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JOURNAL OF MEDIA LAW & ETHICS

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Letter from the Editor

Dear Reader:

Welcome to the first issue of the *Journal of Media Law & Ethics* to be published under the imprimatur of the University of Baltimore School of Law. We are proud to launch the new *University of Baltimore Journal of Media Law & Ethics* with five outstanding articles by established scholars and scholars-in-the-making. We pledge to maintain this high standard in the issues to come.

We would like to acknowledge the foresight and imagination of David Demers of Marquette Books, the founding publisher of *JMLE*, and convey our gratitude for his confidence in the University of Baltimore School of Law as his successor in this venture. I am personally grateful to Dean Michael Higginbotham for his willingness to take on this responsibility, and to my colleagues at the School of Law for their encouragement.

As always, we would like to thank the members of our editorial advisory board for their review of the articles in this issue and the many helpful suggestions they offered. Thanks, too, to Lesley Oswin, for helping us get the *JMLE* up on the web site. And for her work on this issue, a special thank you to my research assistant, Katherine Dorian, who is moving on to become the next editor in chief of the *University of Baltimore Law Review*.

In the coming months, we will be transitioning to a new web design and hope to add such features as book reviews, news summaries, and a blog. We will be taking steps to optimize the visibility of the journal through the legal, social science, and humanities databases and scholarly search engines. We will also begin seeking sponsorship for a print edition. All of this will take time, and we ask you to bear with us as we grow.

Above all, we ask that you continue submitting the fruits of your own scholarship to *JMLE* for publication. Whether you teach or study in a law school or journalism school, we welcome your manuscripts and promise a thorough and objective review by members of our editorial board and other distinguished scholars. Thank you.

Sincerely,
Eric B. Easton, J.D., Ph.D.
Professor of Law and Editor, *JMLE*

Submissions

The **University of Baltimore Journal of Media Law & Ethics** (ISSN1940-9389) is an on-line, peer-reviewed journal published quarterly by the University of Baltimore School of Law. *JMLE* seeks theoretical and analytical manuscripts that advance the understanding of media law and ethics in society. Submissions may have a legal, historical, or social science orientation, but must focus on media law or ethics. All theoretical perspectives are welcome. All manuscripts undergo blind peer review. Access to *JMLE* is available to the public at no charge.

Exclusivity: All manuscripts must be original and must not be under consideration at other journals. **Peer Review:** All manuscripts will undergo blind peer review. The normal review period is three months or less.

Submissions: The ideal length for submitted papers is 20-30 double-spaced pages (6,000 to 8,000 words using 12-point Times Roman or equivalent type), including footnotes, tables, and figures. Longer manuscripts will be considered when space is available. The submission and review process will be electronic; all manuscripts should be prepared using Microsoft Word or converted to that format. One electronic copy should be e-mailed to the editor, Eric B. Easton, eeaston@ubalt.edu.

Manuscript Preparation: All footnotes should be in Bluebook form. All text must be double-spaced except tables and figures, which must be "camera-ready." Microsoft Word is the required software program for formatting manuscripts. The title page should include the title of the manuscript, names and affiliations of all authors, as well as their addresses, phone numbers, and e-mail addresses. Five key words for referencing the document in electronic databases are also required. Only the title page should contain identifying information. The second page should include the manuscript title and an abstract of 150 to 250 words. All figures and tables must be formatted to 5.5 inches in width and no more than 7.5 inches in height.

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JOURNAL OF MEDIA LAW & ETHICS

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UNCHECKED DEFERENCE: *HAZELWOOD'S* TOO BROAD AND TOO LOOSE APPLICATION IN THE CIRCUIT COURTS

DAN V. KOZLOWSKI

In the more than two decades since the U.S. Supreme Court decided Hazelwood School District v. Kuhlmeier, the decision has been analyzed widely and related issues litigated frequently. Yet unanswered questions remain about when the precedent should be applied and what amounts to a “legitimate pedagogical concern” justifying censorship. This article systematically analyzes circuit court cases that have applied Hazelwood and evaluated whether a school’s proffered pedagogical concern is legitimate. Analysis shows that circuit courts have broadened Hazelwood’s scope and expansively interpreted the “legitimate pedagogical concerns” standard, showing generally unchecked deference to schools. The article proposes renewed rigor in deciding when Hazelwood should apply along with an approach to the “legitimate pedagogical concerns” standard that would more closely scrutinize schools’ speech restrictions while still respecting the deference to educators that the Hazelwood opinion so clearly showed.

Keywords: First Amendment, student speech, Supreme Court, *Hazelwood v. Kuhlmeier*

I. Introduction

In February 2005, student journalists working for *The Tattler*, the student newspaper of Ithaca High School, wanted to publish a cartoon that criticized their school’s sex education curriculum. The cartoon depicted a doorway with the phrase “Health 101” written over the door. Inside, a teacher pointed to a blackboard that displayed stick figures in various sexual positions, with the phrase “Test on Monday” written underneath the drawings.¹ The cartoon would have appeared alongside an article headlined “How is Sex Being Taught in Our Health Class?”² – an article that a federal district court labeled “a serious examination of health education in the [school].”³ The political cartoon was meant to be satirical, but the paper’s adviser and the school’s principal were not amused. They permitted the story, but they refused to let the students print the cartoon.

¹ R.O. v. Ithaca City Sch. Dist., 645 F.3d 533, 536 (2nd Cir. 2011).

² *Id.* at 537.

³ R.O. v. Ithaca City Sch. Dist., 2009 U.S. Dist. LEXIS 130993, 61 (N.D. N.Y. 2009).

The students sued, arguing that the school should not be allowed to censor their paper because it was student-run; they worked on the paper during lunch and free periods and they maintained editorial control.⁴ The district court indeed noted that, historically, the paper's adviser did not select editors or assign story ideas or direct staff meetings.⁵ The paper thus seemingly had the markings of a limited public forum, a legal arrangement that is generally favorable to student media⁶ because student speech is protected in such a forum unless it violates the "substantial disruption" standard from the U.S. Supreme Court's *Tinker v. Des Moines Independent Community School District*⁷ decision.

In May 2011, however – in an opinion student speech advocates have called "the most damaging decision to high school journalism in the past 20 years"⁸ – the Second Circuit sided with the school in *R.O. v. Ithaca City School District*. In its *R.O.* opinion, the Second Circuit did in fact label *The Tattler* a limited public forum. The court, though, then ruled that the school's actions were permissible, not under *Tinker*, but under *Hazelwood School District v. Kuhlmeier*, a decision in which the Supreme Court had explicitly ruled the student newspaper in question was *not* a public forum.⁹

Described by one article as "a tsunami that has wiped out all that existed before,"¹⁰ *Hazelwood* fundamentally transformed the student speech landscape

⁴ The Second Circuit noted that "in certain cases, students may receive course credit for their work." Not all did, however. *R.O.*, 645 F.3d at 536.

⁵ *R.O.*, 2009 U.S. Dist. LEXIS 130993 at 39.

⁶ See, e.g., *Dean v. Utica*, 345 F. Supp. 2d 799 (E.D. Mich. 2004); *Draudt v. Wooster City Sch. Dist.*, 246 F. Supp. 2d 820 (N.D. Ohio 2003). The U.S. Supreme Court has identified three kinds of forums: traditional, limited, and nonpublic. Traditional public forums are government-owned properties that the government constitutionally must make available for speech. As the Court said in *Hazelwood School District v. Kuhlmeier*, "The public forums that 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" 484 U.S. 260, 267 (1988) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). A limited public forum is property that the government intentionally opens up for speech. Finally, a nonpublic forum is property that is not by tradition or designation a forum for expression. The government has the most control over speech in these forums; any speech restrictions merely must be reasonable and viewpoint neutral. See KENT MIDDLETON & WILLIAM LEE, *THE LAW OF PUBLIC COMMUNICATION* 55-57 (2007).

⁷ 393 U.S. 503 (1969). See *infra* notes 23-30 and accompanying text.

⁸ *Appeals Court: N.Y. School Can Censor Cartoon in 'Forum' and Independent Newspapers*, STUDENT PRESS L. CTR. NEWSFLASH, May 18, 2011, <http://www.spic.org>.

⁹ 484 U.S. 260, 270 (1988).

¹⁰ J. Marc Abrams & S. Mark Goodman, Comment, *End of an Era? The Decline of Student Press Rights in the Wake of Hazelwood School District v. Kuhlmeier*, 1988 DUKE L.J. 706, 728. Abrams and Goodman still hopefully cautioned that "upon closer inspection, protections remain for student journalists' exercise of free speech." *Id.*

when the Court handed down the decision in 1988. The Court ruled 5-3 that its speech-protective “substantial disruption” standard from *Tinker* was inapplicable to a case involving curricular student speech that bears “the imprimatur of the school.”¹¹ Instead, the Court articulated a new standard for student speech categorized as school-sponsored: “[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”¹²

In reaching its *R.O.* decision, the Second Circuit reasoned that, like the student newspaper in *Hazelwood*, *The Tattler* bore the school’s imprimatur, and *Hazelwood* thus applied. In *Hazelwood*, though, the Court also emphasized that the newspaper there, *Spectrum*, was part of the school’s curriculum,¹³ an element the Second Circuit generally excluded from its analysis. The *Hazelwood* Court then scrutinized the school’s actions and ruled they met the new “legitimate pedagogical concerns” standard. Additionally complicating matters, once the Second Circuit determined that *Hazelwood* applied in *R.O.*, it spent little effort in almost immediately deferring to the school and deciding that the school’s actions satisfied the requirement that restrictions relate to “legitimate pedagogical concerns.” With minimal explanation, the court ruled the cartoon could be censored because the school believed publishing it would have undermined its efforts to stress to students “the seriousness of sexual relations.”¹⁴

R.O., then, highlights important, still-unresolved issues about student speech in the wake of *Hazelwood*. In the twenty-four years since the decision, *Hazelwood* has been analyzed widely and related issues litigated frequently. Yet significant questions remain about the scope of the ruling, and how lower courts are applying it. *R.O.* draws attention to two: When does *Hazelwood* apply, and what amounts to a legitimate pedagogical concern? The first question has attracted some scholarly attention, producing debates, for instance, about whether *Hazelwood* should apply to teachers’ speech in the classroom¹⁵ and to

¹¹ *Hazelwood*, 484 U.S. at 271.

¹² *Id.* at 273. The standard’s resemblance to the one applicable to prisoners is sobering. See *Turner v. Safley*, 482 U.S. 78, 89 (1987) (“[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”).

¹³ See *infra* notes 50-51 and accompanying text.

¹⁴ *R.O. v. Ithaca City Sch. Dist.*, 645 F.3d 533, 542 (2nd Cir. 2011). Alternatively, the court said the cartoon could be censored because it was “lewd” under *Bethel School District v. Fraser*, 478 U.S. 675 (1986). *R.O.*, 645 F.3d at 541.

¹⁵ See generally Emily Gold Waldman, *Returning to Hazelwood’s Core: A New Approach to Restrictions on School-sponsored Speech*, 60 FLA. L. REV. 63, 79-87 (2008) (discussing the division among the circuits regarding *Hazelwood*’s applicability to a teacher’s classroom speech).

the university setting.¹⁶ The second question has received scant attention. The *Hazelwood* Court, though providing examples, laid down no precise definition of what pedagogical purposes count as legitimate.¹⁷ Certainly scholars have recognized that *Hazelwood* considerably curtailed students' speech rights.¹⁸ And part of that recognition has included criticism of the "legitimate pedagogical concerns" standard as the Court articulated it in *Hazelwood*, with commentators calling the standard "vague and broad"¹⁹ and "flawed,"²⁰ among other things. No

¹⁶ See generally Edward Carter, Kevin Kemper, & Barbara Morgenstern, *Applying Hazelwood to College Speech: Forum Doctrine and Government Speech in the U.S. Courts of Appeals*, 48 S. TEX. L. REV. 157, 181 (2006) (concluding that "more than half the federal circuits that have considered the issue have applied aspects of *Hazelwood* to university – or college – student speech, despite arguments that *Hazelwood*'s restrictive standard should not be applied in the post-secondary context").

¹⁷ While scholars have made the point that *Hazelwood* does not explain what constitutes a legitimate pedagogical concern, little or no research has examined how lower courts actually are interpreting what pedagogical concerns satisfy *Hazelwood*'s standard. See, e.g., Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717, 775 (2009) ("*Hazelwood* does not explain...exactly how the federal courts are to determine what constitutes a legitimate pedagogical concern."); Michael Fucci, *Educating our Future: An Analysis of Sex Education in the Classroom*, 2000 BYU EDUC. & L.J. 91, 108 ("What constitutes a legitimate pedagogical concern is still open for interpretation."); Leora Harpaz, *Internet Speech and the First Amendment Rights of Public School Students*, 2000 BYU EDUC. & L.J. 123, 135 ("[T]he Court has not determined the limits of key concepts such as 'school-sponsored activities' and 'legitimate pedagogical concerns.'").

¹⁸ See, e.g., Abrams & Goodman, *supra* note 10; Jack Dvorak & Jon Paul Dilts, *Academic Freedom vs. Administrative Authority*, 47 JOURNALISM EDUCATOR 3, 7 (1992) ("*Hazelwood* is an extraordinary decision to those teachers who find administrative censorship to be a kind of anti-lesson in the pedagogy of freedom."); Scott Andrew Felder, *Stop the Presses: Censorship and the High School Journalist*, 29 J.L. & EDUC. 433 (2000); Richard Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons from the "College Hazelwood" Case*, 68 TENN. L. REV. 481 (2001). *But cf.* ANNE PROFFITT DUPRE, SPEAKING UP: THE UNINTENDED COSTS OF FREE SPEECH IN PUBLIC SCHOOLS 106 (2009) ("There is an ethical component to one's duty both as a citizen and as a journalist, and learning about how to manage that would seem to be one of the most important lessons any student could learn. Thus, *Hazelwood* may not necessarily be as harmful for students as its critics claim.").

¹⁹ Shari Golub, *Tinker to Fraser to Hazelwood – Supreme Court's Double Play Combination Defeats High School Students' Rally for First Amendment Rights: Hazelwood School District v. Kuhlmeier*, 38 DEPAUL L. REV. 487, 513 (1989).

²⁰ Christopher Nielsen Forbis, *Recent Development, Constitutional Law – First Amendment – School Officials Entitled to Regulate Contents of School Sponsored Newspaper in Reasonable Manner*, 19 ST. MARY'S L.J. 1133, 1139 (1988). See also Helene Bryks, Comment, *A Lesson in School Censorship: Hazelwood v. Kuhlmeier*, 55 BROOK. L.

research, however, has systematically analyzed *how*, in fact, circuit courts have interpreted the standard in *Hazelwood's* wake.²¹ Does the standard have any limits? What sort of justification do courts require of school officials to defend their pedagogical concerns as legitimate and their restrictions as reasonable?

Nor have scholars combined the inquiries, analyzing both when *Hazelwood* applies and what constitutes a legitimate pedagogical concern. The questions, though, are intertwined. This article analyzes the nearly fifty circuit court opinions that have both applied *Hazelwood* and evaluated a school official's

REV. 291, 325 (1989) (referring to the "amorphous penumbra of 'legitimate pedagogical concern'"); Dvorak & Dilts, *supra* note 18, at 9 ("A journalism teacher in this post-*Hazelwood* era might well want to insist that censorship is wrong-headed pedagogy for journalism education in light of the traditional goals of journalism."); Joseph Oluwole, *The Genesis of Gangrenes in the Student Free Speech Taxonomy*, 13 UC DAVIS J. JUV. L. & POL'Y 299, 315 (2009) ("The *Kuhlmeier* test developed a very lenient standard for schools seeking to wield control over student speech."); Jeffrey Smith, Comment, *High School Newspapers and the Public Forum Doctrine: Hazelwood School District v. Kuhlmeier*, 74 VA. L. REV. 843, 861 (1988) (concluding "the Court's sweeping language has placed students at the mercy of school officials"); Merle Weiner, *Dirty Words in the Classroom: Teaching the Limits of the First Amendment*, 66 TENN. L. REV. 597, 623 (1999) (arguing "the *Hazelwood* test – that the prohibition on speech be 'reasonably related to legitimate pedagogical concerns' – is a very low level of scrutiny"); Jason Wiener, *The Right to Teach, the Right to Speak, and the Right to be a Valuable Contributor to a Child's Upbringing: Public School Teachers' First Amendment Right to Free Speech and Expression*, 32 W. ST. U. L. REV. 105, 118 (2004) (arguing "by deferring to schools to proffer legitimate pedagogical concerns, courts have created an almost irrefutable presumption of validity for school regulations of classroom conduct"); S. Elizabeth Wilborn, *Teaching the New Three Rs – Repression, Rights, and Respect: A Primer of Student Speech Activities*, 37 B.C. L. REV. 119, 137 (1995) (arguing "[the *Hazelwood* test] translates into essentially no judicial review of the school authorities' conduct"); Dinita James, Note, *The School as Publisher: Hazelwood School District v. Kuhlmeier*, 67 N.C. L. REV. 503, 515 (1989) (arguing that "under the Court's lax standard of legitimate pedagogical concerns, officials can invoke almost any pretext to censor student expression"). *But cf.* STUDENT PRESS LAW CENTER, LAW OF THE STUDENT PRESS 49 (2008) ("The [*Hazelwood* standard] continues to provide some First Amendment protection for students that school officials cannot ignore."); Janna Annet, Note & Comment, *Only the News That's Fit to Print: The Effect of Hazelwood on the First Amendment Viewpoint-neutrality Requirement in Public School-sponsored Forums*, 77 WASH. L. REV. 1227, 1257 (2002) (concluding "the Court's requirement that the school's actions be 'reasonably related to legitimate pedagogical concerns' imposes a limitation beyond mere reasonableness, for not all pedagogical concerns are in fact legitimate").

²¹ Individual cases have received scholarly attention, and scholars have also discussed court rulings in general terms. *See, e.g.*, Brownstein, *supra* note 17, at 784. But no research has systematically explored how the "legitimate pedagogical concerns" standard has been applied across a range of circuit decisions.

proffered purpose for censorship under its standard.²² The article demonstrates that circuit courts have broadly applied *Hazelwood* – both in terms of when it is applied and to whom – and expansively interpreted the “legitimate pedagogical concerns” standard, generally granting wide discretion to school officials. This makes *Hazelwood* doubly dangerous. Courts have broadened its application, and *when* a court rules that *Hazelwood* controls a case, almost always the First Amendment claimant is about to lose *because* the “legitimate pedagogical concerns” standard is applied so deferentially. *Hazelwood* has been stretched far from its factual moorings, and the “legitimate pedagogical concerns” standard is often interpreted so loosely that courts have rendered it effectively meaningless.

Part II of the article reviews the Court’s student speech jurisprudence, including particular focus on the *Hazelwood* holding. Part III analyzes the relevant circuit court opinions. Part IV argues that *Hazelwood* demands a narrower reach, and I then endorse an approach to the “legitimate pedagogical concerns” standard – consistent with a smattering of extant court rulings – that more closely scrutinizes schools’ restrictions while still respecting the deference to educators that the *Hazelwood* opinion so clearly showed. Such an approach reaffirms *Hazelwood’s* original structure, which both acknowledges that not all student speech is school-sponsored and that not all school actions are related to legitimate pedagogical concerns.

II. Student Speech and the First Amendment From *Tinker* to *Hazelwood*

It was not until its 1969 decision in *Tinker*²³ that the Court ruled definitively on the free speech rights of public school students. Hailed by one commentator as “the most important Supreme Court case in history protecting

²² The study focused on circuit court decisions because they set binding precedent for all other lower courts within a particular circuit’s jurisdiction. Cases were identified using LexisNexis’ “Shepard’s Citations” feature, which allows users to trace the history and subsequent treatment of Court decisions. Cases were then analyzed to determine if *Hazelwood* controlled the case and, if so, whether the court considered whether a school’s speech restriction amounted to a legitimate pedagogical concern. Shepardizing *Hazelwood* revealed that the Court’s ruling has been cited in more than 170 circuit cases. Roughly three-fourths of those cases, however, did not directly address the issues under consideration here.

²³ 393 U.S. 503 (1969). In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), the Court struck down a state law that required students to salute the American flag. As the Student Press Law Center has noted, “While the *Barnette* decision held that school officials could not force students to swear an oath of allegiance to the government, the Court in *Tinker* faced the more difficult question of whether school administrators could stifle a student’s own expression.” STUDENT PRESS LAW CENTER, *supra* note 20, at 24.

the constitutional rights of students,”²⁴ *Tinker* is rightly seen as a ringing victory for student speech freedom. Three students were suspended for wearing black armbands in school to protest the Vietnam War. The students sued, arguing the suspensions violated their First Amendment rights. In a 7-2 decision, the Court agreed and ruled the suspensions unconstitutional. “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” Justice Fortas famously declared for the Court.²⁵ Justice Fortas ruled the armbands the students wore were “closely akin to ‘pure speech’...entitled to comprehensive protection under the First Amendment.”²⁶ The Court acknowledged that students’ First Amendment protections were not absolute,²⁷ but it nevertheless embraced a standard that broadly accommodated student expression. School officials may not suppress student speech, the Court ruled, unless they can show that the speech would “materially and substantially disrupt the work and discipline of the school.”²⁸ In this case, the Court said, no disruption occurred and school officials had no reason to forecast that the armbands would interfere with the school’s operation.²⁹ School officials must be able to show that their actions are “caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint,” Justice Fortas wrote.³⁰ Because they did not, the suspensions were constitutionally impermissible.

Tinker has proven to be the high point for student speech protection in front of the Court. In its next student speech case, the 1986 case *Bethel School District v. Fraser*, the Court upheld the suspension of a high school student for delivering a “lewd”³¹ speech laced with “pervasive sexual innuendo”³² at a school assembly. The Court emphasized the “marked distinction between the political ‘message’ of the armbands in *Tinker* and the sexual content”³³ of Fraser’s speech and thus elected not to apply *Tinker*’s material and “substantial disruption” standard in the case. The Court instead stressed that students’ First Amendment rights “are not automatically coextensive with the rights of adults”³⁴ and ruled that the First Amendment permitted schools to bar the “use of vulgar and

²⁴ Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What’s Left of Tinker?* 48 DRAKE L. REV. 527 (2000).

²⁵ *Tinker*, 393 U.S. at 506.

²⁶ *Id.* at 505-06.

²⁷ “We properly read [the Constitution] to permit reasonable regulation of speech-connected activities in carefully restricted circumstances.” *Id.* at 513.

²⁸ *Id.*

²⁹ *Id.* at 509.

³⁰ *Id.*

³¹ 478 U.S. 675, 677 (1986).

³² *Id.* at 683.

³³ *Id.* at 680.

³⁴ *Id.* at 682.

offensive terms in public discourse.”³⁵ Chief Justice Burger thus concluded that “it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the ‘fundamental values’ of public school education.”³⁶

Two years later the Court proved *Fraser* was hardly a jurisprudential aberration and instead was an indication that the Court was increasingly willing to scale back *Tinker’s* protections.³⁷ Students enrolled in the Journalism II course at Hazelwood East High School produced *Spectrum*, a newspaper published every few weeks and distributed throughout the school and to community members.³⁸ The May 13, 1983, issue featured a two-page spread that included articles on a range of complicated issues facing teenagers: teenage marriage, runaways, teenage pregnancy, and students dealing with parents’ divorce.³⁹ Prior review was customary at the school, and so the newspaper’s adviser submitted page proofs to the principal, who objected to two of the articles. One of the articles described three students’ experiences with pregnancy.⁴⁰ The article used pseudonyms, but the principal still worried the pregnant students would be identifiable. In addition, he thought the article’s references to sexual activity and birth control “were inappropriate for some of the younger students at the school.”⁴¹ The principal also disapproved of the aforementioned article about divorce. He was particularly concerned about quotes from a student complaining that her father was frequently absent and “always argued about everything” with her mother.⁴² The principal believed the student’s parents should have been given an opportunity to respond or to consent to publication of the quotes.

Unhappy with those two articles, and believing there was not enough time to make the requisite changes, the principal instructed the adviser to remove the entire two-page spread from the newspaper.⁴³ The students did not find out about the deletion until they received the newspaper back from the printer.⁴⁴ When they did, they sued. The students lost in federal district court, which ruled that the principal’s actions had a “substantial and reasonable basis.”⁴⁵ But the

³⁵ *Id.* at 683. “The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.” *Id.*

³⁶ *Id.* at 685-86.

³⁷ See Peltz, *supra* note 18, at 491.

³⁸ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 263 (1988).

³⁹ *Id.* at 264 n.1.

⁴⁰ *Id.* at 263.

⁴¹ *Id.*

⁴² *Id.* at 263.

⁴³ *Id.* at 263-64.

⁴⁴ See Peltz, *supra* note 18, at 492.

⁴⁵ *Hazelwood*, 484 U.S. at 264 (quoting *Kuhlmeier v. Hazelwood Sch. Dist.*, 607 F. Supp. 1450, 1466 (E.D. Mo. 1985)).

Eighth Circuit reversed. Applying *Tinker*, the court ruled *Spectrum* was a public forum and that there was no evidence the principal could have forecast the articles would create a substantial disruption.⁴⁶ Thus, the censorship was unconstitutional.

The Supreme Court, however, reversed, holding that *Tinker* was inapplicable. The Court first began its analysis considering whether *Spectrum* was a forum for expression.⁴⁷ Finding the evidence the Eighth Circuit relied on to categorize the newspaper as a public forum to be “equivocal at best,”⁴⁸ the Court determined *Spectrum* was instead a nonpublic forum subject to reasonable regulation.⁴⁹ The Court found persuasive that the newspaper was part of the educational curriculum – the course was taught by a faculty member during school hours and students received grades and academic credit.⁵⁰ Moreover, the Court emphasized that the newspaper adviser had significant control over the newspaper’s content; the adviser, for instance, selected the editors, assigned story ideas, edited stories, and chose the letters to the editor.⁵¹ That degree of involvement, the Court thought, belied any argument that *Spectrum* was a forum open for student expression. By both policy and practice, Justice White wrote for the Court, the newspaper remained a nonpublic forum and therefore *Tinker* was inapposite.

The Court then unpacked the standard that *was* applicable to the case. Whether a school must tolerate individual student speech, the Court said, presents a different question from whether a school must affirmatively promote speech “that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”⁵² And the Court defined that latter category of speech broadly to encompass not just school-sponsored publications like *Spectrum* but also “theatrical productions and other expressive activities.”⁵³ Such speech activities, Justice White wrote, “may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.”⁵⁴ The Court reasoned that school officials are entitled “substantial deference”⁵⁵ to control such school-sponsored speech in order to ensure that

⁴⁶ *Id.* at 265 (citing *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368 (8th Cir. 1986)).

⁴⁷ *Id.* at 267.

⁴⁸ *Id.* at 269.

⁴⁹ “School officials did not evince either by policy or by practice any intent to open the pages of *Spectrum* to indiscriminate use by its student reporters and editors, or by the student body generally.” *Id.* at 270 (internal quotations and citation omitted).

⁵⁰ *Id.* at 268.

⁵¹ *Id.*

⁵² *Id.* at 271.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 273 n.7.

“participants learn whatever lessons the activity is design to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.”⁵⁶ Justice White then rattled off a series of descriptions – worth listing here – demonstrating the types of censorship this deference sanctioned. The Court held that a school:

- may disassociate itself from speech that is “ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.”⁵⁷
- must be able to take into account the emotional maturity of the audience in deciding whether to distribute student speech on “potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting.”⁵⁸
- has the authority to refuse to sponsor student speech “that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the shared values of a civilized social order.”⁵⁹
- has the authority to control school-sponsored speech that would “associate the school with any position other than neutrality on matters of political controversy.”⁶⁰

It is impossible to read Justice White’s list and not acknowledge the broad discretion the Court bestowed upon school officials. Yet the Court indicated that discretion was not absolute. Educators can constitutionally exercise control over school-sponsored speech, the Court held, “so long as their actions are reasonably related to legitimate pedagogical concerns.”⁶¹ When a decision to censor “has no valid educational purpose,” the Court ruled, school officials violate the First Amendment.⁶²

In *Hazelwood*, Justice White concluded the principal met the new standard. Given the small number of pregnant students at the school, and considering that one teacher testified that she could identify at least one of the pregnant students and possibly all three, the Court said the principal could reasonably have feared the students were recognizable and thus their anonymity and their boyfriends’ privacy would be violated.⁶³ The Court also said that the

⁵⁶ *Id.* at 271.

⁵⁷ *Id.*

⁵⁸ *Id.* at 272.

⁵⁹ *Id.* (internal quotations and citation omitted).

⁶⁰ *Id.*

⁶¹ *Id.* at 273.

⁶² *Id.*

⁶³ *Id.* at 274.

article's discussion of the students' sexual histories and nonuse of birth control was "frank talk" that the principal reasonably decided was "inappropriate in a school-sponsored publication distributed to 14-year-old freshmen and presumably taken home to be read by students' even younger brothers and sisters."⁶⁴ As for the article about divorce, the Court said the principal could reasonably have concluded that journalistic fairness obligated giving the father identified as inattentive a chance to respond.⁶⁵ And even though the Court acknowledged that the principal never verified whether the changes he sought could have been made before the publication deadline,⁶⁶ the Court nevertheless ruled that his decision to delete the entire two-page spread was also reasonable. The principal's actions were thus constitutional – and the Court had armed school officials with a broad new standard justifying censorship.

Justice Brennan's biting dissent lamented what he thought was the damaging civics lesson the majority taught students – that our youth should "discount important principles of our government as mere platitudes."⁶⁷ Importantly, he also disagreed with the majority and concluded that the principal's "brutal censorship" served *no* legitimate pedagogical purpose.⁶⁸ Instead, Justice Brennan argued, the Court had sanctioned "thought control"⁶⁹ and denuded students of much of their First Amendment rights.⁷⁰

Justices in *Hazelwood*, then, offered differing interpretations of the Court's new "legitimate pedagogical concerns" standard. The dissent thought the principal's explanations were insufficient and the censorship was unconstitutional. The majority, on the other hand, ruled the principal's pedagogical concerns were legitimate. Moreover, Justice White's opinion provided a list of additional concerns that would justify censorship.⁷¹ He never insisted that list was exhaustive, however, and his opinion offered no attempt at elucidating how a court would go about assessing whether a proffered pedagogical concern met the standard. Yet the Court plainly seemed to envision

⁶⁴ *Id.* at 274-75.

⁶⁵ *Id.* at 275.

⁶⁶ Indeed, the principal was "unaware" that the adviser had deleted the student's name from the final version of the article about divorce. *Id.* at 263.

⁶⁷ *Id.* at 291 (Brennan, J., dissenting) (internal quotations and citation omitted).

⁶⁸ *Id.* at 289 (Brennan, J., dissenting).

⁶⁹ *Id.* at 286 (Brennan, J., dissenting). *Cf.* Dvorak & Dilts, *supra* note 18, at 3 ("Certified journalism educators are taught to teach the importance and use of free expression in a democracy. Journalism education at its best is about teaching democratic values of citizen involvement, oversight, outspokenness, and dissent.").

⁷⁰ After *Hazelwood*, the Court did not decide another student speech case for nineteen years. Then in the 2007 case *Morse v. Frederick* the Court carved out another exception to *Tinker*, this time for speech that "can reasonably be regarded as encouraging illegal drug use." 551 U.S. 393, 397 (2007).

⁷¹ *Hazelwood*, 484 U.S. at 271-72.

such a role for the judiciary.⁷² When a decision to censor school-sponsored speech has “no valid educational purpose,” Justice White wrote, the First Amendment requires “judicial intervention” to protect students’ constitutional rights.⁷³ Although *Hazelwood* clearly grants educators “substantial deference,”⁷⁴ then, the opinion just as clearly requires educators to point to a pedagogical concern to justify censorship, which a court will then appraise.⁷⁵ Over more than two decades, circuit courts have validated a wide range of concerns.

III. *Hazelwood's Reach and Application in the Circuit Courts*

A close reading of the circuit court decisions that rely on *Hazelwood* quickly reveals how dramatically the ruling has been stretched and twisted. As Professor Emily Gold Waldman has noted, *Hazelwood* has been “invoked in a tremendous array of school speech cases.”⁷⁶ Surprisingly, however, *R.O.* is the only circuit court case that involves a situation factually parallel to *Hazelwood*: high school students challenging censorship of a school publication.⁷⁷ Instead,

⁷² See *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1300 (10th Cir. 2004) (“In *Hazelwood*, the Supreme Court was unambiguous in requiring school-sponsored speech restrictions to be justified by ‘legitimate’ pedagogical concerns.”). See also Brownstein, *supra* note 17, at 776 (“[I]t is hard to understand why anyone would think that a federal judge is the right person, or a federal court the appropriate forum, to determine what constitutes legitimate pedagogical purposes. But *Hazelwood* requires an answer and federal courts dutifully provide them.”).

⁷³ *Hazelwood*, 484 U.S. at 273.

⁷⁴ *Id.* at 273 n.7.

⁷⁵ See, e.g., *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1293 (10th Cir. 2004) (“We may override an educator’s judgment where the proffered goal or methodology was a sham pretext for an impermissible ulterior motive.”); *Boring v. Buncombe County Bd. Of Educ.*, 98 F.3d 1474, 1483 (4th Cir. 1996), vacated, 136 F.3d 364 (4th Cir. 1998) (en banc) (“The very fact that the Supreme Court in *Hazelwood* held that administrators do not offend the First Amendment in controlling curriculum so long as their actions are reasonably related to legitimate pedagogical concerns strongly indicates that the Court believed some curriculum choices would not meet these requirements.”) (internal quotations and citation omitted); *Poling v. Murphy*, 872 F.2d 757, 762 (6th Cir. 1989) (“The only real question, under *Hazelwood*, is whether the actions of the school officials were reasonably related to ‘legitimate pedagogical concerns’ – and the existence or nonexistence of such a relationship, we take it, is a question of law.”).

⁷⁶ Waldman, *supra* note 15, at 64.

⁷⁷ In *Planned Parenthood of Southern Nevada v. Clark County School District*, 941 F.2d 817, 819 (9th Cir. 1991), the Ninth Circuit claimed it decided a case that “raises the same concern addressed by the United States Supreme Court in *Hazelwood*.” There, however, an outside organization sought to publish its advertisements in school publications, and the school refused – a qualitatively different scenario from students protesting administrative censorship of articles written specifically for a school newspaper. In

Hazelwood has been applied to a range of other student speech broadly categorized as school-sponsored, to teachers' classroom speech, to textbook selection, and to outside entities seeking access to schools.⁷⁸ The cases are most easily categorized according to the identity of the plaintiff; the analysis that follows will thus begin first with student speech cases and then analyze cases in which *Hazelwood* has been applied to teachers, to a school board's textbook selection, and then to outside entities, respectively.⁷⁹

A. Students

1. Broadening *Hazelwood* and Deferring to Schools

Just one year after *Hazelwood*, the Sixth Circuit signaled just how deferentially and expansively the "legitimate pedagogical concerns" standard could be applied. In *Poling v. Murphy*, the Sixth Circuit upheld the punishment of a high school student for giving a campaign speech during a school assembly that included "discourteous" and "rude" remarks about administrators.⁸⁰ In a somewhat cursory discussion, the court ruled there was "no doubt" that the election and the assembly were school-sponsored and that *Hazelwood* provided the standard for review.⁸¹ The court noted that attendance at the assembly was mandated and that school officials determined the eligibility of prospective speakers and vetted the speeches in advance.⁸² Presumably the court was implying that the election and assembly thus bore the school's imprimatur, though the court never said so explicitly. Instead, the court said the only "real

Hosty v. Carter, 412 F.3d 731 (7th Cir. 2005), the Seventh Circuit faced a case concerning censorship of a college newspaper. The court there held that *Hazelwood's* framework "applies to subsidized student newspapers at colleges as well as elementary and secondary schools." *Id.* at 735. The court, however, ruled that the newspaper in question was likely a limited public forum, and the Seventh Circuit ultimately resolved the case by ruling that the school's administrator was entitled to qualified immunity.

⁷⁸ See also Waldman, *supra* note 15, at 64.

⁷⁹ Waldman similarly organized her discussion of *Hazelwood's* reach according to plaintiff status. Waldman, *supra* note 15, at 73-90. The focus here, though, is different from her article, which ultimately proposed a sliding-scale approach that considers the level of school sponsorship in determining whether *Hazelwood* sanctions viewpoint discrimination. *Id.* at 65-66.

⁸⁰ 872 F.2d 757, 758 (6th Cir. 1989). The student said, "The administration plays tricks with your mind and they hope you won't notice. For example, why does Mr. Davidson stutter while he is on the intercom? He doesn't have a speech impediment. If you want to break the iron grip of this school, vote for me for president." *Id.* at 759.

⁸¹ *Id.* at 762.

⁸² *Id.* Dean Poling ignored instructions a teacher gave him to change the content of his speech.

question” was whether the school officials’ actions were reasonably related to legitimate pedagogical concerns.⁸³

Judge Nelson, writing for the Sixth Circuit, said they were. Drawing on language from *Fraser* that affirmed that schools “must teach by example the shared values of a civilized social order,”⁸⁴ Judge Nelson ruled that “the universe of legitimate pedagogical concerns is by no means confined to the academic. . . . [It includes] discipline, courtesy, and respect for authority.”⁸⁵ Moreover, he wrote, “civility is a legitimate pedagogical concern, in our view.”⁸⁶ He indicated the case was a “tale without heroes and without villains” – the student in question, Judge Nelson said, appeared to be intelligent and imaginative, and the administrators appeared to be decent and well-meaning.⁸⁷ Nevertheless, in resolving a dispute between the two parties, the court said deference goes to the administrators. Local school officials should “be accorded wide latitude in choosing which pedagogical values to emphasize, and in choosing the means through which those values are to be promoted,” the court said.⁸⁸ Here, the Sixth Circuit ruled that teaching students the art of public speaking “without indulging in personalities and without unnecessarily hurting the feelings of others” had a valid place in school curriculum.⁸⁹ It was thus “legitimate,” Judge Nelson concluded, “for the school officials here to restrict speech considered insulting to the officials themselves.”⁹⁰ The Sixth Circuit’s reasoning in *Poling* thus appears to offer school officials in effect carte blanche deference, broadening pedagogical to emphasize behavioral and value-based concerns, highlighted by unavoidably vague terms such as “civility.”⁹¹

The Eighth Circuit offered a similarly broad reading in *Henerey v. City of St. Charles*.⁹² There, a high school student was disqualified from a student

⁸³ *Id.*

⁸⁴ *Id.* (quoting *Bethel School District v. Fraser*, 478 U.S. 675, 683 (1986)).

⁸⁵ *Id.* at 762.

⁸⁶ *Id.* at 758.

⁸⁷ *Id.* at 761.

⁸⁸ *Id.* at 762.

⁸⁹ *Id.* at 763.

⁹⁰ *Id.*

⁹¹ See Samuel Jordan, Comment, *Viewpoint Restrictions and School-sponsored Student Speech: Avenues for Heightened Protection*, 70 U. CHI. L. REV. 1555, 1569 (2003) (making this point). For other cases that embody *Poling*’s expansive definition, see also *Corder v. Lewis Palmer Sch. Dist.*, 566 F.3d 1219, 1229 (10th Cir. 2009) (“A graduation ceremony is an opportunity for the School District to impart lessons on discipline, courtesy, and respect for authority.”); *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1540 (7th Cir. 1996) (“[P]edagogical concerns’ include not only the structured transmission of a body of knowledge in an orderly environment, but also the inculcation of civility (including manners) and traditional moral, social, and political norms.”).

⁹² 200 F.3d 1128 (8th Cir. 1999).

council election after he distributed condoms attached to stickers bearing his campaign slogan, "The Safe Choice."⁹³ Each candidate was required to sign a contract agreeing he or she would obey all school rules, and all campaign flyers and posters needed administrative approval prior to distribution. Sophomore Adam Henerey nevertheless distributed the condoms without getting approval. Judge Wollman, writing for the Eighth Circuit, ruled that because the election was operated under the auspices of the school administration – "supervised by a school administrator" and designed to allow "candidates to learn leadership skills" and to expose the student body to the democratic process – "any member of the public could reasonably have concluded that campaign materials were distributed with the implied approval of the school,"⁹⁴ and the election thus amounted to a school-sponsored forum governed by *Hazelwood*. The court then had little difficulty approving the school's pedagogical concerns and upholding the punishment. The school rule requiring administrative approval furthers "several legitimate interests of public schools," Wollman wrote, including "preserving some trace of calm on school property,"⁹⁵ "maintaining decorum,"⁹⁶ and "promoting respect for authority and traditional values be they social, moral, or political."⁹⁷ The *Henerey* court approvingly quoted *Poling* and ruled that, along with civility, "compliance with school rules" constitutes a legitimate pedagogical concern.⁹⁸

The student complained that administrators applied the school rule inconsistently, given that other student candidates distributed candy and gum without approval and escaped discipline. The Eighth Circuit, however, focused on the sexual nature of the student's speech. Handing out condoms "can be read to signify approval or encouragement of teenage sexual activity," Wollman wrote.⁹⁹ And the school, he ruled, "has a legitimate interest in divorcing its extracurricular programs from controversial and sensitive topics, such as teenage sex."¹⁰⁰ In *Hazelwood*, the Court held that a school could permissibly account for the emotional maturity of the audience before distributing "particulars of teenage sexual activity."¹⁰¹ The Court also said school officials could refuse to sponsor

⁹³ *Id.* at 1131.

⁹⁴ *Id.* at 1133. "The election was supervised by a school administrator serving as the student council advisor, and it ran for a limited time period set by the school." *Id.*

⁹⁵ *Id.* at 1134-35 (internal quotations and citation omitted). *See also* Ala. Student Party v. Student Gov't Ass'n, 867 F.2d 1344, 1347 (11th Cir. 1989) (invoking *Hazelwood* in a decision upholding student election regulations at a university because the school sought "to minimize the disruptive effect of campus electioneering" and the school "should be entitled to place reasonable restrictions on this learning experience").

⁹⁶ *Henerey*, 200 F.3d at 1135.

⁹⁷ *Id.* (internal quotations and citation omitted).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1136.

¹⁰¹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988).

student speech that advocates “irresponsible sex.”¹⁰² But in *Henerey*, the Eighth Circuit held that teenage sex in and of itself “is a controversial topic in the public schools” and that the school thus had a legitimate interest in requiring prior notice before someone distributed materials of an “explicit sexual nature.”¹⁰³

Suppressing speech because it is controversial or offensive, in fact, is a common pedagogical concern that circuit courts have deemed legitimate. In *Crosby v. Holsinger*,¹⁰⁴ for instance, the Fourth Circuit upheld a school principal’s decision to eliminate the school mascot, “Johnny Reb,” after he received complaints that the mascot “offended black [students] and limited their participation in school activities.”¹⁰⁵ Without any discussion of whether a school’s mascot was somehow encompassed in a broad definition of curriculum, the Fourth Circuit ruled that the mascot bore the school’s imprimatur and that, under *Hazelwood*, school officials have the authority to “disassociate the school from controversial speech,”¹⁰⁶ and the removal was thus constitutional.

The offensiveness or divisiveness of speech has sanctioned regulation most frequently in cases involving student speech related to religion. Indeed, about sixty percent of the student speech cases under study here involved such speech – a stark reminder of the contentious, and litigious, place religion continues to play in public schools. Circuit courts in these cases have generally broadly interpreted what counts as school-sponsored speech and then have deferred to school officials’ proffered pedagogical concerns. Officials have commonly maintained they silenced the student speech in an attempt to avoid controversy or to limit divisiveness – and to prevent promotion of a religious message in general.

Two relatively recent cases serve as representative examples. In the 2008 case *Curry v. Hensiner*, the Sixth Circuit rejected the First Amendment claim of a fifth-grade student who wanted to “sell” candy canes bearing a religious message during a simulated marketplace at school.¹⁰⁷ Guidelines for the event stipulated that before a product could be approved for sale, students needed to conduct a market survey that asked other students to evaluate a prototype of their product. Joel, a fifth-grade student, elected to make and sell Christmas tree ornaments in the shape of candy canes. After the market survey was completed, he added a

¹⁰² *Id.*

¹⁰³ *Henerey*, 200 F.3d at 1136. See also *R.O. v. Ithaca City Sch. Dist.*, 645 F.3d 533, 542 (2nd Cir. 2011) (ruling that a cartoon depicting stick figures in various sexual positions could be barred from a student newspaper because the school believed publishing it would have undermined its efforts to stress to students “the seriousness of sexual relations”).

¹⁰⁴ 852 F.2d 801 (4th Cir. 1988).

¹⁰⁵ *Id.* at 802.

¹⁰⁶ *Id.* at 803.

¹⁰⁷ 513 F.3d 570, 573 (6th Cir. 2008).

card to the candy canes that explained how they could be viewed as a symbol of Christianity.¹⁰⁸ When the event began and school officials discovered Joel was “selling religious items,” they determined that the card was inappropriate and requested that he sell the candy canes without the message.¹⁰⁹

In ruling for the school, the Sixth Circuit first determined that *Hazelwood*, and not *Tinker*, was the controlling precedent. Although the student argued that *Hazelwood* applies only if an audience might mistake speech as *originating* from the school, the Sixth Circuit disagreed, responding that *Hazelwood* is applicable when the speech at issue “was made as part of school activities”¹¹⁰ – a statement seemingly broader than the *Hazelwood* ruling itself and a statement that sanctions an expansive reach for censorship. “As part of school activities,” after all, does not necessarily suggest or imply school sponsorship. When students converse in the cafeteria or when a student is called upon to articulate his or her personal opinions in class discussion, although that speech is “part of school activities,” it does not bear the “imprimatur of the school” in the way the Supreme Court concluded the newspaper did in *Hazelwood*.¹¹¹ As the Court said in *Board of Education v. Mergens*, “The proposition that schools do not endorse everything that they fail to censor is not complicated.”¹¹² Yet that is not how several circuit courts have interpreted *Hazelwood*, particularly when the speech at issue involves religion. Sometimes over vehement dissents, courts have applied *Hazelwood*, for instance, to sanction regulation of student assignments completed for class.¹¹³ Here in *Curry*, though,

¹⁰⁸ The card read, in part: “Hard candy: Reminds us that Jesus is like a ‘rock,’ strong and dependable. The color Red: Is for God’s love that sent Jesus to give his life for us on the cross.” *Id.*

¹⁰⁹ *Id.* at 575.

¹¹⁰ *Id.* at 577. In a footnote, the court phrased the language in a more narrow way, saying that for speech to bear the imprimatur of the school, the requirement is that “an observer would reasonably perceive that the school *approved* the speech” (emphasis added). *Id.* at 577 n.1.

¹¹¹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). The Court ruled in *Hazelwood*: “[W]e conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression.” *Id.* at 272-73.

¹¹² 496 U.S. 226, 250 (1990). Although *Mergens* was decided on Establishment Clause grounds, the rationale is *apropos* here.

¹¹³ Concerns surrounding the age of the students and how they – particularly younger students – might perceive sponsorship of the religious speech often are relevant in case discussions concerning *Hazelwood*’s applicability – although, as will be discussed below, courts are arguably too quick to defer to those concerns. For additional cases involving religious speech, see *Brody v. Spang*, 957 F.2d 1108, 1122 (3rd Cir. 1992) (writing, in case involving extent to which religious speech is permissible during graduation ceremony, that “even though commencement exercises are arguably not part of the educational curriculum, *Hazelwood* stands for the proposition that school officials are to be accorded

the court's "as part of school activities" phrase arguably stretched farther than the Sixth Circuit needed – or perhaps even meant. Judge Norris, writing for the court, said it was undisputed that Classroom City was part of the school's curriculum, and in a footnote he highlighted that products for sale were

broad discretion in regulating speech in all forums that are non-public" and holding that prohibiting religious speech in order to "avoid offending anyone" and to "prevent controversy" would be constitutional); *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89, 23 (3rd Cir. 2009) (applying *Hazelwood* to restrictions that forbade a kindergarten student from having his mother read a Biblical passage in class as part of his "All About Me" week in order to avoid "promotion of religious messages"); *C.H. v. Oliva*, 195 F.3d 167 (3rd Cir. 1999) (applying *Hazelwood* to restrictions forbidding an elementary school student from reading a Bible story to his class as a reward for special achievement and then later temporarily removing his Thanksgiving poster depicting Jesus from the school hallway); *DeNooyer v. Merinelli* 1993 U.S. App. LEXIS 30084, 2, 7 (6th Cir. 1993) (unpublished per curiam opinion) (applying *Hazelwood* to uphold a teacher's refusal to allow a second-grade student to show "a videotape of her singing a religious song in church" during "show and tell" because the activity was part of the curriculum and the videotape undermined the goal of increasing students' verbal communication skills through a "live classroom presentation"); *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530 (7th Cir. 1996) (ruling, in case initiated by a student seeking to distribute invitations to a religious meeting, that entire elementary school constituted a nonpublic forum and *Hazelwood* thus applied to restrictions regulating the distribution of literature); *Walz v. Egg Harbor Township Bd. of Educ.*, 342 F.3d 271, 279-80 (3rd Cir. 2003) (applying *Hazelwood* to restrictions forbidding an elementary school student from distributing candy canes bearing a religious message during classroom party under "school control" in order to "prevent proselytizing speech"). In *C.H.*, a panel of the Third Circuit said that, "given the sensitivity of the issues raised by student religious expression," the "pedagogical detriment" – such as parental resentment – "likely to flow from permitting what may be perceived as a reading of a Bible story in her classroom outweighs any pedagogical benefits," and barring the story was thus a measure related to legitimate pedagogical concerns, as was removing the poster for a "brief period for deliberation." 195 F.3d at 175. The full Third Circuit later vacated the panel opinion and instead decided the case on procedural grounds. *C.H. v. Oliva*, 226 F.3d 198, 203 (3rd Cir. 2000) (en banc) (holding "we decline to address the tendered constitutional issue"). Then-Judge Alito wrote a scathing dissent of the en banc dismissal, arguing that "reasonable students, parents, and members of the public would not have perceived [the student's] poster as bearing the imprimatur of the school or as an expression of the school's own viewpoint. Thus, it is abundantly clear that *Hazelwood* has no application here." *Id.* at 214 (Alito, J., dissenting). See also *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89, 47 (3rd Cir. 2009) (Hardiman, J., dissenting in part and concurring in part) (arguing that *Hazelwood* was inapposite to a case involving a kindergarten student who invited his mother to read a Biblical passage in class as part of his "All About Me" week because "there is no risk that Busch's speech would bear the imprimatur of the school").

“approved by the school, and this fact was known by students and parents.”¹¹⁴ The court thus concluded that *Hazelwood* provided the applicable precedent.

The district court had ruled that religious-themed candy canes met the ostensible goals of Classroom City, which were to teach economics, marketing, civics, and entrepreneurialism.¹¹⁵ The Sixth Circuit, though, held otherwise. Stressing again that legitimate pedagogical concerns are “by no means confined to the academic,”¹¹⁶ Judge Norris wrote, “The fact that student expression as part of a curricular activity meets the stated parameters of an assignment does not insulate it from school regulation.”¹¹⁷ The court determined that attaching the religious card was not simply a personal religious observance, akin to wearing a cross. Instead, “the expression was part of a curricular assignment, and not one that invited personal views – the assignment encouraged creative products, but it did not solicit viewpoints.”¹¹⁸ Nowhere did the guidelines specify that “personal views” were prohibited from the created products. The Sixth Circuit read in that restriction, ruling that the requirement to develop products for sale could not “seen as a solicitation of personal views on a subject.”¹¹⁹ And Joel’s admitted purpose, the court wrote, was to “promote Jesus to the other students.”¹²⁰

The court then drew attention to what it said was the deferential nature of *Hazelwood*’s standard. *Hazelwood* only demands that the educational purpose behind the restriction be valid, the court said; there is no requirement to weigh the gravity of the purpose.¹²¹ Here, the court said school officials decided that the card was inappropriate because it was religious and therefore might offend students and their parents.¹²² “The school’s desire to avoid having its curricular event offend other children or their parents, and to avoid subjecting young children to an unsolicited religious promotional message that might conflict with what they are taught at home qualifies as a valid educational purpose,” the court concluded.¹²³ And the restriction was thus constitutional.

¹¹⁴ 513 F.3d at 577 n.1.

¹¹⁵ *Id.* at 578 (citing *Curry v. Sch. Dist. of the City of Saginaw*, 452 F. Supp. 2d. 723 (E.D. Mich. 2006)).

¹¹⁶ *Id.* (quoting *Poling v. Murphy*, 872 F.2d 757, 762 (6th Cir. 1989)).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 579.

¹¹⁹ *Id.* The court continued, “Joel was in the fifth grade and the potential audience included much younger students...and the school had complete control over Classroom City, including a formal approval process for the products to be sold, which Joel evaded.” *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* The court noted that Joel’s partner for the assignment had told Joel that “[n]obody wants to hear about Jesus.” *Id.* at 575.

¹²³ *Id.* at 579.

The Eleventh Circuit reached a similar conclusion in *Bannon v. School District of Palm Beach County*.¹²⁴ While their school was undergoing long-term remodeling, school officials invited students to paint murals on plywood panels located inside the school. The school officials instructed students that their artwork “could not be profane or offensive to anyone”¹²⁵ – the school did not, however, specifically prohibit expression of religious views. On a Saturday afternoon, Sharah – a senior who was also a member of the Fellowship of Christian Athletes (FCA) – and other FCA students painted several murals that contained religious messages and symbols.¹²⁶ The following Monday, the murals undeniably caused some commotion: students and teachers gathered around the murals, the school received phone calls about them, and news reporters contacted the school. The school principal spoke with the teacher supervising the beautification project, who then informed Sharah that she needed to repaint the murals in order to remove the religious messages. The student complied but also filed suit.

In the Eleventh Circuit, Sharah argued that, given that the school did not require students to take part (and, in fact, students paid a small fee in order to participate), given that students did not receive a grade or credit for participating, and given that she painted the murals outside of school hours, the beautification project could not be considered a curricular activity and *Hazelwood* therefore was inapposite.¹²⁷ In a per curiam opinion, the Eleventh Circuit ruled otherwise. Though the court agreed that *Hazelwood* applies only to expression that bears the school's imprimatur *and* that occurs in a curricular activity,¹²⁸ it said the beautification project fit the test. First, the court ruled there was “no question” that Sharah's murals bore the imprimatur of the school.¹²⁹ Second, the court ruled that the project *was* a curricular activity. The court observed that the *Hazelwood* Court said that school-sponsored speech can be considered part of the curriculum, even if it occurs outside of the classroom setting, “so long as [it

¹²⁴ 387 F.3d 1208 (11th Cir. 2004).

¹²⁵ *Id.* at 1210.

¹²⁶ One of the panels, for instance, included a crucifix and the words, “Because He Loved, He Gave.” *Id.* at 1211.

¹²⁷ *Id.* at 1214.

¹²⁸ As has already been seen – and as will be discussed more below – courts have not consistently interpreted *Hazelwood* in such a way. As Brownstein has argued, “The issue of school sponsorship is sometimes merged with the second *Hazelwood* factor – whether the activity was part of the school curriculum or served curricular goals. Although there is some practical overlap between these two factors, in an important sense they are analytically distinct.” Brownstein, *supra* note 17, at 762.

¹²⁹ 387 F.3d at 1214. The Eleventh Circuit emphasized that the murals appeared in prominent locations in the school – including next to the school's main office – and that the school approved the beautification project, advertised it, supervised it, limited participation to those who paid a fee, and maintained some form of editorial control. *Id.*

is] supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.”¹³⁰ The beautification project was clearly supervised by faculty members, and the Eleventh Circuit then took a fairly deferential interpretation of the project's intent in order to claim that it met the second prong of the definition. Earlier in the opinion, the court indicated the project's purpose was to “beautify the school” by decorating the “ugly” plywood panels.¹³¹ In ruling that the project was curricular, though, the court said that it also imparted particular knowledge and skills: “It allowed student participants to express themselves artistically, allowed student audiences to appreciate their fellow students' artwork, and promoted school spirit, among other things.”¹³²

After ruling that barring the murals was a content-based restriction on the subject of religion, and did not unconstitutionally single out the students' religious perspectives,¹³³ the Eleventh Circuit then evaluated whether the restriction was reasonably related to legitimate pedagogical concerns, and the court devoted little space – just two sentences – deciding that it was. School officials had a legitimate pedagogical concern in “avoiding the religious controversy and debate” *Sharah's* murals generated and in “avoiding the disruption to the school's learning environment” the murals caused, the Eleventh Circuit ruled.¹³⁴ And because the prohibition of religious views “ended the disruption,”¹³⁵ the court said the restriction proved to be reasonably related to those pedagogical concerns.¹³⁶

¹³⁰ *Hazelwood*, 484 U.S. at 271.

¹³¹ 387 F.3d at 1210.

¹³² *Id.* at 1215.

¹³³ Another of *Hazelwood's* unanswered questions is whether it permits viewpoint discrimination. The Supreme Court has ruled that viewpoint discrimination is generally unconstitutional, even in the nonpublic forum context when government has significant control over speech. See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985). Nevertheless, two circuits have ruled that viewpoint-based regulation is permissible under *Hazelwood*. See *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918 (10th Cir. 2002); *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993). The Second, Ninth, and Eleventh Circuits, on the other hand, have held that *Hazelwood* requires viewpoint-neutrality. See *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208 (11th Cir. 2004); *Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d 617 (2nd Cir. 2005); *Planned Parenthood of Southern Nev. v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991).

¹³⁴ 387 F.3d at 1217.

¹³⁵ *Id.*

¹³⁶ See also *Corder v. Lewis Palmer Sch. Dist.*, 566 F.3d 1219 (10th Cir. 2009). In *Corder*, the Tenth Circuit upheld a school's decision to force a student to publicly apologize for veering off script and mentioning Jesus during her graduation speech. The principal had an unwritten rule requiring each valedictorian to submit his or her speech to him before graduation. *Corder* did so but then gave a different speech during the ceremony in which she encouraged students to “find out more about the sacrifice [Jesus] made for you so that you now have the opportunity to live in eternity with Him.” *Id.* at 1222. As punishment, the principal told *Corder* that she would not receive her diploma unless she

Circuit courts have also ruled that undermining or failing to meet the goal of an assignment amounts to a legitimate pedagogical concern.¹³⁷ And here again, a controversy surrounding student religious expression precipitated a representative case. In *Settle v. Dickson County School Board*,¹³⁸ the Sixth Circuit upheld a teacher's decision to reject a student's research paper on the life of Jesus and to give the student a zero for failing to write on another topic. The teacher, Dana Ramsey, allowed each student in her ninth-grade class to select his or her own paper topic, subject to approval, as long as the topic was "interesting, researchable and decent."¹³⁹ Student Brittney Settle initially signed up to write a paper on "drama," but she subsequently changed her mind and, without Ramsey's permission, submitted an outline for a paper titled "The Life of Jesus Christ."¹⁴⁰ Ramsey refused to accept the outline and told Settle she needed to select another topic, one that did not deal exclusively with Christianity or the life of Jesus. Settle declined and received a zero. Ramsey articulated several reasons for refusing the topic: (1) Settle failed to receive permission prior to handing in the outline. (2) She knew Settle was an ardent Christian and she worried that would make it difficult for her to write a dispassionate research paper; Ramsey also expressed concern that Settle might "take any criticisms of the paper too

explained publicly that her statement reflected her own beliefs and was made without the principal's prior approval. The Tenth Circuit held that, because the school named valedictory speakers based on its own qualifications and exercised control over valedictory speeches in advance of graduation, the ceremony was "clearly a school-sponsored event." *Id.* at 1229. The court then said a "graduation ceremony is an opportunity for the School District to impart lessons on discipline, courtesy, and respect for authority." *Id.* And, the court ruled, a school is entitled to review speeches "in an effort to preserve neutrality on matters of controversy within a school environment." *Id.* at 1230. Thus, the unwritten review policy was related to legitimate pedagogical concerns. As for the forced apology, the Tenth Circuit held that if the school could censor Corder's speech because it is school-sponsored, the school could also then "tell her what to say" when she disregarded the school's policy regarding that school-sponsored speech. *Id.* at 1231. The court said the forced apology was also related to legitimate pedagogical concerns: ensuring that "the views of the individual speaker are not erroneously attributed to the school," and the court said the compelled speech was "related to learning." *Id.* at 1232 (internal quotations and citation omitted).

¹³⁷ In addition to the cases discussed below, see also *DeNooyer v. Merinelli*, 1993 U.S. App. LEXIS 30084, 2, 7 (6th Cir. 1993) (unpublished per curiam opinion) (applying *Hazelwood* to uphold a teacher's refusal to allow a second-grade student to show "a videotape of her singing a religious song in church" during "show and tell" because the videotape undermined the goal of increasing students' verbal communication skills through a "live classroom presentation").

¹³⁸ 53 F.3d 152 (6th Cir. 1995).

¹³⁹ *Id.* at 153.

¹⁴⁰ *Id.* at 154.

personally.”¹⁴¹ (3) Ramsey said she “just knew that we don’t deal with personal religion – personal religious beliefs. It’s just not an appropriate thing to do in a public school.”¹⁴² (4) Ramsey said the purpose of the assignment was to have students research and write a paper on a topic with which they were unfamiliar. (5) At one point during her testimony in front of the school board, Ramsey said “the law says we are not to deal with religious issues in the classroom.”¹⁴³ And (6) Ramsey said the assignment required the use of four sources and “all of the sources [you] are going to find documenting the life of Jesus Christ derive from one source, the Bible.”¹⁴⁴

Writing for the Sixth Circuit, Judge Merritt observed that “few cases” address the conflict between a student’s First Amendment rights and a teacher’s responsibility “to encourage decorum and scholarship, including her authority to determine course content, the selection of books, the topic of papers, the grades of students and similar questions.”¹⁴⁵ The court then turned to *Hazelwood* for help. Judge Merritt recognized that *Hazelwood* involved a situation factually distinct from *Settle*,¹⁴⁶ but he nevertheless restated *Hazelwood*’s legitimate pedagogical concerns test and then ruled:

Where learning is the focus, as in the classroom, student speech may be even more circumscribed than in the school newspaper or other open forum. So long as the teacher limits speech or grades in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere.¹⁴⁷

Applying *Hazelwood* here at all demonstrates its expansion. As Judge Batchelder argued in her concurring opinion, “there is no way to make a colorable claim that this [research] paper is speech which might be viewed by the community as bearing the imprimatur of the school.”¹⁴⁸ Judge Batchelder thus criticized the panel for applying *Hazelwood*.¹⁴⁹ But the Sixth Circuit did, and

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 155.

¹⁴⁶ “The censorship in the *Hazelwood* case...involved a school newspaper, a kind of open forum for students.” *Id.* But the Supreme Court, of course, ruled in *Hazelwood* that *Spectrum* was not an open forum.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 158 (Batchelder, J., concurring in the result).

¹⁴⁹ Moreover, she criticized the panel for engaging in *any* First Amendment analysis: “The bottom line is that when a teacher makes an assignment, even if she does it poorly, the student has no constitutional right to do something other than that assignment and

then generously deferred to Ramsey's pedagogical concerns, some of which were erroneous (concerns that, Settle argued, Ramsey used to mask her hostility to Settle's religious beliefs). The court simply explained those suspect concerns away. Though admitting that Ramsey's claim that the law prohibits "deal[ing] with religious issues"¹⁵⁰ was a "mistake of law"¹⁵¹ and that her contention that there is just one source for a paper about Jesus "may also be mistaken,"¹⁵² the Sixth Circuit nevertheless ruled that there was no basis for finding "a real dispute of fact" about Ramsey's motives.¹⁵³ Judge Merritt wrote that each of Ramsey's stated reasons for rejecting the paper topic "fall within the broad leeway of teachers to determine the nature of the curriculum and the grades to be awarded to students, even the reasons that may be mistaken."¹⁵⁴

Failing to meet the goal of an assignment also was a pedagogical concern cited in a controversial Ninth Circuit case that applied *Hazelwood* to a graduate student's thesis.¹⁵⁵ There, the University of California at Santa Barbara refused to approve a student's thesis, and consequently withheld his master's degree,¹⁵⁶ when he inserted a "Disacknowledgements" section in his project without the knowledge or consent of his committee.¹⁵⁷ After the university discovered the section, the student's committee determined that it "did not meet the professional standards for publication in the field."¹⁵⁸

receive credit for it. It is not necessary to try to cram this situation into the framework of constitutional precedent, because there is no constitutional question." *Id.* (Batchelder, J., concurring in the result). Judge Batchelder argued that if the assignment had been to write a paper of opinion, then the student's First Amendment rights would have been violated. As it stands, though, she wrote, "The one thing which this record demonstrates clearly is that what Ms. Ramsey was guilty of was failing to provide this ninth-grade class with substantive guidelines for choosing their research paper topics." *Id.* at 157.

¹⁵⁰ *Id.* at 154 (majority opinion).

¹⁵¹ *Id.* at 156.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* He continued, "It is not for us to overrule the teacher's view that the student should learn to write research papers by beginning with a topic other than her own theology." *Id.*

¹⁵⁵ *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002). In a much-scrutinized footnote, the *Hazelwood* Court wrote, "We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 n.7 (1988).

¹⁵⁶ During the course of the student's challenge, the university eventually agreed to confer the degree but continued to refuse to add the thesis to the library's archive.

¹⁵⁷ The "Disacknowledgements" section began, "I would like to offer special *Fuck You's* to the following degenerates for of [sic] being an ever-present hindrance during my graduate career." *Brown*, 308 F.3d at 943.

¹⁵⁸ *Id.*

The Ninth Circuit's decision was fractured and set no binding precedent,¹⁵⁹ but Judge Graber's opinion in the case merits discussion. Although admitting that she "found no precedent precisely on point,"¹⁶⁰ she reasoned that the student's First Amendment rights were not violated because *Hazelwood* applied to curricular speech even at the college level. Without any explicit analysis of whether the thesis bore the school's imprimatur, Judge Graber found *Hazelwood* applicable because the thesis requirements amounted to control of "curricular speech."¹⁶¹ *Hazelwood* thus applied, and school officials needed to point to a legitimate pedagogical concern, which she found they did – teaching the student "the proper format for a scientific paper."¹⁶² Judge Reinhardt's biting dissent argued that relying on *Hazelwood* in a case involving a university, and especially a graduate student, was "wholly inappropriate,"¹⁶³ and he also criticized *Hazelwood* generally, saying the standard "is a deferential one that courts often use to justify highly questionable actions by high school educators that restrict controversial speech."¹⁶⁴

Finally, a circuit court has also ruled that prohibiting speech threatening violence amounts to a legitimate pedagogical concern. In *S.G. v. Sayreville Board of Education*, a kindergarten student, A.G., was suspended for three days for telling his friends "I'm going to shoot you"¹⁶⁵ while they were playing "cops and robbers" at recess. Three prior unrelated incidents involving threats of violence at the school had led the principal to impose a zero-tolerance policy that would result in "immediate disciplinary action" for any statements referring to

¹⁵⁹ Two judges ruled in favor of the school, but for dramatically different reasons. Judge Reinhardt wrote in dissent, "I emphasize that there is no agreement between my colleagues in the majority as to the legal standard applicable to Brown's First Amendment claims. Thus, there is no majority opinion and no binding precedent with respect to any First Amendment principles." *Id.* at 956-57 (Reinhardt, J., concurring in part and dissenting in part).

¹⁶⁰ *Id.* at 947 (majority opinion). She said that *Settle* "strongly resembles the present case." *Id.* at 948.

¹⁶¹ *Id.* at 951. And, she wrote, "the Supreme Court's jurisprudence does not hold that an institution's interest in mandating its curriculum and in limiting a student's speech to that which is germane to a particular *academic* assignment diminishes as students age." *Id.* (emphasis in original).

¹⁶² *Id.* at 952.

¹⁶³ *Id.* at 957 (Reinhardt, J., concurring in part and dissenting in part). He wrote, "I vehemently disagree with Judge Graber's conclusion that *Hazelwood* provides the appropriate First Amendment standard for college and graduate student speech." *Id.* at 960.

¹⁶⁴ *Id.* at 962. Judge Reinhardt also questioned whether the university's actions even met *Hazelwood's* standard: "The unusual severity of the actions taken by the university is sufficient in itself to raise a genuine issue of material fact as to whether its decisions to withhold Brown's degree for almost a year and to place him on academic probation during that time are 'reasonably related' to a legitimate pedagogical purpose." *Id.* at 965.

¹⁶⁵ 333 F.3d 417, 418 (3rd Cir. 2003).

violence or weapons.¹⁶⁶ When a student told her teacher that she heard A.G. utter the aforementioned statement, the teacher informed the principal, who then suspended the students.¹⁶⁷ In a poorly reasoned opinion, the Third Circuit upheld the suspensions, though it is unclear exactly under which precedent the court based its decision. The court said, curiously, that *Tinker* did not apply because the case did not “involve the regulation of expressive speech.”¹⁶⁸ The court also referenced other circuit court decisions that have questioned whether *Tinker* applies at all to elementary students,¹⁶⁹ but, without ruling on the issue definitively, the court held that “for our purposes, it is enough to recognize that a school’s authority to control student speech in an elementary school setting is undoubtedly greater than in a high school setting.”¹⁷⁰ Then, without any discussion of whether A.G.’s speech bore the school’s imprimatur or could be considered curricular, or without any explicit citation to *Hazelwood*, the Third Circuit concluded, “[W]e hold that the school’s prohibition of speech threatening violence and the use of firearms was a legitimate decision related to reasonable pedagogical concerns.”¹⁷¹

2. Questioning Schools’ Pedagogical Concerns for Censoring Student Speech

¹⁶⁶ *Id.* at 418.

¹⁶⁷ *Id.* at 419.

¹⁶⁸ *Id.* at 423.

¹⁶⁹ *See, e.g.*, *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1539 (7th Cir. 1996) (“[I]t is unlikely that *Tinker* and its progeny apply to public elementary (or preschool) students. But because the Supreme Court has not directly decided this question, the following analysis will assume that grade schoolers partake in certain of the speech rights set out in the *Tinker* line of cases.”). *But see* *Morgan v. Swanson*, 627 F.3d 170, 179 (5th Cir. 2010) (“It does not follow that, because the majority opinion in *Tinker* did not use the precise term ‘elementary school,’ the Court’s holding that ‘First Amendment rights...are available to teachers and students’ somehow specifically excludes elementary school students.”) (internal quotations and citation omitted). For scholarly discussion of the issue, *see, e.g.*, Jennifer Specht, *Younger Students, Different Rights? Examining the Standard for Student-Initiated Religious Free Speech in Elementary Schools*, 91 CORNELL L. REV. 1313 (2006).

¹⁷⁰ *S.G.*, 333 F.3d at 423.

¹⁷¹ *Id.* Perhaps the court did not intend to explicitly apply *Hazelwood* here. The totality of the court’s opinion indeed seemed to embrace a flexible balancing approach that looked to the Supreme Court’s decisions for guidance in ruling that, in the present case, the balance between the student’s rights and the school’s authority “tilts in favor of the school’s discretionary decision-making.” *Id.* at 422. Regardless, it seems clear the court saw prohibiting speech threatening violence and the use of firearms to be a legitimate pedagogical concern.

Although the above cases gave a great deal of deference to school officials, in two relatively recent cases involving student plaintiffs, circuit courts have suggested that a school's discretion under *Hazelwood* is not unbridled and that a school's motivations for speech restrictions thus should be inspected closely. In *Peck v. Baldwinville Central School District*,¹⁷² student religious speech again took center stage. In response to an assignment asking students to create a poster depicting ways to "save our environment,"¹⁷³ kindergarten student Antonio Peck reportedly told his mother – who helped him make the poster – that "the only way to save the world was through Jesus."¹⁷⁴ His poster thus featured a "robed, praying figure" depicting Jesus along with a church and cross and pictures of children holding hands and people recycling trash.¹⁷⁵ The poster was displayed, along with about eighty others, at a kindergarten environmental assembly for students and their parents – but, at the request of the principal, the robed figure and half of the church were folded under.¹⁷⁶ The student sued, and at the trial level, the court granted summary judgment to the school.

The Second Circuit vacated that decision and remanded the case. The court agreed with the district court that *Hazelwood* provided the applicable standard. Judge Calabresi, writing for the Second Circuit, ruled that because the poster was prepared in response to a class assignment – one with "highly specific parameters"¹⁷⁷ – and because the posters were displayed at a "school-sponsored assembly" to which kindergarten parents were invited, the case fell within "the core of *Hazelwood's* framework."¹⁷⁸ As one commentator has argued, however, given that the poster was clearly attributable to a particular student and was hung alongside dozens of other posters for a limited period of time, it is debatable whether the poster bore the school's imprimatur.¹⁷⁹ Nevertheless, the Second

¹⁷² 426 F.3d 617 (2nd Cir. 2005).

¹⁷³ *Id.* at 621.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 622. The description here is of the second poster Antonio made. After viewing his first poster – which included the Jesus figure, two children on a rock bearing the word "Savior," and the Ten Commandments – his teacher and principal informed him and his mother that because of "religious reasons" and because the poster did not demonstrate any learning of environmental lessons, Antonio needed to make another poster. *Id.* at 622. The principal told Antonio's mother that the new poster could include "a little bit of religious content and more showing the recycling, kids throwing trash." *Id.*

¹⁷⁶ *Id.* at 623. The principal had actually requested only that the Jesus figure be folded under, but a parent volunteer hanging the posters mistakenly concealed half of the church as well.

¹⁷⁷ *Id.* at 628. Those parameters were to "depict[] ways to save our environment" and to "reflect what had been taught in the kindergarten environmental unit." *Id.*

¹⁷⁸ *Id.* at 629.

¹⁷⁹ See Waldman, *supra* note 15, at 118. See also Josie Foehrenbach Brown, *Representative Tension: Student Religious Speech and the Public School's Institutional Mission*, 38 J.L. & EDUC. 1, 45 (2009) ("Seeing 79 posters that did not include pictures of

Circuit ruled that *Hazelwood* applied and that the school thus needed to point to legitimate pedagogical concerns justifying the restriction. The school offered three: that the portion of Antonio's poster depicting Jesus did not respond to the assignment; that the placement of that image was not the student's own work (and was, instead, his mother's); and that displaying the image risked creating the impression that the environmental unit included the teaching of religion.¹⁸⁰ The court did not question the legitimacy of those concerns but instead ruled that the district court overlooked evidence that, viewed in a light most favorable to the student, suggested his poster was censored not for those articulated reasons but because "it offered a religious perspective on the topic of how to save the environment,"¹⁸¹ which would thus constitute viewpoint discrimination.

Judge Calabresi recognized an ongoing split among the circuits regarding whether *Hazelwood* demands viewpoint neutrality, and he admitted the answer to the question is "anything but clear."¹⁸² The Second Circuit concluded, however, that "without clear direction from the Supreme Court," it would continue to require viewpoint neutrality – meaning "a manifestly viewpoint discriminatory restriction on school-sponsored speech is, prima facie, unconstitutional, *even if* reasonably related to legitimate pedagogical interests."¹⁸³ The court indicated that the ban on viewpoint discrimination could be overcome if the state's interests in a regulation were "compelling,"¹⁸⁴ and the court suggested that restrictions necessary to avoid an Establishment Clause violation might count.¹⁸⁵ That was a question for the district court to first ascertain, though, the court held. On the present record, the Second Circuit said "disputed factual questions"¹⁸⁶ existed about whether the student's poster would have been censored if it had depicted a secular image similarly outside the scope of the lessons learned in the environmental unit. "We think it is also possible,"

Jesus or other overtly religious content, the reasonable parent observer would surely conclude that the inclusion of the picture of Jesus reflected the personal perspective of the child who submitted the poster.").

¹⁸⁰ 426 F.3d at 629.

¹⁸¹ *Id.* at 630.

¹⁸² *Id.* at 632. Although the *Hazelwood* Court ruled the newspaper was a nonpublic forum – and the Court's precedents hold that viewpoint neutrality is required in those types of forums – the majority omitted any explicit discussion of viewpoint neutrality in *Hazelwood*, thus fueling a circuit split. See generally Waldman, *supra* note 15, at 90-94 (discussing the division among the circuits regarding whether *Hazelwood* sanctions viewpoint-based regulation).

¹⁸³ *Id.* at 633 (emphasis in original).

¹⁸⁴ *Id.*

¹⁸⁵ The Supreme Court has said "it is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 113 (2001).

¹⁸⁶ 426 F.3d at 631.

the court concluded, “to interpret the testimony of [the teacher and principal] as indicating that they were particularly disposed to censor Antonio’s poster because of its religious imagery.”¹⁸⁷ Pretext matters, then, the court held – even when schools offer otherwise legitimate pedagogical concerns.

Pretext also mattered for the Tenth Circuit in a 2004 decision, *Axson-Flynn v. Johnson*.¹⁸⁸ There, a Mormon student left the University of Utah’s Actor Training Program after faculty members told her to “get over” her refusal, based on religious reasons, to utter profanity or to take God’s name in vain during classroom acting exercises.¹⁸⁹ During her first end-of-semester review, faculty members told the student that her requests to omit offensive language were “unacceptable behavior” and that she instead should “talk to some other Mormon girls who are good Mormons, who don’t have a problem with this,”¹⁹⁰ advice the Tenth Circuit later found cast doubt on the faculty’s true intentions. The student withdrew from the program and later sued, arguing that the faculty’s insistence that she perform her lines as written violated her First Amendment right to refrain from speaking. The district granted summary judgment to the faculty, but the Tenth Circuit reversed.

The court first determined that the case involved school-sponsored speech governed by *Hazelwood*. The court said it was undisputed that the plays with the offending language were chosen specifically by the school and incorporated as part of its curriculum.¹⁹¹ Judge Ebel, writing for the circuit, held that “few activities bear a school’s imprimatur and involve pedagogical interests more significantly than speech that occurs within a classroom setting as part of a school’s curriculum.”¹⁹² Such speech thus falls under *Hazelwood*’s framework, the Tenth Circuit ruled, even in the university setting. The court did acknowledge the “differences in maturity”¹⁹³ between high school and university students, but it said those differences are accounted for when assessing whether the restrictions meet the legitimate pedagogical concerns test, not whether *Hazelwood* applies at all.¹⁹⁴

And so the court next considered whether the faculty’s actions met the test. Judge Ebel emphasized that “educators’ stated pedagogical concerns”

¹⁸⁷ *Id.*

¹⁸⁸ 356 F.3d 1277 (10th Cir. 2004).

¹⁸⁹ *Id.* at 1280.

¹⁹⁰ *Id.* at 1282.

¹⁹¹ *Id.* at 1286.

¹⁹² *Id.* at 1289 (internal quotations and citation omitted).

¹⁹³ *Id.*

¹⁹⁴ See also *Hosty v. Carter*, 412 F.3d 731, 734 (7th Cir. 2005) (“Only when courts need assess the reasonableness of the asserted pedagogical justification in non-public-forum situations does age come into play...To the extent that the justification for editorial control depends on the audience’s maturity, the difference between high school and university students may be important.”).

receive “substantial deference.”¹⁹⁵ He also stressed that student speech in the classroom context is necessarily restricted regularly, and permissibly, in a variety of ways.¹⁹⁶ In *Axson-Flynn*, the faculty justified the need to perform the plays as written as an essential tool to prepare students for acting careers. According to the faculty, requiring students to perform offensive scripts advanced the school’s pedagogical interest in teaching acting because it taught students how to step outside their own values and character, it taught students to preserve the integrity of the author’s work, and, moreover, being able to “convincingly ... portray an offensive part” measures true acting skills.¹⁹⁷ The Tenth Circuit said those reasons satisfy *Hazelwood’s* standard¹⁹⁸ – provided they genuinely motivated the school’s actions, and the court remained unconvinced that they did. Judge Ebel said the court had a “judicial duty”¹⁹⁹ to investigate whether the stated pedagogical concerns were pretextual. “We may override an educator’s judgment where the proffered goal or methodology was a sham pretext for an impermissible ulterior motive,” he wrote.²⁰⁰ And that may have been the case in *Axson-Flynn*, the court held. The Tenth Circuit ruled that summary judgment was improper because, viewed in a light most favorable to the student, evidence in the case “raises concern that hostility to her faith rather than a pedagogical interest in her growth as an actress” motivated the faculty.²⁰¹ Religious discrimination thus *does not* constitute a legitimate pedagogical concern, the court concluded.²⁰²

B. Teachers

Even though *Hazelwood* involved censorship of student speech, several circuit courts have also applied the holding to govern regulation of teachers’ classroom speech. Interestingly, the *Hazelwood* opinion in only one place includes language that would seem to even remotely sanction regulation of such speech. In discussing public forum doctrine’s applicability to the school context, Justice White wrote that if school facilities have been reserved for non-speech purposes, “then no public forum has been created, and school officials may

¹⁹⁵ 356 F.3d at 1291 (internal quotations and citation omitted).

¹⁹⁶ *Id.* (“That schools must be empowered to restrict the speech of their students for pedagogical purposes is not a controversial proposition.”). *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ “The school’s methodology may not be necessary to the achievement of its goals and it may not even be the most effective means of teaching, but it can still be ‘reasonably related’ to pedagogical concerns.” *Id.* at 1292.

¹⁹⁹ *Id.* at 1293.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² “In *Hazelwood*, the Supreme Court was unambiguous in requiring school-sponsored speech restrictions to be justified by ‘legitimate’ pedagogical concerns.” *Id.* at 1300.

impose reasonable restrictions on the speech of students, *teachers*, and other members of the school community.”²⁰³ In all other places, however, the Court consistently grounded its reasoning in *student* speech regulation. The Court, for instance, said its new “legitimate pedagogical concerns” standard applied to “*student* speech in school-sponsored expressive activities.”²⁰⁴ Commentators have thus argued that courts have erroneously applied *Hazelwood* to teacher speech²⁰⁵ and that instead *Pickering v. Board of Education*²⁰⁶ and its progeny,²⁰⁷ or a new standard altogether, should apply. Indeed, those circuits that have rejected *Hazelwood*'s applicability to teacher speech have instead relied on the Court's public employee line of cases – first asking whether the speech at issue involves the teacher speaking as a private citizen on a matter of public concern and then, if so, balancing that teacher's First Amendment interests against the school's interest in a functioning and efficient workplace.²⁰⁸

In contrast, those circuits that have found *Hazelwood* germane have held that teachers' speech bears the imprimatur of the school in ways analogous to school-sponsored student speech.²⁰⁹ And courts have also held that teachers' in-

²⁰³ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (emphasis added).

²⁰⁴ *Id.* at 273 (emphasis added).

²⁰⁵ See, e.g., Karen Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1 (2001); Waldman, *supra* note 15; Alexander Wohl, *Oiling the Schoolhouse Gate: After Forty Years of Tinkering with Teachers' First Amendment Rights, Time for a New Beginning*, 58 AM. U.L. REV. 1285 (2009).

²⁰⁶ 391 U.S. 563, 574 (1968) (holding that “a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment”).

²⁰⁷ See *Connick v. Myers*, 461 U.S. 138 (1983); *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

²⁰⁸ See, e.g., *Boring v. Buncombe County Bd. Of Educ.*, 136 F.3d 364 (4th Cir. 1998); *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036 (6th Cir. 2001); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989). The Court's 2006 decision in *Garcetti v. Ceballos*, in which the Court ruled that public employees' speech is unprotected when the speech is made “pursuant to their official duties,” has altered the analysis in some circuits, however. 547 U.S. 410, 421 (2006). In *Evans-Marshall v. Board of Education*, for instance, the Sixth Circuit held that, even though a teacher's speech satisfied *Pickering*'s balancing test, a school board could nonetheless still restrict the speech under *Garcetti*. 624 F.3d 332 (6th Cir. 2010). See Erica R. Salkin, *Caution in the Classroom: K-12 Teacher In-Class Speech, The Federal Courts and Garcetti*, 15 COMM. L. & POL'Y 175 (2010).

²⁰⁹ See *Bishop v. Aronov*, 926 F.2d 1066, 1074 (11th Cir. 1991) (“insofar as [*Hazelwood*] covers the extent to which an institution may limit in-school expressions which suggest the school's approval, we adopt the Court's reasoning as suitable to our ends”); *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 776 (10th Cir. 1991) (holding the court was “convinced that if students' expression in a school newspaper bears the imprimatur of the school, then a teacher's expression in the traditional classroom setting also bears the imprimatur of the school”) (internal quotations and citation omitted).

class speech is considered part of school curriculum²¹⁰ – and what counts as curriculum has been interpreted broadly. *Lee v. York County*²¹¹ offers one example. There, the Fourth Circuit, following extant circuit precedent, ruled *Pickering* controlled the case, but the court relied on *Hazelwood* to determine whether the speech at issue amounted to a matter of public concern. If the speech is curricular, the court said, then it does not – and the court said *Hazelwood* articulated the relevant definition of curriculum: speech must be “supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.”²¹² In *Lee*, a high school teacher argued that materials he posted on the bulletin boards in his classroom – materials that he said were unrelated to teaching Spanish, the subject of his class²¹³ – were not curricular, and the school’s principal thus unconstitutionally removed them.²¹⁴ The Fourth Circuit disagreed. “Whether classroom speech is designed to impart particular knowledge has a broader meaning than the name of a traditional course of study, or the designation of materials used to achieve specific curricular objectives,” the court held.²¹⁵ Here, the teacher had testified that, along with an obligation to teach Spanish, he also felt responsible for his students’ emotional and moral well-being, and so he posted the materials to his bulletin boards “to inform his students of certain positive figures and these figures’ social and moral values.”²¹⁶ That meant the materials were “designed to impart particular knowledge or skills,”²¹⁷ the Fourth Circuit concluded, and they were thus curricular.

In addition, lower courts applying *Hazelwood* to teachers’ speech have also broadly interpreted what counts as a legitimate pedagogical concern. *Boring v. Buncombe County Board of Education*,²¹⁸ for example, offered a definition so broad as to render the *Hazelwood* standard essentially useless. In the case, a school district transferred a high school drama teacher after she selected a controversial play for her advanced acting class to perform in a state

²¹⁰ See, e.g., *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993) (“[A] teacher’s statements in class during an instructional period are also part of a curriculum and a regular class activity. Like *Kuhlmeier*’s school newspaper, the classroom is not a public forum, and therefore is subject to reasonable speech regulation.”).

²¹¹ 484 F.3d 687 (4th Cir. 2007).

²¹² *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

²¹³ Among other items, the posted materials included “a 2001 National Day of Prayer poster, featuring George Washington kneeling in prayer,” and a newspaper article “detailing the missionary activities of a former Virginia high school student...who had been killed when her plane was shot down in South America.” 484 F.3d at 690.

²¹⁴ *Id.* at 697.

²¹⁵ *Id.* at 699.

²¹⁶ *Id.*

²¹⁷ 484 U.S. at 271.

²¹⁸ 136 F.3d 364 (4th Cir. 1998) (en banc).

competition.²¹⁹ The teacher sued. The district court dismissed the claim, but a Fourth Circuit panel reversed.

Judge Motz, writing for the panel, acknowledged that *Hazelwood* involved the free speech rights of students, but she reasoned that “the rationale that largely animated *Hazelwood*...appears to apply equally well in the context of a teacher’s play selection for a school-sponsored drama production.”²²⁰ The court then reinstated the teacher’s claim because the school district had yet to articulate a pedagogical concern for the transfer. And that concern matters, the court held. Judge Motz said that we should assume the *Hazelwood* Court meant what it said: that school officials’ actions do not offend the First Amendment “so long as their actions are reasonably related to legitimate pedagogical concerns.”²²¹ That language, the Fourth Circuit panel said, “strongly indicates that the Court believed some curriculum choices would *not* meet these requirements.”²²² In *Boring*, the court said legitimate pedagogical concerns might well have motivated the school district’s actions – but none of those concerns had been established on the record, and the district court thus erroneously dismissed the case.²²³

When the Fourth Circuit heard the case en banc, however, in a 7-6 decision the full court vacated the panel opinion and upheld the district court’s dismissal. Judge Widener, who had dissented from the panel decision, wrote the majority opinion for the en banc court, which held instead that *Pickering-Connick* applied and that the transfer was constitutional because “the makeup of the curriculum [should] be entrusted to the local school authorities who are in some sense responsible, rather than to the teachers.”²²⁴ The selection and

²¹⁹ The play, titled “Independence,” “powerfully depicts the dynamics within a dysfunctional, single-parent family – a divorced mother and three daughters; one a lesbian, another pregnant with an illegitimate child.” *Boring v. Buncombe County Bd. Of Educ.*, 98 F.3d 1474, 1476 (4th Cir. 1996), vacated, 136 F.3d 364 (4th Cir. 1998) (en banc).

²²⁰ *Id.* at 1482. Judge Motz continued: “Striking a balance between the school’s role as ultimate arbiter of the school curriculum and the teacher’s limited in-class speech rights obviously presents a challenge. We believe the approach set forth in *Hazelwood*, of requiring school authorities to provide a legitimate pedagogical basis for inclass [sic] speech restriction, provides the best means of navigating this challenge.” *Id.*

²²¹ *Hazelwood*, 484 U.S. at 273 (emphasis added).

²²² *Boring*, 98 F.3d at 1483 (emphasis in original).

²²³ *Id.* at 1479 (“Without any basis for determining the defendants’ intent in transferring *Boring*...the district court should not have dismissed the complaint on the theory that the asserted restriction necessarily related to legitimate pedagogical concerns.”).

²²⁴ *Boring v. Buncombe County Bd. Of Educ.*, 136 F.3d 364, 371 (4th Cir. 1998). For other cases that stress granting deference to school officials to make curricular choices, see also *Cal. Teachers Ass’n v. State Bd. of Educ.*, 271 F.3d 1141, 1154 (9th Cir. 2001) (assuming *arguendo* that *Hazelwood* applies to teachers’ challenge of a state law but ruling “in the context of curriculum presentation, it is the state’s pedagogical interests that take clear precedence over the teachers’ First Amendment interests”); *Kirkland v. Northside Indep.*

production of the play was a curricular decision, the court ruled, and the teacher's dispute with the principal and other school officials was "nothing more than an ordinary employment dispute"²²⁵ without First Amendment protection. Although the school, then, faced no obligation to point to a legitimate pedagogical concern for its decision, the court said – if *Hazelwood* were the applicable standard in the case – the school could.²²⁶ "The makeup of the curriculum...is by definition a legitimate pedagogical concern," the court held. "If the performance of a play under the auspices of a school and which is a part of the curriculum of the school, is not by definition a legitimate pedagogical concern, we do not know what could be."²²⁷

The Fourth Circuit's tautologous reasoning here, then, would seem to turn *all* curriculum decisions into legitimate pedagogical concerns. In this way, anything a school does that is considered curricular necessarily satisfies *Hazelwood's* standard, no matter the school's motivations or the manner in which it carries out its intent. The dissenting judges in *Boring* pointed out that this plainly misreads *Hazelwood*. If anything curricular by definition amounts to a legitimate pedagogical concern, why, then, would the *Hazelwood* Court have assessed the principal's actions so carefully? According to the Fourth Circuit's reasoning, the *Hazelwood* principal could have censored the publication in any way and for any reason he liked since *Spectrum* was part of the curriculum. As Judge Hamilton argued in his *Boring* dissent, though, "the Supreme Court established the *Hazelwood* standard and, in doing so, clearly envisioned some minimal intrusion into public school management insofar as school administrators would be required to articulate a legitimate pedagogical concern."²²⁸ Yet according to the Fourth Circuit, even that "minimal intrusion" is unnecessary because any curricular decision is necessarily constitutional.

Other circuit opinions involving teacher speech have not embodied the breadth of *Boring's* interpretation of legitimate pedagogical concerns, but courts have nonetheless consistently deferred to schools' proffered concerns – and teachers have uniformly lost their First Amendment claims under *Hazelwood*. One common legitimate pedagogical concern that courts have sanctioned is

Sch. Dist., 890 F.2d 794, 795 (5th Cir. 1989) ("Public schools have a legitimate pedagogical interest in shaping their own secondary school curricula and in demanding that their teachers adhere to official reading lists unless separate materials are approved."). As Waldman has noted, circuit courts have sent mixed signals about whether and how the First Amendment applies to curriculum decisions. See Waldman, *supra* note 15, at 75-79.

²²⁵ *Boring*, 136 F.3d at 369.

²²⁶ "While we are of opinion that plaintiff had no First Amendment right to insist on the makeup of the curriculum, even assuming that she did have, we are of opinion that the school administration did have such a legitimate pedagogical interest and that the holding of the district court was correct." *Id.* at 370.

²²⁷ *Id.*

²²⁸ *Id.* at 374 (Hamilton, J., dissenting).

punishing or silencing what might be termed “improper” language or speech, such as profanity or nudity. In *Lacks v. Ferguson Reorganized School District*, for instance, the Eighth Circuit upheld a teacher’s termination for allowing her students “to use profanity repetitiously and egregiously in their written work.”²²⁹ The teacher argued that her “student-centered” teaching method required her to allow students creative freedom, including the use of profanity.²³⁰ The school board, however, fired the teacher for willfully violating a policy that prevented classroom profanity in any context. Ruling in favor of the school board, the Eighth Circuit held that “a flat prohibition on profanity in the classroom is reasonably related to the legitimate pedagogical concern of promoting generally acceptable social standards.”²³¹ In its opinion firing the teacher, the school board had said that its disciplinary policies serve “to establish, to foster, and to reflect the norms and standards of the community.”²³² And the Eighth Circuit concluded that allowing students to use profane language “hardly promotes these shared social standards.”²³³ Circuit courts have also ruled that “keeping scatological documents away from impressionable youngsters” amounts to a legitimate pedagogical concern.²³⁴ So does “restricting the display of photographs of bare-chested women”²³⁵ and “investigating potentially inappropriate discussion of material that could be construed as being of a sexual nature.”²³⁶

In *Miles v. Denver Public Schools*, the Tenth Circuit relied on *Hazelwood* to uphold the disciplining of a teacher who told his ninth-grade class, “I don’t think in 1967 you would have seen two students making out on the tennis court.”²³⁷ The comment referred to a rumor swirling around school that two students had been seen having sex on the tennis court during lunch hour the day before. The parents of the alleged participants complained to the principal, who decided to put the teacher on paid administrative leave for four days and place a

²²⁹ 147 F.3d 718, 719 (8th Cir. 1998).

²³⁰ *Id.* at 722.

²³¹ *Id.* at 724. The court also found that the teacher had adequate notice of the profanity policy. *See also* Ward v. Hickey, 996 F.2d 448, 453 (1st Cir. 1993) (“[T]his circuit has long recognized a teacher’s right to notice of what classroom conduct is prohibited.”).

²³² 147 F.3d at 724.

²³³ *Id.* *See also* Vega v. Miller, 273 F.3d 460, 468 (2nd Cir. 2001) (ruling that students’ shouting of vulgarities during clustering exercise in college course was “unnecessary” and that school officials were thus entitled to qualified immunity for disciplining instructor).

²³⁴ Conward v. Cambridge Sch. Comm., 171 F.3d 12, 17 (1st Cir. 1999) (upholding teacher’s discharge for handing a female student a document containing lewd questions).

²³⁵ Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 723 (2nd Cir. 1994) (upholding punishment for showing film clip of bare-chested women “entirely unnecessary to the subject matter” of the lecture).

²³⁶ Panse v. Eastwood, 303 Fed. Appx. 933, 935 (2nd Cir. 2008) (unpublished opinion).

²³⁷ 944 F.2d 773, 774 (10th Cir. 1991).

letter of reprimand in his file.²³⁸ The teacher sued. The Tenth Circuit ruled that *Hazelwood* provided the applicable standard: “A school’s interests in regulating classroom speech...are implicated regardless of whether that speech comes from a teacher or student,” the court held.²³⁹ The school then offered three pedagogical concerns supporting its decision to discipline the teacher, which the court said “clearly”²⁴⁰ were legitimate: preventing the teacher from “using his position of authority to confirm an unsubstantiated rumor,”²⁴¹ ensuring that teachers “exhibit professionalism and sound judgment,”²⁴² and providing an educational atmosphere “where teachers do not make statements about students that embarrass those students among their peers.”²⁴³ Moreover, the court said the administrative leave was reasonably related to those concerns because it was “directly tied to the interest of avoiding the appearance that the comment was sponsored by the school or in any way reflected the views of the school administration.”²⁴⁴

One year before *Miles*, the Tenth Circuit had ruled that discouraging teachers from reading their own material during class time set aside for student reading so that teachers can be “actively involved in teaching children” also constitutes a legitimate pedagogical concern.²⁴⁵ In the case, a fifth-grade teacher read his Bible, which he kept on his desk throughout the day, during “silent reading period.”²⁴⁶ The teacher also displayed a poster in his classroom that referred to seeing “the hand of God” and included two Christian books in his in-class library.²⁴⁷ The principal ordered the teacher to remove the poster and books and to keep the Bible off his desk during school hours. The teacher sued.

In a curiously reasoned opinion, the Tenth Circuit first suggested that *Tinker* applied to teachers’ classroom speech. The court then ruled, however, that if the speech at issue “endorses a particular religion” and bears the imprimatur of the school – which the teacher’s speech did in this instance – “the activity infringes on the rights of others and must be prohibited” as an Establishment Clause violation.²⁴⁸ In a footnote, though, the court observed that

²³⁸ *Id.* at 775.

²³⁹ *Id.* at 777. The court also wrote, “We are convinced that if students’ expression in a school newspaper bears the imprimatur of the school, then a teacher’s expression in the traditional classroom setting also bears the imprimatur of the school.” *Id.* at 776 (internal quotations and citation omitted).

²⁴⁰ *Id.* at 778.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Roberts v. Madigan*, 921 F.2d 1047, 1057 n.11 (10th Cir. 1990).

²⁴⁶ *Id.* at 1049.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 1057.

evidence in the record also suggested the principal did not want teachers “reading anything during class” so that they could be “actively involved” teaching.²⁴⁹ To the extent *that* motivated the principal to prohibit the Bible reading, the court, citing *Hazelwood*, said the principal’s decision was reasonably related to legitimate pedagogical concerns.

In *Bishop v. Aronov*,²⁵⁰ the Eleventh Circuit also faced a case that resulted from controversy involving a teacher’s religious references in the classroom, though this time at the university level. A University of Alabama professor referred to his religious beliefs during class time, telling students, *inter alia*, “I personally believe God came to earth in the form of Jesus Christ and he has something to tell us about life which is crucial to success and happiness....You need to recognize as my students that this is my bias and it colors everything I say and do.”²⁵¹ The professor also organized a voluntary after-class meeting, which five of his students attended, wherein he discussed “evidences of God in human physiology.”²⁵² Some of the professor’s students complained to his supervisor, who met with a dean and university counsel before preparing a memorandum that ordered the professor to “discontinue” referencing his religious beliefs in class and in after-class meetings.²⁵³ The professor sued and won in federal district court, but the Eleventh Circuit reversed.

The court said that because no precedent was precisely on point, it strived to apply a “balancing approach” that weighed teacher autonomy against the university’s interests.²⁵⁴ And that balance, the court said, “takes as its polestar *Kuhlmeier*’s concern for the basic educational mission of the school,” which gives schools authority to reasonably regulate in-class speech.²⁵⁵ The court acknowledged that *Hazelwood* involved high school students, but it ruled that insofar as the decision governs in-school expressions that suggest the school’s approval, “we adopt the Court’s reasoning as suitable to our ends, even at the university level.”²⁵⁶ The court then said it was cognizant of the “coercive effect

²⁴⁹ *Id.* at 1057 n.11.

²⁵⁰ 926 F.2d 1066 (11th Cir. 1991).

²⁵¹ *Id.* at 1068. He continued: “If that is not your bias, that is fine. You need, however, to filter everything I say with that (Christian bias) filter.” *Id.*

²⁵² *Id.* at 1069.

²⁵³ *Id.*

²⁵⁴ *Id.* at 1072 n.5.

²⁵⁵ *Id.* at 1074 (internal quotations and citation omitted).

²⁵⁶ *Id.* See also *Vanderhurst v. Colo. Mountain Coll. Dist.*, 208 F.3d 908 (10th Cir. 2000). In *Vanderhurst*, the Tenth Circuit assumed *arguendo* that *Hazelwood* applied to a college professor’s in-class speech. In the case, a trial court had ruled in favor of a professor who had been fired on the basis of allegedly inappropriate classroom conduct and comments. At trial, the judge had left it to the jury to decide whether the school’s actions were reasonably related to legitimate pedagogical concerns. The college subsequently argued that determination should have been a matter of law, but the Tenth Circuit held the college had inadequately raised that challenge. The court wrote, “The

upon students that a professor's speech inherently possesses and that the University may wish to avoid."²⁵⁷ The university's primary concern, the court ruled, was thus that its courses be taught "without personal religious bias unnecessarily infecting the teacher or the students."²⁵⁸ Given that concern, the court upheld the restrictions on the teacher as reasonable. "Even the appearance of proselytizing by a professor should be a real concern to the University," the court concluded.²⁵⁹

Finally, in 2005 the Ninth Circuit invoked *Hazelwood* in a case involving a college instructor who was fired after she ignored a directive and organized a de facto class field trip to World Trade Organization protests in Seattle.²⁶⁰ The court applied *Pickering* to what it labeled a hybrid claim involving both speech and associational rights. In conducting *Pickering's* balancing test, though, the court looked to *Hazelwood* for support. The college "has a strong and recognized interest in maintaining its political neutrality as an educational institution," the court wrote, citing *Hazelwood*.²⁶¹ Without ruling definitively whether a college has the same leeway to preserve that neutrality as a high school, the court said it was drawing from *Hazelwood* "the principle that educational institutions have a strong pedagogical interest in avoiding institutional association with potentially divisive political issues."²⁶²

C. Textbook Selections by School Boards

Soon after *Hazelwood*, one circuit also ruled that the holding applies to school board decisions pertaining to textbook selections – although, it should be noted, a 2005 Fifth Circuit decision reached a contrary position and held instead that *Hazelwood* was inapposite because textbook selection is properly

College had ample opportunity to make the court aware of its opposition to submitting this question to the jury. Nevertheless, in its motion for summary judgment, in its initial Rule 50 motion, in the trial brief, during the jury instruction conference, and in its renewed motion, it failed to do so." *Id.* at 917. The Tenth Circuit in *Vanderhurst* thus did not evaluate whether the college's proffered pedagogical concerns were legitimate.

²⁵⁷ 926 F.2d at 1074.

²⁵⁸ *Id.* at 1076.

²⁵⁹ *Id.* at 1077. See also *Webster v. New Lenox Sch. Dist.*, 917 F.2d 1004, 1008 (7th Cir. 1990) ("Given the school board's important pedagogical interest in establishing the curriculum and legitimate concern with possible establishment clause violations, the school board's prohibition on the teaching of creation science to junior high students was appropriate.").

²⁶⁰ *Hudson v. Craven*, 403 F.3d 691 (9th Cir. 2005).

²⁶¹ *Id.* at 700.

²⁶² *Id.* at 701.

categorized as government speech.²⁶³ In the 1989 case *Virgil v. School Board*,²⁶⁴ the Eleventh Circuit applied *Hazelwood* to uphold a school board's decision to remove a textbook from the curriculum. Parents complained about the sexual explicitness of two selections – Aristophanes' *Lysistrata* and Chaucer's *The Miller's Tale* – included in a previously approved textbook used in an elective high school course; the selections were optional reading, neither required nor assigned.²⁶⁵ The school board subsequently voted to remove the book from the course. Students' parents then sued, claiming the removal violated the First Amendment.

The Eleventh Circuit said that *Hazelwood* provided the “most direct guidance” for the case, establishing a “relatively lenient test” for regulating expression that “may fairly be characterized as part of the school curriculum.”²⁶⁶ The court ruled that removing the textbook was a curricular decision, and it also emphasized that courses designed and offered by a school are perceived to bear the school's imprimatur.²⁶⁷ The court then next turned to evaluate the school's proffered concerns. The case record stipulated that the board removed the textbook because of the “explicit sexuality and excessively vulgar language in the selections.”²⁶⁸ The court said it was “clear” from *Hazelwood* that was a legitimate pedagogical concern.²⁶⁹ And, showing deference to schools, the court concluded the removal was reasonably related to that concern. Even though *Lysistrata* and *The Miller's Tale* were “literary classics,”²⁷⁰ the court said it could not hold that the board's actions “were not reasonably related to its legitimate concerns regarding the appropriateness (for this high school audience) of the sexuality and vulgarity in these works.”²⁷¹ The court noted that the works *do* contain passages with sexual explicitness, and the court also observed that the works were not banned from the school entirely (they were available in the school library, for instance). The court emphasized, however, that it did not endorse the board's decision and, in fact, it “seriously question[ed] how young persons just below the age of majority can be harmed by these masterpieces of Western literature.”²⁷² Nevertheless, the court said the board's action was constitutional.

²⁶³ When a school board devises the curriculum and selects the textbook with which teachers will teach, “it is the state speaking,” the court said in *Chiras v. Miller*, 432 F.3d 606, 614 (5th Cir. 2005).

²⁶⁴ 862 F.2d 1517 (11th Cir. 1989).

²⁶⁵ *Id.* at 1518-19.

²⁶⁶ *Id.* at 1521 (internal quotations and citation omitted).

²⁶⁷ *Id.* at 1522.

²⁶⁸ *Id.* at 1523.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.* at 1525.

D. Outside Entities²⁷³

1. Hazelwood Restricts Outside Entities' Speech

Circuit courts have also ruled that *Hazelwood* applies to regulations affecting speakers in school-sponsored activities who are not students or teachers or school board members, such as parents or advertisers. The most recent of these cases – *Fleming v. Jefferson County School District*²⁷⁴ – involved a tile painting project at Columbine High School. In an effort to “retake”²⁷⁵ the school following the 1999 shooting there that killed twelve students and one teacher, the school invited students, family members of the victims, and community members who responded to the shooting to paint tiles that would be installed throughout school hallways. The school, however, placed guidelines on the tiles: It forbade references to the date of the shooting, religious symbols, and anything offensive or obscene.²⁷⁶ When the school rejected tiles that included, *inter alia*, phrases such as “Jesus Christ is Lord” and “4/20/99 Jesus Wept,”²⁷⁷ the school was sued.

The Tenth Circuit applied *Hazelwood* and ruled in the school's favor.²⁷⁸ In *Bannon*, remember, the Eleventh Circuit held that *Hazelwood* controls expression that bears the imprimatur of the school *and* that occurs in a curricular activity.²⁷⁹ In *Fleming*, however, the Tenth Circuit in effect ruled that school-sponsored speech under *Hazelwood* does not need to be curricular in any strict sense – perhaps because arguing that the tile project *was* curricular would have

²⁷³ The phrase is borrowed from Waldman, *supra* note 15, at 87. The Tenth Circuit used the phrase in *Fleming v. Jefferson County School District*, 298 F.3d 918, 931 (10th Cir. 2002), as did the Ninth Circuit in *Planned Parenthood of Southern Nevada, Inc. v. Clark County School District*, 941 F.2d 817, 825 (9th Cir. 1991).

²⁷⁴ 298 F.3d 918 (10th Cir. 2002).

²⁷⁵ *Fleming*, 298 F.3d at 921.

²⁷⁶ *Id.* at 922.

²⁷⁷ *Id.* at 921.

²⁷⁸ The *Fleming* opinion has garnered particular attention in the debate surrounding the presence, or absence, of a viewpoint-neutrality requirement in *Hazelwood*. In a substantive discussion, the Tenth Circuit summarized the circuit split on the issue and then concluded that *Hazelwood* allows viewpoint discrimination. The *Hazelwood* Court's “specific reasons supporting greater control over school-sponsored speech,” the Tenth Circuit held, “often will turn on viewpoint-based judgments.” *Id.* at 928. For extended discussion of *Hazelwood* and viewpoint neutrality, see, e.g., Brownstein, *supra* note 17, at 778-83; Susannah Barton Tobin, *Divining Hazelwood: The Need for a Viewpoint Neutrality Requirement in School Speech Cases*, 39 HARV. C.R.-C.L. L. REV. 217 (2004); Waldman, *supra* note 15; R. George Wright, *School-Sponsored Speech and the Surprising Case for Viewpoint-Based Regulations*, 31 S. ILL. U. L.J. 175 (2007); Annett, *supra* note 20.

²⁷⁹ See *supra* notes 128-32 and accompanying text.

proved fruitless.²⁸⁰ Instead, to be school-sponsored, speech should bear the school's imprimatur and "involve pedagogical concerns," the Tenth Circuit held.²⁸¹ The court continued, "We think that the Court's language that activities are school-sponsored speech if they are designed to impart particular knowledge or skills to student participants and audiences means activities that affect learning, or in other words, affect pedagogical concerns."²⁸² According to the Tenth Circuit, then, speech is school-sponsored if it involves "pedagogical concerns," and restrictions on that speech are permissible so long as they are "reasonably related to legitimate pedagogical concerns,"²⁸³ a tautology similar to the Fourth Circuit's logic in *Boring*. It is hard to imagine that a court would rule as a threshold matter that speech involves pedagogical concerns and that *Hazelwood* thus applies, only to subsequently rule that regulations related to those concerns are illegitimate under *Hazelwood*'s standard.

The *Fleming* court, of course, is right that the Court in *Hazelwood* "recognized the school's pedagogical interests,"²⁸⁴ but the Court evaluated those interests *after* it had first ruled that *Spectrum* was a "supervised learning experience" part of the educational curriculum.²⁸⁵ The Court certainly never said that *Spectrum* was school-sponsored simply because pedagogical concerns motivated the principal's censorship.²⁸⁶ Nevertheless, the Tenth Circuit applied that analysis to rule that *Hazelwood* governed the tile project at issue in the case. First, the court said that because the school "permanently integrated the tiles into the school environment" and was involved "in the creation, funding, supervision, and screening process of the tile project,"²⁸⁷ the tiles bore the school's imprimatur. The court then ruled that the overriding goal of the project – allowing participants to take part reconstructing the school – "falls under the broad umbrella"²⁸⁸ of permissible pedagogical interests.²⁸⁹ Even the environment in which learning takes place can be a pedagogical concern, the

²⁸⁰ See Brownstein, *supra* note 17, at 769 (arguing that "[n]o one could argue that these tile projects were part of the school's educational curriculum").

²⁸¹ 298 F.3d at 924.

²⁸² *Id.* at 925 (internal quotations and citation omitted).

²⁸³ *Id.* at 924.

²⁸⁴ *Id.* at 925.

²⁸⁵ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988).

²⁸⁶ The *Fleming* court also engaged in revisionist history when it reviewed the *Hazelwood* principal's pedagogical concerns. The Tenth Circuit wrote that the concern in *Hazelwood* "was to avoid the controversial subjects of pregnancy and divorce in a school setting because of the potentially disruptive nature of such subjects upon young students." *Fleming*, 298 F.3d at 926. But the Court in *Hazelwood* held that the principal acted reasonably, in part, because he was concerned with privacy invasion and journalistic fairness.

²⁸⁷ *Id.* at 931.

²⁸⁸ *Id.*

²⁸⁹ The court appeared to use the terms "interests" and "concerns" interchangeably.

court said, because it “affects the learning process.”²⁹⁰ And the court ruled that inviting community involvement does not make the project’s goal “less of a pedagogical one.”²⁹¹ As long as a pedagogical purpose is present the speech remains school-sponsored, the court held, even if outside participants contribute to that speech. *Fleming* thus stretches *Hazelwood*’s reach, seemingly extending the ruling to *any* speech that bears the school’s imprimatur in an educational context as long as officials claim the speech involves pedagogical concerns.²⁹²

The court then held that the guidelines were reasonably related to the school’s concerns. The school had two main pedagogical concerns in mind when it created the guidelines, the court said: wanting to “ensure that the interior of the building remained a positive learning environment and not become a memorial to the tragedy” and wanting to “avoid divisiveness and disruption from unrestrained religious debate on the walls.”²⁹³ The plaintiffs noted that school officials had already placed other references to the shooting in the school, such as a display case near the library and a memorial near the baseball field. But the court said that those materials represented government speech –the school’s own speech. It was not unreasonable, then, for the school to allow its own “tasteful and appropriate memorials” but then forbid shooting references in the tile project because it did not want to allow “unconstrained, controversial student debate about the shooting throughout the hallways,” the court said.²⁹⁴ And without much elaboration, the court also concluded that the school’s ban on religious symbols was reasonably related to its goal of preventing “disruptive religious debate.”²⁹⁵ Thus, the guidelines were constitutional.

In *Planned Parenthood of Southern Nevada, Inc. v. Clark County School District*,²⁹⁶ the Ninth Circuit also ruled that *Hazelwood* applied to a case involving an outside entity. There, Planned Parenthood sued after a school district declined to publish its advertisements in student newspapers, yearbooks, and athletic programs.²⁹⁷ From the outset, the court framed the case as raising “the same concern” as *Hazelwood*: “the extent to which educators may exercise editorial control over the contents of high school publications.”²⁹⁸ Even though the facts of *Hazelwood* dealt with student expression, “its rationale was not so

²⁹⁰ *Id.*

²⁹¹ *Id.* at 932.

²⁹² See also Jordan, *supra* note 91, at 1568 (making this point).

²⁹³ *Fleming*, 298 F.3d at 932.

²⁹⁴ *Id.* at 933.

²⁹⁵ *Id.* at 934. Because the Tenth Circuit ruled *Hazelwood* did not require viewpoint neutrality, it thus did not matter that the ban on religious symbols was arguably viewpoint discriminatory.

²⁹⁶ 941 F.2d 817 (9th Cir. 1991).

²⁹⁷ *Id.* at 819. “Each ad offered routine gynecological exams, birth control methods, pregnancy testing and verification, and pregnancy counseling and referral.” *Id.* at 821.

²⁹⁸ *Id.* at 819.

limited,” the Ninth Circuit ruled, because “the school has the same pedagogical concerns, such as respecting audience maturity, disassociating itself from speech inconsistent with its educational mission and avoiding the appearance of endorsing views, no matter who the speaker is.”²⁹⁹ The court thus concluded that there “is no principled distinction between students’ constitutional rights and those of Planned Parenthood to access to school-sponsored publications.”³⁰⁰

The court ruled that student newspapers and yearbooks in the district were part of the curriculum, akin to *Spectrum*. Athletic programs, however, clearly were not curricular, though – once again – that proved to be unproblematic. The court said because the school approves all advertisements and “directly distributes athletic programs at school events,” members of the public might reasonably perceive the programs to bear the school’s imprimatur.³⁰¹ It seems plausible to argue that the programs thus constitute government speech. The Ninth Circuit nevertheless held that each of the publications was a school-sponsored, nonpublic forum and that *Hazelwood* controlled.

Without analysis or explication, the court then cited two of the Supreme Court’s nonpublic forum cases³⁰² – both decided before *Hazelwood* and neither of which involved students – for the proposition that *Hazelwood* required viewpoint neutrality.³⁰³ The court said that because the district banned the entire subject of “birth control products and information,” the refusal to publish the advertisements was viewpoint neutral – a reasonable restriction intended to keep the school from being “forced to open up their publications for advertisements on both sides of the ‘pro-life’- ‘pro-choice’ debate.”³⁰⁴ Quoting *Hazelwood*, the court also said that the school could permissibly refuse to “associate the school with any position other than neutrality” on politically controversial issues.³⁰⁵

²⁹⁹ *Id.* at 827.

³⁰⁰ *Id.*

³⁰¹ *Id.* at 828.

³⁰² The Ninth Circuit cited *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983) and *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788 (1985).

³⁰³ Notably, a subsequent Ninth Circuit panel criticized the *Planned Parenthood* opinion on this point but said it was bound to follow the decision. See *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1010 (9th Cir. 2000) (“Despite the absence of express ‘viewpoint neutrality’ discussion anywhere in *Hazelwood*, the *Planned Parenthood* court incorporated ‘viewpoint neutrality’ analysis into nonpublic forum, school-sponsored speech cases in our Court.”).

³⁰⁴ *Planned Parenthood*, 941 F.2d at 829.

³⁰⁵ *Id.* (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988)). The Ninth Circuit wrote, “Because of the possible perception of sponsorship and endorsement, schools within the district could choose to maintain a position of neutrality on a matter of political controversy and not lend their name and resources to Planned Parenthood’s advertisements.” *Id.* at 830.

Although the district had published other seemingly “controversial” ads, such as ads for churches, political candidates, and casinos – including one that advertised “Packaged Liquor” and “Live Entertainment”³⁰⁶ – the Ninth Circuit suggested that school officials can choose which controversies school-sponsored speech enters. A school’s decision not to promote or sponsor speech that falls under *Hazelwood*’s framework, the court concluded, “is a judgment call which *Hazelwood* reposes in the discretion of school officials and which is afforded substantial deference.”³⁰⁷

2. Striking Down Restrictions on Outside Entities as Unreasonable

The Eleventh Circuit, however, showed school officials substantially less deference in *Searcey v. Harris*.³⁰⁸ There, the Atlanta School Board denied a peace organization – the Atlanta Peace Alliance (APA) – access to the district’s career day, although the board allowed military recruiters. After APA filed suit, the board adopted regulations governing admission to career day that specified that participants “shall have direct knowledge of the career opportunities about which they speak” along with “some present affiliation or authority” with that career field.³⁰⁹ In addition, the regulations stipulated that participants would not be “allowed to criticize or denigrate the career opportunities provided by other participants.”³¹⁰

The school board argued that *Hazelwood* eliminated the viewpoint-neutrality requirement for restrictions on curricular speech. The Eleventh Circuit, however, disagreed and held instead that *Hazelwood* did not “offer any justification for allowing educators to discriminate based on viewpoint.”³¹¹ The court reasoned that *Hazelwood*’s legitimate pedagogical concerns test was simply an application of the Court’s nonpublic forum precedents to a curricular activity.³¹² The *Searcey* court thus clearly viewed career day as curricular, though

³⁰⁶ *Id.* at 835 (Norris, J., dissenting).

³⁰⁷ *Id.* at 829 (majority opinion). See also *Diloreto v. Downey Unified School District*, 196 F.3d 958 (9th Cir. 1999), in which the Ninth Circuit invoked *Hazelwood* in upholding a school district’s decision to refuse to post an advertisement, which contained the Ten Commandments, on the fence of a school’s baseball field.

³⁰⁸ 888 F.2d 1314 (11th Cir. 1989).

³⁰⁹ *Id.* at 1317.

³¹⁰ *Id.*

³¹¹ *Id.* at 1325.

³¹² *Id.* at 1319. The court wrote, “Although the Supreme Court did not discuss viewpoint neutrality in *Hazelwood*, there is no indication that the Court intended to drastically rewrite First Amendment law to allow a school official to discriminate based on a speaker’s views.” *Id.* at 1319 n.7. The court said that “without more explicit direction” it would continue to require viewpoint neutrality in the circuit. *Id.* at 1325.

it offered no explanation why, nor did the court analyze why *Hazelwood* governed a case that involved an outside entity seeking access to a school event.³¹³

What the court did do, though, was rigorously apply *Hazelwood* to strike down the regulations. The court found that the board's treatment of APA "supports an inference" that it unconstitutionally intended to suppress APA's views.³¹⁴ The court also warned against allowing government officials to conceal bias against speakers by labeling them "controversial," which the school board did here.³¹⁵ But the court did not just strike down APA's exclusion on viewpoint discrimination grounds. The court first also – and importantly – closely scrutinized the regulations and ruled them unreasonable.

The school board argued that the direct knowledge and present affiliation requirements ensured that "a presenter knows what he is talking about" and gives credible information; the requirements also offered a way to avoid political debate at career day.³¹⁶ The court said those counted as legitimate pedagogical concerns, "but the question is not the importance of the school's justifications, but whether the regulations adopted are reasonable means to achieve those goals."³¹⁷ The court held that the direct knowledge requirement was reasonable; the present affiliation requirement, however, was not. The court said that, as written, that requirement would exclude retired people and professional career counselors from career day, individuals who had participated in the past.³¹⁸ And the court also emphasized that the board failed to point to any evidence that would justify the requirement. "It is not intuitively obvious that individuals who are no longer affiliated with a career would have less information or would present a less effective role model," the court wrote.³¹⁹ In response to the school's argument that a restriction need only be reasonable – and not the most reasonable – and that therefore the court should defer to the board, the Eleventh Circuit said that rationale "overstates the deference a court must pay to School Board decisions."³²⁰ The court said it simply cannot infer a regulation's reasonableness "from a vacant record."³²¹

The court looked skeptically at the requirement that forbade criticism and discouragement of careers as well. The court agreed with the school board's argument that it was reasonable to prohibit a group or person whose sole purpose was to discourage students from a career.³²² But the court said the requirement

³¹³ See also Waldman, *supra* note 15, at 88 (making this point).

³¹⁴ *Searcey*, 888 F.2d at 1325.

³¹⁵ *Id.*

³¹⁶ *Id.* at 1320-21.

³¹⁷ *Id.* at 1321.

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.* at 1322.

³²² *Id.* "Discouraging students from participating in a particular field clearly detracts from the motivational purpose of the forum," the court ruled. *Id.*

was unreasonable to the extent it prohibited speakers from presenting *any* negative factual information about the disadvantages of specific careers or job opportunities “because such information is useful to students making decisions about careers.”³²³ The court quoted testimony from the district superintendent, who had said that career day should “provide [the students] with an optimum level of information.”³²⁴ That superintendent, though, had also expressed concern that critical information could be misused by career day speakers, and the director of guidance counselors had testified that critical information, though worthwhile, should instead be given to students by their counselors.³²⁵ Nevertheless, the court ruled otherwise. “[S]ince the main purpose of Career Day is to allow students to evaluate their opportunities for the future, presenting only positive information directly conflicts with the educational purpose of the forum,” the court held.³²⁶ The school board could bar controversial topics – such as the “morality of war”³²⁷ – as well as “inaccurate or misleading information,”³²⁸ the court said, but the school could not reasonably ban “bona fide negative facts which are relevant to the requirements or benefits of a specific job, including one in the military.”³²⁹ The *Searcey* court, under a *Hazelwood* analysis, thus refused to glibly defer to schools. Instead, *Hazelwood*'s “legitimate pedagogical concerns” standard meant that a school's motivations mattered and that unreasonable restrictions – both those unsupported and incongruous – should be struck down.

IV. Revisiting *Hazelwood*

As this article has shown, however, *Searcey*'s application of *Hazelwood* is largely anomalous among circuit courts.³³⁰ In fact, circuit courts applied

³²³ *Id.* at 1324.

³²⁴ *Id.* at 1322.

³²⁵ *Id.* at 1323.

³²⁶ *Id.* at 1322.

³²⁷ *Id.* at 1323.

³²⁸ *Id.* at 1324.

³²⁹ *Id.* at 1323.

³³⁰ Even other Eleventh Circuit opinions have not reflected the strength of the scrutiny the *Searcey* court gave the school's restrictions. *See, e.g.,* *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208 (11th Cir. 2004). Building on Waldman's insights, the more rigorous scrutiny in *Searcey* perhaps can be attributed to the fact that the case involved an outside entity seeking access to a school – with the Eleventh Circuit holding that *Hazelwood* applied no differently from the Supreme Court's extant nonpublic forum precedents – whereas subsequent cases in the circuit have offered a more deferential application of *Hazelwood* in cases not involving outside entity plaintiffs. Waldman, *supra* note 15, at 95-96. This is only speculation, however. The circuit has not addressed the seemingly inconsistent application.

Hazelwood yet ruled against the school only four times in the cases reviewed here, and one of those (*Boring*) was a panel decision subsequently vacated by an en banc court.³³¹ *Hazelwood* has been broadly applied, and in most instances it has offered speech scant protection, with the “legitimate pedagogical concerns” standard functioning as a vaporous “test” through which courts grant generally unchecked deference to schools. Even though courts commonly acknowledge that school officials must point to a legitimate pedagogical concern, most courts ultimately seem all too willing to accept just about any concern those officials offer.

Indeed, at least in most circuit court decisions thus far, schools need little more than a vaguely plausible explanation, an articulated good faith effort to pursue some sort of educational objective, as William Buss intimated more than a decade ago.³³² Judicial review is exceedingly deferential, allowing school officials to choose from a near-limitless range of possible pedagogical concerns – and, because too few courts have been willing to closely examine pretext, school officials are able to casually toss those concerns on the record after the speech restriction occurs. Presumably wanton disagreement or disapproval alone would not satisfy *Hazelwood*'s standard, but school officials are too savvy to offer their motivations so brazenly. Instead they can couch their concerns in safer, more ambiguous language, asserting that they censored speech because they worried about controversy or divisiveness or bias or civility or that the speech is unsuitable. *Poling* offers a useful example. School officials there no doubt disliked the speech and disagreed with the student who mocked an administrator's speech impediment, but the Sixth Circuit sanctioned the punishment not based simply on administrator aversion to the speech but on the grounds that “the universe of legitimate pedagogical concerns” includes civility, discipline, courtesy, and “respect for authority.”³³³ As most circuit courts have

³³¹ *Boring v. Buncombe County Bd. Of Educ.*, 98 F.3d 1474, 1483 (4th Cir. 1996), vacated, 136 F.3d 364 (4th Cir. 1998) (en banc). The other three cases are *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004); *Peck v. Baldwinsville Central School District*, 426 F.3d 617 (2nd Cir. 2005); and *Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989). In *Vanderhurst v. Colorado Mountain College District*, the Tenth Circuit assumed *arguendo* that *Hazelwood* applied to a college professor's in-class speech but then ruled in favor of the professor on technical grounds. 208 F.3d 908 (10th Cir. 2000).

³³² William Buss, *Academic Freedom and Freedom of Speech: Communicating the Curriculum*, 2 J. GENDER RACE & JUST. 213, 237 (1999) (“[T]he application of the nonpublic forum test in *Hazelwood* and other cases has been exceedingly undemanding, and it seems likely that ‘legitimate pedagogical concern’ requires only a good faith effort to pursue an educational goal.”). See also Brownstein, *supra* note 17, at 817 (“[A] legitimate pedagogical concern is pretty much whatever school authorities say it is.”); Wohl, *supra* note 205, at 1299 (“A legitimate pedagogical concern is merely what a school board or other administrative authority says it is.”).

³³³ *Poling v. Murphy*, 872 F.2d 757, 762 (6th Cir. 1989).

interpreted *Hazelwood*, then, even the least inventive attorney can conjure up a concern that falls under such a broad umbrella.

Professor Alan Brownstein argued in a recent article that we should thus abandon *Hazelwood's* "legitimate pedagogical concerns" standard altogether.³³⁴ If the range of concerns counting as legitimate is so broad, he wrote, "what remains unclear is whether courts accomplish anything of value in applying a standard that is virtually always satisfied."³³⁵ Brownstein argued that nothing valuable is accomplished, and he instead proposed a new First Amendment category, the "nonforum."³³⁶ For Brownstein, all speech falling in that category, which includes school-sponsored speech, should escape judicial review. "[T]here is no legitimate constitutional basis for requiring courts to go through the pretense of determining whether the control of student speech in a school-sponsored activity serves a legitimate pedagogical concern," he argued.³³⁷

But the *Hazelwood* Court thought that there was such a basis. When a school's decision to censor "has no valid educational purpose," the Court held, "judicial intervention" is required.³³⁸ As Erwin Chemerinsky has argued, the judiciary should and does have a fundamental role to play in ensuring that student speech receives First Amendment protection,³³⁹ especially if *Hazelwood* sanctions what in other contexts would clearly be unconstitutional viewpoint discrimination.³⁴⁰ And although Brownstein is right that pretense aptly describes what often occurs when courts evaluate pedagogical concerns, that current state of judicial affairs is hardly desirable, worth continuing – or even constitutionally correct. Rather than abandon *Hazelwood* – and denigrate students' rights even more dramatically – courts should instead give *Hazelwood* reasonably, and

³³⁴ Brownstein, *supra* note 17.

³³⁵ *Id.* at 784.

³³⁶ *Id.*

³³⁷ *Id.* at 817.

³³⁸ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). See also *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) ("That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.").

³³⁹ Chemerinsky, *supra* note 24, at 546. See also Susan Dente Ross, *Silenced Students: The Uncertain but Extensive Power of School Officials to Control Student Expression*, 79 JOURNALISM & MASS COMMUNICATION Q. 172, 183 (2002) ("[S]tudent expression...belongs to students. Embracing this speech, rather than abridging it, should be a core function of public education.").

³⁴⁰ See *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1219 n.1 (11th Cir. 2004) (Black, J., concurring) ("I caution, however, that when a school discriminates against expression on the basis of viewpoint, it runs a greater risk of having its policy struck down for its failure to be reasonably related to legitimate pedagogical concerns.").

appropriately, sharp teeth, demanding a more substantive review of both *when* to apply the precedent and *how* to apply it in the narrow set of cases it controls.

A. Narrowing Hazelwood's Reach

1. Recognizing *Hazelwood* is a Student Speech Case

This invigoration of *Hazelwood* should occur in both its reach and its application. First, *Hazelwood* is at core a student speech case and should be restricted accordingly.³⁴¹ As Waldman has persuasively argued, "*Hazelwood*'s entire rationale and approach are uniquely suited to student speech."³⁴² Section II.B of the *Hazelwood* opinion, when the Court distinguishes *Tinker* and announces the "legitimate pedagogical concerns" standard, consistently and explicitly references *student* speech or expression. The Court wrote:

[W]e conclude that the standard articulated in *Tinker* for determining when a school may punish *student* expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of *student* expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of *student* speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.³⁴³

Stretching *Hazelwood* to non-student speakers has dislodged the opinion's rationale from its moorings.³⁴⁴ In ruling that *Tinker* was inapposite, the *Hazelwood* Court stressed the custodial role faculty members play when they supervise, and schools affirmatively promote, *student* speech "designed to impart

³⁴¹ I will leave to the side the question of whether *Hazelwood* should apply only to K-12 and not university students, though I am sympathetic to arguments that *Hazelwood* should be inapplicable in the university setting. See, e.g., *Kincaid v. Gibson*, 236 F.3d 342, 352 (6th Cir. 2001) ("The university is a special place for purposes of First Amendment jurisprudence. The danger of chilling ... individual thought and expression ... is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.") (internal quotations and citation omitted). Even if the Court were to rule that *Hazelwood* governs university students (and the *Hazelwood* Court did not foreclose that possibility), the proposals endorsed in this article would limit *Hazelwood*'s scope and strengthen the rigor of the "legitimate pedagogical concerns" standard.

³⁴² Waldman, *supra* note 15, at 99.

³⁴³ 484 U.S. at 272-73 (emphasis added).

³⁴⁴ See also Wohl, *supra* note 205, at 1310 (arguing that *Hazelwood* "simply was never intended to address teacher speech").

particular knowledge or skills to *student* participants and audiences.”³⁴⁵ As Waldman observed, the nature of the relationship between students and the school is fundamentally different from the relationship between the school and outside entities seeking access or between school administrators and the teachers who work for them.³⁴⁶ Other extant legal frameworks better capture those qualitatively different relationships: public forum doctrine for outside entities³⁴⁷ and public employee jurisprudence for teachers.³⁴⁸ And, as the Fifth Circuit held in *Chiras v. Miller*,³⁴⁹ textbook selection is best considered government speech similarly outside of *Hazelwood's* reach. The political process provides the means for a community to rectify a school board's unpopular decision regarding a textbook.³⁵⁰

2. Emphasizing Imprimatur

Second, the expansive interpretation of what counts as school-sponsored, and what *Hazelwood* thus controls, needs to be circumscribed. The *Hazelwood* Court also emphasized that, unlike *Tinker*, the *Hazelwood* case involved the question of whether the First Amendment requires a school to promote particular student expression – a question, the Court said, that concerns school officials' authority over student speech “that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”³⁵¹ The element of imprimatur or implied sponsorship was central to the Court's rationale. The Court thus stressed that the *Hazelwood* standard was applicable for determining “when a school may refuse to *lend its name and resources* to the dissemination of student expression.”³⁵²

³⁴⁵ 484 U.S. at 271 (emphasis added).

³⁴⁶ Waldman, *supra* note 15, at 102 (arguing that “the *Tinker/Hazelwood* division of the student speech universe...strikes a balance reflecting the unique relationship between students and their schools”).

³⁴⁷ Although the Eleventh Circuit's close inspection of the regulations in *Searcey* was commendable, then, the court was nevertheless incorrect to hold that the *Hazelwood* standard is no different “from the *Cornelius* standard for nonpublic forms.” *Searcey v. Harris*, 888 F.2d 1314, 1319 (11th Cir. 1989).

³⁴⁸ Even so, I sympathize with the argument that the current *Pickering-Connick-Garcetti* framework insufficiently protects teachers' speech. See, e.g., Jamin Raskin, *No Enclaves of Totalitarianism: The Triumph and Unrealized Promise of the Tinker Decision*, 58 AM. U.L. REV. 1193 (2009). Yet as this article has shown, *Hazelwood* certainly has not provided any First Amendment relief for teachers in the circuit courts.

³⁴⁹ 432 F.3d 606 (5th Cir. 2005).

³⁵⁰ Unless, of course, the school board decision amounts to an unconstitutional action such as an Establishment Clause violation.

³⁵¹ 484 U.S. at 271.

³⁵² *Id.* at 272-73 (emphasis added).

The Court's subsequent readings of *Hazelwood* likewise have underscored the importance of the imprimatur prong. The Court's most recent student speech case, *Morse v. Frederick*, involved a controversial student banner displayed during what the Court called a "school-sanctioned and school-supervised event."³⁵³ In determining the applicable precedent for the case, Chief Justice Roberts' opinion for the *Morse* Court summarized *Hazelwood* as a case concerning "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."³⁵⁴ And the Court concluded that *Hazelwood* was inapposite "because no one would reasonably believe that [the student's] banner bore the school's imprimatur."³⁵⁵ Moreover, in the 1995 case *Rosenberger v. Rector and Visitors of the University of Virginia*, the Court cited *Hazelwood* for the proposition that schools have greater control over their "own speech."³⁵⁶

Yet imprimatur is often downplayed or ignored in circuit court considerations of *Hazelwood's* applicability. Particularly, but not exclusively,³⁵⁷ in cases involving religion, courts have ruled that any student speech connected in some way to a curricular activity necessarily triggers *Hazelwood*, without critical analysis of whether the speech actually bears the school's imprimatur. A school-sponsored student newspaper – which likely includes the school's name in its masthead as it is distributed throughout the school and, often, to the surrounding community – involves a school, in the words of *Hazelwood*, lending "its name and resources to the dissemination of student expression."³⁵⁸ Thus the *Hazelwood* Court emphasized that the newspaper adviser "was the final authority with respect to almost every aspect of the production and publication of Spectrum, including its content,"³⁵⁹ and the principal subsequently reviewed each issue before publication. But that is an altogether different arrangement from an individual student's poster³⁶⁰ or paper³⁶¹ created in response to a class

³⁵³ 551 U.S. 393, 396 (2007). In *Morse*, a student and his friends unfurled a banner that read "BONG HiTS 4 JESUS" as the Olympic Torch Relay passed in front of their high school. *Id.* at 397.

³⁵⁴ *Id.* at 405 (internal quotations and citation omitted).

³⁵⁵ *Id.*

³⁵⁶ 515 U.S. 819, 834 (1995). See also *Curry v. Sch. Dist. of the City of Saginaw*, 452 F. Supp. 2d 723, 735 (E.D. Mich. 2006) ("The principle that emerges from [the Court's student speech] cases is that the more likely it is that student speech will be attributed to the school itself, the more control over the content of the speech will be tolerated.").

³⁵⁷ See, e.g., *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002).

³⁵⁸ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272-73 (1988).

³⁵⁹ *Id.* at 268-69 (internal quotations and citation omitted).

³⁶⁰ See, e.g., *C.H. v. Oliva*, 195 F.3d 167 (3rd Cir. 1999), vacated in part, *C.H. v. Oliva*, 226 F.3d 198 (3rd Cir. 2000) (en banc); *Peck v. Baldwinsville Central Sch. Dist.*, 426 F.3d 617 (2nd Cir. 2005).

³⁶¹ See, e.g., *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152 (6th Cir. 1995).

assignment. Reasonable “students, parents, and members of the public”³⁶² should recognize that each student response to a classroom curricular activity does not suggest a school’s official sanction or approval. Teachers ask questions and define the parameters of assignments – and grade assignments according to whether those parameters are met³⁶³ – but asking questions and designing assignments does not imply that teachers or the school necessarily endorse or approve of a student’s response. And if educators do worry about sensitive audiences mistakenly assuming implied sponsorship from such speech, the burden should be on those educators to disassociate the school from the speech rather than to censor it – mistakenly – under *Hazelwood*.³⁶⁴ As then-Judge Alito argued while sitting on the Third Circuit, “[N]othing in *Hazelwood* suggests that its standard applies when a student is called upon to express his or her personal views in class or in an assignment.”³⁶⁵

Put succinctly, imprimatur matters. And courts should have to determine whether the contested student speech bears a school’s imprimatur before ruling that *Hazelwood* controls. As the Third Circuit held in *Saxe v. State College Area School District*, “[S]chool sponsorship of student speech is not lightly to be presumed.”³⁶⁶ Courts should be forced to assess whether reasonable – and not the most sensitive – students, parents, and members of the public would believe that the school actually sanctioned or approved the speech.³⁶⁷

³⁶² 484 U.S. at 271.

³⁶³ It seems obvious, for instance, that a student has no constitutional right to challenge his “F” on First Amendment grounds when he responds to an essay prompt asking about Shakespeare by instead focusing on the writings of Saint Paul. See *C.H. v. Oliva*, 226 F.3d 198, 211 (3rd Cir. 2000) (Alito, J., dissenting) (“Public school teachers have the authority to specify the subjects that students may discuss in class and the subjects of assignments that students are asked to complete. Thus, if a student is asked to solve a problem in mathematics or to write an essay on a great American poet, the student clearly does not have a right to speak or write about the Bible instead.”) (internal citations omitted); Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 406 (2011) (“Grades necessarily are based on the content and quality of the students’ writings. Topics often must be assigned – students are not always free to choose their own message.”).

³⁶⁴ See *Hedges v. Wauconda Cmty. Unit Sch. Dist.*, 9 F.3d 1295, 1299 (7th Cir. 1993) (“Public belief that the government is partial does not permit the government to become partial. Students therefore may hand out literature even if the recipients would misunderstand its provenance. The school’s proper response is to educate the audience rather than squelch the speaker.”).

³⁶⁵ *C.H. v. Oliva*, 226 F.3d 198, 213 (3rd Cir. 2000) (Alito, J., dissenting).

³⁶⁶ 240 F.3d 200, 214 (3rd Cir. 2001).

³⁶⁷ See, for example, *Griffith v. Butte School District*, a recent Montana Supreme Court decision that ruled *Hazelwood* was inapposite because “no objectively reasonable observer could perceive that [a student’s] religious references [in her graduation speech] bore the imprimatur of the School District.” 244 P.3d 321, 210 (Mont. 2010).

3. Curricular Counts

In addition, narrowing the too-broad interpretation of school-sponsored involves limiting *Hazelwood* to speech that occurs in a curricular context. The Eleventh Circuit thus got it right in *Bannon* when it ruled that *Hazelwood* “only controls” student expression that “(1) bears the imprimatur of the school, and (2) occurs in a curricular activity.”³⁶⁸ The *Hazelwood* Court examined carefully both the policy and practice of *Spectrum* to rule it was not an open forum but instead was a “supervised learning experience”³⁶⁹ that was “produced as part of the school’s journalism curriculum.”³⁷⁰ Later in the opinion, the Court held that school-sponsored speech that bears the school’s imprimatur can be considered curricular, even if it occurs outside of the classroom setting, so long as it is “supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.”³⁷¹ Yet in spite of that clear emphasis on student speech needing to be curricular, courts in several cases have nonetheless downplayed that criterion and have instead applied *Hazelwood* to arguably non-curricular speech.³⁷² As discussed above, in *Fleming*, for instance, the Tenth Circuit said *Hazelwood* controlled “activities that might reasonably be perceived to bear the imprimatur of the school and that involve pedagogical concerns,”³⁷³ and the circuit thus criticized as “too narrow”³⁷⁴ the district court ruling in the case that held *Hazelwood* only applied to curricular activities. The argument here, though, is that it was instead the Tenth Circuit that erred. For

³⁶⁸ *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1214 (11th Cir. 2004).

³⁶⁹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988).

³⁷⁰ *Id.* at 262.

³⁷¹ *Id.* at 271.

³⁷² *See, e.g., Brody v. Spang*, 957 F.2d 1108, 1122 (3rd Cir. 1992) (“[E]ven though commencement exercises are arguably not part of the educational curriculum, *Hazelwood* stands for the proposition that school officials are to be accorded broad discretion in regulating speech in all forums that are non-public.”); *Corder v. Lewis Palmer Sch. Dist.*, 566 F.3d 1219 (10th Cir. 2009) (applying *Hazelwood* to uphold punishment of a student for her graduation speech without analyzing whether the event was curricular); *Crosby v. Holsinger*, 852 F.2d 801 (4th Cir. 1988) (applying *Hazelwood* to uphold a school principal’s decision to eliminate the school mascot); *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530 (7th Cir. 1996) (ruling that entire elementary school constituted a nonpublic forum and *Hazelwood* thus applied to restrictions regulating the distribution of literature); *Planned Parenthood of Southern Nev. v. Clark County Sch. Dist.*, 941 F.2d 817, 828 (9th Cir. 1991) (applying *Hazelwood* to arguably non-curricular athletic programs “the school directly distributes” at school events); *R.O. v. Ithaca City Sch. Dist.*, 645 F.3d 533 (2nd Cir. 2011) (applying *Hazelwood* to student newspaper the court labeled a limited public forum).

³⁷³ *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918, 924 (10th Cir. 2002).

³⁷⁴ *Id.*

Hazelwood to apply, student speech must bear the school's imprimatur *and* occur in a curricular activity.³⁷⁵ *Hazelwood's* broad definition of curricular³⁷⁶ no doubt leaves itself vulnerable to loose interpretation, as was arguably the case in *Bannon*.³⁷⁷ To rule *Hazelwood* controls, however, a court conducting a good faith review should have to scrutinize the record to ensure both that faculty members in fact supervised the student speech *and* that the school articulated the connection between the speech and the knowledge or skills it was purportedly designed to impart.

B. Clarifying the "Legitimate Pedagogical Concerns" Standard

Invigorating *Hazelwood* requires more than narrowing its reach, however. The "legitimate pedagogical concerns" standard should be strengthened as well, necessitating a more meaningful review of school officials' motivations for speech restrictions – the sort of review actually suggested by the *Hazelwood* opinion itself. The *Hazelwood* Court devoted an entire section to assessing the reasonableness and legitimacy of the principal's actions. The Court evaluated the principal's explanations for his decision, pointing to his trial testimony as well as referencing supporting testimony from an expert witness who was a former journalist and college journalism instructor.³⁷⁸ And although the Court was arguably too deferential in concluding that it was reasonable for the principal to delete two pages without first verifying whether the changes he sought could be made, the Court at least clarified the contextual factors that it thought justified the principal's decision.³⁷⁹

In contrast, at the circuit level, determinations of whether a restriction meets the "legitimate pedagogical concerns" standard have been ad hoc and inconsistent in their approach. On occasion courts have offered hearty discussion

³⁷⁵ See, e.g., *Pounds v. Katy Indep. Sch. Dist.*, 730 F. Supp. 2d 636, 649 (S.D. Tex. 2010) (ruling that *Hazelwood* was inapposite in a case involving holiday cards ordered through an elementary school because "even if the order form bears the imprimatur of the school, neither the program nor the expression at issue...occurred in the context of curricular activities").

³⁷⁶ The Court held that student expressive activities that bear the school's imprimatur "may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

³⁷⁷ See *supra* notes 130-31 and accompanying text.

³⁷⁸ 484 U.S. at 274-76.

³⁷⁹ "We...agree with the District Court that the decision to excise the two pages containing the problematic articles was reasonable *given the particular circumstances of this case.*" *Id.* at 275 (emphasis added).

of why the standard is met.³⁸⁰ In *Virgil v. School Board*, for example, the court first ruled the school board's pedagogical concerns were legitimate and then assessed whether the restriction at issue was reasonably related to those concerns.³⁸¹ Mostly, though, circuit courts have offered little more than glib deference, producing cursory, summary discussions of why a school has met the "legitimate pedagogical concerns" standard,³⁸² with courts using ambiguous phrases to satisfy an already ambiguous phrase.

A more consistent "legitimate pedagogical concerns" standard would instead require courts to substantively evaluate the context of the speech restriction along with a school's articulated pedagogical concern. Phrased differently, and borrowing from the First Circuit's language in *Ward v. Hickey*,³⁸³ whether a regulation is reasonably related to legitimate pedagogical concerns should depend on the nature of the speech, the age and maturity of the students (both the speaker and the audience),³⁸⁴ and the relationship between the restriction and the pedagogical objective. Evaluating whether this test is met is thus a fact-driven analysis that requires schools to state their legitimate pedagogical concerns on the record and then demonstrate to the court that the speech restriction reasonably relates to those concerns.

There is no way, of course, that one could categorize or list exhaustively all possible legitimate pedagogical concerns and scenarios that would satisfy this standard. When considered outside of any factual context, many of the concerns schools have proffered to regulate student speech in the cases discussed herein actually *are* legitimate on their face. Prohibiting speech threatening violence³⁸⁵ and avoiding disruption to the learning environment,³⁸⁶ for instance, are concerns that, at least superficially, square with *Hazelwood*. But courts have, on balance, too loosely applied the *Hazelwood* standard, demanding little

³⁸⁰ See, e.g., *Miles v. Denver Pub. Sch.*, 944 F.2d 773 (10th Cir. 1991).

³⁸¹ 862 F.2d 1517, 1522-25 (11th Cir. 1989).

³⁸² See, e.g., *Curry v. Hensiner*, 513 F.3d 570 (6th Cir. 2008).

³⁸³ 996 F.2d 448 (1st Cir. 1993). In *Ward*, the First Circuit ruled that *Hazelwood* applied to a teacher's in-class speech, although the court ultimately ruled for the school on procedural grounds. In discussing *Hazelwood's* standard, the court wrote, "It stands to reason that whether a regulation is reasonably related to legitimate pedagogical concerns will depend on, among other things, the age and sophistication of the students, the relationship between teaching method and valid educational objective, and the context and manner of the presentation." *Id.* at 453.

³⁸⁴ Accounting for student age and maturity aligns with the *Hazelwood* ruling that "a school must be able to take into account the emotional maturity of the intended audience." *Hazelwood*, 484 U.S. at 272. See also *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289 (10th Cir. 2004) ("Age, maturity, and sophistication level of the students will be factored in determining whether the restriction is 'reasonably related to legitimate pedagogical concerns.'").

³⁸⁵ See *S.G. v. Sayreville Bd. Of Educ.*, 333 F.3d 417 (3rd Cir. 2003).

³⁸⁶ See *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208 (11th Cir. 2004).

justification from schools and downplaying or ignoring the context surrounding and the motivations spurring speech restrictions. As discussed,³⁸⁷ the Fourth Circuit in *Boring*, for instance, sanctioned regulating any speech considered curricular, even though – as the dissent pointed out – the school in the case had not “offered a scintilla of evidence” establishing its reasons for censorship.³⁸⁸ Similarly, *Poling's* too-broad language allows school officials to easily couch their distaste for speech in vague terms such as civility and courtesy, a situation that is exacerbated when courts are then unwilling to closely scrutinize schools' justifications.³⁸⁹

In obsequiously applying *Hazelwood's* standard, circuit courts have also too eagerly deferred to school officials' allusions to controversy as a legitimate justification for censorship. The Eighth Circuit's opinion in *Henerey*, for instance, suggested that “divorcing...programs from controversial and sensitive topics, such as teenage sex” necessarily amounts to a legitimate pedagogical concern sanctioning censorship.³⁹⁰ The standard endorsed here, however, maintains that sex is not inherently a controversial topic demanding restriction and that instead a court *must* consider the context of the speech restriction. Under this approach, then, a school could not censor a well-reported journalistic story³⁹¹ about teenage sexual activity in a school-sponsored student publication simply because the topic is “controversial.”³⁹² The school instead would have to demonstrate to a court, on the record, why the nature of the article's content, the age and maturity of the school's students, and a pedagogical objective warranted censorship. Assuming *arguendo* that *Hazelwood* applied in *R.O.*, the school would struggle to meet that standard. There, the school maintained that because it had learned that “an increasing number of students were engaging in risky sexual behavior,” it believed publishing the cartoon would have undermined its efforts to stress “the seriousness of sexual relations...[and that] sex can often be a

³⁸⁷ See *supra* notes 226-28 and accompanying text.

³⁸⁸ *Boring v. Buncombe County Bd. Of Educ.*, 136 F.3d 364, 377 (4th Cir. 1998) (Motz, J., dissenting).

³⁸⁹ S. Elizabeth Wilborn has argued that *Poling* “leaves open a black hole” into which school officials can cast speech they dislike if the speech is tainted by bad taste or any breaches of decorum, however minor. Wilborn, *supra* note 20, at 139.

³⁹⁰ 200 F.3d 1128, 1136 (8th Cir. 1999).

³⁹¹ The *Hazelwood* Court concluded that it was reasonable for the principal to fear “that the article violated whatever pledge of anonymity had been given to the pregnant students” and also that “the article was not sufficiently sensitive to the privacy interests of the students' boyfriends and parents.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 274 (1988).

³⁹² See *The Elephant in the Corner*, STUDENT PRESS L. CTR. REP., Spring 2004, at 9 (reporting that although many school officials would “prefer that student journalists turn a blind eye to the elephant in the corner,” teen psychologists “argue that coverage of sex should have a place in student publications”).

matter of life and death.”³⁹³ The stick-figure cartoon, however, was not advocating irresponsible sex, nor was it explicit.³⁹⁴ It was satirizing the effectiveness of the school's own sex education curriculum. The students, in effect, were telling the school that its attempts to stress “the seriousness of sexual relations” were unsuccessful. And the school failed to demonstrate why, given that context, such commentary demanded censorship.

Courts have been especially lenient in deferring to schools' claims of controversy and divisiveness in cases involving religion. With minimal, if any, discussion and based on minimal, if any, evidence, courts have been willing to uphold restrictions on religious speech based on schools' assertions that it would cause “divisiveness and disruption”³⁹⁵ or “offend other children or their parents.”³⁹⁶ It is debatable whether these cases even belong under the Free Speech Clause of the First Amendment. If religious speech in fact bears a school's imprimatur – suggesting that the school sanctioned or approved the speech – the Establishment Clause would seem to provide the appropriate constitutional provision to resolve the case.³⁹⁷ But even if courts determine that *Hazelwood* does control, those courts must recognize that speech about religion, like speech about sex, is not by definition divisive and controversial.³⁹⁸ Instead, under the “legitimate pedagogical concerns” standard, the burden should be on schools to demonstrate that disruption or controversy is likely given the context of the situation (again, given the nature of the speech, the age and maturity of the students, and the pedagogical objective). Courts, in other words, should ask of schools *why* they legitimately and reasonably expect divisiveness.

This proposal, it should be emphasized, is not suggesting that courts embrace a strict scrutiny-like standard of review³⁹⁹ in evaluating the answer; nor am I arguing that *Tinker's* substantial disruption test should be resurrected in the school-sponsored student speech context. *Hazelwood* makes clear that such speech deserves a more deferential review. But schools' simply stating, without any evidence, that they have concerns about disruption or controversy should not satisfy *Hazelwood's* standard. The district court in *Curry* embodied this

³⁹³ R.O. v. Ithaca City Sch. Dist., 645 F.3d 533, 542 (2nd Cir. 2011).

³⁹⁴ Indeed, the stick figures in the cartoon were barely discernible.

³⁹⁵ Fleming v. Jefferson County Sch. Dist., 298 F.3d 918, 932 (10th Cir. 2002).

³⁹⁶ Curry v. Hensiner, 513 F.3d 570, 579 (6th Cir. 2008).

³⁹⁷ See Brownstein, *supra* note 17, at 821 (“[T]he Constitution includes specific provisions that deal with religion and it is those provisions, the Free Exercise Clause and the Establishment Clause, that are the proper vehicles for resolving questions about religious speech in school-sponsored activities.”).

³⁹⁸ See Brown, *supra* note 179, at 51 (“School officials' overreaction to student religious expression and courts' failure to correct such misapplications of constitutional principles can needlessly create or often aggravate a sense of alienation from public school among the families of students who seek to speak religiously.”).

³⁹⁹ Under strict scrutiny, a regulation must be justified by a compelling governmental interest, and it must limit expression using the least restrictive means possible.

approach when the judge ruled then that although the school cited “eliminating the threat of disruption”⁴⁰⁰ as one of the concerns that motivated restricting the student’s religious card, the school had “provided no real evidentiary basis for any such concern.”⁴⁰¹ The Sixth Circuit subsequently reversed, however, and instead deferred to the school’s generally unsupported claims that the card would offend students and their parents. Such deference effectively allows *Hazelwood* to function as an easy-to-use trump card that can silence minority religious views or blithely remove student speech about, or references to, religion in general based on “pedagogical” grounds – even when those religious references arguably otherwise fit within the parameters of an assignment.⁴⁰²

The Sixth Circuit, of course, was correct when it noted in *Curry* that it is not the judiciary’s role to articulate a range of possible solutions a school should have considered and then evaluate “whether the [school] made the *best* decision.”⁴⁰³ Educators deserve a certain amount of discretion to make administrative judgments. Permitting schools to restrict student speech based on unsubstantiated claims, however, can allow school officials to hide their motivations behind the vaporous legitimate pedagogical concerns language. And a school’s motivations matter in a *Hazelwood* analysis. Even though two circuits have held that *Hazelwood* sanctioned viewpoint-based pedagogical decisions,⁴⁰⁴ the case certainly did not sanction speech censorship based on hostility or mere disagreement – *Hazelwood* mandates that a school’s pedagogical concerns must be *legitimate*. By attending closely to the context and motivations surrounding speech restrictions – and by insisting that schools state their pedagogical concerns and justify them – the approach endorsed here thus can help courts sniff out pretext put forward to mask illegitimate motives.

⁴⁰⁰ *Curry v. Sch. Dist. of the City of Saginaw*, 452 F. Supp. 2d. 723, 735 (E.D. Mich. 2006).

⁴⁰¹ *Id.* at 736.

⁴⁰² *See, e.g.,* *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89, 23 (3rd Cir. 2009) (applying *Hazelwood* to restrictions that forbade a kindergarten student from having his mother read a Biblical passage in class as part of his “All About Me” week in order to avoid “promotion of religious messages”); *C.H. v. Oliva*, 195 F.3d 167 (3rd Cir. 1999), vacated in part, *C.H. v. Oliva*, 226 F.3d 198 (3rd Cir. 2000) (en banc) (applying *Hazelwood* to restrictions forbidding an elementary school student from reading a Bible story to his class as a reward for special achievement and then later temporarily removing his Thanksgiving poster depicting Jesus from the school hallway).

⁴⁰³ *Curry v. Hensiner*, 513 F.3d 570, 579 (6th Cir. 2008) (emphasis in original).

⁴⁰⁴ *See* *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918 (10th Cir. 2002); *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993). In *C.H. v. Oliva*, a panel of the Third Circuit ruled that “*Hazelwood* clearly stands for the proposition that educators may impose non-viewpoint neutral restrictions on the content of student speech.” 193 F.3d 167, 172 (3rd Cir. 1999). The full Third Circuit, however, later vacated the panel opinion and instead decided the case on procedural grounds. *C.H. v. Oliva*, 226 F.3d 198, 203 (3rd Cir. 2000) (en banc) (holding “we decline to address the tendered constitutional issue”).

And to be clear, this approach is not advocating that courts partake in mind-reading to ascertain a school's motivations and a speech restriction's context. Rather, courts should scrutinize the manifest record, which can include items such as trial testimony and depositions. As discussed,⁴⁰⁵ the *Hazelwood* Court itself actually utilized this method in part. So have the few circuit court decisions that, under *Hazelwood*, still have been willing to protect speech by challenging schools' discretion. *Peck*, for instance, should not be explained away as a case simply involving the debate surrounding whether *Hazelwood* allows viewpoint discrimination. There, the Second Circuit ruled that, in spite of the school's asserted justifications, school officials' testimony suggested instead that they were "particularly disposed" to censor the student's poster because of its religious imagery.⁴⁰⁶ The court was not willing to uncritically accept the school's surface explanations, and it thus remanded the case for further fact-finding. The Tenth Circuit similarly scrutinized educators' motivations in *Axson-Flynn*, when the court there, worried that evidence in the record indicated that the school's proffered concerns were a "sham pretext,"⁴⁰⁷ ruled that summary judgment for the school was inappropriate because hostility to the student's faith actually may have motivated her teachers. And in *Searcey*, the Eleventh Circuit closely reviewed regulations and struck them down, in part, because they were unsupported. "The [school board] advances no argument to support [the] regulation and thus points to no evidence in the record to explain" it, the court wrote in ruling the regulations unreasonable.⁴⁰⁸ As these cases demonstrate, deference under *Hazelwood* does not need to be absolute or inevitable. *Hazelwood* gives schools latitude to restrict a wide range of school-sponsored speech, but schools' pedagogical concerns motivating restrictions must be legitimate, and courts must insist that the restrictions are supported.

That latitude, in other words, has – or at least should have – limits, as a 2004 district court decision exhibited. In *Dean v. Utica*, a school superintendent ordered the removal of a student-written article in the school newspaper that reported on an ongoing lawsuit against the district.⁴⁰⁹ The superintendent maintained that the concern motivating censorship was that, *inter alia*, she deemed the article to be "inaccurate."⁴¹⁰ In ruling for the student, the court held that, unlike *Spectrum*, the student newspaper in *Dean* was a limited public forum.⁴¹¹ But even if it were not, the court said, the superintendent's actions were

⁴⁰⁵ See *supra* notes 378-79 and accompanying text.

⁴⁰⁶ *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 631 (2nd Cir. 2005).

⁴⁰⁷ *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1293 (10th Cir. 2004).

⁴⁰⁸ *Searcey v. Harris*, 888 F.2d 1314, 1321 (11th Cir. 1989).

⁴⁰⁹ 345 F. Supp. 2d 799 (E.D. Mich. 2004). The lawsuit alleged that diesel fumes from idling buses at the district's bus garage constituted a nuisance and harmed the plaintiffs' health. *Id.* at 802.

⁴¹⁰ *Id.* at 803.

⁴¹¹ *Id.* at 806.

unreasonable and unconstitutional under *Hazelwood*. Judge Tarnow spent roughly five pages of his opinion scrutinizing the district's justifications for censorship. He ruled that the alleged inaccuracies were "not material" and that the article in fact "properly and accurately attributes its quotations to their sources."⁴¹² Moreover, he held that, based on the record, the "only reasonable conclusion that can be drawn from all of the evidence"⁴¹³ is that the superintendent ordered the deletion of the article because she disagreed with its content – a motivation that is constitutionally illegitimate, even under *Hazelwood*.⁴¹⁴

The Sixth Circuit's *Settle* decision provides another example where a more meaningful review of the school's actions – the sort of review advocated here and reflected in *Peck*, *Axson-Flynn*, *Searcey*, and *Dean* – would have resulted in a different First Amendment outcome for the student. *Hazelwood* arguably should have been inapplicable to the case in the first place because the student's assignment did not bear the school's imprimatur.⁴¹⁵ Even working within the Sixth Circuit's framework, though, a more rigorous application of the "legitimate pedagogical concerns" standard would have ruled the restriction unreasonable. The teacher's stated concerns for refusing the student's religious topic were inconsistent at best and suspicious at worst.⁴¹⁶ Asking a student to select a topic with which she is unfamiliar and to submit that topic for approval certainly is legitimate, but rejecting a religious topic out of concern the student might "take any criticisms of the paper too personally"⁴¹⁷ and because "personal religion...[is] just not an appropriate thing to do in a public school"⁴¹⁸ suggests hostility toward the student's religion, as does the teacher's assertion that the Bible is the only source documenting the life of Jesus – especially when the teacher had stated earlier that secondary sources such as encyclopedias were perfectly acceptable for the project.⁴¹⁹ Moreover, her claim that "the law"⁴²⁰ prohibits dealing with religious issues in the classroom was, in the words of the concurring judge in the

⁴¹² *Id.* at 812.

⁴¹³ *Id.* at 813.

⁴¹⁴ For another example of a court questioning a school's speech restrictions under *Hazelwood*, see *Desilets v. Clearview Reg'l Bd. of Educ.*, 137 N.J. 585, 593 (N.J. 1994) (ruling a principal's censorship of two reviews of R-rated movies unconstitutional because "the record suggests...that a policy [barring reviews of R-rated movies], if it exists, is vaguely defined and loosely applied and that its underlying educational concerns remained essentially undefined and speculative").

⁴¹⁵ See *supra* notes 148-49 and accompanying text.

⁴¹⁶ *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152, 154-55 (6th Cir. 1995).

⁴¹⁷ *Id.* at 154.

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

case, “dead wrong,”⁴²¹ and it apparently was an interpretation enforced selectively: The teacher permitted other students to research topics such as “Spiritualism” and “Reincarnation.”⁴²² *Hazelwood* does grant schools “broad leeway”⁴²³ – but the Sixth Circuit granted the teacher too much leeway. And that unchecked deference is misplaced. Invoking *Hazelwood* need not be a certain death knell for First Amendment plaintiffs.

V. Conclusion

The approach endorsed here would thus narrow *Hazelwood's* reach and demand that courts more closely scrutinize schools' justifications for censorship. This approach, of course, does not assure – or even anticipate – that, if followed, it would suddenly turn *Hazelwood* into a robust First Amendment shield. What it does, though, is ensure that schools' speech restrictions are openly stated on the record and defended carefully in front of watchful judicial eyes.

But perhaps the proposal is asking too much. The judiciary now overwhelmingly sides with schools in constitutional cases, a situation Chemerinsky has termed the “deconstitutionalization of education.”⁴²⁴ The balance between educators' discretion and students' rights now tilts heavily in schools' favor. And that no doubt has consequences. When First Amendment principles are not taught and practiced in schools, when schools – in the words of Charles Haynes – are run, and judicially permitted to run, in “undemocratic, repressive”⁴²⁵ ways, we risk leaving our students unprepared for civic life. Recent surveys of high school students sponsored by the Knight Foundation demonstrate that students have an alarmingly low level of appreciation for First Amendment rights. The surveys, for instance, show that as many as 45 percent of students think the First Amendment goes too far in the rights it guarantees; 30 percent think the press in America has too much freedom; and nearly 45 percent think that newspapers should not be allowed to publish a story without government approval.⁴²⁶ Those numbers are startling. And as this article demonstrates, courts are generally not the venue for student speech advocates to look for First Amendment relief for students and First Amendment education and advocacy generally, especially in cases involving school-sponsored speech. The conversation instead must focus on persuading school officials, teachers, school

⁴²¹ *Id.* at 159 (Batchelder, J., concurring in the result).

⁴²² *Id.*

⁴²³ *Id.* at 156 (majority opinion).

⁴²⁴ Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 112 (2004).

⁴²⁵ MCCORMICK FOUNDATION, PROTOCOL FOR FREE & RESPONSIBLE STUDENT NEWS MEDIA 3 (2010).

⁴²⁶ KENNETH DAUTRICH ET AL., THE FUTURE OF THE FIRST AMENDMENT: THE DIGITAL MEDIA, CIVIC EDUCATION, AND FREE EXPRESSION RIGHTS IN AMERICA'S HIGH SCHOOLS 121 (2008).

boards, and parents that the First Amendment should matter in our schools, that it is important to cultivate a school culture that embodies “democratic learning and civic engagement”⁴²⁷ – a culture that values student perspectives and encourages students to use their voices thoughtfully and responsibly. As Frank LoMonte recently argued, student speech opponents readily accept the premise that schools function to teach good citizenship when “citizenship is equated with obedience.”⁴²⁸ But if it is truly a school’s role to teach not only math and writing but also what it means to be a democratic citizen, then the stakeholders central to our school systems need to be convinced that “respect for diversity of opinions and free speech are [also] essential components of a public education.”⁴²⁹

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⁴²⁷ MCCORMICK FOUNDATION, *supra* note 425, at 12. The McCormick Foundation’s “Protocol for Free & Responsible Student News Media” was the work product of more than fifty participants from around the country, who were charged with generating “ideas for voluntary protocol that...can help facilitate ethical decision-making, dialogue and partnership among scholastic journalism stakeholders.” *Id.* at 9.

⁴²⁸ Frank LoMonte, *Shrinking Tinker: Students are “Persons” Under Our Constitution – Except When They Aren’t*, 58 AM. U.L. REV. 1323, 1356 (2009).

⁴²⁹ *Id.*

REGULATING GATEKEEPERS OF INFORMATION: THE ASSOCIATED PRESS AS A COMMON CARRIER

STEPHEN BATES

The debate about net neutrality and the investigations into Google's alleged anticompetitive practices have an important historical antecedent. For about seventy-five years after the Civil War, some politicians, judges, scholars, and newspaper publishers called for regulating the Associated Press as a common carrier or a public utility. They contended that the AP was a monopoly that restrained trade in several ways, most notably by giving its members a veto right over applicants in the same market. In 1943, the Second Circuit ruled that the AP had violated antitrust law and must accept all qualified applicants. The Supreme Court agreed in 1945. Both courts advanced an affirmative vision of the First Amendment, under which the government can regulate the press in order to further freedom of expression. This article analyzes the common-carrier approach to the AP, which compromised its business autonomy, as well as the more radical common-carrier proposals to regulate press content, which would compromise editorial autonomy.

Keywords: Associated Press, common carrier, gatekeeper

I. INTRODUCTION

Along with new gateways to information come new gatekeepers, and they sometimes make arbitrary, discriminatory, or at least unpopular decisions. Today, many legislators and regulators want to restrain particular online gatekeepers that, in their view, stifle competition or unjustly favor some content or customers. Such concerns underlie the policy debate about net neutrality¹ and the antitrust investigations of Google.²

¹ Much has been written about net neutrality. A helpful introduction is CONG. RESEARCH SERV., NET NEUTRALITY: BACKGROUND AND ISSUES (March 19, 2009), *available at* <http://fpc.state.gov/documents/organization/122477.pdf> (last visited Aug. 8, 2010). For a critical evaluation based on the history of common-carrier regulation, see Bruce M. Owen, *The Net Neutrality Debate: Twenty Five Years After United States v. AT&T and 120 Years After the Act to Regulate Commerce* (unpublished manuscript, on file with the author and available at <http://www-siepr.stanford.edu/papers/pdf/06-15.pdf> (last visited Aug. 8, 2010)).

Communication technology may change, but the argument about overly powerful gatekeepers remains much the same. Starting nearly a century and a half ago, the telegraph was the new technology, and the Associated Press was the worrisome new gatekeeper. Under its bylaws, the AP placed often-insurmountable hurdles in the way of applicants for membership if they operated in the same market as existing AP members; competitors need not apply. Critics contended that the AP was a monopoly that ought to be regulated as a common carrier or a public utility and required to make its services available to any newspaper that wished to purchase them. Such a requirement, the critics said, would enhance the free flow of information. In *Associated Press v. United States*,³ the Supreme Court disavowed the public-utility rationale but concluded that the AP's anticompetitive bylaws nonetheless violated antitrust law.⁴

In the years since, the public-utility or common-carrier argument has shaped debates about regulating the content of the press—a step well beyond the AP case—including proposals advanced by the Hutchins Commission⁵ and by Jerome A. Barron.⁶ More broadly, the common-carrier argument envisages an affirmative role for the government to play in advancing First Amendment values, not merely a negative, hands-off role. It allows the government to regulate the press in order to smooth the operation of the American system of free expression, and, as a corollary, it assumes that private censorship of ideas represents a threat comparable to government censorship. Put differently, it treats the First Amendment as a grant of power to the federal government—like the commerce clause—and not solely as a prohibition against abusing power—like

² See Thomas Catan, *One Small Antitrust Victory for Google*, Law Blog, WALL ST. J., July 26, 2011 (stating that “Google Inc. is facing intense regulatory pressure around the world, with antitrust enforcers investigating its business practices in the U.S. and the European Union”), <http://blogs.wsj.com/law/2011/07/26/one-small-antitrust-victory-for-google/> (last visited Aug. 24, 2011).

³ *Associated Press v. United States*, 326 U.S. 1 (1945).

⁴ *Id.* at 19.

⁵ The Commission's report is COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS: A GENERAL REPORT ON MASS COMMUNICATION (Robert D. Leigh ed., 1947).

⁶ JEROME A. BARRON, FREEDOM OF THE PRESS FOR WHOM? THE RIGHT OF ACCESS TO MASS MEDIA (1973); Jerome A. Barron, *Access Reconsidered*, 76 GEO. WASH. L. REV. 826-844 (2008); Jerome A. Barron, *Access—The Only Choice for the Media?*, 48 TEX. L. REV. 766-782 (1970); Jerome A. Barron, *Access to the Media: A Contemporary Appraisal*, 35 HOFSTRA L. REV. 937-953 (2007); Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641-1678 (1967) [*hereinafter* Barron, *Access to the Press*]; Jerome A. Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487-509 (1969); Jerome A. Barron, *Rights of Access and Reply to the Media in the United States Today*, 25 COMM. & L. 1-12 (2003) [*hereinafter* Barron, *Rights of Access Today*].

the Eighth Amendment's ban on cruel and unusual punishment. That, too, has been the subject of debate since the late 1860s, in conjunction with the common-carrier debate, and the Supreme Court has rhetorically embraced the affirmative vision of the First Amendment in *Associated Press* and elsewhere.⁷ In this regard, the common-carrier terminology used by the AP's critics is no mere historical quirk. It has contributed to the development of an important branch of First Amendment theory.

Scholars have addressed related topics. Menahem Blondheim has reviewed the debate over regulating the AP in the late nineteenth century.⁸ Margaret Blanchard has chronicled the AP antitrust case.⁹ Many scholars and journalists have recounted the history of the Associated Press.¹⁰ Much has been written about the affirmative approach to the First Amendment.¹¹ But to my knowledge, no one has addressed the pivotal role of the common-carrier approach in the antitrust case and in other proposals to regulate the American press, some of them much farther-reaching than the AP case, and the implications for the First Amendment.

This article presents and analyzes the argument that some news organizations ought to be treated, at least to some extent, as common carriers or

⁷ See *Red Lion Broadcasting Co. v. Fed. Communics. Comm'n*, 395 U.S. 367, 392 (1969); *Associated Press v. United States*, 326 U.S. at 20. *But see* *Miami Herald v. Tornillo*, 418 U.S. 241, 258 (1974); *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 124 (1973).

⁸ Menahem Blondheim, *Rehearsal for Media Regulation: Congress Versus the Telegraph-News Monopoly, 1866-1900*, 56 FED. COMM. L. J. 299-327 (2004).

⁹ Margaret A. Blanchard, *The Associated Press Antitrust Suit: A Philosophical Clash Over Ownership of First Amendment Rights*, 61 BUSINESS HIST. REV. 43-85 (1987).

¹⁰ *E.g.*, KENT COOPER, *KENT COOPER AND THE ASSOCIATED PRESS: AN AUTOBIOGRAPHY* (1959); OLIVER GRAMLING, *AP: THE STORY OF NEWS* (1940); MELVILLE E. STONE, *FIFTY YEARS A JOURNALIST* (1921); Victoria Smith Ekstrand, *Associated Press*, in 1 *ENCYCLOPEDIA OF JOURNALISM* 116-122 (Christopher H. Sterling ed., 2009); Peter B. Knights, *The Press Association War of 1866-1867*, 6 *JOURNALISM MONOGRAPHS* 1-57 (Dec. 1967); Walter R. Mears, *A Brief History of AP*, in *BREAKING NEWS: HOW THE ASSOCIATED PRESS HAS COVERED WAR, PEACE, AND EVERYTHING ELSE* 403-413 (2007). On wire services generally, see MENAHEM BLONDHEIM, *NEWS OVER THE WIRES: THE TELEGRAPH AND THE FLOW OF PUBLIC INFORMATION IN AMERICA, 1844-1897* (1994); VICTOR ROSEWATER, *HISTORY OF COOPERATIVE NEWS-GATHERING IN THE UNITED STATES* (1930); RICHARD SCHWARZLOSE, *2 THE NATION'S NEWSBROKERS: THE RUSH TO INSTITUTION, FROM 1865 TO 1920* (1989); PAUL STARR, *THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS 170-188* (2004).

¹¹ *E.g.*, OWEN M. FISS, *THE IRONY OF FREE SPEECH* (1996); Matthew D. Bunker & Charles N. Davis, *The First Amendment as a Sword: The Positive Liberty Doctrine and Cable Must-Carry Provisions*, 40 *J. BROAD. & ELEC. MEDIA* 77-95 (1996); Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 *GA. L. REV.* 795-849 (1981).

public utilities.¹² First, the article summarizes the Associated Press's birth and rise to power. Second, it discusses the long-running debate over whether to regulate the AP, including state statutes and court decisions imposing common-carrier requirements that proscribed discrimination against would-be AP members. Third, the article briefly summarizes the AP antitrust litigation without delving into the intricacies of the Sherman Act. Fourth, the article examines other examples of common-carrier and public-utility rhetoric and regulation as applied to the press, including arguments over an access right to the media. The concluding section discusses the impacts of common-carrier rhetoric and of the affirmative vision of the First Amendment.

II. THE RISE OF THE ASSOCIATED PRESS

The story of the AP begins with the telegraph, and, as historian Paul Starr emphasizes, the story of the telegraph is intertwined with that of the railroad.¹³ Telegraph companies commonly ran lines alongside railroad tracks, a practice that served two ends. First, a telegraph company might not need to exercise eminent domain and clear land; the railroad might have already done so.¹⁴ Second, railroads relied on telegraph lines. Whereas railroad companies in Britain and other countries generally avoided head-on collisions by laying two sets of tracks, companies in the United States generally used a single set of tracks, with railroad employees communicating by telegraph to ensure that tracks were clear.¹⁵ Reflecting the symbiotic relationship, telegraph offices often operated out of railroad stations.¹⁶

As would be said of the Internet a century and a half later, a few journalists believed that the telegraph could replace at least some newspapers altogether. The *New York Herald* in 1845, a year after Samuel F. B. Morse demonstrated his line between Washington and Baltimore, predicted: "The telegraph may not affect magazine literature, nor those newspapers that have some peculiar characteristic. But the mere newspapers—the circulators of intelligence merely—must submit to destiny, and go out of existence."¹⁷ Readers, it seemed, would receive telegraphic news directly, without having to rely on

¹² This article uses the terms interchangeably, along with "public calling" and "affected with a public interest." These terms are discussed further below.

¹³ STARR, *supra* note 10, at 158, 171-173.

¹⁴ *Id.* at 173; Richard B. Du Boff, *The Rise of Communications Regulation: The Telegraph Industry, 1844-1880*, 34 J. OF COMMUNICATION 52, 57-58 (summer 1984).

¹⁵ STARR, *supra* note 10, at 158, 171-172; Du Boff, *supra* note 14, at 61.

¹⁶ STARR, *supra* note 10, at 185.

¹⁷ *The Electro Magnetic Telegraph—A Great Revolution Approaching*, N.Y. HERALD, May 12, 1845, at 2. See also *The Magnetic Telegraph*, N.Y. HERALD, July 9, 1845, at 2 ("The scissors and paste journalism of the country will be annihilated.").

“mere newspapers.” Instead, though, newspapers began exploiting the telegraph. It supplied news from elsewhere in the country, along with foreign news, which was initially received by ship and telegraphed from the port city.¹⁸ Leading publishers, including James Gordon Bennett (editor of the *Herald*) and Horace Greeley, invested in telegraph companies.¹⁹ Some telegraph firms began using their employees as reporters and selling news to newspapers.²⁰

Six newspapers in New York began informally sharing telegraphic news by the end of 1844.²¹ One of the excluded newspapers sourly referred to the group as the “associated press.”²² The name stuck. From there, the Associated Press developed as a nonprofit cooperative or mutual-benefit association.²³ The AP soon expanded its reach by beginning the practice—which continues today, even though the AP has a large reporting staff—of having member newspapers supply news.²⁴ AP bylaws provided that member newspapers could not share news, including certain news gathered by their own reporters, with nonmembers.²⁵

After initially competing with the AP, telegraph firms got out of the business of reporting the news and settled for merely transmitting it.²⁶ The AP

¹⁸ STARR, *supra* note 10, at 174-175.

¹⁹*Id.* at 170.

²⁰ ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM: ON FREE SPEECH IN AN ELECTRONIC AGE 93 (1983); TOM STANDAGE, THE VICTORIAN INTERNET: THE REMARKABLE STORY OF THE TELEGRAPH AND THE NINETEENTH CENTURY’S ON-LINE PIONEERS 150 (1998).

²¹ Ekstrand, *supra* note 10, at 117-118.

²² STARR, *supra* note 10, at 1; Mears, *supra* note 10, at 404.

²³ S. REP. NO. 242, at 93 (1874); Blanchard, *supra* note 9, at 44; Ekstrand, *supra* note 10, at 116-117, 122. The Associated Press began in New York; competed with and then essentially was replaced by the Western Associated Press, which was incorporated in Illinois; combined previously autonomous regional APs under the Illinois corporation; and, as will be discussed below, reincorporated in New York in the wake of an adverse court decision. Ekstrand, *supra* note 10, at 117-119; Mears, *supra* note 10, at 407. For a rundown of the various APs as of 1874, see S. REP. NO. 242, at 74-75 (1874). Because these corporate details are largely immaterial to the account and argument presented here, I refer simply to the Associated Press throughout. I also do not distinguish between voting and nonvoting classes of AP members. See *United States v. Associated Press*, 52 F. Supp. 362, 365 (S.D.N.Y. 1943), *aff’d*, 326 U.S. 1 (1945); John Henry Lewin, *The Associated Press Decision—An Extension of the Sherman Act?*, 13 U. CHI. L. REV. 247, 250 n.11, 252 n.13 (1945).

²⁴ *United States v. Associated Press*, 52 F. Supp. at 364; Blanchard, *supra* note 9, at 44; Ekstrand, *supra* note 10, at 117-119; Mears, *supra* note 10, at 409.

²⁵ Lewin, *supra* note 23, at 252.

²⁶ Some telegraph operators moonlighted as reporters for the AP. STARR, *supra* note 10, at 185. Western Union twice considered starting its own news service but feared that doing so would bring on government regulation. Blondheim, *supra* note 8, at 312-313. The company did, however, control a company that supplied commercial news. STARR, *supra* note 10, at 181.

enjoyed advantageous rates and terms of carriage from Western Union, the firm that dominated the nation by 1870.²⁷ The AP agreed not to use other telegraph companies, and Western Union gave AP messages priority over other messages and, for a time, refused to carry messages from other news services.²⁸ (Not until 1910 did Congress declare Western Union a common carrier, with standard rates, though an 1866 law conferred privileges on telegraph companies, including the right to run lines across public lands, if they would operate as common carriers.²⁹) The AP also forbade subscribers from using any other telegraph company³⁰—it gives “aid and comfort to the enemy,” one AP man said³¹—and from lending editorial support to any competitor of Western Union.³² Thanks to the last provision, Western Union could argue that the public opposed the idea of a government-run “postal telegraph,” and cite newspaper columns denouncing the proposal as evidence.³³ A Senate witness in 1874 charged that Western Union and the AP formed “a double-headed monopoly.”³⁴ A decade later, a Senate committee said that the two companies were “practically, as against the general public, a single corporation.”³⁵

Illustrating the cozy relationship between the telegraph firm and the wire service, the AP in the 1880s sought to lease a wire from Western Union rather than continuing to pay per word.³⁶ When the president of Western Union proposed an exorbitant rate, the AP men met with the controlling owner of Western Union, the so-called robber baron Jay Gould.³⁷ John Sleicher of the AP

²⁷ S. REP. NO. 624, at 2-3 (1875); STARR, *supra* note 10, at 166, 181, 183; Du Boff, *supra* note 14, at 58; Frank B. Noyes, *The Associated Press*, NORTH AM. REV., May 1913, at 707. Western Union told one editor that the wire-service’s fee would be \$30 a week for AP news and \$105 a week for United Press news. S. REP. NO. 577, at 280, 282 (1884).

²⁸ POOL, *supra* note 20, at 95; STARR, *supra* note 10, at 183, 188; Mears, *supra* note 10, at 405.

²⁹ POOL, *supra* note 20, at 95; STARR, *supra* note 10, at 188.

³⁰ S. REP. NO. 805, at 58, 66 (1879); S. REP. NO. 242, at 12 (1872); CARROLL E. SMITH, THE ASSOCIATED PRESS OF THE STATE OF NEW YORK 15 (1901).

³¹ S. REP. NO. 805, at 86 (1879).

³² *Id.* at 37; STARR, *supra* note 10, at 177. *See* S. REP. NO. 242, at 108 (1874) (quoting AP-Western Union contract); S. REP. NO. 114, at 104 n.* (1870) (same); FRANK PARSONS, THE TELEGRAPH MONOPOLY 86 (1899) (same). Western Union also reportedly exerted its influence directly on occasion, by terminating service to newspapers that published material supporting a government-owned telegraph system. S. REP. NO. 242, at 107-108 (1874); 9 REP. OF THE INDUSTRIAL COMM’N ON TRANSP. 246 (1901).

³³ S. REP. NO. 242, at 3, 22 (1874).

³⁴ S. REP. NO. 242, at 22 (1874).

³⁵ S. REP. NO. 577, at 17 (1884).

³⁶ John A. Sleicher, *How the State Press Got Its Wire*, in CARROLL E. SMITH, THE ASSOCIATED PRESS OF THE STATE OF NEW YORK 36 (1901).

³⁷ *Id.* at 36-37.

said, Sleicher later recalled, “that an opportunity was now presented to Mr. Gould to win the friendship and favor of the press by meeting its request as liberally as possible, and I added that Mr. Gould himself would no doubt enjoy the friendship rather than the disfavor of the newspapers.”³⁸ Though he professed indifference to what was written about him, Gould largely consented to the AP’s proposed arrangement.³⁹

Other wire services remained small. The strongest competition in the nineteenth century came from the United Press, founded in 1882 (a different United Press was founded in 1907).⁴⁰ The United Press thrived in large part by stealing AP news, with the backstage collaboration of several AP directors for a time.⁴¹ The secret arrangement came to light, and the United Press went bankrupt in 1897.⁴²

A major reason that other services had trouble competing was that the AP at first prohibited members from subscribing to any other news service.⁴³ The AP also forbade subscribers from publishing anything derogatory about the AP.⁴⁴ James W. Simonton of the Associated Press said in a Senate hearing in 1879, “Now, I submit that there is not a gentleman here who would sell dry-goods, groceries, or anything else, day after day, to a man who told him every time he came in, ‘You are a thief, a swindler, and a liar.’”⁴⁵

The AP also discouraged competition in another way, one that would prove more consequential in legal terms: its bylaws made it more difficult for a newspaper to join the AP if it competed with an existing AP member. Initially, some newspapers were given a right of veto over the applications of competitors.⁴⁶ Subsequently, admission required a four-fifths vote of members.⁴⁷

³⁸ *Id.* at 37.

³⁹ *Id.* Gould at one point was rumored to be seeking control of the Associated Press, which, *The New York Times* predicted, would enable him to control the government and become “the autocrat of America.” *His Majesty Jay Gould*, N.Y. TIMES, Feb. 23, 1881, at 4.

⁴⁰ GRAMLING, *supra* note 10, at 90; Mears, *supra* note 10, at 406; Wes Pippert, *United Press International*, in ENCYCLOPEDIA OF AMERICAN JOURNALISM 553, 555 (Stephen L. Vaughn ed., 2008). Blondheim contends that AP officials helped establish the United Press in part to defuse accusations that the AP was a dangerous monopoly. Blondheim, *supra* note 8, at 322-323.

⁴¹ GRAMLING, *supra* note 10, at 111-135; STARR, *supra* note 10, at 185; Mears, *supra* note 10, at 407-408.

⁴² STARR, *supra* note 10, at 185; Mears, *supra* note 10, at 408.

⁴³ *Matthews v. Associated Press*, 136 N.Y. 333, 342 (Ct. Apps. 1893); GRAMLING, *supra* note 10, at 79; STARR, *supra* note 10, at 175, 184; Mears, *supra* note 10, at 406. The provision was later changed. *See United States v. Associated Press*, 52 F. Supp. 362, 367 (S.D.N.Y. 1943), *aff’d*, 326 U.S. 1 (1945).

⁴⁴ S. REP. NO. 624, at 4 (1875); STARR, *supra* note 10, at 177, 184; GRAMLING, *supra* note 10, at 81, 96; Mears, *supra* note 10, at 405, 406; Blondheim, *supra* note 8, at 311-312, 315.

⁴⁵ S. REP. NO. 805, at 48 (1879). *See also id.* at 80-82.

⁴⁶ STONE, *supra* note 10, at 212.

Of 103 applications subject to these “rights of protest,” only six attracted the requisite four-fifths majority for admission.⁴⁸ As the Supreme Court would later put it, “Historically, as well as presently, applicants who would offer competition to old members have a hard road to travel.”⁴⁹ The result hindered competition and helped entrench monopoly newspapers. The National Typographical Union in 1869 protested that “the Associated Press has virtually decreed that no more newspapers shall be published in the United States.”⁵⁰ A Senate committee in 1870 said that the AP could “prevent the establishment of newspapers by declining to furnish them with news.”⁵¹ The AP did not dispute the charge. Simonton said in 1879, “We think there are too many newspapers, and we do not care to assist in making any more.”⁵²

The Associated Press proved insurmountable. As early as the 1860s, an AP executive acknowledged that the service had “practically a monopoly of the telegraphic news of the country.”⁵³ It was “virtually in the position of a monopoly news service” in the 1870s, according to economist Stephen Shmanske.⁵⁴ Many newspapers without AP subscriptions struggled to stay afloat.⁵⁵ One journalist wrote that “[m]embership in the Associated Press was the most highly prized privilege in journalism.”⁵⁶ The AP franchise in New York was believed to be

⁴⁷ *United States v. Associated Press*, 52 F. Supp. 362, 364 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945); S. REP. NO. 577, at 296, 297 (1884); STARR, *supra* note 10, at 184. Under pressure from the Justice Department in the early 1940s, the AP changed the requirement to a majority vote but required members to pay a sum, often considerable, to the earlier AP members in the particular market. 52 F. Supp. at 364-365; *Associated Press Is Sued as Trust; Directors to Fight*, N.Y. TIMES, Aug. 29, 1942, at 8. As of 1943, the United Press and the International News Service also imposed a fee on new members that would compete with existing members. *United States v. Associated Press*, 52 F. Supp. at 366-367; Lewin, *supra* note 23, at 260 n.25.

⁴⁸ Lewin, *supra* note 23, at 258.

⁴⁹ *Associated Press v. United States*, 326 U.S. 1, 10 (1945).

⁵⁰ S. MISC. DOC. NO. 13 (1870).

⁵¹ S. REP. NO. 114, at 46 (1870).

⁵² S. REP. NO. 805, at 69 (1879). *See also id.* at 91; S. REP. NO. 577, at 293 (1884); S. REP. NO. 242, at 82-83, 85 (1874); Will Irwin, *What's Wrong with the Associated Press?*, HARPER'S WKLY., March 28, 1914, at 10-12.

⁵³ GRAMLING, *supra* note 10, at 47.

⁵⁴ Stephen Shmanske, *News as a Public Good: Cooperative Ownership, Price Commitments, and the Success of the Associated Press*, 60 BUS. HIST. REV. 55, 62 (spring 1986). *See also* Menahem Blondheim, *The Click: Telegraphic Technology, Journalism, and the Transformations of the New York Associated Press*, 17(4) AM. JOURNALISM 27, 47 (fall 2000) (the AP “was probably the first private sector national monopoly in the United States”).

⁵⁵ STARR, *supra* note 10, at 184.

⁵⁶ M. KOENIGSBERG, *KING NEWS: AN AUTOBIOGRAPHY* 455 (1941).

worth a quarter million dollars.⁵⁷ *The New York Times* said in 1900, “If the President of the United States, the Secretary of State, a committee of Congress, the head of a political party, or a candidate for high office desires to communicate information or views upon a particular question to the people of the country, The Associated Press is the chosen channel of conveyance.”⁵⁸ Mark Twain said in 1906, “There are only two forces that can carry light to all corners of the globe, only two, the sun in the heavens and the Associated Press down here.... I may seem to be flattering the sun, but I do not mean it so.”⁵⁹

III. CRITICISM, STATUTES, AND LITIGATION

A. Regulatory Concepts

Common carriers, public utilities, businesses affected with a public interest, and public callings are overlapping, amorphous, at times arbitrary categories.⁶⁰ Transportation and communication are generally common carriers—they carry goods or information—whereas electricity and natural gas providers are public utilities.⁶¹ Common carriers were initially seen as part of a larger category, common callings, that could be regulated.⁶² Doctors and tailors were once deemed to be engaged in common callings, because they tended to hold monopolies over a given area until industrialism brought competition.⁶³

⁵⁷ STARR, *supra* note 10, at 184.

⁵⁸ *The Law and the Associated Press*, N.Y. TIMES, Feb. 21, 1900, at 6.

⁵⁹ Mears, *supra* note 10, at 403.

⁶⁰ After discussing a state’s authority to regulate businesses affected with a public interest, the Supreme Court said that “[f]rom the same source comes the power to regulate the charges of common carriers,” which themselves are “affected with a public interest.” *Munn v. Illinois*, 94 U.S. 113, 129, 130 (1876). One author interchangeably discusses public callings, public utility regulation, common carriers, and businesses affected with a public interest. Benjamin F. Small, *Anti-Trust Laws and Public Callings: The Associated Press Case*, 23 N.C. L. REV. 1, 3, 4-5, 16, 17 (1944).

⁶¹ Eli M. Noam, *Beyond Liberalization II: The Impending Doom of Common Carriage*, 18 TELECOMM. POL’Y 435, 436 (1994). The original common carriers were transportation-related and dealt with physical carriage; the term was applied by way of analogy to communications firms. Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies: Part I*, 11 COLUM. L. REV. 616, 621-622 (1911).

⁶² Burdick, *supra* note 61, at 622.

⁶³ Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156, 157-160 (1904); *What Constitutes a Public Service*, 26 W. VA. L. Q. 140, 142 (1920). See also OLIVER WENDELL HOLMES, *THE COMMON LAW* 203 (1909) (“An attempt to apply [the public calling] doctrine generally at the present day would be thought monstrous. But it formed part of a consistent scheme for holding those who followed useful callings up to the mark.”).

Public ferries, wharves, and warehouses could be regulated, for they were considered to be “affected with a public interest.”⁶⁴

Three aspects are especially important with regard to the Associated Press. First, businesses falling in these categories are often, though not always, monopolies.⁶⁵ Taxicabs, airlines, and trucking companies are exceptions.⁶⁶ Second, for a business to be regulated in this fashion, it generally must perform a function of particular value to society.⁶⁷ In *Munn v. Illinois*, the Supreme Court upheld an Illinois law regulating the rates charged by grain elevators. Once private property is “affected with a public interest, it ceases to be *juris privati* only,”⁶⁸ the Court said, and grain elevators are a business “of great importance,” one “in which the whole public has a direct and positive interest.”⁶⁹ Third, these aspects of a business or industry can lead to government regulation, most importantly nondiscrimination: a firm must provide equal access to its services, including to competitors, and charge standard rates.⁷⁰ One Senator said in 1926, “[W]henever we say that the service must be rendered without discrimination we have made that agency a common carrier.”⁷¹ The nondiscrimination requirement, which Ithiel de Sola Pool calls “[t]he only essential feature” of common-carrier regulation,⁷² lies at the heart of the AP antitrust case.

⁶⁴ *Munn*, 94 U.S. at 126-128.

⁶⁵ See *id.* at 132 (noting state regulation “to prevent abuses by virtual monopolies”); Wyman, *supra* note 63, at 223 (arguing for regulation, as a public calling, of any “virtual monopoly”).

⁶⁶ POOL, *supra* note 20, at 96; Noam, *supra* note 61, at 438.

⁶⁷ Noam, *supra* note 61, at 439.

⁶⁸ *Munn*, 94 U.S. at 126 (quoting De Mortibus Maris, 1 Harg. Law Tracts, 78). See generally Walton H. Hamilton, *Affection with Public Interest*, 39 Yale L. J. 1089 (1930).

⁶⁹ *Munn*, 94 U.S. at 133. *But cf.* Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem: II*, 17 HARV. L. REV. 217, 223 (1904) (stating that “the sweeping principles” set forth in *Munn* “must be employed with the greatest caution; otherwise there is danger that all businesses may be dragged into the net”).

⁷⁰ POOL, *supra* note 20, at 2, 95-98; Kenneth A. Cox & William J. Byrnes, *The Common Carrier Provisions—A Product of Evolutionary Development*, in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 25, 26 (Max D. Paglin ed., 1989); Noam, *supra* note 61, at 438. *But see* German Alliance Ins. Co. v. Lewis, 233 U.S. 389 (1914) (imposing regulations but not a nondiscrimination requirement on an insurance company); Frank J. Kahn, *The Quasi-Utility Basis for Broadcast Regulation*, 18 J. BROAD. 257, 264, 272 n.33 (1974) (arguing that “[w]hile all common carriers may be public utilities, not all public utilities are common carriers,” and stating that the nondiscrimination requirement need not apply to public utilities).

⁷¹ 67 CONG. REC. 12,502 (1926) (remarks of Senator Albert B. Cummins).

⁷² Ithiel de Sola Pool, *Government Regulation in the Communications System*, 34(4) PROC. OF THE ACAD. OF POL. SCI. 121, 123 (1982).

As a corollary of the nondiscrimination requirement, regulators sometimes ban content origination. The concern behind what can be called “the separation of content and conduit”⁷³ is that a common carrier might otherwise give preferential treatment to its own content. From 1982 to 1989, for example, AT&T was prohibited from generating and providing electronic information.⁷⁴ The competitors who lobbied most strongly for the prohibition were newspaper publishers; long before Craigslist, they worried that “electronic yellow pages” would undermine their classified advertising.⁷⁵ In imposing the restriction, the court advanced the affirmative conception of the First Amendment. If AT&T were permitted to provide content,

there would be a substantial risk not only that it would stifle the efforts of other electronic publishers but that it would acquire a substantial monopoly over the generation of news in the more general sense. Such a development would strike at a principle which lies at the heart of the First Amendment: that the American people are entitled to a diversity of sources of information.⁷⁶

As authority, the court cited the AP case from the New York district court and from the Supreme Court.⁷⁷

The separation of content and conduit, along with the nondiscrimination rule more generally, serves the interests of speakers. A media access right, such as the federal law requiring broadcasters to make their facilities available to candidates for federal office, also serves the interests of speakers (and through them of listeners—a focus on speaker access invariably serves the interests of listeners as well, who, at least in theory, seek to hear a wide range of views from

⁷³ Henry Geller, *Mass Communications Policy: Where We Are and Where We Should Be Going*, in *DEMOCRACY AND THE MASS MEDIA* 290, 317 (Judith Lichtenberg ed., 1990).

⁷⁴ *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 180-186, 223-224 (D.D.C. 1982); Anita Taff, *AT&T Gets OK To Offer Info Services*, *NETWORK WORLD*, Aug. 7, 1989, at 4. The ban did not cover general directory information, time, weather, and other such existing services. *AT&T*, 552 F. Supp. at 185 n.223. For a critique of the ban, see Henry Geller, *Looking Not Far Into the Future*, *SOCIETY*, July-Aug. 1989, at 21, 24-25.

⁷⁵ Ithiel de Sola Pool, *The Culture of Electronic Print*, 111(4) *DAEDALUS* 17, 17-20 (fall 1982). Pool is critical of the publishers’ argument, writing that “[i]n a perfect world, the press, in its own defense, would champion the right of AT&T to publish yellow pages or anything else it wished.” *Id.* at 19. For a more recent proposal that applies content-conduit separation, see Justin Brown, *Fostering the Public’s End-to-End: A Policy Initiative for Separating Broadband Transport from Content*, 8 *COMM. L. & POL’Y* 145-199 (2003).

⁷⁶ *AT&T*, 552 F. Supp. at 224.

⁷⁷ *Id.* at 183. The court also noted, presciently, that “it is not at all inconceivable that electronic publishing, with its speed and convenience[,] will eventually overshadow the more traditional news media.” *Id.* at 184.

diverse sources, though I will characterize such arrangements as falling under a speaker-centered approach). Rules banning content generation and those mandating speaker access interfere with a media organization's editorial autonomy, too. They require the organization to carry at least some content that originates with outsiders, in a nondiscriminatory fashion.

The Associated Press antitrust case, by contrast, deals directly with the rights of listeners: newspapers that wanted AP membership, and, by extension, their readers.⁷⁸ Henry Geller extracts from the AP case the principle that "the American people should receive information from as diverse and antagonistic sources as possible"⁷⁹—listeners' rights. Regulations that extend media availability or reduce costs, such as limits on cable TV rates, also serve the interests of listeners. As in the AP case, such a focus on listeners need not interfere with the media organization's editorial autonomy; it may interfere only with the organization's business autonomy, though of course the two can blur.

As applied to the media, all three regulatory concepts—the focus on the rights of speakers, the focus on the rights of listeners, and the ban on content generation—overlap with the affirmative vision of the First Amendment. In this vision, the First Amendment allows the government to foster free speech, rather than forbidding government intrusion altogether. In particular, this conception allows regulation of the press as a means to resolve what has been termed the conflict between free press and free expression⁸⁰ as well as the conflict between a libertarian theory of free speech and a democratic theory.⁸¹ The affirmative vision of the First Amendment has done much to shape the debates over regulating the Associated Press and other media in the United States.

B. The Associated Press as a Target of Regulation

Starting just after the Civil War, critics charged that the Associated Press was a monopoly providing a vital service. As such, they argued, it ought to be regulated as a common carrier and required to provide its services to every newspaper at nondiscriminatory rates, rather than, as its bylaws provided, (a) giving members a veto over applications from competing newspapers, or otherwise hindering these competitors from subscribing to AP services, and (b) expelling members who subscribed to competing news services. Over the nearly

⁷⁸ Those newspapers that wanted access included nonmembers subjected to a competitor's right of veto and members threatened with ouster from the AP for subscribing to a competing news service. In the latter case, the rights of other potential speakers—competing news services—were also implicated.

⁷⁹ Geller, *supra* note 73, at 290.

⁸⁰ Note, *Resolving the Free Speech-Free Press Dichotomy: Access to the Press Through Advertising*, 22 U. FLA. L. REV. 293, 293 (1969).

⁸¹ FISS, *supra* note 11, at 79.

eight decades that followed, through the 1945 Supreme Court case, many advocates of the common-carrier model maintained, as a foundation of their argument about regulating the AP, that the government possesses affirmative power to advance First Amendment interests by restricting the press.⁸²

Critics first discussed the AP in the context of the Western Union monopoly, which was the subject of congressional proposals in all but one Congress between 1866 and 1900.⁸³ A Senate bill in 1875, for example, would have required Western Union to establish fixed rates for all customers. The report on the bill noted that Western Union charged lower rates to Associated Press members than to nonmembers, and said that the bill was “intended to give equal rights to new associations for the collection and sale of news ... and thus to free the press from dependence upon ... one news association.”⁸⁴

In 1879, Senators and witnesses at a hearing on whether to allow railroads to operate telegraph lines devoted much of their attention to the Associated Press.⁸⁵ One Senator told the AP’s James Simonton that the wire service performed “public duties” and ought to act as a common carrier:

If a man gets on a railroad-train and offers his pay for passage, the railroad company is obliged by law to transport him.... [I]n a large number of other kinds of business the rule is the same, although they are nowhere near so important to the country as is the dissemination of the daily news....⁸⁶

Simonton responded by likening the AP to a hat-seller.⁸⁷ “Would you regard the news ... as having the same relation to the public as a hat?” the Senator asked.⁸⁸ “Certainly not,” replied Simonton.⁸⁹ The Senator said, “I should hope not. I should think it a much more sacred matter.”⁹⁰ A witness who favored imposing a nondiscrimination requirement on the AP, Gardiner G. Hubbard, said,

⁸² For an account of this argument as it arose in the nineteenth century, see Blondheim, *supra* note 8, at 312.

⁸³ *Id.* at 306.

⁸⁴ S. REP. NO. 624, at 2-3 (1875).

⁸⁵ S. REP. NO. 805 (1879). *See id.* at 75-76 (describing bill under consideration).

⁸⁶ *Id.* at 50-51.

⁸⁷ *Id.* at 51.

⁸⁸ *Id.*

⁸⁹ *Id.* *But see* S. REP. NO. 577, at 297 (1884) (AP general manager answers “No” to the question, “Do you make any distinction between the business of collecting and disseminating news calculated to affect the public interests or the business of the country and that of any other private business?”).

⁹⁰ S. REP. NO. 805, at 51 (1879).

I think it is a public business; and if so, the Associated Press has no more right to say that one paper shall not have its news than another at the same rate, than the Pennsylvania road has to say that one man shall ride on their railroad and another man shall not, or than Willard's hotel have a right to say that one shall enter the hotel and another not.... [P]ublic carriers or parties doing a public business cannot say who shall or who shall not participate in the benefit of that business ... on paying the fixed compensation.⁹¹

Talk of regulating the AP increased during the Progressive Era, from the 1890s to World War I.⁹² In a time of trust-busting, many commentators talked of the organization as a “news trust.”⁹³ Criticism focused on the content of AP dispatches as well as the wire service's monopoly—including the AP's tendency not to report accusations that it was a monopoly.⁹⁴ Some accused the wire service of censorship.⁹⁵ A few critics even called for the government to take over and operate the company.⁹⁶

⁹¹ *Id.* at 84. *See also id.* at 77 (Hubbard: “If this is not a public business we know of nothing that is; for every one that reads a newspaper, no matter to what party he belongs, is interested in this matter.”); *id.* at 82 (Hubbard: “[I]f this is a public business it can be regulated by Congress under the powers to regulate commerce and to establish post-offices and post-roads, and it is the duty of Congress to establish rates and regulations which shall give the press, as a matter of right, the Associated Press news on payment of a fair price.”).

⁹² *E.g.*, Thomas W. Brown, *A Newspaper Trust*, 31 AM. L. REV. 569-577 (1897); *The Worship of the Man in Blue Jeans*, GATEWAY, May 1905, at 29. Progressives believed in “communication as the cohesive force in society.” JAMES W. CAREY, *COMMUNICATION AS CULTURE: ESSAYS ON MEDIA AND SOCIETY* 143 (1989). *See generally* Margaret A. Blanchard, *Press Criticism and National Reform Movements: The Progressive Era and the New Deal*, 5 JOURNALISM HIST. 33-55 (summer 1978). *Cf.* Wyman, *supra* note 63, at 173 (noting that as of 1904, “new businesses are being put into the class of public employments”).

⁹³ *E.g.*, JOHN C. REED, *THE NEW PLUTOCRACY* 316 (1903); An Observer, *The Problem of the Associated Press*, ATLANTIC M., July 1914, at 132; *The Associated Press as a Trust*, LITERARY DIG., Feb. 21, 1914; *A Bit of Trust History*, N.Y. TIMES, Oct. 27, 1906, at 8 (*reprinting* RICHMOND NEWS LEADER); Brown, *supra* note 92, at 569; *Is There a Newspaper Trust?*, LITERARY DIG., Feb. 12, 1898.

⁹⁴ UPTON SINCLAIR, *THE BRASS CHECK* 150-175 (1920); Blondheim, *supra* note 8, at 318-319; *Governor Pingree on the Menace of the Trusts*, LITERARY DIG., Jan. 21, 1899, at 68. For an earlier example of this criticism, see S. REP. NO. 242, at 108 (1874).

⁹⁵ PARSONS, *supra* note 32, at 86.

⁹⁶ 9 REP. OF THE INDUSTRIAL COMM'N ON TRANSP. ccxvii (1901).

Again, those favoring regulation sometimes talked of common carriers and related principles. In 1913, a congressman proposed putting the AP and other news services “squarely under the jurisdiction of the [Interstate Commerce Commission], defining them as common carriers, and making it mandatory that they shall furnish their news service to all newspapers desiring the same, upon equal terms and at equal price.”⁹⁷ The same year, *The New York Times* referred to “the general belief that The Associated Press as a common carrier might be compelled by court proceedings to supply its news to all newspapers on equal terms.”⁹⁸ In 1914, an anonymous writer in the *Atlantic Monthly* said that the AP “has strong claims to be recognized as a public service, and to be classed with railways, telephones, telegraphs, waterworks, and many other forms of corporate venture which even the wildest radical admits cannot be subjected to the anarchy of unrestricted competition.”⁹⁹ The writer added that the wire service ought to be deemed “a public-utility corporation” with its service available to all, as well as be subjected to other “government regulation and supervision.”¹⁰⁰ Also in 1914, in an article on whether the Associated Press constituted an unlawful monopoly, *Collier’s* predicted government regulation of the press as a whole, seemingly including content: “We think the time will come when newspapers will be recognized as having the qualities of a public utility, and will be subject to inquiry and regulation by commissions similar to those which have arisen in many States during the past few years to supervise railroad, telephone, and lighting corporations.”¹⁰¹

To many of the reformers who talked of regulating the AP as a common carrier, freedom of the press required an affirmative vision of the First Amendment, one that would leave room for the government to act against private restraints. The wire service argued against this vision. The AP general manager said in 1884, “The Constitution guarantees the liberty of the press, and regulation is inconsistent with the liberty of the press.”¹⁰² This exchange, a pithy summation of the conflict between the affirmative and the negative visions of the First Amendment, followed:

⁹⁷ *Wants Press Associations Declared Common Carriers*, COMMERCIAL TELEGRAPHERS’ J., April 1913, at 112.

⁹⁸ *Experts at Odds on “The World’s” Value*, N.Y. TIMES, June 23, 1913, at 1. See also Noyes, *supra* note 27, at 708.

⁹⁹ An Observer, *supra* note 93, at 133.

¹⁰⁰ *Id.* at 137.

¹⁰¹ COLLIER’S, June 6, 1914, quoted in THE ASSOCIATED PRESS: REPLY TO A CRITICISM, n.p., n.d. See also *The “Sun’s” Complaint*, OUTLOOK, Feb. 28, 1914, at 427.

¹⁰² S. REP. NO. 577, at 299 (1884). See also Noyes, *supra* note 27, at 708 (arguing that treating the AP as a common carrier would endanger “the freedom of the press and in turn ... the freedom of the people”).

Q. It is not inconsistent, however, to pass a law for the freedom of the press and the enforcement of that principle of the Constitution, is it?

A. It requires no enforcement, it belongs to the people. It is not a matter that concerns Congress at all.¹⁰³

The Senator who had asked the question then observed, “The Congress cannot abridge the freedom of the press, but it seems to me that there might be some regulation enacted by Congress which would make more effective the freedom of the press than it would be without regulation.”¹⁰⁴

Although the federal government did not regulate the Associated Press, several states stepped in and prohibited it from discriminating against would-be members. A Nebraska statute enacted in 1897 required news services as well as telegraph companies to serve all newspapers impartially—another example of treating Western Union and the AP as close counterparts.¹⁰⁵ In 1898, Kentucky enacted a law requiring “foreign corporations” engaged in newsgathering to make information available “to any and all persons, firms and corporations organized under the laws of this State.”¹⁰⁶ Texas, Tennessee, Arkansas, and Kansas enacted statutes too.¹⁰⁷ It appears that none of these statutes was used against the AP.¹⁰⁸ In California, a legislative committee voted down a bill to regulate the AP as a common carrier;¹⁰⁹ the Washington and Oregon legislatures also considered such bills.¹¹⁰ Later, in 1931, the New York legislature considered a bill that would have

¹⁰³ S. REP. NO. 577, at 299.

¹⁰⁴ *Id.* See also S. REP. NO. 242, at 84 (1874); Blondheim, *supra* note 8, at 321-322.

¹⁰⁵ SCHWARZLOSE, *supra* note 10, at 193-194; *State Statutes Affecting the Associated Press*, in LAW OF THE ASSOCIATED PRESS 484 (1914); Brown, *supra* note 92, at 574; Small, *supra* note 60, at 20 n.101.

¹⁰⁶ WILLIAM G. HALE & IVAN BENSON, THE LAW OF THE PRESS: TEXT, STATUTES, AND CASES 541 (2d ed. 1933); SCHWARZLOSE, *supra* note 10, at 194; *State Statutes Affecting the Associated Press*, *supra* note 105, at 485-486; Small, *supra* note 60, at 20 n.101.

¹⁰⁷ HALE & BENSON, *supra* note 106, at 541; ROSEWATER, *supra* note 10, at 260; *Public's Press?*, TIME, Feb. 2, 1931, available at <http://www.time.com/time/magazine/article/0,9171,740985,00.html> (last visited Aug. 8, 2010); *State Statutes Affecting the Associated Press*, *supra* note 105, at 502-505; Small, *supra* note 60, at 20 n.101.

¹⁰⁸ William F. Swindler, *The AP Anti-Trust Case in Historical Perspective*, 23 JOURNALISM Q. 40, 48 (1946).

¹⁰⁹ *Associated Press and Its News*, SAN JOSE MERCURY NEWS, Feb. 15, 1903, at 4; *Not a Common Carrier*, SAN JOSE MERCURY NEWS, Feb. 19, 1903, at 2.

¹¹⁰ *Legislature Hard at Work*, MORNING OLYMPIAN (Wash.), Feb. 21, 1903, at 1; *Mr. Amme's Little Bill*, MORNING OREGONIAN, Jan. 30, 1911.

expressly regulated wire services and press syndicates as public utilities.¹¹¹ Though its main concern appears to have been with giving newspapers equal access to these news services, the bill would have allowed the public utility commission to regulate newsgathering, too.¹¹² The bill died in the Judiciary Committee.¹¹³

The Associated Press faced litigation as well. Though it won similar cases,¹¹⁴ the AP lost an important 1900 case in Illinois, where it was then incorporated.¹¹⁵ The case arose when the *Chicago Inter-Ocean* violated AP bylaws by purchasing news from other news services. The newspaper sued for an injunction to require the AP to continue the existing business arrangement. The trial court and the appeals court denied the injunction, but the Illinois supreme court reversed.¹¹⁶ The supreme court said, “The appellee corporation being engaged in a business upon which a public interest is engrafted, upon principles of justice it can make no distinction with respect to persons who wish to purchase information and news...”¹¹⁷ The disputed bylaw had the “clear effect” of “creat[ing] a monopoly, which renders it void.”¹¹⁸ The court noted that the Illinois corporation had been organized in part to erect, buy, and sell telegraph and telephone lines, and it had been granted the power of eminent domain—provisions evidently meant to give the wire service bargaining leverage to get low rates for its telegraph traffic.¹¹⁹ Though the organization had not in fact dealt in telegraph or telephone lines, “it is important to determine the character of the corporation under its charter.”¹²⁰ The court relied on *Munn v. Illinois*, where the

¹¹¹ *Recent Legislative Proposals to Classify Newspapers and Magazines as Public Utilities and to Regulate Them Accordingly*, 17 VA. L. REV. 705, 705 (1931) (citing New York Assembly Bill No. 108 (Jan. 13, 1931)) [*hereinafter* *Recent Legislative Proposals*]. See also *Public’s Press?*, *supra* note 107.

¹¹² *Recent Legislative Proposals*, *supra* note 111, at 705.

¹¹³ *Id.* at 707, 709.

¹¹⁴ *E.g.*, *Star Publishing Co. v. Associated Press*, 60 S.W. 91 (Mo. 1901); *Matthews v. Associated Press*, 136 N.Y. 333 (1893); *Dunlap’s Cable News Co. v. Stone*, 15 N.Y.S. 2 (1891).

¹¹⁵ *Inter-Ocean Publishing Co. v. Associated Press*, 56 N.E. 822 (Ill. 1900). See also GRAMLING, *supra* note 10, at 119; *Associated Press Enjoined*, N.Y. TIMES, June 13, 1900, at 5; *Chicago Inter Ocean Wins*, N.Y. TIMES, May 8, 1900, at 2; *The Law and the Associated Press*, N.Y. TIMES, Feb. 21, 1900, at 6. Two newspapers in Springfield, Illinois, had earlier petitioned the state attorney general to declare the AP a common carrier; the result is unknown. *Associated Press*, COLUMBUS (Ga.) DAILY ENQUIRER, March 8, 1898, at 5.

¹¹⁶ *Inter-Ocean Publishing Co. v. Associated Press*, 83 Ill. App. 377 (1899).

¹¹⁷ 56 N.E. at 825.

¹¹⁸ *Id.* at 826.

¹¹⁹ *Id.* at 824; Swindler, *supra* note 108, at 46.

¹²⁰ 56 N.E. at 824. *But see* *Star Publishing Co. v. Associated Press*, 60 S.W. 91, 94 (Mo. 1901) (noting that inasmuch as AP had never used its authority to conduct telegraph or

Supreme Court had held that grain elevators could be regulated as public-interest businesses.¹²¹ Here, the Illinois court said, the AP “has devoted its property to a public use, and has, in effect, granted to the public such an interest in its use that it must submit to be controlled by the public for the common good.”¹²² Accordingly, “all newspaper publishers desiring to purchase [AP] news for publication are entitled to purchase the same without discrimination.”¹²³ In reaching this conclusion, the court cited cases involving telegraph and telephone companies.¹²⁴ The *Inter-Ocean*’s attorney said afterward that “[t]he Associated Press has been declared a common carrier.”¹²⁵

After the *Inter-Ocean* case, in what one journalist later described as “one of the most dramatic episodes of newspaper history,”¹²⁶ the Associated Press reorganized in New York State as a not-for-profit association.¹²⁷ There, it

telephone business, its power of eminent domain “lay dormant”); GRAMLING, *supra* note 10, at 153.

¹²¹ *Munn v. Illinois*, 94 U.S. 113 (1876). On the application of *Munn* to the press, see Note, *The Public Utility Concept of the Press and Radio*, 36 KY. L.J. 130, 130 (1947).

¹²² *Inter-Ocean*, 56 N.E. at 825.

¹²³ *Id.* See also *Associated Press—Duty to Public—Illegal Conditions*, 9 YALE L. J. 366, 366 (1900) (under *Inter-Ocean*, “news is deemed a commodity of public necessity which, like coal, gas, water, etc., it is illegal to monopolize. The justice and logic of this view can hardly be denied.”).

¹²⁴ *Inter-Ocean*, 56 N.E. at 825-826. On the nondiscrimination principle as applied to the AP in court, see also *International News Serv. v. Associated Press*, 248 U.S. 215, 267 (1918) (Brandeis, J., dissenting) (“If a legislature concluded ... that under certain circumstances news-gathering is a business affected with a public interest, it might declare that, in such cases, news should be protected against appropriation, only if the gatherer assumed the obligation of supplying it, at reasonable rates and without discrimination, to all papers which applied therefor.”); *Minnesota Tribune Co. v. Associated Press*, 83 F. 350 (8th Cir. 1897) (declining to address the issue of whether a court in equity should enforce an AP contract that “would seem to have an obvious tendency to create and perpetuate a monopoly of the news, by limiting the service of news reports to a single newspaper in a large city”). *Cf.* *New York Grain & Stock Exch. v. Board of Trade of Chicago*, 19 N.E. 855, 859-860 (Ill. 1889) (concluding that market quotations are “clothed with a public interest” under *Munn* and should be provided to all who want them).

¹²⁵ *Discuss Decision in Chicago*, CHICAGO TRIB., Feb. 20, 1900, at 7.

¹²⁶ *Text of Paul Bellamy’s Address Reviewing the Rise of Associated Press*, N.Y. TIMES, April 26, 1938, at 16.

¹²⁷ *Associated Press v. United States*, 326 U.S. 1, 10 (1945); GRAMLING, *supra* note 10, at 155-156; Mears, *supra* note 10, at 408-409; *Public’s Press?*, *supra* note 107; Noyes, *supra* note 27, at 701-702. New York amended its law to encompass a membership organization formed to “gather[] ... information ... for the use and benefit of its members, and to furnish and supply the same to its members for publication in newspapers owned or represented by them....” SCHWARZLOSE, *supra* note 10, at 205.

continued to deny membership to some newspapers that competed with existing AP papers.

Four years after *Inter-Ocean*, an Illinois appeals court in *Milwaukee News Publishing Co. v. Associated Press* heard a case brought by a newspaper that had been denied AP service on the veto of a competitor.¹²⁸ Citing *Inter-Ocean*, the court held that the AP “was under the same obligation to furnish to appellant news reports without discrimination, as the railroad companies ... were bound to carry freight without extorting illegal and oppressive rates from the shipper.”¹²⁹ It is unknown whether the ruling was enforced against the AP, which was no longer an Illinois corporation.

The two cases, *Inter-Ocean* and *Milwaukee News*, reflect the two grounds on which the AP would deny service to a newspaper: if the newspaper subscribed to a competing news service, which tended to protect the AP’s monopoly (*Inter-Ocean*); or if the newspaper’s application for membership was vetoed by a competitor, which tended to protect the AP member’s monopoly (*Milwaukee News*). It would be the second issue, the right of veto, that would reach the Supreme Court in 1945.

IV. THE AP ANTITRUST CASE

A. Background

In 1914, the *New York Sun* complained that the Associated Press was violating the Sherman Antitrust Act.¹³⁰ The *Sun*, which operated a competing news service, wanted an end to the AP’s exclusivity agreements with newspapers, just as the *Inter-Ocean* had sought, and wanted an AP membership for itself, just as the *Milwaukee News* had sought.¹³¹ The Attorney General investigated and concluded that the AP’s status did not violate the law.¹³² But he did recommend that the AP allow members to receive news from other wire services—the *Inter-Ocean* issue—and the AP complied.¹³³ Opposing any further attempts at regulation, Adolph Ochs of *The New York Times* observed that the AP was

¹²⁸ *Milwaukee News Publishing Co. v. Associated Press*, 114 Ill. App. Ct. Rep. 24 (1904), reprinted in LAW OF THE ASSOCIATED PRESS 506, 521 (1914).

¹²⁹ *Id.*

¹³⁰ *The Associated Press*, N.Y. TIMES, Feb. 6, 1914, at 8. The *Sun* also complained to Congress, which was considering amendments to the Sherman Act. Swindler, *supra* note 108, at 52.

¹³¹ Will Irwin, *What’s Wrong with the Associated Press?*, HARPER’S WKLY., March 28, 1914, at 10; *The Sun Complains of a “News Trust,”* N.Y. TIMES, Feb. 5, 1914, at 3.

¹³² ROSEWATER, *supra* note 10, at 301-302; *Gregory Vindicates Associated Press*, N.Y. TIMES, March 17, 1915, at 1.

¹³³ Blanchard, *supra* note 9, at 46; Swindler, *supra* note 108, at 53; *Will Not Prosecute Associated Press*, DALLAS MORNING NEWS, March 18, 1915, at 5.

organized under a statute designed for social clubs, and added: “The primary purpose of a social club is to bring into association congenial persons. It is their personality that constitutes all that makes the club congenial. To force an objectionable member into such a club impairs its purpose.”¹³⁴ Ochs said that “the requirements of a common carrier” could be imposed only “by the exercise of the powers of a master over a slave.”¹³⁵

A quarter century after its first inquiry, however, the Justice Department reached the opposite conclusion and proceeded against the AP under antitrust law. By then, both the AP and antitrust law had expanded.¹³⁶ In 1940, Thurman Arnold, the assistant attorney general in charge of antitrust, told Roy Howard of United Press that the government was considering an antitrust suit against the AP, targeting the exclusive franchise rights.¹³⁷ According to an account by Kent Cooper of the AP, Howard said that such a move might aid UP, but he would nonetheless oppose it “because it could result in The Associated Press being declared a common carrier,” in which case “it would come under Government regulations.”¹³⁸

In 1941, Marshall Field III launched the *Chicago Sun* so that the city would have a pro-New Deal paper to balance Colonel Robert R. McCormick’s *Chicago Tribune*.¹³⁹ The *Tribune* had AP service; in order to compete, the *Sun* wanted it.¹⁴⁰ When the *Sun* applied, however, McCormick exercised his protest right. The application went before AP’s members, requiring a four-fifths majority to overturn McCormick’s protest. The members voted against admitting the *Sun* (along with the *Washington Times-Herald*) in April 1942.¹⁴¹ Consequently, the

¹³⁴ STONE, *supra* note 10, at 340.

¹³⁵ *Id.* at 341.

¹³⁶ STEPHEN BECKER, MARSHALL FIELD III: A BIOGRAPHY 305 (1964).

¹³⁷ COOPER, *supra* note 10, at 275.

¹³⁸ *Id.*

¹³⁹ *Id.* at 278-279; RICHARD NORTON SMITH, THE COLONEL: THE LIFE AND LEGEND OF ROBERT R. MCCORMICK xx-xxi (1997); Norma Fay Green, *Chicago Sun-Times*, in ENCYCLOPEDIA OF AMERICAN JOURNALISM 92-93 (Stephen L. Vaughn ed., 2008).

¹⁴⁰ COOPER, *supra* note 10, at 278-279; Blanchard, *supra* note 9, at 47-50.

¹⁴¹ *AP Case Is Heard by Special Court; Decision Reserved*, N.Y. TIMES, July 9, 1943, at 12; *Field Is Elected to AP Membership*, N.Y. TIMES, Nov. 29, 1945, at 20. In Chicago, the *Tribune* and the *Herald-Examiner* protested the application of the *Sun*; in Washington, the *Post* protested the application of the *Times-Herald* and the *Star* reserved judgment. *Associated Press Is Sued as Trust; Directors to Fight*, N.Y. TIMES, Aug. 29, 1942, at 8. Between the *Sun*’s application and the AP vote on it, the wire service changed its bylaws to drop the “protest right” and substitute a four-fifths majority vote to admit an applicant that would compete with an existing member. *Id.* In addition, new members were required to pay a sum to existing members in the same market. *Associated Press v. United States*, 326 U.S. 1, 11 (1945).

Sun had to pay hundreds of thousands of dollars a year for syndicated articles and photographs that the AP would have provided for roughly \$50,000 a year.¹⁴² Field's *Sun* was the only morning newspaper in the country with a circulation exceeding 50,000 that did not have AP service.¹⁴³

The *Sun* complained to the Justice Department (the *Times-Herald* did not).¹⁴⁴ After an investigation—including FBI visits to AP members, which some editors construed as efforts to intimidate them—the government filed a civil suit on August 28, 1942.¹⁴⁵ The Justice Department suggested that the action would advance First Amendment interests: “The national policy in favor of freedom of the press” dictates that “newspapers be unhampered by any artificial or unnecessary restraints, public or private, upon their choice of and free competitive access to the various sources of news, including agencies engaged in assembling and transmitting daily news reports of world events.”¹⁴⁶ Field viewed the antitrust suit similarly: “If this move is successful, it will prove to be one of the most important strokes for freedom of the press in the history of American journalism.”¹⁴⁷ News services, Field wrote in *Editor and Publisher*, ought to be deemed “common carriers of news, open on equal terms to all who desire to purchase the service or share in the cost of a co-operative undertaking.”¹⁴⁸

Opponents of the lawsuit likewise talked of common carriers and public utilities—and some warned that government intervention could extend beyond AP membership and regulate the wire service's content as well. Senator Arthur H. Vandenberg declared: “The theory that newspapers are common carriers ... must imply that they are subject to total governmental control.... [I]f I were an ambitious dictator, seeking to black out my newspaper critics, I certainly would

¹⁴² BECKER, *supra* note 136, at 138-139; JOHN TEBBEL, *THE MARSHALL FIELDS: A STUDY IN WEALTH* 251 (1947).

¹⁴³ *United States v. Associated Press*, 52 F. Supp. 362, 366 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

¹⁴⁴ Blanchard, *supra* note 9, at 48 n.8, 50.

¹⁴⁵ COOPER, *supra* note 10, at 281; Blanchard, *supra* note 9, at 50-52, 52 n. 15; *Associated Press Is Sued as Trust; Directors to Fight*, N.Y. TIMES, Aug. 29, 1942, at 1, 8 [*hereinafter AP Is Sued as Trust*]. The government contended that the restrictive bylaws violated the Sherman Act and that the AP's acquisition of Wide World Photo violated the Clayton Act. *Id.* at 8. The trial court dismissed the Wide World Photo allegation, *United States v. Associated Press*, 52 F. Supp. 362, 374 (S.D.N.Y. 1943), and the Supreme Court did not address it.

¹⁴⁶ *AP Is Sued as Trust*, *supra* note 145, at 8.

¹⁴⁷ *A Statement by Marshall Field*, ED. & PUB., September 5, 1942, at 18. *See also* Noam, *supra* note 61, at 435 (stating that common carriage “is of substantial social value” in that it “extends free speech principles to privately owned carriers”).

¹⁴⁸ *A Statement by Marshall Field*, *supra* note 147, at 18. *See also id.* (“[W]ith news treated as a public utility, open to all alike, it will once more be possible, as it was in the 19th century, for men of moderate capital to embark upon the publication of newspapers without being choked to death at the outset by a monopolistic discrimination.”)

think this convenient common-carrier formula was a perfect anesthetic.”¹⁴⁹ Rep. Earl C. Michener of Michigan predicted that once the AP was deemed “a public utility or common carrier, the government might try to exercise some form of regulation or control.”¹⁵⁰ Edward E. Lindsay, editor of the *Herald and Review* in Decatur, Illinois, said, “If [the AP] came under government regulation as a public utility, as demanded by the *Chicago Sun*, a free press would have vanished in America.”¹⁵¹ McCormick of the *Tribune* said that the suit could “transform[] AP from a private enterprise into a public utility or quasi-public utility,” in “plain violation of the First Amendment.”¹⁵² As for the Justice Department’s contention that the government could play a role in affirmatively advancing press freedom through such regulatory steps, McCormick said,

Under such specious arguments ... have dictatorial governments everywhere subjected the press to their control.... [T]he most dangerous modern threat to free speech and press are those academic thinkers who desire the government to control, regulate and regiment the press in order to obviate some imagined or comparatively insignificant evil of the press.¹⁵³

B. Trial Court

The case was heard by a special three-judge panel in the Southern District of New York: Learned Hand, his cousin Augustus N. Hand, and Thomas Swan.¹⁵⁴ With Judge Swan dissenting, Judges Learned Hand and Augustus Hand concluded, on a motion for summary judgment, that the Associated Press had violated the Sherman Antitrust Act. Writing for the court, Judge Learned Hand focused on the rights of the listener: when a newspaper was denied AP

¹⁴⁹ Paul W. Ward, *Vandenberg, Byrd, Score Field on AP*, BALT. SUN, Oct. 6, 1942.

¹⁵⁰ *Michener Calls AP Suit “Harsh”; Asks Dismissal*, CHI. TRIB., Oct. 22, 1942, at 18.

¹⁵¹ PHILIP KINSLEY, LIBERTY AND THE PRESS: A HISTORY OF THE *CHICAGO TRIBUNE*’S FIGHT TO PRESERVE A FREE PRESS FOR THE AMERICAN PEOPLE 61-62 (1944).

¹⁵² *Id.* at 64. McCormick filed a separate defense in the antitrust suit. Blanchard, *supra* note 9, at 57. See also *AP Is Sued as Trust*, *supra* note 145, at 1, 8 (quoting AP president Robert McLean as saying that AP members are “not willing to accept the status of a public utility”).

¹⁵³ KINSLEY, *supra* note 151, at 65. See also *Col. McCormick Warns NEA of Peril in AP Suit*, CHI. TRIB., Oct. 13, 1942, at 2.

¹⁵⁴ *United States v. Associated Press*, 52 F. Supp. 362 (S.D.N.Y. 1943), *aff’d*, 326 U.S. 1 (1945); *AP Case Is Heard by Special Court; Decision Reserved*, N.Y. TIMES, July 9, 1943, at 1. On the kinship between Learned Hand and Augustus Hand, see GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 281 (1994).

membership, the public was denied information.¹⁵⁵ The availability of competing news services was immaterial, for “it is only by cross-lights from varying directions that full illumination can be secured.”¹⁵⁶ Would this reasoning require an individual reporter to make his or her coverage available to all interested newspapers? No; the issue was scale. “[I]n law differences in quantity again and again become decisive differences in quality.”¹⁵⁷ The court did not need to determine precisely where the line of magnitude fell; the AP—“a vast, intricately reticulated, organization, the largest of its kind, gathering news from all over the world, the chief single source of news for the American press”—was plainly large enough to cross the line.¹⁵⁸ (The AP had long relied on a *reductio ad absurdum*, which the court rejected:

If The Associated Press must give [news] to whomsoever wishes it, then your local association must do the same. And it goes beyond that—the individual reporter, having news, must give it up to whomsoever demands it, because the nature of the function is the same, and you do not alter its character because you multiply the number of reporters.... A hundred black rabbits do not make a black horse.¹⁵⁹)

The Associated Press had argued that the government was seeking to regulate it as an industry “clothed with a public interest,” a categorization, the wire service said, that required legislative action, not merely judicial action.¹⁶⁰ The court termed this an “unhappy metaphor” and “a red herring,” for Congress had already acted by enacting antitrust statutes.¹⁶¹ The application of those statutes depended on

¹⁵⁵ 52 F. Supp. at 372.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 373.

¹⁵⁸ *Id.* See also *Associated Press v. United States*, 326 U.S. 1, 14 (1945) (stating that an exclusive agreement to exchange news on the part of two newspapers might well be reasonable, and thus not violate the Sherman Act).

¹⁵⁹ Frederick W. Lehmann, *Is the Associated Press a Trust?*, in “M.E.S.”: HIS BOOK—A TRIBUTE AND A SOUVENIR OF THE TWENTY-FIVE YEARS, 1893-1918, OF THE SERVICE OF MELVILLE E. STONE AS GENERAL MANAGER OF THE ASSOCIATED PRESS 82 (1918). See also Noyes, *supra* note 27, at 708 (“It does not seem possible to hold fairly that a newspaper in New York may not join with one in Chicago and one in Philadelphia to maintain a common correspondent in Washington without making it obligatory on these three newspapers to share the fruits of their enterprise with other New York, Chicago, and Philadelphia newspapers.”).

¹⁶⁰ 52 F. Supp. at 373.

¹⁶¹ *Id.*

the public importance of the activity which by hypothesis has been restricted; and practically no other conceivable standard is readily available. So far therefore as the conclusion, when the public aspect of the activity prevails, involves a declaration that it is “clothed with a public interest,” in administering the Anti-Trust Acts courts must so declare, as they have independently of those acts declared from time immemorial.¹⁶²

Red herring or not, the court implicitly embraced the concept of “clothed with a public interest” by proceeding to cite the leading case on the doctrine, *Munn v. Illinois*.¹⁶³

As for the public interest at stake in the case, the court set forth the affirmative vision of the First Amendment with a focus on the rights of listeners:

[N]either exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.¹⁶⁴

In response to the AP’s argument that the First Amendment barred the application of antitrust law, the court distinguished business regulation from content regulation: “[T]he mere fact that a person is engaged in publishing, does not exempt him from ordinary municipal law, so long as he remains unfettered in his own selection of what to publish. All that we do is to prevent him from keeping that advantage for himself.”¹⁶⁵ The court thus distinguished breaches of business autonomy from breaches of editorial autonomy.

¹⁶² *Id.*

¹⁶³ *Id.* (citing *Munn v. Illinois*, 94 U.S. 113 (1877)). The court also quoted *Nebbia v. New York*, 291 U.S. 502, 534 (1934): “If one embarks in a business which public interest demands shall be regulated, he must know that regulation will ensue.”

¹⁶⁴ 52 F. Supp. at 372. The Supreme Court quoted the peroration of this passage in *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

¹⁶⁵ 52 F. Supp. at 374.

The court concluded that the AP's restrictions against membership were unlawful.¹⁶⁶ It stayed its judgment for 60 days, and for the pendency of any Supreme Court appeal, "because the interests involved are so important and so large; because the injury done may be so great, if we turn out to be wrong; and because we are not agreed."¹⁶⁷

Dissenting, Judge Swan said that the decision rested solely on the belief that the AP was "engaged in a public calling."¹⁶⁸ The only authority for that proposition offered by the Justice Department was the "discredited" *Inter-Ocean* case, which rested upon the Illinois AP's power of eminent domain and which was contrary to holdings of other courts.¹⁶⁹ Judge Swan added:

The business of gathering news is not one of those occupations which were recognized at common law as affected with a public interest. AP has never held itself out as ready to serve all newspapers.... If such a duty is to be imposed on news gathering agencies, I think it should be by legislative, rather than judicial, fiat.¹⁷⁰

Much of the press sided with Judge Swan and denounced the ruling. *The New York Times* said, "Democracy, which depends upon information, has no greater safeguard than The Associated Press."¹⁷¹ The *Chicago Tribune* called the ruling "the worst decision that has ever been made in the history of the fight for freedom of speech and the press" and predicted that it would lead to "complete censorship."¹⁷² The AP itself issued a statement saying that the ruling "would subject the world's greatest news gathering organization to suit and harassment and to a perpetual injunction which would render it subject to future whims of administrative officials and continued supervision of the Federal courts."¹⁷³

¹⁶⁶ *Id.* at 373. The court also struck down certain rules against sharing news with non-members and portions of the AP's agreement with the Canadian Press news service. *Id.* at 374.

¹⁶⁷ *Id.* at 375.

¹⁶⁸ *Id.* at 375 (Swan, J., dissenting).

¹⁶⁹ *Id.* at 376 (Swan, J., dissenting). The majority did not cite the *Inter-Ocean* case.

¹⁷⁰ *Id.* (Swan, J., dissenting).

¹⁷¹ *The Associated Press Appeal*, N.Y. TIMES, Jan. 21, 1944, at 16.

¹⁷² *McCormick Appeals AP Judgment Also*, N.Y. TIMES, Jan. 20, 1944, at 13. See also *Col. McCormick's Statement*, ED. & PUB., Jan. 22, 1944, at 5.

¹⁷³ *AP to Appeal Summary Judgment; Official "Whims" Seen as Danger*, N.Y. TIMES, Jan. 19, 1944, at 1, 14.

C. Supreme Court

By unanimous vote, the Associated Press decided to appeal to the Supreme Court.¹⁷⁴ In a brief, the AP said that “so grave a step as transferring the press from the field of private enterprise to the status of a regulated public utility is the last thing which the courts should do on their own motion.”¹⁷⁵ The American Newspaper Publishers Association argued that “[t]he press is not like a stock exchange, a commodity exchange, a stockyard, a railroad, [or] an electric utility that can be required to take out a license, obtain a certificate of convenience, or procure a charter with special limitations before it can operate.”¹⁷⁶ Arguing the case, a government lawyer echoed Judge Learned Hand’s listener-rights focus and the affirmative vision of freedom of the press: “The First Amendment was intended to keep the press free ... not for private newspaper enterprise alone, but for the reading public. If the press is to be truly untrammelled, it must be free from restraints imposed upon it by any combination.”¹⁷⁷ Responding to that argument, the *Chicago Tribune* said in a brief: “[The First Amendment] was designed solely to prohibit federal interference.... In the present case for the first time, prohibition against federal interference has been construed into a mandate for federal interference.”¹⁷⁸

The Supreme Court affirmed the panel’s decision—on different grounds, though it did not stress the point.¹⁷⁹ In an opinion by Justice Hugo Black,¹⁸⁰ the

¹⁷⁴ Blanchard, *supra* note 9, at 66. The government also appealed the denial of summary judgment on the Wide World Photo issue, the breadth of the injunction, and other issues. *Associated Press v. United States*, 326 U.S. 1, 5, 22 (1945).

¹⁷⁵ “Public Utility” *Theory in Suit Opposed by AP*, CHICAGO TRIB., Oct. 24, 1944, at 5. *See also AP Charges Suit Aims to Make It a Public Utility*, CHICAGO TRIB., Nov. 26, 1944, at 24.

¹⁷⁶ *Associated Press v. United States*, amicus br. of American Newspaper Publishers Ass’n, 1944, at 6. *See also Associated Press v. United States*, br. of Associated Press, Oct. 23, 1944, at 90 (“[T]he court will be little aided by experience in other fields of public utility law. The news is a product of the mind. It is not a standardized product—like water, gas, or electricity. The service of The Associated Press is not routine in character.”).

¹⁷⁷ *A.P. in Court*, TIME, July 19, 1943, <http://www.time.com/time/magazine/article/0,9171,777900,00.html> (last visited Aug. 6, 2010). *See generally* James J. Butler, *Questions from Bench Enliven Debate on AP*, ED. & PUB., Dec. 9, 1944, at 5, 60.

¹⁷⁸ *Associated Press v. United States*, Jurisdictional Statements of Defendants Tribune Co. & Robert Rutherford McCormick, April 13, 1944, at 9.

¹⁷⁹ *Associated Press v. United States*, 326 U.S. 1 (1945). As a former Attorney General who had reportedly vetoed the filing of the antitrust suit earlier, Justice Robert H. Jackson recused himself. COOPER, *supra* note 10, at 278; Blanchard, *supra* note 9, at 67.

¹⁸⁰ Justice Frankfurter “concur[s] in that part of the opinion which discusses the District Court’s decree but concurs in the judgment of affirmance in a separate opinion.” 326 U.S.

Court rejected the contention that it was treating the AP as a public utility: “It is ... said that we reach our conclusion by application of the ‘public utility’ concept to the newspaper business. This is not correct. We merely hold that arrangements or combinations designed to stifle competition cannot be immunized by adopting a membership device accomplishing that purpose.”¹⁸¹ Like the lower court, Justice Black suggested that the holding advanced, not abridged, First Amendment interests, and he emphasized the rights of the listener:

It would be strange indeed ... if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.... Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.¹⁸²

Writing separately, three justices addressed the public-utility rationale for regulating the Associated Press.¹⁸³ Concurring, Justice William O. Douglas said that the AP was not a monopoly. “Only if a monopoly were shown to exist would we be faced with the public utility theory which has been much discussed in connection with this case and adopted by Mr. Justice [Felix] Frankfurter.”¹⁸⁴ In his concurring opinion, Justice Frankfurter said that he would affirm the judgment for the reasons given by the lower court.¹⁸⁵ Justice Frankfurter added:

at 3 n.2. Other portions of Justice Black’s opinion are a plurality rather than majority opinion.

¹⁸¹ *Id.* at 19. The court also rejected the argument that the Sherman Act was not violated because the reading public could get AP news from at least one newspaper per market. *Id.* at 18.

¹⁸² *Id.* at 20 (footnote omitted). As to the AP’s argument that as a news organization, it was constitutionally entitled to a trial rather than to summary judgment, the Court said: “Member publishers of AP are engaged in business for profit exactly as are other business men who sell food, steel, aluminum, or anything else people need or want. All are alike covered by the Sherman Act.” *Id.* at 7 (citation omitted). The Court also rejected the AP’s contention that the clear and present danger standard ought to apply. *Id.*

¹⁸³ Justice Murphy, dissenting, did not address the public-utility theory. *Id.* at 49-60 (Murphy, J., dissenting).

¹⁸⁴ *Id.* at 25 (Douglas, J., concurring).

¹⁸⁵ *Id.* at 26 (Frankfurter, J., concurring).

Equally irrelevant is the objection that it turns the Associated Press into a “public utility” to deny to a combination of newspapers the right to treat access to their pooled resources as though they were regulating membership in a social club. The relation of such restraints upon access to news and the relation of such access to the function of a free press in our democratic society must not be obscured by the specialized notions that have gathered around the legal concept of “public utility.”¹⁸⁶

In dissent, Justice Owen Roberts, joined by Chief Justice Harlan F. Stone, charged the majority with articulating “a new concept of monopolization,” which “can only be justified on the public utility theory upon which the court below proceeded.”¹⁸⁷ He added a criticism of the Court’s listener-rights focus:

Suffice it to say that this is a novel application of the Sherman Act to treat it as legislation converting an organization, which neither restrains trade nor monopolizes it, nor holds itself out to serve the public generally, into a public utility because it furnishes a new sort of illumination—literary as contrasted with physical—by pronouncing a fiat that the interest of consumers—the reading public—not that of competing news agencies or newspaper

¹⁸⁶ *Id.* at 29 (Frankfurter, J., concurring). Justice Frankfurter also suggested that antitrust law might apply *more* vigorously where the press is involved:

A free press is indispensable to the workings of our democratic society.... Truth and understanding are not wares like peanuts or potatoes. And so, the incidence of restraints upon the promotion of truth through denial of access to the basis for understanding calls into play considerations very different from comparable restraints in a cooperative enterprise having merely a commercial aspect.

Id. at 28 (Frankfurter, J., concurring).

¹⁸⁷ *Id.* at 44 (Roberts, J., dissenting). *See also id.* at 45-46 (charging that the majority “renders AP a public utility subject to the duty to serve all on equal terms,” notwithstanding “the disavowal of any such ground of decision,” for “[t]he District Court made this public utility theory the sole basis of decision”); *id.* at 46-47 (stating that the Sherman Act “never was intended and has never before been thought to require a private corporation, not holding itself out to serve the public, whose operations neither were intended to nor tended unreasonably to restrain or monopolize trade, to fulfill the duty incident to a public calling, of serving all applicants on equal terms”).

publishers—requires equal service to all newspapers on the part of AP....¹⁸⁸

Justice Roberts also referred to the majority's affirmative vision of the First Amendment: "The decree here approved may well be ... but a first step in the shackling of the press, which will subvert the constitutional freedom to print or to withhold, to print as and how one's reason or one's interest dictates.... This is fettering the press, not striking off its chains."¹⁸⁹

D. Aftermath

The AP asked the Supreme Court to reconsider the case, but the Court declined to do so.¹⁹⁰ Meeting in late November 1945, the AP's board of directors voted, 949 to 34, to admit Marshall Field's *Chicago Sun* as a member.¹⁹¹ The AP's counsel advised that refusal to admit the *Sun* could constitute contempt of court.¹⁹² The AP changed its bylaws and the court withdrew its injunction.¹⁹³ McCormick tried to reverse the Court's decision in Congress, with no success.¹⁹⁴

Some expected the AP precedent to lead to greater regulation of the news media. Margaret Blanchard writes that it seemed that the press "might soon be declared a public utility and be brought under governmental control," just as the AP had "been declared as affected with a public interest."¹⁹⁵ A decade after the AP case, attorney Eustace Cullinan asked, "Can the modern newspaper, particularly the chains and news weeklies, in view of their immense circulations and influence, be regulated as partaking of the nature of a public utility though not operating under a franchise from any government?"¹⁹⁶ He supplied no answer.

V. COMMON CARRIAGE AND MEDIA CONTENT

A. Introduction

The debates about the AP as a common carrier, including the antitrust litigation, concerned access on the part of news recipients—that is, listener rights (would-be member newspapers and their readers) rather than speaker rights

¹⁸⁸ *Id.* at 46 (Roberts, J., dissenting).

¹⁸⁹ *Id.* at 48 (Roberts, J., dissenting).

¹⁹⁰ *Rehearing Denied Associated Press*, N.Y. TIMES, Oct. 9, 1945, at 23.

¹⁹¹ *Field Is Elected to AP Membership*, N.Y. TIMES, Nov. 29, 1945, at 1.

¹⁹² *Id.* at 20.

¹⁹³ Swindler, *supra* note 108, at 57.

¹⁹⁴ TEBBEL, *supra* note 142, at 253; Blanchard, *supra* note 9, at 73-82.

¹⁹⁵ Blanchard, *supra* note 92, at 54.

¹⁹⁶ Eustace Cullinan, *The Rights of Newspapers: May They Print Whatever They Choose?*, 41 A.B.A. J. 1020, 1023 (1955).

(news sources and others who would like to spread their messages via the AP). True, some people did advocate regulating the AP more elaborately, including its content. But no one called for making the AP a full-fledged common carrier, on the model of the telephone—requiring it, that is, to use its facilities to transmit content provided by anyone, or by anyone who could pay, and perhaps barring the wire service from providing its own content. Writing of communications media in general, Monroe E. Price terms the pure common-carrier model “the most dramatic form of intervention possible.”¹⁹⁷ Dramatic as it is, though, some *have* advocated applying forms of common-carrier regulation, ones that would encompass content, to particular media. These proposals seek to advance the rights of speakers by giving them access to the media. This section briefly reviews these proposals, including some that expressly rest on the affirmative conception of the First Amendment and the Associated Press case.

B. Broadcasting

The common-carrier model as applied to broadcasting first arose with regard to all programming and later was urged with regard to advertising only. In the 1920s, AT&T experimented with “toll broadcasting” on WEAF in New York. AT&T’s station, one contemporary commentator wrote, could “be hired, as one hires a taxicab.”¹⁹⁸ The broadcaster produced no programming itself. But, finding few takers for its service, AT&T began producing and airing entertainment programs, initially presented by its own employees.¹⁹⁹

After AT&T’s experiment ended, some advocated making radio a common carrier by law, with nondiscriminatory access at fixed rates. Here the concern shifted from a pure common-carrier model with a ban on content generation—in which, like WEAF, the broadcaster carries sponsored advertising and programming but produces no content itself—to two lesser approaches, one that principally addressed advertising and one that principally addressed news. Under the first, broadcasters could produce their own content so long as they treated advertising and sponsored programming in a nondiscriminatory fashion. A House report warned in 1926: “There is nothing to prevent a broadcasting station from permitting one citizen to broadcast for hire and refusing to permit another citizen to broadcast at all, or to prevent the charge of a reasonable rate to one

¹⁹⁷ MONROE E. PRICE, TELEVISION, THE PUBLIC SPHERE, AND NATIONAL IDENTITY 208 (1995).

¹⁹⁸ Waldemar Kaempffert, *Who Will Pay for Broadcasting?*, POPULAR RADIO, Dec. 1922, available at <http://earlyradiohistory.us/1922who.htm> (last visited June 1, 2010).

¹⁹⁹ ERIK BARNOUW, A TOWER IN BABEL: A HISTORY OF BROADCASTING IN THE UNITED STATES TO 1933, at 109-110 (1966). On WEAF and “toll broadcasting,” see also ALFRED BALK, THE RISE OF RADIO: FROM MARCONI THROUGH THE GOLDEN AGE 49-53 (2006); SUSAN SMULYAN, SELLING RADIO: THE COMMERCIALIZATION OF AMERICAN BROADCASTING, 1920-1934, at 98-102 (1994).

citizen and a prohibitive rate to another.”²⁰⁰ Congressional advocates of a common-carrier approach to broadcast advertising alluded to the affirmative vision of the First Amendment. One said, “We are naturally jealous of even governmental censorship, and yet under the existing law and practice we have something far worse—individual and corporate censorship....”²⁰¹

The second approach would extend beyond commercial advertising to news as well as political advertising. Broadcasters would be required to air all sides of “any question affecting the public.”²⁰² (The Fairness Doctrine, a creation of the Federal Communications Commission rather than of Congress, later pursued the same general ends.) Congress used the term “common carrier” and employed language of common-carrier regulation in saying that a license could be revoked if the station “has been guilty of any discrimination.”²⁰³ Advocates talked of the danger of letting a handful of owners of larger stations solely control what the public would hear over the airwaves.²⁰⁴ To some, the need for the provision was made clear when a radio station canceled an appearance by the socialist Norman Thomas, who planned to urge passage of the bill.²⁰⁵ Opponents argued that stations should be permitted to decide what to air. One broadcaster said, “We should be charged with the duty of giving both sides an equal chance, but we should not be charged with the duty of broadcasting any ward heeler who may have something to say in pigeon [sic] English which he thinks is in reply to a dignified discussion by a prominent candidate....”²⁰⁶ In his view, the common-carrier approach would give “Bolshevist propaganda ... a better chance in this country than ever before.”²⁰⁷

Congress opted against the common-carrier approaches as to advertising and public issues, stating explicitly that “a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.”²⁰⁸

²⁰⁰ H.R. Rep. No. 404, 69th Cong., 1st sess., Feb. 27, 1926, at 17.

²⁰¹ *Id.* at 18.

²⁰² *Revised Radio Control Bill Suggests Radical Changes*, N.Y. TIMES, May 16, 1926, at 20.

²⁰³ *Id.*

²⁰⁴ 67 CONG. REC. 12,503-12,504 (1926).

²⁰⁵ 67 CONG. REC. 12,500 (1926); *Cancel Radio Talk by Norman Thomas*, N.Y. TIMES, May 17, 1926, at 18.

²⁰⁶ 67 CONG. REC. 12,499 (1926) (quoting W. G. Cowles).

²⁰⁷ *Id.* at 500 (quoting W. G. Cowles).

²⁰⁸ 47 U.S.C. 153. One broadcaster did argue, unsuccessfully, that it was a common carrier and therefore could not be held responsible for defamatory comments made over its facilities. See *Sorensen v. Wood*, 243 N.W. 82, 86-87 (Neb. 1932). Talk of regulating broadcasting as a common carrier has continued. See, e.g., Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L. Q. 1, 11 (“[I]t is hard to avoid the conclusion that the right to know demands a common carrier system of regulation in

As the Supreme Court later put it, lawmakers contemplated and largely rejected the affirmative theory of the First Amendment, with its focus on private censorship: “Congress appears to have concluded ... that of these two choices—private or official censorship—Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided.”²⁰⁹ Just as advocates of common-carrier regulation had warned, private censorship did result: stations refused to run sponsored programs produced by the NAACP, Consumers Research Inc., the Communist Party, and other groups.²¹⁰

In a case brought under the Radio Act of 1927, the Federal Radio Commission emphasized that radio was not a common carrier and, in the process, stressed listener rights over speaker rights. The Commission spoke of “the self-imposed censorship exercised by the program directors of broadcasting stations” in choosing entertainment and information designed to maximize the audience, by contrast to a common-carrier approach in which anyone could speak over a station’s facilities.²¹¹ A common-carrier approach might drive away the audience.²¹² In addition, it would probably create “an almost insoluble problem, i.e., how to choose from among an excess of applicants who shall be given time to address the public and who shall exercise the power to make such a choice.”²¹³ The common-carrier analogy, the Commission continued, improperly “emphasize[s] the right of the sender of messages to the detriment of the listening public,” whereas “the emphasis should be on the receiving end of the service.”²¹⁴ But one member of the Commission continued to maintain that radio was a common carrier: “All who apply to use a licensed broadcasting station, tendering a fair rate, and willing to conform to reasonable regulations, are entitled.”²¹⁵ In his view, broadcasters who limited what could be said over their stations were committing “a clear violation of the guaranty of free speech.”²¹⁶

broadcasting. Only through such a structure can the right to know be effectively achieved.”).

²⁰⁹ *Columbia Broadcasting Sys. v. Democratic Nat’l Comm.*, 412 U.S. 94, 105 (1973).

²¹⁰ Ira Kadetsky & Leroy Kahn, *Legal Problems of Radio Broadcasting Contracts*, 11 AIR L. REV. 154, 162 (1940).

²¹¹ In re App. of Great Lakes Broadcasting Co., in *Third Annual Report of the Federal Radio Commission* (1929), 32.

²¹² *Id.* at 32-33.

²¹³ *Id.* at 33.

²¹⁴ *Id.*

²¹⁵ Ira E. Robinson, *Educational Obligations of the Broadcaster*, in EDUCATION ON THE AIR: FIRST YEARBOOK OF THE INSTITUTE FOR EDUCATION BY RADIO 3, 13 (Josephine H. MacLatchy ed. 1930).

²¹⁶ *Id.*

Congress did take two important steps in the direction of the affirmative approach to free speech. First, in both the Radio Act of 1927 and the Communications Act of 1934, it required broadcasters to operate in the “public interest, convenience, and necessity.”²¹⁷ The phrase had its origins in the regulation of railroads and other common carriers,²¹⁸ and, historian Douglas B. Craig writes, it “represented a small victory for those who had pushed for radio broadcasting to be regulated as a public utility.”²¹⁹ Second, reflecting a particular fear of common-carrier advocates—that a station might allow advertising by one candidate for a particular office but not others²²⁰—Congress enacted a form of

²¹⁷ 47 U.S.C. § 303. *See also CBS v. DNC*, 412 U.S. at 105-110 (reviewing legislative history and noting “Congress’ flat refusal to impose a ‘common carrier’ right of access for all persons wishing to speak out on public issues”); DOUGLAS B. CRAIG, *FIRESIDE POLITICS: RADIO AND POLITICAL CULTURE IN THE UNITED STATES, 1920-1940*, at 49-51 (2000); J. Roger Wollenberg, *The FCC as Arbiter of “The Public Interest, Convenience, and Necessity,”* in *A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934*, at 61, 73 (Max D. Paglin ed., 1989). From the outset, Britain deemed broadcasting a public utility to be regulated in the public interest. Paddy Scannell, *Public Service Broadcasting: The History of a Concept*, in *UNDERSTANDING TELEVISION 12-13* (Andrew Goodwin & Garry Whannel eds., 1990).

²¹⁸ Glen O. Robinson, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, in *A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934*, at 15 & n.54 (Max D. Paglin ed., 1989). Many states required public utilities to get certificates of “public convenience and necessity” before beginning operations. *See* Louis G. Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 *AIR L. REV.* 295, 300 (1930). By one account, “public interest” in the statute came from *Munn v. Illinois* and subsequent cases finding particular businesses to be “affected with a public interest.” *Id.* at 301.

²¹⁹ CRAIG, *supra* note 217, at 56. The chairman of the Federal Radio Commission opposed the “public interest” requirement, which could, he said, prove to be “an opening wedge to making eventually the broadcasting stations merely common carriers, and I think it would be a calamity.” Hearings before the Comm. on Interstate and Foreign Commerce, U.S. House of Representatives, on H.R. 8301, April 10, 1934, at 350, *reprinted in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934*, at 343, 697 (Max D. Paglin ed., 1989). Based on the phrase and the theory underlying it, one scholar has argued that broadcasting should be deemed a “quasi-utility,” not in the sense that it must serve all advertisers or speakers without discrimination, but in the sense that it must be regulated in order to maximize its important service to the public. Frank J. Kahn, *Economic Regulation of Broadcasting as a Utility*, 7 *J. BROAD.* 97 (1963); Kahn, *supra* note 70, at 257-276. *Cf.* *Office of Comm. of the United Church of Christ v. Fed. Comm. Comm’n*, 359 F.2d 994 (D.C. Cir. 1966) (stating that a broadcaster “is not a public utility in the same sense as strictly regulated common carriers or purveyors of power, but neither is it a purely private enterprise like a newspaper or an automobile agency”) (Burger, J.).

²²⁰ H.R. Rep. No. 404, 69th Cong., 1st sess., Feb. 27, 1926, at 17-18.

nondiscriminatory access right for political candidates.²²¹ (The rule applied to candidates, not parties. Although stations were legally entitled to refuse advertising from the Communist Party, and many did so, the FCC intervened when some stations refused advertising by the Communist Party presidential candidate in 1936.²²²) Opponents argued, unsuccessfully, that broadcasters were entitled to the same control over advertising content as newspapers.²²³ At the urging of broadcasters, however, the Senate did drop language characterizing them as common carriers for the purpose of airing these political appearances.²²⁴

In addition to the congressional action, the Federal Communications Commission adopted the Fairness Doctrine, which aimed to foster a diversity of voices without imposing a common-carrier model. In *Red Lion Broadcasting v. FCC*, the Supreme Court upheld the Fairness Doctrine and the government's broad authority to regulate broadcast content.²²⁵ The Court expressly embraced the listener-centered, affirmative approach to the First Amendment, declaring that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."²²⁶ *Red Lion* held, as the D.C. Circuit later put it, that "the first amendment's protections for the press do not apply as powerfully to the broadcast media."²²⁷

C. Cable Television

In 1974, President Richard M. Nixon's Cabinet Committee on Cable Communications concluded that cable TV should operate as a common carrier,

²²¹ 47 U.S.C. §§ 312, 315. On the legislative history of Section 315, see *Felix v. Westinghouse Radio Stations*, 186 F.2d 1 (3d Cir. 1950).

²²² Kadetsky & Kahn, *supra* note 210, at 168.

²²³ Hearings Before the Comm. on Interstate Commerce, U.S. Senate, on S. 2910, March 9, 10, 13, 14, & 15, 1934, at 67, *reprinted in* A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 119, 189 (Max D. Paglin ed., 1989).

²²⁴ See 67 CONG. REC. 12,503 (1926).

²²⁵ *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969). The FCC stopped enforcing the Fairness Doctrine in 1987 and formally withdrew it in 2011. John Eggerton, *FCC Releases Order Dropping Fairness Doctrine*, BROADCASTING & CABLE, Aug. 24, 2011, *available at* http://www.broadcastingcable.com/article/472844-FCC_Releases_Order_Dropping_Fairness_Doctrine.php (last visited Aug. 24, 2011); FCC, "FCC Chairman Genachowski Continues Regulatory Reform to Ease Burden on Businesses; Announces Elimination of 83 Outdated Rules," News Release, Aug. 22, 2011, *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0822/DOC-309224A1.pdf (last visited Aug. 24, 2011).

²²⁶ *Red Lion*, 395 U.S. at 390.

²²⁷ *Branch v. FCC*, 824 F.2d 37, 49 (D.C. Cir. 1987).

with a ban on content generation, starting when cable penetration reached half of American homes.²²⁸ In this view, according to Ithiel de Sola Pool, cable should

function much like ... a trucking company that for a fee will take anyone's package—or, in the case of cable, anyone's television programming—and distribute it ... to the people who wish to have it. The key point is that the distributors would not be in the business of providing the programming themselves, but would distribute everyone else's programs to viewers that wanted to see them.²²⁹

Ensuring that cable would be “open to all Americans,” the committee said, required restricting the “potentially great” power of the system operator, “because of the local monopoly characteristics.”²³⁰ The proposal was not adopted. Nonetheless, many city governments required cable franchisers to provide public-access channels operating as common carriers, an approach that advanced speakers' interests.²³¹

D. Print

1. Advertising

Two commentators wrote in 1933: “[T]he problem of whether [a newspaper] is a business clothed with a public interest is of greatest concern in cases involving the newspaper's privilege to reject advertising offered to it for

²²⁸ U.S. CABINET COMM. ON CABLE COMM'NS, CABLE: REPORT TO THE PRESIDENT 52 (1974).

²²⁹ POOL, *supra* note 20, at 169.

²³⁰ U.S. CABINET COMM. ON CABLE COMM'NS, *supra* note 228, at 19. *See also* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 261 (1989) (arguing for treating cable at least partly as a common carrier); Pool, *supra* note 75, at 23 (same).

²³¹ PRICE, *supra* note 197, at 207. The FCC required cable systems to provide access channels, but the Supreme Court ruled that the agency had exceeded its authority: “The Commission may not regulate cable systems as common carriers, just as it may not impose such obligations on television broadcasters.” *FCC v. Midwest Video Corp.*, 448 U.S. 689, 708-709 (1979). Cities were free, however, to require access channels as a condition of franchising. Further, one district court concluded that Kansas City, Missouri, having required its cable company to provide an open-access channel, could not close down the channel when the Ku Klux Klan sought to use it. *Missouri Knights of the Ku Klux Klan v. Kansas City*, 723 F. Supp. 1347 (W.D. Mo. 1989).

For skeptical evaluations of the value of public-access channels in opening up the public debate, see BAKER, *supra* note 230, at 252; PRICE, *supra* note 197, at 204. By contrast, Jerome Barron deems public-access channels “a contemporary success story for the cause of public access to the media.” Barron, *Rights of Access Today*, *supra* note 6, at 10.

publication.”²³² On the whole, courts have rejected the argument that advertisers—speakers—enjoy a right of access to media, even monopoly media. In *Pacific Gas & Electric Co. v. Public Utilities Commission*,²³³ the Supreme Court held that a utilities commission could not require an electric company to enclose an interest group’s material with its bills. The commission’s order “impermissibly requires appellant to associate with speech with which appellant may disagree,” the Court’s plurality said.²³⁴ In another case, the magazines *Muscle & Fitness* and *Flex* refused to publish advertisements for particular bodybuilding supplements, seemingly because the magazines’ publisher also marketed such supplements. In *Twin Laboratories v. Weider Health & Fitness*, the Second Circuit held that the plaintiff had failed to establish a violation of the Sherman Antitrust Act, even assuming that the magazines represented a monopoly.²³⁵ The court made no mention of the First Amendment’s affirmative vision or, indeed, of the First Amendment at all. Some litigants have contended that the law treats private media in such a way as to establish state action, activating First Amendment rights. In *Chicago Joint Board, Amalgamated Clothing Workers v. Chicago Tribune Co.*, a union argued that Chicago newspapers had violated the First Amendment by rejecting its editorial advertisements.²³⁶ State action existed, the union argued, because laws and regulations established a “special relationship”

²³² HALE & BENSON, *supra* note 106, at 541.

²³³ 475 U.S. 1 (1986).

²³⁴ *Id.* at 15 (plurality).

²³⁵ *Twin Laboratories v. Weider Health & Fitness*, 900 F.2d 566 (2d Cir. 1990). *See also* *Bloss v. Federated Pubs.*, 145 N.W.2d 800 (Mich. App. 1966) (newspaper could legally refuse adult theater’s advertising), *aff’d*, 157 N.W.2d 241 (Mich. 1968); *Shuck v. Carroll Daily Herald*, 247 N.W. 813 (Iowa 1933) (newspaper could legally refuse advertising); *Friedenberg v. Times Pub. Co.*, 127 So. 345 (La. 1930) (same); *Massachusetts v. Boston Transcript Co.*, 144 N.E. 400 (Mass. 1924) (newspaper could legally refuse to publish findings of minimum wage commission, notwithstanding law to the contrary); *Mack v. Costello*, 143 N.W. 950 (S.D. 1913) (newspaper could legally refuse advertising); *Mid-West Electric Cooperative Inc. v. West Texas Chamber of Commerce*, 369 S.W.2d 842 (TX Civ. Apps. 1963) (chamber of commerce magazine could legally refuse advertising that was inconsistent with its policies).

In non-advertising cases, too, the courts have held that newspapers are private businesses that need not to business with those whom they disfavor—for example, sell newspapers to particular distributors. *See, e.g.*, *Journal of Commerce Pub. Co. v. Tribune Co.*, 286 F. 111 (7th Cir. 1922); *Philadelphia Record Co. v. Curtis-Martin Newspapers Inc.*, 157 A. 796 (Pa. 1931); *Miller v. Post Publishing Co.*, 110 A. 265 (Pa. 1920); *Fisher v. News-Journal Co.*, 21 A.2d 685 (Del. Ch. 1941).

²³⁶ *Chicago Joint Bd., Amalgamated Clothing Workers v. Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970).

between the government and the newspapers.²³⁷ The Seventh Circuit held that no state action existed and disavowed the speaker-rights approach to the First Amendment: “The Union’s right to free speech does not give it the right to make use of the defendants’ printing presses and distribution systems without defendants’ consent.”²³⁸ In the words of one commentator, writing in 1950, “The newspaper is not a public utility and so may do business with whomever it may choose.”²³⁹

Lorain Journal Co. v. United States represents the principal exception to the rule against mandating access for print advertisers.²⁴⁰ There, a newspaper that reached 99 percent of families in its circulation area refused to publish ads from firms that advertised with a competitor, a new radio station—analogueous to the AP’s initial refusal to provide its material to newspapers that belonged to competing wire services.²⁴¹ Six years after deciding the AP case, the Supreme Court held that national advertising constitutes interstate commerce and that the *Lorain Journal’s* actions violated the Sherman Antitrust Act.²⁴² The Court dealt curtly with the *Journal’s* First Amendment argument:

The publisher suggests that the injunction amounts to a prior restraint upon what it may publish. We find in it no restriction upon any guaranteed freedom of the press. The injunction applies to a publisher what the law applies to others.... Injunctive relief under ... the Sherman Act is as appropriate a means of enforcing the Act against newspapers as it is against others.²⁴³

²³⁷ The union cited, *inter alia*, a jury exemption for newspaper employees, laws concerning the publication of legal notices, the exclusion of newspapers’ purchases of newsprint and ink from certain taxes, an ordinance forbidding news racks except for those selling local newspapers, and the custom of providing space for the press in government buildings. *Id.* at 473.

²³⁸ *Id.* at 478. *But see* Note, *supra* note 80, at 313 (proposing a doctrine that would find state action in newspapers’ refusal to publish advertising under *Shelley v. Kraemer*, 334 U.S. 1 (1948)).

²³⁹ FRANK THAYER, *LEGAL CONTROL OF THE PRESS* 128 (2d ed. 1950).

²⁴⁰ *Lorain Journal v. United States*, 342 U.S. 143 (1951).

²⁴¹ *Id.* at 145-146.

²⁴² *Id.* at 151.

²⁴³ *Id.* at 155-156. Just as the Court in *Lorain Journal* held that a news outlet must accept particular advertising, *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), held that a news outlet must *not* accept particular advertising: employment ads in the classified section that listed positions by sex. Both cases overrode the customary autonomy of the print press for public-policy purposes. *Lorain Journal* advanced the interests of speakers; *Pittsburgh Press* diminished them.

As authority for the proposition that the First Amendment did not bar application of the Sherman Act to a newspaper, the Court cited the AP case.²⁴⁴

In addition to *Lorain Journal*, an Ohio trial court in 1919 found a newspaper clothed with a public interest such that it must accept all advertising.²⁴⁵ The court in *Uhlman v. Sherman* said, “We are of the opinion that it will be difficult to find any one line of business in the present age of the world which is of more vital interest and concern to the general public than the newspaper business.”²⁴⁶ Other courts, however, declined to follow *Uhlman* and concluded that newspapers are not clothed with a public interest.²⁴⁷

2. News

As Jeffery A. Smith shows, some publishers in pre-Revolutionary America voluntarily opened their newspapers to anyone’s content, or at least claimed to do so, and thereby advanced the interests of speakers in a partial common-carrier fashion.²⁴⁸ In the *New-England Courant* in 1721, James Franklin said: “What my own Sentiments of things are, is of no Consequence, nor any matter to any Body; I hereby invite all Men, who have Leisure, Inclination and Ability, to speak their Minds with Freedom, Sense and Moderation, and their Pieces shall be welcome to a Place in my Paper.”²⁴⁹ Similarly, the editor of a New York newspaper in 1753 declared (in third person) that “[h]e never look’d on himself as a competent Judge of what ought to be suppressed: He thought it his Duty to print for all Sides.”²⁵⁰ *Pennsylvania Chronicle* publisher William Goddard in 1769 wrote of

²⁴⁴ *Lorain Journal*, 342 U.S. at 155-156.

²⁴⁵ *Uhlman v. Sherman*, 31 Ohio Dec. 54 (Ct. of Common Pleas 1919). Barron discusses the case as a precedent supporting a right of access to the media. BARRON, *supra* note 6, at 22-23.

²⁴⁶ *Uhlman*, 31 Ohio Dec. at 63.

²⁴⁷ *E.g.*, In re Louis Wohl Inc., 50 F.2d 254, 254-257 (E.D. Mich. 1931); J. J. Gordon Inc. v. Worcester Telegram Publishing Co., 177 N.E.2d 586, 588 (Mass. 1961); Bloss v. Federated Pubs., 145 N.W.2d 800, 802-804 (Mich. App. 1966), *aff’d*, 157 N.W.2d 241 (Mich. 1968); Shuck v. Carroll Daily Herald, 247 N.W. 813, 814 (Iowa 1933); Approved Personnel v. Tribune Co., 177 So.2d 704, 707 (Fla. App. 1965). See Note, *supra* note 80, at 301 (stating that all cases but *Uhlman* find the press to be a private enterprise with freedom to decline to sell advertising to anyone).

²⁴⁸ JEFFERY A. SMITH, PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM 124-141 (1988).

²⁴⁹ NEW-ENGLAND COURANT, Nov. 27-Dec. 4, 1721, at 1-2.

²⁵⁰ NEW-YORK GAZETTE: OR, THE WEEKLY POST-BOY, Sept. 3, 1753.

“the free Access every Man has” to his newspaper columns.²⁵¹ James Franklin’s brother Benjamin, however, wrote that he acted as a common carrier as a commercial printer but not as a newspaper publisher:

[W]henever I was solicited to insert [libelous material into the newspaper], and the Writers pleaded as they generally did, the Liberty of the Press, and that a Newspaper was like a Stage Coach in which any one who would pay had a Right to a Place, my Answer was, that I would print the Piece separately if desired....²⁵²

A prominent proposal for press reform that used the term *common carrier* came from the Commission on Freedom of the Press, chaired by University of Chicago president Robert Maynard Hutchins and better known as the Hutchins Commission.²⁵³ Articulating an affirmative conception of the First Amendment—“freedom must mean more than the traditional conception of immunity from government control”²⁵⁴—the Commission said that “the great agencies of mass communication should regard themselves as common carriers of public discussion.”²⁵⁵ In particular, media that dominate a market must “be hospitable to ideas and attitudes different from their own, and they must present them to the public as meriting its attention.”²⁵⁶ In a footnote, the Commission said that it did not mean to suggest imposing the legal status of common carrier, but used the term merely as an analogy.²⁵⁷

²⁵¹ William Goddard, *Proposals for Continuing and Improving the Pennsylvania Chronicle, and Universal Advertiser*, PENNSYLVANIA CHRONICLE & UNIVERSAL ADVERTISER, April 10, 1769, at 85.

²⁵² Benjamin Franklin, *Apology for Printers*, in I THE PAPERS OF BENJAMIN FRANKLIN 194, 196 n.2 (Leonard W. Labaree ed., 1959) (quoting AUTOBIOGRAPHY OF BENJAMIN FRANKLIN (1793)). Somewhat similarly, the *South Carolina Gazette* in the mid-eighteenth century sometimes required writers to purchase advertising space for particularly vituperative writings, but published less contentious pieces without charge. SMITH, *supra* note 248, at 126.

²⁵³ COMMISSION ON FREEDOM OF THE PRESS, *supra* note 5. The Hutchins Commission’s report gave rise to the social-responsibility theory of the press. See FRED S. SIEBERT, THEODORE PETERSON, & WILBUR SCHRAMM, FOUR THEORIES OF THE PRESS 73-103 (1956).

²⁵⁴ *Statement by the Commission*, in ZECHARIAH CHAFEE JR., 2 GOVERNMENT AND MASS COMMUNICATIONS: REPORT FROM THE COMMISSION ON FREEDOM OF THE PRESS viii (1947).

²⁵⁵ COMMISSION ON FREEDOM OF THE PRESS, *supra* note 5, at 23. See also *id.* at 92.

²⁵⁶ *Id.* at 93.

²⁵⁷ *Id.* at 23 n.1. The Commission’s principal funder, *Time* editor Henry Luce, faulted the Report on many grounds, including the argument for a common-carrier model. In a letter to Hutchins, Luce wrote: “Wouldn’t it be truer to say that in our day even anybody with *nothing* to say has no difficulty in getting it published? ... The crisis consists in the cheapening *easiness* with which anybody, anybody *at all*, can break into print....” *Critique*

In separate volumes published by the Commission, two members discussed the common-carrier concept. In *Freedom of the Press: A Framework of Principle*, the philosopher William Ernest Hocking wrote, “[T]he tendency to concentration of [media] control in a few hands ... is bound to raise the question whether, in particular cases, the character of a common carrier is not in fact being assumed; and whether, therefore, the responsibilities associated with that concept should not be required.”²⁵⁸ Hocking said that “[t]he media of mass communication are in a position very imperfectly analogous to that of a common carrier,” and “more closely like a public utility in private hands”; he did not explain the significance of the distinction.²⁵⁹ In *Government and Mass Communications*, First Amendment scholar Zechariah Chafee Jr. rejected the common-carrier approach as unworkable: “[W]e fall into grave difficulties when we try to apply to the mass media of communication legal obligations which were developed in the very different area of railroads, gas companies, and hotels.”²⁶⁰ The model, he maintained, must “represent[] a moral and professional obligation of the press, not a legal obligation.”²⁶¹

Perhaps the most influential call for common-carrier regulation of the press is Jerome A. Barron’s 1967 article “Access to the Press—A New First Amendment Right” and follow-up articles and a book.²⁶² Barron argued that the customary, hands-off vision of the First Amendment no longer suffices. It is

of a Commission, in *THE IDEAS OF HENRY LUCE* 64 (John K. Jessup ed., 1969) (emphasis in original).

²⁵⁸ WILLIAM ERNEST HOCKING, *FREEDOM OF THE PRESS: A FRAMEWORK OF PRINCIPLE* 173 (1947).

²⁵⁹ *Id.* at 173, 174. Hocking also addressed the AP’s virtual monopoly. He asserted:

Press associations for news-gathering, however, especially since not many of them can be tolerated in their activities at any one point on the planet, may well as they approach monopoly be regarded as common carriers in the sense that their services ought to be available to all who are prepared to pay for them at market rates.

Id. at 173. Further, Hocking referred to the affirmative vision of the First Amendment, by saying that in the Associated Press case, “the Supreme Court appears to have set general press responsibility into our fundamental law, professing to find it in the implications of the First Amendment.... [T]he reasoning ... enwraps the whole work of the press in a public interest publicly guaranteed.” *Id.* at 171. He took the Supreme Court decision to mean that “press functions are now, in the eyes of the law as well as of common sense, ‘clothed with a public interest.’” *Id.* at 172.

²⁶⁰ CHAFEE, *supra* note 254, at 634.

²⁶¹ *Id.* at 643.

²⁶² Barron, *Access to the Press*, *supra* note 6. Some of Barron’s writings on the access issue are listed in note 6, *supra*.

necessary to adopt an “access or common carrier concept.”²⁶³ In Barron’s view, “[A]t some point the newspaper must be viewed as impressed with a public service stamp and hence under an obligation to provide space on a nondiscriminatory basis to representative groups in the community.”²⁶⁴

In *Miami Herald Publishing v. Tornillo* in 1974, the Supreme Court unanimously held that the First Amendment is inconsistent with Barron’s access right.²⁶⁵ The Court cited *Associated Press v. United States* and said: “The clear implication [of precedents] has been that any ... compulsion to publish that which “reason” tells them should not be published’ is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.”²⁶⁶ The Court came down on the side of autonomy over content, and against the affirmative conception of the First Amendment: “It has yet to be demonstrated how governmental regulation of [the editorial] process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.”²⁶⁷ In a concurring opinion, Justice Byron R. White expressly said that a newspaper is not a public utility.²⁶⁸

E. The Internet

Common-carrier concepts are implicated in the ongoing debate about so-called net neutrality—the idea providers must not discriminate among websites and users on speed of downloads.²⁶⁹ According to one commentator, “[N]et neutrality is the twenty-first century’s version of common carriage.”²⁷⁰ Although a comprehensive discussion of net neutrality is beyond the scope of this article, it

²⁶³ BARRON, *supra* note 6, at 174. See also Jerome A. Barron, *The Right of Reply to the Media in the United States—Resistance and Resurgence*, 15 HASTINGS COMM. & ENT. L.J. 1, 17 (1992) (referring to the common-carrier model as “a paradigm of the access principle”). For a discussion of Barron’s approach in terms of common carriers and public utilities, see BENNO C. SCHMIDT JR., FREEDOM OF THE PRESS VS. PUBLIC ACCESS 53 (1976).

²⁶⁴ Barron, *Access to the Press*, *supra* note 6, at 1666 (footnote omitted). He notes that this argument “is reminiscent of Professor Chafee’s query as to whether the monopoly newspaper ought to be treated like a public utility.” *Id.* at 1666 n.66.

²⁶⁵ 418 U.S. 241 (1974).

²⁶⁶ *Id.* at 256 (quoting *Associated Press v. United States*, 326 U.S. 1, 20 n.18 (1945)).

²⁶⁷ *Id.* at 258. See also *Reeda v. Tribune Co.*, 218 Ill. App. 45, 49 (1920) (holding that a newspaper had no obligation to publish the fact of plaintiff’s independent candidacy for a judgeship, and stating that “[a] newspaper must remain free to publish such matters as it regards as possessing news value and to refrain from publishing such matter as it may determine does not possess news value”).

²⁶⁸ *Tornillo*, 418 U.S. at 259 (White, J., concurring).

²⁶⁹ See generally CONG. RESEARCH SERV., *supra* note **Error! Bookmark not defined.**

²⁷⁰ TIM WU, *THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES* 286 (2010).

should be noted that the prohibition against different tiers of service goes beyond traditional common-carrier regulation. The U.S. Postal Service and its private competitors, for example, set charges based on the speed of delivery and the weight of the parcel.

Some have argued that Google ought to be regulated as a common carrier, though it is not a media organization as such.²⁷¹ In 2009, AT&T raised the argument with regard to Google Voice, a telephone service using the Internet that blocked certain phone numbers with access charges, such as adult chat lines and conference-call platforms.²⁷² In *Langdon v. Google*, the plaintiff argued that Google, as a company engaged in a public calling, was obliged to sell him advertising; the court dismissed the claim, holding that Google's decisions on whether to accept advertising are protected by the First Amendment as construed in *Tornillo*.²⁷³

More relevant to common-carriage regulation of the media is Google's search service, especially to the extent that it favors Google's own content. Prioritization in search results can be crucial; in one study, a quarter of respondents said they clicked on the first site suggested by the search engine because they believed that placement reflected trustworthiness.²⁷⁴ As noted, a common carrier is sometimes prohibited from providing its own content for fear that it would discriminate against others' material, as in the cases of the Cabinet Committee proposal for cable television in the 1970s and the AT&T ruling in the 1980s. Regulating Google as a common carrier, thus, could bar the service from providing at least some content itself in the name of nondiscrimination. Google might, for example, be limited to providing advertisements on its search pages—its principal source of income—without being permitted to provide other content.

²⁷¹ See Dahlia Lithwick, *Google-Opoly: The Game No One But Google Can Play*, SLATE, Jan. 29, 2003, <http://www.slate.com/id/2077875> (last visited May 30, 2010); James Grimmelman, *Google Replies to SearchKing Lawsuit*, LawMeme, Jan. 9, 2002, <http://lawmeme.research.yale.edu/modules.php?name=News&file=print&sid=807> (last visited May 30, 2010).

²⁷² Robert W. Quinn, AT&T, to Sharon Gillett, Chief, Wireline Competition Bureau, Federal Communications Commission, Sept. 25, 2009, *available at* <http://www.ft.com/cms/3dc7a560-aa15-11de-a3ce-00144feabdco.pdf> (last visited May 30, 2010). *See also* John Gapper, *The Intellectual Contradiction of Google Voice*, FINANCIAL TIMES, Sept. 22, 2009, <http://blogs.ft.com/gapperblog/2009/09/the-intellectual-contradiction-of-google-voice/> (last visited May 30, 2010).

²⁷³ *Langdon v. Google*, Civ. No. 06-319-JJF (D. Del. Feb. 20, 2007), mem., at 12-13, 24, *available at* <http://www.internetlibrary.com/pdf/langdon.pdf> (last visited May 30, 2010).

²⁷⁴ *See* Eszter Hargittai, Lindsay Fullerton, Ericka Menchen-Trevino, & Kristin Yates Thomas, *Trust Online: Young Adults' Evaluation of Web Content*, 4 INT'L J. OF COMM. 468, 479-80 (2010).

Although the common-carrier argument here has not yet gained traction, it may be only a matter of time. In 2003, an online advertising firm called SearchKing sued Google for discriminating against its website in Google searches.²⁷⁵ The court dismissed the case on First Amendment grounds, as in *Langdon*; it held that Google's page rankings, on which it bases the ordering of search results, are protected speech.²⁷⁶ Since 2006, the London comparison shopping site Foundem has complained that Google discriminates against its material in favor of Google's own shopping listings.²⁷⁷ A case brought by an aggregator of shopping links, myTriggers, is pending.²⁷⁸ As for regulatory bodies, Google has argued that the FCC lacks authority over it and that only the Federal Trade Commission and the Justice Department can regulate it.²⁷⁹ The FTC²⁸⁰ and the Antitrust Division of the Justice Department²⁸¹ are indeed monitoring the company, and the Texas attorney general is investigating Google for "search neutrality."²⁸² The European Commission has also launched an investigation of Google, partly based on allegations that it favors its own content in search results.²⁸³

²⁷⁵ Search King v. Google Technology, 2003 U.S. Dist. LEXIS 27193 (W.D. Okla. 2003).

²⁷⁶ *Id.*

²⁷⁷ Charles Arthur, *Foundem Accuses Google of Using Its Power to Favour Own Links*, GUARDIAN, Nov. 30, 2010, available at <http://www.guardian.co.uk/technology/2010/nov/30/google-foundem-ec-competition-rules> (last visited Dec. 14, 2010); Brad Stone, *Sure, It's Big. But Is That Bad?*, N.Y. TIMES, May 23, 2010, at BU1.

²⁷⁸ Claire Cain Miller, *Texas Investigates Whether Google Is Distorting Search Results*, N.Y. TIMES, Sept. 4, 2010, at B3.

²⁷⁹ Google Reply Comments, *In re Preserving the Open Internet: Broadband Industry Practices*, Federal Communications Comm'n, April 26, 2010, available at <http://www.scribd.com/doc/30545713/04-26-10-Google-Open-Internet-Reply-Comments-GN-Dkt-09-191> (last visited May 30, 2010) [*hereinafter* Google Reply Comments].

²⁸⁰ See Google Inc., Form 8-K, United States Securities & Exchange Comm'n, June 23, 2011, available at <http://www.sec.gov/Archives/edgar/data/1288776/000119312511172902/d8k.htm> (last visited Aug. 24, 2011) (stating that the FTC served a subpoena and a notice of civil investigation on the company).

²⁸¹ Diane Bartz, *FTC and Justice Department Mull Google Antitrust Probe*, REUTERS, April 6, 2011, available at <http://www.reuters.com/article/2011/04/06/us-google-ftc-idUSTRE7340L520110406> (last visited Aug. 24, 2011).

²⁸² Miller, *supra* note 278. The Texas investigation includes allegations that Google search results discriminate against Foundem. *Id.* See also *Conflict as Sign of Google's Success*, N.Y. TIMES, Sept. 20, 2010, at B4; Julia Kowell, *Google Faces First US Competition Inquiry*, GUARDIAN, Sept. 5, 2010, available at <http://www.guardian.co.uk/technology/2010/sep/05/google-faces-competition-inquiry> (last visited Sept. 21, 2010).

²⁸³ Charles Arthur, *Google Faces European Commission Probe That Threatens Whole Ethos*, GUARDIAN, Dec. 6, 2010, available at <http://www.guardian.co.uk/media/2010/dec/06/google-european-commission-investigation-search> (last visited Dec. 14, 2010).

The common-carrier issue may arise as Google increasingly provides its own information, as opposed to simply directing searchers to others' information sites.²⁸⁴ One possible conflict involves Unz.org, a website that makes millions of pages of books and magazines available online. The site, which went public in December 2011, includes in-copyright material, such as the magazines *American Mercury* and *The Reporter*, licensed by the copyright owners. The material is searchable and printable, though not downloadable.²⁸⁵ At present, Google Books offers snippet views of some issues of *American Mercury* and *The Reporter*. Where Google Books and Unz.org both feature the same book or periodical, with limited access from Google Books and full text from Unz.org, will Google searches favor the less-useful Google-owned site?

Of course, Google is not a traditional carrier. It does not generally provide communications transmission, by contrast to AT&T.²⁸⁶ It is not a true monopoly, as some common carriers are. Its search algorithm, moreover, is an inherently discriminatory technology that favors some websites based on subjective judgments.²⁸⁷ Nondiscrimination, the heart of traditional common-carrier regulation, is inapplicable. That algorithm, further, operates like an editor, positioning certain results more prominently than others, a paradigmatic First Amendment function.²⁸⁸ Still, Google does facilitate access to content, just as a carrier does. Google's dominance as a search engine—it controls 65 percent of the

²⁸⁴ For one example, see Brad Stone & Jad Mouawad, *Giant Step Into Travel for Google*, N.Y. TIMES, July 2, 2010, at B1.

²⁸⁵ Telephone interview with Ron K. Unz, Unz.org (Dec. 22, 2009); email from Ron K. Unz (Jan. 4, 2012).

²⁸⁶ Google does, however, plan to provide high-speed broadband access on a trial basis. Miguel Helft, *Google Set to Showcase Fast Internet*, N.Y. TIMES, Feb. 11, 2010, at B1; *Project Overview*, <http://www.google.com/appserve/fiberrfi/public/overview> (last visited May 30, 2010). The company nonetheless supports network neutrality and suggests that Internet Service Providers (ISPs) ought to be regulated as common carriers, though such regulation would tie its own hands as an ISP. Google Reply Comments, *supra* note 279, at 23; Cecilia Kang, *Google Filing Urges FCC to Consider Reclassification*, WASH. POST, http://voices.washingtonpost.com/posttech/2010/04/googles_filing_urgues_fcc_to_co.html (last visited May 30, 2010). The company's support for net neutrality, however, does not extend to wireless online services. See Joe Nocera, *The Struggle for What We Already Have*, N.Y. TIMES, Sept. 4, 2010, at B1, B6.

²⁸⁷ Google has raised this argument before the FCC: "[I]t is hard to imagine what 'neutral search' would even look like.... [A] search of 'President Obama' using different search engines produces different results. Which one is more 'neutral'—a Wikipedia entry, the official White House site, a pro- or anti-Obama blog, or a news site?" Google Reply Comments, *supra* note 279, at 56.

²⁸⁸ Some search engines, such as the Christian site www.seekfind.org, do rely partly on human judgment. *Id.* at 56 & n.205.

market as of July 2011²⁸⁹—may invite some form of regulatory oversight to ensure that searches do not discriminate in favor of the company’s own content. One could argue that an unregulated Google may raise, in the words of the AT&T case, “a substantial risk ... that it would stifle the efforts of other electronic publishers”;²⁹⁰ and that, as in *AP*, “freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.”²⁹¹

F. The Common-Carrier Model and the Media

C. Edwin Baker points out that “[t]he structure of the press has no natural content but is a creation instrumentally justified as serving certain social functions.”²⁹² In the United States, those social functions have led common-carrier regulation of media content to be often advocated but rarely imposed. In the few instances where a speaker-rights regime has been forced on the media (as opposed to voluntarily adopted), it has concerned advertising rather than news. Congress imposed partial common-carrier responsibilities on broadcasters only concerning political advertising, and the Supreme Court required advertiser access in *Lorain Journal* but not news access in *Tornillo*. Yet regulatory history could have unfolded differently. Ithiel de Sola Pool argues that newspapers have remained unregulated because they have voluntarily opened themselves to outsiders through letters to the editor, Op-Ed columns, and advertising. “Newspapers, as they moved into the status of monopolies, had the wisdom to defuse hostility by acting in many respects like a common carrier,” Pool writes, adding: “If newspapers were as opinionated as they used to be in the days when they were competitive, public opinion would have long since acted against their unregulated monopoly.”²⁹³

Perhaps for that reason, common-carrier regulation of the media has not extended far beyond the limited approach authorized in *Associated Press*, which aims to protect the rights of listeners over those of speakers, and which breaches business autonomy but not editorial autonomy. As Jerome Barron acknowledges, comparing a monopoly newspaper to a common carrier or public utility “is not an analogy which has met with much favor.”²⁹⁴

²⁸⁹ Drew FitzGerald, *Google’s Search-Market Share Lead Slipped in July—ComScore*, DOW JONES NEWSWIRES, Aug. 10, 2011, available at <http://www.foxbusiness.com/technology/2011/08/10/googles-search-market-share-lead-slipped-in-july-comscore/> (last visited Aug. 24, 2011).

²⁹⁰ *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 224 (D.D.C. 1982).

²⁹¹ *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (footnote omitted).

²⁹² BAKER, *supra* note 230, at 270.

²⁹³ POOL, *supra* note 20, at 238-239.

²⁹⁴ BARRON, *supra* note 6, at 23.

VI. CONCLUSION

At first blush, common carriers and public utilities seem to have little to do with the news media. Common carriers, such as the telegraph, telephone, and postal service, carry information or goods without regard to content; as former Federal Communications Commission chairman Nicholas Johnson has remarked, we would consider it absurd for a telephone company to ask what sort of conversations we planned to have over its equipment.²⁹⁵ Common carriers are also sometimes forbidden from generating their own content. Like public utilities, such as electricity and natural gas providers, further, common carriers provide services indiscriminately, under heavy regulation. The news media, by contrast, traditionally produce content and always select it. They are almost always free to decline business, and they operate largely without content regulation.²⁹⁶

For over a century, nonetheless, interest groups, legislators, and others have recommended a common carrier or public utility model for at least some portion of the media. Nowhere have calls for regulation been louder or more frequent than those targeting the Associated Press, from the late 1860s to the Supreme Court ruling in 1945. But these advocates sought only partial common-carrier regulation. They called for access for potential recipients of AP reports, not for potential speakers who would like to use the AP apparatus to address the country. The focus was on the rights of listeners, not those of speakers. This was access to benefit newspapers and their audiences, not sources of news or advertising. And it was a form of access that interfered with the AP's business autonomy, by requiring it to provide service to certain newspapers, but not its editorial autonomy.

In *Associated Press v. United States*, the Supreme Court imposed this listener-centered form of regulation on the AP. As the dissenters charged, the Court held "that the interest of consumers—the reading public— ... requires equal service to all newspapers on the part of AP."²⁹⁷ Newspaper members of the wire

²⁹⁵ Nicholas Johnson, *Jefferson on the Internet*, 47 FED. COMM. L. J. 281, 284 (1994). It might be absurd, but it would not be wholly without precedent: in the 1930s, Western Union was fined \$500 for transmitting messages protesting police actions in Boston. See NEAL MILLER, *BANNED IN BOSTON: THE WATCH AND WARD SOCIETY'S CRUSADE AGAINST BOOKS, BURLESQUE, AND THE SOCIAL EVIL* 143 (2010).

²⁹⁶ *But see Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (upholding ordinance that prohibited newspaper from publishing help-wanted advertisements in sex-designated columns).

²⁹⁷ *Associated Press v. United States*, 326 U.S. 1, 46 (Roberts, J., dissenting) (1945). See also *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) ("to deprive a paper of the benefit of any [news] service of the first rating is to deprive the reading public of means of information which it should have"), *aff'd*, 326 U.S. 1 (1945).

service could no longer veto applications of their competitors. But the common-carrier approach remained only partial. The regulatory model advanced the interests of listeners—newspapers and their readers—but not those of speakers. Contrary to some predictions, government did not extend its regulations to the AP’s practices in selecting, gathering, editing, or transmitting news. It did not mandate access to the AP for speakers.

Along with voicing fears of content regulation, the AP and its supporters said that requiring it to provide nondiscriminatory access would only extend its reach and enhance its monopolistic tendencies.²⁹⁸ This prediction proved well-founded. In fact, some commentators view the Supreme Court loss as a long-term victory for the wire service. Walter Mears of the AP calls it “a defeat the Associated Press sorely needed,” and adds: “Bound by the old strictures on serving rival newspapers, the wire service could not have expanded, could not have been competitive for business. The court ruling meant it could take in new members.... That added up to new business and new revenues.”²⁹⁹ Thereafter—and as a consequence, according to historian Victoria Smith Ekstrand—the two other leading news services, International News Service and the United Press, struggled and then, in 1958, merged.³⁰⁰

To prevail in the AP case, the Justice Department advanced an affirmative conception of the First Amendment. The affirmative conception posits that freedom of the press is intended to serve the citizenry, not the owners of the press. This is a relatively uncontroversial position; even Colonel McCormick once remarked that the news media, in exercising their constitutional rights, act as “trustees for the American people.”³⁰¹ The affirmative conception then takes a

²⁹⁸ See, e.g., BECKER, *supra* note 136, at 306; *AP Declares Suit Perils Free Press*, N.Y. TIMES, Dec. 7, 1944, at 26; Blanchard, *supra* note 9, at 61; *High Court Ruling Questioned by AP*, N.Y. TIMES, Sept. 8, 1945, at 16; Howard Ellis, *Paradoxes of the Associated Press Decision—A Reply*, 13 U. CHI. L. REV. 471, 474-475 (1946); Noyes, *supra* note 27, at 709. The district court referred to this possibility. *United States v. Associated Press*, 52 F. Supp. at 374. See also THAYER, *supra* note 239, at 134-136 (after the Supreme Court’s ruling, discussing the danger that the government might take control of a single, monopoly news service).

²⁹⁹ Mears, *supra* note 10, at 411. See also Blanchard, *supra* note 9, at 84. The United Press was bound by contract to refund certain sums to a subscriber if a competing newspaper subscribed to UP. Accordingly, UP “would be delighted by a government suit against it.” MORRIS L. ERNST, *THE FIRST FREEDOM* 88 (1946).

³⁰⁰ Ekstrand, *supra* note 10, at 120. See also Pippert, *supra* note 40, at 556.

³⁰¹ ROBERT R. MCCORMICK, *THE FREEDOM OF THE PRESS: A HISTORY AND AN ARGUMENT COMPILED FROM SPEECHES ON THIS SUBJECT DELIVERED OVER A PERIOD OF FIFTEEN YEARS* 58 (1936). See also *Associated Press v. United States*, br. of Associated Press, Oct. 23, 1944, at 100 (“[Defendants] do not claim special privileges for their own benefit. The interest to which they refer is the interest of the public itself, because of the indispensable function of the press in any free society.”).

second step, one that McCormick denounced:³⁰² So that the press can best serve the public, the First Amendment does not invariably prevent the government from regulating the press. At times, it allows the government to step in and advance the interests served by a free press, including by forcing a partial common-carrier model on an unwilling media company. And, in a corollary, private as well as public censorship can imperil First Amendment interests.³⁰³ The Supreme Court adopted this affirmative vision in *Associated Press v. United States*.

The same affirmative conception of the First Amendment has arisen concerning would-be speakers' access to the media—the common-carrier model as applied to content by the Hutchins Commission, Barron, and others. This is a much farther-reaching approach than the partial model applied in the AP case, and it breaches editorial autonomy. With very limited exceptions in the realm of advertising, the American system of mass media has rejected that sort of intervention. The arguments for a media access right, on the whole, have failed. The affirmative conception of the First Amendment that led to partial common-carrier regulation of the Associated Press has not permitted broader common-carrier regulation. The public might benefit from a greater range of voices, as Barron and the others have argued—and as both Judge Learned Hand³⁰⁴ and Justice Black³⁰⁵ wrote in the AP case. But the Supreme Court has said, “For better or worse, editing is what editors are for; and editing is selection and choice of material.”³⁰⁶ Whether that approach applies to Google as “editor” remains to be seen.

Editors can select material without government oversight, but the Associated Press cannot select its customers. The AP, though, was an unusual

³⁰² KINSLEY, *supra* note 151, at 65.

³⁰³ See *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (stating that “freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests”) (footnote omitted); *id.* at 29 (Frankfurter, J., concurring) (“A public interest so essential to the vitality of our democratic government may be defeated by private restraints no less than by public censorship.”).

³⁰⁴ The court said that the First Amendment “presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.” *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

³⁰⁵ Justice Black wrote for the Court that the First Amendment “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.” *Associated Press*, 326 U.S. at 19.

³⁰⁶ *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 124 (1973).

monopoly.³⁰⁷ While it did dominate the wire-service industry, the government and most critics did not seek to break it up or to strengthen its competitors. Even in the days of trust-busters, scarcely anyone spoke of dismantling the so-called news trust.³⁰⁸ In this sense, the AP may be better viewed as an enabler of monopolies: monopoly newspapers, which could hinder competitors and potential competitors by vetoing their applications for AP service.³⁰⁹ *The Nation* in 1943 charged that the AP had “tentacles reaching around the world which for some fifty years [have] operated to restrict the flow of new blood into the newspaper business.”³¹⁰

With AP service, more newspapers could thrive. The AP material might be largely identical across the country, but the rest of the newspapers’ content would be diverse. Paradoxically, standardization of some content would thus foster diversity of content overall. In this regard, the partial common-carrier model that applied to the AP, with access rights for newspapers (and their readers) but not for news sources, for listeners but not for speakers, ended up serving the same end as the more interventionist common-carrier model for speakers: promoting a greater diversity of voices.

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³⁰⁷ Judge Hand said that the AP “is not a monopoly in the sense that membership is necessary to build up, or support, even a great newspaper,” but added that monopoly can be “measured by the handicap [the monopolist] can impose” on competitors. *United States v. Associated Press*, 52 F. Supp. at 371.

³⁰⁸ Justice Douglas noted that the AP was not a monopoly and that Sherman Act decrees “directed at monopolies have customarily been designed to break them up or dissolve them.” *Associated Press v. United States*, 326 U.S. at 25 (Douglas, J., concurring).

³⁰⁹ See *Associated Press*, 326 U.S. at 12-13.

³¹⁰ Keith Hutchison, *The Truth About the A.P.: I. The Growth of a News Trust*, *NATION*, Feb. 6, 1943, at 190.

DEFINING DEFAMATION: EVALUATING HARM IN THE AGE OF THE INTERNET

AMY KRISTIN SANDERS

The need to define harm did not arise because of the Internet; the concept has long played a role in our legal system. In the context of Internet-based defamation, the concept of harm – also discussed as injury to reputation – plays an important role. Courts often evaluate the existence of harm before making several determinations critical to the litigation. First, an evaluation of the level of harm may be used to determine whether the plaintiff actually has a cause of action. Particularly when evaluating a motion to dismiss for failure to state a claim under the Federal Rules of Civil Procedure, the courts often scrutinize whether the plaintiff can produce enough facts to support a claim for injury to reputation. Second, courts often look to level of harm suffered to determine a plaintiff's right to damages. This paper addresses the types of harm that result from both traditional and online defamation, comparing and contrasting the courts' acceptance of certain evidence as proof of harm. It critically evaluates whether the law should recognize the "virtual" damage that can arise in cyberspace defamation cases and raises questions for further research regarding "virtual" reputation. It concludes with the suggestion that courts critically examine a plaintiff's harm in light of the historical goals of defamation law.

Key Words: defamation, harm, Internet, libel, injury

I. INTRODUCTION

As children, we are told, "Sticks and stones can break your bones, but words will never hurt you." As adults, we know this could not be further from the truth. Most recently, a veteran NBA official alleged that a reporter's words, captured in a Tweet, injured his reputation. In March 2011, referee Bill Spooner filed suit against Associated Press sports reporter John Krawczynski, asserting the reporter defamed him by saying "Ref Bill Spooner told Rambis he'd 'get it back' after a bad call. Then he made an even worse call on Rockets. That's NBA officiating folks."¹ Spooner's complaint asserts the comment was defamation *per se*, for which damages should be presumed.² It seeks compensatory damages

¹ Spooner v. Associated Press and Krawczynski, No. 11-CV-00642 (D. Minn. filed March 14, 2011).

exceeding \$75,000. Given that Krawczynski's Twitter feed was followed by about 2,000 followers and had been re-tweeted only 14 times prior to the lawsuit,³ does it make sense to allow Spooner to recover \$75,000 without more substantial proof of actual injury?

Words can – and often do – hurt people, and legal mechanisms have been created to compensate those whose reputations have been hurt by words. Despite this, lawmakers struggle to draft laws in light of new technology. Legal scholar David Ardia is one of many who have called for changes in the legal system based on emerging technology:

It is time again to rethink defamation law. The law we know today saw its origin in feudal times, expanded to serve as a counterweight to the disruption occasioned by the printing press, and was constitutionalized by the Supreme Court in the low-participation age of broadcast and print mass media. The journalistic institutions that led the fight for constitutional reform are now in decline while online platforms optimized for high participation, such as blogs, social networks, and discussion forums, are in ascendency. In this age of the 'networked information economy,' reputation occupies a very different role in the social order than it did even twenty years ago.⁴

Until such recognition leads to change, courts must attempt to use older mechanisms to deal with the harms caused by the Internet. For example, the tort of defamation has long recognized the utterance of false factual assertions can result in a variety of harms, both pecuniary and emotional in nature.

As with nearly all tort claims, plaintiffs must prove harm or injury to succeed in winning damages. Although easily identifiable harm emanates from many instances of cyber-bullying, cyber-smear and other Internet torts, the law is often ill-equipped to address and assess these perils, which can be difficult to prove despite their occurrence. Ardia examines this issue, noting that a person's reputation is essentially a public good.⁵ Thus, injury to a person's reputation results in harm to society as a whole – a harm that defamation law has yet to recognize as compensable:

² *Id.* at 8.

³ Eric Freeman, *NBA Ref Sues AP Writer Over Critical Tweet*, YAHOO!SPORTS, March 15, 2009.

⁴ David Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261 (2010).

⁵ *Id.* at 262-263.

The legal doctrines that deal with reputational harms have not kept pace with these changes. The heterogeneous networked society we know today is far different from the feudal system that predominated during the thirteenth century when the law of slander got its start or even the more enlightened seventeenth century, when the Court of Star Chamber developed the law of libel in response to the printing press. While the way we use reputation has evolved—and is evolving—along with our communication, political, and social systems, defamation law remains distressingly out of step with our increasingly networked society.⁶

In the context of Internet-based defamation, the concept of harm – also discussed as injury to reputation – must play an important role. In all defamation cases, courts typically evaluate the existence of harm before making several determinations critical to the litigation. First, an evaluation of the level of harm may be used to determine whether the plaintiff actually has a cause of action. Particularly when evaluating a motion to dismiss for failure to state a claim under the Federal Rules of Civil Procedure,⁷ the courts often scrutinize whether the plaintiff can produce enough facts to support a claim for injury to reputation. Second, courts often look to level of harm suffered to determine a plaintiff's right to recover damages. For example, state law may require the plaintiff to prove pecuniary injury before recovering certain types of additional damages for emotional harm or other non-financial injury. This is particularly true in states that continue to distinguish between *per se* and *per quod* defamation. In any sense, the courts must determine what harm occurred before such important decisions can be made. In cases involving Internet defamation, this evaluation becomes even more important.

The need to define harm did not arise because of the Internet; the concept has long played a role in our legal system. Even the Restatement (Second) of Torts addressed the importance of proving harm, citing examples in its definition of a defamatory statement and the comments to that definition.⁸ The drafters of

⁶ *Id.* at 263.

⁷ See Federal Rules of Civil Procedure Rule 12(b)(6) (2007). “Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: ... failure to state a claim upon which relief can be granted A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.” *Id.*

⁸ See Restatement (Second) of Torts § 559, cmt. e (1977). “There is a difference ... between determining whether a communication is defamatory and determining whether damages

the Restatement recognized that not all defamatory statements bring about harm, noting that certain individuals may have reputations so poor that a defamatory statement could not injure their reputation. Further, they recognized that in cases of defamation *per se*, where no proof of special damages may be required by state law, the U.S. Constitution does require the plaintiff prove harm in the form of “actual injury.”⁹ In slander *per quod* situations, the American Law Institute’s Restatement drafters reiterated the law’s commitment to the proof of special damages, which they go on to define as the “the loss of something having economic or pecuniary value.”¹⁰ Once this fiscal harm has been proven, plaintiffs can then recover for emotional distress or bodily harm resulting from the defamatory statement.¹¹ The Restatement’s lengthy and multi-faceted explanation of the damage rules in defamation cases illustrated quite well the complex nature of our current system. It did not, however, shed light on the appropriate evidence required to prove harm – in the context of cases involving either the traditional media or the Internet.

The complex system of calculating damage awards that has developed in American law is largely outside the scope of this paper. Instead, this paper addresses the types of harm that result from both traditional and online defamation, comparing and contrasting the courts’ acceptance of certain evidence as proof of harm. It critically evaluates whether the law should recognize the “virtual” damage that can arise in cyberspace defamation cases and raises questions for further research regarding “virtual” reputation. It concludes with the suggestion that courts critically examine a plaintiff’s harm in light of the historical goals of defamation law as well as the unique characteristics of the Internet.

can be recovered. Thus some types of defamation are not actionable unless there is proof of special harm to the other, which may involve proof that the communication was in fact believed and so did in fact damage the reputation of the plaintiff and cause pecuniary loss to him. In addition, the Constitution limits recovery in defamation actions to compensation for ‘actual injury,’ at least in the absence of knowledge or reckless disregard as to the falsity of the communication.”

⁹ See Restatement (Second) of Torts § 569, cmt. c (1977). Interestingly, the U.S. Supreme Court declined to define actual injury in *Gertz v. Welch*, instead stating: “Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.” 418 U.S. 323, 349-350 (1974).

¹⁰ See Restatement (Second) of Torts § 575, cmt. b (1977).

¹¹ See Restatement (Second) of Torts § 621, cmt. a (1977).

II. PROTECTING REPUTATION: A HISTORICAL PERSPECTIVE ON DEFAMATION'S SOCIAL GOALS AND THE COURTS' ATTEMPTS TO COMPENSATE PLAINTIFFS

American tort law, as it has developed over time, now focuses largely on compensating plaintiffs for their injuries as opposed to punishing defendants for their wrongs as it did historically.¹² Such an emphasis has shifted the focus from the requiring the plaintiff prove the defendant engaged in wrongful conduct to allowing the plaintiff instead to exploit the nature of his or her injury. Interestingly, defamation has largely escaped this shift in focus, with modern defamation law largely requiring very little proof of actual injury to allow recovery.¹³ For much of defamation's history in the United States, damages have been presumed in certain cases – a peculiarity in American tort law to be certain.¹⁴ Law professor David Anderson took issue with the unique nature of defamation law, noting that in most defamation cases plaintiffs need prove very little harm to recover:

The presumption of harm often is assumed to be relevant only in *per se* cases, but that assumption is not true; in the absence of a statutory limitation, presumed damages are potentially available in every libel or slander case. The “special harm” that must be shown in the non-*per se* cases is a threshold that must be met, not a limitation on recovery. In those cases, the plaintiff has no cause of action without proof of special damage. Once the plaintiff proves special damage, however, he is entitled not only to those damages, but to presumed damages as well.

To address this issue, Anderson argued (notably in the pre-Internet era) that courts should abolish the doctrine of presumed harm in defamation law, requiring plaintiffs to prove injury to reputation in the form of pecuniary losses

¹² See W. PROSSER & W. KEETON, PROSSER & KEETON ON TORTS § 1, at 5-8 (5th ed. 1984)

¹³ See David Anderson, *Reputation, Compensation & Proof*, 25 WM. & MARY L. REV. 747, 748-749 (1984) (Anderson argued that all defamation plaintiffs should be required to prove actual injury to recover damages and that under no circumstances should mental anguish alone be enough to merit a damage award.).

¹⁴ *Gertz*, 418 U.S., at 349. “The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred.” *Id.*

or non-pecuniary reputational losses.¹⁵ Under his proposal, emotional harm alone would not be sufficient. Given the unique characteristics of the Internet, this article argues that Anderson's suggestion is more important than ever to protect the freedom of expression.

Anderson pointed to four distinct types of reputational harm that plaintiffs could successfully prove to recover damages in a defamation action.¹⁶ First, he noted that defamation could harm the plaintiff's current relationships with third parties. "If his family ostracizes him, his friends shun him, his acquaintances ridicule him, his employer fires him, or his customers desert him, he has suffered an injury to existing social, business, or family relations."¹⁷ Second, a plaintiff could have difficulty making future relationships because other have been deterred from associating with him even if his current associates stand by him. Third, defamation can negatively impact a plaintiff's reputation in the public eye:

A favorable public image enables a public figure to earn large fees for lecturing or for endorsing products. It is a source of influence in politics, entertainment, sports, religion, education, or other fields. It may be an important source of self-esteem and personal satisfaction. A person who enjoys a positive public image thus may be injured by defamation, even if there is no harm to his existing or future personal relations.¹⁸

Finally, a person who had no prior public image can develop a negative one as a result of a defamatory statement. "This injury would occur, for example, if an ordinary person, without a public image, were accused of an act so heinous that both the accusation and the identity of the accused stayed in the public mind."¹⁹

Anderson's approach would allow plaintiffs to prove some form of harm amounting either special damages under the common law rules or actual injury as the Supreme Court has envisioned it.²⁰ His proposal would not require evidence that the injury is strictly pecuniary, and he would not require a complete destruction of the relational interests. As will be discussed later in the paper, such

¹⁵ Anderson, *supra* note 7, at 749.

¹⁶ *Id.* at 765-767.

¹⁷ *Id.* at 765.

¹⁸ *Id.* at 766.

¹⁹ *Id.* at 766-767.

²⁰ *Id.* at 767. "Loss of a specific job, contract, or client is demonstrable pecuniary loss that courts accept under even the narrowest definitions of special harm. The concept of actual injury, however, includes other types of demonstrable harm to existing relations that the special damage rule excludes, such as desertion by a spouse, the estrangement of a child or parent, loss of friends, or any other deterioration of an existing relationship." *Id.*

a proposal has significant implications for cyberspace defamation cases and the level of protection Internet speech receives.

*A. Traditional Media, Traditional Harms:
The Courts Look at Print and Broadcast Defamation*

The U.S. Supreme Court has addressed the definition of harm on numerous occasions, and its defamation jurisprudence constructs overarching guidelines to provide direction for the lower courts in assessing damages. In its opinions, the Court has examined harm in a variety of contexts, including as part of the plaintiff's prima facie case and as part of the evaluation of damages. Thus, the Supreme Court's discussion of harm provides the starting point from which the lower courts begin their analyses.

The U.S. Supreme Court has often said that the primary interest behind the tort of defamation is the compensation of individuals whose reputations have been harmed by defamatory falsehoods.²¹ Justice Stewart enunciated this eloquently in *Rosenblatt v. Baer*, writing that allowing such compensation:

reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.²²

The need for the state to provide protection for reputation runs throughout the Court's defamation jurisprudence, with the Court noting in *Getz v. Welch* that the "truth rarely catches up with a lie" – a statement that takes on an even more important meaning in the Internet era.²³ However, as the Court's defamation jurisprudence has matured, the justices have erected several constitutional hurdles – in addition to the common law damages requirements – which defamation plaintiffs must surmount.²⁴

²¹ See *Getz v. Welch*, 418 U.S. 323, 341 (1974).

²² 383 U.S. 78, 92 (1966) (Stewart, J., concurring).

²³ *Getz*, 418 U.S. at 344 n. 9.

²⁴ See, e.g., *Getz v. Welch*, 418 U.S., at 323; *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985).

1. Common Law Damage Requirements

At common law, damage resulting from a defamatory publication could be presumed.²⁵ In these libel *per se* situations, “the existence of injury is presumed from the fact of publication.”²⁶ Presumed damages allowed plaintiffs to be compensated for emotional harm that resulted from the injury to reputation. Such a view is represented in the *Restatement (Second) of Torts*.²⁷ Libels not falling into the libel *per se* category – libels that were not considered defamatory on their face – were labeled as libel *per quod*.²⁸ The distinction between libel *per se* and *per quod* was important because it had ramifications for a plaintiff’s burden of pleading and proof on the issue of damages. Notably, when a plaintiff pled and established libel *per se*, the plaintiff did not need to allege or prove any special damages, which would compensate the plaintiff for monetary loss. In fact, general damages were presumed and nominal damages were available in any event.²⁹ Many states still allow plaintiffs to proceed in court without having to prove actual damages to meet the common law damages requirement.³⁰ In these states, certain types of defamatory statements – those that are defamatory *per se* – are harmful on their face, and the court will instruct the jury to presume that injury to reputation follows if the statement is found to be defamatory.

To recover damages at common law, libel *per quod* plaintiffs were required to plead and prove special damages, which covered specific economic losses stemming from the defamation.³¹ Special damages, as defined by the *Restatement*,³² covered “the loss of something having economic or pecuniary value,” which has been defined by the courts to include losses that are “capable of being estimated in money.”³³

Except in a specific group of cases outlined by the U.S. Supreme Court in *Gertz*, the common law damages rules, along with some constitutional

²⁵ See DAN B. DOBBS, LAW OF TORTS § 422 (2000).

²⁶ *Gertz*, 418 U.S. at 349.

²⁷ See RESTATEMENT (SECOND) OF TORTS § 569.

²⁸ Black’s Law Dictionary defines libel *per quod* as “Libel in which the defamatory meaning is not apparent from the statement on its face but rather must be proved from extrinsic circumstances.” See BLACK’S LAW DICTIONARY (8th ed. 2004).

²⁹ See *Shoemaker v. Community Action Org. of Scioto City*, 2007 WL 2070365 ¶ 13 (Ohio Ct. App.).

³⁰ See, e.g., *Bentley v. Bunton*, S.W.3d 561, 605 (Texas 2002); *Hamilton v. Prewett*, 860 N.E.2d 1234 (Ind. App. 2007) “If the communication is defamatory *per se*, damages are presumed even without proof of actual harm to the plaintiff’s reputation.” *Id.* at 1243.

³¹ See RODNEY A. SMOLLA, LAW OF DEFAMATION § 7.1 (2d ed. 2004).

³² See RESTATEMENT (SECOND) OF TORTS § 575, cmt. b.

³³ See *Republic Tobacco Co. v. North Atlantic Trading Co., Inc.*, 381 F.3d 717 (7th Cir. 2004).

constraints, still apply to defamation lawsuits in most jurisdictions.³⁴ For private plaintiffs suing for defamation that arises in the discussion of matters of private concern – those plaintiffs covered by the Supreme Court’s decision in *Dun & Bradstreet v. Greenmoss Builders* – the common law damage rules alone guide the award of damages. Thus, the Constitution does not impose any restrictions on damages in these private/private cases.³⁵

Courts relying on the common law approach to defamation often reason that it is too difficult in many defamation cases to prove reputational harm. A Maryland appellate court wrote, on requiring proof of injury to reputation, “This approach, in our view, fails to respect the centuries of human experience which led to a presumption of harm flowing from words actionable *per se*. One reason for that common law position was the difficulty a defamation plaintiff has in proving harm to reputation.”³⁶

State courts have established a variety of methods of proof through which plaintiffs can fulfill the common law damage requirements – some of which match up with Professor Anderson’s asserted types of injury to reputation. Often, plaintiffs prove any of several types of harm: injury to business reputation, injury to personal reputation, or pecuniary injury.

a. Injury to Business Reputation

Injury to business reputation comes up frequently as a means of proving damages. Several states’ laws allow damage awards under a theory of injury to business reputation for a broad assortment of harms. The First Circuit, applying New Hampshire law, found that a doctor had adequately proven actual injury by showing that a *USA Today* article had caused public outrage among the veterans he treated and his colleagues at the Veterans Administration, prompted a campaign calling for his termination, and led to threats at both his workplace and his home.³⁷ In a case in which an oil service company sued its competitor for defamation, the Fifth Circuit found the plaintiff had proven injury to business reputation based on an advertising expert’s testimony that the company would require \$650,000 in rehabilitative advertising, along with the testimony of the company’s economist who said the oil services company would lose millions in profits due to the false report.³⁸ Seventh Circuit Judge Richard Posner ruled that implying that a business was not an approved dealer, however, is not the same as

³⁴ See DOBBS, *supra* note 5, at § 422.

³⁵ *Dun & Bradstreet*, 472 U.S. at 759-760.

³⁶ *Hearst Corp. v. Hughes*, 466 A.2d 486, 495 (Md. 1983).

³⁷ 875 F.2d 935, 948 (1st Cir. 1989).

³⁸ *Brown v. Petrolite Corp.*, 965 F.2d 38, 46 (5th Cir. 1992).

tarnishing their business reputation through statements implying a lack of honesty, integrity or professionalism:³⁹

More is necessary than a diminution of transactional opportunities. In a business setting the imputation, to count as defamation, must charge dishonorable, unethical, unlawful, or unprofessional conduct.⁴⁰

b. Injury to Personal Reputation

Plaintiffs can also recover damages by showing injury to personal reputation. Often, this includes plaintiffs proving that the defamatory statement lowered their reputation in the eyes of the community, caused them personal humiliation, or subjected them to scorn. Such is the case in New Mexico, where the courts required a showing of some type of harm, allowing recovery for harms to personal reputation caused by defamatory statements.⁴¹ Similarly, the Tenth Circuit, applying New Mexico law, held that a doctor whose privileges were revoked at a local hospital could have suffered “impairment of reputation and standing in the community or personal humiliation” as a result.⁴²

c. Pecuniary Injury

Other states take a more stringent approach, similar to the one suggested by Anderson, which requires a showing of economic injury. For a plaintiff to obtain damages on a defamation claim in Indiana, he must be able to prove pecuniary injury even if other types of harm are present.⁴³ For example, the Seventh Circuit has refused to allow damages in at least two Indiana cases in which the plaintiffs could not prove economic harm.⁴⁴ Under Massachusetts law,

³⁹ See *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158 (7th Cir. 1987). In the case, the court held that such an omission could not form the basis for a defamation claim because it does not injure business reputation.³⁹ Judge Richard Posner reasoned that although being left off a dealership list may in fact decrease the opportunity for sales, it is not enough to have impugned the reputation of the dealer.

⁴⁰ *Id.*

⁴¹ *Newberry v. Allied Stores, Inc.*, 773 P.2d 1231, 1236 (N.M. 1989).

⁴² *Brown v. Presbyterian Healthcare Services*, 101 F.3d 1324, 1336 (10th Cir. 1996).

⁴³ *Stanley v. Kelley*, 422 N.E.2d 663, 668 (Ind. Ct. App. 1981).

⁴⁴ In *Grzelak v. Calumet Publishing Company*, the court upheld a motion to dismiss a defamation claim because the plaintiff had shown “severe mental and emotional pain and agony” but could not prove fiscal injury. 543 F.2d 579 (7th Cir.1975). Sixteen years later in *Tackett v. Delco Remy Div. of General Motors Corp.*, the court held that the plaintiff’s psychological harm was not sufficient to support the jury’s award of damages. 937 F.2d

a plaintiff can recover lost earnings resulting from a defamation claim.⁴⁵ For example, the court awarded lost earnings after potential employers testified they decided not to hire the plaintiff as a result of the defamatory statement.⁴⁶ However, Massachusetts' courts have rejected similar claims when plaintiffs have provided no proof that they could not find comparable employment as a result of defamatory statements.⁴⁷ This requirement stems, in part, from Massachusetts' requirement that plaintiffs prove special damages to recover for monetary losses in a defamation claim.

2. Constitutional Damage Requirements

As the Supreme Court began to constitutionalize the law of defamation in the 1960s, its rulings added a set of constitutional requirements for damages on top of the common law requirements.⁴⁸ The Court visited the issue of damages on two occasions in which it began to construct the constitutional restrictions upon damage awards. The most notable – and likely complex – discussions of the subject came in *Gertz v. Welch* and *Dun & Bradstreet v. Greenmoss Builders*. In *Gertz*, the Court explicitly discussed the common law's failure to require evidence of loss or injury.⁴⁹ In these situations, the plaintiff had not been required to plead and prove harm or injury; instead, it was merely presumed from the publication of a defamatory statement:

The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms.⁵⁰

The Court reasoned that it would be possible for a jury to award damages merely to punish a sentiment with which it disagreed.⁵¹ As a result, the *Gertz* Court ruled that plaintiffs who fail to prove actual malice could only recover damages based

1201 (1991). “[W]e find Tacket’s evidence of psychological injury insufficient to demonstrate the special damages necessary to uphold the jury’s award.” *Id.* at 1208.

⁴⁵ See *Faulk v. Aware, Inc.*, 19 A.D.2d 464 (Mass. 1963).

⁴⁶ *Id.* at 470.

⁴⁷ See *Tosti v. Ayik*, 394 Mass. 482 (Mass. 1985).

⁴⁸ See ROBERT D. SACK, *SACK ON DEFAMATION* § 10.2 (3d ed. 2000).

⁴⁹ *Gertz*, 418 U.S. at 349.

⁵⁰ *Id.*

⁵¹ *Id.*

on actual injury under the Constitution's protections.⁵² By its very wording, the *Gertz* opinion placed no restrictions on plaintiffs who prove actual malice, whether they be public officials, public figures or private persons.⁵³ Under *Gertz* then, a private plaintiff must prove actual malice to recover either presumed or punitive damages in cases involving matters of public concern.⁵⁴

The *Gertz* opinion clearly established that damages for actual injury were those damages designed to compensate a plaintiff for the injury to reputation that could actually be proven.⁵⁵ However, the Court did not define the term, writing that trial courts could properly frame the jury instructions for their defamation trials.⁵⁶ Instead, the Court provided some examples of actual injury, which made it clear that actual injury could include more than simply pecuniary harm:

Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.⁵⁷

In making such a decision, the Court also established the need for a plaintiff to present concrete evidence supporting claims of actual injury, noting that mere speculation would not justify an award of damages to compensate a plaintiff.⁵⁸

The *Gertz* decision did not answer all the questions regarding damages. After *Gertz*, a case that involved speech about a matter of public concern, it was unclear what showing of harm private plaintiffs suing over speech that did not involve a matter of public concern would be required to prove to recover damages. In 1985 in *Dun & Bradstreet v. Greenmoss Builders*, Justice Lewis Powell, writing for a plurality of the Court, noted that when speech involves purely private matters:

⁵² *Id.* at 349-350. "It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury." *Id.* at 349.

⁵³ *Id.*

⁵⁴ "In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by New York Times may recover only such damages as are sufficient to compensate him for actual injury." *Id.* at 350.

⁵⁵ *Id.* at 349.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* "Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury." *Id.*

[T]he rationale of the common-law rules has been the experience and judgment of history that “proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact.”⁵⁹

As a result, in cases involving private persons defamed in connection with matters that are not a matter of public concern, the U.S. Supreme Court has upheld the allowance of presumed damages and punitive damages without proof of “actual injury,” noting that the Constitution imposes no restrictions on damage awards. These cases arise, the Court said, when speech involves purely private matters, such as in the case of a credit report. Because of this, the Court stated that there is no public interest and no need for “uninhibited, robust and wide-open” debate on such private matters.⁶⁰ Thus, the Court provides no special protection for the private speech, such as requiring a plaintiff to prove actual injury, before an award of presumed or punitive damages.⁶¹

In the Internet era, the question then arises: Can a defamation case resulting from publication of the defamatory statement via the Internet ever be considered a private/private case or must – by their very nature – all defamatory statements be matters of public concern for which any plaintiff is required to prove actual injury under *Gertz*? Further, when looking at the types of reputational harm suggested by Anderson, do Internet defamation cases merit a different standard of review given the nature of the medium? As the Court pointed out in *Gertz*, the “truth rarely catches up with a lie.” Should the Internet’s ability to rapidly transfer information on a global spectrum alter the manner in which the court evaluates harm to reputation or does it justify even greater protection of free expression?

*B. New Media, New Harms?
The Courts Look at Online Defamation*

For the most part, courts have begun to look at harm in online defamation cases in a manner similar to the way they have addressed harm in traditional

⁵⁹ *Id.* (quoting WM. PROSSER, LAW OF TORTS § 112, p. 765 (4th ed. 1971))

⁶⁰ *Dun & Bradstreet*, 472 U.S. at 762 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 264, 270 (1964)).

⁶¹ *Id.* at 764. “We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of ‘actual malice’ does not violate the First Amendment when the defamatory statements do not involve matters of public concern.” *Id.*

defamation cases, applying the same constitutional and common law principles.⁶² Thus far, a handful of courts have provided substantive discussion of harm in the context of online defamation cases. Others have expressed, in dicta, what types of harm might be expected to occur in defamation cases. The discussions of harm seem to offer little recognition of the unique nature of the medium and the potential for differences in the types of harm that may emerge from defamatory statements published on the Internet. As a result, harm in online cases is most often judged using the same common law rules that courts apply in traditional print and broadcast defamation cases.

One of the clearest examples of the discussion of harm in an online defamation case arose in Indiana. There, the U.S. District Court for the Southern District of Indiana granted summary judgment to a doctor who had sued a former patient for defamation based on the patient's Internet postings.⁶³ The court, in reviewing the evidentiary record, noted:

Additionally, patients considering plastic surgery routinely conduct [I]nternet searches in choosing a surgeon, and Ms. Iacovelli's publications have been successful in driving away potential patients. This damage to Dr. Eppley's reputation and practice is compensable. Dr. Eppley's lost revenues as a result of Ms. Iacovelli's [I]nternet publications has been in the tens of thousands of dollars, he loses approximately one or two patients a month as an identifiable result of those publications, and has incurred \$2,000 to \$3,000 per month of expense attempting to counteract Ms. Iacovelli's [I]nternet campaign above the baseline expenses he would otherwise incur for maintaining a website and conducting ordinary marketing.⁶⁴

The court concluded that such evidence was ample proof of actual injury. However, the analysis largely relies on the common law approach of demonstrating business loss instead of an approach that would examine the unique characteristics of the Internet -- including issues of anonymity and credibility as well as the rapid and potentially global nature of the communication. Further, the court fails to specifically address the plaintiff's ability to mitigate damage to reputation through rebuttal, a key issue when evaluating injury to reputation in traditional defamation cases.

⁶² Most state courts have treated Internet defamation akin to libel, requiring the proof of actual injury to reputation, as opposed to akin to slander, which would not require such proof. *See, e.g.,* W.J.A. v. D.A., 4 A.3d 601 (N.J. Supr. 2010).

⁶³ Eppley v. Iacovelli, 2010 WL 3282574 (S.D. Ind.).

⁶⁴ *Id.* at *6.

In 2010, the Second Circuit vacated a trial court order dismissing a defamation lawsuit by an MSNBC reporter who had been terminated from her job.⁶⁵ After her termination, Claudia DiFolco sued for defamation and other torts, claiming her former colleagues had posted false statements regarding her termination on websites that reached more than 80,000 viewers. The U.S. District Court dismissed her lawsuit for failure to state a claim, concluding that two of the statements were true and the third was protected opinion.⁶⁶ The Second Circuit reinstated the lawsuit, finding the U.S. District Court's conclusions about the statements as true was premature, and noting that DiFolco stated a cause of action under New York law, by asserting:

the statements were untrue and defamatory and were published with malice and “with knowledge of their falsity and/or with a reckless disregard for their truth or falsity.” DiFolco further alleges that these statements were “willful” and “intended to seriously harm [her] ... career.”⁶⁷

The Second Circuit noted that the pleading met the requirements by asserting that the statements:

“impugn Ms. DiFolco’s honesty, trustworthiness, dependability, and professional fitness and abilities by falsely charging her with conduct that would tend to injure her in her trade or business.” These and other allegations in the complaint are adequate to support a claim based on a “writing which tends to disparage a person in the way of [her] office, profession, or trade.”⁶⁸

Clearly then, if proven, this type of injury to business reputation – even in the Internet context – is one the Second Circuit would be willing to recognize. Again, this standard seems to fall squarely in line with the requirements of a non-Internet case.⁶⁹

⁶⁵ DiFolco v. MSNBC Cable LLC, 622 F.3d 144 (2d. Cir. 2010).

⁶⁶ DiFolco v. MSNBC Cable LLC, 2007 WL 959085 (S.D.N.Y 2007).

⁶⁷ *DiFolco*, 622 F.3d, at 114.

⁶⁸ *Id.*

⁶⁹ Similarly, in *Sunlight Saunas v. Sundance Saunas*, the U.S. District Court for the District of Kansas ruled that the plaintiff in an online defamation case involving false representations on the defendant’s website and false oral statements to customers had to establish causation between the statements and harm to his reputation. The court alluded to three possible approaches: the plaintiff could show that people were deterred from associating with the business; the plaintiff could show, through loss of sales, the business’s reputation had been lowered in the community; or the plaintiff could show its

Some courts have not accepted the idea that simply because defamation occurred on the Internet it cannot relate to a private matter. The Appellate Division of the New Jersey Superior Court, in an Internet defamation case based on allegations of child molestation, ruled that New Jersey law permitted recovery for presumed damages in cases involving matters of private concern.⁷⁰ New Jersey law requires that plaintiffs “must have been harmed by the alleged defamation.”⁷¹ As a result, the private plaintiff need not plead actual injury as a part of his prima facie case – a decision in line with *Dun & Bradstreet*.⁷²

In Internet cases where courts do require a showing of harm, it seems that a non-specific pleading alleging harm will not suffice. The New Jersey Superior Court’s decision in *Dendrite International, Inc. v. Doe, No. 3* is the case most often cited for this proposition. There, the appellate division affirmed the trial court’s ruling that the plaintiff corporation must show harm resulting from a defamatory statement before it was entitled to discovery to obtain an anonymous speaker’s identity.⁷³ The court noted that Dendrite Corp.’s claim made vague references to the harms stemming from the John Doe statements:

Defendants’ publication of these statements has caused irreparable harm to Dendrite for which Dendrite has no adequate remedy at law, and will continue to cause such irreparable harm unless restrained by this Court. In addition, as a proximate result of defendants’ publication of these statements, Dendrite has sustained harm to its business reputation resulting in damages in an amount to be proven at trial, and Dendrite will continue to suffer additional damages in the future according to proof.⁷⁴

In a preliminary ruling, one judge alluded to the type of harm that would have met Dendrite Corp.’s burden.⁷⁵ Noting the court was looking for a more concrete showing, the judge said that linking the statements to a decline in stock price might have been acceptable if it had been done by an expert.⁷⁶ Further, the judge asserted that it was not enough for Dendrite Corp. to allege the statements

business suffered. Using the three methods, courts would be permitted to make reasonable inferences as to damage based on the evidence presented. See 427 F.Supp.2d 1032 (D. Kan. 2006).

⁷⁰ *W.J.A. v. D.A.*, 4 A.3d 601 (N.J. Supr. App. Div. 2010).

⁷¹ *Id.* at 604 (quoting *McLaughlin v. Rosanio*, 751 A.2d 1066 (App. Div. 2000)).

⁷² *Id.*

⁷³ *Dendrite International Corp. v. Doe*, 775 A.2d 756, 759-760 (N.J. Super. Ct. App. Div. 2001).

⁷⁴ *Id.* at 769.

⁷⁵ *Id.*

⁷⁶ *Id.*

harmed the company; it must instead show the actual harm that stemmed from those messages.⁷⁷

At least one court has been willing to accept testimony regarding harm to reputation from a third-party witness who was not privy to the defamatory statement. In 2004, the Missouri Court of Appeals ruled that a high school principal who was defamed via the Internet by his wife's paramour could prove harm to reputation based on the testimony of a school superintendent.⁷⁸ The principal sued Robert LeClerq, who was having an affair with the principal's wife, after LeClerq engaged in a defamatory chat room conversation with one of the principal's students.⁷⁹ LeClerq wrote that the principal "was being investigated for harassment and sexual stuff" and told the student to take caution as the principal was mentally unstable.⁸⁰ The superintendent testified that those allegations would damage an educator's reputation:

It is a business where you really live and die on your credibility. That's really all you have is your professional reputation and how the public perceives you and how the board of education perceives you. And if there is a rumor of that nature out there and it isn't true I think it would be normal for that to be reported.⁸¹

The superintendent went further, saying that he thought the principal's reputation was damaged in the eyes of others and that some people likely believed the allegations.⁸² The appellate court, noting that the third-party testimony about injury to reputation was from a person of authority in the relevant profession, found that testimony to be sufficient evidence of harm.⁸³

Through these cases, the courts have expressed a reluctance to apply new rules to evaluate harm in defamation cases involving the Internet. However, the unique nature of the Internet raises a number of concerns mentioned

⁷⁷ *Id.*

⁷⁸ See *Scott v. LeClerq*, 136 S.W.3d 183 (Mo. App. W.D. 2004).

⁷⁹ *Id.* at 194.

⁸⁰ *Id.* at 195.

⁸¹ *Id.* at 195.

⁸² *Id.* at 196.

⁸³ *Id.* "Evidence of the chat room conversation was sufficient to support a finding of actual reputational harm entitling Mr. Scott to damages. Therefore, this court need not decide whether Mr. LeClerq's publishing Mr. Scott's name, address, and telephone number on websites catering to homosexuals and stating that Mr. Scott was a homosexual soliciting sexual relationships with other men, which resulted in Mr. Scott's receiving solicitations from men who had seen this information on the websites, constituted evidence of actual reputational harm." *Id.*

throughout this article. Most importantly, however, is whether the Internet's characteristics adequately justify establishing separate standards of liability for the medium? Additionally, if they do, what standards of liability would be most appropriate?

C. Is the Internet Really Different?

The nature of the Internet creates a number of new considerations and complications in relation to the traditional law of defamation. First, the Internet has greatly increased the average individual's ability to communicate to the masses. Second, the lack of gatekeepers and credibility indicators, along with the ability to speak anonymously, make evaluating the veracity of information quite difficult. Third, the ability to republish defamatory statements without awareness of potential liability abounds on the Internet. Fourth, the audience fragmentation that occurs on the Internet, in combination with the massive quantities of information, impacts the possibility for effective rebuttal – a key element in the assessment of harm.

1. A Multitude of Mass Communicators in the Marketplace

Although the courts have seemed reluctant to carve out special liability rules for the Internet in defamation cases thus far, the U.S. Supreme Court recognized the potential of the Internet as a unique medium in its 1997 *Reno v. ACLU* decision. There, Justice Stevens, writing for a 7-justice majority in the unanimous decision, noted:

The dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention [that harmful or offensive material on the Internet would actually drive users away]. The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.

Although Justice Stevens' does not confront the issue of post-publication punishment, it is clear the Court placed great value on the Internet as a marketplace of ideas. Justice Stevens' comments and the continued growth of the

medium – with 30% of the world population now using the Internet⁸⁴ – suggest unprecedented access to mass communication. Websites, social networks, blogs and other new technologies have made it unnecessary for users to possess high levels of sophistication to engage in mass communication. Gone are the days when *New Yorker* writer A.J. Liebling lamented, “Freedom of the press is guaranteed only to those who own one.”⁸⁵ Thanks to the Internet, the world is populated by more than 2.1 billion potential publishers – all of whom now have access to their own 21st century press.

Unlike the professional media publishers with whom society has become accustomed, Internet publishers may have little formal training or oversight. Yet, the Internet – with its graphical user interface and professional-looking templates – allows nearly any speaker to present himself or herself with a level of apparent professionalism that might belie the underlying lack of familiarity with the values of journalism. And while defamation law has never clearly drawn a line between media and non-media defendants, it can certainly be argued that the undertone of *New York Times v. Sullivan* supports a commitment to the type of discourse that embraces the journalistic values of truthfulness, fairness and objectivity. To be certain, one can point to Internet speakers who enrich the discourse with speech based on these norms. However, for every political blog dedicated to investigation and truth-telling, one need only search a bit further to find another spewing malicious half-truths and unsubstantiated rumors.

2. The Need for Speed, a Red Pen and In-House Counsel

Combined with a newfound ability to communicate to the masses, the ability to communicate instantaneously has a profound impact on the types of discourse that can be found on the Internet. In many instances, the Internet lacks the gatekeepers traditionally associated with journalism and the media – gatekeepers designed to ensure the majority of expression published represented the traditional professional values of truth, fairness and objectivity. To be sure much of the information found on www.nytimes.com still undergoes the rigorous editing process associated with the newspaper’s print product, but some would argue that the Internet has even diminished the professional quality of journalism because of the rush to publish at even the most respected news outlets.⁸⁶ If the rush to publish causes professionals to make errors, it seems only

⁸⁴ Worldwide, more than 2.1 billion users are online, and in North America alone, more than three-fourths of the population uses the Internet. *World Usage and Internet Population Statistics*, March 2011, at <http://internetworldstats.com/stats.htm>.

⁸⁵ A.J. Liebling, *Do You Belong in Journalism?* *NEW YORKER*, May 4, 1960.

⁸⁶ See, e.g., Cyra Master, *Media Insiders Say Internet Hurts Journalism*, *THE ATLANTIC*, July 4, 2010, at <http://www.theatlantic.com/magazine/archive/2009/04/media-insiders-say-internet-hurts-journalism/7410/>; Aleks Krotoski, *What Effect Has the*

natural that individuals without journalistic training – whose approach to Internet publishing is often much more casual – would be even more likely to author something that runs afoul of the law.

Throw into this mix the ability to publish anonymously, and readers are left in the difficult position of trying to evaluate the credibility of the multitude of speakers largely on their own. How the credibility of speech on the Internet will impact defamation law is an open question. On one hand, audience members might be less likely to believe statements made anonymously or from lesser-known sources. On the other, statements made by entities with authoritative voices can be quickly reproduced on the Internet, traveling the globe in a short time frame. This creates a juxtaposition of scenarios: one in which very little harm likely results and another in which serious injury to reputation can occur rapidly, making the courts' evaluation of harm all the more important to the balance of protecting free expression.

3. Psst... Pass It On

Rooted in the traditional chain letters of the snail-mail era, e-mail forwards and re-posting of third-party content are the staple ingredients of much Internet content. Often, users are unaware of the legal liabilities associated with re-publishing third-party content, including defamation and copyright claims. Add to that an Internet user's ability to easily (or inadvertently) forward something to his or her entire contact list, and the possibility for the unintentional republication of defamatory material grows exponentially. Mass publication – intentional or otherwise – must clearly factor into the evaluation of harm to reputation.

4. The Reply Heard 'Round the World?

In the arena of defamation law, the average individual's ease of access to mass communication operates as a double-edged sword. As mentioned above, the Internet's global reach allows defamatory messages to spread through social networks and websites like wildfire; however, it also provides at least some opportunity for rebuttal. Further research is necessary to determine whether the opportunity for rebuttal provides a meaningful counterbalance to the defamatory speech given the difficulty of locating the potential audience of the defamatory speech. Unlike rebuttal in the traditional media, Internet rebuttals run a serious risk of getting overlooked as a result of information overload. The changing and multiple locations of content on the Internet makes it difficult to ensure a rebuttal reaches the initial audience for the defamatory content. Further, the ability to archive content and mirror sites makes takedown a seemingly useless

Internet Had on Journalism?, THE GUARDIAN, Feb. 20, 2011, at <http://www.guardian.co.uk/technology/2011/feb/20/what-effect-internet-on-journalism>.

remedy and inhibits the ability to prevent future encounters with defamatory material.

Taken separately, each of these characteristics can be compared to similar factors in the traditional media that courts have long considered in defamation cases. Taken as whole, however, this combination of characteristics complicates the evaluation of harm in Internet defamation cases and makes striking a balance between freedom of expression and protection of reputation a difficult task for courts. No one of these factors taken alone suggests courts should make it more difficult for plaintiffs to succeed in Internet defamation cases. Nor would any individual characteristic imply that harm to reputation is less likely to occur when defamatory statements are transmitted via the Internet. Instead, they highlight the need for courts to carefully evaluate harm with a cautious eye as to the chilling effect large defamation verdicts could have on Internet speech.

III. CONCLUSION

Whether a plaintiff must prove damages in any defamation action depends on both the constitutional and common law rules that apply. Under *Gertz*, private plaintiffs who file suit over defamatory statements arising from the discussion of matters of public concern must prove actual injury to recover damages. Private plaintiffs suing for defamation arising from matters of private concern – those plaintiffs discussed in *Dun & Bradstreet* – need only meet the common law damages requirements established by their jurisdictions. Although what a plaintiff must prove in these situations varies from state to state, most courts allow plaintiffs to prove injury to business reputation, injury to personal reputation, and pecuniary loss. However, it could be argued that defamation cases involving publication via the Internet are always of public concern and thus cannot create these *Dun & Bradstreet*-like private/private cases, removing the need for such complex standards for proof of damages.

Both the common law standards and constitutional requirements used by the courts traditional print and broadcast defamation cases have been applied to plaintiffs seeking to prove harm in online defamation cases. For the most part, courts have not yet recognized varying definitions of harm or different standards of proof for injury to reputation caused by online defamation. In fact, in most cases, the courts simply apply standards gleaned from earlier print or broadcast defamation cases. However, this article has suggested that statements on the Internet should not be evaluated in the same manner as statements made in the traditional media, implying that the resulting harm should also be evaluated differently.

As Internet defamation cases continue to flourish – and there is no reason to believe they won't – courts must begin to take into consideration the difficulty of ascertaining harm in an online world. Reconsider referee Spooner's pending

case. Should it be enough for the plaintiff to allege that a 140-character Tweet caused \$75,000 in damages? At roughly \$535 per letter, that's one expensive message. Or should courts require more? Does the somewhat ephemeral nature of Twitter demand plaintiffs prove damages in the manner proposed by Professor Anderson in order to properly protect free speech? Or does the ability for that Tweet to spread quickly add to the harm? When does a matter of private concern become a matter of public concern simply because it has been posted on the Internet? The answers to these questions are complex – and uncertain in the current legal arena – but they are also extremely important.

The Internet has certainly not reduced society's rationale for protecting reputation, and it has most definitely increased the probability that some defamatory statements could quickly cause widespread harm. At the same time, the ability for anyone to publish anonymously via the Internet has also impacted the credibility associated with certain statements, which ultimately must play a role in the courts' evaluation of harm. Gatekeepers arose in the traditional media to aid in the publication of truthful, accurate information – making the publication of defamatory material in a well-respected medium more likely to injure a person's reputation. The lack of gatekeepers in much of the Internet realm, thus, often removes that inherent cloak of credibility – particularly in the case of anonymous speech, thereby potentially reducing the resulting harm to reputation.

That is not to say that all harm to reputation from Internet-based defamation will decrease. In fact, given the Internet's global nature, significant harm is likely to result when defamatory statements are published and transmitted by well-respected sources on the Internet. Further, as businesses become more global in nature and individuals more mobile in their personal and social lives, proving pecuniary harm will likely prove more challenging. In large part, this is because damages of a speculative nature – people who chose not to associate with a defamed person or decided not to do business with a company of ill repute could reside thousands of miles away. Common law damage requirements were premised on the idea that a person's social or business reputation was drawn from the geographic area in which he or she resided and conducted business. In a networked world, these geographic boundaries are no longer tenable.

This is not to say that it is impossible to prove harm in many Internet defamation cases. This article is, instead, designed to raise awareness that traditional thinking about defamation likely needs to change to accommodate the traditional goals of defamation law: protecting reputation without needlessly inhibiting “robust and wide-open” debate on matters of public concern. One method of doing so is to consider the societal harm caused by reputational injury as proof of harm. This approach would emphasize the need to protect reputation in cases where harm is less obvious and actual injury may be difficult to establish. A second option would be to require plaintiffs in all Internet defamation cases to prove actual injury – an approach that emphasizes the potential of the Internet to

serve a marketplace of ideas by providing more protection for speech. At some level, both approaches would simply require a more in-depth analysis of the defamatory nature of a statement – mandating that courts determine whether a reasonable person would read the statement as subjecting the named party to ridicule or contempt and then evaluating the harm that flows from the statement.

Consider, for example, the 2009 case of Amanda Bonnen, who was sued for defamation by her property management company Horizon Group Management for a Tweet that said, “You should just come anyway. Who said sleeping in a moldy apartment was bad for you? Horizon realty thinks it’s okay.”⁸⁷ Horizon had argued the same standard of liability for Twitter posts as for any other medium:

The truth is that when people decide to post information or comment on an issue online, they choose to make statements in an online medium available for the public to view. Any expectation of privacy disappears, and any posting must be read under the same standards otherwise involved in a defamation case—as a reasonable reader would interpret the posting.⁸⁸

Luckily for Bonnen, the judge threw out the lawsuit, ruling the Tweet was too vague to be read as defamatory given the context, and it could be considered non-defamatory under the Innocent Construction Rule.⁸⁹ Although the judge never commented on harm, it would have been interesting to see how she would have attempted to balance the harm caused by a person who has only 20 followers on Twitter. Horizon had been seeking \$50,000 in damages from the 25-year-old Chicago woman.

Further, it seems that as technology changes, courts will be required to evaluate the necessity for the distinction between libel and slander – a distinction that flummoxed courts dealing with the initial round of Internet defamation claims. Sound judicial policy requires logical justifications for distinguishing slander and libel – justifications that may no longer exist in a networked world. Similarly, the boundaries between *per se* and *per quod* cases might also need reconsideration. Under a damages structure that requires that all plaintiffs prove actual injury, such a distinction becomes irrelevant.

In a world of legal uncertainties, one thing is clear: the current approach to evaluating harm in defamation cases is complex. Although many aspects of defamation law are convoluted, the inequities relating to damages create situations in which one plaintiff -- proving no injury – can recover damages

⁸⁷ Horizon Group Management LLC v. Bonnen, Cook County No. 2009 L 8675.

⁸⁸ *Id.*

⁸⁹ Jamie Loo, *Judge: Tweet ‘Lacks Context’ For Court Action*, Post Exchange, Jan. 20, 2010, at http://www.mccormickfoundation.org/Civics/programs/post-exchange/Article-Judge_dismisses_twitter_defamation_lawsuit.aspx

based on a defamatory web post while a plaintiff in another jurisdiction is left without remedy for the same post unless he or she can prove actual injury. Such a system can no longer be tolerated given the Internet's global reach.

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JOURNALIST PRIVILEGE IN 1929: THE QUEST FOR A FEDERAL SHIELD LAW BEGINS

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“The difficulty with much constitutional scholarship,” Professor Michael Gerhardt has said, “is that it fails to account for, much less examine, the interplay between judicial and non-judicial precedents.” Gerhardt’s theory of “non-judicial precedents” asserts that rules made outside courts – norms, regulations, statutes – shape constitutional issues long before courts intervene. The question of whether the First Amendment should provide a testimonial privilege to journalists is a case in point: No federal court addressed that issue until 1958, but journalists had framed it as a constitutional issue for decades – even as they lobbied for statutory shield laws.

The primary goal of this paper is to apply Gerhardt’s theory to an early turning point in journalist-privilege history: the first attempts, in 1929, to persuade Congress to adopt a federal shield law. On Gerhardt’s view, it represented a valuable opportunity for non-judicial actors to lead a national dialogue about constitutional meaning and help define freedom of the press, largely undefined by courts at the time.

A second goal is to use original historical research to correct the record about these events and illuminate their significance. This history will emphasize the role that non-judicial actors – including William Randolph Hearst and Fiorello La Guardia – played in leading a national debate about journalism, and, as Gerhardt’s theory would predict, the meaning of the First Amendment. It also will tie these events to a raft of shield laws adopted in the 1930s and 1940s, a link that never has been shown.

Keywords: journalist privilege, shield law, testimonial privilege

I. INTRODUCTION

While the legal landscape of the 19th century was dominated by common-law judges shaping and reshaping common-law precedents, the 20th century saw the rise of statutory law as the engine of an increasingly complex administrative state.¹ Judge-turned-academic Guido Calabresi famously lamented in 1999 that

¹ GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1999).

courts were “choking on statutes.”² Yet, despite its prevalence and importance, statutory law has remained largely understudied and undertheorized in the academy.³

Scholars who specialize in statutory law have criticized constitutional-law scholars for focusing too narrowly on court decisions, especially those of the U.S. Supreme Court, and for failing to account for the work that statutes do in giving practical meaning to broad constitutional principles. Eminent scholars such as Peter M. Shane and William N. Eskridge, Jr., working separately, have theorized a sort of “statutory constitution” that operates in concert with court-made law.⁴ Both have proposed envisioning a broad framework that joins the “large C Constitutional law” created by courts with a “small c constitutional law” created by statutes that operationalize constitutional principles such as equality and non-discrimination.⁵ The most obvious example of their thesis might be to say that the promise of *Brown v. the Board of Education*⁶ would have been meaningless without the mechanism of the Civil Rights Act of 1964.⁷ Both Shane and Eskridge have used voting rights as another obvious example: You cannot understand the evolution of that right by studying only court decisions; those must be situated in a complex matrix of federal and state rules and regulations, starting with the Voting Rights Act of 1965.⁸ Court-myopic scholarship, they have argued, is blind to the reality of how complex and dynamic America’s constitutional system is.⁹

In the realm of communication law, scholar Marouf Hasian, Jr., has contended that by focusing narrowly on the internal legal narratives found in court documents while ignoring the external narratives sounding in the wider culture – including in statutory law – constitutional scholars give a false

² *Id.* at 1.

³ WILLIAM N. ESKRIDGE, JR. DYNAMIC STATUTORY INTERPRETATION 1-8 (1994). *See also* WILLIAM N. ESKRIDGE, JR., AND JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010) (laying out a new theory that integrates statutory law within a constitutional framework).

⁴ Peter M. Shane, *Voting Rights and the “Statutory Constitution,”* 56 L & CONTEMPORARY PROBLEMS 243 (1993); William N. Eskridge, Jr., *American’s Statutory “Constitution,”* 41 U.C. DAVIS L. REV. 1 (2007-2008).

⁵ *See* SHANE, *supra* note 4, at 243-45; ESKRIDGE, *supra* note 4, at 3-6.

⁶ 347 U.S. 483 (1954).

⁷ Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

⁸ Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1971, 1973, 1973a-1973p). *See also* SHANE, *supra* note 4, at 252-69; ESKRIDGE, *supra* note 4, at 12-17.

⁹ Shane has summed up the problem this way: “One way of understanding the capacity of nonjudicial actors to create the operational meaning of our Constitution is to relate the topic to a larger problem perennially plaguing U.S. constitutional theorists, namely, accounting for legal change.” *See* SHANE, *supra* note 4, at 243.

impression of how rights have evolved and who played a role.¹⁰ “In such scenarios, it is empowered individuals with ‘sublime’ powers who help us obtain fundamental rights,” he has written. “The roles of other social agents in the communicative processes are bracketed out so that we can focus on the key words of knowledgeable elites who have handed down this wisdom in the precedents and seminal texts.”¹¹

The boundary between “legal” and “popular” discourses is permeable, Hasian has argued; vernacular legal discourse – how ordinary people talk about the law and make novel claims on the Constitution – always precedes court-conferred recognition of rights. Privacy law provides a paradigmatic example. The ideograph “right to privacy” was born, nurtured and given meaning wholly outside the courts by a variety of non-judicial actors, from activists and social critics to newspaper editorialists, popular writers and legal scholars.¹² The idea of and demand for such a “right” was firmly embedded in the culture when the U.S. Supreme Court finally began to recognize such a right in 1965.¹³ “The supposed ‘extra-judicial’ forces that operated within the broader public community helped to provide a series of key rationales for accepting the ‘right to privacy,’” Hasian concluded.¹⁴ “While orthodox legal scholars pride themselves on the autonomy of the ‘rule of law,’ many of their arguments are based on selective appropriations of tropes and other prefigurations that have circulated in the larger rhetorical culture for years.”¹⁵

Michael Gerhardt’s theory of non-judicial precedents tries to solve the problem identified by these scholars by elevating the role that non-judicial actors play in creating the rules, norms, customs, and traditions that almost always precede recognition in court-made law.¹⁶ “Virtually every question of constitutional law that the Supreme Court hears,” he has written, “already has been considered by one or more non-judicial actors.”¹⁷ Gerhardt has long acknowledged the role that vernacular legal discourse outside the courts can play in articulating normative aspirations about the Constitution.¹⁸

Put in the language of Gerhardt’s theory of non-judicial precedents,¹⁹ journalists have tried for decades to “send signals to courts”²⁰ about their belief

¹⁰ Marouf Hasian, Jr., *Vernacular Legal Discourse: Revisiting the Public Acceptance of the “Right to Privacy” in the 1960s*, 18 POL. COMM. 89 (2001).

¹¹ *Id.* at 90.

¹² *Id.* at 91-101.

¹³ *Id.* at 102.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Michael Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 714 (2008).

¹⁷ *Id.* at 746.

¹⁸ Michael J. Gerhardt, *Constitutional Decision-Making Outside the Courts*, 19 GA. ST. U. L. REV. 1123 (2002-2003).

¹⁹ See Gerhardt, *supra* note 16.

that “freedom of the press” should include protection of confidential sources. Individual journalists have gone to jail rather than reveal their sources, thereby creating a kind of non-judicial precedent. Journalists have ensconced the sanctity of protecting sources in their professional code of ethics, creating a stronger non-judicial precedent.²¹ Legislatures in many states have adopted statutory shield laws barring compelled disclosure, the strongest type of non-judicial precedent because statutes carry the force of law.

Gerhardt’s theory illuminates the communicative nature of these non-judicial activities. “Non-judicial precedents convey agendas just as judicial precedents do,” he has observed,²² and “they send signals in part to make [courts] aware of pertinent non-judicial precedents.”²³ They also facilitate dialogues “designed to educate the public, or others, about constitutional issues.”²⁴ Furthermore, non-judicial precedents can be “instrumental in constructing national identity” and can be deployed in “arguments about what makes the American people or nation distinctive.”²⁵

Four aspects of Gerhardt’s theory seem especially relevant to the early history of the journalist-privilege issue: 1) Non-judicial precedents can help set the public agenda by drawing attention to an issue in need of resolution;²⁶ 2) non-judicial precedents can help facilitate dialogue about a Constitutional question, especially a novel one that courts have not directly addressed;²⁷ 3) non-judicial precedents can help to implement Constitutional values by interpreting broad concepts, such as freedom of the press, into workable rules – with or without a court’s imprimatur;²⁸ and 4) non-judicial precedents can help shape the direction of legal history.²⁹

The primary goal of this paper will be to apply Gerhardt’s theory to an early turning point in journalist-privilege history: the first attempts, in 1929, to persuade Congress to adopt a federal shield law.³⁰ This move significantly raised the stakes in the long-running debate over journalists’ claims for a need to protect confidential sources. With only one state-level shield law on the statute

²⁰ *Id.* at 765-66.

²¹ See GEORGE SELDES, FREEDOM OF THE PRESS 370 (1st ed. 1935) (reproducing the code of ethics adopted in 1932 by the American Newspaper Guild). The Society of Professional Journalists’ current code of ethics includes, as its fourth edict, “Keep promises.” See SPJ Code of Ethics, <http://www.spj.org/ethicscode.asp> (last visited July 12, 2011).

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 767.

²⁵ *Id.* at 774.

²⁶ *Id.* at 765.

²⁷ *Id.* at 766.

²⁸ *Id.* at 775.

²⁹ *Id.* at 772.

³⁰ A Bill Exempting Newspaper Men From Testifying With Respect to the Sources of Certain Confidential Information, S. 2110, 71st Cong., 1st Sess. (Oct. 30, 1929).

books at the time,³¹ a well-organized campaign in Washington raised the specter of the legislative branch intervening in an issue long controlled by the judiciary. According to Gerhardt's theory, it also represented an opportunity for non-judicial actors to help implement the Constitutional value of freedom of the press, which was largely undefined by courts at that time.³²

A second important goal of this paper will be to correct the historical record about the events of 1929 to illuminate their significance. Although Congress has debated adopting a shield law off and on for 80 years and although it has been the focus of intense debate in the last six years,³³ the campaign of 1929 has remained but a footnote.³⁴ Some mid-century media scholars took note of these events,³⁵ but the story has remained largely untold outside of textbooks

³¹ Maryland was unique from 1896 to 1933. *See, e.g.,* David Gordon, *The 1896 Maryland Shield Law: The American Roots of Evidentiary Privilege for Newsmen*, JOURNALISM MONOGRAPHS, No. 22 (Feb. 1972).

³² The first significant Press Clause case to come before the U.S. Supreme Court did not occur until 1907, and the court denied that the First Amendment protected journalists from contempt convictions for publishing articles critical of court decisions, so-called "contempt by publication" convictions. *See* Patterson v. Colorado, 205 U.S. 454 (1907). The Court would not use the First Amendment to curtail this type of conviction, also called indirect contempt, until 1941. *See* Bridges v. California, 314 U.S. 252 (1941). The Court beat back an effort to quash subpoenas to journalists on constitutional grounds in 1915, though the claim was based on the Fifth Amendment's guarantee of protection against self-incrimination. *See* Burdick v. United States, 236 U.S. 79 (1915). The Court had used a First Amendment speech case to begin the process of "incorporating" the First Amendment into the Fourteenth Amendment's liberty interest under the Due Process Clause in 1925, but it should be remembered the Court still ruled in favor of government control over the speaker. *See* Gitlow v. New York, 268 U.S. 652 (1925). A press-protective First Amendment did not truly begin to come into view until the Court struck down Minnesota's so-called "gag law" two years after the events described in this paper. *See* Near v. Minnesota, 283 U.S. 697 (1931).

³³ *See, e.g.,* Anthony L. Fargo, *The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists, and the Uncertain Future of the Federal Journalist's Privilege*, 14 WM. & MARY BILL RTS. J. 1063 (2005-2006) (one of many recent articles calling on Congress to adopt a federal shield law to respond to a growing number of subpoenas issued against journalists in the face of diminishing protection in federal courts).

³⁴ *See, e.g.,* Sam J. Ervin, Jr., *In Pursuit of a Press Privilege*, 11 HARV. J. ON LEGIS. 233, 241 (1973-1974). The slightly erroneous footnote in the Ervin article has been reproduced frequently. *See, e.g.,* Leslie Siegel, *Trampling on the Fourth Estate: The Need for a Federal Reporter Shield Law Providing Absolute Protection Against Compelled Disclosure of News Sources and Information*, 67 OH. ST. L. J. 469, 507 (2006).

³⁵ *See, e.g.,* Walter A. Steigleman, *Newspaper Confidence Laws: Their Extent and Provisions*, 20 JOURNALISM Q. 230, 234 (1943).

with few or no references.³⁶ The history reconstructed here will emphasize the role that non-judicial actors – including William Randolph Hearst and Fiorello La Guardia – played in leading a national debate about journalism, sources and, as Gerhardt’s theory would predict, the meaning of freedom of the press. It also will tie these events directly to a raft of shield laws adopted in the 1930s and 1940s, a link that never has been shown (see APPENDIX).

The study will show that journalists and press advocates in 1929 were better organized and more forceful than ever in their response to defeats in court. They more assertively sought to sway public and elite opinion by emphasizing journalism’s role as a public good; they were in the process of abandoning unsuccessful legal arguments, such as Fifth Amendment claims against self-incrimination; they were more explicitly framing the journalist-privilege question in First Amendment terms; they seemed more ready than ever to turn away from the courts and to seek relief in the legislatures; and they had no doubts that what they were doing was helping to interpret the First Amendment.

The first part of this paper will briefly sketch the position of journalists in society as of 1929 and the press’s legal footing at that time. The second part will sketch the key non-judicial actors who helped drive the events of 1929. The third part will reconstruct the events leading up to and growing out of this initial drive for a federal shield law. The final part will offer an interpretation of these events through the lens of Gerhardt’s theory of non-judicial precedents.

II. POSITION OF THE PRESS IN SOCIETY

The journalistic press was at the height of its powers in the late 1920s, bolstered by strong economic conditions and improved government relations. Although the press was still fighting fundamental legal battles, it could point to some significant victories in this era. On the journalist-privilege issue, the press and its advocates appeared to be losing ground in the courts or, at the least, standing still.

A. Image and Influence

Nineteen-twenty-nine was a record-setting and ground-breaking year for the news industry. *The New York Times* reported a daily circulation of 426,007 and a Sunday circulation of 706,927.³⁷ *Editor & Publisher’s* annual industry survey reported that aggregate advertising revenue had reached a record of \$240

³⁶ The fullest account of these events, running about two pages, was included in a journalism textbook, so scholars have no citations to lead them to further resources. See CURTIS D. MACDOUGALL, *NEWSROOM PROBLEMS AND POLICIES* 320 (1949).

³⁷ *Circulations, Rates and Personnel of U.S. Daily Newspapers*, EDITOR & PUBLISHER, Jan. 25, 1930, at 76. For the sake of brevity and convenience, Editor & Publisher shall be referred to in notes as E&P.

million for the year.³⁸ Newspapers such as the *San Antonio Express* were opening million-dollar headquarters.³⁹ Newspapers were investing in new-fangled methods of reporting, including buying and manning private airplanes.⁴⁰ In November of that year, William Randolph Hearst's Fox Film Corp. opened a theater in New York devoted solely to showing news reels, back to back, a forerunner to today's 24-hour news channel.⁴¹

The press also enjoyed heightened prestige on the national political scene. After suffering through the one of the most repressive eras in its history, during World War I,⁴² the press began to push back during the 1920s.⁴³ Nothing before had cemented the popular image of the press as a check on government corruption like coverage of the Teapot Dome oil-and-kickback scandal, which broke into the headlines early in President Warren G. Harding's administration and remained there through the end of the decade.⁴⁴ Paul Y. Anderson of the St. Louis *Post-Dispatch* was one of several reporters whose work was cited as evidence by Congressional investigators,⁴⁵ and he ultimately won a Pulitzer Prize for it in 1929.⁴⁶ The years-long scandal peaked on Oct. 25 that year, when Albert Fall, former interior secretary under then-dead President Harding, was convicted and sentenced to a year in prison with a \$100,000 fine – the first Cabinet member ever brought down by the press.⁴⁷

One explanation for an empowered press during the 1920s was improved relations with the White House. While Woodrow Wilson's presidency had ended on a bitter note, especially after the United States declined to join the League of

³⁸ See 1929 *Record Year for National Copy; \$240,000,000 Spent, Ad Bureau Says*, E&P, Jan. 11, 1930, at 12.

³⁹ C.M. Meadows, Jr., *San Antonio Dailies in New Plant*, E&P, Oct. 5, 1929, at 12.

⁴⁰ Jerome H. Walker, *Planes Broadened News Field in 1929*, E&P, Dec. 28, 1929, at 9.

⁴¹ John F. Roche, *First Theater Showing All-News Films Opens in New York*, E&P, Nov. 9, 1929, at 28. The theater operated 10 a.m. to midnight, and news buffs paid a quarter for admission.

⁴² See, e.g., Margaret A. Blanchard, "Why Can't We Ever Learn?" *Cycles of Stability, Stress and Freedom of Expression in United States History*, 7 COMM L. & POL'Y 347-378 (2002).

⁴³ WILLIAM L. RIVERS, *THE ADVERSARIES: POLITICS AND THE PRESS* 24 (1970) (recalling that members of the press had "discovered the full thrust of their power" during the Teapot Dome scandal).

⁴⁴ See FRANK LUTHER MOTT, *AMERICAN JOURNALISM: A HISTORY, 1690-1940* 700 (3d Ed. 1962).

⁴⁵ *Id.*

⁴⁶ See The Pulitzer Prizes for 1929, available at <http://www.pulitzer.org/awards/1929>.

⁴⁷ See David H. Stratton, *Behind Teapot Dome: Some Personal Insights*, THE BUSINESS HISTORY REVIEW, Vol. 31, No. 4 (Winter 1957), at 385-402.

Nations,⁴⁸ the arrival of Harding was greeted by cheers in the press corps.⁴⁹ Harding was a newspaperman-turned-politician, and upon his inauguration, 600 newspaper editors from around the country presented him with an editor's chair for the White House.⁵⁰ Even after scandal engulfed his presidency, the press carefully protected Harding, often by casting him as a naïf surrounded by crooks.⁵¹ When Calvin Coolidge took the helm in 1923, he vowed to keep press relations cordial and continued Harding's custom of frequent meetings with the press, though he imposed a strict rule: He was never to be quoted. Not only did this help create the image of "Silent Cal," but it also drove reporters to shift their focus from the White House to Congress;⁵² the Senate became the coveted beat.⁵³ Even Herbert Hoover enjoyed a friendly relationship with the press, at least for a time. He had owned an interest in the Washington *Herald* until 1922, and he was a reliable source for the press during his stint as commerce secretary in Coolidge's administration. His troubles with the press did not begin in earnest until the stock market crash in late October 1929.⁵⁴

B. Legal Footing

Just as in the 1890s, the 1920s saw a rising tide of libel lawsuits.⁵⁵ It became common in this period for large newspapers to hire in-house legal

⁴⁸ See RIVERS, *supra* note 42, at 24. Rivers recalled: "[Wilson] was supersensitive, and he blamed the correspondents for reporting criticism of his Administration voice by Congress. ... He gradually withdrew into a shell of persecution." *Id.*

⁴⁹ See MOTT, *supra* note 43, at 721.

⁵⁰ See *Harding Gets Gift of Editorial Chair, Offering of Friendship From 600 Editors Is Made From Timber of the Old Revenge*, N.Y. TIMES, July 14, 1921, at A2. Sen. Arthur Capper of Kansas was quoted saying:

We believe the American press, exemplified by your own honorable part in its upbuilding, does much to make men more thoughtful and considerate and upright in the forming of the highest ideals of American citizenship. That the newspaper men have complete confidence in your ability and determination to measure up to the great demands of the time is shown in this spontaneous expression today.

Id.

⁵¹ *Id.* See also RIVERS, *supra* note 42, at 25. Rivers wrote: "Toward the end, as the correspondents and the Congress revealed more of the scandals of his subordinates, Harding seemed to withdraw from life. He died in 1923, leaving a memory of a man who was only gradually becoming aware that he had surrounded himself with thieves."

⁵² See MOTT, *supra* note 43, at 722.

⁵³ See RIVERS, *supra* note 42, at 25.

⁵⁴ See MOTT, *supra* note 43, at 722-23.

⁵⁵ See KATHY ROBERTS FORDE, LITERARY JOURNALISM ON TRIAL 87-88 (2008).

counsel to review sensitive articles for potential problems.⁵⁶ By 1929, *Editor & Publisher* magazine reported a stream of new suits and decisions week after week, sometimes lumped under the sub-headline “Libel Epidemic.”⁵⁷ The tide crested in early 1930 with the largest libel lawsuit ever filed: \$48 million in damages sought from nine newspapers and wire services.⁵⁸

Although it is unimaginable today, the press in the 1920s also operated under the onerous threat of so-called indirect contempt, also known as contempt by publication.⁵⁹ Writers, editors and cartoonists were routinely cited and fined for criticizing or even questioning judicial decisions.⁶⁰ In the late 1920s, fines of up to \$1,000 were common.⁶¹ The U.S. Supreme Court in 1907 had ruled that the First Amendment did not protect the press from this sort of contempt citation.⁶² So although journalists routinely talked of indirect contempt as a threat to freedom of the press, they were forced to seek relief through statutory law.⁶³ In 1929, two major lobbying campaigns were launched, in New York⁶⁴ and in Washington.⁶⁵ At the federal level, Sen. Arthur Vandenberg of Michigan, who was a newspaper publisher, led the effort to adopt a law curtailing judges’ powers to hold newspapers in contempt for things they published.⁶⁶ There was talk at the time that Vandenberg’s bill, if adopted, might also be a solution to the journalist-privilege issue.⁶⁷

Another fundamental legal battle the press was waging in 1929 was against prior restraints – or, as *Editor & Publisher* dubbed the problem,

⁵⁶ *Id.*

⁵⁷ See *Libel Epidemic, Three St. Louis Dailies Defendants in Actions Totaling \$300,000*, E&P, Sept. 28, 1929, at 3.

⁵⁸ See *World’s Greatest Libel Suit, Asking \$45,000,000, Filed by Durant*, E&P, Feb. 8, 1930, at 6.

⁵⁹ See WAYNE OVERBECK, MAJOR PRINCIPLES OF MEDIA LAW 321-23 (2006).

⁶⁰ *Id.*

⁶¹ See, e.g., Jerome H. Walker, *Judges Differ in Views on Contempt, Review of Noted Cases Shows Lack of Unanimity in Administering Law*, E&P, Dec. 7, 1929.

⁶² *Patterson v. Colorado*, 205 U.S. 454 (1907). The Court would not use the First Amendment to curtail so-called indirect contempt until 1941, in *Bridges v. California*, 314 U.S. 252.

⁶³ See, e.g., *Revision of Contempt Laws Discussed*, E&P, Nov. 2, 1929, at 32 (stating, “The need for revision of the laws of new York State relating to contempt of court, if the freedom of the press is to be safeguarded” was the topic of a meeting of the Western New York Publishers’ Association).

⁶⁴ *Id.*

⁶⁵ George H. Manning, *Vandenberg Would Limit Power of Judges in Indirect Contempt*, E&P, Sept. 14, at 10.

⁶⁶ George H. Manning, *Editors Acclaim Move to Bring Contempt Cases Before Impartial Tribunal*, E&P, Sept. 28, 1929, at 1. The bill died in committee the following year. See George H. Manning, *Contempt Bill Held in Committee*, E&P, Feb. 15, 1930, at 5.

⁶⁷ *Id.*

“Censorship by Injunction.”⁶⁸ In one particularly egregious case that year, a streetcar company in Milwaukee sought an injunction to prevent a newspaper from printing a letter to the editor written by a dissatisfied customer; when the newspaper pressed its case in court on First Amendment grounds, the court sided with the streetcar company.⁶⁹ The issue was brought to a climax in December that year, when the Minnesota Supreme Court rejected, for a second time, a First Amendment challenge to the state’s so-called gag law.⁷⁰ Immediately, Robert McCormick, the powerful publisher of the *Chicago Tribune*, vowed to put his paper’s influence and money behind an appeal to the U.S. Supreme Court⁷¹ – an effort that led 18 months later to the landmark decision in *Near v. Minnesota*.⁷²

Amid these ongoing battles, the press managed to achieve at least one unqualified – and unquestionably important – legal victory in 1929. Since 1789, the Senate had conducted much of its business behind closed doors, in “executive session,” including its votes on presidential appointments to the federal bench. That dramatically changed in May 1929, in a bitter fight over President Hoover’s appointment of Irvine Lenroot to the U.S. Court of Customs & Patents, not because it was a high-profile post but because Lenroot’s name had become tainted by the Teapot Dome oil-and-kickback scandals. Rather than merely report that Lenroot’s nomination had gone through 42 to 27, United Press reporter Paul Mallon used confidential sources to piece together a nearly flawless roll call of who supported the controversial nominee and who did not.⁷³

The ensuing “bad blood fight” between the Senate and the press included Democratic Senators vowing to conduct a closed-door investigation into Mallon’s reporting, to hold him in contempt and, if he still refused to reveal his sources, to throw him in jail.⁷⁴ After Sen. David Reed of Pennsylvania railed against “the so-called ethics of your so-called profession” and the Senate barred all reporters from the floor, the press went on the attack; it castigated the senators as a

⁶⁸ See *Censorship by Injunction*, E&P, Jan. 11, 1930, at 32.

⁶⁹ *Id.*

⁷⁰ See *Minnesota Suppression Law Upheld, State Supreme Court Rules That Act Does Not Infringe Freedom of Press Guarantee*, E&P, Dec. 28, 1929, at 7.

⁷¹ *Id.*

⁷² 283 U.S. 697 (1931), handed down June 1. For a complete and compelling account, see FRED W. FRIENDLY, *MINNESOTA RAG: CORRUPTION, YELLOW JOURNALISM, AND THE CASE THAT SAVED FREEDOM OF THE PRESS* (2003).

⁷³ Journalists of that era have recounted these events with relish. See, e.g., HUGH BAILLIE, *HIGH TENSION: RECOLLECTIONS OF HUGH BAILLIE* 288 (1959); RAY THOMAS TUCKER, *SONS OF THE WILD JACKASS* 165 (1969); WALTER TROHAN, *POLITICAL ANIMALS: MEMOIRS OF A SENTIMENTAL CYNIC* 157 (1975).

⁷⁴ Special to the New York Times, *Senate Floor Closed to Press*, N.Y. TIMES, May 23, 1929, at A1. See also *Senate v. Press*, TIME, June 3, 1929, available at <http://www.time.com/time/magazine/article/0,9171,732427,00.html>.

secretive elite and praised reporters as representatives of the people.⁷⁵ Sen. Robert La Follette, Jr., a progressive Republican and a newspaper publisher,⁷⁶ vowed to start reporting everything done in secret to his constituents in Wisconsin and dared the Democrats to bar him from the floor along with the reporters.⁷⁷ After a week of merciless press coverage, the Senate backed down: It canceled the investigation of Mallon⁷⁸ and rewrote the rules of the chamber to end closed-door sessions.⁷⁹ Washington reporting was forever changed.⁸⁰

C. Status of the Privilege

The journalistic press was in a strong position to fight for a testimonial privilege in the late 1920s. Journalism historian Joe Campbell has documented how, by 1897, the profession had begun to cast off the stigma of “yellow journalism,” adopted a more professional image by cultivating the “objectivity standard” and built powerful press clubs to foster best practices.⁸¹ Historian and ethicist Robert Spellman has shown that, about the same time, a defiant stance struck by individual journalists to protect sources had hardened into an industry-wide norm expected of all journalists.⁸² Legal historian Eric Easton has argued further that, in the decades that followed, “the press” as an institution emerged as

⁷⁵ M. Farmer Murphy, *Blow at U.P. Closes Senate Floor to Press*, SUN (Baltimore, Md.), May 23, 1929, at 1.

⁷⁶ Robert La Follette, Sr., started the left-wing political newspaper *La Follette's Weekly* in 1909. In 1929, the junior La Follette changed the name of the paper to *The Progressive*, and it is still published under that name. See *The Progressive, History and Mission*, available at <http://www.progressive.org/mission>.

⁷⁷ Associated Press, *Press Row Defense Given, Rules Committee Denounced, La Follette Dares Senate to Expel Him for Telling How He Votes*, L.A. TIMES, May 24, 1929, at A1.

⁷⁸ See, e.g., Special to the New York Times, *Senators Drop Plan for Secret Inquiry*, N.Y. TIMES, May 25, 1929, at A2; United Press, *Senate Gets Report Urging Publicity*, WASH. POST, May 29, 1929, at 2.

⁷⁹ See, e.g., Richard V. Oulahan, *Favor Publishing All Senate Votes; Rules Committee Members Advise Ending Secret Roll-Calls on Nominations*, N.Y. TIMES, May 29, 1929, at 24.

⁸⁰ Since then, the U.S. Senate has only held closed-door sessions a handful of times, during emergencies. See generally Marjorie Cohn, *Senate Impeachment Deliberations Must Be Public*, 51 HASTINGS L.J. 365 (2000).

⁸¹ See, generally, W. JOSEPH CAMPBELL, *THE YEAR THAT CHANGED JOURNALISM: 1897 AND THE CLASH OF THE PARADIGMS* 13 (2006).

⁸² Robert Spellman, *Defying the Law in the 19th Century: Journalist Culture and the Source Protection Privilege* (conference paper presented at the annual meeting of the International Communication Association, May 17-31, 2004, New Orleans) (on file with the author).

a powerful special-interest group, a force capable of reshaping the law to serve its own ends.⁸³

However, the decade of the 1920s began with a major setback, in the eyes of the press, in the quest for a testimonial privilege.⁸⁴ When the U.S. Supreme Court denied *certiorari* in the 1921 case of Hector Elwell, managing editor of the *Wisconsin News*,⁸⁵ journalists interpreted it as a reversal of an apparent trend toward recognition of a privilege.⁸⁶ *Editor & Publisher* went so far as to announce in a large-type headline, “U.S. Supreme Court Made New Law in Elwell Contempt Case.”⁸⁷ The trade magazine recounted a string of cases that suggested a de facto privilege or at least a tacit willingness on the part of judges to excuse reporters from revealing sources based on technical grounds or the belief that the information was not necessary.⁸⁸ The journalists’ sense of a trend was not unfounded: When the question of a journalist privilege first made it to the High Court, in the *Burdick* case of 1915, the reporter won – though only on narrow technical grounds, not because the Court accepted his claim to protection under the Fifth Amendment.⁸⁹ When Elwell’s petition for *cert.* was denied, journalists

⁸³ Eric Easton, *The Press as an Interest Group: Mainstream Media in the United States Supreme Court*, 14 UCLA ENT. L. REV. 247 (2007).

⁸⁴ Legal scholars often point to 1919 as the birth year of the modern First Amendment because of the famous quartet of cases decided by the Court: *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Abrams v. United States*, 250 U.S. 616 (1919). It is important to remember, however, that the Court ruled against the speakers in all of those cases. Likewise, while scholars rightly celebrate the *Gitlow* case of 1925 as a milestone in the Court’s approach to the First Amendment, it would not have provided a strong precedent to lean on in 1929 because, after all, the Court ruled that subsequent punishment in that case did not violate Mr. Gitlow’s rights. See *Gitlow v. New York*, 268 U.S. 652 (1925) (upholding conviction under a state law against criminal anarchy).

⁸⁵ *Elwell v. United States*, 275 F. 775 (7th Cir. 1921), *cert. denied*, 257 U.S. 647 (1921) (holding that a court decides from the circumstances whether Fifth Amendment protection applies; it is not up to a witness’ discretion).

⁸⁶ See, e.g., *No Confessional Seal on News Sources*, E&P, Oct. 29, 1921, at 14 (saying in a sub-headline, “U.S. Supreme Court Says Elwell Was Guilty of Contempt in Not Giving Grand Jury Information – Will Go to Jail, is Belief”).

⁸⁷ Frank Leroy Blanchard, *U.S. Supreme Court Made New Law in Elwell Contempt Case*, E&P, Nov. 5, 1921, at 15 (saying in a sub-headline, “Overthrows Theory That Reporter’s News Sources Are Privileged, Which Has Been Upheld by Lower Courts Actively and by Inference”).

⁸⁸ *Id.*

⁸⁹ *Burdick v. United States*, 236 U.S. 79 (1915). The circumstances in this rarely cited case were peculiar in the extreme. It involved a presidential pardon and the question of whether the reporter was obligated to accept it. No, the Court said, because doing so might tend to incriminate him. The case did not focus squarely on whether testifying and revealing sources alone would tend to incriminate him. See Margaret A. Blanchard, *The*

interpreted it to mean that the Fifth Amendment argument, which he also had made, was effectively foreclosed.⁹⁰ “In other words,” *Editor & Publisher* editorialized, “there is no law that will protect an editor or reporter in his refusal to tell from whom he has obtained news in confidence.”⁹¹

Thus, journalists in 1929 were in roughly the same position as journalists in the 19th century: There was no solid judicial precedent they could cite to support a testimonial privilege based on the common law, based on the Fifth Amendment’s mandate against self-incrimination, or, two years before *Near*, based on the Press Clause of the First Amendment. That explains why, as *Editor & Publisher* presciently predicted,⁹² journalists would have to seek protection in a federal statute. “Its success,” the magazine said, “will assure to the press the freedom from persecution that is implied, if not called by name, in the nation’s fundamental law.”⁹³

III. KEY NON-JUDICIAL ACTORS

Like so many privilege disputes before it, the scandal of 1929 involved news reporting that exposed corruption and ignited the wrath of red-faced members of Congress.⁹⁴ The controversy followed a newspaper expose about lawmakers who publicly called for strict enforcement of Prohibition laws but who secretly visited illegal liquor houses in the capital.⁹⁵ Sharpening the charge of hypocrisy,⁹⁶ Congress less than a month before the scandal broke adopted the Increased Penalties Act of 1929, which called for sentences of up to \$10,000 in fines or five years in jail, or both.⁹⁷ To quell public outrage, Congress launched an

Fifth-Amendment Privilege of Newsman George Burdick, 55 JOURNALISM QUARTERLY 39 (1978).

⁹⁰ Editorial, *Privileged News and the Profession*, E&P, Nov. 5, 1921, at 34 (saying the denial “finally establishes beyond question the right of the courts to compel newspapers to reveal the sources of information in cases coming before them”).

⁹¹ *Id.*

⁹² *Id.* (predicting that “a campaign will have to be undertaken in the near future to establish by Federal statute the privileged character of information given to a reporter or editor in line of duty”).

⁹³ *Id.*

⁹⁴ Media scholar Robert Spellman has catalogued the 12 most high-profile privilege disputes that preceded the events of 1929, and every one of them involved a clash between Congress and the press. See Spellman, *supra* note 81.

⁹⁵ See, e.g., *Probe of Wet Drinking, Dry Voting Is Seen: Congress May Investigate All Incidents Involving Members*, ATLANTA CONST., April 2, 1929, at A1; *Capital Jury to Hunt Drinking by Congressmen*, CHI. DAILY TRIB., Nov. 2, 1929.

⁹⁶ Arthur Sears Henning, *Do Unconvicted Felons Govern This Fair Land?*, CHI. DAILY TRIB., Nov. 4, 1929, at A1.

⁹⁷ See, e.g., *Coolidge Signs Bill for Stiff Dry Penalties*, N.Y. TIMES, Mar. 3, 1929, at A3.

investigation and sought the identity of the so-called “Man in the Green Hat,” the anonymous source for the newspaper stories.⁹⁸

With the investigation launched and subpoenas issued, attention shifted to three reporters of the *Washington Times* who in refusing to testify understood they were playing central roles in a legal struggle important to the entire profession. Their plight was transformed from a local matter into a national *cause célèbre* by the intervention of three high-profile public figures, powerful men who commanded media attention.

A. The Reporters

Gorman M. Hendricks, 35, was a 12-year veteran of the national press corps, having worked at the *Washington Herald* and *Post* before his stint at the *Times*.⁹⁹ Linton Burkett, 30, had 10 years of newspaper experience, mostly at papers in the South such as the *Charlotte (N.C.) Observer*, before arriving in Washington just months before the dispute began.¹⁰⁰ Jack Nevin, Jr., 24, was only a year into his first full-time newspaper job, but he was the son of veteran Washington reporter John E. Nevin of the International News Service.¹⁰¹ Because they worked for the *Times*, they were supported by the considerable legal and financial resources of Hearst Newspapers, one of the largest chains in the nation.¹⁰² Rather than appeal their contempt convictions, the reporters volunteered to serve their sentences to take a stand and draw attention to the issue.¹⁰³ “As we all stated some 45 days ago, when it might have been a question of doing a year or more,” Hendricks said upon release, “we were ready and feel the same way about it (now).”¹⁰⁴ Their roles would be as heroes of the First Amendment.

B. William Randolph Hearst

Because of his immense wealth, outsize ego, political ambitions and business acumen, Hearst was a larger-than-life figure in this era.¹⁰⁵ With

⁹⁸ See, e.g., *Brookhart Subpoenaed in Liquor Probe: Senator Asserts He Will Tell All to Grand Jurors*, ATLANTA CONSTITUTION, Nov. 2, 1929, at A1; *Was This Whisky Intended for U.S. Senators? Capital’s Rum Caches Seized, Arrests Made*, CHI. DAILY TRIB., Nov. 3, 1929, at A5.

⁹⁹ George H. Manning, *Three Washington Reporters Sent to Jail for Refusing to Reveal Source of News*, E&P, Nov. 2, 1929, at 1.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Hearst added the *Washington Times* to his media empire in 1919. See Staff report, *W.R. Hearst Buys Washington Times*, WASH. POST, Nov. 18, 1919, at 8.

¹⁰³ George H. Manning, *Reporters Go Back to Jail*, E&P, Nov. 9, 1929, at 6.

¹⁰⁴ George H. Manning, *Ovation Given Jailed Reporters*, E&P, Dec. 14, 1929, at 7.

¹⁰⁵ See DAVID NASAW, *THE CHIEF: THE LIFE OF WILLIAM RANDOLPH HEARST* (2001).

newspapers stretching coast to coast, Hearst had added radio stations to his empire in the 1920s and, in 1929, created Hearst Metrotone News, a newsreel production company.¹⁰⁶ Reports of his activities that year included a feature package in *The New York Times* about his opulent castle in California¹⁰⁷ and, around the time of the jailing of his reporters, news of a party for the visiting British Chancellor of the Exchequer Winston Churchill.¹⁰⁸ Upon hearing of the jailing, he ordered the *Times* to double the reporters' salaries as long as they remained in jailed, and he promised them bonuses after.¹⁰⁹ His role would be to lionize journalists and to try to sway public opinion.

C. Fiorello La Guardia

Having won a seat in the U.S. House of Representatives in 1923, the future mayor of New York had become "a national gadfly" and media magnet known for his colorful antics in Congress.¹¹⁰ A progressive Republican representing one of the poorest neighborhoods in New York City, he had turned his own humble roots into *bona fides* as a champion of the people.¹¹¹ To align himself with the public's growing anger over Prohibition in 1929, he once defied Alcohol Agents to arrest him while he mixed drinks in front of a group of reporters in Washington.¹¹² He was in the headlines throughout the year as he mounted his first (unsuccessful) campaign for New York mayor against the notoriously corrupt Jimmy Walker.¹¹³ His role in the journalists' dispute would be to champion a shield-law bill in the House while trying to turn the journalist-privilege issue into a populist political cause.

D. Arthur Capper

One of the longest serving members in U.S. Senate history, Sen. Capper of Kansas was at the height of his political powers in 1929.¹¹⁴ A confidant to three

¹⁰⁶ *Id.* at 414-415.

¹⁰⁷ *Id.* at 417.

¹⁰⁸ *Id.* at 423.

¹⁰⁹ See George H. Manning, *supra* note 98.

¹¹⁰ HARRY PAUL JEFFERS, *THE NAPOLEON OF NEW YORK: MAYOR FIORELLO LA GUARDIA* 123 (2002).

¹¹¹ See THOMAS KESSNER, *FIORELLO H. LA GUARDIA AND THE MAKING OF MODERN NEW YORK* (1989).

¹¹² *Id.* at 113.

¹¹³ See JEFFERS, *supra* note 105, at 15-38.

¹¹⁴ See *generally* HOMER E. SOCOLOFSKY, *ARTHUR CAPPER: PUBLISHER, POLITICIAN, AND PHILANTHROPIST* (1962). Socolofsky was Capper's chief biographer and published several books and articles on the politician.

presidents,¹¹⁵ Capper made national and international headlines throughout the year as chief sponsor of the so-called Capper Resolution, which would have outlawed international arms sales.¹¹⁶ Like La Guardia, Capper was a progressive Republican whose people-centered political causes included championing equality for women¹¹⁷ and improving the lives of African Americans.¹¹⁸ Like Hearst, Capper was a successful newspaper publisher who built an empire of holdings that, by 1929, reached more than three million readers in four states.¹¹⁹ In 1926, the same year he made the cover of *Time* magazine,¹²⁰ Capper pushed through a bill to help create the National Press Building, still home to the bulk of the Washington press corps.¹²¹ Six months before the journalist-privilege dispute, Capper gave a keynote address at the 1929 meeting of the American Society of Newspaper Editors that extolled the role of a free press in a democracy: “American newspapers are the breath of life for this government. Without them, it would perish – disintegrate.”¹²² His role in the dispute would be to champion a shield-law bill in the all-important Senate, to work behind the scenes to build support among newspaper publishers, and to frame the issue in persuasive First Amendment terms.

¹¹⁵ Capper had warm relations with the three Republican presidents of the 1920s, Harding, Coolidge and Hoover. Capper was with Coolidge in 1927 when Coolidge stunned the press by announcing he would not seek re-election. See Letter from Everett Sanders, Secretary to President Coolidge, Dec. 1, 1938, in the Arthur Capper Papers, Kansas State Historical Society (recounting events of that day in Rapid City, S.D.).

¹¹⁶ The Capper Resolution was a proposed amendment to the recently ratified international treaty known as the Kellogg-Briand Peace Pact, which outlawed wars of aggression. See, e.g., Edwin L. James, *Capper Moves to Back Peace Pact With Trade Embargo on Violators*, N.Y. TIMES, Feb. 11, 1929, at 1; *Senator Capper’s Anti-War Proposal Wins Praise Here and Abroad*, N.Y. TIMES, Feb. 11, 1929, at 2. Capper’s proposal was never adopted.

¹¹⁷ Capper was one of the earliest champions of an Equal Rights Amendment to the Constitution. See, e.g., *Adopt a Program for “Equal Rights,”* N.Y. TIMES, Dec. 8, 1929, at 16.

¹¹⁸ Capper was one of the earliest sponsors of anti-lynching legislation in Congress. See, e.g., *New Lynching Ban Offered in Senate*, N.Y. TIMES, Jan. 20, 1939, at 4.

¹¹⁹ *Id.* at 143.

¹²⁰ Cover Story, *The Bloc at Work*, TIME, Jan. 18, 1926, at 1. Capper was mentioned at this time as a possible presidential candidate for 1928.

¹²¹ Letter from Harvey D. Jacob, General Counsel, National Press Building Corp., April 17, 1926, in the Arthur Capper Papers, Kansas State Historical Society (thanking Capper for championing legislation to change District of Columbia zoning laws to allow construction of the press building).

¹²² Arthur Capper, *Speech to the American Society of Newspaper Editors*, Apr. 19, 1929, in PROBLEMS OF JOURNALISM: PROCEEDINGS OF THE SEVENTH ANNUAL MEETING OF THE AMERICAN SOCIETY OF NEWSPAPERS 64-74 (1929).

IV. RECONSTRUCTION OF EVENTS

Gerhardt has defined non-judicial precedents as “any past constitutional judgments of non-judicial actors that courts or other public authorities imbue with normative authority.”¹²³ As of 1929, press advocates had persuaded public authorities in just one state, Maryland, to imbue the practice of shielding confidential sources with the normative authority of law. However, that shield law, as a non-judicial precedent, would lend legitimacy to the campaign to adopt a similar law at the federal level as well.

A. Journalist Claims and Judicial Reaction

Events that transformed the question of a journalist’s privilege from a local issue into a national one began with a series of investigative articles published in October 1929 in the *Washington Times*. The three reporters – Hendricks, Burkett, and Nevin – took readers on a tour of 49 speakeasies serving liquor illegally in the heart of the nation’s capital. They withheld exact addresses but described each “joint” in a way that might have been recognizable to local denizens. They withheld names of proprietors and customers, but they alluded mysteriously to the “Man in the Green Hat,” who regularly, they said, provided liquor to members of Congress.¹²⁴

When a grand jury was convened Oct. 30 to investigate Prohibition violations in the District of Columbia, the journalists were its central focus.¹²⁵ First to testify, city editor Daniel O’Connell reminded the grand jury that journalists were not prosecutors or policemen or “stool pigeons,” and he invited the grand jury to summon witnesses and conduct an investigation of its own. When the reporters appeared, they refused to reveal their sources and claimed that all the relevant information could be found in their published stories. On their behalf, their counsel argued that to reveal the names would 1) be a breach of a confidentiality agreement they had made with their sources (a contract argument); 2) tend to hold them up to dishonor (a common law argument), 3) violate the ethics of their profession (a normative argument that had never been recognized by a court), and 4) hurt their ability to earn a livelihood (a common law argument known as loss of estate).¹²⁶ No Fifth Amendment argument was offered.

¹²³ Gerhardt, *supra* note 16, at 715.

¹²⁴ See, e.g., WALTER A. STEIGLEMAN, *THE NEWSPAPERMAN AND THE LAW* 198 (1950).

¹²⁵ See, e.g., Special to the New York Times, *Capital Reporters Jailed for Withholding Bootleggers’ Names From Grand Jury*, N.Y. TIMES, Oct. 31, 1929, at 14.

¹²⁶ George H. Manning, *Three Washington Reporters Sent to Jail for Refusing to Reveal Source of News*, E&P, Nov. 2, 1929, at 1. This was an unreported case, so legal proceedings must be gleaned from press reports.

Federal district court Judge Peyton Gordon summarily rejected the reporters' claims based on the fact that a journalist-source privilege had never been recognized at common law. In addition to sentencing each to 45 days in jail, he warned them that he would re-sentence them to an additional 45 days if they continued to be recalcitrant. In an unusual step, the judge also refused to grant them bail and ordered them taken into custody on the spot.¹²⁷ In something of a rebuke to Judge Gordon, Justice Frederick L. Siddons of the District Supreme Court the next day granted a writ of habeas corpus and ordered the reporters released on bonds of \$500 apiece.

The reporters, vowing to remain silent, were portrayed as defiant celebrities. "Their release came at the end of a full day in jail, during which they reported that they had been accorded splendid treatment," the Associated Press reported. "Other reporters calling to interview them found one in the jail barber shop and another finishing a second helping of breakfast."¹²⁸ As if to heighten the drama surrounding their case, the reporters announced four days later that they would surrender themselves to the court rather than appeal its decision and would serve out their sentences in full.¹²⁹

B. Non-Judicial Mobilization

On the same day the reporters reported to jail to serve their terms, *Washington Times* managing editor Ralph Benton sent a letter to Sen. Capper, as chairman of the Senate's District of Columbia Committee, asking him to begin the process of securing legislation to grant journalists a testimonial privilege in federal courts. Louis Fehr, publisher of the *New York American*, agreed to lead a campaign to organize newspaper publishers to support efforts at the state level.¹³⁰ Capper told the press corps of his intentions to act as early as Nov. 11, and even small newspapers such as the *Morning Call* in Mississippi carried wire reports saying Capper was drafting a bill that would create a federal law similar to the one in Maryland.¹³¹ Besides forcing reporters to betray personal confidences, Capper said, such treatment "paralyzes the power of the press as an agent of

¹²⁷ *Id.*

¹²⁸ Associated Press, *Court Grants Bail to Capital Reporters*, N.Y. TIMES, Nov. 1, 1929, at 14.

¹²⁹ Special to the New York Times, *Reporters Go Back to Jail: Washington Times Men Accept Sentence for Contempt of Jury*, THE NEW YORK TIMES, Nov. 5, 1929, at 57.

¹³⁰ George H. Manning, *Reporters Go Back to Jail, Refusing Confidential Data to Grand Jury*, E&P, Nov. 9, 1929, at 6.

¹³¹ *Measure for Protection of U.S. Press: Senator Capper Says He Will Push Act Through*, MORNING CALL (Laurel, Miss.), Nov. 12, 1929, at 8. The article mentions Capper was speaking to reporters of the Universal Service, one of several wire outfits operating at the time.

public good and renders the press useless to a large extent in exposure of political and public evils.”¹³²

On Nov. 14, Capper introduced the first of many bills to create a federal shield law.¹³³ The Associated Press’ dispatch appeared the next day in papers coast to coast.¹³⁴ Many of these early reports echoed Capper’s emphasis not on the personal rights of the reporters but on the need to protect confidential sources who help journalists serve the public. Editorializing just four days after Capper introduced his bill, the *Herald Examiner* in Chicago argued that reporters working “in the line of duty” are public servants who deserve legal protection. “That is what the Capper bill proposes to do,” the paper said, “compel all federal courts to recognize the quasi-public relation of the newspaper to the public and to protect the newspaper in the faithful discharge of its public obligation.”¹³⁵ Putting an even finer point on that First Amendment rhetoric, the *San Antonio Light* ran its staff-written story under the headline “Bill of Rights Asked for Reporters” and said the plight of the jailed *Washington Times* reporters had sparked “nationwide interest” in the issue.¹³⁶

C. Facilitating a Constitutional Dialogue

Gerhardt would explain that infusion of First Amendment rhetoric into a discussion of a statutory shield law as fulfilling a key function of non-judicial precedents: They facilitate debate about Constitutional principles – to educate the public, to hash out competing claims, to rehearse theories not yet recognized by courts.¹³⁷ Capper’s strategy of generating public awareness and emphasizing the importance of a free press¹³⁸ played a central role in the debate of 1929. Obviously coordinated with Capper in advance, coverage in the weekly trade magazine *Editor & Publisher* included quotes from Capper and the full text of his

¹³² *Id.*

¹³³ See S. 2110, 71st Cong., 1st Sess. (legislative day Oct. 30, calendar day Nov. 14, 1929).

¹³⁴ See, e.g., Associated Press, *Immunity for Reporters Asked by Capper in Senate*, N.Y. TIMES, Nov. 15, 1929, at 22; Associated Press, *Capper Bill Would Protect News Sources*, SAN ANTONIO EXPRESS, Nov. 15, 1929, at 20; Associated Press, *Bill to Free Scribes of Pressure by Courts*, INDEPENDENT (Helena, Mont.), Nov. 15, 1929, at 2.

¹³⁵ Editorial, *Capper Bill to Protect Public Obligations of Nation’s Press*, HERALD EXAMINER (Chicago), Nov. 16, 1929, at 12.

¹³⁶ See *Bill of Rights Asked for Reporters: Capper Measure Outgrowth of Imprisonment of Newspapermen*, SAN ANTONIO LIGHT, Nov. 19, 1929, at 6.

¹³⁷ Gerhardt, *supra* note 16, at 766.

¹³⁸ See, e.g., *Senator Capper Seeks to Protect Information Received Confidentially*, INTELLIGENCER (Edwardsville, Ill.), Nov. 18, 1929, at 8 (saying Capper declares “the power of courts to force newspapermen to reveal the sources of their information endangers freedom of the press”).

bill just two days after he entered it in the Senate.¹³⁹ “I do not know whether we can get a law through Congress or not,” Capper told the magazine. “I am aware that it is a controversial question ... (but it is) a subject that ought to have attention.” Capper hoped that action on the floor of the Senate would lead the Judiciary Committee to debate the merits of a shield law. “My bill,” he said, “will at least serve the purpose of promoting thought and discussion on the subject.”¹⁴⁰

The lead editorial in the same issue of *Editor & Publisher* excoriated the “merciless, mean, unjust and indecent case” against “three honest reporters sent to jail like common criminals,” and it lamented “another instance of blind and staggering justice exacting penalties of blood and torture from those who dare serve spiritual causes!”¹⁴¹ More soberly, the editorial praised Capper’s effort as the start of an important national debate: “He can do nothing for the three reporters in jail, but he might do something for the future.”¹⁴² After decrying the fact that no coordinated legal effort was made to support the reporters, the editorial tried to rally journalists around Capper’s effort: “We join newspaper men in thanking Senator Capper, a man with a heart as well as head.”¹⁴³

Two days later, on Nov. 18, *La Guardia* put the issue back into national headlines by introducing a companion to Capper’s bill in the House and by going much further. While Capper’s bill would have covered reporters, editors and publishers “connected with any newspaper published in the District of Columbia,” *La Guardia*’s bill would have covered journalists in any federal court or in any grand jury proceeding anywhere – truly a federal shield law.¹⁴⁴ Noting that the jailing of the *Washington Times* reporters was “creating discussion all over the country,” Rep. Louis Ludlow, an Indiana Democrat who had been a Washington correspondent for nearly 30 years before going into politics, echoed Capper’s free-press rationale for supporting *La Guardia*’s shield law. “A free, alert and courageous press is the nation’s strongest safeguard,” he told the *New York*

¹³⁹ George H. Manning, *Capper Author of Bill Protecting News Men in Contempt Cases*, *E&P*, Nov. 16, 1929, at 8.

¹⁴⁰ *Id.*

¹⁴¹ Editorial, *Hardboiled*, *E&P*, Nov. 16, 1929, at 36. To underscore the idea of unjust rulers punishing truth-tellers, *E&P* placed a filler quote from the Bible next to the editorial: “And the king said to him, How many times shall I adjure thee that thou say nothing but the truth to me in the name of the Lord?” – II. Chronicles, XVII; 15.” *Id.*

¹⁴² *Id.* In case the reader was not sufficiently sympathetic to the reporters’ plight, the editorial went on: “Perhaps the three young men in jail, one the father of five children of whom one is a two-months infant, will consider [the shield law effort] sufficient compensation for their sacrifice. We doubt, however, if their mothers, fathers, wives or children would agree.” *Id.*

¹⁴³ *Id.*

¹⁴⁴ Special to The New York Times, *La Guardia Bill Would Absolve Reporters Who Refuse to Reveal Their News Sources*, *N.Y. TIMES*, Nov. 19, 1929, at 23.

Times. “There can be no free press in this republic if newspaper reporters are to live in terror of grand jury inquisitions and jail sentences.”¹⁴⁵

Following La Guardia’s action by two days, on Nov. 20, Capper returned to the Senate floor to submit a second bill, this one omitting language that would have limited protection to newspapers in the District of Columbia.¹⁴⁶ This prompted a new wave of editorials in which Capper’s talking points had crystallized: newspapers perform a public service; fulfilling that public service deserves the protection of the law; reporters who go to jail while performing that public service are “martyrs to an important cause.”¹⁴⁷

D. Trying to Generate Public Support

Hearst and editors at the *Washington Times* capitalized on the jailing to portray the reporters as popular heroes and make the case for a privilege in the court of public opinion. Having ordered the newspaper to double the reporters’ salaries while in jail, Hearst also announced that a gold watch, \$1,000 apiece and an extra week of vacation would be waiting for them upon their release.¹⁴⁸ When the reporters were released on the 40th day of their 45-day sentences (released early for good behavior), the newspaper rented out the Belasco Theatre on Washington’s Lafayette Square and staged a standing-room-only celebration that included speeches and Vaudeville entertainment.¹⁴⁹ Col. Frank Knox, general manager of Hearst’s newspaper chain, presented each with a watch inscribed, “From W.R. Hearst for loyalty to newspaper ethics.” In toasting them, Knox said, “I believe I speak the sentiments all the editors in America when I express unbounded admiration for the high courage of these three young men, who kept the faith, preserved the honor of their profession and suffered hardships rather than be false to the traditions, ethics and standards of their profession.”¹⁵⁰

La Guardia used the occasion to pit the journalists, as defenders of the people, against callous judges and to generate support for his shield-law bill. He said the reporters were “victims of judicial stupidity” and said his bill was needed “to guard against a type of intellect that, through accident, or politics or otherwise, happens to fall upon the bench.”¹⁵¹

¹⁴⁵ *Id.*

¹⁴⁶ See S. 2175, 71st Cong., 1st Sess. (legislative day Oct. 30, calendar day Nov. 20, 1929).

¹⁴⁷ Reproduction of wire service articles and editorials were widespread. See, e.g., Editorial, *The Service of News*, OIL CITY DERRICK (Oil City, Penn.), Nov. 30, 1929, at 6; Editorial, *The Service of News*, MORNING CALL (Allentown, Penn.), Nov. 30, 1929, at 8. The editorials in these sister papers were identical.

¹⁴⁸ George H. Manning, *Ovation Given Jailed Reporters*, E&P, Dec. 14, 1929, at 7.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

By this time, mid-December 1929, the bills submitted by Capper and La Guardia were in the Senate and House judiciary committees, dying without debate. Momentous news had moved into the headlines as the jailed reporters' story unfolded: Black Thursday on Oct. 24, Black Monday on Oct. 28 and, the greatest stock market crash of them all, Black Tuesday on Oct. 29.¹⁵² Capper himself was busy fighting other uphill battles: re-submitting the so-called "Capper Resolution" to create a ban on international arms sales,¹⁵³ fighting against a taxpayer bailout of Wall Street speculators,¹⁵⁴ fighting for a long-sought tariff bill protective of Midwest farmers,¹⁵⁵ and reassuring the Farm Bloc that the stock market crash would not spell doom for agriculture.¹⁵⁶

The shield-law idea fell by the way at the federal level, and the *Washington Times* incident shriveled to an unsatisfying end. In a brief item, the *New York Times* reported that "The Man With the Green Hat" was identified as George L. Cassidy and was arrested while delivering liquor to the Senate Office Building. Police were able to make the arrest because the *Washington Times*' city editor provided the information his reporters had tried to protect.¹⁵⁷

E. Creating Network Effects

One of the key functions of non-judicial precedents is creating what Gerhardt has dubbed "network effects,"¹⁵⁸ whereby Constitutional interpretations of non-judicial actors are affirmed and strengthened over time. "The more often that public authorities ... cite or seek to invest past non-judicial activities with normative power," he has written, "the more their meaning and value increase."¹⁵⁹ The existence of the 30-year-old Maryland shield law provided an instant starting place for discussions of a federal law, and it was mentioned in nearly all of the news coverage of the Capper and La Guardia bills.¹⁶⁰

¹⁵² See JAMES STUART OLSON, *HISTORICAL DICTIONARY OF THE 1920S* 80 (1988).

¹⁵³ Special to the *New York Times*, *To Urge Arms Embargo at December Session; Senator Capper Says He Will Call Up His Resolution to Enforce Kellogg Pact*, N.Y. TIMES, Oct. 12, 1929, at 3.

¹⁵⁴ Special to the *New York Times*, *Says Speculators Should Get No Aid; Capper, in Radio Talk, Declares Only Legitimate Business Deserves Help*, N.Y. TIMES, Nov. 18, 1929, at 3.

¹⁵⁵ Special to the *New York Times*, *Capper Forecasts 'Fair' Tariff Bill; Kansan Defends Senate Against attacks on Its Delay With the Measure*, N.Y. TIMES, Nov. 27, 1929, at 2.

¹⁵⁶ Special to the *New York Times*, *Capper Says West Is in Fine Shape; Senator, in Radio Talk, Predicts There Will Be No Buyers' Strike as in 1921*, N.Y. TIMES, Dec. 4, 1929, at 46.

¹⁵⁷ Associated Press, *Capital Jury Indicts 'Man in the Green Hat,'* N.Y. TIMES, Dec. 18, 1929, at 2.

¹⁵⁸ Gerhardt, *supra* note 16, at 719.

¹⁵⁹ *Id.*

¹⁶⁰ See, e.g., *Maryland Law of 1896 Safeguards Newspaper Men in Jury Probe*, E&P, Nov. 9, 1929 (a sidebar focusing on the benefits of a shield law, which accompanied coverage of Capper's earliest effort).

Network effects from the dispute in Washington rippled almost immediately through the states. Just a week after Capper and La Guardia submitted their bills in Congress, Rep. Michael Zack introduced a similar bill in the Massachusetts legislature.¹⁶¹ Within months, legislators had introduced shield-law bills in half a dozen state houses,¹⁶² five in New York alone.¹⁶³ Lobbying continued into 1931, spurred on by the jailing of “youthful, dapper Edmond M. Barr,” a reporter for the *Dallas Dispatch*, hailed by *Time* magazine as a “martyr” for refusing to divulge his sources.¹⁶⁴ None of those efforts found success, but momentum was building.

Just weeks after Capper had submitted his first bill in Congress, Rep. Harry W. Vanderbach in the New Jersey General Assembly announced he would introduce similar shield legislation there.¹⁶⁵ Submitted at the beginning of 1930, the Vanderbach bill was modeled on the existing Maryland law and offered sweeping protection against disclosure in any legal or legislative proceeding, including before grand juries.¹⁶⁶ Less than three years later, the legislature adopted the second shield law in the nation, exactly as Vanderbach had submitted it.¹⁶⁷ Coverage explicitly tied that press victory to Capper’s efforts at the federal level.¹⁶⁸ Thus, passage of the New Jersey shield law grew directly from the dispute of 1929.

¹⁶¹ Staff report, *Seeks New Statute to Protect News Men*, E&P, Dec. 7, 1929.

¹⁶² See NEW YORK LAW REVISION COMMISSION, LEG. DOC. NO. 65 (A) (1949), at 59-88.

¹⁶³ *Id.* at 101-02.

¹⁶⁴ See Editorial, *Professional Secret*, TIME, March 23, 1931, available at <http://www.time.com/time/magazine/article/0,9171,741282,00.html> (noting that a bill was entered “straightaway” into the state legislature and tying the measure to Capper’s unsuccessful attempt at a federal shield law in 1929).

¹⁶⁵ See *Has Bill Protecting News Confidences*, E&P, Dec. 14, 1929, at 10.

¹⁶⁶ *Id.* The bill read:

That no person engaged in, connected with or employed on any newspaper shall be compelled to disclose, in any legal proceedings or trial, before any court or before a grand jury of any county or a petit jury of any court or before the presiding officer of any tribunal or his agent or agents, or before any committee of the legislature or elsewhere, the source of any information procured by or obtained by him, and published in, the newspaper on which he is engaged, connected with or employed.

Id.

¹⁶⁷ N.J. STAT. ANN. (West Co.) 2:97-11 (1933); now codified at N.J. STAT. ANN. §§2A:84A-21 (Thomson West/Westlaw through 2010).

¹⁶⁸ See Editorial, *Off the Record*, TIME, May 22, 1933, available at <http://www.time.com/time/magazine/article/0,9171,745593,00.html> (noting that “in 1929, Senator Arthur Capper proposed a like measure to Congress”).

The cycle began anew in 1935 with the headline-generating case of Martin Mooney, a crime reporter for Hearst's *New York American* newspaper.¹⁶⁹ Subpoenaed by a grand jury following a series of stories on racketeering in New York City, he refused to testify. After Mooney was fined \$250 and ordered to serve 30 days in jail, his lawyers initiated a series of appeals that worked their way through the court system – and kept the issue in the headlines – for nearly a year. “Reporter’s Rights Debated in Court,” the *New York Times* declared in a headline, echoing the First Amendment rhetoric that had emerged in 1929.¹⁷⁰ When the New York Supreme Court upheld Mooney’s sentence in 1936, it was front-page news, played for outrage.¹⁷¹

The court’s decision underscored an important legal point for press advocates: If there were to be a reporter-source privilege comparable to the priest-penitent and husband-wife privileges, it would have to be created by statute, not court decision.¹⁷² Not long after Mooney began serving out his sentence in Queens County jail,¹⁷³ lobbying and legislative action began in response. Capper returned to the U.S. Senate with a bill identical to his 1929 attempt, and he vowed “to push for its passage.”¹⁷⁴ State legislators launched a

¹⁶⁹ See *Reporter’s Writ Stays Jail Term, Freed After Court Reaffirms 30-Day Sentence for Silence Before Grand Jury*, N.Y. TIMES, May 17, 1935, at 5.

¹⁷⁰ See *Reporter’s Rights Debated in Court*, N.Y. TIMES, May 28, 1935, at 9. Mooney’s lawyer framed his defense in freedom-of-the-press rhetoric as well:

It cannot be doubted that newspapers have been largely instrumental in the exposure of crime and bringing about reform, and to now rule that communications made to a reporter in confidence by an informant are not privileged would be to destroy the efficacy of this great instrument of the public welfare.

Id.

¹⁷¹ See Special to the *New York Times*, *High Court Upholds Jailing Reporter ... Mooney Sentence Stands*, N.Y. TIMES, Jan. 8, 1936, at A1.

¹⁷² See *People ex rel. Mooney v. Sheriff of New York County*, 199 N.E. 415 (1936). The court concluded:

It seems clear that this court should not now depart from the general rule in force in many of the states and in England and create a privilege in favor of an additional class. *If that is to be done, it should be done by the Legislature*, which has thus far refused to enact such legislation.

Id. at 295 (emphasis added).

¹⁷³ See *Reporter Starts 30-Day Term in Jail*, N.Y. TIMES, Jan. 18, 1936, at 32.

¹⁷⁴ See Special to the *New York Times*, *Would Protect Reporter, Capper Offers Bill to Bar Forcing Press to Divulge New Source*, N.Y. TIMES, Feb. 25, 1936, at 21 (noting that “six years ago, Mr. Capper introduced a similar measure but Congress took no action upon it”). See also S. 4076, 74th Cong., 2d Sess. (1936).

new raft of bills, seven in New York state alone in 1935-36.¹⁷⁵ Despite opposition by bench and bar,¹⁷⁶ shield laws were successfully adopted in Alabama and California in 1935, Kentucky and Arkansas in 1936.¹⁷⁷

Capper lacked high-profile allies of 1929 to join him in these later efforts. La Guardia left Congress in 1933 to become the mayor of New York City,¹⁷⁸ and Hearst's publishing fortunes and political influence never recovered following the stock market crash of 1929 and ensuing depression.¹⁷⁹ In their place, Capper enlisted the help of newer members of the House of Representatives to enter companion bills to mirror his efforts in the Senate.¹⁸⁰

F. Implementing Constitutional Values

When non-judicial actors create non-judicial precedents, Gerhardt has written, it is often in response to incomplete or imperfect interpretations of Constitutional values, especially those that courts have not elaborated on.¹⁸¹ In his speeches and writings,¹⁸² Capper often elaborated his own interpretation of the First Amendment's guarantee of freedom of the press, and that meant, above all, complete independence from government interference. That belief could be

¹⁷⁵ See NEW YORK LAW REVISION COMMISSION, LEG. DOC. NO. 65 (A) (1949), at 59-88 and 101-02.

¹⁷⁶ See *News Privilege Bill Is Opposed by Bar*, N.Y. TIMES, Feb. 3, 1936, at 4.

¹⁷⁷ See ALA. CODE §12-21-142 (Thomson West/Westlaw through 2010); CAL. EVID. CODE §1070(a) (Thomson West/Westlaw through 2010); KY. REV. STAT. ANN. §421.100 (Thomson West/Westlaw through 2010); ARK. CODE ANN. §15-85-510 (Thomson West/Westlaw through 2010).

¹⁷⁸ See, generally, ARTHUR MANN, LA GUARDIA COMES TO POWER: 1933 (1981). Although remembered for his years as mayor of New York, La Guardia had a long and distinguished career in Washington from 1917 to 1933. See HOWARD ZINN, LA GUARDIA IN CONGRESS (2010).

¹⁷⁹ Despite the fact that Hearst continued construction on his opulent castle in California throughout the 1930s, he was forced to begin liquidating many of his personal properties and possessions by 1938. See BEN H. PROCTOR, WILLIAM RANDOLPH HEARST: FINAL EDITION, 1911-1951 218-20 (2007).

¹⁸⁰ See *infra* note 186 and accompanying text.

¹⁸¹ Gerhardt, *supra* note 16, at 716 and 784.

¹⁸² See, e.g., Arthur Capper, *Address to the Iowa School of Journalism*, April 13, 1934, in the Arthur Capper Papers, Kansas State Historical Society. He wrote:

Nothing can be of greater importance to a people living under a democratic form of government than, (1) full information about what is happening day by day in ever department of human activity, and, (2) full opportunity for the discussion of the import, meaning and significance of what transpire.

Id.

seen in his seemingly contradictory stance on radio: He was a pioneer of the new medium, owning one of the most powerful broadcast stations in the Midwest,¹⁸³ yet he did not see radio as a force in journalism on par with newspapers. The radio's most important journalistic function, as he saw it, was in delivering bulletins of breaking events.¹⁸⁴ More critically, Capper felt that the very definition of "freedom of the press" precluded the kind of direct government involvement represented by the Radio Act of 1927.¹⁸⁵ "Broadcasting stations now operate in the United States under government license," he wrote in 1941, "therefore, radio broadcasting does not have freedom of expression."¹⁸⁶ In that vein, for him, shielding journalists from compelled disclosure was about maintaining a strict separation between government and the journalistic process.

Capper's ongoing effort to pass a shield law at the federal level made an important advance in 1936. U.S. Rep. Michael Curley of New York, who had entered a companion bill to Capper's in the House, was able to get a hearing before a subcommittee of the House Judiciary Committee, which would have to approve the bill if it were to move forward.¹⁸⁷ In making his case for a federal shield law, he told the committee that he was prompted in part by the Mooney case,¹⁸⁸ he pointed to the fact that several states had already adopted shield laws,¹⁸⁹ and he read from a prepared statement of support from William

¹⁸³ See, e.g., *Capper to Improve WIBW at Topeka*, N.Y. TIMES, Oct. 27, 1929, at 13; *Senator Capper Urges Wider Use of Radio as Aid to Farmers*, NEWS (Nyack, N.Y.), April 2, 1929, at A14.

¹⁸⁴ Arthur Capper, *Power of Radio vs. Press*, Undated Memo, Arthur Capper Papers, Kansas State Historical Society. He wrote:

The radio is not likely, in my estimation, ever to take the place of the newspaper. The radio is useful in a news way chiefly for getting brief bulletins on important happenings to the public promptly and for broadcasting notable speeches.

Id.

¹⁸⁵ Arthur Capper, *Freedom of the Press*, typed essay dated 1941, in the Arthur Capper Papers, Kansas State Historical Society. He wrote:

If Government should use its licensing powers to control expression over the radio, then the people would have little practical guarantee of effective expression of views, of opinions, and public policies affecting them.

Id.

¹⁸⁶ *Id.*

¹⁸⁷ *Prohibiting Revelations of Confidential Communications Made to Editors, News Reporters, Correspondents, Journalists, and Publishers*, Hearing on H.R. 10381 Before the H. Comm. on the Judiciary, 74th Cong., 2nd Sess. (1936) (unpublished hearings).

¹⁸⁸ *Id.* at 2.

¹⁸⁹ *Id.* at 6.

Randolph Hearst.¹⁹⁰ However, the crux of his appeal rested on the First Amendment, which he quoted,¹⁹¹ and the role of the press in a well-functioning democracy. He said that subpoenas against reporters were “absolutely placing a stranglehold” on the press as it tried to fulfill its constitutionally sanctioned role, and “we all know that the newspaper reporters have done a great public service in showing up criminal conditions throughout the country.”¹⁹² He urged the committee to allow his bill to go to the floor of the House, and “let us have an open debate upon the question on the merits of it alone.”¹⁹³

Capper wanted a similar debate on the Senate side. After submitting another bill in 1937,¹⁹⁴ he worked behind the scenes to generate publicity and pressure the Senate Judiciary Committee into holding a hearing. Capper contacted J.W. Brown, editor of *Editor & Publisher* magazine, who agreed to launch a series of articles on the journalist privilege issue. He also invited Capper to write a guest column about his bill. “This will serve to focus the attention of the fraternity on the subject,” Brown wrote back.¹⁹⁵

At Brown’s suggestion, Capper wrote to A.H. Kirchhofer, editor of the *Buffalo Evening News* who was serving as president of the American Society of Newspaper Editors. “We think this is desirable legislation,” Kirchhofer wrote back, “and shall be glad to do what we can to help prove the necessity for it.”¹⁹⁶ Capper also contacted James G. Stahlman, president of the *Nashville Banner* who was serving as president of the American Newspaper Publishers Association. Stahlman promised to put the matter on the agenda of the association’s next meeting.¹⁹⁷ More important, Stahlman promised to line up witnesses for a Congressional hearing who would be unequivocally behind Capper’s bill. “We want to be certain that we do not have any namby-pambies of the press testifying in any wishy-washy manner before the committee,” he wrote to Capper. “We want a clean-cut, frank, fair and honest statement that will clinch the question.”¹⁹⁸

One of those “namby-pambies of the press” was Col. Robert McCormick, the powerful editor of the *Chicago Tribune* who also was chairman of ANPA’s Committee on Freedom of the Press. As someone trained in the law and a

¹⁹⁰ *Id.* at 11.

¹⁹¹ *Id.* at 5.

¹⁹² *Id.* at 9.

¹⁹³ *Id.*

¹⁹⁴ See S. 627, 75th Cong., 1st Sess. (1937).

¹⁹⁵ Letter to from J.W. Brown, Dec. 15, 1937, in the Arthur Capper Papers, Kansas State Historical Society.

¹⁹⁶ Letter from A.H. Kirchhofer, Dec. 21, 1937, in the Arthur Capper Papers, Kansas State Historical Society.

¹⁹⁷ Letter from James G. Stahlman, Dec. 21, 1937, in the Arthur Capper Papers, Kansas State Historical Society.

¹⁹⁸ *Id.*

member of the Illinois Bar Association, he had “spoken vigorously in opposition” to shield law bills such as Capper’s.¹⁹⁹ Stahlman, on the other hand, saw the issue as Capper did: in First Amendment terms. “The people of this country are guaranteed a free press,” he told Capper, and “they are entitled to all the facts pertaining to the operation of government.”²⁰⁰ In pledging his support for Capper’s bill, Stahlman concluded: “If the Congress and the courts of the land have the right to compel every editor and reporter to divulge the confidential sources of their information, we would have a censorship the like of which this country has never seen, and it would not be long before there would be no free press to which a free people are entitled.”²⁰¹

G. Extending Network Effects

Capper and Stahlman never got a hearing before the Senate Judiciary Committee, which let Capper’s bill die. True to form, however, Capper submitted yet another bill when the next Congress convened in 1939.²⁰² Meanwhile, press advocates in the states were making significant progress. Legislators were able to push through shield-law bills in Pennsylvania and Arizona in 1937 and in Indiana and Ohio in 1941.²⁰³ It appeared that the shield-law attempts in Washington, though unsuccessful, were themselves acting as non-judicial precedents that helped bolster lobbying efforts in the states.²⁰⁴

The recurring pattern of press-averse judicial actions followed by press-friendly legislative responses continued into the next decade. A high-profile case in 1943,²⁰⁵ this one ensnaring reporters for the *Jersey Journal*, prompted another bill by Capper²⁰⁶ and was followed by the adoption of a shield law in Montana

¹⁹⁹ *Id.* McCormick’s position mirrored the consensus among lawyers, judges and legal scholars.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² See S. 1027, 76th Cong., 1st Sess. (1939).

²⁰³ See 42 PA. CONS. STAT. ANN. §5942 (Purdon’s Pennsylvania Statutes and Consolidated Statutes Annotated 2010); ARIZ. REV. STAT. ANN. §12-2237 (Thomson West/Westlaw through 2010); IND. CODE §§34-46-4-1 (Thomson West/Westlaw through 2010); OHIO REV. CODE ANN. §§2739.04, 2739.12 (Baldwin’s Ohio Revised Code 2010).

²⁰⁴ See, e.g., Editorial, *The Press: Professional Secret*, TIME, Mar. 23, 1931 (referring to the Capper bills when reporting on a shield-law campaign in Texas).

²⁰⁵ See *State v. Donovan*, 30 Atl. (2d) 421 (1943) (denying a reporter protection under New Jersey’s 10-year-old shield law because, the court held, it protected sources but not confidential information).

²⁰⁶ See S. 752, 78th Cong., 1st Sess. (1943). See also *Capper Renews Newspaper Bill*, N.Y. TIMES, Feb. 23, 1943, at 14. Apparently, the reporter for the Times did not speak to Capper, for he or she got the facts wrong: “The Senator’s aides said that Mr. Capper had been introducing such legislation for several sessions, prompted by the plight of certain

that year.²⁰⁷ Another high-profile case in 1948,²⁰⁸ this one involving the Gannett chain's newspaper in Newburgh, N.Y.,²⁰⁹ prompted a flurry of bills in the states²¹⁰ and was followed by passage of a shield law in Michigan.²¹¹

H. Shaping Legal History

When non-judicial actors create non-judicial precedents, Gerhardt has observed, they are often shaping legal history, especially if the norms they establish endure over time and can be cited in the future as having created longstanding custom or tradition.²¹² When journalists and press advocates launched their quest for a federal shield law in 1929, they redirected the trajectory of the journalist-privilege issue away from courts and decisively toward the legislatures. From 1929 to 1949, a dozen bills to create a federal shield law were submitted in Congress, six by Capper alone.²¹³ In that time, the number of state-level shield laws grew from one to a dozen.²¹⁴ No longer could legal scholars dismiss the Maryland shield law as an undesirable aberration.²¹⁵ Journalists were winning support for their cause, among lawmakers at least, and a bona fide movement was under way.²¹⁶ Although journalists and press advocates would continue to fight for recognition of a privilege in courts in decades to come, the dispute of 1929 and the legislative victories that followed provided an enduring model for non-judicial mobilization that resulted in concrete changes in the law.

newspapermen in the Lindbergh kidnapping case.” The Lindbergh kidnapping case was in 1935.

²⁰⁷ See MONT. CODE ANN. §§26-1-901 (Thomson West/Westlaw through 2010).

²⁰⁸ See *People ex rel. Clarke v. Truesdell*, 79 N.Y. Supp. 2d 413 (1948).

²⁰⁹ See Editorial, *There Ought to Be a Law*, TIME, March 8, 1948, available at <http://www.time.com/time/magazine/article/0,9171,853268,00.html>.

²¹⁰ See NEW YORK LAW REVISION COMMISSION, LEG. DOC. NO. 65 (A) (1949), at 59-88, 101-02. Five bills were submitted into the New York Senate and Assembly. Despite the concerted effort, New York did not adopt a shield law until 1970. See N.Y. CIV. RIGHTS LAW §79-h(a)1-8 (Thomson/West 2008).

²¹¹ See MICH. COMP. LAWS ANN. §767.5a (Thomson West/Westlaw through 2010).

²¹² Gerhardt, *supra* note 16, at 717 and 772.

²¹³ *The Newsman's Privilege*, Report Submitted by the Subcommittee on Administrative Practice and Procedure to the S. Comm. on the Judiciary, 89th Cong., 2d Sess. (1966), at 62.

²¹⁴ *Id.*

²¹⁵ See, e.g., Note, *Privilege of Newspapermen to Withhold Sources of Information From the Court*, 45 YALE L. J. 357 (1935) (decrying passage of a shield law in New Jersey in 1933 and the drive for more).

²¹⁶ See Walter A. Steigleman, *Newspaper Confidence Laws: Their Extent and Provisions*, 20 JOURNALISM Q. 230, 236 (1943) (observing that by the 1940s, “Congressmen and many sections of the general public are sympathetic to this ‘customary practice’ “ of refusing to reveal sources).

V. DISCUSSION AND CONCLUSIONS

Michael Gerhardt has observed that non-judicial precedents are legal “history in the making” and that non-judicial precedents often “chronicle constitutional history.”²¹⁷ Viewing the history of the journalist-privilege issue through that lens, one can see that, to borrow from Faulkner, the past is not even past.²¹⁸ When reporter Judith Miller was jailed for 85 days in 2005 for refusing to reveal confidential sources to a grand jury,²¹⁹ all of the events that followed were predicted by the privilege dispute of 1929: outcry among journalists to put the issue on the national agenda, invocations of freedom of the press to try to sway public opinion, lobbying in Washington to adopt a federal shield law, lobbying in the states to signal support for a federal law, failure at the federal level but success in the states,²²⁰ then silence. The only significant legal difference between these two events was that Miller’s lawyers could attempt to make a First Amendment claim to a testimonial privilege in court.

That argument was not available in 1929, when three reporters for the *Washington Times* were sentenced to 45 days in jail for contempt. It was far too early for any well-trained lawyer to make such a Constitutional claim. The U.S. Supreme Court’s only press-specific cases at that point were inapposite. In the *Patterson* case of 1907,²²¹ the Court ruled that the First Amendment did not shield journalists from post-publication punishments such as contempt citations. In the *Burdick* case of 1915,²²² the unusual facts of the case did not necessarily support the press’ frequent claim that the Fifth Amendment should shield them from testifying. In the *Elwell* case of 1921,²²³ the Court’s denial of *certiorari* seemed to confirm the Fifth Amendment argument was dead. Doctrinally, no Constitutional avenue was open.

²¹⁷ Gerhardt, *supra* note 16, at 772. One example offered: President Thomas Jefferson’s unilateral decision to execute the Louisiana Purchase set the stage for future debates about the constitutionality of such an Executive decision without Congressional authority; the non-judicial precedent he set could be used to argue both for and against such a use of Executive power.

²¹⁸ WILLIAM FAULKNER, *REQUIEM FOR A NUN* 92 (1951) (writing, “The past is never dead. It’s not even past.”).

²¹⁹ Susan Schmidt & Jim VandeHei, *N.Y. Times Reporter Released From Jail; Miller to Testify in CIA Leak Probe*, WASH. POST, Sept. 30, 2005, at A1.

²²⁰ See, e.g., Elizabeth Coenia Sims, *Reporters and Their Confidential Sources: How Judith Miller Represents the Continuing Disconnect Between the Courts and the Press*, 5 FIRST AMEND. L. REV. 433 (2006-2007); Daniel Joyce, *The Judith Miller Case and the Relationship Between Reporter and Source: Competing Visions of the Media’s Role and Function*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 555 (2006-2007).

²²¹ *Patterson v. Colorado*, 205 U.S. 454 (1907).

²²² *Burdick v. United States*, 236 U.S. 79 (1915).

²²³ *Elwell v. United States*, 275 F. 775 (7th Cir. 1921), *cert. denied*, 257 U.S. 647 (1921).

Faced with another defeat in a long line of cases denying a reporter-source privilege based on common law, the press took its case to the legislatures instead. Why then? Perhaps the reason was tied to the fact that the newspaper industry was at the zenith of its influence, financially strong and enjoying much improved government relations in Washington, thanks in part to the number of journalists in high positions of power.²²⁴ The press was in a better position to take the fight for statutory protection to the federal level and did, resulting in the first shield-law bills submitted in the U.S. Congress.

In harnessing the influence of nationally known public figures such as William Randolph Hearst, Sen. Arthur Capper and Rep. Fiorello La Guardia, press advocates were, according to Gerhardt's theory, putting the journalist-privilege issue on the public's agenda.²²⁵ This was also the point of having the three reporters at the center of the dispute refuse to appeal their convictions and go to jail instead – to increase the perceived urgency for public attention. Because the dispute was unfolding in Washington, because it included accusations of Congressional corruption, and because it involved the deeply unpopular issue of Prohibition, shield-law advocates were able to generate coverage in newspapers coast to coast.

In consistently framing their arguments for a shield law in First Amendment rhetoric, journalists and press advocates were, according to Gerhardt's theory, "facilitating Constitutional dialogue"²²⁶ and "shaping national identity."²²⁷ Invoking the First Amendment could appeal to Americans' pride in their democracy and their Constitutional system, but courts at the time had offered no concrete guidance as to what freedom of the press meant or what it protected. So the journalists themselves used the privilege issue to launch a discussion, to voice opinions, to articulate theories, to rehearse arguments. Many of the ideas they discussed in 1929 – journalism's role in self-government, the checking function of the press – would find their way into scholarly theories and court decisions decades later.²²⁸

In trying to anchor a testimonial privilege for journalists in the First Amendment, journalists and press advocates were trying themselves to implement Constitutional values.²²⁹ Many of the mandates in the Constitution

²²⁴ Journalist-politicians of this era included President Warren G. Harding and U.S. Sen. Robert M. "Fighting Bob" LaFollette of Minnesota.

²²⁵ Gerhardt, *supra* note 16, at 765. Gerhardt uses the term "agenda-setting" but not in the sense that media scholars would use it.

²²⁶ *Id.* at 766.

²²⁷ *Id.* at 774.

²²⁸ See, e.g., ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977).

²²⁹ See Gerhardt, *supra* note 16, at 775.

and Bill of Rights are so broadly worded as to mean little on their face. Freedom of the press on its own could be described as a “background right” that is “aspirational, embodying ideals.”²³⁰ In arguing for a testimonial privilege to protect confidential sources, journalists were proposing a concrete rule they believed would contribute to implementing that larger aspiration.

In lobbying for a federal shield law to create that concrete rule, journalists pointed repeatedly to the existence of such a law in Maryland, on the books more than 30 years. This fulfilled another key prediction of Gerhardt’s theory: The longer a non-judicial precedent stands and the more it is cited, the more legitimate it becomes as an influence on future decision-making.²³¹ Once the lobbying campaign of 1929 got under way, shield-law bills proliferated in state legislatures from New York to Texas and, within three years, began to be adopted. More bills and more adopted statutes created “network effects,”²³² as Gerhardt would predict, so that subsequent campaigns in the late 1930s and 1940s were easier and more fruitful. As a result, the number of state shield laws grew from one to a dozen from 1929 to 1949.

Although success eluded journalists at the federal level – and still does²³³ – Gerhardt would view that first wave of shield laws as important. Such state-level enactments are often made, he has observed, “to make a point, appease important constituencies, encourage other states to follow suit.”²³⁴ What had been merely a professional norm – protecting confidential sources – now was firmly entrenched in the legal realm. What had seemed an aberration – Maryland’s singular statute – now was legitimated by other laws that used it as a model.

Furthermore, viewed through the lens of Gerhardt’s theory, the drive for a federal shield law in Congress in 1929 was itself a non-judicial precedent, and, as such, it was not a total failure but a partial success. It put the journalist-privilege issue on the nation’s agenda, Gerhardt would point out,²³⁵ and it gave journalists and press advocates an outlet to articulate and rehearse arguments for what they believed freedom of the press should mean. Nearly 30 years before anyone would make the case for a journalist privilege based on the First Amendment in a court of law,²³⁶ these non-judicial actors were making it in the court of public opinion and, thus, paving the way.

²³⁰ *Id.* at 779.

²³¹ *Id.* at 784.

²³² *Id.* at 719.

²³³ See, e.g., Charlie Savage, *After Afghan War Leaks, Revisions in a Shield Bill*, N.Y. TIMES, Aug. 3, 2010, at 2 (reporting that the latest attempt to adopt a federal shield law is still stalled in the U.S. Senate).

²³⁴ See Gerhardt, *supra* note 16, at 766.

²³⁵ *Id.* at 765.

²³⁶ *Garland v. Torre*, 259 F. 2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1959).

This study has shown that Gerhardt's metaphor of statutes as non-judicial precedents is a powerful one. The constitutional rhetoric that has suffused lobbying, debate, and lawmaking in the statutory realm since at least 1929 testifies to the fact that shield laws convey what their creators believe are deeply felt constitutional judgments. The fact that federal courts in nine of the thirteen circuits have over time recognized a reporters privilege based on the First Amendment²³⁷ lends credence to the idea that statutory shield laws are intended to, and do, implement First Amendment values. As Gerhardt's theory urges us to see, statutes empower non-judicial actors to participate in the nation's ever-evolving constitutional culture. Statutes democratize constitutional law.

APPENDIX: CHRONOLOGY OF SHIELD LAWS AND CURRENT CODIFICATIONS

1896 Maryland – MD. CODE ANN., CTS. & JUD. PROC. §9-112 (Thomson West/Westlaw through 2010).

1933 New Jersey – N.J. STAT. ANN. §§2A:84A-21 to 21.13 (Thomson West/Westlaw through 2010).

1935 California – CAL. EVID. CODE §1070 (Thomson West/Westlaw through 2010).

1935 Alabama – ALA. CODE 1975 §12-21-142 (Thomson West/Westlaw through 2010).

1936 Kentucky – KT. REV. STAT. ANN. §421.100 (Baldwin though 2010).

1936 Arkansas – ARK. CODE ANN. §16-85-510 (West 2003 & Supp. 2010).

1937 Pennsylvania – 42 PA. CONS. STAT. ANN. §5942 (Purdon's Pennsylvania Statutes 2010).

1937 Arizona – ARIZ. REV. STAT. ANN. §12-2237 (Thomson West/Westlaw through 2010).

1941 Indiana – IND. CODE ANN. §§34-46-4-1 to 2 (Thomson West/Westlaw through 2010).

1941 Ohio – OHIO REV. CODE ANN. §§2739.04, 2739.12 (Baldwin's Ohio Revised Code 2010).

1943 Montana – MONT. CODE ANN. §§26-1-901 to 903 (Thomson West Westlaw through 2010).

1949 Michigan – MICH. COMP. LAWS ANN. §767.5a (Thomson West/Westlaw through 2010).

1964 Louisiana – LA. REV. STAT. ANN. §§45:1451-1459 (Thomson West/Westlaw through 2010).

1967 Alaska – ALASKA STAT. §§09.25.300-390 (Matthew Bender 2010).

²³⁷ Cathy Packer, *Confidential Sources and Information*, in COMMUNICATION AND THE LAW 335-38 (W. Wat Hopkins, ed. 2010).

- 1967** New Mexico – N.M. STAT. ANN. §38-6-7 (Thomson West/Westlaw through 2010).
- 1969** Nevada – NEV. REV. STAT. §§49.275, 49.385 (Thomson West/Westlaw through 2010).
- 1970** New York – N.Y. CIV. RIGHTS LAW §79-h (McKinney’s Consol. 2010).
- 1971** Rhode Island – R.I. GEN. LAWS §§9-19.1-1 to 1.3 (Thomson West/Westlaw through 2010).
- 1972** Tennessee – TENN. CODE ANN. 24-1-208 (Thomson West/Westlaw through 2010).
- 1973** Nebraska – NEB. REV. STAT. §§20-144 to 147 (Thomson West/Westlaw through 2010).
- 1973** North Dakota – N.D. CENT. CODE §31-01-06.2 (Matthew Bender 2010).
- 1973** Oregon – OR. REV. STAT. §§44.510 to 540 (Thomson West/Westlaw through 2010).
- 1973** Minnesota – MINN. STAT. §§595.021-025 (Thomson West/Westlaw through 2010).
- 1974** Oklahoma – OKLA. STAT. ANN. TIT. 12, §2506 (Thomson West/Westlaw through 2010).
- 1977** Delaware – DE. CODE ANN. TIT. 10, §§4320-4326 (Thomson West/Westlaw through 2010).
- 1982** Illinois – 735 ILL. COMP. STAT. ANN. 5/8-901 to 909 (Thomson West/Westlaw through 2010).
- 1990** Georgia – GA. CODE ANN. §24-9-30 (Thomson West/Westlaw through 2010).
- 1990** Colorado – COLO. REV. STAT. ANN. §13-90-119 (Thomson West/Westlaw through 2010).
- 1992** Dist. of Columbia – D.C. CODE ANN. §§16-4701 to 4704 (District of Columbia through 2011).
- 1993** South Carolina – S.C. CODE ANN. § 19-11-100 (State of South Carolina through 2010).
- 1998** Florida – FLA. STAT. ANN. § 90.5015 (Thomson West/Westlaw though 2010).
- 1999** North Carolina – N.C. GEN. STAT. ANN. §8-53.11 (Thomson West/Westlaw through 2010).
- 2006** Connecticut – CONN. GEN. STAT. ANN. 52-146t, 2006 P.A. 06-140 (Thomson West/Westlaw through 2010).
- 2007** Washington – WASH. REV. CODE 5.68.010 (Thomson West/Westlaw through 2010).
- 2008** Maine – 16 ME. REV. STAT. ANN. §61(Thomson West/Westlaw through 2010).
- 2008** Hawaii – HAW. REV. STAT. §621 (Thomson West/Westlaw through 2010).

2009 Texas – TEX. CODE OF CRIM. PROC. ANN. §§ 38.11, 38.111; Tex. Civ. Code of Practices & Remedies §22.021-22.027 (Vernon 2011).

2010 Kansas – House Bill No. 2585 (Kansas 2010).

2010 Wisconsin – WIS. STAT. ANN. §885.14 (Thomson West/Westlaw through 2010).

2011 West Virginia – Not yet codified. See Kristen Rasmussen, *West Virginia Governor Signs Reporter Shield Law*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, Apr. 6, 2011, available at <http://www.rcfp.org/newsitems/index.php?i=11810> (last visited July 11, 2011).

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COPYRIGHT LAW AND THE IMPLICATIONS FOR USER-GENERATED CONTENT

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This paper discusses issues related to copyright of user-generated content on the Internet. It first reviews the historical roots of modern copyright, including the expansion of both the scope and terms of copyright over the last 200 years. Although the Supreme Court has stated that copyright's primary purpose is to foster development of works for the public interest, in the last 150 years, and especially in the digital age, copyright has increasingly favored private interests. Next, the fair use doctrine is reviewed in detail, including the four factors of fair use determinations, and how these factors cannot necessarily be used a priori to predict fair use court decisions. Direct applications of copyright law to user-generated content are then discussed, including implications for user-authored content and for potentially fair uses (derivations and copies). We review several philosophical and practical perspectives for how copyright can and should operate in today's legal milieu, and in summary we offer some potential solutions to issues raised during the course of the review.

Keywords: copyright, user-generated content, internet, fair use

I. INTRODUCTION

Social, political, and technological forces have radically changed the face of U.S. copyright law, policy, and practice since its codification in the Constitution in 1790. Copyright originally was a privilege traded among professionals (e.g., authors and publishers), which required specific action on the part of the creator to obtain and had narrow scope and short terms. Today, copyright law concerns not only professionals, but consumers and content users—for example, content can be licensed to end-users for certain uses or approved copying, such as installing software. Moreover, copyright can be infringed by end-users in a number of ways—including appropriations, such as derivative works, that would have been legal under prior copyright codes.

An increased scope of the works covered under copyright has been accompanied by increased term lengths, as well as elimination of the need to take action to secure copyright — since 1976, any original and creative work in fixed form is automatically vested with copyright. U.S. copyright, evolving out of a system designed for print media in an environment where the means to publish

was extremely scarce, is a poor fit for some types of digital communication and media content distribution—especially user-generated content on the Internet, the subject of this paper. Negative consequences for the current state of copyright law in the realm of digital communication include restricted speech and transformative art, a glut of infringement lawsuits against individuals for noncommercial uses of corporate-owned content, the inability to easily share reproduction rights or deposit works in the public domain, and the conflation of copyright and privacy. This paper first outlines the history and evolution of copyright law and fair use, and then discusses the implications for user-generated content. We then describe several perspectives on how copyright should operate today, and suggest new recommendations to resolve current problems associated with copyright and user-generated content.

II. A HISTORY OF COPYRIGHT'S EXPANDING DOMAIN

Copyright is a bundle of exclusive rights vested in an author of an original creative work that is fixed in a tangible form. Today, these rights include the rights to reproduce, distribute, exhibit, display, perform, and adapt that work. *Original* in this context means new or unique; it does not require artistic merit, though it does require a modicum of creativity. Currently, copyright is vested upon fixation and publication of the work with no additional effort or registration required by the author or distributor.

The U.S. Constitution granted Congress the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹ The rationale behind this power is to balance the incentive to create works, on one hand, with the free access to scientific and artistic works for the benefit of the public, on the other. Part of this latter benefit includes a rich public domain from which artists and thinkers can draw to create even more works.

The Supreme Court has stated that the “sole interest of the United States and the primary object in conferring the monopoly [of copyright] lie in the general benefits derived from the public from the labors of the authors.”² Similarly, the Court has specified that copyright is not designed to be a “special private benefit,” but rather a “limited grant [that] is a means by which an important public purpose may be achieved.”³ Thus, the primary legal motivations of copyright monopoly terms are public benefit from access to creative works.

Alongside these motivations is the “specter of copyism,” or the idea that if there were no copyright, all anyone would ever pay to consume a creative work is

¹ U.S. CONST. art. I, § 8, cl. 8.

² Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932); United States v. Paramount Pictures, Inc. 334 U.S. 131, 158 (1948).

³ Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

the marginal cost that it takes to copy it.⁴ Moreover, this cost would not flow to the work's owner (e.g., the costs of ripping and uploading or downloading a feature film from a hosting site involves the cost of computer, network, and software use, but not any fee to the film's copyright owner). This idea especially concerns traditional-media content owners with the advent of digital technology that makes copying relatively easy and nearly free, motivating them to lobby for changes to the copyright code and finance litigation for unauthorized copying or use of their work.

A. Expanding Terms and Scope of Copyright

In 1790, Congress passed the first Copyright Act, which set a 14-year copyright term for creative works.⁵ Upon expiration of the first term, the copyright could be renewed for a second 14-year term, but in no instance would protection vest beyond 28 years. To vest copyright, specific actions were required including attaching a notice of copyright to each work, advertising the work in a newspaper, and registering the work by providing a copy to the Secretary of State. These requirements were strictly enforced. In *Wheaton v. Peters*, the first copyright case heard before the Supreme Court, the court decided that if a work was published without complying to the letter with the Copyright Act's requirements, the work immediately passed into the public domain.⁶ Thus, the conditions of U.S. copyright law were initially quite limited—a monopoly on the content was granted for a relatively brief period of time (14-28 years), and only when the author properly registered the work.

Likewise, the scope of the first copyright was narrow, extending only to the specific text and format of the work that was registered—not to abridgements, adaptations, translations, or derivative works. In the mid-1800s, court rulings began to interpret copyright more broadly. A mere seven years after *Wheaton*, the *Folsom v. Marsh* decision effectively redefined infringement as appropriating enough of the original work to diminish its value, protecting abridgments under the umbrella of copyright.⁷ With the Copyright Act of 1909, Congress codified and further expanded this umbrella by explicitly incorporating derivative works into the authors' exclusive rights.⁸ Thus, copyright protection qualitatively changed from merely the right to make a *copy* of a work, in the form that was registered, to the right to publish the work in any possible format or derivation.

When copyright was interpreted narrowly as a monopoly over a single form of a text, the idea of *fair use* did not exist. However, as the scope of

⁴ Tom W. Bell, *The Specter of Copyism v. Blockheaded Authors: How User-Generated Content Affects Copyright Policy*, 10 VAND. J. ENT. & TECH. L., 841, 841-861 (2008).

⁵ Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124.

⁶ *Wheaton v. Peters*, 33 U.S. 591 (1834).

⁷ *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841).

⁸ Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (amended 1976).

copyright increased, the public domain concomitantly narrowed, creating the need protect certain appropriations of copyrighted material. The Copyright Act of 1976⁹ codified the Fair use doctrine¹⁰ (covered in more detail below). The act also removed the requirement for registration, copyright notice, and deposit in order to attain copyright protection. Instead, beginning with this Act and continuing today, all that is required for copyright protection is that a work be “fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”¹¹ That is, with the 1976 Act, copyright was transformed from an opt-in to an opt-out system. Any works produced in a fixed form, whether or not they are intentionally created for profit or with a desire to control distribution, are immediately under the lengthy and powerful protections of copyright law.

The 1998 Sonny Bono Copyright Term Extension Act (CTEA) again extended copyright term, to today’s term length of the life of the author plus 70 years, or for corporate-authored works, 120 years after creation or 95 years after the publication of a work, whichever term is shorter.¹² The CTEA was challenged in the case of *Eldred v. Ashcroft* on the grounds that, by successively extending copyright terms, Congress was effectively creating perpetual copyright protection in violation of the Copyright Clause, which states that copyright must be limited in term.¹³ The Supreme Court rejected this argument, however, and maintained that so long as any given extension is limited, Congress does not run afoul of the Copyright Clause. Therefore, Congress was effectively granted the power to indefinitely extend copyright, so long as each individual extension is itself limited in length. Figure 1 illustrates the steady expansion of the monopoly term across the history of U.S. copyright.¹⁴

B. Copyright for the Digital Age: Liability and Safe Harbor

The 1998 Digital Millennium Copyright Act (DMCA) and the 2005 Family Entertainment and Copyright Act (FECA) add a layer of complexity to copyright by criminalizing some forms of infringement, such as circumvention of digital rights management (DRM) software or hardware per the DMCA, or bootlegging

⁹ Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-805 (2006)).

¹⁰ *Id.* § 107.

¹¹ *Id.* § 102(a).

¹² Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.).

¹³ *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

¹⁴ Tom W. Bell, *Trend of Maximum U.S. General Copyright Term*, TOM W. BELL, http://www.tomwbell.com/writings/%28C%29_Term.html (last visited Mar. 21, 2010).

works, whether released or unreleased per the FECA.¹⁵ The inclusion of criminal liability reflects a shift in the conceptualization of copyright as enforceable against end users rather than against other publishing professionals using works in unauthorized ways.¹⁶

These acts also exemplify a shift in the relative importance placed on the interests of the public versus private benefit in the purpose and nature of copyright. A Congressional report accompanying drafts of the DMCA justifies the Act's changes to U.S. Code by noting that "the digital environment poses a unique threat to the rights of copyright owners ... The Committee thus seeks *to protect the interests of copyright owners* in the digital environment..."¹⁷ As we will discuss below, this focus on protecting copyright owners' interests comes at the expense of, among others', potential UGC creators' interests.

Copyright owners are not the only private interests that are favored under this newer paradigm. Section 512 of the DMCA also creates a "safe harbor" for internet-service providers (ISPs), the definition of which includes social sharing sites and other UGC platforms.¹⁸ This harbor was created due to large ISPs lobbying for protection from liability in the wake of peer-to-peer filesharing litigation.¹⁹ Under DMCA Section 512(c), hosting and sharing services are not liable for their users' infringement if they comply with safe-harbor guidelines, but these guidelines are complicated and include a documentation burden for the ISP.²⁰ According to the safe-harbor guidelines for ISPs hosting content (such as social-media sharing sites), the ISPs must not know of the infringing material, and must not receive financial benefit directly attributable from the infringing material. ISPs must designate an agent to receive notifications of alleged infringement, and upon receiving proper notice of infringement from the copyright holder, ISPs must remove the infringing material for a minimum of 10-14 days, and in some cases discontinue service with the infringing party. The allegedly infringing users can respond with a counter-notification if they believe the content to be legal and request that the content be restored.

¹⁵ Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified in scattered sections of 17 U.S.C.); Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, 119 Stat. 218 (codified as amended in scattered sections of 2, 15, 17, 18, 28, and 36 U.S.C.).

¹⁶ Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated Content*, 11 VAND. J. ENT. & TECH. L., 841, 841-870 (2009); William B. Warner, *Networking and Broadcasting in Crisis: Or, How Do We Own Computable Culture?*, in MEDIA OWNERSHIP: RESEARCH AND REGULATION 77, 77-102 (Ronald E. Rice ed., 2008).

¹⁷ Gervais, *supra* note 16, at 855 (quoting H.R. Rep. No. 105-551, at 25 (1998) (emphasis added)).

¹⁸ Digital Millennium Copyright Act, *supra* note 15, § 512.

¹⁹ Jennifer M. Urban & Lauren Quilter, *Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621 (2005).

²⁰ Digital Millennium Copyright Act, *supra* note 15, § 512(c).

This system becomes problematic in conjunction with the fair use doctrine, which, as outlined below, has no clear *a priori* protections. Moreover, the DMCA does not require copyright complainants to specify which rights have been infringed as part of a takedown notice, nor does it require ISPs to confirm whether or not the materials actually constitute infringement.²¹ That is, content owners can issue takedown notices at will, and ISPs are not required to review legality of the content's use before removing it. Thus, content owners can issue takedown notices and effectively cause materials to be taken down for any or no reason.

Moreover, Urban and Quilter found that 30% of their sample of takedown notices rested on problematic copyright claims, while another 9% contained significant statutory flaws (i.e., did not follow the law's instructions with regard to the information they should provide to the ISP, etc.).²² They also found that the majority of takedown notices concerned matters outside the scope of DMCA 512 (such as peer-to-peer filesharing, or the actions of entities outside the U.S.), and that the practice of issuing a 512 takedown notice is routinely abused as a means of getting content or links taken down for reasons unrelated to infringement (e.g., 57% of takedown notices received by Google between March 2002 and August 2005 demanding the removal of links from its search index were sent from competitors of the linked companies).²³

Recent developments in this area have indicated that the courts may be lenient to service providers in determining "safe harbor." In *Viacom v. YouTube*, the U.S. District Court for the Southern District of New York decided in favor of YouTube in a lawsuit brought against the video-sharing website by media conglomerate Viacom.²⁴ In the decision, the court stated that, while YouTube was aware that copyrighted content had been uploaded onto its site, it was not the case that YouTube was aware of *which* videos were in violation of copyright and which were not.²⁵ The Court noted that YouTube had effectively responded to a mass takedown notice sent by Viacom, which led to the removal of almost 100,000 videos.²⁶ Further, the Court asserted that the DMCA does not require service providers to monitor every piece of content that could possibly be in violation of copyright.²⁷ While this decision is a promising development, it is currently under appeal in the Second Circuit.

²¹ Mike Scott, *Safe Harbors Under the Digital Millennium Copyright Act*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 99 (2005).

²² Urban & Quilter, *supra* note 19.

²³ *Id.*

²⁴ *Viacom Int'l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

Many authors regard the steady expansion of copyright terms and scope as favoring the interests of copyright holders—which tend increasingly to be conglomerate, vertically integrated corporations acting as distributors of traditional media content rather than individual authors—over the public interest.²⁸ Rose suggests that this advantage exists partially because large corporations, which have an interest in retaining the rights to valuable media, can afford to hire lawyers to argue for their case and lobbyists to advocate changes to the U.S. Code, whereas there are fewer moneyed advocates for the public interest.²⁹ He also notes that it is simply easier to conceptualize and argue for copyright as a well-deserved property right than it is to concretize the abstract benefit of a public domain.³⁰ Profits that will be lost when copyright lapses on monetarily valuable media can be measured, whereas the ways in which society benefits from allowing free access to those works are much more difficult to calculate.

With the public domain shrinking as copyright protection expands, fair use offers one arena in which creators can incorporate another's content into their creative works. However, fair use has severe limitations—most notably in their lack of *a priori* definitions. The next section outlines the fair use doctrine in more detail.

III. THE FAIR USE DOCTRINE

The fair use doctrine was codified by the Copyright Act of 1976, and is applied specifically as a defense against alleged copyright infringement. The Act states that the reproduction of copyrighted works “for purposes such as criticism, comment, news reporting, teaching, ... scholarship, or research, is not an infringement of copyright.”³¹ In determining whether fair use applies to a specific case, the courts consider four factors: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyright work as a whole, and (4) the effect of the use upon the potential market for or value of the copyrighted work.³² However, courts are not limited to these factors in their determinations of fair use, and decisions cannot be predicted from any, or even all, of the four factors.

A. Purpose and Character of the New Work

²⁸ See, e.g., Mark Rose, *The Claims of Copyright: Public Purposes And Private Property*, in MEDIA OWNERSHIP: RESEARCH AND REGULATION, *supra* note 16, at 61-76; Warner, *supra* note 16; Bell, *supra* note 4.

²⁹ Rose, *supra* note 28.

³⁰ *Id.*

³¹ Copyright Act of 1976, *supra* note 9, § 107.

³² *Id.*

The first fair use factor—purpose and character of use of the original copyrighted work—assesses whether the allegedly infringing work was created primarily for commercial purposes, or if it was instead created for noncommercial or educational purposes; whether it was created for purposes that were specifically laid out in the fair use provision (criticism and comment, parody and satire, scholarship and research, news reporting, and teaching); and the degree to which the original work has been transformed. In *Campbell v. Acuff-Rose Music, Inc.*, the Court held that it is important whether or not the new work “supersedes” the original, “or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”³³ Thus, if the new work adds new meaning or significance to the original work, rather than merely replacing the original work, it is more likely to be deemed fair use.

B. Nature of the Original Work

The second fair use factor—nature of the copyrighted work—looks at the nature of the *original* work, rather than assessing the new work. This factor favors more robust protection to some types of work over others. In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court noted that works involving a high degree of creativity, such as fictional works, are entitled to more protection than works that are factual in nature.³⁴ Because copyright inherently protects only those works that involve creativity, works comprised largely of facts, such as scholarly works or news items, are afforded more limited copyright protections relative to creative works such as entertainment products.³⁵

C. Amount and Substantiality of the Appropriation

When considering the third factor, courts consider the proportion of the original work that was copied. Because the extent of permissible copying varies with the purpose and character of the use,³⁶ courts determine whether the amount of the original work copied was necessary to serve the new work’s intended purpose.

D. Commercial Effect of the Use

³³ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

³⁴ *Id.* at 586.

³⁵ Lloyd L. Rich, (1996) *How Much of Someone Else’s Work May I Use Without Asking Permission?: The Fair Use Doctrine, Part I*, PUB LAW (1996), <http://www.publaw.com/article/how-much-of-someone-elses-work-may-i-use-without-asking-permission-the-fair-use-doctrine-part-i/>.

³⁶ *Campbell*, 510 U.S. 569.

The fourth fair use factor—the effect on the potential market or value of the copyrighted work—takes into account how much financial harm the new work can cause. If the new work makes the purchase of the original work unnecessary, it would be difficult to defend as a fair use of the copyrighted work. This factor does not suggest that the new work must not be financially successful, but rather that the financial success of the original work must not be harmed. To argue that the use of a copyrighted work constituted infringement, the copyright owner must present empirical evidence that the new work financially harmed the copyright owner. In *Sony Corp. v. Universal City Studios*, Universal City Studios failed to present such evidence, and the use was deemed fair as a result.³⁷ Further, in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, Harper & Row presented evidence of severe revenue loss, which led the Supreme Court to consider the fourth factor “the single most important element of fair use.”³⁸

E. Determining Fair Use

Judges and legal experts can rarely agree on what constitutes fair use; thus, it is difficult for users to ensure that they are producing content lawfully. One reason for these difficulties is that fair use is determined only through litigation. The four factors, as outlined by Congress in Section 107 of the Copyright Act of 1976, only provide guidance to judges as how to determine fair use, but, as the Supreme Court made clear in *Campbell v. Acuff-Rose Music, Inc.*, all individual determinations of fair use must be determined by the courts in a case-by-case fashion.³⁹ Moreover, the Court noted that the four factors are not *exclusive* determinants of whether a use is fair—other circumstances not outlined in the Copyright Act can be considered.⁴⁰ As a result, because the courts are called upon to make decisions concerning fair use for *specific* cases of potential infringement, legal decisions of fair use rarely provide any guidance that can be generalized outside of the case in question. Therefore, the same act done by different means or for a different purpose can be deemed a fair use or an infringement. Even repeating an identical act at a different time can make a difference due to changing social, technological, or other situational factors.

For example, in *Sony Corp. of America v. Universal City Studios*, Universal City Studios sued Sony for copyright infringement because Sony distributed Betamax VTRs, which enabled television viewers to record broadcast-television programs onto videotape.⁴¹ The Court decided that Sony was not liable because television viewers were using the VTRs to record their favorite programs

³⁷ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

³⁸ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

³⁹ *Campbell*, 510 U.S. 569.

⁴⁰ *Id.* at 578.

⁴¹ *Sony Corp. of Am.*, 464 U.S. 417.

(which they were “invited” to watch anyway) for later viewing, which was considered a noninfringing use.⁴² In this decision, the Court focused on the first and fourth fair use factors. Because television viewers were using the Betamax for “time-shifting” rather than for commercial purposes, the Court considered the use of Betamax VTRs to be fair according to the first factor.⁴³ Further, because advertisers were still willing to pay for the programming since their programs were still being watched, “time-shifting” implicated no revenue loss for the copyright holders.⁴⁴ Therefore, it was fair use according to the fourth factor as well. In this case, Betamax VTRs allowed viewers to record entire programs, and thus might be considered infringement according to the third fair use factor, but this was discounted by the Court.⁴⁵ In sum, in the Sony Betamax case, the first and fourth factor played a dominant role, whereas the third factor was discounted as being irrelevant.⁴⁶

In *Harper & Row, Publishers, Inc. v. Nation Enterprises*, Harper & Row Publishers contracted to publish memoirs of President Gerald Ford, and had promised first serialization rights to *Time* magazine.⁴⁷ *The Nation* magazine obtained a prepublication manuscript and published a short column highlighting important details from the book.⁴⁸ As a result, *Time* magazine backed out of the deal with Harper & Row, so the publishers sued *The Nation* to recover the unpaid fee.⁴⁹ In this case, the Court ruled against *The Nation* emphasizing the second and fourth fair use factors.⁵⁰ The publication of the column was deemed copyright infringement on the ground that the creative nature of the memoirs deserved broad copyright protection (particularly because the memoirs were unpublished), and the financial injury that Harper & Row suffered made the fair use defense inapplicable.⁵¹ Finally, while it was noted that *The Nation* only published a small percentage of the original work, it was not a fair use because it was the heart of the memoir (i.e., the portion of the book that concerned the Nixon pardon, which had the greatest commercial appeal).⁵² These cases exemplify the fact that different factors are weighted differently depending on the facts of each individual case, which makes the outcome difficult to predict.

⁴² *Id.* at 456.

⁴³ *Id.* at 449.

⁴⁴ *Id.* at 456.

⁴⁵ *Id.* at 450.

⁴⁶ *Id.* at 456.

⁴⁷ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

⁴⁸ *Id.* at 542.

⁴⁹ *Id.* at 543.

⁵⁰ *Id.* at 569.

⁵¹ *Id.* at 568.

⁵² *Id.* at 565.

As Fortunato points out, copyright experts struggle to predict fair use outcomes, and the U.S. Supreme Court often has trouble agreeing when it comes to fair use decisions.⁵³ To illustrate this difficulty, Nimmer conducted an analysis of fair use cases, broken down by whether the use was considered by the courts to be fair according to each of the four factors, and the outcome of the court decision.⁵⁴ He found that the first factor matched the conclusion of fair use 55% of the time, the second factor corresponded to the conclusion 42% of the time, the third factor corresponded 57% of the time, and the fourth factor corresponded 50% of the time.⁵⁵ Overall, he found that the court's conclusion of whether the use was fair or constituted copyright infringement was only predicted by all of the four factors together 50.8% of the time.⁵⁶

Furthermore, because each case is considered individually, facts of prior cases have little bearing on the resulting opinion, and thus it is impossible to use the fair use doctrine or prior cases as predictive devices. For example, in *Williams & Wilkins v. United States*, the Court of Claims evaluated the costs and benefits of photocopying and distributing scientific and medical research, deciding that the benefits outweighed the costs to the copyright holder.⁵⁷ Following *Williams & Wilkins*, *American Geophysical Union v. Texaco*, and *Princeton University v. Michigan Document Services* should have followed suit, however the decisions in these cases were quite different.⁵⁸ In *American Geophysical Union v. Texaco*, the publishers argued that scientists at Texaco photocopied entire articles from scientific journals for their convenience and for circulation within the company.⁵⁹ In *Princeton University v. Michigan Document Services*, the publishing company sued the photocopying company for photocopying the entirety of scholarly articles and substantial portions of scholarly books while preparing coursepacks for university students.⁶⁰ While the issue for both of these cases involved photocopying and distributing scholarly material, which was the same practice at issue in *Williams & Wilkins*, Texaco and Michigan Document Services were both found liable for copyright infringement.⁶¹

⁵³ Mareasa M. Fortunato, *Let's Not Go Crazy: Why Lenz v. Universal Music Corp. Undermines the Notice and Takedown Process of the Digital Millennium Copyright Act*, 17 J. INTELL. PROP. L. ASS'N 147 (2009).

⁵⁴ David Nimmer, "Fairest of Them All" and Other Fairy Tales of Fair Use. 66 LAW & CONTEMP. PROBS, 263, 263-287 (2003).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (1975).

⁵⁸ *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994); *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381 (6th Cir. 1996).

⁵⁹ *Am. Geophysical Union*, 60 F.3d 913.

⁶⁰ *Princeton Univ. Press*, 99 F.3d 1381.

⁶¹ *Am. Geophysical Union*, 60 F.3d 913; *Princeton Univ. Press*, 99 F.3d 1381.

IV. IMPLICATIONS OF COPYRIGHT FOR UGC

Before we examine specific issues of copyright with respect to user-generated content (UGC), we must define the term. Although it is easy to cite examples of UGC—personal photos uploaded to Flickr, videos created on a personal computer and posted to YouTube, Wall comments on Facebook, blog entries on Tumblr, tweets posted to Twitter—a working definition proves more elusive. We begin by examining each component of the term, beginning with *content*. For our purposes, *content* is limited to written, photographic, video, and/or audio work, usually discussed in the context of social-sharing (i.e., social-networking and file-sharing) Internet sites. While it is possible to distribute content in other ways online, social-sharing sites are extremely popular because they provide tools to easily publish such content.

If *content* refers to works distributed on the Internet, *user* refers to users of a computer network and/or software.⁶² Still, most content today that would *not* be considered UGC—professional, high-production-value, mass-distributed content—is also produced on computers. The unifying characteristic of the “users” who create UGC is their status as *both creator and consumer of content*—that is, the “consumers, readers, purchasers, and audiences” are also the creators.⁶³ Warner refers to this type of content as *networked*, as opposed to *broadcasted*.⁶⁴ Thus, *UGC is content that is produced and distributed among people in a network of relative equals*—that is, while not all consumers of UGC distribute their own content, they nonetheless *could* do so with the same technology that they use to access others’ UGC.

The term *generated* could refer to a number of processes that each have potentially unique legal implications. To clarify this ambiguity, Gervais proposes the following taxonomy of UGC: *user-copied* content, *user-authored* content, and *user-derived* content.⁶⁵ *User-copied content* is content that is shared over a network but is not the work of the user uploading it; this type of content includes infringing uses (e.g., illegally posting a television episode to YouTube), but may also fall under fair use (e.g., embedding a film clip in a critical article). *User-authored content* is work that is completely original and shared online (e.g., a blog post with unique content, original digital photos shared online). *User-derived content* uses other works in a transformative fashion. Examples of transformative UGC that muster large networks of user-creators include fan

⁶² Steven Hetcher, *User-Generated Content and the Future of Copyright: Part One—Investiture of Ownership*, 10 VAND. J. ENT. & TECH. L. 863, 863-892 (2008) [hereinafter Hetcher, *Part One*].

⁶³ Greg Lastowka, *User-Generated Content and Virtual Worlds*, 10 VAND. J. ENT. & TECH. L. 893, 898 (2008).

⁶⁴ Warner, *supra* note 16.

⁶⁵ Gervais, *supra* note 16.

fiction, remixes, *mash-ups* (derivative works that utilize parts of two or more original works in a transformative manner), and *trackjacking* (works that use the video track of a motion picture or other video work and replace the soundtrack to change its meaning⁶⁶). To a large degree, copyright law's future will depend on how such content is dealt with.⁶⁷

A. User-Authored Content

Though it may seem like copyright is relatively straightforward in the case of user-authored content, there are several ways that the current form of copyright fails to make sense in relation to UGC that makes no appropriation of prior works. Perhaps the strangest aspect of copyright in the context of digital communication is that anything “from e-mail messages to doodles on a napkin”⁶⁸ is automatically copyrighted upon creation. We might call this the napkin-doodle problem—any fixed creative expression, no matter how ephemeral or unimportant to the author, is automatically copyrighted. This is awkward in some senses simply because, as Warner points out, we are not used to thinking of communication and what we share on a network as owned by anyone—for example, speech on telephone networks is not copyrighted or owned by anyone.⁶⁹ But because of the nature of online communication where data is stored in fixed form, even if only temporarily, that type of speech is “owned” (copyrighted)—and what is copyrighted can be licensed through a clickwrap agreement, aggregated, and sold to advertisers.⁷⁰

The napkin-doodle problem has another potential implication, however, which is perhaps more relevant to UGC that is intentionally created and distributed as media content (e.g., photos or videos). Because copyright has been traditionally conceived as a property right traded between professionals and because copyright is now automatically vested, there is no easy way to allow works to enter the public domain. That is, although we have referred to the current system as an opt-out system, it is actually rather difficult to opt out. Whereas before 1976 if authors distributed their works without taking the steps required to secure copyright, then their works passed into public domain, now works automatically enter into a lengthy copyright term—and there is no codified,

⁶⁶ S. Wayne Clemons, Jr., *The Fair Use Doctrine and Trackjacking: Beautiful Animal or Destroyer of Worlds?*, 10 VAND. J. ENT. & TECH. L. 479 (2007).

⁶⁷ Steven Hetcher, *User-Generated Content and the Future of Copyright: Part Two—Agreements Between Users and Mega-Sites*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 829, 829-867 (2008) [hereinafter Hetcher, *Part Two*].

⁶⁸ Robert S. Boyton, *The Tyranny of Copyright?*, THE NEW YORK TIMES (Jan. 25, 2004), <http://www.nytimes.com/2004/01/25/magazine/25COPYRIGHT.html?pagewanted=all>.

⁶⁹ Warner, *supra* note 16.

⁷⁰ For an extended discussion of copyright of UGC & privacy concerns, see Hetcher, *Part One*, *supra* note 62, and Hetcher, *Part Two*, *supra* note 67.

simple way to relinquish one's copyright altogether. Thus, in addition to the long terms of copyright, its automatic nature has significantly narrowed the potential public domain. This problem, among others, led to the formulation of the Creative Commons licensing system (see below).

Some argue that the mere existence of user-authored content that successfully competes with business-produced content—such as fiction, music, and digital films that are created for the enjoyment of producing them rather than the expectation of monetary gain—shows that copyright in its current form is not necessary to promote creative works.⁷¹ This free-culture⁷² argument assumes that the cost of producing creative works has been so drastically lowered that hobbyists can enter into the publishing realm, and that long copyright terms are not necessary to capture enough revenue to motivate authors and creators to produce. However, this notion ignores the qualitative difference between user-authored content and the types of content that can be produced and distributed by large corporations. Some types of works can be easily produced without material monetary investment—textbooks, computer software, written fiction, and some kinds of digital filmmaking—but the kinds of works that require significant capital still usually need the incentive of profits to raise money. Thus, UGC without extensive copyright protections may lead to a society with novels but no blockbuster movies, and blogs but no newspapers.

Moreover, as audiences fragment—and as businesses compete with UGC for attention—high-production-value content may generate less revenue in the period immediately following creation than similar fare would have in the age of “mass” audiences. Somewhat counter-intuitively, this point may be an argument in favor of *longer* copyright terms for commercial works as UGC grows more popular and increasingly competes with traditional media for attention; longer terms allow more time for expensive works to become profitable. That is, as initial revenues shrink due to a more fragmented market, long copyright terms allow for a “long tail” model of profitability.⁷³

B. User-Derived and User-Copied Content

User-derived and user-copied content, when not outright piracy, rely on the principles of the fair use doctrine in order to be legitimately distributed. Examples of theoretically legitimate UGC under fair use include mashups or remixes (user-derived content) or portions of a work posted for criticism or educational use (user-copied content). However, it should be apparent from the

⁷¹ See, e.g., Bell, *supra* note 4.

⁷² LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004).

⁷³ CHRIS ANDERSON, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* (2006).

above explanation of the fair use factors that the doctrine is inherently subjective and context-dependent. While the four factors outlined above are to be taken into consideration, there is no concrete definition of fair use. Furthermore, within each factor there is wide room for subjective interpretation. Also, as was mentioned earlier, the Supreme Court has decided that determinations of fair use must be decided on a case-by-case basis, preventing any certainty of fair use on the part of user-derived or copied content.⁷⁴ Thus, since fair use is a legal defense and not an *a priori* method determining a work's legal status, user-derived and user-copied content remains highly vulnerable to DMCA takedown and to civil and criminal action.

Moreover, due to digital rights management software and hardware (and criminal penalties associated with circumventing DRM), uses of these types of UGC require a fair amount of technical ability. Between the ability of rights holders to issue takedown notices, the potential civil and criminal consequences, and the technological threshold imposed by the DMCA and CTEA, it is clear that current copyright law and related practice at least *theoretically* stifles fair use expression.

It is difficult, if not impossible, to say to what degree UGC is actually stifled. Nonetheless, the answer is *at least some*. In 2007, Stephanie Lenz's video of her child dancing to the Prince song "Let's Go Crazy" was taken down by Universal Music Group, which owned the distribution rights to the song.⁷⁵ Lenz responded with the counter-notice procedure asserting that her use of the song was fair.⁷⁶ With the help of the Electronic Frontier Foundation, Lenz sued Universal, asking in part for a declaratory judgment that Lenz's video is a fair, non-infringing use.⁷⁷ The case is ongoing, but a few decisions that have promising implications for fair user-copied and user-derived content have already emerged. First, in an order denying Universal's motion to dismiss, Judge Fogel stated that part of a "good faith" assessment of whether content is infringing is to determine whether the use is fair.⁷⁸ This decision provided precedent establishing that copyright holders cannot demand takedown of content without first evaluating whether it constitutes fair use.⁷⁹ Fogel concedes Universal's points in the counterclaim that fair use is difficult to determine *a priori*, but maintains that "[a]lthough there may be cases in which such considerations will arise, there are likely to be few in which a copyright owner's determination that a particular use is not fair use will meet the requisite standard

⁷⁴ Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

⁷⁵ Lenz v. Universal Music Corp., 2008 U.S. Dist. LEXIS 44549, at *2-3 (N.D. Cal. Apr. 8, 2008).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

⁷⁹ *Id.*

of subjective bad faith....”⁸⁰ Thus, this decision sets a promising precedent for good-faith, *a priori* fair use determinations.

More recently, in an order granting Lenz a partial summary judgment, Fogel decided that Section 512(f), which states that anyone who knowingly misrepresents claims in a takedown notice or counter-notice is liable for damages incurred due to the material’s takedown, allows for awarding of non-monetary damages proximate to the removal of the material.⁸¹ Because the clause is designed principally as a deterrent to bad-faith takedown notices, non-monetary damages are necessary to serve a deterring function, since monetary damages related to takedown of digital content are unlikely to be material and thus the threat of paying them would serve no deterring function. Fogel nonetheless notes that “the combination of the subjective bad faith standard and the proximate causation standard [may] lead many potential Section 512(f) plaintiffs to refrain from filing suit unless they have suffered substantial economic harm or other significant inconvenience.”⁸² In other words, though this decision gives some “teeth” to the 512(f) clause, the majority of bad-faith takedown victims will likely not take the issue to court. In fact, Quilter and Urban found that the vast majority of takedown notices were not responded to via counter-notification or restored, possibly due to end users not understanding the process.⁸³

The vast majority of potential fair use cases likely never see a courtroom, and even those that do often settle before a decision is made. Mazzone contends that the failure of the courts to give unambiguous guidance as to what constitutes fair use in advance causes the market to fill the regulatory void in making such determinations.⁸⁴ Consequently, rather than relying upon clear legal standards, content owners and users often enter negotiations (e.g., in settlements) about what is considered fair use, and content owners can easily exploit the current vagueness of the law to gain the upper hand in these negotiations.⁸⁵

Interestingly, the courts have only rarely addressed the issue of what is considered “normative use” in coming to decisions about fair use. However, according to Madison, integral to any determination of fair use is how that use measures against recognized cultural and social patterns.⁸⁶ In fact, he argues that the courts often already use these norms as the basis for their decisions, even if it is only implicitly.⁸⁷ For example, as previously noted, Madison discusses *Sony*

⁸⁰ *Id.* at 1155.

⁸¹ *Lenz v. Universal Music Corp.*, 2010 U.S. Dist. LEXIS 16899 (N.D. Cal. Feb. 25, 2010).

⁸² *Id.* at *27.

⁸³ Urban & Quilter, *supra* note 19.

⁸⁴ Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395 (2009).

⁸⁵ *Id.*

⁸⁶ Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525 (2004).

⁸⁷ *Id.*

Corp. of America v. Universal Studios Inc., where the reason that individuals were using these devices to make copies of protected works was one of the major issues considered in determining whether video-recording devices were capable of substantial non-infringing uses.⁸⁸ The courts established that the main use of video-recording devices was “time-shifting,” and because individuals were recording programs they had already had legal access to, with the intention of merely watching them at a more convenient time, the Court ruled this was a fair use.⁸⁹ Thus, the determination of fair use was based upon the idea that the use of video-recording devices did not significantly deviate from the way most people already viewed the copyrighted materials, and did not violate an established normative practice. Following from this, Madison argues that the sampling of music, because of its widespread use within the music industry and the emergence of popular sampling based artists, should be officially recognized by the courts as a valid social and cultural pattern, and thus be protected as a fair use.⁹⁰ However, as Madison points out, the implicit reliance on social norms is too often shrouded by the Court’s explicit, conventional reliance on the four factors in determining the fair use of whatever materials are under question.⁹¹

V. PERSPECTIVES ON COPYRIGHT AND UGC

Both at the philosophical/theoretical level and at the practical level, there are many strongly held beliefs about how copyright should operate today. These beliefs and suggested practices are often contradictory and mutually exclusive, due to parties starting with different operating assumptions and values. This historical moment in the U.S. may well turn out to be an important one as these perspectives do battle in the public consciousness—and in Congress and regulatory bodies—to determine the future of digital copyright.

A. Philosophical Perspectives

As our previous discussion outlined, struggles over copyright policy tend to pit business interests against the public interest—with, since the mid-1800s, business interests largely on the winning side. As Rose pointed out, the public interest is much harder to operationalize and argue for (as well as finance the argument), whereas media owners tend to be very powerful.⁹² However, as corporate-owned media sites become increasingly important locations of speech,

⁸⁸ *Id.* at 1571 (discussing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)).

⁸⁹ Madison, *supra* note 86, at 1571 (discussing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Rose, *supra* note 29.

it becomes crucial to consider public-interest arguments as well as those of traditional media owners. Within the public-interest arguments, there are (at least) two perspectives: the progressivist and the democratic-culture perspectives.⁹³ All three of these perspectives have important—and contradictory—implications for how copyright should operate.

B. Business/Economic/Capitalist Interest

UGC is typically distributed on social-networking and file-sharing sites designed specifically for social sharing of content, usually user-authored content. Not all UGC platforms are profit-oriented, but many that acquire any significant user base end up being purchased or valued highly by speculative investors. Once the platform's owners turn their eyes to profit, the interests of the user base often become misaligned with the interests of the owners, as the end-users have gone from being the "customers" to being the product. The economic perspective involves examining UGC platforms as entities with the right (or, in the case of a publicly traded company, a need) to make a profit.

Recently, many large corporations have tried to get into the social-networking game to capture the large user bases that these sites muster; Google bought YouTube and launched Google+, News Corporation bought MySpace, and Facebook has received multiple offers (and Microsoft owns a small interest in the company, which includes some exclusive advertising rights). Returns on these investments are meager, and companies struggle with the question of how to monetize traffic. For example, Facebook's first net-positive quarter was announced in September 2009,⁹⁴ and in 2007 Google reported YouTube's revenues as "not material";⁹⁵ meanwhile, these companies are valued in the tens of billions.

Several models exist to capture revenue, either directly or indirectly, from sharing-site audiences, including subscription services, advertising, and licensing and reselling user content. Many sites use a combination of these methods.

Advertising is the default model for UGC sites, perhaps because many of these sites gained popularity as free services and may anticipate trouble switching to subscription models, especially if they compete with similar sites that still offer free services. However, because of the way users interact with social networking sites, ads often go unnoticed entirely (Facebook's ad click-through rate was as

⁹³ Jack M. Balkin, Commentary, *Digital Speech And Democratic Culture: A Theory Of Freedom Of Expression For The Information Society*, 79 N.Y.U. L. REV. 1 (2004).

⁹⁴ Facebook 'Cash Flow Positive,' Signs 300M Users, CBC NEWS, (Sept. 16, 2009), <http://www.cbc.ca/technology/story/2009/09/16/tech-facebook-300-million-users.html>.

⁹⁵ Yi-Wyn Yen, *YouTube Looks for the Money Clip*, CNN MONEY. (Mar. 25, 2008), <http://techland.blogs.fortune.cnn.com/2008/03/25/youtube-looks-for-the-money-clip/>.

low as 0.04% in 2007⁹⁶). Ads that are targeted based on user demographic and behavioral data fare 30% to 300% better;⁹⁷ however, privacy issues with aggregating and selling user data are a critical concern today, making this type of advertising controversial. In fact, while the Federal Trade Commission (FTC) currently allows the advertising industry to self-regulate user-data sales and use, legislation or FTC regulation may be on the horizon.⁹⁸ In response to this looming regulation, advertising firms wish to appear able to self-regulate; in March 2010 a coalition of prominent marketing firms began labeling ads that are targeted based on behavioral data with an identifying icon.⁹⁹

Like targeted advertising, licensing and reselling content is controversial. This method can involve licensing all content via click-through Terms of Service and selling it to advertisers—for example, a social-networking site selling users' uploaded photos to a dating site, which the dating site then uses in advertisements—which, along with user behavioral data, allows the dating site to show users pictures of their friends in the advertisements.¹⁰⁰ Sites claim license rather than ownership of content both because transfer of copyright ownership requires a written contract and because lack of ownership of the content lets the sites (as ISPs) use the DMCA safe-harbor shelters, protecting them from liability when users upload infringing content.¹⁰¹

Controversy over licensing user content flared in 2009 when Facebook removed a line from its Terms of Service (TOS) that stated that their “irrevocable, perpetual, non-exclusive, transferable, fully paid, worldwide license” expired when users removed content from its site; prominent bloggers¹⁰² understood this deletion to mean that Facebook was staking a claim of “ownership” (license) of

⁹⁶ Catherine Holahan, *So Many Ads, So Few Clicks*, BUSINESSWEEK (Nov. 12, 2007), http://www.businessweek.com/magazine/content/07_46/b4058053.htm.

⁹⁷ *Id.*

⁹⁸ FEDERAL TRADE COMMISSION, *Concurring Statement of Commissioner Jon Leibowitz, FTC Staff Report: Self-Regulatory Principles for Online Behavioral Advertising* (Feb. 2009), <http://www.ftc.gov/os/2009/02/PO85400behavadleibowitz.pdf>; Christopher Hosford, *Industry Prepares for FTC Scrutiny of Behavioral Ads*, B TO B (Mar. 8, 2010), <http://www.btonline.com/apps/pbcs.dll/article?AID=/20100308/FREE/303039999/1445/FREE&template=printart>.

⁹⁹ Hosford, *supra* note 98.

¹⁰⁰ See, e.g., Bonny Albo, *Facebook Shows Married Man His Wife's Picture In Dating Ad*, ABOUT.COM (Jul. 17, 2009), <http://dating.about.com/b/2009/07/17/facebook-shows-married-man-his-wifes-picture-in-dating-ad.htm>.

¹⁰¹ Lastowka, *supra* note 63.

¹⁰² See, e.g., Chris Walters, *Facebook's New Terms of Service: "We Can Do Anything We Want With Your Content. Forever."*, THE CONSUMERIST (Feb. 15, 2009), <http://consumerist.com/2009/02/facebooks-new-terms-of-service-we-can-do-anything-we-want-with-your-content-forever.html>; Amanda French, *Facebook Terms of Service Compared with Myspace, Flickr, Picasa, Youtube, Linkedin, and Twitter* (Feb. 16, 2009), <http://amandafrench.net/2009/02/16/facebook-terms-of-service-compared/>.

user content forever, even after removal from the site. Facebook responded by soliciting feedback from the user community and rebuilding its TOS into a more human-readable Statement of Rights and Responsibilities.¹⁰³ Interestingly, changes to its terms were almost entirely altering the language, not the actual terms—at the time of this writing, Facebook still claims license to the UGC, but the Rights and Responsibilities version of the TOS simply clarified what content is licensed, for what purpose, and for how long.

User concerns over licensed appropriations of UGC—and similar scandals like Facebook’s failed Beacon service, which collected data on and broadcasted users’ online purchases by default—tend to be more related to issues of privacy than concern about copyright per se.¹⁰⁴ For example, people tend to be more concerned about third parties broadcasting their personal photos, potentially to strangers, than the social-networking site or third party making money from their copyrighted work. Currently Facebook’s TOS indicates that license of UGC is subject to privacy controls and account settings; savvy users can opt out by changing their settings. However, some critics including legal scholars¹⁰⁵ point out that such opt-out systems are flawed in that users must have some degree of media and technical literacy in order, first, to know their UGC is sold/distributed, and, second, to set up the privacy controls.

Hand-in-hand with the need to generate revenue is the need to minimize costs. The capital required to host UGC in aggregate is huge. For example, industry analysts estimate that Google pays \$360 million a year for the bandwidth necessary to serve YouTube videos; costs of storage of videos, licensing professionally produced content, and other requirements put the annual costs of running YouTube at over \$700 million—which exceeded YouTube’s revenue by an estimated \$470 million in 2009 alone.¹⁰⁶

Moreover, the ability to control what kind of content is posted to UGC sites is very limited. In order to minimize legal damages, both civil and criminal, from user-uploaded content, sites craft their TOSs to disallow content that may result in lawsuits from other users, such as indecent or obscene content. Sites also ensure that they conform to DMCA safe-harbor guidelines to avoid liability for copyright infringement. Protecting against copyright infringement is a more concrete concern for conglomerate companies that have their own valuable intellectual property—for example, Fox/News Corp. owns MySpace, and thus

¹⁰³ *Statement of Rights and Responsibilities*, FACEBOOK (Apr. 26, 2011), <http://www.facebook.com/terms.php>.

¹⁰⁴ Lastowka, *supra* note 63.

¹⁰⁵ *See, e.g., id.*; Hetcher, *Part One*, *supra* note 62; Hetcher, *Part Two*, *supra* note 67.

¹⁰⁶ Farhad Manjoo, *Do you think bandwidth grows on trees?*, SLATE (Apr. 14, 2009, 6:17 PM), http://www.slate.com/articles/technology/technology/2009/04/do_you_think_bandwidth_grows_on_trees.html.

would have a particular interest in ensuring that MySpace users do not share episodes of *The Simpsons* or songs from *American Idol* in a way that that News Corp. does not condone or control.

The current U.S. (and, increasingly, global) economic system not only rewards, but in the case of publicly traded companies also legally mandates that corporations operate in the financial interest of their shareholders. From that starting point, businesses *should* seek protection for works that they have created or purchased, both from piracy and from reappropriations of content that may hurt their revenue (potentially including parody, satire, or criticism of their works).

Media businesses can profit by identifying how and why users post content. To date, there have been several studies on the uses and gratifications of posting or consuming UGC. Shao found that users consume UGC to fulfill information, entertainment, and mood-management needs; they participate by interacting with the content to enhance social connections and belonging needs; and that users produce UGC for self-expression and self-actualization.¹⁰⁷ Another study found that people produce UGC because they find it fun, because it is a good way to document their lives, and because of the desire to make social connections.¹⁰⁸ Leung found that users produce UGC for recognition (i.e., establish their personal identity, gain respect, build confidence, and publicize their expertise), informational needs, social needs, and entertainment needs.¹⁰⁹ None of these studies suggest that people use or create UGC with the intention to violate copyright law. On the contrary, given that copyright law was designed to encourage the production of creative works, users' transformative works, commentary, and other uses are conforming to the original intent of copyright—to contribute to creativity and knowledge. Thus, rather than limit these uses, media businesses should and foster these activities while finding a way to capture revenue. Successful copyright owners have facilitated, rather than attempting to quash, "fair use" UGC—for example, fans of USA Network television shows can visit their mashup site¹¹⁰ and create their own mashups using the available online tools. Providing users with the tools to engage with creative works on more than

¹⁰⁷ Guosong Shao, *Understanding The Appeal Of User-Generated Media: A Uses And Gratification Perspective*, 19 *INTERNET RESEARCH* 7, 7-25 (2009).

¹⁰⁸ Ralph Stöckl, Patrick Rohrmeier, & Thomas Hess, *Why Customers Produce User Generated Content*, in *WEB 2.0* 271, 271-287 (Berthold H. Hass, Gianfranco Walsh, & Thomas Kilian eds., 2008).

¹⁰⁹ Louis Leung, *User-Generated Content on the Internet: An Examination of Gratifications, Civic Engagement and Psychological Empowerment*, 11 *NEW MEDIA & SOCIETY* 1327, 1327-1347 (2009).

¹¹⁰ See, e.g., *Psych Mash up Generator*, USA NETWORK, <http://mashups.usanetwork.com> (last visited Jan. 25, 2010).

a merely consumptive level encourages brand identification or fan culture¹¹¹, whereas attempting to legislate or prosecute this behavior out of existence merely creates an adversarial relationship between users and “big media.”

Rather than casting the tendency for business to seek profits as a negative, it would be more productive for society to determine where business interests are misaligned with the public interests, and use regulation to circumscribe the actions that businesses are allowed to take in pursuit of profit; indeed, this is the point of government regulation. The next two perspectives embody two lenses through which the public interest can be viewed.

C. Public Interest: Progressivist Perspective

The progressivist perspective¹¹² argues for considering the public interest when considering how copyright and telecommunications regulation should operate, especially with regard to how copyright enables or restricts public political debate, or hampers fostering of an informed citizenry for republican participation. This perspective favors First Amendment free-speech rights, which are conceptualized as a freedom to criticize or engage with government; all other speech uses are ancillary or subordinate to that purpose. The progressivist perspective as applied to UGC highlights the importance of private ownership of Internet service and social-sharing sites, which are increasingly sites of public (political) discourse. Private ownership of UGC platforms means that on the Internet, users’ speech is not protected by the First Amendment because it does not take place in “public.” Thinkers adhering to the progressivist perspective find it deeply problematic that a medium that has become a central part of everyday communication for many Americans is not a free (as in speech) and public medium. These thinkers support regulation that protects First Amendment rights on the Internet, including protecting UGC as speech.

D. Public Interest: Democratic Culture Perspective

The democratic culture perspective¹¹³ shares the same concerns as the progressivist perspective, but also goes beyond, valuing much culture that the progressivist-perspective proponents would regard as unimportant. In the spirit of thinkers such as Lawrence Lessig¹¹⁴ and Henry Jenkins,¹¹⁵ this perspective

¹¹¹ Joshua Green & Henry Jenkins, *The Moral Economy of Web 2.0: Audience Research and Convergence Culture*, in *MEDIA INDUSTRIES: HISTORY, THEORY, AND METHOD* 213, 213-226 (Jennifer Holt & Alisa Perren eds., 2009).

¹¹² Balkin, *supra* note 93.

¹¹³ *Id.*

¹¹⁴ LESSIG, *supra* note 72.

¹¹⁵ Green & Jenkins, *supra* note 111.

recognizes the centrality of culture—including mass-media culture—to people’s everyday lives. Thus, real emotional and social value is attached to media products, and the ability to share, engage with, and re-imagine those products is deeply important to people.¹¹⁶ Thus, democratic-culture (or free-culture) activists support the idea that copyright should be as narrow as possible to accomplish the goals outlined in the Constitution, allowing as much content as possible to pass into public domain for cultural citizens to use in constructive, fulfilling ways. Moreover, fair use should be as broad as possible and defined in an interpretable, *a priori* manner to allow users to share their noncommercial, creative works without the specter of infringement lawsuits.

VI. PRACTICAL PERSPECTIVES

It should be clear that the policies in place are not easing the tensions between the interests of users, copyright holders, and UGC services. The fair use doctrine was designed for a time when derivative works were much more difficult to publish on a mass scale—requiring access to the broadcast or print industry rather than the click of a button. At that time, an in-depth, case-by-case analysis might have been a reasonable expectation. Today, however, computer technology and social media make copying, transforming, and distributing media simple and nearly free, exponentially increasing the number of works/uses that may fall under the protection of fair use. Because the fair use doctrine is so subjective that it requires case-by-case evaluation, it is nearly impossible to implement on such a wide scale—and literally impossible for users to know whether they are, in good faith, adhering to the law *a priori*. Several legal scholars and policy analysts have proposed more reasonable recommendations on how best to regulate copyright on the Internet.¹¹⁷ The following sections describe and analyze some practical perspectives on how best to operate within the current bounds of copyright and fair use, including practices that have been agreed upon by industry leaders, computer scientists, legal experts, and scholars.

A. Principles for UGC Services

In October 2007, a group of some of the world’s largest media corporations, including Disney, CBS, NBC/Universal, Sony, Fox, Microsoft, and others announced that they had developed “a set of collaborative principles that enable the continued growth and development of user-generated content online

¹¹⁶ Balkin, *supra* note 93; Green & Jenkins, *supra* note 111.

¹¹⁷ See, e.g., Robert Latham, Carl Butzer & Jeremy Brown, *Legal Implications of User Generated Content: YouTube, MySpace, Facebook*, 20 INTELL. PROP. & TECH. L.J. 1 (2008).

and respect the intellectual property of content owners.”¹¹⁸ They released a set of principles meant to help guide service providers in creating UGC sites that allow user-generated content but prevent copyright infringement.¹¹⁹ The principles heavily rely on automatic filtering systems and technological solutions to preventing user-uploaded, infringing content, as well as industry collaboration “in developing procedures for promptly addressing claims that content was blocked in error.”¹²⁰ The explicit goal of these principles is to reduce or eliminate infringing UGC.

Chuang notes that the most important feature of the UGC Principles is that they require services that host UGC to incorporate automatic filtering software to patrol infringing content, which is problematic for reasons we will outline below.¹²¹ While the collaborative efforts of the media industry were seen as an exciting first step, many companies, such as Google, Facebook, and YouTube refused to adhere to these principles because they did not believe these efforts were in the best interest of the users. Additionally, the Principles state that UGC services must ensure that the technology that it implements will incorporate fair use, but there is no explicit mention of how fair use is to be determined.¹²² The most glaring flaw that Chuang points out is that the UGC Principles are an agreement between the UGC service and the copyright owners (i.e., the large corporations that founded the User Generated Content Coalition and drafted the principles); these principles do not take the concerns of the UGC creator into account.

As briefly mentioned above, the Principles rely primarily on filtering software to enforce copyright, which is potentially problematic for several reasons. For instance, software is governed entirely by computer code, and code is written based on a set of fairly inflexible rules rather than standards or guidelines that can be evaluated with some subjectivity, or at least acknowledgment of context.¹²³ In other words, when a programmer writes code, the programmer determines the software’s response to every possible input (i.e., every possible case the system can encounter). Additionally, software is immediate and automated, meaning that rather than enforcing rules after a user has committed copyright infringement, the software will *prevent* the user from

¹¹⁸ *Principles for user generated content services: Foster innovation. Encourage creativity. Thwart infringement*, USER GENERATED CONTENT COALITION, <http://www.ugcprinciples.com> (last visited Jan. 25, 2010).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Ian Chuang, *Be Wary of Adding Your Own Soundtrack: Lenz v. Universal and How the Fair Use Policy Should Be Applied to User Generated Content*, 29 LOY. L.A. ENT. L. REV. 163 (2009).

¹²² *Id.*

¹²³ LAWRENCE LESSIG, CODE: VERSION 2.0 (2006).

uploading the content in the first place—and that once the software is running, the computer can make all the decisions without any intervention or check by humans. Moreover, as Grimmelmann notes, the software's rules are not necessarily transparent. Thus, if a user is prevented from uploading content, he or she may not necessarily know why.¹²⁴ Using software to regulate law becomes problematic in this instance because laws value transparency.¹²⁵ Finally, using software to regulate law can be dangerous because software can fail; it can be hacked, use inappropriate rules, or be vulnerable to bugs or viruses.

As discussed previously, fair use guidelines are subjective, and there are no hard rules as to how one might determine fair use. While it is ambitious for the media industry to implement software that regulates copyright while taking fair use into account, code cannot be written without hard rules to govern it. Thus, it would be impossible to write computer code that evaluates something as subjective as fair use; recall how infrequently fair use legal decisions can be predicted from decisions on each of the four factors. Therefore, media industry's increasing use of automatic filtering technology, like the DMCA safe-harbor takedown guidelines, will tend to create an environment that is conservative in its decision of whether or not to allow uses of copyrighted content, functionally narrowing the domain of fair use.

B. Fair Use Principles for User-Generated Video Content

To strike a balance between human- and computer-regulation of UGC copyright, the Electronic Frontier Foundation (EFF) suggested a set of principles for content owners and ISPs to follow that can help ensure that the Fair use doctrine is upheld.¹²⁶

First, the EFF suggests that ISPs refrain from issuing takedown notices for content that is noncommercial, creative, and transformative. Secondly, automated filters must incorporate protections for fair use. As stated above, this can be difficult, so the EFF provides three solutions. The first potential solution suggests that ISPs implement a three-strikes-before-blocking policy, whereby the ISP would not issue a takedown notice unless (1) the video track matches the video track of a copyrighted work submitted by the content owner; (2) the audio track matches the audio track of the same copyrighted work; and (3) 90% or more of the challenged content is comprised of a single copyrighted work. The second solution would be to implement a system whereby humans would review computer decisions. If an automated filtering system detects a match to a

¹²⁴ James Grimmelmann, *Regulation by Software*, 114 YALE L.J. 1719 (2004).

¹²⁵ *Id.*

¹²⁶ Fair Use Principles For User Generated Video Content, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/pages/fair-use-principles-user-generated-video-content> (last visited Jan. 25, 2010).

copyrighted work, the subscriber/user would be notified and be given a chance to dispute the charge. The burden would then fall on the copyright holders to follow DMCA procedures. Lastly, to prevent unnecessary restriction of speech due to automatic filtering, EFF suggests that subscribers/users who receive takedown notices do not lose their subscription or account based on one incident.

EFF's third principle suggests that once the copyright owner issues a takedown notice, that the ISP or UGC platform should ensure that the copyright holder is compliant and not making a baseless accusation. This means that the ISP would not simply act as the intermediary between the copyright owner and the subscriber, but rather that the ISP would also conduct some sort of investigation. Fourth, the EFF suggests that if a copyright owner issues a takedown, that the subscriber/user should be entitled to view the entirety of the complaint, rather than receiving a boilerplate notification. The fifth principle suggests that there be a "dolphin" hotline for users who have been caught in the filtering software mistakenly, to allow users who feel their content was mistakenly denied to be reconsidered. The EFF suggests that each ISP have its own hotline, and that claims be processed within three business days. The final principle simply suggests that ISPs follow DMCA procedures.

The EFF Principles provide practical and concrete guidelines for balancing the interests of all parties involved. For these principles to work, Meyers suggests that ISPs must jointly agree to follow the same set of standards to prevent a race for the most users.¹²⁷ In other words, if some UGC services are more liberal than others, the more liberal services will attract the most users and consequently the most advertising revenue, and thus there would be a competitive advantage to relaxing copyright enforcement (although such a tactic would increase liability for legal action if ISPs or UGC platforms fail to adhere to DMCA safe-harbor guidelines).

C. Code of Best Practices in Fair Use for Online Video

The Center for Social Media, with funding from the Ford Foundation, conducted extensive research on the uses and gratifications of UGC, and used it to formulate best practices for using copyrighted works in online videos. The types of uses studied include parody and satire, negative or critical commentary, positive commentary, quoting to trigger discussion, illustration or example, incidental use, personal reportage or diaries, archiving of vulnerable or revealing materials, and pastiche or collage.¹²⁸ Based on these types of uses of copyrighted

¹²⁷ Brette G. Meyers, *Filtering Systems or Fair Use? A Comparative Analysis of Proposed Regulations for User-Generated Content*, 26 CARDOZO ARTS & ENT. L.J. 935 (2008).

¹²⁸ Pat Aufderheide & Peter Jaszi, *Unauthorized: The Copyright Conundrum in Participatory Video—A Convening Report*, CENTER FOR SOCIAL MEDIA (Apr. 2007), www.centerforsocialmedia.org/files/pdf/rapporteurs_report.pdf.

works, the Center put together *The Code of Best Practices in Fair Use for Online Video*. The code uses common language, and is organized around common situations faced by actual users of online video. It suggests that for any use, crediting the source is one way to show good faith. For each type of transformative UGC, it describes and defines the type, explains principles that the user should follow in order to ensure that they are using the content lawfully when using copyrighted works for that type of UGC, and includes some limitations of the principles for that particular use. At the end, the document debunks several fair use myths.

Unlike the UGC Principles and the EFF Principles, *The Code for Best Practices in Fair Use for Online Video* is targeted to the user. The principles are easy to comprehend, address the concerns of typical users, and are reasonable to apply. The document does not suggest that any policies be changed, but rather it helps the user follow the policies in place.

D. Creative Commons

Creative Commons (CC), a non-profit corporation, was founded in 2001 by legal, computer-science, and media experts to create ways for UGC creators to work within the legal bounds of copyright to share their content—and find content—for transformative uses. In 2002 CC released its first version of a set of free licenses that users can attach to their works, calibrating the rights that they wish to reserve and those actions they wish to allow other users to take. For example, users can license their content for others to use for non-commercial purposes only, can require attribution, and/or can require that others who use their content also release it under a CC license. Over the last several years, updates have been released to the licenses to make them work worldwide, to the extent possible. Creative Commons licenses have steadily gained popularity, with an estimated 130 million works under some form of CC license in 2008.¹²⁹ In 2009 CC launched CCo, a license type that allows people to waive all rights, creating a relatively practical means to release content into the public domain.

Each of these practical perspectives in some way offers ways of working within the current copyright system, while the philosophical perspectives conceptualize how copyright should work, albeit with contradictory results.

VII. CONCLUSIONS AND RECOMMENDATIONS

This article has reviewed implications of copyright for user-generated content on social-sharing sites, elucidating a number of issues along the way. Specifically, though the Supreme Court has affirmed that the purpose of copyright is primarily in service to the public's interest, for the last century and a

¹²⁹ *History*, CREATIVE COMMONS, <http://creativecommons.org/about/history> (last visited Mar. 17, 2010).

half, changes to copyright code and common law have often moved in the direction of protecting and extending *private* interests in ways that have bearing on how users create and share works on the Internet. Moreover, some aspects of copyright law have had unintended and socially undesirable consequences, such as DMCA safe-harbor guidelines granting an easy (albeit illegal) means for anyone to get content taken down, at least temporarily, without cause simply by alleging copyright infringement.

Though this lengthy review has brought up many issues, here we will revisit four of the most important and consequential for UGC production and dissemination, and suggest ways that these issues could be resolved.

A. Lack of A Priori Guidelines for Fair Use

One issue that has drastic implications for UGC is the lack of legal guidelines for using copyrighted works fairly. While the case-by-case nature of the fair use doctrine made sense when only professionals were considered to be potential copyright infringers, and thus comparatively few uses of copyrighted works were potential infringement, the digital era requires some means of distinguishing legal versus infringing appropriations of copyrighted content. Fortunately, the 2008 decision in *Lenz v. Universal* provides precedent for a good-faith determination of fair use outside of the court.¹³⁰ We will return to this issue, in conjunction with the next, below.

B. Takedown System Carries a Private-Interest Bias

In contrast to the public-benefit purpose of copyright, the DMCA and CTEA were created with the intention of preventing and policing infringement rather than protecting or fostering fair use. Perhaps for this reason, the safe-harbor guidelines heavily favor content-owner and ISP interests at the expense of content users⁷—and, because takedown policies require ISPs to respond to notices by taking content down regardless of merit, this is true even when the use is fair.

One potential solution to this issue would be to allow users to attach claims of fair use to content appropriating copyrighted works, and to require complainants issuing takedown notices to argue in good faith why any claimed fair uses are *not* valid before the content can be removed. The 2008 *Lenz* decision already requires that content owners make a fair use determination before issuing takedown notice, but allowing users to attach fair use claims to their content would add a buffering layer against automatic takedown for legitimate appropriations.¹³¹

¹³⁰ *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

¹³¹ *Id.*

C. Instant Vesting Copyrights “Private” Communication

The fact that copyright is instantly vested means communication that takes place in fixed form is copyrighted, including communication and sharing of content intended to reach only a circumscribed audience. Because the communication is copyrighted, it can be licensed, packaged, and resold in a way that makes users uncomfortable (usually with regard to privacy).

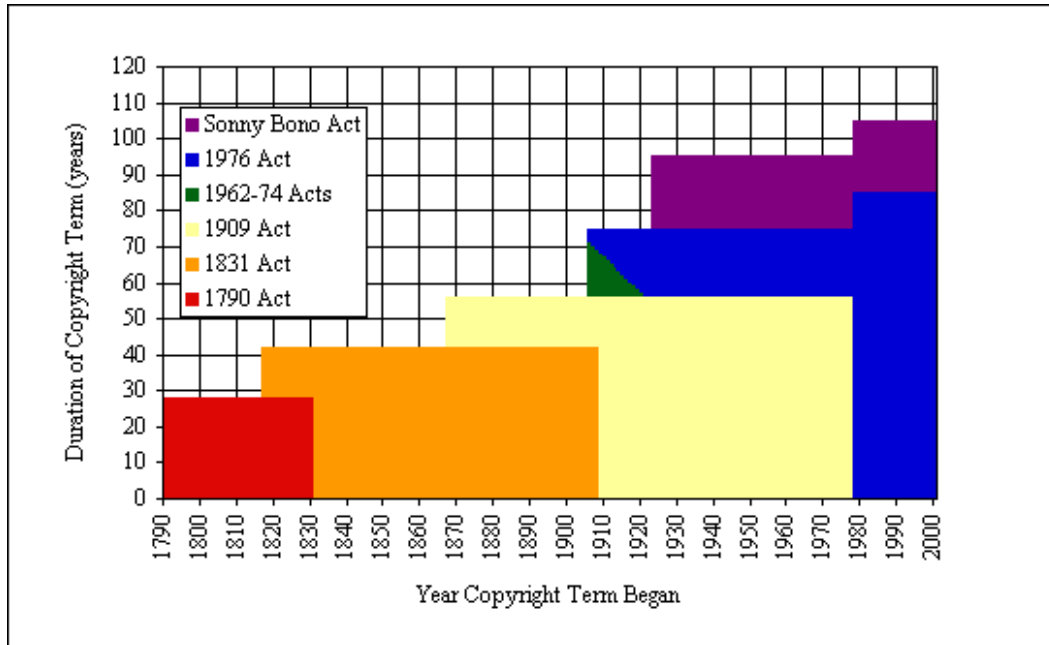
Solutions to this issue are easy to generate in plain speech, but most likely much more difficult to formulate from a legal standpoint. Ethically, ISPs should not be able to license and redistribute content beyond its intended recipient(s) via a click-wrap agreement, especially given that most users do not read and/or understand these documents. UGC sites should be required to ensure that the average users (i.e., “reasonable persons”) would realize and understand that they are granting the ISP the right to reproduce, redistribute, and/or resell content.

D. Unnecessarily Limited Public Domain

Leaving aside the issues of Mickey Mouse’s effectively indefinite copyright protection, long terms and instant vesting mean that there is no codified way to voluntarily relinquish a long copyright or to only reserve monopoly for certain uses and circumstances. This limits the potential public domain and pool of works that can be used to build new works. This particular issue would be relatively easy to solve by codifying a system like Creative Commons, or creating some mechanism by which to opt-out of copyrighting a work. Interestingly, allowing users to relinquish copyright protection would serve the same purpose for which Copyright law was originally intended.

UGC is a major social phenomenon that is changing the media landscape. Proliferation of UGC will almost certainly continue to accelerate, and the future of copyright law will depend on its ability to adapt to these radical changes. We encourage lawmakers, ISPs, and copyright owners to license copyrighted works for non-commercial, transformative use, and to allow users to create UGC using copyrighted works in accordance with fair use guidelines.

Figure 1



Duration of copyright terms for non-anonymous, non-corporate authors by Act -- bars indicate the year copyright terms began, taking into account grandfather clauses. Chart by Tom W. Bell, distributed under Creative Commons Attribution-Share Alike 3.0 license, and available at < http://www.tomwbell.com/writings/%28C%29_Term.html>.

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