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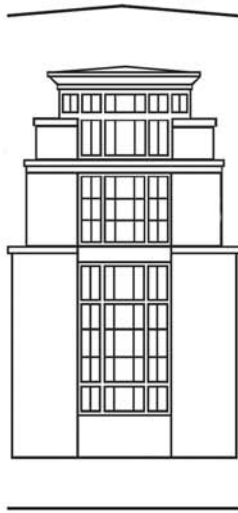
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COPYRIGHT'S PARADOX: Property in Expression/Freedom of Expression

Excerpt from:

(Oxford University Press, forthcoming 2006)

by Neil Weinstock Netanel

Chapter 1
Introduction

The United States Supreme Court has famously labeled copyright the “engine of free expression.”¹ Copyright law, the Court tells us, provides a vital economic incentive for the creation and distribution of much of the literature, commentary, music, art, and film that makes up our public discourse.

Yet copyright also burdens speech. I may need to copy or build upon another’s words, images, or music to convey my own ideas effectively. I can’t do that if the copyright holder withholds permission or insists upon a license fee that is beyond my means. And copyright does not extend merely to literal copying. It can also prevent me from parodying, remolding, critically dissecting, or incorporating portions of existing expression into my own independently created work.

Consider *The Wind Done Gone*, a recent, bestselling novel by Alice Randall. Randall’s novel revisits the setting and characters of Margaret Mitchell’s classic Civil War saga, *Gone With the Wind*, from the viewpoint of a slave. In marked contrast to Mitchell’s romantic portrait of antebellum plantation life, Randall’s story is laced with miscegenation and slaves’ calculated manipulation of their masters. As Randall has explained, she wrote her novel to “explode” the racist stereotypes that she believes are perpetuated by Mitchell’s mythic tale.²

Mitchell’s heirs didn’t gladly suffer Randall’s adulterations.³ They brought a copyright infringement action against Randall’s publisher, and a Georgia district court preliminarily enjoined the novel’s publication.⁴ The Eleventh Circuit reversed and remanded, insisting that copyright law must be interpreted in line with First Amendment protections of free speech. But the case settled before a final judicial determination of the heirs’ claim and Randall’s defense. As we shall see, the extent to which the First Amendment protects such uses of copyrighted works remains uncertain.

Of course, even the lower court injunction did not absolutely prevent Randall from speaking. She still could have vented her views in an op-ed piece or scholarly article. But what more poignant way to drive her point home than to radically recast Mitchell's iconic work? Retellings of classic stories are a time-honored conceit for fiction writers seeking to challenge prevailing ideological and artistic perceptions.

Copyright is thus at once "engine of free expression" and impediment to free expression. It does provide an economic incentive for speech. But copyright may also prevent speakers from effectively conveying their message and challenging prevailing views.

This book addresses the conflict between copyright and free speech. Melville Nimmer, the leading copyright and First Amendment scholar of his day, once aptly termed that conflict a "largely ignored paradox."⁵ Those who valued creative expression happily favored both strong copyright protection and rigorous judicial enforcement of First Amendment rights without perceiving any potential tension between the two.

A recent spate of widely debated lawsuits has shattered that sanguine view. Op-ed pieces across the nation pondered whether copyright, as used by Margaret Mitchell's heirs to suppress Randall's politically charged, acerbically parodic sequel, unduly chills speech. Publishers of public domain books and sheet music challenged the constitutionality of a Copyright Act amendment that adds another twenty years to the copyright term. The ACLU defended artist Tom Forsythe against Mattel's copyright and trademark infringement action over Forsythe's Food Chain Barbie series.⁶ A Princeton University computer science professor petitioned a court to affirm his First Amendment right to present his research at an academic conference after a record industry trade association threatened that the presentation would subject him to liability under the Digital Millennium Copyright Act. Martin Luther King's heirs provoked concerted media protest when they sued CBS for copyright infringement over a CBS documentary on the civil rights movement that included some of the network's original footage of King delivering his seminal "I Have a Dream" speech. Diebold Election Systems, a leading producer of electronic voting machines, sent cease-and-desist letters to three college students and their Internet service providers in a vain attempt to quash the Internet posting of internal company emails revealing technical problems with the machines' performance and integrity. Millions of users of peer-to-peer file trading networks, like Grokster, Kazaa, and the original Napster, have been given cause to consider whether assembling and exchanging a personalized mix of one's favorite music recordings is an exercise of expressive autonomy or the deplorable theft of another's intellectual

property. *The New York Times Magazine* ran a cover story on this emerging “copyright war,” encapsulating the tumultuous cross-currents both in the article’s perplexed, interrogatory title, “The Tyranny of Copyright?” and its unmistakably declarative notice, “Copyright 2004 The New York Times Company.”⁷

Why has the conflict between copyright and free speech come so virulently to the fore? What values and practices does it put at stake? How should the conflict be resolved? These are the principal questions that this book seeks to answer.

At its core, copyright has indeed served as an engine of free expression. In line with First Amendment goals, the Constitution empowers Congress to enact a copyright law in order to “Promote the Progress of Science,” meaning to “advance learning.” Copyright law accomplishes this objective most obviously by providing an economic incentive for the creation and dissemination of numerous works of authorship. But copyright promotes free speech in other ways as well. As it spurs creative production, copyright underwrites a community of authors and publishers who are not beholden to government officials for financial support. Copyright’s support for authorship may also underscore the value of fresh ideas and individual contributions to our public discourse.

But, as I argue in this book, copyright has strayed from its traditional, speech-enhancing core. So much so that in copyright’s present configuration and under present conditions, copyright imposes an unacceptable burden on the values that underlie First Amendment guarantees of free speech. As the Supreme Court has emphasized, the First Amendment aspires to the “widest possible dissemination of information from diverse and antagonistic sources.”⁸ Yet copyright has come systematically to stifle criticism, encumber individual self-expression, and ossify highly skewed distributions of expressive power. Copyright’s speech burdens cut a wide swath, chilling core political speech such as news reporting and political commentary, as well as church dissent, historical scholarship, cultural critique, artistic expression, and quotidian entertainment.⁹ As I will argue, copyright imposes those speech burdens to a far greater extent than can be justified by its vestigial speech-enhancing benefits.

The primary, immediate cause for copyright’s untoward chilling of speech is that copyright has come increasingly to resemble and be thought of as a full-fledged property right rather than a limited federal grant designed to further a particular public purpose.¹⁰ As traditionally conceived, copyright law strikes a precarious balance. To encourage authors to create and disseminate original expression, it accords them a bundle of exclusive rights in their works. But to promote public education and creative

exchange, it both sharply circumscribes the scope of those exclusive rights and invites audiences and subsequent authors freely to use existing works in every conceivable manner that falls outside the copyright owner's domain. Accordingly, through most of the some 300 years since the first modern copyright statute was enacted, copyright has been narrowly tailored to advance learning and the wide circulation of information and ideas, ends that are very much in line with those of the First Amendment. Copyright holder rights have been quite limited in scope and duration, and have been punctuated by significant exceptions designed to support robust debate and a vibrant public domain. Indeed, as courts have repeatedly suggested, it is copyright's traditional free speech safety valves — principally the fair use privilege, copyrights' limited duration, and the rule that copyright protection extends only to literal form, not idea or fact — that have enabled copyright law to pass First Amendment muster.

In recent decades, however, the copyright bundle has grown exponentially. It now comprises more rights, according control over more uses of an author's work, and lasting for a longer time, than ever before. In tandem, the exceptions and limitations that once safeguarded First Amendment values have significantly eroded. If copyright law remained as it was in 1936, the year Margaret Mitchell wrote *Gone With the Wind*, Mitchell's copyright would have already expired, and Randall could have written her sequel without having to defend a copyright infringement lawsuit. In fact, under prior law, even if Mitchell's copyright were still in force, Alice Randall's parodic refashioning of the civil war saga's literary characters and settings might well be considered a perfectly acceptable use of noncopyrightable ideas, not an appropriation of copyright protected expression. Similarly, prior to the Digital Millennium Copyright Act of 1998, Professor Felten's paper on digital music encryption would have fallen entirely outside the reach of copyright law. Had he presented his findings before the DMCA took effect, he would have had no need to invoke the First Amendment to protect his right to speak.

Of course, copyright's ungainly distension has not occurred in a vacuum. Copyright protected expression has assumed a growing importance in the national and global economy. As a result, the industries that produce, distribute, and maintain vast inventories of expressive product have gained considerable political power. The Copyright Act, a product of Congress' wholesale revision in 1976 and numerous additions and modifications since, reflects this influence. The Act's key provisions, especially those of recent amendments, have been passed upon and indeed drafted by copyright industry representatives. The industry has sometimes agreed to carve out narrow, discrete exceptions for well-heeled user organizations like the

telecommunications companies that provide cable television and Internet service. But the broad interest in maintaining a vibrant public domain, an interest diffusely held by the citizenry at large, has consistently been given short shrift.

Concurrently, courts have, for the most part, joined in copyright's expansion by narrowly construing limitations on copyright holder rights. Copyright owners enjoy a decided rhetorical advantage over defendants who assert that their uses of copyrighted works are fair use or otherwise noninfringing. Like other government officials, judges are swayed, no doubt, by the copyright industry's widely-touted importance to our nation's economy. Lower court judges also frequently evince a conventional understanding of copyright as "property," with all the connotations of Blackstonian absolute dominion that that term typically (if incorrectly) implies.¹¹ Imbued with that formulaic proprietarian understanding, courts, like the district court in the *Gone With the Wind* case, have labeled as "theft" and "unabated piracy" any unauthorized use of a copyright holder's work, including even uses like Alice Randall's that contain considerable independent creative expression and critique.¹²

* * * * *

The sharpening conflict between copyright and free speech cuts across traditional and emerging electronic media alike. Yet digital technology adds a vast new dimension to that conflict. It radically transforms the creation, dissemination, and enjoyment of expression, overturning copyright's delicate balance in the process.

The ubiquity of personal computers and other consumer devices capable of copying, storing, manipulating, and communicating expression, coupled with the global reach of digital communications networks, challenge the fundamental assumptions upon which copyright law has traditionally been built. Prior to the advent of digital technology, only large-scale organizations had the wherewithal to produce and distribute expression to a mass audience. Film studios, record companies, television and radio broadcasters, and print publishers came to dominate our cultural landscape because they have the funds and infrastructure to mass produce, package, and distribute authors' works. In that universe of centralized production and distribution, copyright's principal concern was the free riding competitor. Copyright law was designed to create order in the publishing trade, to prevent ruinous competition when unscrupulous firms engage in the bulk sale of counterfeit or substantially similar expressive goods.

Digital technology upends that universe, posing a new, fundamentally different type of threat to the copyright industry. It enables individuals easily to make perfect copies as well as to cut and paste, edit, and remix existing works, and to disseminate those copies and remixes to Internet users the world over. It also makes it possible for authors cheaply to produce and distribute their works directly to audiences, without having to rely on publishers, record companies, movie studios, television networks, or other such intermediaries.¹³ Digital technology, in short, could radically undermine traditional copyright markets not by facilitating misappropriation by unsavory studios and publishers (though it may do that, too), but by enabling consumers and artists to sidestep copyright industry distribution channels altogether.

The copyright industries understandably view the possibility of individuals' untrammelled copying, remixing, and exchange as a mortal threat to the copyright system as we know it. They argue that more extensive copyright protection and enforcement mechanisms are required both to combat massive "digital piracy" and to enable copyright holders better to serve the digital marketplace. The industries have met a receptive ear in Congress and the courts. Yet the millions who regularly download texts, cartoons, music, TV programs, and other material for personal edification, enjoyment, sharing with others, or use in their own creative expression seem increasingly to perceive copyright as an undue and unworthy impingement on their liberty and expressive autonomy. This *Kulturkampf*, possibly even more than the expansion of copyright's scope with respect to traditional media, has brought the copyright-free speech conflict – Nimmer's "largely ignored paradox" – to the fore.

Both sides to this acrimonious debate purport to be the sole, legitimate claimants to copyright's pedigree. The copyright industry posits that copyright serves fundamentally to protect the copyright holder's property and that exceptions, such as fair use, are warranted only in cases of insurmountable market failure, when the high costs of negotiating a license exceed the license fee the copyright owner would demand. Translating those propositions into the digital arena, the industry insists that it must enjoy the effective and enforceable right hermetically to control its content, including the right to charge Internet users every time they read, view or hear a work online. To this end, the copyright industry has sought – and obtained – statutory protection for its planned use of digital technology, including digital watermarking and encryption, to control and meter every access and use of its content.

Internet user advocates, on the other hand, seek faithfully to carry over traditional copyright limitations into the digital arena. In the offline world, I'm largely free to make

personal copies of texts, video, and music, and to share those copies with friends. Many insist that personal copying and posting on the Internet is merely a manifestation of that “right to copy,” and thus should be protected as fair use. Likewise, in the offline world, I can read my books or listen to my sound recordings as often as I like without having to pay a royalty or obtain the copyright owner’s consent. The Internet user advocates accordingly see the specter of a pay-per-use world, a celestial jukebox in which all content resides online and readers and listeners must drop in a digital coin every time they wish to access it, as a horrific expansion of copyright holder prerogatives.

In one important sense, the copyright industry has the better argument. Digital technology radically alters the economic assumptions upon which copyright doctrine is predicated. Accordingly, if we are to remain true to the shared goals of copyright’s fundamental goals, we need to adapt copyright doctrine to changing economic and technological conditions. We cannot simply carry over pre-digital “free use zones” into the digital network environment. At some not-too-distant time, for example, we might generally read texts, view video, and listen to music by ordering access online rather than owning or renting a copy. If so, the law might well need to secure creators’ rights in accessed content in order to maintain the copyright incentive.

But while the copyright industry is correct about the need to translate and adapt copyright doctrine, it is wrong about copyright’s fundamental goals. Copyright is not ultimately about securing property rights. Rather copyright’s fundamental ends, like those of the First Amendment, are to “Promote the Progress of Science” by spurring the creation and widespread dissemination of diverse expression. To the extent exclusive rights in original expression best serve those ends, copyright doctrine should provide for proprietary rights. To the extent not, copyright law should provide for other mechanisms to further education, cultural expression, and robust debate.

From that perspective — and not because Internet users have some inherent “free speech right to copy” — the Groksterization of our expressive matrix may well be a glass half-full rather than the unmitigated disaster that the copyright industries portray. Digital technology offers unprecedented opportunities for collaborative, “peer-to-peer” creation and dissemination of expression at near-zero marginal cost.¹⁴ The Internet already comprises a profuse and richly diverse array of expression, information, and debate, much of it available without any reliance — or intended reliance — on copyright or copyright industry intermediaries. It opens vast new horizons for speakers and audiences alike, making available a wealth of material for inspiration, reconfiguration, sorting, comment, discourse, learning, and enjoyment, all at the click of a mouse.

Thus, even without copyright, the Internet (together with its rapidly evolving wireless counterparts) may well realize as never before the First Amendment ideal of expressive diversity. Indeed, some contend that the Internet will realize its full free speech potential only if copyright is banished from its realm. I would not go so far. As I will argue in this book, there *are* free speech values that copyright will continue to serve in the digital arena, as well as in the creation and distribution of expression offline. But just as in the brick-and-mortar world, copyright should be narrowly tailored to serve its speech-enhancing ends. Our fidelity must be to copyright's speech enhancing purpose, not to extending property rights in expression or propping up traditional industries for their own sake.¹⁵ To the extent property rights in expression unnecessarily stand as an obstacle to free speech, they should be limited or jettisoned in favor of less constraining and less censorial mechanisms for securing authorship credit and remunerating producers and purveyors of original expression. To the extent free speech values are best served by the emergence of new media and greater opportunities for decentralized production and dissemination of original expression, copyright law should encourage, not stand as a barrier, to those developments.¹⁶

* * * * *

An overly capacious copyright may impose a variety of costs. These range from inhibiting innovation in digital technology, to raising prices for entertainment products, to impeding the development of decentralized peer-to-peer production of information products that might make more efficient use of human know-how than do media and information technology conglomerates. Much can be said about each of these costs.¹⁷ But this book addresses them only tangentially. My central focus and theme, rather, is that copyright's expansion and extension unduly burden free speech. This book's premise is that, given the primacy of free speech in a liberal democratic society and the extent to which copyright intertwines with free speech concerns, those concerns must play a central role in shaping copyright doctrine.

In that regard, let me now say a word about economics. Economic analysis has become the dominant framework for explaining intellectual property law, certainly in American scholarship and jurisprudence. Indeed, some commentators have forcefully argued that copyright's scope and duration should be limited on general principles of economic efficiency, just as other economic analysts have sought to justify copyright's broad scope.¹⁸ Lest I be thought blithely to shunt economic analysis aside, I will stress at the outset: Economics is central to understanding how copyright operates. For that reason, much of my argument is made, explicitly or implicitly, with economic tenets in mind. Yet,

efficiency arguments alone fail to capture the essence of what is at stake in copyright's untoward expansion. Unlike patent law, copyright's intellectual property counterpart, copyright law operates almost entirely in the realm of speech. Copyright regulates traditional First Amendment media, new digital media, and, increasingly, individual speakers. Copyright's economic calculus has vital implications for those voices. It determines which speech and whose speech is — and is not — expressed and heard. The complex interplay of copyright's speech benefits and burdens must therefore lie at the fore of copyright doctrine and policy.

Moreover, the limitations of economic analysis do not lie merely in that economics fails adequately to account for copyright's import for speech. Rather, by its very terms, the economic analysis of copyright inevitably devolves to speech policy. In shaping copyright, even from an economic perspective, we must turn to questions regarding the place and contours of speech in our society. How much of society's resources do we want invested in the production and dissemination of original expression as opposed to other endeavors? How willing are we to sacrifice some quantity of investment in, and thus presumably production of, original expression to enable greater access to existing expression? How should copyright be tailored to promote expressive diversity? What balance should be drawn between owners of subsisting copyrights and speakers who desire to use existing expression to convey their message? When does an individual have a right to self-expression that both extends to reiterating or building upon another's expression and trumps a broad societal interest in maximizing investment in producing original expression? How much do we want or need copyright-incented expression as opposed to volunteer authorship that does not rely on copyright? What is our desired mix of speakers as among copyright industry media, individuals, state-subsidized, and nonprofits? All these are fundamentally considerations of speech jurisprudence and policy. As we will see, basic copyright economics, as well as economic analysis of matters such as price discrimination, transaction costs, monopolistic competition, product differentiation, and market concentration, serve as highly useful tools in approaching these questions. But our answers must ultimately turn on our best understanding of and judgments regarding free speech values and copyright's complex role in promoting, shaping, and chilling speech.

That focus on copyright's complex role highlights another important sub-theme of this book: the copyright-free speech conflict can be fully comprehended only by examining how the copyright regime operates in practice. How do markets for original expression and copyright licenses actually work? What are the nature and shape of audience

demand for copyright-protected works? Who owns most copyrights of value to speakers and audiences? How competitive are copyright markets? How concentrated are copyright industries? How are digital creation, communication, and distribution impacting copyright markets and what might they portend for the future? Do new technological media for distributing expression face entry barriers? How are copyrights enforced and what affect does that have on speech? Neither formal economic models nor an exposition of copyright doctrine and case law fully illuminate copyright's impact on speech. Rather copyright law is intertwined with the industries, markets, and legal system through which copyrights are licensed and enforced and original, copyright-protected expression is created and sold.

Finally, crafting solutions to the copyright-free speech conflict requires that we locate copyright in relation to free speech law and policy. Copyright engages free speech law and policy at two basic points. First, copyright implicates the matrix of rules and policies that broadly promotes free speech values. As Thomas Emerson emphasized more than three decades ago, liberal democracy must encompass and nurture a "system of freedom of expression," comprising various speech-related rights, institutions, and types of speakers, and requiring affirmative state support as well as limitations on the power of the state to abridge speech rights.¹⁹ Copyright is an integral part of that framework. It is designed to spur creative expression and to underwrite a sector of authors and publishers who can find financial sustenance from paying audiences (and advertisers) rather than potentially censorial government largess. But in so doing, copyright enables some speakers to speak and not others; it effectively allocates expressive power to certain institutions and not others. Depending on its contours and application, it has the capacity either to promote or to stifle individual self-expression and "the robust debate of public issues" that is the "essence of [collective] self-government."²⁰ To the extent copyright's free speech costs have come to exceed copyright's free speech benefits, it is thus incumbent upon lawmakers to restore copyright's traditional balance. And they must do so within a framework that comports with the changes and new possibilities that accompany digital technology.

Second, in the more narrow, doctrinal sense, copyright implicates the First Amendment. Courts have generally recognized that fact, but have nevertheless held that copyrights are immune from First Amendment scrutiny. In *Eldred v. Ashcroft*,²¹ decided in January 2003, the Supreme Court rejected copyright's categorical First Amendment immunity but left only limited room for First Amendment oversight of copyright owner prerogatives. Contrary to the Court's dismissive view, a considered and consistent application of First Amendment precedent militates in favor of such oversight. Artistic

expression now enjoys a level of First Amendment protection on par with political commentary. Likewise, the First Amendment has been held to limit not only the state's ability to regulate speech through public law, but its power to enforce sundry private rights - including intellectual property rights — as well. There is no reason why those limits should not apply equally to copyright. At the very least, courts should apply the First Amendment to ensure that copyright's traditional free speech safety valves are still up to their task...

* * * * *

¹ Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

² See David D. Kirkpatrick, "A Writer's Tough Lesson in Birthin' a Parody," *N.Y. Times*, Apr. 26, 2001, p. E1. The book jacket to *The Wind Done Gone* describes the novel as "[a] provocative literary parody that explodes the mythology perpetrated by a Southern classic."

³ The *New York Times* reports that the heirs have twice gone to court to prevent alleged copyright infringements and that writer Pat Conroy broke off talks about writing an authorized sequel, saying that "the executors had put undue restraints on the plot." See *Id.*

⁴ See *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357 (N.D. Ga. 2001), *rev'd*, 252 F.3d 1165 (11th Cir. 2001).

⁵ Melville B. Nimmer, "Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?," 17 UCLA L. REV. 1180, 1181 (1970).

⁶ The ACLU represented Forsythe along with the law firm of Howard, Rice, Nemerovsky, Canady, Falk & Rabkin. Forsythe's series depicted nude Barbie dolls in various absurdly compromising situations in order to lambaste the objectification of women and perfection-obsessed consumer culture that, in his view, Barbie embodies. Forsythe's defense was ultimately successful. See *Mattel Inc. v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003).

⁷ Robert S. Boynton, "The Tyranny of Copyright?," *N.Y. Times Magazine*, Jan. 25, 2004, p. 40.

⁸ See *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 226-227 (1997), and *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 799 (1978), both quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

⁹ News reporting: *Harper & Row*, 471 U.S. at 541 (*The Nation's* publication of excerpts from President Ford memoirs describing Nixon pardon), *L.A. News Serv. v. Reuters T.V. Int'l, Ltd.*, 149 F.3d 987 (9th Cir. 1998) (transmission of videotaped scenes of Los Angeles riots), and *Belmore v. City Pages, Inc.*, 880 F. Supp. 673 (D. Minn. 1995) (paper's publication of racist fable from police department newsletter, held to be noninfringing fair use).

Political commentary: *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997) (biting satire of O.J. Simpson trial), and *Los Angeles Times v. Free Republic*, 54 U.S.P.Q.2D (BNA) 1453 (C.D. Cal. 2000) (web site postings of news stories for criticism by right-wing group).

Church dissent: *Worldwide Church of God v. Phila. Church of God Inc.*, 227 F.3d 1110 (9th Cir. 2000) (dissident offshoot's distribution of deceased church leader's tract, now repudiated by mainstream church), and *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 923 F. Supp. 1231 (N.D. Ca. 1995) (Internet posting and criticism of Church of Scientology documents by former Scientologists).

Historical scholarship: *Estate of Martin Luther King, Jr. v. CBS, Inc.*, 194 F.3d 1211 (11th Cir. 1999) (TV documentary using portions of King's "I Have a Dream" speech); *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987) (biographer's quotations from Salinger's unpublished letters).

Cultural critique: *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978) (counterculture comic parody of Disney characters), and *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003) (photographer's savage parodies of Barbie dolls designed to "critique [] the objectification of women associated with [Barbie]").

Artistic expression: *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992), *cert. denied sub nom.*, *Koons v. Rogers*, 506 U.S. 934 (1992) (postmodern sculpture infringing photographer's copyrighted work).

Quotidian entertainment: *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 146 (2d Cir. 1998) (multiple choice trivia quiz regarding the television series *Seinfeld*), and *Steinberg v. Columbia Pictures Indus.*, 663 F. Supp. 706 (S.D.N.Y. 1987) (movie poster infringing copyright on magazine illustration).

¹⁰ Other commentators have also lamented copyright's transformation from a paradigm of limited government grant to a paradigm of property. See, e.g., Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* 83-84, 117-19, 172 (Penguin Press 2004); Jessica Litman, *Digital Copyright* 81 (Prometheus Books 2001); Mark A. Lemley, "Property, Intellectual Property, and Free Riding," 83 TEX. L. REV. 1031 (2005). James Boyle.

¹¹ For an insightful discussion of the role of such conventional understandings in copyright expansion, see Lloyd L. Weinreb, "Copyright for Functional Expression," 111 HARV. L. REV. 1149, 1211-16 (1998), and Mark A. Lemley, "Property, Intellectual Property, and Free Riding," 83 TEX. L. REV. 1031 (2005). As Professors Weinreb and Lemley recognize, to denominate copyright "property" does not inherently connote an expansive, long-term right to exclude. Other commentators concur. See Hanoch Dagan, "Property and the Public Domain," 17 YALE J. L. & HUMANITIES (forthcoming 2006); Richard A. Epstein, "Liberty Versus Property? Cracks in the Foundations of Copyright Law," 42 SAN DIEGO L. REV. 1, 9, 22 (2005). But as I discuss further in Chapter 8, the view and label of copyright as "property" has nevertheless been used to support a broad scope and duration of copyright holder exclusive rights.

¹² *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357 (N.D. Ga. 2001), *rev'd*, 268 F.3d 1257 (11th Cir. 2001). The view that copying another's work is "piracy" has a long pedigree. See *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4436) (stating that while a person may prepare his own map of territory surveyed by another, "[i]f he copies substantially from the map of the other, it is downright piracy"). But until the late nineteenth century, courts generally did not view borrowing from an existing work while adding one's own creative expression as "copying." See Glynn S. Lunney, Jr., "Reexamining Copyright's Incentives-Access Paradigm," 49 VAND. L. REV. 483, 534-40 (1996).

¹³ Eugene Volokh was one of the earliest academic commentators to identify and explore some possible ramifications of this phenomenon. See Eugene Volokh, "Cheap Speech and What it Will Do," 104 YALE L.J. 1805 (1995).

¹⁴ See Raymond Ku, "The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology," 69 U. CHI. L. REV. 263, 273-274 (2002).

¹⁵ As Larry Lessig has cogently argued, "fidelity" to a legal regime's original purpose, principles, and, indeed, meaning requires "translation" in light of new circumstances, not rote application of literal doctrine and text. See Lawrence Lessig, "Fidelity in Translation," 71 TEX. L. REV. 1165 (1993). See also Daniel A. Farber, "Conflicting Visions and Contested Baselines: Intellectual Property and Free Speech in the 'Digital Millennium,'" 89 MINN. L. REV. 1318, 1345 (2005) (concluding that in light of the radical changes wrought by the Internet, "[w]e cannot meaningfully translate copyright rules to the digital world without considering the goals of the copyright regime.")

¹⁶ For illuminating discussion of the democracy-enhancing possibilities of decentralized production and dissemination of expression, see Niva Elkin-Koren, "Cyberlaw and Social Change: A Democratic Approach to Copyright in Cyberspace," 14 CARDOZO ARTS & ENT. L.J. 215 (1996).

¹⁷ See Lawrence Lessig, "The Future of Ideas," (New York: Random House, 2001).

¹⁸ For a discussion justifying a limited scope for copyright, see Mark A. Lemley, *"Property, Intellectual Property, and Free Riding,"* 83 TEX. L. REV. 1031 (2005), Glynn S. Lunney, Jr., *"Reexamining Copyright's Incentives-Access Paradigm,"* 49 VAND. L. REV. 483 (1996), and [Not sure what article: Abramowitz, Copyright as Industry]. For a discussion justifying a broad scope for copyright, see Christopher S. Yoo, *"Copyright and Product Differentiation,"* 79 N.Y.U. L. REV. 212 (2004), and [Not sure what article: Wagner]

¹⁹ Thomas I. Emerson, *The System Of Freedom Of Expression* (New York: Random House, 1970), p. 3-5.

²⁰ *Harper & Row*, 471 U.S. at 605 (Brennan, J., dissenting).

²¹ 537 U.S. 186 (2003).



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WHY ENABLE LITIGATION?: A Positive Externalities Theory of the Small Claims Class Action

by William B. Rubenstein

[This is an abridgement of an article which appears in a Symposium commemorating the 20th anniversary of the Supreme Court's decision in *Phillips Petroleum v. Shutts*.¹]

S*hutts* was a "small claims" class action: the defendant owed thousands of dispersed plaintiffs minute amounts of interest on overdue natural gas royalty payments. With the value of their claims outweighed by the costs of pursuing them, most of these plaintiffs, the Supreme Court observed, "would have no realistic day in court if a class action were not available."² But it was and they did. The class action mechanism enabled "the plaintiffs to pool claims which would be uneconomical to litigate individually,"³ explained then-Associate Justice Rehnquist writing for the Court.

[Introduction](#)

Embedded in this common account of the small claims case are two prevalent ideas about the class action mechanism: that it enables litigation by gathering plaintiffs together so that they can actively pool their claims and that the reason it does so is, figuratively speaking, to assure the plaintiffs' "day in court," or literally, to recoup the plaintiffs' losses. Of course, neither of these conventions is quite right: as the *Shutts* Court itself later acknowledges,⁴ plaintiffs in small claims class actions do nothing, they do that nothing far from the courtroom, and what they collect is likely to be about as close to nothing as was the effort they put in to collecting it. Nonetheless, like *Shutts*, most class action law tends to justify the device by reference to the plaintiffs' plight and as a means of vindicating the plaintiffs' interests. An important strain of the scholarly literature incorporates similar emphases. Scholars have demonstrated that the small claims class faces what economists call a "collective action problem" and they have applauded the class mechanism as the means by which the class overcomes this problem.⁵

My goal in this Article, as may already be apparent, is to suggest some wrinkles in the collective action story of the small claims class action. I argue both that the means is not quite what the account's name implies and that the end is not just what the account's content suggests. But I come to praise this form of representative litigation, not to bury it. I therefore offer a new defense of the small claims class action, one based

not on the collective action theory but on the related concept of positive externalities.⁶ The class action mechanism is important not just because it enables a group of litigants to conquer a collective action problem and secure relief, but also — perhaps more so — because it produces external benefits for society.⁷ It is these spillover effects, these externalities, that are under-produced in the small claims setting in the absence of the class form. By explicating this externalities theory of the small claims class action, my goal is not to displace but to supplement the collective action theory.⁸

The externalities theory supplements the collective action theory because it explicates the *ends* that class actions serve, not just the *means* for accomplishing those ends.⁹ Moreover, like the collective action theory, the externalities theory employs economic insights to illuminate our understanding of litigation. The theories complement one another because they are both tethered to the economic conundrum presented by so-called “public goods.” The phrase “public goods” is meant to describe goods that governments must provide because private profit-oriented markets are unlikely to do so. Markets have difficulty producing public goods because of two defining characteristics of such goods — “jointness of supply and impossibility of exclusion.”¹⁰ The example of a lighthouse helps illuminate these two characteristics:¹¹ one person’s use of its signal in no way diminishes anyone else’s (jointness of supply) and it is generally impossible to provide a lighthouse to some at sea while excluding others (impossibility of exclusion). Private parties are therefore unlikely to invest in lighthouse construction: entrepreneurs are daunted by the impossibility of profiting, while for those needing the product, it seems rational to wait for someone else to pay and then to free-ride on the inevitable positive externality of her purchase. The inevitability of the positive externality exacerbates the collective action problem.

When scholars and judges argue that the class action mechanism solves a collective action problem what they are saying is that the mechanism makes possible the production of a good that would not otherwise be produced. That good is a lawsuit. As I explain in more detail below, litigation can be conceptualized as a public good, its pursuit produces positive externalities, and litigants in group-like situations therefore have incentives to free-ride; where the individual stakes are low, this collective action problem is particularly acute. It is not illogical that scholars have focused on the collective action aspect of the problem when describing the class action, as representative litigation provides the needed solution. But the externality theory adds to the literature by supplementing this discussion of *how* the class action solves the problem with an emphasis on *why* the problem requires attention, why, that is, we need to create litigation. The externality theory appreciates the class action as a means, to

be sure, but envisions its ends as encompassing spillover effects far beyond immediate plaintiff compensation. While the collective action theory tells us how to get the lighthouse built, the externality theory — like a good Los Angeleno — admires the quality of the light.

At first blush, *Shutts* exemplifies the dynamics of a small claims class action. The plaintiffs alleged that a single defendant economically harmed, in a similar fashion, thousands of individuals across all fifty states, the District of Columbia, and several foreign countries.¹² If the harm alleged were indeed unlawful, each of these individuals would become a plaintiff with a meritorious cause of action. Yet, because each plaintiff's claim was so insubstantial, no plaintiff had a stake that justified hiring an attorney for an hourly wage, nor would any attorney see a sufficient contingent fee justifying individual litigation. In addition, each plaintiff had some incentive to do nothing and wait for someone else to do something, then to freely ride upon the defendant's change of policy or the issue preclusive potential of the initial judgment.

*Shutts and
Collective Action*

The class action mechanism solves this problem by pooling the plaintiffs' claims together into one case and enabling the class attorney to take a fee out of the whole recovery, rather than out of one individual's recovery.¹³ Because everyone's take is thereby reduced, no one is riding for free. It is oft-repeated that the class action provides this solution, but in fact the class action mechanism works in harmony with fee rules to provide a solution: collective claims without a collective fee would do far less to solve the problem than would a collective fee without collective claims. The fee rules essentially establish a mechanism for taxing each class member her share of the costs in exchange for her share of the recovery.¹⁴ While no class member's share of the costs alone produces litigation, the collective shares of all the class members comfortably cover the attorneys' fees.

If the first common misstatement of the small claims theory relies on the form without reference to the fee, the second imagines that the small claims class action represents an instance of actual action among members of a collective. The class action mechanism may overcome a collective action problem, but it does not do so by motivating individuals within the group. This is a lovely tension that lies hidden between the lines of the *Shutts* decision. On the one hand, the Court acknowledges the problem of the small claims case and implicitly embraces the idea that Rule 23 solves the collective action problem.¹⁵ In drawing this conclusion, the Court uses the active voice,

stating that class actions “permit the plaintiffs to pool claims,”¹⁶ rather than employing the passive voice to observe that the class action permits the plaintiffs’ “claims to be pooled.” The Court’s chosen locution implies that members of the class actively join together to pursue their common goal. Within a few pages, however, the Court insists that there is no need for plaintiffs to have any geographical relationship to the court in which the action is pending because the plaintiffs in a small claims class action do nothing — they are free-riders: “[A]n absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection.”¹⁷ Moreover, in rejecting an argument that the Constitution compels an opt-in rather than opt-out procedure, the Court states outright that requiring individual action would defeat collective action:

Requiring a plaintiff to affirmatively request inclusion would probably impede the prosecution of those class actions involving an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit. The plaintiff’s claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually, nor would he affirmatively request inclusion in the class if such a request were required by the Constitution.¹⁸

What we are left with at the end of *Shutts* is approval for a mechanism (the class action) that solves a collective action problem (dispersed small claimants) by insisting that no one in the collective need take action. If collective action problems pose a challenge to collective *action*, it would seem a remarkable solution that could achieve the group’s results by insisting on group member *inaction*. Of course, in true small claims situations this may in fact be one of the many peculiar qualities of collective action problems....

...One last aspect of the particular dynamics of the collective action problem in *Shutts* is worth relishing. After insisting that class members can do nothing, the Court acknowledges that 3,400 members, or 10%, of the class in *Shutts* did do something: they opted out.¹⁹ If the class action mechanism was necessary to overcome the collective action concern that no sane person would pursue a claim worth \$100, what explains why 3,400 appear to have done just that? And if they did, was there ever really a collective action problem? It seems that the best explanation of the defectors here is that their claims were *not* worth \$100, that they were not the average stakeholders. The Court’s breakdown of the geographic location of the leases (done for

purposes of its choice-of-law analysis) reveals that the claims appear to be of quite diverse sizes.²⁰ For example, in one class, 2,653 royalty owners in Oklahoma were owed \$83,711 in royalties, or about \$32 per royalty owner.²¹ In that same class, 1,244 royalty owners in Louisiana were owed \$2,187,548, or about \$1,758 per royalty owner.²² Given that the claims in *Shutts* were about the *interest* owed on these royalties, even the larger Louisiana stake holders would not seem to have enough at stake to opt out of the class. But they did.²³

Regardless of *why* 3,400 claimants opted out, these data demonstrate the heterogeneity of the class members' claims. This very heterogeneity could well have been a solution to the collective action problem: the claimants with significant enough claims to opt out theoretically had significant enough claims to litigate on their own.²⁴ If so, they were well-situated to be champions for the rest of the class,²⁵ who could reasonably free ride on their cases.²⁶

Commentators tell us that *Shutts* is a small claims case presenting a classic collective action problem, but that may not be precisely right. The Supreme Court tells us in *Shutts* that class certification is necessary to overcome that collective action problem, but that may not be precisely right. The Supreme Court also tells us in *Shutts* that the class action solves this collective action problem because the plaintiffs actively pool their claims and because the plaintiffs do nothing—two conclusions that seem to stand in inherent contradiction to one another....

...The only plausible mechanisms for inducing group action in small claims cases are coercive, and class action law presently employs two: first, class members are coerced into joining the group by the fact that the class action extinguishes their claims;⁴⁸ and second, class members are coercively taxed the costs of the collective endeavor, depending on the fee setting, either by the contingent fee their attorney extracts or by the defendant lowering its settlements offer to the class by the amount it must separately pay the plaintiffs' attorneys.⁴⁹

The Small
Claims Class
Action as a
Collective Action
Problem

While the small claims class action thereby conquers the collective action problem, several characteristic features of this achievement can now be delineated. First, although the small claims class action solves the collective action problem, it does not result in collective action. No group is formed. A grouping of *claims* occurs, to be sure, but this is not, *pace Shutts*, the same thing as a group of people pooling their claims.

Because no group of people is formed, the class in the small claims class action never itself encounters any of the costs or benefits of group activity. Individuals in the group do not meet one another, trade stories or ideas, or raise consciousness. The group confronts no organizational issues central to normal groups: it does not have to develop internal governance rules or bylaws; it need not identify and select leaders nor develop a means for doing so; it does not have to keep membership records, collect dues, police the boundaries of who is in and who is out. The small claims class is a void, not a group.

Second, not only does no group form, but no group member is even responsible for the grouping of claims that does occur: an external third party, the class' counsel, groups the claims. She is able to do this because the law imposes a coercive grouping on the class members through the preclusion and fee mechanisms. This coercive grouping is therefore distinct from the coercion that attends union or synagogue membership, both of which are typically compelled by group members themselves. This coercion is more like coerced government taxation. But even that is an imprecise metaphor because at least with respect to coerced government taxation, the taxed can vote the bums out. Ideally, the class representative can control and fire class counsel, but this ideal exists in a theoretical realm far removed from the practice of complex litigation. Even where a majority of class members do appear and object to a settlement, their numbers are not necessarily controlling.⁵⁰ The third party who groups the class' claims exerts near total control over the group-that-does-not-exist. To make matters even worse, she often does so with her own interests — her fee — conflicting with the interests of the class members she represents.⁵¹

Third, it is predictable that no group member will attempt to form a group and that no group will actually form since it is *legal claims* that the group members have in common with one another. The absence of group-based activity underscores that litigation in the United States is decidedly individual in nature.⁵²...

In the small claims case, there is neither a group itself, nor any real control by any particular group member. If the collective action literature is interested in the study of when groups form to pursue their interests, there is not much to study in the small claims class action. Small claims class actions are a form of externally-coerced collective taxing, a subset of collective action but not one involving the collective activity of a group. No coordination of effort occurs among class members in the small claims class.

The collective action heuristic is helpful in making sense of the small claims case because this conceptualization identifies that absent particular forms of government

intervention, the litigation marketplace will not generate legal claims sufficient to redress plaintiffs' harms and protect their interests. It is the government action of Rule 23⁵⁵ and fee shifting rules, though, not the activities of any class members, that solve this collective action problem. Specialized government market interventions are called for in situations of market failure, such as those involving externalities. Perhaps this presents a better, if not a distinct, way of conceptualizing small claims cases.

The externality conceptualization of the small claims class action focuses not only on why an individual litigant would not rationally file suit, but additionally, and perhaps more importantly, on the social costs of that lost opportunity. Litigation may provide benefits for the parties to the action — a plaintiff's recovery, a defendant's dismissal, a settlement exchanging money for repose — but lawsuits can also produce value for those not parties to the particular case. Economists label these social benefits "positive externalities" and teach that such externalities are likely to be under-produced. In the following paragraphs, I will develop an account of litigation externalities and then attempt to show how this account provides insight into the conventional understanding of class action lawsuits.⁵⁶

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The economic account of litigation begins with the proposition that a lawsuit represents a transaction and a legal system is a market(place) for such transactions.⁵⁷ This is true of litigated cases, but the point becomes especially obvious in a legal system that primarily produces negotiated settlements.⁵⁸ In a lawsuit, a plaintiff trades her claim for money, the defendant trades its money for finality; the lawsuit is a transaction in which *res judicata* is bought and sold.⁵⁹ It may seem odd that disputants would come to a courthouse rather than just settling the dispute privately. However, plaintiffs turn to law because bargaining within an adjudicative framework serves at least two important functions. First, the possibility of a third-party providing a judgment gives leverage to the person filing suit.⁶⁰ Second, litigation provides the plaintiff with a formal mechanism for obtaining factual information; this levels out information asymmetries that might otherwise preclude settlements (i.e., deals) from being made.⁶¹ Litigation promotes contract/agreement/settlement primarily through information exchange and the risk of an adverse judicial decision.

If litigation is a transaction, a properly structured litigation system should produce an efficient quantity of litigation. What constitutes the efficient level of litigation could be viewed in Pareto optimal terms: every exchange (lawsuit) that would better both parties without making anyone else worse off should take place; if precisely this amount of

litigation — no more, no less — occurs, the litigation system has achieved Pareto optimality.⁶² If litigation exchanges take place that benefit the parties but harm third parties, this spillover effect, or negative externality, demonstrates that the system is not in a Pareto optimal state; one might say it has exceeded it by producing too many detrimental exchanges. Conversely, if trades can still be made that would benefit parties without making anyone worse off and such transactions are not taking place, the system is also not in a Pareto optimal state; one might say it has not reached it by failing to produce enough beneficial exchanges. The absence of Pareto optimality constitutes market failure and market failure justifies some new form of government intervention.⁶³

Most typically, the government intervenes in markets to interrupt negative externalities; less frequently, government intervenes to encourage positive externalities.⁶⁴ Negative externalities are more likely to exist than positive ones for the simple reason that these costs are not borne by the parties to the transaction; as such, they do not operate to deter transactions unless there is a mechanism for internalizing them, that is, unless the transacting parties experience these costs and pay them. For example, passengers and airlines transact with one another for transportation services, but one spillover effect of airline travel is the noise that is created for homeowners in the vicinity of the airport.⁶⁵ If the parties have to pay these costs, airline travel will be made more costly.⁶⁶ Internalizing the negative externalities results in fewer transactions.⁶⁷ Positive externalities are likely to be under-produced because the parties to the transactions that produce them do not directly reap their benefits.⁶⁸ If at least some of the value of the positive externality can be internalized, it will encourage more transactions that then produce more positive externalities.⁶⁹

The class action represents a governmental intervention into the market of legal claims. Absent the availability of the class form, litigants are capable of buying and selling only their own rights. What the government does through the class action mechanism is authorize one litigant to transact other litigants' causes of action. The government generally offers this authorization in a handful of situations captured by Rule 23(b).⁷⁰ As I argue more fully elsewhere,⁷¹ all the various types of class cases can be understood as necessitated by the externalities of individual litigation. This is perhaps simplest to see in situations of negative externalities. In a limited fund class case, for example, individual lawsuits produce spillover effect on persons not parties: by depleting the defendant's available resources, the early individual cases harm later litigants. The class action solves this problem of negative externalities by internalizing them. The class action takes the spillover effect, the burden of scarce resources, and shares that burden among all of the claimants, including the early ones.⁷²

The small claims class action does not immediately appear to fit this paradigm. Individual lawsuits do not produce negative externalities because there are no individual lawsuits. No class member has enough at stake to file suit. Yet the small claims situation can be conceptualized in externalities terms: the absence of individual lawsuits represents market failure because the market has produced too few, not too many, transactions. The absence of individual cases *under-produces positive* externalities. The class form represents a government intervention in the individual litigation market aimed at *producing* small claims cases so as to generate the positive externalities of such lawsuits.

But why? What are the positive social benefits of \$100 lawsuits that are lost in the small claims situation? What are the positive externalities that flow from individual litigation? Most generally, as Judge Posner explains, litigation “establishes rules of conduct designed to shape future conduct, not only the present disputants’ but also other people’s.”⁷³ These “rules of conduct” constitute goods with the attributes of public goods: the rules of conduct are not diminished when used and no individual can be excluded from using them. I return to the public good nature of a lawsuit below,⁷⁴ but before doing so, it is important to sketch out in more depth than does Judge Posner’s comment the precise nature of the good itself. Thus, more specifically, the positive externalities of individual lawsuits can be grouped into four sets of effects: 1) decree effects; 2) settlement effects; 3) threat effects; and 4) institutional effects.

Individual lawsuits resulting in judicial decisions produce external *decree effects*. The legal principle developed in the case will create more certainty in structuring social behavior and lower the need for future adjudication concerning the decided issue. If future litigation does arise, the decree from the initial case will serve as *stare decisis*, hence making resolution of later cases more efficient. Beyond these general legal effects, the decree in the initial case could also be used to preclude re-litigation of factual issues in future cases among the same or similarly situated litigants. And most immediately, the decree may actually require a party to cease a practice affecting a group of individuals, even though the initial case was prosecuted by only one of them. An individual lawsuit that produces a judicial decision thereby has generated significant social benefits in terms of shaping conduct, reducing litigation costs, and preserving judicial resources.⁷⁵

Individual lawsuits resulting in settlements, not judicial decisions, may nonetheless have similar positive externalities as *settlement effects*. To pick up where the last list left off: if one litigant successfully challenges a policy that affects many persons, a defendant

may agree to change its behavior as to the entire class. Even if a defendant does not agree as a formal matter to change its general policy as a consequence of the initial case, it may nonetheless do so informally lest it be faced with repeated lawsuits. This would especially be true if a group of plaintiffs is closely associated with one another or share legal counsel — in such a situation, information about the initial settlement can easily be passed among similarly situated parties who can then use it to their advantage. The converse is true as well: shared information about a weak settlement may deter future litigants. Similarly, settlements by some defendants within an industry could encourage other defendant/competitors to settle. The information externalities of settlements are well known and account for much of the attempt to both publicize and keep confidential such information.⁷⁶ In sum, settlements, as well as judicial decrees, produce positive externalities: they change behavior beyond the parties to the initial suit; they reduce future litigation costs by establishing settlement ranges; and they preserve judicial resources.

The very threat of individual litigation, absent settlement or decree, may also produce positive social benefits. The risk of litigation is a cost that parties must factor into decision-making in any sphere. The most familiar example is that of tort law, where it is said that the costs of accidents, including the litigation costs and legal remedies, structure social decision-making.⁷⁷ The same could be said of the contracting and property realms as well. In undertaking a cost-benefit analysis, a party would logically consider both the risk of losing litigation and the risk that such litigation will actually be filed. If the latter factor is small, it will increase the likelihood a party will engage in the behavior.⁷⁸ The small claims case presents a perfect example. A large corporation can bilk many individuals a very small amount, realizing significant gains without fearing that litigation will follow. The very *possibility* of litigation would change this analysis significantly. Therefore, the *threat effects* inherent in individual lawsuits produce positive externalities.

Finally, the institutional result of the class action mechanism and related fee provisions is the development of a private group of law enforcers.⁷⁹ By enabling litigation, the class action has the structural consequence of dividing law enforcement among public agencies and private attorneys general and of shifting a significant amount of that enforcement to the private sector. This is an important benefit if in fact private enforcement is, as often argued, more efficient than public enforcement. Even if private enforcement generates its own problems (such as the agency costs that inhere in class actions), nonetheless “the sheer diversity of enforcers should generate more innovations than a monopolistic government enforcer would produce.”⁸⁰ These

structural effects are not the immediate purpose of any particular piece of class action litigation, yet they are critical externalities of class suits.

Because the settlement, decree, or threat resulting from one individual lawsuit — and its likely enforcement by a private attorney general — will often compel a defendant to change its behavior, that lawsuit creates positive externalities. Conventionally, the small claims case is thought to vindicate the interests of the individual class members whose harms are so small individually, yet so large collectively. The externality story defends the class suit not just in terms of the benefits to the litigants themselves, but also in terms of the spillover effects small claims cases will have for society more generally. It is from society's perspective, not just that of the plaintiffs, that we lament the underproduction of individual small claim lawsuits: we weep not just for them but for us.

When the legal system is conceptualized as a market for legal claims, it becomes apparent that the product of the individual lawsuit has the characteristics attributed to public goods: all members of society share the good without depleting it and none can be excluded from doing so. Tragically, therefore, no class member has any incentive to bring the case. This is the collective action dilemma which results in the underproduction of the positive externality. Small claims situations at once pose a collective action problem and a problem of the underproduction of positive externalities.

Why the Positive
Externality
Approach is
Helpful

While the two concepts are closely intertwined, the class action literature has framed class suits, particularly small claim class suits, almost exclusively in the language of collective action. There is little that describes or conceptualizes the problem in terms of externalities. The benefits of adding such a conceptualization to the literature include the following.

First, ... the collective action moniker is a bit of a misnomer. Those conversant with the collective action literature appreciate that coerced taxation is a response to a collective action problem and can appreciate the dilemma and solution in these terms. However, to a wider audience familiar with the *representative* nature of class actions, it may seem peculiar or confusing to describe the class action in terms of *collective action*. The risk of such confusion only grows as the explanation is proffered to a truly lay audience: they at once learn that a class action solves a collective action problem and that class members therefore do nothing. While this sounds like a semantic problem, my sense is

that it pervades both popular and legal understandings of class actions; most observers, including lawyers and judges, believe that a class case involves a group of people descending on the courthouse *en masse* and most fail to appreciate that in fact representative litigation is precisely the opposite. The collective action conceptualization furthers this misunderstanding by implying that because it solves a collection action problem, the class action enables collective action to occur.

Second, the collective action conceptualization suggests that the primary value of the class suit is the benefits to those in the collective that flow from Rule 23's brilliant resolution of the collective action problem. By contrast, the positive externality story suggests that what are lost absent litigation are benefits exceeding those provided to the parties themselves. It is true that in a narrow sense the positive externalities of one class member's lawsuit are the benefits that flow to the other members of the class (those who share the lighthouse). But the externalities of litigation may be felt by a wider range of citizens than those involved in the current controversy. The lawsuit might develop legal principles, change industry practices, or conserve judicial and social resources. The collective action/externality distinction could be seen as analogous to the compensation/deterrence distinction.⁸¹ The collective action story about the small claims case is one about how to secure benefits for those in the collective who have been bilked.⁸² The externality story is one about how to secure the deterrent effects of litigation. But the externality story can be read even more broadly in that the externalities exceed simple deterrence.

Third, the externality approach re-frames the discussion of the general shortcoming of class actions. Conventionally, these are described in agency cost terms as the strike suit and the sell-out: the former is a case with no merit settled too high, while the latter is a case with merit settled too low.⁸³ From a market externality perspective, the strike suit is a transaction that should not have taken place, the overproduction of positive externalities, a lighthouse built in a landlocked territory. By contrast, the sell-out creates not too many, but too few positive externalities; it is a shore-based lighthouse but one lacking a bulb. These agency costs of representative litigation remain, but their effects are broadened. Not only are the class-members harmed by the strike suit or sell-out, but because externality production is skewed, so too is society generally. It is true that the externality story does not provide a solution for these agency costs. But its broader focus helps amplify the need for one.

Finally, most generally, the positive externality story about the small claims case lines up the rationale for this type of class action with the rationale for the other existing

types of class cases. Federal class action law currently encompasses five distinct categories of class cases: 1) those involving the risk of “incompatible standards” for the defendant;⁸⁴ 2) those involving limited funds;⁸⁵ 3) those involving injunctive relief;⁸⁶ 4) those involving money damages where claims are small;⁸⁷ and 5) those involving money damages where claims are not small.⁸⁸ I elsewhere argue that the essential organizing principle of all five types of class cases recognized by Rule 23 is that they each resolve problems concerning the spillover effects of individual lawsuits.⁸⁹ Thus, for example, limited fund cases internalize the externalities created when, in a race to the courthouse, an individual litigant depletes the defendant’s resources and harms her similarly situated would-be litigants.⁹⁰ In a not dissimilar fashion, in large mass tort situations such as asbestos, the court system may be swamped with individual claims.⁹¹ These claims deplete the resources society has allotted to adjudication and thus have negative externalities on the ability of the legal system to accomplish its social function. In short, the different types of representative litigation all share one common characteristic: they each respond to a particular problem created by a distinct failing of individualist procedure. All class suits are necessitated not by collective action problems specifically, but by the more general notion of externalities. Each form of the class case addresses a particular type of positive or negative externality problem in individualist procedure. Conceptualizing small claims cases in externalities terms helps make their relationship to other forms of class cases clearer.

The legal claims that formed the basis of *Phillips Petroleum Co. v. Shutts* were meritorious, yet of relatively modest value. Generally, these were negative value claims that would not have been litigated individually because the costs of doing so outweighed the benefits to individual litigants. Phillips Petroleum could well have walked away without liability. Conventionally, scholars describe this situation as posing a collective action problem and demonstrate how the class action mechanism works to solve that problem.

Conclusion

In this Article, I have discussed the problem of negative value claims in a different language. The fact that parties will not pursue these claims is, I argue, an example of the underproduction of positive externalities. Put simply: were individuals to litigate their small claims, these lawsuits would produce collateral social benefits. The class action mechanism helps produces these benefits by internalizing a benefit (to class counsel) that consequently enables the lawsuits to be brought.

I argue that the addition of this analysis to the scholarly literature serves several functions. Among these is that it illuminates how little collective action really took place in *Shutts*, how relatively unimportant the compensatory aspects of the case are compared to its other social functions, and how *Shutts* is more like other types of class cases than generally presumed.

This last point is particularly important for in the two decades since the Supreme Court decided *Shutts*, class action practice has exploded. Despite a variety of attempts to shut them down, ranging from disapproving Supreme Court decisions to a variety of Congressional enactments, class action lawsuits appear unlikely to die. The externality story of the small claims case sets the groundwork for a more general understanding of the common feature of class suits.

* Professor of Law, UCLA School of Law. I am grateful for helpful comments that I received from Steve Bainbridge, Mark Grady, Sam Issacharoff, Seana Shiffrin, and Steve Yeazell, and for the research assistance of Holning Lau. I am particularly indebted to Lynn Stout for helping me think through the relationship of externalities, collective action, and class actions.

¹ Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

² *Id.*

³ *Id.*

⁴ *Id.* at 812-813

⁵ A good explication of this theory in the class action literature can be found in Jonathan R. Macey & Geoffrey C. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991). Macey and Miller state that "[t]he class action is a tool for overcoming the free-rider and other collective action problems that impair any attempt to organize a large number of discrete individuals in any common project." *Id.* at 8. See also, Joseph A. Grundfest & Michael A. Perino, *The Pentium Papers: A Case Study of Collective Institutional Investor Activism in Litigation*, 38 ARIZ. L. REV. 559, 563 (1996) (stating, in a section entitled "The Theory of Collective Action and Class Actions", "[t]he class action device is an attempt to overcome the problem of dispersed injured parties whose damage claims are sufficiently small that they lack incentives to pursue individual litigation. Absent the class action device, collective action problems can prevent the aggregation of individual claims into one action that would support economically viable litigation."); Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 70 (2003) (stating "[a]mong other things, class actions solve the collection action problems faced by individuals with claims too small to be economically adjudicated individually..."); Randall S. Thomas & Robert G. Hansen, *Auctioning Class Action and Derivative Lawsuits: A Critical Analysis*, 87 NW. U. L. REV. 423, 427 (1993) (stating that "the class action aims to overcome the collective action problems inherent in any effort to organize a large group of individuals into one common project"). On the instances of collectives within the litigation system more generally, see Stephen C. Yeazell, *Collective Litigation as Collective Action*, 1989 U. ILL. L. REV. 43 (1989).

⁶ An "externality is defined as a cost or benefit that the voluntary actions of one or more people imposes or confers on a third party or parties without their consent." Robert Cooter & Thomas Ulen, *Law and Economics* 45 (1988). A negative externality "results when the activity of one person... imposes a cost on someone else." Jeffrey L. Harrison, *Law and Economics in a Nutshell* 42 (2d ed. 2000). "Positive externalities occur when the activities of an individual... result in benefits, the value of which the producer is unable to internalize or enjoy." *Id.* at 46. The concept of externalities is generally traced to the British economist A. C. Pigou, who in 1920 stated that externalities are created by exchange when:

[O]ne person A, in the course of rendering some service, for which payment is made, to the second person B, incidentally also renders services or disservice to other persons... of such a sort that payment cannot be exacted from the benefited parties or compensation enforced on behalf of the injured parties.

Arthur Cecil Pigou, *The Economics of Welfare* 183 (1st ed. 1920).

⁷ See Richard A. Posner, *Economic Analysis of Law* 530-31 (6th ed. 2003) (discussing social benefits of litigation beyond dispute resolution).

⁸ The one scholarly article discussing class actions and externalities is Gerald A. Wright's Note, *The Cost-Internalization Case for Class Actions*, 21 STAN. L. REV. 383 (1969). Wright generally uses "externalities" to refer to the negative externalities underlying the legal case — of, for example, pollution — and does not use the language of externalities to refer, as I do, to litigation itself.

⁹ The “collective action” scholarship is relatively indifferent as to the goals of class cases. See, e.g., Macey & Miller, *supra* note 5, at 11. Generally, though, the law and economics focus of this literature emphasizes the compensatory rather than deterrent aims of class suits by insisting that the class attorney is the agent for the immediate class members themselves and not for some larger social good. For an explanation and critique, see William B. Rubenstein, *On What A “Private Attorney General Is” — And Why It Matters*, 57 VAND. L. REV. 2129, 2161-2167 (2004). As I note there, *id.* at 2165 n.126, David Rosenberg’s work uniquely emphasizes the deterrent ends of class action litigation in the mass torts context. As I argue below, see *supra* Part IV, litigation’s positive externalities exceed both simple compensation and simple deterrence; therefore the theory I offer here does more than elaborate a deterrence theory of class actions.

¹⁰ See Russell Hardin, *Collective Action* 17 (Dorothy Sawicki ed., 1982) (“If a good is in joint supply, one person’s consumption of it does not reduce the amount available to anyone else... If a good is characterized by impossibility of exclusion, it is impossible to prevent relevant people from consuming it”).

¹¹ For centuries, economists employed lighthouses as a prime example of a public good. But then in 1974, Ronald Coase argued that, in fact, lighthouses had often been produced by private parties. See R.H. Coase, *The Lighthouse in Economics*, 17 J. LAW & ECON. 357 (1974), reprinted in R.H. Coase, *The Firm, The Market, and The Law* 187 (1988). In response to Coase’s article, David Van Zandt helpfully clarified that lighthouses — like all goods — are produced through a combination of private markets and governmental action, though the precise mix of the public and private varies depending upon the characteristics of the goods in questions. David E. Van Zandt, *The Lessons of the Lighthouse: “Government” or “Private” Provision of Goods*, 22 J. LEGAL STUD. 47 (1993). Dean Van Zandt’s article demonstrates that — whether or not the label “public good” is at all helpful — the nondeplatable and nonexcludable characteristics of lighthouses means that their erection may require modes of public involvement that are distinct from public interactions with markets for depletable and excludable goods. I therefore employ the jargon of “public goods” and the example of “lighthouses” throughout the Article consciously, using these as shorthand for nothing more than the distinctive characteristics of such goods; I do not mean to imply that only the government can produce such goods, nor, conversely, that there is elsewhere a market completely free of public involvement.

¹² *Shutts*, 472 U.S. at 799. Phillips Petroleum’s leases were geographically centered in eleven different states, but the plaintiff/royalty owners were more widely dispersed. *Id.*

¹³ See generally 10 Charles Alan Wright, et al., *Federal Practice and Procedure* § 2675 (3d ed. 1998). Depending upon the type of case, the fee in small claims cases can be a percentage of the fund recouped or it can be paid by the losing defendant pursuant to a fee-shifting statute or rule. *Id.* In either case, the plaintiff likely bears the cost, either directly in a contingent fee case, or indirectly in a fee-shifting case, as the defendant’s settlement offer to the plaintiff class is adjusted to account for the fee it must also pay the plaintiffs’ attorney.

¹⁴ For an exploration of the underlying rationale, see Charles Silver, *A Restitutionary Theory of Attorneys’ Fees in Class Actions*, 76 CORNELL L. REV. 656 (1991).

¹⁵ *Shutts*, 472 U.S. at 799.

¹⁶ *Id.* at 809.

¹⁷ *Id.* at 810.

¹⁸ *Id.* at 812-13 (citation omitted).

¹⁹ *Id.* at 801.

²⁰ *Shutts*, 472 U.S. at 815 n.6.

²¹ *Id.*

²² *Id.*

²³ It is possible that those who opted out had some connection to a different attorney hoping to put together a class action — and secure the fee of it — in a different jurisdiction. Such disgruntled attorneys are often the source of objections to class action settlements. See William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 373 (2001) (hereinafter Rubenstein, “*Transactional Model*”).

²⁴ This is essentially the solution to the collective action problem of securities classes that Congress enacted in the Private Securities Litigation Reform Act of 1995 (“PSLRA”), 15 U.S.C. §§ 77z-1-78j-1 (2005) which authorizes plaintiffs with large interests to be lead plaintiffs, conduct the case, and choose counsel for the class. Elsewhere, I have questioned what might motivate such claimants to go through the motions of filing class suits where their interests appear significant enough to sustain individual lawsuits. See Rubenstein, *Transactional Model*, *supra* note 21, at 399-400.

²⁵ Heterogeneity of the claims could, in theory, present typicality problems for large claimants proposed to represent small claimants. See generally Rubenstein, *Transactional Model*, *supra* note 21, at 393-403. However, given the straightforward financial nature of the legal issues in *Shutts*, the heterogeneity of claims did not present the type of typicality problems that characterize large claim personal injury cases. See *Shutts*, 472 U.S. at 808-09 n.1 (noting that the named plaintiffs adequately represent the class and “all members of the class have the same interest in enforcing their claims against the defendant”).

²⁶ If the large claimants established a recovery fund, presumably the costs of their attorneys could be shared throughout the class via common law fee sharing principles. See, e.g., *Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161 (1938); *Cent. R.R. & Banking Co. of Ga. v. Pettus*, 113 U.S. 116 (1885); *Trustees v. Greenough*, 105 U.S. 527, 532 (1881). See generally Wright et al., *supra* note 13, at 322-23 (discussing “a common fund doctrine”).

⁴⁸ See *Hansberry v. Lee*, 311 U.S. 32, 41 (1940) (noting that “the judgment in a ‘class’ or ‘representative’ suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it”). For a thorough recent exploration of the principle, see Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717 (2005).

⁴⁹ See *supra* note 13.

⁵⁰ See William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1657 n.163 (1997) hereinafter, Rubenstein, *Divided We Litigate*.

⁵¹ This second point—that no group member controls the small claims class—must be relaxed in certain heterogeneous class actions, just as Olson predicted it might be. See *supra* note 42. Specifically, since Congress’s enactment of the PSLRA, it has become more evident that many securities classes are heterogeneous with regard to the stakes of the class members, perhaps even “privileged” in Olson’s terms, in that some class members may have claims that are economically viable legal claims. See Rubenstein, *Transactional Model*, *supra* note 23, at 395-400. As large institutional investors have begun to act as lead plaintiffs in these cases, they themselves have become agents for overcoming the collective action problem; as Olson predicted, they likely shoulder all, or a disproportionate fraction, of the costs expended by class members in their cases.

⁵² See Yeazell, *supra* note 7, at 47-55; Rubenstein, *Divided We Litigate*, *supra* note 50, at 1644-54.

⁵⁵ See FED. R. CIV. P. 23.

⁵⁶ I am not, of course, the first person to utilize economic analyses of the class case. For an overview of the vast literature, see Robert G. Bone, *Civil Procedure: The Economics of Civil Procedure* 261-65 (2003). Nonetheless, as noted at the outset, nothing in this literature discusses small claims class actions in terms of positive externalities. See *supra* note 8.

⁵⁷ I have argued elsewhere that complex class actions can be conceptualized as transactions. Rubenstein, *Transactional Model*, *supra* note 21, *passim*. I adapt that argument here to apply to all lawsuits.

⁵⁸ See, e.g., Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77 (1997) (stating that 90-95% of cases that are not dismissed before trial end in settlement).

⁵⁹ See Rubenstein, *Transactional Model*, *supra* note 21, at 419 n.213 (stating “[in a lawsuit] what is bought and sold are rights to sue”). When a judicial decision is rendered, that too can be conceptualized as a transaction — res judicata is exchanged for money—though one ordered by the court.

⁶⁰ See Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

⁶¹ For a richer analysis, see Bone, *supra* note 56, at 203-31.

⁶² See Walter Nicholson, *Microeconomic Theory: Basic Principles and Extensions* 217 (1989) (defining Pareto optimality as “[a]n allocation of available resources in which no mutually beneficial trading opportunities are unexploited [, or] more simply, an allocation in which no one person can be made better off without someone being made worse off”).

⁶³ See John G. Head, *Public Goods and Public Welfare* 199 (1974) (explaining Pigou’s conceptualization of the market interventions of “bounties and taxes” to correct for the absence of positive or presence of negative externalities).

⁶⁴ For a cogent discussion – preceding a sharp critique – see Aaron Wildavsky, David Fogerty & Claude Jeanrenaud, *At Once Ubiquitous and Elusive, the Concept of Externalities is Either Vacuous or Misapplied*, in *Culture and Social Theory* 55, 55-84 (Sun-Ki Chai & Brendon Swedlow eds., 1988).

⁶⁵ For an analysis of externalities utilizing this problem as its paradigm, see Richard A. Ippolito, *Economics for Lawyers* 228-46 (2005).

⁶⁶ See *id.*

⁶⁷ See *id.*

⁶⁸ See Cooter & Ulen, *supra* note 6, at 411 (explaining that in the external benefit situation the “benefit-creator engages in a socially sub-optimal amount of the benefit generating activity”); Steven C. Hackett, *Environmental and Natural Resources Economics: Theory, Policy, and the Sustainable Society* 45-48 (2d ed. 2001) (stating that “[b]ecause those who benefit from positive externalities do not pay for them, their willingness-to-pay is not included in market demand, and

accordingly, is too small"). The "classic example of a good that produces positive externalities is the inoculation, which not only lessens the incidence of disease in the recipient, but also inhibits contagion, producing a benefit for others." Jeffrey Standen, *Private Remedies for Public Purposes*, 36 *Williamette L. Rev.* 927, 931 n.13 (2000).

⁶⁹ Hackett, *supra* note 68, at 47 (explaining "[i]f the benefits flowing to free riders were included in the market, such as through compulsory taxes or user fees, market demand would shift out and a larger equilibrium quantity would result").

⁷⁰ See FED. R. CIV. P. 23(b).

⁷¹ See William B. Rubenstein, *A General Theory of the Class Suit* (April 1, 2006) (unpublished manuscript on file with author).

⁷² See Bone, *supra* note 56, at 261-65.

⁷³ Posner, *supra* note 9, at 530-31. See also Kenneth E. Scott, *Two Models of the Civil Process*, 27 *STAN. L. REV.* 937, 938 (1975) (describing a "behavior modification model" of litigation in which "[n]ot the resolution of the immediate dispute but its effect on the future conduct of others is the heart of the matter").

⁷⁴ See *infra* Part V.

⁷⁵ This is one of the primary reasons that Professor Fiss opposes settlement. See Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073, 1085 (1984).

⁷⁶ On information and settlement, see Blanca Fromm, Comment, *Bringing Settlement out of the Shadows: Information about Settlement in an Age of Confidentiality*, 48 *UCLA L. REV.* 663 (2001).

⁷⁷ See Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (1970). See, e.g., Robert Cooter, *Economic Theories of Legal Liability*, 5 *J. ECON. PERSPECTIVES* 11, 15 (1991).

⁷⁸ See, e.g., Robert Cooter, *Economic Theories of Legal Liability*, 5 *J. ECON. PERSP.* 11, 15 (1991).

⁷⁹ I am indebted to Sam Issacharoff for suggesting that the private attorney general function could be situated in my field of externalities.

⁸⁰ Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 *U. ILL. L. REV.* 185, 206.

⁸¹ See also Scott, *supra* note 59, *passim* (contrasting a "conflict resolution model" of civil adjudication that focuses on compensating plaintiff losses with a "behavior modification model" that focuses on deterring defendants).

⁸² As I noted above, see *supra* note 9, many collective action scholars are indifferent as to whether compensation or deterrence is the goal; their focus is on the class mechanism as the means of overcoming the collective action problem. Nonetheless, their private law interests tend to emphasize individual compensation not deterrence. *Id.*

⁸³ See, e.g., Bruce L. Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 *NOTRE DAME L. REV.* 1377 (2000).

⁸⁴ Fed. R. Civ. P. 23(b)(1)(A).

⁸⁵ *Id.* at 23(b)(1)(B).

⁸⁶ *Id.* at 23(b)(2).

⁸⁷ *Id.* at 23(b)(3).

⁸⁸ *Id.* Many courts and commentators believe that large claim cases should not or do not fit within Rule 23. See Rubenstein, *Transactional Model*, *supra* note 23, at 394-395 & nn.110-11, 400 & n.136.

⁸⁹ See *supra* note 71 (citing Rubenstein, *A General Theory of the Class Suit*).

⁹⁰ See *supra* notes 71-72 and accompanying text.

⁹¹ Bone, *supra* note 45, at 265 n.73.



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WHAT IS REALLY WRONG WITH COMPELLED ASSOCIATION?

Excerpt from:

by Seana Valentine Shiffrin*

R*oberts v. United States Jaycees*¹ held that it was constitutionally permissible for Minnesota to require the *Jaycees*, as a public accommodation, to desegregate and to admit women. Sixteen years later, *Boy Scouts of America v. Dale*² held that it was constitutionally impermissible for New Jersey to require the Boy Scouts, as a public accommodation, to remain partly desegregated and to retain an openly gay Scoutmaster. It is no surprise that *Dale* caused gnashing of teeth by those who applauded *Roberts v. Jaycees*: the Court's commitment to integration seemed all too limited. Women counted; gays and lesbians did not.

Introduction

This analysis may be a partly accurate diagnosis of *Dale*'s resolution, but it does not fully capture what is troubling about *Dale* from a First Amendment perspective. Those who support *Roberts v. Jaycees*, especially liberals, should have been disturbed by *Dale*, not entirely because of its outcome, but because the reasoning of *Dale* and the debate between the justices was foreshadowed by Justice Brennan's majority opinion in *Jaycees*. In this Essay, I will argue that *Jaycees* was correctly decided but that Justice Brennan's majority opinion reflects and has reinforced a message-centered approach to freedom of association that denigrates its value and implicitly distorts and underplays its intimate connection to freedom of speech. A parallel mistake occurs in a common articulation of the objection to certain forms of compelled speech. Drawing upon a core, but underemphasized, aspect of liberalism, I will re-fashion the case against compelled speech in a way that concomitantly provides a stronger foundation for freedom of association. Specifically, the fundamental wrong of compelled speech in cases such as *West Virginia State Board of Education v. Barnette*,³ which found the compulsory recitation of the Pledge of Allegiance unconstitutional, does not depend on the external effect of others possibly misunderstanding a person's compelled speech as his own. It has more to do with the illicit influence compelled speech may have on the character and autonomous thinking process of the compelled speaker, and with illicit and disrespectful governmental efforts, however fruitless, to exert such influence.⁴

Similarly, the wrong of compelled association is not fully captured by analyses that concentrate upon the risk that the association's message will somehow become garbled and less intelligible either to outsiders or insiders. Associations have an intimate connection to freedom of speech values not solely because they can be

mechanisms for message dissemination or sites for the pursuit of shared aims. Associations have an intimate connection to freedom of speech values in large part because they are special sites for the generation and germination of thoughts and ideas. As with compelled speech, our concern should be turned inward onto the internal thinking process of group members, rather than predominantly on whether there is confusion in the transmission of a group's message.

Rethinking the
Disvalue of
Compelled
Association

the narrow
model of the
free speech
value of
associations

*dale and
jaycees*

...The Court's framing of the issues in *Dale* grew straight out of Justice Brennan's opinion in *Roberts v. Jaycees*.⁵ *Jaycees* involved a First Amendment challenge by the *Jaycees* against the application of a Minnesota public accommodations law to require the admission of women into the decidedly all-male *Jaycees*. . . . Justice Brennan began the analysis of the majority opinion by distinguishing between intimate association rights that are protected "as a fundamental element of personal liberty" and those association rights protected by the First Amendment. The latter garner constitutional protection not as a fundamental element of liberty but "as a . . . means" of preserving other liberties.⁷ While he acknowledged overlap between the categories and a spectrum between the extremes, Justice Brennan located the boundary between intrinsically valuable associations and instrumentally valuable associations as that between intimate and expressive associations.⁸ Intimate associations, such as the family, friendships, and other close personal relationships, are sites for the formation and transfer of culture and the emotional attachments that are crucial to one's identity.⁹ On the other hand, expressive associations serve as venues for the pursuit of shared social, political, cultural, and religious ends and provide effective and safe means for voicing shared views.¹⁰ As Justice Brennan articulated it, the right of expressive association derives from the "individual's freedom to speak, to worship, and to petition" for redress;¹¹ specifically, the right of association facilitates activities that enhance the effectiveness of the individual's First Amendment rights and that provide a protective buffer against potential state efforts at suppression.

Justice Brennan characterized the boundary between intimate and expressive associations in terms of the properties of intimate associations — their small size, selectivity, and seclusion. The *Jaycees* did not have these features, being a large, national, decentralized, and "basically unselective"¹² group that excluded only on the bases of age and sex.¹³ Hence, the *Jaycees* did not qualify for the substantive due process protections afforded intimate (and in Justice Brennan's view, intrinsically valuable) associations.

The question, therefore, was whether the compelled inclusion of women infringed the Jaycees' instrumentally valuable freedom of expressive association. If so, then a regulation compelling inclusion would only be permissible if the infringement served a compelling state interest unrelated to the suppression of ideas and if that interest could not be achieved through significantly less restrictive means.¹⁴

Justice Brennan assessed whether a burden on expressive association was imposed by looking to whether the regulation directly affected the association's ability to engage in outward endeavors, such as civic or charitable lobbying and fundraising activities or "to disseminate its preferred views."¹⁵ The regulation at issue in *Jaycees*, Justice Brennan reasoned, advanced the interest of equality "through the least restrictive means," for no demonstration was made that the inclusion of women "impose[d] any serious burdens on the male members' freedom of expressive association."¹⁶ Minnesota's purpose was not to suppress ideas "or to hamper the organization's ability to express its views," but to eliminate discrimination.¹⁷ The Court concluded that the regulation would not require the Jaycees to alter their creed to promote men's interests nor would it prevent their adopting selection criteria that excluded people with views adverse to their own....

Justice Brennan's approach represented a well-meaning effort to connect freedom of association to freedom of speech. However, his analysis — in particular, his dichotomy between intrinsically and instrumentally valuable associations — rests upon a constrictive understanding of the First Amendment value of freedom of association. He concomitantly imagines an overly narrow range of the dangers of compelled association, one that mainly locates the possible dangers occasioned by compelled association outward, concentrating on the potential alteration or distortion of the relationship between the association and the outside world.

rethinking the
connection
between
associations
and free
speech

The effects compulsion may exert on the internal cognitive life enjoyed within the association represent significant but neglected dangers. Such effects implicate First Amendment interests, not only the personal and social values served by associational membership. These First Amendment interests, however, are not accurately represented in terms of associations' messages, whether internally or externally promulgated. Both *Jaycees* and *Dale* wrongly adopted a conception of associational freedom that is insufficiently appreciative of the sort and strength of the speech interests at stake. In a different respect, both cases were *overly* speech-protective by

focusing just on whether the association had a message rather than on what *sort* of association it was. Before making out the account of the more intimate connection between associational freedom and the First Amendment, I will discuss compelled speech to prefigure the shift from a predominantly outward-looking, message-centered approach to one that also stresses an inward, thought-centered perspective.

the case
against
compelled
speech

Arguments against compelled speech by individuals sometimes take a form analogous to the form of argument voiced in *Jaycees* and echoed in *Dale*. For example, consider the constitutional protection against compelled recitation of the Pledge of Allegiance recognized in *West Virginia Board of Education v. Barnette*⁴⁰ and the subsequent protection against having to sport state-dictated messages on one's license plate recognized in *Wooley v. Maynard*.⁴¹ These opinions exhibit admirable distaste for government-prescribed orthodoxies "in politics, nationalism, religion, or other matters of opinion."⁴² But interpreting the meaning of the objection to orthodoxy is a delicate matter. The objection, of course, could not be to the government's taking strong, even unequivocal, positions on political topics.⁴³ Rather, it is that the mode of government speech was objectionable and infringed on the compelled speaker's rights. One way to understand this speaker-based rationale behind cases like *Barnette* and *Wooley* is that they protect individuals from having to mouth government orthodoxies that may misrepresent their views to others.⁴⁴

Put this way, the concern, as in *Jaycees* and *Dale*, is whether the regulation disrupted or distorted the regulated party's message. This is not a negligible concern, to be sure, but it is unclear whether this interest was powerfully implicated in cases like *Barnette* and *Wooley*.⁴⁵ If a certain speech act is required of everyone and it is publicly known that it is required, it would be unwarranted for any reasonable observer to infer that any particular utterance reflected the sincere, genuine thoughts of the particular speaker. The reasonable conclusion is that the message is attributable only to the state, not to the particular citizen. If the occasions for compelled speech are clearly delineated, then there is no substantial worry that a citizen's message will be misunderstood or even that she will be taken to be communicating at all.⁴⁶

The worry about misunderstanding seems small — at least where it is clear that the view and the contents of the speech are compelled and the circumstances of compulsion are reasonably well-defined, discrete, and obvious to observers.⁴⁷ There are two superior justifications for the holdings of *Barnette* and *Wooley* that focus

entirely on the speaker and her interest in what she comes to think and to say in the first place, prior to her interest in being properly understood in communication. The first locates a threat posed by compelled speech to freedom of thought and the autonomous agent's control over her mind. The second identifies an inconsistency between practices of compelling speech and the endorsement of and support for the virtue of sincerity, a commitment to which, I argue, is presupposed by the First Amendment commitment.

First, let us posit that a speaker, as a rational agent, has an interest in how she comes to produce messages — in her thoughts and more generally in her thought process — in how she thinks about topics, and in being able to reason about them consciously, sincerely, authentically and directly. Specifically, the speaker has an interest in trying and being able to come to conclusions about matters by thinking directly about the relevant considerations that bear on the subjects.⁴⁸ Compelled speech may be reasonably regarded as potentially posing a risk to the pursuit of this interest and so may be reasonably resisted by a thinker.

freedom of
thought and
mental
autonomy

One may worry that compulsory, frequent repetition of the Pledge of Allegiance will have an influence on what and how one thinks, independent of one's direct deliberations on its subject matter. Routine recitation may make its message familiar. Through regularity, it may become a comfort and an internal source of authority for consultation. At a later point, one might instinctively, without further thought and without awareness of the origin of the thought, characterize the polity as a republic, or as a place where there is freedom and justice, or perhaps more plausibly, be more likely assent to another's assertion to that effect.

The more general concern at issue for protecting freedom of thought is that what one regularly says may have an influence on what and how one thinks. The things one finds oneself regularly doing and saying will have an understandable impact on what subjects one thinks about. The regular presence of specified statements in one's speech and related action may predictably have an influence on which topics seem salient. Further, these statements may have an influence on what one thinks about and how. Commonly heard sentiments may become comfortable sentiments. Commonly voiced sentiments bear an even more intimate relation to the self.⁴⁹ Isn't that a good part of why proponents advocate for the institution of such compelled speech rituals?

The notion and the concern that what one says (as well as what one hears) has a bidirectional relation to one's thought is familiar to feminists, among others — including anti-racists. One's linguistic patterns may serve as a reference when one lacks information — how one tends to talk may serve as mental evidence for how an item about which there is uncertainty is likely to be. For example, the persistent use of the male pronoun for the generic person may make the speaker and listener more inclined to assume that a person whose gender is unknown is a man; one may tend to have men in mind as the generic agent.⁵⁰

The phenomenon is not limited to contexts involving gender or particular patterns of speech. It is also not entirely an unwelcome phenomenon that ways of speaking and acting may influence one's thought processes.⁵¹ Take, for instance, the use of intuitions in moral methodology. It is common, when deliberating ethically, to consult our intuitions (or what some call our moral sense). We try to assess how we react to and feel about an action or a situation, to think about how we are inclined to characterize it and to speak about it, and to reflect on how we behave in such situations. Philosophers may be especially prone to consult their speech habits. For example, discussions about the removal of aid in cases of euthanasia or abortion sometimes begin with someone saying “we [would or] wouldn't call that a *killing*.” Others may reflect more on their patterns of action and their moral reflexes in similar situations or in the very situation at hand. Such intuitions may not be (and in the long run should not be) treated as dispositive, but they often provide starting points for ethical thought,⁵² set the moral agenda for further investigation, confirmation, or disconfirmation, and provide at least *prima facie* considerations about action.

...Through experience and acculturation, people navigate a wide range of ethical situations, make judgments, and learn from their own and others' actions and reactions. Their intuitions often reflect their unarticulated yet still deliberative reactions to such situations, as well as rationalizations of their own experience and action. So, it is an important skill of the moral agent that she learns from how she acts and draws lessons from her action both consciously and unconsciously in deliberation. Thus, it should also be important to an agent to maintain control over how she acts and speaks so as to maintain control over the evidentiary pool from which she may later draw in further action and reasoning.

That what one says and how one behaves may have an influence on thought is also the aspiration of some counsels of religious practice. On some understandings of the Jewish faith, practice may precede and cause faith. One is counseled to engage in the

ritual expressive of a belief even if one lacks the belief.⁵⁴ The hope is that the practice of the ritual may lead one over time to develop the belief, even when arguments and direct efforts to induce the belief fail.⁵⁵

Similarly, though it may not always be their aspiration, some actors find that they take on (often temporarily) some of the habits, character traits, and perspectives of the characters they play.⁵⁶ Some even report finding themselves thinking and feeling as their characters would.⁵⁷ Indeed, this effect is part of the motivation for using drama as an educational and therapeutic tool.⁵⁸

Obviously, this is a complex phenomenon that is difficult to interpret with confidence or clarity. It is worth noting three important contrasts between the insincere speech of acting and that of compelled speech. First, in contrast to compelled speech, actors intentionally seek to identify with — even immerse themselves in — their roles and what their characters say, to deliver a convincing performance. Second, this immersion is deliberate. The actor has a high level of awareness and deliberately frames the process; it is fairly transparent (and voluntary). Third, the performance is valued by the actor and others as a performance; it is a special event of non-authentic expression that is not a quotidian element of the actor's life. This may make its status as a performance more salient to the actor than to the compelled speaker. For non-actors, the compulsory nature of the speech may possibly recede into the background of the speaker's awareness because it is not essential to its performance that it be a performance. Quite the contrary, those who compel the speech typically aim for the compelled speech to come to be sincere, or at least for its compulsory nature not to be salient to the agent. However, compelled speech may come to exert an influence on the thoughts (and actions) of the speaker in a way that surreptitiously bypasses the agent's conscious consideration and does not reflect her sincere deliberation about the matter. Autonomous thinkers therefore may have strong objections against a loss of control over what they say.

But, it might be objected, since the speaker (as well as her audience) knows that the speech is compelled, won't this knowledge have an impact on the extent to which what she says influences what she thinks?...My replies are threefold. First, where the compelled speech is frequent and presented as standard, normal conduct, the background compulsion may not be salient. I have in mind cases like the Pledge of Allegiance and school prayer. Second, it is not clear that awareness of the pretense serves as a reliable barrier against the pretense affecting one's belief and affective states.⁵⁹ Third, moral agents who value sincerity and transparency have a general

interest in avoiding an analog to (or on some descriptions, a kind of) cognitive dissonance. A moral agent has an interest in controlling and being able to avoid states that I will call “performative dissonance”: states of conflict or tension between what one says or appears to say and what one thinks. This interest provides some subtle internal pressure to conform one’s thoughts to one’s utterances and vice versa. Where the utterances cannot be altered because they are compelled, the impulse to avoid performative dissonance may exert subtle, perhaps unconscious, pressure to alter one’s thoughts to conform to the content of those utterances.⁶⁰...One’s own statements are typically associated with oneself and with moral norms of sincerity. Consequently, connections of identity and pressures of sincerity may be activated.⁶² By contrast, when one listens, there is an intrinsic separation between oneself and what is communicated....

What lurks behind the model of freedom of association in *Jaycees* and *Dale* is a conception of freedom of association on which associations are viewed as amplification devices. On this view, associations are valuable from a freedom of speech perspective because they amplify the messages individuals seek to express.⁷¹ By banding together, individual speakers can be louder and more effective in dispersing their message. They can convey more accurately the intensity and depth with which its content is adhered to by a range of members of the public.⁷²

But, the most important connection between association and speech is not that of amplification. Rather, the central connection is an internal creative and constituting one: associations and social connections are places where ideas are formed, shared, developed, and come to influence character... We should think of associations as sites where ideas are developed and take root, instead of just viewing them as devices for exporting ideas to others. On this conception, by analogy to *Barnette*, the danger of compelled association is not simply or necessarily that of message distortion but something more akin to interference with freedom of thought. This argument challenges the idea that social associations must be consciously engaged in expressive activity or have a concrete message to garner First Amendment protection. Bowling leagues, drinking clubs, knitting circles, and debating societies, as well as the NAACP, should fall under the umbrella of the First Amendment’s protection.⁷⁷ Hence, I will replace Justice Brennan’s language of “expressive associations” with the broader language and wider implications of “social associations.”...

There are two interconnected ways to make out the intimate connection between associations and freedom of speech. The more obvious way is to substantiate the sociological claim that people's ideas and beliefs are influenced by their social relationships.⁷⁹ The other way is to argue that, normatively, it is what we would expect and want from citizens, especially within liberalism....

...The strongest forms of liberalism start from premises that emphasize the significance and value of social relationships and social cooperation.⁸² To the extent that liberalism is a distinctive theory, distinguishable from libertarianism, liberalism is essentially a theory about the value of cooperative activity and the proper role social cooperation plays in shaping the identities and opportunities of autonomous individuals who engage in it.⁸³...

liberalism,
social
cooperation,
and social
connection

Ironically, Justice Brennan's theory of freedom of association in *Jaycees*, and its extension into *Dale*, resembles more of a libertarian theory of association than a liberal theory of association. A liberal theory would take more seriously that associations have formative effects on their members' beliefs and are not merely conglomerations of people with stable identities and pre-formed positions.

Social interactions, like one's activities, influence the subjects and content of one's thought. This effect is not merely a product of familiarity and the tendency to assimilate and integrate that which is close. It is also a product of admirable qualities that serve our moral ends. Social cooperation involves not merely efficient divisions of labor but also the relations of trust, reciprocity, mutual engagement, mutual interests, and mutual enjoyment of each others' company fostered by social cooperation. Our relations of trust do not amount solely to beliefs that people will keep their commitments and refrain from doing one another harm. Trust also involves participation in epistemic relationships in which we often take others' assertions to be true; in other cases, we take them to be likely to be true or at least worth considering. The concerns and beliefs of our fellow cooperators occupy a prominent place on our mental agenda. Such epistemic relationships form partly because they are essential for pursuing complex projects of material labor as well as for intellectual production. Such projects would not be possible were we to regard ourselves as responsible for independently initiating every plan, every belief, or for verifying every claim.⁸⁴

Such epistemic relationships also form because they are outgrowths of proper and natural moral attitudes cooperators take toward one another. Cooperation and mutual dependence involve high levels of emotional and cultural engagement and self-definition among participants. People whose lives are intertwined are reasonably and understandably influenced by one another's thoughts and ideas. They both consciously and unconsciously take an interest in their peers' interests. Mature moral agents engaged in cooperation become sensitive to one another, and aim toward certain forms of consensus, intersecting interests, and mutual understanding. Sustained interaction with others will influence what people think about and what conclusions they draw. Their mental lives will be structured substantially through processes of absorbing and reacting to the ideas and beliefs of their companions. These are built upon and refined to produce ideas and views that differ from those that would be produced by solitary individuals or ones who interact but do not build relationships of cooperation and interdependence. That is, the suggestion is that in liberal societies, in sites of association as well as other locales, ideas are exchanged and built upon; that individuals' mental lives are strongly influenced by these interactions; and that ideas and expressions, whether shared or held only by certain individual members, are the joint product of these forms of association. On this picture, then, associations are not merely devices for more efficient broadcasting of ideas and views that like-minded individuals have independently but coincidentally formed. Nor is the more sophisticated view that they are sites for the mutual pursuit of shared aims a full characterization of the general value of association.⁸⁵...

liberal virtues
and the value of
free
associations

Thus far, I have claimed that liberalism champions social interaction and coordination and regards social cooperation not as a challenge or threat to individual autonomy, but as a context in which autonomy is most fully realizable. I have also claimed that social cooperation involves forms of conscious and unconscious epistemic cooperation and mutual influence, both as a means of pursuing more complex material and intellectual joint endeavors but also as a byproduct of the character virtues associated with social cooperation.

To connect these claims to issues of freedom of association and compelled association involves two further but fairly predictable steps. First, social associations merit strong forms of protection within a liberal society, both to facilitate the non-speech-related benefits of close and regular social connections to other community members and to protect First Amendment interests. Social associations bear a special relationship to

speech values partly in light of the instrumental properties emphasized in Justice Brennan's model. They also bear such a relationship because the connection between cooperation and the production, generation, and refinement of ideas is pronounced in associations; they involve continuous and regular interactions between individuals who come to exert intellectual influence upon one another in explicit and implicit ways.

Second, given the influence closely interacting people may have on one another, members of social associations have important freedom of speech interests in strong control over the membership of such associations. We would expect these processes of productive influence on mental content (whether positive or critical) to work more readily in contexts where members feel comfortable and believe that they can trust one another. Further, given the character virtues activated and inculcated by social cooperation and individuals' openness to having their thoughts influenced by others with whom they interact in relations of trust, we might expect individuals to regard it as fairly important to be able to be selective about with whom they interact, especially in contexts in which the interactions and conversations are meant to be relaxed, unfocused, and unguarded. If they feel they will be influenced in ways they may not be able to predict or articulate by those they have close interactions with, and that their character traits and virtues render them open to such influence, they may reasonably want to protect themselves against influence by those they do not trust or do not feel kinship with. While Brennan's imagined horror of compelled association was message disruption, on this picture, as with the recasting of the disvalue of compelled speech, the complementary and perhaps more salient hazard sounds in concerns about freedom of thought. The ability to determine autonomously with whom one associates operates to protect the ability to exercise freely character virtues that play a central role in human flourishing but also in a healthy free speech culture.

I do not mean to suggest that one must affirmatively trust specific people, whether consciously or not, to have some reason to believe what they say. Nor do I claim that all relations of trust contribute directly and immediately to the discovery or appreciation of truth. Nor am I making a prescriptive claim that one should be influenced only by those with whom one is in a comfortable relation of trust. Rather, I claim that, while individuals may well have *pro tanto* warrants to accept others' seemingly sincere assertions as a default matter, relations of trust can reasonably, and often do empirically, encourage and heighten both the level of engagement with others' claims and ideas as well as the level of their acceptance. The higher degree of acceptance of claims can be justified by epistemic reasons and explained by normative pressures. Epistemically, trust and specific beliefs about others' expertise and reliability may supply reasons that overcome

reasons to doubt. Normatively, there are often reasons to try to find consensus and common ground with those with whom one shares activities and space; one also has normative reason to provide and to consider carefully criticism and deviation from those with whom one shares such bonds. Whether or not such reasons justify greater rates of acceptance of others' claims, they certainly justify higher levels of engagement with others' claims. Often, one should at least attend to the beliefs of those with whom one has interactions and relationships, even if only to evaluate them critically.⁸⁶ If, as it turns out, one fails to share common ground with these peers, one may be pushed by these normative considerations of friendship and community to devote time and mental energy to grapple with this issue, rather than others, and to come to a more articulate accounting for one's cross purposes.

These interactive effects, I claim, enrich — in essential ways — the intellectual climate in which the First Amendment operates and has meaning. Some ideas and schools of ideas gain greater development and refinement than they would in isolation, while others are mooted and more closely evaluated within a climate of sympathy; the dissent and criticism they generate may be more effective because of the congenial milieu in which they are aired.⁸⁷...

...Legally, neither articulateness, decisiveness, nor coherence should be preconditions for the successful assertion of free association rights. Freedom of speech must protect the process by which ideas and expressions are generated, nurtured, and mooted, both in individuals and within groups. Any plausible theory of the development and evaluation of ideas should recognize that this process may involve dispute, dissension, substantive missteps, and unclarity (especially within a social setting), that these stages may be temporary or ongoing, and that these features are not necessarily a sign of failure. Dispute or dissension within a group of people who are comfortable with one another and willing to associate may be a productive catalyst in the formation and understanding of the beliefs of individual members. Nonetheless, the members of the group should have the ability to determine the conditions on which they interact and the people with whom they share and recognize the relations of identification and trust that underlie these processes of social influence, whether the chosen relationships are harmonious, articulate and focused, or shaggy, disorganized, and contentious.

From a moral standpoint, however, I affirm that people should be generally open to and comfortable in associative environments in which their peers differ substantially from

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Its Conditions

the positive right

them and in which their views may be explicitly or implicitly challenged. But not all people are there, fully, all the time; frankly, most of us are not. Most find one sort of understandable and unique connection with those who seem familiar and who appear to have shared past life experiences. Some sorts of intellectual and moral progress and understanding may be in easier reach among those who seem familiar even where these judgments of familiarity and comfort are overly parochial. Such urges, morally, may be and have been historically taken too far. But, as with other instances of the right of freedom of speech, how individuals might best exercise the right does not define the full scope of the right. The right may encompass the ability to do what is morally wrong. The freedom of speech right encompasses a right to resist certain forms of mental interference and mind control and to make up one's own mind, even if the exercise of that right may sometimes lead a person to ignore important information, to emerge with incorrect judgments, and to make poor decisions.

...My argument has criticized government regulations that, either as their aim or substantial effect, exert substantive influence on mental content in ways that are indifferent to and attempt to bypass the thinker's authentic consideration of and conscious engagement with the idea, especially when the exertion works by way of manipulating a character virtue presupposed by democratic society.⁹⁰ In the compelled speech context, in which a particular script is dictated, the concern is especially strong because a particular message or idea may be foisted onto the speaker in a way that bypasses her deliberative processes (or an attempt to do so may be at hand).... Compelled association does not necessarily involve an effort to foist a message or idea on association members through forced membership. But, it does risk... an analogous interference in the autonomous process of thought formation in social groups, for this process relies on dynamics of trust and identification that may be disrupted or distorted by forced membership. Compelled association thus also displays an objectionable indifference to the autonomous thought processes manifested in voluntary social associations and their genesis, while yet representing an effort to make use of the character virtues associated with the close connections that are the product of voluntary association.

[I]ndividual freedom of thought is a clear requisite for meaningful freedom of speech protections. This holds true even when a person is not actively deliberating in any focused way. Obviously, the government and the community may permissibly (and must) gain people's attention and influence their thoughts, for example through direct and indirect address, signs, letters, speeches, and media, etc.

But, though such efforts and successes in engaging others' thought are permissible and, indeed, essential to our leading meaningful lives together, the permission to provoke and engage others' minds is not sweeping and comprehensive across all contexts. The autonomous agent must have some ability to control what influences she is exposed to, to what subjects she directs her mind, and whether she, at all times, directs her mind toward anything at all or instead "spaces out" and allows the mind to relax and wander. To function as an independent thinker and evaluator, the individual must have domains in which she may enjoy the privacy of her thoughts. Some of the most productive, creative sorts of thinking follow periods of woolgathering. Crystalline clarity may emerge from utter blankness. But even if this were not the case, the recognition of the individual thinker as independent and autonomous has to allow for some domains (spaces and times) in which the individual wields the power to control whether and how she approaches a subject and how and when she deploys her rational capacities. I contend it would violate the First Amendment by infringing privacy of thought — were the government concerned to keep rational agents on the ball as much as possible, bombarding a person with attention — grabbing stimuli or with informative messages whenever she was on the brink of spacing out and relaxing. It would not be a sufficient defense that the messages did not disrupt or contradict a substantive line of thought she was pursuing or even that attending to them might strengthen her understanding of her own point of view.

This argument has an analog in the social domain. Social associations represent an important site for individual idea formulation. Compelled social association, then, may pose two objectionable hazards from a First Amendment perspective. First, compelled association may, by aim or by effect, exert substantive influence on individual members in an indirect, non-straightforward way, which takes advantage of and manipulates moral connections of trust and propinquity or, alternatively, may provoke guardedness, which detracts from the value of social associations. Second, compelled association may intrude on the privacy of social associations — the relaxed, unguided, unstructured social interplay that, for some, operates as the social intellectual counterpart of individual wool gathering.

I am not arguing that individuals — whether alone or in associations — must be insulated from all efforts to influence or stimulate their thoughts. Quite the contrary. I am arguing that freedom of thought requires there should be *some* protected domains free from such efforts, including domains of interpersonal privacy. Specifically, the right to participate in certain processes of idea formation in some domains free from social efforts to influence thought encompasses not only the individual's mind, considered in

isolation, but also some social processes and sites of idea formation. Given the significance of social interaction and cooperation, the latter may be as important as domains for solitary contemplation.

I have advanced considerations supporting a strong right of freedom of association, stronger than the one articulated by the Court in *Dale*. Nonetheless, I am not convinced that *Dale* was correctly decided. The most interesting questions about the case were not addressed. What ought to have been mooted in *Dale* was not the issue of whether the group's retention of Dale, a gay Boy Scout leader, would distort its message, but instead whether an association primarily of children and for children should enjoy the same form of freedom of association as is properly afforded to groups of adults. In two related respects, the Boy Scouts are not prototypical of the associations that the right to associational freedom protects. First, it is an association filled with children, not adults. Second, it is an association filled with children that is directed and run by adults. These two features raise deep, difficult constitutional questions that were not, but should have been, prominent in the debate in *Dale*...

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¹ 468 U.S. 609 (1984).

² 530 U.S. 640 (2000).

³ 319 U.S. 624 (1943).

⁴ The approach I take is a hybrid one, looking either at the risk of such illicit influence occurring or at a governmental purpose to bring about such effects. I defend the need for a hybrid approach that is sensitive to consequences as well as to governmental purpose in *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135, 1168-71 & *passim* (2003).

⁵ 468 U.S. 609 (1984).

⁷ *Jaycees*, 468 U.S. at 617.

⁸ *Id.* at 618, 620. The notion of a "right to intimate association" as such was first introduced and developed in Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

⁹ *Jaycees*, 468 U.S. at 618-19.

¹⁰ *Id.* at 622.

¹¹ *Id.*

¹² *Id.* at 621.

¹³ *Id.* at 620-21.

¹⁴ *Id.* at 623.

¹⁵ *Id.* at 627.

¹⁶ *Id.* at 626.

¹⁷ While the aim to eliminate discrimination is not directly an effort to suppress ideas or expression, there is an important non-accidental connection between regulating association membership and efforts to influence the thoughts and ideas of the membership. See *infra* Part II.B.2.

⁴⁰ 319 U.S. 624, 625 (1943).

⁴¹ 430 U.S. 705 (1977). I will focus predominantly on cases where a person is compelled to speak in non-artificial circumstances irrespective of his or her beliefs about the subject of compulsion. Typically, in these cases, the compelled speech occurs regularly and/or is meant (in some way) to have force over time. I have in mind such cases as compelled Pledge of Allegiance, school prayer, loyalty oaths, and labels or messages one must wear for prolonged periods. Compelled testimony in court or legislative hearings, in which an individual is compelled to speak but the content of the utterance is not externally determined, raise different issues I do not aim to address.

⁴² *Barnette*, 319 U.S. at 642; see also *Wooley*, 430 U.S. at 715.

⁴³ This point and the general account of compelled speech offered here extends a position initially introduced in Vincent Blasi & Seana Shiffrin, *The Story of West Virginia State Board of Education v. Barnette*, in *Constitutional Law Stories: An In-Depth Look at Ten Leading Constitutional Cases* 433, 454-61 (Michael Dorf ed., 2004).

⁴⁴ See, e.g., Abner S. Greene, *The Pledge of Allegiance Problem*, 64 *FORDHAM L. REV.* 451, 469, 473-75 (1995) (placing emphasis on whether the reasonable observer would take the compelled message to be the speaker's own).

⁴⁵ See *id.* at 473-75, 482-83 (discussing this difficulty and for that reason, shifting from a free speech account to an autonomy analysis to explain the full *Barnette* protection); see also Laurence Tribe, *American Constitutional Law* § 15-5, at 1317 (2d ed. 1988) (making the criticism of *Wooley*).

⁴⁶ The force of this critique, of course, can be overstated. Outsiders who are unaware of the legal convention may mistake compelled utterances for voluntary ones. As some of my students have insisted, tourists to New Hampshire might not know the license plates' messages were state-dictated and might mistakenly infer a citizenry that was united behind radical civil libertarianism. Also, the reception of a voluntarily uttered message may be affected when that message is *sometimes* compelled. An audience savvy to the fact that the utterance is compelled in some contexts may not recognize it as voluntarily delivered in others. The voluntary utterance may be mistakenly taken to be a compelled utterance or as an ironic comment on the compelled utterance. Ironically, those who agree with the content of the compelled utterance may have a greater complaint against its compulsion than dissenters. The former's ability to communicate their sincerity may be compromised by its sometimes being compelled. But even when the context is clear, the compelled speaker has the different complaint that I discuss in the text.

⁴⁷ Although, in "The Attribution of Attitudes," Edward Jones and Victor Harris found that some listeners still inferred the speaker believed the content of her speech even when the listener knew the speech was assigned. This attribution effect was, however, significantly less powerful than in cases where the listener believed the speech's content to be chosen. Further, the effect in both situations was more pronounced where the content of the speech was unusual or unpopular. Furthermore, the situation studied differed from the sort of compelled speech I am discussing in that the speech in Jones' study was nonetheless constructed by the speaker (even if the direction of its content was assigned), was not frequent, and was not assigned by the state. Edward E. Jones & Victor A. Harris, *The Attribution of Attitudes*, 3 *J. EXPERIMENTAL PSYCHOL.* 1, 23-24 (1967).

⁴⁸ This claim bears a relation to the philosophical discussion about whether rational agents can coherently try to believe a proposition directly on the basis of reasons that do not directly support that proposition but rather merely support the desirability of believing that proposition. See, e.g., Bernard Arthur Owen Williams, *Problems of the Self* 136-52 (1973); Pamela Hieronymi, *Controlling Attitudes*, 87 *PAC. PHIL. Q.* 45-74 2006. Suppose they are correct that rational agents, qua rational, cannot decide directly to believe a proposition on the grounds of the desirability of that proposition's being believed, but can only come directly to a conclusion by assessing the considerations taken to bear on the proposition and finding them to appear true and to yield the conclusion. Then, it would seem natural to think that they would have an interest, qua rational

agents, against being manipulated into beliefs that are not held because the considerations that bear on the proposition were available to them and directly affirmed as yielding the proposition at issue as a conclusion. That is, they would have an interest in not being manipulated into coming to believe in ways inconsistent with their rational agency.

⁴⁹ See Jon Elster, *Alchemies of the Mind: Rationality and the Emotions* 333, 364-65 (1999); see also Eliot Aronson, Dissonance, Hypocrisy, and the Self-Concept, in *Cognitive Dissonance: Progress on a Pivotal Theory in Social Psychology* 103, 113 (1999).

⁵⁰ See, e.g., Mykol Hamilton, *Using Masculine Generics: Does Generic He Increase Male Bias in the User's Imagery?*, 19 *SEX ROLES* 785, 795, 798 (1988) (conducting an empirical study on the use of the masculine versus gender neutral pronouns and finding that "use of the masculine pronoun per se increases male bias" by the language user (emphasis added)); Fatemeh Khosroshahi, *Penguins Don't Care but Women Do: A Social Identity Analysis of a Whorfian Problem*, 18 *LANGUAGE SOC'Y* 505 (1989) (finding ambiguous results, that women who had adopted non-sexist pronoun practices were less likely to make sexist assumptions about referents of "he" than other women and than men generally); see also Donald Mackay, *Psychology, Prescriptive Grammar, and the Pronoun Problem*, 35 *AM. PSYCHOLOGIST* 444, 449 (1980); Sally McConnell-Ginet, *What's in a Name? Social Labeling and Gender Practices*, in *The Handbook of Language and Gender* 550, 552-54, 566-67 (Janet Holmes & Miriam Meyerhoff eds., 2003); Janice Moulton et al., *Sex Bias in Language Use: Neutral Pronouns that Aren't*, 33 *AM. PSYCHOLOGIST* 1032, 1032 (1978) (finding male terms, even when used in gender neutral form, "caused people to think first of males more often than did 'his or her'"); Anne Pauwels, *Linguistic Sexism and Feminist Linguistic Activism*, in *The Handbook of Language and Gender* 550 (Janet Holmes & Miriam Meyerhoff eds., 2003).

⁵¹ See Tamar Szabó Gendler, *On the Relation Between Pretense and Belief*, in *Imagination, Philosophy, and the Arts* 125, 125, 127, 131-36 (Matthew Kiernan & Dominic Lopes eds., 2003) (discussing psychological evidence that pretending can cause belief and affective states among children and adults, even when subjects are "explicitly aware" of the pretense, and discussing the connection between this phenomenon and important cognitive mechanisms); see also William Ian Miller, *Faking It* 109-20 (2004).

⁵² Compare this with Barbara Herman's discussion of the role of rules of moral salience within the more formal Kantian moral system. See Barbara Herman, *The Practice of Moral Judgment*, in *The Practice of Moral Judgement* 73, 76-83, 86-88, 90 (1993).

⁵⁴ See generally Moshe Halbertal & Avishai Margalit, *Idolatry* 174-76 (Naomi Goldblum trans., 1992) (discussing the widely shared view that "the adoption of a religious way of life, which embodies the right beliefs, increases the chances that the person who lives this way will come to believe in the true religion, while someone who adopts an idolatrous way of life is much more likely to adopt idolatrous beliefs as well."); see also Nachum Amsel, *The Jewish Encyclopedia of Moral and Ethical Issues* 176-81 (1994) (discussing Exodus 24:7, Maimonides, and the idea that performing mitzvot will be followed by and provoke an understanding of the meaning of the practices and not the reverse order); S. Schechter, *Some Aspects of Rabbinic Theology* 161 (1969) (arguing that the ideal is to obey law for its own sake but that those unable to do so should still study Torah and fulfill the commandments "for this occupation will lead in the end to the desired ideal of the purer intention"); Edward L. Greenstein, *Dietary Laws*, in *New York Rabbinical Assembly* 1460, 1464 (David Lieber & Etz Hayim eds., 2001) (stating that dietary practices are meant "to instill the idea that life belongs to God"; unlike Christian views, the Torah holds that the physical and spiritual are not separate; "the many meanings that are encoded within [dietary] behaviors are meant to act on and cultivate the ethical and spiritual dimensions of those who observe them" (emphasis added)). Maimonides, an influential adherent of the doctrine, appeared to believe that the effect might occur for false rituals and views, not merely true ones. This infused his understanding of the prohibition on performing acts associated with idolatry. Maimonides, *Mishneh Torah, The Book of Knowledge* 66a-69b (Moses Hyamson trans., 1974). For an articulation of the view by a Christian, see Blaise Pascal, *Pensées* 155-56 (Honor Levi trans., 1995) ("You want to find faith and you do not know the way? You want to cure yourself of an

unbelief and you ask for the remedies?... [B]ehav[e] just as if they believed, taking holy water, having masses said, etc. That will make you believe quite naturally, and according to your animal reactions.”).

⁵⁵ For more general discussion of the idea that pretense of virtue may lead to virtue, see Miller, *supra* note 51, at 28.

⁵⁶ The idea is a familiar one (which is not to say that its familiarity renders it true). Some examples: Writing about the effect of her immersion into roles, Shakespearean actress Zoe Caldwell remarked, “It takes me usually six months to regain my self, my life.” Zoe Caldwell, *I Will be Cleopatra* 241 (2001). Christine Lahti reported that playing a Holocaust-era Jewish gynecologist provoked panic attacks, insomnia, and experiences of anxiety. She recounted that it was difficult to move beyond her character’s experiences, that it took “several months to recover,” and found “when I got back to my life, I could take nothing for granted ever again.” Robin Pogrebin, *A Survivor’s Story: Choosing When There Are No Choices*, N.Y. Times, Apr. 13, 2003, at 12. Michael Paul Rogin argues that Ronald Reagan was unable to disentangle his real life from his cinematic roles and that this confusion infected his Presidency. Michael Paul Rogin, Ronald Reagan, *The Movie and Other Episodes in Political Demonology* 1-43 (1987). In an interview with a young method actor, he reported that it typically took him a week to recover fully from taking on a character for an audition; that roles he had played influenced his behavior toward his brother and his girlfriend; that he responded emotionally to a commercial he saw as a character he recently played would have; and that playing an emotionally disturbed man influenced how he later viewed and responded to a friend’s emotional problems. Interview with Santiago Ponce, *Method Actor*, in Los Angeles, Cal. (Feb. 12, 2003). The phenomenon is not, I think, belied by the method-influenced idea that good actors draw from their own experiences or even re-enact prior emotional episodes. For while an actor’s insight into, and presentation of, a character may be driven by her own direct experience, the composition of the character’s traits—the character’s attitudes, judgments, habits, behaviors—that the actor inhabits may be quite different from the actor’s own. Taking on a role may push one towards a pattern of thoughts and behavior practice of playing the role. Interview with Latima Good, *Actress*, in New York, N.Y. (Sept. 13, 2004). Not all actors experience significant leakage between their characters and their outside lives. One actor I interviewed (KK) did not believe he was directly influenced by his roles in this way. Although he reported that playing troubled characters helped him to understand certain sorts of people and their actions better, he connected this deeper understanding to a change in some political views and to coming to an opposition to the death penalty. Some doubts about the spillover effect of acting onto the actor’s personal life are expressed in Charles Neuringer & Ronald A. Willis, *The Cognitive Psychodynamics of Acting: Character Invasion and Director Influence*, *EMPIRICAL STUD. ARTS* 47-53 (1995). Their study, however, was based on a fairly short period of time and a relatively small sample, assessing student actors’ responses over only the rehearsal process and a short run of performances. It did not attempt to assess whether the role had an influence on the actor after a long run.

⁵⁷ For a rich discussion of the philosophical issues involved, see Richard Wollheim, *Imagination and Identification*, in *On Art and the Mind* 54, 60-76 (1974). Other results in cognitive psychological research lend suggestive support. See, e.g., Robin Darnrad-Frye & James D. Laird, *The Experience of Boredom: The Role of Self-Perception of Attention*, 57 J. PERSONALITY AND SOC. PSYCHOL. 315, 315 (1989) (reporting “much research” that “people induced to act as though they held particular emotions, attitudes, motives or beliefs” report later having these mental states); Paul Ekman & Richard Davidson, *Voluntary Smiling Changes Regional Brain Activity*, 4 PSYCHOL. SCI. 342, 345 (1993) (distinguishing between the presentation of voluntary and involuntary smiles but finding that deliberately produced smiles generate some of the brain activity associated with positive emotions); Robert Levenson et al., *Voluntary Facial Action Generates Emotion-Specific Autonomic Nervous System Activity*, 27 PSYCHOPHYSIOLOGY 363, 364, 368, 376, 382 (1990) (describing exercises directing actors and non-actors to configure their faces as though they were experiencing emotion as well as those directing subjects to relive a past emotional experience significantly influenced subjects’ current mental and emotional states). The studies support the view that actions can influence feelings and beliefs, not just reflect them. Some of these studies conflate more behaviorist views (that the relevant mental states are identical to a set of activities)

and epistemological views (that one's mental states are known by observing one's behavior) with the causal thesis that the relevant mental states may be caused by, and not only causes of, the relevant activities. See, e.g., Damrad-Frye & Laird, *supra*, at 315.

⁵⁸ See, e.g., Mallika Henry, *Drama's Ways of Learning*, 5 RES. DRAMA EDUC. 45-62 (2000).

⁵⁹ See Gendler, *supra* note 51, at 125, 131.

⁶⁰ See, e.g., Bertram Gawronski & Fritz Strack, *On the Propositional Nature of Cognitive Consistency: Dissonance Changes Explicit, but Not Implicit Attitudes*, 40 J. EXPERIMENTAL PSYCHOL. 535 (2004). Gawronski and Strack discuss and confirm prior findings that writing counter-attitudinal essays for moderate but not strong incentives influences the writers' explicit but not implicit attitudes to shift toward the essays' positions. This terminological distinction is not entirely clear but seems to be a distinction between attitudes that are both propositional and conscious and those that are non-propositional and not necessarily or consistently available to consciousness.

⁶² Amy Adler drew my attention to Stephen Greenblatt's moving story of his reluctance to mouth the words "I want to die," even in response to a compellingly put request of a father hoping to train himself to recognize what his speechless hospitalized son might be trying to mouth. Greenblatt refused from a concern to protect his identity by choosing what words to speak. Stephen Greenblatt, *Renaissance Self-Fashioning: From More to Shakespeare* 255-57 (1980); see also Eddie Harman-Jones & Judson Mills, *An Introduction to Cognitive Dissonance Theory and an Overview of Current Perspectives on the Theory*, in *Cognitive Dissonance*, *supra* note 49, at 3, 13-14 (discussing research on self-consistency models of cognitive dissonance that find dissonance where there is inconsistency between behavior and the self-concept, including one's self conception as a moral person and insincere behavior).

⁷¹ See also Amy Gutmann, *Freedom of Association: An Introductory Essay*, in *Freedom of Association* 3 (Amy Gutmann ed., 1998).

⁷² Rick Hills independently coined a similar label, labeling this approach the 'megaphone' conception; see Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 147 (2003).

⁷⁷ Families and friendships are also central in this conception.

⁷⁸ I will also bracket the further complications posed by state funding of some groups. I discuss some of these complications in *Egalitarianism, Choice-Sensitivity, and Accommodation*, in *Reasons and Values, Themes from Joseph Raz* 270, 296-30 (Philip Pettit et al. eds., 2004).

⁸² For example, John Rawls' *A Theory of Justice* treats social cooperation as the unproblematic beginning point around which the theory revolves, not the hoped for end of the justificatory project. See, e.g., Rawls, *supra* note 53, § 4. Joseph Raz's work has also emphasized the supportive role and constitutive context for individual autonomy provided by liberal forms of social cooperation. See, e.g., Joseph Raz, *Morality of Freedom* (1988); see also Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law & Politics* 10, 13, 18, 39, 106-07 (1996). By contrast, see Robert Nozick's more troubled discussion of social cooperation in *Anarchy, State and Utopia* 183-98 conceives them, to act in cooperation with one another in *Morals by Agreement* (1987).

⁸³ See also Seana Valentine Shiffrin, *Race, Labor, and the Fair Equality of Opportunity Principle*, 72 FORDHAM L. REV. 1643, 1662-68 (2004).

⁸⁴ See Burge, *Content Preservation*, *supra* note 80, at 466, 485 (noting that most of our knowledge derives from and builds upon others' communications).

⁸⁵ See Stuart White, *Freedom of Association and the Right to Exclude*, 4 J. POL. PHIL. 373, 377, 380 (1997) (characterizing freedom of association and its value as the ability to pursue a shared set of beliefs).

⁸⁶ For further philosophical discussion of trust, see Annette Baier, *Moral Prejudice* 1-18, 95-203 (1995); Karen Jones, *Politics of Credibility*, in *A Mind of One's Own* 54-77 (Louise Antony & Charlotte Witt eds., 2d ed. 2002).

⁸⁷ This last point is the focus of Roderick Hills's extremely interesting essay, *The Constitutional Rights of Private Governments*, with which I have much sympathy. See Hills, *supra* note 72. Hills stresses that protecting the institutional autonomy of associations is important to foster contexts in which robust and effective debates and dissent may occur. While I agree and while we largely converge on the flaws of the *Dale* approach, we disagree about the proper positive account. I do not think the freedom of speech value of associations is confined to their being sites for fostering debate, disagreement, and dissent. While I applaud dissent, iconoclasm, and productive clashes as much as another family member, there are convergence as well as divergence values here. The overt, as well as the more subtle, forms of agreement, concurrence, and mutual evolution that occur in social associations, both writ large and more casually between members in comfortable interactions, play as important a freedom of speech role for the culture and for the individuals who may take advantage of these socially formed thoughts and expressions. Thus, I would not concentrate the test for heightened First Amendment protection, as Hills would, on how controversial the speech fostered by the association or how heterogeneous the association's membership is. See Hills, *supra* note 72, at 219. Similar problems, I submit, plague fair use analyses that treat parody (but not non-critical appreciation) as a specially protected category. See also Amici Brief for Eugene Volokh & Erik S. Jaffe at 8-10, *McFarlane v. Twist*, 110 S.W.3d 363 (Miss. 2003) (No. 03-615), *cert. denied*, 124 S. Ct. 1058 (2004).

⁹⁰ See discussion *supra* Part II.B.1.



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DETECTING SPEECH: When Is It “McCarthyism”? When Is It Proper?

Excerpt from:

by Eugene Volokh*

Introduction

What may government officials do to prevent speech that they think is evil and dangerous? What may businesses, organizations, or individuals do? Some actions are clearly permitted, even laudable: Persuading people that the speech is bad is the obvious example. Neither we nor the government need sit idle when evil ideas are spread.¹

It's also quite proper to make sure that our ideological groups are not taken over by evil movements. The 1950s ACLU, for instance, rightly rejected members who supported totalitarian ideologies.² Totalitarianism is the antithesis of civil liberties: A civil libertarian organization may rightly support totalitarians' right to speak, but it should also want to avoid involving pro-totalitarians in its decision making.³ Likewise, groups that take controversial but well-meaning stands on racial issues may rightly want to exclude racists from their ranks, and especially from their leadership. That's both good politics and good policy.

A third acceptable option is to create social norms that condemn contemptible views and the people who express them. These norms may deter even those speakers who aren't persuaded by them — unlike pure persuasion, the norms may, in some sense, be socially coercive. Racists, for example, often feel reluctant to express their views because they fear social opprobrium. This is generally good. Likewise, people are legally free to praise rape, child molestation, or other crimes, but they tend to keep quiet about such views in most circles. That also is generally good.

Of course, such norm creation is proper only if the condemned views are indeed contemptible. Social norms that condemn thoughtful and polite criticism of race-based affirmative action, American foreign policy, or various religions are counterproductive — because they stifle potentially enlightening debate — and unfair. Yet this merely counsels caution and thoughtfulness in adopting and applying such norms; it doesn't undermine the legitimacy of anti-speech social norms as such. We should be polite and welcoming to those who have unorthodox views on social security reform. We needn't, however, apply the same social ground rules to those who have the unorthodox view that certain races are subhuman.

Other actions to combat evil views are rightly forbidden by the First Amendment — often by First Amendment doctrines that spring from reactions to the McCarthy era — or by well-accepted social norms.⁴ The government may not throw people in prison for their bad ideas, whether Communist, racist, or pro-terrorist.⁵ The government may not

ban political parties that express those views.⁶ The government shouldn't bar people from professions or from universities,⁷ threaten civil liability,⁸ or strip divorcing parents of child custody for expressing or tolerating such views.⁹

Likewise, both governmental critics and private critics shouldn't resort to lies or unfounded accusations. They shouldn't use excessive rhetoric that smears people with labels that they don't deserve, such as calling everyone on the Left "[C]ommunist sympathizers,"¹⁰ or calling people racists simply because they oppose affirmative action or support English-only instruction.¹¹

Yet between the easy cases of mere persuasion and clear First Amendment violation lie practices that are rightly contested. May government officials argue that the government's political opponents are unwittingly helping evil? May private parties properly use their economic power to retaliate against those whose views they condemn? May the government subpoena library and bookstore records to help uncover the identities of political criminals or terrorists?

Such practices sometimes trigger charges of "McCarthyism." Critics correctly point out that these practices may deter — even without legally prohibiting — certain kinds of speech. Some of the practices may even be intended to deter such speech.

Yet as the example of social norms against racist speech shows, some deterrence of bad speech is socially and legally permissible. The hard question, which this Essay focuses on, is when such practices really deserve to be labeled "McCarthyism" and to be forbidden by the First Amendment, by statute, or by social norm.¹² I regret that I can't offer a general answer, or even discuss more than a few such practices. But in this Essay, I hope to offer some thoughts on the subject, thoughts which surely aren't conclusive, but which I hope will be helpful.

Condemnation
of Those Who
Inadvertently
Help the Enemy

“To those who scare peace-loving people with phantoms of lost liberty,” Attorney General Ashcroft famously said not long after September 11, “my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America's enemies....”¹³ That's McCarthyism, some replied.¹⁴

Here's another quote, this one from the president: “Our nation has felt the lash of terrorism.... We can't let [a certain group] turn America into a safehouse for terrorists. Congress should get back on track and send me tough legislation that cracks down on terrorism. It should listen to the cries of the victims and the hopes of our children, not the back-alley whispers of the [group].” The president was Bill Clinton, and the group that he was condemning was the “gun lobby,” which opposed some gun-control proposals that Clinton favored.¹⁵

Likewise, following the Oklahoma City bombing, President Clinton argued on national television that violence is caused “not just [by] the movies showing violence. It’s the words spouting violence, giving sanction to violence, telling people how to practice violence that are sweeping all across the country. People should examine the consequences of what they say and the kind of emotions they’re trying to inflame.”¹⁶ He might have meant to condemn only those who actually urge violence, and not those who simply “giv[e] sanction to violence” by harshly criticizing the government. But his words could also have been interpreted (and were interpreted, by at least one sympathetic commentator) as a criticism of strident anti-government rhetoric more broadly.¹⁷

Similarly, consider Winston Churchill’s lament that his critics’ wartime statements were (among other things) “weaken[ing] confidence in the Government,” “mak[ing] the Army distrust the backing it is getting from the civil power,” and “mak[ing] the workmen lose confidence in the weapons they are striving so hard to make,” all “to the distress of all our friends and to the delight of all our foes.”¹⁸ And, finally, consider this quote from George Orwell during World War II: “Pacifism is objectively pro-fascist. This is elementary common sense. If you hamper the war effort on one side, you automatically help out that of the other.”¹⁹ Orwell’s message, I take it, was this: The pacifists’ tactics only aid the Nazis, for they erode the Allies’ national unity and diminish their resolve. They give ammunition to the Allies’ enemies.

Such statements have some things in common. They accuse people of doing things that help the enemy. The great majority of the accused are probably decent people, who have no desire to help terrorists or Nazis.²⁰ The statements may also deter dissenters: People don’t like to be told that they are helping the nation’s mortal enemies, especially when the charge comes from an official to whom millions listen. Even if the accused think the accusation is unjust, they may keep quiet, or at least tone down their arguments, to avoid such attacks in the future.²¹ The accusers likely intended to deter dissent by making potential dissenters feel embarrassed to make certain criticisms that the accusers thought baseless and harmful.²²

And the accusations may also have been factually correct. Pacifists’ opposition to the Allied war effort may have helped the Nazis as much as pro-Nazi opposition would have. Excessive insistence on gun owners’ rights might likewise help terrorists.²³ Similarly, criticisms of the administration’s actions may well erode national unity, diminish national resolve, give ammunition to our enemies, and aid terrorists. This is especially true when the criticisms come from legislative leaders. Recall that Ashcroft’s statement came at a hearing organized by Senator Patrick Leahy, then-chair of the Democrat-run Senate Judiciary Committee and a leading adversary of Ashcroft.²⁴ The hearing had apparently been called in part to criticize the administration’s antiterrorism policy on civil liberties grounds.²⁵ Enemies who see our political leaders divided on the war on terror may well be emboldened, and foreign neutrals may see us as less likely to prevail than if we seemed united. Such internal division may well “distress . . . all our friends and . . . delight

all our foes.”²⁶ And if Senator Leahy’s and others’ criticisms were indeed unfounded or at least exaggerated (a hotly contested position, of course, but one that Ashcroft defended on the merits in his testimony), then Ashcroft could have reasonably concluded that the critics’ actions were both unjustified and dangerous.

Good intentions may sometimes yield bad results. That’s true of well-intentioned administration actions, which the party out of power often warns about. It’s also true of well-intentioned criticisms of such actions. If such bad results seem likely, then the public ought to be warned of this danger, though of course those who disagree should likewise argue that the danger is itself a “phantom.”

And government officials are as entitled as anyone else to note such dangers. The administration, which is responsible for keeping the country safe, has a responsibility to warn of a wide range of dangers. People who ignore the danger, if the danger is real, may well deserve to be criticized. And when political leaders debate questions of liberty and national security, plausible claims that one side’s actions may jeopardize liberty may reasonably be met by plausible claims that the other side’s actions may jeopardize security.²⁷

Now it’s true, as many critics argue, that such accusations try to move people through fear.²⁸ But terrorists ought to be feared. Many groups rightly try to influence voters by making them afraid of environmental catastrophe, crime, gun violence, terrorism, war, special interests, or suppression of civil rights. Well-founded fear is better than foolish fearlessness. Some fear is excessive or even irrational, but some is eminently justified, or is at least a reasonable response to uncertainty.²⁹

It’s also true that politicians sometimes harness fear for political advantage. That’s what they’re supposed to do in a democracy. When national security is a big part of an election campaign, each side likely believes that its program will protect the nation, and the other side’s will (at least comparatively) endanger the nation — and each side then has the right and even the duty to make these arguments to the voters.³⁰

In 2004 Democrats sincerely believed that re-electing George W. Bush would endanger America, because they thought that Bush’s national security policy was dangerous. House Minority Leader Nancy Pelosi, for instance, argued that “the president has failed in how he has tried to protect America.... We are less safe — we are less safe because he is president....”³¹ Republicans sincerely believed the same of Kerry, and argued accordingly.³² One might find one side’s case to be erroneous or even dishonest, but making fear of terrorism an “underlying theme of domestic and foreign policy”³³ is quite proper when terrorists are doing frightening things.

Yet at the same time, pointing out (even if accurately) that criticism of the administration is helping America’s foreign or domestic enemies has costs. To begin with, it can distract from the legitimate arguments that the critic is making. Perhaps

paying more attention to civil liberties will actually help the war effort by showing us to be a humane and tolerant nation and thus making us more popular throughout the world. Or maybe broadly protecting civil liberties will hurt the war effort, but some cost to the war effort is a tolerable price to pay for preserving our traditional rights.

Moreover, arguing that critics of the government are helping our enemies can wrongly tar people with the implication of bad purpose, even if no such charge is explicitly made. This may be unfair. It may breed unnecessary political hostility — not just disagreement but contempt or hatred — that is itself harmful to the nation. It can over-deter speech by making speakers afraid to level even those criticisms that, on balance, help the country more than hurt it. As Orwell himself wrote, just two years after the lines I quote above;

We are told that it is only people's objective actions that matter, and their subjective feelings are of no importance. Thus pacifists, by obstructing the war effort, are "objectively" aiding the Nazis; and therefore the fact that they may be personally hostile to Fascism is irrelevant. I have been guilty of saying this myself more than once....

...In my opinion a few pacifists are inwardly pro-Nazi....The important thing is to discover *which* individuals are honest and which are not, and the usual blanket accusation merely makes this more difficult. The atmosphere of hatred in which controversy is conducted blinds people to considerations of this kind. To admit that an opponent might be both honest and intelligent is felt to be intolerable. It is more immediately satisfying to shout that he is a fool or a scoundrel, or both, than to find out what he is really like.³⁴

Now perhaps Orwell's change of mind was occasioned by the change from the dark days of 1942 to post-D-day, post-Stalingrad 1944. It is easier to be generous to those who, in your view, helped Hitler (even unintentionally) when Hitler is nearly defeated. Yet I think that Orwell's second thoughts, whatever their reason, were objectively the right ones. Explaining why your adversaries' arguments unintentionally help the enemy is legitimate. But expressly acknowledging that this effect is likely unintentional — even when you're tussling with a senator who you think has unfairly attacked you — is fairer, less politically divisive, and often more rhetorically effective. I suspect John Ashcroft's quote alienated more Americans than it persuaded. Likewise, the vitriolic Bush-the-Nazi attacks from some parts of the Left probably, on balance, helped Bush in the 2004 election.

So it seems to me that, first, the quotes with which I began this Part could have been put better. Second, because people tend to overestimate the bad effects of their adversaries' speech, we should often be skeptical about allegations of such bad effects. And third, such allegations provide a convenient way to evade (deliberately or subconsciously) the substantive criticisms leveled by the adversaries' speech.

Nonetheless, responding to such allegations with charges of McCarthyism is likewise a convenient way to evade the merits of those allegations. If Ashcroft, Clinton, Orwell, and Churchill were wrong in their estimates of the harm that their adversaries' arguments were causing, one should certainly call them on that. One should do likewise if the harms are exceeded by the benefit of the remedies that the adversaries propose. But these arguments need to be made on the merits. Labeling allegations as "McCarthyism" is likely to distract listeners more than it helps them assess which allegations are sound and which aren't....

“ [Rabbi Max] Wall is distressed at the echoes of McCarthyism he hears today. The USA Patriot Act, [among other things]...allows investigators to inspect library records. 'It bothers me very much,' Wall said. Just as he was bothered 50 years ago by [McCarthyism].”¹⁰⁰ Under this “New McCarthyism,” another commentator writes, “[y]ou are no longer free to patronize a bookstore without fear of government scrutiny.”¹⁰¹

As it happens, the Patriot Act has no special provisions regarding library subpoenas, and its general subpoena provision — section 215 of the Act — isn't particularly novel: The government has long had the power to subpoena lots of records, including library records, simply by using the normal grand jury subpoena.¹⁰² Still, while the Patriot Act isn't at fault here, there surely is a plausible argument against library and bookstore subpoenas:

- (1) Reading books is constitutionally protected activity.
- (2) Reading certain books can make the police suspect that you're prone to do illegal things and can make juries think you're the one who did some act suggested by those books. This may be true of bombmaking manuals, pro-Communist propaganda, or racist tracts. It may also be true of chemistry textbooks that discuss explosives, books that harshly condemn government policies, or scholarly volumes on supposed genetic differences among the races. Naturally, not everyone who reads such books will attract police attention. But if the police are trying to find out who's involved in some bomb plot, subversive conspiracy, or hate crime, they might try to use reading records to identify potential suspects.
- (3) If the police can easily learn who bought or borrowed certain books, then some people may be deterred from reading suspicious books.
- (4) Therefore, we should interpret the First Amendment as prohibiting, or at least sharply limiting, subpoenas for bookstore or library records.

In 2002, the Colorado Supreme Court accepted this very argument in holding that the

Colorado Constitution barred subpoenas or searches of bookstore records unless prosecutors could “demonstrate a sufficiently compelling need for the specific customer purchase record” and in particular that there are no “reasonable alternate ways of conducting an investigation other than by seizing a customer’s book purchase record.”¹⁰³ This is a deliberately demanding standard, much higher than the usual standard for subpoenas (that there’s a “reasonable possibility [that the subpoena]... will produce information relevant to the [investigation]”¹⁰⁴) or even the probable cause standard for searches. This logic should also apply to library records.

And there is precedent for this sort of restriction on the government’s investigative powers: The Court has long restricted the government’s ability to forcibly discover who belongs to or contributes to expressive associations, precisely because government scrutiny may deter people from participating in such groups.¹⁰⁵ Likewise, many circuit courts have relied on this argument in granting journalists a qualified privilege not to reveal the identities of confidential sources.¹⁰⁶

Yet appealing as this argument might seem, consider its close analog:

- (1) Speaking or sending email is constitutionally protected activity.
- (2) Saying or writing certain things can make the police suspect you of various illegal conduct and can make juries think you’re guilty of such conduct. This may be true of pro-terrorist, pro-Communist, or racist statements, as well as statements that are well-intentioned but might be interpreted as pro-terrorist, pro-Communist, or racist.
- (3) If the police (or civil litigants) can easily learn who said what, then some people may be deterred from saying or writing suspicious things.
- (4) Therefore, we should interpret the First Amendment as prohibiting, or at least sharply limiting, subpoenas demanding that people testify about what someone said or wrote.

The two arguments are similar — yet the latter argument is quite unlikely to prevail. First Amendment law doesn’t bar the police from investigating what suspects have said or written to acquaintances, or who has said or written something that might make him a suspect.¹⁰⁷ Nor does it bar prosecutors from using subpoenas or other techniques to coerce the suspect’s acquaintances into testifying about such things.¹⁰⁸ Say the police are investigating the killing of an abortion provider, the bombing of a federal building, or the burning of a black church. Surely they would ask around: Who has been saying things that reveal an ideological motive to commit the crime? Has this particular person sent you any email that revealed such a motive?¹⁰⁹ These are legitimate and valuable questions.¹¹⁰ If need be, the police might try to pressure people to talk, or subpoena them to testify before a grand jury or at trial. When they find a suspect, and have

probable cause to believe that his computer contains information that might reveal (among other things) a motive, they can search the suspect's files. They may subpoena the suspect's Internet service provider for records of messages that he had sent or received, looking both for evidence against him and for evidence that others shared his motive and may thus have acted together with him. And, of course, in civil cases it's routine for litigants to demand a wide range of email and other records from the other side, hoping that these records may contain helpful evidence.¹¹¹

This necessarily has a deterrent effect on speakers. Even nonviolent people who hold pro-life, anti-government, or racist views might become reluctant to express these views to acquaintances, especially in writing (such as email). It's true that because bookstore records can be subpoenaed, you aren't "free to patronize a bookstore without fear of government scrutiny" of what you read. But you have never been free to speak or email without fear of similar government scrutiny of what you say or write — yet this deterrent effect has not prevented government investigations of who said what. Courts don't even require police to show a "compelling need" for each piece of speech-related evidence for which they subpoena or search.¹¹²

We see, then, a tension in the First Amendment law related to potentially speech-detering government inquiries. On the one hand, the law restricts coercive discovery of who belongs to a group, or, in some jurisdictions, who said something to a journalist. On the other hand, it does not restrict the discovery of what a suspect said, discovery of what university professors said in tenure reviews,¹¹³ or what reporters said in editorial discussions about an allegedly libelous story,¹¹⁴ though such discovery can deter people from speaking candidly.¹¹⁵ And notwithstanding what some lower courts have done, the Court's *Branzburg v. Hayes* opinion held — and the Court later reaffirmed — that prosecutors can indeed discover the names of a journalist's confidential sources.¹¹⁶

The search for truth in the courtroom, like the search for truth in public debate, usually benefits from more information.¹¹⁷ The First Amendment bars the government from outlawing certain speech, or making it subject to civil liability. But the legal system's investigative power may often properly be used to uncover relevant evidence even when that discovery may deter valuable speech.

What, if anything, can be done about these deterrent effects? First, courts or legislatures could indeed impose demanding standards for subpoenaing or searching library or bookstore records, though not for discovery of what people have said or written. The theory would be that people's reading habits (as opposed to people's statements) are important evidence in only a few cases, so the legal system can operate well enough without such evidence.¹¹⁸

Yet reading habits are potentially relevant. In the Unabomber case, the FBI combed

library records for people who might have borrowed two obscure (and by themselves innocent) books that the bomber quoted in his manifesto; unfortunately, the FBI could look only in the few geographic areas to which they had linked the bomber, so the searches didn't help.¹¹⁹

Police tracking the Zodiac serial killer noticed that the killer's modus operandi seemed to be inspired by a Scottish mystic's books (which were again by themselves innocent), and the police thus subpoenaed the records of people who had borrowed the books from local libraries.¹²⁰ A disclosure rule that's demanding enough to diminish readers' fears that the police can learn what they're reading will also substantially interfere with these investigations.¹²¹ And focusing on the rare subpoenas that deter reading without doing anything about the more common subpoenas that deter actual speech (or writing) may be a largely empty step.

Second, courts or legislatures could impose a higher threshold for bookstore and library subpoenas than on normal subpoenas, but not a much higher standard. This would interfere less with government investigations, but it will also do little to satisfy readers' concerns about a chilling effect.¹²² We'll still be unable to patronize a library or bookstore without fear of government scrutiny, even though the scrutiny might require a bit more justification on the government's part.

Third, courts or legislatures could constrain discovery of any information related to any First Amendment-protected activities. For example, we could require the police to pass a high threshold before they could investigate what people said or wrote, at least when the speech has some ideological component. Or perhaps we could demand this threshold requirement only for coercive investigations (using subpoenas or search warrants), and not simple questioning.¹²³ The same rule may also be applied to subpoenas in civil cases, thus reversing *Herbert v. Lando* and *University of Pennsylvania v. EEOC*. Yet this would dramatically interfere with the investigation of many crimes and torts, especially those that have an ideological motive.

Or, fourth, courts and legislatures could conclude that the deterrent effects of subpoenas for library or bookstore records are acceptable, just as the deterrent effects of subpoenas for testimony about a person's statements are acceptable. In this, they would simply be following the logic of *Branzburg*, *Herbert*, and *University of Pennsylvania*.

But in any event, it's a mistake to view subpoenas of library or bookstore records as a radical innovation. They are simply special cases of a more general and well-established phenomenon, subpoenas of information related to First Amendment activities. Some such subpoenas, for instance subpoenas of membership records, are presumptively forbidden. Yet others are generally allowed even when they may deter people from saying or writing suspicious-seeming things.

Perhaps the First Amendment test should be different for subpoenas about reading than for subpoenas about speaking or writing — but that conclusion is far from obvious. And it hardly seems McCarthyite to treat subpoenas of bookstore and library records like the subpoenas for speech-related information that the courts have routinely upheld.

First Amendment law rightly recognizes that laws can have a “chilling effect.” Libel laws may, on their face, prohibit only false speech, but they may also deter true speech.¹²⁴ Vague laws may cause people to “steer far wider of the unlawful zone” than clear laws, and may thus deter more speech than they ultimately punish.¹²⁵

But not all actions that deter speech are unconstitutional or even improper. Some speech should be deterred. One reason that evil and offensive speech can remain constitutionally unpunished is that it is kept in check through social norms and economic retaliation.¹²⁶

Racist speech is a classic example: Many people, including those who have some racist views, are likely reluctant to say racist things for fear of social opprobrium. Media outlets generally refuse to carry racist propaganda.

Outlets that do carry racist material may face economic retaliation. At times, this has led to too much speech being deterred. But, on balance, checking racist speech through social and market pressures — as well as through persuasion — is a good solution. It’s better than suppressing racist speech through legal sanctions. And it’s better than not trying to deter it at all, or confining ourselves to polite persuasion, much as we do for erroneous views about tax policy or highway-construction funds.

Naturally, which deterrents are proper and which aren’t is a difficult question. As a general matter, deterrence through factually accurate denunciation and social opprobrium (Part I) is likely the least troublesome.

Deterrence through private economic pressure (Part II) is potentially troublesome, but still often acceptable. Deterrence as an effect of the government’s coercive investigative tools, such as subpoenas (Part III), is potentially more troublesome, but probably inevitable and proper in at least some situations. But I’m sure that there are exceptions to many of these generalities.

This discussion also hasn’t dealt with many other deterrents that are sometimes labeled “McCarthyism” but that can’t always be dismissed so easily: infiltration of allegedly dangerous political or religious groups; infiltration of groups that are not themselves dangerous, but that may be meeting places for potential terrorists or saboteurs; firing of government employees who express certain views or belong to certain groups;

legislative investigation of alleged attempts to subvert various organizations to evil ends; and more. I have no good solutions to those problems, but I thought I would close this Essay with a hypothetical scenario that we might use to think through them. I hope this scenario won't come to pass, but I am afraid it's not implausible.

The year 2022 is a dangerous one for America. The White Rights Movement (slogan: "for the race, everything; for those outside the race, nothing"), has been on the rise. While the White Rights Party itself has only a couple of hundred thousand members, civil rights activists suspect that it has millions of sympathizers.

The Party has urged its members to join other groups and covertly take them over, so that they seem to be independent voices but are actually aligned with the Party's political plans. Many civil rights leaders claim that many groups — including important political and social organizations from the National Rifle Association to many chapters of the Jaycees — have been taken over by Party faithful. The leaders of the groups, and the Party itself, deny this.

What exactly is the Party's agenda? That too is hotly disputed. Some of the Party's ideological documents suggest a desire to take over the government, by violent means if necessary, and then institute a massive campaign of governmental discrimination against non-whites: limits on non-white immigration, exclusion of non-whites from key government jobs, denial of the franchise, and eventually forcible expulsion. Similar movements in a few European countries, which had long been racked by racial hostility against Middle Easterners, have implemented such a program.

But the Party leadership dismisses these documents as mere theoretical speculation. When asked, party leaders say that the Party's goals of "protecting the race" can be accomplished through peaceful change in social attitudes, such as voluntary self-segregation by all racial groups. If that is done, Party leaders point out, there'll be no need for any harsher action.

In any event, when they have the choice, Party members don't talk theory much, at least to the public. Rather, they stress a wide range of specific policy proposals, many quite mainstream: harsher prison sentences and broader death penalty provisions for violent criminals (who still happen to be disproportionately black and Hispanic, even in 2022); restrictions on immigration; repeal of affirmative action programs, many of which are still in effect; an end to welfare; and so on.

Because these proposals have broad public support, and because many people think that major party politicians have soft-pedaled these issues in the 2010s and early 2020s, the Party has attracted substantial support from some nonmembers, despite its racist theories. "We don't buy any of the Party's racist nonsense," people have been heard to say, "but they're the only ones who are taking seriously the country's real problems."

Civil rights activists, and decent Americans more generally, are naturally appalled. Finally, more than fifty years after the Civil Rights Act of 1964, it looked like the battle for racial tolerance was nearly won — and now it looks like those gains might be reversed.

Serious observers don't, of course, worry that the Party will take over the government anytime soon. About 40% of the population is now non-white, and, even among whites, only 10% tell pollsters that they have a favorable view of the Party (though some respondents might be concealing their true feelings). The Party has never gotten more than a few percent of the vote in any election. Most Americans think racism is downright un-American.

But the Party and its message are dangerous even if the Party never wins an election. First, many people suspect that Party members and sympathizers will discriminate against non-whites every chance they get: in employment, in grading in schools and universities, in awarding contracts, in law enforcement, in political decisionmaking, in judicial decisions, in jury verdicts, and so on. There have been plenty of discrimination lawsuits in which the plaintiffs have somehow discovered that the person who fired them or arrested them was a Party member; and while the members have always claimed that their real reasons for the decisions were nonracial, naturally few people have believed them.

What's more, many people suspect that there's a lot more racism than is visible. Discrimination is hard to detect. When a non-white American is arrested or fired by a white, the thought often crosses his mind: Was this a White Rights thing? This fear is nothing new, and by all accounts there's less discrimination in 2022 than there was in 1982 or even 2002. But the White Rights movement has heightened people's awareness of the persistence of racism. And some controversial data suggest the movement has indeed led to an increase in discrimination from the lows seen in the mid-2010s.

So non-whites are suffering. Institutions, private and public, are suffering, too, because non-whites' reasonable fear of discrimination decreases the institutions' credibility. Police departments have worked hard to build trust among minority communities, but that trust is now disappearing.

Likewise for universities, banks, and big corporations. And many whites are suffering, too: They also hate racism, and they're troubled by the social harm caused by this increased discrimination and reasonable fear of discrimination.

Second, people are worried about what will happen ten or twenty years from now. For the first time in many decades, university professors are openly teaching classes on supposed racial differences in intelligence or on the moral value of racial purity and racial segregation.

The professors argue that they're just trying to present a balanced perspective on important issues, but in many instances, the professors seem to be sympathizing with the White Rights line. And the mood among students has shifted, too: While the majority strongly disagrees with the pro-White-Rights professors, a vocal minority stridently (and sometimes violently) resists any attempts to criticize the White Rights view. Civil rights activists fear that the students on their side have become complacent after many decades during which racial equality has been the official orthodoxy, and that the students on the other side have energy and organization that makes them powerful far beyond their numbers.

Likewise, some private racist schools have sprung up, and the Party has seemingly made inroads among teachers even in public schools and nonracist private schools. Some former Party members also say that the Party has made it a priority to infiltrate newspapers, broadcasters, and movie studios. The Party's method seems not to be the inclusion of overt propaganda, but subtle shadings: A few more black villains here, a story twisted to make a racist character seem more sympathetic, and so on.

People worry: What will happen when these seeds grow? In Europe, the racists have made their main inroads in times of economic trouble. The American economy is slowing too, and some people are predicting a serious recession.

What will happen then, or perhaps the next time, especially if the recession is blamed on competition from Third World nations? An outright racist revolution, even an unsuccessful one, is unlikely, but will there be racist riots? Will covert Party members in the police and the National Guard help the rioters, or at least be deliberately slow in stopping them?

Will we discover that the Party's proselytizing has created millions of racist white teenagers and twenty-somethings, some of whom will be angry enough and misguided enough to get violent? Will black Americans again be afraid to walk in white parts of town or be seen with white women?

Many leaders, including respected, thoughtful, and well-intentioned politicians, civic leaders, and intellectuals, demand action. When faulted for seeking "witch hunts," they respond, "Witch hunts are bad because we know there are no witches. There are racists, and they can cause real harm. Nothing needs to be done about witches. Something needs to be done about large nationwide racist conspiracies."

This scenario is, of course, not identical to Communist conspiracies of the 1950s. Racists jeopardize equality; Communists jeopardized democracy and freedom. People were worried about Communists partly because our enemies abroad were Communist; that doesn't appear in my hypothetical.

Sabotage and espionage are rarer than discrimination, though each single instance of sabotage and espionage might be more harmful than each single instance of discrimination.

But I don't think these differences matter that much. Tomorrow's problems won't be identical to yesterday's, but they may be similar enough. "History doesn't repeat itself, but it rhymes."¹²⁷

Someday we will again face an ideological movement that seeks to undermine fundamental American values and uses speech not just to advocate for lawful (but evil) political change, but also to promote illegal, or even violent, behavior. I give one possible example, but there are others.

How should our government and our society fight back? When speech can genuinely cause harm — and when we have rightly forsworn the ability to simply lock up the speakers or bankrupt them with damages awards — what tools do we have left to fight the harm? What can we do to protect liberty, while also effectively fighting a movement that itself threatens liberty?

¹ See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring in the judgment) (“[T]he fitting remedy for evil counsels is good ones.”).

² See ACLU, *America’s Need: A New Birth of Freedom*: 34th Annual Report 128 (1954) (“The ACLU needs and welcomes the support of all those-and only those-whose devotion to civil liberties is not qualified by adherence to Communist, Fascist, KKK, or other totalitarian doctrine.”); see also Mary McAuliffe, *The Politics of Civil Liberties: The American Civil Liberties Union During the McCarthy Years*, in *The Specter: Original Essays on the Cold War and the Origins of McCarthyism* 154, 154-58 (Robert Griffin & Nathan Theoharis eds., 1974) (discussing the ACLU’s policy in more detail). The ACLU may have been partly concerned about deflecting public criticism, but that’s perfectly sensible: If it was proper, as I argue, for civil liberties advocates to want nothing to do with those who would extinguish civil liberties, it was also proper for civil liberties advocates to make this desire clear to the public.

³ I thus disagree with Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from The Sedition Act of 1798 to The War on Terrorism* 420-21 (2004), which says this was a sign of “falter[ing]” by an “organization[] expressly dedicated to the protection of civil liberties,” and with McAuliffe, *supra* note 2, which takes a similar view.

⁴ I take it, for instance, that critics of the statements discussed in Part I — statements that assert that “our adversaries’ speech is helping the enemy” — would urge a social norm that such statements be condemned, rather than a legal rule prohibiting the statements.

⁵ See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁶ See *Communist Party of Ind. v. Whitcomb*, 414 U.S. 441 (1974).

⁷ But see *In re Hale*, 723 N.E.2d 206, 206 (Ill. 1999) (Heiple, J., dissenting) (“The crux of the [Illinois Bar Committee on Character Fitness] decision to deny petitioner’s application to practice law is petitioner’s open advocacy of racially obnoxious beliefs. The Inquiry Panel found that, in regulating the conduct of attorneys, certain ‘fundamental truths’ of equality and nondiscrimination ‘must be preferred over the values found in the First Amendment.’”).

⁸ Cf. Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 L. & CONTEMP. PROBS. 299 (2000) (describing how hostile environment harassment law suppresses speech that expresses sexist, racist, and religiously offensive viewpoints in workplaces, educational institutions, and places of public accommodation); Eugene Volokh, *What Speech Does “Hostile Work Environment” Harassment Law Restrict?*, 85 GEO. L.J. 627 (1997) (same, in more detail and only as to workplaces); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992) (criticizing many aspects of hostile work environment law on First Amendment grounds), available at <http://www1.law.ucla.edu/~volokh/harass/substanc.htm> in updated form.

⁹ See Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 80 N.Y.U. L. REV. (forthcoming 2006), at <http://www1.law.ucla.edu/~volokh/custody.pdf> (noting cases from the 1930s and 1950s in which parents’ Communist affiliations were counted against them in child custody decisions, and cases from the 1970s to the present in which parents’ racist advocacy was counted against them in child custody decisions).

¹⁰ See, e.g., Helen Dewar, *A GOP Campaign Document on Metzenbaum Stirs Furor; ‘Communist Sympathizer’ Label Was Proposed*, Wash. Post, July 30, 1987, at A1 (discussing “a secret Senate Republican campaign document urging that Sen. Howard M. Metzenbaum (D-Ohio) be characterized as a [C]ommunist sympathizer” on the grounds that Metzenbaum had “sa[id] that

'the long-range solution for unemployment lies in creating a healthy atmosphere for industrial expansion' and... declin[ed] to rule out 'use of WPA and Jobs Corps techniques as a pump primer').

¹¹ See, e.g., Sharon Bernstein, *Storm Rises over Ex-Klansman at Debate*, L.A. Times, Sept. 11, 1996, at A3 ("Proposition 209 is racist, [Patricia Ewing, who heads the campaign to defeat Proposition 209,] said...."). Prop. 209 is the California measure that barred government officials from using race and sex preferences in employment, education, and contracting. *Id.*; see also George Cothran & John Mecklin, *The Grid*, S.F. Weekly (May 27, 1998), available at http://www.sfweekly.com/issues/1998-05-27/news/columns_print.html ("Ron Unz, the hateful creep who supports the elimination of all bilingual education in the state, knows nothing about education policy.... Proposing to harm children for political reasons is a special type of sin that should earn Mr. Unz a special place in hell. Before he gets there, give him his earthly reward. Vote to defeat ugly, racist Proposition 227."); Greg Lucas, *Brown Decries Plans to End Affirmative Action*, S.F. Chron., Feb. 15, 1995, at A10 ("An impassioned Assembly Speaker Willie Brown lashed out yesterday at proposals to end affirmative action in California, branding them 'pure, unadulterated exploitation of racism.'"); Kara Platoni, *Money, Sex, and Politics*, Sacramento News & Rev., Mar. 26, 1998 ("Proposition 227, which would do away with bilingual education, also came under heavy fire [at the California Democratic Party Convention] and was roundly denounced by Steve Ybarra, Chairman of the Chicano/Latino Caucus, as 'racist thuggery.'"). Cf. Jacques Steinberg, *Increase in Test Scores Counters Dire Forecasts for Bilingual Ban*, N.Y. Times, Aug. 20, 2000, § 1, at 1 ("Two years after Californians voted to end bilingual education and force a million Spanish-speaking students to immerse themselves in English as if it were a cold bath, those students are improving in reading and other subjects at often striking rates, according to standardized test scores released this week."). This is precisely the effect that Ron Unz had predicted and worked for.

¹² "McCarthyism," according to the American Heritage Dictionary of the English Language 1084 (4th ed. 2000), is "[t]he practice of publicizing accusations of political disloyalty or subversion with insufficient regard to evidence" or "[t]he use of unfair investigatory or accusatory methods in order to suppress opposition"; the definition I've heard used most often is the latter one, which I'm using here. Hence, to decide whether some behavior is properly called by the pejorative label "McCarthyism," we need to ask whether the behavior is indeed improper.

¹³ *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the Senate Comm. on the Judiciary*, 107th Cong. 313 (Dec. 6, 2001).

¹⁴ See, e.g., John W. Dean, *Liberties Disappearing Before Our Eyes*, L.A. Times, Sept. 21, 2003, at R3; Geoffrey R. Stone, *America's New McCarthyism*, Chi. Trib., Oct. 17, 2004, at C11.

¹⁵ William J. Clinton, President Clinton's Weekly Radio Address, 1996 PUB. PAPERS 463, 464 (Mar. 16, 1996).

¹⁶ William J. Clinton, Interview on CBS' "60 Minutes", 1995 PUB. PAPERS 574, 578 (Apr. 23, 1995).

¹⁷ E.J. Dionne Jr., *A Time for Politicians to Look Within*, Wash. Post, Apr. 25, 1995, at A17 ("It's wrong to suggest that honest advocates of smaller government have anything in common with killers and fanatics.... [But m]ainstream politicians... have to assess whether they have stood silently as [violent] attitudes took hold [among far-right militias], whether they exploited them and whether, at times, they may even have encouraged them.... After the suffering in Oklahoma City, the country needs an extended period in which political rhetoric is toned down, words are more carefully weighed and, as the president said yesterday, 'the purveyors of hatred and division' and 'the promoters of paranoia' are resisted and condemned."). But cf. Virginia I. Postrel, *Does Reading This Make You a Terrorist?*, ReasonOnline, July 1995, at <http://reason.com/9507/VIPedit.jul.shtml> (criticizing Dionne's article).

¹⁸ What a remarkable example [the debate] has been of the unbridled freedom of our Parliamentary institutions in time of war! Everything that could be thought of or raked up has been used to weaken confidence in the Government, has been used to prove that Ministers are incompetent and to weaken their confidence in themselves, to make the Army distrust the backing it is getting from the civil power, to make the workmen lose confidence in the weapons they are striving so hard to make, to represent the Government as a set of nonentities over whom the Prime Minister towers, and then to undermine him in his own heart and, if possible, before the eyes of the nation. All this poured out by cable and radio to all parts of the world, to the distress of all our friends and to the delight of all our foes. Winston Churchill, Speech in the House of Commons (July 2, 1942), in *Never Give In!: The Best of Winston Churchill's Speeches* 339 (Winston S. Churchill ed., 2003). Churchill stressed that he was "in favour of this freedom, which no other country would use, or dare to use, in times of mortal peril such as those through which we are passing." *Id.* But it was clear that he saw certain uses of the freedom as being helpful to the nation's enemies. See also Letter from Thomas Jefferson to the Republican Young Men of New London, (Feb. 24, 1809) in 16 *The Writings of Thomas Jefferson* 339 (Andrew A. Lipscomb ed., 1903) ("That in a free government there should be differences of opinion as to public measures and the conduct of those who direct them, is to be expected. It is much, however, to be lamented, that these differences should be indulged at a crisis which calls for the undivided counsels and energies of our country...."); Letter from Thomas Jefferson To His Excellency Governor Daniel D. Tompkins, (Feb. 24, 1809), *Id.* at 341 ("The times do certainly render it incumbent on all good citizens attached to the rights and honor of their country, to bury in oblivion all internal differences All attempts to enfeeble and destroy the exertions of the General Government in vindication of our national rights... merit the discountenance of all."). Thanks to Bob Turner and to <http://etext.lib.virginia.edu/jefferson/quotations/> for pointers to these Jefferson quotes.

¹⁹ George Orwell, *Pacifism and the War*, *PARTISAN REV.*, Sept.-Oct. 1942, reprinted in 2 *THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL* 226 (Sonia Orwell & Ian Angus eds., 1968).

²⁰ If the statements condemned people who did support terrorists or Nazis, I take it they would be clearly proper.

²¹ Some have argued that Ashcroft's quote was particularly threatening because he made the statement as the nation's chief federal law enforcement official. The same could be said about President Clinton's statement, since presidents give orders to federal law enforcement. But I think neither quote can reasonably be interpreted as an actual threat to prosecute those who criticize the administration's policies on some aiding-the-terrorists theory. If it were a threat, it would have been an uncommonly empty one — neither the Clinton nor the Bush Justice Departments ever engaged in any such prosecutions, either before the statements or after. Nor did such prosecutions seem likely at the time. Only unusually fearful defenders of gun rights or of other civil liberties would have been silenced because they interpreted either statement as threatening prosecution. (Noncitizens did indeed have more to fear from the Justice Department; if they drew the government's attention, and the government then found that the noncitizens had committed technical immigration violations, they could be deported. See *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 488-91 (1999). But Ashcroft's domestic civil-libertarian critics at the time, to whom he was responding, were overwhelmingly citizens.) Both Ashcroft and Clinton likely did want to deter people from expressing certain views — but with the threat of social opprobrium, not of criminal prosecution.

²² Of course Ashcroft and Clinton also likely hoped that some critics would be persuaded that their criticisms were simply mistaken; there can be little objection to such an outcome. But I suspect they realized that many people wouldn't be persuaded on the merits but might, nonetheless be deterred from speaking by the risk of public opprobrium.

²³ I think gun controls probably won't materially interfere with terrorists' plans, but reasonable minds may differ.

²⁴ See *supra* note 13.

²⁵ See Abraham McLaughlin & Dante Chinni, *Ashcroft Finally Faces Hill Critics*, Christian Sci. Monitor, Dec. 5, 2001, at 1 (“As he sits down before the Senate Judiciary Committee tomorrow, Attorney General John Ashcroft can expect a grilling not seen since his Senate confirmation hearing. The line of questioning will likely boil down to one issue: whether he and the Bush administration have been overly authoritarian in prosecuting the war on terrorism and protecting the public.”).

²⁶ Churchill, *supra* note 18.

²⁷ I've heard some ask why, if this point was to be made, Ashcroft was the one to make it. Why not leave it to some less controversial administration official, or even to private parties? To begin with, I think that controversial attorneys general have as much right to express their views as do less controversial figures in other jobs. It may sometimes be more politic for an administration to leave some statements to less controversial officials, but political effectiveness is a different matter from propriety. But more importantly, Ashcroft was responding to criticisms of proposals that came from his Justice Department, that were associated with him in the public mind, and that were often tied to him by name. See, e.g., Gail Gibson, *Ashcroft Faulted Over Civil Liberties*, Balt. Sun, Nov. 25, 2001, at 1A (noting that a “liberal activist” called Ashcroft “the most dangerous threat to civil liberties in the federal government”); David Jackson, *Bush Defends Call for Military Trials*, Dallas Morning News, Nov. 30, 2001, at 18A (“Next week, Mr. Leahy’s committee will hear from Attorney General John Ashcroft, who is bearing the brunt of criticism from civil libertarians.”); John Lancaster, *Hearings Reflect Some Unease With Ashcroft’s Legal Approach*, Wash. Post, Dec. 2, 2001, at A25 (“A few critics, led by Sen. Patrick J. Leahy (D-Vt.), have been vocal about what they regard as overreaching by the executive branch, Attorney General John D. Ashcroft in particular.”); McLaughlin & Chinni, *supra* note 25 (“[P]artisanship is resurrecting itself on Capitol Hill. Furthermore, Ashcroft himself, ‘has become the clear face of hard-core conservatism’ for some Democrats, ‘and that has fueled opposition to him on civil liberties and other issues,’ says [Hudson Institute congressional analyst Marshall] Wittmann.... [R]ecently on Capitol Hill lawmakers who have been only quietly criticizing the administration have grown bolder....”). Ashcroft’s political adversaries challenged him for allegedly threatening Americans’ liberty. Ashcroft responded by pointing out in some detail why he thought the charges were groundless, and in the process he also said that such charges were not only unfounded but harmful. It makes sense that a politician criticized by other politicians would defend himself, rather than expecting others to defend him.

²⁸ See, e.g., Stone, *supra* note 14 (condemning Dick Cheney’s “assertion that a vote for John Kerry would endanger the nation” as “part of a cynical campaign to frighten and confound the American people”). If one is watching for McCarthyism, one might note that Democratic vice presidential candidate John Edwards promptly denounced Cheney’s remarks as “un-American.” Judy Woodruff’s *Inside Politics* (CNN television broadcast, Sept. 8, 2004).

²⁹ Cf. Stone, *supra* note 14 (distinguishing “reasoned fear of Soviet espionage” from what the author sees as “an unreasoned fear of ‘un-Americanism’”).

³⁰ Cf. Editorial, *In Defense of Dick Cheney*, L.A. Times, Sept. 9, 2004, at B10: The war on terrorism is the central issue in the campaign, and both parties’ candidates have various points to make about it. But the issue boils down to one question: Which candidate would do the best job, as president, of making sure that we don’t “get hit again.” That is what people really care about. Sens. Kerry and John Edwards have been criticizing President Bush’s performance on terrorism since 9/11 and promising to do a better job at it if given the chance. In doing so, they surely mean to suggest that the risk of another terrorist attack will be greater if Bush and Cheney win the election. A vote for George W. Bush, in other words, is a vote for more terrorism. Or if Kerry and Edwards don’t mean that, it’s hard to know what they do mean. See also Mickey Kaus, Kausfiles, Slate (Sept. 9, 2004), at <http://www.slate.com/id/2106296>: Why can the [New York] Times say the administration has increased the danger but Cheney can’t make his arguments that the administration has reduced the danger? Isn’t that what a discussion of the actual major issue of the campaign looks like?... In this increased/decreased argument, I tend to side with Kerry and

Edwards — we've now angered enough people around the world that our chances of getting hit will probably be higher if Bush is reelected than if Kerry wins. But it's not an argument in which only Kerry's side is allowed to participate.

³¹ *This Week With George Stephanopoulos* (ABC television broadcast, Oct. 31, 2004).

³² See Transcript, White House, Vice President and Mrs. Cheney's Remarks and Q&A at a Town Hall Meeting (Sept. 7, 2004) (making the allegation that Professor Stone apparently refers to, in the course of a fairly detailed criticism of Kerry's proposed policies), *available* at <http://www.whitehouse.gov/news/releases/2004/09/20040907-8.html> (last visited Apr. 7, 2005).

³³ See Stone, *supra* note 14 (quoting James Goodby).

³⁴ George Orwell, *As I Please*, Tribune, Dec. 8, 1944, *reprinted in* 3 THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL 288-89 (Sonia Orwell & Ian Angus eds., 1968).

⁹⁹ See *supra* Part II.B. Both cases involved on-the-job speech; firings based on similar off-the-job speech would even more clearly be overreaction.

¹⁰⁰ Brent Hallenbeck, *When McCarthyism Hit Vermont*, Burlington Free Press, Sept. 7, 2003, at 1A. See also, e.g., Bessy Reyna, *Poet Uses Her Art to Fight Social Injustice*, Hartford Courant, Apr. 20, 2003, at G1.

¹⁰¹ Matthew Rothschild, *The New McCarthyism*, Progressive, Jan. 1, 2002, at 20.

¹⁰² For a state case involving a normal subpoena served against a library, see *Brown v. Johnston*, 328 N.W.2d 510, 512 (Iowa 1983). I have faulted section 215 for allowing the government to subpoena records and at the same time order the subpoena recipients not to disclose the subpoena's existence. This provision and similar provisions that have long existed in other subpoena, search, or wiretap statutes are speech restrictions — they bar people from revealing certain information that may be relevant to public debate about the government's investigative practices-and I think they are unconstitutional, though understandable. See Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, especially 1100 n.29 (2005). But whether people may be ordered to remain quiet about the subpoenas is a separate issue from whether the subpoenas should be permissible in the first place.

¹⁰³ *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1059 (Colo. 2002); see also *In re Grand Jury Subpoena to Kramerbooks & Afterwords, Inc.*, 26 MED. L. RPTR. 1599 (D.D.C. 1998) (reaching a similar result).

¹⁰⁴ *United States v. R. Enters.*, 498 U.S. 292, 301 (1991).

¹⁰⁵ See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958). *Buckley v. Valeo*, 424 U.S. 1 (1976), upheld a requirement that people's political contributions and expenditures be disclosed, despite the potential deterrent effect on such behavior. But *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982), held that even this requirement must be waived when a minor party to which the contribution is made is unpopular enough that the deterrent effect is likely to be especially severe. The Court has also generally struck down requirements that people identify themselves in their publications. See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). Such requirements, though, not only deter certain kinds of speech, but also forcibly change the content of speech: They bar speech of a certain content (unsigned material) and mandate the inclusion of content (the author's name) that the author might want to avoid. The Court thus held the identification requirements to be unconstitutional partly because they are "a direct regulation of the content of speech," *id.* at 345, a justification that doesn't apply equally to normal discovery requests, which don't directly regulate the content of a publication.

¹⁰⁶ See, e.g., *Titan Sports, Inc. v. Turner Broad. Sys.* (In re Madden), 151 F.3d 125, 128-29 (3d Cir. 1998); *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998); *Shoen v. Shoen*, 5 F.3d 1289, 1292-93 (9th Cir. 1993); *United States v. Long* (In re Shain), 978 F.2d 850, 852 (4th Cir. 1992); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1181-82 (1st Cir. 1988); *Von Bulow v. Von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977); *Cervantes v. Time, Inc.*, 464 F.2d 986, 992-93 & n.9 (8th Cir. 1972). But see *McKevitt v. Pallasch*, 339 F.3d 530, 532-33 (7th Cir. 2003) (reasoning, I believe correctly, that the Supreme Court's *Branzburg v. Hayes* decision should be read as foreclosing such a privilege, and disagreeing with the cases cited above); *In re Grand Jury Subpoena*, 397 F.3d 964 (D.C. Cir. 2005) (rejecting such a privilege); *Scarce v. United States* (In re Grand Jury Proceedings), 5 F.3d 397, 402-03 (9th Cir. 1993) (likewise); *Storer Communications, Inc. v. Giovan* (In re Grand Jury Proceedings), 810 F.2d 580, 584-86 (6th Cir. 1987) (likewise); *In re Letellier*, 578 A.2d 722 (Me. 1990) (likewise); *Capuano v. Outlet Co.*, 579 A.2d 469, 474 (R.I. 1990) (likewise).

¹⁰⁷ It doesn't even bar the admission of such evidence at trial, see cases cited *supra* note 74; a fortiori, it doesn't bar inquiries about such statements.

¹⁰⁸ See, e.g., *Univ. of Pa. v. EEOC*, 493 U.S. 182 (1990) (holding that there is no First Amendment bar to subpoenas for evidence of what people said in tenure reviews); *Herbert v. Lando*, 441 U.S. 153 (1979) (likewise as to what people said in editorial-room conferences).

¹⁰⁹ This speech is likely to be just among friends, and not intended for publication; but such speech is an important part of political debate: Many people are more persuaded by political discussions with friends they trust than by public speech that comes from strangers. See Frederick Schauer, "Private" Speech and the "Private" Forum: *Givhan v. Western Line School District*, 1979 Sup. Ct. Rev. 217 (1979).

¹¹⁰ One difference between investigating what someone said and what he read is that what people read is usually less telling than what they say. Imagine that the police or jurors are trying to find out whether a person committed some hate crime, or whether the crime he allegedly committed was indeed motivated by racial hostility. Evidence that the suspect read a supposedly racist book won't be as probative of his actions or intentions as evidence that he expressed supposedly racist views. Therefore, the argument might go, the police have less need to discover the person's reading habits than to discover his past statements. But for this very reason, the threat of discovery is less likely to deter a person from reading a book than from making a statement. If the person is contemplating reading a racist book, he knows that he can likely give a plausible innocent explanation: He was just curious about what this notorious book really said; he doesn't agree with the book's views but wanted to know what the other side was arguing; he saw something online praising the book and picked it up without really knowing what it contained. But if the person is contemplating writing a racist email, he knows that the email—were it to come to light—would likely be much more incriminating.

¹¹¹ See, e.g., George Brandon, *Workers' Web Use a Growing Concern for More Employers*, *Kiplinger Bus. Forecasts*, Feb. 21, 2005 ("Plaintiff attorneys routinely subpoena e-mail records in sexual harassment, racial discrimination and hostile work environment cases, says Jennifer Brown Shaw, a partner in the Sacramento office of employment law firm Jackson Lewis. And when e-mails with sexually explicit or other inappropriate content are introduced as evidence in workplace harassment lawsuits, 'the question that will inevitably come up is why the employer didn't know,' Shaw adds."); Bill Atkinson & Stacey Hirsh, 1 E-mail. *Many Lives*, *Balt. Sun*, Oct. 10, 2004, at 1C ("Chances are big brother is reading over your electronic shoulder. If you are involved in a workplace lawsuit, whether it is sexual harassment, racial discrimination, wrongful termination, hostile work environment, you can take it to the bank . . . that e-mail is going to be subpoenaed and used as evidence for or against your case.") (quoting Nancy Flynn, "author of several books on e-mail").

¹¹² See *United States v. R. Enters.*, 498 U.S. 292, 301 (1991).

¹¹³ *Univ. of Pa.*, 493 U.S. at 182. Of course, like all subpoenas, such subpoenas could seek only relevant evidence, but that's an easy standard to meet.

¹¹⁴ *Herbert v. Lando*, 441 U.S. 153 (1979).

¹¹⁵ As *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964), pointed out, the "fear of [civil] damage awards" can be at least as "inhibiting [as] fear of prosecution."

¹¹⁶ *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (stating that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news," and noting as an example that "the First Amendment [does not] relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source") (citation omitted); *Univ. of Pa.*, 493 U.S. at 201 (analogizing the case, in which the Court rejected a privilege, to *Branzburg*, and characterizing *Branzburg* as "reject[ing] the notion that under the First Amendment a reporter could not be required to appear or to testify as to information obtained in confidence without a special showing that the reporter's testimony was necessary"); (Powell, J., concurring) (joining the majority opinion and specifically rejecting the qualified privilege proposed by the dissent, though elaborating that "harassment" of journalists without "legitimate need" would not be allowed under the majority's opinion).

¹¹⁷ See, e.g., *United States v. Nixon*, 418 U.S. 683, 709-10 (1974). Naturally, the analogy can only go so far: Time constraints, for instance, necessarily require some truthful evidence to be excluded as duplicative or too tangential.

¹¹⁸ See also *supra* note 110 (responding to another version of this argument).

¹¹⁹ See Lance Gay, *Suspect Fit Profile but Went Unnoticed*, *Plain Dealer*, Apr. 6, 1996, at 7A (noting that the police searched records in the San Francisco area and the Chicago area); Gary Marx & Peter Kendall, *Unabomber Path Leads Back to Utah*, *Chi. Trib.*, Sept. 25, 1995, at N1 (noting that the police subpoenaed records from the Brigham Young University library, and were planning to do the same as to the University of Utah library); see also ABC World News Tonight, (ABC television broadcast, Apr. 8, 1996) ("FBI agents in Montana have also subpoenaed library records to see if they can tie Kaczynski to two books. One is a war novel entitled *Ice Brothers*, in which the Unabomber concealed a bomb. And the other is *Chinese Political Thought in the 20th Century*, which was mentioned in the Unabomber's manifesto."). Unfortunately, the library had apparently deleted these records. See Carol M. Ostrom, *Unabomber Case Gives Librarians Privacy Fits*, *Seattle Times*, May 1, 1996, at A1.

¹²⁰ *Library Files Checked In Zodiac Investigation*, *N.Y. Times*, July 18, 1990, at B4; see also Kathy M. Flanders, *Whitesboro Library Posts New Privacy Law*, *Post-Standard* (Syracuse, N.Y.), July 28, 1998, at B1 (noting a case in which a prosecutor subpoenaed a book's circulation records to find out who had written a death threat against the president on the book's flyleaf); *Kidnapping May Have Been Copied out of Book*, *UPI*, Sept. 18, 1987 ("[P]rosecutors subpoenaed library circulation records in three cities attempting to learn if two suspects in the kidnapping and slaying of a media heir borrowed the crime plot from a book about a similar 1968 case.").

¹²¹ See *Univ. of Pa.*, 493 U.S. at 194 (1990) ("Moreover, we agree with the EEOC that the adoption of a requirement that the Commission demonstrate a 'specific reason for disclosure'... beyond a showing of relevance, would place a substantial litigation-producing obstacle in the way of the Commission's efforts to investigate and remedy alleged discrimination.") (citation omitted).

¹²² See *id.* at 200 ("Moreover, some disclosure of peer evaluations would take place even if petitioner's 'special necessity' test were adopted. Thus, the 'chilling effect' petitioner fears is at most only incrementally worsened by the absence of a privilege.").

¹²³ Bulk seizures of many copies of books and films are subject to special First and Fourth Amendment restrictions, because there is a risk that such a seizure would physically prevent people from buying, reading, or watching constitutionally protected material. *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 62-64 (1989). But seizures of individual items to be used as evidence are generally permissible under the normal probable cause standard, subject only to slightly increased procedural requirements. *Heller v. New York*, 413 U.S. 483, 492-93 (1973).

¹²⁴ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹²⁵ *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

¹²⁶ Cf. *Dennis v. United States*, 341 U.S. 494, 589 (1951) (Douglas, J., dissenting) (reasoning that Communist advocacy ought not be criminalizable partly because the Communists had already been rendered harmless by other means, including surveillance by the FBI and "the activities in recent years of committees of Congress, of the Attorney General, of labor unions, of state legislatures, and of Loyalty Boards").

¹²⁷ Often attributed to Mark Twain.

