> The printer of the

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<sup>117</sup> MASS. CENTINEL, Oct. 10, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 1, at 315; see also 4 *id.* at 444.

<sup>118</sup> BOSTON AM. HERALD, Oct. 15, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 1, at 316; see also 4 *id.* at 445.

<sup>119</sup> *Supra* note 74 and accompanying text.

<sup>120</sup> "A Citizen," MASS. GAZETTE, Oct. 16, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 1, at 316.

<sup>121</sup> *Id.*



*Gazette* appended a note to this article stating that he would “adopt the rules referred to in the above . . . so far as they respect pieces wrote [sic] on . . . the New Federal Constitution.”<sup>122</sup> It was not clear from that comment whether the editor would insist on disclosure of the names of all writers, or only Anti-Federalists. However, after hearing one Anti-Federalist’s reasons for seeking anonymity, that editor did grant that person space in his newspaper without requiring disclosure.<sup>123</sup>

The *Centinel-Gazette* disclosure rules were criticized widely. On October 24, the Philadelphia *Freeman’s Journal* printed “a letter from Boston” questioning the fairness of the policy.<sup>124</sup> In Boston (the letter-writer asserted), a person must be brave to oppose the new Constitution;<sup>125</sup> thus the disclosure policy obstructed “that freedom of enquiry which truth and honour never dreads.”<sup>126</sup> In the *New York Journal*, an essayist writing under the name “Detector” contended that the *Centinel-Gazette* disclosure announcements violated the principle of press freedom.<sup>127</sup> “Detector’s” disagreement was not that the policy was being applied only to Anti-Federalists. (It apparently wasn’t). His disagreement was that forced disclosure of names, even if formally evenhanded, violated freedom of the press.

Two Providence, Rhode Island essayists assumed opposite sides in the dispute. One opposed the *Centinel-Gazette* disclosure rule as violating liberty of the press.<sup>128</sup> The other supported the rule

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<sup>122</sup> *Id.* at 317.

<sup>123</sup> 13 DOCUMENTARY HISTORY, *supra* note 1, at 317.

<sup>124</sup> PHILA. FREEMAN’S J., Oct. 24, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 1, at 317-18.

<sup>125</sup> *Id.* at 317.

<sup>126</sup> *Id.* at 318.

<sup>127</sup> “Detector,” N.Y. J., Oct. 25, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 1, at 318.

<sup>128</sup> “M. Argus,” PROVIDENCE UNITED STATES CHRON., Nov. 8, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 1, at 320.

because it enabled readers to assess the motives of a writer.<sup>129</sup> The latter essayist, however, did not address the liberty-of-the-press issue.

The controversy spread to Philadelphia. On October 29, 1787, a letter-writer urged Philadelphia editors to require that everyone opining on the Constitution provide his name, but did not specifically urge publication of those names.<sup>130</sup> Two days later, a less tolerant Philadelphia Federalist contended that only those opposing the Constitution should be required to leave their names.<sup>131</sup> On the same day the latter epistle was published, the *Freeman's Journal* printed what purported to be "a late letter from Boston" decrying the disclosure policy as inviting reprisals against writers.<sup>132</sup> Shortly thereafter, a professed Federalist quarreled with the assertion that only opponents should be required to disclose their identities. He favored applying the policy to all, so that readers could determine whether the writer was a foreigner seeking to "divide and conquer" Americans.<sup>133</sup>

On November 7, the Philadelphia *Independent Gazetteer* published the first in a series of essays by "Philadelphiensis," later identified as Benjamin Workman, a faculty member at what is now the University of Pennsylvania. Workman argued that the effect of the disclosure rule was that, "In Boston the liberty of the press is now completely abolished."<sup>134</sup> A few weeks later he again charged that

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<sup>129</sup> Anonymous, PROVIDENCE UNITED STATES CHRON., Nov. 15, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 1, at 321.

<sup>130</sup> "A Philadelphia Mechanic," PHILA. INDEP. GAZETTEER, Oct. 29, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 1, at 318.

<sup>131</sup> "J. Galba," PHILA. INDEPENDENT GAZETTEER, Oct. 31, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 1, at 319.

<sup>132</sup> Anonymous, PHILA. FREEMAN'S J., Oct. 31, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 1, at 319.

<sup>133</sup> "The Jewel," PHILA. INDEP. GAZETTEER, Nov. 2, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 1, at 320.

<sup>134</sup> "Philadelphiensis" (Benjamin Workman), Letter I, PHILA. INDEP. GAZETTEER, Nov. 7, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 1, at 574, 576.

the rule was inconsistent with press freedom.<sup>135</sup> One reason he offered in support of anonymity was that substantive issues should not be muddied by personal invective.<sup>136</sup> It must have strengthened his case when, on March 29, 1788, an author writing as “A Candid Observer,” having learned that “Philadelphiensis” was Workman, launched a personal attack upon the fellow.<sup>137</sup>

Back in Boston, *Centinel* editor Russell penned a defense of his actions and sent it to a Philadelphia paper. Russell claimed that he had rejected the “Lucius” contribution because it contained no reasoning, only abuse; and that he (Russell) was demanding identification from all authors, whether they favored the Constitution or not.<sup>138</sup> In response, “Philadelphiensis” agreed that reasoning was more important than identity, and urged Russell to adopt that principle for his own paper.<sup>139</sup>

Other printers boasted that they would uphold freedom of the press by leaving their papers open to all sides,<sup>140</sup> and still others praised, as supporting freedom of the press, those editors who remained “impartial.”<sup>141</sup> A Boston Federalist alleged that the presses

<sup>135</sup> “Philadelphiensis,” *Letter VIII*, PHILA. FREEMAN’S J., Jan. 23, 1788, reprinted in 15 DOCUMENTARY HISTORY, *supra* note 1, at 458, 459.

<sup>136</sup> “Philadelphiensis,” *Letter I*, PHILA. INDEP. GAZETTEER, Nov. 7, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 1, at 574, 577.

<sup>137</sup> “A Candid Observer,” FED. GAZETTE, Mar. 29, 1788, reprinted in 2 DOCUMENTARY HISTORY, *supra* note 1, at Mfm:Pa. 579 (stating that Workman was not in the country during the Revolution, and therefore was entitled to no credit in questioning leaders who were).

<sup>138</sup> Benjamin Russell to Eleazer Oswald, PHILA. INDEP. GAZETTEER, Dec. 4, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 1, at 579; see also 4 DOCUMENTARY HISTORY, *supra* note 1, at 46.

<sup>139</sup> “Philadelphiensis” to Eleazer Oswald, PHILA. INDEP. GAZETTEER, Dec. 5, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 1, at 580.

<sup>140</sup> AM. HERALD, Dec. 17, 1787, reprinted in 4 DOCUMENTARY HISTORY, *supra* note 1, at 48.

<sup>141</sup> N.Y.J., Dec. 27, 1787, reprinted in 5 DOCUMENTARY HISTORY, *supra* note 1, at 539, 539-40 (praising a Boston editor who “has published pieces for and against the proposed constitution, notwithstanding the attempts in that place to destroy the

of his city were free, and “the antifederalists have made them groan with their repetitions upon repetitions.”<sup>142</sup>

What can we deduce from this exchange? On balance, it supports the view that anonymity was a core component of press freedom. Some contributors argued that writers ought to disclose their names to printers, editors, and perhaps to others; but none of those contributors stated flatly that authors’ names should be *printed*. Only one writer, “A Citizen,” tried explicitly to square disclosure with freedom of the press, while many more found the two concepts inconsistent.

Also telling was the actual conduct of authors and editors. The editor of the very paper that published “A Citizen” nevertheless allowed at least one Anti-Federalist to contribute anonymously.<sup>143</sup> None of the non-editor contributors wrote under his own name. All remained anonymous or employed pseudonyms.

Finally, those writers who did favor disclosure urged it upon the editors and printers as good policy. *No one* suggested that disclosure be mandated by the government.

### VIII. EXCEPTIONS THAT PROVE THE RULE

A founding-era legal maxim stated that exceptions could prove the rule.<sup>144</sup> There were several established exceptions to liberty of the press: defamation, treason, obscenity, perjury, blasphemy,

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freedom of the press by making it partial to the friends of the constitution” and further hoping that the people will give “preference to such printers as have spirit enough to be impartial, and a competent knowledge of the genuine meaning of this emphatical sentence, “FREEDOM OF THE PRESS”.”).

<sup>142</sup> “A Federalist,” BOSTON GAZETTE, Dec. 3, 1787, reprinted in 4 DOCUMENTARY HISTORY, *supra* note 1, at 360, 362.

<sup>143</sup> *Supra* note 122 and accompanying text.

<sup>144</sup> *Exceptio probat Regulam, de rebus non exceptis* (“An exception proves the rule, with respect to matters not excepted.”). THOMAS BRANCH, PRINCIPIA LEGIS ET AEQUITATIS 31 (1753).

breach of parliamentary privilege, and sedition.<sup>145</sup> There was no exception for anonymity per se. On the contrary, officials could require disclosure of an author's name only when a writing presumptively fell within one of the recognized exceptions. As the great law abridger, Charles Viner, relying on one of Edward Coke's reports, declared:

If one finds a Libel *against a private Man*, he may either *burn it or deliver it to a Magistrate immediately*; But if it concerns a Magistrate, or other *Publick Person*, he ought immediately to *deliver it to a Magistrate*, that the Author may be found out.<sup>146</sup>

In such a case, the printer was obligated to reveal the author's identity.<sup>147</sup> If he refused to do so or could not do so, the printer was

<sup>145</sup> For these exceptions see *supra* notes 45-50 and accompanying text.

<sup>146</sup> 15 CHARLES VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY 88 (1746) (citing 5 Co. Rep. 125—that is, the Case *de Libellis Famosis* [1605] 5 Co. Rep. 125, 77 Eng. Rep. 205) (available as 1793 reprint). This passage also was cited in JOSEPH TOWERS, OBSERVATIONS ON THE RIGHTS AND DUTIES OF JURIES IN TRIALS FOR LIBELS 77 (1785).

The holding of that case—that truth was not a defense in a public libel—had been superseded by the founding era. *Supra* note 37 and accompanying text.

<sup>147</sup> ROBERT MACFARLANE, THE HISTORY OF THE REIGN OF GEORGE III 217 (1770) (stating that the printer of a libelous tract can be detained until he reveals the author); Anonymous, *Proposals For Publishing, and Continuing, Under the Auspices of a Free People*, PHILA INDEP. GAZETTEER, Apr. 13, 1782:

When a Charge or other Matter, affecting the Character of any private Person, is exhibited thro' the Press, there is an implied Obligation upon the Printer, to admit the affected Person, to an equal Liberty in his Vindication. And when a seasonable [or reasonable, the text is unclear] Cause appears for discovering [i.e., revealing] the Author of an anonymous Publication, after giving him notice of the Demand, unless he can show good Reasons to justifying the Printer for continuing his Concealment, he should be given up: For it would be imprudent in a Printer, to publish anonymous Productions without such Conditions, which, being before hand known to the Author, could occasion no Complaint. Besides, this will be a salutary Re-

potentially liable.<sup>148</sup> If the printer did reveal the author, the printer generally was exonerated.<sup>149</sup> One modern commentator has described this sort of regime as “pseudo-anonymity,” and outlined its advantages:

Pseudo-anonymous communication [unlike truly anonymous communication], on the other hand, is inherently traceable. Though the identity of the message sender may seem truly anonymous because it is not easily uncovered or made readily available, by definition it is possible to somehow discover the identity of a pseudo-anonymous message sender. Pseudo-anonymity has significant social benefits; it enables citizens of a democracy to voice their opinions without fear of retaliation against their personal reputa-

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straint upon Authors; it will prevent their publishing any Thing against others, but what they can occasionally [i.e., on those occasions when challenged] answer and support.

See also ANONYMOUS, *THE PRINCIPLES OF MODERN PATRIOTISM CATECHETICALLY EXPLAINED: IN A DIALOGUE BETWEEN PHLOGUS AND WAGSTAFF* 48-49 (1770). This essay took the classic form of a dialogue between a wise man and a fool. When discussing liberty of the press the wise man proposed that each printer be required to obtain the guarantee of truth from authors in case the author should be “questioned and called to account for it.”

<sup>148</sup> “Philadelphiensis,” *PA. GAZETTE*, May 7, 1788, reprinted in 2 *DOCUMENTARY HISTORY*, *supra* note 1, at mfm 673 (noting that the consequences of an item are on the printer unless he names the author); *American Intelligence*, in *THE ARGUS* (Boston), Aug. 26, 1791 (stating that printer must bear burden of defamation if author remains anonymous).

<sup>149</sup> In 1784, the Irish Parliament considered a bill making printers liable for all consequences of their publication, but it was not adopted until it was limited to a requirement that a printer include his correct name in the matters he published. No such bill was adopted in England. 17 *THE REMEMBRANCER, OR IMPARTIAL REPOSITORY OF PUBLIC EVENTS* 291-96 (1775-84). Passage of the bill is noted *id.* at 315.

tions, but it forces them to take ultimate responsibility for their actions should the need somehow arise.<sup>150</sup>

The Irish Parliament adopted a measure requiring papers to be acknowledged by the *printer*. But it stopped short of requiring disclosure of *authors*. Unless a production was otherwise actionable, British and American authorities refused to require disclosure of either.<sup>151</sup> The Irish exception also suggests that anonymity was otherwise protected.

#### IX. CONCLUSION

Justice Thomas' conclusion in *McIntyre v. Ohio Elections Commission* was absolutely correct: The founding generation did understand "freedom of the press" to include a right to anonymity—that is, the right of an author to protect his or her privacy from public disclosure. If the printer or editor insisted on knowing who was contributing to his paper, the printer or editor could do so; but then he usually was bound to respect the author's confidence. To be sure, the evidence for these conclusions is not as copious as that sometimes found on constitutional questions.<sup>152</sup> In the almost complete absence of contradiction, however, it would seem to be extensive enough.

This evidence is of several kinds. The first is actual usage: As a matter of practice, authors of newspaper letters and essays and

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<sup>150</sup> *du Pont*, *supra* note 1, at 196. See also *id.* at 200 (noting that most historical examples of true anonymity were actually examples of pseudo-anonymity).

<sup>151</sup> 17 THE REMEMBRANCER, OR IMPARTIAL REPOSITORY OF PUBLIC EVENTS 292 (1775-84) (noting absence of such a rule in Britain).

<sup>152</sup> Compare Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 23-24 (2010) (stating that evidence on the subject of the article was so copious it represented an "embarrassment of riches," so it was necessary to limit citations to illustrative ones only); Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117 (2009) (featuring footnotes that far exceed the text on many pages).

of pamphlets, at least on political subjects, nearly always wrote anonymously or pseudonymously.<sup>153</sup> This was certainly true of writing on the Constitution, as on other political issues.

Second, anonymity furthered the underlying purposes of free press doctrine, as the Founders understood those purposes.<sup>154</sup> Moderns tend to think in “free marketplace of ideas” terms, a formulation that renders the value of anonymity disputable,<sup>155</sup> but the Founders did not think that way. There were other reasons for a free press, including protection of natural rights, and anonymity furthered such principles.

Third, the historical record contains comments by opinion-makers that both state and imply that anonymity was a core component of press freedom.<sup>156</sup> These comments arose in both Britain and America, and with the exception of a single claim in the contentious Boston press debate, appear uncontradicted. Moreover, participants in the Boston debate who did urge disclosure did not (with the aforementioned exception) attempt to square it with freedom of the press. They promoted it merely as a good policy for the *printer* or *editor*. No one on either side suggested that disclosure be mandated by *government*.<sup>157</sup>

Finally, freedom of the press was subject to well-recognized exceptions: defamation, obscenity, perjury, sedition, blasphemy, breach of parliamentary privilege, and treason.<sup>158</sup> The need for disclosure of the author in such cases was often discussed. But no one suggested that anonymity standing alone was an exception.<sup>159</sup>

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<sup>153</sup> *Supra* Part IV.

<sup>154</sup> *Supra* Part V.

<sup>155</sup> *Yale Comment, supra* note 1, at 1112 (explaining that disclosure has both advantages and disadvantages under “market place” theory, and that there is no way of determining which prevails).

<sup>156</sup> *Supra* Parts VI & VII.

<sup>157</sup> *Supra* Part VII.

<sup>158</sup> *Supra* Part VIII.

<sup>159</sup> *Supra* Part VIII.



To the extent the courts follow the Constitution's original legal force, therefore, they should recognize that author privacy is itself a First Amendment right. Although history does not provide definitive guidance on the boundaries of that right, it does teach us one thing: Whether anonymity is protected should not depend on a court's calculus of whether disclosure would suppress free expression in a particular case. The First Amendment protects an author's privacy for its own sake.