HOW CIVIL RIGHTS AND PRO-PEACE DEMONSTRATIONS TRANSFORMED THE PRESS CLAUSE THROUGH SURROGACY

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I. INTRODUCTION

Rhetoric surrounding the value of a free press—similar to the hype surrounding free speech—has always outrun reality.[1] Many texts, reproduced in countless blogs and websites, put forward a history of our Constitution that stretches its contours in ways that underscore its symbolic value. There is pride of ownership and a

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1. LEONARD LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 63 (1960).

reverent orientation among citizens of the United States, most notably among students of government, which prompts even lay people to undertake the task of interpreting constitutional mandates. Scholars have continuously embraced efforts to resolve conflicts arising between the fundamental purpose of the First Amendment and necessary limits on government speech, public displays of hate-filled symbolic speech, and all areas where speech rights collide with tort law. Unfortunately, these efforts have done little more than deconstruct contrasting jurisprudential traditions. We have yet to reach the threshold of institutional control that would insure application of primary rules in service of substantive justice. Comprehensive analyses of rules relating to liberty of conscience require continual monitoring to verify they are mutually reinforcing in both character and application and that they promote rather than discourage civic engagement. Liberal democracies are effectively sustained with a compliment of rules and dispositions supporting their norms and practices. It remains somewhat of an enigma that we assume that courts, as guardians of minority rights, will provide the necessary leadership and guidance on these questions without meaningful confrontation with the political realities that disrupt fulfillment of that obligation.

Constitutional historian David Kairys has long asserted that "[t]here are only two periods in our entire history [that can be rightfully] characterized by sustained judicial liberalism, and they correspond to periods of sustained progressive political power."[2] Kairys cites cases from the early Labor Movement from about 1937 to 1944 and the Civil Rights Movements from about 1961 to 1973.[3] John Hart Ely and Cass Sunstein dispense with period analysis in favor of examining where individual cases fall within a two-tier framework characterized as protecting either high or low value speech.[4] This, however, effectively assumes that preserving individual autonomy, as a means for advancing deliberative democracy, is the primary goal of the First Amendment. If the courts have not always been reliable guardians of civil, political, and human rights, and we place a higher value on speech that advances

2. THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 10 (David Kairys ed., 3d ed. 1998).

3. *Id.* at 10–11.

4. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 75–77 (1980); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 232-56 (1993).

deliberative processes, then why all the rhetoric? Invariably, the rhetoric fuels the much-needed fire of resistance. Resisting abuse of power is the path to substantive justice, as originally envisioned in eighteenth century demands for the Bill of Rights.

This article explores the evolution of press rights in the United States by highlighting the context in which the Supreme Court gave its most expansive interpretations of the Press Clause.[5] This expansion, similar to all clear articulations of freedom and liberty, is founded upon the need that arises in every generation to oppose abuse of governmental authority. The late Justice Douglas warned that:

> One of the earmarks of the totalitarian understanding of society is that it seeks to make all sub-communities—family, school, business, press, church—completely subject to control by the State. . . . [Communities] are, in principle, reduced to organs and agencies of the State. In a democratic political order, this megatherian concept is expressly rejected as out of accord with the democratic understanding of social good, and with the actual make-up of the human community.[6]

This article conceptualizes the Press Clause as part of the social contract designed to reproduce that important information which inherently belongs to the public, now popularly characterized as the "right to know."[7] The public right to know refers to acquisition of information on the inner workings of government and industry, particularly with respect to transactions between the two.[8] In its production and delivery of the news, the press performs the role of a typical gestational surrogate. The conceptus (right to know relevant information) belongs to the people; the press carries out the delivery without any viable claim to the fruit of that labor.

5. The First Amendment reads, in part, "Congress shall make no law . . . abridging the freedom of . . . the press . . . ." U.S. CONST. amend. I.

6. Poe v. Ulman, 367 U.S. 497, 521–22 (1961) (Douglas, J., dissenting).

7. *See* Branzburg v. Hayes, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting) (arguing that laws requiring reporters to disclose their sources will reduce communication by dissidents to reporters and "will cause editors and critics to write with more restrained pens"); *see also* Saxbe v. Washington Post Co., 417 U.S. 843, 863 (1974) (Powell, J., dissenting) (arguing that the press performs a crucial societal function by providing "the means by which the people receive that free flow of information and ideas essential to intelligent self-government").

8. *See* David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV 455, 460 (1983) (explaining Justice Stewart's view that the freedoms associated with a robust press clause "assure organized, expert scrutiny of all three branches [of government]").

Adequate understanding and enforcement of rules governing a free press insures government of, by, and for the people. Protection for a press that fails to promote civic engagement raises significant questions of efficacy and accountability as well as undermines general efforts to achieve substantive justice. As one news editor stated in addressing a group of journalists concerning the balance between the First Amendment's commitment to a free press and the self-imposed regulations that keep it free:

> [W]e return to the articles of democracy to give us a place at the table. . . .
>
> [W]hich means not just freedom but the robust life in a democratic state. . . . I can imagine a fat and prosperous press without the freedoms of contradiction and accuracy. It would not be a free press, just a profitable one. Its people might think themselves free, yet would not be.[9]

Part two provides an overview of the First Amendment by examining the history of the Press Clause and its evolution during the colonial period.[10] It summarizes the theory and rhetoric around liberty of conscience and the normative legal ordering that sustains free speech, press, assembly, petition, academic prerogatives, and association. It concludes by exposing the inherent flaws of rationalizing speech rights based upon categorical commitments to discovering the truth, and noting the impact of market-based limits on access to national media, the use of labels to stifle dissent, and the influence of corporate entities in shaping public debate. Part three illustrates that the Supreme Court's modern articulation of the right to associational freedom and fortification of the Press Clause relate directly to student protests against United States' apartheid and the mob violence that epitomized the Jim Crow era.[11] Historic links to the Civil Rights and Pro-Peace Movements of the 1960s and 1970s solidified a number of legal reforms that some mistakenly perceive as immutable, original, and normative features of rights guaranteed by the First Amendment. Part four notes the context in which the staunchest period of protection for the press began and outlines the phenomenal change in the national press corp's understanding

9. James F. Vesely, *The Handoff: Newspapers in the Digital Age*, SEATTLE TIMES, Dec. 11, 2007, *available at* http://seattletimes.nwsource.com/html/opinion/2004018678_sundayjim18.html.

10. *See infra* Part II.

11. *See infra* Part III.

of its mission and significance in this nation.[12] Part five conducts an analysis of modern aspects of mass media, with a focus on how the freedom granted during that historic period of expansion is being utilized today.[13] In the United States, we operate under a system that guarantees heightened deference to individual and institutional advocates, despite irreconcilable differences in their nature and origins, as well as enormous inequities in their capital resources and overall means of influence. Thus, the long-term implications for maintaining a free press under corporate domination, in light of evolving technologies that impact public media generally, is ripe for constitutional analysis.

II. LIBERTY OF CONSCIENCE

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[14]

A. *Historical Backdrop*

Shortly after the founding of this nation, Congress enacted the First Amendment in response to censorship and prosecution for criticism of the British Crown.[15] English libel law was invoked to punish statements damaging to another's reputation or that impugned the integrity of officials acting on behalf of church and state, whether true or false. Monarchies reigned throughout Europe, where national allegiance to a single established church was the rule rather than the exception. Government, like the church, was perceived as an agent of divine law. British Puritans living in the United States rejected the Anglican Church, prompting competition among religious sects for the loyalty of early settlers. Thus, the post-revolutionary era featured large groups dispersed among different religious faiths.

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12. *See infra* Part IV.
13. *See infra* Part V.
14. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
15. *See* LUCAS A. POWE, JR., THE FOURTH ESTATES AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 58 (1991).

John Zenger's 1734 arrest brought the first sustained examination of seditious libel laws in the colonies.[16] Bill Cosby, the royal governor of New York, had Zenger arrested for criticizing Cosby's removal of a judge who had ruled against the governor's interests in a lawsuit.[17] Zenger was tried after spending eight months in prison.[18] The question before the jury was whether liability should attach for defamatory statements that were shown to be true.[19] Holding that it should not, the truth of a published statement became an absolute defense to the charge of libel.[20] Even so, seditious libel remained a part of American legal doctrine well into the eighteenth century, even after adoption of the Bill of Rights. Congress established truth as a defense when the Sedition Act was passed in 1798.[21] In a subsequent case, a Vermont newspaper publisher criticized President John Adams for his "unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice."[22] Editor Matthew Lyons was convicted of libel and spent four months in jail, until he was able to pay the $1000 fine.[23] Lyon's prosecution was upheld because the truth of the statement was difficult to establish.

James Madison, the fourth President of the United States and an active participant at the 1787 Constitutional Convention, is renowned for being widely read on the history of governments and for advocating formation of a union through his extensive writings on the efficacy of republican forms of government. The most famous include Federalist Papers Numbers 10 and 51[24] and the First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

16. *See* EDWIN G. BURROWS & MIKE WALLACE, GOTHAM: A HISTORY OF NEW YORK CITY TO 1898, at 153–55 (1999).

17. Accounts of the Zenger trial have been published in a variety of sources, based primarily on a 1736 description prepared by one of Zenger's attorneys, James Alexander. *See, e.g.*, JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER (Stanley Nider Katz ed., 1963) (1736).

18. *Id.* at 19.

19. *Id.* at 33.

20. *Id.* at 22.

21. Act of July 14, 1798, ch. 74, 1 Stat. 596 (expired 1801).

22. FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS: WITH REFERENCES, HISTORICAL AND PROFESSIONAL, AND PRELIMINARY NOTES ON THE POLITICS OF THE TIMES 333 (1970).

23. *Id.* at 337.

24. THE FEDERALIST NOS. 10, 51 (James Madison).

> right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[25]

A champion of "liberty of conscience" as part of government sustainability, Madison characterized human nature when compelled by force of allegiance to factional interests as the greatest danger to democracy.[26] He viewed representative governance as offering the strongest protection for minority rights as long as freedoms of speech, religion, and press were adequately secured.[27] Obliging the government to control itself is deemed the hallmark of a just society.[28] Many scholars view a free press as "an organic necessity" since the first act of antidemocratic forces when taking over a country is to "muzzle the press."[29]

Eighteenth century British politician Edmund Burke is renowned for loudly proclaiming that, even though there are three Estates in Parliament, "in the Reporters' Gallery yonder, there sat a *Fourth Estate* more important far than they all."[30] Burke's "Fourth Estate" became synonymous with the press overnight.[31] Its popularity is a testament to the notion that the avowed purpose of the Press Clause was to create a mechanism outside government control as an additional check on the three official branches.

Reference to the Press Clause highlights eleven words in the U.S. constitution: "Congress shall make no law . . . abridging the freedom . . . of the press . . . ."[32] Justice Holmes's 1919 dissent in

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25. U.S. CONST. amend. I.

26. *See* THE FEDERALIST NO. 10, at 131 (James Madison) (Benjamin Fletcher Wright ed., 1961) (stating that "[t]he latent causes of faction are thus sown in the nature of man"); *see also* 1 ANNALS OF CONG. 448-60 (Joseph Gales ed., 1834) (statement of James Madison), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=225.

27. Anderson, *supra* note 8, 532–33.

28. *See* THE FEDERALIST NO. 51, at 356 (James Madison) (Benjamin Fletcher Wright ed., 1961) (pointing out that when "framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.").

29. Melvin Urofsky, *Rights of the People: Individual Freedom and the Bill of Rights, Chapter 4 Freedom of the Press*, U.S. DEPT. OF STATE'S BUREAU OF INT'L INFO. PROGRAMS (Dec. 2003), *available at* http://www.usinfo.state.gov/products/pubs/rightsof/press.htm.

30. THOMAS CARLYLE, ON HEROES, HERO-WORSHIP, AND THE HEROIC IN HISTORY 228 (John Chester Adams ed., 1907).

31. *Id.* "Literature is our Parliament too. Printing, which comes necessarily out of Writing, I say often, is equivalent to Democracy." *Id.*

32. U.S. CONST. amend. I.

Abrams v. United States[33] became a rallying cry in the fight to eliminate government censorship of ideas.[34] Before that time, Blackstone had declared that although liberty of the press was essential to the nature of a free state it could and should be bounded.[35] As the debate about the limits of free expression raged on, enlightenment scholars searched for a means of justifying its protection.[36]

Early press cases involved statutes that specifically targeted the press.[37] For example, malicious, scandalous, or defamatory publications were once punishable under Minnesota law as a public nuisance.[38] In *Near v. Minnesota*,[39] the manifest goal of the challenged legislation was to close down a single newspaper, *The Saturday Press*.[40] Its editors published racist attacks against blacks and Jews and exposed corruption among prominent business and government leaders.[41] On appeal, the Supreme Court held that, excepting wartime emergencies, news editors had a constitutional right to publish their views.[42]

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33. 250 U.S. 616 (1919).

34. *See generally id.* at 628.

> But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned.

Id.

35. WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAW OF ENGLAND *151–53 (Univ. of Chicago Press 1979) (1769). Blackstone believed that holding those who abused the freedom of press publicly accountable would ultimately safeguard that freedom from absolute state-imposed restraints on publishing:

> The liberty of the press is indeed essential to the nature of a free state . . . Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.

Id. at 151–52.

36. *See, e.g.*, JUHANI KORTTEINEN ET AL., THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT, ARTICLE 19, at 394 (Gundmundur Alfredsson & Asbjorn Eide eds., 1999).

37. *See, e.g.*, Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931).

38. *Id.* at 702.

39. *Id.* at 697.

40. *Id.* at 703.

41. *Id.* at 703–05.

42. *See id.* at 716, 722–23.

Judicial decisions characterizing the press range from debate about whether it should be accorded preferred institutional status,[43] to identification of permissible means of preventing members of the press from abusing power and exploiting individuals under the guise of discharging its obligations.[44] Of the former, the Court declared that the Press Clause makes no distinction between the average citizen printing and distributing flyers to convey a message and larger entities like CNN.[45] English practices involving licensing and prior restraint were an anathema to the newly established rights.[46] On the other hand, in 1937, when the Associated Press declared immunity from federal labor law after firing an employee for attempting to organize workers and pursue collective bargaining, the Court ruled that the press had no special immunity from regulation through general laws unrelated to the news.[47] In civil society, there must be legitimate restraints on the press corps.

B. Theory and Rhetoric of Free Speech

Scholars of constitutional history believe that freedom of conscience was essential for promotion of three compelling goals: the search for truth to aide the task of self-governance; access to a free flow of information to assist in evaluating candidates for public office; and freedom of inquiry that might lead down the path of self-realization.[48] In the United States, the theory that we have the

43. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 797–98 (1978).

44. Assoc'd Press v. NLRB, 301 U.S. 103, 131–33 (1937).

45. Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 910–11, 592 P.2d 341, 347–48 (1979). *See also Bellotti,* 435 U.S. at 777 ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."); U.S. Department of State, *Rights of the People: Individual Freedom and the Bill of Rights, available at* http://usinfo.state.gov/products/pubs/rightsof/press.htm (last visited Mar. 13, 2008) ("[F]reedom of the press is different from other liberties of the people in that it is both individual and institutional. It applies not just to a single person's right to publish ideas, but also to the right of print and broadcast media to express political views and to cover and publish news.").

46. *Bellotti*, 435 U.S. at 800–1 (comparing American lawmakers with "English and continental monarchs, fearful of the power implicit in [the printing press'] use and the threat to Establishment thought and order-political and religious-devised restraints, such as licensing, censors, indices of prohibited books, and prosecutions for seditious libel, which generally were unknown in the pre-printing press era.").

47. *Assoc'd Press*, 301 U.S. at 132–33.

48. SEIDMAN ET AL., THE FIRST AMENDMENT 13 (Geoffrey R. Stone ed., 2d ed. 2003).

oldest living constitution and that our democratic form of government has survived precisely because we have these safeguards, is subject to relatively little scrutiny. We take as an article of faith that strong support for free expression means that the electorate is (or may one day be) comprised of model citizens who speak out, vote, and give consent to those who govern—fully and purposefully engaged in civic culture.

Following soul-searching debate in the early sedition cases over the nature and extent of actionable threats to national security interests when the nation is at war, Oliver Wendell Holmes picked up where James Madison left off as the champion of free speech in a democracy.[49] Justice Holmes's dissent in *Lochner v. New York*[50] embraced Jefferson's view that the Constitution was a living document, "made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."[51] Founding principles in the mission statement of National Public Radio, conceptualizes its responsibility in those very terms.[52] The network's philosophy became the basis for its popular program "All Things Considered," which first debuted in 1971.[53] The statement opens by declaring that:

> National Public Radio will serve the individual: it will promote personal growth; it will regard the individual differences among men with respect and joy rather than derision and hate; it will celebrate the human experience as infinitely varied rather than vacuous and banal; it will encourage a sense of active constructive participation, rather than apathetic helplessness.[54]

In all areas of First Amendment debate, few issues have received more scholarly attention than exploration of the

49. *But see, e.g.,* Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919); Sugarman v. United States, 249 U.S. 182 (1919).

50. 198 U.S. 45 (1905).

51. *Id.* at 76 (Holmes, J., dissenting).

52. William H. Siemering, National Public Broadcasting Purposes, Public Broadcasting PolicyBase, *at* http://www.current.org/pbpb/documents/NPR purposes.html (last visited Mar. 3, 2008).

53. *Id.*

54. *Id.*

functional value of the amendment in the service of truth.[55] German Enlightenment philosopher Johann Gottlieb Fichte believed it was the duty of government and citizens to work together toward discovering the truth, while exposing false and misleading ideas.[56] In the United States, we are conditioned to view free speech and press through a lens of competing interests. Reluctant to cede to any one group or individual the claim of an objective truth, Holmes captured the imagination of scholars of political history by likening American interest in free debate to competition in an open market. His now famous dissent in the case of *Abrams v. United States*[57] contains an oft quoted passage detailing the Justice's view: "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that . . . is the theory of our Constitution."[58]

Speech has never operated within a competitive realm where a consumer's natural selection of true ideas and authentic representations are certain. Discovery of true ideas presupposes that the average citizen will know them when they hear them, accepts the possibility that there could be some kernel of truth in every idea, and assumes that true ideas always triumph over false representations. In theory, the marketplace of ideas is where the truth keeps rising to the surface, and persistent challenges to the truth enable—even propel—us to "verify" its existence. A now famous philosophical refrain has become judicial mantra, where we are encouraged to accept that the only alternative to a "living truth" is a dead dogma.

In sum, the goal of the First Amendment as a means for discovering truth is widely presented as necessary for democracy to endure and thrive. A prominent case featured a religious group who claimed that the principles of their faith forbade saluting a flag or pledging themselves to political institutions or symbols.[59] The Supreme Court upheld the right of the individual against imposition of penalties for failure to participate in government-sponsored speech as a demonstration of patriotism and

55. *See generally* SEIDMAN, *supra* note 48, at 8–13.

56. *See generally* Lindsley Armstrong Smith, *Johann Gottlieb Fichte's Free Speech Theory*, 4 AM. COMM. J. 1 (2001), *available at* http://www.acjournal.org/holdings/vol4/iss3/articles/lsmith.pdf.

57. 250 U.S. 616 (1919).

58. *Id.* at 630 (Holmes, J., dissenting).

59. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 629 (1943).

conformance to the values of the institution.[60] The opinion is grounded in circuitous reasoning. For example, Judge Hand later declared that we must:

> [P]resuppose[] that there are no orthodoxies—religious, political, economic, or scientific—which are immune from debate and dispute. Back of that is the assumption—itself an orthodoxy, and the one permissible exception—that truth will be most likely to emerge, if no limitations are imposed upon utterances that can with any plausibility be regarded as efforts to present grounds for accepting or rejecting propositions whose truth the utterer asserts, or denies.[61]

In a similar vein, the Court introduced a theory that links freedom of conscience and the mission of educators, particularly at colleges and universities. According to Justice William Brennan, writing for the majority in *Keyishian v. Board of Regents*,[62] transcendent values support our deep national commitment to safeguarding academic freedom, "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[63] It may not be tolerated under constitutional law, but some argue that the long-term effects of the standardization of curriculum and teaching methods, has all but escaped public notice.[64] According to National Public Radio Organizer William Siemering:

> Broadcasting of public hearings and public affairs programs is not just a "good thing to do" but a necessity for citizens in a democratic society to be enlightened participants.[65] The mechanistic instruction about

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60. *Id.* at 642.

61. Int'l Bhd. of Elec. Workers, Local 501 v. NLRB, 181 F.2d 34, 40 (2d Cir. 1950).

62. 385 U.S. 589 (1967).

63. *Id.* at 603.

64. Robin D. Barnes, *Black American and School Choice: Charting a New Course*, 106 YALE L.J. 2375, 2398–2403 (1997).

65. Siemering, *supra* note 52.

> [C]urriculum should be 'balanced if not replaced by emphasis on the influence of personal motives and ambitions, emotions (envy, hate, love, pride), political debts, accidents and even honest mistakes in the formulation of public policy.' This requires investigative reporting and citizen participation during the decision-making process. Broadcasts of public hearings are one of the best ways to hear the evidence presented on proposed legislation and public radio might develop some vehicle through local affiliates whereby citizens could indicate their judgment to

> government we all recall from civics classes ill prepares adults to know about the real legislative process and how to effect change.[66]

Political scientist Fred Newmann believes that "[b]y teaching that the constitutional system of the United States guarantees a benevolent government servicing the needs of all [citizens], the schools have fostered massive public apathy."[67]

Limits around academic freedom at the elementary and secondary level are the subject of continuing debate among courts in various states. The early cases arose in response to regulations governing what students should learn in the areas of science and religion.[68] Cases involving the rights of high school students to protest at the height of the Pro-Peace Movement reaffirmed their speech rights without mentioning academic freedom. The discussion continues at this level partly in response to Justice Frankfurter's declaration that the essential elements of a functioning democracy, as guaranteed by the Constitution of the United States against infraction by national or state government, include protection for teachers:

> To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion.

> the decision makers. This coverage need not be confined to Congressional Hearings but should apply to governmental regulatory agencies as well. If no government body is holding hearings on an important issue, National Public Radio could sponsor its own debate to help define the problem and suggest alternate solutions with the consequences of each explored.

Id. (citations omitted).

66. *Id.*

67. *Id. See also* U.S. CONST. pmbl. (proclaiming one of the goals of the United States as "promot[ing] the general Welfare" of its citizens).

68. For example, Tennessee passed an anti-evolution statute that led to the famous trial of John Scopes:

> That it shall be unlawful for any teacher in any of the Universities, Normals and all other public schools of the State which are supported in whole or in part by the public school funds of the State, to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals.

Act of Mar. 13, 1925, ch. 27, 1925 Tenn. Pub. Acts 185.

> Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them.[69]

Noting that "[s]cholarship cannot flourish in an atmosphere of suspicion and distrust," Justice Brennan characterized the "essentiality of freedom in the community of American universities [as] almost self-evident."[70] With grave determination, Frankfurter sets forth the prerequisites for scholarly productivity:

> [F]reedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. [Scholars] must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government.[71]

In *Sweezy v. New Hampshire*, Brennan writes, "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[72]

Is Learned Hand correct in assuming that truth will most likely emerge when no limitations are imposed upon utterances that can, with any plausibility, be regarded as efforts to present grounds to accept or reject a particular proposition? Plausibility is an interesting standard. We know from every historical record that there is an absence of credible proof that we can discover an objective truth, coupled with ample evidence that those in power often go to great lengths to thwart its discovery.[73] Thus, strong measures of protection for teachers, investigative journalists, and whistleblowers, and preventing corporate manipulation of public

69. Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).
70. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).
71. *Wieman*, 344 U.S. at 196–97.
72. *Sweezy*, 354 U.S. at 250.
73. *See* Richard Rorty, *Is This the End of Democracy*, THEAGE.COM.AU, Apr. 24, 2006, http://www.theage.com.au/articles/2004/04/26/1082831494716.html.

discourse through deployment of SLAPP suits, take on greater importance.

Freedom of inquiry, as championed by Fitche, received constitutionally-based recognition by the Court on numerous occasions.[74] Exploration for no discernable purpose has also been deemed useful for its potential as a path to truth. While it is vital to articulate a clear statement of theory surrounding First Amendment values, the everyday reality has become a touchstone for analysis precisely because the theory has evolved into orthodoxy. The critical inquiry becomes whether truth-seeking in today's media environment continues to serve as a justification for heightened speech protection. The opposite is true in relation to academic freedom, which deserves heightened protection as a result of the tendencies of research and debate to uncover misinformation and promote a fuller understanding of various phenomena. Lofty statements of principle have likened universities to laboratories where free inquiry can only have a positive influence on the inculcation of democratic values, and professors to the scientists whose dedication to perfecting the research and increasing new knowledge bring forth that result. In practice, as succinctly stated by Ronald Standler:

> [A]cademic freedom is invoked to justify statements by faculty that offend politicians, religious leaders, corporate executives, parents of students, and citizens. Such offense is easy to understand, given that professors are often intellectual risk-takers, ahead of their time, and loyal to Truth—wherever it may lead and whoever it may offend—instead of loyal to money, political or corporate power, and dogma.[75]

The institutional nature of today's mass media, by contrast, raises legitimate doubts about the extension of protections designed for smaller diverse media groups to a limited number of large scale entities. Profit-driven news rooms increasingly tend toward reduction of objective investigative reporting, replacing it with partisan talking-heads. Thus, loyalty attaches to their bottom line rather than to the mission of creating an informed civil society.

74. *Wieman*, 344 U.S. at 195 (Justice Frankfurter concurring, "By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling.") *Id.*

75. Ronald B. Standler, *Academic Freedom in the USA* (2000), http://www.rbs2.com/afree.htm (last visited Mar. 8, 2008).

Likewise, profit motives explain how the lack of clear boundaries in reporting on celebrity morals and lifestyle has shifted attention away from the fundamental values of privacy, as if the traditionally protected realm of familial privacy has automatically become a matter of public concern.[76]

Failure of the market is worthy of constitutional notice in the context of free speech on multiple levels. Beyond shrinking loyalties to the public good, we have to investigate the rationale for elevating protection for nearly every kind of speech as a means of discovering something important about the world when we fail to incorporate generally acknowledged influences of the psychological processes embraced by most people. Research has shown that understanding is chosen or created rather than discovered. People rarely embrace ideas because they are true. Rather, people embrace ideas based upon how closely they align with their own core beliefs. Emotional and irrational appeals have great impact; subconscious repressions, phobias, and desires all influence individual capacity to assimilate messages.[77] Stimulus response and selective attention and retention processes influence daily understanding and perspectives.[78] Instead of treating truth as the cream that rises to the top of a frothy, refreshing debate, a more lucid approach to First Amendment jurisprudence might take into account that individuals tend to affirm as truth information that confirms long-held beliefs. Opportunities to influence opinion by so-called rational means are largely only possible in those areas where an individual has not already formed an opinion. As we move toward areas where public opinion is up

76. ROBIN D. BARNES, OUTRAGEOUS INVASIONS 144–45 (forthcoming 2008). That celebrities have been cast by the media and by the court as a point of crystallization for adoption or rejection of a lifestyle, or point of view by example or counter-example, is only relevant in relation to celebrities who choose that role. *Id.*

77. WILLIAM HIRSTEIN, BRAIN FICTION: SELF-DECEPTION AND THE RIDDLE OF CONFABULATION 4 (2005) (describing "confabulation" as a common condition in which there is "an absence of doubt about something one should doubt . . . .").

78. *Id.* at 230. Hirstein writes:

> The problem with selectivity is that one can know that it is there without knowing anything at all about what is doing the selecting, and how. Several processes below the level of full intentional action can create this selectivity. One can imagine a simple process that keeps items from coming consciousness on the basis of a nonconscious reaction to that information.

Id.

for grabs, we quickly encounter the twin obstacles of credibility and access.

C. Credibility and Access to Public Debate

The Democracy Papers is a series of articles, essays, and editorial opinions that discuss current threats to the marketplace of ideas.[79] As they point out "[t]echnology has created space for more voices, yet fewer and fewer are heard" because consolidation of American media has transformed ownership from a large number of owners into just five or six large corporations.[80] Fewer small outlets for radio, newspapers, magazines, and music have gone beyond chilling a once potentially robust marketplace of ideas, to what some claim to be a corporate-controlled backlash. Without entering that debate, what emerges in point of fact from the traditional rhetoric and free speech theory is a false notion that all viewpoints are both entitled to be, and actually represented in the market. Without a corresponding entitlement or access to a shared market space and resources, the entitlement rings hollow, reproducing all the traditional problems of the economic market, without addressing core First Amendment issues.

As a matter of political expediency, a host of labels were created to discount the message of particular speakers. For example, we imbue Harvard graduates with near instant credibility, assuming they are among the best and the brightest and therefore likely to be individuals worth listening to. When the Harvard graduate is a woman who has something important to say about what she sees as systemic affronts to women's rights, she is labeled a radical feminist in order to discount the message. Like the emergency broadcast system, the listener is forewarned that the messenger is a "radical feminist"[81] or prone to playing the "race

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79. *The Democracy Papers,* THE SEATTLE TIMES, *available at* http://seattletimes.nwsource.com/html/thedemocracypapers/ (last visited Mar. 8, 2008).

80. *Id.* On December 18, 2007, the FCC voted to allow for increased media consolidation, overturning a long-standing ban that prevented single companies from owning both a television or radio station in addition to a newspaper with the same public audience. John Eggerton, *FCC Loosens Newspaper-Broadcast Cross-Ownership Limits,* BROADCASTING & CABLE, Dec. 18, 2007, http://www.broadcastingcable.com/article/CA6513656.html.

81. *See, e.g.*, Melissa Pardue, *The Heritage Foundation, In Defense of Marriage* (2003), http://www.heritage.org/Press/Commentary/ed070203a.cfm ("No one doubts that marriage is good for all involved. Well, almost no one. A handful of

card."[82] By listening, one is likely to be dragged into a meaningless debate or, worse yet, engaged by an individual who "has their own agenda."[83] Thus, labeling effectively guarantees that; those freedoms of inquiry, debate, and access to the "marketplace of ideas" do not rise to the level of established rights which members of the ruling elite at either the micro or macro level are bound to respect.

The Preamble to the Bill of Media Rights states:

> [I]n recent years, massive and unprecedented corporate consolidation has dangerously contracted the number of voices in our nation's media. While some argue we live in an age of unprecedented diversity in media, the reality is that the vast majority of America's news and entertainment is now commercially-produced, delivered, and controlled by a handful of giant media conglomerates seeking to minimize competition and maximize corporate profits rather than maximize competition and promote the public interest.[84]

Beyond corporate dominance, few critiques of public media focus upon whose interests are served by giving wholesale news producers unqualified rights to present only one side of major political debates while effectively ignoring unequal distribution of power. The *New York Times*, *Boston Globe*, *Wall Street Journal*, and other major newspapers are large scale corporations, but their news is also initially produced and packaged by organizations like Reuters, Associated Press, and United Press International that are subjected to relatively little scrutiny. They wield a great deal of power acquired through litigation over the student organizing and protests that resulted in meaningful articulation of doctrine related to associational freedom. The era of world-wide protests and demonstrations solidified principles that had only been alluded to in dissent during the early labor movement. Proper analysis of

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radical feminists are opposed to the president's measure [to spend $300 million to help new parents build healthy marriages].").

82. Alicia Colon, *Obama's Race Card Play Shows Ignorance*, N.Y. SUN, Aug. 3, 2007, *available at* http://www.nysun.com/article/59776.

83. *See, e.g.*, John Gibson, *Most People Don't Want to See Two Guys Get It On*, FOX NEWS, Jan. 3, 2006, http://www.foxnews.com/story/0,2933,180499,00.html (commenting that the film, BROKEBACK MOUNTAIN, is "a gay agenda movie and as such it might sweep the Oscars.").

84. FLORIDA PIRG, BILL OF MEDIA RIGHTS, at 1, http://www.floridapirg.org/uploads/KG/jB/KGjBfY–RQVU34ZOsVByvQ/media-bill-of-rights.pdf (last visited Mar. 8, 2008).

heightened protection for the press corps is undertaken by examining the context within which freedom of association evolved in the United States.

III. STUDENT PROTEST MOVEMENT'S LEGACY OF SPEECH AND ASSOCIATION

A. *History of Civil Rights*

The Civil Rights Movement provided the necessary traction for vibrant press protections. Apartheid emerged as a way of life in the United States during the post-slavery era. Marked by years of brutal violence, it is a testament to the legacy of chattel slavery. The Thirteenth Amendment to the United States Constitution was ratified in 1865, prohibiting slavery and involuntary servitude, except as punishment for commission of a crime. Three days later, black codes were introduced throughout Southern states. Life under the codes and its system of apartheid is often referred to as the Jim Crow Era. Essentially, the codes were relatively minor revisions of the former slave codes; i.e., replacing the word "slave" with the word "servant" and leaving much else exactly as it was before. Even those who remained relatively indifferent to the plight of the Negro conceded that the ultimate effect (if not purpose) of the black codes was involuntary servitude. Almost every act, word, or gesture of the Negro not consonant with good taste, good manners, and good morals (as defined by whites) was made a crime or misdemeanor for which he was first fined by the magistrates and then consigned to a condition of servitude, often for life, until he could pay the fine.[85]

Jim Crow struck foreigners as a strange name for a legal and social system of dominance, but one need only understand the impact of the Minstrel Era to see why the name stuck. Hailed by the American writer Samuel Clemens—also known as Mark Twain—as the greatest era of all time,[86] minstrel shows consisted of entertaining whites with images of black stupidity. The then-

85. Abel A. Bartley, *The Fourteenth Amendment: The Great Equalizer of the American People*, 36 AKRON L. REV. 473, 480–81 (2003).

86. Eric Lott, *Mr. Clemens and Jim Crow: Twain, Race and Blackface*, *in* THE CAMBRIDGE COMPANION TO MARK TWAIN 129, 129 (Forrest G. Robinson ed., 1995) (quoting Twain, "If I could have the nigger show back again in its pristine purity and perfection, I should have but little further use for the opera").

illiterate and debased condition of the former slave became something to laugh about rather than repent for virtually overnight.[87]

On the other hand, Jim Crow laws or black codes codified official policies of separate but equal, conveniently rationalized by the degraded conditions of Black Americans. Widespread coercive practices led to involuntary servitude and demands for conformity without civil or political recourse. In short, the Jim Crow Era describes a social phenomenon prescribed by law and cemented by popular culture. "Jim Crow," like "Uncle Sam," is a fiction. He is a minstrel character who was created in the 1830s by Thomas D. Rice and modeled after an elderly crippled black slave who sang and shuffled. Rice's performance of "Jump Jim Crow" in blackface was widely acclaimed throughout the United States and England, becoming well known "not only in the United States but internationally.[88] Also, "in 1841 the United States' ambassador to Central America, John Lloyd Stephens, wrote that upon his arrival in Mérida, Yucatán, the local brass band played 'Jump Jim Crow' under the mistaken impression that it was the USA's national anthem."[89] Thus, a new weapon emerged in the fight over imagery in popular culture:

> The good slave or servant was the apologist for the former genteel White confederacy. Never overtly sexual, often referred to as uncle, Tom, or Remus and the female corollary was the mammy, the overweight maid, cook and nanny responsible for the comfort of the southern White household. With no life of her own, she was imbued with practical wisdom and took an inordinately intense interest in the welfare of the White family and children that she cared for.[90]

Black Americans, such as Harriet Tubman, Sojourner Truth, and Ida B. Wells, held a different vision of what it meant to be free and independent, and began to lose ground in the court of public opinion on the question of innocence. Blacks were maliciously portrayed as evil in literature distributed by the Ku Klux Klan,

87. Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 373–74 (1996).

88. *See* AfricanAmericans.com, African American Historical Documents, *The Origin of "Jim Crow"*, http://www.africanamericans.com/JimCrow.htm.

89. *Id.*

90. ROBIN D. BARNES, THE NATURE AND SCOPE OF INDIVIDUAL RIGHTS, EMERGING DEBATES IN CONSTITUTIONAL LAW 211 (2007).

whose advertisements warned about their so-called bestial and cunning nature making them prone to thievery and rape.[91] The counter-image to the black mammy was Jezebel, the black female whore—not only incapable of being tamed, but also cunning and lacking in appropriate morals and values.[92]

The 1915 film *Birth of a Nation*, often cited as a milestone in the history of American motion pictures, transformed a novel into vivid images that captured the uncles, mammies, buffoons, and mulatto mistresses; it claimed to illustrate the circumstances to which Southern families were reduced after the Civil War.[93] The opening depicts benevolent masters served by loyal slaves who contentedly pick cotton, perform chores, and aim to please. By the end of the war, the tranquil social order had degenerated into lawlessness. Newly emancipated slaves are depicted as roaming the streets and terrorizing whites. Anarchic hordes take over the polls, disenfranchise white voters, and seize control of Congress. Black legislators are portrayed as contemptible fools, swigging whiskey from a bottle, gnawing on fried chicken legs, and holding their first legislative session with their shoes off and feet up on the desk. According to the film, emancipation was destructive of the public as well as private sphere; communities fell prey to ruin, devastation, pillage, and rape. In the climatic scene, a former slave is shown pursuing a young white woman until she leaps to her death from a pedestal-like perch at the edge of a cliff. A dramatic and victorious ride to the "rescue" by the Ku Klux Klan finally restores "civilization." The film packed movie houses in the North for twelve months and in the South for fifteen years. A special screening was held at the White House for the President, attended by the entire Supreme Court. President Woodrow Wilson described the film as "like writing history with lightning," stating that one of his regrets was that "the film was so terribly true."[94] To this day, the movie remains one of the highest-grossing box office hits in the history of Hollywood.

91. *See generally Jim Crow: Museum of Racist Memorabilia*, *The Brute Caricature*, *at* http://www.ferris.edu/jimcrow/brute/ (last visited Mar. 13, 2008).

92. Lori A. Tribbett-Williams, *Saying Nothing, Talking Loud: Lil' Kim and Foxy Brown, Caricatures of African-American Womanhood*, 10 S. CAL. REV. L. & WOMEN'S STUD. 167, 169–70 (2000).

93. THE BIRTH OF A NATION (Epoch Film Co. 1915).

94. Christopher A. Bracey, *Louis Brandeis and the Race Question*, 52 ALA. L. REV. 859, 875–76 (2001).

There was nothing that educated blacks, abolitionists, and anti-racists could do to counteract the film's impact. In the aftermath, the Klan gained enormous power in the post-war South. Organized by former commanders, soldiers, leaders of the Confederacy, and local churchmen, they used a combination of mystical talk, white sheets, and domestic terrorism. Through lynching, beating, burning, and other forms of guerilla warfare, they successfully intimidated blacks and their white liberal comrades. Theirs, according to Lerone Bennett, Jr., was "the boldest and most ruthless political operation in American history."[95] They reduced blacks to political impotence:

> By stealth and murder, by economic intimidation and political assassinations, by whippings and maimings, cuttings and shootings, by the knife, by the rope, by the whip. By the political use of terror, by the braining of the baby in its mother's arms, the slaying of the husband at his wife's feet, the raping of the wife before her husband's eyes. By *Fear.*[96]

The Freedman's Bureau, established to serve as guardian over former slaves to ensure their safety, was quickly disbanded. Black schools and churches had worked with the Bureau to settle a hefty number of newly freed slaves who had been subjected to a lifetime of abuse, even as the former slaveholders instituted a new reign of terror, including several massacres.[97]

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95. LERONE BENNETT, JR., BEFORE THE MAYFLOWER: A HISTORY OF THE NEGRO IN AMERICA, 1619–1966, at 197 (3d ed. 1966).

96. *Id.*

97. The most prominent is the Colfax Massacre:

> On April 13, 1873, violence erupted in Colfax, Louisiana. The White League, a paramilitary group intent on securing white rule in Louisiana, clashed with Louisiana's almost all-black state militia. The resulting death toll was staggering. Only three members of the White League died. But some one hundred black men were killed in the encounter. Of those, nearly half were murdered in cold blood after they had already surrendered.

PBS Online, American Experience, Ulysses S. Grant, People and Events, The Colfax Massacre, http://www.pbs.org/wgbh/amex/grant/peopleevents/e_colfax.html (last visited Mar. 7, 2008). Another similar atrocity occurred in 1921, this time in North Tulsa, Oklahoma, a thriving and prosperous black community. Its financial district was referred to as the Black Wall Street. Its residents owned land, and operated businesses, schools, and banks. On the day that Roland, the Black owner of a shoeshine stand, took an elevator to the top floor of a building to use the colored-only restroom, he stepped on the toe of a white female operator who yelled as the door was closing. Roland was arrested the next day on charges of rape. As rumors swirled that he would be lynched, white rioters set fire to

At the turn of the century, lynching was the dominant tool for managing race relations.[98] What began as extreme violence against blacks was eventually applied to whites. When a young black man flirted with a white girl and she received his attentions with a smile instead of reporting him, a mob came to lynch him. His father greeted them with a shotgun, allowing the son to escape. Afterwards, the mob gang-raped the girl "to teach her a lesson."[99] According to Dr. Lisa Cardyn, such behavior was part of a growing national trend, where white men imagined themselves as upholders of the race.[100] Their vigilantism was about the right of self-protection and repulsion of so-called unlawful incursions upon life, liberty, and property.

> [White supremacy left many white men believing] they were in danger of being overtaken by an odious force, their lives and identities forever compromised, submerged in a sea of Blackness. Heightening their anxiety was the collective nightmare shared by growing numbers of white men who envisioned their women raped, their land despoiled, their manhood threatened by the depredations of freedmen, a figment of the racial imagery that appeared no less horrifying for being completely unreal.[101]

In 1923, a violent mob ravaged Rosewood, Florida killing dozens of black residents. It all started when a twenty-two year-old white woman was having an affair with a white man who left bruises and marks on her body that she could only explain to her husband by claiming that a black intruder assaulted her while he was away.

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everything owned by blacks. Bundles of dynamite were dropped from an airplane and destroyed the entire district. Four hundred black residents were interned on fairgrounds in cattle and hog pens. While in the national spotlight, Tulsa authorities led the nation to believe that they would rebuild the district. They later approved a plan to allow railroad tracks and a train station to run straight through the district, effectively precluding the rebuilding of that community. Charles J. Ogletree, Jr., *Tulsa Reparations: The Survivors' Story*, 24 B.C. THIRD WORLD L.J. 13, 17–22 (2004). For a comprehensive overview of the Tulsa event, *see* Danney Goble, *Tulsa Reparations Coalition, Final Report of the Oklahoma Commissoin to Study the Tulsa Race Riot of 1921*, Feb. 7, 2000, http://www.tulsareprations.org/FinalReport.htm.

98. *See generally* SHERRILYN A. IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY (2007).

99. Emma Coleman Jordan, *Crossing the River of Blood Between U.S.: Lynching, Violence, Beauty, and the Paradox of Feminist History*, 3 J. GENDER RACE & JUST. 545, 546 (2000).

100. *See* Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 679 (2002).

101. *Id.* at 795 (footnotes omitted).

The local sheriff led the six-day attack, during which a group of white men burned down the entire town. No one was ever convicted of the murders, and state officials simply removed the town from the state map.[102]

In 1993, exactly seventy years later, the Florida legislature held a memorial for those who died, reimbursed the families for their loss of property, and placed the town back on the map.[103] The opening ceremony began as follows:

> People came from all around to take part in the manhunt. They were people with a thirst for blood. The remaining survivors of Rosewood are still tortured with the lingering image of a parent or grandparent being lynched, or shot, of the family home being burned to the ground, of crawling through the woods in the dead of night and hiding from an armed and crazed mob, of being hated and attacked for nothing more than their skin color.[104]

Between 1882 and 1968, 4743 people were lynched.[105] This figure excludes hangings when the death penalty was imposed after a hasty trial, secret proceedings, and those occurring in the backwoods that were later covered up following official threats to introduce federal anti-lynching legislation in the late 1930s.[106] Lynch mobs routinely formed after an all-white jury acquitted a black man for a crime.[107] As public events, they were advertised in advance and often held in public squares near official buildings. Along with the lynching were the rituals of burning at the stake, mutilation, and riddling bodies with bullets. Spectators were allowed to take home an ear or a finger; one man's knuckles were on display in the local grocery store. The highly public display of lynching was used to punish criminal acts; it was deployed as

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102. *See generally* Maxine D. Jones et al., *Documented History of the Incident Which Occurred at Rosewood, Florida, in January 1923*, Report Submitted to the Florida Board of Regents, Dec. 22, 1993, *available at* http://mailer.fsu.edu/~mjones/ rosewood/rosewood.html (discussing "racial unrest and violence against African Americans . . . during the post-World War I era").

103. Jeanne Bassett, *House Bill 591: Florida Compensates Rosewood Victims and Their Families for a Seventy-One-Year-Old Injury*, 22 FLA. ST. U. L. REV. 503, 506–08 (1994).

104. KARLA FC HOLLOWAY, PASSED ON: AFRICAN AMERICAN MOURNING STORIES 64 (2003).

105. Robert L. Zangrando, *Lynching, in* THE READER'S COMPANION TO AMERICAN HISTORY 685–86 (Eric Foner & John A. Garraty eds., 1991).

106. *Id.*

107. Taunya Lovell Banks, *Exploring White Resistance to Racial Reconciliation in the United States*, 55 RUTGERS L. REV. 903, 951 (2003).

retribution for economic competition, and used against those believed to be a threat to the status quo. The white editor of a local paper reported that following the Rosewood massacre, victim's penises, testicles, fingers, and toes were kept in Mason jars for show.[108] The editor received death threats for printing what she witnessed and for providing interviews to Northern journalists.[109] Lynch mobs displaced conventional legal processes. This system of lawlessness, from roughly 1870 to 1955, reflected a social consensus that permitted lynching to thrive without punishment as a symbolic expression of the social contract that supported the criminal justice system in the United States.

B. *Protests for Civil Rights and World Peace*

Against this backdrop, the Civil Rights Movement emerged in the late 1950s and 1960s largely because the South was still a hotbed of terrorism. It was simply not a punishable crime to kill a Negro or a civil rights worker in the South. In Louisiana, the Klan marched through the black section of town behind a sheriff's patrol car in the mid 1960s. In the face of brutal repression, the National Association for the Advancement of Colored People (NAACP) continued the fight for racial justice begun by abolitionists in 1909. The organization became the bane of existence for Southern leadership and a natural target for anti-black legislation. Southern state strategies included attempts to have civil rights organizations classified as subversive, and the widespread imposition of severe economic reprisals for blacks who became involved in civil rights.[110] Federal troops were required to uphold court ordered desegregation in the high schools.[111] When the national organization opened offices in a Southern state, the jurisdiction's official machinery went into operation.

108. Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413, 439 n.117 (2006) (this report is of post-lynching behavior in general, not necessarily Rosewood in particular).

109. *See* Jordan, *supra* note 99.

110. *See* Robin D. Barnes, *The Reality and Ideology of First Amendment Jurisprudence: Giving Aid and Comfort to Racial Terrorists*, *in* FREEING THE FIRST AMENDMENT: CRITICAL PERSPECTIVES ON FREEDOM OF EXPRESSION 253 (Robert Jensen & David Allen eds., 1995).

111. *See* Constance Baker Motley, *The Historical Setting of Brown and its Impact on the Supreme Court's Decision*, 61 FORDHAM L. REV. 9, 16 (1992).

In the landmark case of *NAACP v. Alabama* ex rel. *Patterson*, state officials demanded a list of all NAACP members.[112] In protest of the caste system that was created and maintained through extreme violence, the NAACP refused and simultaneously held out to the rest of the world as part of an inherent division of divinely appointed racial talents. It was this contradiction of meaning, betrayal of citizenship, and breach of faith that led Dr. Martin Luther King, Jr., to conclude the following:

> Writing in Life [magazine], William Faulkner, Nobel prize-winning author from Mississippi, recently urged the NAACP to "stop now for a moment." That is to say, he encouraged Negroes to accept injustice, exploitation and indignity for a while longer. It is hardly a moral act to encourage others patiently to accept injustice which he himself does not endure.[113]

A unanimous Supreme Court developed the doctrine surrounding associational freedom in this context during the height of the Civil Rights Movement. The 1958 decision favoring the NAACP against the State of Alabama demonstrates that the Court's main inquiries surrounded the history and purpose of the plaintiff organization, any evidence of subversive or unlawful activities by that organization, the nature of the plaintiff's grievance concerning the challenged legislation, and the extent to which upholding the state regulation would impact upon fundamental rights.

The plaintiff worked closely with other civil rights organizations. Their major protest strategies eventually involved sit-ins and other types of civil disobedience. Southern states seeking to immobilize voter registration efforts began enacting voter qualification statutes dealing with literacy, employment, and character.[114] Under the guise of state investigative powers, many states enacted registration statutes which compelled disclosure of

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112. 357 U.S. 449, 451 (1958).

113. Martin Luther King, Jr., *Our Struggle*, *in* LIBERATION, Apr. 1956, at 5, *available at* http://www.stanford.edu/group/King/publications/papers/vol3/560400.001-Our_Struggle.htm.

114. Robin D. Barnes, *Blue by Day and White by (K)night: Regulating the Political Affiliations of Law Enforcement and Military Personnel*, 81 IOWA L. REV. 1079, 1140 (1996) (citing DAVID GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965, at 8 (1978) (describing Alabama as the state where the first and most extensive efforts were devised "by which black applicants for registration [could] be rejected.")).

the membership lists of various civil rights organizations.[115] In *NAACP v. Alabama ex rel. Patterson*, the plaintiffs challenged the authority of the State of Alabama to extract a list of members. The Court found that the State's purpose in requiring the list was to identify publicly the names of the members, thus exposing them to severe community reprisals such as the loss of employment, the calling or denial of bank loans, foreclosure of mortgages, and violence by the KKK.[116] Arguments advanced by the plaintiffs centered upon the demonstrable harm they would suffer if forced to comply with Alabama's registration statute.[117] Counsel for the State of Alabama argued that the State's police power covered both the registration of foreign corporations and a duty to remain apprised of activities conducted within the State.[118] The Court noted, as a preliminary matter, that the regulation could have the effect of curtailing freedom of association and went on to find that the NAACP had made an uncontroverted showing that on past occasions revelation of the identity of its rank and file members had exposed them to severe physical and economic injury.[119] Holding that the State's alleged interest was outweighed by the members' right to organize freely, the opinion declared that the "crucial factor" in deciding this case was the "interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold."[120]

A second prominent case, *Williams v. Wallace*,[121] involved a proposed march from Selma to Montgomery, where civil rights workers once again faced virulent opposition from Alabama officials.[122] During the 1950s, murders, death threats, selected bombings, and widespread racial terror served to discourage Southern blacks from registering to vote. In the early 1960s, the Voter Education Project became the organizing vehicle for many civil rights organizations in their quest to secure the right to vote as guaranteed under the Fifteenth Amendment to the United States

115. *Id.* (citing Joseph B. Robinson, *Protection of Associations from Compulsory Disclosure of Membership*, 58 COLUM. L. REV. 614 (1958)).
116. *Patterson*, 357 U.S. at 462.
117. *Id.* at 459.
118. *Id.* at 464.
119. *Id.* at 460–61.
120. *Id.* at 463.
121. 240 F. Supp. 100 (M.D. Ala. 1965).
122. *Id.* at 102.

Constitution.[123] Concerted efforts by numerous civil rights organizations to register Southern blacks in 1964 became known as the Mississippi Freedom Summer.[124] Racial terrorism resulted in six murders, thirty-five shootings, thirty homes bombed, thirty-five churches burned, and eighty persons beaten.[125] Citizens from every part of the nation began to march in protest against the "scandalous misuse of police power."[126] Those marching in Selma, Alabama made national headlines:

> The news from Selma, Alabama, where police beat and mauled and gassed unarmed, helpless and unoffending citizens will shock and alarm the whole nation. It is simply inconceivable that in this day and age, the police who have sworn to uphold the law and protect the citizenry could resort, instead, to violent attacks upon them.
>
> Decent citizens will weep for the wronged and persecuted demonstrators, for the decent citizens of Alabama who must recoil in horror from the spectacle of sadism, for the good name of the nation before the world. This brutality is the inevitable result of the intolerance fostered by an infamous state government that is without conscience or morals.[127]

Responding to these abuses, Martin Luther King, Jr. proposed to march from Selma to Montgomery, Alabama. Alabama Governor George C. Wallace banned the march in an order which provoked legal action. The demonstration eventually took place under the protective order of U.S. District Court Judge Frank Johnson.[128] The NAACP petitioned the court for a declaration that Wallace's proclamation banning the march violated their speech rights under the Constitution.[129] The State argued that the march would constitute unlawful assembly and would surely result in a breach of peace.[130] The plaintiffs argued that they possessed a fundamental right to publicly demonstrate in protest of the denial

123. GARROW, *supra* note 114, at 20.
124. *Id.*
125. *Id.* at 21.
126. *Id.* at 87.
127. Editorial, *Outrage at Selma*, WASH. POST, Mar. 9, 1965, at A16, *reprinted in* GARROW, *supra* note 114, at 87.
128. Williams v. Wallace, 240 F. Supp. 100, 110 (M.D. Ala. 1965).
129. *Id.* at 102.
130. *Id.* at 111.

of voting rights and officially sponsored racial attacks.[131] Judge Johnson, writing for the majority declared:

> [T]here must be in cases like the one now presented, a 'constitutional boundary line' drawn between the competing interests of society. This Court has the duty and responsibility in this case of drawing the 'constitutional boundary line.' In doing so, it seems basic to our constitutional principles that the extent of the right to assemble, demonstrate and march peaceably along the highways and streets in an orderly manner should be commensurate with the enormity of the wrongs that are being protested and petitioned against. In this case, the wrongs are enormous. The extent of the right to demonstrate against these wrongs should be determined accordingly.[132]

The 1963 march on Washington garnered support from President John F. Kennedy and members of his administration for passage of the Civil Rights Act (1964) and the Voting Rights Act (1965). After leading his first Vietnam demonstration, on April 4, 1967, King addressed a crowd of 3,000 people at Riverside Church in New York City where he declared that the Vietnam War was:

> [T]aking the black young men who had been crippled by our society and sending them eight thousand miles away to guarantee liberties in Southeast Asia which they had not found in southwest Georgia and East Harlem.[133]

Student protests at the University of California at Berkeley from 1963–1967, at Columbia University in 1967 and 1968, at Kent State University in 1970, and Jackson State University in 1970, are among the most memorable worldwide for their determination to eliminate racism, halt the draft, and end the Vietnam War. In a clear statement of principle, published by Students for a Democratic Society, they announced their mission to a world captivated by their boldness and sincerity.

The Port Huron Statement explaining the goals of student protests was written by Senator Tom Hayden and distributed across the nation in 1962.[134]

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131. *Id.* at 102–03.

132. *Id.* at 106.

133. MARTIN LUTHER KING, JR., RESEARCH AND EDUC. INST., KING ENCYCLOPEDIA, *available at* http://www.stanford.edu/group/King/about_king/encyclopedia/vietnam.htm. (last visited Mar. 7, 2008).

134. PORT HURON STATEMENT OF THE STUDENTS FOR A DEMOCRATIC SOCIETY

(Relevant Excerpts)

We are people of this generation, bred in at least modest comfort, housed now in universities, looking uncomfortably to the world we inherit.

When we were kids the United States was the wealthiest and strongest country in the world: the only one with the atom bomb, the least scarred by modern war, an initiator of the United Nations that we thought would distribute Western influence throughout the world. Freedom and equality for each individual, government of, by, and for the people—these American values we found good, principles by which we could live as men. Many of us began maturing in complacency.

As we grew, however, our comfort was penetrated by events too troubling to dismiss. First, the permeating and victimizing fact of human degradation, symbolized by the Southern struggle against racial bigotry, compelled most of us from silence to activism. Second, the enclosing fact of the Cold War, symbolized by the presence of the Bomb, brought awareness that we ourselves, and our friends, and millions of abstract "others" we knew more directly because of our common peril, might die at any time. We might deliberately ignore, or avoid, or fail to feel all other human problems, but not these two, for these were too immediate and crushing in their impact, too challenging in the demand that we as individuals take the responsibility for encounter and resolution.

While these and other problems either directly oppressed us or rankled our consciences and became our own subjective concerns, we began to see complicated and disturbing paradoxes in our surrounding America. The declaration "all men are created equal" . . . rang hollow before the facts of Negro life in the South and the big cities of the North. The proclaimed peaceful intentions of the United States contradicted its economic and military investments in the Cold War status quo.

. . . .

Beneath the reassuring tones of the politicians, beneath the common opinion that America will "muddle through", beneath the stagnation of those who have

(1962), *available at* http://coursesa.matrix.msu.edu/~hst306/documents/huron.html (last visited Mar. 7, 2008).

> closed their minds to the future, is the pervading feeling that there simply are no alternatives, that our times have witnessed the exhaustion not only of Utopias, but of any new departures as well. Feeling the press of complexity upon the emptiness of life, people are fearful of the thought that at any moment things might thrust out of control. They fear change itself, since change might smash whatever invisible framework seems to hold back chaos for them now. For most Americans, all crusades are suspect, threatening. The fact that each individual sees apathy in his fellows perpetuates the common reluctance to organize for change. The dominant institutions are complex enough to blunt the minds of their potential critics, and entrenched enough to swiftly dissipate or entirely repel the energies of protest and reform, thus limiting human expectancies. Then, too, we are a materially improved society, and by our own improvements we seem to have weakened the case for further change.
>
> Some would have us believe that Americans feel contentment amidst prosperity—but might it not better be called a glaze above deeply felt anxieties about their role in the new world? And if these anxieties produce a developed indifference to human affairs, do they not as well produce a yearning to believe there is an alternative to the present, that something can be done to change circumstances in the school, the workplaces, the bureaucracies, the government? It is to this latter yearning, at once the spark and engine of change, that we direct our present appeal. The search for truly democratic alternatives to the present, and a commitment to social experimentation with them, is a worthy and fulfilling human enterprise, one which moves us and, we hope, others today. On such a basis do we offer this document of our convictions and analysis: as an effort in understanding and changing the conditions of humanity in the late twentieth century, an effort rooted in the ancient, still unfulfilled conception of man attaining determining influence over his circumstances of life.[135]

135. *Id.*

IV. EXPANDING PRESS RIGHTS THROUGH SURROGACY

Persuasive statements of principle were likewise developing about the role of a free press. The post-1960s era ushered in a period of excitement and sense of purpose for the national press. As in most gestational surrogacy cases, there is a certain level of sweat equity that goes into the process of delivering the news. No court, however, has permitted a carrier to maintain custody in the absence of a biological relation.[136] The law supported by the American Fertility Association concludes that gametes and concepti are the property of the donors.[137] The donors therefore have the right to decide, at their sole discretion, the disposition of these items. Such is the case with the news.

No Supreme Court ruling articulating the rights of the press has received as much praise, nor been the subject of as much envy abroad as the landmark case of *New York Times Co. v. Sullivan*,[138] which grew out of calls for enforcement of civil rights against government repression. Brutality against civil rights advocates in Montgomery, Alabama, prompted a group of civil and human rights organizations along with prominent individuals to take out a full-page advertisement in The *New York Times* entitled "Heed Their Rising Voices."[139] The advertisement reported details of the violent responses to peaceful protests that civil rights workers faced and solicited donations for legal fees and the like.[140] Although police commissioner L.B. Sullivan was not mentioned by name, he sued The *Times*, alleging that the advertisement's factual errors defamed his reputation concerning performance of his official duties.[141] A local jury found in Sullivan's favor, and awarded him a half-million dollars in damages.[142] The case was appealed, and the judgment affirmed. On further appeal, the United States Supreme court granted certiorari and reversed the lower courts' rulings.[143]

Justice William Brennan, Jr., writing for the majority stated:

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136. *See* Amy M. Larkey, *Redefining Motherhood: Determining Legal Mastery in Gestational Surrogacy Arrangements*, 51 DRAKE L. REV. 605, 606 (2003).

137. Am. Fertility Soc'y Ethics Comm., *Ethical Statement on In Vitro Fertilization*, 41 FERTILITY & STERILITY 12 (1984).

138. 376 U.S. 254 (1964).

139. *Id.* at 256.

140. *Id.* at 256–58.

141. *Id.* at 258.

142. *Id.* at 256.

143. *Id.* at 264–65.

> [W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent.[144]

The Court held that it did not.[145]

The *New York Times* decision was hailed as a victory for proponents of a free press as it pertains to important matters of national debate. In the years that followed:

> [R]eporters for such papers as The Baltimore Sun or the Los Angeles Times fanned across the country and the world. They picked up phones and filed copy from a dozen datelines. Wire service dispatches were bundled from the ether by AP, UPI, Reuters and APF copy-desk editors of sure hands and legendary knowledge of their cities and the globe.[146]

As a result of the press's newfound confidence and following an intense battle with the Justice Department, the *New York Times* secured a second complete victory in the United States Supreme Court—as well as the most prestigious honor in the publishing industry, the highly coveted Pulitzer Prize.

A. *The Pentagon Papers*

In June of 1971, a reporter for the *New York Times* obtained a leaked copy of government documents that were classified at the time.[147] They were shown to contain details of the United States Government's decision-making process regarding the Vietnam War.[148] The *Times* published a series of articles detailing evidence

144. *Id.* at 270–71 (internal citations and quotations omitted).

145. *Id.* at 273.

146. James F. Vesely, Opinion, *The Handoff: Newspapers in the Digital Age*, SEATTLE TIMES, Nov. 18, 2007, at F1.

147. MARGARET A. BLANCHARD, REVOLUTIONARY SPARKS: FREEDOM OF EXPRESSION IN MODERN AMERICA 369 (1992).

148. *Id.* at 368 (noting that the documents, commissioned by Secretary of

that the government had misled the American people about the War.[149] The newspaper published its first report on June 13, 1971 and received a telegram from U.S. Attorney General John Mitchell on June 14, 1971, warning that publication of classified information was a violation of the Espionage Act and that further publication would "cause irreparable injury to the defense interests of the United States."[150]

The most interesting part of the case is the sense of a unifying mission among the papers around the role of a free press in a democracy. Just as the *New York Times* began publication of the Pentagon Papers, the Justice Department secured a temporary injunction against the *Times*.[151] The next day, the *Washington Post* began publishing information from its copy of the Pentagon Papers.[152] As the government sought to enjoin the *Post*, the *Boston Globe* published its take on the documents.[153] Unsurprisingly, the lower courts were busily illustrating key elements of chaos theory. The courts were wrestling with frenzied and ominous charges.[154] The government claimed that the news organizations were violating the Espionage Act in the middle of a war, compromising foreign intelligence sources, inducing, receiving, and rewarding the theft of government property, and delaying, if not derailing, efforts to end the war.[155] Decades later, government prosecutors involved in the case confessed that no such damage was done.[156]

The underlying injunction was supported by differing views on the applicability of the Press Clause, shifting the burden of proof to the government to justify restraint when data surfaces that is damaging to the government but poses no threat to national security.[157] Justifications for injunctive relief were not viewed unanimously by the lower courts, and the government claimed that publication threatened national security. Thus, the Supreme Court

Defense Robert McNamara, detailed the history of American involvement in the Vietnam War).

149. *Id.* at 369 (noting the first *Times* article's focus on three decades of growing U.S. involvement in the Southeast Asian conflict).

150. Telegram from John Mitchell, Attorney General, to New York Times, *in* BLANCHARD, *supra* note 147, at 370.

151. *Id.*

152. *Id.* at 371.

153. *Id.* at 372.

154. Max Frankel, *Word & Image; Top Secret*, N.Y. TIMES, June 16, 1996, at 20.

155. *Id.*

156. *Id.*

157. *See, e.g.,* Org. for a Better Austin v. Keefe, 402 U.S. 415, 419–20 (1971).

agreed to an expedited hearing. The Court ruled 6-3 that publication of the series could continue because prior restraint on publication "bear[s] a heavy presumption against its constitutional validity."[158]

Justice Brandeis viewed participation in public discussion as part of one's civic duty and a fundamental principle of American governance.[159] The ability to enter that discussion and carry out one's responsibilities as a citizen required complete and timely information from independent sources.[160] Justice Potter Stewart also saw the role of an independent press as essential in "exposing [government] corruption."[161] Justice William O. Douglas concluded that the press facilitates the public's right to know.[162] The right includes knowing that which is crucial to the governing process.[163] Despite the fact that some disclosures may have a serious impact, the dominant intent behind the Press Clause was to prohibit the widespread practice of governmental suppression of embarrassing information.[164] In the midst of an important national debate over United States involvement in the Vietnam War, citizens were entitled to the information that allowed for intelligent participation.[165] Calls for increased transparency flowed from these and similar events.[166] Citizens, joined by the press, sought effective means for securing information from governmental agencies.[167]

158. New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).

159. *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

160. *See id.* at 375–77.

161. *See* Houchins v. KQED, Inc., 438 U.S. 1, 17 (1978) (Stewart, J., concurring) (quoting Estes v. Texas, 381 U.S. 532, 539 (1965)).

162. *New York Times Co.*, 403 U.S. at 721 (Douglas, J., concurring).

163. Pell v. Procunier, 417 U.S. 817, 840 (1974) (citing Branzburg v. Hayes, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting)).

164. *New York Times Co.*, 403 U.S. at 723–24 (Douglas, J., concurring).

165. *See id.* at 724 (arguing that information published by the press concerning the Vietnam War was "highly relevant to the [public] debate").

166. In response to the public's calls for increased transparency in government conduct and decision making, Congress enacted the Freedom of Information Act (FOIA) in 1966. Pub. L. No. 89-554, 80 Stat. 383 (codified as amended at 5 U.S.C. § 552 (2000)). The Supreme Court has noted that the FOIA was designed to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny" by facilitating public access to government documents. U.S. Dep't of State v. Ray, 502 U.S. 164, 173 (1991) (citations omitted).

167. *Rights of the People: Individual Freedom and the Bill of Rights*, USINFO (U.S. Dep't of State), Dec. 2003, http://usinfo.state.gov/products/pubs/rightsof/press.htm.

Although trained researchers could track down information, large media organizations with abundant resources and employees could generate greater cooperation.[168]

Access to information would enable citizens to cast intelligent ballots, sign petitions, write letters to the legislature, and in general fulfill their civic obligations—things now only made possible by a free press.[169] The concept of participatory governance originated from the theory that the people, from which all power is derived, are entitled to have access to government documents, data, and relevant information through publicly held meetings.[170] Thus, statutory rights to obtain desired information and to observe decision makers in action, such as judicial proceedings, have all been justified as part of the public's right to observe and to critique the efficacy of governmental operations. In response to growing demands for transparency and cooperation, federal and state versions of public access to information laws were proposed.[171] Congress passed the Freedom of Information Act, commonly called FOIA, in 1967.[172] Members of the press, political organizers, and consumer organizations, along with leaders of public interest and advocacy groups, made it clear that they expected both thorough and timely responses to requests for government information, thus expanding the legislative mandate.[173]

B. *The Freedom of Information Act*

Chapter five of the United States Code, section 552 (as amended by Public Law No. 104–231, 110 Stat. 3048) states the following:

> § 552. Public information; agency rules, opinions, orders, records, and proceedings

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168. *Id.*

169. *Id.*

170. *See* S. REP. NO. 813, at 37–8 (1965) (In describing the purpose of The FOIA, Senator Long of Missouri quoted James Madison's comments concerning the passage of the First Amendment. "Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both.").

171. *Id.*

172. Pub. L. No. 90–23, 81 Stat. 54–56 (1966) (codified as amended at 5 U.S.C. § 552 (2006)).

173. *See* The National Security Archive: FOI Basics, http://www.gwu.edu/~nsarchiv/nsa/foia/guide.html#foia.

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency;

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the

> nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and
>
> (E) a general index of the records referred to under subparagraph (D).

V. CONTOURS OF TODAY'S FREE PRESS

> While the newspaper is expendable, the tradition it represents and the information it supplies are not. The evolution from Gutenberg to Gates may be irreversible, but as new media replace the old ones there's no official passing of the torch of responsibility, no automatic transfer of the sacred trust the First Amendment placed upon the free press and its proprietors. In fact, the handoff, such as it is, has been fumbled very badly. As newspapers are eviscerated, marginalized and abandoned, they leave a vacuum that nothing and no one is prepared to fill—a crisis on its way to becoming a tragedy. When railroads and riverboats began to go the way of the passenger pigeon, no one was harmed except the work force and a few big investors who had failed to diversify. If professional journalism vanishes along with the newspapers, this thing we call a constitutional democracy becomes a banana republic.[174]

Doctrines governing the press reinforced federal legislation in mutually consistent exemplary fashion following the publishers' victory in the Pentagon Papers case.[175] Courts granted greater editorial discretion,[176] improved access to criminal proceedings,[177]

174. Hal Crowther, *Stop the Presses, The Future of the Newspaper—Without the Paper*, INDYWEEK.COM, Oct. 17, 2007, http://www.indyweek.com/gyrobase/Content?oid=oid%3A162480.

175. New York Times Co. v. United States, 403 U.S. 713 (1971).

176. For example, a Florida statute granting a political candidate the right to equal space to reply to a newspaper's criticism and attacks on his or her record was struck down by the Court in *Miami Herald Publ'g Co. v. Tornillo,* 418 U.S. 241 (1974). The Court ruled that forced or compelled publications would place an undue burden on the press by diverting resources away from other priorities and impermissibly intrude upon editorial prerogative. *Id.* at 257–58.

177. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980) (dealing with decisions to summarily close the courtroom doors). Following a first trial reversed on appeal and two subsequent retrials ending in mistrials for a defendant charged with murder, the judge and both attorneys agreed to close the courtroom to spectators at the start of a fourth trial. *Id.* at 555. It was a matter of grave

protection for confidential sources,[178] and took a decidedly pro-press stance during efforts to enforce fair reporting requirements.[179] These new rights produced intransigent disagreements between absolutists and those would advocate protecting the press only to the extent that it serves its original purpose of providing adequate checks and balances.

For example, as a part of the investigative process, journalists must occasionally rely on confidential sources to gather important news and information they might not otherwise be able to lawfully obtain. The First Amendment also provides journalists with a limited privilege not to disclose their sources of information.[180] Reporters who observed and then wrote about matters directly relating to criminal conduct could not exercise such privileges when called to testify before a grand jury.[181] Shield laws protect news gathering with a qualified privilege in less compelling circumstances by shifting the burden of proof.[182] Those seeking disclosure must prove relevance, necessity, and inability to obtain the information from other available sources.[183]

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concern to the Court, implicating the rights of those accused to a jury of their peers, a speedy public trial, effective assistance of counsel, impartial judicial proceedings, especially in capital cases, and the public's interest in the fair administration of justice. *Id.* at 584 (Stevens J., concurring). The judicial use of gag orders, the sealing of court documents, changes in venue, sequestering of jurors, and a host of other procedural mechanism have long been utilized with these interests in mind. The decision was overturned. *Id.* at 555 (majority opinion).

178. *See* Zurcher v. Stanford Daily, 436 U.S. 547, 571–72 (1978) (holding that "[p]rotection of [confidential] sources is necessary to ensure that the press can fulfill its constitutionally designated function of informing the public, because important information can often be obtained only by an assurance that the source will not be revealed") (citing Mills v. Alabama, 384 U.S. 214, 219 (1966); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964); Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936)).

179. *See* Jonathan Donnellan & Justin Peacock, *Truth and Consequences: First Amendment Protection for Accurate Reporting on Government Investigations*, 50 N.Y.L. SCH. L. REV. 237, 239–43 (2006) (discussing how even defamatory third party statements, made in public proceedings and part of public records that are fairly and accurately reported, will not result in the newspapers liability under libel law).

180. *See* Branzburg v. Hayes, 408 U.S. 665, 681 (1972); Associated Press v. United States, 326 U.S. 1, 20 (1945).

181. *Branzburg*, 408 U.S. at 667.

182. 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, 569–70 (2007).

183. *See id.* at 564–68.

Inevitably, as state laws shielding reporters' uses of unnamed sources have increased, the number of stories utilizing them has also increased, triggering a corresponding rise in prosecutorial attempts to subpoena journalists for identification of confidential sources and production of recordings, notes, documents, or photographs used to verify facts. Invariably, government officials assert interests that involve public safety, morality in relation to minors, or national security as a compelling justification when seeking access to confidential information. The most recent and shocking case dealt with the claim that high level government officials leaked the name of a CIA operative in retaliation for her husband's revelation that the Bush Administration presented fake evidence to the American public to justify the invasion of Iraq.

In mid-June 2003, according to federal court records, Bush Administration officials, including Richard Armitage, Karl Rove, and I. Lewis "Scooter" Libby, discussed with various reporters the employment of a classified, covert Central Intelligence Agency officer, Valerie E. Wilson (also known as Valerie Plame).[184] On July 14, 2003, a newspaper column entitled "Mission to Niger" by Robert Novak disclosed Plame's name and status as an "operative" who worked in a CIA division on the proliferation of weapons of mass destruction.[185] Mrs. Wilson's husband, Ambassador Joseph C. Wilson, stated in various interviews and subsequent writings (as listed in his 2004 memoir *The Politics of Truth*) that his wife's identity was covert and that members of the administration knowingly revealed it as retribution for his op-ed entitled "What I Didn't Find in Africa," published in the *New York Times* on July 6, 2003.[186] There was little discussion of the journalist Robert Novak's potential culpability in this case. Only one government official, I. Lewis "Scooter "Libby, was convicted, sentenced, and then immediately granted clemency by President George W. Bush.[187]

Historically, the courts have been reluctant to extend unqualified protection of the identity of confidential sources. Journalists claim that without the promise of anonymity, reluctant sources remain silent, thereby chilling the free flow of information.

184. For information about the Valerie Wilson affair, see Scott Shane & Neil A. Lewis, *Bush Commutes Libby Sentence, Saying 30 Months "Is Excessive"*, N.Y. TIMES, July 3, 2007, at A1.

185. Robert Novak, *Mission to Niger*, WASH. POST, July 14, 2003, at A21.

186. JOSEPH WILSON, THE POLITICS OF TRUTH: INSIDE THE LIES THAT LED TO WAR AND BETRAYED MY WIFE'S CIA IDENTITY 326–43 (2004).

187. *See* Shane & Lewis, *supra* note 184.

Publishers warn that the burden on news gathering that results from compelled disclosure outweighs the public interest in obtaining the information because future sources with legitimate fears of retribution will decline to speak. Compelled disclosure tends to hinder investigative reporting into high-level corruption, such as found in the Enron case. Investigative reporting is directly tied to uncovering information about wide-scale corruption and injury to large segments of the public. Thus, the only sustained public interest appears to relate to law enforcement, which has occasionally been held to outweigh the "burden on news gathering."[188]

This stance is interesting because any principled discussion of the First Amendment guarantee of a free press would have to concede that investigative journalism focused upon government officials and powerful corporate actors is the closest we will ever get to the heart of the constitutional guarantee. Essays written by award winning journalists reveal a very different reality beneath the so-called protective surface of the press guarantee.[189] Serious journalists face growing efforts to control their work product, ranging from increases in editorial discretion, to privishing,[190] to the prospect of imprisonment, and even death.

There are reporters for whom serious news is the only news, and they have indeed paid a price for revealing information that powerful corporate and government actors have fought to keep secret. Writer and activist Naomi Wolf wrote an article for the newspaper the *Guardian* entitled "A Fascist America in Ten Easy Steps" where she warned of the consequences of the public's ignorance of increased governmental actions to control the press.[191]

> The Committee to Protect Journalists says arrests of US journalists are at an all-time high: Josh Wolf (no relation), a blogger in San Francisco, has been put in jail for a year for refusing to turn over video of an anti-war demonstration; Homeland Security brought a criminal

188. Branzburg v. Hayes, 408 U.S. 665, 690–91 (1972).

189. *See generally* INTO THE BUZZSAW: LEADING JOURNALISTS EXPOSE THE MYTH OF A FREE PRESS (Kristina Borjesson ed., 2002).

190. *See, e.g.,* Gerald Colby, *The Price of Liberty*, *in* INTO THE BUZZSAW, *supra* note 189, at 15–33 (describing the advent of privishing in the publishing industry).

191. Naomi Wolf, *Fascist America, in 10 Easy Steps*, THE GUARDIAN (London), Apr. 24, 2007, *available at* http://www.guardian.co.uk/world/2007/apr/24/usa.comment. Wolf argues that the United States is sliding into fascism, outlining this contention in ten points. This article is an adaptation from her latest book THE END OF AMERICA: A LETTER OF WARNING TO A YOUNG PATRIOT (2007).

> complaint against reporter Greg Palast, claiming he threatened "critical infrastructure" when he and a TV producer were filming victims of Hurricane Katrina in Louisiana. Palast had written a bestseller critical of the Bush administration.
>
> Prosecution and job loss are nothing, though, compared with how the US is treating journalists seeking to cover the conflict in Iraq in an unbiased way. The Committee to Protect Journalists has documented multiple accounts of the US military in Iraq firing upon or threatening to fire upon unembedded (meaning independent) reporters and camera operators from organisations ranging from al-Jazeera to the BBC. While westerners may question the accounts by al-Jazeera, they should pay attention to the accounts of reporters such as the BBC's Kate Adie. In some cases reporters have been wounded or killed, including ITN's Terry Lloyd in 2003. Both CBS and the Associated Press in Iraq had staff members seized by the US military and taken to violent prisons; the news organisations were unable to see the evidence against their staffers.[192]

Many of the better known faces of national media represent corporate and political forces that ignore journalistic standards. David Walker of the *Guardian* warns that today's "journalists and editors undertake deliberate political activism in their writing," demonstrating a dangerous trend toward mixing commentary and factual reporting, thereby increasing public distrust of political discourse.[193] The business of trading off-the-record information or leaked information for favorable coverage and the phenomenal growth of stories based upon unsubstantiated information weakens representative politics. If the press is to play a constitutionally protected role in providing checks and balances against abuse of power, then setting adequate priorities is the place to start and the courts can assist in that process.

Worse still is the presence of the tabloid press, merchants of sleaze who refer to themselves as the entertainment press. The problem is that they capitalize on inadequate court enforcement of

192. *Id.*

193. *Invisible Political Actors: The Press as Agents of Anti-Politics*, Unlock Democracy Incorporating Charter 88, Nov. 18, 2004, *available at* http://www.unlockdemocracy.org.uk/?p=178 (discussing David Walker's critique of the political agenda of the national press).

the laws of defamation and privacy in order to satisfy voyeuristic tendencies, by printing salacious gossip and unauthorized photographs in order to turn a profit.[194] Even reputable news organizations have coined the phrase "entertainment news" and added such segments to their regular newscasts. In short, detailed coverage of Enron and similar corporate scandals is far closer to what the public has a right to know than what Britney Spears was wearing to her latest custody hearing in her quest to divorce Kevin Federline.

In response to such developments, a broad coalition of consumer, public interest, media reform, organized labor, and other groups representing millions of Americans have proposed a Bill of Media Rights:[195]

Media That Provide "An Uninhibited Marketplace of Ideas"

The American public has a right to:

- Journalism that fully informs the public, is independent of the government and acts as its watchdog, and protects journalists who dissent from their employers.

- Newspapers, television and radio stations, cable and satellite systems, and broadcast and cable networks operated by multiple, diverse, and independent owners that compete vigorously and employ a diverse workforce.

- Radio and television programming produced by independent creators that is original, challenging, controversial, and diverse.

- Programming, stories, and speech produced by communities.

194. Robin D. Barnes, *The Caroline Verdict: Protecting Individual Privacy Against Media Invasion As a Matter of Human Rights*, 110 PENN ST. L. REV. 599, 601 (2006).

195. *See* FLORIDA PIRG, *Bill of Media Rights, at* http://www.floridapirg.org/uploads/KG/jB/KGjBfY–RQVU34ZOsVByvQ/media-bill-of-rights.pdf (last visited Mar. 3, 2008).

- Internet service provided by multiple, independent providers who compete vigorously and offer access to the entire Internet over a broadband connection, with freedom to attach within the home any legal device to the net connection and run any legal application.

- Public broadcasting insulated from political and commercial interests that is well-funded and especially serves communities underserved by privately-owned broadcasters.

- Regulatory policies emphasizing media education and public empowerment, not government censorship, as the best ways to avoid unwanted content.

Media That Use The Public's Airwaves To Serve The Public Interest

The American public has a right to:

- Electoral and civic, children's, educational, independently produced, local and community programming, as well as programming that serves Americans with disabilities and underserved communities.

- Media that reflect the presence and voices of people of color, women, labor, immigrants, Americans with disabilities, and other communities often underrepresented.

- Maximum access and opportunity to use the public airwaves and spectrum.

- Meaningful participation in government media policy, including disclosure of the ways broadcasters comply with their public interest obligations,

ascertain their community's needs, and create programming to serve those needs.

<u>Media That Reflect And Respond To Their Local Communities</u>

The American public has a right to:

- Television and radio stations that are locally owned and operated, reflective of and responsible to the diverse communities they serve, and able to respond quickly to local emergencies.

- Well-funded local public access channels and community radio, including low-power FM radio stations.

- Universal, affordable Internet access for news, education, and government information, so that the public can better participate in our democracy and culture.

- Frequent, rigorous license and franchise renewal processes for local broadcasters and cable operators that meaningfully include the public.[196]

VI. CONCLUSION

Offering special protections to the press is consistent with the goals of democracy. Public demand for access to information and greater participation in decision-making processes in legitimate areas of public concern was the primary basis for expanding protections available to the press today. For example, official harassment of the press for the purpose of disrupting a reporter's relationship with his news sources under the guise of law enforcement has no justification and is prohibited under United States law. Grand jury investigations, if instituted in bad faith, often serve as retaliation or retribution for investigative reports. We outlaw this behavior in theory; in practice, many claim that a whole

196. *Id.*

other story is unfolding. Forcing journalists to reveal their confidential sources would have a chilling effect on future efforts.[197] The privilege is vital when the accused is a government, church, or large-scale corporate official. The question remains whether the same analysis is relevant to smaller private or individual defendants.

Government secrecy is the next frontier. American media has failed to use its reaffirmed freedom to pursue what the public really has a right know—government secrets that hide corruption, error, and waste of public funds.[198] Critics warn that judges, meanwhile, have enlarged their own bureaucratic stake in secrets. To promote efficiency—but certainly not justice—they lock down a large number of reports containing information revealed during pre-trial discovery and regarding financial settlements, thus denying information to other injured parties. For example, Frankel notes that when *Business Week* obtained evidence of corporate fraud, "it was censored for three weeks and dragged through months of litigation before it could shake off a judge's vindictive charge of illegal conduct."[199]

These examples confirm that democratic processes must be reaffirmed in each generation. Noting what has happened with criminal libel and suppression of dissident voices in all movements for equality both here and abroad, demonstrates the need for considerable deliberation of every rule that impacts speech and press. But, the decline of reporting on matters affecting public policy and governance coupled with the proliferation of tabloid publishers who claim that the moral values and lifestyles of celebrities are matters of public concern, on the theory that they deserve more scrutiny just because some people base their choice of lifestyle on their example, is a troubling development. In the past forty years there has been a marked increase in claims of libel, defamation, invasions of privacy, and presentation of true information in a false light. Beside the injuries to individuals targeted, many note widespread societal harms. According to Lee Bollinger, our code of civility is under attack. Justice Harlan warned in *Curtis Publishing Co. v. Butts*[200] about problems beyond the precipitous deterioration in the quality of public discourse. He

197. *See* Donnellan & Peacock, *supra* note 179 and accompanying text.

198. *See* Frankel, *supra* note 154, at 20 (discussing the role of the press in the failure to pursue and produce government secrets).

199. *Id.*

200. 388 U.S. 130, 149–51 (1975).

noted the effect of the rapid decline in citizen access to truthful information.[201] Justice Harlan believed that public officials and public figures deserved public vindication in response to public humiliation and that a societal interest in receiving truthful information is a compelling justification for modifying the actual malice test developed in *New York Times Co. v. Sullivan.*[202]

Getting back on course and returning to those time-honored values for which press privileges were first granted is urgently needed. The press has the power to regulate itself in these areas before it becomes necessary for the courts to intervene. Following the example of National Public Radio, in its classic journalistic mode, when they pledged to "actively explore, investigate and interpret issues of national and international import," with programming that will "enable the individual to better understand himself, his government, his institutions and his natural and social environment so he can intelligently participate in effecting the process of change"[203] would be an excellent place to start.

201. *Id.* at 150–51.
202. *Id.* at 152–53 (discussing New York Times Co. v. Sullivan, 376 U.S. 967 (1964)).
203. Siemering, *supra* note 52.