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# HOW THE FCC KILLED THE FAIRNESS DOCTRINE: A CRITICAL EVALUATION OF THE 1985 FAIRNESS REPORT THIRTY YEARS AFTER *SYRACUSE PEACE COUNCIL*

Mark R. Arbuckle, Ph.D.\*

## INTRODUCTION

The year 2017 marks the thirtieth anniversary of the Federal Communications Commission's ("FCC's") elimination of the broadcast Fairness Doctrine in *Syracuse Peace Council*.<sup>1</sup> This ruling, upheld by the United States Court of Appeals for the District of Columbia,<sup>2</sup> eliminated fairness rules that had been in place since the 1940s. The broader principle of broadcast fairness, including fairness and access rules for political candidates,<sup>3</sup> goes back to the earliest days of broadcasting in the 1920s.<sup>4</sup> Since 1949 broadcasters had been formally required to air controversial issues of public importance and provide reasonable opportunities for presentation of opposing views as part of their mandate to serve the public interest.<sup>5</sup>

Unlike the fairness rules enacted specifically for the benefit of political candidates, the Fairness Doctrine aimed to benefit the non-candidate general public by requiring broadcasters to present diverse viewpoints on important public issues. The FCC, in its 1949 Report on Editorializing,<sup>6</sup> explained that broadcasters were required to play a "conscious and positive

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<sup>1</sup> 2 FCC Rcd. 5043 (1987).

<sup>2</sup> *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

<sup>3</sup> Section 18 of the 1927 Radio Act and section 315 of the 1934 Communication Act required broadcasters to provide fair access to political candidates. *See* Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162, *repealed by* Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 151 (1996)).

<sup>4</sup> Fairness for candidates was a topic of considerable debate leading up to passage of the 1927 Radio Act. *See* LOUISE M. BENJAMIN, *FREEDOM OF THE AIR AND THE PUBLIC INTEREST: FIRST AMENDMENT RIGHTS IN BROADCASTING TO 1935*, 32-54 (2001); STEVEN J. SIMMONS, *THE FAIRNESS DOCTRINE AND THE MEDIA* 16-27 (1978); David H. Ostroff, *Equal Time: Origins of Section 18 of the Radio Act of 1927*, 24 J. OF BROAD. 367 (1980).

<sup>5</sup> *See* Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949) (hereinafter 1949 Report on Editorializing).

<sup>6</sup> *Id.*



role”<sup>7</sup> in presenting opposing views, and make their facilities “available for the expression of the contrasting views of all responsible elements in the community on the various issues which arise.”<sup>8</sup> In 1969, the U.S. Supreme Court upheld the Fairness Doctrine in *Red Lion Broadcasting v. FCC*,<sup>9</sup> and it reached a high point in the 1970s. In its 1974 Fairness Report<sup>10</sup> the Commission characterized broadcast fairness as “the single most important requirement of operation in the public interest—the *sine qua non* for grant of a renewal of license.”<sup>11</sup> So, how did the Fairness Doctrine go from this lofty position in 1974 to being unnecessary and eliminated in 1987? The answer can be found in the FCC’s 1985 Fairness Report.<sup>12</sup>

The 1985 Report laid the foundation for the elimination of the Fairness Doctrine two years later in *Syracuse Peace Council*.<sup>13</sup> The justifications put forth by the FCC are contained in the 1985 Report. This anniversary year—with the benefit of three decades of hindsight—is a good time to look back at the FCC’s reasoning for ending the Fairness Doctrine that had been in place the previous four decades. This article critiques the 1985 Fairness Report based on analysis of its key justifications and conclusions.

## I. BROADCASTING AND FAIRNESS

The concept of broadcast fairness is virtually as old as broadcasting itself. Many historians consider the 1920 election night broadcast by radio station KDKA in Pittsburgh, Pennsylvania, to be the beginning of the broadcast era.<sup>14</sup> Within

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<sup>7</sup> *Id.* at 1251.

<sup>8</sup> *Id.* at 1250.

<sup>9</sup> 395 U.S. 367 (1969).

<sup>10</sup> In the Matter of the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 F.C.C.2d 1 (1974) [hereinafter 1974 Fairness Report].

<sup>11</sup> *Id.* at 10 (quoting Committee for the Fair Broadcasting of Controversial Issues, Memorandum Opinion and Order, 25 F.C.C.2d 283, 292 (1970)).

<sup>12</sup> Inquiry into Section 73.1910 of the Commission’s Rules and Regulations Concerning the General Fairness Obligations of Broadcast Licensees, 102 F.C.C.2d 143 (1985) [hereinafter 1985 Fairness Report].

<sup>13</sup> 2 FCC Rcd. 5043 (1987).

<sup>14</sup> See SYDNEY HEAD, BROADCASTING IN AMERICA: A SURVEY OF TELEVISION AND RADIO, 134 (Houghton Mifflin, 1956); see also ROBERT L. HILLIARD & MICHAEL C. KEITH, THE BROADCAST CENTURY: A BIOGRAPHY OF AMERICAN BROADCASTING, 22–23 (Focal Press 1997); H.P. DAVIS, *The Early History of Broadcasting in the United*

two years there were already accusations of political favoritism and censorship. In 1922, Republican Senator Harry New used U.S. Navy radio facilities to broadcast a campaign message from Washington to his constituents in Indiana.<sup>15</sup> When Democrats complained, the Navy adopted a policy of denying use of its facilities for political broadcasts.<sup>16</sup> That same year Democrat William Jennings Bryan predicted in the *New York Times* that radio would benefit Democrats because “arrangements will be made for impartial treatment of candidates”<sup>17</sup> with no similar requirement for influential newspapers, many of which favored Republicans.<sup>18</sup>

During the 1924 presidential campaign, Progressive Party candidate Robert La Follette raised charges of censorship when he was not allowed to speak on a Republican-owned station in Des Moines, Iowa.<sup>19</sup> An official from AT&T reportedly expressed reluctance to air broadcasts by Progressive candidates for fear of angering stockholders.<sup>20</sup> Secretary of State Charles Evans Hughes complained to AT&T after radio commentator H. V. Kaltenborn made critical statements about him during a 1924 broadcast on AT&T’s WEAf station.<sup>21</sup> Company officials subsequently adopted a policy prohibiting broadcasts critical of the government or government officials.<sup>22</sup> The General Electric company adopted rules during the 1924 campaign requiring its stations to present opposing views when broadcasting political speeches or other controversial subjects.<sup>23</sup>

When Republican President Calvin Coolidge was reelected, *The New Republic* complained that because the majority of stations were owned by corporations and managed by

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*States*, IN THE RADIO INDUSTRY: THE STORY OF ITS DEVELOPMENT 195 (A.W. Shaw 1928); GLEASON L. ARCHER, HISTORY OF RADIO TO 1926, 200-204 (American Historical Society 1938); Joseph E. Baudino & John M. Kittross, *Broadcasting's Oldest Stations: An Examination of Four Claimants*, 67 J. OF BROAD. 21 (1977).

<sup>15</sup> Ostroff, *supra* note 4, at 369.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 374.

<sup>19</sup> *Id.* at 371.

<sup>20</sup> *Id.* at 370–71.

<sup>21</sup> BENJAMIN, *supra* note 4, at 33–34.

<sup>22</sup> *Id.* (stating that Kaltenborn’s contract was not renewed despite his popularity with WEAf listeners).

<sup>23</sup> *Id.* at 46–47.

conservatives, Republicans got more airtime than Democrats and “at least ten times as much as the Progressives.”<sup>24</sup> Political censorship and discrimination were also among the issues discussed at the four National Radio Conferences<sup>25</sup> called by Secretary of Commerce Herbert Hoover in 1922.<sup>26</sup> Lawmakers also expressed concern over broadcast fairness during much of the debate leading up to passage of the 1927 Radio Act.<sup>27</sup> Democrat Representative Ewin Davis argued that broadcasters were using their stations for selfish purposes not in the public interest.<sup>28</sup> He advocated regulating radio as a public utility.<sup>29</sup>

We are going to have to regulate the rates and the service, to force them to give equal service and equal treatment to all. As it stands now they are absolutely the arbiters of the air . . . They can permit the proponents of a measure to be heard and can refuse to grant the opposition a hearing . . . There is absolutely no restriction whatever upon the arbitrary methods that can be employed and witnesses have appeared before our committee and already have given instances of arbitrary and tyrannical action in this respect, although the radio industry is now only in its infancy.<sup>30</sup>

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<sup>24</sup> Editorial, *THE NEW REPUBLIC*, Nov. 19, 1924, 284.

<sup>25</sup> See *Proceedings of the Fourth National Radio Conference and Recommendations for Regulation of Radio* (Nov. 9-11, 1925), available at <http://earlyradiohistory.us/1925conf.htm>; C. M. Jansky, Jr., *The Contribution of Herbert Hoover to Broadcasting*, 1 *J. OF BROAD.* 241, 245 (1957); DONALD G. GODFREY, *The 1927 Radio Act: People and Politics*, 4 *JOURNALISM HISTORY* 74-78 (1977); DANIEL E. GARVEY, *Secretary Hoover and the Quest for Broadcast Regulation*, 3 *JOURNALISM HISTORY* 66-85 (1976); JOSEPH P. MCKERNS, *Industry Skeptics and the Radio Act of 1927*, 3 *JOURNALISM HISTORY* 128-36 (1976); Louise Benjamin, *Working it Out Together: Radio Policy From Hoover to the Radio Act of 1927*, 42 *J. OF BROAD.* 221, 223 (1998); SIMMONS, *supra* note 4, at 21-22; PHILIP T. ROSEN, *THE MODERN STENTORS: RADIO BROADCASTERS AND THE FEDERAL GOVERNMENT* 94-95 (Greenwood 1980).

<sup>26</sup> Hoover was in charge of broadcast regulation under the ineffective 1912 Radio Act. The 1912 Act, enacted before the broadcast era, was aimed at regulation of wireless telegraphy. Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162.

<sup>27</sup> 67 CONG. REC. 12503-04 (1926). BENJAMIN, *supra* note 4, at 32-54; SIMMONS, *supra* note 4, at 16-27; Ostroff, *supra* note 4, at 367-80.

<sup>28</sup> 67 CONG. REC. 5483.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

Davis also cited committee testimony in which an AT&T executive had admitted that his company had rejected “a great many”<sup>31</sup> requests to use its stations and edited speakers’ statements.<sup>32</sup> He said he was opposed to government censorship but was “even more opposed to private censorship over what American citizens may broadcast to other American citizens.”<sup>33</sup> However, Republican Representative Arthur Free argued that radio stations had a right to edit for slander and seditious statements.<sup>34</sup> Democrat Representative Luther Johnson offered an unsuccessful equal opportunity amendment that would have broadly required stations to offer fair treatment to all political parties and candidates and to those for and against “all political questions or issues.”<sup>35</sup> Johnson also warned of the potential misuse of broadcasters’ power to influence discussion of public issues. “American thought and American politics will be largely at the mercy of those who operate these stations. If a single selfish group is permitted to . . . dominate these broadcasting stations throughout the country, then woe be to those who dare to differ with them.”<sup>36</sup>

Senators Thomas Heflin and Robert Howell—though far apart politically—shared significant concern over fairness during Senate debate on the 1927 Radio Act. Heflin, an Alabama Democrat and white segregationist,<sup>37</sup> argued that conditions for getting on the air should be fair. “We ought not to let anyone have a monopoly of the air.”<sup>38</sup> Howell, a progressive Nebraska Republican who had served as chairman of the U.S. Post Office Department’s Radio Commission in 1921,<sup>39</sup> was (like Representative Johnson) concerned about broadcasters’ ability to censor.<sup>40</sup> “Are we content to the building up of a great

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<sup>31</sup> *Id.* at 5484.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 5491.

<sup>35</sup> *Id.* at 5560.

<sup>36</sup> *Id.* at 5558.

<sup>37</sup> See DOUGLAS BLACKMON, *SLAVERY BY ANOTHER NAME* 122, 222 (Doubleday 2008).

<sup>38</sup> 67 CONG. REC. 12503-04 (1926).

<sup>39</sup> See Howell, *Robert Beecher (1864-1933)*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=H000868> (last visited Feb. 1, 2017).

<sup>40</sup> 67 CONG. REC. 12503 (1926).

publicity vehicle and allow it to be controlled by a few men, and empower those few men to determine what the public shall hear?”<sup>41</sup> Howell argued that it was a “matter of tremendous importance”<sup>42</sup> to include a fairness provision that would not only ensure equal treatment of candidates, but also extend to discussion of public issues. “I cannot emphasize this too strongly.”<sup>43</sup>

The 1927 Radio Act included fairness rules for political candidates<sup>44</sup> but it did not include a Fairness Doctrine-style requirement that broadcasters provide equal opportunity for discussion of public questions and issues, despite the concerns of Davis, Johnson, Howell and others. When the 1934 Communications Act replaced the 1927 Radio Act, the Section 18 rules providing fairness for political candidates were carried over as Section 315.<sup>45</sup> However, specific fairness rules for discussion of public questions and issues were again left out. Even though general fairness rules were not formally written into the Act, fairness for non-candidates and discussion of public issues had been an ongoing part of the discussion.<sup>46</sup> The American Civil Liberties Union and the National Council on Freedom From Censorship wrote letters to the 1934 Act’s co-author Senator Clarence Dill asking for a provision requiring stations to provide equal opportunity for discussion of public questions and issues.<sup>47</sup> Dill feared that such a requirement might lead to unreasonable demands for opportunities to reply.<sup>48</sup> Nevertheless, an amendment expanding fairness to discussion of public questions (a Fairness Doctrine of sorts) was included in a 1933 report on H.R. 7716.<sup>49</sup> “Furthermore, it shall be considered in the public interest for a licensee, so far as possible, to permit

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

<sup>42</sup> *Id.* at 12504.

<sup>43</sup> *Id.*

<sup>44</sup> Radio Act of 1927, Pub. L. No. 69-632, 44 Stat.1162.

<sup>45</sup> *See id.*

<sup>46</sup> Louise Benjamin, *Working it Out Together: Radio Policy from Hoover to the Radio Act of 1927*, 42 J. OF BROAD. 221, 223 (1998).

<sup>47</sup> BENJAMIN, *supra* note 4, at 192–95.

<sup>48</sup> 67 CONG. REC. 12504 (1926).

<sup>49</sup> Amending the Radio Act of 1927, H.R. REP. NO. 72-2106 (1933).

equal opportunity for the presentation of both sides of public questions.”<sup>50</sup>

Though the bill—that would have implemented a 1932 Fairness Doctrine—passed the House and Senate, President Hoover pocket-vetoed it, along with other legislation from the lame duck Congress.<sup>51</sup> In addition to Dill’s concern over stations being overrun with access requests, he believed specific rules were not needed because the Federal Radio Commission (“FRC”) already had authority to enforce general fairness rules because fairness was included in broadcasters’ duty to serve the public interest.<sup>52</sup>

#### *A. Public Interest Regulation*

Because broadcasters utilize the scarce publicly-owned electromagnetic spectrum, they are subject to government regulation and must serve the public interest.<sup>53</sup> Specifically, broadcasters are required to serve the “public interest, convenience, or necessity” as a condition of holding a broadcast license.<sup>54</sup> Two controversial broadcasters lost their licenses in the early 1930s for airing programming that the FRC said did not serve the public interest. In *KFKB Broadcasting Association v. Federal Radio Commission*,<sup>55</sup> and the following year in *Trinity Methodist Church South v. Federal Radio Commission*,<sup>56</sup> the D.C. Circuit upheld FRC decisions to deny license renewals based on the stations’ programming that failed to serve the public

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

<sup>51</sup> See BENJAMIN, *supra* note 4, at 196.

<sup>52</sup> See H. R. REP. NO. 72-2-7716 (1933); SIMMONS, *supra* note 4, at 30.

<sup>53</sup> *FCC v. League of Women Voters*, 468 U.S. 364 (1984); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969); *Nat’l Broad. Co. v. United States*, 319 U.S. 190 (1943). Broadcast scholar Walter Emery noted 48 years ago that broadcasters have a duty to serve the public even if members of the public are unaware of the public nature of the electromagnetic spectrum. “Many people seem unaware that the radio spectrum belongs to the public and no broadcaster, whether commercial or educational, acquires any ownership rights in the frequency which is assigned to him. He receives a license . . . to use this publicly owned resource. This license is subject to renewal if he can show that his station has operated in the public interest and not simply in terms of his private and personal interest. Too many people think of radio and television stations as being owned in the same way as farm land, grocery or hardware stores.” WALTER B. EMERY, NATIONAL AND INTERNATIONAL SYSTEMS OF BROADCASTING: THEIR HISTORY, OPERATION AND CONTROL 13 (1969).

<sup>54</sup> 47 U.S.C. § 307(a) (2004); *Nat’l Broad. Co.*, 319 U.S. at 215.

<sup>55</sup> 47 F.2d 670 (D.C. Cir. 1931).

<sup>56</sup> 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 284 U.S. 685 (1932).

interest.<sup>57</sup> The FRC had denied KFKB's renewal because Dr. John Brinkley, a quack doctor who diagnosed listeners' conditions and promoted his own dangerous remedies on the air, was using the station to further his personal interest at the expense of the public interest.<sup>58</sup> Trinity lost its license for station KDEF because of defamatory statements regularly made on the air by the Reverend Bob Shuler against government officials and labor and religious groups.<sup>59</sup>

The FRC's 1930s efforts to influence broadcast program content in the name of the public interest eventually evolved into a large body of regulations aimed at managing broadcast programming. The FCC's chain broadcasting rules, upheld by the U.S. Supreme Court in the landmark *NBC v. U.S.*<sup>60</sup> case, limited network control over programming on local stations.<sup>61</sup> The FCC's "Blue Book,"<sup>62</sup> issued in 1946, suggested program guidelines for broadcasters to follow to ensure they served the public interest. Numerous content-based FCC initiatives and legislation were subsequently enacted. The list includes, but is not limited to, political access rules,<sup>63</sup> including an absolute right of access for federal candidates with no censorship;<sup>64</sup> race- and gender-based ownership rules designed to foster diversity in programming;<sup>65</sup> the requirement that station management meet with specified community leaders and ascertain community

<sup>57</sup> See *KFKB Broad. Ass'n*, 47 F.2d 670; *Methodist Church South*, 62 F.2d 850.

<sup>58</sup> See BENJAMIN, *supra* note 4, at 91. In addition to diagnosing patients on the air, Brinkley surgically implanted goat testicles into men as a treatment for sexual impotency. See THOMAS G. KRATTENMAKER & LUCAS A. POWE JR., REGULATING BROADCAST PROGRAMMING 26–27 (The MIT Press 1994); KANSAS HISTORICAL SOCIETY, *John R. Brinkley, Goat Gland Doctor, Radio Pioneer, 1885-1942* (Apr. 2014), <https://www.kshs.org/kansapedia/john-r-brinkley/11988>.

<sup>59</sup> See BENJAMIN, *supra* note 4, at 100–01; KRATTENMAKER & POWE, *supra* note 58, at 16–17; Charley Orbison, "Fighting Bob" Shuler: Early Radio Crusader, 21 J. OF BROAD. 459, 469–70 (1977); SIMMONS, *supra* note 4, at 33.

<sup>60</sup> 319 U.S. 190 (1943).

<sup>61</sup> *Id.*

<sup>62</sup> Public Service Responsibility of Broadcast Licensees (Mar. 7, 1946), reprinted in DOCUMENTS OF AMERICAN BROADCASTING 152 (Frank J. Kahn ed., 2d ed. 1973) (hereinafter FCC "Blue Book").

<sup>63</sup> See Communications Act of 1934, 47 U.S.C. § 315 (1934).

<sup>64</sup> See *id.* § 312(a)(7). In *Daniel Becker v. FCC*, the court said under Sections 315 and 312 broadcasters could not edit political advertisements depicting aborted fetuses or channel them to late-night hours. 95 F.3d 75 (D.C. Cir. 1996). In *Letter to Lonnie King*, the Commission told broadcasters they could not edit and must air the racially offensive campaign commercials of a white racist candidate. 36 F.C.C.2d 635 (1972).

<sup>65</sup> See *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990); *U.S. v. Storer Broad.*, 351 U.S. 192 (1956).

tastes and needs and program stations accordingly;<sup>66</sup> restrictions on broadcasting material that falls short of the legal definition for obscenity and is merely indecent;<sup>67</sup> using stations' proposed programming as a criterion in license hearings;<sup>68</sup> mandatory children's programming;<sup>69</sup> restrictions on lotteries;<sup>70</sup> and the Fairness Doctrine.<sup>71</sup>

### *B. Fairness Before the Doctrine*

As previously noted, fairness has been an issue since the earliest days of broadcasting. President Calvin Coolidge told delegates at the third National Radio Conference in 1924 that the government should safeguard radio from monopoly in order to ensure the widest degree of freedom, and that the government's goal is "an opportunity for everyone to have access to radio communication without limitation."<sup>72</sup> That same year, testifying before the House Committee on the Merchant Marine and Fisheries, Hoover said, "[w]e cannot allow any single person or group to place themselves in position where they can censor the material which shall be broadcasted to the public, nor do I believe that the Government should ever be placed in the position of censoring this material."<sup>73</sup> Five days later Hoover told the *New York World* the bill currently under debate in Congress would "enable us to keep the ether open to everybody."<sup>74</sup>

<sup>66</sup> See The Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650 (1971).

<sup>67</sup> See *FCC v. Fox Television Stations*, 556 U.S. 502 (2009); *FCC v. Pacifica*, 438 U.S. 726 (1978); New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees, 2 FCC Rcd. 2726 (1987); *Obscene, Indecent and Profane Broadcasts*, FED. COMM'N COMM'N, <https://www.fcc.gov/consumers/guides/obscene-indecnt-and-profane-broadcasts> (last updated Oct. 25, 2016).

<sup>68</sup> Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d. 393 (1965).

<sup>69</sup> In the Matter of Policies and Rules Concerning Children's Television Programming, 11 FCC Rcd. 10660 (1996).

<sup>70</sup> Broadcast of Lottery Information, 5 FCC Rcd. 3019 (1990).

<sup>71</sup> See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

<sup>72</sup> *Proceedings of the Third National Radio Conference* (Oct. 6-10, 1924), at 37, (transcript available at Herbert Hoover Presidential Library, West Branch, Iowa, Commerce Papers, Box 496).

<sup>73</sup> *To Regulate Radio Communication, and for Other Purposes: Statement by Secretary Hoover at Hearings Before the Committee on the Merchant Marine and Fisheries on H.R. 7357* (Mar. 11, 1924) (transcript available at Herbert Hoover Presidential Library, West Branch, Iowa, Commerce Papers, Box 489).

<sup>74</sup> *The Government's Duty is to Keep the Ether Open and Free to All*, N.Y. WORLD, Mar. 16, 1924.



After passage of the 1927 Radio Act, the FRC wasted little time in making clear to broadcasters that fairness was a fundamental part of serving the public interest.<sup>75</sup> In its 1928 Annual Report the Commission said a New York Socialist party station must show “due regard for the opinions of others.”<sup>76</sup> The following year the FRC told the Chicago Federation of Labor that its station should appeal to the general public and serve the public interest, rather than just benefiting a narrow group or class interests.<sup>77</sup> The Commission concluded that because of spectrum scarcity, “all stations should cater to the general public and serve public interest as against group or class interest.”<sup>78</sup> Also in 1929, in what came to be known as the *Great Lakes* statement, the FRC said allowing one-sided presentations of political issues would not be good service to the public, and public interest required ample free and fair competition of opposing views.<sup>79</sup> The Commission also noted that such fairness applied not only to candidates, but also to “all discussions of issues of importance to the public.”<sup>80</sup> The Commission further explained that broadcasting stations “are licensed to serve the public and not for the purpose of furthering the private or selfish interests of groups of individuals. The standard . . . means nothing if it does not mean this.”<sup>81</sup>

In denying a license application from a fundamentalist religious group in 1938, the FCC reemphasized its view that, due to spectrum scarcity, one-sided propaganda programming that only presented the narrow viewpoint of the licensee did not serve the public interest.<sup>82</sup> The fundamentalist group indicated it was going to air only one-sided programming that supported its beliefs.<sup>83</sup> The Commission followed up in its 1940 Annual Report explaining that licensees had discretion in deciding what individual people or groups to allow on their stations but the public interest required they air “well-rounded rather than one-

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<sup>75</sup> Federal Radio Commission, 2 F.R.C. ANN. REP. 155 (1928).

<sup>76</sup> *Id.*

<sup>77</sup> See Chicago Fed'n of Labor, 3 F.R.C. ANN. REP. 36 (1929).

<sup>78</sup> *Id.* at 36.

<sup>79</sup> Great Lakes Broad. Co., 3 F.R.C. ANN. REP. 32 (1929).

<sup>80</sup> *Id.* at 33.

<sup>81</sup> *Id.* at 32.

<sup>82</sup> Young People's Ass'n for Propagation of Gospel, 6 F.C.C. 178 (1938).

<sup>83</sup> See *id.*

sided discussions of public questions.”<sup>84</sup> The following year in its *Mayflower* Statement,<sup>85</sup> the FCC said licensees must provide full and equal opportunity for presentation of all sides of public issues.<sup>86</sup> However, some interpreted the Statement as an outright ban on stations editorializing because the Commission also said “truly free radio cannot be used to advocate the causes of the licensee,”<sup>87</sup> and “[t]he public interest—not the private—is paramount.”<sup>88</sup>

In 1945, foreshadowing creation of the Fairness Doctrine, the FCC attempted to clarify broadcasters’ public interest obligation to present important public issues.<sup>89</sup> The FCC said it is “the duty of each licensee to be sensitive to the problems of public concern in the community and to make sufficient time available, on a nondiscriminatory basis, for full discussion thereof . . . .”<sup>90</sup> Balance among various viewpoints was not required in individual programs, but the Commission expected stations to practice ongoing fairness “on an over-all basis . . . [so that] over the weeks and months it will maintain such a balance.”<sup>91</sup> The FCC’s “Blue Book” suggested program guidelines for broadcasters to follow to ensure they served the public interest.<sup>92</sup> While it did not focus exclusively on fairness, it emphasized the affirmative duty of broadcasters to present controversial public issues.<sup>93</sup> Broadcasters were not serving the public interest if they failed to address controversial public issues.<sup>94</sup>

Despite no explicit policy requiring fairness for the discussion of public issues and questions, the various statements, reports and rulings from 1928 to 1946 demonstrate that the

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<sup>84</sup> 6 FCC ANN. REP. 55 (1940).

<sup>85</sup> *Mayflower Broad. Corp.*, 8 F.C.C. 333 (1941).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 340.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *United Broad. Co.*, 10 F.C.C. 515, 517 (1945).

<sup>91</sup> *Id.* at 517.

<sup>92</sup> FCC “Blue Book” *supra* note 62.

<sup>93</sup> *See id.*

<sup>94</sup> In 1976, the FCC reprimanded a West Virginia radio station for refusing to air programming on strip mining even though it was an important controversial community issue. The station itself had cited development of new industry, and air and water pollution as issues important to its listeners. *See Rep. Patsy Mink*, 59 F.C.C.2d 987 (1976).

FRC/FCC expected fairness from licensees as part of their responsibility to serve the public interest.<sup>95</sup> In 1949, this implicit expectation became an explicit requirement.

*C. The Fairness Doctrine: 1949–1987*

Partly as a response to continuing confusion about airing editorials after the 1941 *Mayflower* Statement, the FCC issued the 1949 Report on Editorializing.<sup>96</sup> The Report explained that stations could, in fact, air editorials representing the views of the licensees but such editorials should be just one part of the larger duty to devote reasonable time to presentation of differing views on public issues.<sup>97</sup> Under this new two-part Fairness Doctrine, licensees were required to present controversial issues of public importance and allow reasonable opportunity for opposing views.<sup>98</sup> The Commission explained that there would be no simple fairness formula to measure station compliance but, rather, the FCC would use a reasonableness standard.<sup>99</sup> Licensees were now formally required to make their stations available for “the expression of the contrasting views of all responsible elements in the community on the various issues which arise.”<sup>100</sup>

Congress had previously attempted to amend the 1927 Radio Act to include Fairness Doctrine requirements only to fail. However, in 1959 Congress appeared to elevate the Fairness Doctrine from the level of FCC policy to statutory law when it amended the 1934 Communications Act to include the following Section 315 (a) (4) language:

Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable

<sup>95</sup> 67 CONG. REC. 12503.

<sup>96</sup> Report on Editorializing by Broadcast Licensees, 13 F.C.C.2d 1246 (1949).

<sup>97</sup> *Id.*

<sup>98</sup> *See id.* at 1249.

<sup>99</sup> *See id.* at 1251.

<sup>100</sup> *Id.* at 1250.

opportunity for the discussion of conflicting views on issues of public importance.<sup>101</sup>

The FCC supported this interpretation in a 1963 letter to Congressman Oren Harris in which it explained that the Fairness Doctrine had become a “specific statutory obligation.”<sup>102</sup>

The following year the FCC issued the 1964 Fairness Primer.<sup>103</sup> The primer summarized a decade of fairness rulings and attempted to clarify definitions and questions about the application of the Fairness Doctrine.<sup>104</sup> Three years later the Commission issued rules<sup>105</sup>—Fairness Doctrine corollaries—dealing with on-air personal attacks and political editorials. Licensees were now required to notify any person or group that was attacked during the presentation of controversial public issues and offer them reasonable response time.<sup>106</sup> In addition, stations who endorsed or opposed candidates in on-the-air editorials were required to offer reasonable response time to them or their representatives.<sup>107</sup> The Commission concluded, “[t]he development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day is the keystone of the Fairness Doctrine.”<sup>108</sup>

The personal attack provision of the Fairness Doctrine eventually led to a First Amendment challenge in the U.S. Supreme Court. In *Red Lion Broadcasting v. FCC*<sup>109</sup> in 1969 the Court upheld the Doctrine noting, “the fairness doctrine and its component personal attack and political editorializing regulations are a legitimate exercise of congressionally delegated authority.”<sup>110</sup> Red Lion owned a radio station in Pennsylvania that had aired a *Christian Crusade* broadcast in 1964 in which

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<sup>101</sup> 47 U.S.C. § 315(a)(4) (2002).<sup>[L]</sup><sup>[SEP]</sup>

<sup>102</sup> *In re* “Fairness Doctrine” Implementation, 40 F.C.C. 582, 583 (1963).<sup>[L]</sup><sup>[SEP]</sup>

<sup>103</sup> Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (1964).

<sup>104</sup> *Id.*

<sup>105</sup> 32 Fed. Reg. 10305-06 (1967).

<sup>106</sup> *See id.* at 1030304.

<sup>107</sup> *See id.*

<sup>108</sup> *See id.* at 10303 (quoting the 1949 Report of the Commission in the Matter of Editorialization by Broadcast Licensees, 13 F.C.C 1246, 1249 (1949)).

<sup>109</sup> 395 U.S. 367 (1969).

<sup>110</sup> *Id.* at 385.

author Fred J. Cook was personally attacked by the Reverend Billy James Hargis.<sup>111</sup> During the broadcast, Hargis claimed that Cook, who had written a book titled *Goldwater—Extremist on the Right*,<sup>112</sup> had worked for a Communist publication and was attempting to smear Republican presidential candidate Barry Goldwater.<sup>113</sup> Cook asked for reply time and was denied.<sup>114</sup> When he complained to the FCC, the Commission told Red Lion it must give Cook reply time under the Fairness Doctrine.<sup>115</sup> Red Lion argued that the Fairness Doctrine violated the First Amendment.<sup>116</sup> The Supreme Court held that, because of spectrum scarcity, the personal attack rules and the Fairness Doctrine overall did not violate the First Amendment rights of broadcasters.<sup>117</sup> “Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.”<sup>118</sup>

The Court said the First Amendment rights of the viewing and listening public to receive diverse viewpoints trumps the rights of the broadcasters to air their viewpoints.<sup>119</sup> “It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”<sup>120</sup> Echoing concerns over private censorship expressed by lawmakers in the 1920s and 1930s, the Court expressed fear that station owners and a limited number of networks “would have unfettered power . . . to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed.”<sup>121</sup> “There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all.”<sup>122</sup> The

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<sup>111</sup> *Id.* at 371–72.

<sup>112</sup> FRED J. COOK, *BARRY GOLDWATER: EXTREMIST OF THE RIGHT* (Grove Press 1964).

<sup>113</sup> *Red Lion Broad. Co.*, 395 U.S. at 371–72.

<sup>114</sup> *Id.* at 389.

<sup>115</sup> *Id.* at 372–73.

<sup>116</sup> *Id.* at 375.

<sup>117</sup> *Id.* at 386–87.

<sup>118</sup> *Id.* at 388.

<sup>119</sup> *Id.* at 390.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 392.

<sup>122</sup> *Id.*

personal attack/editorial rules were codified as federal statutory law in 1976.<sup>123</sup>

The Fairness Doctrine reached its zenith in the FCC's 1974 Fairness Report.<sup>124</sup> The Commission noted that two decades had passed since the 1949 Report on Editorializing,<sup>125</sup> and it was time for a "reassessment and clarification of the basic policy."<sup>126</sup> The FCC reviewed written comments from the advertising and broadcast industries, labor unions, environmental and consumer groups, public interest groups, and law schools.<sup>127</sup> Additionally, the Commission conducted a week of panel discussions featuring fifty people, and approximately thirty individuals engaged in oral arguments.<sup>128</sup> As noted previously, the Commission concluded that broadcast fairness was "the single most important requirement of operation in the public interest."<sup>129</sup> Citing continuing spectrum scarcity and "concentration of control," the Commission noted the government had an affirmative responsibility to use its power to "expand broadcast debate."<sup>130</sup>

Thus, in the context of the scarcity of broadcast frequencies and the resulting necessity for government licensing, the First Amendment impels, rather than prohibits, governmental promotion of a system which will ensure that the public will be informed of the important issues which confront it and of the competing viewpoints on those issues which may differ from the views held by a particular licensee.<sup>131</sup>

The Report also emphasized that the FCC did not expect balance in each individual program, but rather a good faith attempt at fairness in licensees' overall programming.<sup>132</sup> The

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<sup>123</sup> See 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679 (1976).

<sup>124</sup> 13 F.C.C.2d 1246 (1949).

<sup>125</sup> See *id.*

<sup>126</sup> 48 F.C.C.2d 1, 2 (1974).

<sup>127</sup> *Id.* at 2.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 10 (quoting 25 F.C.C.2d 283, 292 (1970)).

<sup>130</sup> *Id.* at 3 (describing the government's affirmative responsibility of "maintaining and enhancing a system of freedom and expression").

<sup>131</sup> *Id.* at 5-6.

<sup>132</sup> *Id.* at 8.

Commission also pointed out that in the previous year only 94 of 2,400 complaints were forwarded to stations.<sup>133</sup> Emphasizing the challenge of ensuring broadcast fairness, the Report concluded that the Fairness Doctrine could only fulfill its purpose if broadcasters, the FCC and the public “participate with a sense of reasonableness and good faith.”<sup>134</sup>

Many broadcasters were unhappy with the Fairness Doctrine and some media scholars argued it was impractical and unconstitutional.<sup>135</sup> Noted scholars, Lucas A. Powe Jr. and Thomas G. Krattenmaker, argued that despite its good intentions, “the Fairness Doctrine will not and cannot work.”<sup>136</sup> Writing in 1985, Krattenmaker and Powe Jr. likened it to a hapless major league baseball team.<sup>137</sup> “At best, the Fairness Doctrine is, like the 1962 New York Mets, a glorious but futile symbol, full of wondrous pretension and promise, yet utterly devoid of performance.”<sup>138</sup> Another scholar argued that fairness regulation “has proved to be a means of chilling rather than facilitating”<sup>139</sup> broadcast message diversity.

In 1980, the election of Ronald Reagan and his appointment of a deregulation-minded FCC signaled a distinct departure from the previous three decades of electronic media regulation—including broadcast fairness. This new business-friendly regulatory philosophy became apparent when FCC Chairman, Mark Fowler (communications counsel for the Reagan presidential campaign), said in a 1981 interview that television is just another household appliance, and characterized

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<sup>133</sup> See *id.* The Commission explained that it relied on citizen complaints and did not monitor broadcasts for fairness violations. *Id.* Moreover, only complaints that presented *prima facie* evidence of a violation were forwarded to licensees. *Id.*

<sup>134</sup> *Id.* at 33.

<sup>135</sup> See SIMMONS, *supra* note 4, at 80–92; FORD ROWAN, BROADCAST FAIRNESS: DOCTRINE – PRACTICE – PROSPECTS: A REAPPRAISAL OF THE FAIRNESS DOCTRINE AND EQUAL TIME RULE 189 (Longman 1984); see also LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 142–61 (Univ. of California Press 1987).

<sup>136</sup> KRATTENMAKER & POWE, JR., *supra* note 58, at 240.

<sup>137</sup> Thomas G. Krattenmaker & Lucas A. Powe, Jr., *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L. J. 151, 157 (1985).

<sup>138</sup> *Id.*

<sup>139</sup> Donald E. Lively, *Fairness Regulation: An Idea Whose Time Has Gone*, 45 WASH. & LEE L. REV. 1379, 1387–88 (1988).

it as nothing more than “a toaster with pictures.”<sup>140</sup> The stage was set for the FCC to revisit the Fairness Doctrine.

As it had done before issuing the 1974 Report, the FCC solicited input on the Fairness Doctrine from numerous individuals and groups.<sup>141</sup> Those responding included broadcasters, public interest groups, corporate interests, labor groups, and religious groups.<sup>142</sup> The FCC was concerned with three primary Fairness Doctrine questions: (1) Does it violate the First Amendment rights of broadcasters? (2) Is it necessary and effective, or does it actually chill speech? (3) Does the Commission have the authority to repeal or modify it or is it codified under Section 315 of the 1934 Act?<sup>143</sup> The Commission concluded the Doctrine was no longer needed and no longer served the public interest,<sup>144</sup> for reasons to be addressed below.

## II. SUMMARY AND CRITIQUE OF THE 1985 FAIRNESS REPORT

After briefly reviewing the history and traditional justifications for the Fairness Doctrine—including spectrum scarcity and the public interest standard—the Commission noted the importance of the continuing “interest of the listening and viewing public in obtaining access to diverse and antagonistic sources of information.”<sup>145</sup> However, the Commission went on to argue, “that the fairness doctrine is no longer a necessary or appropriate means by which to effectuate this interest.”<sup>146</sup> The Report maintained that growth in the number of media outlets—the multiplicity of voices in the marketplace—ensured viewpoint

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<sup>140</sup> Peter J. Boyer, *Under Fowler, T.V. Treated as Commerce*, N.Y. TIMES (Jan. 19, 1987), at C15 (quoting Mark S. Fowler); see also John Eggerton, *More Than a ‘Toaster With Pictures,’* BROAD. & CABLE (Dec. 19, 2008), <http://www.broadcastingcable.com/news/news-articles/more-toaster-pictures/109654>; Penny Pagano, *The Fowler Legacy and Shock Radio Facing Test of Time: At FCC, Word is Deregulation*, L.A. TIMES (Apr. 25, 1987), [http://articles.latimes.com/1987-04-25/entertainment/ca-959\\_1\\_broadcasters](http://articles.latimes.com/1987-04-25/entertainment/ca-959_1_broadcasters).

<sup>141</sup> 102 F.C.C.2d 143, 146 (1985).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 145.

<sup>144</sup> *Id.* at 246.

<sup>145</sup> *Id.* at 147 (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (noting the need for “[t]he widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . .”).

<sup>146</sup> 1985 Fairness Report, *supra* note 12, at 147.



diversity and that the Doctrine led to inappropriate government intrusion on program content and restricted “journalistic freedom of broadcasters.”<sup>147</sup>

*A. First Amendment Questions*

The Commission began its attack on the Fairness Doctrine by questioning its constitutionality. The Report quoted *FCC v. League of Women Voters*,<sup>148</sup> noting that speech on issues of public concern “is entitled to the most exacting degree of First Amendment protection.”<sup>149</sup> The Report also cited *New York Times v. Sullivan*,<sup>150</sup> to further emphasize that speech on public issues should be “uninhibited, robust and wide open,”<sup>151</sup> and *Miami Herald v. Tornillo*,<sup>152</sup> supporting the view that the intent of the First Amendment “was to protect the free discussion of governmental affairs.”<sup>153</sup>

The Commission next recalled that the U.S. Supreme Court’s *Red Lion* opinion was “narrowly circumscribed,”<sup>154</sup> pointing out the Court’s warning that if at a future time the Fairness Doctrine hindered, rather than promoted, diverse broadcast expression, serious constitutional questions would arise.<sup>155</sup> The Commission went on to argue that, due to advances in technology and the broadcast marketplace over the previous sixteen years, such questions had indeed arisen.<sup>156</sup> The Report noted the rise of cable and satellite technology and challenged the ongoing legitimacy of spectrum scarcity as a justification for content regulation of broadcasting.<sup>157</sup> Characterizing broadcasters as “broadcast journalists”<sup>158</sup> and referring to

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<sup>147</sup> *Id.*

<sup>148</sup> 468 U.S. 364 (1984).

<sup>149</sup> 1985 Fairness Report, *supra* note 12, at 149 (internal quotations omitted) (quoting *League of Women Voters*, 468 U.S. at 375–76).

<sup>150</sup> 376 U.S. 254 (1964).

<sup>151</sup> 1985 Fairness Report, *supra* note 12, at 149 (quoting *Sullivan*, 376 U.S. at 270).

<sup>152</sup> 418 U.S. 241 (1974).

<sup>153</sup> 1985 Fairness Report, *supra* note 12, at 149 (quoting *Tornillo*, 418 U.S. at 259 (White, J., concurring)).

<sup>154</sup> *Id.* at 150.

<sup>155</sup> *Id.* at 150–51.

<sup>156</sup> *See id.* at 151.

<sup>157</sup> *See id.* at 153–56.

<sup>158</sup> *Id.* at 155.

broadcasters' "journalistic freedom,"<sup>159</sup> the Commission noted a newspaper right-of-reply law had been struck down in *Tornillo*, partly because of its potential to inhibit, rather than encourage, coverage of controversial issues.<sup>160</sup> The FCC noted that it is the responsibility of the federal judiciary, and not an administrative agency, "to interpret the Constitution."<sup>161</sup> Nevertheless, the Commission went on to challenge the concept of spectrum scarcity as the rationale for broadcast content regulation, instead advocating the same First Amendment standard for "broadcast journalists as currently applies to journalists of other media."<sup>162</sup> The Commission conceded that while spectrum scarcity could no longer justify content regulation of broadcasting, "the limited availability of the electromagnetic spectrum may constitute a *per se* justification for certain types of government regulation, such as licensing . . . ."<sup>163</sup> Over the next 100-plus pages of the Report, the FCC laid out the specifics of its reasoning for eliminating the Fairness Doctrine. The following section will summarize and critique those key justifications and arguments.

### *B. The Fairness Doctrine Inhibits Controversial Programming*

The Commission argued that licensees tended to avoid airing controversial programming on issues of public importance, even though the first prong of the Fairness Doctrine required them to, because of "asymmetry"<sup>164</sup> between that first prong and the second prong (requiring reasonable opportunity for opposing views).<sup>165</sup> The Report noted that an overwhelming majority of complaints and "virtually all our orders directing licensees to take corrective action"<sup>166</sup> were in regard to the second prong.<sup>167</sup> As a result, licensees aired only a minimal amount of controversial programming—to comply with the first prong—in order to "minimize[] the potentially substantial burdens

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<sup>159</sup> *Id.* at 154 (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 378 (1984)).

<sup>160</sup> *Id.* at 152.

<sup>161</sup> *Id.* at 155.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 157.

<sup>164</sup> *Id.* at 161.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

associated with the second prong.”<sup>168</sup> The Commission warned that more stringent enforcement of the first prong was not a good solution because it would “increase the government’s intrusion into the editorial decision making process of broadcast journalists.”<sup>169</sup> In addition, the Commission claimed the second prong chilled the expression of unorthodox ideas because the requirement to present balanced programming favored orthodox viewpoints.<sup>170</sup> Only “major or significant” opinions were “within the scope of the regulatory obligation to provide contrasting viewpoints.”<sup>171</sup>

The Commission cited licensees’ fear of government punishment as a significant factor in their reluctance to air controversial programming on public issues. Fairness Doctrine compliance problems could become the basis for the FCC denying a license renewal—a punishment it called “a sanction of tremendous potency.”<sup>172</sup> The Commission also noted that because questions of balance in programming could come up in a renewal proceeding, broadcasters had an incentive to avoid airing controversial programming beyond the bare minimum required by the first prong of the Fairness Doctrine.<sup>173</sup> Expense of Fairness Doctrine litigation was also cited as a reason broadcasters avoided airing controversial programming.<sup>174</sup>

### 1. Response

The assertion that broadcasters avoided addressing controversial issues out of fear of running afoul of the second prong of the Fairness Doctrine is unconvincing. First, one can argue this avoidance of controversial public issues was a compliance and enforcement problem rather than a problem with the requirement itself. Government regulations are frequently unpopular. However, commercial broadcasters use a limited, publicly owned resource—the electromagnetic spectrum—and, as a result, are required to abide by regulation

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<sup>168</sup> *Id.*

<sup>169</sup> *Id.* n.66.

<sup>170</sup> *See id.* at 188.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 162 (internal quotations omitted) (quoting *Bus. Execs.’ Move for Vietnam Peace v. FCC*, 450 F.2d 642, 666 (D.C. Cir. 1971) (McGowan, J., dissenting)).

<sup>173</sup> *See id.*

<sup>174</sup> *See id.* at 164.

promulgated in the name of the public interest. The Commission's warning against more stringent enforcement was illogical. It is akin to arguing that the best way to stop drivers from exceeding the highway speed-limit is less stringent enforcement of the speed limit. The Commission was essentially saying broadcasters avoided the first prong of the Fairness Doctrine as much as they could because they feared the uncertainty of the second prong. Obviously, there are First Amendment issues to be carefully considered when regulating broadcasters' speech that are not present in other non-speech industries (or highway speed limits) but the principle is the same. It seems likely that a better solution would have been clarification and stronger enforcement of the second prong, not the entire elimination of the Fairness Doctrine because broadcasters did not like it.

Second, even if one accepts claims from some broadcasters that other interest groups used Fairness Doctrine threats to attempt to influence their programming decisions,<sup>175</sup> overall, even at its high point in the 1970s, the Fairness Doctrine was virtually nonexistent as a legitimate threat to broadcasters' licenses. Media scholar, Steven J. Simmons, noted in 1978 that, "[a]n outright license revocation for fairness doctrine violations has never occurred,"<sup>176</sup> and there was only one "instance of nonrenewal of a license based in part on fairness doctrine violations."<sup>177</sup> The Media Access Project and Telecommunications Research and Action Center argued, "licensees do not lose licenses for violation of the fairness doctrine in the coverage of an issue and the Commission knows it."<sup>178</sup> The Commission countered this statement, simply with "[w]e disagree," but then cited only one example of a license renewal ever being denied on the basis of Fairness Doctrine violations.<sup>179</sup> The FCC's "sanction of tremendous potency"<sup>180</sup>

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<sup>175</sup> *See id.*

<sup>176</sup> SIMMONS, *supra* note 4, at 15 n.29.

<sup>177</sup> *Id.* at 15 n.31.

<sup>178</sup> *See* 1985 Fairness Report, *supra* note 12, at 163 n.75 (quoting Comments of Media Access Project and Telecommunications Research and Action Center, at 137).

<sup>179</sup> *Id.* (citing *Brandywine-Main Line Radio, Inc.*, 24 F.C.C.2d 18 (1970)).

<sup>180</sup> *Id.* at 162 (internal quotations omitted).

was utilized only once in connection with the Fairness Doctrine in the years between 1949 and 1970.<sup>181</sup>

The concept of renewal expectancy provided further protection for broadcasters from the possibility, however remote, of losing a license due to Fairness Doctrine violations. Introduced in 1951, renewal expectancy provided that when the incumbent and challenger are equally qualified an incumbent who has provided excellent past service would be given a clear advantage.<sup>182</sup> Renewal expectancy was intended to be a means of providing stability and rewarding incumbent licensees for superior service and encouraging them to continue investing without fear of arbitrary or gratuitous non-renewal.<sup>183</sup> It also meant losing a license because of Fairness Doctrine violations was virtually impossible. Though the FCC had no way of knowing it in 1985, Congress would eliminate comparative renewal proceedings altogether as part of Section 309 of the 1996 Telecommunications Act.<sup>184</sup> As one observer noted, “[w]hereas only a tiny fraction of one percent of all stations were denied renewals under the old rules, the new law makes license renewal virtually automatic in the future.”<sup>185</sup>

The Commission also expressed concern over the chilling effect resulting from burdens to broadcasters that did not rise to the level of losing a license.<sup>186</sup> As previously mentioned, some broadcasters had cited examples of issues they had not addressed due to fears of Fairness Doctrine complaints and associated litigation costs. For example, the Commission noted a Comment from the National Association of Broadcasters recounting how a station had cancelled a series examining a religious cult after a cult member threatened to file a Fairness Doctrine complaint.<sup>187</sup> The Report notes various other examples of interest groups using

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<sup>181</sup> See *id.* at 163 n.75 (citing *Brandywine-Main Line Radio*, 24 F.C.C.2d 18 (1970)).

<sup>182</sup> See *Hearst Radio, Inc. (WBAL)*, 15 F.C.C. 1149, 1189 (1951).

<sup>183</sup> See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 849 (1970); *Cowels Broad., Inc. (WESH-TV)*, 86 F.C.C.2d 993, 1045–46 (1981).

<sup>184</sup> Telecommunications Act of 1996, Pub. L. No. 104–104, § 204(a), 110 Stat. 56, 112–13.

<sup>185</sup> CHRISTOPHER H. STERLING, *THE CONCISE ENCYCLOPEDIA OF AMERICAN RADIO* 759 (2010).

<sup>186</sup> See 1985 Fairness Report, *supra* note 12, at 164.

<sup>187</sup> See *id.* n.79.

the Fairness Doctrine to try to influence programming<sup>188</sup> but the Commission also conceded that most broadcasters were “not confronted with actual fairness doctrine litigation.”<sup>189</sup> In fact, as noted in the 1974 Fairness Report, only 94 of 2,400 complaints the FCC received in 1973 were forwarded to stations for their comments.<sup>190</sup> To put this number in perspective, media scholars Don Pember and Clay Calvert noted, in 2004 the FCC received more than 1.4 million indecency complaints.<sup>191</sup>

Nevertheless, the Commission argued that even if stations were not directly burdened by Fairness Doctrine litigation, “virtually all broadcasters do incur administrative and financial costs which result from presenting responsive programming and negotiating with complainants.”<sup>192</sup> From a journalistic perspective, one can argue that presenting responsive programming and seeking out multiple viewpoints are core tenets of journalism. Costs or not, these are what good journalists do—whether one is discussing traditional print journalists or the “broadcast journalists” so frequently referenced in the 1985 Report (the terms broadcast journalism or broadcast journalists appear 15 times in the 110-page Report). This failure to understand traditional public interest broadcast journalism<sup>193</sup> and acknowledge the costs associated with it are not altogether surprising coming from a regulatory philosophy that views television as merely “a toaster with pictures.”<sup>194</sup> The Commission cited statements from respected broadcast journalists, Dan Rather and Bill Monroe, in which they described how they felt independent when they were print journalists but later felt less free working as broadcast journalists with the government “looking over their shoulders.”<sup>195</sup>

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<sup>188</sup> *See id.* 164–66.

<sup>189</sup> *Id.* at 167.

<sup>190</sup> *See* 1974 Fairness Report, *supra* note 10, at 8.

<sup>191</sup> DON R. PEMBER & CLAY CALVERT, *MASS MEDIA LAW* 696 (McGraw Hill 2007).

<sup>192</sup> 1985 Fairness Report, *supra* note 12, at 167.

<sup>193</sup> *See* Edward R. Murrow, RTNDA Speech (Oct. 15, 1958), ([http://www.rtdna.org/content/edward\\_r\\_murrow\\_s\\_1958\\_wires\\_lights\\_in\\_a\\_box\\_speech#.VC14tmddVWI](http://www.rtdna.org/content/edward_r_murrow_s_1958_wires_lights_in_a_box_speech#.VC14tmddVWI)); Newton Minow, NAB Speech (May 9, 1961), (<http://www.americanrhetoric.com/speeches/newtonminow.htm>). *See also*, JOE FOOTE, *LIVE FROM THE TRENCHES: THE CHANGING ROLE OF THE TELEVISION NEWS CORRESPONDENT* (1998) (discussing the decline of network television journalism in the 1980s as traditional standards gave way to the demand for more profits.).

<sup>194</sup> Boyer, *supra* note 140.

<sup>195</sup> 1985 Fairness Report, *supra* note 12, at 171.

While these statements reflect honest concerns, those concerns pale when compared to the 1980s commercialization of network television news that virtually gutted much broadcast journalism. Thanks to large layoffs of journalists<sup>196</sup> and a mindset that placed profits over the public interest,<sup>197</sup> most of the broadcast network news bureaus were closed around the world and the emphasis shifted to less expensive soft news. Media scholar, Joe Foote, characterized the broadcast networks during this period as follows: “Rocked to their core by mergers and increased competition, the networks quickly whipped themselves into profit centers. Correspondents suffered.”<sup>198</sup> The same Dan Rather, quoted by the FCC in 1985, sadly characterized the 1987 budget cuts at CBS as “a tragic transformation from Murrow to mediocrity.”<sup>199</sup>

It should be emphasized again that this was happening in the 1980s at the very time the FCC was putting forth the argument that it was the Fairness Doctrine that was a threat to broadcast journalism. As for the station that cancelled the series on the religious cult after a member threatened a Fairness Doctrine complaint, perhaps rather than cancelling the series, the station should have delved deeply into the issue and presented a thorough examination of the subject from a multitude of viewpoints with reasonable reply opportunities—thus satisfying both prongs of the Fairness Doctrine and the basic requirements of journalism.

The FCC’s contention that the Fairness Doctrine stifled the expression of unorthodox viewpoints<sup>200</sup> is unconvincing. The Commission claimed a number of stations that aired more controversial issue programming than a typical licensee were “placed in jeopardy due to allegations of fairness doctrine

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<sup>196</sup> Commentator Michael Kinsley observed that by early 1987 CBS had fired 215 people and cut its budget by 10 percent. Michael Kinsley, *When Layoffs Hit the News*, WASH. POST (Mar. 12, 1987), <https://www.washingtonpost.com/archive/opinions/1987/03/12/when-layoffs-hit-the-news/b7821551-3ef2-49f4-8f9c-4885b41e12c8/>.

<sup>197</sup> Former network news producer Lowell Bergman used the term self-censorship to describe the practice of avoiding stories that would threaten the company’s financial interests. BRAD SCHULTZ, *BROADCAST NEWS PRODUCING* 26 (2004).

<sup>198</sup> FOOTE, *supra* note 193.

<sup>199</sup> Kinsley, *supra* note 196.

<sup>200</sup> See 1985 Fairness Report, *supra* note 12, at 188.

violations”<sup>201</sup> because many in society found opinions expressed to be abhorrent or extreme. Based on the scenarios as described in the Report, the stations simply should not have been placed in jeopardy in the first place. There is no question of Fairness Doctrine violations if the licensees were presenting controversial issues of public importance (with no personal attacks) and providing reasonable opportunities for multiple viewpoints. While it is possible there could be an indecency question or some other problem, some audience members’ opinions that ideas expressed are abhorrent or extreme are irrelevant and do not constitute Fairness Doctrine violations. It should also be noted that, in the absence of the Fairness Doctrine, licensees are free to totally avoid airing any controversial or unorthodox ideas at all, depriving their viewers and listeners of any opportunity to receive opinions from “diverse and antagonistic sources.”<sup>202</sup>

### *C. Inappropriate Government Intrusion*

The Commission complained that the Fairness Doctrine forced it to evaluate program content and interjected it into the “editorial decision making process”<sup>203</sup> of broadcasters. The Report again cited *Tornillo* to emphasize that the U.S. Supreme Court had held that a right-of-reply statute for newspapers was an unconstitutional intrusion on the editorial freedoms of journalists.<sup>204</sup> The Commission warned that the “intrusive power over program content occasioned by the fairness doctrine”<sup>205</sup> gave government officials power to influence broadcasters for partisan political purposes.<sup>206</sup> The Report cited past efforts by the Nixon administration to coerce broadcasters to support this concern.<sup>207</sup>

## 1. Response

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<sup>201</sup> *Id.* at 189.

<sup>202</sup> *See* *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (declaring the importance of information from “diverse and antagonistic sources.”).

<sup>203</sup> 1985 Fairness Report, *supra* note 12, at 190.

<sup>204</sup> *Id.* at 192.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 193.



The Commission's complaint that the Fairness Doctrine put it in the uncomfortable position of evaluating programming content is nearly nonsensical. It is true that broadcasters enjoy some degree of First Amendment protection,<sup>208</sup> but one can reasonably argue that making licensing decisions—which necessarily includes evaluating programming content—has historically been one of the FCC's most important and necessary responsibilities. In 1943, in the landmark case *NBC v. United States*,<sup>209</sup> the U.S. Supreme Court held that the FCC has authority to determine which applicants are worthy of getting a license based on who would best serve the public interest.<sup>210</sup>

We are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to protect stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of traffic. It puts upon the Commission the burden of determining the composition of that traffic.<sup>211</sup>

The *NBC* case clarified the FCC's duty to regulate broadcast content (going beyond mere regulation of technical issues) to ensure broadcasters serve the public interest.<sup>212</sup> Former FCC Chairman, Frederick W. Ford, noted in 1961 that despite the Communication Act's prohibition on interference with freedom of speech, "courts have repeatedly held that programming is a significant element in determining a station's performance in the public interest."<sup>213</sup> In 1965, the Commission had explicitly approved of using broadcasters' proposed programming as a criterion in license hearings.<sup>214</sup>

Without the ability to evaluate programming or even possibly interject itself into the editorial decision making process of broadcasters, the FCC would be powerless to enforce any

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<sup>208</sup> See 47 U.S.C. § 151 (1996).

<sup>209</sup> *Nat'l Broad. Co. v. United States*, 319 U.S. 190 (1943).

<sup>210</sup> *Id.* at 215–16.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 226–27.

<sup>213</sup> Frederick W. Ford, *The Meaning of the "Public Interest, Convenience or Necessity,"* 5 J. OF BROADCAST. 205, 211 (1961).

<sup>214</sup> See Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965).

regulations—including political candidate broadcasting rules,<sup>215</sup> children’s television advertising restrictions/educational requirements,<sup>216</sup> and broadcast indecency standards.<sup>217</sup> The term, “intrusion” appeared eleven times in the Report and, as noted above, the terms broadcast journalism or broadcast journalist appeared even more frequently.<sup>218</sup> The FCC seemed unwilling or unable to distinguish between “journalism” and “broadcasting,” tending to, instead, use the term “broadcast journalism” as a blanket term to refer to broadcasting expression generally.<sup>219</sup> This indiscriminate use of terminology potentially elevates any broadcast expression to the same level of First Amendment protections as traditional print media, even though broadcasters utilize the publically-owned and limited spectrum, and must serve the public interest in exchange for the privilege of holding a license. This imprecise terminology also fails to acknowledge the non-journalistic entertainment/opinion nature of much broadcasting, what one former television journalist characterized as “rant and rave journalism.”<sup>220</sup> Just because there can be no single, simple, definition of journalism, it does not follow that terms such as entertainment, opinion, and information are interchangeable with journalism. The rise of talk radio in the years immediately after the Fairness Doctrine was eliminated is a good example of this sort of non-journalistic broadcasting.

The highly successful conservative talk radio host, Rush Limbaugh, characterized his political talk show as “entertainment” rather than news.<sup>221</sup> In 2003, he told *Mediaweek* magazine, “I’m proud to be an entertainer. This is showbiz.”<sup>222</sup>

<sup>215</sup> See 47 U.S.C. §§ 312(a)(7), 315 (2004).

<sup>216</sup> See 47 U.S.C. §§ 303(a)-(b), 394 (2010); *In re* Policies and Rules Concerning Children’s Television Programming, 11 FCC Rcd.10660 (1996).

<sup>217</sup> See *FCC v. Pacifica*, 438 U.S. 726 (1978); *New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees*, 2 FCC Rcd. 2726 (1987).

<sup>218</sup> *New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees*, 2 FCC Rcd. 2726 (1987).

<sup>219</sup> *Id.*

<sup>220</sup> Nancy Graham Holm, *Bring Back the Fairness Doctrine: I’d Rather Have Debate Than Ranting-and-Raving Journalism*, HUFF. POST (Apr. 15, 2014), [http://www.huffingtonpost.com/nancy-graham-holm/bring-back-the-fairness-d\\_1\\_b\\_4775492.html](http://www.huffingtonpost.com/nancy-graham-holm/bring-back-the-fairness-d_1_b_4775492.html).

<sup>221</sup> *Rush: He’s Changed the World of Talk Radio*, NEWSMAX (Aug. 12, 2003), <http://www.newsmax.com/Pre-2008/RushHe-s-Changed-the/2003/08/12/id/676559/> (“I’m a salesman first and foremost.”).

<sup>222</sup> *Id.*

Other talk radio hosts, as documented by liberal television commentator, Bill Moyers, in 2008, had success airing a more extreme form of entertainment over the public airwaves.<sup>223</sup> They were free from government intrusion in their editorial decision making in the post-Fairness Doctrine world.

Examples include: Michael Savage on his radio show calling liberalism “the HIV virus” of the nation and characterizing children with autism as “in 99 percent of the cases, it’s a brat who hasn’t been told to cut the act out . . . don’t sit there crying and screaming, idiot[;]”<sup>224</sup> Glenn Beck fantasizing on the air about killing liberal film maker, Michael Moore, “I’m wondering if I could kill him myself or if I would need to hire somebody to do it. I think I could. I think he could be looking me in the eye, you know, and I could just be choking the life out . . . is this wrong?[;]”<sup>225</sup> Michael Reagan suggesting on his show that those who claim that the 9/11 attacks of 2001 were a government conspiracy should be shot, “[y]ou call them traitors, that’s what they are and you shoot them dead . . . I’ll pay for the bullet[;]”<sup>226</sup> Neal Boortz characterizing victims of Hurricane Katrina in New Orleans as, “useless” and “worthless” and saying Muslims observing Ramadan only eating at night are, “like cockroaches[;]”<sup>227</sup> and finally, Jim Quinn referring to the National Organization for Women as, “the National Organization of Whores.”<sup>228</sup>

Columnist Michael Goodwin, in 2004, noted a number of extreme comments made by liberal commentators on the now-defunct Air America network aired on station WLIB in New York.<sup>229</sup> They included an unnamed host saying Defense Secretary Donald Rumsfeld “ought to be tortured,” and host, Randi Rhodes, comparing U.S. prisons in Iraq to the “Nazi

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<sup>223</sup> Bill Moyers Journal, PBS (Sept. 12, 2008), <http://www.pbs.org/moyers/journal/09122008/watch.html>.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> Michael Goodwin, *Liberal Radio is Airing Bad Jokes and Worst Taste*, N.Y. DAILY NEWS (May 12, 2004), <http://web.archive.org/web/20040608211516/http://www.nydailynews.com/news/col/story/192671p-166266c.html>.

golog” and saying “the day I say thank you to Rumsfeld is the same day I’ll say thank you to the 12 people who raped me.”<sup>230</sup>

The Commission’s concern over interfering with broadcasters’ editorial discretion in the name of the Fairness Doctrine is also puzzling when viewed next to some of its rulings in the area of political broadcasting. In 1972, the FCC told an Atlanta radio station it must continue airing an inflammatory political advertisement of a white racist running for the U.S. Senate.<sup>231</sup> In the ad, candidate J.B. Stoner claimed “the niggers want our white women,” and “you cannot have law and order and niggers too.”<sup>232</sup> The Commission said the no censorship provision of Section 315 prohibited stations from censoring or banning such political advertisements from the public airwaves, despite reported threats of bombing the station if it continued to air the ads.<sup>233</sup> Because the Stoner message itself did not contain direct incitement to violence, candidates’ free speech rights trumped broadcasters’ editorial discretion.<sup>234</sup> In 1978, the Commission said words such as “nigger” cannot be censored from broadcast political advertisements even if they are thought by some to be indecent.<sup>235</sup>

Similarly, in 1994, the FCC ruled that television advertisements from an anti-abortion candidate for the U.S. Senate featuring graphic images of aborted fetuses must be aired, but the FCC also said the television station could channel the ads to a time at night when children would be less likely to be in the audience.<sup>236</sup> However, the D.C. Circuit Court of Appeals said such content-based channeling of the ads to late night hours violated Section 312 (a)(7) and Section 315 access rights of the candidate.<sup>237</sup> The alleged intrusion on broadcasters’ editorial

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<sup>230</sup> *Id.*

<sup>231</sup> LaVonda N. Reed-Huff, *Offensive Political Speech from the 1970s to 2008: A Broadcaster’s Moral Choice*, 8 U. MD. L.J. RACE RELIG. GENDER & CLASS 241, 260 n.98 (2008).

<sup>232</sup> See Letter to Lonnie King, 36 F.C.C.2d 635, 636 (1972).<sup>[1]</sup><sup>[2]</sup>

<sup>233</sup> *Id.*

<sup>234</sup> See *id.*; see also *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (stating such speech can only be prohibited when it is directly inciting imminent lawless action that is likely to occur).

<sup>235</sup> See *In re Complaint by Julian Bond*, 69 F.C.C.2d 943 (1978).

<sup>236</sup> *In re Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act*, 9 FCC Rcd. 7638, 7649 (1994).

<sup>237</sup> See *Becker v. FCC*, 95 F.3d 75, 75–76 (D.C. Cir. 1996).

independence imposed by Fairness Doctrine requirements—to make a good faith effort to present controversial public issues with reasonable opportunities for diverse viewpoints in overall programming—seems insignificant when compared to these scenarios in which the FCC forced licensees to air political messages against their wishes.

*D. More Information Sources in the Marketplace*

The Commission noted the significant increase in the number of outlets available to the public in the media marketplace as a strong argument against the Fairness Doctrine.<sup>238</sup> Specifically, the Report concluded that so many “diverse and antagonistic sources of information available in the marketplace . . . attenuates the need for a system of government imposed ‘fairness’ with its corollary duty to discover and present controversial issues of public importance.”<sup>239</sup> The Commission cited growth in the number of radio and television broadcast stations,<sup>240</sup> along with cable<sup>241</sup> and satellite<sup>242</sup> services, to argue that viewpoint diversity and fairness would result without government intervention. The report noted that from the time *Red Lion* was decided in 1969 to 1985 the total number of U.S. radio stations had grown from 6,595 to 9,766.<sup>243</sup> The numbers for television stations during that time had risen from 837 to 1,208.<sup>244</sup>

The Commission placed much confidence in technology, even citing the potential of video cassette recorders (VCRs) becoming the “electronic handbills”<sup>245</sup> of the future. The Commission also cited the particular significance of the growth of the number of “radio voices” available in local markets and the competition that would result.<sup>246</sup> The FCC concluded that the increased number of available media voices and “market forces”<sup>247</sup> would ensure adequate and fair coverage of

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<sup>238</sup> 1985 Fairness Report, *supra* note 12, at 197.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 202–204.

<sup>241</sup> *Id.* at 208–10.

<sup>242</sup> *Id.* at 213–16.

<sup>243</sup> *Id.* at 202.

<sup>244</sup> *Id.* at 204.

<sup>245</sup> *Id.* at 214.

<sup>246</sup> *Id.* at 203.

<sup>247</sup> *Id.* at 219–21.

controversial public issues.

### 1. Response

Clearly, the FCC was correct in noting that there were many more stations on the air than there had been when the Court upheld the Fairness Doctrine (citing spectrum scarcity) in *Red Lion* in 1969.<sup>248</sup> The emergence of cable and satellite technology also contributed greatly to the expanding media marketplace. However, these media voices would ultimately prove to be less diverse and antagonistic than suggested by the Report in 1985. Simply stated, more stations on the air does not necessarily equal more diverse voices. As noted in the Report, the Commission was already using the more stations-on-the-air rationale to justify loosening ownership concentration limits and scale back commercial limitations and ascertainment requirements for commercial radio stations.<sup>249</sup> This trend accelerated after the 1996 Telecommunications Act eliminated numerical limits on station ownership nationwide<sup>250</sup> (raising the audience reach cap from twenty-five percent to thirty-five percent)<sup>251</sup> and raised the number of stations a single party may own in individual markets from three to six up to between five and eight depending on market size.<sup>252</sup>

According to data from the FCC, between 1996 and 2007 the number of U.S. commercial radio stations increased approximately seven percent while the number of station owners decreased thirty-nine percent.<sup>253</sup> Additionally, the two largest group owners, Clear Channel Communications and Cumulus Broadcasting, owned sixty-two and fifty-three radio stations respectively in 1996.<sup>254</sup> Those numbers jumped to over 1,100 and 300 by 2007.<sup>255</sup> Further challenging the more--stations--equals--more--diversity view, a study by the Pew Research Center

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<sup>248</sup> 395 U.S. 367, 389 (1969).

<sup>249</sup> 1985 Fairness Report, *supra* note 12, at 203.

<sup>250</sup> 47 C.F.R. § 73.3555 (1996).

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> See George Williams, *Review of the Radio Industry 2007*, at 1,

[https://apps.fcc.gov/edocs\\_public/attachmatch/DA-07-3470A11.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DA-07-3470A11.pdf).

<sup>254</sup> See *The Year That Changed Radio Forever: 1996*, MEDIA LIFE MAG., Sept. 1, 2016, <http://medialifemagazine.com/1996-year-changed-radio-forever/>.

<sup>255</sup> *Id.*

revealed that in 2015, out of approximately 1,700 television stations, only 12 were owned by African Americans (one person owned seven of the twelve).<sup>256</sup> The study found that four percent of television station news directors were African American in 2015.<sup>257</sup> These figures represent only a slight improvement over numbers cited by the U.S. Supreme Court in 1990, noting that in 1986 minorities “owned just 2.1 percent of the more than 11,000 radio and television stations in the United States.”<sup>258</sup>

This significant lack of diversity is apparent in broadcast radio programming when one considers that talk radio is the second most popular radio format (second only to country music)<sup>259</sup> and the most popular talk radio entertainment hosts are overwhelmingly conservative.<sup>260</sup> An informal scanning of the AM radio dial on any weekday in virtually any U.S. community confirms this, but the numbers have been formally documented for a number of years.<sup>261</sup> Another strike against program diversity is the fact that women are outnumbered by men seven to one as talk radio program hosts.<sup>262</sup> The Commission pointed to new communication technology, such as satellite and cable, as a future source of media diversity.<sup>263</sup> However, while a 2016 Pew Research Center survey showed that over half of respondents age

<sup>256</sup> Nancy Vogt, *State of the News Media 2016, African American News Media: Fact Sheet*, PEW RESEARCH CTR. (Jun. 15, 2016), <http://www.journalism.org/2016/06/15/african-american-media-fact-sheet/>.

<sup>257</sup> *Id.*

<sup>258</sup> *Metro Broadcasting v. F.C.C.*, 497 U.S. 547, 553 (1990).

<sup>259</sup> Nancy Vogt, *State of the News Media 2016, Audio: Fact Sheet*, PEW RESEARCH CTR. (Jun. 15, 2016), <http://www.journalism.org/2016/06/15/audio-fact-sheet/>.

<sup>260</sup> The anti-ownership concentration group Free Press noted that a 2007 study revealed that of the 257 news/talk stations owned by the top five commercial station owners, 91 percent of the total weekday talk radio programming was conservative, and 9 percent was progressive. *New Free Press Report on the Structural Imbalance of Political Talk Radio*, FREE PRESS (Jun. 21, 2007), <http://www.freepress.net/release/246>.

<sup>261</sup> Mackenzie Weinger, *Limbaugh, Hannity Lead Talkers' Top 100*, POLITICO (Mar. 13, 2013), <http://www.politico.com/blogs/media/2013/03/limbaugh-hannity-lead-talkers-top-100-159206>; see also *2016 Talkers Heavy Hundred*, TALKERS MAGAZINE, <http://www.talkers.com/heavy-hundred/> (last visited Feb. 17, 2017); *An Annual Report on American Journalism: Talk Radio*, THE STATE OF THE NEWS MEDIA 2007, <http://www.stateofthemediamedia.org/2007/radio-intro/talk-radio/> (last visited Feb. 17, 2017); *The Top Talk Radio Audiences*, TALKERS MAGAZINE (May 2016), [http://www.talkers.com/wp-content/uploads/2011/09/audiencechart\\_may2016\\_useme.jpg](http://www.talkers.com/wp-content/uploads/2011/09/audiencechart_may2016_useme.jpg).

<sup>262</sup> Jeff McKay, *The State of Women on Talk Radio—Part 5: Why Aren't There More?*, TALKERS MAGAZINE (Nov. 6, 2015), <http://www.talkers.com/2015/11/06/the-state-of-women-on-talk-radio-part-5/>.

<sup>263</sup> 1985 Fairness Report, *supra* note 12, at 197.

12 or over had listened to “online radio” in the past month, 91 percent of 395,000 respondents reported listening to traditional AM/FM radio during the past week.<sup>264</sup> Talk radio had become a significant part of the media landscape with approximately 400 stations airing a talk format within 3 years of the demise of the Fairness Doctrine.<sup>265</sup> By 2006 that number had grown to 1,400<sup>266</sup> and by 2015 nearly 2,000 stations were broadcasting a talk radio format.<sup>267</sup> As the Pew Research Center pointed out, the talk radio format (sometimes called news/talk/information) is considered a separate format, distinct from the all-news format, which accounted for only one percent of the overall radio audience in 2015.<sup>268</sup> These low-audience news format stations—rather than the popular talk format stations—more appropriately fit into the “broadcast journalist” category the FCC so frequently referred to in the 1985 Report.

With regard to television, the number of cable channels available to consumers is vastly greater than it was in 1985. The Commission was correct when it noted cable’s potential for increasing the number of viewing options available to the public, specifically noting the Cable News Network, the Financial News Network, and public affairs channel, C-SPAN.<sup>269</sup> However, numbers alone do not necessarily tell the whole story. A Nielson study revealed that while the average U.S. home in 2013 received 189 cable channels, each household watched, on average, only 17 channels.<sup>270</sup> The number of channels watched (17) remained unchanged from 2008 when the channels received average was 129,<sup>271</sup> suggesting that the seemingly ever-increasing number of available channels does not lead to more diverse viewing

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<sup>264</sup> Nancy Vogt, *State of the News Media 2016, African American News Media: Fact Sheet*, PEW RESEARCH CTR. (Jun. 15, 2016), <http://www.journalism.org/2016/06/15/african-american-media-fact-sheet/>.

<sup>265</sup> Nancy Vogt, *State of the News Media 2016, Audio: Fact Sheet*, PEW RESEARCH CTR. (Jun. 15, 2016), <http://www.journalism.org/2016/06/15/audio-fact-sheet/>.

<sup>266</sup> *See id.*

<sup>267</sup> Nancy Vogt, *State of the News Media 2016, Audio: Fact Sheet*, PEW RESEARCH CTR., (Jun. 15, 2016), <http://www.journalism.org/2016/06/15/audio-fact-sheet/>.

<sup>268</sup> *Id.*

<sup>269</sup> 1985 Fairness Report, *supra* note 12, at 210–11.

<sup>270</sup> *Changing Channels: Americans View Just 17 Channels Despite Record Number to Choose From*, NIELSEN (May 6, 2014), <http://www.nielsen.com/us/en/insights/news/2014/changing-channels-americans-view-just-17-channels-despite-record-number-to-choose-from.html>.

<sup>271</sup> *Id.*



choices.

Any argument that broadcasters do not need to provide controversial programming on public issues from diverse viewpoints because cable, satellite, or any other non-broadcast communication media is doing it, ignores the public interest responsibilities of broadcasters and contradicts established FCC philosophy in other areas of content regulation. First and foremost, broadcasters must serve the public interest as a condition of using the public's airwaves.<sup>272</sup> This is the foundation of the U.S. system of broadcast regulation. As FCC commissioner Clifford Durr noted in 1959:

There is need to reiterate over and over again the idea that broadcasting frequencies are *public* property, even if it has been said 99 times before. The people don't know it; they don't understand that this is *not* the property of the broadcasters. We need to create in the public mind an awareness of the fact that the people *do* have an interest.<sup>273</sup>

If cable or other non-broadcast program providers are providing diverse programming on controversial public issues with multiple viewpoints represented, they should be applauded for their public service. However, their programming does not relieve broadcast licensees from their mandate to provide their own programming that serves the public interest. Children's television regulation provides a good example of this principle.

Foreshadowing some of the justifications it would include in the 1985 Fairness Report, the FCC announced in 1984 that commercial television stations did not need to air educational programming for children because there was sufficient programming available from cable and non-commercial stations.<sup>274</sup> The Commission concluded, "there is no national failure of access to children's programming."<sup>275</sup>

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<sup>272</sup> 47 U.S.C. § 307(a) (2004); *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 215 (1943).

<sup>273</sup> WALTER B. EMERY, NATIONAL AND INTERNATIONAL SYSTEMS OF BROADCASTING: THEIR HISTORY, OPERATION, AND CONTROL 14 (Michigan State Univ. Press 1969).

<sup>274</sup> *In re Children's Television Programming and Advertising Practices Report and Order*, 96 F.C.C.2d 648 (1984).

<sup>275</sup> *Id.*

Congress disagreed, passing the Children’s Television Act<sup>276</sup> in 1990, which required stations to air a minimum of three hours per week of educational/information children’s programming and established commercial limits.<sup>277</sup> Broadcasters must serve the public interest regardless of what programming other media are providing.

Broadcast indecency is another area in which the FCC regulates—some might say intrudes on programming decisions—broadcasters more strictly than other media such as satellite or cable channels. It is a long-established<sup>278</sup> principle that airing indecent programming (even when it falls short of being obscene)<sup>279</sup> during times of day when children are likely to be in the broadcast audience is not in the public interest.<sup>280</sup>

The most substantial change during the evolution of the media marketplace in the years since 1985 is the rise of home computers and the Internet. The Commission briefly mentioned the increasing significance of computers in the 1985 Report, concluding that, “home computer systems have played a significant role in adding to the information services marketplace. However, we do not find these services to be significant contributors to media diversity at this time.”<sup>281</sup> That has obviously changed in the era of smart phones and social media. Nevertheless, over-the-air broadcast television and radio remain significant contributors to the media marketplace. As recently as February 2016 a Pew Research Center study found that fifty-seven percent of respondents often get news from television, compared to twenty-eight percent for news web sites or apps and eighteen percent for social networking sites.<sup>282</sup> Of particular interest, respondents ranked local TV news at forty-six percent, compared to national nightly network TV news at thirty

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<sup>276</sup> 47 U.S.C. §§ 303(a)-(b), 394 (2010).

<sup>277</sup> *Id.*

<sup>278</sup> See Milagros Rivera-Sanchez, *The Origins of the Ban on “Obscene, Indecent, or Profane” Language of the Radio Act of 1927*, 149 JOURNALISM & MASS COMM. MONOGRAPHS 8 (1995); *In re Citizen’s Complaint Against Pacifica Foundation Station WBAI (FM)*, 56 F.C.C.2d 94, 98 (1975).

<sup>279</sup> See *Miller v. California*, 413 U.S. 15 (1973).

<sup>280</sup> *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 749–50 (1978).

<sup>281</sup> 1985 Fairness Report, *supra* note 12, at 217.

<sup>282</sup> *State of the News Media 2016, Digital News Audience: Fact Sheet*, PEW RESEARCH CTR. (Jun. 15, 2016), [http://www.journalism.org/2016/06/15/digital-news-audience-fact-sheet/pj\\_2016-06-15\\_state-of-the-news-media\\_digital-audience-01/](http://www.journalism.org/2016/06/15/digital-news-audience-fact-sheet/pj_2016-06-15_state-of-the-news-media_digital-audience-01/).

percent and cable TV news at thirty-one percent.<sup>283</sup> Respondents cited radio at twenty-five percent and print newspapers at twenty percent.<sup>284</sup> The continuing importance of broadcast television in the digital age is also apparent in the FCC's efforts to educate citizens in the months leading up to the 2009 digital television transition.<sup>285</sup> Why conduct a public service campaign to ensure viewers can continue to receive free over-the-air television if the public has so many other diverse sources of information in the media marketplace? Clearly, broadcast television still occupies an important position in the marketplace.

Despite the number of media outlets available, media message diversity is still limited. One media diversity advocacy group claimed that the lack of playlist diversity on commercial music radio stations has led to one song—"Mrs. Robinson" by Simon and Garfunkel—being played six million times between 1968 and 2011.<sup>286</sup> This example illustrates lack of diversity in music programming, but the point applies equally to viewpoint diversity. It does not matter if there are thousands of voices, there is not true diversity if they are all singing the same handful of songs. Having more media voices in the marketplace does not automatically lead to citizens receiving diverse information on controversial public issues with reasonable opportunities for opposing views. As one scholar observed in 2003, "[o]utlet diversity should not be presumed to guarantee viewpoint diversity in a highly concentrated industry in which profit drives the content chosen."<sup>287</sup>

#### *E. Modification or Repeal of the Fairness Doctrine*

The final section of the Report deals with the Commission's authority to modify or repeal the Fairness Doctrine. The Commission declined to consider alternatives such as, placing a two--year moratorium on enforcement in

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<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> See F.C.C., *DTV Headlines Archive*, <https://www.fcc.gov/general/dtv-headlines-archive>.

<sup>286</sup> See Libby Reinish, *Media Consolidation: The Illusion of Choice*, FREE PRESS (Nov. 22, 2011), <http://www.freepress.net/blog/11/11/22/media-consolidation-illusion-choice>.

<sup>287</sup> Ann L. Plamondon, *Proposed Changes in Media Ownership Rules*, 25 COMM. & THE L. 47, 93 (2003).

order to examine impact on broadcast speech, exempting all advertising from Fairness Doctrine requirements, and replacing the case-by-case review of complaints with a single examination of fairness compliance at license renewal time.<sup>288</sup> The remainder of this section instead focuses on the history of the Fairness Doctrine and the Commission's authority to enforce fairness.

The Commission noted that neither the 1927 Radio Act nor the 1934 Communications Act contained provisions requiring broadcasters to provide fairness during presentations of controversial issues of public importance.<sup>289</sup> The Report also noted the failed attempts to add Fairness Doctrine-like language to Section 315 in 1932.<sup>290</sup> The Commission argued that, "prior to 1959 at least, Congress had steadfastly refused to statutorily require broadcasters to provide fairness in the coverage of controversial questions and issues of public concern."<sup>291</sup> The Report further detailed how the FRC and FCC imposed fairness requirements—even though no codified Doctrine existed—from the 1920s, culminating in the formal two-prong fairness requirements announced in the 1949 Fairness Report.<sup>292</sup> The Commission clarified that even the Doctrine as announced in the 1949 Report was not the result of any specific command of the Communications Act, but rather a requirement promulgated by the FCC under its general authority to regulate broadcasters in the public interest.<sup>293</sup> The Commission concluded that the "sole statutory basis for the doctrine was the general duty of licensees to serve the public interest."<sup>294</sup> In the Commission's view, the Fairness Doctrine was merely an FCC policy that was not specifically mandated by the 1934 Communications Act.

The Commission next addressed the question of whether or not the 1959 amendment to Section 315 codified the Fairness Doctrine or merely "acknowledged and preserved the Commission's policy in this area without statutorily mandating

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<sup>288</sup> See 1985 Fairness Report, *supra* note 12, at 226.

<sup>289</sup> See *id.* at 227–28.

<sup>290</sup> See *id.* at 229.

<sup>291</sup> *Id.*

<sup>292</sup> See *id.* at 229–30.

<sup>293</sup> See *id.* at 230.

<sup>294</sup> *Id.* at 231.

its continuance.”<sup>295</sup> Section 315 of the 1934 Act spells out the rules for appearances by political candidates.<sup>296</sup> Section 315(a)(4) includes the following language that appears to directly reference the two prongs of the Fairness Doctrine.

Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest *and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.*<sup>297</sup>

After briefly discussing the legislative history of the 1959 amendment, the Commission concluded there was no clear evidence demonstrating that Congress intended to “codify the doctrine.”<sup>298</sup> The Commission also noted that no court had ever directly ruled on the question of whether or not the Fairness Doctrine was a statutory mandate, and dictum in both *Red Lion*<sup>299</sup>

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<sup>295</sup> *Id.* at 232.

<sup>296</sup> 47 U.S.C. § 315(a) reads as follows:

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provision of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any--(1) bona fide newscast, (2) bona fide news interview, (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

<sup>297</sup> *See id.* (emphasis added).

<sup>298</sup> 1985 Fairness Report, *supra* note 12, at 235.

<sup>299</sup> 395 U.S. 367 (1969).

and *Columbia Broadcasting System v. Democratic National Committee*<sup>300</sup> was self-contradictory and plagued by ambiguous terminology.<sup>301</sup> The Commission noted, for example, the Court said in *Columbia Broadcasting* that the 1959 amendment gave “statutory approval to the Fairness Doctrine.”<sup>302</sup>

The Commission then went on to argue that this language “could suggest that the Court understood the 1959 amendments to codify the fairness doctrine. Contrarily, this same statement could stand for the proposition that Congress was recognizing and approving the doctrine, but not mandating its retention.”<sup>303</sup> The Report noted that the FCC itself had failed to adopt a clear interpretation of the Doctrine as being codified or merely a policy.<sup>304</sup> The Commission closed out this section of the Report noting that “Congress itself was not certain whether the fairness doctrine has been codified.”<sup>305</sup>

### 1. Response

A cynical interpretation of the FCC’s dismissal of the proposed fairness enforcement alternatives might lead one to conclude that the Commission’s purpose was to find justifications and authority to achieve its ultimate goal—eliminating the Fairness Doctrine—rather than seriously addressing ways the Fairness Doctrine might be modified to better serve the public interest. The Report noted the lack of specific Fairness Doctrine-like requirements in both the 1927 Radio Act and the 1934 Communications Act as evidence that such specific requirements were not intended by the authors of those statutes, but the Report did not include or reference the numerous public statements from Representatives Ewin Davis and Luther Johnson, Senator Robert Howell, and Secretary of Commerce Herbert Hoover on the need for fairness.<sup>306</sup> As previously noted, Davis warned in 1926 “[w]e are going to have to regulate the rates and the service, to force them to give equal

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<sup>300</sup> 412 U.S. 94 (1973).

<sup>301</sup> See 1985 Fairness Report, *supra* note 12, at 241–242.

<sup>302</sup> *Id.* at 242.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at 245–46.

<sup>306</sup> *Id.* at 228.

service and equal treatment to all . . . They can permit the proponents of a measure to be heard and can refuse to grant the opposition a hearing.”<sup>307</sup> The Report also failed to mention that language very similar to the Fairness Doctrine was, in fact, passed by Congress in 1932 only to be pocket-vetoed by President Hoover.<sup>308</sup> Speaking in support of the 1932 fairness amendment, Representative Harold McGugin argued that freedom of speech was worthless without “reasonable freedom of access to radio.”<sup>309</sup> Senator Clarence Dill, co-author of the 1927 and 1934 Acts, believed a specific fairness amendment was unnecessary because the FRC already had public interest authority to require equal opportunity for fair discussion of public issues.<sup>310</sup> Fairness Doctrine scholar, Steven Simmons, concluded in 1978 that, because most congressmen at the time agreed the fairness mandate in the 1932 bill did not change the substantive law, there is support for “the Supreme Court’s opinion of the late 1960s that the FCC could impose the fairness doctrine based on the statutory authority of the public interest standard of the 1934 Act.”<sup>311</sup>

Determining legislative intent decades after the fact can be challenging if not impossible. The degree to which those lawmakers who shaped the 1927 and 1934 Acts supported specific fairness requirements can be debated endlessly. However, the historical record strongly suggests they did not favor a total *laissez faire* approach, where licensees are free to use the public airwaves to broadcast one-sided viewpoints and personal attacks day after day while offering no opportunities for opposing opinions—such as exists in our present-day post-Fairness Doctrine broadcasting landscape. Lawmakers in the 1920s and 1930s understood—to paraphrase an expression—a radio was not merely a toaster with sound.

The Commission devoted much attention to the question of whether or not the Doctrine had been codified in 1959. The Report emphasized that the evidence is conflicting, but the

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<sup>307</sup> 67 CONG. REC. 5444, 5483 (1926).

<sup>308</sup> See SIMMONS, *supra* note 4, at 27.

<sup>309</sup> 75 CONG. REC. 3487, 3692 (1932).

<sup>310</sup> See H.R. REP. NO. 2-72-7716 (1933).

<sup>311</sup> SIMMONS, *supra* note 4, at 30.

Commission ultimately concluded that, because it would not act on the Fairness Doctrine before Congress reviewed the Report, it was unnecessary to “reach a definite conclusion on this matter . . . .”<sup>312</sup> The Commission characterized the evidence as conflicting, but evidence supporting the view that it was codified is clear and direct. As previously noted, a 1963 FCC letter to Congressman Oren Harris explicitly said the Fairness Doctrine was a “specific statutory obligation.”<sup>313</sup> During congressional hearings that same year, Senator John Pastore said the Fairness Doctrine was codified as part of Section 315 and any revision of that section should include a “restatement on the fairness doctrine.”<sup>314</sup> The 1985 Report itself noted, during hearings in 1975, Senators Pastore and William Proxmire said the Doctrine was codified as part of Section 315.<sup>315</sup> Pastore, leaving no room for confusion, said, “we codified the fairness doctrine in 1959.”<sup>316</sup> Commissioner James Quello agreed. In a concurring statement, he wrote that “this record compels the conclusion that Congress intended to codify the fairness doctrine as part of the 1959 amendments to the Communications Act.”<sup>317</sup>

In a brief concluding section, the Commission explained that, despite confusion about the statutory status of the Fairness Doctrine and its concerns about the Doctrine’s efficacy and constitutionality, it would not eliminate it.<sup>318</sup> The Report noted bills introduced in Congress and ongoing hearings dealing with the Fairness Doctrine as reasons to delay acting on it.<sup>319</sup> However, the following year the U.S. Court of Appeals for D.C.—relying in part on the Commission’s 1985 Report—ruled in 1986 that Congress had not codified the Fairness Doctrine and the FCC could eliminate it if the Commission felt it no longer served the public interest.<sup>320</sup>

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<sup>312</sup> 1985 Fairness Report, *supra* note 12, at 246.

<sup>313</sup> *In re* “Fairness Doctrine” Implementation, 40 F.C.C. 582, 583 (1963).

<sup>314</sup> *Equal Time: Hearings on S.251, S.252, S.1696, and H.J. Res. 247 Before the Subcomm. on Comm’n’s of the Senate Comm. on Commerce*, 88th. Cong., 59 (1963).

<sup>315</sup> 1985 Fairness Report, *supra* note 12, at 245.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* at 253.

<sup>318</sup> *Id.* at 246–47.

<sup>319</sup> *See id.* at 247.

<sup>320</sup> *Telecommunications Research and Action Ctr. v. FCC*, 801 F.2d 501, 517–18 (1986), *cert. denied*, 482 U.S. 919 (1987).



## CONCLUSION

The FCC's 1985 Fairness Report marked the formal beginning of the end of the Fairness Doctrine. It provided the justification that would lead to the Doctrine's elimination in 1987. The Commission argued that it inappropriately intruded on the First Amendment rights of broadcasters, it no longer served the public interest because it inhibited rather than encouraged diverse public affairs programming, it was no longer needed due to the many diverse media outlets available, and it was not statutorily mandated.<sup>321</sup> In 1989, the D.C. Circuit affirmed the Commission's conclusions.<sup>322</sup>

First Amendment questions are inevitable anytime the government attempts to regulate the content of speech, and rightly so. However, the Fairness Doctrine was not content-based in the sense of a traditional prior restraint, such as the one struck down in 1931 in the landmark *Near v. Minnesota*<sup>323</sup> case or the indecency standard upheld in 1978 in *FCC v. Pacifica*.<sup>324</sup> It did not prohibit speech based on content or viewpoint. To the contrary, it encouraged speech, to be followed by more counter speech and debate. As Justice Brandeis famously argued in 1927, "the remedy to be applied is more speech, not enforced silence."<sup>325</sup> The philosophical foundation for the Fairness Doctrine is the Jeffersonian ideal of an informed citizenry practicing democracy in a marketplace of ideas.<sup>326</sup> This is only possible when the public has access to diverse opinions on important public issues.

One might argue that the coerced speech doctrine<sup>327</sup> prohibits government from forcing broadcasters to air

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<sup>321</sup> *In re* Complaint of Syracuse Peace Council against Television Station WTHV, Memorandum Opinion and Order, 2 FCC Rcd 5043, 5057-58 (1987), *recon. denied*, 3 FCC Rcd. 2035 (1988).

<sup>322</sup> *Syracuse Peace Council v. F.C.C.*, 867 F.2d 654, 669 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

<sup>323</sup> 283 U.S. 697 (1931).

<sup>324</sup> 438 U.S. 726 (1978).

<sup>325</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927).

<sup>326</sup> *See* THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6-8 (1970); RODNEY SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 6-7 (1992); *see generally* ERWIN CHERMERINSKI, *INTERPRETING THE CONSTITUTION* (1987); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

<sup>327</sup> The compelled speech doctrine posits that the government may compel its citizens to engage in certain forms of speech. This governmental action, however, is not

programming against their wishes but, once again, the First Amendment interests of the public outweigh the interests of individual broadcasters.<sup>328</sup> The Supreme Court applied this principle to cable television in 1997 in *Turner Broadcasting v. FCC*.<sup>329</sup> The Court upheld must-carry rules that forced cable providers to carry local broadcast TV stations on their systems even if they did not want to.<sup>330</sup> The Court said the government's important interest in "promoting the widespread dissemination of information from a multiplicity of sources"<sup>331</sup> outweighed the First Amendment rights of cable providers to exclude certain stations. Just as in *Turner Broadcasting*, Fairness Doctrine requirements furthered a government interest that outweighed the First Amendment rights of individual broadcast licensees. As the Court explained in *Red Lion*,

There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and

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absolute, and when such compelled speech infringes upon private—rather than commercial—interests, courts review the government's actions with more scrutiny, and are less inclined to uphold the government action. In *Wooley v. Maynard*, for example, the Court overturned a state law that forced drivers in New Hampshire to display the state motto (live free or die) on the license plates of their private vehicles. 430 U.S. 705, 717 (1977). In this case, the state's interest in coercing expression—easy identification of non-commercial passenger vehicles and fostering appreciation of state history—was deemed insufficient to justify infringing the First Amendment rights of drivers to not express the motto. *Id.* at 716-17. *See also* *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 236 (1977) (holding that unions may only "spend funds for the expression of political views" if the employees who pay those funds do not object to such spending, and their agreement is not the product of coercion, threat, or duress on the part of the union); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (striking down a statute that required students to salute the American flag and recite the Pledge of Allegiance as a violation of students' First Amendment rights).

<sup>328</sup> The U.S. Supreme Court had explained that spectrum scarcity and the public nature of the spectrum justified the Fairness Doctrine and its personal attack rule in 1969 in *Red Lion*. 395 U.S. 367 (1969). The Court's 1974 ruling in *Miami Herald v. Tornillo*, that a newspaper right-of-reply requirement was unconstitutional, is consistent with *Red Lion* because print media do not use the spectrum and are not subject to public interest regulation. 418 U.S. 241 (1974).

<sup>329</sup> 520 U.S. 180 (1997).

<sup>330</sup> *Id.* at 224-25.

<sup>331</sup> *Id.* at 189.

which would otherwise, by necessity, be barred from the airwaves.<sup>332</sup>

The fact that licensees are allowed to use a limited public resource, free of charge, means they are subject to public interest regulations, however much some licensees might wish it weren't so. As former FCC commissioner, Michael Copps, explained in 2007, "America lets radio and TV broadcasters use public airwaves worth more than half a trillion dollars for free. In return, we require that broadcasters serve the public interest . . . Using the public airwaves is a privilege—a lucrative one—not a right."<sup>333</sup> If one is willing to discount the unique public nature of broadcasting to argue that broadcasters deserve the same full First Amendment protections enjoyed by print media, cable television or Internet speakers,<sup>334</sup> then it's not just the Fairness Doctrine that comes under question. Virtually any content regulation could potentially be invalidated under this theory of the First Amendment application to the limited broadcast spectrum. The political candidate rules, indecency restrictions, prohibitions on false advertising, and children's television regulations could all potentially be held unconstitutional.

Appeals to the First Amendment rights of broadcasters (or broadcast journalists) without meaningful consideration of context have little value. Such concerns ring hollow when one considers the FCC's record of forcing broadcasters to air repugnant messages of ignorance and racial hatred. More simply, why is it in the public interest to require stations to air depictions of aborted fetuses and racist candidates ranting that "you can't have law and order and niggers too,"<sup>335</sup> but requiring

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<sup>332</sup> *Red Lion Broad. Co.*, 395 U.S. at 389.

<sup>333</sup> Michael J. Copps, *The Price of Free Airwaves*, N.Y. TIMES (Jun. 2, 2007), [http://www.nytimes.com/2007/06/02/opinion/02copps.html?\\_r=2&n=Top%2fOpinion%2fEditorials%20and%20Op%2dEd%2fOp%2dEd%2fContributors&oref=slogin](http://www.nytimes.com/2007/06/02/opinion/02copps.html?_r=2&n=Top%2fOpinion%2fEditorials%20and%20Op%2dEd%2fOp%2dEd%2fContributors&oref=slogin).

<sup>334</sup> See *Reno v. ACLU*, 521 U.S. 844, 882 (1997) (stating internet indecency restrictions in the Communications Decency Act violate the First Amendment); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding right-of-reply law violated First Amendment rights of newspaper); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 708 (1931) (presuming prior restraints on print media to be unconstitutional); *Cruz v. Ferre*, 755 F. 2d 1415, 1421 (11th Cir. 1985) (noting cable television has more First Amendment protection than broadcast regarding FCC regulation).

<sup>335</sup> Letter to Lonnie King, 36 F.C.C.2d 635, 636 (1972).

broadcasters to present controversial public issues and make a good faith effort to be balanced in their overall programming is not in the public interest? When one considers the present-day status of broadcast journalism<sup>336</sup>—including the popularity and content of “entertainment” talk radio<sup>337</sup> versus actual news radio—the FCC’s 1985 concerns about the negative impact of the Fairness Doctrine on the quality of broadcast journalism seem tragically irrelevant.

The argument put forth by the FCC and some licensees in the 1985 Report that the Fairness Doctrine inhibited the presentation of diverse controversial public questions and issues is also unpersuasive. The Commission, and some broadcasters, argued that because licensees feared getting in trouble for not meeting the opposing views requirement of the second prong of the Fairness Doctrine, they aired as little first-prong controversial programming as they could get away with. This situation was further exacerbated by the FCC’s virtually non-existent enforcement of the Fairness Doctrine.<sup>338</sup> As one observer noted about the Fairness Doctrine, “past problems seem to rest more with inconsistent application than with theoretical problems.”<sup>339</sup> It seems that any such Fairness Doctrine chilling effect could be significantly mitigated by clarifying expectations

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<sup>336</sup> See *The Decline of TV News Credibility*, CYBERCOLLEGE INTERNETCAMPUS (Aug. 29, 2013), <http://www.cybercollege.com/tvnews.htm>; Shuchi Bansal, *TV News: The Credibility Issue*, LIVEMINT (May 21, 2015), <http://www.livemint.com/Opinion/74wFbiXtKnYcQcwkp200pJ/TV-news-The-credibility-issue.html>. For personal accounts from broadcast journalists of the rise and decline of network television journalism in the 1970s and 1980s, see FOOTE, *supra* note 193 and accompanying text.

<sup>337</sup> Talk radio host Rush Limbaugh, on August 17, 2016, accused the Obama Administration of offering federal funding to “lesbian farmers” as a means of attacking conservative rural states. See Jonathan Chait, *Mass Lesbian Farm Infiltration Is Obama’s Best Scheme Yet*, N.Y. MAGAZINE (Aug. 23 2016), <http://nymag.com/daily/intelligencer/2016/08/mass-lesbian-farm-infiltration-is-obamas-best-scheme-yet.html>; see also *Latest Lib Assaults: Lesbian Farmers, Transgender Homeless Shelters, American Flags Ripped from Fire Trucks*, THE RUSH LIMBAUGH SHOW (Aug. 17, 2016), [http://www.rushlimbaugh.com/daily/2016/08/17/latest\\_lib\\_assaults\\_lesbian\\_farmers\\_transgender\\_homeless\\_shelters\\_american\\_flags\\_ripped\\_from\\_fire\\_trucks](http://www.rushlimbaugh.com/daily/2016/08/17/latest_lib_assaults_lesbian_farmers_transgender_homeless_shelters_american_flags_ripped_from_fire_trucks).

<sup>338</sup> Robert D. Hershey, *F.C.C. Votes Down Fairness Doctrine In A 4-0 Decision*, N.Y. TIMES (Aug. 5, 1987), <http://www.nytimes.com/1987/08/05/arts/fcc-votes-down-fairness-doctrine-in-a-4-0-decision.html> (“Enforcement of the doctrine has been spotty over the years . . .”).

<sup>339</sup> Plamondon, *supra* note 287, at 93.

and then consistently applying and enforcing it.<sup>340</sup> Even then, questions would invariably arise. As the Commission noted in the 1949 Fairness Report, there can be no simple fairness formula.<sup>341</sup> However, the FCC could employ a reasonableness standard to ensure it was not acting in an arbitrary or capricious manner when enforcing the Fairness Doctrine.<sup>342</sup>

Regulating expression in a manner consistent with the First Amendment is challenging, and such regulations are frequently unpopular with speakers, but the FCC routinely does it in the areas of indecency, political candidate broadcasting, and children's television. Enforcing good faith attempts at fairness should be no more difficult than enforcement in these other areas of broadcast expression. In fact, one might argue that, compared to indecency regulation over the past four decades,<sup>343</sup> the Fairness Doctrine requirements were specific and clear. Noting in the 1985 Report the confusion the Fairness Doctrine created for licensees, the Commission observed that "broadcasters are not lawyers."<sup>344</sup> The Commission appeared to have little confidence in the cognitive abilities of broadcasters. How difficult is it to understand that airing absolutely no public affairs programming at all or airing only one political viewpoint all day

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<sup>340</sup> The U.S. Supreme Court explained the need for precision in laws regulating conduct as follows: "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

<sup>341</sup> See 1985 Fairness Report, *supra* note 12, at 227-229.

<sup>342</sup> Administrative agencies, such as the FCC, are prohibited from acting in an arbitrary or capricious manner by the Administrative Procedure Act. 5 U.S.C. §§ 551-559 (2012).

<sup>343</sup> Such regulation has revolved around court declarations that speech containing curse words or sexually explicit language, although not necessarily obscene, may nonetheless be regulated by such government agencies as the FCC on the grounds that the speech is patently offensive or indecent. Reasons why these regulations are upheld include the ubiquitous nature of broadcast media and the fact that it is easily accessible to children, leading courts to find that the government has a compelling interest in protecting the well-being of its minors. As such, the First Amendment rights of broadcasters are less than other forms of media. See generally *FCC v. Pacifica*, 438 U.S. 726 (1978) (discussing curse words on public, prime time radio); *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995); see also *New Indecency Enforcement Standards to be Applied to all Broadcast and Amateur Radio Licensees*, 2 FCC Rcd. 2726 (1987) (informing of new standards enacted in response to *Pacific* and similar cases); *Complaints About Various Licensees Regarding Their Airing of the "Golden Globes Awards" Program*, 19 FCC Rcd. 4975 (2004) (holding that a Golden Globes live broadcast contained prohibited, indecent language).

<sup>344</sup> 1985 Fairness Report, *supra* note 12, at 182-83.

long, day after day, with no opportunity for opposing views does not serve the public interest? One does not have to be a lawyer to understand this. The elimination of comparative renewal proceedings and the lengthening of license terms in the 1996 Telecommunications Act to eight years<sup>345</sup> should further alleviate broadcasters' fears and any resulting chilling effect should any future fairness rules be enacted.

The Commission's point that government-mandated broadcast fairness is no longer needed because citizens today have access to many diverse media outlets is valid only if one is willing to ignore the impact of ownership concentration on program diversity and forget that broadcasters have public interest responsibilities. The Internet, along with satellite and cable technology, is revolutionizing media. The proliferation of smart phones is changing the way many citizens receive news, particularly young people.<sup>346</sup> However, a 2016 study conducted by the Pew Research Center found that of those who chose to access their news via an online technology, seventy-six percent said the actual news sources are professional news organizations as opposed to friends and family.<sup>347</sup> As previously noted, these news organizations are increasingly coming under more concentrated ownership and control. Additionally, of the sixty-two percent of adult respondents who said they get news from social media sites, sixty-four percent said they get news from only one site (Facebook being the most popular).<sup>348</sup> This is a far cry from the goal of "[t]he widest possible dissemination of information from diverse and antagonistic sources," held by the Supreme Court to be "essential to the welfare of the public."<sup>349</sup> Interviewed in 1969, Senator Clarence Dill, co-author of both the 1927 Radio Act and the 1934 Communications Act, expressed

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<sup>345</sup> 47 U.S.C. § 307(c)(1) (2004).

<sup>346</sup> A 2016 study by the Pew Research Center found that, while television news is still the most popular medium for news overall (57% report that they often watch TV news), for those aged between 18 and 29, viewing news online was more popular than watching it on television (50% reporting online versus 27% reporting television as source). Amy Mitchell, et al., *The Modern News Consumer*, PEW RESEARCH CTR., (July 7, 2016), <http://www.journalism.org/2016/07/07/pathways-to-news/>.

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> *Associated Press v. United States.*, 326 U.S. 1, 20 (1945).

his concern over ownership concentration and the resulting power.

When we wrote the radio act, Congress had no idea that the licensing of the air waves would bring great fortunes to a few people. The air waves are limited, just as the numbers of hydroelectric dam sites are limited. The public has retained ownership of most of these electric power sites, but it has not retained ownership of the air waves. If I were in the Senate today, I would do my best to rewrite the Federal Communications Act.<sup>350</sup>

One can only imagine what Dill's reaction would be to media consolidation today.

Broadcasters must serve the public, which includes being subject to regulations—such as the Fairness Doctrine—that are not required of other media. Broadcast scholar, Walter Emery, explained in 1969 that broadcasters have a duty to serve the public even if members of that public are unaware of the public nature of the electromagnetic spectrum.<sup>351</sup>

Many people seem unaware that the radio spectrum belongs to the public and no broadcaster, whether commercial or educational, acquires any ownership rights in the frequency which is assigned to him. He receives a license . . . to use this publicly owned resource. This license is subject to renewal if he can show that his station has operated in the public interest and not simply in terms of his private and personal interest. Too many people think of radio and television stations as being owned in the same way as farm land, grocery or hardware stores.<sup>352</sup>

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<sup>350</sup> Drew Pearson, *Dill Cites Shortcomings in Communications Act*, SPOKANE DAILY CHRONICLE 4 (Mar. 26, 1969), <https://news.google.com/newspapers?id=JGxYAAAAIIBAJ&sjid=FfgDAAAAIIBAJ&pg=3669%2C2686400>.

<sup>351</sup> WALTER B. EMERY, NATIONAL AND INTERNATIONAL SYSTEMS OF BROADCASTING: THEIR HISTORY, OPERATION AND CONTROL 13, 13 (1969).

<sup>352</sup> *Id.*

It should be emphasized that commercial broadcasters voluntarily and knowingly go into a business that is dependent on the use of the broadcast spectrum—a limited publically—owned resource. As Secretary of Commerce, Herbert Hoover, succinctly explained in a 1925 radio address, each licensee “must perform the service which he had promised . . . or his life as a broadcaster will end.”<sup>353</sup> Service to the public is the price broadcasters must pay for the privilege of using the public airwaves.

The Commission conceded that the record was unclear as to whether the Fairness Doctrine was elevated to the level of statutory law in 1959 or if it was merely an FCC policy. Ultimately, this portion of the 1985 Report became irrelevant the following year when the U.S. Court of Appeals ruled that it was an FCC policy that the Commission could (and did) eliminate.<sup>354</sup> A fairness bill was passed in 1987 only to be vetoed by President Reagan and another bill died in 1991 after a veto threat from President Bush.<sup>355</sup> The personal attack and political editorial portions of the Fairness Doctrine were finally eliminated in 2000.<sup>356</sup> In 2009 and 2011, bills were introduced that would have stripped the FCC of the authority to reinstate a Fairness Doctrine, though none passed.<sup>357</sup>

The elimination of the Fairness Doctrine was a classic example of throwing the baby out with the bathwater. It was far from perfect and, given the FCC’s inconsistent enforcement and the technological changes taking place in the 1980s, it was due for a reevaluation and possible update. Instead, the

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<sup>353</sup> Herbert Hoover Radio Address (Nov. 12, 1925) (transcript available at Herbert Hoover Presidential Library 4, West Branch, Iowa, Commerce Papers, Box 496).

<sup>354</sup> See *Telecomm. Research Action Ctr. v. FCC*, 801 F.2d 501, 513 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987).

<sup>355</sup> Congress passed The Fairness in Broadcasting Act of 1987, but President Reagan vetoed the legislation. Penny Pagano, *Reagan’s Veto Kills Fairness Doctrine Bill*, L.A. TIMES (June 21, 1987), [http://articles.latimes.com/1987-06-21/news/mn-8908\\_1\\_fairness-doctrine](http://articles.latimes.com/1987-06-21/news/mn-8908_1_fairness-doctrine). Proposed fairness legislation died in 1991 after President Bush threatened to veto it. Val E. Limburg, *Fairness Doctrine*, MUSEUM BROAD. COMM., <http://www.museum.tv/eotv/fairnessdoct.htm> (last visited Feb. 17, 2017).

<sup>356</sup> See *Radio-Television News Dir.’s Ass’n v. FCC*, 229 F.3d 269 (D.C. Cir. 2000); *In re Repeal or Modification of the Pers. Attack & Political Editorial Rules*, 15 FCC Rcd. 20697 (2000).

<sup>357</sup> See, e.g., *Broadcaster Freedom Act of 2009*, 111 H.R. 226 (2009).



deregulation--minded Commission fashioned the steak—in the form of the 1985 Fairness Report—to drive through the heart of the Fairness Doctrine. The Doctrine, as it existed in 1985, might well be unworkable in the present-day media landscape. In fact, legitimate arguments can be made for why a Fairness Doctrine is not needed today. It is relatively easy with thirty-two years of hindsight to be critical of the 1985 Report but it included many valid points. Nevertheless, an informal sampling of the programming available on the public airwaves today provides ample evidence for why some form of fairness regulations are needed.

With three decades having passed since elimination of the Fairness Doctrine, it is time for a critical evaluation of broadcast fairness and the overall state of the media marketplace today. If the public interest is still to be taken seriously as the broadcast regulatory standard in the twenty-first century, it is time for a new Fairness Report that reflects the realities of 2017 and beyond.

# PRAYING FOR TOUCHDOWNS: CONTEMPORARY LAW AND LEGISLATION FOR PRAYER IN PUBLIC SCHOOL ATHLETICS

Brett A. Geier\* & Annie Blankenship\*\*

## INTRODUCTION

### *A. The Ethical Conundrum of Supporting Jurisprudence That Runs Contrary to Personal Beliefs*

“It’s un-American,”<sup>1</sup> exclaimed Florida’s Speaker of the House, Will Weatherford, in reaction to the memo from the Pasco County Schools’ (Florida) superintendent reminding coaches that they may not lead or participate in prayer while working in their official roles.<sup>2</sup> In response to the directive, a Pasco County School staff member exclaimed, “[i]f you had told anybody 30 to 40 years ago . . . that a coach wouldn’t be allowed to legally lead a prayer with his players, I don’t think anyone would have believed you.”<sup>3</sup>

The act of public schools leading prayer in an official capacity was deemed unconstitutional over fifty years ago,<sup>4</sup> yet a renaissance of sorts is occurring among the Religious Right to permeate the theoretical barrier separating church and state,

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<sup>1</sup>Jeffrey S. Solochek, *House Speaker Says Coaches Should Be Able to Pray with Players*, TAMPA BAY TIMES (Sept. 30, 2013), <http://www.tampabay.com/news/education/k12/house-speaker-says-coaches-should-be-able-to-pray-with-players/2144714>.

<sup>2</sup> Memorandum from Kurt Browning to Pasco County Schools Staff (Sept. 26, 2013) (on file with Pasco County Schools).

<sup>3</sup> Solochek, *supra* note 1.

<sup>4</sup> *Engel v. Vitale*, 370 U.S. 421 (1962) (holding that the First Amendment protects religious liberty by keeping government from determining when and how people should pray or worship, and that school officials may not require devotional religious exercises during the school day, as this practice unconstitutionally entangles the state in religious activities and establishes religion); *see also* *Herdahl v. Pontotoc Cty. Sch. Dist.*, 933 F. Supp. 582, 585–86 (N.D. Miss. 1996) (“[T]he Bill of Rights was created to protect the minority from tyranny by the majority. Indeed, without the benefit of such a document, women in this country have been burned because the majority of their townspeople believed their religious practices were contrary to the tenets of fundamentalist Christianity.”).

specifically in public schools.<sup>5</sup> In 1989, Eugene Bjorklun noted, “[n]umerous efforts have been made by state legislatures to evade the ban on organized, devotional prayer in public schools through ‘voluntary’ prayer and/or moment-of-silence statutes.”<sup>6</sup> The quest to allow Christian prayer in schools has increased dramatically since Mr. Bjorklun’s statement. Arguing that religious freedoms are being chilled, state legislatures have taken different approaches to infuse religion (particularly Christianity) into schools. Generally, legislation enacted at the state level seeks to reinforce religious freedoms already provided to public school students,<sup>7</sup> and to circumvent well-established case law on the First Amendment’s Establishment Clause.<sup>8</sup>

In this context of pro-Christian prayer legislation, we look beyond the classroom to consider the role of prayer in public school athletics. Spectators, coaches, and athletes often seek divine guidance for protection and excellence on the field or

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<sup>5</sup> KATHERINE STEWART, *THE GOOD NEWS CLUB: THE CHRISTIAN RIGHT’S STEALTH ASSAULT ON AMERICA’S CHILDREN 3* (2012) (providing an analysis of the rise of fundamentalist Christians reacting to the massive social transformation taking place in America).

<sup>6</sup> Eugene C. Bjorklun, *Prayers and Extracurricular Activities in Public Schools*, 16 *RELIGION & PUB. EDUC.* 459, 461 (1989).

<sup>7</sup> See FLA. STAT. § 1001.432 (2016) (enacted) (authorizing, but not requiring, a district school board to adopt a policy allowing an inspirational message to be delivered by students at a student assembly. The policy provides that students who are responsible for organizing any student-led portion of a student assembly must have sole discretion in determining whether an inspirational message is to be delivered. If the policy is adopted, school district personnel may not monitor or otherwise review the content of a student volunteer’s inspirational message); N.C. GEN. STAT. §115C-407.30 (2015) (affording students the right to pray, either silently or audibly and alone or with other students, to attempt to share religious viewpoints with other students, and to possess or distribute religious literature, provided that any activity is done in an orderly fashion. It also provides protection for student-led religious groups, and states that, “a student shall not be penalized or rewarded based on the religious content of the student’s work”).

<sup>8</sup> See H.R. 45, 2013-2014 Leg., Reg. Sess. (Ala. 2014) (couched in historical, secular significance, this bill would allow public buildings and schools to erect the Ten Commandments as long as they were part of other historical documents); *Stone v. Graham*, 449 U.S. 39 (1980) (insisting that the statute in question serves a secular legislative purpose, the Court found that the display had no educational function but that the preeminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature; the Ten Commandments are undeniably a sacred text in Jewish and Christian faiths and no legislative recitation of a supposed secular purpose can bind us to that fact); *ACLU v. McCreary Cty.*, 354 F.3d 438 (6th Cir. 2003) (holding that framed copies of the Ten Commandments in two Kentucky courthouses amounted to an accommodation of Christianity and a violation of church and state separation). *But see Van Orden v. Perry*, 545 U.S. 677 (2005) (stating in its plurality opinion that a monument displaying the Ten Commandments did not violate the Establishment Clause, as it held historical and political significance rather than a solely religious purpose).

court at athletic events. However, if the contests are sponsored by a public school, then employees must be cognizant of the fact that open displays of prayer or other religious rituals may violate the Establishment Clause. This can be an unpopular posture, particularly in communities dominated by groups with strong religiosity. Representative Gene Green from Texas embodied much of the consternation by religious groups seeking influence at athletic events by asking, “[h]ow does a prayer before a football game act to establish a religion?”<sup>9</sup> Supporters of prayer in public schools expound upon the notion that athletic events are analogous to other co-curricular activities in that a group’s right to use facilities outside school hours for religious purposes is protected.<sup>10</sup> However, organized prayer at athletic contests raises constitutional concerns related to religious content, free speech and public fora doctrine, and school coercion. While arduous, the public schools must maintain viewpoint neutrality and navigate these factions, ensuring individual religious expression and minimizing school coercion.

In this Article, we consider the history of prayer in K-12 public school classrooms and on the sports field. Next, we discuss the foundational case law on the First Amendment’s separation of church and state. We then consider how that separation has played out in public school prayer cases, and then more specifically, in public school sports cases. In this section, we discuss the rules of law developed by the Supreme Court to determine if alleged school prayer constitutes a violation of the Establishment Clause. We next consider contemporary manifestations of prayer in athletics, particularly the trend of prayer at the fifty-yard line. Finally, we discuss the tension between federal case law and state legislative efforts regarding

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<sup>9</sup> 145 CONG. REC. H11325 (daily ed. Nov. 2, 1999) (statement of Rep. Green) (speaking about a resolution he cosponsored in reaction to the Fifth Circuit Court of Appeals ruling in *Doe v. Santa Fe Independent School District* that amplified his concern and perplexity as to how a prayer for the safety of the athletes before a sporting event could be held as unconstitutional).

<sup>10</sup> See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (holding that a school district may not engage in viewpoint discrimination by denying religious community groups access to the use of school facilities after hours on the same basis as other groups).

prayer in public schools and the implications for educational and legal practice.

*B. The Tradition of Prayer in Public Schools*

Those who argue the religious rights of public school students have been chilled fail to acknowledge that state and federal courts have repeatedly ruled that the First Amendment's Free Exercise Clause "explicitly *protects* the rights of children to pray in schools in a nondisruptive, noncoercive fashion."<sup>11</sup> As long as the act of praying does not impede the educational process, students are free to engage in prayer. As individuals, students have "the right to freely articulate [their] religious beliefs in a public setting [which] is fundamental to American constitutional entitlements."<sup>12</sup> There is a "wall" separating church and state. As conceived by Thomas Jefferson, this "wall" is a theoretical barrier, which seeks to protect individual rights and prohibit government intrusion into religious matters.<sup>13</sup> In 1952, the Court determined that it was constitutional for students to engage in voluntary religious education off school premises.<sup>14</sup>

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<sup>11</sup> ROBERT BOSTON, *WHY THE RELIGIOUS RIGHT IS WRONG ABOUT SEPARATION OF CHURCH AND STATE* 111 (2003).

<sup>12</sup> Brett A. Geier, *Texas Cheerleaders and the First Amendment: Can You Cheer for God at a Football Game?*, 33 *MISS. C. L. REV.* 65, 66 (2014). *Cf.* *S.D. v. St. Johns Cty. Sch. Dist.*, 632 F.Supp. 2d 1085, 1091 (M.D. Fla. 2009) (noting that "there exists a tension between the doctrines, when applied: the government action to facilitate free exercise might be challenged as impermissible establishment, and government efforts to refrain from establishing religion might be objected to as denying the free-exercise of religion.").

<sup>13</sup> Letter from Thomas Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, A Committee of the Danbury Baptist Association, in the State of Connecticut (Jan. 1, 1802), *available at* <https://www.loc.gov/loc/lcib/9806/danpre.html> (last visited Feb. 8, 2017). Writing to President Thomas Jefferson, the Danbury Baptist Association wanted to congratulate him on his election to the presidency and to seek his approval of religious freedom. With the Bill of Rights not pertaining to the states during this time, many states still had officially established religions, and Connecticut was one of those states. The Danbury Baptists knew of Jefferson's leading role in the struggle to end state-established religion in Virginia and felt Jefferson would lend a sympathetic ear. However, in his response, Jefferson stated, "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church [and] State."

<sup>14</sup> *Zorach v. Clausen*, 343 U.S. 306, 313-14 (1952) (writing for the majority, Justice Douglas stated, "We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and

Further, in 1962, *Engel v. Vitale*, saw the parents of ten students challenge a New York state law requiring public schools to begin each day with a prayer drafted by the State Board of Regents.<sup>15</sup> Supporting the *Engel* decision, a year later, the Court held that a Pennsylvania state law requiring “at least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day”<sup>16</sup> violated the Establishment Clause of the First Amendment.<sup>17</sup> “Public school children . . . have been, in effect, required by law to pray and have been regimented in their prayers. To establish such a religious exercise upon these citizens is an unconstitutional use of governmental authority.”<sup>18</sup> In 1971, the Supreme Court constructed a three-pronged analysis, known as the *Lemon* test, which provided a model to measure the constitutionality of religious challenges in public schools.<sup>19</sup> In sum, the Court firmly

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the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities . . . it follows the best of our traditions.”)

<sup>15</sup> *Engel v. Vitale*, 370 U.S. 421, 425 (1962) (“[W]e think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government.”).

<sup>16</sup> *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 205 (1963).

<sup>17</sup> *Id.* at 225 (“[I]t might well be said that one’s education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. But the exercises here do not fall into those categories. They are religious exercises, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion.”).

<sup>18</sup> Boston, *supra* note 11, at 122 (quoting an undated press release from Americans United for Separation of Church and State).

<sup>19</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (holding that government actions or practices violate the Establishment Clause if they do not have a valid non-sectarian purpose, advance or impede religion, or create excessive government entanglement with religion). Two other tests have been created since the *Lemon* test: the Endorsement Test and the Coercion Test. The Endorsement Test finds an Establishment Clause violation if the act or practice has a purpose or effect of endorsing or disapproving religion. The Coercion Test holds an act unconstitutional if it places direct or indirect government coercion on individuals to profess a faith. *Lee v. Weisman*, 505 U.S. 577 (1992). A crafty maneuver by state legislatures to amend these decisions can be seen in the attempt to couch prayer in silent meditation legislation. *See Wallace v. Jaffree*, 472 U.S. 38, 59 (1985) (The Court distinguished between implicitly allowing students an opportunity for voluntary prayer during “an appropriate moment of silence during the school day,” and a moment of silence designed explicitly to favor prayer or other religious practices. The Court noted that a 1978 Alabama statute already protected students’ rights to pray during the moment of silence and the only purpose for changing the statute was to highlight, endorse and

established a line between government intrusion and the freedoms of the individual—a concept which had lacked clarity.

## I. FOUNDATIONAL ESTABLISHMENT CLAUSE CASE LAW

### A. *The First Amendment*

Traditionally, the United States has promoted the ideal of individuals being able to express their beliefs in public fora.<sup>20</sup> Public schools are a prime setting for the expression of beliefs of students and, indirectly, parents. Public schools must balance students' rights to express individual beliefs with the perception or reality that the school is endorsing a particular religious message.<sup>21</sup> School administrators must be cognizant of church and state tension and ensure the school maintains a constitutional, viewpoint-neutral position.<sup>22</sup> This can be an arduous task. When an individual is prohibited from expressing his or her religious faith, it may cause conflict between public school stakeholders. Public school administrators are required to conciliate these conflicts, which may run contrary to the administrator's own personal beliefs and/or convictions. Having religious convictions that are contrary to jurisprudence can pose significant ethical dilemmas for leaders.

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prefer prayer.); *see also* *Brown v. Gilmore*, 258 F.3d. 265, 270, 276 (4th Cir. 2001) (holding that a Virginia silent prayer statute authorizing a “daily observance of one minute of silence” in all classrooms so that pupils may “meditate, pray, or engage in any other silent activity” was neutral toward religion). *Compare* MICH. COMP. LAWS SERV. § 380.1565 (LexisNexis 2016) (“The board of education of a school district may by resolution provide the opportunity during each school day to allow students who wish to do so, the opportunity to observe time in silent meditation.”), *with* FLA. STAT. § 1003.45(2) (2012) (“The district school board may provide that a brief period, not to exceed 2 minutes, for the purpose of silent prayer or meditation be set aside at the start of each school day or each school week in the public schools in the district.”).

<sup>20</sup> *See* *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). *See also* *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983) (“In places which by long tradition or by government fiat have been devoted to assembly and debate.”).

<sup>21</sup> JEROME A. BARRON, C. THOMAS DIENES, WAYNE MCCORMACK & MARTIN H. REDISH, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICY, CASES AND MATERIALS* 1431–32 (8th ed. 2012).

<sup>22</sup> *See* *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (holding that if secular community groups are allowed to use the public school after school hours to address particular topics, a sectarian group desiring to show a film series from a religious perspective cannot be denied public school access).

The First Amendment to the Constitution includes a simple, yet nebulous clause: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”<sup>23</sup> It restrains government intervention while protecting individual expressions of faith. Supporters who encourage religious practices in public schools have advocated a strict interpretation of the Establishment Clause, contending that states and public schools, as agents of the state, are not bound by this clause.<sup>24</sup> The suggestion that states are exempt from the Bill of Rights, or at least the First Amendment, had some plausibility early in American jurisprudential history. In *Barron v. Baltimore*,<sup>25</sup> the Court held that no part of the Bill of Rights, including the First Amendment, applied to the States.<sup>26</sup> Speaking for the majority, Chief Justice John Marshall said:

These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them . . . [T]he fifth amendment . . . is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states.<sup>27</sup>

Further, in *Permoli v. First Municipality of New Orleans*,<sup>28</sup> the Court held that “[t]he Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states.”<sup>29</sup> Despite these rulings, all the states assumed the dual obligation of supporting the free exercise of religion and maintaining religious neutrality in their respective constitutions.<sup>30</sup> Every state that entered the union after the

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<sup>23</sup> U.S. CONST. amend. I.

<sup>24</sup> Heritage Guide to the Constitution, *Establishment of Religion*, THE HERITAGE FOUND., <http://www.heritage.org/constitution#!/amendments/1/essays/138/establishment-of-religion> (last visited Apr. 8, 2017).

<sup>25</sup> 32 U.S. 243 (1833).

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

<sup>27</sup> *Id.* at 250.

<sup>28</sup> 44 U.S. 589 (1845).

<sup>29</sup> *Id.* at 609.

<sup>30</sup> LEO PFEFFER, CHURCH, STATE, AND FREEDOM 140 (1953).



Constitution was ratified included a basic law or prohibition in its constitution regarding religion.<sup>31</sup> No state attempted “to establish any denomination or religion; on the contrary, in varying language but with a single spirit, all states expressly forbade such attempt.”<sup>32</sup> “The decision was in all cases voluntary; and it was made because the unitary principle of separation and freedom was as integral a part of American democracy as republicanism, representative government, and freedom of expression.”<sup>33</sup> The principle of separation of church and state was embedded in standard colonial thought and practice.

### *B. In God We Trust*

In God We Trust—the national motto that adorns many government buildings and icons throughout the nation—has a compelling history. In fact, it was institutionalized by an act of Congress.<sup>34</sup> It is now used in conjunction with, or in some cases replaces altogether, the more traditional motto, *e pluribus unum* (out of many, one), used since the colonial era.<sup>35</sup> *E pluribus unum* captured the formation of the United States by defining it as a collection of many religions, cultures, factions, colonies, etc., that joined to become one nation.<sup>36</sup> The phrase, “In God We Trust” has its roots in the Civil War period when the motto was added to coins.<sup>37</sup> In 1956, the Nation was just over a decade removed from World War II, the Korean Conflict had just concluded, and the United States was on the brink of a nuclear

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<sup>31</sup> *Id.* at 142.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Patriotic Societies and Observances Act, 36 U.S.C. § 302 (1956).

<sup>35</sup> See Candida Moss, “*In God We Trust*” Doesn’t Mean What You Think It Does, THE DAILY BEAST (Jan. 24, 2016), <http://www.thedailybeast.com/articles/2016/01/24/dear-atheists-don-t-fear-in-god-we-trust.html>. See also, Monroe E. Deutsch, *E Pluribus Unum*, 18 THE CLASSICAL JOURNAL, 387, 392 (1923).

<sup>36</sup> See Deutsch, *supra* note 35 at 393.

<sup>37</sup> Moss, *supra* note 35 (“The use of the phrase “In God We Trust” in U.S. currency first appeared in 1864. Salmon P. Chase, Lincoln’s Secretary of the Treasury in the middle of the Civil War, received a letter from a Pennsylvanian minister requesting some recognition of God in a national motto.”).

war with Russia.<sup>38</sup> The threat of imminent annihilation was reported in newspapers and the Emergency Broadcast System's off-putting siren permeated from the television set announcing civilian alert protocols.<sup>39</sup> Many people in America sought a belief in a Christian God for guidance and protection in a modern and frightening period.<sup>40</sup> This fear opened the door for leaders of the Religious Right to push for greater expressions of the Christian faith in the public arena.<sup>41</sup> To combat Godless communism, Congress enacted legislation which placed the motto "In God We Trust" on paper currency ("under God" was added to the Pledge of Allegiance around the same time).<sup>42</sup> Those that supported Christianity in the public sector also sought the adoption of more religious (Christian) rhetoric in public schools.<sup>43</sup>

Paradoxically, Christian sectarians consistently argue that the framers of the Constitution intended for Christianity to be the foundation on which all public governance would rely.<sup>44</sup> They have described the founders of the United States as men of intense Christian faith.<sup>45</sup> These advocates claim the founders

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<sup>38</sup> *The United States and Soviet Union Step Back from the Brink of Nuclear War*, HISTORY CHANNEL, <http://www.history.com/this-day-in-history/the-united-states-and-soviet-union-step-back-from-brink-of-nuclear-war> (last visited Apr. 20, 2017).

<sup>39</sup> Dennis Mersereau, *There's a Meaning to the Horrible Noise the Emergency Alert System Makes*, THE VANE (May 18, 2015), <http://thevane.gawker.com/theres-a-meaning-to-the-horrible-noise-the-emergency-al-1705168960>.

<sup>40</sup> Interview by Terry Gross with Kevin Kruse, Professor of History, Princeton University, NPR (Mar. 18, 2015), <http://www.npr.org/2015/03/30/396365659/how-one-nation-didnt-become-under-god-until-the-50s-religious-revival>.

<sup>41</sup> *See id.*

<sup>42</sup> Act of July 11, 1955, Pub. L. No. 84-140, 69 Stat. 290; *see also* Interview by Terry Gross with Kevin Kruse, Professor of History, Princeton University, NPR (Mar. 18, 2015), <http://www.npr.org/2015/03/30/396365659/how-one-nation-didnt-become-under-god-until-the-50s-religious-revival>.

<sup>43</sup> *See* Geier, *supra* note 12, at 66.

<sup>44</sup> *See, e.g.*, Mark David Hall, *Did America Have a Christian Founding?*, THE HERITAGE FOUND. (June 7, 2011), <http://www.heritage.org/research/lecture/2011/06/did-america-have-a-christian-founding>; Michael Medved, *The Founders Intended a Christian, Not Secular, Society*, TOWNHALL (Oct. 3, 2007), [http://townhall.com/columnists/michaelmedved/2007/10/03/the\\_founders\\_intended\\_a\\_christian\\_not\\_secular\\_society](http://townhall.com/columnists/michaelmedved/2007/10/03/the_founders_intended_a_christian_not_secular_society); Dave Miller, *Christianity is in the Constitution*, APOLOGETIC PRESS, <https://apologeticspress.org/apcontent.aspx?category=7&article=2556> (last visited Dec. 14, 2016).

<sup>45</sup> Steven K. Green, *God is Not on Our Side: The Religious Right's Big Lie About the Founding of America*, SALON (June 28, 2015), [http://www.salon.com/2015/06/28/god\\_is\\_not\\_on\\_our\\_side\\_the\\_religious\\_rights\\_](http://www.salon.com/2015/06/28/god_is_not_on_our_side_the_religious_rights_)

were descendants of those who fled the European continent in search of religious liberties—the freedom to practice the purist of Christian doctrines.<sup>46</sup> They have imbued our founders, such as Jefferson, Adams, and Franklin, with the presumed Christian piety of their forefathers.<sup>47</sup> This natural transfer of Christian belief would most assuredly be their foundation for the creation of the Nation. However, this historical notion is in error.<sup>48</sup>

Absent in the Constitution is specific language that describes a specific deity which must be worshipped for effective governance of the Nation. The Declaration of Independence stopped short of divinization of a specific deity. Founding father Thomas Jefferson may have referred to “God” but not the “God” traditionally recognized by Judeo-Christian faiths:

By invoking ‘the Laws of Nature and of Nature’s God’ rather than the Judeo-Christian God, it made clear that it was not a Christian document, that it did not reflect uniquely Christian or Judeo-Christian beliefs, and that it was not ‘a bridge between the Bible and the Constitution.’ To the contrary, it rejected Christianity, along with other organized religions, as a basis for governance, and it built a wall – rather than a bridge – between the Bible and the Constitution.<sup>49</sup>

By penning the Declaration of Independence, Jefferson sought to attack “two claims of absolute authority – that of any

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[big\\_lie\\_about\\_the\\_founding\\_of\\_america/?utm\\_source=facebook&utm\\_medium=socialflow](http://big_lie_about_the_founding_of_america/?utm_source=facebook&utm_medium=socialflow).

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

<sup>47</sup> Bill Flax, *Was America Founded as a Christian Nation?*, FORBES (Sept. 25, 2012), <http://www.forbes.com/sites/billflax/2012/09/25/was-america-founded-as-a-christian-nation/#20b13c3f4cd9>.

<sup>48</sup> *See, e.g.*, PFEFFER, *supra* note 30 (throughout this work, Pfeffer lists George Washington, Patrick Henry, George Mason, James Madison, Benjamin Franklin, Thomas Paine, John Adams and Thomas Jefferson as the most prominent leaders of the time who were influenced by deism or Unitarianism. Jefferson, Adams, and Franklin were three leaders of the aforementioned group who sat on the committee to draft the Declaration of Independence).

<sup>49</sup> ALAN DERSHOWITZ, *BLASPHEMY: HOW THE RELIGIOUS RIGHT IS HIJACKING OUR DECLARATION OF INDEPENDENCE* 53 (2007) (affirming the notion that a major founding father did not espouse the tenet that the Nation was uniquely created by a Judeo-Christian god, which is anathema to the present Conservative philosophy that the Nation was founded as strictly a Christian nation).

government over its subjects and that of any religion over the minds of men.”<sup>50</sup> However, the fact that God was included in this non-sectarian document provides some confusion as to why Thomas Jefferson, a religious skeptic, would include the reference at all.

The inclusion of the Judeo-Christian God, or even the idea of a God of nature, which Jefferson conjectured to be the bona fide deity of the universe, may give the impression that he was religious and/or supported the inclusion of religious thought in the public sector. An acute study of Jefferson’s time, in contrast with today’s society, provides some resolution to this query. A modern reading might support the conclusion that the reference to God in the Declaration of Independence meant Jefferson and the founders intended to create a Christian nation. However, for those that were reading the document in the late eighteenth century, their paradigm for analysis was much different, and Jefferson’s rejection of clericalism was unambiguous.<sup>51</sup> “The Declaration of Independence was a resounding defeat for organized religion in general and traditional Christianity in particular.”<sup>52</sup>

If the framers had intended to create a Christian nation with no ambiguities, dogmatic terms such as “God,” “Lord God,” “Almighty God,” or “Jesus Christ,” would have been incorporated into the Nation’s foundational documents.<sup>53</sup> Further evidence of the framer’s intent is found in a treaty signed with the Barbary Coast signed by John Adams,<sup>54</sup> which was subsequently approved by the Senate, included the clause, “the government of the United States is not in any sense founded on the Christian religion.”<sup>55</sup> This is noteworthy since John Adams also served on the drafting committee for the Declaration of

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<sup>50</sup> ALLEN JAYNE, *JEFFERSON’S DECLARATION OF INDEPENDENCE: ORIGINS, PHILOSOPHY, AND THEOLOGY* 174 (1998).

<sup>51</sup> DERSHOWITZ, *supra* note 49, at 56.

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

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

<sup>54</sup> EDMOND S. MORGAN, *BENJAMIN FRANKLIN* 29 (Yale Univ. Press 2002); *see also* John Fea, *Religion in Early Politics: Benjamin Franklin and his Religious Beliefs*, PENNSYLVANIA HERITAGE (2011) (Benjamin Franklin was another distinguished father of the United States who proffered his belief of being “a thorough deist” who “[re]jected his Christian upbringing”).

<sup>55</sup> Treaty of Peace and Friendship between the United States of America and the Bey and Subjects of Tripoli of Barbary, art. 11, November 4, 1796, 8 Stat. 154.

Independence.<sup>56</sup> The absence of recognition of a formal deity in the Declaration of Independence and the fact that President John Adams declared the United States is not founded on the Christian religion as detailed in the Treaty is not mere happenstance.<sup>57</sup> It demonstrates a theoretical principle of separation of church and state in the creation of national documents practically applied in foreign affairs of the Nation. In support of the bifurcation of religion and state matters, other scholars contend that the authors of the Constitution intended for the Nation to be constructed as a secular state. For example, Frank Lambert concluded:

By their actions, the Founding Fathers made clear that their primary concern was religious freedom, not the advancement of a state religion. Individuals, not the government, would define religious faith and practice in the United States. Thus the Founders ensured that in no official sense would America be a Christian Republic. Ten years after the Constitutional Convention ended its work, the country assured the world that the United States was a secular state, and that its negotiations would adhere to the rule of law, not the dictates of the Christian faith. The assurances were contained in the Treaty of Tripoli of 1797 and were intended to allay the fears of the Muslim state by insisting that religion would not govern how the treaty was interpreted and enforced. John Adams and the Senate made clear that the pact was between two sovereign states, not between two religious powers.<sup>58</sup>

The spirit of dogmatism and bigotry Adams saw in clergy and laity alike repelled him.<sup>59</sup> Adams concurred with Jefferson's rejection of the Holy Trinity in favor of the "God of nature," as evidenced by the following missive to Jefferson:

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<sup>56</sup> See FRANK LAMBERT, *THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA* 11 (Princeton Univ. Press 2006).

<sup>57</sup> *See id.*

<sup>58</sup> *See id.*

<sup>59</sup> DAVID MCCULLOUGH, *JOHN ADAMS* 37 (Simon & Schuster 2001).

The question before the human race is whether the God of nature shall govern the world by His own laws, or whether priests and kings shall rule it by fictitious miracles? Or, in other words, whether authority is originally in the people? Or whether it has descended for 1800 years in a succession of popes and bishops, or brought down from heaven by the Holy Ghost in the form of a dove in a phial of holy oil.<sup>60</sup>

The spirit of Jefferson and Adams is reflected in the careful choice of language used in the Constitution and Bill of Rights.

## II. A COMPENDIUM OF RELIGION IN PUBLIC SCHOOLS

Public schools are the epicenter of activity for many local communities. For most students and parents, they will attend a public school at some point in their educational career.<sup>61</sup> Because all students are eligible and entitled to a public education, by nature of their attendance they are bringing their religiosity into this cauldron of culture. If world history has been any guide to the passion and ire that religion can raise among individuals, it is no surprise that religion has also caused titanic conflicts in public schools.

A review of the history of religion in American public schools reveals limited judicial interventions prior to 1945<sup>62</sup> and jurisprudential confusion between 1945 and 1971.<sup>63</sup> Until about 1940, daily prayer, recitation of religious materials, and the recitation of the Pledge of Allegiance,<sup>64</sup> were widely accepted—

<sup>60</sup> Letter from John Adams to Thomas Jefferson (June 20, 1815), in CORRESPONDENCE OF JOHN ADAMS AND THOMAS JEFFERSON: 1812-1826 112 (1925).

<sup>61</sup> Jack Jennings, *Proportion of U.S. Students in Private Schools is 10 Percent and Declining*, HUFF. POST (Mar. 28, 2013), [http://www.huffingtonpost.com/jack-jennings/proportion-of-us-students\\_b\\_2950948.html](http://www.huffingtonpost.com/jack-jennings/proportion-of-us-students_b_2950948.html).

<sup>62</sup> John M. Flynn, *Constitutional Law – Accommodation of Religion – The Answer to the Invocation Dilemma – Jager v. Douglas County School District*, 24 WAKE FOREST L. REV. 1045, 1050 (1989).

<sup>63</sup> *Id.* at 1052.

<sup>64</sup> See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (stating the Pledge of Allegiance has its own separate and distinct history of controversy. Because of Supreme Court contests including Jehovahs' Witnesses families who requested their students not say the Pledge in violation of the Bible's First Commandment, "Thou shall have no other gods before me," public schools were forbidden to require students to honor the nation by reciting the Pledge of Allegiance. When the Supreme Court held that a school district could not force

even expected in public schools. It was not until the 1960s that the Court built a foundation of case law upholding the proverbial “wall separating church and state.”<sup>65</sup>

To maintain separation of church and state, the Supreme Court has provided guidance as to the constitutionality of various religious expressions. This, of course, requires a balance of the prohibitions of the Establishment Clause with the rights of the Free Exercise Clause, which affords significant protection to students practicing their religion at school.<sup>66</sup>

#### *A. Pre-1945 Case Law*

An analysis of the Establishment Clause in the First Amendment can be conveniently categorized into two segments leading up to 1971.<sup>67</sup> The two categories are from the First Amendment’s passage in 1791<sup>68</sup> to 1945 and from 1945 until the *Lemon v. Kurzman*<sup>69</sup> decision in 1971. For nearly a century after “the adoption of the First Amendment, no petitioner argued before the Court that a law violated the Establishment Clause.”<sup>70</sup> During this period there were two cases that implicitly dealt with the Establishment Clause.

In the first case, *Terret v. Taylor*,<sup>71</sup> the Supreme Court assessed laws passed by the Virginia legislature, which would have divested the Episcopal Church of lands it had acquired before the American Revolution.<sup>72</sup> The Court found against the statutes giving tremendous deference for religion and a willingness for religion to prosper at state expense.<sup>73</sup> In *Vidal v.*

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someone to say something he or she did not believe, a new era in religious jurisprudence began that provided verve for the authority of the Establishment Clause).

<sup>65</sup> Flynn, *supra* note 62, at 1056–57.

<sup>66</sup> U.S. CONST. amend. I.

<sup>67</sup> Flynn, *supra* note 62, at 1050.

<sup>68</sup> *Id.* (citing GERALD GUNTHER, CONSTITUTIONAL LAW (11th ed. 1985)).

<sup>69</sup> 403 U.S. 602 (1971).

<sup>70</sup> Henry T. Miller, *Constitutional Fiction: An Analysis of the Supreme Court’s Interpretation of the Religion Clauses*, 47 LA. L. REV. 169, 187 (1986).

<sup>71</sup> 13 U.S. 43 (1815).

<sup>72</sup> *Id.* at 51.

<sup>73</sup> *Id.* at 52 (basing its holding on “the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals . . .”).

*Gerard's Executors*,<sup>74</sup> the Court held that money left by Gerard to establish a school for boys with the caveat that “no ecclesiastic, missionary, or minister . . . shall ever hold or exercise any station or duty”<sup>75</sup> in the school was not incompatible with Pennsylvania common law because the testator’s will would allow the teaching of Christianity, simply not by clergy, thus a complaint could not be legally supported.<sup>76</sup> These cases demonstrate the Court’s generally neutral position towards education.

The Supreme Court’s first Establishment Clause case came in 1899. In *Bradfield v. Roberts*,<sup>77</sup> the appellant argued that a congressional act giving money to a Roman Catholic hospital for maintenance constituted the establishment of religion.<sup>78</sup> The Court disagreed with this argument declaring that the money was appropriated for a secular purpose of maintaining a hospital and not advancing religion.<sup>79</sup> Nearly twenty years later, in *Arver v. United States*,<sup>80</sup> the Court summarily rejected as unsound an Establishment Clause challenge to a federal statute requiring conscientious objectors to perform noncombatant military service.<sup>81</sup> Finally, in 1930, a Louisiana statute allowing the distribution of books at state expense to children attending private schools was attacked as violative of the Establishment Clause.<sup>82</sup> The Court rejected the argument, claiming the secular purpose of education did not interfere with religion.<sup>83</sup> To sum, during this pre-1945 period, the Court was most concerned with protecting religion from state intrusion. As described, laws were made allowing religion to flourish.<sup>84</sup> It would not be until the post-1945 period that the principle concern of the Court would

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<sup>74</sup> 43 U.S. 127 (1844).

<sup>75</sup> *Id.* at 133.

<sup>76</sup> *Id.* at 199–200.

<sup>77</sup> 175 U.S. 291 (1899).

<sup>78</sup> *Id.* at 295.

<sup>79</sup> *Id.* at 299–300 (holding that the hospital was incorporated under an act of Congress and its property was acquired in its own name for its own purpose and it was not under supervision or control by any ecclesiastical authority).

<sup>80</sup> 245 U.S. 366 (1917).

<sup>81</sup> *Id.* at 390.

<sup>82</sup> *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930).

<sup>83</sup> *Id.* at 375 (declaring that “[t]he legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method comprehensive. Individual interests are aided only as the common interest is safeguarded”).

<sup>84</sup> *See id.*; *see also* *Vidal v. Phila.*, 43 U.S. 127 (1844).



shift and it would seek to protect the state from religious influence.

*B. Post-1945 Case Law*

The imbroglio that occurred during the period of 1945 to 1971 regarding religion and public schools is due in large part to different standards that were applied by the Supreme Court to similar cases.<sup>85</sup> The most intelligible method by which to analyze Establishment Clause jurisprudence during this period is to divide the cases into two categories: those that violated the Establishment Clause and those that did not.

During this period, the Court began shifting its focus in safeguarding religion in the public realm to removing religion from the public sphere. The concept of neutrality became the general philosophy of the Court in some Establishment Clause decisions.<sup>86</sup> In 1948, the Champaign Council on Religious Education, a voluntary association, obtained permission to give religious instruction in public schools in Illinois.<sup>87</sup> The Court determined that the State's tax-supported public schools were being used for a religious purpose and that the State was helping to provide an audience for the instruction by allowing the schools to be used in that manner.<sup>88</sup> A seminal case that is frequently cited regarding public schools and religion, *Engle v. Vitale*,<sup>89</sup> struck down a mandate by the New York Regents (a government agency overseeing public education), which required the recitation of a daily prayer in public school classrooms.<sup>90</sup> In *School District of Abington Township v. Schempp*,<sup>91</sup> the Court held unconstitutional a Pennsylvania statute, which required prayer and Bible reading in the public schools.<sup>92</sup> More significant than the actual holding was the Court's method of analysis.<sup>93</sup> Justice

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<sup>85</sup> Compare *Zorach v. Clauson*, 343 U.S. 306 (1952), with *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948) (involving release time programs for public schools but resulted in different holdings by the Supreme Court).

<sup>86</sup> See *Epperson v. Arkansas*, 393 U.S. 97 (1968).

<sup>87</sup> *Illinois ex rel. McCollum*, 333 U.S. at 203 (1948).

<sup>88</sup> *Id.* at 212.

<sup>89</sup> 370 U.S. 421 (1962).

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

<sup>91</sup> 374 U.S. 203 (1963).

<sup>92</sup> *Id.*

<sup>93</sup> Flynn, *supra* note 62, at 1053.

Clark established for the Court a two-prong test that looked first for a secular purpose and second for the effect of the challenged law.<sup>94</sup> Finding no secular purpose for the prayer or Bible reading, the Court declared the statute unconstitutional.<sup>95</sup>

However, during the same period, the court also supported the continued relationship between the state and religion in schools. In 1947, a New Jersey law allowed public funds to be spent on the transportation of students to parochial schools.<sup>96</sup> By not reviewing the motive of the legislature or effect of the statute, the Court held that the transportation of all students, irrespective of whether they attend a parochial or public school, should receive equal treatment, and may, thus, be transported to school supported by public funds.<sup>97</sup> In *Zorach v. Clauson*,<sup>98</sup> the Court recognized a new trend, “release time,” as constitutional. The New York law allowed students to leave school grounds to receive religious instruction and participate in devotional exercises.<sup>99</sup> The “release time” program involved neither religious instruction in public school classrooms nor the expenditure of public funds.<sup>100</sup> Students whose families chose not to participate in the release program stayed at school.<sup>101</sup> These holdings show a trend during this period to accommodate religion in the public sphere, reminiscent of its position during its first 150 years.<sup>102</sup>

This period of judicial analysis amplifies the Court’s use of an *ad hoc* formula to make judgments regarding religion in public schools.<sup>103</sup> The Court’s uncertainty in the post–1945 period provided the setting for some statutes to be found unconstitutional, while others passed constitutional muster. The modification in judicial approach can be characterized thusly:

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<sup>94</sup> Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 222 (1963).

<sup>95</sup> *Id.* at 224–225.

<sup>96</sup> Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1 (1947).

<sup>97</sup> *Id.*

<sup>98</sup> 343 U.S. 306 (1952).

<sup>99</sup> *Id.* at 308.

<sup>100</sup> *Id.* at 308–09.

<sup>101</sup> *Id.* at 308.

<sup>102</sup> Flynn, *supra* note 62, at 1054–56.

<sup>103</sup> *Id.* at 1056.

The Court's shift in interpretation corresponds with a change in the American philosophy of law. Since the late nineteenth century the Court has rejected the natural law theory in favor of theories which associate laws with utility or policy, and general morality with religion. The Court now follows a legal theory which is generally hostile to aid, encouragement, or support of religion, because under the utility or policy theory of law, any statute which encourages and affects religion is viewed as the union of church and state.<sup>104</sup>

The decisions finding violations between 1945 and 1971 demonstrate an increased reticence toward religion during the twentieth century.<sup>105</sup> Several cases during this period provide foundational elements for the next wave of Establishment Clause cases.<sup>106</sup>

### *C. The Lemon Test*

In 1971, the Supreme Court was called upon to rule on the constitutionality of two state acts, one from Pennsylvania and one from Rhode Island.<sup>107</sup> Each State took advantage of the vagueness of the holding in *Board of Education of Central School District No. 1 v. Allen*,<sup>108</sup> in which States attempted to give public funds to parochial schools.<sup>109</sup> In Pennsylvania, the state legislature enacted a law, which provided reimbursement to nonpublic schools for costs of teachers' salaries (so long as they did not teach religion), textbooks, and instructional materials.<sup>110</sup> In Rhode Island, teachers in nonpublic elementary schools were paid a 15% supplement to their annual salaries.<sup>111</sup> The Supreme

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<sup>104</sup> Miller, *supra* note 70, at 190.

<sup>105</sup> Flynn, *supra* note 62, at 1057.

<sup>106</sup> *Id.*

<sup>107</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>108</sup> 392 U.S. 236 (1968) (the holding created many questions on the part of both public and parochial schools. The language was unclear, failing to delineate First Amendment restrictions in providing state aid to parochial schools. The public purpose theory was applied so that the state could give assistance to religious schools so long as the aid was provided for only secular services).

<sup>109</sup> *Id.*

<sup>110</sup> *See Lemon*, 403 U.S. at 607.

<sup>111</sup> *Id.*

Court struck down the statutes of both States and provided its now famous three-prong test to determine constitutionality.<sup>112</sup>

*Lemon* gave direction to whether a state statute or other state action is constitutional under the Establishment Clause of the First Amendment with three tests:

- (1) The statute must have a secular legislative purpose;
- (2) Its principal or primary effect must be one that neither advances nor inhibits religion;
- (3) It must not foster excessive government entanglement with religion.<sup>113</sup>

In regards to the specific state statutes at issue in *Lemon*, the Court found no basis in the legislative history of either statute by which to conclude that either legislature intended anything other than a secular purpose.<sup>114</sup> The Court also concluded that there was clearly excessive entanglement between government and religion in both states and an analysis of the primary effect was not warranted.<sup>115</sup> As for Rhode Island, the Court held that the statute would allow for the presence of teachers of religion in public schools.<sup>116</sup> The Court further noted, “[w]e cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education.”<sup>117</sup> Thus, the mere potential for conflict was enough to violate the entanglement prong.<sup>118</sup> The Pennsylvania statute had a similar infirmity.<sup>119</sup> The Court noted, “the very restrictions and surveillance necessary to ensure that teachers play a strictly non-ideological role give rise to entanglements between church and state.”<sup>120</sup> The Supreme Court developed a new formula by which challenges to the separation of church and state would be evaluated, and while alternative legal theories have developed, the *Lemon* test remains foundational in Establishment Clause challenges.

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<sup>112</sup> *Id.* at 613–14.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 613; see Flynn, *supra* note 62, at 1058.

<sup>115</sup> Flynn, *supra* note 62, at 1058.

<sup>116</sup> See *Walz v. Tax Comm’n of New York*, 397 U.S. 664 (1970).

<sup>117</sup> *Lemon*, 403 U.S. at 617.

<sup>118</sup> Flynn, *supra* note 62, at 1058.

<sup>119</sup> *Id.*

<sup>120</sup> *Lemon*, 403 U.S. at 620–21.

### III. MODERN CASE LAW

Despite the seemingly well-settled principals set forth in *Lemon v. Kurtzman*<sup>121</sup> regarding the Establishment Clause and prayer in public schools, teachers, administrators, and coaches continued to engage in religious activities with students for decades. Cases in the First, Second, Third, Fourth, Fifth, and Eleventh Circuits help expand on the rules established in *Lemon* and possible outcomes in other circumstances.

#### A. Other Tests

In addition to the three-pronged test used in *Lemon v. Kurtzman*,<sup>122</sup> the Supreme Court and lower federal courts have used two additional tests, creating a “trilogy of tests”<sup>123</sup> used in determining whether a state agent’s actions violated the Establishment Clause: the endorsement test and the coercion test.

#### 1. The Endorsement Test

As noted in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter et al.*,<sup>124</sup> in cases following *Lemon*, courts considered whether the state action or practice “has the purpose or effect of ‘endorsing’ religion.”<sup>125</sup> The Court noted, “[t]he Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from ‘making adherence to a religion relevant in any way to a person’s standing in the political community.’”<sup>126</sup> The Court’s prohibition of government “endorsement” or

<sup>121</sup> *Id.* at 602.

<sup>122</sup> *Id.*

<sup>123</sup> See *Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 592; see also *Engel v. Vitale*, 370 U.S. 421 (1962); *Sch. Dist. Of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) (holding that Alabama’s moment-of-silence statute was unconstitutional because it was enacted “for the sole purpose of expressing the State’s endorsement of prayer activities.”); *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987) (holding Louisiana’s “Creationism Act” unconstitutional because its purpose was to endorse religion); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 17 (1989) (limiting tax exemptions to religious periodicals “effectively endorses religious belief”).

<sup>126</sup> *Allegheny*, 492 U.S. at 593–94 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring)).

“promotion”<sup>127</sup> of religion “preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *avored* or *preferred*.”<sup>128</sup> The Court warned that such state actions can have the effect of making non-adherents feel like outsiders, ostracized from the community, and adherents feel like favored members.<sup>129</sup>

Whether a state action constitutes an endorsement of religion is not a matter of subjectivity; the endorsement test requires the court to take the viewpoint of an “objective observer, acquainted with the [context], legislative history, and implementation of the statute.”<sup>130</sup> Context can be particularly important in how a state action is perceived.<sup>131</sup> This is evident in two Supreme Court cases that both addressed the display of crèches at Christmas, a symbol, which by itself is religious in nature. In *Lynch v. Donnelly*,<sup>132</sup> the Court concluded that a crèche displayed as part of a larger holiday display that included other non-religious symbols depicting the origins of the Christmas holiday did not constitute an endorsement of religion.<sup>133</sup> However, in *County of Allegheny*, the Court determined that a crèche, standing alone as a single element of display including an angel saying “[g]lory to God in the Highest!” was an endorsement of Christian religious belief.<sup>134</sup> Therefore, in determining the constitutionality of the actions of public school coaches, coaching staff, band directors, and other state actors, courts must look not only at the action itself, but if the action

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<sup>127</sup> Courts use both terms to describe the same government actions. See *Allegheny*, 492 U.S. at 593 (noting that “whether the key word is ‘endorsement,’ ‘favoritism,’ or ‘promotion,’ the essential principle remains the same.”); *Wallace*, 472 U.S. at 59–60.

<sup>128</sup> *Allegheny*, 492 U.S. at 593 (quoting *Wallace*, 472 U.S. at 70).

<sup>129</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000).

<sup>130</sup> *Wallace*, 472 U.S. at 76. In *S.D. v. St. Johns Cty. Sch. Dist.*, the court noted, “The question as to whether certain conduct violates the Establishment or Free Exercise Clause is objective and based on a First Amendment analysis that is largely independent from individual feelings of indignity or personal affront.” 632 F.Supp.2d 1085, 1092 (M.D. Fla. 2009).

<sup>131</sup> *Freedom from Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1, 12 (5th Cir. 2010).

<sup>132</sup> 465 U.S. 668 (1984).

<sup>133</sup> *Id.* at 669.

<sup>134</sup> *Allegheny*, 492 U.S. at 598–600 (noting that the crèche was the setting for the county’s annual Christmas-carol program and that it bore a sign disclosing ownership by a Roman Catholic organization; the Court determined that both of these facts further supported the conclusion that the crèche constituted an endorsement of religion).

would be perceived by an objective observer in context as an endorsement of religion.

## 2. The Coercion Test

In *Lee v. Weisman*,<sup>135</sup> pursuant to district policy for middle and high schools, a public school principal invited a local religious leader to give an invocation and benediction prayer at the middle-school graduation ceremony.<sup>136</sup> The rabbi gave a nonsectarian prayer, as he was instructed, just following the Pledge of Allegiance.<sup>137</sup> Based on these facts, the Court found the district policy allowing such religious demonstrations at middle and high school graduation ceremonies to be so blatantly unconstitutional that it did not deem it necessary to discuss complicated issues of religious accommodation or controlling precedent for religious exercise in primary and secondary public schools.<sup>138</sup> Writing for the majority, Justice Kennedy wrote,

The government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school. Conducting this formal religious observance conflicts with settled rules pertaining to prayer exercises for students, and that suffices to determine the question before us.<sup>139</sup>

Justice Kennedy went on to write that any attempt to accommodate the free exercise of religion cannot supersede the limitations imposed by the Establishment Clause.<sup>140</sup> He stated, “[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . . .”<sup>141</sup>

While the Court did note that participation in graduation ceremonies was voluntary, it found that students were subject to

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<sup>135</sup> 505 U.S. 577 (1992).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 581–86.

<sup>138</sup> *Id.* at 586–87; *see also* S.D. v. St. Johns Cty. Sch. Dist., 632 F. Supp. 2d 1085, 1092 (M.D. Fla. 2009) (noting, “the analysis is not effected by whether the student was or was not offended by the school district’s conduct”).

<sup>139</sup> *Weisman*, 505 U.S. at 587.

<sup>140</sup> *Id.* at 587–99.

<sup>141</sup> *Id.* at 587.

peer-pressure to attend the graduation and to participate, even if tacitly, in the religious exercises by standing and remaining silent.<sup>142</sup> The coercion “need not be direct to violate the Establishment Clause, but rather can take the form of ‘subtle coercive pressure’ that interferes with an individual’s ‘real choice’ about whether to participate in the activity at issue.”<sup>143</sup>

### B. Contemporary Prayer Cases

In reviewing actions of state actors that may constitute religious exercise, particularly when conducted in front of or with primary or secondary school students, courts may use one or all of the aforementioned tests. In extreme cases, like the one described in *Lee*, a court may not find it necessary to use all three tests. However, in less clear cut cases, the use of multiple tests may provide courts with more nuanced analyses. In this section, we will discuss how these tests have been applied to more contemporary cases involving K-12 public school students and sports (sporting events, interactions with coaches, etc.).

#### 1. Student-Initiated Prayer

In 2000, the Supreme Court took on the issue of student-led prayer at high school football games. In *Santa Fe Independent School District v. Doe*,<sup>144</sup> students filed suit against the school

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<sup>142</sup> *Id.* at 593; *see also*, *Freedom from Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1, 12 (5th Cir. 2010).

<sup>143</sup> *Freedom from Religion Found.*, 626 F.3d at 12 (quoting *Lee*, 505 U.S. at 592). Federal courts have considered prayer at different ceremonies and meetings associated with public schools and the primary factor in determining whether the Establishment Clause applies is whether children are present as part of the formal school day or at a school event. The same rules may not apply for a school board meeting. In *Doe v. Tangipahoa Parish School Board*, the court considered whether an opening prayer given by a member of the clergy at a school board meeting violated the Establishment Clause. 631 F.Supp.2d 823 (E.D. La. 2009). The United States District Court for the Eastern District of Louisiana concluded that a school board was a governing body and thus more like a legislature than a school. They applied the holding in *Marsh v. Chambers*, 463 U.S. 783 (1983), “because the opening of legislative sessions with the recitation of prayer is deeply embedded in the ‘unique history’ and tradition of this country, the Supreme Court upheld as constitutionally permissible the Nebraska state legislature’s practice of beginning each session with a prayer from a chaplain, even one paid by the state.” *Id.* at 835 (summarizing *Marsh*, 463 U.S. at 790–93). However, *Marsh* stipulated that “[t]he content of the prayer is not a concern to judges [when] there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.” *Marsh*, 463 U.S. at 794–95.

<sup>144</sup> 530 U.S. 290 (2000).



district for permitting, and perhaps endorsing, prayer before the football games.<sup>145</sup> The school district argued that because the prayers were student-initiated and student-led they were private speech protected by the Free Exercise Clause.<sup>146</sup> The Court did not agree.<sup>147</sup> Justice Stevens, writing for the majority, argued a number of the school district's actions raised alarm, clearly endorsing religion.<sup>148</sup> First, he noted that the pre-football invocations were given by a student who held the school-elected position of student council chaplain.<sup>149</sup> The district argued that the invocation constituted a free exercise of religion by a student elected by his or her peers.<sup>150</sup> However, the Court concluded that any attempts by the district to disentangle itself from religious speech through the two-step student election process were futile; the election itself was conducted because the board chose to permit a student-led prayer.<sup>151</sup> Second, Justice Stevens noted that the invocations were authorized by the school and took place on government property at a government-sponsored school-related event.<sup>152</sup> Therefore, while the speech was delivered by a student, the school's endorsement of the speech made it government speech for purposes of the Establishment Clause.<sup>153</sup>

The Court acknowledged that not all speech given in government forums constitutes government-sponsored speech, particularly when the government has created an open forum or limited public forum for individual free speech.<sup>154</sup> However, by limiting the pre-game ceremony to one prayer given by a single student, the school had not created an open forum, open to other individual expressions of free speech.<sup>155</sup> Furthermore, the school limited the student's prayer to messages that were nonsectarian and non-proselytizing, thus precluding the creation of a limited

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<sup>145</sup> *Id.* at 294–95.

<sup>146</sup> *Id.* at 302.

<sup>147</sup> *Id.* at 309–10.

<sup>148</sup> *Id.* at 308–10.

<sup>149</sup> *Id.* at 309.

<sup>150</sup> *Id.* at 301–304.

<sup>151</sup> *Id.* at 305–06.

<sup>152</sup> *Id.* at 303.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* For example, sharing one's opinion at a government-sponsored public debate would not constitute government sponsored speech. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 894–95 (1995).

<sup>155</sup> *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 304.

public forum because the speech itself was state controlled.<sup>156</sup> Thus, the Court concluded that school district's policy allowing the student council chaplain to give an invocation at the beginning of each home football was "invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events."<sup>157</sup>

In a recent conflict at Kountze High School, the football cheerleaders created a traditional run-through banner in which football players tore through in the pregame ceremony encouraging school spirit.<sup>158</sup> Typically, these banners provide encouragement to the team by giving support or even messages wishing for the defeat of the opposition. The Kountze cheerleaders exceeded this tacit canon by placing religious missives on the banner.<sup>159</sup> Recognizing this act had the potential of positioning the District in violation of the Establishment Clause, school administrators requested the cheerleaders no longer include religious messages on the run-through banners.<sup>160</sup> The cheerleaders, supported by their parents, immediately sought an injunction against the school district allowing them to continue with their practice.<sup>161</sup> The district court concurred with the cheerleaders allowing them to continue with their practice.<sup>162</sup> In May 2013, the district court, in a very succinct decision, held that the cheerleaders were employing their free speech rights and their activities did not require the school district to violate the Establishment Clause.<sup>163</sup> The school district permitted the

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 317.

<sup>158</sup> *Kountze Indep. Sch. Dist. v. Matthews*, 482 S.W.3d 120, 124–126 (Tex. App. 2016).

<sup>159</sup> Order on Plaintiff's Application for Temporary Injunction at 4, *Matthews v. Kountze Indep. Sch. Dist.* No. 53526 (Dist. Ct. Tex. Oct. 18, 2012) (No. 53526). See Brett A. Geier, *supra* note 12, at 70.

<sup>160</sup> Order on Plaintiff's Application for Temporary Injunction at 4, *Matthews v. Kountze Indep. Sch. Dist.* (Dist. Ct. Tex. Oct. 18, 2012) (No. 53526). See Brett A. Geier, *supra* note 12, at 70.

<sup>161</sup> Order on Plaintiff's Application for Temporary Injunction at 4, *Matthews v. Kountze Indep. Sch. Dist.* (Dist. Ct. Tex. Oct. 18, 2012) (No. 53526). See Brett A. Geier, *supra* note 12, at 70.

<sup>162</sup> Order on Plaintiff's Application for Temporary Injunction at 4–22, *Kountze Indep. Sch. Dist.* (Dist. Ct. Tex. Oct. 18, 2012) (No. 53526).

<sup>163</sup> Summary Judgment Order at 2, *Kountze Indep. Sch. Dist.* (Dist. Ct. Tex. May 8, 2013) (No. 53526).

banners with Bible verses to be raised at sporting events and filed an appeal.<sup>164</sup> The Texas Court of Appeals noted that since the school district was permitting the banners the case was moot.<sup>165</sup> The plaintiff cheerleaders challenged that the school district's voluntary cessation prohibiting the banners did not render their claim for prospective relief moot.<sup>166</sup> The Texas Supreme Court accepted the interlocutory appeal and reversed the court of appeals judgement stating that the "[d]istrict's voluntary abandonment here provides no assurance that the District will not prohibit the cheerleaders from displaying banners with religious signs or messages at school-sponsored events in the future."<sup>167</sup> In our opinion, the district and state supreme courts failed to accurately employ previous case law and Establishment Clause intent by permitting religious missives by students participating on school-sponsored teams at co-curricular activities managed by the public school.<sup>168</sup>

A final recent example comes from New York where a student wanted to end her graduation speech at a public middle school by stating, "may the LORD bless you and keep you; make His face shine upon you and be gracious to you; lift up His countenance upon you, and give you peace."<sup>169</sup> The school district believed the student's message was too religious and a reasonable observer would perceive the student's speech as being endorsed by the middle school.<sup>170</sup> The student argued the remarks were her private free speech and the school censored them as a result of viewpoint discrimination.<sup>171</sup> Losing in the Second Circuit, the student applied for *writ of certiorari* with the Supreme Court, which was denied.<sup>172</sup>

## 2. Coach-Initiated/Led Prayer

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<sup>164</sup> *Kountze Indep. Sch. Dist. v. Matthews*, 482 S.W.3d 120, 123 (Tex. App. 2014).

<sup>165</sup> *Id.* at 124.

<sup>166</sup> *Mathews, on behalf of M.M. v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416, 417 (Tex. 2016).

<sup>167</sup> *Id.* at 420.

<sup>168</sup> *Geier*, *supra* note 12, at 84-88.

<sup>169</sup> *A.M. ex rel. McKay v. Taconic Hills Cent. Sch. Dist.*, No. 12-753-cv, 2013 WL 342680, at \*5 (2d Cir. Jan. 2013), *cert denied*, 134 S.Ct. 196 (2013).

<sup>170</sup> *Id.* at \*8.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

The Court considered the constitutional limits of coach led prayer in public school athletics in *Doe v. Duncanville Independent School District*.<sup>173</sup> In 1988, Jane Doe enrolled as a seventh grade student in Duncanville Independent School District (DISD).<sup>174</sup> After qualifying for the girls' basketball team, she was enrolled in a special athletics class specially designed for the team held during the last period of the school day.<sup>175</sup> Doe received academic credit for the class and for her participation on the basketball team.<sup>176</sup> During her first class, Doe learned the following:

[T]he girls' basketball coach, Coach Smith, included the Lord's Prayer in each basketball practice. The basketball team also said prayers in the locker rooms before games began, after games in the center of the basketball court in front of spectators, and on the school bus travelling to and from basketball games. Coach Smith initiated or participated in these prayers. These prayers had been a tradition for almost twenty years.<sup>177</sup>

At first, Doe participated in the prayers so she would fit in with her teammates.<sup>178</sup> However, when she told her father that she preferred not to participate, he encouraged her to discontinue her participation.<sup>179</sup> Her lack of participation immediately attracted attention from her teammates, spectators, and teachers.<sup>180</sup> Doe's history teacher reportedly referred to Doe as a "little atheist."<sup>181</sup> Doe's father complained to the superintendent, who stopped the prayers at the pep rallies but said there was nothing he could do about the post-game prayers.<sup>182</sup>

Doe also participated in choir from seventh to twelfth grade, for which she received academic credit.<sup>183</sup> The theme song

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<sup>173</sup> 70 F.3d 402 (5th Cir. 1995).

<sup>174</sup> *Id.* at 404.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

identified for the seventh and eighth grade choruses was “Go Ye Now in Peace,” based on Christian text.<sup>184</sup> In high school choir, she was required to sing another Christian theme song, “The Lord Bless You and Keep You,” which had reportedly been the choir’s theme song for over twenty years.<sup>185</sup> They would sing the theme songs at the end of class each Friday, at some concerts, and in competitions.<sup>186</sup>

Doe filed an application for a restraining order and a preliminary injunction forbidding DISD from allowing its employees from leading, encouraging, promoting, or participating in “prayer with or among students during curricular or extra-curricular activities, including sporting events.”<sup>187</sup> The court used the “triad of tests” to identify violations of the Establishment Clause, breaking the case up into analyses of prayer at curricular and extra-curricular activities, the choirs’ theme songs, and the distribution of the Gideon Bible to fifth grade students.<sup>188</sup> For the first part, the court considered DISD’s prohibitions on employee participation of prayer.<sup>189</sup> With regards to employee participation in prayer, the court upheld the district’s prohibition.<sup>190</sup> It noted, “the principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.”<sup>191</sup> They found this “particularly true in the . . . context of basketball practices and games.”<sup>192</sup> The prayers took place during instructional time or school-controlled time during school-sponsored, extra-curricular activities that team members were required to attend as members of the team.<sup>193</sup> As representatives of their school district, the coach’s prayers

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 404–05. DISD also engaged in other religious activities or customs, “such as holding prayers and distributing pamphlets containing religious songs at awards ceremonies, allowing student-initiated prayers before football games, allowing Gideon Bibles to be distributed to fifth grade classes, and until 1990, including prayers during school pep rallies.”

<sup>187</sup> *Id.* at 405.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 406.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* (quoting *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 165 (5th Cir. 1993)).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

“improperly entangle[ed] [the district] in religion and signal[ed] an unconstitutional endorsement of religion.”<sup>194</sup>

However, the court did not come to the same conclusion in its analysis of the choir theme songs. The parties acknowledged that religious music can be and often is used by public school choirs and choruses for secular purposes.<sup>195</sup> In this case, Doe argued that by identifying the songs as theme songs and singing them at every practice and many performances year after year, the songs were given a greater significance, rising to an endorsement of religion.<sup>196</sup> The court disagreed, concluding that given the dominance of religious music in this field, the selection of a religious theme song in and of itself does not constitute an endorsement of religion.<sup>197</sup> In fact, the court noted, “to forbid DISD from having a theme song that is religious would force DISD to disqualify the majority of appropriate choral music simply because it was religious. Within the world of choral music, such a restriction would require hostility, not neutrality, toward religion.”<sup>198</sup> For the last part, the court determined that neither Doe nor her father had standing regarding this claim because the Gideon Bibles were distributed to fifth grade students and Doe did not enter the district until the seventh grade.<sup>199</sup>

The issue of coach led prayer was further troubled the in *Borden v. School District of the Township of East Brunswick*.<sup>200</sup> In 2008, the Third Circuit considered an action brought by a football coach against a school district, claiming that the district’s prohibition of faculty and coaches participating in prayer violated his rights to free speech, academic freedom, freedom of association, and due process.<sup>201</sup> The Petitioner, Marcus Borden, was the head football coach at East Brunswick High School

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 407–08.

<sup>196</sup> *Id.* at 407.

<sup>197</sup> *Id.* at 407–08.

<sup>198</sup> *Id.* In *Lynch v. Donnelly*, 465 U.S. 669, 678 (1984), the Court stated, “[i]n our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court.”

<sup>199</sup> *Id.* at 408–09.

<sup>200</sup> 523 F.3d 153 (3d Cir. 2008).

<sup>201</sup> *Id.* at 158–59.

(EBHS).<sup>202</sup> During his tenure at EBHS, he made a habit of leading the team in prayer before games and at the weekly team dinner (with players, parents, and cheerleaders).<sup>203</sup> Before Borden's arrival, the prayers at the team dinners were led by a local minister.<sup>204</sup> From 2003–2005, Borden led the prayer at the first team dinner of every season and then selected a senior player to lead prayer in the subsequent weeks.<sup>205</sup> Additionally, after discussing strategy before each game, Borden would ask the assistant coaches and players to take a knee as he led them in prayer.<sup>206</sup>

In 2005, three sets of parents complained to the District Superintendent about the prayer at the team dinner.<sup>207</sup> One player indicated that he was uncomfortable and was afraid that the coach would call on him to lead the prayer.<sup>208</sup> In the weeks following the complaints, the attorney for the school district stated that Borden “could not lead, encourage, or participate” in prayer with his players at team dinners or before games.<sup>209</sup> In a memo to Borden and all faculty members, the Superintendent reminded all faculty and staff that students have a constitutionally protected right to pray at school so long as it did not interfere with the “normal operations of the school or district.”<sup>210</sup> However, she noted, representatives of the school or school district (teachers, coaches, administrators, board members, etc.) “were prohibited from encourag[ing,] lead[ing,] initiat[ing,] mandat[ing,] or otherwise coercing student prayer, either directly or indirectly,” during school time or at any school sponsored event.<sup>211</sup> She advised that failure to comply with these

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<sup>202</sup> *Id.* at 159.

<sup>203</sup> *Id.*

<sup>204</sup> *Borden*, 523 F.3d at 159. In 1997, the athletic director told Borden that the minister could no longer read the prayer. From 1997 to 2003, when the minister retired, the minister wrote a prayer that students took turns reading each week.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 160.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 160–61. Note that while in *Borden*, the Third Circuit found the superintendent's memo seeking to avoid future Establishment Clause violations was not unconstitutional, *id.* at 179, courts may not always come to that conclusion. In considering pre-emptive regulations, the Supreme Court has said that the state must have a “plausible fear” of being associated with religion or a particular religion, and there must be a “likelihood that the speech in question is being either endorsed or

guidelines would be considered insubordination.<sup>212</sup> Borden resigned the evening he received the memo but returned to his position ten days later, agreeing to comply with the specified terms.<sup>213</sup> He filed suit against the district five weeks after returning to his position.<sup>214</sup>

Prior to the commencement of the 2006 football season, Borden asked his team captains to talk to all of the members of the team to determine if they wanted to continue prayer before team dinners and games.<sup>215</sup> The captains indicated to him that the team voted to continue the pre-meal and pre-game prayers.<sup>216</sup> Accordingly, while Borden no longer led his players in prayer, he continued to bow his head before team meals and take a knee before each game.<sup>217</sup>

In considering the limitations of the First Amendment for Borden and other public school employees, the Third Circuit Court of Appeals reminded, “the day has long since passed when individuals surrendered their right to freedom of speech by accepting public employment.”<sup>218</sup> However, their rights are not unlimited.

Borden argued that his speech (bowing his head and taking a knee) was protected by the First Amendment’s freedom of speech, academic freedom, freedom of association, and due process.<sup>219</sup> The court quickly concluded that Borden’s speech was not a matter of public concern and thus not protected First Amendment speech.<sup>220</sup> The court next concluded that Borden’s

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coerced by the State.” *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 841–42 (1995); *see also*, *Tucker v. Cal. Dept. of Educ.*, 97 F.3d 1204, 1213 (9th Cir. 1996) (holding that a blanket ban on all employee religious speech or expression went beyond what was necessary to protect the State from Establishment Clause violations. The court stated, “The challenged regulation here prohibits all sorts of employee speech that could in no way create the impression that the state has taken a position in support of a religious sect or of religion generally.”).

<sup>212</sup> *Borden*, 523 F.3d at 160.

<sup>213</sup> *Id.* at 161.

<sup>214</sup> *Id.* at 162.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 162. Note that because Borden discontinued other acts of religious expression with players, the court in this case considered only Borden’s acts of bowing his head and taking a knee. *See id.* at 162–163.

<sup>218</sup> *Id.* at 168, (quoting *Sanguini v. Pittsburgh Bd. of Pub. Educ.*, 968 F.2d 393, 396 (3d Cir. 1992)).

<sup>219</sup> *Id.* at 163 nn. 4–5.

<sup>220</sup> *Id.* at 171. The court used the two-pronged test from *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Under the *Pickering* test, the court must first



speech was not protected under academic freedom because his speech was intended to be a pedagogic method, rendering him a “proxy” for the school district.<sup>221</sup> In considering Borden’s freedom of association claim,<sup>222</sup> the court noted that the relationship that Borden shared with his players was not sufficiently close to warrant constitutional protection.<sup>223</sup> Finally, the court dismissed Borden’s due process claims because he could not identify a fundamental right that was infringed upon by the district prayer policy.<sup>224</sup>

The court next considered whether the school district had the right to adopt the prayer policies in an effort to avoid

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determine if the public employee is speaking on a matter of public concern. *Id.* If the speech relates to matters of public concern, then the court must consider the second prong of the test, which requires a balancing of the interests of the public employee, commenting as a citizen and someone who may have special knowledge on a subject of public concern, with the interests of the employer in efficient operations. *Id.* In considering the nature of Borden’s speech, the court notes that Borden’s speech was not, in fact, public in nature. *Id.* at 169. His speech only occurred in private settings, at the invitation-only dinner and in the locker room before games. *Id.* at 171. The court concluded that the speech was intended for the football players (and their parents) only. *Id.*

<sup>221</sup> In *Bradley v. Pittsburgh Board of Education*, the Third Circuit determined that in-class conduct did not constitute protected speech. 910 F.2d 1172, 1176 (3rd Cir. 1990) (“Although a teacher’s out-of-class conduct, including her advocacy of particular teaching methods, is protected . . . her in-class conduct is not.”). In *Borden*, the Third Circuit noted that when a teacher engages in “in-class conduct,” he or she is acting as the educational institution’s proxy, and the institution, not the teacher, has the right to direct how and what students are taught. *Borden*, 523 F.3d at 172. See also *Brown v. Armenti* 247 F.3d 69, 74–75 (3d Cir. 2001). But note that courts distinguish between religious activities conducted in a teacher or coach’s own school from those conducted in other schools. See, for example, *Wigg v. Sioux Falls School Dist.*, in which the court reviewed a district policy prohibiting teachers from participating in after-school, religiously-based, non-school related activities in all schools in their district. 382 F.3d 807, 815–16 (8th Cir. 2004). The court noted that this restriction was overly restrictive and violated the mandate of religious neutrality. *Id.* To avoid possible Establishment Clause violations, the district could prohibit the teacher from engaging in religiously-based after-school activities at her own school but not the other schools in the district. *Id.* at 815–16.

<sup>222</sup> Borden alleged that the school district’s guidelines separated Borden from his players, both physically and emotionally, during times of prayer. *Borden*, 523 F.3d at 173.

<sup>223</sup> *Id.* The Supreme Court has ruled that certain close relationships require protection, such as “marriage, the begetting and bearing of children, child rearing and education, and cohabitation with relatives.” *Id.* (citing *Bd. of Dirs. of Rotary Int’l v. Rotary Club*, 481 U.S. 537, 545 (1987)). While the court conceded that football coaches can have a very special relationship with their players, those relationships are not sufficiently close to require constitutional protections. *Id.* (citing *Bd. of Dirs. of Rotary Int’l*, 481 U.S. at 545).

<sup>224</sup> *Id.* at 173–74.

violating the Establishment Clause. The prayer policy was not unconstitutional on its face and, as stated above, did not violate Borden's constitutional rights.<sup>225</sup> Therefore, the court focused on whether the policy was "reasonably related to a legitimate educational interest."<sup>226</sup> As noted in *Capitol Square Review and Advisory Board v. Pinette*,<sup>227</sup> "compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech."<sup>228</sup>

The court concluded that Borden's conduct violated the Establishment Clause using the Endorsement Test.<sup>229</sup> The court looked to how "a reasonable observer familiar with the history and context of the display"<sup>230</sup> would perceive Borden's actions. Contextually, the court considered not just Borden bowing his head before pre-game meals and taking a knee in the locker room, but also looked at Borden's history with the team and the fact that he engaged in religious activities with players for an extended period.<sup>231</sup> The court concluded that his involvement as "an organizer, participant, and a leader . . . would lead a reasonable observer to conclude that he was endorsing religion."<sup>232</sup> However, the court noted that "[w]ithout Borden's twenty-three years of organizing, participating in, and leading prayer with his team, this conclusion would not be so clear as it presently is."<sup>233</sup> The Court went on to state:

[I]f a football coach, who had never engaged in prayer with his team, were to bow his head and take a knee while his team engaged in a moment

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<sup>225</sup> *Id.* at 165–66.

<sup>226</sup> *Id.* at 174 (citing *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir. 1998)). Note that the court actually determined that this analysis was unnecessary since the policy was not unconstitutional on its face and did not violate Borden's fundamental rights. *Id.* However, it opted to go through the analysis to make clear that the school district has a legitimate educational interest if avoiding Establishment Clause violations and that the prayer policy guidelines were reasonably related to that interest. See generally *Borden*, 523 F.3d. at 174.

<sup>227</sup> 515 U.S. 753 (1995).

<sup>228</sup> *Id.* at 761–62.

<sup>229</sup> *Borden*, 523 F.3d at 175. The court found it unnecessary to analyze Borden's actions using the coercion test or the *Lemon* test because his conduct so obviously violated the Establishment Clause using the endorsement test. *Id.*

<sup>230</sup> *Id.* (citing *Modrovich v. Allegheny Cty.*, Pa., 385 F.3d 397, 401 (3d Cir. 2004)).

<sup>231</sup> *Id.* at 176–77.

<sup>232</sup> *Id.* at 176.

<sup>233</sup> *Id.* at 178.

of reflection or prayer, we would likely reach a different conclusion because the same history and context of endorsing religion would not be present.<sup>234</sup>

Despite ruling against Borden, this Third Circuit opinion contemplates a circumstance in which a coach bowing his head or taking a knee out of respect during a time of student-initiated prayer may not violate the Establishment Clause.

#### IV. MODERN TRENDS AND CASES OF RELIGIOUS EXPRESSION IN PUBLIC SCHOOL SPORTS

In the early 2000s, there was a renewed movement to embrace Christian tenets in public school settings, in direct contradiction to the Supreme Court's ruling protecting the "wall of separation between Church and State."<sup>235</sup> Katherine Stewart, author of *The Good News Club: The Christian Right's Stealth Assault on America's Children*, identified proponents of this movement as the "Christian Nationalists," those intent upon assuming a cultural control of the public schools.<sup>236</sup> Stewart frames her philosophy on the work of Jerry Falwell. Falwell stated, "I hope to see the day when, as in the early days of our country, we don't have public schools . . . . The churches will have taken them over again and Christians will be running them."<sup>237</sup> This doctrine has been advanced by several justices of the Supreme Court, namely Justices Scalia and Thomas. Justice Scalia argued that the founding fathers never intended to keep religion and state separate.<sup>238</sup> The Free Exercise Clause and the Establishment Clause, "applies only to the words and acts of government. It was never meant and has never been read by the court to serve as an impediment to purely private religious speech."<sup>239</sup> The

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<sup>234</sup> *Id.* at 178–79.

<sup>235</sup> *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 512 (1947).

<sup>236</sup> KATHERINE STEWART, *THE GOOD NEWS CLUB: THE CHRISTIAN RIGHT'S STEALTH ASSAULT ON AMERICA'S CHILDREN* 85 (1st ed. 2012).

<sup>237</sup> JERRY FALWELL, *AMERICA CAN BE SAVED* 52–53 (1979).

<sup>238</sup> Debra Cassens Weiss, *Scalia Compares Himself to Frodo in Originalism Battle*, ABA JOURNAL (Oct. 2, 2014),

[http://www.abajournal.com/news/article/scalia\\_compares\\_himself\\_to\\_frodo\\_in\\_orignalism\\_battle](http://www.abajournal.com/news/article/scalia_compares_himself_to_frodo_in_orignalism_battle).

<sup>239</sup> STEWART, *supra* note 236, at 85 (citing JEFFERY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 114 (2007)).

axiom created is that religion, in and of itself, is speech and should be protected under the free speech doctrine. This represents a substantial potential doctrinal shift that actually marginalizes the Free Exercise and Establishment Clauses of the First Amendment.

This doctrinal shift can be seen on the sports fields nationwide. For example, in Bremerton, Washington, former assistant football coach Joe Kennedy has received a great deal of attention for his religious demonstrations following Bremerton High School (BHS) football games. Beginning in 2008, Kennedy went to the fifty-yard line directly following the conclusion of each football game, took a knee, bowed his head, and quietly prayed a “prayer of thanksgiving for player safety and sportsmanship that lasts approximately 15-30 seconds.”<sup>240</sup> He claimed that he was first inspired to engage in this kind of post-game prayer after watching the Christian football film *Facing the Giants*.<sup>241</sup> Kennedy noted that other BHS coaches often joined him in this prayer ritual.<sup>242</sup> Over time, players began to join Kennedy in prayer following the game.<sup>243</sup> Kennedy claims that he did not direct or coerce players to join him and did not direct their prayer once on the field.<sup>244</sup> By the 2009 season, a majority of the BHS players and some players from opposing teams joined him on the field for post-game prayer.<sup>245</sup> Kennedy explains, “[a]t some point during the 2009 season, I started giving a short motivational speech prior to some of my post-game prayers. Around the same time, some of my prayers began to be audible.”<sup>246</sup>

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<sup>240</sup> Addendum to EEOC Intake Questionnaire – Joseph A. Kennedy, EEOC Intake Questionnaire, at 1, <https://www.scribd.com/document/293388712/Kennedy-EEOC-Intake-Questionnaire-and-Supporting-Materials-Redacted> (last visited Feb. 17, 2017). Note that we rely heavily on Kennedy’s own EEOC Complaint so as to present the facts most favorable to Kennedy and thus avoid any appearance of bias. Note that for purposes of this article, we give deference to the facts as presented by Coach Kennedy and his legal team, in part because they have made their official record of events available to the public; additionally, given the nature of this study, we want to present facts and legal arguments as neutrally as possible.

<sup>241</sup> Lindsay McCane, *Bremerton Football Coach Joe Kennedy Defies Orders, Prays on Field*, INQUISITOR (Oct. 20, 2015), <http://www.inquisitr.com/2508188/bremerton-football-coach-joe-kennedy-defies-orders-prays-on-field/>.

<sup>242</sup> Addendum to EEOC Intake Questionnaire, *supra* note 240, at 1.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

On September 17, 2015 the Bremerton School District (BSD) superintendent sent a letter to BHS parents and staff providing information on prayer at athletic events.<sup>247</sup> The superintendent noted that the athletic staff could give motivational talks focusing on “appropriate themes such as unity, teamwork, responsibility, safety, and endeavor,”<sup>248</sup> but should not engage in religious expression, including prayer with or in front of students.<sup>249</sup> He reminded the Bremerton community that the students retained their right to free expression so long as it did not interfere with the athletic event and was “entirely and genuinely student-initiated.”<sup>250</sup> He concluded by reminding the community that “[t]he District is bound by . . . federal precedents[,]” and he provided a copy of the school board policy and legal references on faculty and staff prayer.<sup>251</sup>

After receiving this letter, Mr. Kennedy temporarily (from September 17 until October 16, 2015) stopped praying after BHS football games.<sup>252</sup> On October 14, 2015 Mr. Kennedy’s attorneys sent a letter to BSD informing the district that Mr. Kennedy would resume his practice of praying on the fifty-yard line following the October 16 game and demanding the district rescind its September 17 directive.<sup>253</sup> BSD did not respond to Mr. Kennedy’s October 14 demand and he did engage in prayer on the fifty-yard line following the October 16 homecoming football game, in violation of district policy.<sup>254</sup> In a letter dated October 23, 2015 the BSD superintendent specifically noted, “I wish to make it clear that religious exercise that would not be perceived as District endorsement, and which does not otherwise interfere with the performance of job duties, can and will be accommodated.”<sup>255</sup> The letter also included the following

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<sup>247</sup> *Id.* at Exhibit B.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at Exhibit B.

<sup>252</sup> Addendum to EEOC Intake Questionnaire, *supra* note 240.

<sup>253</sup> *Id.* at Exhibit C, 6.

<sup>254</sup> *Id.* at Exhibit D, 1. Pursuant to the response letter sent to Mr. Kennedy on October 23, 2015, Mr. Kennedy went to great effort to publicize his intention to pray on the field following the October 16<sup>th</sup> football game. *Id.*

<sup>255</sup> *Id.* at Exhibit D, 2. The superintendent further suggested that Mr. Kennedy could be accommodated by permitting him a brief period for prayer before or after games in the “school building, athletic facility, or press box”. *Id.* at Exhibit D, 3. There

directive: “While on duty for the District as an assistant coach, you may not engage in demonstrative religious activity, readily observable to (if not intended to be observed by) students and the attending public.”<sup>256</sup> Despite this directive, Mr. Kennedy engaged in public prayer following the varsity football game on October 23 and the junior varsity game on October 26 while on duty as a district employee.<sup>257</sup> Consequently, on October 28, 2015 Mr. Kennedy was placed on paid administrative leave.<sup>258</sup> Subsequently, Mr. Kennedy’s contract was not renewed after he received an unsatisfactory performance review, citing his failure “to follow district policy and his actions [that] demonstrated a lack of cooperation with administration.”<sup>259</sup>

After consulting with attorneys at the Liberty Institute, Mr. Kennedy filed a complaint with the Equal Employment Opportunity Commission (EEOC), claiming BSD’s actions violated his First Amendment right to free exercise of religion.<sup>260</sup> To date, there has been no resolution to the EEOC complaint and Kennedy filed suit against the Bremerton School District on August 9, 2016 claiming that the school district violated his First Amendment rights to free speech and free exercise of religion.<sup>261</sup> Specifically, the complaint alleges that the Bremerton employee directive, instructing employees to abstain from “demonstrative religious activity,” is “baldly unconstitutional.”<sup>262</sup> It goes on to claim:

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appears to be a discrepancy in the timeline between the statement of fact written by Mr. Kennedy’s attorneys for the EEOC complaint and the letters provided as exhibits. In points, the timeline hinges on what time particular letters were sent and received. We have closely read the entire EEOC complaint and all supporting documents. The facts in this section take into account Mr. Kennedy’s timeline of events and conflicting correspondence provided as exhibits to the EEOC complaint. Specifically, Mr. Kennedy claims in his timeline that he requested religious accommodation to engage in prayer before or after the football games sometime between October 16 and 23. In his timeline, he further claims that BSD denied his request for religious accommodation on October 23. However, the letter attached as Exhibit D to his EEOC complaint does not support this series of events, as BSD’s October 23<sup>rd</sup> letter clearly offers Mr. Kennedy a religious accommodation.

<sup>256</sup> *Id.* at Exhibit D, 3.

<sup>257</sup> *Id.* at Exhibit E.

<sup>258</sup> *Id.* at Exhibit E, 1.

<sup>259</sup> *Id.* at Exhibit H, 1-2.

<sup>260</sup> Addendum to EEOC Intake Questionnaire, *supra* note 240.

<sup>261</sup> Complaint at 3, Kennedy v. Bremerton Sch. Dist., No. 3:16-cv-05694 (W.D. Wash. 2016).

<sup>262</sup> *Id.* (internal quotation marks omitted).

On its face, BSD's policy would prohibit all on-duty school employees, while in view of any student or member of the community, from making the sign of the cross, praying towards Mecca, or wearing a yarmulke, headscarf, or a cross. After all, each of those actions is "demonstrative" religious expression and would be interpreted as such.<sup>263</sup>

Finally, Kennedy notes that he brought the "[c]omplaint to vindicate his constitutional and civil rights to act in accordance with his sincerely held religious beliefs by offering a brief, private prayer of thanksgiving at the conclusion of BHS football games."<sup>264</sup> U.S. District Court Judge Ronald Leighton has already declined Kennedy's request for a preliminary injunction which would have required the school district to immediately re-hire Kennedy as an assistant football coach.<sup>265</sup>

Coach Kennedy's case is not an isolated event. For example, in July 2015, the Hall County School District in Gainesville, Georgia settled a lawsuit brought by the American Humanist Association alleging Establishment Clause violations.<sup>266</sup> In part, the complaint alleged that "the School District [had] an ongoing policy, practice, and custom of allowing its faculty, including coaches, to lead and participate in prayers with students during school-sponsored activities."<sup>267</sup> It further alleged that coaches led and participated in prayers with student players at practices and games and integrated Bible verses into team documents and workout logs.<sup>268</sup> While the exact terms of the settlement remain confidential, both the American Humanist Society and Hall County officials indicated that the

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<sup>263</sup> *Id.* Note that lower courts have upheld state statutes prohibiting teachers' religious expression, including religious dress, while teaching. See *United States v. Bd. of Educ. for the Sch. Dist. of Philadelphia*, 911 F.2d 882, 894 (3d Cir. 1990); *Cooper v. Eugene Sch. Dist. No. 4J*, 723 P.2d 298, 313 (Or. 1986).

<sup>264</sup> Complaint, *Kennedy v. Bremerton Sch. Dist.*, *supra* note 261, at 3.

<sup>265</sup> *Judge Won't Issue Injunction in Postgame Prayer Lawsuit*, WASH. TIMES (Sept. 19, 2016), <http://www.washingtontimes.com/news/2016/sep/19/judge-wont-issue-injunction-in-postgame-prayer-law/>.

<sup>266</sup> Tyler Estep, *Lawsuit Challenging Hall County School Prayer Dismissed*, ATLANTA-J. CONST. (July 20, 2015), <http://www.ajc.com/news/news/local/lawsuit-challenging-hall-county-school-prayer-dism/nm3h3/>.

<sup>267</sup> Complaint at 4, *Am. Humanist Ass'n. v. Hall Cty. Sch. Dist.*, No. 2:14-cv-288-WCO (N.D.Ga., 2014).

<sup>268</sup> *Id.* at 5-6.

Hall County School District would issue a memorandum outlining “the standards for religious neutrality” and hold professional development sessions for faculty and staff (including coaches) on their constitutional duties with regards to prayer.<sup>269</sup> Similar cases have arisen across the country in public elementary and secondary schools, and even in some public universities.<sup>270</sup> While the school or school district in each case has been responsive and made efforts to more closely comply with the prayer guidelines set forth in case law (either voluntarily or with some legal pressure), in many cases they have faced pushback from Christian community members, organizations, and in some cases, political figures. As communities are pushed to consider other divisive issues considered by some to be religious or moral in nature, such as the rights of persons identifying as LGBTQ, women’s health care rights, and sex education, the question of prayer in schools continues to be a challenge despite well settled case law. In fact, in some states, legislators have made attempts to circumvent Supreme Court case law by passing pro-prayer legislation. In the next section, we will consider legislative machinations to circumvent legal precedent.

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<sup>269</sup> Press Release, American Humanist Association, Georgia District Settles Football Prayer Lawsuit with Humanist Group (July 20, 2015), <https://americanhumanist.org/news/2015-07-georgia-school-district-settles-football-prayer-laws/>. See also Estep, *supra* note 266, at para. 4.

<sup>270</sup> See, Heather Clark, *Illinois High School Football Team Stands by Coach Told to Stop Leading Prayers*, CHRISTIAN NEWS (Dec. 12, 2015), <http://christiannews.net/2015/12/12/illinois-high-school-football-team-stands-by-coach-told-to-stop-leading-prayers/>; Emma Ginader, *Facebook Post Prompts Ban on Pregame Religious Traditions at Pa. School*, TRAVERSE CITY RECORD EAGLE (Dec. 1, 2016), [http://www.record-eagle.com/cnhi\\_network/facebook-post-prompts-ban-on-pregame-religious-traditions-at-pa/article\\_3f4007d0-1cb2-59a3-b087-5895bda8c108.html](http://www.record-eagle.com/cnhi_network/facebook-post-prompts-ban-on-pregame-religious-traditions-at-pa/article_3f4007d0-1cb2-59a3-b087-5895bda8c108.html); Richard Orbert, *Tempe Prep Football Coach Suspended for Praying with his Team*, THE ARIZONA REPUBLIC (Sept. 19, 2014), <http://www.azcentral.com/story/sports/high-school/2014/09/19/tempe-prep-football-coach-suspended-for-praying-with-team/15907411/>; Samuel Smith, *Ohio Community Defies Atheist Group’s Threat with Public Prayer at High School Football Game*, CHRISTIAN POST (Oct. 11, 2014), <http://www.christianpost.com/news/ohio-community-defies-atheist-groups-threat-with-public-prayer-at-high-school-football-game-127882/>; Press Release, American Civil Liberties Union, ACLU Declares Victory in Ohio School where Football Coach Led Prayers, Read Scripture (Oct. 19, 1999), <https://www.aclu.org/news/aclu-declares-victory-ohio-school-where-football-coach-led-prayers-read-scripture>; Press Release, American Civil Liberties Union, ACLU Will Defend Five Sued for Libel by Football Coach in Ohio School Prayer Case (July 6, 1999), <https://www.aclu.org/news/aclu-will-defend-five-sued-libel-football-coach-ohio-school-prayer-case>.



## V. LEGISLATION: GOVERNMENT'S METHOD TO CIRCUMVENT ESTABLISHED CASE LAW

In spite of the fact that officially sanctioned prayer in public schools was held unconstitutional in 1962,<sup>271</sup> controversy regarding this decision has not waned and efforts by state legislators to mitigate the impact of *Engel* continue. The *Engel* decision proscribed public entities from leading prayer, but did not prohibit individuals from praying silently. Consternation for this decision was swift and resistant. Former Democratic Senator from West Virginia, Robert C. Byrd commented, “[c]an it be that we, too, are ready to embrace the foul concept of atheism? . . . Somebody is tampering with America’s soul. I leave it to you who that somebody is.”<sup>272</sup> Senator Byrd’s comment was Cold War hyperbole as it attempted to link separation of church and state to Soviet hostility toward religion.<sup>273</sup> In actuality, the *Engel* decision increased religious freedom by providing parents complete control over what prayers their children would say and to what religious texts they would be exposed.<sup>274</sup> Nonetheless, legal attempts have been made by state legislatures throughout the Nation to support some form of state-sponsored voluntary prayer or meditation in public schools; these attempts have been largely unsuccessful.<sup>275</sup>

The Supreme Court responded to the prayer and silent meditation issue in 1985. In *Wallace v. Jaffree*,<sup>276</sup> a father of three elementary students challenged the validity of two Alabama statutes: a 1981 statute that allowed a period of silence for “meditation or voluntary prayer,” and a 1982 statute authorizing teachers to lead willing students in a nonsectarian prayer composed by the state legislature.<sup>277</sup> After a lower court found both statutes unconstitutional, the Supreme Court agreed to review only the portion that allowed meditation or voluntary prayer.<sup>278</sup> The Court concluded that the intent of the Alabama

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<sup>271</sup> *Engel v. Vitale*, 370 U.S. 421, 430 (1962).

<sup>272</sup> PFEFFER, *supra* note 30, at 466.

<sup>273</sup> Boston, *supra* note 11, at 121.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> 472 U.S. 38 (1985).

<sup>277</sup> *Id.* at 40.

<sup>278</sup> *Id.* at 41.

legislature was to affirmatively reestablish prayer in the public schools.<sup>279</sup> Inclusion of the words “or voluntary prayer” in the statute indicated that it had been enacted to convey state approval of a religious activity and violated the First Amendment’s Establishment Clause.<sup>280</sup> However, as Essex noted, “student-initiated meditation that is not endorsed by school officials will not likely violate the Establishment Clause so long as the school does not set aside moments or prescribe that students should do so and no disruption to the educational process occurs.”<sup>281</sup>

Even though the *Engel* Court was clear in its prohibition of government-sanctioned prayer, and *Wallace* clarified the limitations for state legislation endorsing officially sanctioned prayer, there remains motivation on the part of many government officials to enact legislation that endorses government-sponsored prayer. As highlighted by Table 1, thirty-eight states have enacted legislation that addresses prayer or silent meditation in public schools.<sup>282</sup> For thirteen states and the District of Columbia, no statute is in effect and the state relies upon federal jurisprudence for guidance.<sup>283</sup> Some of the enacted state legislation needs to be carefully scrutinized because components of the language (or, in many circumstances, the legislative intent) is to promote school-sponsored prayer.

In 2012, Governor Rick Scott of Florida signed Florida Senate Bill 98, which permitted a district school board to adopt a policy allowing an inspirational, religious message to be delivered by students at a student assembly.<sup>284</sup> To date, no school

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<sup>279</sup> *Id.* at 58.

<sup>280</sup> *Id.* at 59–60.

<sup>281</sup> NATHAN L. ESSEX, *SCHOOL LAW AND THE PUBLIC SCHOOLS: A PRACTICAL GUIDE FOR EDUCATIONAL LEADERS* 124 (6th ed. 2016).

<sup>282</sup> See *infra* Appendix A.

<sup>283</sup> *Id.*

<sup>284</sup> S 98, 2012 Leg., Reg. Sess. (Fla. 2012) (allowing the use of a prayer of invocation or benediction at the discretion of the student government as long as students will deliver all prayers, all prayers will be nonsectarian and nonproselytizing in nature, and school personnel will not participate in, or otherwise influence any student in determining whether to use prayers); see also *Adler v. State*, 250 F.3d 1330, 1352 (11th Cir. 2001) (permitting a graduating student, elected by her class, to give a message unrestricted by the school). *But see Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (holding that pregame prayer given by a student at high school football games communicates a government religious endorsement and, as such, violates the Establishment Clause).

boards in Florida have established such a policy. However, SB 98 and other Florida laws make it clear that the Florida legislature supports a religious presence in public schools.<sup>285</sup>

In June 2014, North Carolina enacted Senate Bill 370 commonly known as *Student Prayer and Religious Activity*.<sup>286</sup> The law begins by noting that the U.S. Constitution is its guiding principal and that it does not promote religion or one religion over another.<sup>287</sup> While the law purports to do nothing more than merely clarify what types of behaviors are allowed under the U.S. Constitution, federal law, and state law, it does augment religious activities for students and employees. Most importantly is what Senate Bill 370 identifies as acceptable employee behavior. Whereas, prior legal history restricts attendance at and participation in student-led religious activities, SB 370 states that employees may not only attend student-led prayer activities, but if present, “shall not be disrespectful of the student exercise of such rights and may adopt a respectful posture.”<sup>288</sup> This section of the statute comes precariously close to crossing the Establishment Clause line, and as is noted in *Wallace v. Jaffee*, a court will consider the objective context of alleged Establishment Clause violations.<sup>289</sup> The federal Equal Access Act,<sup>290</sup> recognizes this thin boundary, and states that if a student group is meeting for any religious purpose, the role of the faculty present must be a non-participatory role only, to prevent the perception of

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<sup>285</sup> FLA. STAT. §1003.45 (2017) (“The district school board may install in the public schools in the district a secular program of education including, but not limited to, an objective study of the Bible and of religion . . . [and] may provide that a brief period, not to exceed 2 minutes, for the purpose of silent prayer or meditation be set aside at the start of each school day or each school week in the public schools in the district.”).

<sup>286</sup> N.C. GEN. STAT. §§ 115C-407.30, 407.33 (2015).

<sup>287</sup> *Id.* § 115C-407.32(a).

<sup>288</sup> *Id.* § 115-407.32(c).

<sup>289</sup> See *Jager v. Douglas Cty. Sch. Dist.*, 862 F.2d 824 (11th Cir. 1989) (banning the practice of coaches leading their players in prayer before an athletic event); see also SEE YOU AT THE POLE, <http://www.syatp.com> (last visited Aug. 17, 2016) (students all over the world are encouraged to meet at the flagpole on school campuses prior to classes commencing on the fourth Wednesday in September for a general session of prayer. This activity is specifically student-organized and student-led and is outside of regular school hours. Adult participation is specifically prohibited in its guidelines and adult participation is specifically prohibited. Adults are informed they should not be present.).

<sup>290</sup> 20 U.S.C. § 4071 (2012) (providing that if a school district receives federal money and allows noncurricular activities and club meetings, then it is unlawful to deny students the right to meet for religious activities).

government endorsement of the practice.<sup>291</sup> Under SB 370, state employees must be particularly careful in how their actions could be perceived by an objective observer.

In 1975, Alabama enacted legislation which established a period of quiet reflection in which students may pray or meditate silently.<sup>292</sup> The statute allows public school teachers to lead their class in prayer to “the Lord God.”<sup>293</sup> The constitutionality of this clause is highly suspect. Yet, the concept of praying or meditating silently is similar to language in many other states.<sup>294</sup> Like Alabama, there are states that have enacted laws, which not only permit Christian prayer—they promote it.<sup>295</sup>

In contrast, some states and governmental bodies within the states (such as local boards of education), have begun to retreat from language that permits and promotes prayer in public schools, instead seeking to comply with judicial holdings, by securing individual rights to pray and limiting governmental coercion.<sup>296</sup> For example, the Berkeley County School Board in

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<sup>291</sup> *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 240–41 (1990) (citing 20 U.S.C. § 4071(f)).

<sup>292</sup> ALA. CODE § 16-1-20.4 (2016).

<sup>293</sup> *Id.* § 16-1-20.2.

<sup>294</sup> *See, e.g.*, DEL. CODE ANN. tit. 14 § 4101A (2016) (granting “a brief period of silence, not to exceed 2 minutes in duration, to be used according to the dictates of the individual conscience of each student” during the beginning of the school day); FLA. STAT. ANN. § 1003.45(2) (West 2016) (“The district school board may provide that a brief period, not to exceed 2 minutes, for the purpose of silent prayer or meditation be set aside at the start of each school day or each school week in the public schools in the district”); GA. CODE ANN. § 20-2-1050 (2016) (at the start of each school day, the teacher shall hold a brief period of quiet reflection up to 60 seconds for all students in the classroom); 105 IL. COMP. STAT. 20/1 (2016) (a brief period of silence which “shall not be conducted as a religious exercise but shall be an opportunity for silent prayer or for silent reflection”); IND. CODE § 20-30-5-4.5 (2016) (“[T]he governing body of each school corporation shall establish the daily observance of a moment of silence in each classroom or on school grounds”); KAN. STAT. ANN. § 72-5308a (2016) (“In each public school classroom the teacher in charge may observe a brief period of silence with the participation of all the pupils therein assembled at the opening of every school day”).

<sup>295</sup> *See, e.g.*, KY. REV. STAT. ANN. § 158.175 (West 2016) (“As a continuation of the policy of teaching our country’s history and as an affirmation of the freedom of religion of this country, the board of education of a local school district may authorize the recitation of the Lord’s [P]rayer . . .”).

<sup>296</sup> *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305 (2000) (holding that the Establishment Clause prohibits governmental bodies from taking any action that communicates “endorsement of religion”); *Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987) (students are impressionable, and because their attendance at school is involuntary, courts are “particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools”); *see also Lee v. Weisman*, 505 U.S. 577, 592 (1992) (stating that in the public school context, there are “heightened concerns with protecting freedom of conscience from subtle coercive

South Carolina recently revisited the issue of praying (reciting the Lord's Prayer) before each school board meeting.<sup>297</sup> The Board recognized that reciting the Lord's Prayer prior to a public school board meeting could be deemed unconstitutional.<sup>298</sup> In fact, the chair of the Board, highlighting its options, stated that the Board can continue to recite the Lord's Prayer and "face a long, expensive lawsuit that many others have already fought and lost."<sup>299</sup> However, as in this case, such decisions are not made without considerable push back.<sup>300</sup>

With the support of fifty state legislators, South Carolina Senator Larry Grooms, composed a letter supporting the Berkeley County School Board in opening their meetings with prayer.<sup>301</sup> Employing an untenable position, the legislators cite *Green v. Galloway*<sup>302</sup> and the *Public Prayer and Invocation Act of South Carolina*<sup>303</sup> as evidence that jurisprudence recognizes that prayer before public meetings has been part of the nation's history.<sup>304</sup> This is a deficient summary on the part of advocates

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pressure"); *Engel v. Vitale*, 370 U.S. 421, 425 (1962) (finding that public schools may not require recitation of prayers at beginning of the school day because "it is no part of the business of government to compose official prayers").

<sup>297</sup> Deanna Pan, *Berkley Board No Longer Reciting Lord's Prayer*, THE POST & COURIER (June 28, 2016), <http://www.postandcourier.com/20160628/160629397/berkeley-county-school-board-no-longer-reciting-lords-prayer>.

<sup>298</sup> *Id.*

<sup>299</sup> *Id. Compare* *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 385–86 (6th Cir. 1999) (holding that school board meetings were held on school property, were regularly attended by students, and did not resemble legislative sessions. The court further emphasized that board meetings had a function that was uniquely directed toward students and school matters, making it necessary for students to attend such meetings on many occasions. The court stated that prayer at school board meetings was potentially coercive to students in attendance – prayer has the tendency to endorse Christianity through excessively entangling the board in religious matters), *with* *Greece v. Galloway*, 134 S.Ct. 1811 (2014) (holding the town's practice of opening its town board meetings with a prayer offered by members of the clergy does not violate the Establishment Clause when the practice is consistent with the tradition long followed by Congress and state legislatures, the town does not discriminate against minority faiths in determining who may offer a prayer, and the prayer does not coerce participation from non-adherents).

<sup>300</sup> Pan, *supra* note 297.

<sup>301</sup> Herb Silverman, *Letter: Matter of Prayer*, THE POST & COURIER (July 15, 2016), [http://www.postandcourier.com/opinion/letter-matter-of-prayer/article\\_77d6e246-5d15-53ae-9c87-e2c65da4bd36.html](http://www.postandcourier.com/opinion/letter-matter-of-prayer/article_77d6e246-5d15-53ae-9c87-e2c65da4bd36.html).

<sup>302</sup> 134 S. Ct. 1811 (2014).

<sup>303</sup> S.C. CODE ANN. § 6-1-160 (2016) (allowing invocations to open meetings of deliberative bodies, so as to provide that public prayer means a prayer or invocation; to provide that deliberative public body includes a school district board; to provide that public invocations may not proselytize or and advance any one faith or belief, or coerce participation by observers).

<sup>304</sup> Silverman, *supra* note 301.

of prayer prior to public board meetings. *Marsh v. Chambers*<sup>305</sup> found government funding of chaplains to provide an invocation opening legislative session constitutional because of the unique history of the United States.<sup>306</sup> School board meetings are not congruous to other public board meetings. As the Sixth Circuit Court noted, school board meetings are held on school property, are regularly attended by students, and do not resemble legislative sessions.<sup>307</sup>

## VI. DISCUSSION FOR PRACTICE

Throughout the nation, public school officials are challenged with constitutional law and policy which may be contrary to their personal religious philosophies. In many communities, it is expected that religious doctrine (often Christianity) will be strictly adhered to in public schools despite decades of case law requiring a separation of church and state in public schools. The notion that many of these school officials ignore the legal proscriptions and permit certain activities to occur is concerning. Many school officials face compelling pressure from religious groups who can influence their employment in the district.

In school districts across the county, school officials have ignored constitutional precedent to permit religious activities to occur to conform to the religious beliefs of the majority and local community pressures. Individual school officials can be conflicted between their personal faith and legal precedent; but they must be able to navigate between them to be an effective administrator. Unfortunately, for school officials, either decision meets disapproval from one group or another, which can cause large religious schisms in the community. The discord that develops can permeate the school community causing poor learning environments and potentially impact student achievement.

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<sup>305</sup> 463 U.S. 783 (1983).

<sup>306</sup> *Id.* at 787 (three days before the ratification of the First Amendment in 1791, containing the Establishment Clause, the U.S. Congress authorized the hiring of a chaplain to open the session with prayer).

<sup>307</sup> *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 381 (6th Cir. 1999).

A primary objective for courts is to protect minority viewpoints. The right to individual religious belief is a fundamental concept in constitutional law. The freedom to worship or not worship as one chooses is an inherent right of all citizens in the nation. Yet, as important, is the ability to ensure that minority viewpoints are not trampled, causing religious discrimination in public spaces, including schools. Public schools are representative of the nation's many cultures and religions. Young children and adolescents are impressionable and vulnerable, and the courts, through their rulings, have tried to protect them from being influenced by religious activities in public school. Students, on the whole, want to participate in school activities and want to be accepted in the macro- and micro-communities within the school. Employees acting as agents of the public school bear the imprimatur of the school, and must realize that they directly and/or indirectly influence students.

Restricting religious expression of public school employees includes curricular activities and co-curricular activities. Central to this article is the issue of athletic coaches engaging in religious activities in the presence of student-athletes. Jurisprudence has been established that chills the right of coaches to engage in prayer with student-athletes before or after a contest. In addition, coaches who wish to express religious moments prior to, during, or after athletic contests need to engage in these activities whereby they do not, in perception or reality, bear the imprimatur of the school. Kneeling to pray on the field or court immediately following an athletic contest should be perceived as the school endorsing the activity, which is in violation of the Establishment Clause.

## APPENDIX 1

### INDIVIDUAL STATE LEGISLATION PERTAINING TO PRAYER IN PUBLIC SCHOOL

State	Applicable State Code	What is Allowed?
Alabama	ALA. CODE § 16-1-20 & 16-1-20.3	1.) Period of silence not to exceed one minute in duration, shall be observed for mediation or voluntary prayer, and during any such period no other activities shall be engaged in 2.) Alabama statute says public school teachers may lead their class in prayer to the "Lord God" but at this time its constitutionality is questionable.
Arkansas	No Statutory Provision	Silent and voluntary prayer (in accordance with federal constitutional law).
California	No Statutory Provision	While many state laws mandate a period of silence in which students and faculty may pray or meditate silently, California schools may honor this custom voluntarily.
Colorado	No Statutory Provision	No Statutory Provision
Connecticut	CONN. GEN. STAT. § 10-16(a)	Silent meditation.
Delaware	DEL. CODE ANN. tit. 14 § 4101, 4101A(b)	A brief period of silence not to exceed two minutes to be used according to



		dictates of individual student's conscience. First Amendment read to students on first day.
District of Columbia	No Statutory Provision	Federal law holds that school staff may not lead students in prayer or in any way "establish" or promote any religion in a public school. Although many schools have implemented a minute of silence at the start of each school day.
Florida	FLA. STAT. ANN § 1003.45(2)	Individual school districts may decide whether to allow brief periods not to exceed two minutes, for the purpose of silent prayer or meditation.
Georgia	GA. CODE ANN. § 20-2-1050	At the start of each school day, the teacher shall hold a brief period of quiet reflection (up to 60 seconds) for all students in the classroom.
Hawaii	No Statutory Provision	Hawaii's religion in public school policy seems clear. The policy prohibits any employee of the Department of Education from giving any religious instruction shall in any public school during the regular school day, and states, "Prayer and other religious observances shall not be organized or

		sponsored by schools and the administrative support units of the public school system, especially where students are in attendance.
Idaho	No Statutory Provision	Many school districts in Idaho mandate a regular minute of silence each morning. The Idaho Constitution echoes the religious protections provided by federal law.
Illinois	105 ILL. COMP. STAT. 20/1	Brief period of silence, which shall not be conducted as a religious exercise but shall be an opportunity for silent prayer or for silent reflection.
Indiana	IND. CODE § 20-30-5-4.5	Brief period of silent prayer or meditation. Schools and employees may not cause or encourage attendance or attach opprobrium to these observances
Iowa	No Statutory Provision	Schools must provide religious accommodations for students upon request.
Kansas	KAN. STAT. ANN. § 72-5308a	Schools must provide religious accommodations for students upon request.
Kentucky	KY. REV. STAT. ANN. § 158.175	1.) Recitation of Lord's Prayer to teach our country's history and as an affirmation of the freedom of religion in this country, if authorized by local

		<p>school district; pupil's participation is voluntary.</p> <p>2.) At the commencement of the first class of each day in all public schools, the teacher in charge of the room may announce that a moment of silence or reflection not to exceed one (1) minute in duration shall be observed.</p>
Louisiana	LA. STAT. ANN. § 17:2115 to 2115.11	<p>Each parish or city public school board must allow (but not force) schools to start the school day with a brief time of silent meditation or prayer. The law explicitly proclaims this "shall not be intended nor interpreted as state support of or interference with religion, nor shall such time allowance be promoted as a religious exercise and the implementation of this Section shall remain neutral toward religion."</p>
Maine	ME. STAT. tit. 20-A, § 4805	<p>Period of silence shall be observed for reflection or meditation.</p>
Maryland	MD. CODE ANN. EDUC. §7-104	<p>Meditate silently for approximately one minute; student or teacher may read the holy scriptures or pray.</p>

Massachusetts	MASS. GEN. LAWS ch. 71 § 1(A)(B)	1.) Provides for a period of silence not exceed on minute. The moment of reflection occurs at the start of each school day for every grade of all public schools. During the period of silence the classroom cannot engage in other activities. 2.) Permits the school committee of any city or town to allow any student attending its public schools to voluntarily pray if the child's parent has given permission. If allowed, the praying must occur before the start of the daily school session.
Michigan	MICH. COMP. LAWS § 380.1565	Opportunity to observe time in silent meditation.
Minnesota	No Statutory Provision	Silent and voluntary prayer (in accordance with federal constitutional law).
Mississippi	MISS. CODE ANN. § 37-13-4.1	Student-initiated voluntary prayer permitted on school property.
Missouri	MO. CONST. art. 1 § 5	Voluntary, private, and non-disruptive prayer.
Montana	MONT. CODE ANN. § 20-7-112	A publication of a sectarian or denominational character may not be distributed in any school. Instruction may not be given advocating sectarian or

		denominational doctrines. Any teacher, principal, or superintendent may open the school day with a prayer.
Nebraska	NEB. CONST. art. 1, § 4	Silent and voluntary prayer (in accordance with federal constitutional law). Reading in public schools of passages from the Bible, singing of hymns, and offering prayer, in accordance with the doctrines of sectarian churches, is forbidden by the Constitution.
Nevada	NEV. REV. STAT. § 388.075	Silent period for voluntary individual meditation, prayer, or reflection.
New Hampshire	N.H. REV. STAT. ANN. § 189:1-b	On each school day, before classes of instruction officially convene in the public schools of this sovereign state, a period of not more than five minutes shall be available to those who wish to exercise their right to freedom of assembly and participate voluntarily in the free exercise of religion. There shall be no teacher supervision of this free exercise of religion, nor shall there be any prescribed or proscribed form or content of prayer.

New Jersey	No statutory provision	Silent and voluntary prayer (in accordance with federal constitutional law).
New Mexico	N.M. CONST. art. 2, § 11	Public schools in New Mexico must comply with federal laws and cases that provide religious accommodations for students.
New York	N.Y. EDUC. LAW § 3029-a	Brief period of silent meditation which may be opportunity for silent meditation on a religious theme or silent reflection.
North Carolina	N.C. GEN. STAT. § 115C-47(29)	Period of silence not to exceed one minute in duration shall be observed and silence maintained; prayer by individuals on a voluntary basis allowed.
North Dakota	N.D. CENT. CODE § 15.1-19-03.1	<p>1.) A student may voluntarily pray aloud or participate in religious speech at any time before, during, or after the school day to the same extent a student may voluntarily speak or participate in secular speech.</p> <p>2.) A school board, school administrator, or teacher may not impose any restriction on the time, place, manner, or location of any student-initiated religious speech or prayer which exceeds the</p>

		restriction imposed on students' secular speech. 3.) A school board may, by resolution, allow a classroom teacher to impose up to one minute of silence for meditation, reflection or prayer at the beginning of each school day.
Ohio	OHIO REV. CODE ANN. § 3313.601	Reasonable periods of time for programs or meditation upon a moral, philosophical or patriotic, or patriotic theme.
Oklahoma	OKLA. STAT. tit. 70, § 11-101.1	Oklahoma public schools must permit those students and teachers who wish to participate in voluntary prayer to do so.
Oregon	No Statutory Provision	The state relies on guidance from federal law. Students who wish to pray may do so, in accordance with their constitutional rights, but only if it does not disrupt class or the learning process. Also, teacher may include religion in their curriculum as long as its sole purpose is for education.
Pennsylvania	24 PA. STAT. AND CONS. STAT. ANN. § 15-1516.1	Brief period of silent prayer or meditation, which is not a religious exercise but an opportunity for prayer or

		reflection as child is disposed.
Rhode Island	16 R.I. GEN. LAWS § 16-12-3.1	At opening of every school day in all grades in all public schools the teacher in charge of the room in which each class is held shall announce that a period of silence not to exceed one minute in duration shall be observed for meditation, and during this period silence shall be maintained and no activities engaged in.
South Carolina	S.C. CODE ANN. § 59-1-443	All schools shall provide for a minute of mandatory silence at the beginning of each school day.
South Dakota	No Statutory Provision	Silent and voluntary prayer (in accordance with federal constitutional law).
Tennessee	TENN. CODE ANN. § 49-6-1005	Mandatory period of silence of approximately one minute; voluntary student participation or initiation of prayer permitted.
Texas	TEX. EDUC. CODE ANN. § 25.901	Student has absolute right to individually, voluntarily, and silently pray or meditate in a non-disruptive manner.
Utah	UTAH CODE ANN. § 53A-11-901.5	Teacher may provide for the observance of a period of silence



Vermont	No Statutory Provision	Silent and voluntary prayer (in accordance with federal constitutional law).
Virginia	VA. CODE ANN. § 22.1-203	School may establish the daily observance of one minute of silence; students may engage in voluntary student-initiated prayer.
Washington	No Statutory Provision	Silent and voluntary prayer (in accordance with federal constitutional law).
West Virginia	WEST. VA. CONST. art III, §15(a)	The West Virginia Constitution requires public schools to provide a designated brief time at the beginning of the school day for students to exercise their right to personal and private contemplation, meditation, or prayer. Students can neither be denied the right to voluntarily prayer, nor be required or encouraged to participate in any type of meditation or prayer as part of the school curriculum.
Wisconsin	No Statutory Provision	Silent and voluntary prayer (in accordance with federal constitutional law).
Wyoming	No Statutory Provision	Student-led prayers, religious student groups, and religious exercise absent school-direction.

# STUDENT JOURNALISTS V. SCHOOL ADMINISTRATORS: A STRUCTURED WAY TO RESOLVE EDITORIAL DISPUTES

Jonathan Peters, J.D., Ph.D.\* & Breanna McCarthy, J.D.\*\*

## INTRODUCTION

Public high schools for many decades have had a fitful relationship with free expression. One district expelled students who refused to salute the American flag at school.<sup>1</sup> Another suspended students who wore armbands at school to protest the Vietnam War.<sup>2</sup> One suspended a student who made sexual references in a school speech.<sup>3</sup> Another suspended a student who displayed, at a school-sanctioned event, a banner supposedly promoting the use of illegal drugs.<sup>4</sup> Many have removed books from their libraries and curricular reading lists.<sup>5</sup> Many have censored articles and advertisements set to appear in student publications,<sup>6</sup> and some have suspended students who used their personal, off-campus Web sites or social media platforms to

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<sup>1</sup> *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 628–29 (1943).

<sup>2</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

<sup>3</sup> *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 678–79 (1986).

<sup>4</sup> *Morse v. Frederick*, 551 U.S. 393, 396 (2007).

<sup>5</sup> *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 856 (1982); see also Jonathan Peters, *Book Bans Are About Policing Ideas*, COLUMBUS DISPATCH (Sept. 30, 2010),

<http://www.dispatch.com/content/stories/editorials/2010/09/30/book-bans-are-about-policing-ideas.html>.

<sup>6</sup> *Hazelwood Sch. Dist. et al. v. Kuhlmeier*, 484 U.S. 260, 264 (1988).

criticize teachers or administrators.<sup>7</sup> Some have even forbade students from wearing “I <3 Boobies” bracelets at school to raise awareness of breast cancer.<sup>8</sup>

The courts have been active in this area, and today it is settled law that a public-school student generally does not have the same free-expression rights as an adult in a non-school setting.<sup>9</sup> The reasons are threefold. First, public schools have an obligation to create an environment conducive to learning and relatively free of disruptions.<sup>10</sup> Second, they have an obligation to maintain a curriculum that is appropriate for the ages and maturity levels of their students.<sup>11</sup> Third, they have an obligation to protect the rights and interests of all students while at school.<sup>12</sup> Sometimes those obligations cause teachers or administrators to restrict student expression.

Every year brings new disputes about schools and the student press.<sup>13</sup> Indeed, tensions between high school papers and principals probably date back to the first time a student journalist suggested in a story that Central High, U.S.A., was not the very best school anywhere.<sup>14</sup> Most student media “exist at the mercy of the school boards that fund them, just as most grown-up newspapers exist at the mercy of the publishers who own them.”<sup>15</sup> They all live, in other words, with somebody looking over their shoulders, and for high school journalists that reality stems from the 1988 case *Hazelwood v. Kuhlmeier*.<sup>16</sup>

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<sup>7</sup> *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011); *see also Snyder v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2014 BL 87168 (M.D. Pa. Mar. 31, 2014).

<sup>8</sup> *See B.H. v. Easton Area Sch. Dist.*, 725 F.3d 293 (3d Cir. 2013) (en banc); *J.A. v. Fort Wayne Cmty. Sch.*, 2013 U.S. Dist. LEXIS 117667, at \*1 (D. Iowa 2013).

<sup>9</sup> *Bethel*, 478 U.S. at 683.

<sup>10</sup> SUSAN DENTE ROSS, *DECIDING COMMUNICATION LAW* 13.2 (2004).

<sup>11</sup> *Id.* at 13.1.

<sup>12</sup> *Id.*

<sup>13</sup> *See, e.g.,* Jaclyn Hirsch, *High School Censorship*, STUDENT PRESS LAW CTR. REPORT, Spring 2009, at 11, *available at*

[http://media.spl.s3.amazonaws.com/408\\_reportspring09o.pdf](http://media.spl.s3.amazonaws.com/408_reportspring09o.pdf); Jimmie Collins, *High School Censorship*, STUDENT PRESS LAW CTR. REPORT, Fall 2008, at 4, *available at* [http://media.spl.s3.amazonaws.com/413\\_fallreport2008o.pdf](http://media.spl.s3.amazonaws.com/413_fallreport2008o.pdf); Erica Hudock, *High School Censorship*, STUDENT PRESS LAW CTR. REPORT, Spring 2007, at 6, *available at* [http://media.spl.s3.amazonaws.com/412\\_splcreportspring2007o.pdf](http://media.spl.s3.amazonaws.com/412_splcreportspring2007o.pdf).

<sup>14</sup> Judy Mann, *Principal as Publisher*, WASH. POST, Jan. 15, 1988, at C3.

<sup>15</sup> *Id.*

<sup>16</sup> 484 U.S. 260 (1988).

In that case, the Supreme Court held that the content of a public school newspaper produced as part of a class—in the absence of a policy or practice establishing it as a forum for student expression—can be regulated by administrators if the regulation is viewpoint-neutral and the administrators show a reasonable educational justification for it.<sup>17</sup> Schools since then have used *Hazelwood* to legitimize all manner of speech and press restrictions, and calls for help from student journalists and their advisers have been on the rise.<sup>18</sup> In the ten years following that decision, for example, the Student Press Law Center (SPLC), a nonprofit organization that offers legal assistance to student journalists, saw its help requests increase by roughly 300 percent.<sup>19</sup>

As a general matter student journalists, unless they secure the support of an organization like the SPLC, do not have the resources to take editorial disputes to court.<sup>20</sup> It even appears that *Hazelwood* has had a deterrent effect in that regard, discouraging student journalists from pursuing legal action to defend their rights.<sup>21</sup> For those reasons, some student journalists try to resolve editorial disputes informally, first meeting with a principal and then, if necessary, a superintendent or school board. Other student journalists contact members of the local media to try to force administrators to defend publicly efforts to restrict the student press, and still others find or develop their own independent means of publishing. The results have been as varied as the approaches—often generating more heat than light, so to speak. Professional customs and values can create language barriers that fuel misunderstandings among student journalists and school administrators, and even lead to protests, threats, and disciplinary actions.

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<sup>17</sup> *Id.* at 272–73.

<sup>18</sup> Mark Goodman, *Freedom of the Press Stops at the Schoolhouse Gate*, NIEMAN REPORTS (Spring 2001), <http://www.nieman.harvard.edu/reports/article/101739/Freedom-of-the-Press-Stops-at-the-Schoolhouse-Gate.aspx>.

<sup>19</sup> *Id.*

<sup>20</sup> WAYNE OVERBECK, *MAJOR PRINCIPLES OF MEDIA LAW* 585 (1st ed. 2009).

<sup>21</sup> Richard Just, *Unmuzzling High School Journalists*, WASH. POST, Jan. 12, 2008, at A17; Angela Riley, *20 Years Later: Teachers Reflect on Supreme Court's Hazelwood School District v. Kuhlmeier Ruling*, ST. LOUIS DAILY RECORD (Oct. 6, 2008), <https://www.highbeam.com/doc/1P2-19281151.html>.

That is problematic because disputes in the school environment have the potential to be highly disruptive and harmful to students' academic performance and mental health. For those and other reasons, this Article proposes a structured process for school administrators and student journalists to resolve editorial disputes<sup>22</sup>—mediation. Part I explores the facts, holding, and implications of *Hazelwood* to lay the foundation for understanding the context in which student-administrator editorial disputes typically arise. Part II profiles three recent editorial disputes involving student papers at public high schools, highlighting how the student journalists tried to resolve each one. We selected disputes about stories on sexual topics (i.e., pregnancy, abortion, and contraception), because those were the topics at the heart of *Hazelwood*. For the same reason, we focused on public high schools rather than private ones.<sup>23</sup> Part III shows that the disputes were resolved using an unstructured process and that the disputes were less about the accuracy of the content and more about perceptions of its decency, taste, or age-appropriateness. Ultimately, we propose mediation to resolve editorial disputes arising between school administrators and student journalists. Part IV concludes that the Dispute Systems Design process, which seeks to develop dispute-resolution methods for similar and repeated conflicts, would empower student journalists, school administrators, and other stakeholders to develop an effective mediation program.

### I. *HAZELWOOD* REDEFINED THE STANDARD

*Hazelwood* upheld the authority of administrators at a suburban St. Louis high school to censor stories in its school-sponsored student newspaper about teen pregnancy and the

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<sup>22</sup> We define “editorial dispute” to mean a conflict, controversy, or difference of opinion among student journalists, teachers, or administrators regarding the gathering, production, or distribution of content by a student news organization.

<sup>23</sup> We focused on public schools, too, because the state-action doctrine generally requires only government actors, like public schools and unlike private schools, to comply with the First Amendment. See Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: “State Action,” Equal Protection, and California’s Proposition 13*, 81 HARV. L. REV. 69 (1967).

effects of parental divorce on children.<sup>24</sup> The respondents were three former Hazelwood East students who had been staff members of *Spectrum*, the student paper.<sup>25</sup> Written and edited by the Journalism II class, and school funded, it published one issue every three weeks or so that year, and “[m]ore than 4,500 copies were distributed to students, school personnel, and members of the community.”<sup>26</sup> The required textbook was approved by the school board and included discussions about media law and reporting on sensitive issues.<sup>27</sup> Among the topics covered by *Spectrum* since 1976 were teen dating, teen drug and alcohol use, teen marriage and pregnancy, and school desegregation.<sup>28</sup>

Customarily, the journalism teacher would submit page proofs of every issue, before publication, to the principal.<sup>29</sup> When he delivered the May 13, 1983 issue, the principal objected to two articles: one described the pregnancy experiences of three students, while the other discussed the impact of parental divorce on students.<sup>30</sup> The principal criticized the pregnancy article because he feared that the students, identified by pseudonyms, would be identifiable—and he felt that the subject was inappropriate for some students.<sup>31</sup> Meanwhile, he criticized the divorce story because it named a student for attribution who had said that her father was not spending enough time with her mother and sister, that he was always out of town or with his friends, and that he argued with their mother.<sup>32</sup> The principal believed the parents should have had the chance to respond and perhaps to consent to their publication; he did not know that the student’s name had been cut from the final version of the article.<sup>33</sup>

Concluding that the changes could not be made before the press run, which also could not be delayed, the principal directed

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<sup>24</sup> *Hazelwood*, 484 U.S. at 263.

<sup>25</sup> *Id.* at 262.

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

<sup>27</sup> *Id.* at 262–63.

<sup>28</sup> *Kuhlmeier v. Hazelwood Sch. Dist.*, 607 F. Supp. 1450, 1453 (E.D. Mo. 1985).

<sup>29</sup> *Hazelwood*, 260 U.S. at 263.

<sup>30</sup> *Id.*

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

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

the journalism teacher not to publish those articles.<sup>34</sup> In response, the student journalists filed a lawsuit in federal court seeking a declaration that their First Amendment rights had been violated, as well as injunctive relief and money damages.<sup>35</sup> The court ruled against the student journalists.<sup>36</sup> However, the U.S. Court of Appeals for the Eighth Circuit reversed,<sup>37</sup> and the Supreme Court agreed to hear the case.<sup>38</sup> The justices ruled in the school's favor, by a 5-3 vote.

They began by reaffirming that students in public schools do not “shed their . . . freedom of speech or expression at the schoolhouse gate,”<sup>39</sup> but that First Amendment rights of students “are not automatically coextensive with [those] of adults in other settings.”<sup>40</sup> From that premise the Court used forum analysis, which balances the government's interest in regulating the use of its property with the speaker's interest in expression,<sup>41</sup> to determine if the censorship of *Spectrum* was constitutional. Reasoning that the paper was the forum to be examined, not the school, the Court found that *Spectrum* was neither a public forum nor entitled to the First Amendment protections of one.<sup>42</sup> It also noted that the newspaper was subject to the discretion of school administrators because its production was part of the school curriculum.<sup>43</sup>

The Court distinguished *Tinker*, which held generally that students may be punished for their speech only when it materially and substantially disrupted school activities.<sup>44</sup> The Court said there is a difference between student speech that occurs on campus and school-sponsored speech.<sup>45</sup> *Spectrum* was part of the curriculum, thus entitling the school, in its capacity as

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<sup>34</sup> *Id.* at 263–64.

<sup>35</sup> *Kuhlmeier v. Hazelwood Sch. Dist.*, 607 F. Supp. 1450 (E.D. Mo. 1985).

<sup>36</sup> *Id.* at 1467.

<sup>37</sup> *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d. 1368 (8th Cir. 1986).

<sup>38</sup> *Hazelwood*, 484 U.S. at 260.

<sup>39</sup> *Id.* at 266 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. at 503, 506 (1969)).

<sup>40</sup> *Id.* at 266 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. at 682 (1986)).

<sup>41</sup> *Id.* at 267.

<sup>42</sup> *Id.* at 267–71.

<sup>43</sup> *Id.* at 268–69.

<sup>44</sup> *Id.* at 269 n.2.

<sup>45</sup> *Id.* at 270.

publisher, to regulate or otherwise “disassociate itself” from the speech.<sup>46</sup> “[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”<sup>47</sup> One such concern was the exposure of students to “material that may be inappropriate for their level of maturity.”<sup>48</sup>

Accordingly, the Court noted that the students featured in the pregnancy article could be identified, invading the privacy interests of their boyfriends and parents, and that the father in the divorce article could have been defamed because he did not get a chance to defend himself.<sup>49</sup> In other words, the Court said, the principal reasonably could have concluded that the students who produced those articles had not sufficiently mastered parts of

the Journalism II curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals whose most intimate concerns are . . . revealed in the newspaper, and the . . . ‘restrictions imposed upon journalists within [a] school community’ that includes adolescent subjects and readers.<sup>50</sup>

For those reasons, the Court ruled against the student journalists and reversed the Eighth Circuit.

On the one hand, *Hazelwood* stood in contrast to two decades of court decisions handed down nationwide that granted student journalists extensive expressive rights.<sup>51</sup> And, as noted above, the case has been used since then to justify all manner of censorship in schools, and there is evidence that it has both chilled the student press and intensified administrative efforts to

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<sup>46</sup> *Id.* at 266–67 (quoting *Bethel Sch. Dist. No. 403*, 478 U.S. 675, 685–686 (1986)).

<sup>47</sup> *Id.* at 272–73.

<sup>48</sup> *Id.* at 271.

<sup>49</sup> *Id.* at 274–75.

<sup>50</sup> *Id.* at 276.

<sup>51</sup> *Hazelwood School District v. Kuhlmeier: A Complete Guide to the Supreme Court Decision*, STUDENT PRESS LAW CTR. (2008), <http://www.splc.org/pdf/HazelwoodGuide.pdf>.



control the content of student papers.<sup>52</sup> On the other hand, surveys conducted before and after *Hazelwood* have suggested that the majority of school newspapers have long and broadly been subject to censorship.<sup>53</sup> What is common across these surveys is that they “paint a clear picture of a high school student press that is not free”; that is controlled by advisers, principals and school boards; and that considers prior review to be the norm.<sup>54</sup> With those things in mind, the next part of this article examines how student journalists in recent years have attempted to resolve editorial disputes that have arisen in that environment.

## II. PROFILES OF HIGH SCHOOL CENSORSHIP

Student journalists approach editorial disputes in various ways. At one school, a student journalist may reach out to the local media for support, at another a student journalist may meet informally with a principal to argue against censorship, and at another a student journalist may create an independent news outlet to publish the objectionable content. Aside from pursuing litigation, there is not a generally adopted structured process to resolve such disputes, and the following three cases exemplify the variations on the approaches. As noted earlier, we selected disputes on sexual topics (i.e., pregnancy, abortion, and contraception), because those topics were at the heart of *Hazelwood*; and for the same reason, we focused on public high schools rather than private ones.

### A. *Statesman, Adlai E. Stevenson High School (Lincolnshire, Illinois)*

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<sup>52</sup> See Carol S. Lomicky, *Analysis of High School Newspaper Editorials Before and After Hazelwood School District v. Kuhlmeier: A Content Analysis Case Study*, 29 J.L. & EDUC. 463 (2000).

<sup>53</sup> Lillian Lodge Kopenhaver & J. William Click, *High School Newspapers Still Censored Thirty Years After Tinker*, 78 JOURNALISM & MASS COMM. Q. 321, 338 (2002); J. William Click & Lillian Lodge Kopenhaver, *Principals Favor Discipline More Than a Free Press*, 43 JOURNALISM EDUCATOR 48, 51 (1998); Thomas V. Dickson, *Attitudes of High School Principals About Press Freedom After Hazelwood*, 66 JOURNALISM Q. 169, 172 (1989); Thomas V. Dickson, *Self-Censorship and Freedom of the Public High School Press*, 49 JOURNALISM EDUCATOR 59, 62 (1994).

<sup>54</sup> Kopenhaver & Click, *High School Newspapers*, *supra* note 53, at 335.

The *Statesman* in January 2009 was an autonomous student newspaper not subject to prior review.<sup>55</sup> Just a few years earlier, it had won the National Scholastic Press Association's "Pacemaker Award," the Pulitzer Prize of high school journalism, and it had taken the top two spots in the Illinois Journalism Education Association's "Journalist of the Year" competition.<sup>56</sup> It was quickly becoming the new gold standard of high school papers nationwide. By February 2009, however, district administrators had implemented a strict policy requiring the director of the school's communication and arts program to review every *Statesman* issue before going to print.<sup>57</sup>

So, what happened?

The *Statesman* in its January 30, 2009, issue featured a series of articles and sidebars about "hooking up" and the teen dating scene.<sup>58</sup> The articles included student, teacher, and professional perspectives on "hooking up" and the dynamics of post-high school relationships.<sup>59</sup> School officials said the articles were irresponsible, unbalanced, and lacking news value—and so began a long fight over the *Statesman's* content.<sup>60</sup>

The following fall, after the prior review policy was implemented, administrators refused to print the November 20, 2009, issue, objecting to (1) an article about underage drinking, intended for the front page, and (2) an article about teen pregnancy.<sup>61</sup> The administrators disapproved of the use of anonymous sources in the drinking story, which reported on "illegal activity," they said, and thus "was not fit for print."<sup>62</sup> *Statesman* staff members protested by pretending to distribute

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<sup>55</sup> Nicole Ocran, *Their Last Resort*, STUDENT PRESS LAW CTR. (May 1, 2010), <http://www.splc.org/article/2010/05/their-last-resort>.

<sup>56</sup> *The Statesman's Loss*, CHI. TRIB. (Apr. 26, 2009), <http://www.chicagotribune.com/news/opinion/chi-0406edit2apr06-story.html>.

<sup>57</sup> Jaclyn Hirsch, *Stevenson High School Adviser Resigns Position After Prior Review Policy Enforced*, SPLC NEWS FLASH (Apr. 21, 2009), <http://www.splc.org/article/2009/04/stevenson-high-school-adviser-resigns-position-after-prior-review-policy-enforced>.

<sup>58</sup> Ocran, *supra* note 55.

<sup>59</sup> See *The Statesman's Loss*, *supra* note 56.

<sup>60</sup> *Id.*

<sup>61</sup> *Muzzling Students*, CHI. TRIB. (Nov. 26, 2009), [http://articles.chicagotribune.com/2009-11-26/news/0911250926\\_1\\_student-journalists-administrators-story](http://articles.chicagotribune.com/2009-11-26/news/0911250926_1_student-journalists-administrators-story).

<sup>62</sup> *Id.*

nonexistent newspapers to students as they entered the school.<sup>63</sup> When the issue finally went to press, it was “five days late and four pages light,” including neither the drinking article nor the pregnancy one.<sup>64</sup> The *Statesman* had wanted to leave the front page blank, except for a note explaining that the article for that page had been cut, but administrators would not allow it.<sup>65</sup>

One month later, administrators refused to print an article in the December 18, 2009, issue about prescription drugs that included a personal account of a student’s experience with birth control.<sup>66</sup> This time, the *Statesman* did run a blank page in place of the article, with a note explaining the newspaper’s decision.<sup>67</sup> The editors then obtained legal counsel and met with administrators to discuss the prior review policy, and later took their concerns to the school board.<sup>68</sup> At a board meeting in December 2009, the *Statesman*’s editor-in-chief said her staff felt “bullied and helpless, intimidated and unimportant” because of its dispute with school officials.<sup>69</sup> “The worst part about it all is that (the censorship) is not just unlawful—it’s bad teaching and bad journalism,” she said.<sup>70</sup> “The fact that we are students does not deprive us of our rights as journalists.”<sup>71</sup> The board chairman issued a statement to emphasize that the “recent controversies are not, fundamentally, ones of ‘censorship,’ but of helping our students to learn appropriate curricular and journalistic standards.”<sup>72</sup>

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<sup>63</sup> Ocran, *supra* note 55.

<sup>64</sup> *Muzzling Students*, *supra* note 61.

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

<sup>66</sup> Ocran, *supra* note 55.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*; see also Russell Lissau, *7 Statesman Editors Leave Stevenson High Student Newspaper*, DAILY HERALD (Dec. 18, 2009), <http://www.dailyherald.com/article/20100120/news/301209749/>.

<sup>69</sup> Lisa Black, *Stevenson High School newspaper: After Latest Article is Blocked, Staff Takes its Case to School Board*, CHI. TRIB. (Dec. 18, 2009), [http://articles.chicagotribune.com/2009-12-18/news/chi-stevenson-newspaper-flapdec18\\_1\\_smoking-by-honor-students-student-journalists-board-president-bruce-lubin](http://articles.chicagotribune.com/2009-12-18/news/chi-stevenson-newspaper-flapdec18_1_smoking-by-honor-students-student-journalists-board-president-bruce-lubin).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *School Board Statement on Statesman*, ADLAI E. STEVENSON HIGH SCH. DIST. 125 (Dec. 17, 2009), [http://web.archive.org/web/20141120103827/http://www.d125.org/school\\_board\\_statement\\_on\\_statesman.aspx](http://web.archive.org/web/20141120103827/http://www.d125.org/school_board_statement_on_statesman.aspx).

Shortly thereafter, the *Statesman's* top editors and the majority of its staff members resigned and dropped out of the journalism class, one of them commenting, "I'd rather practice no journalism than journalism that doesn't follow with my ethics and what I believe in."<sup>73</sup> Many of those students went on that spring to launch their own news website with the help of *ChicagoNow*, a subsidiary of what was then the Chicago Tribune Media Group.<sup>74</sup> As for the *Statesman*, four students continued to produce it through the end of the 2009-2010 school year, after administrators clarified what was expected of them and how they would be graded.<sup>75</sup> The editor-in-chief was responsible for advertising, page design, and final editing, while each staff member was responsible for writing content and copyediting.<sup>76</sup> That heavy load caused at least one delay in publication and the reduction of the paper from sixteen to twelve pages.<sup>77</sup>

*B. Electron, Franklin Community High School (Franklin, Indiana)*

The *Electron*, in January 2008, published a two-page spread about sex, running this note at the top of the front page:

Although sex is a common theme among teenagers, the *Electron* senses some students may not have the facts straight. We recognize that there are sexually active teens, and while we are not encouraging the behavior, we are emphasizing that those who make these choices must make them responsibly and with ample knowledge.<sup>78</sup>

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<sup>73</sup> Dan Simmons & Lisa Black, *Top Editors Resign from Stevenson High Newspaper*, CHI. TRIB. (Jan. 21, 2010), <http://www.chicagotribune.com/news/ct-met-0121-stevenson-paper-20100120-story.html>.

<sup>74</sup> Ocran, *supra* note 55, at 7.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Lisa Black, *What is Next for Stevenson High School Newspaper?*, CHI. TRIB. (Nov. 2, 2014), [http://articles.chicagotribune.com/2010-02-10/news/ct-x-n-0210-stevenson-newspaper-20100208\\_1\\_supreme-court-case-hazelwood-story-on-prescription-drug-legitimate-pedagogical-concerns](http://articles.chicagotribune.com/2010-02-10/news/ct-x-n-0210-stevenson-newspaper-20100208_1_supreme-court-case-hazelwood-story-on-prescription-drug-legitimate-pedagogical-concerns).

<sup>78</sup> *Feature*, ELECTRON, Jan. 16, 2008, at 8.

Below that note were myths and facts about birth control, sexually transmitted diseases, and emergency contraceptives; information about condom safety; and an article about human papillomavirus, which can cause cancer.<sup>79</sup> The school principal, conceding that the information was accurate, took issue with the balance of the reporting: the omission of abstinence.<sup>80</sup> He notified the *Electron* that he planned to develop a prior review process that would enable him to edit articles or remove them.<sup>81</sup> Up to that point, the paper had been autonomous, and the editors, as a courtesy, would notify the principal of stories they planned to publish that might be controversial.<sup>82</sup>

*Electron* editors told the principal they were not comfortable with prior review and asked to meet with him.<sup>83</sup> The purpose of the meeting, mediated by Indiana High School Press Association director Diana Hadley, was to discuss how they could work together in the future.<sup>84</sup> For his part, the principal wondered whether a faculty member, perhaps the journalism teacher, could take a more active role in the newspaper's publishing process, to ensure that if "there is a controversial issue [in a story], then there are certain things that are taken into consideration."<sup>85</sup> It was becoming clear that the principal wanted to settle the matter informally and no longer felt the need to involve the school board, although one of the editors did address the board to underscore that the *Electron* always had been student-run.<sup>86</sup> The board chairman said he hoped the matter could be resolved at the school level.<sup>87</sup>

Notably, while meeting with the student journalists, the principal learned that he did not understand what prior review meant in the journalistic context.<sup>88</sup> He said afterward that if he had known, he would have approached the situation differently

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<sup>79</sup> *Id.* at 8–9.

<sup>80</sup> Katy Yeiser, *Student Paper Draws Criticism*, DAILY J., Feb. 9, 2008, at A1.

<sup>81</sup> *Id.* at A8.

<sup>82</sup> *Id.*

<sup>83</sup> Katy Yeiser, *Students, Principal to Talk*, DAILY J., Feb. 13, 2008, at A1.

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

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

<sup>86</sup> *Id.* at A8.

<sup>87</sup> Katy Yeiser, *Dust-up Subsides*, DAILY J., Feb. 14, 2008, at A1.

<sup>88</sup> *Id.*

and that it “probably wouldn’t have been [this] major of a deal.”<sup>89</sup> Hadley, who mediated, said she was impressed by both sides and confident they would reach an agreement, which they did.<sup>90</sup> They produced new guidelines that required the *Electron* to make a judgment about the relevance of any article to the student body, to ensure that the health and safety of any student would not be at risk, and to notify the principal if any story would be controversial,<sup>91</sup> including stories on these topics: “sex, drug and alcohol use, teen suicide, teen pregnancy, religion, gangs, violence, race, and criminal proceedings involving students or staff.”<sup>92</sup>

That approach concerned at least one student press law specialist who said the agreement, although written with good intentions, could chill student speech by discouraging student journalists from writing about those topics altogether.<sup>93</sup> To the principal, though, the agreement was a mutually beneficial compromise, and to the *Electron* it reflected—to a significant degree—the reporting process that it already followed.<sup>94</sup> The agreement became school policy, and in producing the next two issues, the students complied with it and notified the principal, for example, about an abortion spread they planned to run.<sup>95</sup> He did not object.<sup>96</sup>

### C. *Le Sabre*, Grover Cleveland High School (Reseda, California)

In 2008, the Valentine’s Day issue of *Le Sabre*, a mostly student-run newspaper, was described as a “bombshell.”<sup>97</sup> It featured a detailed anatomical diagram of a vagina, under the hot-pink headline “Have a happy Vagina Day!”<sup>98</sup> The

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<sup>89</sup> *Id.* at A5.

<sup>90</sup> Katy Yeiser, *Reporters, Principal on the Same Page*, DAILY J., Feb. 29, 2008, at A1.

<sup>91</sup> Kathleen Fitzgerald, *Risque Business*, SPLC (May 15, 2008),

<http://www.splc.org/article/2008/05/risque-business>.

<sup>92</sup> *Id.*

<sup>93</sup> Yeiser, *Dust-up Subsides*, *supra* note 87, at A10.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*; see also Fitzgerald, *supra* note 91.

<sup>96</sup> Yeiser, *Dust-up Subsides*, *supra* note 87, at A10.

<sup>97</sup> Susannah Rosenblatt, *School Newspaper Drops a V-Bomb*, L.A. TIMES (Feb. 19, 2008), <http://www.latimes.com/local/la-me-cleveland16feb16-story.html>.

<sup>98</sup> Rachel Reyes, *Have a Happy Vagina Day!*, LE SABRE, Feb. 14, 2008, at 1.

accompanying articles reported on Eve Ensler's *The Vagina Monologues* and "V-Day," a national movement to raise awareness about violence against women.<sup>99</sup> As soon as the principal saw the issue, he directed that all copies be confiscated, saying the diagram was "not tasteful" and "would be disruptive to the school's educational program."<sup>100</sup> Teachers and administrators halted distribution of the paper, and "some students reported that security guards snatched papers out of their hands."<sup>101</sup> With copies already in circulation, however, it "quickly became a hot read" and made for a "very interesting" few days at the school.<sup>102</sup>

One *Le Sabre* editor and several staff members, upset by the principal's actions and unsatisfied by his reasons for them, protested by coming to school the next day wearing homemade t-shirts with the words "[m]y vagina is obscene" written across the front.<sup>103</sup> They also posted fliers around the school bearing the same message.<sup>104</sup> When they refused to change clothes, administrators sent them home, effectively suspending them.<sup>105</sup> Meanwhile, the rest of the student journalists were "less combative" when they met later the same day with the principal, who wanted to talk about his plan "to convene a committee of students and teachers to review questionable articles and other journalistic content before publication of future issues."<sup>106</sup> The committee already existed under policies of the Los Angeles Unified School District, but it had never been convened.<sup>107</sup>

The following week, the school held a student-teacher forum to discuss the problem of violence against women and the "fallout, residue and interesting implications" of the dispute

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<sup>99</sup> *Id.*

<sup>100</sup> Steve Lopez, *Another Day in Paradise*, L.A. TIMES (Feb. 15, 2008), <http://latimesblogs.latimes.com/lanow/2008/02/another-day-i-1.html>.

<sup>101</sup> Rosenblatt, *supra* note 97.

<sup>102</sup> *Id.*

<sup>103</sup> Kathleen Fitzgerald, *Papers at L.A. High School Confiscated Over V-Day Spread*, SPLC (Feb. 19, 2008), <http://www.splc.org/article/2008/02/papers-at-l-a-high-school-confiscated-over-v-day-spread>.

<sup>104</sup> Rosenblatt, *supra* note 97.

<sup>105</sup> Fitzgerald, *Papers at L.A. High School*, *supra* note 103.

<sup>106</sup> Rosenblatt, *supra* note 97.

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

between *Le Sabre* and the principal.<sup>108</sup> It lasted twenty-five minutes, and over 300 students attended.<sup>109</sup> Of the newspaper staff members who spoke, one said the anatomical diagram was not included for shock value; another said people should not feel ashamed of their sexuality; and another said the staff intended to raise awareness about violence against women and that a state student-expression law protected the newspaper.<sup>110</sup> Many teachers, administrators, and other students responded in kind, with one administrative assistant even accusing *Le Sabre* of producing “yellow journalism,”<sup>111</sup> a pejorative term for a reporting style popularized in the nineteenth century stressing sensationalism.

In the next month, the principal made good on his promise to establish a review process, ultimately requiring that page proofs be submitted one week before publication to the assistant principal.<sup>112</sup> The student editor said he did not plan to challenge that process or take further action, because he was afraid his advisor would lose his job, adding, “[t]here's no part of it that I think is OK.”<sup>113</sup>

### III. RESOLVING EDITORIAL DISPUTES: STUDENT JOURNALISTS V. SCHOOL ADMINISTRATORS

Disputes that arise in the school environment, like those that arise in the employment environment, have the potential to be highly disruptive.<sup>114</sup> Students, teachers, and administrators

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<sup>108</sup> Kari Thumlert, *Student/Teacher Forum Discusses Censorship and Obscenity*, THE SUNDIAL (Feb. 20, 2008), <http://sundial.csun.edu/2008/02/studentteacherforumdiscussesensorshipandobsce>nity/.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Fitzgerald, *Risque Business*, *supra* note 91.

<sup>113</sup> *Id.*

<sup>114</sup> Thomas J. Bergmann and Roger J. Volkema, *Understanding and Managing Interpersonal Conflict at Work: Its Issues, Interactive Processes, and Consequences*, in M. AFZALUR RAHIM, *MANAGING CONFLICT: AN INTERDISCIPLINARY APPROACH* 7 (1989); Barry Fields, *Interpersonal Conflict in Schools: How Teachers Manage Conflict in the Workplace*, 16 EDUC. & SOC'Y 55 (1998); Michael Frone, *Interpersonal Conflict at Work and Psychological Outcomes: Testing a Model Among Young Workers*, 5(2) J. OCCUPATIONAL HEALTH PSYCHOL. 246 (2000); Brett Laursen & Andrew Collins, *Interpersonal Conflict During Adolescence*, 115(2) PSYCHOLOGICAL BULL. 197 (1994);



spend a great amount of time around one another, and the nature of their working relationships can profoundly affect their performance and mental health.<sup>115</sup> Moreover, one significant characteristic of their relationships is the imbalance of power among them.<sup>116</sup> Schools can and do act *in loco parentis* in some respects, and thus they perform certain custodial and child-rearing tasks associated with parenthood.<sup>117</sup> Teachers and administrators also can exercise power over students through their grading and disciplinary authority—and through their role as references for college and job applications.<sup>118</sup> The power imbalance can make it difficult for students, teachers, and administrators to bargain in a fair, productive, and meaningful way. Further, students are more likely to engage in constructive conflict-management behaviors if they perceive that school officials' decision-making and dispute-resolution processes are fair and just.<sup>119</sup> The following sections of this article synthesize the different approaches that student journalists historically have used to resolve editorial disputes with administrators, ultimately proposing a more structured process for doing so: mediation.

#### *A. Different Dispute-Resolution Approaches*

Student journalists approach editorial disputes in various ways, and one resource from the National Scholastic Press Association sets out a plan for student journalists who want “to

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James A. Wall, Jr. & Ronda Roberts Callister, *Conflict and Its Management*, 21 J. MGMT. 515 (1995).

<sup>115</sup> Lyndal Bond et al., *Social and School Connectedness in Early Secondary School as Predictors of Late Teenage Substance Use, Mental Health, and Academic Outcomes*, 40(4) J. ADOLESCENT HEALTH 357 (2007); Lauren R. Miller-Lewis et al., *Student-Teacher Relationship Trajectories and Mental Health Problems in Young Children*, 2:27 BMC PSYCHOL. (2014); Habib Özgan, *The Usage of Domination Strategies in Conflicts Between the Teachers and Students: A Case Study*, 11(4) EDUC. RES. & REVIEWS 146 (2016).

<sup>116</sup> David W. Jamieson & Kenneth W. Thomas, *Power and Conflict in the Student-Teacher Relationship*, 10:3 THE J. APPLIED BEHAVIORAL SCI. 321 (1974); Jason J. Teven & Jane E. Herring, *Teacher Influence in the Classroom: A Preliminary Investigation of Perceived Instructor Power, Credibility, and Student Satisfaction*, 22(3) COMM. RES. REPORTS 235 (2005); Meni Koslowsky & Joseph Schwarzwald, *The Use of Power Tactics to Gain Compliance: Testing Aspects of Raven's (1988) Theory in Conflictual Situations*, 21(2) SOC. BEHAVIOR & PERSONALITY 135 (1993).

<sup>117</sup> Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L. J. 663, 667, 700 (1987).

<sup>118</sup> See generally Jamieson & Thomas, *supra* note 116; Özgan, *supra* note 115.

<sup>119</sup> See generally Özgan, *supra* note 115.

fight and win the censorship battle.”<sup>120</sup> Conceding that “not all censorship fights are the same,” the plan recommends the practice of responsible and ethical journalism; that students pick their battles wisely; take the time to understand their rights; meet as soon as possible with the censor; marshal supporters; present the censor with a letter objecting to the censorship; appeal to the superintendent; go public with a press release or peaceful protest; submit a written appeal to the school board; publish in alternative, independent media; and finally, consider their legal options.<sup>121</sup>

That approach has worked for some student journalists, and as Part II of this article demonstrated, there are many variations on those approaches.<sup>122</sup> *Statesman* staff members protested censorship of their November issue by pretending to distribute nonexistent papers.<sup>123</sup> And when the principal refused to print an article in the December issue, staff members ran a blank page in place of it.<sup>124</sup> Later, they obtained legal counsel and met with administrators, all before taking their concerns to the school board.<sup>125</sup> The dispute was not resolved to their satisfaction, so the top editors and staff members resigned from the paper, dropped out of the journalism class, and launched their own news site.<sup>126</sup>

Meanwhile, *Electron* staff members, when they learned that school administrators planned to implement a prior review process, asked to meet with the principal, who himself learned that he did not understand what prior review meant to student

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<sup>120</sup> Mike Hiestand, *Fighting Censorship: A Checklist*, NAT'L SCHOLASTIC PRESS ASS'N (April 4, 2005), <http://web.archive.org/web/20120408135638/http://www.studentpress.org/nsps/trends/~law0305hs.html>. Another resource is the *Protocol for Free & Responsible Student News Media*, MCCORMICK FOUNDATION (2010), <http://www.jeasprc.org/wp-content/uploads/2010/08/221.003.McCormickConfProtocol.k3Final.pdf>. It is a checklist that student journalists, advisers, and administrators can use to guide ethical editorial decision-making—to provide a “pathway . . . to resolve conflicting principles and help determine . . . actions.” *Id.* Although it offers valuable insights, it does not focus on mediation.

<sup>121</sup> Hiestand, *supra* note 120.

<sup>122</sup> *See supra* Part II.

<sup>123</sup> Ocran, *supra* note 55.

<sup>124</sup> *Id.*; Lissau, *supra* note 68.

<sup>125</sup> Ocran, *supra* note 55.

<sup>126</sup> Simmons & Black, *supra* note 73.

journalists.<sup>127</sup> Their meeting ultimately produced guidelines that the principal and journalists agreed would help them work together in the future.<sup>128</sup>

And, finally, some *Le Sabre* staff members protested their principal's decision to confiscate their Valentine's issue by wearing colorful t-shirts, while others met with the principal to discuss their concerns.<sup>129</sup> Ultimately, the top editors decided not to challenge the principal's use of prior review.<sup>130</sup>

### *B. Theorizing a More Structured Approach: Mediation*

Numerous organizations that support the student press, such as the SPLC,<sup>131</sup> the Journalism Education Association,<sup>132</sup> and the Association for Education in Journalism and Mass Communications,<sup>133</sup> have drafted model policies and model legislation<sup>134</sup> to protect the rights of student media and more

<sup>127</sup> Yeiser, *Students, Principal to Talk*, *supra* note 83.

<sup>128</sup> Fitzgerald, *Risque Business*, *supra* note 91.

<sup>129</sup> Fitzgerald, *Papers at L.A. High School Confiscated Over V-Day Spread*, *supra* note 103.

<sup>130</sup> *Id.*

<sup>131</sup> See *About the Student Press Law Center*, STUDENT PRESS LAW CTR., <http://www.splc.org/page/about> (last visited Sept. 26, 2016) ("Since 1974, the Student Press Law Center has been the nation's only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment and supporting the student news media in their struggle to cover important issues free from censorship. The SPLC provides free legal advice and information as well as low-cost educational materials for student journalists on a wide variety of topics.").

<sup>132</sup> See *Our Mission*, JOURNALISM EDUC. ASS'N, <http://jea.org/home/about-jea/mission/> (last visited Sept. 26, 2016) ("The Journalism Education Association supports free and responsible scholastic journalism by providing resources and educational opportunities, by promoting professionalism, by encouraging and rewarding student excellence and teacher achievement, and by fostering an atmosphere which encompasses diversity yet builds unity.").

<sup>133</sup> See *About*, ASS'N FOR EDUC. IN JOURNALISM AND MASS COMM., <http://www.aejmc.org/home/about/> (last visited Sept. 26, 2016) ("[AEJMC] is a nonprofit organization of ... educators, students and practitioners from around the globe. ... [It] is the oldest and largest alliance of journalism and mass communication educators and administrators at the college level. AEJMC's mission is to promote the highest possible standards for journalism and mass communication education, to encourage the widest possible range of communication research, to encourage the implementation of a multi-cultural society in the classroom and curriculum, and to defend and maintain freedom of communication in an effort to achieve better professional practice, a better informed public, and wider human understanding.").

<sup>134</sup> To be clear, model legislation is statutory text meant to be enacted as it is written or to be a guide for legislatures in drafting their own versions. The goal is to create a standard way of addressing a particular problem, with the purpose of harmonizing state and local laws that may conflict. In contrast, a model policy is regulatory text meant to be adopted by the governing body of an organization, and it sets out

generally to guide their editorial practices.<sup>135</sup> Some schools and student media have used the model policies to enact their own,<sup>136</sup> and some states have used the model legislation to pass laws protecting student press rights.<sup>137</sup> Indeed, right now New Voices, USA, an SPLC project, is pushing nationwide for state legislation giving student journalists clearer rights to gather and share information about matters of public concern, without interference from school officials.<sup>138</sup> There are campaigns in eighteen states, and bills have been introduced in six.<sup>139</sup> The bills vary in some ways, but basically they repudiate *Hazelwood* and say that the *Tinker* standard should be restored in public high schools.<sup>140</sup> Eleven states already have such a statute on the books.<sup>141</sup>

That said, although the legislation is important, in this context we are more interested in the policies adopted by schools and student media, because they present a unique opportunity to develop and implement a structured process for resolving

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principles to guide operations and decision-making processes within the organization (e.g., a school district).

<sup>135</sup> See, e.g., *JEA Model Editorial Policy*, JOURNALISM EDUC. ASS'N, <http://jeasprc.org/wp-content/uploads/2009/10/jeamodeleditpolicy2013.pdf> (last visited Sept. 26, 2016); *Student Press Law Center Model Guidelines for High School Student Media*, STUDENT PRESS LAW CTR., <http://web.archive.org/web/20140704182716/http://www.splc.org/knowyourrights/legalresearch.asp?id=6> (last visited Sept. 26, 2016); *Student Press Law Center Model Legislation to Protect Student Free Expression Rights*, STUDENT PRESS LAW CTR., <http://www.splc.org/article/1998/09/student-press-law-center-model-guidelines-for-high-school-student-media> (last visited Sept. 26, 2016).

<sup>136</sup> *Editorial Policy*, ARLINGTONIAN, <http://www.arlingtonian.com/edpolicy> (last visited Sept. 26, 2016); *Editorial Policy*, MOUNTAIN VIEW HIGH SCH., <http://mvhsoracle.com/about/editorial-policy> (last visited Sept. 26, 2016); *School Newspaper Editorial and Ethics Policies*, HIGHLANDS HIGH SCH., <http://www.hhsrampages.com/about/school-newspaper-editorial-and-ethics-policies/> (last visited Sept. 26, 2016); *Editorial Policy*, FRANCIS HOWELL NORTH HIGH SCH., <http://fhntoday.com/editorialpolicy/> (last visited Sept. 26, 2016).

<sup>137</sup> See, e.g., Arkansas Student Publications Act, ARK. CODE ANN. §§ 6-18-1201, 6-18-1204 (2015); Colorado Student Free Expression Law, COLO. REV. STAT. § 22-1-120 (2016); Oregon Student Free Expression Law, ORE. REV. STAT. § 336.477 (2007); Pennsylvania Administrative Code: Student Rights and Responsibilities, 22 PA. CODE § 12.9 (2016); Washington Administrative Code: Student Rights, WASH. ADMIN. CODE § 392-400-215 (2016).

<sup>138</sup> Jonathan Peters, *How a New Campaign is Trying to Strengthen the Rights of Student Journalists*, COLUMBIA JOURNALISM REV. (Feb. 19, 2016), [http://www.cjr.org/united\\_states\\_project/new\\_voices\\_campaign.php](http://www.cjr.org/united_states_project/new_voices_campaign.php).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

editorial disputes between student journalists and school administrators. With little variation, the model policies distinguish school-sponsored and independent student media, and they prescribe the responsibilities of student journalists, clarify the differences between protected and unprotected expression, and state that no student media will be subject to prior review.<sup>142</sup> Many of the implemented policies, like those at the schools profiled in Part II of this article,<sup>143</sup> are not as comprehensive or as protective as the models. And, notably, all of the policies—the models and those implemented—lack a clause addressing what happens if an editorial dispute arises under their terms (i.e., if an administrator threatens to censor a student publication).<sup>144</sup> In general, millions of contracts and policies have such a clause,<sup>145</sup> but these policies simply say—if anything about dispute resolution—that student journalists may consult an attorney if a legal issue arises.<sup>146</sup> This could be one reason student journalists have approached editorial disputes in such varied ways.

In any case, whether by policy or practice, school administrators and student journalists need a structured way to

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<sup>142</sup> See, e.g., *JEA Model Editorial Policy*, *supra* note 135; *Student Press Law Center Model Guidelines for High School Student Media*, *supra* note 135.

<sup>143</sup> *Administrative Guide*, L.A. UNIFIED SCH. DIST., <http://www.lausd.net/lausd/board/secretary/BoardRules/BoardRules3-08.pdf> (last visited Sept. 26, 2016); *Stevenson High School Student Guidebook, Co-Curricular Activities, Section D, Student Publications*, ADLAI E. STEVENSON HIGH SCH., [http://www.d125.org/assets/1/documents/student\\_guidebook\\_2010-11.pdf](http://www.d125.org/assets/1/documents/student_guidebook_2010-11.pdf) (last visited Sept. 26, 2016).

<sup>144</sup> *JEA Model Editorial Policy*, *supra* note 135; *Student Press Law Center Model Guidelines for High School Student Media*, *supra* note 135; *Administrative Guide*, *supra* note 143; *Stevenson High School Student Guidebook, Co-Curricular Activities, Section D, Student Publications*, *supra* note 143.

<sup>145</sup> *Drafting Dispute Resolution Clauses*, AM. ARBITRATION ASS'N, 5 [https://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_002540](https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540) (last visited Sept. 26, 2016). Contracts and policies governing the relationship between two or more parties commonly include a clause addressing what happens if a dispute arises between them. See *id.* at 5. For example, employment and service contracts, as well as labor agreements, often include clauses stating that arbitration or mediation will be the default dispute-resolution mechanism should a dispute arise. See *id.* at 18–19. Such policies may also include a choice-of-law clause. *Id.* at 7.

<sup>146</sup> See, e.g., *Student Press Law Center Model Guidelines for High School Student Media*, *supra* note 135.

resolve editorial disputes,<sup>147</sup> one that is sensitive to the nature of their working relationships and suitable for the school environment, where disputes have the potential to be highly disruptive<sup>148</sup> and to affect academic performance and mental health.<sup>149</sup> With those interests in mind, mediation is a sensible choice.

It is a form of “nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.”<sup>150</sup> It is, essentially, assisted negotiation.<sup>151</sup> The mediator “helps the parties reach consensus by listening, suggesting and brokering compromise.”<sup>152</sup> This means the “parties control the proceedings,”<sup>153</sup> and the mediator is expected to be impartial—she may not favor one party or the other during the mediation process.<sup>154</sup> Importantly, too, privacy must be maintained.<sup>155</sup> Statements made in mediation form the basis of settlement discussions, which are generally promoted by confidentiality.<sup>156</sup> Those discussions focus on the “perceptions, concerns, and interests” of the parties,<sup>157</sup> compelling them “to clarify [their] interests and transform rhetoric into proposals.”<sup>158</sup> Thus, mediation’s “distinguishing feature” is the mediator’s “ability . . . to help the parties resolve their dispute by assisting them to identify shared interests . . . for agreement.”<sup>159</sup> To that

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<sup>147</sup> Although this paper focuses on student newspapers, the need for a structured way to resolve editorial disputes applies with equal force to yearbooks and other student media.

<sup>148</sup> Bergmann & Volkema, *supra* note 114; Fields, *supra* note 114; Frone, *supra* note 114; Laursen & Collins, *supra* note 114; Wall & Roberts-Callister, *supra* note 114..

<sup>149</sup> Bond et al. *supra* note 115; Miller-Lewis et al. *supra* note 115; Özgan, *supra* note 115.

<sup>150</sup> BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>151</sup> In short, mediation is different from litigation, which involves an actual lawsuit; different from arbitration, which ordinarily grants the third party power to make a decision; and different from negotiation, which does not involve a neutral third party.

<sup>152</sup> EDWARD J. BRUNET, CHARLES B. CRAVER & ELLEN E. DEASON, *ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE’S PERSPECTIVE* 1 (2001).

<sup>153</sup> *Id.* at 182.

<sup>154</sup> *Id.* at 206.

<sup>155</sup> *Id.* at 182.

<sup>156</sup> *Id.*

<sup>157</sup> SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY, AND PRACTICE* § 3:2, at 3–4 (2016).

<sup>158</sup> JOSEPH B. STULBERG, *TAKING CHARGE/MANAGING CONFLICT* 1 (1987).

<sup>159</sup> BRUNET, *supra* note 152, at 183.

end, mediation relies on the power of understanding. As two scholars put it:

We want everything to be understood from how we will work together to the true nature of the conflict in which the parties are enmeshed. . . . We believe the parties should understand the legal implications of their case, but that the law should not usurp or direct our mediation. We put as much weight on the personal, practical, or business related aspects of any conflict as on the legal aspect. . . . [W]e want the parties to recognize what is important to them in the dispute, and to understand what is important to the other side. . . . Conflict is rarely just about money, or who did what to whom. It also has subjective dimensions.<sup>160</sup>

Student journalists and school administrators involved in editorial disputes would benefit from that approach. It opens up the lines of communication, and one party often does not understand why the other party did what it did. Consider, for example, the disputes profiled in Part II of this Article.<sup>161</sup> One *Statesman* editor said, “I think there was a lot of [our] being told one thing, and the next day [school officials] were saying the polar opposite. They were strongly urging us to communicate with our advisers rather than talk to them, saying that they didn't have anything to do with it.”<sup>162</sup> Meanwhile, the principal involved in the *Electron* dispute said before meeting with the paper's editors that he did not understand what prior review meant.<sup>163</sup> And one *Le Sabre* editor said his staff “didn't do anything wrong” and that school administrators failed to justify their actions,<sup>164</sup> while the principal said the stories in question were “tasteless.”<sup>165</sup>

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<sup>160</sup> Gary Friedman & Jack Himmelstein, *Resolving Conflict Together: The Understanding-Based Model of Mediation*, 2006 J. OF DISP. RESOL. 523, 524 (2006).

<sup>161</sup> See *infra* Part II.

<sup>162</sup> Ocran, *supra* note 55.

<sup>163</sup> Yeiser, *Students, Principal to Talk*, *supra* note 83.

<sup>164</sup> Fitzgerald, *Papers at L.A. High School Confiscated Over V-Day Spread*, *supra* note 103.

<sup>165</sup> Rosenblatt, *supra* note 97.

Mediation could close those gaps in understanding—to help the parties “clarify [their] interests and transform [their] rhetoric into proposals.”<sup>166</sup> It also has the potential, with its emphasis on privacy, to accommodate the reputational interests of student journalists, teachers, and administrators in the school environment, where reputation and perceptions are significant matters. For example, a principal may not want to make a public concession to students that could create the appearance of weakness, but she may be willing to make the concession in private. That reputational concern stems from the school’s legitimate interest in its authority, which mediation would serve because “the parties control the proceedings.”<sup>167</sup> The school would not be required to submit to a neutral third party with decisional power.<sup>168</sup> Instead, it would simply come to the table to discuss its concerns and interests.<sup>169</sup> Mediation’s voluntary nature is significant, too, because participation indicates the parties’ willingness to try to reach agreement.<sup>170</sup> And, in turn, when voluntary agreement is reached, the parties tend to be committed to it.<sup>171</sup> The reason: much of the mediation process revolves around principles of self-determination that allow the parties to control the resolution of their dispute, “enhanc[ing] commitment to the settlement terms because parties make decisions themselves instead of having a resolution imposed upon them by an authoritative third party.”<sup>172</sup> The mediation process, thus, would be sensitive to the nature of the working relationships among students, teachers, and administrators.

Mediation can also help preserve ongoing relationships between parties (e.g., student journalists and administrators). That is the case because the process encourages the parties “to work together to find a mutually acceptable solution,” fostering “an atmosphere conducive to maintaining and furthering

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<sup>166</sup> STULBERG, *supra* note 158, at 1.

<sup>167</sup> BRUNET, *supra* note 152, at 182.

<sup>168</sup> *See id.*

<sup>169</sup> *See* SARAH R. COLE ET AL., *supra* note 157, § 3:2.

<sup>170</sup> *See* John A. Fiske & Michael L. Leshin, *Mediation and Other Dispute Resolution Alternatives*, in MASSACHUSETTS DIVORCE LAW PRACTICE MANUAL, § 3.2.4 (2012).

<sup>171</sup> *Id.*

<sup>172</sup> *Saeta v. Superior Court*, 11 Cal. Rptr. 3d 610, 616 (Ct. App. 2004).



relationships rather than destroying them.”<sup>173</sup> In that regard, mediation is preferable to litigation, which is more adversarial, because the former encourages students and administrators to cooperate and to engage in regular communication.<sup>174</sup> And it is less costly,<sup>175</sup> benefitting both student journalists and school districts with limited resources. Mediation takes less time,<sup>176</sup> too, and often is more dispassionate because of its cardinal rule that the parties may not make personal attacks.<sup>177</sup> Moreover, the focus on the parties’ future relationship helps free them from past transgressions.<sup>178</sup> That is important in the school environment because student journalists and administrators must negotiate years-long relationships in close quarters. Trust between the parties may erode during an editorial dispute, so rebuilding trust, an important part of the mediation process,<sup>179</sup> would help the parties’ ongoing relationship.<sup>180</sup>

Further, mediation is well suited for editorial disputes between student journalists and school administrators because its “essential values and characteristics . . . make it . . . particularly effective . . . in situations where power imbalances play a role.”<sup>181</sup> As a general matter, the school environment is rife with such imbalances—between students and teachers, between students and administrators, between teachers and administrators, etc.—

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<sup>173</sup> H. WARREN KNIGHT, RICHARD CHERNICK, SUSAN W. HALDEMAN & WILLIAM L. BERTINELLI, *CALIFORNIA PRACTICE GUIDE: ALTERNATIVE DISPUTE RESOLUTION* 3:37-38 (2016).

<sup>174</sup> Richard M. Calkins, *Caucus Mediation—Putting Conciliation Back into the Process: The Peacemaking Approach to Resolution, Peace, and Healing*, 54 *DRAKE L. REV.* 259, 263 (2006) (discussing generally the idea that litigation is more adversarial than mediation and that the latter encourages the parties to cooperate and communicate).

<sup>175</sup> Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 *OHIO ST. J. DISP. RESOL.* 641, 672–73 (2002).

<sup>176</sup> Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 *MO. L. REV.* 473, 482 (2002).

<sup>177</sup> Charles R. Pyle, *Mediation and Judicial Settlement Conferences: Different Rides on the Road to Resolution*, 33 *ARIZ. ATT’Y* 20, 23 (1996).

<sup>178</sup> Jennifer Gerarda Brown, *Peacemaking in the Culture War Between Gay Rights and Religious Liberty*, 95 *IOWA L. REV.* 747, 800 (2010).

<sup>179</sup> Ellen E. Deason, *The Need for Trust as a Justification for Confidentiality in Mediation: A Cross-Disciplinary Approach*, 54 *U. KAN. L. REV.* 1387, 1414 (2006) (discussing generally the idea that trust is essential to the parties’ ongoing relationship).

<sup>180</sup> *Id.*

<sup>181</sup> Albie M. Davis & Richard A. Salem, *Dealing with Power Imbalances in the Mediation of Interpersonal Disputes*, 6 *MEDIATION Q.* 17, 18 (1984).

and the students involved in the disputes discussed in this Article made comments that illustrated those imbalances. One *Statesman* editor said of his decision to drop out of the journalism class that it was his only option, adding, “If you're dealing with people who aren't playing fair, people who aren't playing by the rules, if you're in a situation that you can't win, it's something that you have to consider.”<sup>182</sup> Similarly, when copies of *Le Sabre* were being confiscated, some students said security guards took the paper from their hands.<sup>183</sup> One wrote in a note to a *Los Angeles Times* reporter: “I was reading [the paper] at lunch and got it taken away by a school security guard! I asked the security guard what she would do if I didn't give it up, and she threatened me with ‘disciplinary actions.’”<sup>184</sup>

Mediators can address manifestations of those power imbalances during the dispute-resolution process. Among other things, they can compensate for low-level negotiating skills,<sup>185</sup> interrupt bargaining patterns that might be intimidating,<sup>186</sup> ensure that one party does not settle out of fear of retaliation,<sup>187</sup> and nonverbally communicate their support for the weaker party.<sup>188</sup> They also can help the weaker party identify and express its interests and weigh the consequences of the terms of any agreement.<sup>189</sup> In other words, the mediator can “correct a power imbalance by initiating moves to assist the weaker party in mobilizing the power he or she possesses.”<sup>190</sup> That can empower the weaker party with a “sense of self-worth and confidence,” which allows that party more clearly to “perceive both [its] goals and necessary strategies.”<sup>191</sup> Those practices would enable student journalists to bargain productively and meaningfully

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<sup>182</sup> Ocran, *supra* note 55.

<sup>183</sup> Rosenblatt, *supra* note 97.

<sup>184</sup> Lopez, *supra* note 100.

<sup>185</sup> Davis & Salem, *supra* note 181, at 20.

<sup>186</sup> *Id.* at 20–21.

<sup>187</sup> *Id.* at 21.

<sup>188</sup> *Id.* at 20.

<sup>189</sup> *Id.* at 24.

<sup>190</sup> JOHN W. COOLEY, *THE MEDIATOR'S HANDBOOK: ADVANCED PRACTICE GUIDE FOR CIVIL LITIGATION* 51 (2006).

<sup>191</sup> Brunet, *supra* note 152, at 203.

with administrators who otherwise might enjoy an advantage because of their relative power.

It is also notable that mediation maximizes exploration of the parties' options. The process does not focus on assigning blame<sup>192</sup>—it focuses on the parties' interests.<sup>193</sup> This allows the parties to be creative in their discussions and the solutions they consider.<sup>194</sup> Plus, mediation places few constraints, such as evidentiary or procedural rules, on the presentation of information during a session.<sup>195</sup> Contrast that with litigation, in which a judge “can only resolve a dispute by determining existing rights” and cannot suggest new rights or arrangements, both possible in mediation<sup>196</sup> because of its focus on “creative ‘win-win’ resolutions.”<sup>197</sup> In the context of editorial disputes, that would serve student journalists and administrators well because they could develop mutually beneficial compromises (e.g., the guidelines developed in the *Electron* dispute<sup>198</sup>) that would not be possible in actual litigation.

### *C. The Nuts and Bolts of Building the Mediation Program*

There is precedent for creating mediation programs that facilitate dispute resolution in the school environment, such as code-of-conduct violations,<sup>199</sup> truancy,<sup>200</sup> and bullying.<sup>201</sup> There is also precedent, outside the school environment, for creating programs that facilitate the resolution of disputes regarding

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<sup>192</sup> Morton Denlow, *Mediation of Commercial Disputes: A Useful Tool for Trial Lawyers and Their Clients*, 9 CHI. B. REC. 30, 34 (1995).

<sup>193</sup> Pyle, *supra* note 177, at 22.

<sup>194</sup> Gail M. Valentine-Rutledge, *Mediation as a Trial Alternative: Effective Use of the ADR Rules*, 57 AM. JURIS. TRIALS 555 (2014).

<sup>195</sup> Kenneth Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. 5, 8 (1989).

<sup>196</sup> Michael Pryles, *Assessing Dispute Resolution Procedures*, 7 AM. REV. OF INT'L ARB. 267, 278 (1996).

<sup>197</sup> Feinberg, *supra* note 195, at 6.

<sup>198</sup> Fitzgerald, *supra* note 91.

<sup>199</sup> *School Program*, N.Y.C COMM'N ON HUM. RTS., <http://www1.nyc.gov/site/cchr/community/school-program.page> (last visited Sept. 26, 2016).

<sup>200</sup> *Arkansas Youth Mediation Program*, U. ARK. LITTLE ROCK, <http://ualr.edu/law/clinical-programs/mediation/arkansas-juvenile-mediation-project/> (last visited Sept. 26, 2016).

<sup>201</sup> Jon M. Philipson, *The Kids are Not All Right: Mandating Peer Mediation as a Proactive Anti-Bullying Measure in Schools*, 14:81 CARDOZO J. OF CONFLICT RESOL. 81 (2012).

freedom of information and expression.<sup>202</sup> As of a few years ago, thirty-two states had implemented an alternative dispute resolution program for public-access problems, including agencies, mediation programs, access counselors, ombudsman services, special duties for attorneys general, and organizations that provide advisory opinions.<sup>203</sup> Moreover, in 2009, the federal government established the Office of Government Information Services to oversee agency compliance with the Freedom of Information Act and to mediate disputes arising under that law.<sup>204</sup> In states that have mediation programs for public-access problems, they are voluntary in nature and participants cannot be compelled to reach agreement,<sup>205</sup> although many officials willingly participate because of the penalties for violating access laws.<sup>206</sup> They submit to mediation to avoid enforcement actions and their penalty provisions.<sup>207</sup>

Those programs, varied as they are, could be precedents for a program designed to help student journalists and school administrators resolve editorial disputes. However, instead of leaving to legislators the task of creating such a program, the use of Dispute Systems Design, a process that seeks to develop alternative dispute resolution mechanisms for handling similar and repeated disputes,<sup>208</sup> would be helpful in conceiving and implementing a mediation program for student-administrator editorial disputes. It would be helpful, in part, because people who participate in the process of designing a system are more likely to honor agreements produced by that system.<sup>209</sup>

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<sup>202</sup> Daxton R. Stewart, *Evaluating Public Access Ombuds Programs: An Analysis of the Experiences of Virginia, Iowa and Arizona in Creating and Implementing Ombuds Offices to Handle Disputes Arising under Open Government Laws*, 2012 J. DISP. RESOL. 437, 437–38 (2012).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> Daxton R. Stewart, *Let the Sunshine In, Or Else: An Examination of the “Teeth” of State and Federal Open Meetings and Open Records Laws*, 15 COMM. L. AND POL’Y 265, 304 (2010).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* 44 (1996); WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, *GETTING DISPUTES RESOLVED* (1993).

<sup>209</sup> Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L. J. 60, 69 (2000) (analyzing data about regulatory

So, with the purpose of creating an effective program, the major stakeholders would appoint representatives to serve on a design team. The major stakeholders would include, at the very least, student journalists, school administrators, consumers of student journalism, and mediators. Their representatives would discuss their interests and what dispute-resolution policies and practices would best serve those interests. Along the way, the design team would consult other members of their stakeholder groups to solicit comments and suggestions about their options. Then, the team would develop a plan to establish a mediation program incorporating the stakeholders' interests, along with their policy and practice preferences.

Dispute Systems Design processes assume that training and education are needed to implement the program, so the design team would also make provisions for training and educating the stakeholder groups.<sup>210</sup> Thereafter, the team would begin implementation, possibly with an initial pilot program to refine the system.<sup>211</sup> The plan would include a process for evaluating and refining the system after its implementation.<sup>212</sup> To be sustainable, the system must be able to adapt as methods gain or lose effectiveness.<sup>213</sup> Indeed, building a system “with the knowledge that opportunities will exist to correct failures, respond to uncertainties, and incorporate experience may also create a willingness among parties to try solutions that otherwise would be too risky.”<sup>214</sup>

It is hard to predict the kind of mediation program that process would produce, because it is hard to predict exactly how the major stakeholder groups would define and articulate their interests—and local norms may vary from place to place, causing different operational problems that call for different designs and

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negotiations, a process similar to that of Dispute Systems Design, and arguing that participatory consensus increases compliance with the resolutions reached).

<sup>210</sup> COSTANTINO & MERCHANT, *supra* note 208, at 134–49.

<sup>211</sup> *Id.* at 150–67.

<sup>212</sup> *Id.* at 168–86.

<sup>213</sup> *Designing a Prisoner Reentry System Hardwired to Manage Disputes*, 123 HARV. L. REV. 1339, 1342 (2010).

<sup>214</sup> Khalil Z. Shariff, *Designing Institutions To Manage Conflict: Principles for the Problem Solving Organization*, 8 HARV. NEGOT. L. REV. 133, 155 (2003).

policies.<sup>215</sup> For example, stakeholders in some places may believe that certain parties would not participate in mediation as productively as possible if they were scheduled at times believed to be inconvenient (e.g., right after school in a community where many student journalists are involved in extra-curricular activities and would have regular conflicts).<sup>216</sup> In those places, a policy could be developed for the scheduling of mediation sessions. So, even if Policy X seemed generally optimal, if the prevailing local norms favor Policy Y, then the program planners could expect resistance to Policy X as long as local norms favored Policy Y.<sup>217</sup> The planners would use a Dispute Systems Design process “to identify the norms of various local stakeholder groups, consider the likely effects of various policy options given those norms, and then make and implement decisions accordingly.”<sup>218</sup>

And, as noted above, it is hard to predict exactly how the major stakeholder groups would define and articulate their interests. As parties, in fact, student journalists and school administrators would share some interests. They would want opportunities to be heard and to participate in determining the mediation’s outcome, and it is likely that they would be more satisfied if they felt the process was understandable,<sup>219</sup> as well as attentive to their interests, impartial, un-coerced, and private.<sup>220</sup> Parties tend to be more satisfied, too, when they feel that they saved money or time—or avoided emotional distress.<sup>221</sup> And regarding fairness, parties normally seek both substantive *and* procedural satisfaction.<sup>222</sup>

When Professor Nancy Welsh analyzed the procedural justice theory and related literature, she identified four factors

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<sup>215</sup> John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 116 (2002).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 117.

<sup>218</sup> *Id.*

<sup>219</sup> Chris Guthrie and James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. DISP. RESOL. 885, 892–93 (1998).

<sup>220</sup> *Id.* at 893–94.

<sup>221</sup> *Id.* at 896–97.

<sup>222</sup> Lande, *supra* note 215, at 118–19.

that promote parties' experience of procedural fairness.<sup>223</sup> First, perceptions of procedural justice are enhanced to the extent that disputants perceive that they had the opportunity to present their views, concerns, and evidence to a third party and had control over their presentation ("opportunity for voice").<sup>224</sup> Second, disputants are more likely to perceive procedural justice if they perceive that the third party considered their views, concerns, and evidence.<sup>225</sup> Third, disputants' judgments about procedural justice are affected by the perception that the third party treated them in a dignified, respectful manner and that the procedure itself was dignified.<sup>226</sup> Although it seems a disputant's perceptions of a fourth factor—the impartiality of the third-party neutral—ought to affect procedural justice, disputants are influenced more strongly by their observations of the third party's attempts at fairness.<sup>227</sup>

Student journalists and school administrators, as parties, would likely share those interests, but in other respects they might be at odds. It is easy to imagine, for example, that student journalists would have a bias favoring press freedom and expect the mediator to be a First Amendment expert. In contrast, school administrators, who have obligations to create an environment conducive to learning and to protect the rights and interests of all students on their campuses, might expect the mediator to be experienced in school administration. Similarly, student journalists might want some of the process to be open and subject to public scrutiny, a reflection of the larger news industry's pro-transparency ethos. School administrators, meanwhile, with interests in their organization's image and their own authority, might prefer a discreet and confidential process. So, again, it is hard to predict the kind of mediation program that would emerge from this Dispute Systems Design process—chiefly because of differences in stakeholder interests and local norms, even assuming that some stakeholders, as parties, would share some interests. But it is possible to identify the main issues that

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<sup>223</sup> Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. OF DISP. RESOL. 179, 184 (2002).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

designers would have to confront, again evaluating them from a local perspective.

First, who will administer the program? Will it be part of a government effort to provide dispute-resolution services? If so, the planners should consider what government stakeholders to involve in the design process—and ultimately where the program would be housed and whether it would be created as a new program or folded into an existing one, like a FOIA mediation service. Most such services are housed in the executive branch, at the state level. Until recently, for example, Ohio's was housed in the state attorney general's office, but, because the office also represented state entities, it could not mediate disputes involving state entities.<sup>228</sup> Where the program is housed, then, is important because “perceived lapses in independence or impartiality [would] implicate the credibility of a . . . program as it handles inquiries.”<sup>229</sup>

Second, if not the government, then who would administer it? Perhaps a nonprofit organization, such as a state press association, would agree to do it—or a state education association, such as a school or district. Those considerations, among others, would also shape the program's name and identity, far from trivial matters. For example, in Iowa, the Office of Ombudsman is an independent, impartial agency where citizens can air grievances about government.<sup>230</sup> It facilitates communication between agencies and citizens,<sup>231</sup> and it once was called the Office of Citizens' Aide/Ombudsman, which to some observers seemed partial to citizens.<sup>232</sup> That “perception . . . made government officials . . . ‘reluctant to work with them or listen to any suggestions they [had] for improvement.’”<sup>233</sup>

Third, what level of financial support would the program need, and where would that support come from? The

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<sup>228</sup> Breanne Parcels, *Bring Back the Bite: Restoring Teeth to Ohio's Public Records Law*, 38 U. OF DAYTON L. REV. 225, 247 (2012).

<sup>229</sup> Daxton R. Stewart, *Designing a Public Access Ombuds Office: A Case Study of Virginia's Freedom of Information Advisory Council*, 9 APPALACHIAN J. L. 217, 255 (2010).

<sup>230</sup> *Our Mission*, OFF. OF OMBUDSMAN, <https://www.legis.iowa.gov/Ombudsman/> (last visited Sept. 26, 2016).

<sup>231</sup> *Id.*

<sup>232</sup> Stewart, *Evaluating Public Access Ombuds Programs*, *supra* note 202, at 458.

<sup>233</sup> *Id.* at 461.



government could finance and provide the service directly, as it does in some states for FOIA mediation programs, discussed earlier. Or the government could finance the provision of services by a private entity. For the latter, the legislature would have to appropriate money, in which case it would be critical for the team designing the program to involve legislative staff in the process. Alternatively, if the system were privately financed, the main funding source could be a nonprofit or a foundation like McCormick, which invests in “youth journalism education both in and outside the classroom,” with an eye toward helping students “understand the central role the [First] Amendment plays in our democracy as well as the power of youth voice in advancing civic discourse.”<sup>234</sup>

Fourth, who and what will the program cover? This is, essentially, a matter of personal and subject matter jurisdiction. Would the program be limited to student journalists and school administrators? What about teachers, for example? Or a student media adviser who is also a teacher, with dual and potentially conflicting roles at the school? And, concerning the subject matter, this Article has discussed the mediation of editorial disputes, defined as a conflict, controversy, or difference of opinion among student journalists, teachers, or administrators regarding the gathering, production, or distribution of content by a student news organization. But are there other issues that should be covered?

Fifth, how formal would the program be, and how would it operate? Presumably, it would be established by a written document that would articulate its policies. It would be sensible if schools’ media policies were amended to include a clause directing anyone covered by the policy to mediate editorial disputes generally or to mediate disputes arising under the policy’s terms. That being said, how would a person request mediation, and how long would it take to mediate a dispute after a request is filed? Would a request automatically trigger a mediation session, or would a program administrator have the opportunity to review and grant some while denying others, on

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<sup>234</sup> *Democracy Program—Journalism*, MCCORMICK FOUNDATION, <http://www.mccormickfoundation.org/democracy/journalism> (last visited Sept. 26, 2016).

a neutral and objective basis?

Sixth, related to housing, operations and financing, if the program is administered by an agency or organization whose office is distant from the parties seeking mediation, what would be the solution? Perhaps the program would offer mileage reimbursements or virtual mediation through video conferencing.<sup>235</sup> Any number of platforms could be used: Webex, Skype, Zoom, Google Hangouts, GoToMeeting, or Adobe Connect.<sup>236</sup> With video, the mediation could achieve much of what an in-person session would, at a reduced cost. Nonverbal communication, for instance, is a critical component of trust,<sup>237</sup> and research has found that trust can be achieved nearly as well in video interaction as face-to-face interaction.<sup>238</sup> On the other hand, virtual mediation would require the parties to have technology and Internet access, without which the conferencing would not work.<sup>239</sup> That could create not only access barriers for schools with limited technology resources but also barriers based on the parties' attitudes toward technology and their knowledge and skills around using it.

Finally, when and how would the program be evaluated? As noted above, the design team's plan would include a process for evaluating and refining the system after its implementation.<sup>240</sup> That evaluation surely would track metrics like the rate of party compliance with agreements, the number of parties requesting mediation, the levels of participant satisfaction, and the achievement of goals set by the design team and program administrators—along with the amount of money received and spent each fiscal year on the program.

## CONCLUSION

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<sup>235</sup> Melissa Kucinski, *The Pitfalls and Possibilities of Using Technology in Mediating Cross-Border Child Custody Cases*, 2010 J. DISP. RESOL. 297, 313.

<sup>236</sup> Teresa F. Frisbie, *Can Online Videoconferencing Tools Help the Mediation Process?*, 160:36 CHI. DAILY L. BULL. (Feb. 20, 2014), [http://www.virtualmediationlab.com/wp-content/uploads/2014/03/zzz\\_VML\\_Article.pdf?7b3734](http://www.virtualmediationlab.com/wp-content/uploads/2014/03/zzz_VML_Article.pdf?7b3734).

<sup>237</sup> Noam Ebner & Jeff Thompson, *@ Face Value? Nonverbal Communication & Trust Development in Online Video-Based Mediation*, 2014(2) INT'L J. ONLINE DISP. RESOL. (2014).

<sup>238</sup> *Id.* at 23.

<sup>239</sup> Kucinski, *supra* note, 235, at 313.

<sup>240</sup> COSTANTINO & MERCHANT, *supra* note 208, at 168–86.

After winding through the federal judiciary, the law is this: Although students at public schools do not enjoy the same First Amendment rights as adults in non-school settings, they do not give up those rights when they step on school grounds or when they are under the supervision of school personnel. Hanging in the balance are student press rights. On the one hand, administrators have used *Hazelwood* to expand their control of student media; on the other hand, student journalists and advocacy groups have pushed back, to reclaim the *Tinker* standard and to neutralize *Hazelwood* as much as possible.

To be sure, editorial disputes between administrators and student journalists are nothing new. And such disputes, as those profiled in this Article show, are less about the accuracy of student-media content—more about perceptions of decency, taste, and age-appropriateness. The resolution process around the disputes is often unstructured, and professional customs and values can create language barriers that fuel misunderstandings and lead to protests or threats—and sometimes disciplinary or legal actions. That is problematic because disputes in the school environment can be highly disruptive. Students, teachers, and administrators spend a lot of time around one another, and their working relationships can affect their performance and mental health. With that in mind, administrators and student journalists need a structured process to resolve their editorial disputes.

Mediation is a sensible choice. It would help the parties reach consensus by focusing on their interests and perceptions and by transforming their rhetoric into proposals—opening up lines of communication and closing gaps in understanding. At the same time, mediation's core values make it effective for bargaining sessions involving power imbalances and ongoing relationships. The mediator can address any imbalances while encouraging the parties to work together and cultivating an atmosphere conducive to trust and maintaining relationships.

Of course, mediation is no panacea for all of the dispute-resolution problems that student journalists and administrators face, and Dispute Systems Design does not guarantee optimal mediation policies. Innovation in any institution is hard, and here it is likely to be successful only with strong support from

school boards and administrators, as well as a willingness to overcome barriers to innovation. We expect, for example, that a major one would be opposition of key stakeholder groups, such as administrators, who might fear that mediation would threaten their authority.

We expect that another barrier would be the proposition that disputes involving rights, such as the freedoms of speech and press, should not be mediated at all—and that rights, unlike interests, should be clarified in an adjudicatory process. The theory is that a right is an entitlement, and thus its claimants should not compromise it in a mediation process. We do not see these conceptions as mutually exclusive, because the design process could structure the mediation program to recognize in full all rights claims while allowing parties to reach sustainable agreements on other issues and interests. Moreover, there is precedent for using mediation in the school environment and for using it otherwise to resolve disputes involving freedom of information and expression.

For all of these reasons, we believe mediation would be a promising process, if not a perfect one, for student journalists and school administrators to resolve their editorial disputes.

# THE RIGHT TO POST: HOW NORTH CAROLINA'S REVENGE PORN STATUTE CAN ESCAPE RUNNING AFOUL OF THE FIRST AMENDMENT POST-BISHOP

Ashton Cooke\*

## INTRODUCTION

On September 13, 2016, thirty-one year old Tiziana Cantone hanged herself at her aunt's home in the south of Italy.<sup>1</sup> In a time of "fragility and depression" for her, Cantone and a male acquaintance recorded six videos of her performing sexual acts, which went viral after being sent to a few friends with whom she had "virtual relationships."<sup>2</sup> Within a few days, the videos had been viewed by more than one million people,<sup>3</sup> "copied and republished thousands of times,"<sup>4</sup> and Cantone was "being recognized on the street."<sup>5</sup> A phrase that was spoken to her partner, translated as "[a]re you shooting a video? Bravo!"<sup>6</sup> appeared on t-shirts, smartphone cases, and other paraphernalia throughout the country.<sup>7</sup>

In an attempt to escape the growing publicity, Cantone quit her job and moved to Tuscany<sup>8</sup> before approaching the state prosecutor's office in May 2015 to file a report demanding that her videos be taken down.<sup>9</sup> After a lengthy court battle, a judge in Naples ruled in Cantone's favor in the weeks preceding her

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<sup>1</sup> James Masters & Livia Borghese, *Tiziana Cantone's Family Calls for Justice After Suicide Over Sex Tape*, CNN (Sept. 16, 2016),

<http://www.cnn.com/2016/09/16/europe/tiziana-cantone-sex-tape-suicide/>.

<sup>2</sup> Fulvio Bufi & Fiorenza Sarzanini, *Tiziana's Shame: "I was Fragile and Depressed,"* CORRIERE DELLA SERA (Sept. 16, 2016),

[http://www.corriere.it/english/16\\_settembre\\_16/tiziana-s-shame-was-fragile-and-depressed-aafebbf4-7c28-11e6-a2aa-53284309e943.shtml](http://www.corriere.it/english/16_settembre_16/tiziana-s-shame-was-fragile-and-depressed-aafebbf4-7c28-11e6-a2aa-53284309e943.shtml).

<sup>3</sup> Masters & Borghese, *supra* note 1.

<sup>4</sup> *Tiziana Cantone: Suicide Following Years of Humiliation Online Stuns Italy*, BBC (Sept. 16, 2016), <http://www.bbc.com/news/world-europe-37380704>.

<sup>5</sup> Gaia Pianigiani, *Viral Sex Tapes and a Suicide Prompt Outrage in Italy*, N.Y. TIMES (Sept. 16, 2016), <https://nyti.ms/2jZWKmb>.

<sup>6</sup> *Id.*

<sup>7</sup> Masters & Borghese, *supra* note 1.

<sup>8</sup> *Id.*

<sup>9</sup> Bufi & Sarzanini, *supra* note 2.

death<sup>10</sup> in line with the precedent established in May 2014<sup>11</sup> granting individuals the “right to be forgotten.”<sup>12</sup> Although the court ultimately ruled in her favor, Cantone was left with the crushing weight of her legal fees<sup>13</sup> and with a reputation that a court decision could not erase.<sup>14</sup>

Italian author, Roberto Saviano, shared in the immense and nationwide grief via social media.<sup>15</sup> Translated, Saviano lamented: “I grieve for Tiziana, who killed herself because she was a woman in a country where uninhibited and playful sex is still the worst of sins.”<sup>16</sup> Saviano hits on a poignant and tragic conception of female sexuality that encourages the public to sensationalize and disseminate a woman’s seemingly private sexual encounters while simultaneously subjecting her to scorn and ridicule for the content that they are consuming.<sup>17</sup> This combination resulted in the premature death of Tiziana Cantone, a victim of the worldwide internet phenomenon “revenge porn.”

Revenge porn, as defined by the Cyber Civil Rights Initiative, is “the distribution of sexually graphic images of individuals without their consent” regardless of whether the

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<sup>10</sup> Pianigiani, *supra* note 5.

<sup>11</sup> Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, ECLI:EU:C:2014:616 (May 13, 2014).

<sup>12</sup> *Masters & Borghese*, *supra* note 1 (If websites do not comply with requests for removal, the court can order removal if the information is found to be “inaccurate, inadequate, irrelevant, or excessive.”). Additionally, the right to be forgotten can extend to situations where there is no “interest of the public in having access to that information.” European Commission, *Factsheet on the “right to be Forgotten” Ruling (C-131/12)*, 2, [http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet\\_data\\_protection\\_en.pdf](http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf) (last visited Apr. 9, 2017).

<sup>13</sup> *See id.* (“Still, Cantone was ordered to pay 20,000 euros (\$22,500) in legal costs, which local media have called a ‘final insult.’”).

<sup>14</sup> *See* Pianigiani, *supra* note 5 (“Unfortunately, in such cases, it’s like emptying the ocean with a bucket. Even if the watchdog ordered the cancellation of 300 URLs, another 300 could appear the day after.”).

<sup>15</sup> *See* Roberto Saviano (@robertosaviano), TWITTER (Sept. 14, 2016, 8:43 AM), <https://twitter.com/robertosaviano/status/776053739329359872?lang=en> (translating “Addolorato per Tiziana, che si è uccisa perché donna in un Paese in cui il sesso disinvolto e giocoso è ancora il peggiore dei peccati.”).

<sup>16</sup> *Id.*

<sup>17</sup> *See* *Masters & Borghese*, *supra* note 1 (a Naples newspaper asking, “Why are these images still there? Why can people still mock and laugh at this young woman who ended her days because of this humiliation that she suffered?”); *see also* *Tiziana Cantone: Suicide Following Years of Humiliation Online Stuns Italy*, *supra* note 4 (Walter Caputo, a Turin city councilor, referring to Cantone as “certainly not a saint” and as potentially “aiming for a certain notoriety”).

images or videos were taken consensually.<sup>18</sup> As with much of cyber law, revenge porn and its potential solutions are in the periphery of legal jurisprudence.<sup>19</sup> However, prominent political figures have started to give it the attention it seeks while the legal system catches up. Hillary Clinton, the first female presidential candidate for a major political party,<sup>20</sup> publicly announced that if elected president, she would “do everything [she] can” to provide revenge porn victims with the tools that they need to protect themselves.<sup>21</sup>

Revenge porn statutes, as they stand, are largely a byproduct of the gains that have been made in the fields of online harassment and cyberbullying. In order to assess the merits of a potential legal challenge to the language of a revenge porn statute, it is important to first review the successes and failures already traced within the realm of cyberbullying legislation. In Part I, this article explores the similarities between the United States’ cyberbullying and revenge porn statutes, to the extent that they exist, through a comprehensive examination of their history and formation. In Part II, it provides context to the arguments that have been made in advancement of the theory of the First Amendment as protection for online harassment. Finally, Part III reviews the cyberbullying and revenge porn statutes in North Carolina and provides a case analysis of *North Carolina v. Bishop*<sup>22</sup>—the decision that ultimately overturned the state’s cyberbullying law. Part IV advances suggestions on how North Carolina’s revenge porn statute can be amended to avoid preemption by *Bishop* on the grounds of protection under the First Amendment.

## I. BACKGROUND

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<sup>18</sup> Mary Anne Franks, *Frequently Asked Questions: What is Revenge Porn?*, CYBER CIVIL RIGHTS INITIATIVE, <http://www.cybercivilrights.org/faqs/> (last visited Apr. 21, 2017).

<sup>19</sup> See Sarah Ashley O’Brien, *Will Hillary Clinton be the One to Crack Down on Revenge Porn?*, CNN MONEY (Aug. 26, 2016), <http://money.cnn.com/2016/08/26/technology/hillary-clinton-revenge-porn/> (referring to laws against revenge porn as “notoriously weak,” and pointing out a “lack of basic understanding” of cybercrime).

<sup>20</sup> *Hillary Clinton Fast Facts*, CNN (Feb. 6, 2017, 7:07 PM), <http://www.cnn.com/2012/12/20/us/Hillary-clinton---fast-facts/>.

<sup>21</sup> O’Brien, *supra* note 19.

<sup>22</sup> 368 N.C. 869 (2016).

Common to the more traditional trope of the “schoolyard bully” is the idea of direct aggression, which includes actions like hitting, kicking, and taking items by force.<sup>23</sup> “Cyberbullying” is “willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices.”<sup>24</sup> Cyberbullies likewise tend to convey physical or violent threats; but, because the cyberbully is one step removed from his target, much of the aggression manifests as “psychological, emotional, or relational.”<sup>25</sup> While different organizations and policymakers have chosen to define bullying and cyberbullying in a number of ways,<sup>26</sup> two features seem to permeate through each of those definitions: repetition and power imbalance.<sup>27</sup>

As hurtful as a rude comment or a mean joke can be, especially for school-aged children, one isolated act of aggression is not sufficient to qualify as bullying.<sup>28</sup> “The repetitive nature of bullying creates a dynamic where the victim continuously worries about what the bully will do next.”<sup>29</sup> The repetition and pattern of abuse central to the act of bullying are what make it such a pervasive societal issue and an elusive one for lawmakers to combat. The power imbalance present in more traditional bullying dynamics often manifests in the form of physical strength or social stature in the bully,<sup>30</sup> which results in the victim changing her daily routines or behaviors so as to avoid confrontation. In situations of cyberbullying, the means of exerting power present differently and are often more “amorphous” or nuanced.<sup>31</sup> Online power can stem from “proficiency or knowledge or the possession of some content (information, pictures, or video) that can be used to inflict

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<sup>23</sup> *Id.* at 6.

<sup>24</sup> SAMEER HINDUJA & JUSTIN W. PATCHIN, *BULLYING BEYOND THE SCHOOLYARD: PREVENTING AND RESPONDING TO CYBERBULLYING* 11 (2d ed. 2015).

<sup>25</sup> *Id.* at 12.

<sup>26</sup> *Id.* at 8.

<sup>27</sup> *See id.* at 5, 12.

<sup>28</sup> *See id.* at 6.

<sup>29</sup> *Id.*

<sup>30</sup> Sameer Hinduja & Justin W. Patchin, *Cyberbullying Fact Sheet: What You Need to Know About Online Aggression*, CYBERBULLYING RES. CTR. 1 (2009), [http://cyberbullying.org/cyberbullying\\_fact\\_sheet.pdf](http://cyberbullying.org/cyberbullying_fact_sheet.pdf).

<sup>31</sup> *See id.*



harm.”<sup>32</sup> Unlike the scenario where a student may choose to take the longer route to her classroom or plan her school departure so as to leave little time for idleness, a cyberbully has access to his victim at all times and with virtually unlimited channels through which to inflict harm.<sup>33</sup> Cyberbullies also have the benefits of choosing to stay anonymous,<sup>34</sup> little to no parental supervision or oversight,<sup>35</sup> and far larger audiences than one could reach with a “picture of a classmate on the mirror in the girls’ bathroom.”<sup>36</sup>

Because many forms of harassment and violence go unreported, specifically childhood bullying,<sup>37</sup> it is difficult to ascertain the prevalence of cyberbullying in the United States. This is made even more difficult by a media landscape that shifts and expands to new platforms each year. In a survey of 457 middle schoolers administered by the Cyberbullying Research Center, approximately thirty-four percent of students reported experiencing some measure of cyberbullying in their lifetime,<sup>38</sup> which may be a modest showing compared to what some researchers estimate.<sup>39</sup> Although prevalence statistics are more sparse than in other areas of the law, what is not sparse is the research on the effects of bullying. Victims tend to be more prone to vengefulness, anger, and self-pity; to struggle academically; to have difficulty making and maintaining friendships; and to feel “lonely, humiliated, insecure, and fearful going to school.”<sup>40</sup> In the long term, victims of traditional bullying and cyberbullying

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<sup>32</sup> *Id.*

<sup>33</sup> *See id.* at 2 (explaining that the presence of computers in adolescents’ private bedrooms as well as the “inseparability” of a cell phone from its owner has made it possible for people to be “perpetual target[s] for victimization”).

<sup>34</sup> *Id.* at 1.

<sup>35</sup> *See id.* at 2.

<sup>36</sup> *Id.*

<sup>37</sup> Rebecca Fraser-Thill, *Why Victims May Not Report Bullying*, VERYWELL (May 11, 2016), <https://www.verywell.com/why-victims-may-not-report-bullying-3287762> (reporting that as many as one-third of bullying victims either do not report or wait to report until years after the bullying has ended).

<sup>38</sup> Hinduja & Patchin, *supra* note 30.

<sup>39</sup> *Cyberbullying Facts Summarizing What is Currently Known*, CYBERBULLYING RES. CTR., <http://cyberbullying.org/facts> (finding that after a review of 73 articles in peer-reviewed academic journals, the rates of victimization ranged widely from 2.3% to 72%).

<sup>40</sup> Hinduja & Patchin, *supra* note 30, at 10.

have been more prone to depression and to contemplating suicide in adulthood than non-victims.<sup>41</sup>

Although the effects of bullying are increasingly well-cited, attorneys have had a difficult time prosecuting cyberbullying cases, especially felony charges,<sup>42</sup> partly because of the evidentiary leap that the jury is asked to make in order to find cause. Unlike traditional bullying, there may be no signs of physical harm nor accounts of any witnesses. It is also possible for bullies or other cyber criminals to erase evidence altogether.<sup>43</sup> Juries are asked to consider whether they believe that someone can inflict emotional distress or precipitate a suicide through the use of a cell phone or social networking site. In November 2008, a federal jury returned what “legal experts” said was the “country’s first cyberbullying verdict.”<sup>44</sup> Lori Drew, forty-nine, along with her daughter Sarah, and a family friend, created a fake MySpace profile under the name “Josh Evans” as a ploy to lure Megan Meier, Sarah’s “nemesis,” into a fictitious courtship before abruptly breaking up with her.<sup>45</sup> After receiving an e-mail from “Josh” that said, “[t]he world would be a better place without you,” Megan hanged herself in her bedroom the same day.<sup>46</sup>

Thomas P. O’Brien, a United States attorney, prosecuted the case under the Computer Fraud and Abuse Act (CFAA), a statute designed to combat computer crimes.<sup>47</sup> Ms. Drew was

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<sup>41</sup> *Id.* (finding that bullying increases the likelihood of contemplating suicide by ten percent in boys, and by more than 20 percent in girls); see also Helen Cowie, *Cyberbullying and its Impact on Young People’s Emotional Health and Well-Being*, 37 THE PSYCHIATRIST 153, 167–68 (May 1, 2013), <http://pb.rcpsych.org/content/pbrpsych/37/5/167.full.pdf> (finding that school-age cyber victims show heightened risk of “depression, of psychosomatic symptoms such as headaches, abdominal pain and sleeplessness[,] and of behavioural difficulties including alcohol consumption.”) (footnotes omitted).

<sup>42</sup> Michael Martinez, *Charges in Rebecca Sedwick’s Suicide Suggest ‘Tipping Point’ in Bullying Cases*, CNN (Oct. 28, 2013), <http://www.cnn.com/2013/10/25/us/rebecca-sedwick-bullying-suicide-case/>.

<sup>43</sup> See *Fighting Cyber Crime: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 107th Cong. 51 (2001) (statement of Thomas T. Kubic, Deputy Assistant Director, Federal Bureau of Investigation) (“What little evidence is available in an on-line crime will usually not exist for long.”).

<sup>44</sup> Jennifer Steinhauer, *Verdict in MySpace Suicide Case*, N.Y. TIMES (Nov. 26, 2008), [http://www.nytimes.com/2008/11/27/us/27myspace.html?\\_r=0](http://www.nytimes.com/2008/11/27/us/27myspace.html?_r=0).

<sup>45</sup> *Id.*

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

<sup>47</sup> *Id.*

charged with three counts of violating a felony portion of the CFAA for “accessing a computer without authorization . . . and obtaining information from a protected computer where the conduct involves an interstate or foreign communication.”<sup>48</sup> The jury returned a verdict for the lesser included crime of misdemeanor violation,<sup>49</sup> which Ms. Drew was later acquitted of on constitutional grounds under the void-for-vagueness doctrine.<sup>50</sup> Although the judgment was ultimately vacated, the case of Megan Meier exemplified the first attempt by the courts to seek justice for a victim of cyberbullying and the first attempt to introduce a bill calling for the development of a federal crime.<sup>51</sup>

Unfortunately, attempts at criminalizing cyberbullying have thus far been largely unsuccessful,<sup>52</sup> and the same has been true for revenge porn until recently.<sup>53</sup> Cyber harassment, and specifically revenge porn, has to this point been solely in the purview of the states, with thirty-four states now hosting some form of a protective statute.<sup>54</sup> However, unlike with cyberbullying, a few of the basic tenets of revenge porn—those of privacy, the capture of explicit images, and the images’ dissemination, do find a starting point in a chapter of the U.S. Code: the Video Voyeurism Act.<sup>55</sup> Where this act falls short in

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<sup>48</sup> *United States v. Drew*, 259 F.R.D. 449, 452 (C.D. Cal. 2009).

<sup>49</sup> *Id.* at 453.

<sup>50</sup> *Id.* at 463–64 (“The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”) (citation omitted).

<sup>51</sup> See Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. § 3(a) (2009) (proposing an amendment to the federal criminal code to impose criminal penalties on anyone who “transmits . . . a communication intended to coerce, intimidate, harass, or cause substantial emotional distress to another person, using electronic means to support severe, repeated, and hostile behavior.”).

<sup>52</sup> See *Policies & Laws: Federal Laws*, STOPBULLYING.GOV (Mar. 31, 2014), <http://www.stopbullying.gov/laws/federal/>.

<sup>53</sup> See Steven Nelson, *Lawmakers Unveil Proposal to Take Nip Out of Revenge Porn*, U.S. NEWS (July 14, 2016), <http://www.usnews.com/news/articles/2016-07-14/lawmakers-lay-bare-proposal-to-take-nip-out-of-revenge-porn> (Representative Jackie Speier’s bill, if approved, would make it a crime to distribute a “visual depiction of a person who is identifiable from the image itself or information displayed in connection with the image and who is engaging in sexually explicit conduct, or of the naked genitals or post-pubescent female nipple of a person, with reckless disregard for the person’s lack of consent to the distribution.”).

<sup>54</sup> *State Revenge Porn Laws*, C.A. GOLDBERG (last updated Mar. 17, 2017), <http://www.cagoldberglaw.com/states-with-revenge-porn-laws/>.

<sup>55</sup> Video Voyeurism, 18 U.S.C. § 1801 (2012).

its protection of revenge porn victims is in the exclusion of images or videos taken in the context of a personal relationship.<sup>56</sup>

Explicit in the elements making up the crime are that the images be taken under circumstances in which an individual has a “reasonable expectation of privacy,” and explicitly “without [the] consent” of the subject.<sup>57</sup> Revenge porn is distinct from voyeurism because there is often a level of intimacy between the subject and the disseminator such that the subject may *not* have an expectation of being able to “disrobe in private,” and the images are often taken *with* the consent of the subject under the assumption that they will not be shared beyond the relationship.<sup>58</sup>

Like in cases of cyberbullying, and as evidenced by the cruel ending to Tiziana Cantone’s story, the harm to victims of revenge porn is great, and thanks to technology, enduring. Because of the ability of the poster to disseminate the image or video within minutes, it may reach hundreds of websites and dominate search engine results within days.<sup>59</sup> As a result, victims are “frequently threatened with sexual assault, stalked, harassed, fired from jobs, and forced to change schools.”<sup>60</sup> Unlike Europe, the United States does not have legislation akin to the “right to forget.” Victims must try their hand at contacting the websites directly, or can sometimes find luck through an advocacy organization, such as the Cyber Civil Rights Initiative, which receives twenty to thirty requests from victims per month.<sup>61</sup>

Although the volume of case law is expanding in regard to sanctions on the websites hosting the explicit content,<sup>62</sup>

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<sup>56</sup> See *id.* (requiring the action to be non-consensual and performed when the subject had a reasonable expectation of privacy); see also Mary Anne Franks, *Frequently Asked Questions: Aren't Victims Protected by Existing Criminal Laws Against Stalking, Harassment, and Voyeurism?* CYBER C.R. INITIATIVE, <http://www.cybercivilrights.org/faqs> (last visited Apr. 21, 2017).

<sup>57</sup> 18 U.S.C. § 1801(a).

<sup>58</sup> See Mary Anne Franks, *supra* note 56 (“[A]nti-voyeurism laws generally apply only to victims whose images were originally obtained without consent, not images consensually obtained for private use by an intimate partner.”).

<sup>59</sup> Mary Anne Franks, *Drafting an Effective “Revenge Porn” Law: A Guide for Legislators*, CYBER C.R. INITIATIVE 1, 2 (2016), <https://www.cybercivilrights.org/guide-to-legislation/>.

<sup>60</sup> *Id.* (footnotes omitted).

<sup>61</sup> *Id.*

<sup>62</sup> See e.g., *People v. Bollaert*, 248 Cal. App. 4th 699 (2016) (convicting the owner of YouGotPosted.com of identity theft and extortion in the first criminal prosecution of

Section 230 of the Communications Decency Act (CDA) provides an out for providers acting solely as intermediaries for third-party content,<sup>63</sup> which in essence allows quick-thinking website operators to escape liability so long as they refrain from engaging in the actual content production, and rather act only as a vehicle for the perpetrators—an exemption that is allowing this sector of the pornography market to grow and self-sustain.

## II. FIRST AMENDMENT AS APPLIED TO CYBER CRIME

After an in-depth exploration of the history of these cybercrimes and the harm they are proven to cause, it may seem as though these offenses would actually be fairly easy to prosecute, especially as the judicial system continues to acquaint itself with more modern technology. However, attorneys within the last decade have been met with a most formidable foe—the First Amendment. The First Amendment reads, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>64</sup> While it is doubtful that the drafters of the Bill of Rights anticipated its application to the dissemination of explicit images,<sup>65</sup> it is at this junction that the legal profession finds itself.

While it has been argued that the First Amendment was initially enacted as a way to prohibit prior restraint<sup>66</sup>—a concern rising from the history of licensing in England<sup>67</sup>—three theories of the First Amendment’s inception have emerged: free speech

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a revenge porn site operator); In the Matter of Craig Brittain, No. 132-3120, 2015 WL 9702431 (F.T.C. Dec. 28, 2015) (finding that the website owner used deception to solicit private images and then to extort hundreds of dollars from victims to remove the images).

<sup>63</sup> 47 U.S.C. § 230(c)(1) (2012).

<sup>64</sup> U.S. CONST. amend. I.

<sup>65</sup> The founders believed that the liberties announced in the First Amendment were necessary for the survival of a representative democracy. See *Amendment I: Freedom of Religion, Speech, Press, and Assembly*, THE RUTHERFORD INST., [https://www.rutherford.org/constitutional\\_corner/amendment\\_i\\_freedom\\_of\\_religion\\_speech\\_press\\_and\\_assembly](https://www.rutherford.org/constitutional_corner/amendment_i_freedom_of_religion_speech_press_and_assembly) (last visited Nov. 5, 2016) (“As Benjamin Franklin proclaimed, ‘Whoever would overthrow the liberty of a nation must begin by subduing the freeness of speech.’”).

<sup>66</sup> See DAVID KOHLER ET. AL., *MEDIA AND THE LAW* 144 (2d ed. 2014).

<sup>67</sup> *Id.*

as a means to protecting democracy; as a tool that leads to the ultimate discovery of truth; and as a vehicle for self-fulfillment.<sup>68</sup> The second of these theories is where cybercrime may find its justification. A branch that emerges from the full-bodied argument of the search for truth is the “marketplace of ideas,” a metaphor that speaks to the idea of allowing ideas to be exchanged freely without the threat of governmental intervention in such a way that it “represents paradigmatically the kind of freedom to which we aspire.”<sup>69</sup>

The theory assumes that the only way to discover truth is to allow it to compete with falsehood.<sup>70</sup> When conflicting ideas clash in the proverbial marketplace, the best, *or the most truthful*, ideas will prevail, which allows for a more informed citizenry.<sup>71</sup> Cyberbullying and revenge porn are, in their own respect, an expression of ideas tossed in to the metaphorical ring to fight for relevance and consideration in the ultimate discovery of truth. Whether we find those ideas worthy of debate or not is of no consequence.

Today, the First Amendment largely speaks to the United States’ reticence to police *content* regardless of at what point the policing takes place. Unless the speech falls within one of the Court’s proscribed categories,<sup>72</sup> laws restricting speech on the basis of content are invalid unless “necessary to a compelling state interest.”<sup>73</sup> Content-based restrictions are determined based on the content of the speech, that is the expression of the idea, rather than the manner or method with which it is

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<sup>68</sup> See George Rutherglen, *Theories of Free Speech*, 7 OXFORD J. LEGAL STUD. 115, 118–19 (1987).

<sup>69</sup> Jill Gordon, *John Stuart Mill and the “Marketplace of Ideas”*, 23 SOC. THEORY AND PRAC. 235, 235 (1997).

<sup>70</sup> Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 6 (1984).

<sup>71</sup> See *id.* at 4, 6 (“[I]f the conflicting opinions each contain part of the truth, the clash between them is the only method of discovering the contribution of each toward the whole of the truth . . .”).

<sup>72</sup> Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 EMORY L.J. 661, 662 (2016) (including the categories of “incitement, threats, obscenity, child pornography, defamation of private figures, criminal conspiracies, and criminal solicitation.”).

<sup>73</sup> *Id.* (footnote omitted).

communicated.<sup>74</sup> “A law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.”<sup>75</sup>

The laws that have been drafted in response to cyberbullying, cyberstalking, online harassment, and revenge porn, all attempt to criminalize *content*—the pictures, the videos, and the cruel words. As such, each of these regulations, depending on their language, run the risk of butting heads with the presumption of invalidity that the First Amendment affords to content-based restrictions.<sup>76</sup> Because the legal system is familiar with the concept of traditional schoolyard bullying, the case law surrounding students’ free speech rights is substantial,<sup>77</sup> and its application to cyberbullying has developed more quickly.<sup>78</sup> The same depth does not exist in the realm of revenge porn, as its ascension has been more rapid and more difficult to contain. Also adding to the difficulty of creating constitutionally sound legislation is a major difference between the actors in a cyberbullying scenario versus that of a revenge porn scenario—age. The Supreme Court has generally held that the constitutional rights of children are not equal to those of adults,<sup>79</sup> which makes the largely “adult” crime of revenge porn more difficult to navigate while still protecting the borders of the First Amendment. Exceptions that encroach on students’ speech (i.e. school-sponsorship, disruption of classwork, “substantial

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<sup>74</sup> See *Turner Broad. Sys., Inc. v. Fed. Comm’n Comm’n*, 512 U.S. 622, 643 (1994) (“As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.”).

<sup>75</sup> Koppelman, *supra* note 72, at 665 (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015)).

<sup>76</sup> See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (“Content-based regulations are presumptively invalid.”).

<sup>77</sup> See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969) (holding that student speech may be censored if it “materially disrupts classwork or involves substantial disorder or invasion of the rights of others”).

<sup>78</sup> See *J.S. v. Bethlehem Area Sch. Dist.*, 569 Pa. 638 (2002); see also CATHERINE D. MARCUM, *CYBER CRIME* 102–03 (2014) (explaining the *Bethlehem* holding that although the minor’s website was created off-campus, the access on school property and derogatory effect it had on students and teachers was enough to strip it of First Amendment protection).

<sup>79</sup> See *Fraser*, 478 U.S. at 682 (“[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”).

disorder”<sup>80</sup>) do not translate as easily to crimes involving adults. This results in a blank slate from which legislators attempt to fashion appropriate sanctions.

Because it is clear that attempts at regulating these behaviors are indeed content-based, the second step in that inquiry is whether the content falls or *can* fall<sup>81</sup> within one of the Court’s aforementioned proscribed categories. In *United States v. Stevens*,<sup>82</sup> the Court considered whether a federal law seeking to ban the “commercial creation, sale, or possession” of depictions of animal cruelty violated the First Amendment.<sup>83</sup> Chief Justice Roberts delivered an opinion that, in effect, put a halt to the contention that the Court’s categories of proscribed speech were fluid, and which placed an additional barrier between revenge porn victims and their hopes of redress through the court system:

The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document “prescribing limits, and declaring that those limits may be passed at pleasure.”<sup>84</sup>

Because the Court held that all categories of proscribed speech must have a history or tradition of regulation,<sup>85</sup> it was not

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<sup>80</sup> See MARCUM, *supra* note 78, at 102.

<sup>81</sup> See Koppelman, *supra* note 72, at 663 (“The present exceptions to free speech protection are judge-made doctrines. The courts that made them are by the same authority free to construct additional exceptions. Those exceptions would be justified by whatever justified the exceptions already on the books.”).

<sup>82</sup> *United States v. Stevens*, 559 U.S. 460, 465–66 (2010) (determining whether “crush” videos—videos featuring the “intentional torture and killing of helpless animals,” which apparently “appeal to persons with a very specific sexual fetish”—are consistent with the freedom of speech guaranteed by the First Amendment).

<sup>83</sup> *Id.* at 464.

<sup>84</sup> *Id.* at 470 (citation omitted).

<sup>85</sup> *Id.* at 469.



possible to add depictions of animal cruelty to that list, and it will likely not be possible to add revenge porn to that list either.

The hope that attorneys in this field must hang their hats on, until and unless a federal statute or regulation is enacted,<sup>86</sup> is the argument that there is a compelling state interest in the regulation of revenge porn. Examples of what the Court has found to be “compelling” enough to withstand strict scrutiny include: the attainment of a diverse student body,<sup>87</sup> national security,<sup>88</sup> and prison safety.<sup>89</sup> One argument in favor of the idea that there is a compelling state interest in prohibiting revenge porn is one at the base of the First Amendment’s supposed aims: the right of each person to participate in public discussion,<sup>90</sup> and to contribute to the marketplace of ideas. Revenge porn threatens to create a class of people who are “chronically dogged by a spoiled social identity, and a much larger class of people who know that they could be subjected to such treatment without hope of redress,”<sup>91</sup> which runs directly afoul of the ideal of a regime that allows for confidence, empowerment, and agency in the forum of public debate.<sup>92</sup>

This state interest may not meet the burden imposed by the doctrine of strict scrutiny if the Court were to fall in line with the precedent established in *United States v. Morrison*,<sup>93</sup> which although advanced under the Commerce Clause, presents a similar argument for women’s ability to be active social and economic participants in their communities due to the threat of

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<sup>86</sup> See generally Steven Nelson, *Lawmakers Unveil Proposal to Take Nip out of Revenge Porn*, U.S. NEWS (July 14, 2016), <http://www.usnews.com/news/articles/2016-07-14/lawmakers-lay-bare-proposal-to-take-nip-out-of-revenge-porn>. A federal statute may be on the horizon as California Democrat, Rep. Jackie Speier, introduced a bill to make revenge porn a federal crime in July 2016. *Id.* The crime would impose a maximum five-year sentence with a showing of “reckless disregard” for the subject’s lack of consent. *Id.*

<sup>87</sup> See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>88</sup> See *Korematsu v. United States*, 323 U.S. 214 (1944). *But see* Adam Liptak, *A Discredited Supreme Court Ruling That Still, Technically, Stands*, N.Y. TIMES (Jan. 27, 2014), [http://www.nytimes.com/2014/01/28/us/time-for-supreme-court-to-overrule-korematsu-verdict.html?\\_r=0](http://www.nytimes.com/2014/01/28/us/time-for-supreme-court-to-overrule-korematsu-verdict.html?_r=0) (explaining that although *Korematsu* has not been explicitly overturned, it has been called into doubt, and is largely regarded as “shameful” and “thoroughly discredited”).

<sup>89</sup> See *Johnson v. California*, 543 U.S. 499 (2005).

<sup>90</sup> See Koppelman, *supra* note 72, at 663.

<sup>91</sup> *Id.*

<sup>92</sup> See *id.*

<sup>93</sup> 529 U.S. 598 (2000).

violence.<sup>94</sup> The Court applied an even less stringent test of intermediate scrutiny, which is predominantly the test for “gender-based” discrimination,<sup>95</sup> and the Court held that Congress could not regulate non-economic, violent criminal conduct based solely on an “aggregate effect”<sup>96</sup> on interstate commerce. Again, although *Morrison* was not argued on First Amendment grounds, it shows a reluctance on the Court’s part to impose liability based on what some may view as a theoretical inability to participate fully in the public sphere.

On the other hand, regulation of “group libel” or “hate speech”<sup>97</sup> is often supported by the same reasoning that *Morrison* rejected: that “if members of historically disadvantaged groups are subjected to name-calling and harassment, their own ability to speak—to participate in public debate within the community—will be compromised and perhaps destroyed.”<sup>98</sup> Hate speech is not one of the Court’s strict categories of proscribed speech, but it decidedly has “low” First Amendment value,<sup>99</sup> and therefore tends to receive less protection—a categorization that could reasonably and arguably apply to revenge porn.<sup>100</sup>

### III. CYBERBULLYING AND REVENGE PORN IN NORTH CAROLINA

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<sup>94</sup> See *id.*

<sup>95</sup> See *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (“So far, [intermediate scrutiny] has been applied to content-neutral restrictions that place an incidental burden on speech, to disabilities attendant to illegitimacy, and to discrimination on the basis of sex.”).

<sup>96</sup> See *Morrison*, 529 U.S. at 617.

<sup>97</sup> See GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* 259 (5th ed. 2016) (“[H]ate speech regulation can be understood as the protection of a certain sort of precious public good: a visible assurance offered by society to all of its members that they will not be subject to abuse, defamation, humiliation, discrimination, and violence on grounds of race, ethnicity, religion, gender, and in some cases sexual orientation.”).

<sup>98</sup> Stephen L. Carter, *Does the First Amendment Protect More than Free Speech?*, 33 WM. & MARY L. REV. 871, 888 (1992).

<sup>99</sup> See STONE ET AL., *supra* note 97, at 258 (“Group libel is of ‘low’ first amendment value because it operates not by persuasion but by insidiously undermining social attitudes and beliefs.”).

<sup>100</sup> See Catharine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL’Y REV. 321, 323–24 (1984) (“[P]ornography causes attitudes and behaviors of violence and discrimination which define the treatment and status of half of the population.”).

*A. Cyberbullying Statute (N.C.G.S. 14-458.1)*

Adopted in 2009, North Carolina's cyberbullying statute prohibited the use of a computer or computer network to post or "encourage others to post on the Internet private, personal, or sexual information pertaining to a minor" with "the intent to intimidate or torment" the minor.<sup>101</sup> Its adoption represented a growing trend within the United States to enact protective legislation. The first cyberbullying bill was enacted in 1999, and 166 other bills were either enacted or amended by 2011.<sup>102</sup> As of January 2016, all fifty states had bullying laws, and twenty-three had laws specifically prohibiting cyberbullying.<sup>103</sup>

However, the North Carolina Supreme Court struck down one of these cyberbullying statutes in 2016, in *State v. Bishop*.<sup>104</sup> Defendant, Robert Bishop, was arrested and charged under North Carolina's cyberbullying statute on February 9, 2012,<sup>105</sup> for taking part in a number of conversations on Facebook revolving around "negative pictures and comments" posted on the victim's, Dillion Price's, Facebook page. The postings largely included "comments and accusations about each other's sexual proclivities" along with name-calling and insults of a similar tone.<sup>106</sup> In December, 2011, Price's mother called the police when she found her son very upset and engaging in self-harm as a result of the comments and pictures that she saw on his cellphone.<sup>107</sup>

On February 5, 2014, Bishop's pretrial motion to dismiss based on the argued unconstitutionality of the cyberbullying statute was denied, and he was convicted by a jury of one count of cyberbullying.<sup>108</sup> At the North Carolina Court of Appeals, Bishop renewed his argument that the statute restricted speech under the First Amendment because the restriction was (1)

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<sup>101</sup> N.C. GEN. STAT. § 14-458.1 (2015).

<sup>102</sup> U.S. DEP'T. OF EDUC., ED-CFO-10-A-0031/0001, ANALYSIS OF STATE BULLYING LAWS AND POLICIES 16 (2011).

<sup>103</sup> Sameer Hinduja & Justin W. Patchin, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies*, CYBERBULLYING RES. CTR. 1 (2016), <http://cyberbullying.org/Bullying-and-Cyberbullying-Laws.pdf>.

<sup>104</sup> 368 N.C. 869 (2016).

<sup>105</sup> *Id.* at 869.

<sup>106</sup> *Id.* at 870.

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

<sup>108</sup> *Id.* at 871.

content-based, and (2) too broad to satisfy strict scrutiny.<sup>109</sup> The Court of Appeals rejected those arguments, holding that the statute prohibited *conduct* rather than speech, and that the statute was narrow enough not to sweep in speech outside of the context of “disclosure of ‘private, personal, or sexual information pertaining to [a] minor’ on the Internet with the specific intent to intimidate or torment a minor.”<sup>110</sup> On August 20, 2015, the North Carolina Supreme Court granted Bishop’s petition for discretionary review.<sup>111</sup>

The Supreme Court reversed the decision of the Court of Appeals, holding that the statute restricted speech; that the restriction was content-based; and that the statute’s scope was not “sufficiently narrowly tailored” to serve the State’s interest in “protecting children from the harms resulting from online bullying.”<sup>112</sup>

The Court first inquired as to whether Bishop’s behavior constituted *expressive speech* or *nonexpressive conduct*.<sup>113</sup> In looking to the United States Supreme Court, it found that in order for the speech to be protected, it must be “inherently expressive” and it must *not be* otherwise proscribable criminal conduct that *happens to* involve the written word.<sup>114</sup> The Court determined that the statute outlawed “posting particular subject matter, on the internet, with certain intent,” which was a regulation of speech and not of conduct.<sup>115</sup> The “act” of posting could not strip the speech of its protection, because “much speech requires an ‘act’ of some variety.”<sup>116</sup>

Next, the Court analyzed whether the statute was a content-based or content-neutral restriction on speech—the former requiring satisfaction of strict scrutiny in order to survive.<sup>117</sup> This determination can be made through analysis of the plain text, the animating impulse behind it, or the lack of any

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 872.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 873.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 874.

<sup>117</sup> *Id.*

other explanation for the restriction aside from “distaste for the subject matter or message.”<sup>118</sup> The Court found that North Carolina’s cyberbullying statute was clearly content-based, as it defined which messages to criminalize based on their particular subject matter, thereby sanctioning some messages and not others.<sup>119</sup>

Finally, the Court evaluated whether or not the State had proven a compelling governmental interest, which could protect the statute under strict scrutiny regardless of the findings that the statute created a content-based restriction on protected speech.<sup>120</sup> Protecting children from online bullying is undisputedly a compelling governmental interest, so the subsequent inquiry was whether the statute “embodie[d] the least restrictive means” to effectuate that purpose.<sup>121</sup> The Court held that it did not for three reasons: (1) the statute contained no requirement of actual harm;<sup>122</sup> (2) the terms used to describe motive (“intimidate” and “torment,” which the State felt should be further defined to include “annoy, pester, or harass”) were unconstitutionally broad;<sup>123</sup> and (3) the description of the proscribed conduct was also too expansive and could allow the posting of “*any* information about *any* specific minor” to be prohibited, which is beyond the call of the State’s reported interest.<sup>124</sup> However “laudable” the State’s interest, the Court concluded that the statute created a criminal prohibition of “alarming breadth.”<sup>125</sup> The statute had the potential to criminalize behavior, that although distasteful, must be tolerated under the First Amendment in order to maintain a “robust contemporary society.”<sup>126</sup>

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<sup>118</sup> *Id.* at 875 (citing *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015)).

<sup>119</sup> *Id.* at 876.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 878.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 879.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

*B. Revenge Porn Statute (N.C.G.S. 14-190.5A)*

Because of the similarities between statutes proscribing cyberbullying and statutes proscribing revenge porn, it is imperative that attorneys lend the same careful eye to the language of the latter so as to avoid the fate of the former.

Made effective December 1, 2015, North Carolina's "revenge porn" law, officially titled "Disclosure of Private Images,"<sup>127</sup> was a collaborative effort between the North Carolina Coalition Against Domestic Violence (NCCADV) and Representative Rob Bryan to fill the gap where the State's stalking, cyberstalking, and harassment laws fell short.<sup>128</sup> The law applies when someone "discloses" an image of another person with whom they had a "personal relationship" (pursuant to N.C. Gen. Stat. § 50B)<sup>129</sup> that the person is identifiable, and the image was taken or given consensually with the expectation that the image would remain private.<sup>130</sup> A successful prosecution of the perpetrator in a revenge porn case, aside from the issue described herein regarding constitutionality, already lies beneath the weight of a hefty burden. In order to be convicted under the statute, *five* factors must be present; that is, a person is only guilty of "disclosure of private images" if *all* five criteria are present.<sup>131</sup> With the additional weight added by the protection of free speech under the First Amendment, the statute may not withstand the pressures of practicality imposed by *Bishop*.

When viewed against the opinion in *Bishop*, the revenge porn statute encounters many of the same objections submitted in the Court's review of the last prong in its analysis: whether the

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<sup>127</sup> N.C. GEN. STAT. § 14-190.5A (2015).

<sup>128</sup> 2015 *Legislative Update*, N.C. COALITION AGAINST DOMESTIC VIOLENCE 2 (2016), [http://nccadv.org/images/2015\\_Legislative\\_Summary.pdf](http://nccadv.org/images/2015_Legislative_Summary.pdf).

<sup>129</sup> N.C. GEN. STAT. § 50B-1(b) (2015) (defining the term "personal relationship" to include: current or former spouses; persons of the opposite sex who live or have lived together; persons who are related as parents and children or grandparents and grandchildren; persons who have a child in common; who are current or former household members; who are persons of the opposite sex in a dating relationship).

<sup>130</sup> See § 14-190.5A; see also 2015 *Legislative Update*, *supra* note 128.

<sup>131</sup> See § 14-190.5A(b) (criteria including, (1) The person knowingly disclosed the image with the requisite intent, (2) The depicted person is identifiable from the image or accompanying information, (3) The depicted person's intimate parts are exposed, or the person is engaged in sexual conduct, (4) The image is disclosed without affirmative consent, and (5) The distributor knew or should have known that the depicted person had a reasonable expectation of privacy).

statute “embodies the least restrictive means”<sup>132</sup> to effectuate a compelling state interest. Because the United States Supreme Court has not yet heard a case arising from a conviction under a revenge porn statute, States have not to this point had the opportunity to benefit from precedent regarding what “compelling state interest” would be argued; and, as discussed previously, that may or may not be an uphill battle. Assuming however that the compelling state interest prong could be satisfied, the discussion would move to the second half of the inquiry—whether the statute is narrowly tailored.

As a reminder, the *Bishop* court found that the cyberbullying statute was not narrowly tailored because it did not require a harm; the language of the motive or intent was too broad; and the language of the actual proscribed conduct was similarly too broad to pass constitutional muster.<sup>133</sup>

As with the cyberbullying statute, the revenge porn statute similarly does not require an actual harm be proved, or “even that he or she become aware of such a posting.”<sup>134</sup> Although actual harm is not necessarily required as an element in all crimes, as a practical matter, it can be difficult to prosecute a case when harm appears to be hypothetical or when causation seems tenuous.

The overbreadth doctrine,<sup>135</sup> which spelled the end for the motive requirement in *Bishop*, could have similar power here. The *Bishop* Court took particular offense to the terms “intimidate” and “torment,” and specifically to how the Court was asked to expand the definition of “torment” to include “annoy, pester, or harass,” opining that it was “hardly clear that teenagers require protection via the criminal law from online annoyance.”<sup>136</sup> The North Carolina revenge porn statute features a more expansive motive requirement, which indicates intent to coerce, harass, intimidate, demean, humiliate, or cause financial

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<sup>132</sup> State v. Bishop, 368 N.C. 869, 878 (2016).

<sup>133</sup> *Id.* at 878–79.

<sup>134</sup> *Id.* at 878.

<sup>135</sup> See STONE ET AL., *supra* note 97, at 115 (“The traditional ‘as applied’ mode of judicial review tests the constitutionality of legislation as it is applied to particular facts . . . [but] [t]he First Amendment overbreadth doctrine, on the other hand, tests the constitutionality of legislation in terms of its *potential* applications.”).

<sup>136</sup> *Bishop*, 368 N.C. at 878–79.

loss.<sup>137</sup> As in the case of the cyberbullying statute, the revenge porn statute similarly does not define the terms from which it rests its motive requirement. The motive prong is consequently left open to judicial discretion at best, and preemption for overbreadth at worst.

Although there is great danger in the ways that the statutes' language overlaps, the revenge porn statute *does* diverge in two ways that could help to bolster its strength upon a constitutional challenge: (1) it includes more definitive terms (coerce, or cause financial harm) which lend themselves to a more definable and measurable harm; and (2) it includes a section that explicitly lays out exceptions.<sup>138</sup> The *Bishop* Court was especially concerned that the cyberbullying statute could make it unlawful to post *any content* about *any* specific minor because of the way that the State defined "personal" as "of or relating to a particular person."<sup>139</sup> The revenge porn statute may be able to avoid some of the same concerns of over-expansiveness by detailing exceptions for voluntary exposure, disclosures made in the public interest, and exceptions for providers of interactive computer services, as defined in Section 230 of the CDA.<sup>140</sup>

#### IV. SUGGESTIONS TO AMEND THE STATUTORY LANGUAGE

To escape the danger of unconstitutionality now presented post-*Bishop*, legislators and legislative allies will need to set their eyes on avoiding overbreadth by amending the revenge porn statute to be more narrowly tailored to its aim: "to protect the public from revenge posting online by making it a criminal offense to disclose certain images in which there is a reasonable expectation of privacy."<sup>141</sup> To succeed, an amendment would need to (1) add a *mens rea* component to each

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<sup>137</sup> N.C. GEN. STAT. § 14-190.5A (2015).

<sup>138</sup> *See id.*

<sup>139</sup> *Bishop*, 368 N.C. at 879.

<sup>140</sup> N.C. GEN. STAT. § 14-190.5A (2015).

<sup>141</sup> N.C. Sess. Laws 2015-250 (2015).



element of the crime;<sup>142</sup> and (2) remove the motivation component to reflect revenge porn as a privacy harm rather than a harassment harm.<sup>143</sup>

#### *A. Adding an Intent Requirement*

Although a successful conviction under the revenge porn statute must satisfy five *factors*, the crime itself essentially requires the perpetrator to commit two acts: disclose the image with the requisite intent, and disclose the image without the subject's explicit consent.<sup>144</sup> As written, the first act requires that the perpetrator commit it "knowingly,"<sup>145</sup> which the Model Penal Code (MPC) defines as being "aware that it is practically certain" that his conduct will cause such a result.<sup>146</sup> By requiring knowledge, the law accounts for the possibility of accidental disclosure,<sup>147</sup> which has become increasingly common in the smartphone era.<sup>148</sup> Knowledge therefore entails an affirmative action—the choice to disclose.

To mirror the first act, the second act required under the statute could similarly benefit from an intent requirement. "Purpose"<sup>149</sup> or "knowledge," in the context of consent, could result in too high of a hurdle for prosecutors to clear. Proving that the defendant *knew* that the subject had not given consent would present a high bar when cases involving consent are already remarkably difficult to argue.<sup>150</sup> The occasion where a perpetrator admits to intent during deposition, discovery, or at

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<sup>142</sup> See *Mens Rea*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/mens\\_rea](https://www.law.cornell.edu/wex/mens_rea) (last visited Nov. 5, 2016) ("[T]he state of mind indicating culpability which is required by statute as an element of a crime.").

<sup>143</sup> See Franks, *supra* note 59, at 8.

<sup>144</sup> § 14-190.5A.

<sup>145</sup> *Id.*

<sup>146</sup> MODEL PENAL CODE § 2.02 (AM. LAW INST. 1981).

<sup>147</sup> See Franks, *supra* note 59, at 8.

<sup>148</sup> See, e.g., Andres Jauregui, *Man Accidentally Sends Nude Photos to HR Director, Loses Job Offer*, HUFF. POST (Sept. 2, 2015), [http://www.huffingtonpost.com/entry/man-naked-selfie-hr-director\\_us\\_55e750b4e4b0c818f61a535c](http://www.huffingtonpost.com/entry/man-naked-selfie-hr-director_us_55e750b4e4b0c818f61a535c).

<sup>149</sup> See MODEL PENAL CODE, *supra* note 146 ("A person acts purposely . . . when . . . he is aware of the existence of such circumstances or he believes or hopes that they exist.").

<sup>150</sup> See, e.g., *State v. Way*, 297 N.C. 293 (finding that consent cannot be withdrawn in the middle of a sexual act.)

trial, is rare,<sup>151</sup> which means that more often than not, the prosecutor is in the unwieldy position of attempting to create and relay a picture of what the defendant was thinking at the time of the crime.<sup>152</sup> This is often accomplished through the presentation of circumstantial evidence,<sup>153</sup> which as discussed earlier,<sup>154</sup> can be difficult to obtain during the investigation of a cybercrime, including revenge porn. Rather, legislators should adopt the lesser standard of “recklessness.”

The MPC defines acting recklessly as “consciously disregard[ing] a substantial and unjustifiable risk that the material element exists or will result from his conduct.”<sup>155</sup> This standard would require the offender to know the risk exists and be “unable to offer justification for why he took that risk.”<sup>156</sup> The *Bishop* Court was concerned that the cyberbullying statute had created an issue of throwing the baby out with the bath water, that is, punishing innocuous behavior in order to execute what the statute intended to punish.<sup>157</sup> By adding an intent requirement to the second act, the revenge porn statute could avoid overbreadth without creating an impossibly high burden for the prosecution.

#### *A. Removing the Motive Requirement*

The *Bishop* Court recognized that overbreadth could be minimized by tweaking a statute’s intent requirement, but the aggregate effect of each of the cyberbullying statute’s components spanned too wide to pass strict scrutiny: “While adding a mens rea requirement can sometimes limit the scope of a criminal statute, reading the motive and subject matter requirements in tandem here does not sufficiently narrow the

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<sup>151</sup> Chad S.C. Stover, *Best Practices in Proving Specific Intent and Malice. What Can Civil and Criminal Litigators Learn from One Another?* ABA 1, 2 (2014), [http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014\\_sac/2014\\_sac/best\\_practices.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014_sac/2014_sac/best_practices.authcheckdam.pdf).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> See *Fighting Cyber Crime*, *supra* note 43.

<sup>155</sup> MODEL PENAL CODE, *supra* note 146.

<sup>156</sup> Franks, *supra* note 59, at 6.

<sup>157</sup> *State v. Bishop*, 368 N.C. 869, 878 (2016) (“In addition, as to both the motive of the poster and the content of the posting, the statute sweeps far beyond the State’s legitimate interest in protecting the psychological health of minors.”).

extensive reach of the cyberbullying statute.”<sup>158</sup> Therefore, in order to succeed where cyberbullying failed, the revenge porn statute must also amend its motive requirement or as this paper suggests, remove it altogether.

As in the cyberbullying statute, the revenge porn statute lays out a number of motive requirements<sup>159</sup> that attempt to create a picture for the jury of the mindset or rationale that helped to urge the offender to commit the offense. Although it is argued that statutes must have motive requirements in order to stand up to constitutional muster,<sup>160</sup> “[t]he Supreme Court has never held that statutes regulating expression must include motive requirements; if anything, the Court has suggested that motive requirements might render an otherwise constitutional statute unconstitutional.”<sup>161</sup>

Removing the motive component takes some of the guesswork out of the jury’s hands while also criminalizing the targeted behavior more directly. The *Bishop* Court was concerned by how vague the motivating terms were, and further, by the lack of definition provided by the statute’s plain language.<sup>162</sup> Without the motive requirement, the statute punishes the *act* itself, and moves away from discriminating based on mindset or viewpoint, both of which ignore the reality of the harm to the victim and the purpose of the attempt to criminalize.

Removal also helps the statute to resist becoming duplicative of North Carolina’s well established harassment statutes,<sup>163</sup> which the revenge porn statute was created to supplement, not replace. If the same conduct can be prosecuted under multiple statutes, and the penalties for violating each statute differ, “the danger is that different people who are equally situated can receive different punishments.”<sup>164</sup> When a court is

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<sup>158</sup> *Id.* at 879.

<sup>159</sup> N.C. GEN. STAT. § 14-190.5A (2015) (“Coerce, harass, intimidate, demean, humiliate, or cause financial loss . . .”).

<sup>160</sup> See Complaint for Declaratory and Injunctive Relief at 5, *Antigone Books L.L.C. v. Horne*, No. 2:14-cv-02100-SRB (D.Ariz. Sept. 23, 2014) (“The Arizona State Legislature failed to tailor the law’s reach to harmful, malicious, harassing, or privacy-invading conduct.”).

<sup>161</sup> *Franks*, *supra* note 59, at 8 (citing *R.A.V. v. St. Paul*, 505 U.S. 377 (1992)).

<sup>162</sup> See *Bishop*, 368 N.C. at 879.

<sup>163</sup> See N.C. GEN. STAT. §14-277.3A (2015).

<sup>164</sup> Martin H. Tish, *Duplicative Statutes, Prosecutorial Discretion, and the Illinois Armed Violence Statute*, 71 J. CRIM. L. & CRIMINOLOGY 226, 226 (1980).

looking to validate a statute's existence, a clear indication of failure is if it overlaps with other laws already on the books.<sup>165</sup>

Further, although outside of the scope of this paper, removing the intent requirement can help those who have been victimized *not* by a revenge plot, but rather by someone with a “desire to entertain, to make money, or achieve notoriety.”<sup>166</sup> Although colloquially, and within the confines of this note, the statute at issue has been referred to under the term “revenge porn,” “nonconsensual pornography” may be a more apt name going forward, and one that more appropriately falls within the statute's official title: disclosure of private images. Recognizing the lapse in coverage, NCCADV hopes to aid in amending the statute to protect victims outside of the realm of what North Carolina deems a “personal relationship.”<sup>167</sup>

### CONCLUSION

In March 2016—four months after the statute's inception—Ashley Augustine of Apex, North Carolina, became the first to be arrested under the new law for posting a photograph of a woman having sex, “knowing that the woman didn't consent to the posting.”<sup>168</sup> Although charged accordingly as a Class H Felony, Ashley was released on a \$3,000 bond<sup>169</sup> and sentenced to community service.<sup>170</sup> Now legislators, policy directors, and allies will wait and watch as the legal system (hopefully)<sup>171</sup> continues to explore the boundaries of convictions under this statute.

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<sup>165</sup> See e.g., *Ball v. United States*, 470 U.S. 856, 864 (1985) (finding that two independent but overlapping statutes were not “directed to separate evils.”)

<sup>166</sup> Franks, *supra* note 59, at 8.

<sup>167</sup> 2017-18 Legislative Agenda, NORTH CAROLINA COALITION AGAINST DOMESTIC VIOLENCE, <http://nccadv.org/public-policy/legislative-agenda> (last visited Nov. 6, 2016).

<sup>168</sup> Amanda Lamb, *Apex Woman Charged Under New 'Revenge Porn' Law*, WRAL (Apr. 4, 2016), <http://www.wral.com/apex-woman-charged-under-new-revenge-porn-law/15619397/>.

<sup>169</sup> *Id.*

<sup>170</sup> *Offender Pub. Info., Offender Search*, N.C. DEPT. PUB. SAFETY <http://webapps6.doc.state.nc.us/opi/offendersearch.do?method=view> (enter Ashley Augustine in search field; click offender number 1515400; scroll to “Most Recent Period of Supervision Record”).

<sup>171</sup> Assuming that offenders are actually prosecuted under the new crime.

There is an opportunity for legislators—during this time of exploration—to consider how they may prevent the revenge porn statute from falling victim to a First Amendment challenge. The opinion in *Bishop* provides apt guidance for avoiding preemption under the overbreadth doctrine. To do this, legislators should consider: (1) adding a *mens rea* requirement to the act of disclosure without consent in order to narrow the pool from which criminality draws breath; and (2) remove the motive requirement so as to protect the aim of the legislation without utilizing vague terms that compromise the personal liberties secured to the People by the First Amendment.

# TWITTER IN THE AGE OF TERRORISM: CAN A RETWEET CONSTITUTE A “TRUE THREAT”?

Taylor Spencer\*

## INTRODUCTION

The communication landscape in recent years has drastically expanded and changed to include new mediums of communication, and that growth is illustrated in the proliferation of social media platforms like Twitter. Since its inception in 2006,<sup>1</sup> Twitter has grown to boast 313 million monthly active users, with seventy-nine percent of those users holding accounts outside the United States.<sup>2</sup> The reach and influence of Twitter, along with other social media sites, is tremendous, and has had both positive and negative consequences for the world at large.

One area in which Twitter has created an unforeseen impact is through the Islamic State of Iraq and Syria’s (“ISIS”) use of the platform as a radicalization and recruitment tool. ISIS has been a designated Foreign Terrorist Organization since 2004.<sup>3</sup> Users across the world are able to spread ISIS’s message through social media, contributing to the proliferation of “lone wolf” terrorist attacks carried out on behalf of the organization.<sup>4</sup> Safya Roe Yassin, an American-born Muslim woman living in Missouri, is one such American who has been accused of supporting ISIS through her Twitter and other social media accounts.<sup>5</sup> Yassin retweeted multiple statements supporting ISIS, resulting in her arrest for what the prosecution describes as

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<sup>1</sup> *Twitter Turns Six*, TWITTER (Mar. 21, 2012), <https://blog.twitter.com/2012/twitter-turns-six>.

<sup>2</sup> *Twitter Usage/Company Facts*, TWITTER, <https://about.twitter.com/company> (last visited Sept. 19, 2016).

<sup>3</sup> Bureau of Counterterrorism, *Foreign Terrorist Organizations*, U.S. DEP’T OF ST., <http://www.state.gov/j/ct/rls/other/des/123085.htm> (last visited Sept. 20, 2016).

<sup>4</sup> Katie Worth, *Lone Wolf Attacks Are Becoming More Common—And More Deadly*, FRONTLINE (July 14, 2016), <http://www.pbs.org/wgbh/frontline/article/lone-wolf-attacks-are-becoming-more-common-and-more-deadly/> (“Al Qaeda- and ISIS-inspired lone wolf attacks in the U.S. numbered 20 so far this decade, up from eight in the 2000s . . .”).

<sup>5</sup> Nicole Hong, *ISIS Retweet Arrest Raises Free Speech Issues*, WALL ST. J. (Aug. 12, 2016), <http://www.wsj.com/articles/isis-retweet-arrest-raises-free-speech-issues-1471033391>.

threats.<sup>6</sup> Her story highlights the struggle the U.S. government faces in attempting to combat pro-ISIS rhetoric without encroaching on the First Amendment rights of American citizens,<sup>7</sup> and raises the unique issue of how retweets should be treated for purposes of the First Amendment. Because of its pervasive presence and relative newness, social media has presented challenges to the legal world in applying existing legal doctrine to new developments, particularly in the context of the First Amendment.

This Note examines the relationship between social media and true threats as related to retweets on Twitter, and the issues facing courts as they seek to apply the First Amendment to new channels of communication. Part I discusses how ISIS and its supporters use social media, in particular Twitter, to their advantage, and the measures the government and social media platforms are implementing to combat this usage. In light of this background, this Note then discusses the details of Yassin's case in particular. Part II examines the First Amendment framework of the true threat doctrine and the problems that arise when courts attempt to apply that doctrine to novel forms of internet communication, like retweets, using Yassin's case to demonstrate the difficulties in determining whether such speech is, or should be, protected. While there are some complexities in punishing such speech, I argue that retweets are protected speech under the First Amendment, unless they constitute true threats, which is a category of unprotected speech. Finally, the conclusion applies this analysis to Yassin's retweets and concludes that they constitute true threats and are therefore undeserving of First Amendment protection.

## I. BACKGROUND

### *A. ISIS's Social Media Strategy*

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<sup>6</sup> Affidavit in Support of Complaint at 17, *United States v. Yassin*, No. 6:16-cr-03024 (W.D. Mo. Feb. 23, 2016).

<sup>7</sup> This article is limited to discussion of the First Amendment rights of U.S. citizens. This discussion may be applicable to immigrants to the United States, but the case law has not been fully developed and falls outside of the scope of this article. For more information about this issue, see generally Michael Kagan, *Do Immigrants Have Freedom of Speech?*, 6 CAL. L. REV. CIR. 84 (Sept. 2015).

In the age of social media, terrorist groups have used online platforms to disseminate their message, recruit new members, and incite sympathizers to action, with much of their audience consisting of young people.<sup>8</sup> Of the major terrorist groups, ISIS in particular has achieved success through this strategy, especially through its supporters on Twitter.<sup>9</sup> Twitter allows users to post “Tweets,” which are statements that must be fewer than 140 characters and can include videos, photos, and links to other websites.<sup>10</sup> Users can also share another user’s tweets using a feature called a “Retweet,” to which users can add their own comments, or post the original tweet as is.<sup>11</sup> Twitter touts this feature as a “way to pass along news and interesting discoveries.”<sup>12</sup> In order to retweet another user’s tweet, a computer user must hover over a tweet, click the “retweet” button, and click the “retweet” button again when a pop-up shows the user what tweet he is attempting to retweet.<sup>13</sup> Unless a user “protects” his or her tweets, the user’s tweets are “public,” meaning that they are visible to anyone, even to people who do not have Twitter accounts.<sup>14</sup>

While it is difficult to quantify just how many Twitter accounts are held by ISIS supporters, J.M. Berger and Jonathon Morgan conducted a research study and determined that in the short period from September through December 2014, there were at least 46,000 Twitter accounts used by active ISIS

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<sup>8</sup> See Leonid Bershidsky, *Don't Censor Islamic State, Spy on It*, BLOOMBERG VIEW (Aug. 25, 2014), <https://www.bloomberg.com/view/articles/2014-08-25/don-t-censor-islamic-state-spy-on-it> (“Terrorist groups have always used YouTube, Twitter, Facebook and other platforms to draw young people into their ideological orbit, later pulling the most dedicated recruits down into the encrypted, unindexed ‘Dark Web’ and then bringing them over to fight for the cause.”).

<sup>9</sup> See Uri Friedman, *An American in ISIS's Retweet Army*, THE ATLANTIC (Aug. 29, 2014), <https://www.theatlantic.com/international/archive/2014/08/an-american-in-isis-retweet-army/379208/> (“ISIS has exploited the power of today’s social web more effectively and enthusiastically than al-Qaeda has, and it’s done so seemingly without concern about propagating a strain of extremism that alienates mainstream Muslims . . . ISIS has also demonstrated a preference for primarily spreading its message through social media rather than news outlets . . .”).

<sup>10</sup> *Posting a Tweet*, TWITTER, <https://support.twitter.com/articles/15367> (last visited Oct. 11, 2016).

<sup>11</sup> *Retweeting another Tweet*, TWITTER, <https://support.twitter.com/articles/20169873> (last visited Oct. 11, 2016).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *About Public and Protected Tweets*, TWITTER, <https://support.twitter.com/articles/14016> (last visited Oct. 11, 2016).



supporters, and that there could be as many as 70,000 such accounts.<sup>15</sup> Most accounts they examined did not enable location services on their tweets, and none of the users who did were located in the United States.<sup>16</sup> Furthermore, pro-ISIS accounts had an average of 1,000 followers each, which is significantly higher than the number of followers most Twitter users have.<sup>17</sup>

The organization's strategy on Twitter relies on the interaction between the "nodes," the "amplifiers," and the "shout-outs."<sup>18</sup> First, "nodes are the leading voices that enjoy a prominent status within the larger community and are the primary content creators for the network."<sup>19</sup> Second, amplifiers "retweet" and "favorite," or "like,"<sup>20</sup> material posted by more popular accounts rather than posting new content, in order to increase the number of Twitter users who see ISIS propaganda and messages.<sup>21</sup> Third, shout-outs, which are "vital to the survival of the ISIS online scene," "introduce new, pro-ISIS accounts to the community and promote newly created accounts of previously suspended users," which allows the previously suspended users to become prominent once more among Twitter users.<sup>22</sup>

The postings of ISIS supporters vary. Some postings are intended to appeal to westerners, such as the "Nutella Campaign," where ISIS fighters posed with jars of Nutella, and

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<sup>15</sup> J.M. Berger & Jonathon Morgan, *The ISIS Twitter Census: Defining and Describing the Population of ISIS Supporters on Twitter*, 20 CTR. FOR MIDDLE EAST POLICY AT BROOKINGS INST. 1, 3 (Mar. 2015), [https://www.brookings.edu/wp-content/uploads/2016/06/isis\\_twitter\\_census\\_berger\\_morgan.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/isis_twitter_census_berger_morgan.pdf).

<sup>16</sup> *Id.* at 11.

<sup>17</sup> *Id.* at 3.

<sup>18</sup> Lorenzo Vidino & Seamus Hughes, *ISIS in America: From Retweets to RAQQA, Program on Extremism*, GEORGE WASHINGTON UNIVERSITY ix (2015) <https://cchs.gwu.edu/sites/cchs.gwu.edu/files/downloads/ISIS%20in%20America%20-%20Full%20Report.pdf>.

<sup>19</sup> *Id.* at 24 ("A group of two or three clustered users will often swap comedic memes, news articles, and official ISIS tweets, allowing them to pool followers and more easily spread content both to new audiences and throughout their network.").

<sup>20</sup> See Casey Newton, *Twitter Officially Kills Off Favorites and Replaces Them with Likes*, THE VERGE (Nov. 3, 2015), <http://www.theverge.com/2015/11/3/9661180/twitter-vine-favorite-fav-likes-hearts> (explaining that Twitter replaced the "favorite" button with the "like" button). See also *Liking a Tweet or Moment*, TWITTER, <https://support.twitter.com/articles/20169874> (last visited March 13, 2017) ("Likes are represented by a small heart and are used to show appreciation for a Tweet or a Moment.").

<sup>21</sup> Vidino & Hughes, *supra* note 18, at 24.

<sup>22</sup> *Id.*

in another campaign, sympathizers posted pictures of fighters with kittens called “little mewjahideen.”<sup>23</sup> In other postings, ISIS has shared videos of executions and other gruesome images, which are intended to appeal to radical young Muslims.<sup>24</sup> For example, ISIS released a video of the execution of American journalist James Foley on Twitter and ISIS supporters have circulated similar images, such as a photo of a child holding a decapitated head.<sup>25</sup>

In recent years, ISIS’s social media campaign has resulted in the radicalization of individuals living in the west, just as the organization intended. Nearly ninety percent of ISIS-related cases in the United States have involved social media use.<sup>26</sup> Elton Simpson, the shooter who opened fire on the Prophet Mohammed cartoon contest in Garland, Texas, tweeted shortly before the shooting, “[m]ay Allah accept us as mujahideen” with the hashtag,<sup>27</sup> “#texasattack,” and had previously asked his followers to follow another ISIS propaganda account on Twitter.<sup>28</sup> In another instance illustrating the presence of ISIS on Twitter, ISIS supporters on Twitter changed their profile pictures to images of Omar Mateen, the shooter at Pulse Nightclub in Orlando, after he called police during the shooting to pledge support for ISIS.<sup>29</sup> These cases illustrate that while the majority of ISIS sympathizers on Twitter may never “make the leap from talk to action, from being keyboard warriors to actual militancy,”

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<sup>23</sup> Bershidsky, *supra* note 8; Natalie Andrews & Felicia Schwartz, *Islamic State Pushes Social-Media Battle with West*, WALL ST. J. (Aug. 22, 2014), <http://www.wsj.com/articles/isis-pushes-social-media-battle-with-west-1408725614> (“[T]hese memes are organized and planned in online forums and then rolled out on social networks as a deliberate strategy to make the Islamic State seem more friendly and familiar to Westerners.”).

<sup>24</sup> Bershidsky, *supra* note 8.

<sup>25</sup> Andrews & Schwartz, *supra* note 23.

<sup>26</sup> *Case by Case: ISIS Prosecutions in the United States*, CENTER ON NATIONAL SECURITY AT FORDHAM LAW 1, 27 (July 6, 2016), <http://static1.squarespace.com/static/55dc76f7e4b013c872183fea/t/577c5b43197ae832bd486c0/1467767622315/ISIS+Report+-+Case+by+Case+-+July2016.pdf>.

<sup>27</sup> *Using Hashtags on Twitter*, TWITTER, <https://support.twitter.com/articles/49309> (last visited March 13, 2017) (“A hashtag—written with a # symbol—is used to index keywords or topics on Twitter. This function was created on Twitter, and allows people to easily follow topics they are interested in.”).

<sup>28</sup> Holly Yan, *Texas Attack: What We Know About Elton Simpson and Nadir Soofi*, CNN (May 5, 2012), <http://www.cnn.com/2015/05/05/us/texas-shooting-gunmen/>.

<sup>29</sup> Kristen V. Brown, *How Did ISIS Radicalize the Orlando Shooter?*, FUSION (June 13, 2016), <http://fusion.net/story/313671/orlando-nightclub-shooting-omar-mateen-isis-internet-radicalization/>.

there are individuals in the U.S. who have, and their speech has had an effect on those who are considering supporting, and acting on behalf of, ISIS.<sup>30</sup>

*B. Responses to the Twitter Success of ISIS*

Both Twitter and the U.S. government have attempted to combat the use of Twitter as a means of spreading ISIS propaganda. According to Twitter's rules, users "may not make threats of violence or promote violence, including threatening or promoting terrorism."<sup>31</sup> As of early 2016, Twitter had suspended over 125,000 accounts for threatening or promoting terrorism, and most of those accounts were related to ISIS.<sup>32</sup> However, suspending accounts is only a temporary solution because many users are able to create new accounts and continue to post on behalf of ISIS, and accumulate more followers through the use of the aforementioned shout-out accounts.<sup>33</sup>

The government has also sought to work with social media platforms and arrest individuals who have advocated for ISIS, mainly through Facebook and Twitter.<sup>34</sup> Since March 2014, 105 individuals have been charged in the U.S. with ISIS-related offenses.<sup>35</sup> The arrested individuals are overwhelmingly male and young, with an average age of twenty-six years old, and are mainly U.S. citizens.<sup>36</sup> However, while those arrested for providing support to ISIS tend to be male, women operate nearly

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<sup>30</sup> See Vidino & Hughes, *supra* note 18, at 33.

<sup>31</sup> *The Twitter Rules*, TWITTER, <https://support.twitter.com/articles/18311> (last visited Sept. 20, 2016).

<sup>32</sup> *Combating Violent Extremism*, TWITTER (Feb. 5, 2016), <https://blog.twitter.com/2016/combating-violent-extremism>.

<sup>33</sup> Vidino & Hughes, *supra* note 18, at 24 ("While American ISIS accounts are suspended with some frequency, these suspensions have become a badge of honor and a means by which an aspirant can bolster his or her legitimacy. In most suspension cases, a new (and often more than one) account with a variation of the previous username is created within hours . . . The user's first tweet is often an image of the Twitter notification of suspension, proving that they are the owner of the previous account, along with a request for shout-outs. The new accounts are then retweeted by others, allowing the user to regain his or her previous online following.")

<sup>34</sup> See *Case by Case: ISIS Prosecutions in the United States*, *supra* note 26.

<sup>35</sup> *GW Extremism Tracker: ISIS in America*, PROGRAM ON EXTREMISM, GEORGE WASHINGTON UNIVERSITY (Sept. 29, 2016), [https://cchs.gwu.edu/sites/cchs.gwu.edu/files/downloads/MidSeptember\\_Update\\_ISIS%20in%20America.pdf](https://cchs.gwu.edu/sites/cchs.gwu.edu/files/downloads/MidSeptember_Update_ISIS%20in%20America.pdf).

<sup>36</sup> *Id.*

one-third of Twitter accounts that could be traced to the U.S.<sup>37</sup> The federal statute under which most of the suspected supporters of ISIS who have been arrested have been charged is 18 U.S.C. § 2339B<sup>38</sup> which punishes “[w]hoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so.”<sup>39</sup> “Material support” under this section is defined as follows:

any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.<sup>40</sup>

However, as is evident from the above definition of material support, the government may not be able to sustain a conviction of those disseminating ISIS propaganda on Twitter under the material support statutes, because those using Twitter to disseminate ISIS propaganda are not necessarily providing material support to the terrorist organization as defined by the statute, but are still aiding the organization through their speech.<sup>41</sup>

To avoid the difficulty of obtaining convictions under the material support statute, the Government has utilized 18 U.S.C. § 875(c) to convict Twitter users promoting ISIS on Twitter. The statute utilizes congressional authority over interstate commerce and provides that: “Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or

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<sup>37</sup> Vidino & Hughes, *supra* note 18, at 23.

<sup>38</sup> 18 U.S.C. § 2339B (2012).

<sup>39</sup> *Id.* § 2339B(a)(1).

<sup>40</sup> *Id.* § 2339A(b)(1).

<sup>41</sup> *See* Hong, *supra* note 5.

both.”<sup>42</sup> Section 875(c) has been used in five ISIS cases, including Yassin’s, two of which resulted in guilty pleas and three of which are still pending.<sup>43</sup> Because Section 875(c) punishes pure speech, it implicates the First Amendment, as will be discussed below.<sup>44</sup>

While both the government and social media platforms recognize the importance of monitoring extremist activity on these websites, critics have expressed concerns about the type of individuals the government is actually charging.<sup>45</sup> For example, the FBI investigated Omar Mateen, the Florida resident who expressed his support for ISIS during his shooting rampage at an Orlando nightclub, for his online activity on two separate occasions, but he was never charged with any crime.<sup>46</sup> Because of the focus on Internet activity, the government has ended up convicting “often-hapless people” for terrorism who are essentially “wayward isolated young men (and a few women) with little connection to international terrorist groups,” and who “come across as more pathetic than fearsome.”<sup>47</sup> For instance, Ali Shukri Amin, a seventeen year old student in Virginia suffering from Crohn’s disease who spent much of his time on the internet, explained to the judge at sentencing that his online relationships were important because his “friends” treated him “with respect and occasionally reverence.”<sup>48</sup> He was sentenced to eleven years in prison for his tweets that had elevated him to one of the most prominent American supporters of ISIS on Twitter.<sup>49</sup> Cases like Amin’s illustrate the difficulty the government faces in “trying to identify and imprison real

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<sup>42</sup> 18 U.S.C. § 875(c) (2012).

<sup>43</sup> Hong, *supra* note 5 (“[T]he theories behind the government’s case against Ms. Yassin are also largely untested. The primary statute used against Ms. Yassin, which prohibits communications containing ‘any threat to injure,’ has been used by the government only in four other Islamic State-related cases . . . The statutes have also been used in a variety of other cases, including cyber harassment.”).

<sup>44</sup> *Cf. Watts v. United States*, 394 U.S. 705, 707 (1969) (“[A] statute such as this one, which makes criminal a form of *pure speech*, must be interpreted with the commands of the First Amendment clearly in mind.” (emphasis added)).

<sup>45</sup> Murtaza Hussain & Josh Begley, *ISIS in America: Nine Lost Souls the FBI Charged as Terrorists While Letting the Orlando Shooter Go*, THE INTERCEPT (June 17, 2016), <https://theintercept.com/2016/06/17/nine-lost-souls-the-fbi-charged-as-terrorists-while-letting-the-orlando-shooter-go/>.

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

<sup>47</sup> *Id.*

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

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

terrorists before they commit acts of terrorism,”<sup>50</sup> and lends force to an argument erring in favor of protecting freedom of speech for online communications.

### C. Yassin’s Case

Yassin, a U.S. citizen, came to the attention of the FBI for her activity on social media that indicated support for ISIS.<sup>51</sup> A person who had befriended Yassin on Facebook called the FBI’s Public Access Line (“PAL”) and notified the FBI that while in the beginning of their friendship Yassin had been “unexceptional in her teachings” of Islam, the complainant was concerned because she had recently started attempting to gather support for ISIS and believed that ISIS was “going to save the world.”<sup>52</sup> For example, as her views became more extreme, she told the complainant that he/she “would go to hell if he/she did not divorce his/her non-Muslim spouse.”<sup>53</sup> When interviewed, Yassin told FBI investigators that she did not support ISIS and that she “simply reports the news” through her postings on social media.<sup>54</sup> She also told investigators that she had no intention of supporting ISIS, financially or otherwise.<sup>55</sup> Shortly before the FBI interview, Yassin contacted the person who informed the FBI about her online activity and asked him not to contact her again.<sup>56</sup>

Through its investigation, the FBI also discovered that Yassin used multiple Twitter handles, which were changed throughout the day as she posted, and her accounts were ultimately suspended for violating Twitter’s terms of service.<sup>57</sup> This situation is consistent with the experiences of other ISIS-

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

<sup>51</sup> Hong, *supra* note 5.

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

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

<sup>54</sup> *Id.* at 6.

<sup>55</sup> *Id.* (“She stated she is not pro-[ISIS], does not intend to travel to Iraq or Syria, would never encourage anyone else to do so, and has never sent financial support to [ISIS].”).

<sup>56</sup> *Id.* at 7 (“Yassin sent the complainant an e-mail instructing the complainant to never contact Yassin again. Yassin explained that she knew the complainant was the one that ‘snitched’ on her, and that Yassin was going to expose the complainant to Muslims everywhere.”).

<sup>57</sup> *Id.* at 5 (alleging that an account belonging to Yassin tweeted, “Please help share my account, this is my 3rd suspension in less than 48 hours. may Allah Reward you!!”).

supporters on Twitter who are suspended, but immediately create more accounts from which they continue to espouse support for the organization.<sup>58</sup> She posted pictures of children with ISIS flags, although Yassin explained to the FBI that the flags were actually traditional Islamic flags that were “co-opted” by ISIS, and she shared the pictures because “the children were cute,” not out of support for ISIS.<sup>59</sup>

As the investigation continued, some of the statements that were most concerning to the FBI consisted of Yassin’s retweets of the tweets of others.<sup>60</sup> Through her retweets, Yassin played the role of an “amplifier” in the ISIS Twitter strategy, helping to spread information from popular users.<sup>61</sup> As a result, Yassin was arrested and charged with two counts of violating 18 U.S.C. § 875.<sup>62</sup> The tweets for which she was charged included a retweet of personal information about two FBI agents along with the statement “[w]anted to kill;” a link to photographs, contact information, and credit card information of U.S. military members and State Department employees; and a link that listed the location and phone number for 150 U.S. Air Force personnel along with the quote, “[r]ejoice, O supporters of the Caliphate State, with the dissemination of the information to be delivered to lone wolves . . . God said: ‘And slay them wherever you may come upon them.’”<sup>63</sup> These retweets will be discussed in greater detail in Part Three. As a result of the retweet containing the personal information of Air Force members, multiple Air Force personnel were threatened, which the prosecution argues was a direct result of Yassin’s retweet, among other retweets of the same information.<sup>64</sup> However, the prosecution conceded that the

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<sup>58</sup> See Vidino & Hughes, *supra* note 18, at 24.

<sup>59</sup> Affidavit in Support of Complaint, *supra* note 6, at 6.

<sup>60</sup> Hong, *supra* note 5.

<sup>61</sup> See Vidino & Hughes, *supra* note 18, at 24.

<sup>62</sup> Affidavit in Support of Complaint, *supra* note 6, at 17.

<sup>63</sup> *Id.* at 2.

<sup>64</sup> *Id.* at 15 (“For example, . . . a day before [Yassin] posted the list, United States Air Force Major [Actual First and Last Name] . . . received two phone calls from an unknown individual threatening to kill both Major [Actual Last Name-0] and his family. The caller specifically threatened Major [Actual Last Name-0] and his family with beheading, shooting, and bombing if he did not comply with the caller’s demands to stop working for the Air Force within 72 hours.”).

death threats happened before Yassin herself retweeted the information about Air Force personnel.<sup>65</sup>

Yassin has pleaded not guilty and argues the communications for which she was charged do not constitute true threats because the government cannot prove that she intended to kill or inflict bodily harm on a particular individual or group of individuals and she was merely reporting the statements of others.<sup>66</sup> Furthermore, her retweets did not include specific information, like times and locations, for carrying out threats.<sup>67</sup> Therefore, she argues that her speech is protected under the First Amendment.<sup>68</sup> She further argues that 18 U.S.C. § 875(c) is unconstitutionally overbroad on its face because it captures speech that should be protected under the First Amendment.<sup>69</sup> In contrast, the government asserts that there is no legal precedent to support Yassin's argument that retweets should be held to a different standard, and that Yassin's tweets were "anything but generalized statements of religious/political beliefs."<sup>70</sup>

## II. FIRST AMENDMENT FRAMEWORK

### A. *The True Threat Doctrine*

The First Amendment declares that "Congress shall make no law . . . abridging the freedom of speech . . ."<sup>71</sup> At the heart of the First Amendment protection is that the government may not regulate speech "because of disapproval of the ideas expressed."<sup>72</sup> While on its face the First Amendment may sound like an absolute prohibition on any regulation that limits the freedom of speech, the Supreme Court has rejected that interpretation: "[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances."<sup>73</sup>

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<sup>65</sup> *Id.* at 15.

<sup>66</sup> Motion to Dismiss Indictment at 6–8, 11–17, *United States v. Yassin*, No. 6:16-cr-03024 (W.D. Mo. Feb. 23, 2016).

<sup>67</sup> *Id.* at 23.

<sup>68</sup> *Id.* at 7–8.

<sup>69</sup> *Id.* at 24.

<sup>70</sup> Hong, *supra* note 5.

<sup>71</sup> U.S. CONST. amend. I.

<sup>72</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

<sup>73</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).



Instead, the Court has recognized that there are certain categories of speech that can be regulated without violating the First Amendment, including “the lewd and obscene, the profane, the libelous, and . . . ‘fighting’ words.”<sup>74</sup> The Court concluded, “such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>75</sup> With this observation, the Court indicated that, because certain speech is low in value and does not implicate any of the goals of the First Amendment, it does not deserve full protection.<sup>76</sup> Even if certain speech falls into one of the unprotected categories, however, the government still may not discriminate on the basis of content because the Court’s jurisprudence stands for the principle that “these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content—not that they are categories of speech entirely invisible to the Constitution, so that they may be made vehicles for content discrimination unrelated to their distinctively proscribable content.”<sup>77</sup>

Threats are another such category.<sup>78</sup> For a threat to be punishable under the First Amendment, a threat must be a “true threat,” which is defined as “encompass[ing] those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group . . . .”<sup>79</sup> The rationale behind categorizing threats as unprotected speech is the desire to protect “individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur . . . .”<sup>80</sup> Furthermore, threats do not serve to promote public discourse, but instead serve to coerce others to change their

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<sup>74</sup> *Id.* at 572.

<sup>75</sup> *Id.*

<sup>76</sup> *See id.*

<sup>77</sup> *R.A.V.*, 505 U.S. at 383–84.

<sup>78</sup> *See* *Watts v. United States*, 394 U.S. 705, 707 (1969) (concluding that because a statute prohibiting threats criminalizes “a form of pure speech,” . . . “[w]hat is a threat must be distinguished from what is constitutionally protected speech.”).

<sup>79</sup> *Virginia v. Black*, 538 U.S. 343, 359 (2003).

<sup>80</sup> *R.A.V.*, 505 U.S. at 388.

behavior.<sup>81</sup> For these reasons, true threats fall into the category of low-value speech.<sup>82</sup>

The Supreme Court has grappled with the question of under what circumstances a threat constitutes a “true threat” that falls outside the protection of the First Amendment. In determining whether a threat falls into this category, one piece of evidence the Court has used is the content and context of the statements.<sup>83</sup> For example, in *Watts*, the Court was faced with the question of whether an eighteen year old’s statement at a public rally where he was discussing police brutality with others that “[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” constituted a threat.<sup>84</sup> In evaluating his statement, the Court looked at his relative youth, the setting in which he made the statement, the point of the gathering, and the laughter it invoked among his listeners and concluded that his statement was political hyperbole, not a true threat.<sup>85</sup> However, the Court has given little other guidance as to how to determine if speech constitutes a true threat, resulting in confusion among lower courts.<sup>86</sup>

Another piece of the puzzle in deciding whether a statement constitutes a true threat is the speaker’s intent. Because one of the motivations behind not protecting threats is defending individuals from the fear of violence, “[t]he speaker need not actually intend to carry out the threat” to be punished.<sup>87</sup> Section

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<sup>81</sup> See Geoffrey R. Stone, *Sex, Violence, and the First Amendment*, 74 U. CHI. L. REV. 1857, 1864 (2007) (“Threats . . . affect people’s behavior not by persuasion but by coercion. The First Amendment is not designed to foster speech that influences people by intimidation. A threat may literally be ‘speech,’ but its primary effect is analogous to twisting someone’s arm.”).

<sup>82</sup> See *Watts*, 394 U.S. at 707; *Black*, 538 U.S. at 359–60.

<sup>83</sup> Jennifer Elrod, *Expressive Activity, True Threats, and the First Amendment*, 36 CONN. L. REV. 541, 559 (2004).

<sup>84</sup> *Watts*, 394 U.S. at 706.

<sup>85</sup> Elrod, *supra* note 83, at 559–60.

<sup>86</sup> See Adrienne Scheffey, *Defining Intent in 165 Characters or Less: A Call for Clarity in the Intent Standard of True Threats After Virginia v. Black*, 69 U. MIAMI L. REV. 861, 872 (2015) (“After *Watts*, very little guidance could be derived from Supreme Court precedent to clarify the standard for true threats . . . As a consequence of the minimal guidance, courts turned to cases interpreting other categories of unprotected speech, such as fighting words, incitement, and imminent lawless action, in attempts to create a consistent test for true threats. This only further muddled the true threat’s [sic] test.”).

<sup>87</sup> *Black*, 538 U.S. at 359–60.

875(c), the federal threat statute,<sup>88</sup> does not specify that the defendant have any particular mental state in order to be convicted.<sup>89</sup> On its face, the statute only requires “proof that a communication was transmitted and that it contained a threat.”<sup>90</sup> The Court recently addressed the question of what mental state the government must prove in order to convict an individual under Section 875(c) in *Elonis v. United States*.<sup>91</sup>

In *Elonis*, the defendant posted graphic and violent rap lyrics on Facebook about his wife, co-workers, a kindergarten class, and law enforcement, often accompanied by statements to the effect that he was simply exercising his First Amendment rights.<sup>92</sup> Both his wife and co-workers felt threatened by the posts, and eventually the FBI arrested the defendant for violating Section 875(c).<sup>93</sup> He was convicted after the trial court instructed the jury “that *Elonis* could be found guilty if a reasonable person would foresee that his statements would be interpreted as a threat.”<sup>94</sup>

The Supreme Court reversed his conviction.<sup>95</sup> The Court concluded that in order to punish an individual under Section 875(c), the government must prove that the defendant intended his or her statement to be a threat.<sup>96</sup> The Court explicitly rejected the adoption of a reasonable person standard because such a standard would ignore the defendant’s culpability, requiring only a showing of negligence, which the Court was reluctant to find in a criminal statute.<sup>97</sup> The Court stated that the “mental state requirement in Section 875(c) is satisfied if the defendant

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<sup>88</sup> 18 U.S.C. § 875(c) (2012).

<sup>89</sup> *Elonis v. United States*, 135 S. Ct. 2001, 2008 (2015).

<sup>90</sup> *Id.* at 2011.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 2004–07.

<sup>93</sup> *Id.* at 2005.

<sup>94</sup> *Id.* at 2007.

<sup>95</sup> *Id.* at 2003.

<sup>96</sup> *Id.* at 2011 (“Here ‘the crucial element separating legal innocence from wrongful conduct’ is the threatening nature of the communication. The mental state requirement must therefore apply to the fact that the communication contains a threat.” (internal citations omitted)).

<sup>97</sup> *Id.* (“Such a ‘reasonable person’ standard . . . is inconsistent with ‘the conventional requirement for criminal conduct—*awareness* of some wrongdoing.’ Having liability turn on whether a ‘reasonable person’ regards the communication as a threat—regardless of what the defendant things—‘reduces culpability on the all-important element of the crime to negligence’ . . . .” (internal citations omitted)).

transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat,” but declined to decide whether a finding of recklessness would satisfy the statute.<sup>98</sup> In sum, while the defendant does not need to intend to carry out his or her threatening statement, he or she must have intended the statement to be a threat. The Court did not address the First Amendment implications of Section 875(c)’s prohibition on certain speech, in spite of the fact that Section 875(c) implicates expression typically afforded First Amendment protections.<sup>99</sup> However, because true threats are not protected speech under the First Amendment, the statute appears to be consistent with the Court’s view of true threats, as long as the government establishes the nature of the threatening communication in accordance with the Court’s true threat doctrine.<sup>100</sup>

While the Court has addressed some of the requirements for speech to constitute a true threat, new questions have arisen in recent years about how to apply the Court’s guidance when examining statements and other modes of expression made on the Internet, particularly on social media platforms.

### *B. The True Threat Doctrine in the Context of the Internet & Social Media*

As noted above, the advent of the Internet has brought about sweeping changes in the way our society functions, changes that have been especially noticeable in the way

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<sup>98</sup> *Id.* at 2012 (“In response to a question at oral argument, Elonis stated that a finding of recklessness would not be sufficient. Neither Elonis nor the Government has briefed or argued that point, and we accordingly decline to address it.” (internal citations omitted)).

<sup>99</sup> *Id.* (“Given our disposition, it is not necessary to consider any First Amendment issues.”); See Alison J. Best, *Elonis v. United States: The Need to Uphold Individual Rights to Free Speech While Protecting Victims of Online True Threats*, 75 MD. L. REV. 1127, 1132 (2016) (“Historically, the Supreme Court has treated true threats as a category of speech unprotected by the First Amendment. When analyzing statutory provisions that reference true threats, however, the Court has applied varying intent standards . . . without referencing the First Amendment implications of these statements.”) (footnotes omitted). *But see* *Watts v. United States*, 394 U.S. 705, 707 (1969) (“[A] statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech.”).

<sup>100</sup> See *Watts*, 394 U.S. at 707 (concluding the statute that prohibits threats against the President was constitutional on its face).

individuals communicate with each other. The prevalence of the Internet in today's society has led to an increase in true threat cases "because it is easier than ever before to disseminate information to large groups of people quickly, inexpensively, and for an extended or possibly indefinite period of time."<sup>101</sup> It also allows users to post information "anonymously without regard to geographic location."<sup>102</sup> These characteristics of Internet speech make it unique in the context of historical channels of communication and also make it useful for ISIS and its followers to disseminate their message and threats. Because of this aspect of Internet speech, it is necessary to analyze how the true threat doctrine articulated in *Watts*, *Black*, and *Elonis* can be used in the context of threats on the Internet.

The Internet has also introduced new methods of communication, like retweeting, that do not necessarily resemble substantive speech as traditionally understood. While the speech in *Elonis* clearly constituted pure speech, other methods of communication unique to the Internet are not so obviously speech. The Supreme Court has not yet had a chance to address some of the new methods of communication available on the Internet. As discussed earlier, retweets allow Twitter users to share statements made by other users on Twitter. Essentially, "retweeting' someone else's 'tweet' creates words on the user's Twitter profile, as if the user typed the words herself."<sup>103</sup> Because retweets do not consist of words written by the person who is retweeting the original tweet, there is some question if a retweet constitutes speech for the purposes of the First Amendment.<sup>104</sup> However, another argument is that retweets should be protected as expressive conduct, if not pure speech, because by retweeting another user's tweet, "the user intends to convey the message

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<sup>101</sup> Scheffey, *supra* note 86, at 864 ("Scholars note that true threat cases are becoming more prevalent in light of the expansion of ubiquitous access to the Internet and social media . . .") (footnote omitted).

<sup>102</sup> *Id.* at 865 (footnote omitted).

<sup>103</sup> Bethany C. Stein, *A Bland Interpretation: Why a Facebook "Like" Should Be Protected First Amendment Speech*, 44 SETON HALL L. REV. 1255, 1277 (2014).

<sup>104</sup> *Id.* ("Because the user is not actually typing the words, but rather clicking two buttons, courts could look at the 'retweet'. . . find that it is not substantive, and hold it to be unprotected.").

that she agrees with the tweet, and viewers will understand it that way.”<sup>105</sup>

An analogous means of communication that is unique to the Internet is a Facebook “like.” Facebook users can “like” Facebook pages and posts, which will allow the page’s name to appear on the user’s profile and in the user’s friends’ news feeds.<sup>106</sup> “Liking” a Facebook page allows users to indicate pages or posts they enjoyed without leaving a comment, and also allows users to communicate ideas and opinions to friends.<sup>107</sup> Like retweeting, “liking” a Facebook page or comment consists of clicking a button, which is not an activity traditionally viewed as speech. While the Supreme Court has not addressed this question, the United States Court of Appeals for the Fourth Circuit concluded that “liking” a Facebook page is speech for the purposes of the First Amendment in *Bland v. Roberts*.<sup>108</sup> There, the Fourth Circuit concluded that “liking” a campaign’s Facebook page qualified as speech:

On the most basic level, clicking on the “like” button literally causes to be published the statement that the User “likes” something, which is itself a substantive statement. In the context of a political campaign’s Facebook page, the meaning that the user approves of the candidacy whose page is being liked is unmistakable. That a user may use a single mouse click to produce that message that he likes the page instead of typing the same message with several individual key strokes is of no constitutional significance.<sup>109</sup>

This analysis also provides a means of understanding how retweets should be treated under the First Amendment. Following this analysis, a retweet should constitute speech for

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<sup>105</sup> *Id.* (footnote omitted).

<sup>106</sup> *Id.* at 1261–62. (footnotes omitted).

<sup>107</sup> *See id.*; *What Does It Mean to “Like” Something?*, FACEBOOK, [https://www.facebook.com/help/110920455663362?helpref=uf\\_permalink](https://www.facebook.com/help/110920455663362?helpref=uf_permalink) (last visited Oct. 19, 2016).

<sup>108</sup> *Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013) (concluding that “liking” a political candidate’s campaign page constitutes speech and is therefore protected under the First Amendment.).

<sup>109</sup> *Id.*

the purposes of the First Amendment, even though a user only has to click a button to retweet another user's tweet. However, there are still questions as to what a Twitter user's purpose is when sharing another user's tweets through a retweet. Twitter itself describes retweeting as "a great way to pass along news and interesting discoveries."<sup>110</sup> Because retweets are so useful in spreading information, "retweeting is like using a tiny, powerful printing press."<sup>111</sup> In this way, retweeting is the modern-day equivalent to historical means of distributing information through pamphleteering and door-to-door canvassing, which have been historically understood to be central to the exercising of an individual's freedom of speech rights.<sup>112</sup> Additionally, like more traditional means of distributing information, Twitter offers a method for groups to spread their ideas to a large audience.<sup>113</sup> The fact that Twitter is free makes it an even more powerful tool, considering pamphleteering and leafleting can be expensive for groups wishing to reach a broad audience.

While retweeting could simply be a means of passing along information, it often equals an endorsement of the ideas contained in the original tweet, and the Justice Department has taken the position that it does in Yassin's case.<sup>114</sup> Without adding

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<sup>110</sup> *Retweeting Another Tweet*, *supra* note 11.

<sup>111</sup> Margarita Noriega, *Why We Retweet*, THE DAILY DOT (Dec. 11, 2015), <http://www.dailydot.com/debug/why-we-retweet/>.

<sup>112</sup> *See, e.g.*, *Martin v. City of Struthers*, 319 U.S. 141, 146–47 (1943) ("Door to door distribution of circulars is essential to the poorly financed causes of little people. Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved.").

<sup>113</sup> *See New User FAQs*, TWITTER, <https://support.twitter.com/articles/13920> (last visited Nov. 6, 2016) ("Twitter is a service for friends, family, and coworkers to communicate and stay connected through the exchange of quick, frequent messages . . . All you need to use Twitter is an internet connection or a mobile phone.").

<sup>114</sup> Charles Pulliam-Moore, *You May Not Think Retweets are Endorsements, but the Justice Department Might*, FUSION (Apr. 5, 2016), <http://fusion.net/story/287685/do-retweets-equal-endorsements/> ("Depending on who you ask, hitting the little green "retweet" button on someone else's tweet can mean a couple of different things. Some people retweet to signal boost a message while others retweet ironically to mock an idea. According to the Justice Department though, regardless of what your intentions might have been and whatever disclaimers you've attached to your profile, a retweet could be considered an explicit endorsement of the original tweet."); Bianca Bosker, *What Do We Retweet—And Why?*, HUFF. POST (May 25, 2011), [http://www.huffingtonpost.com/2010/12/16/what-do-we-retweetand-why\\_n\\_797369.html](http://www.huffingtonpost.com/2010/12/16/what-do-we-retweetand-why_n_797369.html) ("[R]etweets are also an act of Twitter goodwill, a show of support for the person who's posted the tweet, as well as content contained in her pithy post.").

additional comments before a statement, such as a disclaimer, readers on Twitter will likely assume that the user who retweeted a statement agrees with the message contained in the original tweet, although it is unclear whether such a disclaimer would prevent prosecution in cases like Yassin's.<sup>115</sup> From another point of view, however, it is less clearly an endorsement of the message than a Facebook "like" is, considering "the universally understood 'thumbs up' symbol" more clearly indicates support.<sup>116</sup> Therefore, it may be necessary for courts to consider the circumstances surrounding the retweet, such as the user's Twitter history, to understand the intent behind the retweet.<sup>117</sup>

However, even if retweets are protected speech under the First Amendment, they will still be subject to the traditional categories of unprotected speech, including true threats. The next section examines Yassin's case in particular in light of this tension between retweets and more traditional means of pure speech to determine whether her retweets constitute true threats that are not protected by the First Amendment.

### C. Yassin's Retweets

Yassin was charged under Section 875(c) for allegedly retweeting threats on Twitter.<sup>118</sup> Two of the retweets for which Yassin was charged consisted of personal information about U.S. military members and FBI agents along with a statement that seemed to be intended to incite violence against them.<sup>119</sup> One consisted of a retweet of contact information about two FBI agents with the statement, "[w]anted to kill," posted under the

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<sup>115</sup> See Jeff John Roberts, *Justice Department Says Retweets Are Endorsements in Terrorism Case*, FORTUNE (Apr. 5, 2016), <http://fortune.com/2016/04/05/retweet-endorsement/> ("You know the phrase: 'RT does not equal an endorsement.' Once upon a time, it was a fancy way for media types to tell people on Twitter they didn't necessarily agree with messages they retweeted. Today, though, most people view the 'not an endorsement' disclaimer as self-important or the sign of a social media rookie.").

<sup>116</sup> *Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013) ("The distribution of the universally understood 'thumbs up' symbol in association with [the] campaign page, like the actual text that liking the page produced, conveyed that [defendant] supported [the] candidacy.").

<sup>117</sup> See *Watts v. United States*, 394 U.S. 705, 707-08 (1969) (concluding that defendant's statement constituted "political hyperbole" rather than a true threat when considered under the circumstances in which the statement was made).

<sup>118</sup> Affidavit in Support of Complaint, *supra* note 6, at 2.

<sup>119</sup> *Id.*



banner “[w]e are the hackers of the Islamic State.”<sup>120</sup> Another retweet consisted of a link that stated, “Caliphate soldiers leak the information of American army,” and listed the contact information for around 150 U.S. Air Force personnel.<sup>121</sup> The retweet also contained an image of a computer keyboard with Arabic writing and the phrase “ISIS Electronic Army,” along with a quote that included in pertinent part the phrase, “God said: ‘And slay them wherever you may come upon them.’”<sup>122</sup> Yassin was not the only Twitter user who “retweeted” the list of Air Force members, and before she “retweeted” it, multiple Air Force members actually did receive threats from anonymous callers.<sup>123</sup>

*Planned Parenthood v. American Coalition of Life Activists*,<sup>124</sup> a 2002 case from the Ninth Circuit, presented a set of facts similar to the facts in Yassin’s case.<sup>125</sup> While this case is no longer good law since the Supreme Court decided *Elonis*, it still offers insights as to how a court might decide Yassin’s case. There, the American Coalition of Life Activists (“ACLA”) created a website called the “Nuremburg Files” for the purpose of “collecting dossiers on abortionists in anticipation that one day we may be able to hold them on trial for crimes against humanity.”<sup>126</sup> The website also listed the names of doctors who provided abortions, with those who had been murdered crossed out.<sup>127</sup> Abortion providers were also listed on “[w]anted posters,” which identified doctors who were later murdered.<sup>128</sup> The

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 14.

<sup>122</sup> *Id.* (“The link also contains Arabic text that is translated as follows: In the name of God, and peace and blessings be upon the messenger of His mercy and the epic, he who is happy [in times of peace] and grim [in times of war]. Muhammad Bin-Abdallah. This information was seized from American [web] sites belonging to the American Crusader army by a hacker of the Islamic State, may God grant it strength and support it through victory. Rejoice, O supporters of the Caliphate State, with the dissemination of the information to be delivered to lone wolves. God said: ‘And slay them wherever you may come upon them,’ [partial Koranic verse, Al-Baqarah, 2:191].”).

<sup>123</sup> *Id.* at 15.

<sup>124</sup> 290 F.3d 1058 (9th Cir. 2002).

<sup>125</sup> *See id.* at 1063–66.

<sup>126</sup> *Id.* at 1080.

<sup>127</sup> *Id.* at 1065 (posting on the Nuremburg Files website approximately 400 names with the legend, “Black font (working); Greyed-out Name (wounded); Strikethrough (fatality).”).

<sup>128</sup> *Id.* at 1062.

defendants were not charged under Section 875(c), but under the Freedom of Access to Clinics Entrances Act (“FACE”), which “gives aggrieved persons a right of action against whoever by ‘threat of force . . . intentionally . . . intimidates . . . any person because that person is or has been . . . providing reproductive health services.’”<sup>129</sup>

The Ninth Circuit applied a reasonable person standard, concluding that because “a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault,”<sup>130</sup> ACLA’s conduct was not protected expression under the First Amendment.<sup>131</sup> Furthermore, the court looked at the circumstances surrounding ACLA’s conduct, including the pattern of the posters as “Wanted” posters and the lines drawn through the names of murdered doctors to support its finding that the ACLA’s actions constituted a true threat.<sup>132</sup> The Court also concluded that “the only intent requirement for a true threat is that the defendant intentionally or knowingly communicate the threat,”<sup>133</sup> which is no longer the requirement after *Elonis*. Applying the subjective standard enunciated in *Elonis*, the outcome could have been different because the ACLA’s conduct would have been protected speech unless the government could meet the subjective requirement and prove that defendant intended the communication to constitute a threat.<sup>134</sup>

In light of *Elonis*, the government must prove that Yassin intended her statement to be a threat.<sup>135</sup> Yassin’s retweets containing information about U.S. military and government personnel were similar to the information contained in the ACLA’s website at issue in *Planned Parenthood*.<sup>136</sup> Because she retweeted the information, however, the crucial question that remains is how the government can meet *Elonis*’s subjective

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<sup>129</sup> *Id.* (quoting 18 U.S.C. § 248(a)(1) and (c)(1)(A) (2012)).

<sup>130</sup> *Id.* at 1074.

<sup>131</sup> *Id.* at 1077.

<sup>132</sup> *Id.* at 1063.

<sup>133</sup> *Id.* at 1075.

<sup>134</sup> *See* *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015).

<sup>135</sup> *See id.* at 2011.

<sup>136</sup> *See Planned Parenthood*, 290 F.3d at 1065.

requirement and show that she intended information that she did not write to be a threat.<sup>137</sup> This analysis presumes that a court would agree that retweets are protected speech.

Like the Court in *Watts*, where the Supreme Court considered the political context of the speaker's statements when deciding if they constituted threats, the court in Yassin's case should take into account the context in which she retweeted the alleged threats and other background information about her online presence when determining whether she had the requisite intent to be convicted under Section 875(c).<sup>138</sup> First, the quotes and statements accompanying Yassin's retweets are indicative of her purpose in sharing those tweets. The statements "wanted to kill" and the portion of a verse from the Koran both indicate what Yassin intended her posts to do: incite violence against U.S. military and government employees.<sup>139</sup> Additionally, one of her retweets included the statement, "[w]e are the hackers of the Islamic State," which demonstrates her support for the terrorist organization and that she was passing along the contact information on behalf of ISIS.<sup>140</sup>

Second, Yassin's other activity on social media sites, the postings on which "consistently and similarly promote[d] [ISIS's] message of violent Jihad," lends supports to a finding that she intended to communicate threats through her retweets.<sup>141</sup> On Twitter, other tweets she posted demonstrated that she supported ISIS and wanted to spread its message. For example, after one of her multiple Twitter accounts was suspended for its activity, she tweeted, "I am back . . . yet again!! They can't suspend the truth or Islam."<sup>142</sup> Her Facebook posts also evinced her affiliation with ISIS, and demonstrated her role as an "amplifier" in ISIS's larger Twitter strategy.<sup>143</sup>

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<sup>137</sup> See *Elonis*, 135 S. Ct. at 2012.

<sup>138</sup> See *Watts v. United States*, 394 U.S. 705, 706–08 (1969).

<sup>139</sup> See Affidavit in Support of Complaint at 2–3, *United States v. Yassin*, No. 6:16-cr-03024 (W.D. Mo. Feb. 23, 2016).

<sup>140</sup> *Id.* at 2.

<sup>141</sup> *Id.* at 9.

<sup>142</sup> *Id.* at 8 n.1.

<sup>143</sup> See *id.* at 8 ("A message was . . . posted on Yassin's account that contained a headline from a British newspaper stating that 'Twitter has suspended more than 30,000 of pro-ISIS accounts in the last 2 days.' The account also posted a message stating the following: 'They're very proud of themselves (that they had to run it on the media) they really felt like they won some battle on the frontlines. Meanwhile,

Yassin argues that she was simply reporting the news, and that because her retweets did not contain explicit directions for carrying out violence against the individuals whose contact information was included, her expression did not constitute true threats.<sup>144</sup> However, the above discussion of the information included in Yassin's retweets and her other Internet activity demonstrate that she was not merely reporting the news in the retweets for which she was charged, but was communicating threats against U.S. military and government employees. While the First Amendment certainly protects an individual's right to share news, and many of Yassin's retweets may be protected for that reason, the specific retweets for which she was charged under Section 875(c) are not. Therefore, the government can likely show that Yassin possessed an intent to communicate threats when she "retweeted" posts geared toward inciting violence against U.S. military and government employees.

### CONCLUSION

As a result of the tremendous changes in how society communicates today, courts are facing serious questions about how new channels of communication should be treated under the First Amendment. However, "whatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears."<sup>145</sup> Therefore, while a retweet may not look like traditional means of communication, it should be protected speech under the First Amendment for the reasons articulated in this Note, even though a Twitter user can retweet the statement of another user simply by clicking a button. The act of retweeting another user's tweet evinces support for the words contained therein, and is akin to more traditional methods

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everyone is back within a few minutes. Honestly, this increases Twitters "worth" temporarily, because it shows an increased number of new users.'"); *see also* Vidino & Hughes, *supra* note 18, at 24.

<sup>144</sup> Motion to Dismiss Indictment at 6–8, 11–17, *United States v. Yassin*, No. 6:16-cr-03024 (W.D. Mo. Feb. 23, 2016).

<sup>145</sup> *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952)) (concluding that violent video games are protected under the First Amendment).

of spreading one's views such as leafleting. Therefore, it is important that courts recognize that retweets should qualify as protected speech under the First Amendment.

While retweets should be considered speech for the purposes of the First Amendment, they are still subject to the narrow categories of unprotected speech as defined by the Supreme Court, which includes true threats.<sup>146</sup> Where a Twitter user retweets a communication that constitutes a true threat, then, that user can still be liable for communicating a threat as if she had written the statement herself. Because a retweet should be considered speech under the First Amendment unless it falls into one of the categories of unprotected speech, Yassin's retweets of threats against U.S. government and military personnel are punishable under Section 875(c), provided the government can illustrate that Yassin intended her retweets to constitute a threat, per the Court's decision in *Elonis*.<sup>147</sup>

Treating retweets as protected speech, except in cases where the information contained in the retweet falls into a category of unprotected speech, such as a true threat, ensures that First Amendment freedoms are preserved except in cases where the government's interest in limiting that speech outweighs an individual's freedom of speech rights, like in true threat cases. In the context of ISIS activity on Twitter, treating retweets as protected First Amendment expression prevents the government from suppressing views it finds repugnant, but if the retweet contains a true threat, the government can step in and prosecute speakers who intend their communication to be a threat under statutes like Section 875(c). Treating retweets as if the user had created the statement herself also reflects the reality of ISIS's Twitter strategy, which relies on retweets to spread the group's messages and calls to action.<sup>148</sup> Ultimately, such an analysis allows the government to address the legitimate national security issues arising from ISIS's presence on Twitter without infringing on the free speech rights of Americans. Yassin's case has not yet gone to trial, but hopefully the court will recognize the free speech implications of her case and strike the right balance

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<sup>146</sup> See *Virginia v. Black*, 538 U.S. 343, 359–60 (2013).

<sup>147</sup> See *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015).

<sup>148</sup> See *Vidino & Hughes*, *supra* note 18, at 24.

between freedom of speech and the realities of social media in the age of terrorism.