

# Registering Publius: The Supreme Court and the Right to Anonymity

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## I. Introduction

One of the most interesting facts about George Orwell, author of *1984* and *Animal Farm*, is that he was not George Orwell.<sup>1</sup> The man who created a society of total transparency and observation chose to conceal his own name, Eric Blair.<sup>2</sup> Authors like Blair, Mary Ann Evans (George Eliot),<sup>3</sup> and Samuel Clemens (Mark Twain) adopted noms de plume for a variety of reasons ranging from persecution to prejudice to privacy.<sup>4</sup> The practice of publishing anonymously was once the norm among literary and political thinkers. There was nothing strange about a Framer adopting a name like Publius to espouse fundamental principles in *The Federalist Papers*. Today, this practice is viewed with greater suspicion and prompts endless efforts to uncover the true identity of historical figures like Deep Throat<sup>5</sup>

<sup>1</sup>See Jonathan Turley, *Anonymous Advocacy at Risk*, NAT'L L. J., Apr. 1, 2002, at A20.

<sup>2</sup>Orwell is indicative of someone who risked social and political (if not legal) backlash for some of his views. A former police officer in Burma, Orwell was a socialist who developed contrarian views during service in the Spanish Civil War. See Lewis C. Mainzer, *Orwell: The Authorized Biography*, 30 SOC'Y. 89 (1993).

<sup>3</sup>*A Class Act*, TORONTO STAR, Apr. 23, 2000, at 1 ("the female authors known as George Sand and George Eliot, published under male pseudonyms to ensure a fair reading from a public that assumed no woman could write great literature.").

<sup>4</sup>Another author who employed a pseudonym was Amandine Auror Lucie Dupin (George Sand).

<sup>5</sup>The search has never waned for the most mysterious figure of Watergate. See, e.g., Ron Grossman, *Deep Throat Mystery Over, Students Say; U. of I. Team Feels Buchanan Is Watergate Figure*, CHI. TRIB., June 15, 2002, at 8.

or literary figures like “Anonymous,” the author of *Primary Colors*.<sup>6</sup> Yet, anonymity has never been more important, with a trend against privacy and confidentiality interests in the United States. With the diminishment of the expectation of privacy has come a diminishment of the expectation of anonymity. Like the right to distribute thoughts, the right to anonymous thoughts is an essential component of free speech. It is a right that protects the most valuable speech in a free nation: those views that challenge the status quo and question both the government and most of its citizens. The question of the “right” to anonymity in public expression was put squarely before the Supreme Court last term. In *Watchtower Bible Society v. Village of Stratton*,<sup>7</sup> the Court reviewed an ordinance that required a permit for any door-to-door solicitation. This case was only the latest round in a long and uncertain debate over the relative importance of anonymity in the shifting balance between speech rights and governmental interests.

For the Framers and their contemporaries, anonymity was the deciding factor between whether their writings would produce a social exchange or a personal beating. Obviously, before and during the war, anonymity was used to disguise the identity of a writer who might be subject to British punishment. The pamphleteer was a vital element of the American resistance movement, and the greatest of this diverse group, Thomas Paine, would significantly influence both the war and its underlying cause. Even after the war, anonymity was an accepted and widely used practice. Early American politics produced severe divisions between Federalist and anti-Federalists. Later, with the establishment of political parties, the division between Federalists and Jeffersonian Republicans emerged. These were not mere parlor debates. Jefferson would refer to the rule of the Federalists as the “reign of the witches.”<sup>8</sup> Each side accused the other of treasonous intentions and engaged in violent attacks against their opponents. Even the First Army was involved

<sup>6</sup>Despite repeated public denials, the author proved to be Joe Klein, a political columnist for Newsweek. Klein was uncovered by handwriting on the manuscript and writing analysis. This outing of the author not only stripped him of his desired anonymity but, at a professional cost, forced him to admit that he had lied to other journalists and friends. Elisabeth Bumiller, *A No-Apologies, Sometimes No-Name Author*, N.Y. TIMES, March 13, 1998, at B2.

<sup>7</sup>\_\_\_ U.S.\_\_\_, 122 S. Ct. 2080 (2002).

<sup>8</sup>Letter from Thomas Jefferson to John Taylor (June 1, 1798), reprinted in 7 THE WRITINGS OF THOMAS JEFFERSON 263, 265 (P. Ford ed. 1892–1899).

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in widespread attacks on Republicans and Anti-Federalists under John Adams,<sup>9</sup> who also used the Sedition Act to punish critics criminally. Anonymity in this period was not simply a charming diversion but a matter of personal survival.

Our history as a republic was shaped by essays written by anonymous authors.<sup>10</sup> Federalist essays appeared under fictitious names like "Americanus,"<sup>11</sup> "An American Citizen,"<sup>12</sup> "Caesar," "A Countryman,"<sup>13</sup> "Fabius,"<sup>14</sup> "Landowner,"<sup>15</sup> and "Publius."<sup>16</sup> Anti-Federalists responded with writings under names like "An Old Whig," "Brutus,"<sup>17</sup> "Cato,"<sup>18</sup> "Centinel,"<sup>19</sup> "Cincinnatus,"<sup>20</sup> and "Federal

<sup>9</sup> See Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1 (2002).

<sup>10</sup> Some of these authors like "Caesar," "An Old Whig" and "Aristocratis" remain uncertain as to their actual identities.

<sup>11</sup> See Americanus No. 7 (John Stevens Jr.), *A Refutation of Governor Edmund Randolph's Objections*, DAILY ADVERTISER (N.Y.), Jan. 21, 1788, reprinted in 2 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTI-FEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 58, 60 (Bernard Bailyn ed., 1993).

<sup>12</sup> James Wilson is believed to have used the name "An American Citizen."

<sup>13</sup> Roger Sherman wrote under the name "A Countryman." See 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 290 n.15 (John P. Kaminski & Gaspare J. Saladino eds., 1986) at 172. Sherman also wrote under the pseudonym "Citizen of New Hampshire."

<sup>14</sup> "Fabius" was the pseudonym of John Dickinson. See LETTERS OF FABIUS (1788), reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 178 (Paul L. Ford ed., 1888).

<sup>15</sup> This name was used by Federalist Oliver Ellsworth. See 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 513 (M. Jensen ed. 1976) at 490; Ellsworth, *Landholder*, No. 7 (Dec. 17, 1787), reprinted in 4 THE FOUNDERS' CONSTITUTION 639, 639–40 (P. Kurland & R. Lerner eds., 1987).

<sup>16</sup> Publius was used by James Madison, Alexander Hamilton, and John Jay.

<sup>17</sup> Brutus was used by Robert Yates. "Brutus" was a powerful counterbalance to Publius and the publication of sixteen essays in "Letters of Brutus," was highly influential at that time. See ESSAYS OF BRUTUS, in 2 THE COMPLETE ANTI-FEDERALIST 214, at 358, 369, 379–80 (H. Storing ed., 1981).

<sup>18</sup> Cato was the name used by pre-Revolutionary era pamphleteers John Trenchard and Thomas Gordon, as well as George Clinton, though there remains some debate on the latter. See 2 DEBATE ON THE CONSTITUTION at 102.

<sup>19</sup> Samuel Bryan also wrote under the fictitious name "Centinel." See, e.g., REPLY TO WILSON'S SPEECH: "CENTINEL" (1787), in 1 DEBATE ON THE CONSTITUTION *supra* note 11, at 77; *Letters of Centinel*, in 2 THE COMPLETE ANTI-FEDERALIST at 130, 142 (H. Storing ed., 1981).

<sup>20</sup> Cincinnatus was a name attributed to Arthur Lee. See, e.g., *Reply to Wilson's Speech: "Cincinnatus"* (1787), in 1 DEBATES, *supra* note 11, at 114. Some of these essays may

Farmer."<sup>21</sup> Alexander Hamilton and James Madison shared the famous moniker "Publius." When they disagreed over George Washington's neutrality policies, they simply spawned new identities as "Helvidius"<sup>22</sup> and "Pacificus."<sup>23</sup> Because of this historical record, the use of anonymity was firmly ingrained in American society and, as noted by the Supreme Court, "under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent."<sup>24</sup>

This is not to say that there was no opposition to anonymous speech. Not surprisingly, many leaders resented the ability of writers to criticize the government or its policies behind the protection of anonymity. The Continental Congress tried to uncover the identity of the writer known as "Leonidas" after he accused Congress of corruption and ineptitude.<sup>25</sup> The writer was, in fact, Dr. Benjamin Rush, but various members rose to defend the right of the author to anonymity and free speech. These members viewed the effort to expose the author as inimical to the "freedom of the press."<sup>26</sup> Likewise, irritated legislators in New Jersey sought to uncover the identity of "Cincinnatus," to allow a possible charge of sedition. The printer of this work, Isaac Collins, refused to disclose the identity with the declaration: "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."<sup>27</sup> In some cases, anonymity was used to defend anonymous speech. Such was the case with William Livingston who wrote as "Scipio" in defense of anonymous speech as both necessary to prevent retaliation and as an element

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also have been written by his brother Richard Henry Lee. 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 19, at 5,6 & n.2.

<sup>21</sup>"The Federal Farmer" is believed to have been Richard Henry Lee.

<sup>22</sup>Alexander Hamilton, *Pacificus No. 1*, June 29, 1793, in 15 PAPERS OF ALEXANDER HAMILTON 33-43 (H. Syrett ed., 1969).

<sup>23</sup>James Madison, *Helvidius No. 1*, Aug. 24, 1793, in 15 PAPERS OF JAMES MADISON 66-73 (T. Mason, R. Rutland, J. Sisson eds. 1985); James Madison, *Helvidius No. 4*, Sept. 14, 1793, in 6 THE WRITINGS OF JAMES MADISON 171, 174 (Gaillard Hunt ed., 1906).

<sup>24</sup>*McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).

<sup>25</sup>*McIntyre*, 514 U.S. at 361-362. Justice Thomas recounts this history (and the various examples below) in his concurrence to *McIntyre*.

<sup>26</sup>*Id.* at 362.

<sup>27</sup>R. HIXON & ISAAC COLLINS: A QUAKER PRINTER IN 18<sup>TH</sup> CENTURY AMERICA 95 (1968), quoted in *McIntyre*, 514 U.S. at 362.

of freedom of the press.<sup>28</sup> Not surprisingly, it was the Federalists who proved most hostile to anonymity and were the most frequent targets of anonymous attacks. Nevertheless, anonymous speech flourished and ultimately shaped aspects of our early constitutional and political debates.

## **II. Anonymity, Spontaneity, and Ambiguity: The Court's Uncertain Treatment of the Identification of Speakers and Solicitors**

The historical use of anonymous speech strongly suggests that the Framers originally viewed anonymity as a vital part of free speech and freedom of the press. This relative historical clarity has been met with persistent judicial ambiguity over the place of anonymous speech in the First Amendment. Indeed, the right to anonymity is a subject that the Supreme Court has treated with almost coquettish regard, neither formally establishing the right nor allowing its abrogation. While the Court has repeatedly struck down laws that stripped citizens of anonymous speech, it has also permitted the abridgement of this right under certain circumstances. This has led to continual debate as to whether this is a true “right” that triggers the strictest scrutiny or some lesser type of constitutional value that informs but does not control a constitutional interpretation.<sup>29</sup> This uncertainty can be traced to Court decisions that often note the dangers of compelled identity disclosure but actually decide the merits on a more general First Amendment theory or an alternative constitutional provision. This was the case in *Lovell v. Griffen*<sup>30</sup> in which Alma Lovell was imprisoned for failing to pay a \$50 fine for distributing a magazine entitled *Golden Age*, which contained religious material proselytizing Jehovah’s Witnesses. The city of Griffen had an ordinance requiring a license to distribute any printed material. The Court viewed the issue as a restriction on the right to circulate or distribute literature as central to the First Amendment. The Court specifically noted the failure of the city to tailor the restrictions so as not to prohibit unlicensed distribution “of any kind

<sup>28</sup> *McIntyre*, 514 U.S. at 363.

<sup>29</sup> This ambiguity has been carried over to appellate and district court opinions that refer to anonymity as “an aspect of free speech.” *Wasson v. Sonoma County Junior Coll.*, 203 F.3d 659, 663 (9th Cir. 2000).

<sup>30</sup> 303 U.S. 444 (1938).

at any time, at any place, and in any manner.”<sup>31</sup> While noting the danger of licensing schemes in history and the importance of every type of publication in “defense of liberty,” the Court avoided a direct establishment of a right to anonymity.

In later cases the Court repeatedly confronted unconstitutional statutes restricting anonymous speech and repeatedly avoided the issue in favor of alternative constitutional theories. In *N.A.A.C.P. v. Alabama*,<sup>32</sup> such a case presented itself when Alabama sought to force the NAACP (National Association for the Advancement of Colored People) to reveal the names and addresses of its members—a disclosure that could have resulted in beatings and lynchings in 1958.<sup>33</sup> The Court viewed the disclosure requirement as impinging on freedom of association. Protecting the “privacy” interests of the members, the Court noted that it is “hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective restraint on freedom of association.”<sup>34</sup> Anonymity was a question relevant to the maintenance of “[e]ffective advocacy”<sup>35</sup> and meaningful association rather than a concern in its own right. The Court again avoided a direct reliance on the right to anonymity in *Bates v. City of Little Rock*,<sup>36</sup> in which the NAACP violated a membership disclosure requirement under a different ordinance. The Court focused on the right of association and membership disclosure ordinances as simply a “more subtle [form of] governmental interference” with that right.<sup>37</sup>

This ambiguity might have come to an end in 1960, in *Talley v. California*,<sup>38</sup> when the Court considered an ordinance that prohibited the distribution of anonymous handbills in Los Angeles. The handbill in question was on behalf of the “National Consumers Mobilization” and sought a boycott of named businesses that would not

<sup>31</sup> *Id.* at 451.

<sup>32</sup> 357 U.S. 449 (1958).

<sup>33</sup> *Id.* at 462 (noting that “on past occasions revelation of the identity of its rank-and-file members [had] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.”).

<sup>34</sup> *Id.* at 462.

<sup>35</sup> *Id.* at 460.

<sup>36</sup> 361 U.S. 516 (1960).

<sup>37</sup> *Id.* at 486.

<sup>38</sup> 362 U.S. 60 (1960).

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“offer equal employment opportunities to Negroes, Mexicans, and Orientals.” It also solicited members for the organization. Talley’s failure to include the required names and addresses of the author, printer, and distributor resulted in a conviction and a \$10 fine. *Talley* was in some respects the perfect anonymous speech case with all of the elements that concern those supportive of this right. First, the case involved both speech and association components. Second, the anonymous advocacy was the work of an organization and a cause that was intensely unpopular in some quarters in the 1960s. Third, the content of the speech could pose a social and economic risk for the authors, printers, and distributors if identified. Finally, the case involved a state interest that is characteristically broad in barring anonymity to prevent “fraud, deceit, false advertising, negligent use of words, obscenity, and libel.” The fact that the speech dealt with racial discrimination at the height of the Civil Rights period magnified these concerns. Perhaps for this reason, the Court voted 6–3 to strike down the law as facially unconstitutional. However, the Court failed to embrace the notion of a free-standing right to anonymity and instead employed what would become a characteristic (and maddening) level of ambiguity. Justice Hugo Black seemed to studiously avoid recognizing a right of anonymity while strongly defending anonymity as a condition needed for free speech. The Court crafted its language to refer to restrictions that would harass or deter speech. The Court simply held that

[t]here can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.<sup>39</sup>

As in later cases, the Court went on to recognize the historical role of anonymous speech but it did so to reinforce the importance of its holding and not as the specific right abridged. The Court observed that “[i]t is plain that anonymity has sometimes been assumed for the most constructive purposes.”<sup>40</sup> Nevertheless, the Court stressed

<sup>39</sup>*Id.* at 64.

<sup>40</sup>*Id.*

the “important role in the progress of mankind”<sup>41</sup> played by anonymous publications. Black noted that “persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.”<sup>42</sup> In this way, *Talley* established that the mandatory disclosure of identity as a prerequisite for speech runs afoul of the First Amendment—as a restriction generally on speech as opposed to a right to speak anonymously.

Despite the ambiguity of such cases, the Supreme Court has repeatedly identified anonymity as a vital component to both free speech and association. If this were the extent of the Court’s precedent, it would leave a strong presumption, at minimum, that the statutes barring anonymous speech were unconstitutional. However, the Court verged sharply away from this position in *Buckley v. Valeo*<sup>43</sup> in which it upheld reporting and disclosure requirements for political contributors in the Federal Election Campaign Act of 1971. There, the Court accepted that the federal law requiring disclosure of contributors would chill some speech. Nevertheless, it found the statute to be constitutional given the strong governmental interests in detecting and deterring corruption.<sup>44</sup> Despite its holdings in cases like *NAACP v. Alabama*,<sup>45</sup> the Court insisted that the countervailing interest in the “free functioning of our national institutions” could outweigh such rights.<sup>46</sup> As for the right to anonymity, the Court was silent and gave only passing reference to *Talley*. Once again, the fate of the anonymous speech seemed uncertain, if not dim.

The fortunes of this fledging right were reversed roughly 20 years later in the Court’s decision in *McIntyre v. Ohio Elections Commission*.<sup>47</sup> While lingering in the darkness of past cases, anonymity was directly at issue in the question before the Court: “whether and to what

<sup>41</sup> *Id.* at 65.

<sup>42</sup> *Id.* at 64.

<sup>43</sup> 424 U.S. 1 (1976).

<sup>44</sup> *Id.* at 67; see also *id.* at 68 (“disclosure requirements . . . appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist.”).

<sup>45</sup> 357 U.S. 449 (1958); see also *Brown v. Socialist Workers ’74 Campaign Comm.* (Ohio), 459 U.S. 87 (1982).

<sup>46</sup> *Id.* at 66.

<sup>47</sup> 514 U.S. 334 (1995).

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extent the First Amendment's protection of anonymity encompasses documents intended to influence the electoral process."<sup>48</sup> The specific controversy involved an Ohio statute requiring that writings used in elections bear the name and address of the individual or individuals responsible for the communication. Margaret McIntyre's advocacy was the prototypical example of anonymous and spontaneous speech. Opposed to a new school tax levy, she prepared a leaflet on her home computer and passed out copies of it at various meetings. After a long fight over the levy, a school official who supported the levy filed a charge against McIntyre that resulted in a \$100 fine.

Justice Stevens placed anonymity at the heart of the controversy and stressed its importance as a prerequisite for speech in some cases. Stevens noted that the motivation for anonymous speech may be to avoid social ostracism, to prevent retaliation, or to protect privacy. It may also be used by an unpopular individual "to ensure that readers will not prejudge her message simply because they do not like its proponent."<sup>49</sup> It is anonymous speech that shields individuals "from the tyranny of the majority . . . [It] protect[s] unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society."

In *McIntyre*, the Supreme Court magnified the significance of *Talley* as a case defending anonymous speech. Although Stevens recognized that the Court had limited anonymous speech in *Buckley*, a distinction was drawn between the regulation of candidate elections versus issues like a school tax. Stevens noted that "[t]hough such mandatory reporting undeniably impedes protected First Amendment activity, the intrusion is a far cry from compelled self-identification on all election-related writings. A written election-related document—particularly a leaflet—is often a personally crafted statement of a political viewpoint."<sup>50</sup>

Despite the powerful language, however, the most that Stevens would say about anonymous speech as a constitutional matter is that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication,

<sup>48</sup>*Id.* at 344.

<sup>49</sup>*Id.* at 343.

<sup>50</sup>*Id.* at 445.

is an aspect of the freedom of speech protected by the First Amendment.<sup>51</sup> In this way, Justice Stevens fell just short in *McIntyre* of recognizing a right to anonymity—a fact not missed by Justice Clarence Thomas. Thomas concurred in the decision but objected to the ambiguity in the Court’s treatment of anonymous speech. Thomas placed the real question in sharp relief and offered a refreshing and long-overdue recognition of the right to anonymity. “Instead of asking whether ‘an honorable tradition’ of anonymous speech has existed throughout American history or what the ‘value’ of anonymous speech may be,” Thomas wrote, “we should determine whether the phrase ‘freedom of speech, or of the press,’ as originally understood, protected anonymous political leafleting. I believe that it did.”<sup>52</sup> Thomas viewed the issue as one of original meaning and, although there is no record of any discussion of anonymity in the First Congress, the original meaning of terms like “press” appear to include anonymous publishing. Thomas correctly noted that the Framers referred to a variety of independent publishers and pamphleteers as “the press,” including those who published anonymous writings.<sup>53</sup> Detailing this historical record, including thwarted attacks on anonymous writing, Thomas criticized the majority for failing to directly deal with the question as one of original meaning.

Thomas’s view was answered in an equally strong and well-written dissent by Justice Scalia (and joined by Chief Justice William Rehnquist). Scalia objected to relying on historical practice as a misleading and uncertain basis for protecting anonymity either as a right or as a dominant value under the First Amendment. Scalia noted that “to prove that anonymous electioneering was used frequently is not to establish that it is a constitutional right.”<sup>54</sup> Scalia further noted that earlier anonymous speech cases involved questions of punishing speech in which anonymity was a mere collateral issue.<sup>55</sup> Noting that every state except California had legislation similar to Ohio’s, Scalia denounced the imposition of a new constitutional

<sup>51</sup> *Id.* at 342.

<sup>52</sup> *Id.* at 359.

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

<sup>54</sup> *Id.* at 374.

<sup>55</sup> *Id.* at 375.

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“value” that would undo a widely accepted view of the First Amendment. In Scalia’s view, the decision effectively created a right to anonymity and “[t]he silliness that follows upon a generalized right to anonymous speech has no end.”<sup>56</sup> Finally, discussing *Buckley*, Scalia observed that the Court had not adopted inherently conflicting positions on anonymity and had avoided this conflict by ignoring the extent of the loss of anonymity under its prior holding.<sup>57</sup> Ultimately, Scalia concluded that the decision to strike down the Ohio law “on the ground that all anonymous communication in our society is traditionally sacrosanct, seems . . . a distortion of the past that will lead to a coarsening of the future.”<sup>58</sup>

Whether *McIntyre* created a de facto right to anonymity would remain a question for academic debate.<sup>59</sup> However, it was clear that the Court viewed anonymity as a critical component of speech under the First Amendment. This was clear in the Court’s 1999 decision in *Buckley v. American Constitutional Law Foundation*.<sup>60</sup> In this case, the Court struck down provisions of Colorado’s law governing ballot initiatives and specifically the signature-gathering process. Writing for the majority, Justice Ginsburg reaffirmed the Court’s view that petition circulation is a “core” element of political speech. The Court relied on *McIntyre* to invalidate the badge requirement provision in the law as inimical to anonymity. The Court distinguished between an affidavit submitted to the agency and a badge identifying an individual who is interacting with other citizens:

Unlike a name badge worn at the time a circulator is soliciting signatures, the affidavit is separated from the moment the circulator speaks. As the Tenth Circuit explained, the name badge requirement “forces circulators to reveal their identities at the same time they deliver their political message,” . . . it operates when reaction to the circulator’s message is immediate and “may be the most intense, emotional, and unreasoned.” The affidavit, in contrast, does not expose the circulator to the risk of “heat of the moment” harassment.

<sup>56</sup> *McIntyre*, 514 U.S. at 381 (Scalia, J. dissenting).

<sup>57</sup> *Id.* at 384.

<sup>58</sup> *Id.*

<sup>59</sup> See Jonathan Turley, *Anonymous Advocacy at Risk*, NAT’L L. J., April 1, 2002, at A20.

<sup>60</sup> 525 U.S. 182 (1999).

[T]he restraint on speech in this case is more severe than was the restraint in *McIntyre*. Petition circulation is the less fleeting encounter, for the circulator must endeavor to persuade electors to sign the petition. . . . The injury to speech is heightened for the petition circulator because the badge requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest.<sup>61</sup>

Much like the analysis of *Watchtower* discussed below, the Court was ambiguous on the level of scrutiny or its application to specific provisions in invalidating the provisions. The Court used a maddening array of expressions that studiously avoided a clear standard. It was Justice Thomas who identified this problem in his concurrence and argued that the Court should have applied a strict scrutiny standard when a state imposed such "severe burdens" on speech. The only indication that the Court was in fact applying such a standard came in a footnote in response to Thomas, but (perhaps to maintain its precarious alliance of justices) the Court left the matter intentionally ambiguous.<sup>62</sup>

These cases offered advocates of anonymous speech a sense of protection while clearly recognizing the place of anonymity in the core rights of speech, religion, and association. Given the strong combination of *Talley* and *McIntyre*, it was long predicted that the Court was close to establishing a "right to anonymity" and, when the Court accepted *Watchtower v. Village of Stratton*, it appeared that this constitutional value might finally ripen into a constitutional right.

### III. *Watchtower v. Village of Stratton*: Protecting the Exercise of, if Not the Right to, Anonymous Speech

The two greatest contributors to constitutional interpretation in our history may be Chief Justice John Marshall and the Jehovah's

<sup>61</sup> *Id.* at 199–200.

<sup>62</sup> As in other speech cases, the majority was met with a strong dissent from Chief Justice Rehnquist. Rehnquist contested the majority's statistical studies indicating that such rules discourage participation in the political system and further questioned the constitutional significance of such a finding.

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Witnesses. The latter have actively and successfully resisted restrictions on their rights of speech, religion, and association for decades.<sup>63</sup> Many of these struggles produced important precedent that has benefited the entire population to a degree that most laypersons are entirely unaware.<sup>64</sup> Mention the Jehovah's Witnesses,<sup>65</sup> and most people immediately think of preachers visiting our homes at inconvenient hours. For the Jehovah's Witnesses, proselytizing door-to-door is not simply to advance their faith but the very article of faith. Founded by Charles Taze Russell in 1875,<sup>66</sup> Jehovah's Witnesses read various biblical passages<sup>67</sup> to require such individual preaching, particularly passages like Matthew 28:19–20, where Jesus went house-to-house to preach.<sup>68</sup> For that reason, Jehovah's Witnesses often refer to themselves as "publishers."<sup>69</sup> Biblical passages also prevented the Jehovah's Witnesses from participating in oaths of allegiance and other forms of patriotic expression. This belief led to well-known acts of repression in the United States. However, the

<sup>63</sup> See generally WILLIAM KAPLAN, *STATE AND SALVATION: THE JEHOVAH'S WITNESSES AND THEIR FIGHT FOR CIVIL RIGHTS* (1989); William Shepard McAninch, *A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court*, 55 U. CINN. L. REV. 997 (1987).

<sup>64</sup> See, e.g., *Thomas v. Review Bd. of Ind. Employment*, 450 U.S. 707 (1981); 430 U.S. 705 (1977); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Jones v. City of Opelika*, 316 U.S. 584 (1942); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

<sup>65</sup> The term Jehovah's Witnesses was not actually adopted by the church until 1931. Before that date, they were known variously in 1884 as "Zion's Watch Tower Society"; in 1896 as "Watch Tower Bible and Tract Society"; or more generally as "Russellites." See McAninch, *supra*, at 1004. The term is based on the repeated reference to Jehovah in the Bible and the passage in John 18:37 where Jesus Christ tells Pontius Pilate: "To this end was I born, and for the cause came I into the world, that I should bear witness unto the truth." See generally Gabriele Yonan, *Spiritual Resistance of Christian Conviction in Nazi Germany: The Case of the Jehovah's Witnesses*, 41 J. CHURCH & STATE 307 (1999). They also rely on the passage of Isaiah in which God states "Ye are my witnesses, said Jehovah."

<sup>66</sup> There remains some debate on this point since Russell technically established the "Bible Students" in 1872 and many Russell followers split off from the church after his death and the establishment of Joseph Rutherford as president. See Kenneth Rawson, *Pastor Charles Taze Russell*, JERUSALEM POST, Jan. 6, 1993. It was Rutherford in 1931 who created the term Jehovah's Witnesses.

<sup>67</sup> These include Isaiah 43:9–12; Matthew 10:7, 12; Acts 20:20; 1 Peter 2:21 and 1 Corinthians 9:11.

<sup>68</sup> *Watchtower*, 122 S. Ct. at 2085 n.7.

<sup>69</sup> McAninch, *supra*, at 1005.

Jehovah's Witnesses faced even worse treatment at the hands of the Nazi and Imperial Japanese governments. Refusing to say "Heil Hitler" or even to bow to the Emperor Hirohito led to the torture and killing of thousands of Jehovah's Witnesses.<sup>70</sup> The religion's apocalyptic predictions,<sup>71</sup> anti-Catholic statements,<sup>72</sup> and neutral position in the major wars led to direct oppression by the U.S. government.<sup>73</sup> Despite this persecution, including recent hostile acts by governments,<sup>74</sup> the church has grown to include millions around the world.<sup>75</sup>

When the Village of Stratton, Ohio, enacted Ordinance No. 1998-5, the Jehovah's Witnesses found it all too familiar, including evidence of specific hostility against their faith by the mayor.<sup>76</sup> The ordinance required that anyone "going in and upon" any private residence for any "cause" would have to obtain a "solicitation permit." Although there was no charge for the permit, the "solicitor" was required to fill out a "Solicitor's Registration Form" that included identification information as well as the names of residents who would be visited. The solicitor was then required to carry the permit and produce it when asked. Although modified by the district

<sup>70</sup> See generally Carolyn R. Wah, *Jehovah's Witnesses and the Empire of the Sun: A Clash of Faith and Religion During World War II*, 44 J. CHURCH & STATE 45 (2002); Gabriele Yonan, *Spiritual Resistance of Christian Conviction in Nazi Germany: The Case of the Jehovah's Witnesses*, 41 J. CHURCH & STATE 307 (1999).

<sup>71</sup> Russell had predicted the "end of the Gentile times" would come in 1914. McAninch, *supra*, at 1006. Armageddon was again predicted for 1925 and then 1975. *Id.*

<sup>72</sup> The Roman Catholic Church was "pictured as a semiclad harlot reeling drunkenly into fire and brimstone." McAninch, *supra*, at 1006.

<sup>73</sup> This included widespread arrests and seizure of property. McAninch, *supra*, at 1006.

<sup>74</sup> This includes the decision of the French government that the Jehovah's Witnesses do not constitute a true religion but rather a "dangerous sect." Larry Witham, *Jehovah's Witnesses Fight Taxes in France; Probe Decided Sect Is Not Religion*, WASH. TIMES, July 1, 1998, at A1.

<sup>75</sup> See Linda Tagliaferro, *Jehovah's Witnesses Hold Forth at Coliseum*, N.Y. TIMES, July 11, 1999, at 2. The Jehovah's Witnesses claim roughly 15 million members worldwide. Witham, *supra* note 74, at A1.

<sup>76</sup> *Watchtower*, 122 S. Ct. at 2085. (noting that evidence was introduced "that the ordinance was the product of the mayor's hostility to their ministry, but the District Court credited the mayor's testimony that it had been designed to protect privacy rights of the Village residents.").

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court, the ordinance also prohibited solicitation after 5:00 P.M.<sup>77</sup> Like many of the laws addressed earlier, the Stratton ordinance was expressly based on broad justifications of protecting citizens from “fraud and undue annoyance” and criminal violations.

A split panel of the United States Court of Appeals for the Sixth Circuit found this basis to be sufficient.<sup>78</sup> Judge Cornelia G. Kennedy viewed the regulation as subject to standard time, place, and manner analysis. As a content neutral regulation, the court applied an intermediate standard.<sup>79</sup> Judge Ronald Lee Gilman dissented. Although Gilman viewed the intermediate standard to be the appropriate standard, he disagreed with its application to these facts. In Gilman’s view the “ordinance violates the First Amendment by burdening substantially more speech than is necessary to further the Village’s legitimate interests.”<sup>80</sup> As it turns out, the appellate court paid far greater attention to methodology and standards than would be the case before the Supreme Court.

Justice Stevens wrote for the majority of eight justices.<sup>81</sup> Stevens traced the Court’s protection of door-to-door canvassing and pamphleteering over the prior 50 years. Remarkably, Stevens, the author of *McIntyre*, spent little time discussing the protection of anonymous speech. Referring to “anonymity interests” under the First Amendment, Stevens cited this intrusion as one of three “examples” of the “pernicious effect of such a permit requirement.”<sup>82</sup> In the one paragraph committed to this interest, Stevens expressly noted that such interests can be abridged, but that the ordinance “sweeps more

<sup>77</sup>The district court ordered that this be changed to “reasonable hours of the day” and also removed the requirement that every resident be listed. It then found the ordinance to be constitutional in a rather curious interpretation. It is hard to see how these small modifications would cure the constitutional violation recognized by the court.

<sup>78</sup>*Watchtower Bible and Tract Society v. Vill. of Stratton*, 240 F.3d 553 (6th Cir. 2001).

<sup>79</sup>*Watchtower*, 240 F.3d at 561 (“our review of the ordinance leads us to conclude it is content neutral and of general applicability . . . [a] law is content neutral and of general applicability if on its face and in its purpose it does not make a distinction between favored and disfavored speech.”).

<sup>80</sup>*Id.* at 570.

<sup>81</sup>This included a concurrence by Justice Breyer, joined by Justices Souter and Ginsburg, and a concurrence by Justice Scalia, joined by Justice Thomas.

<sup>82</sup>122 S. Ct. at 2089.

broadly, covering unpopular causes unrelated to commercial transactions or to any special interest in protecting the electoral process.”<sup>83</sup> It was the lack of tailoring in the ordinance that was the most cited reason for its downfall. Indeed, in a strong signal for the next case in this area, Stevens notes that “[h]ad this provision been construed to apply only to commercial activities and the solicitation of funds, arguably the ordinance would have been tailored to the Village’s interest in protecting privacy of its residents and preventing fraud.”<sup>84</sup> Although vague on the specific constitutional standard and basis used to reach this result, the majority found the ordinance to be “offensive—not only to the values protected by the First Amendment, but to the very notion of a free society.”<sup>85</sup> Both speech and religion concerns are implicated by such ordinances. Moreover, in the area of speech rights, Stevens notes that one interest is not simply anonymity but spontaneity. The ordinance is cited as barring the most genuine forms of neighbor-to-neighbor political speech by requiring a trip to a village office and the completion of an application for a permit.

The two concurring opinions did not significantly add to the majority decision. A concurrence by Justice Breyer (with Justices Souter and Ginsburg) is only a one-page response to the sole dissenter, Chief Justice Rehnquist. Breyer criticized Rehnquist for relying heavily on a crime prevention justification that was not advanced by the village. “In the intermediate scrutiny context,” Breyer stated, “the Court ordinarily does not supply reasons the legislative body has not given.”<sup>86</sup> The concurrence by Justice Scalia (with Justice Thomas) was even more pointed. Scalia objected to the language that some individuals “would prefer silence to speech licensed by a petty official.”<sup>87</sup> Such language, according to Scalia, only suggests protection for fringe beliefs over otherwise valid regulations:

<sup>83</sup> *Id.* at 2090.

<sup>84</sup> *Id.* at 2089.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 2091 (Breyer, J., concurring).

<sup>87</sup> *Id.* at 2092 (Scalia, J., concurring). It is telling that the specific importance of anonymity is not emphasized by either the majority or the concurring justices to any significant degree. The fact that Scalia and Thomas (the combatants in the *McIntyre* decision) joined in a concurrence indicates that no “right to anonymity” was seen as established by the majority decision.

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If a licensing requirement is otherwise lawful, it is in my view not invalidated by the fact that some people will choose, for religious reasons, to forgo speech rather than observe it. That would convert an invalid free-exercise claim . . . into a valid free-speech claim—and a more destructive one at that. Whereas the free-exercise claim, if acknowledged, would merely exempt Jehovah’s Witnesses from the licensing requirement, the free-exercise claim exempts *everybody*, thanks to Jehovah’s Witnesses.

As for the Court’s fairy-tale category of “patriotic citizens” . . . who would rather be silenced than licensed in a manner that the Constitution (but for their “patriotic” objection) would permit: If our free-speech jurisprudence is to be determined by the predicted behavior of such crackpots, we are in a sorry state indeed.<sup>88</sup>

As he had in cases like *Buckley v. American Constitutional Law Association* and *McIntyre*, Chief Justice Rehnquist dissented over the sweep of the Court’s holding in uprooting long-standing state interests and laws. Rehnquist emphasized what he viewed as a clear crime prevention interest behind the ordinance and took judicial notice of a recent murder of two Dartmouth College professors. The professors, Rehnquist noted, were killed by teenagers posing as door-to-door canvassers conducting an environmental survey for school. Rehnquist objected that the Court was ignoring a long line of cases that explicitly or implicitly recognized the right of a state to regulate solicitation in the interests of crime prevention. Rehnquist correctly brings the majority up short on the same failure that was evident in *Buckley v. American Constitutional Law Association*: the failure to state a clear standard for review of such violations. Rehnquist insists that such regulations should be handled under the Court’s prior holdings relating to time, place, and manner regulations. As such, Rehnquist argued that “[t]here is no support in our case law for applying more stringent than intermediate scrutiny to the ordinance.”<sup>89</sup> Rehnquist notably does not view the case as turning on anonymity, a subject on which he had previously expressed strong opposition in his dissent with Scalia in *McIntyre*. Rather, the issue was for Rehnquist a simple application of intermediate scrutiny and

<sup>88</sup>*Id.* (internal citations omitted).

<sup>89</sup>*Id.* at 2094 (Rehnquist, C.J., dissenting).

the rule that “[a] discretionless permit requirement for canvassers does not violate the First Amendment.”<sup>90</sup>

There was much in these decisions to encourage those who advocate the right of anonymity and those who believe in a robust protection of speech and association. However, *Watchtower* is more notable in maintaining a trend of ambiguity over the standard protecting the “interest” in anonymity. As will be discussed, this trend appears quite intentional—a by-product of the politics of the Court rather than legal theory or philosophy.

#### IV. The Importance of Being Anonymous: A Right in Search of a Rationale

Anonymity is a value that is often viewed with considerable suspicion today. Privacy and anonymity are under attack in a society that is increasingly subject to a variety of governmental and private tracking and surveillance systems. The use of the Social Security number as an effective national identifier has led to massive data banks and the potential for real-time tracking systems.<sup>91</sup> Private and governmental surveillance cameras have become commonplace and can be found on highways, convenience stores, workplaces, and virtually every destination outside of the home.<sup>92</sup> As we develop a type of fishbowl society, the expectations of citizens regarding privacy and anonymity have diminished sharply. Given the centrality of the “reasonable expectation of privacy” in protecting citizens, this trend may have significant effects in the criminal area. In the area of speech, the expectation of anonymity has eroded under the same pressures as the expectation of privacy. The one exception has proven to be the Internet where anonymous communications are one of the great draws of users. This produces an increasing conflict among young citizens on the question. When *Watchtower* was still

<sup>90</sup>*Id.* at 2097.

<sup>91</sup>This subject was discussed recently in the context of the proposed national identification card. See *Oversight Hearing on National Identification Cards Before the Subcomm. on Government Management, Information, and Technology of the House Committee on Government Reform*, 107th Cong. (Sept. 16, 2002) (testimony of Professor Jonathan Turley); see also Jonathan Turley, *National ID: Beware What You Wish For*, L.A. TIMES, January 9, 2002, at A11.

<sup>92</sup>See Lisa Guernsey, *Living Under an Electronic Eye*, N.Y. TIMES, Sept. 27, 2001, at 1 (discussing various new surveillance measures in society).

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under consideration, the case was debated in my *The Supreme Court and the Constitution* class. Many law students expressed skepticism over the value of door-to-door solicitation and seemed willing to curtail anonymous speech for the least showing of government interest. Yet, when the question turned to the Internet, students argued strongly in favor of a right to anonymity. This argument reflects a shift in the center of gravity for speech in the United States from in-person advocacy to a type of virtual democracy. The solicitor who goes door-to-door is viewed as an annoyance, if not an anachronism, by many students. The effect of this generational shift is difficult to gauge. However, regardless of the forum, there remain compelling interests that are protected by a right to anonymity.

1. *Protection from Persecution.* Anonymity allows speech where identification would chill or deter speech for some citizens.<sup>93</sup> Persecution may come from associating with an unpopular group like socialists or from advocating an unpopular cause like opposition to a war. The Court has recognized that “anonymity is a shield from the tyranny of the majority.”<sup>94</sup> Putting aside the social benefit of such speech (discussed below), this protection guarantees the very conditions needed for speech.

2. *Preventing Disenfranchisement.* Many citizens in history have faced marginalization in society because of their religious beliefs, race, social standing, or political viewpoints. For such citizens, participation in public debate is severely limited by social stereotyping or unpopularity. Anonymity becomes the avenue through which they can continue to enjoy the most cherished element of citizenship: participation in social and political debates. For a socialist or an anti-war protester, an anonymous flier allows their views and ideas to be considered without the heavy baggage of an unpopular identification. Such a right protects the general speech and association rights of such individuals by assuring them that unpopular stands will not necessarily cut off their access to participatory politics. It also increases the ideas and values that are offered in public debate;

<sup>93</sup>This need for anonymity was stressed by Justice Hugo Black who noted that “persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.” *Talley v. California*, 362 U.S. 60, 64 (1960).

<sup>94</sup>*McIntyre*, 514 U.S. at 357.

allowing worthy ideas to work through the filter of personalities. For example, in the 1930s and 1940s, socialists in the United States argued for many policies that are now considered mainstream like worker safety laws and minimum wage statutes. Yet, associating with a socialist organization was viewed as so stigmatizing that such identification limited the reach of any proposal in society. Anonymity untethers such ideas from their sources and prevents some individuals from being rendered effectively inactive in the exercise of their speech rights.

3. *Encouraging Pluralistic Values and Thoughts.* American society is rich precisely because it is pluralistic and diverse. From the very founding of the Republic, this nation was established to allow and foster a variety of faiths and views. Although other nations viewed such diversity and heterogeneity as a weakness, we viewed it as a strength. Moreover, it is easy for those in the majority to belittle the need for anonymity of some people to express their views fully to other citizens. Although Justice Scalia has characterized as “crackpots” those people who would rather be silenced than licensed in some circumstances, today’s social crackpots often turn into tomorrow’s political prophets.

4. *Protecting Spontaneity.* One of the least appreciated interests in the area of free speech is spontaneity. In some ways, spontaneous speech is a barometer of the condition of free speech rights in a society. The degree to which an individual feels free to speak in a spontaneous and unrehearsed manner is a good measure of a society’s success in protecting the expression of ideas. Moreover, spontaneous speech is often the most genuine. It is the type of speech that occurs between neighbors. It is the type of speech involved in the first-time expression of political views. It is the impulse to suddenly speak out on a question of personal import. Spontaneous speech is often anonymous. When people feel an urge to oppose a policy or law, they often act in the heat of the moment. They are people, like Ms. McIntyre, who quickly run off a flier venting their anger against a new tax or local decision. It is this spontaneous speech that may be the greatest bulwark against government abuse—petty and grand. It is the ability of a citizen to mount a one-person campaign that guarantees that contemporary debates are not controlled exclusively by the institutional press or the political system.

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5. *Enhancing Privacy Values.* Anonymous speech is also tied to the privacy interests of citizens. Privacy is often perceived as the security of a home from invasion or as the confidentiality of communications. There is also an element of privacy in free speech despite the apparent contradiction. Obviously, people who advocate a public position expose themselves to the world, or at least a small part of it. Yet, some citizens withhold a part of their privacy in the form of their names. This may be due to the fear of reprisals. However, it may be due to a desire to separate their personal home life from their public advocacy. Moreover, the fear of identification in joining public debates undermines the more general notions of privacy. The attacks on the expectations of anonymity chill speech in the same way as attacks on the expectations of privacy.

6. *Protecting Internet Speech.* Anonymity has a particularly direct relationship to the most important avenue for speech invented since the printing press—the Internet. If Thomas Paine were alive today, the Great Pamphleteer would most likely turn to the Internet rather than the mainstream press to express his ideas. Internet speech is now the virtual town hall for individual public expression. Individuals who would once take a soapbox to London’s Hyde Park would now go online to seek those of like minds. It is on the Internet that a lone wolf may become a pack leader. However, it is anonymity that gives this powerful form of unregulated speech such appeal. Anyone perusing the Internet will find every type of thought—some half-formed, others presented in detail. Missing, until recently, has been the threat of government surveillance. Even with such threats as the government’s Carnivore system and surveillance,<sup>95</sup> it remains raw and uninhibited—and largely anonymous. The Internet is the one major development that runs against the trend toward greater control and surveillance over communications. It is a vital resource that must be protected as a form of individual expression. The protection of anonymity is the single most valuable factor in fostering

<sup>95</sup>Carnivore is an intelligence system that allows the government to intercept e-mail systems. This system has an obvious chilling effect on Internet speech as do other governmental efforts to tap into the Internet. Anick Jesdanun, *Privacy, Security, Censorship Among Upcoming Net Challenges*, SAN DIEGO UNION-TRIB., Dec. 26, 2000, at 7. Ironically, whatever value Carnivore would offer to the government has been limited by serious failures in its use. Dan Eggen, *Carnivore Glitches Blamed for FBI Woes*, WASH. POST, May 29, 2002, at A7.

Internet speech, and fostering Internet speech may be the single most valuable factor in the protection of free speech in the twenty-first century.

These interests were significantly advanced by the decision in *Watchtower*. Certainly, *Watchtower* strengthens the notion that identification requirements “extend beyond restrictions on time and place—they chill discussion itself.”<sup>96</sup> However, the Court intentionally left anonymity as an “interest” that is clearly protected but poorly defined. The Court has repeatedly suggested that this interest will trigger a strict scrutiny analysis. In *Buckley v. American Constitutional Law Foundation*, the Court made passing reference to the higher standard in response to the challenge by Justice Thomas.<sup>97</sup> In *Watchtower*, Chief Justice Rehnquist noted that the Court suggested that “Stratton’s regulation of speech warrants greater scrutiny” than intermediate scrutiny.<sup>98</sup> Although the appellate court in *Watchtower*, was, in my view, mistaken, it was far more methodical in identifying and explaining its application of intermediate scrutiny of a time, place, and manner regulation. The Court’s reluctance to expressly establish this standard may reflect a box of its own creation. While seemingly applying the higher standard, the Court does not want to trigger an open confrontation with these cases. As a result, the Court simply rules on the outcome of these cases without articulating a clear justification.

In the area of anonymous speech, the Court’s confused analysis over the relevant constitutional standard also reflects a coalition that comprises justices with wildly different views. This produces a judicial variation of “cycling majorities” that depend on the shifting facts and order of cases. Anonymous speech is highly illustrative of the problem. The coalition has comprised justices like Thomas and Scalia who take diametrically opposed views of a right to anonymity. These justices often agree only on the outcome of cases. In the absence of a clear constitutional interpretative position, these rulings appear to be instinctive judgments that border on legislative choices as to the value of and alternatives to state regulations. Of course, the area of anonymous speech is hardly unique. The division of the Court

<sup>96</sup> *Hynes v. Mayor of Oradell*, 425 U.S. 610, 628 (1976).

<sup>97</sup> *Id.* 525 U.S. at 192 n.12.

<sup>98</sup> *Id.* S. Ct. at 2094 (Rehnquist, C.J., dissenting).

has routinely produced decisions that contain maddening gaps and ambiguities. These opinions reflect the same phenomenon seen in legislative decisionmaking. It is common for Congress to knowingly leave gaps in legislation to secure the passage of a bill. Faced with opposition over a provision, the compromise is often to simply remove it without answering the underlying dispute. Often members hope that courts will gap-fill and remove the painful political choices from the legislative branch. However, the divided Court increasingly has used the same technique to secure its own slim majorities and pluralities. This is one of the reasons that I have criticized the current structure of a nine-justice Court.<sup>99</sup> The relatively small number of justices increases the likelihood of such tight votes and artificially elevates the importance of “swing” justices like O’Connor and Kennedy.<sup>100</sup> I have suggested increasing the size of the Court to as many as 19 members.<sup>101</sup> There are a variety of reasons for such an expansion,<sup>102</sup> but one of the most important is to diminish the political cycling systems of a small majority court.

The Court’s ambiguous treatment of the relevant standard leaves uncertain whether mandatory identification requirements can be reviewed under a time, place, and manner precedent, as suggested by Chief Justice Rehnquist in *Watchtower*. This uncertainty leaves state and municipal officials confused over whether they must support such regulations under an intermediate or strict standard. Of course, protecting a right to anonymity may come at a social price.

<sup>99</sup> See Jonathan Turley, *Justice O’Connor Wields a Mighty Vote*, L.A. TIMES, July 4, 2002, at A17; see also Jonathan Turley, *Undoing a Stitch in Time: The Expansion of the Supreme Court in the Twenty-First Century*, Symposium on The Supreme Court and the Rule of Law, Perspectives on Political Science.

<sup>100</sup> The anonymity cases have not turned on 5–4 splits to the same extent as some other areas like the religion clause cases. See *Zelman v. Simmons-Harris*, \_\_\_ U.S. \_\_\_, 122 S. Ct. 2460 (2002). However, the anonymity cases often reflect the highly generalized and uncertain language that has come to characterize decisions on this divided court.

<sup>101</sup> Such expansion of the Court’s membership would be staggered over years to prevent a single president or Congress from stacking the Court.

<sup>102</sup> In addition to the problem of swing voting and cycling majorities, there are practical reasons for this expansion. It seems inevitable that we will increase the number of federal circuits in time. It is likely that we will end up with 16 to 18 circuits with a possible splitting of the Ninth Circuit. Increasing the size of the Supreme Court to 19 members would allow each circuit to have a single assigned justice without the current “doubling” the number of circuits assigned to each justice.

For example, some states have prohibited the wearing of masks or hoods to combat the hateful activities of the Ku Klux Klan. Here, courts like the Georgia Supreme Court have held that “when individuals engage in intimidating or threatening mask-wearing behavior, their interest in maintaining their anonymity . . . must give way to the weighty interests of the State.”<sup>103</sup> A state cannot outlaw racist speech generally without violating the First Amendment. In the same fashion, it should not be able to criminalize the concealing of an identity while engaging in such protected speech. The fact that the Ku Klux Klan is an infamous and despicable organization does not alter the fact that citizens are allowed to engage in racist speech. In fact, protecting this type of speech is the main purpose of the First Amendment; there is less need to protect speech that is popular or valued. If protected expression is “the transcendent value to all society,”<sup>104</sup> anonymity is the prerequisite for much of this expression. It would obviously be a great social benefit to be rid of the type of hateful and ignorant views associated with groups like the Ku Klux Klan. However, the removal of such views from society will occur, if at all, through social debate and not governmental restrictions. Restrictions on anonymous speech only force some views underground where they fester and grow more extreme or violent. Of course, nothing prevents citizens from calling for advocates of hate speech to reveal themselves and not to hide behind hoods. Nor does anything prevent citizens from refusing to hear or consider any views that are offered anonymously. However, the decision to listen and the value of listening to anonymous speech are choices for individual citizens to make in carrying out their First Amendment activities. Hoods are threatening because they are tied to the content of the speech itself. They are a powerful symbol for both the wearer and the observer. The same may be true of cross-burning, which will be before the Court in the next term.<sup>105</sup> Such facts, however, only bring the expression closer to the core of the First Amendment.

<sup>103</sup>State v. Miller, 398 S.E.2d 547, 553 (Ga. 1990).

<sup>104</sup>Los Angeles Police Dep’t v. United Reporting Publ. Corp., 528 U.S. 32, 38 (1999).

<sup>105</sup>In *Virginia v. Black*, No. 01-1107, the Court will consider Virginia’s law prohibiting the burning of a cross with the intent to intimidate. Various states have similar such laws.

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Both the abridgment of the right of anonymity and the use of content-based restrictions on speech are implicated in such cases.

It is quite likely that we will see another round of anonymity cases after *Watchtower*. The Court clearly indicated that some limitation of anonymous speech would be acceptable to the majority. If Stratton narrowly tailors its ordinance to commercial speech, the Court is poised to accept such a restriction as justified by a showing of a governmental interest to prevent fraud and abuse. The more worrisome possibility is an ordinance that restricts speech more broadly but is based more clearly on crime prevention. Justice Breyer's concurrence suggests that some members did not review the ordinance under this justification and criticized Chief Justice Rehnquist for his assuming such a rationale.<sup>106</sup> Justice Breyer noted that "[b]ecause Stratton did not rely on the crime prevention justification, because Stratton has not now 'present[ed] more than anecdote and supposition,' . . . and because the relationship between the interest and the ordinance is doubtful, I am unwilling to assume that these conjectured benefits outweigh the cost of abridging the speech covered by the ordinance."<sup>107</sup> Although there appears to be a strong majority that would have overturned the ordinance even with such a suggested governmental purpose, the exchange between Chief Justice Rehnquist and Justice Breyer leaves a lingering question as to whether an ordinance based on crime prevention would have garnered more support. Clearly, any such attempt will be met with some skepticism if the ordinance touches on political or religious speech.<sup>108</sup> Yet, there is enough in this opinion to give hope to those who either oppose the right to anonymity or desire to curtail door-to-door advocacy. For that reason, *Watchtower* may be the prelude

<sup>106</sup> Justice Breyer noted that the rationales advanced below were described by the district court and appellate court as deterring "flim-flam con artists" and "protecting residents from fraud and undue annoyance." *Watchtower*, 122 S. Ct. at 2091 (Breyer, J., concurring).

<sup>107</sup> *Id.* at 2092.

<sup>108</sup> Justice Breyer noted that both the scope and purpose of such an ordinance would be closely scrutinized: "It is . . . intuitively implausible to think that Stratton's ordinance serves any governmental interest in preventing such crimes. As the Court notes, several categories of potential criminals will remain entirely untouched by the ordinance. . . . And as to those who might be affected by it, '[w]e have never accepted mere conjecture as adequate to carry a First Amendment burden.'" *Id.* (internal quotations and citations omitted).

to a more fundamental showdown over the status of anonymous speech.

## V. Conclusion

For those who believe in a right to anonymity, *Watchtower* can only be viewed as a significant and positive development. The combination of *Watchtower*, *Buckley*, and *McIntyre* offer strong and relatively consistent support for the practice of anonymous speech. What is missing is a clear foundational principle and standard as advocated by Justice Thomas in his concurrence to *McIntyre*. Anonymous speech is an example of the realpolitik that has reigned on this Court during its years of 5–4 divisions. Majorities are often secured on the conclusions rather than the principles of a case. It is clear that the majority of justices do not want to undermine anonymous speech. The isolation of Chief Justice Rehnquist as the sole strong dissent in *Watchtower* reflects this general agreement. However, this unified façade is misleading. Chief Justice Rehnquist was correct in his criticism of the imprecision in the language and standards used by the Court. He saw a majority that was bound only by the loose convenience of a decision that strived to reach the “right outcome.” The failure of the Court to be clearer on the foundations and standard for a right to anonymity leaves a dangerous ambiguity when privacy and confidentiality are under increased attack. Just as the Court succeeded recently in reinforcing the long-neglected right of association,<sup>109</sup> it was hoped that it would draw a bright line of protection around anonymous speech. It may still do so. With the combination of these cases, the Court is inching closer to a clear and unambiguous recognition of anonymity, not as an “aspect” or a “condition,” but as a right of free speech and freedom of the press.

Anonymity is an issue for our time. As we increasingly yield to the countless demands for increased surveillance and monitoring, the fight over anonymity reminds us of what we may have lost in the crush of technology and modern life. One of the greatest liabilities of a democracy is the danger that majoritarian authority will coerce citizens into silence or acquiescence. Forcing some people into the

<sup>109</sup>*Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (allowing the Boy Scouts to bar a gay scoutmaster); Jonathan Turley, *Of Boy Scouts and Bigots*, CHICAGO TRIB., June 30, 2000, at A27 (supporting the Court’s holding in *Boy Scouts of America v. Dale*).

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light may just force many ideas into the darkness. This could come at considerable cost for society. History has shown that it is sometimes those individuals on the very edge of our society who possess the greatest insights or clearest perspective of contemporary problems. In some ways, by protecting the right to anonymity, a society maximizes the likelihood that its collective decisions will be challenged and tested. As counterintuitive as that may seem for some countries, it is the very essence of the American experiment with democratic rule.

