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Eric Easton

University of Baltimore School of Law, eeaston@ubalt.edu

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PUBLIC IMPORTANCE: BALANCING PROPRIETARY INTERESTS AND THE RIGHT TO KNOW

ERIC B. EASTON*

The extension of the *New York Times* test proposed by the Rosenbloom plurality would . . . [force] state and federal judges to decide on an ad hoc basis which publications address issues of “general or public interest” and which do not—to determine, in the words of Mr. Justice Marshall, “what information is relevant to self-government.”¹ We doubt the wisdom of committing this task to the conscience of judges.

—*Gertz v. Robert Welch, Inc.*, 418 U.S. 346 (1974).

The enforcement of that provision in this case, however, implicates the core purposes of the First Amendment because it imposes sanctions on the publication of truthful information of public concern. In this case, privacy concerns give way when balanced against the interest in publishing matters of public importance. As Warren and Brandeis stated in their classic law review article: “The right of privacy does not prohibit any publication of matter which is of public or general interest.”²

—*Bartnicki v. Vopper*, 121 S.Ct. 1764-65 (2001).

INTRODUCTION

Articulating a coherent, all-encompassing First Amendment doctrine for freedom of speech and of the press has so far eluded every scholar who has tried, not least because of the variety of analytical approaches and potentially dispositive factors in Supreme Court jurisprudence.³ For example, the same regulation might be

* Associate Professor, University of Baltimore School of Law. B.S. Northwestern University, 1968; J.D., University of Maryland School of Law, 1989. I wish to thank my colleagues Michael Meyerson and Robert Lande for their generous assistance and inspiration. Whatever errors may be found in this article undoubtedly result from my disregarding their sage advice.

¹ *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 79 (1971).

² Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214 (1890).

³ See, e.g., Harry Kalven, Jr., A WORTHY TRADITION 3 (1988) (“The Court has not fashioned a single, general theory which would explain all of its [freedom of speech] decisions; rather, it has floated different principles for different problems.”); Rodney A. Smolla, FREE SPEECH IN AN OPEN SOCIETY 18 (1992) (“[M]odern First Amendment problems present an intricate maze of competing philosophies, sharp social conflicts and complicated legal doc-

enforceable in one medium, but not another;⁴ in one forum, but not another.⁵ Enforceability may depend on the regulator's purpose and drafting skill, or not,⁶ depending in turn on whether the speech deserves full protection,⁷ some protection,⁸ or no protection at all.⁹ Sometimes enforceability depends on the speaker's intent,¹⁰ or knowledge,¹¹ or care¹² . . . or none of those factors.¹³ Sometimes it depends on the speaker's status¹⁴ or access to alternative communication channels;¹⁵ sometimes it depends on the status

trines. . . . The modern student of free speech will quickly be tempted to abandon the search for general organizing principles. . . ."); STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY AND ROMANCE* 2-3 (1993) ("First amendment law now is, if nothing else, a complex set of compromises. . . . a committee product. . . . To formulate an organizing vision for the first amendment is to risk detachment from social reality.").

⁴ Compare *Miami Herald v. Tornillo*, 418 U.S. 241 (1974) (state law requiring newspapers to provide space for political candidates to reply to adverse editorials violated First Amendment freedom of the press), with *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (federal policy requiring broadcasters to provide time for political candidates to reply to adverse editorials did not violate First Amendment freedom of the press).

⁵ Compare *Madison Jt. Sch. Dist. v. Wis. Empl. Rel. Commn.*, 429 U.S. 167 (1976) (school district would violate nonunion teacher's First Amendment right of free speech by prohibiting him from speaking on collective bargaining negotiations at a public board of education meeting), with *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983) (school district did not violate the First Amendment by permitting teachers' exclusive bargaining representative access to the inter-school mail system but denying such access to a rival teacher group).

⁶ See *Turner Broad. Sys., Inc. v. FCC [Turner I]*, 512 U.S. 622, 642-43 (1994) ("But while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content-based, it is not necessary to such a showing in all cases. Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content." (citations omitted)).

⁷ See, e.g., *Reno v. ACLU*, 521 U.S. 844, 875 (1997) (governmental interest in protecting children from harmful materials does not justify an unnecessarily broad suppression of speech meant for adults).

⁸ See, e.g., *Barnes v. Glen Theatre*, 501 U.S. 560, 567 (1991) (state public indecency statute is constitutional despite its incidental limitations on some expressive activity).

⁹ See, e.g., *Miller v. California*, 413 U.S. 15, 23 (1973) ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.").

¹⁰ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action. . . .").

¹¹ See, e.g., *Smith v. California*, 361 U.S. 147, 153-55 (1959) (absent a scienter requirement, an ordinance holding a bookseller criminally liable for stocking an obscene book is unconstitutional).

¹² See, e.g., *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964) (requiring a public official plaintiff to show that a libel defendant acted with actual malice, that is knowledge of falsity or reckless disregard for the truth).

¹³ See, e.g., *Cohen v. Cowles Media*, 501 U.S. 663, 669 (1991) (generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news).

¹⁴ See, e.g., *Doe v. McMillan*, 412 U.S. 306, 314-16 (1973) (members of Congress and their staffs held immune from libel action for ordering or voting for a publication going beyond the reasonable requirements of the legislative function, but not those legislative functionaries involved in the publishing or distribution of otherwise actionable materials).

¹⁵ See, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (government may impose reasonable restrictions on the time, place, or manner of pro-

or access of one who objects to the speaker's speech.¹⁶

In any given case, the analysis may begin with the speaker or the speech, with the regulator or the regulator's putative beneficiary. Although difficult and inconsistent, these analyses are reasonably well-established. Some questions remain unresolved, and new media—like the Internet—send lawyers scrambling to find appropriate analogs, judges to select among them, and law professors to second-guess judges.¹⁷ But, in general, the cases tell us what rules to apply, if not exactly how to apply them.

In a handful of cases, however, the analysis focuses on the speaker's audience—the listener or reader or public in general. Because the rights of the listener are poorly defined, and the power of the public vigorously disputed,¹⁸ consistency is even harder to find in these cases. This article endeavors to bring some coherence to this body of law by identifying its source and surveying its contemporary application. Simply stated, this article argues that the First Amendment's penumbral "right to know" is the source of a "public importance test" that the Supreme Court has reluctantly, but ineluctably, adopted to help mediate between the proprietary claims of private citizens and the reportorial imperatives of the press. It goes on to suggest that, properly applied, this public importance test has significant implications for freeing proprietary information, whether held by government or private entities. It concludes that several areas of law generally thought to be exempt from constitutional analysis—newsgathering torts, freedom of information statutes, and especially copyright law—must be reexamined in light of this test.

Few of the corollary principles that grow out of the First Amendment have inspired more thoughtful scholarship and impassioned debate than the notion that an implicit right to know

tected speech, provided the restrictions. . . leave open ample alternative channels for communication of the information).

¹⁶ See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (setting a lower constitutional fault standard for libel plaintiffs who are private individuals than for public official or public figures).

¹⁷ Compare *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) (treating Internet Service Providers (ISPs) as "distributors," rather than "publishers" of libelous material), with *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 N.Y. Misc. LEXIS 1995 (N.Y. Sup. May 24, 1995) (treating ISPs as publishers under similar circumstances). See also Michael I. Meyerson, *Authors, Editors, and Uncommon Carriers: Identifying the "Speaker" Within the New Media*, 71 NOTRE DAME L. REV. 79, 123 (1995) (urging that ISP liability be limited to those instances where the ISP had a high degree of involvement in the offending speech). This issue was resolved by Congress in the Communications Decency Act of 1996, 47 U.S.C. § 230, which immunized ISPs from publisher liability. See *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

¹⁸ See *infra* text accompanying notes 111-43.

accompanies the explicit right to speak. In Part I of this article, I suggest that the right to receive information (a more precise, if rather awkward, formulation than “right to know”) holds a long-standing and positive place in First Amendment jurisprudence as an indispensable complement to the right to speak.¹⁹

Yet, as Part II demonstrates, some scholars believe that the right to know precedes, explains, and justifies the right to speak, and therefore invites or even requires government intervention to temper the right to speak where necessary to serve the public debate.²⁰ Others, seeing this connection as a dangerous, ideologically motivated infringement on free speech and press, deny the very existence of a right to know.²¹ Still others, uncomfortable with the implications of a strong right to know, but unable to deny its existence, would enforce the right pragmatically against some kinds of speech or some kinds of media.²²

In Part III, I assert that the right to know, like the right to speak itself, is a right that individuals may exercise solely against their government. In particular, it cannot be used to bootstrap direct government regulation of media content when a broader public interest in “uninhibited, robust and wide-open” debate²³ appears threatened by private actions.²⁴

Government intervention may be necessary to preserve the “marketplace of ideas”²⁵ by limiting structural concentration in the media industry, and proper application of the right to know can support that purpose,²⁶ but the First Amendment stands as a bar to any government intervention that prohibits or compels private speech.

Having determined what the right to know is not, Part IV identifies the “public importance test” as a manifestation of the public’s right to know and surveys applications of the test in libel and privacy cases from *New York Times v. Sullivan*²⁷ to *Bartnicki v. Vopper*.²⁸

¹⁹ See *infra* text accompanying notes 38-110.

²⁰ See *infra* text accompanying notes 125-31.

²¹ See *infra* text accompanying notes 116-24.

²² See *infra* text accompanying notes 132-43.

²³ *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

²⁴ See *infra* text accompanying notes 144-68.

²⁵ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . .”); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market. . . .”).

²⁶ See *infra* text accompanying notes 169-71.

²⁷ 376 U.S. 254 (1964).

²⁸ 532 U.S. 514 (2001).

The test is sometimes called “public interest,”²⁹ sometimes “legitimate public concern,”³⁰ and sometimes “newsworthiness.”³¹ As a constitutional *fact*, the importance of information can bar government suppression of speech and perhaps even discourage punishment when reporters have compromised their own interests through tortious or criminal acts.³²

Then again, speech is sometimes suppressed or punishment meted out whether the speech is important or not. Predictability remains elusive, especially in newsgathering, access to public records, and copyright. In Part V, I urge the vigorous application of a public importance test in these areas, which might be characterized as “unwilling speaker” cases.³³ Far from being merely a “dangerous slogan,”³⁴ or a post-modern construct designed to thwart the libertarian view of the First Amendment, the right to know, manifested in this way, offers new support for expanding the amount of information in the public domain.³⁵

Part VI raises two cautionary notes: (1) that deference to proprietary rights such as personal privacy, government secrecy, and copyright may be necessary, as a practical matter, to preserve core freedoms of speech and publishing,³⁶ and (2) that investing in courts the power to determine the public importance undermines both the political branches and the independent judgment of journalists.³⁷ Nevertheless, I conclude that, once the courts accept the notion that a First Amendment right to know prevents Congress

²⁹ I use the term “public importance” to avoid the confusion inherent in the term “public interest.” One dictionary offers two definitions of public interest: “1. the welfare or well-being of the general public; commonwealth: *health programs that directly affect the public interest*. 2. appeal or relevance to the general populace: *a news story of public interest*.” *Random House Unabridged Dictionary* 1563 (2d ed. 1993) (emphasis in original). In this article, I am primarily concerned with the latter, and while “public interest” appears far more frequently in the literature, using “public importance” better preserves the distinction between the two meanings.

³⁰ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571-72 (1968) (“the question whether a school system requires additional funds is a matter of legitimate public concern on which. . . free and open debate is vital to informed decision-making by the electorate”). See also *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting “legitimate public concern” standard from *Pickering*).

³¹ *Garrison v. Louisiana*, 379 U.S. 64, 73 n.9 (1964) (noting that the law of privacy recognizes severe limitations where public figures or newsworthy facts are concerned).

³² See *infra* text accompanying notes 172-244.

³³ It is often said, in a disparaging tone, that if the “right to know” exists at all, it merely protects from unwarranted government interference the right of a willing listener to hear a willing speaker. In the case of newsgathering, access to government information, and copyright, however, I argue that the right to know can and should be asserted against government to pry information from unwilling speakers.

³⁴ Lucas A. Powe, Jr., *THE FOURTH ESTATE AND THE CONSTITUTION* 257 (1992).

³⁵ See *infra* text accompanying notes 245-341.

³⁶ See *infra* text accompanying notes 341-47.

³⁷ See *infra* text accompanying notes 348-50.

from having a free hand in restricting the flow of information, the courts themselves will find the proper balance the way they always do, one difficult case at a time. In any event, there is no reasonable alternative.

I. THE RIGHT TO KNOW

Although *Red Lion Broadcasting Co. v. FCC*³⁸ is generally considered the preeminent “right to know” case, the concept goes back much further in First Amendment jurisprudence.³⁹ Even before the First Amendment’s right to speak was formally incorporated through the Due Process Clause of the Fourteenth Amendment to apply to state law,⁴⁰ the U.S. Supreme Court in *Meyer v. Nebraska*⁴¹ averred that the right to receive information was itself protected as a “liberty interest” by that same Clause.⁴² Striking down Nebraska’s World War I-era ban on teaching children to read in German or other foreign languages, the Court found that the concept of liberty “[w]ithout doubt” includes “the right of the *individual*. . . to acquire useful knowledge.”⁴³ Moreover, the Court said,

this liberty may not be interfered with, *under the guise of protecting the public interest*, by legislative action which is arbitrary or without some reasonable relation to some purpose within the competency of the state to effect. . . . The American people have always regarded education and *acquisition of knowledge* as matters of supreme importance, which should be diligently promoted.⁴⁴

In *Meyer*, the relationship between the right to know and the right to speak was symbiotic. Although it is possible to see *Meyer* as turning exclusively on the teacher’s right to speak, the better view is that the reversal of *Meyer*’s conviction vindicates both aspects of this liberty interest.⁴⁵

³⁸ 395 U.S. 367 (1969).

³⁹ See Wilfrid C. Rumble, student author, *The FCC’s Reliance on Market Incentives to Provide Diverse Viewpoints on Issues of Public Importance Violates the First Amendment’s Right to Receive Critical Information*, 28 U.S.F.L. REV. 793 (1994). Although I obviously disagree with this Comment’s thesis, its author has done an admirable job in assembling the important cases.

⁴⁰ See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

⁴¹ 262 U.S. 390 (1923).

⁴² *Id.* at 399 (1923); see also *Pierce v. Society of Sisters of Holy Names*, 268 U.S. 510, 534-35 (1925) (holding that the liberty interest protects the right of parents to educate their children in private schools).

⁴³ *Id.* (emphasis added).

⁴⁴ *Id.* at 399-400 (emphasis added).

⁴⁵ The *Meyer* Court does not explicitly address whether the teacher had standing to raise the student’s right to receive the German language training. But a later case, *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965), not only settles the issue in favor of the speaker’s standing to raise the constitutional rights of the listener, it even cites *Meyer* as a case in which this was done. *Id.* *Griswold*’s value to this discussion is somewhat limited by the fact

Nearly twenty years later, long after incorporation, the Court reaffirmed the right to receive information in *Martin v. City of Struthers*,⁴⁶ which struck down a local ordinance barring door-to-door distribution of handbills, circulars, or other advertisements.⁴⁷ Again, the Court enlisted “the right of the *individual* householder” to receive the information in support of the convicted distributor’s right to distribute it.⁴⁸

The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance (footnote omitted). This freedom embraces the right to distribute literature, *Lovell v. Griffin*, 303 U.S. 444, 452 (1938), and *necessarily protects the right to receive it*.⁴⁹

As in *Meyer*, the Court saw no need to state with specificity whether Martin would have prevailed solely on the ground of her right to speak, without reference to anyone’s right to receive information.⁵⁰ Both opinions also took the measure of the countervailing government interests, easily finding them inferior, but neither laid down any rigorous criteria for the balancing test.⁵¹

Other contemporaneous cases also spoke to the right to receive information,⁵² but it was not until 1965 that the Court finally

that, ultimately, the holding turned on the unconstitutionality of state prohibition on contraception as an invasion of privacy, rather than merely the right to receive information about contraception. Still, as suggested below, the relationship between privacy and the right to receive information is not without relevance. See *infra* text accompanying notes 201-244.

⁴⁶ 319 U.S. 141 (1943).

⁴⁷ See *id.* at 143.

⁴⁸ *Id.* (emphasis added).

⁴⁹ *Id.* (emphasis added).

⁵⁰ The Court’s citation to *Lovell v. Griffin*, another Jehovah’s Witnesses case, is curious. In *Lovell*, a municipal ordinance barring distribution of handbills without a license was struck down without reference to the right to receive information. Presumably, the same rationale would be available to Martin. But the Court’s sentence structure would seem to suggest that the right to receive information stands alone.

⁵¹ See *Meyer*, 262 U.S. 390, 403 (1923) (“No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed.”), and *Martin*, 319 U.S. at 147 (“The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.”) The language from *Meyer* quoted in the text might suggest a modern “rational basis” test, but the better interpretation would be that, having found that the statute failed even that minimal test, 262 U.S. at 403, the Court had no need to look further.

⁵² See, e.g., *Thomas v. Collins*, 323 U.S. 516, 534 (1945) (reversing the conviction of a union organizer for speaking to a group of workers without the required state license, on ground that the license requirement imposed an unconstitutional “restriction upon

confronted a pair of cases that placed the right to receive before the Court without a corresponding right to speak. Both cases pit the appellants' right to receive information against the government's asserted national security interest.

In *Zemel v. Rusk*,⁵³ the Court upheld the State Department's refusal to validate a private citizen's passport for travel to Cuba "to satisfy [his] curiosity about the state of affairs in Cuba and to make [him] a better informed citizen."⁵⁴ The Court denied that Zemel's First Amendment rights were implicated by the government's action, distinguishing earlier cases reversing passport denials by the absence of any asserted interest in expression or association.⁵⁵ The Court conceded that the government's action "renders less than wholly free the flow of information concerning [Cuba]," but saw that as a "factor to be considered in determining whether [Zemel] had been denied due process of law."⁵⁶

The Court read the government's action as a restriction on Zemel's right to *act*, not his right to receive information.⁵⁷ Indeed, the Court's only reference to such a right was even less than lip service: "The right to speak and publish does not carry with it the *unrestrained* right to gather information."⁵⁸

Two weeks later, the Court issued a dramatically different opinion. In *Lamont v. Postmaster General*,⁵⁹ the Court struck down a federal statute requiring a request in writing as a prerequisite to the delivery of nonsealed mail from abroad containing Communist propaganda material. In a very brief and narrow opinion, Justice Douglas held the requirement an "unconstitutional abridgment of the addressee's First Amendment rights."⁶⁰ While he did not say precisely which First Amendment right was implicated, the right to receive information is the only logical possibility.⁶¹ Justice Brennan

Thomas' right to speak and the rights of the workers to hear what he had to say. . . .") and *Marsh v. Alabama*, 326 U.S. 501, 508-9 (1946) (reversing the conviction of a Jehovah's Witness for distributing literature on the sidewalks of a company-owned town, on ground that the First and Fourteenth Amendments prohibit censorship of the information the residents of the town need to be properly informed, good citizens).

⁵³ 381 U.S. 1 (1965).

⁵⁴ *Id.* at 4.

⁵⁵ *See id.* at 16 (distinguishing *Kent v. Dulles*, 357 U.S. 116 (1958), and *Aptheker v. Secretary of State*, 378 U.S. 500 (1964)).

⁵⁶ *See Zemel*, 381 U.S. at 16.

⁵⁷ *See id.* (emphasis added).

⁵⁸ *Id.* at 17 (emphasis added).

⁵⁹ 381 U.S. 301 (1965).

⁶⁰ *Id.* at 307.

⁶¹ It might seem as though Lamont's right to refrain from compelled speech is also implicated by the requirement for a written request. But there would be no compulsion issue unless Lamont wanted to receive mail that was withheld because of its political content, in this case, the *Peking Review*. *Id.* at 304. Signing for routinely undeliverable mail has

spells it out in a concurring opinion:

It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful (citations omitted). I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.⁶²

So, how are these cases to be reconciled? Although *Zemel* appears to give short shrift to any right to receive information, the Court was really looking at the conduct that would be required before any information could be received. Conduct, other than “expressive” conduct, is not protected by First Amendment,⁶³ and therefore could not prevail over the asserted national security interest. *Lamont* involved a similar national security interest,⁶⁴ but against speech, not mere conduct, so the First Amendment right to receive information was squarely before the Court.

Justice Douglas does not even try to balance *Lamont*’s interest in receiving the speech in question against the government’s interest in suppressing it.⁶⁵ He simply strikes down the regulation as an unconstitutional burden, like a license requirement or tax, on the exercise of *Lamont*’s First Amendment right.⁶⁶

never been considered “compelled speech.” *Lamont*’s own speech interest plays no role in the case, although he intended to redistribute the magazine. *Id.* Nor is the ultimate disposition of the material a factor in government’s decision to withhold it. And Justice Brennan’s concurrence puts to rest any concern that the sender’s speech interests are implicated. *Id.* at 308 (Brennan, J., concurring).

⁶² *Id.*

⁶³ That, of course, has been the primary doctrinal argument against First Amendment protection for newsgathering. The author has previously written that *Zemel* was not really a newsgathering case, in part because bona fide journalists were receiving State Department approval to travel to Cuba. See Eric B. Easton, *Two Wrongs Mock a Right: Overcoming the Cohen Maledicta that Bar First Amendment Protection for Newsgathering*, 58 OHIO ST. L.J. 1135, 1148 (1997) [hereinafter Easton, *Two Wrongs*].

⁶⁴ In both cases, the regulations in question were justified in part by the claim that such intercourse somehow subsidized these antagonistic regimes or furthered their revolutionary aims. See *Zemel v. Rusk*, 381 U.S. 1, 14-15, and *Lamont v. Postmaster General*, 381 U.S. 301, 310 (1965) (Brennan, J., concurring).

⁶⁵ It should not be surprising that Justice Douglas does not talk about “balancing,” famous as he was for his First Amendment absolutism. See, e.g., *CBS v. Democratic Natl. Comm.*, 412 U.S. 94, 156 (1973) (Douglas, J., concurring in the judgment). In fact, the notion that there is any balancing to be done in a case involving content-based regulation would have been anathema to him. For a discussion of the illegitimacy of balancing in such circumstances, see *Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124-28 (1991) (Kennedy, J., concurring in the judgment).

⁶⁶ See *Lamont*, 381 U.S. at 305-6 (“Just as the licensing or taxing authorities in the *Lovell*,

By 1969, the Court could declare in *Stanley v. Georgia*⁶⁷ that, “It is now well established that the Constitution protects the right to receive information and ideas.”⁶⁸ Citing *Martin, Griswold, Lamont*, and *Pierce*, Justice Marshall wrote, “This right to receive information and ideas, regardless of worth (citation omitted), is fundamental to our free society.”⁶⁹ Significantly, Marshall tied the right to receive information that the Court, found by the Court in *Stanley* to be inextricably tied to a penumbral privacy right *vis a vis* government:

Moreover, in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person’s own home—that right [to receive information] takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy.⁷⁰

Through *Stanley*, then, the First Amendment right to receive information is consistently reaffirmed as an individual right against the government’s interest, even the broad “public interest,” in suppressing obscene speech. Two months later, everything changed.

Without citing even one of the cases discussed above, Justice White co-opts and distorts individuals’ right to receive information in order to uphold the federal government’s imposition of the Fairness Doctrine and its right of reply on broadcasters. His words in *Red Lion* have become the mantra of those advocating government intervention in the arena of free speech:

Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the *people as a whole* retain their interest in free speech by radio and *their collective right* to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount (citations omitted). It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee (citations omitted). It is

Thomas and *Murdock* cases sought to control the flow of ideas to the public, so here federal agencies regulate the flow of mail.”)

⁶⁷ 394 U.S. 557 (1969) (striking down a Georgia law that imposed criminal penalties for mere possession of obscene materials).

⁶⁸ *Id.* at 564.

⁶⁹ *Id.*

⁷⁰ *Id.* at 564.

the *right of the public to receive suitable access* to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not be constitutionally abridged either by Congress or by the FCC.⁷¹

In Part III, I will more closely examine the thesis that Justice White erroneously conflated the First Amendment right to know with a public interest in receiving information that predates the First Amendment and grows out of the constitutional structure as a whole.⁷² I will not dwell on whether, after correcting their doctrinal foundation, the Fairness Doctrine and other broadcast regulations were constitutionally permissible, although I will discuss the continuing viability of such regulations.⁷³ The question that remains for us here is whether the First Amendment ever permits, let alone compels, government intervention to curtail one speaker's rights if more speech, from more and more diverse speakers, will reach the public listeners as a result.⁷⁴

This question was not presented in the next "right to know" case, *Kleindienst v. Mandel*,⁷⁵ in which the Court cited both *Red Lion* and the earlier cases to acknowledge a First Amendment right to receive information.⁷⁶ The Court wielded that right to reject the government's arguments that the First Amendment was not implicated by the Attorney General's refusal to allow a Belgian communist entry to speak at academic meetings.⁷⁷

But the Court declined to balance that right against the "plenary" power of the government to exclude aliens,⁷⁸ relying instead on the Attorney General's determination that Mandel had abused his privilege in previous visits.⁷⁹ "What First Amendment or other

⁷¹ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (emphasis added).

⁷² See *infra* text accompanying notes 144-68.

⁷³ See *infra* text accompanying notes 169-71.

⁷⁴ For this proposition, Justice White apparently relied on the words of Justice Black: "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." *Red Lion*, 395 U.S. at 392 (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)). Justice Black was saying that the First Amendment is no defense to application of the Sherman Antitrust Act to a combination of publishers acting to "restrain trade in news and views," *id.*, making the phrase singularly inapplicable to anything Justice White was talking about. See *infra* note 148 and accompanying text.

⁷⁵ 408 U.S. 753 (1972) (upholding the Attorney General's power to refuse to allow an alien scholar to enter the country to attend academic meetings against the First Amendment rights of U.S. scholars who invited him).

⁷⁶ See *id.* at 762-63. The Court cited both *Red Lion* and the line of cases vindicating individual First Amendment interests.

⁷⁷ See *id.* at 764-65. The government argued that entry involved only action, not speech, and that American scholars had alternative access to Mandel's ideas.

⁷⁸ See *id.* at 765.

⁷⁹ See *id.* at 769.

grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced is a question we neither address nor decide in this case."⁸⁰

In his dissent, however, Justice Marshall pointed out that there were two problems with the government's action:

There can be no doubt that by denying the American appellees access to Dr. Mandel, the Government has directly prevented the free interchange of ideas guaranteed by the First Amendment. It has, of course, interfered with appellees' personal rights both to hear Mandel's views and to develop and articulate their own views through interaction with Mandel. But as the court below recognized, apart from appellees' interests, there is also a 'general public interest in the prevention of any stifling of political utterance.' And the Government has interfered with this as well.⁸¹

Marshall went on to make a strong First Amendment case, relying fundamentally on the individual right expressed in *Lamont* to show that Mandel was not excludable,⁸² but the majority was determined to duck the issue.⁸³ Although Marshall recognized that the "public interest" to which he referred was something "apart from" the individual interests of the appellees, it is not clear whether he was speaking about a collective right to know or the structural interest I identify in *Red Lion*. In *Kleindienst*, unlike *Red Lion*, the two concepts were compatible, not conflicting, and Marshall wrote that government had trenched both. Consequently, the fundamental difference between them was obscured.

In 1973, the difference resurfaced in another broadcasting case. The Court held in *CBS v. Democratic National Committee (DNC)*⁸⁴ that the First Amendment did not compel broadcasters to

⁸⁰ *Id.* at 770.

⁸¹ *Id.* at 776 (Marshall, J., dissenting) (citing *Mandel v. Kleindienst*, 325 F.Supp. 620, 632 (1971)).

⁸² See *Kleindienst*, 408 U.S. at 781.

⁸³ See *id.* at 768-68. In a remarkable admission that it really did not know how to deal with this individual right to receive information, the majority said:

Were we to endorse the proposition that governmental power to withhold a waiver must yield whenever a bona fide claim is made that American citizens wish to meet and talk with an alien excludable under § 212 (a)(28), one of two unsatisfactory results would necessarily ensue. Either every claim would prevail, in which case the plenary discretionary authority Congress granted the Executive becomes a nullity, or courts in each case would be required to weigh the strength of the audience's interest against that of the Government in refusing a waiver to the particular alien applicant, according to some as yet undetermined standard.

Id.

⁸⁴ 412 U.S. 94 (1973).

take paid editorial advertising,⁸⁵ but a majority appeared to leave open the possibility that the First Amendment would not prevent the FCC from imposing such a requirement in the public interest.⁸⁶ Grounding its opinion solidly in the *Red Lion* doctrine,⁸⁷ five members of the Court spoke of the “continuing search for means to achieve reasonable regulation compatible with the First Amendment rights of the public and the licensees.”⁸⁸ At the very least, the majority said, “courts should not freeze this necessarily dynamic process into a constitutional holding.”⁸⁹

If the majority opinion in *CBS* is cautious and deferential, the separate opinions reveal dramatically how pervasive Justice White’s error had become. Following the Court of Appeals,⁹⁰ Justice Brennan, writing in dissent for himself and Justice Marshall, defined the broadcasters as government actors and found their ban on editorial advertising tantamount to censorship.⁹¹ Relying largely on *Red Lion*, Brennan focused on the public’s “strong First Amendment interests in the reception of a full spectrum of views - presented in a vigorous and uninhibited manner - on controversial issues of public importance.”⁹² And those interests, he said, are thwarted by an absolute ban on editorial advertising.⁹³

In other words, the First Amendment right to know, far from being merely an aggregate of individual rights against government suppression, could be vindicated by government regulation of broadcasters, i.e., other First Amendment speakers. The fiction that a broadcaster’s ban on editorial advertising was tantamount to government action was not adopted by the majority, but the “public interest” rationale was warmly embraced by all save Justices Stewart and Douglas.

Justice Douglas, concurring in the judgment, vigorously disagreed:

I did not participate in [*Red Lion*] and, with all respect, would not support it. The Fairness Doctrine has no place in our First Amendment regime. It puts the head of the camel inside the

⁸⁵ See *id.* at 132.

⁸⁶ *Id.* at 131 (“Conceivably at some future date Congress or the Commission - or the broadcasters - may devise some kind of limited right of access that is both practicable and desirable.”).

⁸⁷ See *id.* at 101-2.

⁸⁸ *Id.* at 132.

⁸⁹ *Id.*

⁹⁰ See *Bus. Executives’ Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971).

⁹¹ See *CBS v. Democratic Nat’l Committee*, 412 U.S. 94, 180-81 (1973) (Brennan, J., dissenting).

⁹² *Id.* at 184.

⁹³ See *id.* at 196-97.

tent and enables administration after administration to toy with TV or radio in order to serve its sordid or its benevolent ends.⁹⁴

Justice Stewart wrote along similar lines, expressing “considerable doubt” over *Red Lion* and calling the regulatory scheme that it upheld “within the outer limits of First Amendment tolerability.”⁹⁵ Taking aim at the notion that government could further regulate broadcasters’ editorial decisions based on First Amendment values, Justice Stewart said First Amendment values themselves dictated that editorial decisions be made “in the free judgment of individual broadcasters” rather than by “bureaucratic fiat.”⁹⁶

Justice Stewart later reiterated that position in a dissent joined by Justice Douglas in *Pittsburgh Press v. Pittsburgh Commission on Human Relations*.⁹⁷ The cause was lost because the speech in question was gender-based advertising, but Justice Stewart’s view was adopted the following year by a unanimous Court in *Miami Herald v. Tornillo*.⁹⁸ By finally isolating the “right to know” issue from a regulated medium or disfavored speech, the Court definitively answered the second question raised by *Red Lion*. There is no right to know that can justify government intervention to curtail one speaker’s rights—even if more speech, from more and diverse speakers, will reach the public listeners as a result.

Tornillo’s facts are constitutionally indistinguishable from *Red Lion*’s. *Tornillo*’s right of reply to adverse commentary was grounded in state law, not federal regulation, but there was otherwise no difference between the two cases, . . . except, of course, that *Tornillo* sought to exercise his right of reply in a newspaper, not on a radio station. With *Red Lion* decided five years earlier, and reaffirmed in more recent broadcast cases,⁹⁹ the Court had only three alternatives: (1) apply the *Red Lion* rule in *Tornillo*, (2) overrule *Red Lion*, or (3) confine the rule of *Red Lion* to the broadcast medium.

Not only does the Court speak approvingly of Justice Stewart’s

⁹⁴ *Id.* at 154 (Douglas, J., concurring in the judgment). Justice Douglas explicitly mentioned the “right to know,” which he said had been “undermined by our decisions requiring . . . a reporter to disclose the sources of the information he comes across in investigative reporting,” *id.* at 165 (referring to *Branzburg v. Hayes*, 408 U.S. 665 (1972)), while allowing government to avoid giving evidence through the “easy use of the stamp ‘secret’ or ‘top secret.’” *Id.* at 166 (referring to *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973)). I return to that thought in Part III, *infra*.

⁹⁵ *Id.* at 138 (Stewart, J., concurring).

⁹⁶ *Id.* at 146.

⁹⁷ 413 U.S. 376 (1973).

⁹⁸ 418 U.S. 241 (1974).

⁹⁹ In addition to *CBS v. DNC* in 1973, see *United States v. Midwest Video Corp.*, 406 U.S. 649, 669 n. 27 (1972).

position in *CBS v. DNC* and *Pittsburgh Press*,¹⁰⁰ it avoids any mention of *Red Lion*. And while the Court spells out the arguments of the “access advocates” in great detail, it never confronts their underlying premise that concentration of ownership in the newspaper industry undermines the public right to receive information. Instead, the Court holds that, however valid those arguments may be, the remedy sought is flatly barred by the First Amendment.¹⁰¹

Looking back from *Tornillo*, one finds that the Court has consistently found a right to receive information that trumps the government’s right to prevent its reception.¹⁰² At the same time, the Court has rejected the notion that this right to receive information ever justifies curtailing the right to speak—at least absent some constitutional infirmity in the speech (e.g., broadcasting or unlawful advertising) or the speaker (Mandel). The post-*Tornillo* cases reinforce and refine both prongs of the doctrine.

For example, the Court upheld the right to receive information even when the recipients were prisoners¹⁰³ or students,¹⁰⁴ even when the speech was commercial,¹⁰⁵ even when the speakers were corporations,¹⁰⁶ and even when conflicting constitutional values were present.¹⁰⁷ And it rejected government suppression of speech even when suppression would favor political candidates¹⁰⁸ or utility ratepayers¹⁰⁹ whose voices might not otherwise be heard. Only

¹⁰⁰ 418 U.S. at 255-56.

¹⁰¹ See *id.* at 58.

¹⁰² For the moment, I am not considering the government’s right to withhold information that it alone owns or possesses. For that discussion, see Part V, *infra*.

¹⁰³ See *Procunier v. Martinez*, 424 U.S. 1, 48-49 (1976) (per curiam) (striking down regulations governing the censorship of prisoner correspondence, holding that both sender and recipient derive “a protection against unjustified governmental interference with the intended communication” from the First and Fourteenth Amendments).

¹⁰⁴ See *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (rejecting a school district’s unfettered discretion to remove books from school libraries, citing the “right to receive ideas [as] a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press and political freedom.”).

¹⁰⁵ See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 757 (1976) (striking down a state ban on the advertising of prescription drug prices, holding that would-be recipients of the information had standing under the First Amendment to assert their right to receive it).

¹⁰⁶ See *First National Bank v. Bellotti*, 435 U.S. 765, 791 n. 31 (1978) (striking down a state law limiting corporate contributions to referendum campaigns, asserting that the “First Amendment rejects the ‘highly paternalistic’ approach of statutes [. . .] which restrict what the people may hear.”).

¹⁰⁷ See *Richmond Newspapers v. Virginia*, 448 U.S. 555, 576 (1980) (striking down a state law permitting the exclusion of the public from criminal trials, pointing out that “[f]ree speech carries with it some freedom to listen”).

¹⁰⁸ See *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (striking down limits on campaign spending on the ground that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”).

¹⁰⁹ See *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 9-10 (1986) (vacating a

broadcast and, later, cable¹¹⁰ cases held otherwise; but that, it turns out, has been more than enough to trigger a vigorous academic debate. I explore that debate now.

II. THE RIGHT TO KNOW MISCONSTRUED

Any attempt to summarize and characterize the ideological positions that comprise the scholarship in this area must inevitably strip away the subtleties and nuances that mark its finest thinking and writing. The intellectual and even emotional power behind these arguments cannot but fade in the process, and the reader is urged to return to the original articles and books to sample (or, as I have, wallow in) some of the best scholarship of our discipline.

With that apology, then, I begin with three important and accessible monographs from the past decade: Lucas Powe's *The Fourth Estate and the Constitution*,¹¹¹ Owen Fiss's *The Irony of Free Speech*,¹¹² and Lee Bollinger's *Images of a Free Press*.¹¹³ These books, along with numerous articles by these scholars and others,¹¹⁴ represent the three main lines of thinking on the extent to which the First Amendment protects a "right to know"—sometimes articulated, sometimes implied—even at the expense of a "right to speak" under certain circumstances.¹¹⁵

Professor Powe ascribes the popularization of the "right to

Commission order requiring a utility company to disseminate the literature of a ratepayers' organization, relying in part on *Tormillo's* proscription against curtailing one speaker's right to speak in favor of another's).

¹¹⁰ See *Turner Broad. Sys. Co. v. FCC* (II), 520 U.S. 180, 227 (1998) (applying a *Red Lion*-like analysis to uphold "must-carry" requirements for cable operators, with the gate-keeping power of private cable operators purportedly supplying the artificial scarcity that justifies government intervention).

¹¹¹ See Powe, *supra* note 34.

¹¹² OWEN M. FISS, *THE IRONY OF FREE SPEECH* (1996).

¹¹³ LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* (1994).

¹¹⁴ Perhaps chief among the leading scholars most neglected in this analysis is Professor Cass R. Sunstein, whose more recent work in this area is discussed only briefly in Part VI. See *infra* text accompanying notes 345-47.

¹¹⁵ Professor Edwin Baker has recently identified four theories of democracy, and their corresponding views of the press, in a way that might shed further light on the theoretical grounding of these positions. To adherents to what Baker calls "elitist" democracy, the role of the press is essentially limited to "checking" government to prevent it from muzzling the press and prevent it from performing its essential mission of exposing corruption and incompetence among the elites who manage the country. To the "liberal pluralists," the press must also reflect the diverse interests of various segments of society, alerting constituencies to threats to those interests and mobilizing them to protect their interests. To allow the press to fulfill that function, government must prevent structural monopolization and preserve partisanship. "Republicans" fear atomization and seek, instead, the common good of society. The press must be balanced, objective, civil and inclusive, and government press policy must foster, even mandate those values. Finally, what Baker calls "complex democracy" recognizes the importance of both liberal pluralist and republican values, and sees the government intervening through press regulation to preserve a healthy balance between them. See Presentation to the Association of American Law Schools, Sec-

know” following World War II to the institutional press’s desire to manifest its “preferred position” under the Constitution through special legal privileges for its reporters and editors.¹¹⁶ By successfully equating the people’s “right to know” with “freedom of the press,” rather than insisting on special treatment for its own sake, Powe argues, the press was ultimately able to secure privileges from the Court that it neither needed nor, in the end, benefited from.¹¹⁷ And in so doing, it unleashed a monster.

At about the same time, Powe says, Professor Jerome Barron’s influential argument for a new First Amendment right of access to the increasingly concentrated media was validated in *Red Lion*’s “listener-oriented, right-to-know” opinion.¹¹⁸ The “right to know” that had been so arrogantly equated with press freedom was now turned around to justify press regulation.

Powe sees all subsequent cases, save an aberrational *Virginia Pharmacy*, as a repudiation of that model.¹¹⁹ Nevertheless, he says, a new generation of academics, including Professor Fiss, rushed to embrace it as the rationale for inviting government regulation of the media as a means of overcoming the distortion of wealth and structural concentration on the marketplace of ideas.¹²⁰

Duly crediting the work of other scholars, Powe neatly links the two “right to know” theories by showing that the institutional press version inevitably invoked an inquiry as to whether the press was, indeed, properly fulfilling its obligation to satisfy the public’s right to know.¹²¹ And when the answer is no, as it so often is these days, the academic version is ready and able to justify government’s step into the breach with appropriate regulation.¹²²

The right to know is not a right; it’s a slogan. Furthermore, it is a dangerous slogan, because it instantly invites inquiry into the actual performance of a newspaper. Instead of giving the press more rights, it runs the risk of denying the press its most sacred possession, its autonomy.¹²³

tion on Communications Law, January 2000; see also C. Edwin Baker, *The Media that Citizens Need*, 147 U. PENN. L. REV. 317 (1998).

¹¹⁶ Powe, *supra* note 34, at 242-43. Powe points out that the Associated Press’s Kent Cooper is generally given credit for popularizing the phrase “right to know” as used in this discussion. *Id.*

¹¹⁷ *Id.* at 243-45.

¹¹⁸ *Id.* at 245-48. See especially Jerome A. Barron, *A Right of Access and Reply to the Press*, 80 HARV. L. REV. 1641 (1967).

¹¹⁹ See Powe, *supra* note 34, at 248-50.

¹²⁰ See *id.* at 250-51. Judith Lichtenberg is also noted. *Id.*

¹²¹ See *id.* at 255-56. Powe particularly cites the work of Lillian BeVier, William Van Alstyne and Anthony Lewis. *Id.*

¹²² See *id.* at 256-57.

¹²³ *Id.* at 257.

When it really counted, the Supreme Court guaranteed that the press could perform its various roles in our democracy. But, apart from Justice Douglas, and with the exception of some overblown dicta from other justices, the Court never saw the right-to-know model as a viable First Amendment doctrine. Whether out of distrust of the press, distrust of its own abilities, or faithfulness to a simpler constitutional ideal, the Court never embraced either side of the right to know. In rejecting that theory, however, it never endangered the essential autonomy of a free press.¹²⁴

Powe's characterization of Fiss's thought is based on two of Fiss's influential law review articles from the 1980s.¹²⁵ By the mid-1990s, he had pulled those views together in the slim but powerfully argued monograph I examine here. In it, Fiss does not dispute Powe's analysis of the Supreme Court's shift away from a right-to-know-based jurisprudence after *Red Lion*,¹²⁶ but unlike Powe, he finds no satisfaction in it. Indeed, he laments the triumph of press autonomy at the expense of governmental power to impose regulations that further the democratic mission of the press: informing the public about its political options.¹²⁷

While Fiss concedes that the press needs a "certain amount of autonomy from the state" to perform that function,¹²⁸ and while he acknowledges that the state will sometimes try to "stifle free and open debate,"¹²⁹ he unabashedly looks to the state to act to further the "robustness" of public debate when other forces, namely market forces, would curtail it.

Government may have to allocate public resources—hand out megaphones—to those whose voices would not otherwise be heard in the public square. It may even have to silence the voices of some in order to hear the voices of others. Sometimes there is simply no other way.¹³⁰

The failure of government to intervene in this way reduces free press to free enterprise, Fiss says, "and the fate of our democracy will be placed wholly in the hands of the market."¹³¹

Where both Powe and Fiss see the Court's post-*Red Lion* jurisprudence as a retreat from the regulatory model—Powe hailing it,

¹²⁴ *Id.* at 259.

¹²⁵ See Owen Fiss, *Why the State?* 100 HARV. L. REV. 781 (1987), and Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986).

¹²⁶ See Fiss, *supra* note 12, at 79.

¹²⁷ See *id.* at 82-83.

¹²⁸ *Id.* at 50.

¹²⁹ *Id.* at 3.

¹³⁰ *Id.* at 4.

¹³¹ *Id.* at 78.

Fiss bemoaning it—President Bollinger sees it as recognition that the autonomy model and the regulatory model are merely two ends of a spectrum of theories the Supreme Court has employed to strike a proper and rational balance between competing values.¹³² While the disparate treatment of broadcast and print media in this regard “makes good sense in terms of both public policy and First Amendment theory,”¹³³ it is not because broadcasting is structurally different from print, but because partial regulation is generally better than either universal regulation or no regulation at all.¹³⁴

Bollinger explicitly rejects Powe’s thesis that an affirmative governmental role in regulating the press is “fundamentally inconsistent with an open democracy,”¹³⁵ asserting that Powe’s catalog of governmental abuses is simplistic and inconclusive.¹³⁶ Bollinger finds that Powe’s anecdotal evidence fails to show that a beneficent regulatory structure cannot be created that does far more good than harm.¹³⁷ But Bollinger also takes issue (albeit far more sympathetically) with Fiss and others who predicate their advocacy of regulation on the failure of the unregulated marketplace to ensure that the public has the sufficiency and diversity of information it needs for democratic self-government.¹³⁸

In Bollinger’s view, the justification for regulation lies not merely in the failure of the marketplace, but in ourselves:

We have good reason to be wary of ourselves, and we should fear not just the failures of the market system but our own failures of intellect. A democratic society, like an individual, should strive to remain conscious of the biases that skew, distort, and corrupt its own thinking about public issues. Society should be intellectually humble in the way that a true education tries to inculcate respect for one’s own ignorance and intellectual incapacities. The upshot is this: even in a world in which the press is entirely free and open to all voices, with a perfect market in that sense, human nature would still see to it that quality public debate and decision making would not rise naturally to the surface but would, in all probability, need the buoyant support of some form of collective action by citizens, involving public

¹³² See Bollinger, *supra* note 113, at 109, 145.

¹³³ *Id.* at 109.

¹³⁴ See *id.*

¹³⁵ LUCAS A. POWE, AMERICAN BROADCASTING AND THE FIRST AMENDMENT 254-55 (1987). Powe was himself responding to Bollinger’s earlier *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976).

¹³⁶ See Bollinger, *supra* note 113, at 130-131.

¹³⁷ See *id.*

¹³⁸ See *id.* at 137-38. Here, Bollinger cites Fiss’s *Why the State*, 100 HARV. L. REV. 781 (1987).

institutions.¹³⁹

In other words, even if there were no market failure, even if all voices could be heard in the marketplace of ideas, we might choose not to listen. Absent some reformation in the way we make decisions, we might choose to watch soap operas instead.¹⁴⁰

But Bollinger is not sure we are ready for that kind of reform. And, unlike Fiss, he is not even sure “whether the government can be trusted with the power to intervene in the field of public debate.”¹⁴¹ The public’s right to know, which—more like Powe than Fiss—Bollinger calls a “platitude,”¹⁴² is largely irrelevant to his regulatory ideal, which is more interested in satisfying a societal need to know. Until we know more, Bollinger suggests, the complex system that has evolved seems reasonably healthy.¹⁴³

In the view of these scholars, then, the “right to know” is either an illegitimate slogan that invites government regulation to suppress speech in the marketplace of ideas; a vital protection that invokes government power against the stifling of diverse voices when economic power distorts that marketplace; or the mirror that will ultimately force us to recognize that we really do not want a fully stocked marketplace of ideas at all, but rather a series of property rights that insulates us from too much information. I consider the first two in Part III; I return to the third in Part VI.

III. SLAYING THE LION

To suggest, as Powe does, that there is no “right to know” is to defy history,¹⁴⁴ case law,¹⁴⁵ and common sense. Even if one does not accept the Meiklejohnian notion that the First Amendment operates exclusively to promote democratic values by ensuring that citizens have the information they need to make informed political decisions,¹⁴⁶ other First Amendment values are fully consistent with

¹³⁹ Bollinger, *supra* note 113, at 139.

¹⁴⁰ Sunstein brings this notion into the Internet age with “The Daily Me.” Cass R. Sunstein, *republic.com* 3-16 (2001).

¹⁴¹ *Id.* at 142.

¹⁴² *Id.* at 149.

¹⁴³ *See id.* at 143.

¹⁴⁴ “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. Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power that knowledge gives.” Letter from James Madison to W.T. Barry (Aug. 4, 1822), in *The Writings of James Madison*, vol. ix, 1819-1836, 103 (Gaillard Hunt ed. 1910).

¹⁴⁵ *See supra* text accompanying notes 38-110.

¹⁴⁶ *See* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961) (“The First Amendment does not protect a ‘freedom to speak.’ It protects the freedom of those activities of thought and communication by which we ‘govern.’ It is concerned, not with a private right, but with a public power, a governmental responsibility.”).

a public right to know. For example, the ability of the press to perform the checking function on which Powe relies is considerably enhanced by the newsgathering privileges that Powe says the press doesn't need.¹⁴⁷ The more exotic notion that the First Amendment right to speak is predicated on the noninstrumental value of the speaker's personal fulfillment is utterly hollow if there is no audience.¹⁴⁸ In the end, Powe's condemnation is less an assessment of the right to know than of the powers that some of its advocates have claimed for it.

Fortunately, those powers simply do not exist. Apart from the broadcasting (and possibly cable) cases, the Supreme Court has never held that the First Amendment compels or even condones the power of government to suppress some speech so that other speech may be heard.¹⁴⁹ If there is, as Justice White asserted in *Red Lion*, a "collective right" to "receive suitable access" to a variety of diverse voices, and if this right "belongs to the people as a whole" and may thus be exercised against broadcasters through the people's government, this "right" does not spring from the First Amendment.¹⁵⁰

Certainly this "right" is not the right of the "individual" discussed in *Meyer*, which was openly suspicious of infringing such rights in the name of the "public interest."¹⁵¹ Certainly it is not the right of the "householder" in *Martin*,¹⁵² nor the "addressee" in *Lamont*,¹⁵³ the married couple in *Griswold*,¹⁵⁴ nor the movie buff in *Stanley*.¹⁵⁵ Nor is Justice White's purported First Amendment

¹⁴⁷ See Powe, *supra* note 34, at 245-48, 260-61.

¹⁴⁸ See, e.g., THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1971).

¹⁴⁹ See Associated Press (AP) v. United States, 326 U.S. 1 (1945), did not rely on the First Amendment or its penumbral right to know, but rather on the Sherman Antitrust Act, 15 U.S.C. §§ 1 *et seq.*, in order to force the AP to abandon its anticompetitive practices. *Red Lion*'s repeated allusions to dicta in *AP* on the First Amendment's support for government intervention are misplaced. See *Red Lion*, 395 U.S. at 387, 390, 392. *AP* invoked government power against business practices that effectively prevented others from publishing; the injunction did "not compel AP or its members to permit publication of anything which their 'reason' tells them should not be published." *AP*, 326 U.S. at 20 n. 18. A closer case is *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), which upheld use of the Sherman Act to force a publisher to accept advertising it would otherwise have refused. *Id.* at 144. Despite the direct effect on the publisher's overall product, there was no suppression of the publisher's speech such as that later found in *Miami Herald v. Tornillo*, 418 U.S. at 256-58. The order affected only commercial advertising, and then only that advertising the publisher refused in order to drive a competing radio station out of business. *Lorain Journal*, 342 U.S. at 155-56. There was no indication that the publisher was compelled to publish, or prevented from publishing, anything contrary to its journalistic "reason." *Id.*

¹⁵⁰ *Red Lion*, 395 U.S. at 390.

¹⁵¹ 262 U.S. 390.

¹⁵² 319 U.S. 141.

¹⁵³ 381 U.S. 301.

¹⁵⁴ 381 U.S. 479.

¹⁵⁵ 394 U.S. 557.

“right” an aggregation of these. If nothing else, his use of the word “suitable” suggests something other than a First Amendment right to receive information. *Stanley* had made no such qualification; on the contrary, Justice Marshall had made the point that right to receive information stood independent of the value of the information or even its eligibility for First Amendment protection.¹⁵⁶

Assuming *arguendo* that Justice White reached the correct result from a faulty doctrinal analysis, what does justify *Red Lion*'s conclusion?

First, *Red Lion* presented two related factors that were not involved in the earlier cases: a speaker whose right to speak at all was granted by and retained at the sufferance of government, and speech that might not have reached the listener *but for* the government's regulation. The influence of the first of these factors is easily seen in the two precedents Justice White selected to support his assertion that the right of the viewers and listeners is paramount.¹⁵⁷ Both involve the FCC's allocation of licenses among competitors in the public interest as a question of statutory construction. Neither mentions the First Amendment nor even remotely deals with the issue of broadcast content. One of them, however, provides a clue to the origin of the right that Justice White finds.

But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.

The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license. Licenses are limited to a maximum of three years' duration, may be revoked, and need not be renewed. Thus the channels presently occupied remain free for a new assignment to another licensee in the interest of the listening public.

Plainly it is not the purpose of the Act to protect a licensee

¹⁵⁶ See *Stanley*, 394 U.S. at 565 (“[M]ere categorization of these films as ‘obscene’ is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendment.”). Years later, Justice Scalia would also reject the notion that any speech was “entirely invisible to the Constitution” such that it can be regulated in a way that, itself, violates the First Amendment. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-84 (1992).

¹⁵⁷ See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940), and *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 361-62 (1955). Justice White also draws on the writings of Zechariah Chafee for the Commission on Freedom of the Press, citing 2 *Govt. and Mass Commun.* 546 (1947).

against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.¹⁵⁸

Evidently, Justice White extrapolated his version of the collective First Amendment right to receive information from the proprietary rights of the public¹⁵⁹—whose ownership of the spectrum is exercised through Congress and the FCC—and the resulting license obligations of broadcasters. Both are the proper subject of government oversight and regulation. In that respect, it differs dramatically from a collective First Amendment right derived by aggregating individual rights against government suppression.

But *Red Lion* was not a simple contracts case. Although Justice White was wrong to draw support for his conclusion from a First Amendment right to know, he was certainly correct to identify an overriding public interest in the “widest possible dissemination of information from diverse and antagonistic sources.”¹⁶⁰ Elsewhere in the opinion, he correctly identifies that interest as instrumental in “producing an informed public capable of conducting its own affairs,” which he describes as a “goal” of the First Amendment.¹⁶¹ That description is fair enough; the judicial and scholarly literature declaring self-government to be an important, if not the only, reason to protect speech is rich indeed.¹⁶² As long as Justice White speaks in terms of “consistency” with First Amendment purposes, or the absence of sanction within the First Amendment for inconsistent governmental action, he is on solid ground. But the framers apparently understood the need for an informed, self-governing citizenry to fulfill their constitutional dreams long before they accepted the need for a written guarantee in a Bill of Rights. The constitutional scheme itself is a far more focused instrument for producing an informed electorate, or rather, limiting the electorate to informed citizens.¹⁶³ Limitations on who could

¹⁵⁸ *Sanders Bros.*, 309 U.S. at 475 (emphasis added).

¹⁵⁹ This reference to the public’s proprietary rights in the spectrum should not be confused with the view that First Amendment rights are akin to property rights insofar as they establish the relationship between the individual and the government. See John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49 (1996).

¹⁶⁰ *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

¹⁶¹ *Red Lion*, 395 U.S. at 392.

¹⁶² See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); ZECHARIAH CHAFEE JR., *FREE SPEECH IN THE UNITED STATES* (1964); THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* (1966).

¹⁶³ Madison’s *Federalist 10*, for example, extols the ability of a republican government “to

vote for or serve in the Congress, the interposition of a Senate elected by state legislatures against the "People's House," and the Electoral College¹⁶⁴ were all aimed at producing decision-makers from among the nation's educated and knowledgeable elite, not to mention other characteristics that might seem even less attractive today.

Indeed, the Federalists saw no need for a Bill of Rights at all, but accepted it as politically expedient in the face of Antifederalist warnings that the new national government would trample state prerogatives and individual liberties.¹⁶⁵ Certainly they saw no need for a First Amendment to educate the masses they had so carefully excluded from power. By the time the First Amendment was adopted, even the Antifederalists had lost interest;¹⁶⁶ its language was terse, debate and explication minimal, and it had only one purpose: to limit federal meddling with pre-existing rights.¹⁶⁷ However the meaning and significance of the First Amendment may have evolved over the years since ratification, only one change in the amendment's fundamental nature was ever adopted: after 1921, states, too, were prohibited from interfering with freedom of speech by virtue of the 14th Amendment.¹⁶⁸

Thus, if the public interest on which *Red Lion* is predicated comes not from the First Amendment, but from the constitutional structure as a whole, the regulatory regime that *Red Lion* sanctioned cannot be a product of the First Amendment's right to know, even if that right were aggregated. The only "paramount" right that the public holds in broadcasting is a proprietary one, which the public acquired by virtue of its natural ownership of the spectrum. The First Amendment operates to ensure that neither the owner, i.e., the collective public, nor its steward, i.e., the government, violates the speech, press and related rights of their licensees as they go about the business of bringing the spectrum to life.

refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations." *The Federalist No. 10*, at 82 (James Madison) (Clinton Rossiter, ed., 1961).

¹⁶⁴ U.S. Const. art. I, §§ 2, 3; art. II, § 1.

¹⁶⁵ See LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 255 (1985). One might argue that the First Amendment was adopted, in part, to protect some higher value, but the evidence is less than compelling. About all we know of the original purpose of the First Amendment is this: ratification of the Constitution depended on a promise to adopt a bill of rights, including a guarantee to protect a rather ambiguous concept of free speech and press from abridgment by the new federal government. *Id.* at 234-35.

¹⁶⁶ See *id.* at 236.

¹⁶⁷ In fact, the Senate killed an amendment proposed by Madison to protect speech and press freedoms from the states as well as the federal government. *Id.* at 262.

¹⁶⁸ See *Gillow*, 268 U.S. at 652.

We leave for another day any thorough exploration of whether content regulation of broadcasting is barred by the First Amendment, notwithstanding public ownership of the spectrum or the public interest in information from diverse speakers. With each passing day, the question, like broadcasting itself, grows less important. Briefly, however, this analysis suggests that government may regulate broadcast industry structure, but not content, with a view toward ensuring that diverse viewpoints are aired.

The public through its government might have chosen to retain for itself the privilege to speak over the spectrum, as have any number of other countries, but instead elected to allocate that privilege among private entities. No one doubts that the public, through its government, has the power to withdraw that privilege tomorrow, but no one expects such an action either. And, as long as licensees are privileged to broadcast, they are First Amendment speakers, whose freedom of speech cannot be abridged by the public or its government.

The obvious analogy is the limited public forum.¹⁶⁹ The public, through its government, invited certain individuals (broadcasters) to speak in a publicly owned place (the electromagnetic spectrum) subject to a reasonable and necessary time, place, and manner restrictions (allocating licenses). Having created this forum, the First Amendment requires the public and government to give up the power of viewpoint-based regulation, including, I submit, the power to ensure by direct regulation that a diversity of viewpoints is expressed. The public can reclaim that power only by closing the forum.

That is not to say that the public, through its government, is constrained by the First Amendment from withdrawing proprietary rights it has conferred on media companies. The antitrust actions in *AP* and *Lorain Journal* were not incompatible with the guarantees of free speech and free press, nor is antitrust scrutiny of media mergers.¹⁷⁰ And, as discussed in Part V, the First Amendment right to know demands limits on copyright privileges. What matters is that, in neither of these cases, is government intervening to suppress some speakers in favor of others.¹⁷¹

Having thus freed the right to know from its unsavory associa-

¹⁶⁹ See, e.g., *Rosenberger v. Rector & Visitors of the U. of Va.*, 515 U.S. 819, 829 (1995) ("Once [the state] has opened a limited forum. . . [it may not] discriminate against speech on the basis of its viewpoint.").

¹⁷⁰ See Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. PITT. L. REV. 503, 517-18 (2001) ("[M]edia mergers should be carefully scrutinized for loss of non-price competition along the dimension of diversity in programming.").

¹⁷¹ Cable regulation arguably does curtail some of the rights of First Amendment speak-

tion with broadcast regulation, Powe's primary objection and Fiss's primary justification go away. I will return to President Bollinger's analysis after reviewing the jurisprudence that demonstrates the central thesis of this article: that the First Amendment right to know is manifest in the "public importance" test that the Supreme Court regularly applies in libel and especially privacy cases, and inconsistently applies in newsgathering, access, and copyright cases.

IV. WHERE IMPORTANCE IS ALREADY IMPORTANT

A.

Recognition of the "right to know" should be immediately apparent where the public's interest in speech has been found to alter the fact or scope of the speaker's tort or statutory liability. It would defy logic to suggest that the First Amendment protects speech about public concerns solely because of some benefit realized by the speaker.

Before 1964, the relatively few such cases arose in a labor relations context. In 1937, for example, the Court required the Associated Press (AP) to reinstate an employee who was discharged for union organizing activities.¹⁷² The dissent urged that, because union organizing was a matter of great public interest, AP's ability to report objectively on that subject was protected by the First Amendment; realizing that protection, it reasoned, depended upon AP's ability to fire an editorial employee who was also a union activist.¹⁷³ In 1940, the Court struck down legislation restricting labor union picketing, citing the public interest in labor relations.¹⁷⁴ And in 1959, the public interest in possible misuse of federal agency funds was one of the factors prompting the Court to immunize a government official from the libel claims of employees

ers, but not without a degree of heightened scrutiny unavailable to broadcasters. See *Turner I*, 512 U.S. at 661.

¹⁷² See *AP v. NLRB*, 301 U.S. 103 (1937) (holding that requiring a media employer to reinstate an employee discharged because of union organizing activities did not violate the First Amendment).

¹⁷³ *Id.* at 138 (Sutherland, J., dissenting).

The daily news with respect to labor disputes is now of vast proportions; and clearly a considerable part of petitioner's editorial service must be devoted to that subject. Such news is not only of great public interest; but an unbiased version of it is of the utmost public concern. To give a group of employers on the one hand, or a labor organization on the other, power of control over such a service is obviously to endanger the fairness and accuracy of the service.

Id.

¹⁷⁴ See *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940) ("The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.").

whom he had publicly dismissed.¹⁷⁵

It was only in 1964, however, that the Court came to view the public interest in the content of speech as a value to be balanced against other individual or proprietary rights.¹⁷⁶ The case, of course, was *New York Times v. Sullivan*¹⁷⁷, and the balancing test is obscured somewhat by the way the Court formulated the new rule, i.e., raising, on constitutional grounds, the degree of a libel defendant's culpability required for recovery when the plaintiff is a public official.¹⁷⁸ The underlying presumption is that all speech about public officials bearing on their fitness for or performance in office is a matter of public importance, even if false, and that importance outweighs the common law interest in reputation.¹⁷⁹ To give effect to that balance, the Court deprived public-official plaintiffs of their common-law reputational interest, substituting a narrower, constitutionally limited, reputational interest. That same year, the Court reinforced this principle by extending it to criminal as well as civil libel cases.¹⁸⁰

¹⁷⁵ See *Barr v. Matteo*, 360 U.S. 564, 575 (1959) ("It would be an unduly restrictive view of the scope of the duties of a policy-making executive official to hold that a public statement of agency policy in respect to matters of wide public interest and concern is not action in the line of duty.")

¹⁷⁶ Even though *Barr* speaks in terms of "weighing" individual rights against the public interest, *id.* at 565, the public interest addressed in that sentence refers to the public's interest in protecting officials from frivolous lawsuits. The public interest in the substance of the speech, misuse of funds, was essentially evidence bearing on whether the defendant was acting within the scope of his official duties, the *sine qua non* for finding a privilege. *Id.* at 575.

¹⁷⁷ 376 U.S. 254 (1964).

¹⁷⁸ See *id.* at 279-80 (1964).

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

¹⁷⁹ See *id.* at 271-73.

Thus we 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. (Citation omitted.) 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. . . . If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate.

Id.

¹⁸⁰ See *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964).

The *New York Times* rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed. *The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants.* To this end, anything which might touch on an official's fitness for office is relevant. (Emphasis added.)

The Court's procedural focus on the status of the plaintiff when its real concern was the public interest in the content of the speech at issue became increasingly problematic as lower courts struggled to apply *New York Times*. Inevitably, status came to be expressed in terms of public importance,¹⁸¹ until, in *Rosenbloom v. Metromedia*,¹⁸² a plurality of the Court voted to drop the surrogacy altogether and grant *New York Times* protection to all speech about matters of "public or general concern."¹⁸³

Opposition to the new rule stood on four separate grounds: (1) that the First Amendment does not tolerate any libel judgments against the news media,¹⁸⁴ (2) that the rule unnecessarily usurped state libel law,¹⁸⁵ (3) that the rule would subject the press to "judicial second-guessing of the newsworthiness of each item they print,"¹⁸⁶ and (4) that courts are better equipped to apply general rules than to balance facts in every libel case.¹⁸⁷ The first can be dismissed as merely an ideological or idiosyncratic expression; the third will be more fully examined in Part VI.

It was the second and fourth grounds on which the Court subsequently overturned *Rosenbloom*.¹⁸⁸ Writing for the Court in *Gertz*, Justice Powell found the state's interest in protecting its citizens' reputations more substantial than *Rosenbloom* admitted and cautioned that relying on judges' ad hoc determinations in every case "would lead to unpredictable results and uncertain expectations," as well as making supervision of the lower courts "unmanageable."¹⁸⁹ Accordingly, *Gertz* lays down what Justice Powell characterized as "broad rules of general application,"¹⁹⁰ focusing once again on the status of the plaintiff rather than the newsworthiness

Id.

¹⁸¹ See, e.g., *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966) (limiting application of the rule to positions with "such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it"); *Curtis Publ. Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in the result) ("Our citizenry has a legitimate and substantial interest in the conduct of [public figures], and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.'").

¹⁸² 403 U.S. 29 (1971).

¹⁸³ *Id.* at 52.

¹⁸⁴ See *id.* at 57 (Black, J., concurring in the judgment).

¹⁸⁵ See *id.* at 59 (White, J., concurring in the judgment).

¹⁸⁶ *Id.* at 63 (Harlan, J., dissenting); see also *id.* at 79 (Marshall, J., dissenting).

¹⁸⁷ See *id.* at 63 (Harlan, J., dissenting); see also *id.* at 81 (Marshall, J., dissenting).

¹⁸⁸ See *Gertz v. Welch*, 418 U.S. 323, 346 (1974) ("The extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge this legitimate state interest to a degree that we find unacceptable. And it would occasion the additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of 'general or public interest' and which do not. . . .").

¹⁸⁹ *Id.* at 343.

¹⁹⁰ *Id.* at 343-44.

of the utterance.¹⁹¹

Notwithstanding that repudiation of *Rosenbloom*, an assessment of the public interest in the defamatory utterance crept back into libel jurisprudence, albeit through a back door of sorts. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,¹⁹² the Court held that “permitting recovery of presumed and punitive damages in defamation cases absent a showing of ‘actual malice’ does not violate the First Amendment *when the defamatory statements do not involve matters of public concern.*”¹⁹³

One need not join the debate over whether *Gertz* itself contained this distinction, implicitly or explicitly,¹⁹⁴ it suffices to say that Justice Powell no longer seemed concerned about the burden that a “public interest” analysis imposes on judges and, in fact, devoted only two paragraphs to that analysis in this case.¹⁹⁵ After *Dun & Bradstreet*, the First Amendment *requires* courts to determine whether defamatory statements involve matters of public concern, at least where plaintiffs are private figures seeking to recover presumed or punitive damages without showing *New York Times* malice.

B.

The right to know, again manifested by a “public importance” balancing test, is even stronger, and surfaces earlier, in constitutional privacy cases. Even before the Court extended the *New York Times* rule to public-figure libel plaintiffs,¹⁹⁶ it held in *Time, Inc. v. Hill*¹⁹⁷ that privacy interests involving false, but not defamatory, speech must yield to constitutional protections for speech and press, absent knowing falsity or reckless disregard for the truth.¹⁹⁸ Although largely couched in terms of protecting the speaker,¹⁹⁹ Justice Brennan makes clear that the constitutional guarantees are “not for the benefit of the press so much as for the benefit of all of

¹⁹¹ This is not to say that characterizing libel plaintiffs as public or private figures is without its own problems. Although Powell averred that “we have no difficulty in distinguishing among defamation plaintiffs,” *id.* at 344, subsequent cases would suggest otherwise. *See, e.g., Time, Inc. v. Firestone*, 424 U.S. 448 (1976), *Wolston v. Reader’s Digest Assn.*, 443 U.S. 157 (1979), *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

¹⁹² 472 U.S. 749 (1985).

¹⁹³ *Id.* at 763 (emphasis added).

¹⁹⁴ *See id.* at 761 n.7.

¹⁹⁵ *See id.* at 762-63.

¹⁹⁶ *See Curtis Publ. Co. v. Butts*, 388 U.S. 130, 164 (1967).

¹⁹⁷ 385 U.S. 374 (1967).

¹⁹⁸ *See id.* at 387-88. Despite Justice Brennan’s admonition that even a negligence standard would place an intolerable burden on the press in this context, some courts have applied the *Gertz* rationale to false light privacy cases. *See, e.g., Dresbach v. Doubleday & Co.*, 518 F. Supp. 1285, 1288 (D.D.C. 1981).

¹⁹⁹ *See Hill*, 385 U.S. at 389.

us.”²⁰⁰ This is, unmistakably, the right to know.

The right to know is strongest, of course, when the speech in question is true. Beginning with *Cox Broadcasting Corp. v. Cohn*,²⁰¹ the Court has inched its way toward a still-undeclared declaration that truthful speech may never be suppressed or punished to protect individual privacy interests—if at all. From *Cox Broadcasting’s* limited holding that no liability could be imposed for publishing truthful information taken from official court records,²⁰² the doctrine evolved to cover nearly all truthful information about matters of public significance.²⁰³ In *Bartnicki v. Vopper*,²⁰⁴ the Court brought the doctrine to its highest level to date.

In *Bartnicki*, an unknown person intercepted a cellular telephone conversation between Gloria Bartnicki, a Pennsylvania teachers’ union negotiator, and Anthony Kane, president of the union local. The conversation pertained to on-going negotiations between the union and the school board, including possible strike preparations and “the need for a dramatic response to the board’s intransigence.”²⁰⁵ At one point in the conversation, Kane says: “If they’re not gonna move for three percent, we’re gonna have to go to their, their homes. . . . To blow off their front porches, we’ll have to do some work on some of those guys.”²⁰⁶

Whoever taped the conversation delivered it to the head of a local taxpayer’s organization, who, in turn, delivered it to Frederick Vopper, a local radio commentator, and other media outlets. The taped conversation was repeatedly broadcast by Vopper and others, and its substance was published in local newspapers. Alleging that each of the defendants “knew or had reason to know” that the original intercept was illegal, Bartnicki and Kane sued under both federal and Pennsylvania law, which criminalized the knowing

²⁰⁰ *Id.*

²⁰¹ 420 U.S. 469 (1975).

²⁰² *See id.* at 496.

²⁰³ *See Oklahoma Publ. Co. v. District Court*, 430 U.S. 308, 310 (1977) (holding that publication of truthful information revealed in open court could not be suppressed); *see also* *Landmark Comm. v. Virginia*, 435 U.S. 829 (1978) (holding the First Amendment prohibits criminal punishment of third persons who are strangers to the inquiry, including the news media, for divulging or publishing truthful information regarding confidential proceedings of a judicial review commission); *Smith v. Daily Mail Publ. Co.*, 443 U.S. 97, 103 (1979) (holding that publication of truthful information, lawfully obtained, may not be punished absent a need to further a state interest of highest order); *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (holding that publication of truthful information, lawfully obtained, may be punished “only when narrowly tailored to a state interest of the highest order”).

²⁰⁴ 121 S. Ct. 1753 (2001).

²⁰⁵ *Id.* at 1757.

²⁰⁶ *Id.*

disclosure of an illegally intercepted conversation.²⁰⁷ On cross-motions for summary judgment, the district court rejected Vopper's First Amendment defense, but granted his motion for an interlocutory appeal.²⁰⁸ The Court of Appeals applied an intermediate scrutiny standard²⁰⁹ to hold the statutes unconstitutional as deterring more speech than necessary to protect the privacy interests at stake.²¹⁰

The U.S. Supreme Court accepted petitioners' contentions that the original intercept was illegal and that respondents had reason to know that fact. The Court also accepted respondents' assertions that they played no part in the intercept, that they committed no unlawful act in gaining access to the tape, and that the "subject matter of the conversation was a matter of public concern."²¹¹

In the opinion written by Justice Stevens, the Court acknowledged that the law was content neutral, but also found the statutes' disclosure provisions aimed directly at "pure speech," rather than conduct or any hybrid of the two.²¹² Without explicitly characterizing the degree of scrutiny it would apply, the Court proceeded to "consider whether, given the facts of this case, the interests served by § 2511(1)(c) can justify its restrictions on speech."²¹³ The Court minimized the government's asserted interest in deterring illegal interceptions²¹⁴ and focused instead on the "considerably stronger" interest in privacy.²¹⁵ "In this case," the Court said, "privacy concerns give way when balanced against the interest in publishing matters of public importance"²¹⁶ and no "stranger's illegal conduct" can "remove that First Amendment shield."²¹⁷ In a concurring opinion written "only to stress the narrowness of the

²⁰⁷ *Id.* (quoting 18 U.S.C. 2511(1)(c) and related provisions).

²⁰⁸ *See Bartnicki*, 121 S. Ct. at 1758.

²⁰⁹ *See id.* (citing *Bartnicki v. Vopper*, 200 F.3d 109, 121 (3d Cir. 1999)).

²¹⁰ *See Bartnicki*, 200 F.3d at 129.

²¹¹ *Bartnicki*, 121 S. Ct. at 1760.

If the statements about the labor negotiations had been made in a public arena - during a bargaining session, for example - they would have been newsworthy. This would also be true if a third party had inadvertently overheard *Bartnicki* making the same statements to Kane when the two thought they were alone.

Id.

²¹² *Id.* at 1761.

²¹³ *Id.* at 1762. Although this sounds like *ad hoc* balancing, the Court is presumably applying strict scrutiny. In *O'Brien v. United States*, 391 U.S. 367, 377 (1968), which spells out the generic intermediate scrutiny test, the asserted governmental interest must be "unrelated to the suppression of free expression." Apparently, Justice Stevens found the regulation of "pure speech" too closely related to the suppression of free expression to warrant intermediate scrutiny in this case.

²¹⁴ *See Bartnicki*, 121 S. Ct. at 1762.

²¹⁵ *Id.* at 1764.

²¹⁶ *Id.* at 1765.

²¹⁷ *Id.*

Court's holding" in light of physical threats to board members within the taped conversation,²¹⁸ Justice Breyer reached the same conclusion as the majority by asking only whether the statutes struck a "reasonable balance between their speech-restricting and speech-enhancing consequences."²¹⁹ Chief Justice Rehnquist, dissenting, condemned the majority's "tacit application of strict scrutiny"²²⁰ and applied intermediate scrutiny to reach the opposite result.²²¹

So how does *Bartnicki* contribute to the Court's right-to-know jurisprudence and help to define the concept? The focus of the constitutional inquiry is on the rights of the speaker, Vopper, not those of his radio audience. It is Vopper's right to publish the information—the nature of its acquisition apparently of little concern to anyone on the Court, as long as Vopper was not involved—that trumps Bartnicki's right to keep it private. The only reference to the listener is oblique: the high (Justice Breyer says "unusually high"²²²) public interest in the labor dispute and any information about it.

But that oblique reference precisely identifies *Bartnicki's* contribution to right-to-know jurisprudence: in its aggregated form, the individual's right to know is the public importance of specific information that the Court here called a "matter of public concern." At some point, that importance negates the state's interest in suppression, as well as private interests in reputation and privacy, even where acquisition of the information is tainted by illegal conduct. Evidently, the bar is not terribly high, for, contrary to the Court's assertion, Vopper's *legitimate* interest in broadcasting the tape was really quite low.²²³

For years now, the Court has equivocated on whether publication of illegally acquired information can be punished. If the Pentagon Papers case settled the issue as to prior restraint,²²⁴ Chief Justice Rehnquist here points out that five justices may well have voted then to punish the newspapers for publishing the purloined documents.²²⁵ The constitutional privacy cases are replete with

²¹⁸ *Id.* at 1766.

²¹⁹ *Id.*

²²⁰ *Id.* at 1770.

²²¹ *See id.* at 1772.

²²² *Id.* at 1768.

²²³ The emphasis is mine, but it mirrors Justice Breyer's emphasis on the limited legitimacy of Bartnicki's privacy interest. *See id.* at 1767. I use the word "legitimate" somewhat facetiously, of course, since I believe the Court's traditional positions as described here are generally wrong.

²²⁴ *See* *New York Times v. United States*, 403 U.S. 713 (1971).

²²⁵ *See* *Bartnicki*, 121 S. Ct. at 1776.

cautionary disclaimers,²²⁶ enough to persuade lower courts that they could enjoin or punish illegally acquired speech.²²⁷ In *Bartnicki*, though, the taint of unlawful acquisition seems to be of little consequence. But if it had any effect at all, it must have been to reduce, not enhance, Vopper's interest in publication.

Moreover, the majority's suggestion that the information would be fair game if overheard²²⁸ is more than offset by the fact—alluded to in all three opinions—that Vopper's broadcast could have been enjoined or punished if the conversation had been taped by its authors, Bartnicki and Kane, and protected by copyright.²²⁹ Before *Bartnicki*, one could even argue along similar lines that the speech in question was not Vopper's at all, so how strong could his interest have been?²³⁰

Notwithstanding Justice Breyer's apparent concern for the safety of the school board (as in "I'm shocked, shocked to find that gambling is going on in here."²³¹), the Supreme Court long ago recognized that hyperbole permeates the speech of union officials

²²⁶ See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524, 535 n.8 (1989) ("The *Daily Mail* principle does not settle the issue whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well. This issue was raised but not definitively resolved in *New York Times Co. v. United States*, 403 U.S. 713 (1971), and reserved in *Landmark Communications*, 435 U.S., at 837. We have no occasion to address it here.").

²²⁷ See Easton, *supra* note 63, at 1187-91 (1997) (discussing various cases in which the court imposed or considered injunctive relief or damages for publishing illegally acquired information).

²²⁸ See *Bartnicki*, 121 S. Ct. at 1760.

²²⁹ The majority cites *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985), for the proposition that communications privacy is an important government interest.

The essential thrust of the First Amendment is to prohibit improper restraints on the voluntary public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.

Bartnicki, 121 S. Ct. at 1764 n.20 (quoting *Harper & Row*, 471 U.S. at 559, which in turn quoted *Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 255 (N.Y. 1968)). Justice Breyer refers to the same passage to suggest that the statutes at issue "directly enhance private speech," *Bartnicki*, 121 S. Ct. at 1766, as does Chief Justice Rehnquist. *Id.* at 1775.

²³⁰ See *Boehner v. McDermott*, 191 F.3d 463, 466 (D.C. Cir. 1999), *cert. granted, judm. vacated*, 121 S.Ct. 2190 (2001), another of the three cases that created the conflict in the circuits that the Court sought to resolve by granting certiorari in *Bartnicki*, 121 S. Ct. at 1758 (citing *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158 (5th Cir. 2000)). The *Boehner* court, which upheld the provisions at issue in *Bartnicki*, had ridiculed the defendant's assertion that his disclosure of an intercepted telephone conversation constituted protected speech:

[T]hose who expose private activity to public gaze are not necessarily engaging in speech, let alone "the freedom of speech." . . . The tape does indeed contain speech about political matters. But the speech is not McDermott's and §§ 2511(1)(c) does not render him liable for anything anyone said on the recording."

Boehner, 191 F.3d at 466.

²³¹ *Casablanca* (Warner Bros. 1942).

and discounted it for purposes of libel.²³² Absent a trial record, there is no way to determine how serious this "threat" might have been, and Justice Breyer correctly absolved editors of the responsibility for making such determinations.²³³ But Vopper only broadcast the threat *after* the parties accepted a nonbinding arbitration proposal that was generally favorable to the teachers.²³⁴ Vopper himself had been critical of the union, as was the intermediary from whom he received it.²³⁵

On the other hand, one is hard pressed to find fault with Chief Justice Rehnquist's analysis of Bartnicki and Kane's privacy interest,²³⁶ or the larger societal interest in encouraging private discussion of public matters.²³⁷ Pointing out that the Court "does not even attempt to define" the "amorphous concept" of "public concern," Chief Justice Rehnquist charges that the decision "diminishes, rather than enhances, the purposes of the First Amendment: chilling the speech of the millions of Americans who rely upon electronic technology to communicate each day."²³⁸

There are three possible explanations for this decision, each of which is reflected in Justice Stevens's opinion. First, the Court may have viewed this case as the next unavoidable, incremental step toward deciding that "truthful publication may [n]ever be

²³² "[F]ederal law gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point." *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 283 (citing *Linn v. United Plant Guard Workers*, 383 U.S. 53, 60 (1966)).

²³³ See *Bartnicki*, 121 S.Ct. at 1768.

²³⁴ See *id.* at 1757.

²³⁵ See *id.*

²³⁶ Pointing out that 40 states and the District of Columbia had enacted similar prohibitions on knowing disclosure of intercepted conversations, Chief Justice Rehnquist quoted congressional findings that,

tremendous scientific and technological developments that have taken place in the last century have made possible today the widespread use and abuse of electronic surveillance techniques. As a result of these developments, privacy of communication is seriously jeopardized by these techniques of surveillance No longer is it possible, in short, for each man to retreat into his home and be left alone. Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage.

Id. at 1769 (Rehnquist, C.J., dissenting) (quoting Sen. Rpt. 90-1097, at 67 (1968)).

²³⁷ Indeed, both the Chief Justice and Justice Stevens quoted from a 1967 Presidential Commission:

In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas.

Bartnicki, 121 S.Ct. at 1769-70 (quoting President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 202 (1967)).

²³⁸ *Bartnicki*, 121 S.Ct. at 1769.

punished consistent with the First Amendment."²³⁹ This question has plagued the Supreme Court at least since *Cox Broadcasting Corp. v. Cohn*²⁴⁰ in 1975 and perhaps, Chief Justice Rehnquist's headcount notwithstanding, since the Pentagon Papers case in 1971.²⁴¹ Justice Stevens recites *Daily Mail's* admonition that "state action to punish the publication of truthful information seldom can satisfy constitutional standards,"²⁴² but he also emphasizes the narrowness of the *Bartnicki* holding.²⁴³ *Bartnicki* is a major step toward the end game, but the Court is not yet ready to predicate its decisions on a doctrine of absolute protection for the category of truthful speech.

The second possibility is that one or another of the balancing tests is really at work here. I have already noted the ambiguity in the standard used by the Court; in truth, the actual analysis seems just about the same in all three opinions. A cynic might say that the press always wins when strict scrutiny is applied; that the press usually loses when the Chief Justice applies intermediate scrutiny; and that no prediction is possible when Justice Breyer balances values ad hoc. But if *Bartnicki* is merely Justice Stevens leading the Court in an application of strict scrutiny, what in these facts compels that test? Stevens calls it "pure" speech, perhaps to distinguish it from the hybrids (symbolic speech, expressive conduct) that in-

²³⁹ *Id.* at 1762.

²⁴⁰ 420 U.S. 469 (1975) (denying recovery against a newspaper for publishing the name of a rape victim that appeared in official court documents). Other cases in that line include *Landmark Communications v. Virginia*, 435 U.S. 829 (1978) (barring prosecution of a nonparty newspaper for publishing truthful information about a confidential proceedings of a judicial disciplinary commission); *Oklahoma Publishing v. District Court*, 430 U.S. 308 (1977) (striking down an injunction against publishing the name of a juvenile offender tried in open court); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (barring prosecution of newspaper for publishing the name of a juvenile suspect obtained by interviewing witnesses, the police and a prosecutor); and *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (denying recovery against a newspaper for publishing the name of a sexual assault victim obtained from a publicly released police report). See *supra* note 194.

²⁴¹ 403 U.S. 713 (1971).

²⁴² *Bartnicki*, 121 S.Ct. at 1762.

²⁴³ See *id.* at 1764. As noted above, Justice Breyer is also intent on stressing the narrowness of the opinion, although his protest is less than convincing. See *supra* text accompanying notes 218-19. Rather than merely avoiding the categorical slippery slope that Justice Stevens fears, Justice Breyer seems more concerned to limit the "public interest" exception lest it "swallow[] up" privacy law. *Bartnicki*, 121 S. Ct. at 1768. The reference is to Professor Kalven's observation of state privacy litigation.

Professor Kalven notes, however, that since Warren and Brandeis championed an action against the press for public disclosure of truthful but private details about the individual which caused emotional upset to him, "it has been agreed that there is a generous privilege to serve the public interest in news. . . . What is at issue, it seems to me, is whether the claim of privilege is not so overpowering as virtually to swallow the tort. What can be left of the vaunted new right after the claims of privilege have been confronted?" [Hairy] Kalven, [Jr.] *Privacy in Tort Law—Were Warren and Brandeis Wrong?* 31 LAW & CONTEMP. PROB. 326, 335-336 (1966).

voke *O'Brien*. But the Court applied an intermediate scrutiny to the viewpoint-neutral regulation of pure speech in *Turner*. Prohibiting the disclosure of intercepted conversation would seem to be the same type of viewpoint-neutral regulation.

The third is, I think, the most compelling explanation: the right to know simply trumps all privacy interests. That is, privacy interest will never prevail when the information is a matter of public importance. That has long been the common law rule,²⁴⁴ and it follows the logic of previous constitutional libel and privacy cases. The right to know limits damages when the speech in question is false and defamatory; might it not limit liability itself when the speech is true and important? If that is so, then it would seem to follow that the right to know ought to have a significant influence on the outcome of cases in which truthful and important information is sought by the press for the benefit of the public, even where the speaker is unwilling to disseminate that information.

V. WHERE IMPORTANCE SHOULD BE IMPORTANT

Writing in 1991,²⁴⁵ President Bollinger saw a vital corollary of the right to know—the right to gather news—as “the most powerful force driving us toward” a new conceptualization of press freedom.²⁴⁶

The public must know what is happening within official quarters, not only to maintain the ability to participate effectively but also for the purifying effect public scrutiny has on the decision-making process (giving rise to the metaphor that sunshine is the best disinfectant). A compelling logic in the newsgathering right says that the right to speak is meaningless if one has nothing to report.²⁴⁷

Recognizing a robust newsgathering right, however, will force us to face the uncomfortable truth that we really do not trust the process of wide-open public debate with full information, Bollinger said.²⁴⁸ It threatens the comfort level we now have in exalting freedom of speech and the press, “because we know in our hearts that

²⁴⁴ See, e.g., *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1993). People who do not desire the limelight and do not deliberately choose a way of life or course of conduct calculated to thrust them into it nevertheless have no legal right to extinguish it if the experiences that have befallen them are newsworthy, even if they would prefer that those experiences be kept private.

Id.

²⁴⁵ Shortly before the newsgathering right was sharply curtailed by the legacy of *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). See Easton, *supra* note 63.

²⁴⁶ Bollinger, *supra* note 113, at 145.

²⁴⁷ *Id.* at 146.

²⁴⁸ See *id.* at 150.

truly harmful situations will rarely arise because we retain the ability to keep really dangerous information secret."²⁴⁹ Referring primarily to the power of government to withhold its own secrets, Bollinger asserted that we rely on "the law of property" to protect us from completely uninhibited dissemination of information, even as we "claim a contrary self-image."²⁵⁰

Although Bollinger's primary concern in 1991 was to justify differential regulatory treatment of print and electronic media, he was on to something far more important. Recognizing that freedom of the press was becoming a struggle between property and access, Bollinger saw that concepts such as "'public controversies,' newsworthiness, and the fact-opinion distinction" then emerging from libel jurisprudence would be important factors on the access side of that struggle.²⁵¹ But Bollinger missed the connection between these concepts and the public's "right to know," a phrase for which he had little use.

One suspects that Bollinger saw in the notion of a "right to know" the ultimate, unqualified triumph of access over property, which he was unprepared to accept. If one views the right as manifested by "'public controversies,' newsworthiness, and the fact-opinion distinction," and therefore qualified by these and similar concepts, the right becomes a significant, but not necessarily dispositive weight on the side of access. The Supreme Court seems to have recognized this principle in the area of personal privacy, and it has worked to find the proper balance the only way it can, one case at a time. *Bartnicki* is just the latest case in that search.

But the Court has not been nearly as receptive to these manifestations of the public right to know in three other areas: news gathering torts and access to public records, both of which were cited by President Bollinger, and copyright. This needs to be remedied.

A.

I have written elsewhere that the imposition of liability for newsgathering torts requires some degree of First Amendment scrutiny apart from any constraint on the punishment meted out for publishing the fruits of such questionable conduct.²⁵² In *Bart-*

²⁴⁹ *Id.* at 147.

²⁵⁰ *Id.* at 145.

²⁵¹ *Id.* at 151.

²⁵² See Easton, *supra* note 63, at 1206-15 (arguing for a constitutional rule protecting newsgathering absent bad faith or outrageous behavior).

nicki, the Supreme Court neatly sidestepped the issue, along with a companion case that could have presented it squarely.

In *Peavy v. WFAA-TV, Inc.*,²⁵³ Carver Dan Peavy was an elected trustee who controlled the purchase of insurance for employees of a public school district. His incriminating cordless telephone conversations were intercepted by a neighbor who, in turn, brought tapes of the conversations to WFAA-TV.²⁵⁴ After consulting outside counsel, the station commenced an investigation into suggestions of bribery and other wrongdoing that appeared on the tapes.²⁵⁵ The neighbor was encouraged to provide additional tapes and instructed as to the best way to create tapes for broadcast.²⁵⁶

Before any broadcast took place, however, counsel told the station that its previous advice had been incorrect, that the interception was illegal, and that the station ought not accept any more tapes, broadcast them, or otherwise use or disclose their contents.²⁵⁷ The station complied with that advice and broadcast three reports based on alternative sources.²⁵⁸ The broadcasts did, however, cover some of the same material that appeared in the tapes.²⁵⁹ Peavy was indicted, tried and acquitted on all charges.²⁶⁰ He subsequently sued WFAA-TV, alleging violations of federal and state wiretap laws.²⁶¹

The district court granted summary judgment for WFAA-TV on grounds that the station did not procure or obtain the tapes in violation of the wiretap laws and that its use and disclosure of their contents were protected by the First Amendment under a strict scrutiny standard.²⁶² The Court of Appeals for the Fifth Circuit vacated the summary judgment on the question of whether the station procured the tapes in violation of the acts.²⁶³ It also summarily rejected defendant's apparently half-hearted First Amendment defense of its newsgathering practices.²⁶⁴ The court then reversed the

²⁵³ 221 F.3d 158 (5th Cir. 2000).

²⁵⁴ *See id.* at 164.

²⁵⁵ *See id.* at 164-65.

²⁵⁶ *See id.* at 164.

²⁵⁷ *See id.* at 165-66.

²⁵⁸ *See id.* at 166.

²⁵⁹ *See id.*

²⁶⁰ *See id.*

²⁶¹ *See id.* Specifically of concern here were the questions of whether WFAA-TV procured the tapes in violation of the federal wiretap act, 18 U.S.C. 2511(1)(a), or the largely parallel Texas statute, Tex. Civ. Prac. & Rem. Code 123.002(a)(1); and whether WFAA-TV used or disclosed the contents of those tapes in violation of 18 U.S.C. 2511(1)(c) & (d) and Tex. Civ. Prac. & Rem. Code 123.002(a)(2).

²⁶² *See Peavy*, 221 F.3d at 166-67.

²⁶³ *See id.* at 194.

²⁶⁴ *See id.* at 172.

In a footnote to their contention there is *no* "procurement" action, defendants conclusorily

summary judgment on use and disclosure and, adopting an intermediate scrutiny standard, upheld the statutory provisions against the station's as-applied challenge.²⁶⁵

The U.S. Supreme Court denied *certiorari*,²⁶⁶ and the case settled for a reported \$5 million.²⁶⁷ The question of whether and how the First Amendment protects a publisher's use and disclosure of information obtained illegally by its own reporters will have to wait yet another day.

What was especially troubling about this case was the possibility that important information might never have been brought to the public's attention. Here, the information concerned apparently unlawful behavior by an elected official in a position of trust. Because that information was brought to a television station as the result of an illegal interception, the station faced civil and criminal liability and, in the end, paid a substantial settlement for using the information it learned to develop the story through legitimate sources and for disclosing facts to the public that happened to be on the intercept tapes, notwithstanding the station's independent efforts.

Even if the courts had ultimately held that the First Amendment protects the publication of important information, whether lawfully or unlawfully acquired by the publisher, reporters and editors may still decline to pursue such stories where, as here, their newsgathering practices raise separate grounds for liability. In this case, a lawyer, albeit no expert in this field, counseled the station "not to accept additional tapes, not to broadcast any tapes, not to disclose the contents of the tapes to third parties, and not to confront individuals about the conversations on the tapes, unless the information was available from other sources."²⁶⁸ The court would later nullify the tiny safe harbor in that final clause,²⁶⁹ and yet still

assert: "if procurement is construed as broadly as [the Peavys] would have it, the . . . provision also would be unconstitutional as applied . . . and on its face." . . . Obviously, assuming defendants intend this to apply to the "obtains" claim, it is *not* adequately briefed. In any event, it is without merit. Defendants have essentially conceded the First Amendment would *not* bar an action against them for interception. There is *no* basis for distinguishing, for First Amendment purposes, between a person intercepting, on the one hand, and *obtaining* it through someone else, on the other. (Emphasis in original.)

Id. As a technical matter, the word "procure" is used in the operative provision of the federal statute, which, the court held, afforded Peavy no civil damages; "obtain" is used in the state statute, which, the court held, did provide for recovery. The court somewhat blurs the fact that the Texas statute speaks not of obtaining the intercepted material, but rather of obtaining a person to intercept the conversation.

²⁶⁵ See *id.* at 194.

²⁶⁶ See *WFAA-TV, Inc. v. Peavy*, 121 S. Ct. 2181 (2001).

²⁶⁷ See *Belo, Peavy Settle Suit Over WFAA Reports*, Dallas Morning News 34A (Oct. 19, 2001).

²⁶⁸ *Peavy*, 221 F.3d at 165-66 (emphasis in original).

²⁶⁹ See *id.* at 174 ("In correctly rejecting defendants' reliance on [attenuation doctrine],

declare it “highly unlikely [that the burden the acts impose on journalists] will result in ‘timidity and self-censorship’”²⁷⁰

If a similar case ever reaches the Supreme Court, there may yet be an opportunity to reconsider a First Amendment defense for the publisher’s initial conduct in acquiring the information. The only way to ensure that such stories as this one reach the public ear is to temper today’s misguided rule that newsgathering torts are nothing more than “generally applicable laws” that “do *not* offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”²⁷¹ Recognizing the public’s right to know serves that purpose well by requiring some heightened degree of First Amendment scrutiny whenever the information in question is a matter of legitimate public concern.

I have previously urged that the First Amendment must protect tortious and even some criminal conduct in good-faith pursuit of a bona fide story, absent outrageous behavior.²⁷² Such conduct should be immunized as to public figure plaintiffs or where, as here, the defendant is covering government operations.²⁷³ While the *Peavy* court properly rejected an “ignorance or mistake of the law” defense, based on the journalists’ good-faith belief that their actions were lawful,²⁷⁴ the journalists acted quite reasonably in light of the information they had. Indeed, to have dropped the story once they heard the tapes, which the court suggests they were bound to do,²⁷⁵ would have been the greater breach of faith with the public.

At the very least, an *ad hoc* balancing of interests would have dictated a finding of no liability for WFAA-TV and its employees—provided, that is, that the public’s right to know is recognized as a legitimate interest. Indeed, such a balancing might be precisely what is needed to vindicate the public’s interest when important information is “owned” by public or private entities.

the district court stated: ‘The fact that [defendant] later obtained the same information from independent sources’ was irrelevant.”).

²⁷⁰ *Id.* at 190.

²⁷¹ *Id.* at 185 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 669 (1972) (emphasis added)).

²⁷² See Easton, *Two Wrongs*, *supra* note 63.

²⁷³ See *id.* Private figure plaintiffs would be limited to compensatory damages absent such a showing.

²⁷⁴ *Peavy*, 221 F.3d at 178-79.

²⁷⁵ See *id.* at 176 (rejecting defendants’ contention that, to preserve vital First Amendment interests, the court should construe the proscribed “use” and “disclosure” narrowly to exclude exploring leads from lawfully obtained sources).

B.

In the previous section, I argued that the invocation of generally applicable law requires some degree of First Amendment scrutiny when employed against a gatherer of news acting on behalf of the public. If there is even a scintilla of validity to that position, then surely First Amendment scrutiny is required when a law enacted to facilitate the dissemination of information to the public is invoked to keep information from the public. This section and the next explore the relationship between the right to know and access to governmental and privately owned information.

Few constitutional principles are as well settled or as often repeated as the absence of a First Amendment right of access to government information.²⁷⁶ Indeed, President Bollinger paraphrases Alexander Bickel, who represented the *New York Times* in the Pentagon Papers case, to the effect that “it will never be feasible to develop a press (or public) right to obtain government-held information.”²⁷⁷ Bickel reasoned that it would be better to leave the government and the press to their own best efforts in protecting and pursuing, respectively, important information than to give judges the power to compel disclosure and, concomitantly, forbid publication.²⁷⁸

Justice Potter Stewart perhaps put it best:

There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. The public’s interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.

The Constitution, in other words, establishes the contest, not its resolution. Congress may provide a resolution, at least in some

²⁷⁶ See, e.g., *Houchins v. KQED*, 438 U.S. 1, 9 (1978) (“This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control.”); *Saxbe v. Wash. Post*, 417 U.S. 843, 850 (1974) (quoting *Pell v. Procunier*, 417 U.S. 817, 834 (1974): “Newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public.”); *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) (“[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (“The right to speak and publish does not carry with it the unrestrained right to gather information.”). But see *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-600 (1978) (discussing the common law right of access to court documents); *Press-Enterprise Co. v. Superior Court (I)*, 464 U.S. 501, 512 (access to court records may be constitutionally required even where the proceeding itself was properly closed).

²⁷⁷ Bollinger, *supra* note 113, at 148 (paraphrasing ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 78-86 (1975)).

²⁷⁸ See *id.*

instances, through carefully drawn legislation. For the rest, we must rely, as so often in our system we must, on the tug and pull of the political forces in American society.²⁷⁹

Be that as it may, the government may not ignore the First Amendment once it decides to make information available. In *Saxbe v. Washington Post*,²⁸⁰ for example, the Court upheld a Bureau of Prisons regulation governing media access to federal prisoners against a First Amendment challenge precisely because the regulation did not deny the press access to sources available to members of the general public.²⁸¹ Had the regulation barred only credentialed reporters, it would surely have been held unconstitutional as singling out the press for special treatment.²⁸²

In a more recent access case, the Supreme Court rejected a facial challenge to a California statute regulating access to the addresses of persons arrested by police.²⁸³ The Court pointed out that California could have decided not to give out arrestee information at all without violating the First Amendment.²⁸⁴ But eight justices agreed that the Constitution would limit California's freedom to decide how to distribute the information if the state had decided to make it available.²⁸⁵ In my view, a "public importance" test would be the logical manifestation of any such limitation; it remains only to examine how such a test might work in practice.

Whether the press and public should have access to information in the hands of government is unquestionably determined by

²⁷⁹ Potter Stewart, *Or of the Press*, 26 HASTINGS L. J. 631, 636 (1975) (quoted in *Houchins*, 438 U.S. at 14-15).

²⁸⁰ 417 U.S. 843 (1974).

²⁸¹ *Id.* at 850.

²⁸² See, e.g., *Minn. Star & Tribune Co. v. Minn. Commr. Of Revenue*, 460 U.S. 575, 592-93 (1983) (striking down a state use tax that singled out the press for special treatment). See also *R.A.V. v. St. Paul*, 505 U.S. 377, 383-84 (1992) (holding that even so-called "unprotected" speech is not "entirely invisible to the Constitution" and may not be regulated in ways that otherwise offend First Amendment values).

²⁸³ See *Los Angeles Police Dept. v. United Rptg. Publg. Corp.*, 528 U.S. 32, 34 (1999).

²⁸⁴ See *id.* at 40.

²⁸⁵ See *id.* at 42-45. Justice Scalia, in a concurring opinion joined by Justice Thomas, asserted that a "restriction upon access that allows access to the press (which in effect makes the information part of the public domain), but at the same time denies access to persons who wish to use the information for certain speech purposes, is in reality a restriction upon speech rather than upon access to government information." *Id.* at 42. Justice Ginsberg, in a concurring opinion joined by Justices O'Connor, Souter and Breyer, agreed with Justice Scalia on that point and added: "To be sure, the provision of address information is a kind of subsidy to people who wish to speak to or about arrestees, and once a State decides to make such a benefit available to the public, there are no doubt limits to its freedom to decide how that benefit will be distributed." *Id.* at 42-43. And Justice Stevens, in a dissenting opinion joined by Justice Kennedy, would have held that the statute was unconstitutional because it made the information generally available, but denied it to "a narrow category of persons solely because they intend to use the information for a constitutionally protected purpose." *Id.* at 45.

statute, and every state and the federal government has enacted some kind of open records law.²⁸⁶ To a greater or lesser extent, each of those laws contains exceptions to a general disclosure requirement that represent the legislature's determination that some other value outweighs the public's interest in the information.²⁸⁷ When those exceptions involve such values as personal privacy, for example, the courts have historically "balanced the public interest in disclosure against privacy interests."²⁸⁸ With respect to the federal Freedom of Information Act (FOIA), however, Professors Halstuk and Davis have shown that "the scope of acceptable public interest arguments in favor of disclosure" has been sharply narrowed by an unfortunate distortion of the "central purpose" of the act in *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*,²⁸⁹ in which the Court denied press access to cumulative "rap sheets" held by the Justice Department.

Halstuk and Davis argue persuasively that two factors underlay the Supreme Court's retrenchment: a sense that release of computerized databases is qualitatively different from release of the very same information one paper record at a time;²⁹⁰ and disapproval of the uses to which released records are put, primarily by businesses and lawyers.²⁹¹ Although enactment of the Electronic Freedom of

²⁸⁶ See Reporters Committee for Freedom of the Press, *Tapping Officials' Secrets*, at <http://www.rcfp.org/tapping/index.cgi> (last visited Dec. 8, 2001). State statutes providing for public access to government records were enacted as early as 1849, when the Wisconsin legislature passed a public records law. See *Comments, Public Inspection of State and Municipal Executive Documents*, 45 *FORDHAM L. REV.* 1105, 1105 (1976). A recent study of state public records laws rated Vermont's the best in the country, but gave it only a B-. See Better Government Association, *Freedom of Information in the USA* 6 (forthcoming; draft on file with author).

²⁸⁷ See, e.g., 5 U.S.C. 552(b)(1)-(9) (2001) (listing nine exemptions under the Federal Freedom of Information Act [hereinafter FOIA]).

²⁸⁸ Martin E. Halstuk and Charles N. Davis, *The Public Interest Be Damned: Lower Court Treatment of the Reporters Committee "Central Purpose" Reformulation*, 54 *ADMIN. L. REV.* 983, 986 (2002) [hereinafter Halstuk & Davis]. The authors cite *U.S. Dept. of the Air Force v. Rose*, 425 U.S. 352, 361 (1972), for the proposition the FOIA exemptions should be "narrowly construed" and that "balanced the public and social interest in disclosure against the individual's interest in protecting personal privacy against the social value of public disclosure must be the device to determine whether information should be disclosed."

²⁸⁹ 489 U.S. 749 (1989). Halstuk and Davis argue that *Reporters Committee* limits the "public interest" side of the balancing equation to information that "directly" addresses government operations or activities, not the data collected through those activities, even though examining such data might shed even more light, albeit indirectly, on those activities. Halstuk & Davis, *supra* note 288, at 5-6.

²⁹⁰ See *id.* at 40-41 (quoting *Reporters Committee*, 489 U.S. at 764: "Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearing house of information.").

²⁹¹ See Halstuk & Davis, *supra* note 288, at 43-45 (noting then-Judge Patricia Wald's observation that lawyers could find facts faster through FOIA requests than through civil discovery and businesses could use FOIA to get information about their competitors).

Information Act (EFOIA) has partly overcome the first of these factors,²⁹² they conclude that *Reporters Committee* and its progeny continue to restrict access to important information held by the federal government.²⁹³

According to Halstuk and Davis, form and purpose are impermissible grounds for denying access to public records as a matter of statutory construction and official policy. A fully developed right to know would make denial on those grounds constitutionally impermissible as well. I have elsewhere suggested that the First Amendment proscribes suppressing information already in the public domain by virtue of its form.²⁹⁴ I submit that suppressing information because the person requesting it is a lawyer seeking discovery by other means, or an entrepreneur seeking information on competitors, or a journalist seeking a news story, is precisely the kind of discrimination that the First Amendment right to know forbids once government has decided to make the information public in one form or another. At the very least, the government's interest in withholding such information must be balanced against the public's interest in releasing it, without the artificial constraints imposed by *Reporters Committee*.

Again, one can find analogous reasoning in public forum doctrine. Government is under no compulsion to create a public forum where none existed by "long tradition."²⁹⁵ If government nevertheless chooses to create a public forum, it may "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."²⁹⁶ But when government creates a public forum

²⁹² Pub. L. No. 104-231, § 3, 110 Stat. 3049 (1996) (amending 5 U.S.C. 552(f) to include electronic records within the definition of "record.").

²⁹³ See Halstuk & Davis, *supra* note 288, at 46.

²⁹⁴ See Eric B. Easton, *Closing the Barn Door after the Genie is Out of the Bag: Recognizing a "Futility Principle" in First Amendment Jurisprudence*, 45 DEPAUL L. REV. 1 (1995). The argument that computerized records may be withheld when paper records are available, albeit with some effort, is roughly analogous to the *Karn* case discussed in this article at 56-63. The U.S. Department of State prevented *Karn* from exporting a cryptographic algorithm in digital format, even though it was readily available abroad in text. Although the district court upheld the department's ruling against *Karn*'s First Amendment challenge, see *Karn v. U.S. Dept. of State*, 925 F. Supp. 1, 10-13 (D.D.C. 1996), the administration soon thereafter transferred authority over such exports from State to the Department of Commerce, cutting short any substantive review of that holding. See *Karn v. U.S. Dept. of State*, 1997 U.S. App. LEXIS 3123 (D.C. Cir. Jan. 21, 1997) (*per curiam* opinion remanding the case in light of the transfer). *Karn*'s case was dismissed as moot following the transfer. See Phil *Karn*, *The Applied Cryptography Case: Only Americans Can Type!*, at <http://people.qualcomm.com/karn/export/> (last visited Dec. 9, 2001).

²⁹⁵ *Perry Educ. Assn. v. Perry Loc. Educators' Assn.*, 460 U.S. 37, 45-46 (1983).

²⁹⁶ *Id.* at 46 (citing *U.S. Postal Serv. v. Greenburgh Civic Assn.*, 453 U.S. 114, 129 (1981)).

generally open to the public for expressive purposes, reasonable time, place, and manner restrictions may apply, but “a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.”²⁹⁷ Similarly, government may withhold from the public information that it alone possesses.²⁹⁸ Or it can enact a law releasing the information “for any public or private purpose,”²⁹⁹ subject only to explicit statutory exceptions. When government has done the latter, as ours has, it may not then arbitrarily withhold the information, absent some compelling interest that overrides the public’s interest in seeing the information come to light.

Whether the Court will reconsider its crabbed interpretation of FOIA, as a matter of either statutory construction or constitutional requirement, may become apparent sooner rather than later, as two lawsuits begin to work their way through the federal courts. On December 5, 2001, the Center for National Security Studies and others sought release of information about persons arrested and detained in the aftermath of the September 11 terrorist attacks.³⁰⁰ The complaint alleges that the Department of Justice’s failure to release the requested information or even respond in a timely manner violates not only FOIA, but also First Amendment and common law rights of access.³⁰¹ And on November 28, 2001,

²⁹⁷ *Perry*, 460 U.S. at 46 (citing *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981)).

²⁹⁸ Although even here, there must be limits. One cannot imagine the government indefinitely withholding access to, say, presidential papers. Can one?

²⁹⁹ EFOIA, P.L. 104-231, 2(a)(1), 110 Stat. 3048 (1996):

(a) Findings. The Congress finds that - (1) the purpose of section 552 of title 5, United States Code, popularly known as the Freedom of Information Act, is to require agencies of the Federal Government to make certain agency information available for public inspection and copying and to establish and enable enforcement of the right of any person to obtain access to the records of such agencies, subject to statutory exemptions, *for any public or private purpose*, (emphasis added).

³⁰⁰ Compl. for Inj. Relief at 12, *Ctr. for Natl. Sec. Stud. v. U.S. Dept. of Justice*, No. 01-2500 (D.D.C. filed Dec. 5, 2001). In their letters to Justice and the Immigration and Naturalization Service, the plaintiffs couched their request for information in terms quoted from DOJ’s own criteria for expedited processing:

The ‘information is urgently needed to inform the public concerning some actual or alleged government activity;’ the requesting organizations are primarily engaged in disseminating information to the public; the subject of the detainees ‘is of widespread and exceptional media interest and the information sought involves possible questions about the government’s integrity which affect public confidence,’ and the information is needed immediately to prevent “the loss of substantial due process rights” to individuals and ‘threats to their physical safety.’

Id. at 8. On Aug. 2, 2002, the court ordered the government to produce a list of the identities of all individuals detained in connection with the investigation of the Sept. 11 terrorist attacks, then granted the Government’s motion for a stay pending appeal. *Ctr. for Natl. Sec. Stud. v. U.S. Dept. of Justice*, 217 F. Supp. 2d 58 (D.D.C. Aug. 15, 2002) (referring to its order at 215 F. Supp. 2d 94 (D.D.C. Aug. 2, 2002)). Oral arguments before the Court of Appeals for the District of Columbia Circuit were held Nov. 18, 2002.

³⁰¹ See *id.* at 10-12. On Oct. 12, 2001, Atty. Gen. John Ashcroft issued a new statement of

the American Historical Association and others sought a declaratory judgment setting aside President Bush's executive order governing the release of presidential documents³⁰² and an injunction ordering the release of some 68,000 documents from the Reagan Administration.³⁰³

Neither of these cases puts either the statutory or constitutional questions as squarely as one might wish. The FOIA claim implicates national security, as well as personal privacy exemptions; the constitutional claim is limited to those "agency records that are also court records";³⁰⁴ and the presidential papers case is controlled by another statute altogether. But both cases would afford a sympathetic Supreme Court the opportunity to recognize a constitutional right to know and vindicate that right by balancing the government's interest in withholding the records against the public's interest in disclosure.³⁰⁵

C.

Finally, I turn to the right to know information in private hands—information protected by copyright or so-called paracopyright laws like the Digital Millennium Copyright Act.³⁰⁶ Our starting point is a recognition that the right to know is already an integral part of copyright law. Specifically, the right to know is

Bush administration policy on FOIA compliance emphasizing that discretionary disclosures should be made "only after full and deliberate consideration of the institutional, commercial and privacy interested that could be implicated" and promising that the Justice Department will defend agency decisions to withhold records, in whole or in part, unless they "lack a sound legal basis." Memo from John Ashcroft, Atty. Gen., to Heads of All Federal Departments and Agencies, *Freedom of Information Act* (Oct. 12, 2001), at <http://www.usdoj.gov/oip/foiapist/2001foiapist19.htm> (last visited Dec. 28, 2001).

³⁰² See Exec. Or. 13233, 66 Fed. Reg. 56025 (Nov. 1, 2001) (entitled *Further Implementation of the Presidential Records Act*, 44 U.S.C. §§ 2201-07, allowing either a sitting president or former president to block the release of the former president's records).

³⁰³ See Compl. for Decl., Inj., and Mandamus Relief at 22, *Am. Hist. Assn. v. Natl. Archives and Recs. Admin.*, No. 01-2447 (D.D.C. filed Nov. 28, 2001). See also *Bush Administration keeps Reagan Records Under Lock and Key*, News Media Update (newsletter of the Reporters Committee for Freedom of the Press) 3 (July 23, 2001); Josh Chafetz, *The White House Hides History*, *The New Republic* (Aug. 27, 2001), at <http://www.thenewrepublic.com/082701/chafetz082701.html>; Richard Reeves, *In War, Truth and History Die First*, *Universal Press Syndicate* (Nov. 16, 2001), at <http://www.richardreeves.com>.

³⁰⁴ Compl. for Inj. Relief at 11-12, *Ctr. for Natl. Sec. Stud. v. U.S. Dept. of Justice*, No. 01-2500 (D.D.C. filed Dec. 5, 2001).

³⁰⁵ Quite apart from federal and state open records laws, recognizing a constitutional right to know might also release other closely held records in the public interest. Settlements that implicate public health or safety, for example, ought to be in the public domain, along with all relevant discovery materials.

³⁰⁶ See Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 24 (2001) [hereinafter Netanel] (defining "paracopyright" as technology- or contract-based protections against unauthorized access or use of digital content, such as those afforded by the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998)).

advanced by several limitations on and exceptions to copyright law that allow it to coexist with the First Amendment.³⁰⁷ the fact-expression dichotomy,³⁰⁸ the first sale doctrine,³⁰⁹ the fair use defense,³¹⁰ compulsory licensing,³¹¹ and the limitations on purpose and duration contained in the constitution's intellectual property clause.³¹² Together, these arguably satisfy whatever public importance test might be required by the First Amendment right to know, and copyright might just as well have been discussed with

³⁰⁷ Netanel calls this notion the "Nimmer Exoneration." *Id.* at 7-12 (citing Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970), and noting the distortion of Nimmer's analysis by courts in holding that copyright does not implicate the First Amendment).

³⁰⁸ The Copyright Act of 1976 provides that "Copyright protection subsists. . . in original works of authorship fixed in any tangible medium of expression," 17 U.S.C. § 102 (a), but "[i]n no case does copyright protection. . . extend to any idea. . . embodied in such work." 17 U.S.C. § 102 (b). *See, e.g.,* Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 350 ("As applied to a factual compilation, assuming the absence of original written expression, only the compiler's selection and arrangement may be protected; the raw facts may be copied at will."); *Harper & Row Publ., Inc. v. The Nation Enters.*, 471 U.S. 539, 560 (1985) ("First Amendment protections [are] already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas. . .").

³⁰⁹ "[T]he owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." 17 U.S.C. 109(a). *See, e.g.,* *Amer. Intl. Pictures, Inc. v. Foreman*, 576 F.2d 661, 664 (5th Cir. 1978) ("The exclusive right to vend a copy of a copyrighted work extends only to the first sale of that copy. After the first sale of a copy the copyright holder has no control over the occurrence or conditions of further sales of it." (citation omitted)). The free lending library, for example, depends in part on the first sale doctrine to immunize its operations from liability for copyright infringement. *See generally* Laura N. Gasaway, *Values Conflict in the Digital Environment: Librarians versus Copyrightholders*, 24 COLUM.-VLA J.L. & ARTS 115 (2000).

³¹⁰ "[T]he fair use of a copyrighted work. . . for purposes such as criticism, comment, news reporting, teaching. . . , scholarship, or research, is not an infringement of copyright." 17 U.S.C. § 107. *See, e.g.,* *Consumers Union of the U.S., Inc. v. Gen. Signal Corp.*, 724 F.2d 1044, 1050 (2d Cir. 1983) ("The scope of [fair use] is undoubtedly wider when the information conveyed relates to matters of high public concern."). *But see Harper & Row*, 471 U.S. at 559 ("It is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public.").

³¹¹ *See* 17 U.S.C. 111 (secondary transmissions of broadcast signals), 115 (making and distributing phonorecords), 116 (jukeboxes), 118 (noncommercial broadcasting). Compulsory licenses represent an attempt to accommodate the monopoly rights of authors and inventors under copyright and patent law with other social needs or political choices. *See, e.g.,* Theodore C. Bailey, Student Author, *Innovation and Access: The Role of Compulsory Licensing in the Development and Distribution of HIV/AIDS Drugs*, 2001 U. ILL. J.L. TECH. & POLICY 193, 217 (concluding that compulsory licensing of HIV/AIDS drugs in developing countries contributes to a socially optimal balance between discovery and distribution). *But see* Salah Basalamah, *Compulsory Licensing for Translation: An Instrument of Development?*, 40 IDEA 503 (2000) (advocating an international fair use regime for less developed countries to replace the current compulsory license for translation).

³¹² U.S. Const. art. I, 8 ("The Congress shall have Power. . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. . ."). Courts have explicitly rejected the assertion that the language in this clause imposes any substantive limitation on congressional authority to set copyright terms and conditions. *See, e.g., Schnapper v. Foley*, 667 F.2d 102, 112 (D.C. Cir. 1981).

libel and privacy law in Part IV of this article to demonstrate that the public importance test is alive and well.

Alive, perhaps, but not so well these days. All of these safeguards are currently under assault in Congress and the courts.³¹³ A growing number of important books, articles, and amicus briefs attest to the concern within the academic community that the protections accorded privately held information have expanded beyond tolerable levels under the First Amendment.³¹⁴ As those protections expand, the body of information in the public domain is diminished, rather than enhanced as the framers envisioned.³¹⁵ So far, however, most courts have been reluctant to look beyond the statute to see the constitutional significance of this erosion in the right to know.³¹⁶ Even where courts have applied a First Amendment analysis, the results have perpetuated the power of the copyright holders.³¹⁷

³¹³ See, e.g., the "Sonny Bono" Copyright Term Extension Act [hereinafter CTEA], Pub. L. No. 105-298, 112 Stat. 2827 (1998) (extending the copyright term by 20 years); the Digital Millennium Copyright Act [hereinafter DMCA], Pub. L. No. 105-304, 112 Stat. 2860 (1998) (generally prohibiting the circumvention of technology used to prevent access to or copying of works protected by copyright, as well as the trafficking in circumvention technology); Collection of Information Antipiracy Act, H.R.2652, 105th Cong. (1998) (database protection legislation passed by the House but dropped from the Conference Report on the DMCA). The CTEA was upheld against a First Amendment challenge in *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001) *aff'd*, 123 S. Ct. 769 (2003), while the DMCA survived a constitutional assault in *Universal City Studios, Inc. v. Corley*, 2001 U.S. App. LEXIS 25330 (2d Cir. Nov. 28, 2001).

³¹⁴ See, e.g., JESSICA LITMAN, *Digital Copyright* 14 (Prometheus Books 2001) ("If current trends continue unabated . . . we are likely to experience a violent collision between our expectations of freedom of expression and the enhanced copyright law."); Br. of Amicus Curiae, American Civil Liberties Union *et al.*, *Universal City Studios*, 2001 U.S. App. LEXIS 25330; see also *infra* text accompanying notes 315, 319-23.

³¹⁵ See, e.g., Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 354-55 (1999) (Although the First Amendment requires a "robust" public domain, "our society is making a series of decisions that will subject more of the ways in which each of us uses information to someone else's exclusive control.").

³¹⁶ Netanel points out that *Suntrust Bank v. Houghton Mifflin Co.*, 252 F.3d 1165 (11th Cir. 2001) (vacating an injunction barring publication of the parody *The Wind Done Gone* as an unlawful prior restraint) marked the first time that an appellate court had applied the First Amendment's Press Clause to constrain enforcement of a copyright. See Netanel, *supra* note 306, at 2.

³¹⁷ In *Universal City Studios*, 2001 U.S. App. LEXIS 25330, the court acknowledged that the computer code embodying the DVD decryption algorithm DeCSS was "speech" within the meaning of the First Amendment, but found that the injunction issued under the DMCA to bar the defendants from posting the algorithm on their web sites or linking to other web sites carrying the algorithm implicated non-speech, functional components of the algorithm, in the case of posting, and the hyperlink, in the case of linking. Having established that the injunction was content-neutral, the court then held that it survived the heightened scrutiny test of *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994).

A California appellate court reached a different result, however, when the recording industry tried to enjoin the posting of DeCSS under the Uniform Trade Secrets Act, Civ. Code § 3426.1 *et seq.* In *DVD Copy Control Assn. v. Bunner*, 2001 Cal. App. LEXIS 1179 (6th App. Dist. Nov. 1, 2001), the court held that the lower court's injunction against future

Proposed remedies for this erosion have included denying copyright to newsworthy works,³¹⁸ providing heightened First Amendment scrutiny for copyright regulation,³¹⁹ limiting preliminary injunctions against copyright infringers,³²⁰ reformulating the fair use doctrine to give greater weight to speech than to market concerns,³²¹ creating an independent First Amendment privilege beyond fair use,³²² even permitting abandonment of copyright altogether in favor of technological self-help.³²³ Any of these alternatives would reinvigorate the right to know with respect to copyright, although most would operate in practice as defenses to an infringement or circumvention complaint and, therefore, require an actor willing to risk liability for making a mistake (the dreaded “chilling effect”).

For certain works in which the public interest is especially high, I would have Congress provide a “condemnation” proceeding,³²⁴ initiated by the government or a private actor, who would

disclosure of DeCSS was an unconstitutional prior restraint and that Bunner’s First Amendment rights trumped DVDCCA’s statutory right to protect its trade secrets. *Id.* at 32-34. The court cited copyright law’s constitutional pedigree and statutory safety valves to distinguish it from the trade secret statute at issue here.

³¹⁸ See, e.g., *Los Angeles News Serv. v. Tullo*, 973 F.2d 791, 795 (1992) (“[Defendant] contends that . . . we should adopt a bright-line rule that no videotape of a newsworthy event is copyrightable because its creator’s proprietary interest must give way to the public’s First Amendment right of access to information.”).

³¹⁹ See, e.g., *Netanel*, *supra* note 306, at 54 (“[C]opyright law constitutes content-neutral speech regulation that should be subject to heightened (*Turner*), but not strict, scrutiny.”).

³²⁰ See, e.g., Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 210 (1998) (asserting that preliminary injunctions should be permitted only in cases involving literal copying).

³²¹ See, e.g., Ruth Okediji, *Giveers, Takers and Other Kinds of Users: A Fair Use Doctrine for Cyberspace*, 53 FLA. L. REV. 107, 113 (2001) (“[A]s owners’ rights are expanded to respond to the ease with which digital technology enables large scale infringement, users’ rights should, correspondingly, be reconceived to reflect the variety of ways the Internet facilitates—indeed encourages—production, access, and use of copyrighted content.”); L. Ray Patterson, *Free Speech, Copyright & Fair Use*, 40 VAND. L. REV. 1, 61 (1987) (a rational fair use doctrine would distinguish the impermissible use of a copyright by a competitor from the protected use of the underlying work by a consumer).

³²² See, e.g., Stephen Fraser, *The Conflict Between the First Amendment and Copyright Law and its Impact on the Internet*, 16 CARDOZO ARTS & ENT. L.J. 1, 51-52 (advocating an independent First Amendment privilege, outside the scope of fair use, based on factors such as a public interest in the copyrighted work and the necessity for access to it); Henry S. Hoberman, *Copyright and the First Amendment: Freedom or Monopoly of Expression*, 14 PEPP. L. REV. 571, (1987) (“The first amendment should protect unconsented use of copyrighted material when the alleged infringer can show (1) necessity, (2) originality, and (3) advancement of first amendment interests.”).

³²³ See, e.g., Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CINN. L. REV. 741 (2001) (asserting that copyright owners should have the right to choose between the rights accorded by federal copyright law and technological self-help measures and accompanying common law protections); Julie E. Cohen, *Copyright and The Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089, 1141 (1998) (advocating a right to hack digital code that prevents users from exercising those copyright privileges required by the First Amendment).

³²⁴ The term “condemnation,” of course, is a real property concept, but I use it here

seek a declaration that the public importance of the work is so great that some rights must be taken from the copyright owner and dedicated to the public.³²⁵ Obviously, there is a legitimate public interest in much of the copyrightable work in private hands, and any or all of the remedies suggested above could be employed to ensure that copyright protection does not impair the public's access to it. Under my proposal, only works of extraordinary importance to the public could be condemned at taxpayer expense, among them perhaps the famous Zapruder film of President Kennedy's assassination.³²⁶

Another such work is Dr. Martin Luther King's "I Have a Dream" speech, delivered at the Lincoln Memorial during the civil rights leader's Aug. 28, 1963, March on Washington.³²⁷ Dr. King applied for a statutory copyright about a month later, then successfully pursued an injunction against the sale of unauthorized recordings of the speech.³²⁸ More than 30 years later, CBS produced a documentary containing about sixty percent of the speech.³²⁹ The King estate, which owned the copyright, sued, but the district court granted CBS's motion for summary judgment on the ground that, under the 1909 Copyright Act, the work entered the public domain by virtue of its "general publication" on Aug. 28, 1963.³³⁰ The court of appeals reversed, remanding the cause for a trial on whether a general publication in fact occurred.³³¹ Neither court reached the fair use issue, and the case was settled in July 2000.³³²

only to suggest that the device I propose resembles the familiar "taking" of private property for public use with just compensation. I do not mean to imply any closer similarity between copyright and rights in real property.

³²⁵ Professor Litman has written that seasoned copyright experts could not agree whether it is even possible to dedicate works to the public domain after the Berne Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853 (1988). See Litman, *supra* note 314, at 76 n.10.

³²⁶ See *Time, Inc. v. Bernard Geis Assoc.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968). When *Time, Inc.*, used considerable parts of the Zapruder film without permission, the court found the use was fair. But the "fair use" defense is hardly a reliable safeguard when market value is weighed more heavily than public importance. See *Harper & Row*, 471 U.S. at 566.

³²⁷ The text of the speech is widely available. See, e.g., The Douglass Archives of American Public Address, at http://douglass.speech.nwu.edu/king_b12.htm (last visited Dec. 17, 2001).

³²⁸ See *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1213 (11th Cir. 1999).

³²⁹ See *id.*

³³⁰ *Id.* at 1213-14.

³³¹ See *id.* at 1220.

³³² On July 12, 2000, The Martin Luther King, Jr., Center for Nonviolent Social Change issued a press release announcing terms of the settlement. CBS News would "retain the right to use its footage of the speeches," and would "also have the right to license its footage to others while providing contact information, as appropriate, regarding the Estate's claimed intellectual property rights." The release went on to say that CBS would provide

No one can deny the vital importance of this speech, and especially film of this speech, to the public. It represents a pivotal moment in twentieth century American social and political history. Yet, short of misuse,³³³ there is no mechanism under the 1976 Act for a copyright to enter the public domain before expiration unless it is dedicated to the public by the copyright owner.³³⁴ The so-called “fact-expression” dichotomy affords no relief; no mere description of this speech, nor even its text, could adequately convey all or even a substantial portion of the “information” the public requires.³³⁵ The sight, the sound, the setting—all of these are our history. Moreover, nothing less than the full speech will do, negating any possibility that fair use will suffice.³³⁶ While some form of compulsory license might give the film some circulation, control would remain in the hands of those who could afford the license fee rather than the public at large.³³⁷ Finally, any concern that the film would be put to some less-than-enlightened uses might be ameliorated by allowing the author’s estate to retain a quasi-moral right to preserve the integrity of the work.³³⁸

If condemnation seems a narrow and problematic reform, it is

footage of the speeches for use by the King Estate and would make a contribution to the King Center. Available at http://www.thekingcenter.org/tkc/press_release/07-12-2000.htm (last visited Dec. 17, 2001).

³³³ Misuse of copyright is an equitable defense to an infringement action based on the plaintiff’s attempt to leverage its copyright to acquire an exclusive right or limited monopoly beyond those afforded by copyright law. See, e.g., *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970, 978 (4th Cir. 1990). While the effect of misuse is suspension of the plaintiff’s capacity to bring an infringement action, plaintiff can purge itself of the misuse and recover all of its copyright rights. *Id.* at 979, n.22.

³³⁴ Under the 1909 Act, which governed Dr. King’s copyright, a “general publication” of the speech might have precluded protection as a literary work and thrust the speech into the public domain. That issue was actually litigated the same year in *King v. Mister Maestro, Inc.*, 224 F. Supp. 101 (S.D.N.Y. 1963), with the court holding that Dr. King’s public delivery of the speech and his providing the press with an advance copy of the text did not constitute a general publication. In the CBS case, the district court explicitly and substantively disagreed with that decision: “As one of the most public and most widely disseminated speeches in history, it could be the poster child for general publication.” *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 13 F. Supp. 2d 1347, 1353 (N.D. Ga. 1998).

³³⁵ See Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guaranties of Free Speech and the Press?*, 17 UCLA L. Rev. 1180, 1197 (1970) (“It would be intolerable if the public’s comprehension of the full meaning of My Lai could be censored by the copyright owner of the photographs.”).

³³⁶ See *Harper & Row*, 471 U.S. at 565-66 (holding that taking even a relatively small portion of the original work can negate the fair use defense).

³³⁷ Hoberman considers compulsory licenses a “tax on free speech” that is repugnant to First Amendment values. See Hoberman, *supra* note 322, at 593-94.

³³⁸ This is not the place to go into whether the right of integrity exists in the United States. For a discussion on the various copyright law provisions, common law protections, and court decisions that may satisfy the Berne Convention, see H.R. Rpt. 100-609, at 32-34 (1988). In any event, the King Estate has already alienated some of Dr. King’s former associates by licensing the film for use in an Alcatel commercial. See *Controversy Over Use of King Name*, promoting a segment on the Dec. 2, 2001, edition of CBS’s *60 Minutes*, at <http://www.cbsnews.com/now/story/0,1597,319500-412,00.shtml> (last visited Dec. 13, 2001).

at least a step toward unwinding the constraints within which copyright is enclosing the informational commons.³³⁹

Coupled with some of the other reforms suggested above, the taking of copyright in the public interest will help expand the amount of important information in the public domain and reduce the control exercised by an increasingly concentrated media industry.³⁴⁰

Indeed, it may come to pass that some limitation of copyright may play a role in preventing further consolidation of the media industry, if not rolling back such consolidation as has already occurred. Antitrust scholars are already looking at the media industry as a potential target for intervention,³⁴¹ but, in my view, they face serious First Amendment obstacles. This is not to say that the media industry is immune from antitrust action to block mergers or break up monopolies; the case law clearly shows otherwise.³⁴² Where the rationale for antitrust action is economic, the First Amendment has nothing to say. But where the rationale for antitrust action is the same as the rationale for direct government regulation—the need to preserve some minimal number of voices in the marketplace of ideas—the First Amendment stands as an insurmountable barrier. Any such action that requires the government to inquire into the substance, as well as the number, of messages reaching the public would, in my view, invoke strict scrutiny.

But, to the extent that consolidation of the media industry is a function of copyright protection (as Professor Benkler has argued³⁴³), it might be slowed or rolled back by selective curtailment of copyright, without First Amendment implications.³⁴⁴ Because the grant of copyright is, itself, a privileged exception to the First Amendment, the withdrawal of one or more exclusive rights or shortening of the copyright term when the protected matter is of public importance, cannot but advance First Amendment interests. Although the Copyright Office takes no notice of a work before copyright “subsists,” and conducts only a modest review for

³³⁹ See Benkler, *supra* note 315, at 354-55.

³⁴⁰ See *id.* at 410 (“[I]ncreases in copyright protection. . . is likely to lead, over time, to concentration of a greater portion of the information production function in society in the hands of large commercial organizations that vertically integrate new production with owned-information inventory management.”).

³⁴¹ See, e.g., Lande, *supra* note 170.

³⁴² See *supra* text accompanying note 149.

³⁴³ See *supra* text accompanying note 340.

³⁴⁴ But see David McGowan, *Innovation, Uncertainty, and Stability in Antitrust Law*, 16 BERKELEY TECH. L.J. 729 (2001) (arguing against making the exercise of legitimate IP rights the basis for antitrust action, absent abuse such as conditional refusal to license which expands the rights-owner’s power beyond that granted by Congress).

copyrightability before registration, nothing in the constitutional authority given to Congress requires such forbearance. Copyright examinations could be made as exhaustive as patent examinations if Congress wished it so.³⁴⁵ Thus, inquiry into the substance of messages withheld from the public domain by copyright poses no further intrusion on the First Amendment than the copyright privilege itself.³⁴⁶

As a practical matter, the inquiry that I suggest into the public importance of a protected work would occur only after a condemnation claim has been filed. Congress might designate the Register of Copyrights to conduct the inquiry and impose an appropriate disposition: withdrawal of copyright, with or without compensation, reduction of term, or some limitation on exclusive rights.³⁴⁷ Any such action would be appealable to the courts.

The scope of this proposal is limited indeed; it offers no answer to private control of information of less than surpassing importance. That would require a sweeping reevaluation of the relationship between copyright and mass-audience news in general. I believe such a reevaluation could lead to the public's recovering most of the exclusive copyright rights to journalistic work product in exchange for rights of integrity and attribution.³⁴⁸ If one assumes that today's media giants participate in the hard news enterprise solely for prestige and legitimacy, such a "bargain" should create incentives to produce more (at least not less) newsworthy

³⁴⁵ The distinction between copyrights and patents in this regard is generally attributed to absence of a novelty requirement in copyright law. Authors are free to create new works that precisely match pre-existing works, so long as the first work is not copied and the match is purely coincidental. See, e.g., ARTHUR R. MILLER, *INTELLECTUAL PROPERTY LAW, PATENTS, TRADEMARKS AND COPYRIGHT, IN A NUTSHELL* 399 (West 3d ed. 2000). But this distinction is a practical one created by Congress; the constitutional charge is identical as to both kinds of intellectual property.

³⁴⁶ One might argue that giving government the opportunity to reward or penalize an author by a grant or denial of copyright protection, based on the content of the work, is impermissible under the First Amendment. Yet that is precisely the nature of "fair use," so the power is already woven into the fabric of the copyright law. Where prior restraint is the status quo ante, one cannot say that any relief violates freedom of speech because it is incomplete.

³⁴⁷ In particular, the right to make derivative works could be dedicated to the public with little harm to the copyright owner and great benefit to the public. See, e.g., Eric B. Easton, *Annotating the News: Mitigating the Effects of Media Convergence and Consolidation*, 23 *UALR L. REV.* 143, 148-50 (2000) (arguing that annotating news stories should not be considered infringement of the copyright owner's exclusive right to make derivative works).

³⁴⁸ I have only begun to work through this theme, but, at the moment, I believe that the reproduction right should be preserved for compilations and other collective works; otherwise, the rights to reproduce and distribute a single news story, to make annotations and other derivative works, and to perform or display the work publicly would all be dedicated to the public domain. In return, the "author" would be guaranteed prominent attribution and some protection from distortion (although not criticism).

information and to disseminate it more widely.³⁴⁹ To the extent that profitability matters, that could be accommodated by structuring the transaction in the nature of a compulsory license for, say, the first 24 hours.

Of course, that raises all sorts of questions about defining journalism and other publicly important information, but those questions are already being raised.³⁵⁰ That the *New York Times* and *The Washington Post* have become “private copyright cops,”³⁵¹ controlling how their stories may be used (or abused), is anathema to any meaningful notion of a free press. Only when the public’s right to know is given full effect through the application of a public importance test, may copyright law actually achieve the purpose intended by the framers—to be the “engine of free expression.”³⁵²

VI. SECOND THOUGHTS

The thesis of this article—that a penumbral First Amendment right to know is manifest in a public importance test that (1) is routinely applied by the courts in some areas and (2) ought to be applied more rigorously in others—raises at least two troublesome issues. The first is whether deference to proprietary interests such as personal privacy, government secrecy, and copyright is necessary, as a practical matter, to preserve core freedoms of speech and publishing; the second, whether investing in courts the power to determine what is publicly important undermines both the prerogatives of the political branches and the independence of journalists. As noted above, the first of these comes from Alexander Bickel

³⁴⁹ Legendary CBS Chairman William Paley supposedly once explained why he continued to invest in money-losing hard-news coverage: “I hate losing the money, but I like what it buys me in respectability and licensing protection.” Jane Mayer, *Bad News*, THE NEW YORKER, Aug. 14, 2000, at 30, 35, quoted in David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 454 n.126 (2002).

³⁵⁰ As this article was being finished, Professor David Anderson published an important new article that deserves far more attention than can be given here. Professor Anderson argues that the Press Clause of the First Amendment, as distinct from the Speech Clause, must be invoked if we are to preserve those legal preferences enjoyed by what we have traditionally viewed as “the press.” See Anderson, *supra* note 349, at 528. Doing so, however, requires us to distinguish between the broadly defined provision of information – accomplished by any number of economic actors in this information age – and the functions traditionally performed by journalists. See *id.* at 448-49. That, in turn, requires content discrimination based on importance. See *id.* at 530. Professor Anderson notes that such discrimination has been with us since the “beginning of the republic,” albeit masked by proxies such as format, frequency and means of distribution, and essentially denied in First Amendment theory. *Id.* at 528-29. Although I remain uncomfortable with Professor Anderson’s suggestion that such discrimination be undertaken by all levels and branches of government, *id.* at 528, I embrace his sense of the importance of public importance.

³⁵¹ SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 188 (2001).

³⁵² *Harper & Row*, 471 U.S. at 558.

by way of President Bollinger;³⁵³ the second from Justices Harlan and Marshall.³⁵⁴ But they are two sides of the same coin: trust.

Bollinger believes we, the people, cannot be trusted with really important information and, what is more, do not want to be burdened with it. As the right to gather news becomes stronger, he wrote,

we are being forced to confront the disconcerting fact that much information in this or any society is better left unspoken, often because of a legitimate distrust of the process of public discussion. As this occurs, we will come to discover that the law of property is relied upon to protect us from completely 'uninhibited' and 'wide-open' dissemination of information, while we claim a contrary self-image.³⁵⁵

A decade later, Professor Sunstein would take Bollinger's distrust of the public to yet another level—for the Internet age.³⁵⁶ Faced with a nearly infinite array of information choices, Sunstein writes, we will gravitate toward those that reflect our own views and concerns and filter out those with which we disagree or in which we have little interest. Left to our own devices, we will splinter into enclaves of like-minded people, deprive ourselves of new or challenging information, and forgo the shared experiences that are so vital to our democracy. The more consumer freedom we exercise, the more political freedom we lose.³⁵⁷

Sunstein believes that we can save ourselves from this fate by putting our consumer preferences aside and, as responsible citizens acting through our government, force ourselves to take the medicine we need. While this can be done voluntarily, there is no reason to fear regulation. After all, what we mistakenly think of as freedom of the press is really only a system of property allocations enforced by law and regulation at taxpayer expense. So it is really quite a small matter to adjust those property rights into a configuration that better serves our democracy.³⁵⁸

If Bollinger and Sunstein are right, Madison must have been wrong, and the First Amendment should be rewritten to authorize Congress to make whatever laws may be necessary to ensure that government can protect the people from their own weaknesses and the media companies that would exploit those weaknesses for

³⁵³ See *supra* text accompanying notes 277-78.

³⁵⁴ See *supra* text accompanying note 1.

³⁵⁵ Bollinger, *supra* note 113, at 145.

³⁵⁶ See Sunstein, *supra* note 140.

³⁵⁷ See *id.* at 44-50.

³⁵⁸ See *id.* at 128-131.

profit. But was it not Congress that created the system of property allocations that brought us to this sorry state of affairs? If Professor Litman's brief history of copyright law is any indication, we the people will be the last to benefit when and if Congress reallocates those property rights.³⁵⁹

If not Congress, then who? The dissenting opinions in *Rosenbloom* presaged the consensus in *Gertz* that courts should stay out of it. Justice Harlan's observation is quoted above;³⁶⁰ herewith, Justice Marshall's:

In order for particular defamation to come within the privilege there must be a determination that the event was of legitimate public interest. That determination will have to be made by courts generally and, in the last analysis, by this Court in particular. Courts, including this one, are not anointed with any extraordinary prescience. But, assuming that . . . courts are not simply to take a poll to determine whether a substantial portion of the population is interested or concerned in a subject, courts will be required to somehow pass on the legitimacy of interest in a particular event or subject; what information is relevant to self-government. *The danger such a doctrine portends for freedom of the press seems apparent.*³⁶¹

But is the danger really so apparent? Intuitively, Justice Marshall's concern rings true. No journalist wants to be second-guessed by a judge as to which stories are newsworthy and which are not. As a practical matter, though, the worst case scenario looks a lot like the situation that exists today. By construing public importance narrowly, courts could subject journalists to greater risk of liability in private facts cases and greater damages in private plaintiff libel cases. By construing public importance narrowly, courts could reduce the likelihood of a fair use defense to copyright infringement. By construing public importance narrowly, courts could decline to excuse news gathering torts or to pry information from government agencies. How is that dangerous?

Recognizing a constitutional right to know would put more public importance decisions in the hands of judges. But it is difficult to see how judges, even in the worst case, could constrict the flow of information to the public beyond today's baseline. In any event, there is no reasonable alternative.

³⁵⁹ Litman, *supra* note 314, at 63.

³⁶⁰ See *supra* text accompanying note 186.

³⁶¹ *Rosenbloom*, 403 U.S. at 79 (Marshall, J., dissenting) (emphasis added).