

No Place to Hide: First Amendment Protection for Location Privacy

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The place you stand on the earth can speak volumes about you. Are you at home or at work? Are you in a meeting of political radicals or dining at an expensive restaurant? Are you peeking into a neighbor's window or accepting an award for your contributions to humanity? Are you deep in the woods or lost in a crowd? Given the lack of public discourse on the subject, it seems that most Americans are not concerned about the privacy of their location. But the ability of family, friends, employers and the government to know where you are at any given moment is increasing dramatically with modern technology, and this loss of location privacy is affecting your fundamental rights under the Constitution.

The privacy of a person's location has a practical component, as population pushes back wilderness and electronic sensors capture people's activities. Location privacy also includes a legal component, as law enforcement agencies press the courts for more rights to monitor citizens and more access into American private lives. So if a person is concerned about the privacy of his location, two important and intertwined questions must be addressed: 1) CAN a person act anonymously given the nature of surveillance technology improvements, and 2) does a person have a RIGHT to act anonymously under the laws of the land. As technology to constantly capture our location improves, then the answer to the legal question becomes more important, because if we postpone answering the question long enough, then technology will overrun any opportunity to establish a meaningful location privacy right. The technology will answer all relevant questions before the legislatures or courts can consider them.

Many of the most interesting constitutional problems faced by courts today arise because technology and society have evolved in ways that the founders could never have considered, and that we could not expect them to have addressed. The need to assert the privacy of one's location would have been unfathomable to even the farthest thinkers of the eighteenth century, but the ability to act or even exist outside the watchful eye of government is rapidly disappearing in the full-time surveillance society of the United States in the twenty-first century.

When the American founding fathers were drafting and voting on the Constitution of the United

States, the world's first hot air balloon flight took place in France, lifting a duck and sheep and a rooster off of the ground for a full 15 minutes, and within two years, Jean Pierre Blanchard, and American John Jefferies rode a hot air balloon across the English Channel. During this time when the full extent of land and sea on the earth was still unknown, and when the United States consisted of territories locked to the Atlantic seaboard abutting a vast unexplored wilderness, it was inconceivable that anyone, government or otherwise, would be able to know the location of specific individuals if those individuals wished to remain hidden. It would be nearly a full century following passage of the United States Constitution before practical electric light would be invented and another decade beyond that before power generation would reach major American cities, beginning the process of lighting the night sky. In the founder's time, people could disappear into the night, not only in the wilderness but also in the greatest cities, with no thought of being identified or watched by the government. The manpower required to continuously track and monitor a freely moving person is prohibitively expensive without technological help, and every person in Colonial America knew that he or she could disappear from sight with minimal effort, and only gossip and rumor could trace his or her location.

Our founding fathers lived in a time when entire armies and fleets could vanish overnight. Many historians believe that General Washington's finest military operation was his undetected withdrawal of the American army and all of its supplies across the East River to Manhattan after defeat in Brooklyn Heights in the summer of 1776. The entire Continental Army disappeared from its camp on Long Island and appeared the next day without notice of a watchful enemy. Ships, once at sea, may never be seen again. Many ships in Colonial times, like the HMS *Heureux*, the USS *Insurgent* and the USS *Saratoga* vanished once they left the safety of port. For example, the USS *Pickering* left Newcastle, Delaware on August 20, 1800 and never arrived at her destination of Guadeloupe; she is thought to be lost in a storm with all hands. No one knows for certain where she disappeared or what might have happened to her. This was not a world where privacy of location could be questioned. Anyone who chose to act privately or anonymously need only slip into the dark night. How could the U.S. founding fathers, living in such a world of mystery and anonymity, ever conceive that a government would track its citizens from satellites orbiting earth, triangulated airborne cellular signals or multiple coordinated computerized cameras? Why would they have thought to protect personal dignity and security from inconceivable technological advancement?

Today's world brings an entirely different circumstance to those wishing privacy or anonymity. The United States is considerably more crowded, with eighty one percent of Americans living in cities. In addition, unlike the world of our founders, today's United States is mapped and known. Every point where you could walk or climb in this nation is charted and assigned with a latitude and longitude, which global positions are then understood in the context of the nearest landmarks, roads, cities, shorelines or government installations. Current technology has also changed privacy calculations. Since 1996, when President Clinton declared the Global Positioning System to be a dual-use system to be shared between military and civilian purposes, the world has become a smaller place. As the internet allowed mass customization of advertising, GPS applications have created mass-customization of location identification. We drive GPS-enabled cars and carry GPS-enabled phones and other tools. We tag our pets with location devices and strap GPS beacons to our children. Our products have RFID tags that can follow us

home from the store, broadcasting location and other information.

When we add this GPS explosion to the current proliferation of stationary cameras – video captured at intersections, at ATMs and at businesses – we are caught in a society with all the tools to surveil everyone all the time. And each day brings total surveillance closer. First, the trend toward more monitoring and more subtle monitoring is increasing exponentially as the technology becomes cheaper and easier to use. For example, the owner of a new fast food restaurant can add nine cameras monitored over the internet for pennies per day. Adding location-aware applications and software can cost us nothing at the online App Store, and can be added and accessed from anywhere. Second, the digitization of pictures, the plummeting cost of computer storage, and the ability to run interpretive software on the video in real time makes surveillance cameras more useful and cost effective. Cameras following traffic or monitoring security are adding computer analysis of every frame. Biometric programs measuring a person's gate or recognizing her face are becoming more common with law enforcement and business, and biometric capture, used everywhere from Disney parks to airports, will note your location with a high degree of certainty. Third, the society is becoming more comfortable with constant monitoring. Unlike past generations where a fourth-grade son or daughter was pushed outside for ten hours of unsupervised playtime, children are no longer free to roam the neighborhoods and parks; now we need to know their locations at all times. We expect camera systems watching our movements will dissuade criminal activity in banks and convenience stores. We accept full body scans and sniffer machines in airports.

Given our increasingly networked world and the reduced cost of all the technologies described above, it is fair to assume that we have not reached the zenith of the surveillance society. We should expect more and better cameras, more and cheaper tracking beacons, and more GPS technology built into our vehicles, devices, equipment and clothing. As this trend expands, every American's reasonable expectation of privacy diminishes, limiting judicial inquiry into police tactics in more circumstances that were heretofore considered clearly private. If a camera and a keycard records the times a person leaves and enters his apartment, the person cannot reasonably expect privacy in this place. If a GPS beacon in a car reports on every location the automobile visits, the driver cannot reasonably expect that anywhere she drives will be secret. If the police are allowed to place tracking beacons on people, equipment or vehicles, no person can reasonably expect privacy from such intrusion in their lives. Our right to expect privacy in any situation is fading quickly, and this is doubly true for our expectation of privacy in the place we are sitting at any given moment.

Some people may not care that they can be tracked throughout the world and monitored by public and private entities alike. Many people are perfectly comfortable announcing their locations on Foursquare, Facebook or the dozens of other tracking applications available today. But there are likely times in everyone's life when he or she just wants to disappear for a while, and nearly everyone would admit that there are people to whom he or she does not want to telegraph every location. A person may be concerned about giving too much information to a boss, a spouse, the police, the neighbors, a stalker or a mother-in-law, but privacy becomes important in critical situations. Once location privacy is lost as a physical fact and as a legal

right, then it will not be regained easily, if at all.

Support for a Constitutional Right to Geolocation Privacy and Anonymity.

The United States Constitution famously does not mention privacy, although it mentions personal security, which could have meant something similar to the founders. However, cases addressing the First and Fourth Amendments to the Constitution clearly illustrate that a person's ability to remain anonymous in his location in certain circumstances is an important underpinning for his Constitutional rights. The right to free assembly cannot be fully practiced if the state and non-state actors can track where a citizen goes and who is with her at all steps of the journey. The right to free speech cannot be fully practiced if a person cannot speak out anonymously against tyranny. The right to be secure in person, house or effects cannot be fully practiced if police may surveil a person's every movement without warrant or court order. So U.S. Constitution cases lay the groundwork for arguing that, at least in some circumstances, privacy of location is a personal right of every American. This paper examines the First Amendment cases, most specifically the cases addressing rights to free speech and free association, that may be used to underlie an argument that United States citizens hold a Constitutional right to location privacy.

Freedom of Association

As of this writing, courts in the United States have not directly addressed whether an American citizen has the right to remain anonymous in her location, or whether any of the legally recognized rights to privacy extend beyond a person's body to the physical location of her body within the United States. However, clearly established precedent from the Supreme Court points to lines of Constitutional rights and legal reasoning that support some instances of anonymity and privacy for a person's earthly location. This precedent lies in the series of cases protecting anonymous association as a cornerstone of the First Amendment freedom of association, and the group of cases finding a right to privacy and anonymity in free speech. Both lines of judicial reasoning make clear that our fundamental rights to speech and association can be easily thwarted by exposing to personal attack speakers and political groups with unpopular views. And if such rights to situational anonymity exist in this country, then a person must also have the right to be free from surveillance when he attends meetings of political import or writes the contemporary equivalent of the Federalist Papers on an internet-connected computer.

In 1958, the United States Supreme Court recognized that the First Amendment right to free association is inseparable from the right to privacy in one's associations. In the case of *NAACP v. Alabama*^[1], the state of Alabama sought to compel a civil rights organization to list the names of its members. The Supreme Court held that the Constitution protected the rights of individuals to associate anonymously, especially in cases where the association was advocating a controversial point of view. "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."^[2] Recognizing the recent oppressive totalitarian past in Western and Central Europe, and the Communist totalitarianism in the East, where associating with dissenters could lead to imprisonment or death, the Court stood against intimidation of

dissenting views through following dissidents or surveilling dissenting groups. Any state actor that keeps careful track of dissenting minority individuals builds an engine of intimidation, a loaded gun that could be triggered at any time in a variety of methods. Tracking a citizen's locations and associations is an early step toward state tyranny.

But the state need not explicitly attack dissidents through police or other state apparatus to intimidate its citizens. It could use non-state actors to the same effect. The *NCAAP v. Alabama* Court found a threat in disclosure of the Association's names despite the fact that any likely repression following release of the names "follows not from state action but from private community pressures."^[3] The Court understood the stakes involved for NAACP members. The state of Alabama was institutionally opposed to improved civil rights for African Americans at the time this suit was filed, and Alabama elected officials were also aligned with non-state actors like the Ku Klux Klan who might act as repressors on behalf of the powerful institutions within Alabama. If the state of Alabama was able to identify all the individuals promoting the unpopular position of equal rights for African Americans, then the Ku Klux Klan or other non-state actors could use that information to threaten individual NAACP members and their families, eviscerating the rights of those citizens to free association.

Given the importance of freedom of association in political organizing and in educating disadvantaged people about their voting rights, privacy of these associations is significant for a full and fair exercise of a citizen's political rights. If institutions within Alabama were actively working to hinder the voting rights of African Americans in the 1950s, revealing the names of local NAACP members to Alabama government at the time could impair NAACP member voting rights throughout the state. With this at stake, the *NCAAP v. Alabama* Court also found that freedom to engage in association for the advancement of beliefs and ideas "is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment" and that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."^[4] Under this logic, privacy of association is crucial for exercising the most basic political rights protected in the United States.

The United States Supreme Court continued looking to the First and Fourteenth Amendments to protect privacy of association when the question rose again in *Gibson v. Florida Legislative Investigation Committee*^[5], finding that Constitutional guarantees of freedom encompasses protection of associational privacy in certain organizations. These freedoms "need breathing space to survive" and are "protected not only against heavy-handed frontal attack, but also from being stifled by more subtle government interference."^[6] The Gibson case also involved a Southern state using governmental means, in this case a legislative contempt order, to force an office of the NAACP to reveal its membership list to the state. The Court's decision expanded protections of associational privacy and restated the high standard that a state must meet to forcefully invade this protected realm of privacy, finding that to do otherwise would be to sanction "unjustified and unwarranted intrusions into the very heart of the constitutional privilege to be secure in associations in legitimate organizations engaged in the exercise of First and Fourteenth Amendment rights."^[7] The *Gibson* Court concluded its opinion by stating that

groups which are neither engaged in subversive or other illegal activity must be protected in their rights of free and private association.^[8] This statements permits an assumption that United States citizens who are not acting illegally have a right to privacy in who they association with, and as part of that right, a right to privacy in where they are when associating with others for lawful purposes.

Reaching a similar conclusion in an entirely different set of facts, the U.S. Supreme Court in *Shelton v. Tucker*^[9], found a right for public school teachers to keep their recent associations private because “to compel a teacher to disclose his every associational tie is to impair that teacher’s right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.”^[10] The state of Arkansas attempted to enforce its law requiring all public school teachers to file an affidavit with the state naming all of the organizations to which the teacher belonged or regularly contributed for the preceding five years. The court was concerned that teachers, who serve at the will of the state, should be forced to lose privacy of association by exposing all associations to their employer, who controls the teacher’s professional destiny. Under the majority’s reasoning, what a teacher does in his hours off work should not be open to examination through the intimidating power of the state. The logic of this ruling seems to protect the identity of places the teacher goes, as well as the people the teacher sees.

The Supreme Court continued protecting privacy of association in later eras as well. In 1982, these rights were explicitly extended to contributors to minor political parties in *Brown V. Socialist Workers ‘74 Campaign Committee (Ohio)*^[11], applying not only to the compelled disclosure of campaign contributors but also to the compelled disclosure of recipients of campaign disbursements. Those people receiving money from a political campaign were protected on equal footing as the people who donated funds to the campaign. The Brown Court held that “The Constitution protects against the compelled disclosure of political associations and beliefs. Such disclosures “can seriously infringe on privacy of association and belief guaranteed by the First Amendment.”^[12] Privacy of association and belief would be undermined by allowing government actors to trail and trace citizens so that every location, every meeting and every conversation is documented. In order for these rights to exist, United States Citizens must feel free to associate without the threat of government tracking.

Lower courts have recognized and extended this line of thinking over the years.^[13] The clear legal position in current United States jurisprudence states that privacy is necessary to protect freedom of association. And since it is also clear that privacy of association is undermined by government tracking and surveillance, then a right to privacy of a person’s location from government view must, at least in some instances, exist for United States citizens.

Freedom of Speech

Not only do American citizens have the right to assemble in private and join organizations anonymously and free from government interference, but they also have the right to speak and publish their thoughts anonymously. United States Law and the English tradition that underpins

it both offer a long and respected history of protecting anonymous political speech. The anonymous pamphleteer is a respected member of Anglo-American political discourse. Under fear of a repressive government, anonymity may be the only safe way to spread ideas. People in the United States have the right to speak openly, and the right to speak privately. However, those rights cannot exist without the right to move freely, at least in some circumstance, without the official observation of the state. Privacy to speak anonymously is fragile and depends on privacy at all stages of speaking or publication. Government tracking and surveillance undermines this right of anonymous speech.

Anonymity in political idea and political protest is an old and honored tradition in this country and in other influential Western Democracies. For example, the important letters highlighting the rights of Englishmen in the early 1770 were published by a still-unknown author under the title of Junius, and the French political exile and philosopher of the rights of man François-Marie Arouet published his work under more than 100 pseudonyms, including Voltaire. Of course, many of the most influential arguments toward ratification of the United States Constitution were published in the federalist papers under the pseudonym Publius, probably written by founding fathers Alexander Hamilton, James Madison and John Jay. Similarly, people supporting human rights organizations, from the NAACP to the Jewish Defense League to the Stonewall Union could benefit by choosing anonymity to continue functioning in mainstream society while supporting an unpopular cause. American courts recognize and honor these political traditions. But now that the technology and infrastructure exists to monitor, track and otherwise surveil individuals at all the places in their daily lives, the right to privacy in certain places may need to be officially recognized by courts to preserve the rights to anonymity protected by our Constitution. Otherwise those rights may be rendered meaningless.

Anonymous political speech is an especially protected type of discourse in the United States. A line of cases arising from *McIntyre v. Ohio Elections Commission*^[14], confirms that anonymity is a legally accepted shield from tyranny of the majority. The McIntyre Court notes that “Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.”^[15] “Whatever the motivation may be,” wrote the McIntyre Court, “at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.”^[16]

The right to anonymity of publication is not limited to direct voting materials. In a more recent Supreme Court case, the majority protected distribution of anonymous leaflets on college campuses.^[17] As technology changes, so the right of free speech is adapted to new ways of placing the speech into the marketplace of ideas. For example, several recent courts have found, “It is [also] clear that speech over the internet is entitled to First Amendment protection [and that] [t]his protection extends to anonymous internet speech.”^[18] As technology provides for more ways to thwart anonymity, new technologies like the internet provide additional methods of publicizing facts and opinions. Free speech has moved deeply into this important new forum.

Courts also recognize that a right to free anonymous speech relies on attendant rights necessary for practical application of the primary right. The Texas Appeals Court in *In Re Does* held that, while the right to speak anonymously is not absolute, “this right would be of little practical value if there was no concomitant right to remain anonymous after the speech is concluded.”^[19] Anonymity of speech relies on several attendant rights, including the right to remain private following publication, and the right to remain private in your location as you publish.

Political discourse in this world may have moved from the pamphleteering of Voltaire to the internet comments on the Politico website, but all ends of that spectrum allow a speaker to keep his identity a secret. Anonymity of speech, from leaflets, books or the internet is protected by the Constitution, but that right to anonymity is undercut by the ability of the state or private actors to monitor and trace the origins of speech by filming and following the trails of publication. It is difficult to envision a right to anonymous speech in a world where the government can practically trace all publications back to their source, and where the government knows the location of all potential rabble-rousers at all times.

Reduced Intrusion Destroys Anonymity

But anonymity ignites definitional and practical problems. The legal protections cited above address anonymous rights of free assembly and anonymous contributions to political discourse. The cases hold that the government cannot force groups to disclose their members or to provide records showing all affiliates; the cases do not imply that government agents may not stand outside of a meeting hall to see who enters, or to review the tapes of security cameras at that same hall. They address legal use of force to disclose business records, not actual attendance at meetings or the locations of group members. Similarly, the free speech cases focus on state requests for post-speech release of the speaker’s identity. If state agents could non-intrusively determine the writer by tracking computer files, internet trails, IP addresses or personal location at the computer creating the protected speech, would a court move to stop the state from doing so? As surveillance becomes pervasive and routine, less intrusion and official force is necessary for the state to gather the information that it needs, and courts may not find the lighter touch as distasteful to freedom as heavy hand of an earlier era.

The First Amendment cases cited above measure the intrusion of government into the workings of political groups and the distribution of political ideas. With today’s technology, the government need not intrude to receive the information it seeks. An assessment of our rights to location privacy forces us to think about the places that we are truly private. Even assuming that Americans have a right to privacy of their location behind closed doors, then the right ends as soon as an American steps out into the public forum. Leaving a private space exposes an American to a (possibly monitored) public space, and therefore his time in the private space is noted by implication. If a government satellite photographs him entering his house at night and exiting his front door in the morning, then he has no privacy or anonymity of location in his home. Therefore, if functionally all public spaces are monitored by government, then no anonymity of location can exist. When we reach this level of pervasive surveillance, which is now more a matter of cost and infrastructure rather than government ability, then a court’s ruling

in favor of location privacy will not have practical significance.

Revisiting our important questions from the opening of this paper, under a Constitutional First Amendment analysis protecting freedom of association and freedom of speech, United States citizens should have a legal right to location privacy and anonymity in certain circumstances. The U.S. Supreme Court has recognized fundamental rights to speak anonymously and to assemble privately, and for those rights to have any meaning, the state cannot know the physical location of United States citizens at every moment of every day. To make the analogy to the Supreme Court's decision in *NAACP v. Alabama*, if it was unconstitutional for the state of Alabama to receive the NAACP membership list, it would also have been unconstitutional for the Alabama state police to send officers into the NAACP meetings to record the names of all participants. The state should not be able to acquire the list by tracking people's locations when it could not acquire the list by judicial process.

And yet, the evolving answer to our second important question may render this legal reasoning moot. Can a person remain anonymous in today's surveillance society, with heat sensors, satellite tracking, biometric identification, traffic cameras, security monitoring, RFID tags and vehicle broadcast devices in place and expanding? When we reach the point where the government can easily know without coercion where every person stands or sleeps at every moment of every day, then the logic of *NAACP v. Alabama* no longer applies. The state will not need to compel dissident organizations to provide their membership lists, it will simply know who attended all the meetings. Therefore, the most important question regarding location privacy in the United States, is whether its citizens, judges and politicians care enough about this underlying legal right to preserve the right under law before it disappears for all practical purposes.

If our judiciary and/or legislature specifically acknowledges that each United States citizen holds a right to be private and anonymous in his location at certain times, then law enforcement and commercial organizations would be forced to take this right into account. They would have to limit non-stop surveillance in some circumstances, turn off cameras at sensitive moments and not pursue tracking and monitoring of lawful assemblies. However, without such acknowledgement, the march of progress toward total surveillance will eliminate a citizen's location privacy right with practical certainty before most people are able to consider the consequences.

[1] 357 U.S. 449 (1958).

[2] *Id.* at 462.

[3] *Id.* at 463.

[4] *Id.* at 460-61.

[5] 372 U.S. 539 (1963).

[6] *Id.* at 544 (citing *NAACP v. Button*, 371 U.S. 415 (1963) and *Bates v. Little Rock*, 361 U.S. 516 (1960)).

[7] *Id.* at 558.

[8] *Id.*

[9] 364 U.S. 479 (1960).

[10] *Id.* at 485-486.

[11] 459 U.S. 87 (1982).

[12] *Id.* at 420 (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976)).

[13] *See, e.g.*, *Pollard v. Roberts*, 283 F. Supp. 248 (E.D. Ark. 1968), *aff'd mem.*, 393 U.S. 14 (1968) (Bank not required to turn over documents naming members of state Republican Party); *Dole v. Service Employees Union*, 921 F.2d 1456 (9th Cir. 1990) (labor union); *Bursey V. United States*, 466 F.2d 1059 (9th Cir. 1972) (Black Panther Party); *ETSI Pipeline Project v. Burlington Northern, Inc.*, 674 F. Supp. 1489 (D.D.C. 1987) (public interest organization).

[14] 514 U.S. 334 (1995).

[15] *Id.* at 341 (quoting *Talley v. California*, 362 U.S.60, 64 (1960)).

[16] *Id.* at 342.

[17] *Justice for All v. Faulkner*, 410 F.3d 760 (5th Cir. 2005).

[18] *Solers v. Doe*, 977 A.2d 941, 950 (Tex. 2009) (quoting *Doe v. Cahill*, 884 A2d. 451, 456 (Del. 2005) (citing *Reno v. ACLU*, 521 U.S. 844, 870 (1997)).

[19] *In Re Does*, 242 S.W.3d 805 (Texas App. 2007) (citing *Doe v. 2TheMart.com Inc.*, 140 F.Supp.2d 1088 (D.Wash. 2001)).