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CAN POSTMODERNIST ANALYSIS BETTER EXPLAIN THE FIRST AMENDMENT JURISPRUDENCE OF THE ROBERTS COURT?

ROBERT L. KERR*

Given evidence in the literature of thematic elusiveness in the First Amendment jurisprudence of the Roberts Court in the course of its first decade, this study proposes considering the quest alternatively by drawing upon primal elements of postmodernist thought as an approximate template for analysis. Although no formal method of such analysis can be legitimately derived from postmodernism, a school of thought that rejects any such systematic mode of interpretation, this study utilizes a framework for identifying evidence of postmodernist motifs articulated by Stephen Feldman as part of his effort to assess the Rehnquist Court in postmodernist terms that may offer a plausible basis for attempting to better understand the Roberts Court's First Amendment jurisprudence. Considered strictly within that context, this study finds it is possible to suggest support for the validity of postmodernism's objective to demonstrate contradictions that undermine the explanatory power of grand narratives such as those that propose doctrinal coherence that may not actually be justified. What a postmodernist approach to analysis of the Court's jurisprudence offers in practical terms seems more limited, however.

Keywords: First Amendment law, U.S. Supreme Court, Postmodernism, Roberts Court, Legal Interpretation

Since the death of Chief Justice William Rehnquist in 2005, the bench at the United States Supreme Court has undergone significant change beyond the appointment of a new chief justice in John Roberts.¹ Many scholars seeking to identify thematic consistency in the First

¹ Until 2005, the same chief justice had sat on the Court since 1986, and the makeup of the Court had not changed in a decade. Then Chief Justice Roberts took his seat at the Court in the latter part of 2005, replacing Chief Justice Rehnquist. Justice Samuel A. Alito, Jr., was sworn in at the beginning of 2006, after the retirement of Justice Sandra Day O'Connor. Three years later, in August of 2009, Justice Sonia Sotomayor became the third woman to serve on the Court, following the retirement of Justice David H. Souter, and she was followed by the fourth in August of 2010, Justice Elena Kagan, who replaced the retiring Justice John Paul Stevens.

Amendment rationales of the Roberts Court over the course of its first decade have found that to be a rather elusive quest. In the literature on the subject one finds assertions that the “content” of the Court’s “vision remains obscure, perhaps even to the Roberts Court itself”² and that it is “hard to discern any pattern to its decisions or any clearly unified conception of our legal system” in the reasoning of the Roberts Court.”³ Other scholars have declared that although Chief Justice Roberts seems “quite interested in free-speech cases,” based on his rulings, “it is hard to say where he will wind up.”⁴ It has been suggested that despite evidence that the chief justice brought considerable skills to the job, it is not clear if he will be able to “deploy his formidable assets in service of a mission that history recognizes as enhancing the rule of law.”⁵ And the Court’s First Amendment jurisprudence has been one in which a considerable number of dissenting and concurring opinions can be fairly characterized as “spirited” – a standard on which the Roberts Court has placed consequential significance.⁶

Given such evidence of thematic elusiveness in the Roberts Court’s First Amendment jurisprudence, this article proposes considering it alternatively by drawing upon primal elements of postmodernist thought as an approximate template for analysis. The term “approximate template” must be emphasized, because as will be discussed, no formal method of such analysis can be legitimately derived from postmodernism, a school of thought that rejects any such systematic mode of interpretation.⁷ Therefore, this study suggests that an approach articulated by Stephen Feldman as part of his effort to assess the Rehnquist Court in postmodernist terms may offer a plausible basis for attempting to better understand the Roberts Court’s First Amendment jurisprudence. In 2000, Feldman asserted that while Rehnquist Court “[parsed] the supposedly precise meanings of various case precedents” and “[wove] elaborate webs of rationally consistent legal propositions,” its legal arguments more justifiably could be characterized as “tattered remnants of ... modernist beliefs” that represented instead a “brand of postmodern jurisprudence.”⁸

² Thomas P. Crocker, *Envisioning the Constitution*, 57 AM. U.L. REV. 1, 70 (2007).

³ Edward L. Rubin, *The Roberts Court at Age Three: Question Regarding D.C. v. Heller*, 54 WAYNE L. REV. 1105, 1106, 1107, 1108-1109 (2008).

⁴ Arnold H. Loewy, *Chief Justice Roberts (A Preliminary Assessment)*, 40 STETSON L. REV. 763, 774 (2011).

⁵ Joel K. Goldstein, *Leading the Court: Studies in Influence as Chief Justice*, 40 STETSON L. REV. 717, 753, 760 (2011).

⁶ See *infra* notes 119-21 and accompanying text for discussion on the subject of “spirited” opinions that do not speak for a majority of the Court.

⁷ See, e.g., HANS-GEORGE GADAMER, TRUTH AND METHOD 81-82 (1975) (asserting, “Since a text does not exist in an independent and uninterrupted state, its meaning cannot be derived through some mechanical technique or method”).

⁸ See STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM 186 (2000).

Feldman's specific proposed framework for identifying evidence of postmodernist motifs and the broader rationale for considering the relevance of postmodernist theory in this analysis will be discussed more fully further below. That section provides a concise summary of guiding themes that emerge from the substantial but complex body of work on postmodernist thought, particularly its overriding skepticism of the explanatory power of "metanarratives."⁹ In the section preceding that, however, this study considers how efforts utilizing more traditional legal analysis have encountered difficulties discerning a coherent doctrine in the First Amendment cases of the Roberts Court — or attempting to construct a metanarrative that could establish a pattern of foundationalist coherence, as such efforts would be characterized in postmodernist analysis. Postmodern theory argues that all such efforts to find explanatory consistency in linear terms are "losing their validity and legitimacy" and increasingly prone to criticism."¹⁰ Nevertheless, this article does not employ postmodernist analysis to reject or disprove more traditional methods of legal analysis, but rather to place the quest for meaning that can be derived from First Amendment jurisprudence of the Roberts Court within a dialogue structured along lines of postmodernist inquiry. Ultimately, that inquiry suggests confirmation of many asserted truths central to postmodernist thought — despite significant challenges in practically applying such truths.

I. A VISION PERHAPS MORE OBSCURE THAN MANIFEST

Relatively early in the Roberts Court era, Thomas Crocker opined that in terms of First Amendment rights and other constitutional questions, the Roberts Court was "beginning to make manifest its vision of the Constitution."¹¹ However, he was unable to determine exactly what it might be: "The content of that vision remains obscure, perhaps even to the Roberts Court itself, but what is clear is that substantive constitutional decisions will be determined by that developing vision."¹² Crocker was unable to go beyond that enigmatic assessment, advising, "We must await further manifestations of what matters of concern will occupy the attention of this new Court."¹³ A year later, Victoria Dodd expressed suspicion that "something new was afoot" in First Amendment law at the Roberts Court.¹⁴

⁹ See *infra* notes 66-67, 70-75, and accompanying text for discussion of that skepticism of metanarratives.

¹⁰ See DOMINIC STRINATI, AN INTRODUCTION TO THEORIES OF POPULAR CULTURE 209 (2004).

¹¹ Crocker *supra*, note 2, at 70.

¹² *Id.*

¹³ *Id.*

¹⁴ Victoria J. Dodd, *The 2007 Roberts Court Education Law Cases: Reaffirmation or Cut-Back of Student Rights*, 42 SUFFOLK U. L. REV. 61, 63-64 (2008).

She declared that its finding of additional restrictions on the First Amendment rights of students in *Morse v. Frederick*,¹⁵ signaled “certainly a new approach in Supreme Court student First Amendment constitutional doctrine” and that the Roberts Court in that and matters other than the First Amendment was “teetering on the cusp of reversing years of what some scholars consider to be legal progress in the pursuit of a more perfect and civilized society.”¹⁶ The same year, Kathleen Sullivan asserted that First Amendment rulings by the Roberts Court suggested it would be less supportive than earlier Courts of free-speech rights in which the speaker had received “privilege” from the government.¹⁷ Considering a group of cases that included *Morse* and *Federal Election Commission v. Wisconsin Right to Life, Inc.*,¹⁸ she declared: “[T]he pattern of free speech cases in the Roberts Court lies not in a distinction between speakers espousing conservative or liberal causes, but rather in a distinction between speakers who speak with private resources and speakers who depend upon government largesse.”¹⁹

In a Wayne State University Law School symposium titled “The Roberts Court at Three,” Erwin Chemerinsky noted four First Amendment cases among the ten that he considered the most important decisions of the Roberts Court at that point²⁰ in the course of declaring it the “most conservative Court since the mid-1930s.”²¹ Those labels were determined by “the issues that in our society today are often the litmus tests for ideology,” primarily abortion and race, as well as separation of church and state, and what Chemerinsky characterized as being “very pro-business” in the case of conservatives,²² but not elements that might be considered conservative in more broadly philosophical and traditional terms, such as deference to legislative judgment and established precedent. He concluded that the Roberts Court “generally favors the government over claims of individual rights, and business interests over those of employees and

¹⁵ 551 U.S. 393 (2007). See *infra* notes 123-136 and accompanying text for fuller discussion of that case.

¹⁶ *Id.* at 76.

¹⁷ Kathleen M. Sullivan, *An Enigmatic Court? Examining the Roberts Court as it Begins Year Three*, 35 PEPP. L. REV. 533, 539 (2008).

¹⁸ 551 U.S. 449 (2007). See *infra* notes 110-122 and accompanying text for fuller discussion of that case.

¹⁹ *Id.* at 538-40. Her assessment seemed to characterize required attendance at public schools as a form of “largesse” justifying restrictions on speech when not actually at school, on the one hand, while on the other dismissing as non-benefits the perpetual life, limited liability, and numerous tax advantages bestowed through government-issued corporate charter.

²⁰ Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947, 954-55 (2008).

²¹ *Id.* at 948.

²² *Id.* at 957.

consumers.”²³ Since that time, business interests have fared even better in First Amendment cases, but the Court has upheld claims of individual rights over government in a number of rulings, which at the very least raises questions about the definitional validity of those criteria for determining how “conservative” the Roberts Court may actually be in historical terms.

Jonathan Adler, for example, argued insistently in the same symposium that Chemerinsky overstated the case for branding the Roberts Court so broadly conservative, maintaining that most of what could be called its conservative rulings had been “relatively modest,” while issuing “many decisions that are quite liberal.”²⁴ He conceded only that the Court could be considered somewhat conservative in regard to being less likely than earlier courts “to embrace the continued progressive evolution of constitutional law doctrines” rather than “maintain, and refine, the status quo” and more likely to “decide cases on the most narrow available grounds.”²⁵ Kenneth Starr also pronounced the Roberts Court’s jurisprudence “much more richly textured than the facile ‘liberal’ versus ‘conservative’ short-hand labels that oftentimes impair a more nuanced understanding” of the Court.²⁶

Christopher Peters characterized *Wisconsin Right to Life*²⁷ as a prime example of what it called the Roberts Court’s developing predisposition in favor of an ambiguous practice of “under-the-table overruling” — rulings that have the effect of reversing a precedent while avoiding actually stating that it has been reversed.²⁸ He argued that practice “probably hurts the Court’s legitimacy in the medium to long term” because “eventually the public is likely to catch on ... that the Court has been changing constitutional law without saying so.”²⁹ He contended the practice could “come back and haunt” the Court, if future majorities should “simply ignore previous underrulings and revert to faithful applications of the original, never-formally-overruled precedential decisions.”³⁰

Edward Rubin declared that the Roberts Court’s early terms offered little basis for believing it would over time be considered one of the great Supreme Courts, based on a standard of those “whose unity of purpose projects a vision that at least foreshadows and perhaps transfigures the

²³ *Id.* at 947.

²⁴ Jonathan H. Adler, *The Roberts Court at Age Three: Getting the Roberts Court Right*, 54 WAYNE L. REV. 983, 986 (2008).

²⁵ *Id.* at 1012.

²⁶ Kenneth W. Starr, *The Roberts Court at Age Three: A Response*, 54 WAYNE L. REV. 1015, 1032 (2008).

²⁷ 551 U.S. 449 (2007).

²⁸ Christopher J. Peters, *The Roberts Court at Age Three: Under-the-Table Overruling*, 54 WAYNE L. REV. 1067, 1068 (2008).

²⁹ *Id.* at 1072.

³⁰ *Id.* at 1104.

direction their society is headed.”³¹ In contrast, he found it “hard to discern any pattern to its decisions or any clearly unified conception of our legal system” in the reasoning of the Roberts Court, as well as little commitment to protecting First Amendment freedoms.³² Robert Sedler found no cause for concern in the Roberts Court’s First Amendment jurisprudence, however, because it was “reluctant to overrule particular precedents,” and thus “we do not see, for the most part, any significant change in the ‘law of the Constitution,’ nor do we see any decisions that when viewed carefully in terms of their specific holding, will have an important public policy impact.”³³

A 2011 Stetson University College of Law symposium continued to reflect the difficulty in identifying thematic consistency in the growing body of work of the Roberts Court. Joel Goldstein, for example, found Chief Justice Roberts had clearly demonstrated energy, interpersonal skills, and the ability to master appellate records and frame issues in a compelling manner and to articulate doctrinal arguments, but that it was not yet clear if he would be able to “deploy his formidable assets in service of a mission that history recognizes as enhancing the rule of law” — the author’s standard asserted as central to assessment of the success of a chief justice’s Court.³⁴ Arnold Loewy also found much unclear thematically about the Roberts Court, observing that the chief justice seems “quite interested in free-speech cases” but based on his rulings, “it is hard to say where he will wind up,” beyond finding it “fair to say that he will probably more readily align himself with the conservative wing of the Court than with the liberal wing.”³⁵

Russell Weaver contended that it was “unfair to characterize the Roberts Court’s campaign-finance decisions” in *Citizens United v. Federal Election Commission*³⁶ and *WRTL* as “being intentionally pro-business,” in that they were “more easily explained as a fundamental disagreement regarding the government’s right to control political speech and ... equalize resources in political campaigns.”³⁷ He emphasized that even though *Citizens United* swept away the body of precedents represented by *Austin v. Michigan Chamber of Commerce*³⁸ and *McConnell v. Federal Election Commission*,³⁹ that did not represent “judicial activism” because in those

³¹ Rubin, *supra* note 3, at 1106.

³² *Id.* at 1108-1109.

³³ Robert A. Sedler, *The Roberts Court at Age Three: A Different Take on the Roberts Court*, 54 WAYNE L. REV. 1033, 1062 (2008).

³⁴ Goldstein, *supra* note 5, at 753, 760.

³⁵ Loewy, *supra* note 4, at 774.

³⁶ 558 U.S. 310 (2010). See *infra* notes 144-165, and accompanying text for fuller discussion of that case.

³⁷ Russell L. Weaver, *The Roberts Court and Campaign Finance: “Umpire” or “Pro-Business Activism?”* 40 STETSON L. REV. 839, 858-59 (2011).

³⁸ 494 U.S. 652 (1990).

³⁹ 540 U.S. 93.

earlier cases “a substantial number of Justices felt that such restrictions violated the right of free expression.”⁴⁰ He did not mention in his assessment the inconvenient fact that the number of justices who held in *McConnell* that such restrictions did *not* violate free expression was exactly the same number (five) as those who felt they did in *Citizens United* – and the number in the majority in *Austin* (six) was actually greater than that of *Citizens United*.⁴¹ Eric Segall argued that the Roberts Court “does not take the requirement of transparency seriously and does not believe that prior positive law (such as precedent) places any real constraint on Supreme Court decisionmaking,” and indeed in “numerous important constitutional law cases ... did not seem to grapple with prior law in good faith nor provide the true basis for their decisions.”⁴²

Deanna Pollard Sacks made the case that the Roberts Court appeared to be building a doctrinal foundation to “usher in a new era of children’s constitutional jurisprudence grounded in legislative fact-finding” that would grant government more leeway for protecting children from harmful influences.⁴³ She interpreted the Court’s action in *Morse v. Frederick*,⁴⁴ and its first hearing of *Federal Communications Commission v. Fox Television Stations*⁴⁵ as backing government when it “acted to shield children from potentially harmful speech that could influence them to smoke marijuana or use indecent language.”⁴⁶ The latter of those two cases involved the Court’s initial review in 2009 of First Amendment challenges to FCC orders that had deemed broadcasters in violation of its indecency policy, in which the Court found the agency’s order consistent with its indecency policy and remanded it to lower courts for fuller consideration of the First Amendment challenges.⁴⁷ Based on the Court’s rulings in those two cases, Sacks found a common principle grounded in “the same basic social science research concerning children’s developmental immaturity.”⁴⁸ She proposed that “[t]his theory envisions the Court reversing” a lower-court ruling that had struck down an effort by the state of California to restrict purchases by children of violent video games, or “at the very least,

⁴⁰ *Id.* at 859.

⁴¹ See *infra* notes 104-17, and accompanying text for fuller discussion of *Austin*.

⁴² Eric J. Segall, *Is the Roberts Court Really a Court?* 40 STETSON L. REV. 701, 701-702 (2011).

⁴³ Deana Pollard Sacks, *Children’s Developmental Vulnerability and the Roberts Court’s Child-Protective Jurisprudence: An Emerging Trend*, 40 STETSON L. REV. 777, 779 (2011).

⁴⁴ 551 U.S. 393 (2007).

⁴⁵ *Federal Communications Commission v. Fox Television Stations*, 556 U.S. 502 (2009).

⁴⁶ See Sacks, *supra* note 43, at 778.

⁴⁷ 556 U.S. at 538-39.

⁴⁸ *Id.* at 778. Sacks also developed her argument more broadly based on the Court’s 2010 decision in *Graham v. Florida* that a criminal penalty imposed on a juvenile violated the Eighth Amendment.

rendering an opinion that offers some guidance on how states can justify speech regulation to protect children without offending the First Amendment.”⁴⁹ When that case reached the Court in 2011 as *Brown v. Entertainment Merchants Association*⁵⁰ however, a seven-to-two majority instead declared the restriction unconstitutional⁵¹ while offering virtually no indication it would even consider any other such regulation.⁵² And when *FCC v. Fox*⁵³ returned to the Supreme Court in 2012, the FCC order against the broadcasters was struck down as unconstitutionally vague.⁵⁴

So in efforts by scholars to identify clear doctrinal motifs in the body of First Amendment rulings handed down by the Roberts Court over the course of its first decade can be found assessments of that jurisprudence as pro-business, and not; as conservative, and not; as transparent and direct, and not; as respectful of precedent, and not. Further, such assessments of the Roberts Court as reluctant to overrule precedent, as being deferential to government, and as protective of children, for example, have been proven far wide of the mark in subsequent rulings. Indeed, the Roberts Court’s body of First Amendment jurisprudence might be characterized as “diverse, iconoclastic, referential and collage-like,”⁵⁵ a phrase from postmodernist thought on how knowledge claims can more accurately be articulated than in terms of foundationalist, explanatory metanarratives. A fuller discussion of postmodernist thought proceeds in the next section.

II. POSTMODERNISM’S CRITIQUE OF EXPLANATORY NARRATIVES

Any attempt to summarize the essential meanings of postmodernist theory — at least any attempt to do so in a conventionally linear articulation that may resonate with a general audience — must begin with the acknowledgment that “finding ... a simple, uncontroversial meaning for the term ‘postmodern’ is all but impossible.”⁵⁶ In attempting to define the subject in “reasonably straightforward terms,” scholars find that “it is hard

⁴⁹ See Sacks, *supra* note 43, at 791.

⁵⁰ 131 S. Ct. 2729 (2011)

⁵¹ *Id.* at 2742.

⁵² *Id.* at 2735. The majority’s disregard for social-science research presented in *Brown* to justify the restriction led one group of legal scholars to declare it “a wake-up call” for communication scientists that “could severely reduce the utility of media effects research in terms of providing the legislative facts upon which speech-restrictive statutes are premised.” See Clay Calvert, Matthew D. Bunker, and Kimberly Bissell, *Social Science, Media Effects & The Supreme Court: Is Communication Research Relevant After Brown v. Entertainment Merchants Association?* 19 UCLA ENT. L. REV. 293, 298 (2012).

⁵³ 132 S. Ct. 2307 (2012).

⁵⁴ *Id.* at 2320.

⁵⁵ See STRINATI, *supra* note 10, at 209.

⁵⁶ See SIMON MALPAS, *THE POSTMODERN: THE NEW CRITICAL IDIOM* 4 (2005).

to identify the essence of something that denies the reality of essences.”⁵⁷ Rather than providing any sort of “scientific reason or philosophical logic,” or even “common sense and accessibility,” discussions of postmodernism more often speak of a process that “seeks to grasp what escapes these processes of definition and celebrates what resists or disrupts them.”⁵⁸ Although the subject has generated a vast body of literature, “there are few sources which provide clear and readable accounts of postmodern theory.”⁵⁹ Discourse on postmodernism is “often associated with philosophical writings and social and political theories that are complex, dense, esoterically sophisticated and all too often replete with jargon and incomprehensible prose, which intimidate even the most sophisticated readers.”⁶⁰ Indeed, the use of language that is “too vague, abstract and difficult to understand”⁶¹ and “a bewildering array of meanings which vary frequently from discipline to discipline”⁶² is intentional, at least to the extent that a “clear and concise process of identification and definition is one of the key elements of rationality that the postmodern sets out to challenge.”⁶³ Ultimately, as has been suggested, the coda to any discussion of the subject probably must be: “And it is more ... or perhaps less.”⁶⁴

All that said, this study proposes that in the concept of postmodernism, there can be something more than “academic irresponsibility and ivory-tower indifference” that rejects “all wisdom of the past” by “playfully appeal[ing] to our subjectivities” but making “no genuine judgment of what is better or worse.”⁶⁵ Rather, an approach more specifically detailed later in this section is utilized as a relatively systematic strategy in the quest to assert proposed understandings of complex phenomena – in this case, the First Amendment rulings of the Roberts Court. This study considers postmodernism’s skepticism of the explanatory power of “metanarratives” in relation to the difficulty of discerning a coherent doctrine in those rulings. What has been described as “postmodern scholarship’s major characteristic” is an “opposition to what we may call the Enlightenment’s tradition of thought which searches to

⁵⁷ See FRANK WEBSTER, *THEORIES OF THE INFORMATION SOCIETY* 228-9 (2006).

⁵⁸ See MALPAS, *supra* note 56, at 4.

⁵⁹ See STRINATI, *supra* note 10, at 204.

⁶⁰ See MICHAEL DROLET, ED., *THE POSTMODERNIST READER: FOUNDATIONAL TEXTS* 1 (2003).

⁶¹ See STRINATI, *supra* note 10, at 204.

⁶² See DROLET, *supra* note 60, at 1.

⁶³ See MALPAS, *supra* note 56, at 4.

⁶⁴ See Peter J. Gade, *Postmodernism, Uncertainty, and Journalism*, in WILSON LOWREY & PETER J. GADE, EDs., *CHANGING THE NEWS: THE FORCES SHAPING JOURNALISM IN UNCERTAIN TIMES* 63 (2011) (ellipse included).

⁶⁵ See Harvey Cormier, *Richard Rorty and Cornel West on the Point of Pragmatism*, in RANDALL E. AUXIER & LEWIS EDWIN HAHN, EDs., *THE PHILOSOPHY OF RICHARD RORTY* 88-89 (2010).

identify the *rationalities* ... which govern change and behavior.”⁶⁶ Postmodern theory argues that such efforts to articulate linear, explanatory narratives are “disintegrating, losing their validity and legitimacy and increasingly prone to criticism” and that it is becoming ever more “difficult for people to organize and interpret their lives in light of meta-narratives of whatever kind.”⁶⁷

Expression of such penumbral ideas began as early as 1928 in the work of Catholic theologian Bernard Iddings Bell on a more “intelligent alternative to the two rival ideologies” of liberalism and totalitarianism then dominating modern Western societies. By the 1950s, artists and poets were using the term as a rejection of their judgment that modernism had become “entrenched and conventional.” In the 1970s, the highly influential work of philosophers such as Michel Foucault and Luce Irigaray, sociologist Jean Baudrillard, and political philosopher Jean-Francois Lyotard more fully articulated intellectual repudiations of central tenets of the Western philosophical tradition in terms of postmodern theory.⁶⁸

Many who write on the subjects of modernism and postmodernism, however, “either do not bother to state precisely what they mean by these words or concentrate only upon certain features of what they take them to be.” But within the social sciences, the former “is generally understood to identify a cluster of changes – in science, industry and ways of thought” commonly referred to as the Enlightenment that “brought about the end of feudal and agricultural societies in Europe and which has made its influence felt pretty well everywhere in the world” – while the latter “announces a fracture with this.”⁶⁹ Most centrally, the school of postmodernism does that by challenging what are variously referred to as metanarratives, grand narratives, rationalities, or totalities, striving “to demonstrate the fractures and silences that have always been a part of the grand narratives.”⁷⁰ It represents a perspective “axiomatic to postmodern thought” that “all the accounts of the making of the modern world, whether Marxist or Whig, radical or conservative, that claim to perceive the mainsprings of development ... are to be resisted” because they “have been discredited by the course of history.”⁷¹ Lyotard described that process of resisting as the “antimythologizing manner in which we must ‘work through’ the loss of the modern.”⁷² Baudrillard characterized postmodernism as “the immense process of the destruction of meaning”

⁶⁶ See WEBSTER, *supra* note 57, at 231 (emphasis included).

⁶⁷ See STRINATI, *supra* note 10, at 209.

⁶⁸ See DROLET, *supra* note 60, at 2-4.

⁶⁹ See WEBSTER, *supra* note 57, at 229.

⁷⁰ See MALPAS, *supra* note 56, at 131.

⁷¹ See WEBSTER, *supra* note 57, at 231-32.

⁷² See Jean-Francois Lyotard, *Universal History and Cultural Differences*, in ANDREW BENJAMIN, ED., *THE LYOTARD READER* 319 (1989).

and declared that “[w]hoever lives by meaning, dies by meaning.”⁷³ In rejecting the “the claim of any theory to absolute knowledge,” postmodernism suggests “more contingent and probabilistic claims to the truth” that understand it in terms of a more “diverse, iconoclastic, referential and collage-like character.”⁷⁴ Thus, for some, postmodernism may well be characterized as “the narrative of the end of narratives.”⁷⁵

This study considers how postmodernism’s assertions regarding the futility of relying on metanarratives may inform efforts to identify coherence in the First Amendment doctrine of the Roberts Court. To that end, the quest for meaning in that line of jurisprudence is placed in a dialogue structured along lines of postmodernist inquiry is methodologically grounded most specifically and substantially in Feldman’s eight-theme set of criteria put forth in 2000 as one basis in legal and other analysis for identifying postmodernist motifs. Feldman proposed that even though postmodernist theory rejects “modernist methodology and objectivity,” it “does not mean that understanding or interpretation is purely subjective or capricious” but rather that, “an interpreter always is situated in a communal ‘tradition’ that inculcates the individual with prejudices and interests, which then constrain and direct the understanding of any text.”⁷⁶ As Stanley Fish has argued, “There has never been nor ever will be anyone who could survey interpretive possibilities from a vantage point that was not itself already interpretive.”⁷⁷

Thus, Feldman proposed that postmodernism should best be understood as an “extant intellectual, cultural, and social era” characterized by “eight broad overlapping themes” that “neither exhaust the meaning of postmodernism nor stand independently from each other.”⁷⁸ In the sections that follow, those eight themes are employed successively to highlight elements selected from the Roberts Court’s body of First Amendment jurisprudence that may illuminate the potential of their respective presence in that jurisprudence more broadly. Considered in the context of meaning derived through discussion of those broad overlapping themes, this approach to analysis of that body of law suggests the Roberts Court can be understood to be practicing a “brand of postmodern jurisprudence.”⁷⁹

⁷³ See Jean Baudrillard, *On Nihilism*, 6 *ON THE BEACH* 38, 38-39 (1984).

⁷⁴ See STRINATI, *supra* note 10, at 209.

⁷⁵ See FREDRIC JAMESON, *POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM* xii (2003).

⁷⁶ See FELDMAN, *supra* note 8, at 31 (citing HANS-GEORGE GADAMER, *TRUTH AND METHOD* 81-82 (1975)).

⁷⁷ See Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 *Yale L. J.* 1773, 1795 (1987).

⁷⁸ See FELDMAN, *supra* note 8, at 38, 44.

⁷⁹ *Id.* at 186.

The cases highlighted do not represent an exhaustive survey of postmodernist elements in all Roberts Court First Amendment rulings but rather a selection based on the author's assessment of cases that offer particularly defensible examples in support of the eight themes upon which the analysis is structured.

III. THE ANTI-FOUNDATIONALIST ESSENCE OF POSTMODERNISM

The first of Feldman's eight themes for identifying postmodernist qualities focused on how consistently postmodernism is "anti-foundationalist and anti-essentialist, and therefore contravenes modernist epistemologies" so that "meaning and knowledge always remain ungrounded" and a "text or event has many potential meanings, many possible truths."⁸⁰ This analysis offers for consideration of that proposition the Roberts Court's first venture into the body of case law relating to regulation of commercial speech, in which it took the opportunity to quite potentially rewrite the Court's long-established doctrine in that area of the law — while contradictorily and rather inexplicably asserting faithfulness to it.

In *Sorrell v. IMS Health Inc.*⁸¹ a six-to-three majority struck down a Vermont law prohibiting the sale for marketing purposes of physicians' prescription records without their permission on the grounds that it imposed "content- and speaker-based restrictions."⁸² The majority reached that conclusion by finding a disfavoring of marketing — which it characterized as no more than "speech with a particular content" — as well as of "specific speakers, namely pharmaceutical manufacturers."⁸³ Thus, the majority held that the regulation "imposes burdens that are based on the content of speech and that are aimed at a particular viewpoint."⁸⁴ Writing for the majority, Justice Kennedy brushed aside the government's asserted interest in protecting "medical privacy, including physician confidentiality, avoidance of harassment, and the integrity of the doctor-patient relationship"⁸⁵ as "manipulation to support just those ideas the government prefers."⁸⁶ The ideas that Justice Kennedy characterized as those the government prefers were his reference to exceptions in the law that allowed private or academic researchers access to the prescription records for non-commercial purposes,⁸⁷ which he characterized elsewhere

⁸⁰ *Id.* at 38.

⁸¹ 131 S. Ct. 2653 (2011)

⁸² *Id.* at 2663.

⁸³ *Id.*

⁸⁴ *Id.* at 2663-64.

⁸⁵ *Id.* at 2668.

⁸⁶ *Id.* at 2672.

⁸⁷ *Id.* at 2662-63.

as evidence that the regulation “by design favored speakers of one political persuasion over another.”⁸⁸

By reducing the well established distinction between commercial and non-commercial speech to nothing more than differences in “political persuasion,” the Court would seem to have effectively opened the door to no end to the potential meanings commercial speakers may henceforth assert in proposing their activities too be redefine for First Amendment purposes as further forms of political persuasion. As for a report that indicated some doctors had complained of feeling coerced and harassed by pharmaceutical marketers before the regulation was implemented, Justice Kennedy declared: “Many are those who must endure speech they do not like, but that is a necessary cost of freedom,”⁸⁹ illustrating his point by comparing the way in which the Court held in an earlier case that the families of slain soldiers must endure harassment by politically motivated picketers in order to preserve First Amendment values to *Sorrell*'s assertion that marketing based on private prescription records must similarly be endured, because “[s]peech remains protected even when it may “stir people to action,” “move them to tears,” or “inflict great pain.”⁹⁰

Considering all that — the majority's ruling that the purposes of commercial speakers represent no more than a viewpoint or political persuasion which the government may not burden with regulation that it does not impose on non-commercial speakers — it seems almost impossible not to question whether *Sorrell* thus ungrounds virtually all foundationalist meaning long thought to be maintained as central to the Court's established commercial-speech doctrine. One can certainly not avoid the fact that Justice Kennedy paid rather minimal attention to the cornerstone intermediate-level First Amendment test that the Court theretofore had employed to test the constitutionality of government regulations on advertising challenged on First Amendment grounds ever since it was established in *Central Hudson Gas and Electric v. Public Service Commission* in 1980.⁹¹ Justice Kennedy briefly acknowledged and purported to apply the test, but declared up front that “the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied,” declaring that the government's interests in the regulation did not withstand either.⁹²

⁸⁸ *Id.* at 2669.

⁸⁹ *Id.* at 2669.

⁹⁰ *Id.* at 2670 (quoting *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011)).

⁹¹ 447 U.S. 557, 566 (1980), establishing (“At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.”)

⁹² 131 S. Ct. at 2667-68.

Tamara Piety, one of the most prolific and authoritative scholars on commercial speech in recent years, went so far as to declare that the ruling in *Sorrell* renders the *Central Hudson* doctrine “incoherent” and establishes in its place a rationale that “cannot be reconciled with the concept of a commercial speech doctrine.”⁹³ Rather than maintaining First Amendment protection for truthful commercial speech in order to protect consumers’ right to receive accurate product information, *Sorrell* seems to suggest any sales pitch may be protected as a “viewpoint.” That would place the Court “in a position to pick and choose and selectively invalidate” any parts of any “regulation of commerce brought to it with which its majority disagrees.”⁹⁴

Writing in dissent, Justice Breyer formally applied the *Central Hudson* test in the overt manner that had long been the Court’s practice in such cases, and concluded it showed the government had “developed a record that sufficiently shows that its statute meaningfully furthers substantial state interests. Neither the majority nor respondents suggests any equally effective ‘more limited’ restriction,” and therefore, “even if we apply an “intermediate” test such as that in *Central Hudson*, this statute is constitutional.”⁹⁵ Justice Souter characterized Justice Kennedy’s purported application of the *Central Hudson* test as an “unforgiving brand of ‘intermediate’ scrutiny”⁹⁶ and also warned that to “apply a strict First Amendment standard virtually as a matter of course when a court reviews ordinary economic regulatory programs (even if that program has a modest impact upon a firm’s ability to shape a commercial message) would work at cross-purposes” with the Court’s established commercial-speech doctrine.⁹⁷

IV. THE CHALLENGES OF MULTIPLE NARRATIVES

Feldman’s second theme for identifying postmodernist motifs emphasizes the tendency to challenge certainties and boundaries in a manner that engenders multiple narratives without universal or encompassing principle or explanatory power.⁹⁸ A dramatic example of such multiple fracturing of what had once seemed a more singular precedent can be considered in 2010’s *Citizens United v. Federal Election Commission*.⁹⁹ In that ruling, the Roberts Court more sweepingly than ever protected corporate political media spending from regulation aimed at preventing corruption of candidate campaigns, ruling for the first time that

⁹³ Tamara R. Piety, “A Necessary Cost of Freedom”? *The Incoherence of Sorrell v. IMS*, 64 ALA. L. REV. 1, 7 (2012).

⁹⁴ *Id.* at 54.

⁹⁵ *Id.* at 2684.

⁹⁶ *Id.* at 2679 (Breyer, J., dissenting).

⁹⁷ *Id.* at 2675 (Breyer, J., dissenting).

⁹⁸ See FELDMAN, *supra* note 8, at 39.

⁹⁹ 558 U.S. 310 (2010).

corporations may make unlimited political expenditures directly from their treasuries, and declaring unconstitutional virtually any limits on such spending.¹⁰⁰

On the first page of his majority opinion, Justice Kennedy sought to characterize the ruling as a simple case of the Court faithfully applying “ancient First Amendment principles.”¹⁰¹ He asserted it to be so with his depiction of *First National Bank of Boston v. Bellotti*, the 1978 ruling that had held corporate political media spending on referenda, however but not candidate elections to be protected by the First Amendment.¹⁰² In the course of citing *Bellotti* twenty-four times, he conceded that it “did not address the constitutionality” of a government “ban on corporate independent expenditures to support candidates,” but hypothesized well beyond its long held certainties and boundaries to assert: “In our view, however, that restriction would have been unconstitutional under *Bellotti*’s central principle: that the First Amendment does not allow political speech restrictions based on a speaker’s corporate identity.”¹⁰³ Then in order to move his argument further forward, Justice Kennedy proceeded as if there were also no certainties or boundaries established by related cases from *Bellotti* in 1978 until *Austin v. Michigan Chamber of Commerce*¹⁰⁴ was decided twelve years later, flatly stating immediately after his *Bellotti* hypothesis: “Thus the law stood until *Austin*.”¹⁰⁵ After noting *Austin* upheld the constitutionality of restrictions on corporate political media spending,¹⁰⁶ he declared: “The Court is thus confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker’s corporate identity and a post-*Austin* line that permits them.”¹⁰⁷

Justice Kennedy thus in effect engendered an array of new narratives made possible by virtually ignoring the line of cases between *Bellotti* and *Austin* that had in fact provided what had theretofore been held to have established a quite substantial body of certainties and boundaries upon which *Austin* had firmly been adjudicated. In 1982’s

¹⁰⁰ *Id.* at 365-66.

¹⁰¹ *Id.* at 318 (quoting *Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 490 (Scalia, J., concurring in part and concurring in judgment)).

¹⁰² 435 U.S. 765, 784 (1978).

¹⁰³ 558 U.S. at 347.

¹⁰⁴ 494 U.S. 652 (1990).

¹⁰⁵ 558 U.S. at 347.

¹⁰⁶ 494 U.S. at 656. A six-to-three majority held that such corporate spending represents a “corrosive” threat in candidate elections, not because of the *amount* of corporate wealth but because that wealth derives from special advantages not possessed by human individuals but bestowed upon the corporate form by government — particularly “limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets.” *Id.* at 658-60.

¹⁰⁷ 558 U.S. at 348.

Federal Election Commission v. National Right to Work Committee,¹⁰⁸ the government successfully argued that it had a compelling interest in ensuring that the “substantial aggregations of wealth” accumulated through the special legal advantages¹⁰⁹ granted the corporate form¹¹⁰ would not be converted into political “war chests” — the deployment of which could incur political debts from candidates in elections, as the Court had established in 1957 in *United States v. United Auto Workers*.¹¹¹ In accepting that the asserted interests were compelling and thus outweighed the First Amendment rights asserted by the NRWC,¹¹² the unanimous Court — including *Bellotti* author Justice Lewis F. Powell — declared: “The governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized and *there is no reason why it may not in this case be accomplished by treating unions, corporations and similar organizations differently from individuals.*”¹¹³ Also, in 1985’s *Federal Election Commission v. National Conservative Political Action Committee*,¹¹⁴ the Court emphasized that the speech interests of individuals joined together for the purpose of expressing viewpoints were protected and distinguished from the economic interests represented by funds accumulated in corporate treasuries through the special advantages of the business corporate form.¹¹⁵ A year after that, in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*,¹¹⁶ the Court declared that the economic advantages provided to the business corporate form can create “an unfair advantage in the political marketplace.”¹¹⁷

¹⁰⁸ 459 U.S. 197 (1982).

¹⁰⁹ *Id.* at 18. “We agree with petitioners that these purposes are sufficient to justify the regulation at issue,” the Court declared. 459 U.S. at 208

¹¹⁰ See *United States v. Morton Salt Co.*, 338 U.S. 632 (1950). Those were the specifically the advantages on which the *Austin* majority based its holding. See *supra* note 106.

¹¹¹ 352 U.S. 567, 579 (1957).

¹¹² 459 U.S. at 208-09.

¹¹³ *Id.* at 210-11 (emphasis added).

¹¹⁴ 470 U.S. 480 (1985).

¹¹⁵ *Id.* at 500. In striking down of limits on campaign expenditures by political action committees, the Court declared that it did so because such expenditures did not represent the same threat of real or apparent corruption as those of business corporations. *Id.* at 495-96, 500-01.

¹¹⁶ 479 U.S. 238 (1986).

¹¹⁷ *Id.* at 257-58 (declaring that “resources in the treasury of a business corporation ... are not an indication of popular support for the corporation’s political ideas. They reflect instead the economically motivated decisions of investors and customers.”) The Court held that regulations of independent political expenditures applied to ideological corporations (rather than business corporations) were unconstitutional, again distinguishing spending made directly via the treasuries of business corporations as fundamentally different from human First Amendment expression. *Id.* at 259-63.

Indeed, in his *Citizens United* dissent, Justice John Paul Stevens pointed to the incongruity of a reading of the relevant case law that cast aside their most encompassing principle. Justice Stevens pointed out that in the majority's view, "*Buckley* and *Bellotti* decisively rejected the possibility of distinguishing corporations from natural persons ... [I]t just so happens that in every single case in which the Court has reviewed campaign finance legislation in the decades since, the majority failed to grasp this truth."¹¹⁸ In his concurring opinion, Chief Justice Roberts sought to offer still another narrative so as to respond to such assertions that the majority had diverged radically from precedent. He maintained that the "validity of *Austin's* rationale — itself adopted over two 'spirited dissents' — has proven to be the consistent subject of dispute among Members of this Court ever since," noting that the criticism of justices Kennedy, Scalia, and Thomas for the earlier rulings on corporate political media spending in *WRTL* and *McConnell* served to "undermine the precedent's ability to contribute to the stable and orderly development of the law."¹¹⁹ That encompassing principle that the chief justice proffered through that narrative, however, is undermined substantially by the fact that *Bellotti* itself also had been adopted over two quite "spirited dissents,"¹²⁰ which between them drew the support of four justices who so strongly disputed some of its implications that they were able to later form the majorities that made clear its certainties and boundaries in a series of First Amendment cases on corporate political media spending that reached the Court in the 1980s.¹²¹ If disputes raised via dissents that rise to what may be considered to be "spirited" can be considered sufficient justification for abandoning

¹¹⁸ 558 U.S. at 441 (Stevens, J., dissenting).

¹¹⁹ 494 U.S. at 379 (Roberts, C.J., concurring).

¹²⁰ Chief Justice Roberts drew the term "spirited dissents" from *Payne v. Tennessee*, a case that itself generated considerably spirited dissents critical of its holding that overturned prior precedents concerning the use of victim-impact statements in the sentencing phase of death-penalty cases. See 501 U.S. 808, 828-29 (1991). See also *id.* at 844-56 (Marshall, J., dissenting), and 856-67 (Stevens, J., dissenting). In his *Bellotti* dissent, Justice Byron R. White flatly declared: "In short, corporate management may not use corporate monies to promote what does not further corporate affairs but what in the last analysis are the purely personal views of the management, individually or as a group." 435 U.S. at 813 (1978) (White, J., dissenting). Justice William Rehnquist also issued a withering dissent that proclaimed the majority decision as significantly at odds with settled law regarding the corporate being: "So long as the Judicial Branches of the State and Federal Governments remain open to protect the corporation's interest in its property, it has no need, though it may have the desire, to petition the political branches for similar protection." *Id.* at 826-27 (Rehnquist, J., dissenting).

¹²¹ See *supra* notes 108-18, and accompanying text for discussion of those cases. See also Robert L. Kerr, *What Justice Powell and Adam Smith Could Have Told the Citizens United Majority About Other People's Money*, 9 FIRST AM. L. REV. 211 (2011) for fuller argument of how those cases contradict the rationale and holding of the majority in *Citizens United*.

the certainties and boundaries of established precedent, that would seem to represent a capacious opening for multiple alternative narratives on end, regardless their grounding in any actual universal or encompassing principle.

V. REVELING IN PARADOXES

The Roberts Court provided a remarkable demonstration of consistency with Feldman's third theme of postmodernism as an ethos that "revels in paradoxes"¹²² on the day in 2007 when it handed down two First Amendment rulings, both authored by Chief Justice Roberts. In *Federal Election Commission v. Wisconsin Right to Life, Inc.*,¹²³ a five-to-four majority decided in favor of an as-applied First Amendment challenge to federal regulation aimed at preventing "electioneering" – the use of corporate treasury funds to influence candidate elections through attack ads cloaked as issue advocacy.¹²⁴ In the principal opinion, Chief Justice Roberts articulated a new interpretation for when an exception for regulation of such spending would be henceforth constitutional: "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." He called that standard "the functional equivalent of express advocacy"¹²⁵ It meant that, as Justice Souter put it in dissent, corporate spending on such ads would be protected by the First Amendment when they did not specifically urge "viewers to 'vote against Jane Doe,' " but instead "condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'"¹²⁶

Justice Roberts' opinion concluded the regulation was unconstitutional as applied to the advertisements in question, finding that they were not the "functional equivalent of express advocacy" and declaring, "The First Amendment requires us to err on the side of

¹²² See FELDMAN, *supra* note 8, at 40.

¹²³ 551 U.S. 449 (2007).

¹²⁴ *Id.* at 481. Chief Justice Roberts was joined by justices Samuel Alito, Scalia, Kennedy, and Thomas on the judgment, but only by Justice Alito on his principal opinion.

¹²⁵ *Id.* at 469-70.

¹²⁶ *Id.* at 520 (Souter, J., dissenting.) (quoting *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 193, 126-27 (U.S. 2003)). Justice Scalia, writing in concurrence with the judgment and joined by justices Kennedy and Thomas, argued almost as forcefully against Justice Roberts' new standards as did the dissent, on the grounds that there is "fundamental and inescapable problem" with any test that attempts to distinguish between issue and express advocacy. Because such tests are "tied to the public perception, or a court's perception, of the import, the intent, or the effect of the ad," he declared, they are "impermissibly vague and thus ineffective to vindicate the fundamental First Amendment rights" of corporations. *Id.* at 492 (Scalia, J., concurring in judgment).

protecting political speech rather than suppressing it.”¹²⁷ The opinion then concluded that no compelling interests existed to justify the electioneering provision, as applied in that case, and thus held it to be unconstitutional,¹²⁸ asserting: “Where the First Amendment is implicated, *the tie goes to the speaker, not the censor.*”¹²⁹ The *WRTL* majority was virtually silent on the long established doctrine grounded in “legislative judgment that the special characteristics of the corporate structure require particularly careful regulation”¹³⁰ and avoided addressing that in any significant way. That doctrine had been most recently advanced just four years before in *McConnell v. Federal Election Commission*,¹³¹ as vigorously maintained by the Justice Souter’s *WRTL* dissent, in which he rejected the Chief Justice’s contention that the *WRTL* ruling was a narrow one that did not undermine *McConnell*, declaring that the ruling indeed “stands *McConnell* on its head.”¹³²

But on the day that Chief Justice Roberts professed that “[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor,”¹³³ what arguably can be read as virtually unabashed revelry in paradox unfolded when his majority opinion sided *with the censor* — rather than the speaker — in the second First Amendment handed down that day that seemed to hinge on just such a “tie.” In *Morse v. Frederick*,¹³⁴ the Court ruled against the challenge by a high school student of his suspension for displaying a banner reading “BONG HiTS 4 JESUS” at a city parade that students had been released from classes to attend.¹³⁵ Drawing upon other cases that already had modified the student-speech cornerstone *Tinker, et al. v. Des Moines Independent Community School District, et al.*¹³⁶ holding that student expression may not be punished unless officials

¹²⁷ *Id.* at 457.

¹²⁸ *Id.* at 476-77.

¹²⁹ *Id.* at 474 (emphasis added).

¹³⁰ Fed. Election Comm’n v. Nat’l. Right to Work Comm’n, 459 U.S. 197, 209-10 (1982) (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)). That doctrine held that restrictions on corporate political media spending directly from general treasury funds to influence candidate elections were constitutional because such funds derive through the special advantages (perpetual life, limited liability and tax advantages) granted the corporate form. See 338 U.S. at 652. Such spending had long been recognized by the Court as a potentially corrupting force. See *United States v. United Auto Workers*, 352 U.S. 567, 579 (1957).

¹³¹ 540 U.S. 93.

¹³² 551 U.S. at 526-27 (Souter, J., dissenting). Justice Souter concluded that the majority had left “the ban on contributions by corporations and unions” thereafter “open to easy circumvention.” *Id.* at 536.

¹³³ *Id.* at 474.

¹³⁴ 551 U.S. 393 (2007).

¹³⁵ *Id.* at 396-97. That led the majority to characterize the public parade as “a school-sanctioned” event. *Id.*

¹³⁶ 393 U.S. 503 (1969).

reasonably conclude it will “materially and substantially disrupt the work and discipline of the school,”¹³⁷ the Court ruled that “schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.”¹³⁸

When it comes to speech, the Court has established on more than one occasion that the First Amendment protects “not only informed and responsible criticism but the freedom to speak foolishly and without moderation,”¹³⁹ and “what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege,”¹⁴⁰ recognizing that “many things done with motives that are less than admirable are protected” forms of expression.¹⁴¹ Indeed, the appellate court for the Ninth Circuit had also ruled in favor of the student, holding that the expression involved did not give rise to a risk of substantial disruption.¹⁴² And although one interpretation of the message on Frederick’s banner could be the encouraging of illegal drug use, it would hardly meet the “susceptible of no reasonable interpretation other than” standard Chief Justice Roberts had articulated in *WRTL*.¹⁴³ The Chief Justice acknowledged as much: “The message on Frederick’s banner is cryptic. It is no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all. Frederick himself claimed ‘that the words were just nonsense meant to attract television cameras.’”¹⁴⁴

Writing in partial concurrence and partial dissent, Justice Breyer argued that the Court could have stopped at holding that qualified immunity protected the school official who suspended the student from the imposition of monetary damages – rather than going further to establish a precedent that potentially could “authorize further viewpoint-based restrictions.” In a decidedly modernist proposition, he asserted that “[l]egal principles must treat like instances alike” and questioned whether the *Morse* holding could justify punishment of messages concerning underage consumption of alcohol, the use of marijuana by glaucoma sufferers to relieve the pain, deprecating commentary on antidrug films or a banner that read “LEGALIZE BONG HiTS.”¹⁴⁵ In dissent, Justice Stevens, joined by Justices Souter and Ginsburg, cited the Chief Justice’s opinion in *WRTL* in arguing that “abundant precedent,” supports “the proposition that when the “First Amendment is implicated, the tie goes to the speaker,” rather than the “inventing out of whole cloth a special First Amendment rule

¹³⁷ *Id.* at 513.

¹³⁸ 551 U.S. at 397.

¹³⁹ *Baumgartner v. United States*, 322 U.S. 665, 674-75 (1944).

¹⁴⁰ *Cohen v. California*, 403 U.S. 15, 25 (1971).

¹⁴¹ *Hustler Magazine and Larry C. Flynt v. Jerry Falwell*, 485 U.S. 46, 53 (1988).

¹⁴² *Frederick v. Morse*, 439 F.3d 1114, 1118, 1121-23 (2006).

¹⁴³ 551 U.S. 393, 469-70 (2007).

¹⁴⁴ 551 U.S. 393, 401 (2007).

¹⁴⁵ *Id.* at 426-27 (Breyer, J., concurring in judgment in part and dissenting in part).

permitting the censorship of any student speech that mentions drugs, at least so long as someone could perceive that speech to contain a latent pro-drug message.”¹⁴⁶ Emphasizing how it had long been established that government punishment “for advocating illegal conduct is constitutional only when the advocacy is likely to provoke the harm that the government seeks to avoid” and that the “beliefs of third parties, reasonable or otherwise, have never dictated which messages amount to proscribable advocacy,” Justice Stephens highlighted the roisterous paradox in finding that “Frederick’s ridiculous sign,” whatever it might have meant, could be considered within “the vanishingly small category of speech that can be prohibited because of its feared consequences.”¹⁴⁷

VI. EXERCISING POWER THROUGH WORDS

An example of Feldman’s fourth theme of postmodernism, which focuses on the use of language as a technique for exercising power not necessarily through the soundness of reasoning but rather through institutional structure,¹⁴⁸ can be considered in *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*.¹⁴⁹ By that point, a year after *Citizens United*, it was not remarkable that a regulation seeking to influence the unrestrained flow of money into the electoral process found support from five justices. The new element in *Arizona Free Enterprise Club* was the arguably contrived use of language by the five-justice majority led again by Chief Justice Roberts that an Arizona public financing system “substantially burden[ed]” the protected political speech of wealthy candidates and independent-expenditure funds by providing matching public funds to their opponents.¹⁵⁰ The Chief Justice declared that imposing such a burden inhibited “debate on public issues [that] should be uninhibited, robust, and wide-open,”¹⁵¹ quoting one of the Court’s most famous lines from 1964’s *New York Times v. Sullivan*, a ruling that *itself* actually imposed the burden of proving actual malice on public officials in order to promote an uninhibited, robust, wide-open debate on public issues.¹⁵² Chief Justice Roberts declared that the campaign-finance

¹⁴⁶ 551 U.S. 393, 444-46 (2007) (Stevens, J., dissenting) (citing 551 U.S. 449, 474 (2007)).

¹⁴⁷ *Id.* at 436-38 (2007) (Stevens, J., dissenting) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447-48, 449 (1969)).

¹⁴⁸ See FELDMAN, *supra* note 8, at 40.

¹⁴⁹ 131 S. Ct. 2806 (2011).

¹⁵⁰ *Id.* at 2828-29.

¹⁵¹ *Id.* (quoting 376 U.S. 254, 270 (1964)).

¹⁵² See 376 U.S. at 279-80, holding that “constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’ – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”

regulation involved in *Arizona Free Enterprise Club* represented a burden that was unconstitutional under the First Amendment because of “the manner in which that funding is provided – in direct response to the political speech of privately financed candidates and independent expenditure groups.”¹⁵³

That reasoning could be contended as questionable most particularly in light of the fact that the regulation in question did not place any burden of restriction as traditionally understood on any speaker, but rather subsidized additional speech.¹⁵⁴ Writing for the four justices in dissenters, Justice Elena Kagan made the case for the difficulty of understanding that as a burden in terms of most understood definitions of the term: “The statute does not tell candidates or their supporters how much money they can spend to convey their message, when they can spend it, or what they can spend it on,” but rather by “enabling participating candidates to respond to their opponents’ expression, the statute expands public debate, in adherence to ‘our tradition that more speech, not less, is the governing rule. What the law does – all the law does – is fund more speech.”¹⁵⁵ She found the very notion that additional speech constitutes a ‘burden’ is odd and unsettling,” noting that “Arizona imposes nothing remotely resembling a coercive penalty on privately funded candidates. The State does not jail them, fine them, or subject them to any kind of lesser disability.”¹⁵⁶ Nevertheless, despite such argued flaws in the reasoning behind declaring such a matching-fund provision to be a burden, the language utilized in *Arizona Free Enterprise Club* can be read as illustrating the use of an effective technique for the exercise of power through the social structure represented by a majority of five justices.

VII. IDENTITY AS CONSTRUCTED THROUGH ORGANIZATIONAL SCHEME

Feldman’s fifth theme focuses on postmodernism’s emphasis on sense of self or identity as constructed through its placement in organizational schemes of society,¹⁵⁷ the manipulation of which can be understood as the central concern of the majority in *Gil Garcetti, et al. v. Richard Ceballos*.¹⁵⁸ In a ruling that arguably constructed the First Amendment identity of public employees so transformatively according to its placement in conceivably subjective organizational schemes that it potentially undermined constitutional protections well beyond the immediate scope of the case, a five-to-four majority held that such

¹⁵³ *Id.* at 2824.

¹⁵⁴ *Id.* at 2833 (Kagan, J., dissenting).

¹⁵⁵ *Id.* at 2833-34 (Kagan, J., dissenting) (quoting *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 361 (2010)).

¹⁵⁶ *Id.* at 2836 (Kagan, J., dissenting).

¹⁵⁷ See FELDMAN, *supra* note 8, at 40.

¹⁵⁸ 547 U.S. 410 (2006).

employees making statements “pursuant to their official duties” are not protected by the First Amendment from punitive actions by employers.¹⁵⁹

The case involved a deputy district attorney’s allegations of retaliatory actions by his employer relating to a memorandum he wrote recommending dismissal of a case that his supervisor decided nevertheless to prosecute.¹⁶⁰ Justice Anthony Kennedy’s majority opinion recognized immediately as “well settled” the understanding of a government employee’s First Amendment identity as one in which government cannot condition employment “on a basis that infringes the employee’s constitutionally protected interest in freedom of expression.”¹⁶¹ He asserted as central to the majority’s reasoning *Pickering v. Board of Education*,¹⁶² in which the Court had ruled a public school teacher’s letter to a newspaper was protected from punitive action by his employer,¹⁶³ declaring “the interest of the school administration in limiting teachers’ opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.”¹⁶⁴ Justice Kennedy summarized the relevant case law as establishing that government “has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity’s operations.”¹⁶⁵ That serves to balance between promoting “the individual and societal interests that are served when employees speak as citizens on matters of public concern” and respecting “the needs of government employers attempting to perform their important public functions.”¹⁶⁶

That all seemed to suggest a very well established understanding of the nature of a government employee’s constitutional identity in that particular organizational scheme. Yet the majority in the case held all that could be reconstructed so as to eliminate the constitutional protections “when public employees make statements pursuant to their official duties” — because in those instances employees “are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”¹⁶⁷ The majority found that allowing an exception for “statements made ... pursuant to official duties” to be “simply reflect[ing] the exercise of employer control over what the employer itself has commissioned or created,”¹⁶⁸ creating what arguably

¹⁵⁹ *Id.* at 421.

¹⁶⁰ *Id.* at 413-15.

¹⁶¹ *Id.* at 413 (citing *Connick v. Myers*, 461 U.S. 138, 142 (1983)).

¹⁶² 391 U.S. 563 (1968).

¹⁶³ *Id.* at 574-75.

¹⁶⁴ *Id.* at 573.

¹⁶⁵ 547 U.S. at 418.

¹⁶⁶ *Id.* at 413 (citing *Rankin v. McPherson*, 483 U.S. 378, 384 (1987)).

¹⁶⁷ *Id.* at 421.

¹⁶⁸ *Id.* at 422.

seemed to represent different senses of constitutional identity with different levels of accompanying protection based on such distinctions.

In dissent, Justice Stephens questioned the “notion that there is a categorical difference between speaking as a citizen and speaking in the course of one’s employment” as “quite wrong.”¹⁶⁹ Stephens called it “senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description.”¹⁷⁰ Also writing in dissent, Justice Souter articulated how potentially sweeping the majority’s new exception could be, warning that with government able to “freely penalize the school personnel officer for criticizing the principal because speech on the subject falls within the personnel officer’s job responsibilities,” it “may well try to limit the English teacher’s options by the simple expedient of defining teachers’ job responsibilities expansively, investing them with a general obligation to ensure sound administration of the school.”¹⁷¹ The power to so easily reconstruct a public employee’s constitutional identity to that extent, he said, could potentially “imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to ... official duties.’ ”¹⁷²

VIII. SELF-REFERENTIAL AND CONTINGENT PRACTICES

Feldman’s sixth theme dealt with the self-reflexive or self-referential nature of postmodernism as a form of self-production of practices that might otherwise cease to exist,¹⁷³ a theme that can be considered in the way the Roberts Court referenced its long held protections for offensive expression as justification for extending its very recent practice of protecting unlimited political spending. Indeed, in *McCutcheon v. Federal Election Commission*,¹⁷⁴ Chief Justice Roberts’ core summary of the basis for the holding of the five justices in the majority can be read as so remarkably self-referential that it arguably could not stand if its focus on the self-production of the Roberts Court — especially the self-production of the five-justice *McCutcheon* majority — were removed from that analysis.

In laying out the essential case law that he held forth as the basis for dismissing a nearly half-century-old limit on aggregate campaign

¹⁶⁹ *Id.* at 427 (Stephens, J., dissenting) (citing *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 414 (1979) in which a unanimous court rejected “the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly.”)).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 431.

¹⁷² *Id.* at 438.

¹⁷³ See FELDMAN, *supra* note 8, at 42.

¹⁷⁴ 134 S. Ct. 1434 (2014).

contributions by individuals in federal candidate elections as doing “little, if anything” in “combatting corruption” and “therefore invalid under the First Amendment,”¹⁷⁵ Chief Justice Roberts cited eight essential propositions.¹⁷⁶ Five of those eight were cited to Roberts Court rulings less than four years old — and four of those to rulings decided by the same five-justice majority as in *McCutcheon*.¹⁷⁷ The chief justice began by conceding that “[o]ur cases have held that Congress may regulate campaign contributions to protect against corruption or the appearance of corruption” was clearly established in 1976’s *Buckley v. Valeo*,¹⁷⁸ the cornerstone of the Court’s modern campaign-finance regulation cases. However, he countered next with the assertion that “we have made clear that Congress may not regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others,”¹⁷⁹ citing that proposition to the same majority’s five-to-four ruling less than three years before in *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*.¹⁸⁰

Building upon those two propositions, Chief Justice Roberts then declared, “Money in politics may at times seem repugnant to some,” but if “the First Amendment protects flag burning, funeral protests, and Nazi parades — despite the profound offense such spectacles cause — it surely protects political campaign speech despite popular opposition.”¹⁸¹ In support of equating restrictions on campaign contributions to such forms of profoundly offensive expression, he cited three cases, including the Roberts Courts’ 2011 *Snyder v. Phelps*.¹⁸² Further, the Chief Justice emphasized, the First Amendment “has its fullest and most urgent application precisely to the conduct of campaigns for political office.”¹⁸³ From there, in support of the proposition that “government regulation may not target the general gratitude a candidate may feel toward those who

¹⁷⁵ *Id.* at 1442.

¹⁷⁶ *Id.* at 1441.

¹⁷⁷ *Id.*

¹⁷⁸ 424 U.S. 1, 26-27 (1976).

¹⁷⁹ 134 S. Ct. at 1441.

¹⁸⁰ 131 S. Ct. 2806, 2827 (2011).

¹⁸¹ 134 S. Ct. at 1441.

¹⁸² 131 S. Ct. 1207 (2011) (affirming an appeals court reversal of a jury verdict of intentional infliction of emotional distress against picketers at a military funeral). In support of that proposition, Chief Justice Roberts also cited *Texas v. Johnson*, 491 U.S. 397 (1989) (affirming an appeals court reversal of a conviction for flag desecration) and *National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977) (reversing a state supreme court denial of a stay of an injunction blocking a march by the National Socialist Party of America in a community with a large population of Holocaust survivors).

¹⁸³ 134 S. Ct. at 1441 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971) (reversing a judgment by a state supreme court against a newspaper in a libel action brought by a political candidate).

support him or his allies, or the political access such support may afford,”¹⁸⁴ he quoted the four-year-old *Citizens United v. Federal Election Commission* — “Ingratiation and access ... are not corruption” — also decided by the same five-to-four majority.¹⁸⁵ He then also cited to *Citizens United* the proposition that any “regulation must instead target what we have called ‘quid pro quo’ corruption or its appearance.”¹⁸⁶

The Chief Justice then proceeded to advance the propositions that *quid pro quo* “captures the notion of a direct exchange of an official act for money,”¹⁸⁷ and that the “hallmark of corruption is the financial quid pro quo; dollars for political favors,”¹⁸⁸ by citing rulings that preceded the Roberts Court. He then concluded with the proposition that “[c]ampaign finance restrictions that pursue other objectives, *we have explained*, impermissibly inject the Government ‘into the debate over who should govern,’”¹⁸⁹ cited once more to the same five-to-four majority in *Arizona Free Enterprise Club*. That summary of the essentials of the rationale for the ruling then concluded with a brief description of the challenged regulation and the government’s argument that the regulation served the objective of combatting corruption, before declaring that the majority rejected that argument and thus the regulation was held to be invalid under the First Amendment.¹⁹⁰

What could well be read as a virtual textbook example of a modernist analysis — particularly in the context of asserting a foundationalist rationale grounded in a pre-Roberts Court body of case law — was put forth by Justice Breyer writing for the four dissenting justices. In his analysis, the majority had departed from a foundationalist understanding grounded in the firm, enduring meaning of *Buckley*. In that case, Justice Breyer asserted, “this Court considered the constitutionality of laws that imposed limits upon the overall amount a single person can contribute to all federal candidates, political parties, and committees taken together. The Court held that those limits did not violate the Constitution.”¹⁹¹ Justice Breyer cited as support for that proposition the Court’s “citing with approval” the aggregate limits holding of *Buckley* twenty-seven years later in *McConnell v. Federal Election Commission*.¹⁹² In his analysis, the “*Buckley* Court focused upon the same problem that concerns the Court today” and came to a foundational conclusion that had

¹⁸⁴ *Id.* at 1441.

¹⁸⁵ 558 U.S. 310, 360 (2010).

¹⁸⁶ 134 S. Ct. at 1441 (citing 558 U.S. at 359).

¹⁸⁷ *Id.* (citing *McCormick v. United States* 500 U.S. 257, 266 (1991)).

¹⁸⁸ *Id.* (citing *Federal Election Comm’n v. National Conservative Political Action Comm.*, 558 U.S. 470 U.S. 489 (1985)).

¹⁸⁹ *Id.* (citing and quoting 131 S. Ct. 2806, 2826 (2011)) (emphasis added).

¹⁹⁰ *Id.* at 1442.

¹⁹¹ *Id.* at 1465 (Breyer, J., dissenting) (citing 424 U.S. at 38).

¹⁹² *Id.* (citing 540 U.S. 93, 138, n. 40, 152-53, n. 48 (2003)).

not changed — the aggregate limit represented “quite modest restraint upon protected political activity” that is “no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid.”¹⁹³ For the dissent, that concise set of propositions and citations covered the subject, because they were all so clearly and fully grounded in the relevant foundation for understanding it. Therefore, it was impossible for the majority’s conclusion to be correct, because it “rests upon *its own, not a record-based, view* of the facts.”¹⁹⁴ And it must follow, “taken together with” *Citizens United*, that *McCutcheon* eviscerates our Nation’s campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve.”¹⁹⁵

IX. DISMISSING THREATS WITH IRONY

The Court can be seen as demonstrating a form of Feldman’s seventh thematic quality of postmodernism — the use of modernist tools or arguments as a form of irony in response to epistemological threats¹⁹⁶ — in *Brown v. Entertainment Merchants Association*.¹⁹⁷ In that ruling, a seven-to-two majority found unconstitutional a California law that restricted the sale or rental of violent video games to minors,¹⁹⁸ a case in which the makers of the games challenged¹⁹⁹ the state’s civil fines for selling or renting to minors such games based on a statutory description very close to the test established by the Supreme Court nearly four decades earlier for defining legal obscenity.²⁰⁰ For Justice Scalia in his majority opinion, the Court had “no business passing judgment on the view of the California Legislature that violent video games ... corrupt the young or harm their

¹⁹³ *Id.* (quoting 424 U.S. at 38).

¹⁹⁴ *Id.* (emphasis added).

¹⁹⁵ *Id.* (emphasis added).

¹⁹⁶ See FELDMAN, *supra* note 8, at 42.

¹⁹⁷ 131 S. Ct. 2729 (2011)

¹⁹⁸ *Id.* at 2742.

¹⁹⁹ *Id.* at 2733.

²⁰⁰ Games were restricted that involved “killing, maiming, dismembering, or sexually assaulting an image of a human being” when depicted in a manner that a “reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors,” that is “patently offensive to prevailing standards in the community as to what is suitable for minors,” and that “causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.” *Id.* at 2733 (quoting California Assembly Bill 1179 (2005)) See also *Miller v. California*, 413 U.S. 15, 24 (1973), defining obscenity as “conduct specifically defined by the applicable state law, as written or authoritatively construed” and also “limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”).

moral development,” but had only the task of declaring “whether or not such works constitute a ‘well-defined and narrowly limited’ ” class of speech, “the prevention and punishment of which have never been thought to raise any Constitutional problem.”²⁰¹ The Court has long “long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try,” Justice Scalia wrote, because such judgments are for “the individual to make” and as a general matter, “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”²⁰²

Conceding “[t]here are of course exceptions” such as obscenity, incitement, and fighting words, he pointed out that just the previous year in *United States v. Stevens*,²⁰³ the Court had declared “new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated” absent persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription.”²⁰⁴ For Justice Scalia, *Stevens* provided the holding that controlled the case before him, because as in *Stevens*, lawmakers had “tried to make violent-speech regulation look like obscenity regulation” but “[o]ur cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of ‘sexual conduct’ ”²⁰⁵ — citing the obscenity test from *Miller* but without acknowledging that it did not actually consider the question of violent speech as obscenity. Further, the law at stake in *Brown* “wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children,” which Justice Scalia pronounced “unprecedented and mistaken.”²⁰⁶

Irony can be read throughout the opinion. Quite arguably, for example, the student whom the Court ruled against in the *Morse* case could well have wondered at what would likely seem obviously significant to him though seemingly unknown to Justice Scalia: Had the Court in his case not created a category of content-based regulation — on messages by high school students that may be thought to promote drug use — that is permissible only for speech directed “at individuals young enough to justify governmental protection and largely within the under-age-seventeen category of the regulation in *Brown*? Justice Scalia in *Brown* also declared that “minors are entitled to a significant measure of First Amendment protection” and speech that is “neither obscene as to youths nor subject to

²⁰¹ *Id.* at 2741 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, (1942)).

²⁰² *Id.* at 2733.

²⁰³ 559 U.S. 460 (2010). The Court declared a federal law unconstitutional that sought to punish the commercial creation, sale, or possession of specified depictions of animal cruelty. *Id.* at 482.

²⁰⁴ 131 S. Ct. at 2733-34 (citing 559 U.S. at 472).

²⁰⁵ *Id.* at 2734 (citing 413 U.S. at 24).

²⁰⁶ *Id.* at 2735.

some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.”²⁰⁷ How ironic this too might understandably strike the banner bearer in *Morse*, given the suppression of his speech that was neither obscene nor subject to other proscription — until day the Court declared it unsuitable in ruling on his case.

Justice Breyer in his dissent pondered the irony of the reasoning in the majority’s determination to limit definitions of obscenity limited strictly to sexual matters, asking, “What kind of First Amendment would permit the government to protect children by restricting sales of that extremely violent video game only when the woman — bound, gagged, tortured, and killed — is also topless?”²⁰⁸ Justice Breyer would have upheld the regulation under strict scrutiny, finding it imposed “a restriction on speech that is modest at most,” was “justified by a compelling interest (supplementing parents’ efforts to prevent their children from purchasing potentially harmful violent, interactive material) and had “no equally effective, less restrictive alternative.”²⁰⁹

Justice Alito’s concurring opinion argued that the Court should have struck down the California law on grounds of vagueness, but should not have so broadly rejected restrictions on the threat represented by violence in new media such as video games. For Justice Alito, and Chief Justice Roberts in joining the dissent, the majority was in error to “jump to the conclusion” that “all those concerned about the effects of violent video games — federal and state legislators, educators, social scientists, and parents — are unduly fearful, for violent video games really present no serious problem.”²¹⁰ Further, while Justice Scalia compared playing the video games in question to reading Grimm’s Fairy Tales,²¹¹ Justice Alito highlighted how contrary to that casually innocuous characterization was his own epistemological approach to determining the truth of the content in question, providing a graphic examination of games actually on the market: “Victims by the dozens are killed with every imaginable implement, including machine guns, shotguns, clubs, hammers, axes, swords, and chainsaws. Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. They cry out in agony and beg for mercy. Blood gushes, splatters, and pools.”²¹² He further noted games in which “a player can ... reenact the killings carried out by the perpetrators of the murders at Columbine High School and Virginia Tech,” in which the objective is to rape a mother and her daughters,” “to rape

²⁰⁷ *Id.* at 2733-34 (citing *Erznoznik v. Jacksonville*, 422 U.S. 205, 212-213, 213-214 (1975)).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 2742 (Alito, J., concurring).

²¹¹ *Id.* at 2736.

²¹² *Id.* at 2749 (Alito, J., concurring).

Native American women,” to engage in “ethnic cleansing” by choosing to “gun down African-Americans, Latinos, or Jews,” or “attempt to fire a rifle shot into the head of President Kennedy as his motorcade passes by the Texas School Book Depository.”²¹³ Justice Alito’s epistemological approach for determining the nature of threat in question thus contrasted starkly with that of Justice Scalia, and concluded that it represented something more ominous than fairy tales.

X. THE POLITICAL AMBIVALENCE OF ANY MEANING AS GOOD AS ANOTHER

Finally, Feldman’s eighth theme focuses on the political ambivalence of postmodernism in which no one meaning is better or worse than any other,²¹⁴ a quality that can be considered in the manner in which the majority at the Court in 2012 dealt with whether the First Amendment protected false statements about military records. In *United States v. Xavier Alvarez*,²¹⁵ six justices joined in the judgment that a federal criminal statute under which a California man was prosecuted for lying at a public meeting about being a Congressional Medal of Honor recipient infringed protected speech, declaring that “one of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace.”²¹⁶ Five justices suggested enough ambivalence regarding that assertion, however, that they signaled they would support denying First Amendment protection for false statements of that kind.

Writing in concurrence with the judgment, Justices Breyer and Ginsburg declared they would have applied less rigorous intermediate scrutiny to the statute in question, “because the government often has good reasons to prohibit such false speech”²¹⁷ and should be allowed to enact “a more finely tailored statute” that could survive such intermediate scrutiny and “significantly reduce the threat of First Amendment harm while permitting the statute to achieve its important protective objective.”²¹⁸ And writing in dissent for himself and justices Scalia and Thomas, Justice Alito made clear they would have upheld the constitutionality of the statute as “a narrow law enacted to address an important problem” and which “presents no threat to freedom of expression.”²¹⁹ That meant that five justices went on record as supporting the denial of First Amendment protection for such falsity on a standard of something less than strict scrutiny — in a case that contradictorily did not in fact establish that.

²¹³ *Id.* at 2749-50 (Alito, J., concurring).

²¹⁴ See FELDMAN, *supra* note 8, at 42.

²¹⁵ 132 S. Ct. 2537 (2012).

²¹⁶ *Id.* at 2551.

²¹⁷ *Id.* at 2552 (Breyer, J., concurring).

²¹⁸ *Id.* at 2556 (Breyer, J., concurring).

²¹⁹ *Id.* at 2565 (Alito, J., dissenting).

In the plurality opinion, Justice Kennedy applied strict scrutiny to the statute, articulating the established standard that “[w]hen content-based speech regulation is in question ... exacting scrutiny is required” because statutes “suppressing or restricting speech must be judged by the sometimes inconvenient principles of the First Amendment. By this measure, the statutory provisions under which respondent was convicted must be held invalid, and his conviction must be set aside.”²²⁰ He affirmed that it was “uncontested that this is a legitimate Government objective, indeed a most valued national aspiration and purpose.”²²¹ Justice Kennedy declared “[a]bsent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements,” which “comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.”²²² He noted that the Court had “not confronted a measure,” like the statute before it “that targets falsity and nothing more,” maintaining that all previous such cases addressed “defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation.”²²³

Justice Kennedy warned of the greater dangers of criminalizing false speech with such justifications. “Permitting the government to decree” expression such as false statements about one’s military record “to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable,” he contended.²²⁴ Further, the “facts of this case indicate “that the dynamics of free speech, of counterspeech, of refutation, can overcome the lie.”²²⁵ “The remedy for speech that is false is speech that is true. This is the ordinary course in a free society,” Justice Kennedy declared, because the “American people do not need the assistance of a government prosecution to express their high

²²⁰ *Id.* at 2543.

²²¹ *Id.*

²²² *Id.* at 2544 (citing 376 U.S. 254, 271 (1964)).

²²³ *Id.* at 2545. He pointed to examples of constitutionally consistent laws such as those that made criminal false statements to government officials did not “establish a principle that all proscriptions of false statements are exempt from exacting First Amendment scrutiny,” that perjury is not punishable simply because it lacks First Amendment protection but because it “undermines the function and province of the law and threatens the integrity of judgments that are the basis of the legal system.” *Id.* at 2546-46.

²²⁴ *Id.* at 2547.

²²⁵ *Id.* at 2549-50. Justice Kennedy observed that after the individual charged in *Alvarez* made his false statements about his military record, “he was ridiculed online” and “his actions were reported in the press,” and there is good reason to believe a similar fate would befall other false claimants.” *Id.* at 2549.

regard for the special place that military heroes hold in our tradition. ... Truth needs neither handcuffs nor a badge for its vindication.²²⁶

Those actual meaning that would seem to be suggested by those stirringly articulated principles did not, however, win a majority at the Court for more than the judgment. While Justice Breyer's concurrence found that the statute as written would have been declared unconstitutional even under his application of intermediate scrutiny, he argued for the less restrictive standard as the appropriate one in reviewing other such statutes so as to make it "possible substantially to achieve the Government's objective in less burdensome ways."²²⁷ He observed that while "many statutes and common-law doctrines make the utterance of certain kinds of false statements unlawful," such as fraud, defamation, perjury, lying to a government official under oath, or false statements about crimes or catastrophes, "[t]hose prohibitions ... tend to be narrower than the statute before us, in that they limit the scope of their application"²²⁸

For Justice Alito, however, while "[n]either of the two opinions endorsed by Justices in the majority claims that the false statements" in question "possess either intrinsic or instrumental value,"²²⁹ it is very much the case that individuals "often falsely represent themselves as award recipients in order to obtain financial or other material rewards, such as lucrative contracts and government benefits."²³⁰ He declared that by holding the First Amendment "nevertheless shields these lies, the Court breaks sharply from a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest."²³¹ Thus, five justices went on the record as willing to support broader exceptions for the government to face less than strict scrutiny concerning false statements. It raises at least the hypothetical question of whether lower courts henceforth might well recognize that as a *de facto* majority in *Alvarez* that did not form in the actual judgment — as some lower courts have done with the *Branzburg v. Hayes*²³² case — for speech lacking the "intrinsic or instrumental value"

²²⁶ *Id.* at 2550-51.

²²⁷ *Id.* at 2556 (Breyer, J., concurring).

²²⁸ *Id.* at 2553-54 (Breyer, J., concurring).

²²⁹ *Id.* at 2564 (Alito, J., dissenting).

²³⁰ *Id.* at 2559 (Alito, J., dissenting).

²³¹ *Id.* at 2557 (Alito, J., dissenting).

²³² 408 U.S. 665 (1972) In *Branzburg*, Justice Lewis F. Powell's concurrence expressed support for a limited reporter's privilege to protect anonymous sources that the four dissenting justices backed. 408 U.S. 665, 709-710 (1972) (Powell, J., concurring). It provided a basis that some lower courts have relied upon since then, based on the stated opinions of those five justices, for preserving under certain circumstances just such a reporter's privilege as the case's majority in fact flatly rejected. See, e.g., Michelle Bush Kimball, *The Intent Behind the Cryptic Concurrence That Provided a Reporter's Privilege*, 13 COMM. LAW & POL'Y 379 (2008).

that five justices found absent in speech they would, by different means, allow government to punish. If so, it could be read as quite postmodernist in terms of Feldman's eighth theme — a ruling of such potential doctrinal ambivalence that for lower courts one meaning might well be just as good as another.

XI. CONCLUSIONS

As the analysis above indicates, interpreting First Amendment rulings of the Roberts Court in such postmodernist terms can provide a basis for dismantling the rationales — or metanarratives — asserted in support of those rulings. Considered strictly within that context, it is possible to suggest support for the validity of postmodernism's objective to demonstrate contradictions that undermine the explanatory power of grand narratives such as those that propose doctrinal coherence that may not actually be justified. And within that context, the Roberts Court's body of First Amendment jurisprudence further can be read as offering support for the postmodernist assertion that efforts to articulate linear, explanatory narratives are "disintegrating, losing their validity and legitimacy and increasingly prone to criticism," as well as the the assertion that it is becoming ever more "difficult for people to organize and interpret their lives" based on such metanarratives.²³³

However, when considered *beyond* the artificial boundaries of that theoretical context, what do such findings mean — and do they really even matter in practical terms?

Arguably not. In practical terms anyway. Feldman's proposed framework for identifying evidence of postmodernist motifs and the broader rationale for considering the relevance of postmodernist theory in this analysis offers consistent demonstrations of the "fractures and silences"²³⁴ that postmodernism argues discredit such narratives as may be represented by the First Amendment jurisprudence of the Roberts Court. And this study found reason to assert regarding the Roberts Court — as did Feldman's regarding the Rehnquist Court before it — that it "parse[s] the supposedly precise meanings of various case precedents" and "weave[s] elaborate webs of rationally consistent legal propositions" to advance legal arguments that justifiably could be characterized instead as simply "tattered remnants of ... modernist beliefs" and a "brand of postmodern jurisprudence."²³⁵ Yet in considering such assessments of those courts, it inevitably raises the question of whether the "fractures and silences" highlighted by such postmodernist analysis, as well as the profusion of dissents and challenging concurrences involved, might also be found just as commonly in the bodies of jurisprudence of earlier Courts.

²³³ See STRINATI, *supra* note 10, at 209.

²³⁴ See MALPAS, *supra* note 56, at 131.

²³⁵ See FELDMAN, *supra* note 8, at 186.

In considering the implications of his assessment of the Rehnquist Court, Feldman observed that “from the Supreme Court’s vantage ... postmodernism might look precisely like a license for unconstrained textual interpretation.”²³⁶ For even if justices should be aware that postmodernist analysis shows “their judicial decisions cannot be objectively grounded on firm foundations, yet they still must decide the cases.”²³⁷ Ultimately, that is, the justices “must, therefore, autocratically pronounce the law” and even if they “might be playing with the judicial pieces in a postmodern fashion ... they will continue to act, in many instances, as if they were discovering objectively based rules of law or even deducing uncontroversial conclusions from eternal principles.”²³⁸ Even, for example, in the much questioned (here and elsewhere) *Citizens United* ruling, Justice Kennedy insisted on the first page of his majority opinion that the five justices in the majority were faithfully applying “ancient First Amendment principles.”²³⁹

In an earlier application of postmodernist analysis to the work of another body of professionals determined similarly to just get a challenging job done, Frank Durham in 1998 highlighted the way journalists failed repeatedly to produce a valid explanation concerning the cause of the crash of TWA Flight 800 two years earlier.²⁴⁰ Durham asserted the fallibility of the reporters assumption that “the cause of the crash should have been knowable” as an effort to exclude the dominance of “postmodern chaos” and “reproduce the fragile ideological framework of modernity.”²⁴¹ He proposed that “given the lack of actual empirical data defining the cause of the crash, the more interesting story would have been a critique of the postmodern politics of official meaning-making.”²⁴² Adopting such an approach would mean that “[n]ews stories would be more complicated, and multiple explanations would replace the streamlined empiricism of modern journalism” and ultimately tell readers more than the latter.²⁴³

To that notion, most journalists likely would respond with some version of what Feldman hypothesized as a defense for Supreme Court justices who maintain modernist poses in the face of postmodernist challenges: “Unlike their estranged associates in legal academe, the justices cannot celebrate the undecidability of textual meaning because, as the

²³⁶ *Id.* at 195.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ 558 U.S. 310, 318 (quoting *Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 490 (Scalia, J., concurring in part and concurring in judgment)).

²⁴⁰ See Frank D. Durham, *News Frames as Social Narratives*, 48 J. OF COMM. 100, 114 (1998).

²⁴¹ *Id.*

²⁴² *Id.* at 115.

²⁴³ *Id.*

justices might sneer, they are just too busy deciding real cases.”²⁴⁴ So in that vein, postmodernist analyses of Supreme Court jurisprudence may be limited in what they offer for legal practitioners. However, analyses such as this study of the Roberts Court’s body of First Amendment work can at least be read as a cautionary tale for scholars who would seek to organize and interpret with linear clarity and consistency that body of jurisprudence. Scholars must consider that rather than articulating reliable thematic principles established by the “grand narrative”²⁴⁵ of that body of jurisprudence, it may be possible to go no further than identifying and scrutinizing its fractures and silences in quest of “more contingent and probabilistic claims to the truth.”²⁴⁶

Such an approach indeed is unlikely to provide the more orderly and practically useful results of modernist legal analysis, but in terms of predictive longevity, it may prove a more accurate guide. Because if Chief Justice Roberts is correct that “spirited dissents” indeed undermine a precedent’s “ability to contribute to the stable and orderly development of the law,”²⁴⁷ this analysis suggests that First Amendment law at the High Court — whether considered in postmodernist, modernist, or other terms — is in for a period of anything but stable and orderly development.

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²⁴⁴ See FELDMAN, *supra* note 8, at 195.

²⁴⁵ See MALPAS, *supra* note 56, at 131.

²⁴⁶ See STRINATI, *supra* note 10, at 209.

²⁴⁷ 494 U.S. at 379 (Roberts, C.J., concurring).

ROBERTS'S RULES OF ORDER: A HERMENEUTICAL ANALYSIS OF HOW THE CHIEF JUSTICE INTERPRETS MEANING IN FREEDOM OF SPEECH CASES

JARED SCHROEDER*

John Roberts was the second youngest chief justice of the United States when he took the oath of office in 2005. Only eight years into what is expected to be a lengthy tenure, Chief Justice Roberts has already left his mark on freedom of speech law. This article employs philosophical hermeneutics to examine how Chief Justice Roberts interprets meaning, especially as it applies to apprehending the future trajectory of free speech. The result, after examining four key freedom-of-speech decisions by the Roberts Court, is a set of what might be thought of as "Roberts's rules of order" in terms of the focus of this study. The analysis suggests Roberts is rigidly objective in his interpretation. His rules require messages be respectful of local authorities, be orderly, and be delivered in a traditional format. Roberts makes it a point to tie his opinions to precedent, but precedent does not appear, generally, to be a deciding factor in his decision-making process. Overall, these characteristics indicate individual ideological motivations, rather than institutional forces, form the basis for his interpretations.

Key Words: Roberts, Supreme Court, Hermeneutics, Freedom of Speech, Interpretation.

I. INTRODUCTION

In his relatively short time on the Supreme Court, Chief Justice John Roberts has already left a substantial mark on freedom of speech in the United States. From his favoring a school principal's right to quash a student's non-violent message in *Morse v. Frederick*¹ to his argument for unabridged corporate political speech in *Citizens United v. Federal*

¹ 551 U.S. 393 (2007).

*Election Commission*² three years later, and in several other cases,³ Chief Justice Roberts's has conveyed substantial understandings in his writings for the Supreme Court regarding his conceptualization of freedom of speech. And, at 58 years old, he remains the Court's second youngest justice (only Justice Elena Kagan is younger at 53 years old). As the *New York Times* asserted on Roberts's biography page, the chief justice is "settling in for what is likely to be a very long tenure at the head of a court that seems to be entering a period of stability."⁴

Law reviews, communication journals, and newspaper editorial pages have not lacked for commentary regarding the seventeenth chief justice of the United States. What the discussion has lacked is a broader philosophical examination of how Chief Justice Roberts understands freedom of speech. This analysis brings hermeneutical philosophy, the study of how people understand and interpret meaning⁵ into the discussion regarding the trajectory of freedom of speech during the Roberts Court era. As Richard Palmer, who has studied this area of philosophy extensively, contended, hermeneutics is "a term at once unfamiliar to most educated people and at the same time potentially significant to a number of disciplines concerned with interpretation, especially text interpretation."⁶

This analysis taps into the unique capacity of hermeneutics, the philosophy of *how we understand*, to help us understand how Chief Justice Roberts conceptualizes freedom of speech. To that end, two sets of information are considered. The first involves concepts that were put forth by Chief Justice Roberts during his time as a lawyer and circuit judge and statements he utilized to characterize the role of Supreme Court justices during his confirmation hearings in 2005. The second part analyzes his opinions from four of the principle freedom-of-speech cases the Court has heard during his tenure: *Morse*,⁷ *Citizens United*,⁸ *United States v. Stevens*,⁹ and *Snyder v. Phelps*.¹⁰ The four cases utilized were selected from the cases in which Chief Justice Roberts has written the opinion of the Court or a dissenting or concurring opinion regarding a freedom-of-speech

² 130 S. Ct. 876 (2010).

³ See, e.g., *Snyder v. Phelps*, 131 S. Ct. 1207 (2011); *United States v. Stevens*, 559 U.S. 460 (2010); and *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449 (2007).

⁴ *John G. Roberts Jr.*, N.Y. TIMES, July 26, 2010, http://topics.nytimes.com/top/reference/timestopics/people/r/john_g_jr_roberts/index.html.

⁵ RICHARD E. PALMER, HERMENEUTICS: INTERPRETATION THEORY IN SCHLEIERMACHER, DILTHEY, HEIDEGGER, AND GADAMER 8 (1969).

⁶ *Id.* at xiii.

⁷ 551 U.S. 393 (2007).

⁸ 130 S. Ct. 876 (2010).

⁹ 130 S. Ct. 1577 (2010).

¹⁰ 131 S. Ct. 1207 (2011).

issue.¹¹ From the list, these four cases represented the most significant rulings in which Chief Justice Roberts authored opinions.

The analysis does not so much focus on the outcomes of the cases as it centers on Chief Justice Roberts. How does he interpret meaning and how does his way of understanding influence how he conceptualizes freedom of speech? Utilizing the line of hermeneutical philosophy built by Martin Heidegger, Hans-Georg Gadamer, and Paul Ricoeur, this analysis first outlines the foundational ideas behind hermeneutics, including the possibility of objective truth, the unique historicity of man and how this affects his worldview, and the hermeneutic spiral. With these concepts outlined, statements made within Chief Justice Roberts's writings and statements from before he joined the Court are considered and the four opinions are analyzed. Finally, what emerges through the process of this study are what might be thought of as "Roberts's rules of judicial order." Within the final analysis, the way Chief Justice Roberts interprets meaning is discussed as it was revealed through the central understandings that were identified through analyzing the cases through the hermeneutical lens, with support from information from his statements and writings from before he joined the Supreme Court.

II. THE LENSES WE USE

The word "hermeneutics" is derived from Hermes, the messenger god in Greek mythology.¹² Hermes was related to translating information that was not understandable to humans into something that could be apprehended.¹³ Or, as Friedrich Nietzsche wrote, making it so "something strange [could] be reduced to something familiar."¹⁴ The word "hermeneutics" is rooted in "hermeneuein," a verb that means "to interpret" and "hermenia," a noun that means "interpretation."¹⁵ Hermeneutics, defined in its most parsimonious form, is the study of

¹¹ To be reasonably certain that all of the relevant cases were identified, a keyword search was conducted using LexisNexis Academic. The search terms utilized were "First Amendment" and "Speech" and the inquiry was limited to cases decided after September 29, 2005, the date Chief Justice Roberts took office. Of the sixty-three cases found, cases that referred to freedom of speech only in passing or did not include any opinions by Chief Justice Roberts were eliminated. This process left only eleven cases at the time of this writing, from which the four cases used in this analysis were drawn.

¹² Donald H. J. Hermann, *Phenomenology, Structuralism, Hermeneutics, and Legal Study: Applications of Contemporary Continental Thought to Legal Phenomena*, 36 U. MIAMI L. REV. 379, 401-402 (1982).

¹³ PALMER, *supra* note 5, at 13.

¹⁴ FRIEDRICH NIETZSCHE, *THE GAY SCIENCE* 300 (Walter Kaufmann, trans., Vintage Books 1974).

¹⁵ PALMER, *supra* note 5, at 12.

understanding.¹⁶ Perhaps Ricoeur improved this short definition when he defined hermeneutics as the pursuit of understanding in “relation to the comprehension of texts.”¹⁷ The long tradition of philosophy regarding how understanding is achieved can be applied to the work of judges. The duties of justices include, in a primary sense, interpreting laws, statutes, and, for the Supreme Court, the Constitution. Justices also interpret precedent-setting opinions, amicus briefs, and other documents as part of their duties. To judge is to interpret and to interpret is to entangle oneself, knowingly or unknowingly, in hermeneutics.

Before moving into a fuller definition of hermeneutics, it is important to note that other legal analyses have found success in applying hermeneutics to law. Media law scholar Donna Dickerson employed Ricoeur’s philosophy to a study of the Supreme Court’s use of metaphors in freedom of expression cases.¹⁸ International human rights scholar Ida Elisabeth Koch utilized hermeneutics as a lens through which to explore social, cultural, and economic rights in Europe.¹⁹ Legal scholar Donald Hermann examined the potential uses of hermeneutics in legal research.²⁰ Overall, however, hermeneutics finds itself commonly cited but rarely explored in its vast depth and fullness.²¹ Often it is ancillary to the broader goals of law articles. This article, however, focuses the hermeneutic lens on examining how Chief Justice Roberts understands freedom of speech by analyzing the meanings he conveyed within the texts of four pivotal First Amendment cases. To accomplish this goal, this section discusses two fundamental parts of hermeneutics: the subjectivity of the interpreter and the spirals and horizons that limit understanding. Both are vital to understanding Roberts’s rules of judicial order.

A. Spirals and Horizons.

¹⁶ *Id.* at 8.

¹⁷ PAUL RICOEUR, *HERMENEUTICS & THE HUMAN SCIENCES: ESSAYS ON LANGUAGE, ACTION, AND INTERPRETATION* 43 (John B. Thompson, trans., Cambridge University Press 1981).

¹⁸ Donna L. Dickerson, *Freedom of Expression and Cultural Meaning: An Analysis of Metaphors in Selected Supreme Court Texts*, 1 *COMM. L. & POL’Y* 367 (1996).

¹⁹ Ida Elisabeth Koch, *Economic, Social, and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective*, 10 *THE INT’L J. OF HUMAN RIGHTS*, 405 (2006).

²⁰ Hermann, *supra* note 12, at 398-405.

²¹ See generally Colin Starger, *Response Metaphor and Meaning in Trawling for Herring*, 111 *COLUM. L. REV. SIDEBAR* 109 (2011); Michael R. Siebecker, *Building a “New Institutional” Approach to Corporate Speech*, 59 *ALA. L. REV.* 247 (2008); Donald L. Drakeman, *Everson v. Board of Education and the Quest for the Historical Establishment Clause*, 49 *AM. J. LEGAL HIST.* 119 (2007).

Broadly, hermeneutics posits that man cannot escape history. Gadamer explained “history does not belong to us; we belong to it. Long before we understand ourselves through the process of self-examination, we understand ourselves in a self-evident way in the family, society, and state in which we live.”²² Therefore, the interpreter cannot escape the impressions left upon him by his experiences.²³ To explain this concept, philosophers have employed the metaphors of horizons and circles.

The concept of a hermeneutic circle occupies a significant role in interpreting texts. The hermeneutic circle represents the absence of a true starting point for understanding a text. Because man cannot set out in the act of interpretation with a clean, objective slate, his work is in progress before he begins. His personal history and experiences inform the interpretation before he sets out to interpret.²⁴ Every part of understanding presupposes the existence of the others.²⁵ To this end, a circle lacks a beginning or an end. So any dialogue between a text and an interpreter starts in the middle of a circuitous conversation. The circle also represents the dialogical operation that occurs between the interpreter and the text.²⁶ In that sense, this article, however, utilizes the word “spiral” instead of “circle.” A circle connotes that the interpreter never makes progress but simply circles the same territory. A spiral better explains the dialogical interplay between the text and the interpreter as progress is made toward understanding.²⁷ The heart of the hermeneutic spiral metaphor is based on the concept that understanding is a referential process.²⁸ The spiraling cycle includes two levels of inquiry: the inter-textual process of expanding one’s horizons to encompass a text and the extra-textual process of bringing one’s own experiences and history into the interpretation process. In both cases, the process is dialogical. Palmer wrote that “we understand something by comparing it to something we know.”²⁹ We understand at first a part of a text by comparing it to other parts of the text. The process of understanding small parts helps to create an understanding of the text as a whole. The process also works in the opposite direction. The meaning of a text helps us understand the meaning of a sentence or the usage of a word.³⁰ The whole and the parts of the text give each other meaning through a dialogical interaction. Palmer wrote that “because within this

²² HANS-GEORG GADAMER, *TRUTH AND METHOD* 278 (Joel Weinsheimer and Donald G. Marshall, trans., Continuum 2nd ed. 2006) (1975).

²³ PALMER, *supra* note 5, at 116-117; RICOEUR, *supra* note 17, at 55.

²⁴ RICOEUR, *supra* note 17, at 55.

²⁵ PALMER, *supra* note 5, at 121.

²⁶ *Id.* at 87.

²⁷ GRANT R. OSBORNE, *THE HERMENEUTIC SPIRAL: A COMPREHENSIVE INTRODUCTION OF BIBLICAL INTERPRETATION* 6 (1991).

²⁸ PALMER, *supra* note 5, at 87.

²⁹ *Id.* at 87.

³⁰ *Id.*

‘circle’ the meaning comes to stand, we call this the ‘hermeneutical circle.’”³¹ Palmer called this portion of the spiral the linguistic level.³²

The second level involves a concurrent process that addresses the dialogical interaction of shared knowledge between the interpreter and the text. The interpreter’s knowledge and history can be viewed as a circle that extends to certain horizons. Much as man can only see so far when he looks out upon a landscape, so are the limits, or horizons, of knowledge. At the same time, the issue being interpreted encompasses certain horizons of its own. Some limited overlap between the horizons of the interpreter and the issue must exist for understanding to emerge.³³ The interpreter must stretch his or her knowledge to expand the horizon to overlap with the issue’s horizon. Palmer understood this interaction as a form of contradiction. The reader must already know what is to be understood. It is in this that the role of preunderstanding emerges. Modern hermeneutics philosophy not only accepts presuppositions as inevitable to an extent, but also requires them for the dialogue between the text and the interpreter to begin.³⁴ The preunderstandings an interpreter brings to the text change according to his situation in time and place.³⁵ A person from 17th century Europe, for example, will have a different preunderstanding of the word “terror” than a 21st century person from Western culture. Gadamer explained the role of prejudices as being far more powerful than that of judgment.³⁶

The concept of prejudice plays a significant role both in this and the ensuing discussion of objectivity in interpretation. Gadamer argued prejudices are not automatically problematic. Some prejudices are legitimate.³⁷ While preunderstanding is required, it should not be arbitrary or immovable. Gadamer explained a person’s “fore-meanings” should be examined regarding their legitimacy before the text is approached.³⁸ Preunderstandings should also be replaced by more accurate understandings as the dialogical process continues.³⁹ Firmly set preunderstandings impede the interpretive process. In this sense, hermeneutics must be a way of questioning things to which the interpreter sincerely seeks answers. Gadamer wrote that “a person trying to understand something will not resign himself from the start to relying on his own accidental fore-meanings, ignoring as consistently and stubbornly

³¹ *Id.*

³² *Id.* at 88.

³³ *Id.*

³⁴ RICOEUR, *supra* note 17, at 54-55.

³⁵ PALMER, *supra* note 5, at 119-120.

³⁶ GADAMER, *supra* note 22, at 278.

³⁷ *Id.*

³⁸ *Id.* at 270.

³⁹ *Id.*

as possible the actual meaning of the text.”⁴⁰ Inflexible preunderstandings retard the ability of the interpreter’s horizon to expand to meet the world of the text.

B. The Myth of Objectivity

The very heart of the hermeneutical debate during the twentieth century revolved around the matter of objectivity in interpretation. The subjective-objective knowledge argument is also fundamental to this paper. In exploring Roberts’s rules of judicial order, the subjective-objective argument must be explored. German philosopher Wilhelm Dilthey sought, unsuccessfully, to employ hermeneutics to create an objective set of methods for understanding in the human sciences.⁴¹ Later, Emilio Betti argued the subjective path Heidegger and Gadamer took regarding understanding made hermeneutics “a standardless morass of relativity.”⁴² The Heidegger-Gadamer-Ricoeur line of philosophical hermeneutics has largely quieted the arguments of the positivists. Gadamer, in refuting Betti, contended that “to speak of ‘objectively valid interpretations’ is naïve.”⁴³ To Gadamer, objectivity could not be achieved because it required the interpreter be capable of rising up and outside of the line of history that he himself was and continued to be a part of. This is the fundamental argument for the impossibility of objective interpretation. Man exists within the hermeneutic circle. He cannot leave that circle. The interpreter cannot step outside of his own experiences, traditions, and language and objectively view the world.⁴⁴

1. Separating truth and method

Heidegger sought to find ways to help us identify presuppositions, and therefore understand them. In this sense, Heidegger unveiled a key hermeneutic principle. He found interpretation is never without presuppositions.⁴⁵ He explained that “This ‘presupposing’ of Being has rather the character of taking a look at it beforehand, so that in the light of it the entities presented to us get provisionally Articulated in their Being.”⁴⁶ Thus, to Heidegger, the presuppositions color the nature of how we understand what we encounter. Furthermore, Palmer wrote that “what appears from the ‘object’ is what one allows to appear and what the thematization of the world at work in his understanding brings to light. It is

⁴⁰ *Id.* at 271.

⁴¹ RICOEUR, *supra* note 17, at 53.

⁴² PALMER, *supra* note 5, at 48.

⁴³ *Id.* at 46.

⁴⁴ PALMER, *supra* note 5, at 177-178; GADAMER, *supra* note 22, at 452.

⁴⁵ PALMER, *supra* note 5, at 136.

⁴⁶ MARTIN HEIDEGGER, BEING AND TIME 26-27 (1962).

naïve to assume what is ‘really there’ is ‘self-evident.’”⁴⁷ In this sense, even what is called an objective, methodological approach is filled with presuppositions. The presuppositions are merely unnoticed or ignored. Nietzsche wrote that “one hears only those questions for which one is able to find answers.”⁴⁸ Those in the natural sciences study objects and as a result have a series of methods for understanding them. Those who study works or texts require a different and more properly suited approach. Human expressions cannot be studied in the same ways as rocks and trees.⁴⁹ The fundamental point of Gadamer’s masterwork *Truth and Method* is that truth and method are separate. Method does not necessarily reveal truth. Palmer, in discussing Gadamer, wrote that “strictly speaking, method is incapable of revealing new truth; it only renders explicit the kind of truth already implicit in the method.”⁵⁰ The humanness of being makes it impossible for natural science methods and objectivity to answer questions regarding human behavior.

2. *The limits of the circle*

A text and an interpreter each bring with them separate horizons. Since the interpreter views the world from his horizon, which is informed by traditions passed down to him and his own experiences, he cannot bring an objective perspective to understanding.⁵¹ Palmer wrote, “We understand by constant reference to our own experience.”⁵² And to what Palmer called experience, we can also add time or place in history. He wrote that “finite, historical man always sees and understands from his standpoint in time and place.”⁵³ Palmer defined historicity as meaning “we understand the present really only in the horizon of past and future; this is not a matter of conscious effort but is built into the structure of experience itself.”⁵⁴ We cannot help but refer to the present in explaining the past.⁵⁵ Recognition of the role of man’s individual experiences, his past, traditions, and how he connects them to the present is a fundamental part of Gadamer’s philosophical hermeneutics.⁵⁶ He asserted that we often do not recognize that we project much of ourselves, a formation of our traditions, language, and experiences, on to the text or object we are interpreting. Gadamer explained that this lack of awareness of man’s unique historical

⁴⁷ PALMER, *supra* note 5, at 136. See also HEIDEGGER, *supra* note 46, at 27.

⁴⁸ NIETZSCHE, *supra* note 14, at 206.

⁴⁹ PALMER, *supra* note 5, at 8.

⁵⁰ *Id.* at 165.

⁵¹ *Id.* at 121.

⁵² *Id.*

⁵³ *Id.* at 178.

⁵⁴ *Id.* at 111.

⁵⁵ *Id.* at 176.

⁵⁶ GADAMER, *supra* note 22, at 300.

consciousness often leads to little separation existing between ourselves and the text being interpreted.⁵⁷ In other words, we project so much meaning on the text that we merely see what we expect to or want to see.

So how is any interpretation possible? While objective historical understanding cannot be attained, historical knowledge can be broadened, to some extent, to inform an interpreter's understanding of a text. Ricoeur explained that our horizons can be enlarged and the distance between the interpreter and the text can be closed by a fusion of the two horizons.⁵⁸ Ricoeur posited that the limitations of knowledge and the shackles of the interpreter's view from his time and place in history can be mediated through exposure to the text and allowing the text to open our horizons. He argued this was the best way to understand the text's world.⁵⁹

The preceding sections have sought, as briefly as possible, to establish the key concepts of hermeneutics as they apply to this article. There is certainly much more that can be said, especially in regard to how to interpret texts. The goal, however, has been to establish the concepts regarding the impossibility of objective interpretation and the unique historicity of man. The hermeneutic spiral essentially limits the interpreter to the unique horizons of his or her understandings and experiences. Having outlined the preceding fundamental concepts of hermeneutics, this article next examines relevant statements and writings made by Chief Justice Roberts before he joined the Supreme Court.

III. FACTS AND LOGIC: ROBERTS'S PRE-SUPREME COURT LEGAL STATEMENTS

In 2005, Roberts became the youngest chief justice of the United States in more than two hundred years.⁶⁰ Only Chief Justice John Marshall, who was forty-five years old in 1801, was younger.⁶¹ Part of understanding Chief Justice Roberts's rules of judicial order requires considering how he characterizes, in his words, his judicial philosophy and, in a hermeneutical sense, the unique philosophical horizons that radiate from his judicial experiences before joining the Supreme Court.⁶²

Chief Justice Roberts was a law clerk for Judge Henry Friendly of the U.S. Court of Appeals for the Second Circuit from 1979 to 1980 before clerking for then-Associate Justice William Rehnquist on the Supreme

⁵⁷ *Id.*

⁵⁸ RICOEUR, *supra* note 17, at 62.

⁵⁹ *Id.* at 143.

⁶⁰ LISA TUCKER MCELROY, JOHN G. ROBERTS, JR.: CHIEF JUSTICE 34 (2007).

⁶¹ *John G. Roberts, Jr.*, OYEZ: U.S. SUPREME COURT MEDIA, www.oyez.org/justices/john_g_roberts_jr (last visited June 6, 2014).

⁶² GADAMER, *supra* note 22, at 300; NIETZSCHE, *supra* note 14, at 290.

Court.⁶³ As a clerk for Justice Rehnquist, Chief Justice Roberts was responsible for a set of cases during each term.⁶⁴ The responsibilities included extended legal discussions with Justice Rehnquist regarding the Court's or the justice's own reasoning regarding a case and writing the first drafts of opinions for Justice Rehnquist. In a hermeneutical sense, such personal experiences with then-Associate Justice Rehnquist could be understood as uniquely influencing the horizons of how Chief Justice Roberts conceptualizes the role of the Supreme Court, how it functions, and the presuppositions with which he approaches certain areas of law, such as First Amendment law. Such an influence was evident in an introduction Chief Justice Roberts penned for a special issue of the *Harvard Law Review* in 2005, after Chief Justice Rehnquist's death. In remembering his former supervisor, for whose memorial he helped carry the casket into the Supreme Court building, Chief Justice Roberts chose to emphasize his "direct, straightforward, utterly without pretense" approach,⁶⁵ a characteristic, as will be highlighted later in this article, that is also evident in Chief Justice Roberts's own idealization of his leadership of the Court and in his opinions for it. Chief Justice Roberts further isolated Chief Justice Rehnquist as a "towering figure in American law, [and] one of a handful of great Chief Justices."⁶⁶ Furthermore, he wrote "there will be time enough to assess and debate his impact on the law,"⁶⁷ indicating not only the esteem in which he held his former supervisor, but that Chief Justice Roberts understands the places of chief justices in terms of their historical greatness and values such assessments.

A. Arguing before the Supreme Court

Throughout the 1980s, Chief Justice Roberts worked in variety of roles for the federal government, including special assistant to the attorney general, associate counsel to President Ronald Reagan, and principle deputy solicitor general.⁶⁸ During his time in the solicitor general's office, and in professional practice, between 1989 and 2002, he argued thirty-nine cases before the Supreme Court.⁶⁹ In cases representing a broad spectrum of legal questions, Chief Justice Roberts steadfastly stood by his

⁶³ *Biographies of the Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/biographies.aspx> (last visited June 6, 2014).

⁶⁴ WILLIAM H. REHNQUIST, *THE SUPREME COURT*, 260-263 (2001).

⁶⁵ John G. Roberts, *In Memoriam: William H. Rehnquist*, 119 HARV. L. REV. 1 (2005).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Biographies of the Current Justices*, *supra* note 63.

⁶⁹ *Chief Justice John G. Roberts Cases before the Supreme Court*, WASHINGTON UNIVERSITY LAW, <http://law.wustl.edu/news/pages.aspx?id=5484> (last visited June 6, 2014).

understandings of Congressional intent regarding statutes and the Court's intended meanings in previous rulings in his oral arguments before the Court. To that end, his method of argument was narrowly focused and supported by legal evidence. Such an approach can be related to the understandings he formulated from his time working with Chief Justice Rehnquist. In a 2006 speech, Chief Justice Roberts lauded his former supervisor for changing the culture of oral arguments before the Court from "free-ranging" and "free-wheeling" to a "more rigorous and focused" approach.⁷⁰ In characterizing more researched and focused arguments as "legal argument" and other approaches as being of less value, Chief Justice Roberts indicated that he presupposed other forms of argument as being of lesser value.⁷¹ For example, in his oral arguments in *Bray v. Alexandria Clinic*, a freedom-of-speech case that dealt with the rights of anti-abortion protestors, Chief Justice Roberts calmly and confidently responded to intensive questioning from the Court regarding some of his central arguments.⁷² He responded to justices' questions using absolutes, continuously affirming that his understanding was the proper one. In one exchange regarding United States Code section 1985(3) regarding depriving citizens of rights or privileges,⁷³ Chief Justice Roberts repeatedly clarified his understanding that the law was intended to deal specifically with discriminatory actions that limited people's rights, not actions that generally limited rights. When justices questioned his interpretation, he flatly and confidently dispatched their arguments. A justice, for example, suggested the law would protect a person who two or more people sought

⁷⁰ John G. Roberts, Speech: William H. Rehnquist: A Remembrance, 31 VT. L. REV. 431, 437 (2007).

⁷¹ *Id.*

⁷² 506 U.S. 263 (1993)

⁷³ Ku Klux Act § 1985(3), 42 U.S.C. (1871) reads, "Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

to halt from communicating a message. In response, Chief Justice Roberts stated, “That’s wrong as a matter of logic . . . for a conspiracy to seek to deprive persons of the equal protection of the laws or equal privileges and immunities, the conspirators must seek to deny to some what they would permit to others.”⁷⁴ In this manner, Chief Justice Roberts clearly, and largely without pause, stood firmly, with strong support from legal precedent and knowledge of the law in question, upon his understanding. Similarly, in *Lujan v. National Wildlife Federation*, a case that focused upon whether the National Wildlife Federation had standing to challenge a Bureau of Land Management decision,⁷⁵ Chief Justice Roberts maintained that the case was substantially similar to *Sierra Club v. Morton*.⁷⁶ When one of the justices interrupted him to suggest that the appeals court’s ruling was in conflict with that position, Chief Justice Roberts stated, “with respect, Your Honor, no, it did not . . . it is, as I’ve mentioned, the Sierra Club case all over again.”⁷⁷ Within this same passage, as he reiterated his position, he brought another Supreme Court precedent, information from the district and appeals-court rulings, and an affidavit into the argument to support his position.

Certainly, it is not unusual for a lawyer to stand by his arguments, support them, and to repeat them, but of value to this article is not only Chief Justice Roberts’s propensity to stick to his arguments, but the nature of how he understands and communicates those understandings to others. In his arguments before the Court, he did not qualify his positions and he seldom paused, even for a second, to consider the justices’ suggestions. Rather, he evidenced, to turn back to the hermeneutical lens, an objective understanding of the world around him, one that he viewed in blacks and whites, rather than in shades of gray. Such a view is further evidenced in the analysis of his opinions for the Court, which are examined in the next section.

B. Circuit-Court opinions

George W. Bush nominated Roberts for a seat on the U.S. Court of Appeals for the District of Columbia in 2001, but the nomination died in

⁷⁴ John G. Roberts, Jr., *Oral Argument of John G. Roberts, Jr. in Bray v. Alexandria Clinic*, OYEZ IIT CHICAGO-KENT COLLEGE OF LAW, (last visited June 6, 2014), http://www.oyez.org/cases/1990-1999/1991/1991_90_985/.

⁷⁵ 497 U.S. 871 (1990).

⁷⁶ 405 U.S. 727 (1972). This case dealt with whether the Sierra Club had standing to object to the placement of a ski resort in a federal forest. The Court found the organization did not have standing because the development did not affect its members.

⁷⁷ John G. Roberts, Jr., *Oral Argument of John G. Roberts, Jr. in Lujan v. National Wildlife Federation*, OYEZ IIT CHICAGO-KENT COLLEGE OF LAW, (last visited June 6, 2014), http://www.oyez.org/cases/1980-1989/1989/1989_89_640.

the Democrat-controlled Senate Judiciary Committee.⁷⁸ Bush again nominated him for the post in 2003. This time he was confirmed and he served two years on the court before George W. Bush nominated him as chief justice in September 2005. During his brief time on the D.C. Circuit, Chief Justice Roberts authored forty-eight opinions, forty-four of which were for unanimous decisions by the court. In an analysis of his rhetoric, legal scholar Laura Krugman Ray found that Chief Justice Roberts's opinions for the D.C. Circuit reflected the work of "a confident stylist who deliberately selects the word, the image, the tone that will convey not just a legal position but a personal perspective as well."⁷⁹ Ray's findings regarding Chief Justice Roberts's confidence and deliberateness as a circuit judge relate to what was seen in his arguments when he was standing before the Supreme Court. He showed himself to be a clear, black-and-white thinker, who makes in-depth preparations based on facts and understands such information to be correct to the extent that it is generally beyond discussion.

Such fact-based clarity of purpose could be seen in one of the most significant cases the D.C. Circuit considered while he was on the court – *Hedgepeth v. Metropolitan Area Transit Authority*.⁸⁰ The case dealt with unreasonable search and seizure and equal protection questions that arose after a twelve-year-old girl was arrested for violating the Metropolitan Area Transit Authority's "zero-tolerance" policy regarding eating and drinking in a station.⁸¹ Chief Justice Roberts, in writing the court's opinion, quickly dispatched two claims made by the transit authority regarding whether the girl and her family had standing in the case because the policies had been changed in the time after her arrest. He wrote "the answer to both objections is found in the *precise* relief sought by Ansche."⁸² And while Chief Justice Roberts recognized that "no one is very happy about the events that led to this litigation," he indicated the question before the court was not in regard to whether or not the transportation authority's policies were good or bad, but, rather "whether they violated the Fourth and Fifth Amendments to the Constitution."⁸³ While such clear thinking is expected of jurists, the way that Chief Justice Roberts put forth his reasoning – not in one case, but in many – indicates strongly held presuppositions, something hermeneutical thinkers have cautioned against, and objective-type forms of meaning-making.

⁷⁸ John G. Roberts, Jr., OYEZ IIT CHICAGO-KENT COLLEGE OF LAW, http://www.oyez.org/justices/john_g_roberts_jr (last visited June 6, 2014).

⁷⁹ Laura Krugman Ray, *The Style of a Skeptic: The Opinions of Chief Justice Roberts*, 83 IND. L. REV. 997, 998 (2008).

⁸⁰ 386 F.3d 1148 (D.C. 2004).

⁸¹ *Id.* at 1150-1152.

⁸² *Id.* at 1152 (emphasis added).

⁸³ *Id.* at 1150.

His concurrence with the court's judgment in *PDK Laboratories v. United States Drug Enforcement Administration* included similar themes because, while Chief Justice Roberts agreed with the other judges in their ruling in the case, he could not go along with the opinion because he concluded that their reasoning "fails at each step, and each defect is fatal to the majority's analysis."⁸⁴ In this sense, Chief Justice Roberts conveyed an understanding that not only must the conclusion be correct, but also the reasoning that supports it must fit his often-rigid understanding of the facts. A competing set of reasons, as was found in the majority's opinion in *PDK Laboratories*, was deemed deficient by Chief Justice Roberts, and he responded with a concurrence that was nearly the same length as the majority's opinion. The concurring opinion went through each argument made by the majority, going so far as to include a footnote that lamented that he did not "chase down every rabbit spooked by the majority's alternative holding."⁸⁵ To this end, Chief Justice Roberts communicated that rightness, in the process as well as in the outcome, is highly valued.

United States v. Jackson, a case in which he dissented, further illustrates how Chief Justice Roberts makes meaning – especially because it includes two competing understandings of facts in the case.⁸⁶ The majority concluded that police lacked the necessary probable cause to search a vehicle's trunk during a traffic stop. The majority wrote that police could only search a trunk without obtaining a warrant if they believed "the trunk contained contraband or evidence of a crime."⁸⁷ They found the fact that the driver had committed several traffic violations did not meet the probable-cause burden. Utilizing the same facts, Chief Justice Roberts disagreed, going so far as to number the majority's arguments and respond to each of them. He found the traffic violations raised enough suspicions to warrant the search. In concluding, he recognized his colleagues' "sentiments" regarding the Fourth Amendment, but asserted "sentiments do not decide cases; facts of the law do. There is no dispute here on the law: if the officers had probable cause, they did not need a warrant."⁸⁸ In this sense, he indicated that his understanding of the facts, and the meanings that he attached to them, was correct, and placed little value in the understanding the majority of the court had come to regarding those facts. Certainly, judges and justices commonly disagree about the facts involved in the cases they hear, but the relatively rigid approach Chief Justice Roberts utilizes, in relation to the hermeneutical lens, indicates the presence or relatively strongly held presuppositions that include looking for facts to be utilized in a certain way that lines up with the meaning he has made of them.

⁸⁴ 362 F.3d 786, 799-800 (D.C. 2004) (Roberts, J., concurring).

⁸⁵ *Id.* at 804.

⁸⁶ 415 F.3d 88 (2005).

⁸⁷ *Id.* at 91.

⁸⁸ *Id.* at 105-106 (Roberts, J., dissenting).

C. Roberts the judicial minimalist

During his Senate confirmation hearings, Chief Justice Roberts framed himself as judicially modest and respectful of precedent.⁸⁹ While he was asked by one senator to choose among a set of judicial philosophies, he stated that he sought to be “modest,” but then essentially described himself as a minimalist. He stated: “The role of the judge is limited; the judge is to decide the cases before them; they’re not to legislate; they’re not to execute the laws.”⁹⁰ Of course, famously, Chief Justice Roberts employed an umpire metaphor to describe the role of judges in the opening statements of his confirmation hearings. He stated: “Umpires don’t make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role.”⁹¹ Whether the metaphor was a cleverly crafted attempt to win the hearts of the Senate committee he was speaking before or actual evidence of his judicial beliefs continues to be debated.⁹² What is certain is the chief justice continues to use similar, precedent-honoring, minimalist, even originalist wording in his opinions and in public appearances.⁹³ In a 2006 graduation address to Georgetown University law students, he emphasized the value of consensus in producing narrow decisions when he said “the broader the agreement among the justices, the more likely it is that the decision is on the narrowest possible grounds.”⁹⁴

Chief Justice Roberts’s writings from before he joined the Court show a high level of consistency in his outward statements regarding minimalist, precedent-based decisions. In a rebuttal of an article that criticized Justice Scalia’s opinion in *Lujan v. Defenders of Wildlife*,⁹⁵ he

⁸⁹ *Transcript: Day Two of the Roberts Confirmation Hearings*, WASHINGTON POST (Sept. 13, 2005, 11:17 a.m.), <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300876.html>.

⁹⁰ *Id.*

⁹¹ *Senate Judiciary Committee Hearings on the Nomination of Judge Roberts*, N.Y. TIMES (Sept. 15, 2005), www.nytimes.com/2005/09/12/politics/politicsspecial1/12text-roberts.html?pagewanted=56.

⁹² Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1069-1070 (2006).

⁹³ See generally *Morse v. Frederick*, 551 U.S. 393 (2007); *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010); *United States v. Stevens*, 130 S. Ct. 1577 (2010); *Snyder v. Phelps*, 131 S. Ct. 1207 (2011). Also see *Georgetown University Law Center commencement*, C-SPAN VIDEO LIBRARY (May 20, 2006), <http://www.c-spanvideo.org/program/192685-1>.

⁹⁴ *Georgetown University Law Center commencement*, C-SPAN VIDEO LIBRARY (May 20, 2006), <http://www.c-spanvideo.org/program/192685-1>.

⁹⁵ 504 U.S. 555 (1992). This case bears strong similarities to *Lujan v. National Wildlife Federation* (497 U.S. 871 (1990)), which Chief Justice Roberts argued before the Supreme Court, representing Secretary of the Interior Manuel Lujan.

wrote that the Court provided “a sound and straightforward decision.”⁹⁶ He continued, “The *Defenders* Court engaged in just such an exercise of judicial self-restraint, soundly based on precedent.”⁹⁷ Legal scholar Cass Sunstein has questioned and debated Roberts’s claims of minimalism in newspaper and law review articles.⁹⁸ Initially, Sunstein found no reason to disagree with Roberts’s avowed adherence to minimalism and narrowly tailored opinions.⁹⁹ When Roberts was nominated to the Supreme Court, Sunstein analyzed Roberts’s lower-court rulings and found he was indeed practicing judicial minimalism. In recent years, Sunstein has found Roberts to be less minimal than was first thought.¹⁰⁰ Sunstein wrote that Chief Justice Roberts’s support of consensus and narrow opinions does not necessarily equate to robust, easy-to-follow precedents. He wrote that “a unanimous ruling is more likely to be narrow, simply because a wide ruling is unlikely to be able to attract a consensus. The problem is that a unanimous, narrow ruling might offer significantly less guidance than a divided, wide ruling.”¹⁰¹

Sunstein’s concerns regarding Roberts’s minimalism are largely on the philosophical level. Other scholars have considered different measures regarding how Chief Justice Roberts views consensus, minimalism, and judicial roles. Chief Justice Roberts utilized Chief Justice Marshall as a role model during his first year on the court, especially as Marshall’s example applied to building consensus among justices.¹⁰² According to one analysis, Chief Justice Roberts “hoped to resurrect Marshall’s model in a polarized age, urging his own colleagues to converge around narrow, unanimous opinions.”¹⁰³ Chief Justice Roberts appeared to be succeeding during his first term, but by the of the 2007 term, one-third of the decisions resulted in five-to-four votes, the highest percentage in years.¹⁰⁴ In an analysis of the chief justice’s voting record during his first term, legal scholar Michael Dorf found he voted the same way in non-unanimous decisions as Justice

⁹⁶ John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L. J. 1219, 1219 (1992-1993).

⁹⁷ *Id.* at 1221.

⁹⁸ Cass R. Sunstein, *The Minimalist*, LOS ANGELES TIMES (May 25, 2006), <http://articles.latimes.com/2006/may/25/opinion/oe-sunstein25>; Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 TULSA L. REV. 825 (2007-2008); Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (Nov., 2006).

⁹⁹ Cass R. Sunstein, *John Roberts, Minimalist*, WALL STREET JOURNAL, September 5, 2005, <http://www.law.uchicago.edu/news/sunstein090105>.

¹⁰⁰ Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 TULSA L. REV. 825, 836-837 (2007-2008).

¹⁰¹ *Id.* at 837.

¹⁰² Jeffery Rosen, *The Supreme Court: Judicial Temperament and the Democratic Ideal*, 47 WASHBURN L.J. 1, 3 (2007-2008).

¹⁰³ *Id.* at 4

¹⁰⁴ *Id.*

Alito 89 percent of the time and Justice Scalia 79 percent of the time.¹⁰⁵ Chief Justice Roberts voted the opposite way of Justice Stevens 64 percent of the time. By the end of the 2007 term, the Roberts court had become among the most divided and right-leaning in history.¹⁰⁶ The division has continued during the past few years with five-to-four decisions making up a significant part of the Court's decisions.¹⁰⁷

Hermeneutics argues man is a historical creature. Life is viewed through continuous references to experiences.¹⁰⁸ And this perspective can certainly be found in other legal research. For example, scholars have connected Supreme Court justices' voting behaviors to their past experiences, and factors such as age, race, gender, religion, and political ideology.¹⁰⁹ This analysis approaches the question of judicial voting behavior using a different, broader, more philosophical lens than most previous inquiries. It also focuses specifically on freedom of speech and the occasion of the nation having a relatively young chief justice. Chief Justice Roberts's legal experiences prior to joining the Court and avowed judicial philosophy, explored above, provide some insight regarding the unique lenses through which he goes about his work interpreting the Constitution, laws, and other documents.

IV. FOUR CASES: A SAMPLE OF ROBERTS'S OPINIONS REGARDING FREE SPEECH

Four Supreme Court decisions regarding free speech act as the primary texts in this analysis. The cases were chosen because they provide a diverse representation of Chief Justice Roberts's contributions regarding free speech. The decisions were selected from the eleven cases in which he had written the opinion of the Court or a dissenting or concurring opinion regarding a freedom-of-speech issue.¹¹⁰ Of the eleven cases, these four

¹⁰⁵ Michael C. Dorf, *Does the Federal Executive Branch Experience Explain Why Some Republican Supreme Court Justices 'Evolve' and Others Don't?*, 1 HARV. L. & POL'Y REV. 457, 465 (2007).

¹⁰⁶ Joan Biskupic, *Roberts Steers Court Right Back to Reagan*, USA TODAY, June 28, 2007, at 8A; Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1; Robert Barnes, *A Rightward Turn and Dissension Define Court This Term*, WASHINGTON POST, July 1, 2007, at A7.

¹⁰⁷ Adam Liptak, *A Significant Term, With Bigger Cases Ahead*, N.Y. TIMES, June 28, 2010, at A12.

¹⁰⁸ PALMER, *supra* note 5, at 121.

¹⁰⁹ Tracey E. George, *From Justice to Judge: Social Background Theory and the Supreme Court*, 86 N.C. L. REV. 1333, 1348-1349 (2007-2008); Shirley S. Abrahamson, *The Women Has Robes: Four Questions*, 14 GOLDEN GATE U. L. REV. 489, 492-494 (1984).

¹¹⁰ To be reasonably certain that all of the relevant cases were identified, a keyword search was conducted using LexisNexis Academic. The search terms utilized were "First Amendment" and "Speech" and the inquiry was limited to cases decided

represent the most significant rulings in which Chief Justice Roberts authored an opinion in regard to free speech. Three of the cases provide majority opinions written by the chief justice: *Stevens*,¹¹¹ *Snyder*,¹¹² and *Morse*.¹¹³ *Citizens United*¹¹⁴ provides a concurring opinion. By considering the basic facts, arguments, and articulations involved in each of the cases and Chief Justice Roberts's opinions, this article seeks to move forward in terms of analyzing his jurisprudence in search of clear, emergent indicators regarding how he conceptualizes freedom of speech.

A. The Crushing Case

Stevens stemmed from a federal law that criminalized the creation, sale, and possession of mediated depictions of cruelty to animals.¹¹⁵ Congress passed 18 U.S.C.S. § 48 as a response to “crush videos,” which depict the torture and killing of small animals, often in relation to sexual fetishes.¹¹⁶ The case before the Court, however, centered on Robert J. Stevens, who sold videos of dogfights and of dogs attacking other animals.¹¹⁷ Stevens was indicted based on 18 U.S.C.S. § 48, which he challenged on the basis that it was unconstitutional because it limited free speech.¹¹⁸ The Court found the law was unconstitutional, voting eight-to-one with Justice Samuel Alito dissenting.

In his opinion for the Court, Chief Justice Roberts asserted that “the Court declined to recognize a new category of unprotected speech for depictions of animal cruelty.”¹¹⁹ He conceptualized the areas of speech that had been found to be outside the protection of the First Amendment in past rulings as a “list” and contended that depictions of animal cruelty should not be “added to the list.”¹²⁰ He based his reasoning for the opinion on the First Amendment’s promise of free speech and emphasized that government restrictions of expression cannot be based on the content of the message, ideas, or subject matter. He stated, “The First Amendment itself reflects a judgment . . . that the benefits of its restrictions on the

after September 29, 2005, the date Chief Justice Roberts took office. Of the sixty-three cases found, cases that referred to freedom of speech only in passing or did not include any opinions by Chief Justice Roberts were eliminated. This elimination process left eleven cases, from which the four cases used in this analysis were drawn.

¹¹¹ 130 S. Ct. 1577 (2010).

¹¹² 131 S. Ct. 1207 (2011).

¹¹³ 551 U.S. 393 (2007).

¹¹⁴ 130 S. Ct. 876 (2010).

¹¹⁵ 130 S. Ct. 1577, 1582 (2010).

¹¹⁶ *Id.* at 1583.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 1583-84.

¹²⁰ *Id.* at 1585.

government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.”¹²¹ He argued that the Constitution does not “prescribe” limitations that can be whimsically overturned. He recognized that the Supreme Court has allowed exceptions for certain types of speech, citing *R.A.V. v. St. Paul* (1992), a cross-burning case, and *New York v. Ferber* (1982), which dealt with child pornography. The chief justice declined to extend a similar protection to animal cruelty videos because the precedents “do not set forth a test that may be applied.”¹²²

Furthermore, Chief Justice Roberts expressed that he was fundamentally concerned by the “alarming breadth” of the crush-video law.¹²³ He contended that the law could make recreational hunting publications illegal because representations of animals being killed might be found to equate to cruelty to animals in certain jurisdictions. Chief Justice Roberts wrote, “Because the statute allows each jurisdiction to export its laws to the rest of the country, § 48(a) extends to *any* magazine or video depicting lawful hunting.”¹²⁴ In constructing his argument, he emphasized that hunting-related publications are part of a \$135 million industry; substantially more than the one-million-dollars-per-year crush video sales.

B. Doing What Must Be Done for Corporate Speech

*Citizens United*¹²⁵ resulted in a five-to-four decision from the Supreme Court. Justice Kennedy wrote the Court’s opinion. Chief Justice Roberts wrote a concurring opinion that accomplished three things: (1) It focused on the meaning and value of precedent, (2) explained the Court’s unavoidable duty to overturn the law, (3) and mounted a bludgeoning response to Justice Stevens’s scathing attack on the majority’s decision. The case was based on a First Amendment challenge by a political organization that sought to fund a documentary partially with contributions from business corporations. The funding of the film was alleged to have violated the Bipartisan Campaign Finance Act (BCRA), which made it illegal for corporations to pay for broadcasts that targeted a specific candidate within 30 days of a primary or 60 days of an election.¹²⁶ The Supreme Court declared the BCRA unconstitutional and overturned the precedent from *Austin v. Michigan State Chamber of Commerce*,¹²⁷ which banned corporations from using general treasury money on

¹²¹ *Id.*

¹²² *Id.* at 1586.

¹²³ *Id.* at 1588.

¹²⁴ *Id.* at 1589.

¹²⁵ *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010).

¹²⁶ *Id.* at 880.

¹²⁷ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

individual candidates in election campaigns.¹²⁸ Justice Stevens, in writing for the four-justice dissent, asserted that “the Court today rejects a century of history. ... Relying largely on individual dissenting opinions, the majority blazes through our precedents, overruling or disavowing a body of case law.”¹²⁹

C. BONG HiTS 4 JESUS

*Morse*¹³⁰ revolved around a student’s display of a banner that read “BONG HiTS 4 JESUS” during the Olympic Torch run in Juneau, Alaska, in 2002. Students were released from classes, under teacher and administrative supervision, to watch the torch run as it passed the school. Joseph Frederick, a senior, was late to school and joined his classmates on the street for the event. Frederick and others unfurled the fourteen-foot banner with the “BONG HiTS 4 JESUS” message on it while the camera crews followed the torch-bearer past the spot where the students were standing. The principal, Deborah Morse, told students to take down the banner. Frederick refused to comply. The principal confiscated the student’s banner, and Frederick was suspended. The student argued that his First Amendment rights were violated by the school’s actions. The majority at the Supreme Court disagreed, voting five-to-four that the student’s First Amendment rights were not violated.

In the majority opinion, Chief Justice Roberts emphasized that the student was at a school-sponsored event and the principal “reasonably” viewed the banner as promoting a message that supported illegal drug use. Both of these arguments act as significant building blocks in his opinion. He wrote that “schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.”¹³¹ Chief Justice Roberts framed the ruling between three previous landmark cases regarding freedom of expression in schools. He separated the facts of the case from *Tinker v. Des Moines*,¹³² reinforcing that “students do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’”¹³³ Roberts then brought *Bethel v. Fraser*¹³⁴ and *Hazelwood v. Kuhlmeier*¹³⁵ into his opinion, contending that the decisions narrowed the *Tinker* precedent. He stated that schools

¹²⁸ Robert R. Kerr, *Naturalizing the Artificial Citizen: Repeating Lochner’s Error in Citizens United v. Federal Election Commission*, 15 COMM. L. & POL’Y 311, 312-313 (2010).

¹²⁹ 130 S. Ct. 876, 930 (2010).

¹³⁰ *Morse v. Frederick*, 551 U.S. 393 (2007).

¹³¹ *Id.* at 396.

¹³² 393 U.S. 503 (1969).

¹³³ 551 U.S. 393, 406 (2007).

¹³⁴ 478 U.S. 675 (1986).

¹³⁵ 484 U.S. 260 (1988).

present a unique educational environment and that students' rights while in school are not equal to those of adults in general.¹³⁶

D. "Thank God for Dead Soldiers"

*Snyder*¹³⁷ focused on the Westboro Baptist Church's right to communicate its anti-homosexual message by picketing at the funerals of American soldiers who were killed in Iraq and Afghanistan. Members of the church picketed at Marine Lance Corporal Matthew Snyder's funeral in Maryland. Snyder's father filed suit regarding five state tort laws: defamation, public disclosure of private facts, intentional infliction of emotional distress, intrusion, and civil conspiracy.¹³⁸ Church members also picketed at the United States Naval Academy and the Maryland State House on the day of the funeral. The signs they carried included phrases such as "God Hates the USA/Thank God for 9/11," "Thank God for IEDs," and "Thank God for Dead Soldiers."¹³⁹ Picketers notified the police of their intention to picket at the funeral and stood more than 1,000 feet away in a 25-by-10-foot, fenced-in area that was designated for them. Picketers did not interrupt the funeral service, nor could the mourners see their messages. The Supreme Court voted eight-to-one, with Justice Alito dissenting, in favor of Westboro Baptist.

In his decision, Chief Justice Roberts made distinctions between public and private speech, as well as expression that is made in public forums. In the first half of the opinion, the chief justice emphasized four times that the picketers were on public land that was next to public streets. Roberts contended that the messages "may fall short of refined social or political commentary."¹⁴⁰ He explained they do, however, refer to issues of significant public concern, such as homosexuality, the wars in Iraq and Afghanistan, and sex scandals involving Catholic clergy.

V. ANALYSIS: ROBERTS'S RULES OF ORDER

A set of Chief Justice Roberts's judicial rules of order emerged from analyzing the four cases. The analysis suggested that the chief justice has a specific and unique personal understanding of what free speech should look like. From a historical perspective, his definition compares more closely with *Lochner*-era, laissez faire Supreme Court reasoning¹⁴¹ than

¹³⁶ 551 U.S. 393, 396 (2007).

¹³⁷ 131 S. Ct. 1207 (2011).

¹³⁸ *Id.* at 1214.

¹³⁹ *Id.* at 1213.

¹⁴⁰ *Id.* at 1217.

¹⁴¹ See Chapter 5 in ROBERT G. MCCLOSKEY (REVISED BY SANFORD LEVINSON), *THE AMERICAN SUPREME COURT* (5th ed. 2010).

with progressive-era civil liberties perspectives.¹⁴² The chief justice showed a clear inclination toward protecting freedom of speech when the expression in question fit a set of rules that were formulated and interpreted based on strongly held personal presuppositions. Such rigidity in Chief Justice Roberts's understandings was seen in his arguments as a lawyer before the Supreme Court, such as when he declined to entertain alternative conceptualizations of the Ku Klux Klan Act in *Bray v. Alexandria Clinic*,¹⁴³ and in his decision that the student's questionable message in *Morse* was intended to encourage drug use.¹⁴⁴

Foremost among Chief Justice Roberts's rules is that the speech must fit among a limited group boxes that he tends to define rather rigidly. The speech must be orderly, respectful of local authority figures, and intended to make a clear statement that fits within the boxes. Also noteworthy is the place of corporate speech in Chief Justice Roberts's conceptualization of free-speech jurisprudence. The voices of businesses, to Chief Justice Roberts, are among the traditionally vaunted categories of speech, such as political and religious expression.¹⁴⁵ Though he consistently emphasized the importance of precedent in his opinions, it did not appear to be among the determining factors for the chief justice when he approached a case.

A. Roberts and Objectivity

Establishing where the chief justice stands regarding interpretation and the nature of understanding affects all of the other characteristics revealed by this analysis. In the opinions analyzed, the chief justice showed that he is not given to dealing in shades of gray. His statements indicated that he is a black-or-white, on-or-off, right-or-wrong, interpreter of information. For example, to Chief Justice Roberts, the issue at hand in *Citizens United* was political speech.¹⁴⁶ Considerations about the unique advantages corporations have over average citizens, such as perpetual life, limited liability, and stronger ability to pool capital,¹⁴⁷ were deemed by the chief justice as apparently playing no part in the consideration. These ideas were recognized and quickly dispatched in the majority opinion, which Chief Justice Roberts joined. They were not mentioned in Chief Justice Roberts's concurrence. The discussion was not to be so nuanced as to

¹⁴² *Id.* at Chapters 7-8.

¹⁴³ 506 U.S. 263 (1993).

¹⁴⁴ 551 U.S. 393, 401-402 (2007). While Chief Justice Roberts indicated that the student's message was "cryptic," he concluded the sign "advocated the use of illegal drugs."

¹⁴⁵ *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 919 (2010).

¹⁴⁶ *Id.* at 917.

¹⁴⁷ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659 (1990).

consider issues that could potentially muddy and confuse the truth as he understood it.

Similarly, Chief Justice Roberts dismissed the dissenting justices' argument that the majority's conclusion in *Citizens United* was overly broad. He agreed decisions should be narrow, but argued it was even more important that they be right.¹⁴⁸ Chief Justice Roberts wrote "there is a difference between judicial restraint and judicial abdication."¹⁴⁹ In framing his argument in terms of rightness and within the context of the competing definitions of the words "restraint" and "abdication," the chief justice further contributed to the understanding that he commonly conceptualizes ideas in objectivist terms. He conveyed a strong confidence in the opinions regarding his ability to isolate and stand for truth. Rightness often seemed to be a quality that Chief Justice Roberts felt he could unequivocally ascertain and hold forth as the foundation of his reasoning. The hermeneutics philosophies of Heidegger, Gadamer, and Ricoeur argue, however, that objective interpretation of truth is not possible.¹⁵⁰ Man is a product of his history, traditions, and experiences.¹⁵¹

Chief Justice Roberts's opinion in *Morse* provides another example of his no-middle-ground approach to interpretation. He decided that Frederick's "BONG HiTS 4 JESUS" sign had a pro-drug message, and therefore could not be protected.¹⁵² Certainly, the meaning of the message could be seen as murky. Chief Justice Roberts conceded as much,¹⁵³ but quickly defined the banner as a pro-drug message and built his argument upon that understanding. Roberts mentioned the possibility that the message might mean something else only long enough to dispatch the argument.¹⁵⁴ After devoting several paragraphs to the dangers of drugs and drug abuse in young people, Chief Justice Roberts concluded his opinion for the Court in *Morse* by stating "The First Amendment does not require schools to tolerate at school events student expression that contributes to [drug-related] dangers."¹⁵⁵ In *Morse* in particular, the chief justice's determination that a possibly nonsensical message was absolutely intended to advocate illegal drugs led to his devoting several paragraphs to the dangers of drug use in young people and to concluding his opinion for the Court by stating that "The First Amendment does not require schools to tolerate at school events student expression that contributes to [illegal-drug-use] dangers."¹⁵⁶

¹⁴⁸ *Citizens United*, 130 S. Ct. at 919.

¹⁴⁹ *Id.*

¹⁵⁰ PALMER, *supra* note 5, at 46.

¹⁵¹ *Id.*; GADAMER, *supra* note 22, at 26.

¹⁵² *Morse v. Frederick*, 551 U.S. 393, 396 and 402 (2007).

¹⁵³ *Id.* at 401.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 409.

¹⁵⁶ *Id.*

Chief Justice Roberts's objectivist approach to understanding did not appear to stem from a predetermined allegiance to a certain form of judicial philosophy. Rather, the analysis indicated the black-or-white approach stemmed more from confidence in his personal understandings of the information before him. For example, when given the opportunity to make an originalist argument in his refutation of the dissent in *Citizens United*, an argument based on the intent of the framers to protect political debate, he declined to do so. Instead, Chief Justice Roberts placed his own understanding of the facts surrounding the intent of the authors of the First Amendment against the dissenters in the case.¹⁵⁷ In this example, he declined to argue a specific judicial philosophy, choosing instead to rely on his own understanding of the circumstances.

The final passage of Chief Justice Roberts's majority opinion in *Snyder* and another section in *Stevens* provide further insight into this discussion. In *Snyder*, he wrote "on the facts before us, we cannot react to that pain by punishing the speaker. As a nation we have chosen a different course – to protect even hurtful speech on public issues to ensure that we do not stifle public debate."¹⁵⁸ Similarly, in *Stevens*, he wrote, "The First Amendment reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it."¹⁵⁹ In both passages, we see a strong confidence in a robust freedom of speech. We do not see Chief Justice Roberts going back to the Framers' intent. He again passes on the opportunity to exhume James Madison and other Framers. This analysis suggests he has a great deal of confidence in his personal perception of freedom of speech – and that perception does not necessarily lean upon an originalist approach.

B. Boxes, Messages, and Their Delivery

The chief justice's positivist tendency has significant overarching meaning for the trajectory of free speech. It both helps explain the boxes, or rather rigid categorizations that emerged in the analysis, and, more broadly, the existence of a set of Roberts's rules of order. From a hermeneutics point of view, a chief justice who employs a strong, positivist set of criteria when viewing a case and the precedents, facts, laws, and Constitutional issues that surround it, will end up making ideologically based decisions. As Gadamer discussed, preunderstandings are not inherently bad. In fact, they are unavoidable. Preunderstandings are how we begin our dialogue between our horizon and that of the text. Palmer wrote, "We must be prepared to distinguish between fruitful

¹⁵⁷ *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 925-926 (2010).

¹⁵⁸ *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011).

¹⁵⁹ *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010).

presuppositions and those that imprison and prevent us from thinking and seeing.”¹⁶⁰ Hermeneutics contends that an interpreter should be aware of preunderstandings and allow for his or her knowledge to change and shift as information is comprehended.¹⁶¹

1. Narrow, personally defined boxes

One of the themes that emerged in the case analysis was Chief Justice Roberts’s use of box-like definitions for types of speech. The opinions showed evidence that he was looking to place speech in a box or was defending why he categorized speech in a box. This follows the logic of his rigid right-versus-wrong approach to interpretation. To understand the future trajectory of freedom of speech, one must maintain an awareness of the boxes and understand how he defines them. Chief Justice Roberts views all protected speech as fitting in one of what appear to be four boxes. The closest he came to explicitly listing the boxes was in *Snyder*, though they can certainly be seen in the other opinions. He listed religious and political speech, as well as matters of social or community concern.¹⁶² In examining the Westboro church’s messages in *Snyder*, he wrote:

The “content” of Westboro’s signs plainly relates to broad issues of interest to society at large, rather than matters of “purely private concern.” . . . While [the] messages may fall short of refined social or political commentary, the issues they highlight – the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy – are matters of public import.¹⁶³

Following the *Citizens United* decision, it would be reasonable to add a box for corporate speech. In his concurring opinion in the case, Chief Justice Roberts concluded that the First Amendment right to free speech means that “Congress may not prohibit political speech, even if the speaker is a corporation or union.”¹⁶⁴ On the same page, he further articulated this idea, asserting that “corporations as well as individuals enjoy the pertinent First Amendment rights.”¹⁶⁵ Aside from corporate speech, the list is not new or unique to Chief Justice Roberts. In fact, he referred to the *Connick v. Myers*¹⁶⁶ decision in listing the areas of protection in *Snyder*. What is

¹⁶⁰ PALMER, *supra* note 5, at 183.

¹⁶¹ GADAMER, *supra* note 22, at 271.

¹⁶² 131 S. Ct. 1207, 1211 (2011).

¹⁶³ *Id.* at 1216-1217.

¹⁶⁴ *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 919 (2010).

¹⁶⁵ *Id.*

¹⁶⁶ *Connick v. Myers*, 461 U.S. 138 (1983).

noteworthy, however, is the relative narrowness and rigidity that emerged regarding the way he understands the boxes.

Within the broader understanding that Chief Justice Roberts approaches free-speech questions in terms of their ability to fit within a rigid set of boxes are a more full list of rules regarding how he conceptualizes speech, and how he determines if speech fits into one of the boxes. The rules include: respect for local authorities, the orderliness of the message, and how traditionally the message is delivered. Furthermore, he writes the opinions as if precedent is in the driver's seat, but the conflicting nature of some of the decisions shows that precedent is selected to fit the conclusions he comes to using other rules. Roberts's boxes appeared to be the primary guide in his deciding process. The following sections examine these "rules" in regard to the cases involved in this analysis.

2. *Bong hits and boxes*

Roberts's rules can be seen in the chief justice's evaluation of the student's message, and how it was communicated, in *Morse*. In the opinion for the Court, he repeatedly emphasized that Frederick's message conflicted with local authorities – the principal and other school officials.¹⁶⁷ Chief Justice Roberts highlighted on the first page of the opinion that Frederick refused to take down the banner when he was asked to do so by Principal Morse.¹⁶⁸ On the next page, Chief Justice Roberts again emphasized Frederick's conflict with the principle, writing that when Morse demanded the banner be taken down "everyone but Frederick complied."¹⁶⁹ In his closing words in the opinion, he wrote "school principals have a difficult job, and a vitally important one,"¹⁷⁰ thus again emphasizing, in the context of Frederick's banner, that his understanding of speech is one that requires a respect for local authorities.

Chief Justice Roberts emphasized that the message was not delivered in a classic format. In other words, it did not *look* like free speech should look according to Roberts's personal conceptualization of the First Amendment. In describing the message, he wrote, "It is no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all."¹⁷¹ He furthermore characterized the speaker as a rule-breaking student, rather than a person who presented a message to an audience. Such an approach is substantially different than what was found in *Snyder*, for example, where in upholding the church's free-speech rights, Chief Justice Roberts quoted the *Texas v. Johnson* opinion's conclusion that the "bedrock principle underlying the First Amendment [is] that the

¹⁶⁷ *Morse v. Frederick*, 551 U.S. 393, 398 and 401 (2007).

¹⁶⁸ *Id.* at 396.

¹⁶⁹ *Id.* at 397.

¹⁷⁰ *Id.* at 410.

¹⁷¹ *Id.* at 401.

government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”¹⁷² In *Snyder*, he argued that the content of the message, the idea, should not be a part of the Court’s consideration. In *Morse*, however, the content of the student’s message was at the center of his reasoning. Chief Justice Roberts faulted the dissenters in the case for confusing Frederick’s motive with his message. He wrote, “that is a description of Frederick’s *motive* for displaying the banner; it is not an interpretation of what the banner says. The way Frederick was to fulfill his ambition of appearing on television was by unfurling a pro-drug banner.”¹⁷³ Chief Justice Roberts looked at Frederick’s message and he looked at his rules of order, and decided the unusual message that disturbed local officials advocated a pro-drug message. He stressed these factors, as well as his point that the message was not religious or political speech, several times in the decision.¹⁷⁴ It appears that because of these factors, and not because of precedent, he sided with *Morse*. Once the decision was made, he appeared to choose to focus on *Bethel v. Fraser*¹⁷⁵ and *Hazelwood v. Kuhlmeier*¹⁷⁶ instead of *Tinker v. Des Moines*.¹⁷⁷ Precedent offered him just as much support on the side of *Tinker*’s political speech protections as *Fraser* did in arguing for limiting the student’s speech. If Roberts had chosen to interpret the message as being in the political or religious speech boxes, *Tinker* would have supported his choice.

3. *Westboro follows the rules*

Snyder offers an important comparison regarding Chief Justice Roberts’s criteria, especially his boxes. In *Snyder*, the protesters’ signs, such as “Thank God for IEDs” and “Priests Rape Boys”¹⁷⁸ could at least potentially, in light of the conclusion Chief Justice Roberts came to regarding the student’s banner in *Morse*, be construed as encouraging illegal or corrosive behavior in society. But a few differences in the facts changed how the case was boxed by Chief Justice Roberts. The protesters alerted local police before arriving and stayed within the boundaries the officials provided for them.¹⁷⁹ They did not cause any disturbances with local officials or the funeral. These facts were emphasized in Chief Justice Roberts’s opinion for the Court. In the first sentences of the opinion, he

¹⁷² *Snyder v. Phelps*, S. Ct. 1207, 1219 (2011) (citing *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

¹⁷³ *Morse*, 551 U.S. at 403 (emphasis included).

¹⁷⁴ *Id.* at 402.

¹⁷⁵ 478 U.S. 675 (1986).

¹⁷⁶ 484 U.S. 260 (1988).

¹⁷⁷ 393 U.S. 503 (1969).

¹⁷⁸ *Snyder v. Phelps*, 131 S. Ct. 1207, 1213 (2011).

¹⁷⁹ *Id.*

highlighted that “the church notified the authorities in advance” and “picketers complied with police instructions.”¹⁸⁰ Furthermore, in his concluding words, he repeated that “Westboro addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials.”¹⁸¹ In this sense, the Westboro protesters’ messages fit the orderly, traditional picture of how the chief justice personally conceptualizes free speech should look like. Because the message passed these formalist tests, Chief Justice Roberts was able to move forward with deciding which box the speech went into. He had no trouble placing it in the political speech box.

4. Corporate speech, right and wrong

In *Citizens United*, Chief Justice Roberts immediately placed the issue in question into the political speech box.¹⁸² Unlike the other cases, *Citizens United* did not involve local authorities or disturbances, and he emphasized that the film qualified as a “core political speech” vehicle.¹⁸³ For these reasons, Chief Justice Roberts’s conceptualization of free speech, his “rules of order” in this case, required only that precedent and simple box categorization be considered. As indicated earlier, precedent did not appear to be a deciding factor for the chief justice. *Citizens United* offered the most interesting example of this theme. Chief Justice Roberts’s concurrence is filled with references to the value of precedent and judicial minimalism,¹⁸⁴ and he listed his purpose at the outset of his concurring opinion as being to address “important principles of judicial restraint and *stare decisis*.”¹⁸⁵ Such an emphasis in his concurring opinion evidenced that he seeks to assert that precedent is important to him. Still, the analysis of his opinion suggested the decision dictated the precedents that were supported and those that were not. His concurring opinion appeared to be written to deal with the precedential problems created by the Court’s ruling.

In supporting the Court’s decision to go against precedent, Chief Justice Roberts wrote, “It follows that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent.”¹⁸⁶ He started his opinion by putting the issue in the political speech box.¹⁸⁷ Afterward, he set out with a classical argument, held forth as

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 1220.

¹⁸² *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 917 (2010).

¹⁸³ *Id.* at 929.

¹⁸⁴ *Id.* at 918-919.

¹⁸⁵ *Id.* at 917.

¹⁸⁶ *Id.* at 921.

¹⁸⁷ *Id.* at 917.

strongly supported by the references to past opinions that he included, regarding the role of the Supreme Court and how it has certain established principles.¹⁸⁸ Having in that manner set up what he sought to establish as the appropriate understanding of the Court's respect for precedent, Chief Justice Roberts moved to the argument of his opinion: "There is no way to avoid *Citizens United's* broader constitutional argument."¹⁸⁹ Here again, Chief Justice Roberts's objectivist perspective, his strong confidence in his personal ability to discern right from wrong, was evidenced. To the chief justice, the broader, precedent-upsetting sweep of the ruling was an imperative. It could not have been avoided.

Roberts asserted that "what makes the case difficult is the need to confront our prior decision in *Austin*."¹⁹⁰ *Austin v. Michigan Chamber of Commerce* upheld Michigan's ban on corporations using general funds for candidate expenditures in elections.¹⁹¹ Media Law scholar Robert Kerr has made the case that the *Citizens United* majority "reinvented *Austin* as a doctrinal island."¹⁹² That approach can be seen in Chief Justice Roberts's concurring opinion when he argued that the court had never been asked to reaffirm *Austin*. At the same time, he quickly dispatched Justice Stevens's argument in the dissent in *Citizens United* that *Austin* was addressed in three other Supreme Court decisions. Justice Stevens stated that the precedent was supported in *Federal Election Commission v. Beaumont*,¹⁹³ *McConnell v. Federal Election Commission*,¹⁹⁴ and *Federal Election Commission v. Wisconsin Right to Life*.¹⁹⁵ After identifying *Austin* as the problem, Chief Justice Roberts argued the precedent was too flawed to stand. He concluded, quoting a Supreme Court racial discrimination decision from 1986,¹⁹⁶ that moving away from precedent to "sounder doctrine established by prior cases"¹⁹⁷ was necessary. In that sense, he situated his argument so the precedent must change because the Court went in the wrong direction in *Austin*.

Perhaps Chief Justice Roberts's closing words in *Citizens United* are the most telling regarding the discussion of personal or institutional influences on interpretation. The words also provide a strong bridge to another key aspect of Roberts's rules of judicial order – corporate speech. He finished his *Citizens United* opinion by stating: "To exclude or impede corporate speech is to muzzle the principle agents of the modern free

¹⁸⁸ *Id.* at 917-918.

¹⁸⁹ *Id.* at 918.

¹⁹⁰ *Id.* at 919.

¹⁹¹ 494 U.S. 652 (1990); Kerr, *supra* note 128, at 312.

¹⁹² Kerr, *supra* note 128, at 341.

¹⁹³ 539 U.S. 146 (2003).

¹⁹⁴ 540 U.S. 93 (2003).

¹⁹⁵ 551 U.S. 449 (2007).

¹⁹⁶ *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986).

¹⁹⁷ *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 921 (2010).

economy. We should celebrate rather than condemn the addition of this speech to the public debate.”¹⁹⁸ This passage further reinforced the idea that he draws heavily from personally directed, rather than institutional, definitions. In *Citizens United*, he elevated the concept of corporate speech to its highest levels in history. The *First National Bank of Boston v. Bellotti* decision brought the concept of corporate speech into the Supreme Court’s vernacular.¹⁹⁹ He asserted that the lack of an explicit First Amendment qualification regarding corporate speech or individual speech meant the Court must allow it.²⁰⁰

This argument is similar to the *Lochner v. New York* ruling where the Court struck down a state labor law created to protect public health. The Court argued that the Constitution, specifically the Fourteenth Amendment, provided no right of a government to violate a person’s right to free contract.²⁰¹ Similarly, the absence of direction argument can be seen in *Dred Scott v. Sanford*, where the Court infamously ruled that the Constitution provided no right of the government to deprive a man of his property, even if that property is another human being.²⁰² Much as the rulings in *Lochner* and *Dred Scott* had significant impacts on the course of American life, the objectivist-orientation utilized by Chief Justice Roberts to conceptualize the boundaries of free speech, and to understand the rightness of precedent, led to an elevation of corporate speech that is likely to affect the American democratic process in powerful ways.²⁰³

Most of Chief Justice Roberts’s corporate-speech elevating passages included either broad First Amendment statements or stand-alone statements made in definitive terms. A lengthy section of the *Citizens United* concurrence considered the dissent’s argument that the Framers would not support so much corporate-speech influence. Chief Justice Roberts utilized the phrase “despite the corporation-hating quotations the dissent has dredged up”²⁰⁴ to begin one section of his argument. As indicated in the previous paragraph, Chief Justice Roberts’s First Amendment support for his view was primarily based on the absence of

¹⁹⁸ *Id.* at 929.

¹⁹⁹ 435 U.S. 765 (1978).

²⁰⁰ 130 S. Ct. 876, 925-926 (2010).

²⁰¹ 198 U.S. 45, 53 (1905); Kerr, *supra* note 127, at 329.

²⁰² 60 U.S. 393, 450-451 (1856).

²⁰³ Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. 497, 550 (2010); Nicholas Confessore, *Outside Groups Eclipsing G.O.P. as Hub of Campaigns*, N.Y. TIMES (Oct. 29, 2011), at A1; Dan Eggen & T.W. Farnam, *The Influence Industry: Judicial elections, corporate policies give glimpse into 2012*, WASHINGTON POST (Oct. 26, 2011), http://www.washingtonpost.com/politics/the-influence-industry-judicial-elections-corporate-policies-give-glimpse-into-2012/2011/10/26/gIQAeOWzJM_story.html.

²⁰⁴ 130 S. Ct. 876, 925 (2010).

explicit limitations on corporate speech.²⁰⁵ Later in the opinion, he compared corporate speech to political party speech, asserting that “the association of individuals in a business corporation is no different – or at least it cannot be denied the right to speak on the simplistic ground that it is not ‘an individual American.’”²⁰⁶

The evidence that this is more of a personal view, more of a result of a strong personal well of confidence and an objective perspective of right and wrong, can be further seen when *Citizens United* is compared to *Stevens*. Chief Justice Roberts’s majority opinion in *Stevens* came only a few months after *Citizens United*. While the case did not deal with corporate speech, Chief Justice Roberts based some of his reasoning on business concerns. One of his arguments for striking down the law is that “there is an enormous national market for hunting-related depictions in which an animal is intentionally killed”²⁰⁷ The passage continued with information, mostly sourced from a National Rifle Association amici brief, that hunting magazines make \$135 million a year.²⁰⁸ His arguments are not without merit. But it is noteworthy for this analysis that the chief justice chose to place in his opinion for the Court a few hundred words about the potential financial impact of a law. His principle argument, that the law was overbroad and unclear, did not require this kind of support. Nor do these facts relate in any way to precedent. Instead, the inclusion of this information, when considered in concert with the ideas in *Citizens United*, helps reveal more about the lenses Chief Justice Roberts utilizes to understand freedom of speech.

Overall, Chief Justice Roberts’s conceptualization of free speech was tied closely to his personal, objectivist-based understanding of the First Amendment and, more generally, the world around him. Such an understanding was communicated in examining his writings and arguments before he joined the Court and was substantially conveyed in the box-like Roberts’s rules of order that were revealed in the preceding analysis of the four free-speech-related decisions. Chief Justice Roberts’s primarily sought to place speech within four relatively rigidly defined boxes, or areas, which included religious, political, social or community concern, and corporate speech. In order to determine the rightness of fit within these boxes, the chief justice utilized a set of rules that consisted of respect for local authorities, the orderliness of the message, and how traditionally the message is delivered. Furthermore, despite his words about the value of precedent, Chief Justice Roberts’s personal motivations appeared to dictate his interpretations. The next section brings the boxes and rules that emerged from the analysis together with primary ideas regarding hermeneutics.

²⁰⁵ *Id.* at 927.

²⁰⁶ *Id.* at 928.

²⁰⁷ *United States v. Stevens*, 130 S. Ct 1577, 1589 (2010).

²⁰⁸ *Id.*

VI. CONCLUSION

Roberts's rules of judicial order provide a sort of roadmap for understanding the chief justice's conceptualization of free speech. By considering Chief Justice Roberts's opinions in these four cases through a hermeneutical lens, a unique set of insights emerged regarding how he understands a central area of American law. These insights suggest some significant findings about the chief justice. Chief among the evidential findings was the deeply personal and self-assured approach to interpretation he employs in his work. Chief Justice Roberts's understandings appeared to be fundamentally moored within objectivist, rather than subjective, thinking. He believes in a right and a wrong and does not appear to allow for any play in between. Hermeneutic thought, as put forth by the line of philosophers consisting of Heidegger, Gadamer, and Ricoeur, contends that objectivity in understanding is not possible because such a form of comprehension would require the individual rising outside of himself and the line of history to view the world around him without the influences that come about as part of each person's *weltanschauung*, or world view.²⁰⁹ To this end, Gadamer wrote, "Long before we understand ourselves through the process of self-examination, we understand ourselves in a self-evident way in the family, society, and state in which we live."²¹⁰

In relation to this finding regarding objectivity is the related conclusion that the basis of Chief Justice Roberts's understanding is personal, not institutional. He does not appear to seek to be an objective judge in the sense that he will rule like an umpire, simply calling balls and strikes with no investment in one succeeding. Instead, the analysis of the cases, as well as the examination of some of the chief justice's arguments as a lawyer before the Court and as a circuit-court judge, indicated that his decisions were substantially influenced by a personal perception of the world that includes strongly held presuppositions regarding what is right, what is wrong, and a confidence in a personal ability to distinguish in relatively absolute terms between the two. These traits philosophically disconnect him from two primary ideas regarding the judicial branch. He is essentially unmoored from the umpire metaphor mentioned earlier and left to place precedent in a subservient position to personally held understandings. In this sense, we can see the roots of political scientist Robert Dahl's groundbreaking exploration of the Supreme Court as a political, policy-making institution.²¹¹ The case analysis indicated that Chief Justice Roberts places ideology, which for him is based in a strong sense of right and wrong, above precedent. Precedent becomes merely a vehicle to

²⁰⁹ PALMER, *supra* note 5, at 177-178; GADAMER, *supra* note 22, at 452.

²¹⁰ GADAMER, *supra* note 22, at 278

²¹¹ Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 50 EMORY L. J. 563 (2001).

support arguments for ideas. This analysis is most concerned with the fact that the nation's relatively young chief justice bases his interpretations, the way he understands, on a personal compass that points in only two directions – right and wrong. Gadamer discussed the concept of prejudices. Prejudices cannot be avoided but should be examined before interpretation begins.²¹² After all, preunderstanding is required for the interpreter to expand his or her horizons to meet the horizon of the text. It is the dialogical interplay necessary for understanding.²¹³ Ricoeur identified the centrality of this interplay between the preexisting, the known, and the unknown, as central to understanding when he wrote that “We live neither in closed horizons, nor within one unique horizon. Insofar as the fusion of horizons excludes the idea of total and unique knowledge, this concept implies a tension between what is one's own and what is alien, between the near and the far; and hence the play of difference is included in the process of convergence.”²¹⁴ In this summation by Ricoeur, the knowledge that a person possesses must continue to interact with what is unknown. The cases contained within this analysis, and other information discussed in this article, indicated Chief Justice Roberts was relatively unwilling to subject his own knowledge to an interaction with what was unknown in a way that would allow the development of further understanding.

This idea relates to the concept of preunderstandings. The interpreter must be willing to change his or her understanding as the dialogical interaction with the subject evolves. Firmly set preunderstandings impede the interpretive process. Preunderstandings should be replaced by more accurate understandings as the dialogical process continues.²¹⁵ The concern with Chief Justice Roberts is that his rigid, objective approach does not allow for the dialogical process to occur, and his understanding is impeded by concrete preunderstandings. Nietzsche explained that when man's limited horizons of historical consciousness are not flexible, the interpreter ends up asking “should we not make new for ourselves what is old and find ourselves in it?”²¹⁶

We see Chief Justice Roberts's rules of order take shape as a result of this strong personal, rather than institutional, mode of understanding. Expressions of speech must be orderly, respectful of local authorities, and made in traditional ways. The boundaries of these traditional ways are not clear from the analysis, though he considered the delivery of the message carefully in *Morse*, *Snyder*, and *Citizens United*. In addition to this set of boundaries for speech are his boxes. The boxes both reinforce his objectivist method of understanding and reveal more about how his historicity affects his outlook. The analysis suggested speech must fall into

²¹² PALMER, *supra* note 5, at 136.

²¹³ PALMER, *supra* note 5, at 199-200; RICOEUR, *supra* note 17, at 62.

²¹⁴ RICOEUR, *supra* note 17, at 62.

²¹⁵ GADAMER, *supra* note 22, at 270.

²¹⁶ NIETZSCHE, *supra* note 14, at 136-137.

political, religious, corporate, or community/socially beneficial boxes to warrant protection under the free-speech clause of the First Amendment.

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THE HIGH LIFE AT MIMI'S: QUESTIONING THE LEGALITY OF WEST VIRGINIA'S BAN ON SLOT PARLOR ADVERTISING

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This paper explores West Virginia Association of Club Owners and Fraternal Services v. John Musgrave. The author argues the United States Court of Appeals for the Fourth Circuit decision to uphold a state ban on advertising privately operated video lottery parlors violates the principles set out in Central Hudson Gas and Electric v. Public Service Commission and Greater New Orleans Broadcasting Association, Inc. v. United States. The author advocates strict scrutiny for commercial speech.

Keywords: Commercial Speech, First Amendment, Strict Scrutiny

I. Introduction

Finding a video lottery parlor in West Virginia can be quite difficult, that is, unless you know Mimi. Or Paula. Or Lisa. Or Kim. Or that High Life is more than a brand of the Miller Brewing Company. In West Virginia, these names signify several major chains of slot machine parlors. Despite their cryptic human monikers, these private gaming parlors arguably are being treated inhumanely by the state, at least in terms of free speech.

In 2001, the West Virginia Legislature legalized slot machines statewide through the Limited Video Lottery Act and charged the West Virginia Lottery Commission with their operation.¹ Video lottery media advertising was banned by the law. In 2003, Gov. Bob Wise, offended by a single sign for a parlor he saw while on a road trip, signed an executive order banning the use of approximately 200 gambling-related words and images in the naming and signage of the “mini-casinos.”² The West Virginia Legislature affirmed the ban in its 2004 session. This legislation provoked the American Civil Liberties Union to file a lawsuit on behalf of the West Virginia Association of Club Owners and Fraternal Services claiming that the 2004 regulations violated the First Amendment.³

¹ Limited Video Lottery Act, W. Va. Code § 29-22B (2001).

² W. Va. Exec. Order No. 21-03 (Oct. 29, 2003).

³ W. Va. Ass'n of Club Owners & Fraternal Servs. v. Musgrave, 553 F.3d 292, 301 (4th Cir. 2009).

U.S. District Court Judge Joseph R. Goodwin subsequently ruled that the restrictions were unconstitutional, in part, because they did not advance a substantial state interest.⁴ John Musgrave, state lottery commissioner, appealed this decision to the United States Court of Appeals for the Fourth Circuit and requested that Judge Goodwin stay his ruling until the court of appeals could decide the issue. In 2009, the court of appeals, finding that the state did have a substantial interest in reducing the incidence of compulsive gambling, overturned the decision of the trial court and upheld the statute as constitutional.⁵

The thesis of this paper is threefold. First, the author argues that West Virginia's law violated the First and Fourteenth Amendment rights of the Limited Video Lottery operators. Second, the United States Court of Appeals for the Fourth Circuit wrongly overturned the District Court's ruling by a misapplication of *Central Hudson Gas and Electric v. Public Service Commission of New York*⁶ and the precedents of *44 Liquormart v. Rhode Island*⁷ and *Greater New Orleans Broadcasting Association, Inc. v. United States*.⁸ Lastly, the decision to restrict advertising and naming conventions for Limited Video Lottery slot parlors while allowing them for the state's Racetrack Video Lottery operating casinos should have faced strict scrutiny by the court.

The ruling in *WVACOFS* could be a significant decision as many states consider the addition or expansion of gaming as a way to boost budgets. States, and courts, could view this decision as permission to restrict the rights of speech about gaming. Further, this case is an anomaly in the judicial trend to allow greater freedom in speech about vice.

II. Commercial Speech Law and the *Central Hudson* Test

The First Amendment of the United States Constitution guarantees that Congress shall make no law abridging the freedom of speech or of the press, among other guaranties.⁹ The Fourteenth Amendment, one of three passed following the Civil War, guaranteed that the liberties of the Bill of Rights could not be superseded by the states.¹⁰ A series of Supreme Court decisions ruled that corporations possessed many of the same rights as persons under the law, including *Santa Clara County v. Southern Pacific Railroad Company*¹¹ and *Citizens United v. Federal Election*

⁴ *Id.*

⁵ *Id.*

⁶ 447 U.S. 557 (1980).

⁷ 517 U.S. 484 (1996).

⁸ 527 U.S. 173 (1999).

⁹ U.S. Const. amend. I.

¹⁰ U.S. Const. amend. XIV.

¹¹ 118 U.S. 394 (1886).

Commission.¹² The Court, however, has taken liberties with these rights, excluding some categories of speech and some behaviors from the protection granted by the amendments.

After initially rejecting protection for commercial speech in *Valentine v. Chrestensen*,¹³ the Court in *Bigelow v. Virginia*¹⁴ recognized that some commercial speech serves a public purpose. Bigelow paved the way for *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,¹⁵ in which a prescription-drug users advocacy group sought to overturn the ban on price advertising of prescription drugs by pharmacies. In the Court's opinion, Justice Harry Blackmun said price advertising is permissible because the communication of the idea of "I will sell you the X prescription drug at the Y price"¹⁶ is part of a democratic decision-making process where people need to be informed of their options.

In 1980, the Court developed a test for restrictions on commercial speech in *Central Hudson*.¹⁷ New York's ban on commercial speech about electricity prevented the Central Hudson utility company from communicating with its ratepayers, and the company went to court to have the ban declared unconstitutional. The Court ruled that the ban was too restrictive because it blocked potentially good messages from reaching the public. In the process, it created a four-part test, often referred to as the *Central Hudson* test, that more narrowly circumscribed the constitutional dimensions of commercial speech.

First, said the Court, to be protected, the commercial speech must be accurate speech about a lawful product or service. Speech that is false or advertises an illegal product or service is not eligible for First Amendment protection. This was asserted first in *Virginia Pharmacy*, in which the Court said commercial speech proposed nothing more than a commercial transaction and "related solely to the economic interests of the speaker and the audience."¹⁸

The second part of the test requires a substantial interest on the part of the government in regulating the commercial speech. The third part requires the government to demonstrate that the chosen regulatory remedy advances the government's stated interest. As this part of the test has developed since *Central Hudson*, the government must show not only that the regulation will advance its interest but also that the "restriction on speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."¹⁹

¹² 558 U.S. 310 (2010).

¹³ 316 U.S. 52 (1942).

¹⁴ 421 U.S. 809 (1975).

¹⁵ 425 U.S. 748 (1976).

¹⁶ *Id.* at 760.

¹⁷ 447 U.S. at 563.

¹⁸ *Id.* at 561 (citing *Virginia Pharmacy*).

¹⁹ *Edenfield v. Fane*, 507 U.S. 761, 762 (1993).

Lastly, the government must show that the regulation is no more restrictive than necessary. This prong was modified in 1980 in *Board of Trustees of State University of New York v. Fox*, which held that the regulation need only represent a “reasonable fit” between the government’s interest and the means chosen to achieve that interest.²⁰

III. Rulings about Vice Speech

In *Posadas de Puerto Rico Association v. Puerto Rico*, the Court ruled that Puerto Rico had the right to ban advertising of a casino on the island because the advertising might be viewed by Puerto Ricans.²¹ Advertising to Puerto Ricans is banned by the territory’s gaming act, but advertising outside of Puerto Rico is permitted after approval from the Tourism Development Company.²² Apparently, the legislators believed the risks associated with casino gambling outweighed the risks of other types of gambling common on the island. Challenged by a casino gambling organization, the Supreme Court ruled that the restrictions on commercial speech were fitting despite the uneven treatment of casino versus other forms of gambling and despite the claim that

The First Amendment requires the Puerto Rico Legislature to reduce demand for casino gambling among the residents of Puerto Rico not by suppressing commercial speech that might encourage such gambling, but by promulgating additional speech designed to discourage it. We reject this contention. We think it is up to the legislature to decide whether or not such a “counterspeech” policy would be as effective in reducing the demand for casino gambling as a restriction on advertising. The legislature could conclude, as it apparently did here, that residents of Puerto Rico are already aware of the risks of casino gambling, yet would nevertheless be induced by widespread advertising to engage in such potentially harmful conduct.²³

Although *Posadas* has largely been ignored in subsequent decisions, the ruling does point to the elasticity of the *Central Hudson* test to restrict some speech while allowing others.

In *United States v. Edge Broadcasting Company*,²⁴ the Court ruled that a radio station based in a non-lottery state could not air lottery advertising, despite a large portion of the broadcast audience being in a

²⁰ 492 U.S. 469, 480 (1989).

²¹ 478 U.S. 328, 341–3 (1986).

²² *Id.* at 333.

²³ *Id.* at 344.

²⁴ 509 U.S. 418 (1993).

lottery state. This decision, however, faced influence from broadcast regulation more than limits on vice-like activity. Three years later, in *44 Liquormart*,²⁵ the Court indicated that commercial speech about alcoholic beverages should be evaluated under a standard *Central Hudson* analysis. The Court held that the Rhode Island's ban on the advertising of alcoholic beverage prices did not advance the state interest of encouraging temperance, as the state could not prove that advertising prices would substantially increase consumption of liquor.²⁶ In the opinion, Justice Paul Stevens quoted *Virginia Pharmacy* to decry the paternal nature of legislative restriction on commercial speech.

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents the 'professional' pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.²⁷

Rejecting the logic of *Posadas*, *44 Liquormart* held that the state does not have the right to ban speech just because the message's call to action could cause harm to the public. Rather, the Court said the state must clearly meet the criteria of *Central Hudson* to sustain a restriction on speech. Justice Stevens noted the right to regulate a product does not give the government a right to ban lawful expression about that product.²⁸

In 1999, a group of broadcasters in New Orleans brought suit against the United States and the Federal Communications Commission calling a ban of Louisiana casino advertising unconstitutional.²⁹ The broadcasters argued that because gambling is a legal activity in Louisiana, the FCC ban violated their right to disseminate commercial speech. The Court found that the regulation did not pass *Central Hudson* because, while the state is motivated to reduce the social ills of gambling, the state

²⁵ 517 U.S. 484.

²⁶ *Id.*

²⁷ *Id.* at 496 (quoting *Virginia Pharmacy*, 425 U.S. at 770).

²⁸ *Id.* at 510.

²⁹ *Greater New Orleans Broadcasting*, 527 U.S. 173.

has also encouraged gambling for its economic benefits, and therefore cannot make a reasonable fit for restricting the speech.

With regard to the first asserted interest — alleviating the social costs of casino gambling by limiting demand — the Government contends that its broadcasting restrictions directly advance that interest because “promotional” broadcast advertising concerning casino gambling increases demand for such gambling, which in turn increases the amount of casino gambling that produces those social costs. Additionally, the Government believes that compulsive gamblers are especially susceptible to the pervasiveness and potency of broadcast advertising. Assuming the accuracy of this causal chain, it does not necessarily follow that the Government’s speech ban has directly and materially furthered the asserted interest. While it is no doubt fair to assume that more advertising would have some impact on overall demand for gambling, it is also reasonable to assume that much of that advertising would merely channel gamblers to one casino rather than another.³⁰

Thus, while the state has the ability to regulate gambling, it cannot ban the advertising of an activity that is legal. While reducing problematic gambling is a substantial state interest worthy of limiting the advertising speech of casinos, there is no proof that these limits will produce the desired result.

IV. Scholarship Advocating Strict Scrutiny

Numerous commentators have researched the application of First Amendment law to commercial speech about vice-like behavior. They have found varying stances taken by the Court in regard to commercial speech regulation, vice speech, and the standards for scrutiny of speech regulations. These scholars indicate that vice speech has gained protection and acceptance, and that the Court’s opinions have evolved from a largely collectivistic perspective to one of individualism.

First, Kerri Keller, in an examination of *Lorillard Tobacco Co. v. Reilly*,³¹ considered the content-based restrictions of tobacco advertising, and found that the limits should have undergone strict scrutiny rather than the intermediate scrutiny of *Central Hudson*.³² Keller explained that

³⁰ *Id.* at 188-9.

³¹ 533 U.S. 525 (2001).

³² Kerri L. Keller, *Lorillard Tobacco Co. v. Reilly: The Supreme Court sends First Amendment guarantees up in smoke by applying the commercial speech doctrine to content-based restrictions*, 36 AKRON L. REV. 133 (2002-2003).

requiring all potential restrictions of commercial speech to undergo strict scrutiny would protect the integrity of the First Amendment by allowing more speech to serve the public interest. This would especially be true for the case of advertising of vices: alcohol, tobacco, erotic material and gambling.³³

According to Keller, states have tried to set limits on vice communication, and the Court has continually rejected a categorical ban of speech regarding vices. The argument is that states have other ways to achieve the desired effect of restricting speech, such as starting antismoking programs in schools instead of banning all cigarette advertising in the sight of minors, and those avenues should be exhausted before infringing on the First Amendment rights of vice speech. Requiring strict scrutiny would prevent the erosion of the First Amendment because governments would not be able to make speech restriction a first-response fix to problems.³⁴

Michael Hoefges noted the departure from paternalism in issues of commercial speech law with the Court's decision in *Lorillard*. Hoefges argued that, through *Rubin v. Coors Brewing Co.*,³⁵ *44 Liquormart*, and *Greater New Orleans*, the Court has virtually eliminated its exemption for vice advertising, and that this rule continued in the *Lorillard* decision.³⁶ The general rejection of restrictions in vices cases, he said, shows the Court is willing to use the flexibility of *Central Hudson*, despite the vague "reasonable fit" or "least restrictive" category of the test. The vagueness of this prong has allowed the Court to protect information about vice products so long as the products are legal. Like Keller, Hoefges argued that adopting strict scrutiny, as advocated by Justice Clarence Thomas, would best protect the interests of free speech.

Hoefges and Milagros Rivera-Sanchez explored the heritage of the *Central Hudson* test and agreed with Keller that strict scrutiny must be applied when creating exemptions to the protection of commercial speech.³⁷ They found that after *Edge*, the court has used a stricter version of *Central Hudson* that puts the burden on the state to elaborate on how the restriction directly advances the state interest. They built their argument on *Rubin*, in which the Court affirmed a decision allowing brewers to list alcohol content on beer labels; *44 Liquormart*, in which the Court found that alcohol retailers could advertise their prices; and *Greater*

³³ *Id.*

³⁴ *Id.*

³⁵ 514 U.S. 476 (1995).

³⁶ Michael Hoefges, *Protecting Tobacco Advertising Under the Commercial Speech Doctrine: The Constitutional Impact of Lorillard Tobacco Co.*, 8 COMM. L. & POL'Y 267-311 (2003).

³⁷ Michael Hoefges and Milagros Rivera-Sanchez, "Vice" Advertising under the Supreme Court's Commercial Speech Doctrine: The Shifting Central Hudson Analysis, 22 HASTINGS COMM. & ENT. L.J. 345 (2000).

New Orleans, where the Court found casinos have the right to advertise their legal activity. In these cases, the Court dismissed the notion that advertising causes consumption and countered that advertising would only shift customers from one business to another. By requiring strict scrutiny, the Court would challenge the states to prepare more compelling legislation and consider other avenues to reach a desired behavior before restricting speech.³⁸

In an examination of the Court's treatment of commercial speech, Elizabeth Blanks Hindman found that collectivist and individualist perceptions divided the Court in its decisions. Hindman cited these perceptions as the reason the Court would have differing consensus in *Posadas* and *44 Liquormart*.³⁹ Justice John Paul Stevens argued that false or misleading speech should be judged under a collectivist doctrine, while truthful speech should be judged under an individualist doctrine. Hindman uses Stevens's logic for banning speech in her claim that strict scrutiny should be the standard for all restrictions on commercial speech. Stevens argued that bans on speech where the Court restricted factual speech to protect consumers "often serve only to obscure an 'underlying governmental policy' that could be implemented without regulating speech. In this way, these commercial speech bans not only hinder consumer choice, but also impede debate over central issues of public policy."⁴⁰

Hindman summarized the dichotomy in Court opinions on the value of speech and the ability of the audience. "In articulating the purposes of protecting commercial speech, the Court has acknowledged its value while at the same time casting its worth as beneath that of ideological speech. In exploring the abilities of audiences, the Court has labeled them as unsophisticated and gullible, but also as rational and able to tell 'good' from 'bad.'" ⁴¹

Collectivist rulings by the Court fall on the idea of the "third person effect," which is based on a social science theory that suggests people perceive a behavior to have more effect on others than on themselves, according to Seounmi Youn, Ronald J. Faber, and Dhavan V. Shah. These researchers have found that the gap in a perception that gambling affects others more than it affects oneself increases proportionally with one's desire for regulation of gambling advertising. This behavior, often referred to as paternalism by courts and legislatures, suggests that the state is

³⁸ *Id.*

³⁹ Elizabeth Blanks Hindman, *The Chickens Have Come Home To Roost: Individualism, Collectivism And Conflict In Commercial Speech Doctrine*, 9 COMM. L. & POL'Y 237-71 (2004).

⁴⁰ *44 Liquormart*, 517 U.S. at 503.

⁴¹ Hindman, *supra* note 39, at 271.

willing to restrict things perceived as causing harm to the public, even without evidence to prove they do.⁴²

In *WVACOFS*, the United States Court of Appeals for the Fourth Circuit leaned toward collectivism when the Supreme Court in *44 Liquormart* and *Greater New Orleans* leaned toward individualism. The court followed the *Posadas* logic in the “reasonable fit” prong, and treated gambling advertising as a vice with a need for greater restriction. When determining the ability of the audience to interpret the speech, Chief U.S. District Judge Joseph R. Goodwin followed individualistic logic while the United States Court of Appeals for the Fourth Circuit followed collectivism.

V. History and Revenue Structure of the West Virginia Lottery

In 1984, West Virginia voters passed an amendment to the state constitution that allowed the state to sponsor lotteries, and the West Virginia Lottery Commission was formed to regulate gaming.⁴³ The Lottery’s reach widened in 1994 with the introduction of video slot machines at the four privately owned dog and horse racetracks, then named Wheeling Island Racetrack in Wheeling, Tri-State Racetrack in Nitro, Mountaineer Race Track in Chester, and Charles Town Races in Charles Town, through the Racetrack Video Lottery (RVL) Act.⁴⁴ Through these partnerships, the tracks were able to offer a greater gambling experience, and could advertise their games.⁴⁵ In 2001, after years of questionable operations statewide, all video lottery terminals came under the Lottery umbrella. The state sold licenses for 9,000 private machines with all non-licensed machines deemed illegal. This allowed the state to capture up to 50 percent of the gross profits from the machines.⁴⁶

In 2007, Kanawha, Ohio, and Hancock counties passed referenda to allow table games at their racetracks. Table games began at Wheeling Island Hotel Casino Racetrack and Mountaineer Casino Racetrack and Resort in 2007,⁴⁷ and at Tri-State Racetrack and Gaming Center in 2008.⁴⁸

⁴² Seounmi Youn, Ronald J. Faber, and Dhavan V. Shah, *Restricting Gambling Advertising and the Third-Person Effect, Psychology & Marketing*, 633-49 (2000).

⁴³ Lottery History, <http://www.wvlottery.com/aboutus/lotteryhistory.aspx> (last visited June 5, 2014).

⁴⁴ Wheeling Island Racetrack is now Wheeling Island Hotel, Casino & Racetrack; Tri-State Racetrack is now Mardi Gras Casino & Resort; Mountaineer Race Track is now Mountaineer Casino, Racetrack & Resort; Charles Town Races is now Hollywood Casino at Charles Town Races.

⁴⁵ Lottery History, *supra* note 43.

⁴⁶ *Id.*

⁴⁷ Vicki Smith, Associated Press, *Hancock approves table games*, SUNDAY GAZETTE-MAIL, July 1, 2007, at 1A.

⁴⁸ Jake Stump, *What’s the next move for Tri-State?*, CHARLESTON DAILY MAIL, Aug. 21, 2007, at 1A.

In 2009, Jefferson County voters approved table games for Charles Town Races, which began in 2010.⁴⁹ Also in 2009, voters in Greenbrier County allowed The Greenbrier to offer table games and slot machines at the world-renowned White Sulphur Springs resort, which also began in 2010.⁵⁰ Money from The Greenbrier funds a specific Historic Resort account, from which the state receives a portion of the funds.

Racetracks are required to license video lottery terminals from the Lottery Commission at an annual fee.⁵¹ Under current law, the state retains about 48% of all revenue from the racetrack video lottery, with about 46% going to the state budget earmarked for lottery-funded services and about 2% going to the municipality and the county where the racetrack is located.⁵²

The 2001 Limited Video Lottery (LVL) Act⁵³ allowed video lottery terminals to be used under state control by private entities outside the four racetracks. The Commission may license up to 9,000 terminals at establishments with licenses to sell alcohol or non-intoxicating beer, excluding places that also sell petroleum products. Revenue from the LVL is allocated through a tiered structure, where machines with greater revenues contribute a greater percentage of their earnings to the state; a portion of revenue funds compulsive gambling treatment.⁵⁴

The legislation that legalized the RVL in 1994 and then the LVL in 2001 set out different procedures for collecting revenue, with the state taking a bigger cut from LVL operators than from RVL operators. The substantial money already being collected from racetracks was a factor in the state budget, and Governor Wise sought to combine it with the LVL revenue to fund senior services and his newly created PROMISE scholarship program, which gave full, merit-based scholarships for state-resident students at state universities. The varying fee structure for LVL operators allowed long-term profitable operation of the terminals, as well as provided a system to meet the growing budgetary needs of Wise's social programs. As more people earned scholarships and as senior services expanded, the LVL parlors would have established customers. Current financial reports indicate this is the case, as revenue from the LVL and the RVL have generally risen over time.⁵⁵

⁴⁹ Vicki Smith, Associated Press, *Eastern Panhandle gambling vote passes hands-down in Jefferson*, SUNDAY GAZETTE-MAIL, Dec. 6, 2009, at 1A.

⁵⁰ Michelle Saxton, *Resort set to offer gambling*, CHARLESTON DAILY MAIL, Sept. 29, 2009, at 1A.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Limited Video Lottery Act, W.Va. Code § 29-22B (2001).

⁵⁴ *Id.*

⁵⁵ W. Va. Financial Statements—Unaudited, Monthly Report To Governor for May, (2011).

VI. Lineage of WVACOFS

Although the Limited Video Lottery Act legalized video gambling outside the four racetracks, it prohibited the advertisement of the video machines at those establishments.⁵⁶ It did not take long, however, until LVL retailers began to question the ban on advertising. In 2003, Danny Thomas, owner of Blazzin 7's Casino and Lounge in Clarksburg and Nutter Fort, began advertising his slots parlors on television, referring to the machines as "West Virginia Games" and as a "video room." This distinction skirted the law, which Thomas said privileges racetracks over LVL establishments. "I don't think that it's fair that the race tracks can advertise and show pictures of their video lottery machines on TV," he said in an interview with the Associated Press.⁵⁷

The slot parlors had found a loophole. While the law did not allow them to discuss their slots business, parlor owners were allowed to name their business whatever they wanted. So while a business might not be able to say "play our slot machines" in an advertisement, nothing stopped that business from being called "Moneybags Casino," as the LVL Act only banned the words "video lottery" from business names. "I can't do anything about it when it's part of the corporate name," Commissioner Musgrave said in an interview with the *Charleston Gazette*. "A number of them are going back and making a name change." But the Lottery countered with a proposal for legislation that would "prohibit bars and taverns from using any words 'commonly associated with gambling' in their names."⁵⁸ State Senator Mike Oliverio, a Democrat from Monongalia County, led the charge for the rules change, and warned Secretary of State Joe Manchin III about incorporating businesses under that name.⁵⁹ Manchin sought an opinion from the state attorney general to determine if his office had the power to restrict such naming.⁶⁰

On October 29, 2003, Governor Wise signed an executive order banning all instances of the word "casino" and other gambling-related words and images from advertising of establishments with LVL machines, closing the loophole. "The spirit of this law was to ensure an environment free of outdoor lottery advertising and prevent this blight on our landscape," Wise said in an interview with the Associated Press. "This order will clarify the law until the amendments can be passed by the

⁵⁶ Limited Video Lottery Act, W. Va. Code § 29-228.

⁵⁷ Associated Press, *Club owner questions video lottery ad ban*, CHARLESTON DAILY MAIL, Feb. 6, 2003, at 9A.

⁵⁸ Phil Kabler, *Lottery officials try to close video slot loophole*, CHARLESTON GAZETTE, July 23, 2003, at 2A.

⁵⁹ Phil Kabler, *Senator wants to eliminate 'casino' names*, CHARLESTON GAZETTE, Aug. 6, 2003, at 1C.

⁶⁰ Phil Kabler, *Manchin seeks opinion on 'casino' prohibition*, CHARLESTON GAZETTE, Aug. 7, 2003, at 2A.

Legislature.” The order mandated that establishments “shall not use a name that contains any word or wording commonly associated with video lottery ... or use symbols commonly associated with video lottery and/or gambling/gaming in any advertising, promotional materials or on any exterior/outdoor signage.” Retailers were given until January 1, 2004, to comply with the order.⁶¹

The executive order was prompted by a trip to Washington, D.C., that took the governor through Bruceton Mills in Preston County on Interstate 68. The governor saw a placard on a blue “Attractions” highway sign for Crazy Charlie’s Casino. “I said, ‘Enough’s enough. It’s time we rein this in,’ ” Wise told the *Charleston Gazette*. While driving, Wise called the Department of Highways to have the sign removed and then called Musgrave to see how the state could crack down on gambling references in parlor names. “If someone wants to sue us, bring it on,” Wise said. The Wise proclamation follows the Lottery-proposed change in the LVL rules to restrict the naming of parlors, but put the ruling into earlier action. “We’re getting an early crack at it,” Wise said of the executive order. “We want this practice to stop.”⁶²

Retailers pushed back by saying the order was too restrictive, and that it banned lottery advertising as well as LVL advertising.⁶³ The state revised its stance to allow traditional lottery advertising, while keeping the LVL ban in place.⁶⁴

During the 2004 Legislative Session, Wise signed the restrictions into law, which allowed only a 1-foot square sign supplied by the Lottery to be displayed to advertise LVL products. “We worked too hard to put an end to the illegal video lottery business in stores, gas stations and other open locations in 2001 through the Limited Video Lottery Act,” Wise told the Associated Press. “Unfortunately, some licensed retailers incorporated language and symbols associated with gambling in the legal name of their location and bombarded roadways and communities with gambling signs. This was not the intent of the law.”⁶⁵

By the end of June 2004, retailers were complaining that the ban had caused a “marketing nightmare” for their businesses. While revenue had not decreased, retailers were forced to change names and signs to comply with the new law. “(The state) can advertise its product however it wants, but we can’t advertise ours,” said Tom Sanders, owner of Club 47

⁶¹ Associated Press, *Wise’s order limits gambling signs*, CHARLESTON DAILY MAIL, Oct. 30, 2003, at 7D.

⁶² Phil Kabler, *Governor’s order on ‘casino’ billing inspired by I-68 sign*, CHARLESTON GAZETTE, Oct. 31, 2003, at 8A.

⁶³ Josh Hafenbrack, *Gambling ad rules come under fire*, CHARLESTON DAILY MAIL, Dec. 23, 2003, at 1A.

⁶⁴ Brian Farkas, Associated Press, *State Lottery revises stand on video lottery advertising*, CHARLESTON DAILY MAIL, Jan. 3, 2004, at 5A.

⁶⁵ Associated Press, *Wise signs video slots legislation*, April 2, 2004, at 5C.

near Parkersburg in an interview with the *Charleston Daily Mail*. “You go over the bridge and you can see a billboard advertising the giant Powerball jackpot. We have to camouflage our name however they want, but people still know what it is. I think it’s very foolish because you can’t take every word out of the dictionary. It’s goofy.”⁶⁶

In August 2005, the lottery went a step further and prohibited any form of advertising or promotion of LVL machines or parlors.⁶⁷ The rule was designed to crack down on parlors that gave prizes to frequent players.⁶⁸ But LVL operators again said the ban is too restrictive, and that the ruling could prohibit restaurants and hotels with LVL terminals from advertising at all. This also banned LVL parlors from offering free food or drinks to its players. At the same time, the Lottery earned record revenue, led by the racetracks, with \$88.2 million, with the LVL contributing \$27.9 million.⁶⁹

The LVL operators, aided by the American Civil Liberties Union, struck back in 2007 filed a complaint in U.S. District Court in Charleston challenging the constitutionality of the advertising ban, which listed words associated with gambling, such as Jack, Queen, King, Ace, Lucky, Dough, Cash, Casino, Chance, Dollar, and about 200 others.⁷⁰ The complaint also asked the court to overturn sign and advertising restrictions on the slots parlors and fraternal organizations that operate LVL terminals. “Andrew Schneider, director of the West Virginia ACLU, said the law also violates the equal protection provisions of the Fourteenth Amendment because the state's four racetrack casinos are allowed to advertise thousands of slot machines with few restrictions.”⁷¹ Roger Forman, a lawyer for the West Virginia Association of Club Owners & Fraternal Services, said the restrictions prohibited people from making an informed choice. “West Virginians are perfectly capable of making their own decisions about gaming, based on truthful information about what's available to them,” he said in a prepared statement. “There are other ways to address concerns about gambling without muzzling small business owners.”⁷² The West Virginia Amusement and Limited Video Lottery Association and the West

⁶⁶ Kris Wise, *Retailers unhappy with lottery law*, CHARLESTON DAILY MAIL, June 30, 2004, at 1C.

⁶⁷ Phil Kabler, *Lottery operators seek easing of advertising rules*, CHARLESTON GAZETTE, Sept. 1, 2005, at 7A.

⁶⁸ The state’s privately owned racetracks are not prohibited from offering rewards to their frequent players.

⁶⁹ Phil Kabler, *Lottery operators seek easing of advertising rules*, CHARLESTON GAZETTE, Sept. 1, 2005, at 7A.

⁷⁰ Vicki Smith, Associated Press, *ACLU, bar owners sue W.Va. over limits on gambling ads*, CHARLESTON DAILY MAIL, Feb. 28, 2007, at 7A.

⁷¹ *Id.*

⁷² *Id.*

Virginia Limited Video Lottery Retailers Association were not parties to the lawsuit.⁷³

That June, the West Virginia Amusement and Limited Video Lottery Operators Association changed its name to the West Virginia Amusement and Limited Video Lottery Association, and allowed retailers in the LVL industry to join its membership, as well as owners.⁷⁴ The association's director said the move allowed everyone in the LVL industry to work together. "Strength and unity, that's what we're looking for," said association chief Patricia Rouse Pope. "People in this industry need to stick together so we can have a unified message if and when the time comes."⁷⁵ This move came at a time when the racetracks were in the process of adding table games to their gambling offerings. Ohio County had already approved games at Wheeling Island, and Hancock and Kanawha counties would do so for Mountaineer and Tri-State in the coming months.⁷⁶

On September 28, 2007, Chief U.S. District Judge Joseph R. Goodwin granted an injunction against the West Virginia Lottery Commission blocking it from enforcing its ban on LVL advertising.⁷⁷ "The advertising ban does not directly and materially advance a substantial government interest, and is therefore an impermissible restriction on commercial speech under the First Amendment,"⁷⁸ Goodwin wrote in the opinion. "The advertising ban infringes upon limited video lottery retailers' right to speak and impedes the public's ability to engage in informed political discourse."⁷⁹ Goodwin ruled that the LVL operators are doing the speaking, not the state, and that the operators have a First Amendment right to that speech. He also rejected the notion that *Central Hudson* does not apply, as the state argued, because the product being sold is privately owned, despite the fact it is state supported. The state argued that precedent from *Central Hudson* and *44 Liquormart* do not apply, but Goodwin countered that electricity and alcohol are subject to regulation, as is gambling, and therefore the precedent stands.⁸⁰ Goodwin wrote that the terms banned by the state are not inherently misleading and should be allowed.

Based on the record before me, I cannot find that the speech banned by the State is inherently misleading, at least without any evidence of the context in which it would be

⁷³ *Id.*

⁷⁴ Justin D. Anderson, *Slots group bolsters numbers*, CHARLESTON DAILY MAIL, June 12, 2007, at 1A.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ 512 F.Supp.2d 424.

⁷⁸ *Id.* at 425.

⁷⁹ *Id.*

⁸⁰ *Id.* at 440.

used. The LVLA prohibits LVL licensees from using the words “video lottery” in “the name of the approved location, or in any directions or advertising visible from outside the retailer's establishment.” I fail to see how the phrase “video lottery” is inherently misleading in an advertisement for an establishment that legally offers video lottery. Likewise, it is not inherently misleading for a business to use words commonly associated with gambling in its corporate or business name when gambling via limited video lottery legally occurs there. Moreover, even a cursory glance at the list of words that LVL retailers are prohibited from using demonstrates that many of the words are not inherently misleading. For instance, I cannot find that the words “amusement,” “progressive,” or “wild” are inherently misleading.

Nor has the defendant offered any evidence that the prohibited terms are actually misleading. Instead it notes that the Commission has banned the terms because of the possibility that they are misleading. The Supreme Court has explained, however, that the “rote invocation of the words ‘potentially misleading’ ” cannot supplant the defendant's burden “to ‘demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.’ ”⁸¹

Goodwin said that LVL speech is commercial and is subject to protection. Then he agreed that the state does have a substantial interest in controlling gambling. However, Goodwin ruled that the regulation failed the third prong of *Central Hudson* because there was not a reasonable fit between the regulation and the state interest.

Additionally, Goodwin ruled that the state was unable to meet the fourth prong of *Central Hudson* because *Posadas* and *Greater New Orleans* indicate that the power to regulate an industry does not inherently give the power to regulate speech about that industry.⁸² Goodwin concluded by arguing that allowing advertising would shed light on the LVL industry and would allow it to be better scrutinized by the public.

Whether intentional or not, the effect of the ban on limited video lottery advertising is to hide the extent of this form of gambling from the public eye...Lifting the LVLA's ban on commercial speech will bring limited video lottery into the light, thereby providing important information to those who want to play, and those who want to protest. I therefore

⁸¹ *Id.* at 440-1.

⁸² *Id.* at 446.

FIND that granting the injunction serves the public interest.⁸³

Businesses were excited at the prospect of advertising, particularly bars and restaurants, hoping that they could show a more complete picture of their business.⁸⁴ However, the state sought to appeal Goodwin's ruling immediately after it was filed.⁸⁵ Manchin, now governor, warned LVL operators wanting to put up "flashy neon signs" for their business that they might have to take them down. Although the governor said he respected Goodwin's ruling, "I don't believe it was the intent of the state to attract an outside industry with signs up 24 hours a day attracting your grandmother, your sister, and your aunt and uncle," Manchin told the *Charleston Daily Mail*. "I'm hoping that when we go back (to session) in January, we'll do whatever it takes. I believe the representatives of the Legislature will do the right thing."⁸⁶

The West Virginia Amusement & Limited Video Lottery Association urged its members to be respectful with signage and advertising. "We believe that advertising restrictions are in the mutual interest of the public and those of us in the limited video lottery business," association President Anthony Sparachane said. "Even though it may be legal for limited video lottery to engage in the same sort of advertising as the racetracks, our highest priority is to be responsible good neighbors in the communities we serve."⁸⁷

On November 20, 2007, the United States Court of Appeals for the Fourth Circuit issued an injunction that froze Goodwin's ruling based on an appeal filed by the Lottery Commission.⁸⁸ The state won its appeal on January 13, 2009, when the United States Court of Appeals for the Fourth Circuit overturned Goodwin's ruling that the advertising ban was unconstitutional. The court ruled that overturning the state's ban would violate judicial restraint.⁸⁹

On the circumstances presented here, we must reverse. The Supreme Court has cautioned that we not casually invalidate state legislation on facial grounds, for the simple reason that such challenges "often rest on

⁸³ *Id.* at 447.

⁸⁴ Sarah K. Winn, *Businesses prep for changes in video lottery ads*, CHARLESTON GAZETTE, Oct. 1, 2007, at 1A.

⁸⁵ Phil Kabler, *State may appeal video lottery advertising ruling*, CHARLESTON GAZETTE, Oct. 2, 2007, at 1A.

⁸⁶ Jake Stump, *Manchin warns lottery parlors*, CHARLESTON DAILY MAIL, Oct. 2, 2007, at 1A.

⁸⁷ *Id.*

⁸⁸ Associated Press, *Court freezes ruling on lottery ads*, CHARLESTON DAILY MAIL, Nov. 21, 2007, at 11A.

⁸⁹ 553 F.3d at 294.

speculation” and “run contrary to the fundamental principle of judicial restraint.” In this particular context, we think that caution is especially advisable. The state has a longstanding and substantial interest in regulating the implementation and promotion of its own lottery. It has done so by attempting to raise revenues necessary for education and infrastructure without magnifying the social maladies often associated with gambling addictions. It is this interest in a balanced approach to lottery promotion that would be eviscerated by the wholesale invalidation of West Virginia’s advertising restrictions.⁹⁰

The court found that the state had an ownership interest in LVL parlors.⁹¹ In regard to *Central Hudson*, the court ruled the test did not fully apply because the speech had government implications, and that advertisements could not be ruled misleading because no examples of advertisements were given. Because the state legalized the LVL, the court ruled, it has a substantial interest in regulating the lottery, preventing the social ills associated with gambling, and gaining a revenue source.⁹²

We independently evaluate defendant’s assertion that the advertising restrictions advance the state’s interest, and we rely on the valid sources of history, consensus, and common sense.

Much of what was said in the preceding section pertains to this prong of the inquiry as well. In many interrelated ways, the advertising restrictions serve the state’s interest in conducting its video lottery in a manner that raises revenue but avoids amplifying the social ills associated with gambling. The advertising restrictions prevent retailers from having names, signs, and advertisements that might prey on those prone to gambling addiction. The restrictions also limit the spread of the private establishment video lottery and reduce demand for it.

In contrast, an unlimited right to advertise video lotteries poses the risk of spreading the negative effects of lotteries throughout the state.⁹³

The court held that because the racetrack lottery promoted tourism and the LVL was aimed at local gamblers, regulation for the two could be

⁹⁰ *Id.*

⁹¹ *Id.* at 301.

⁹² *Id.* at 302.

⁹³ *Id.* at 303-4.

different. The court also contradicted the holding in *Greater New Orleans*, which said that advertising does not necessarily cause consumption.

The advertising restrictions also serve the state's interest by reducing demand for the video lottery in private establishments. Of course this makes perfect sense. If advertising did not increase demand, commercial establishments would be loathe to pay for it. This very linkage between advertising and demand led the Court to recognize that in some instances a reduction in advertising could directly advance the government's interest in reducing demand for a product.⁹⁴

The court said the regulation passed the fourth prong of *Central Hudson* because the state regulates all gambling in a variety of ways, and restricting speech would be another way to achieve the desired effect.⁹⁵

VII. A Ruling in Error

It is difficult not to see the strains of the now discredited logic of *Posadas* in the decision by the United States Court of Appeals for the Fourth Circuit in *WVACOFS*. Apparently, the court's decision was based in large measure on the idea that, because West Virginia highly regulates the gambling industry, the state is similarly entitled to severely restrict the commercial speech of the gambling industry. Specifically, the court contended that because the state has controlling interest in the LVL parlors, it has a right to restrict their speech. Applying *Central Hudson*, the state does have a substantial interest in controlling gambling, but the fit between the restriction and the interest is implausible because the restriction applies to one form of video lottery but not another, as was true in *Greater New Orleans*.

In *44 Liquormart*, the state of Rhode Island had a controlling interest in alcohol sales, but restrictions there were struck down by the Supreme Court. The structure of the RVL and LVL dictate that the lottery terminals are privately owned, but licensed and maintained by the state. The state receives a share of the profits through a distribution structure of the revenue in both the RVL and LVL, but does not claim ownership of the facilities, the machines or their speech. Therefore, the only legal difference between the RVL and LVL is the structure by which their revenues are distributed.

Trial Court Judge Goodwin agreed with the arguments by the Club Owners that to restrict the speech for the LVL but not the RVL constitutes a violation of the Fourteenth Amendment. The similarities between the

⁹⁴ *Id.* at 304.

⁹⁵ *Id.* at 306.

operation structure of the RVL and LVL indicate that the two industries are governed the same way and create revenue in the same way. Restricting LVL speech amounts to a categorical exclusion and, therefore, should be subject to strict scrutiny. But even at intermediate scrutiny, the state arguably would be unable to prove the connection between restricting speech and controlling problem gambling because other forms of gambling, such as the RVL, table games, racing, and lotteries, are legally advertised. As found in *Greater New Orleans*, advertising the LVL might generate new revenue, but it will also show that there are options to gambling beyond the advertised ones.

Controlling the speech of LVL retailers without controlling the speech of racetracks amounts to an unequal application of the law. Although the Supreme Court has upheld divergent regulations for similarly placed speakers,⁹⁶ the severe restrictions imposed here on LVL retailers seem to raise different First Amendment questions.

The United States Court of Appeals for the Fourth Circuit contended that the audiences for racetracks and LVL parlors were different, as racetracks draw tourists from other states and other regions of West Virginia while LVL parlors attract local residents. The author suggests that this is clearly shortsighted and ill-informed. Racetrack advertisements appear on billboards statewide, and on statewide television. In trying to reach people in Kentucky and Ohio, advertisements for Mardi Gras Casino & Resort reach people in Charleston and Huntington. Moreover, casino advertising is targeted to the hometown audience with promotions for, among other things, \$9.99 prime rib dinners at a casino restaurant at Mardi Gras advertised in the Charleston newspapers. Casinos want to target the local audience as well as the tourist audience. LVL parlors in border counties also draw out-of-state tourists. People from Ohio and Kentucky can easily gamble in Huntington, which borders those states, in the LVL parlors there and not travel to Mardi Gras in Nitro. The same is true in Parkersburg, Bluefield, Martinsburg, Morgantown, New Martinsville, and even at Crazy Charlie's in Bruceton Mills. The LVL and RVL attract both locals and tourists and should be allowed to compete for that market on an equal footing.

VIII. Potential for Long-Term Judicial Impact

In *Virginia Pharmacy*, the Court cautioned against paternalism from legislatures and the courts, indicating that it would be better for the public to decide what is worthwhile communication. In *WVACOFS*, the

⁹⁶ See, e.g., *Leathers v. Medlock*, 499 U.S. 439 (1991) (upholding differential tax schemes for cable and satellite television services and print media).

United States Court of Appeals for the Fourth Circuit returned to paternalism, saying the state has a right to regulate commercial speech simply because the legislature does not like the speech. The paternalistic nature of law is a slippery slope, as legislatures could restrict speech about other vices or activities it deems unsavory and could develop a deep infringement on the First Amendment.

This ruling also adds new flexibility to the fourth prong of *Central Hudson*. Zoning restrictions could be just as effective in limiting the “neon signs” that concerned Gov. Manchin as a restriction on the content of signage. If the purpose of this legislation were only to reduce problem gambling, the comments of Gov. Wise and Gov. Manchin disdaining signage would be superfluous. In fact, the state does not want to see the open promotion of a vice activity through signage and advertising. Reducing problem gambling is merely a more palatable legal justification to achieve what might be an unconstitutional purpose. So, the fourth prong of *Central Hudson* was stretched to say that the state can have multiple interests, compelling and otherwise, and the option that advances both of those interests, least restrictive or not, is permissible.

IX. A Call for Strict Scrutiny

The case of *West Virginia Association of Club Owners and Fraternal Services v. John Musgrave* furthers the arguments of Keller, Hoefges, Rivera-Sanchez, and Hindman that strict scrutiny for any restriction on commercial speech would discourage paternalistic actions by governments. In this case, strict scrutiny would have required the state to justify its claim beyond desire to control gambling and answer to the claims raised by the Court in *Greater New Orleans* and *44 Liquormart* that advertising a product does not lead to consumption of that product.

Application of the intermediate scrutiny standard of *Central Hudson* in the last decade has been incomplete and fractured, as explained by Emily Erickson in an examination of cases of the First Amendment rights of telemarketers.⁹⁷ A series of district and circuit cases used *Central Hudson* to say that Do Not Call registry does not violate free speech rights, despite its ban on commercial interaction, but allowance of charitable solicitation. Erickson argued this privileges non-commercial speech over commercial speech, and that the applications of *Central Hudson* in these cases take a vague view on scrutiny, and do not strongly explain why the restriction is the best suited to achieve the desired effect.

This is also true in *WVACOFS*, because if the desired effect is to curtail problem gambling, then the state would equally restrict advertising of the lottery and the racetracks and casinos. Erickson argued courts have viewed commercial speech closer to its restrictiveness of *Edge*

⁹⁷ Emily Erickson, *Disfavored Advertising: Telemarketing, Junk Faxes and the Commercial Speech Doctrine*, 11 COMM. L. & POL’Y 589 (2006).

Broadcasting than its freedom of *Virginia Pharmacy*, and that the Court should take a stand on a case about less-than-desirable speech to clarify the legal precedent and to set stricter and clearer standards for restrictions on speech. A case such as *WVACOFS* would fit that bill, as gambling speech is a controversial category and lower courts applied *Central Hudson* in differing ways. Its nature as a categorical exemption is similar to the telemarketing cases and would give the Court an opportunity to make an bold statement on commercial speech law.

X. Conclusion

In an examination *West Virginia Association of Club Owners and Fraternal Services v. John Musgrave*, the author of this paper suggests that the state has violated the First and Fourteenth Amendments by restricting the use of advertising, signage, and even certain names. Gaming may be a cause of social ills and gaming parlors are probably less palatable than pawn shops and liquor stores, but this, at least in West Virginia, does not preclude their existence, and, even more, their right to talk about their existence. And yet, these same issues appear in different form throughout the country. The states of Colorado and Washington have proposed legislation to limit or ban the advertisement of marijuana after voters there approved recreational marijuana use.⁹⁸ States have also targeted sites such as Craigslist.com and Backpage.com for prostitution advertising; while prostitution is illegal in most states, the restrictions also cut into legal adult services advertising.⁹⁹ The reverse of vice advertising restrictions is true, as well. The popularity of craft beer has led some states to advertise beer destinations for tourism. And, as is the case in *WVACOFS*, states continue to advertise gambling in an effort to similarly promote tourism.

While the Court has yet to speak on the marijuana issue, it can be presumed the arguments there will be similar to those expressed in *WVACOFS*. Yes, the state does have an interest in minimizing the proliferation of a vice activity, marijuana or gambling. However, limitations of commercial speech favoring one institution over another — be it about the use of medical marijuana instead of recreational, or slot parlor gaming instead of casino — amounts to a categorical exemption, and such restrictions should be required to withstand strict scrutiny. Those whose legal speech is thereby limited should challenge the state legislatures' edicts on these grounds.

For the United States Court of Appeals for the Fourth Circuit to exercise judicial restraint in wishing not to intervene in state legislation is laudable, but, in this case, it would have been more appropriate to have

⁹⁸ David Sirota, Marijuana opponents' new plan: Kill First Amendment, Salon, May 20, 2013, http://www.salon.com/2013/05/20/marijuana_opponents_new_plan_kill_first_amendment/.

⁹⁹ *Craigslist v. McMaster, et al.*, Civil Action No. 2:09-1308-CWH (2009).

recognized its role in upholding constitutionally granted freedoms and Supreme Court precedents. Going forward, the Supreme Court should finally, clearly and irrevocably exorcise the ghost of *Posadas*. Above all, the author argues that requiring strict scrutiny for any restriction on commercial speech would still restrict unwanted behavior, but would reduce the chilling effect of current laws allow for greater freedom of speech.

For the Mimis, Paulas, Lisas, Kims, and High Lifes of the Mountain State, being allowed to advertise could expand the revenue streams going to their in-state owners and operators, and perhaps could pull money from the out-of-state owned racetrack casinos. Zoning restrictions could have the same effect as limiting the neon signs Gov. Manchin feared, and the LVL could lose some of its clandestine perception and get the economic credit it deserves.

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ONLINE NEWS AGGREGATORS, COPYRIGHT AND THE HOT NEWS DOCTRINE

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This article will assess the legal validity of online news aggregation and continued viability of the hot news doctrine in the face of the changing media landscape. The first section will provide a foundational explanation of online news aggregation and the problems created by such practice. Section II will explore several theoretical principles that apply to online news aggregation. Legal principles of copyright law and unfair competition—including the hot news doctrine—will be explored in Section III.

Keywords: Online, Aggregators, Copyright, Hot News

I. Introduction

The Internet is more popular than ever.¹ Currently, seventy-eight percent of adults regularly visit cyberspace,² for a myriad of purposes.³ One such reason that Internet users visit the World Wide Web is to find and read news.⁴ Indeed, news consumption is the third most-popular activity among adult Internet users.⁵ As of 2011, more people obtained news information online than from traditional print newspapers.⁶ A full forty-five percent used the Internet to get news every day,⁷ and that number is

¹See Pew Research Center, *Who's Online: Internet User Demographics*, PEW INTERNET & AMERICAN LIFE PROJECT (May 2011), [http://pewinternet.org/Trend-Data-\(Adults\)/Whos-Online.aspx](http://pewinternet.org/Trend-Data-(Adults)/Whos-Online.aspx).

²*Id.*

³See Pew Research Center, *What Internet Users Do On a Typical Day*, PEW INTERNET & AMERICAN LIFE PROJECT (May 2011), [http://pewinternet.org/Trend-Data-\(Adults\)/Online-Activities-Daily.aspx](http://pewinternet.org/Trend-Data-(Adults)/Online-Activities-Daily.aspx).

⁴*Id.*

⁵See *id.*

⁶Jolie O'Dell, *For the First Time, More People Get News Online Than From Newspapers*, MASHABLE (March 15, 2011), <http://mashable.com/2011/03/15/online-versus-newspaper-news/>.

⁷See Pew Research Center, *What Internet Users Do On a Typical Day*, *supra* note 3.

growing.⁸ As it has become increasingly popular to read the news online, it should be no surprise that the number of websites offering such a service has also grown.⁹

One particular type of website that offers news online is a news aggregator.¹⁰ Online news aggregators are websites that collect news material from multiple sources and provide it together via a single online resource.¹¹ Aggregators may group news material by topic, story, source, date, or other characteristic,¹² and often encourage readers to comment on stories or to share them with others via e-mail or social networking sites.¹³ Although the formatting and additional content accompanying aggregated news varies with the aggregator, news stories served by such organizations are generally displayed as a headline and kicker,¹⁴ and are typically linked back to the full story on the original news site.¹⁵ The various types of aggregators will be discussed in greater detail in subsection B.

This article will assess the legal validity of online news aggregation and the continuing viability of the hot news doctrine in the face of the changing media landscape. The introductory section will provide a foundational explanation of online news aggregation and the problems created by such practice. Section II will explore several property theory concepts as applied to online news aggregation. Legal principles of unfair competition—including the hot news doctrine—and copyright law will be explored in Section III.

A. The Problem

As users increasingly rely on the Internet for news,¹⁶ news organizations are looking for ways to bring their business into the Information Age. Most Internet sites generate revenue in two ways: (1) with a “paywall,” where users pay for access; or (2) with advertising, where

⁸See Pew Research Center, *Usage Over Time*, PEW INTERNET & AMERICAN LIFE PROJECT (September 2011), available at http://www.pewinternet.org/Static-Pages/Trend-Data/~//media/Infographics/Trend%20Data/November%202010/UsageOverTime_11_09_10.zip.

⁹O’Dell, *supra* note 6.

¹⁰Kimberley Isbell, *The Rise of the News Aggregator: Legal Implications and Best Practices* (August 30, 2010), THE BERKMAN CENTER FOR INTERNET & SOCIETY RESEARCH PUBLICATION SERIES, No. 2010-10 at 2, available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1670339.

¹¹*Id.*

¹²*Id.*

¹³See *id.* at 5.

¹⁴*Id.*

¹⁵*Id.*

¹⁶See O’Dell, *supra* note 6.

advertisers pay website operators to serve ads to the users.¹⁷ Due to technical limitations of the Internet and site visitor tracking, both methods require that users visit the source website. Traditional news organizations argue that aggregators deflect traffic from their websites because users who read news on aggregator sites often fail to follow links to full articles after reading the headlines and summaries.¹⁸ Aggregators, in their defense, have insisted that they aid traditional news sites by increasing story exposure and driving users to the original websites.¹⁹

Although both arguments appear to have at least some merit, whether aggregators drive traffic to websites or deflect users from them is a contested matter,²⁰ and the answer likely varies based on a multitude of factors. Nevertheless, the concern itself is real, and both sides agree that the emergence of online aggregators has clearly had an effect on the business—both the money and the model—of traditional news organizations.²¹ In light of the impact of these practices, and the seemingly inexorable advance of the Internet and technology, the legality of online news aggregators deserves closer examination.

B. Online News Aggregators Distinguished

¹⁷See, e.g., Glenn Halbrooks, *Making Money with a Media Website*, ABOUT.COM, <http://media.about.com/od/onlinemedia/a/Making-Money-With-A-Media-Website.htm> (last accessed June 4, 2014).

¹⁸ PhysOrg.com, *Nearly half of Google News users just read headlines: report* (January 19, 2010), <http://www.physorg.com/news183152413.html>.

¹⁹See, e.g., Lauren Indvik, *Study Says Drudge Report Drives More Traffic Than Facebook & Twitter Combined* (August 10, 2011), MASHABLE, <http://mashable.com/2011/08/10/news-traffic-referral-study/>.

²⁰Compare, e.g., Lesley Chiou & Catherine Tucker, *How Does Content Aggregation Affect Users' Search for Information?* NET INST. WORKING PAPER 11-18 (September 29, 2011) at 2, available on SSRN at <http://ssrn.com/abstract=1864203> (examining the effect of a contract dispute between Google News and The Associated Press, and finding that “users do not view an aggregator as a perfect substitute for content,” but that “they are more likely to be provoked to seek additional resources and read further rather than merely being satisfied with a summary”) with PhysOrg.com, *supra* note 18.

²¹See, e.g., Susan Athey, Emilio Calvano, and Joshua S. Gans, *The Impact of the Internet on Advertising Markets for News Media* (January 2011) at 5, presented at the Nov. 2011 FTC Microeconomics Conference, available at <http://businessinnovation.berkeley.edu/WilliamsonSeminar/gans033111.pdf> (“[A]mong users who consumed at least 10 news articles per week, the concentration of a user’s consumption among different news outlets, as measured by a news consumption Herfindahl index, was strongly and negatively associated with the users’ frequency of using Google news and Bing news”); see also Greg Sandoval, *Techmeme founder: WSJ, NYT are aggregators* (April 8, 2009), CNET NEWS, http://news.cnet.com/8301-1023_3-10215444-93.html.

As described, online news aggregators are websites that collect news material from multiple sources and provide it together at a single source.²² All aggregators are not the same, however; broadly speaking, four categories of news aggregator exist.²³ These are: (1) feed aggregators, (2) specialty aggregators, (3) blog aggregators, and (4) user-curated aggregators.²⁴ Not discussed in the present article are aggregators that collect and repost news articles verbatim, in their entirety.²⁵

Feed aggregators are the perhaps the most intuitive example of news aggregator. They collect traditional news stories from traditional news outlets and organize them, often using traditional categories, such as “World,” “U.S.,” “Politics,” “Business,” “Sports,” and others.²⁶ Although sharing and commenting may be enabled, such sites often limit their content to professionally produced news material.²⁷ Feed aggregators thus serve as an index of sorts, allowing users to quickly find online news stories that may be of interest.

Specialty aggregators are in many ways similar to feed aggregators, but restrict content to specific topics.²⁸ Often, stories on specialty aggregators are of limited interest outside of their particular local or online community, and such aggregators gather content related to a geographical location or a specialized topic.²⁹ They may encourage commenting, given the small community nature of their user base.³⁰ And, like feed aggregators, specialty aggregators often serve as an index of the aggregated content. But unlike most feed aggregators, many specialty aggregators have more relaxed standards of professionalism, often aggregating both amateur and professional content that fits within their topical ambit.³¹

In contrast to both feed aggregators and specialty aggregators, blog aggregators are populated primarily with original content.³² This is because the material on blog aggregators consists mainly of commentary about and analysis of third-party articles.³³ Typically, a writer for a blog aggregator chooses an online article that he believes users will find relevant and interesting, and writes his own article highlighting and explaining the

²² Isbell, *supra* note 10 at 2.

²³ *Id.*

²⁴ *Id.*

²⁵ *E.g.*, *Los Angeles Times v. Free Republic*, 2000 WL 565200 (C.D. Cal.). As will be discussed briefly in Section III.B, such practices fall squarely within the realm of copyright infringement.

²⁶ *See, e.g.*, GOOGLE NEWS, <http://news.google.com> (last accessed June 4, 2014).

²⁷ *See, e.g., Id.*

²⁸ Isbell, *supra* note 10 at 3.

²⁹ *Id.*

³⁰ *See, e.g.*, TECHMEME, <http://www.techmeme.com> (last accessed June 4, 2014).

³¹ *Id.*

³² Isbell, *supra* note 10 at 5.

³³ *Id.*

information contained in the original.³⁴ While the content of most blog aggregator sites is often written by professionals,³⁵ the articles selected for commentary may or may not be professionally produced, and may or may not consist of traditional news content.³⁶ While most blog aggregators have a specific focus—for example, Gizmodo³⁷ focuses on consumer electronics—content is generally selected for its appeal to the user base, rather than for strict thematic fit.³⁸ User comments are often solicited explicitly, and sharing is usually encouraged.³⁹

Distinct from the previous three types of news aggregators is the user-curated aggregator. The user-curated aggregator can be distinguished by the fact that users, rather than website operators, select the content to be included.⁴⁰ User-curated sites have been likened to the proverbial water cooler,⁴¹ where users discuss topics of mutual interest and have conversations, some of which may depart tangentially from the subject at hand. While some user-curated aggregators may have guidelines for appropriate content,⁴² the material included is often collected from a wide variety of sources, including traditional news sites and sources of information, as well as multimedia, entertainment and comedy sites, and personal web pages.⁴³ Commenting and sharing are strongly encouraged,⁴⁴ and a sense of community is typically fostered.⁴⁵

C. Methodology

This subsection will describe the methodology used by the author, including the questions asked and answered, research strategies, and the limitations imposed by the methods employed.

1. Research Questions

³⁴See, e.g., THE GAWKER NETWORK, <http://gawker.com> (last accessed June 4, 2014).

³⁵See, e.g., *id.*

³⁶*Id.*

³⁷GIZMODO, <http://gizmodo.com> (last accessed June 4, 2014).

³⁸See, e.g., *id.*

³⁹*Id.*

⁴⁰Isbell, *supra* note 10 at 4.

⁴¹Matthew Lynley, *Reddit, the Web's new watercooler, hits 1 billion pageviews*, SOCIALBEAT (Feb. 2, 2011), <http://venturebeat.com/2011/02/02/reddit-the-webs-new-watercooler-hits-1-billion-pageviews/>.

⁴²See, e.g., DIGG, <http://www.digg.com> (last accessed June 4, 2014).

⁴³Isbell, *supra* note 10 at 4.

⁴⁴See, e.g., DIGG, *supra* note 42.

⁴⁵See, e.g., REDDIT (contributors and commenters on the Reddit website refer to themselves and each other as “Redditors,” and appropriate etiquette--“reddiquette”--is established collectively by the users), <http://www.reddit.com> (last accessed June 4, 2014).

This study proposes to answer two primary questions. The first is whether the practice of online news aggregation is legal. This issue will be addressed using copyright law, including an examination of the fair use defense, and unfair competition law, with a detailed analysis of the applicability of the hot news doctrine. The second question is whether the hot news doctrine remains viable, and if so, to what degree. The discussion of this matter will involve a brief exploration of the historical development and justification of the hot news doctrine, analysis of several recent cases involving aggregators, and the resultant commentary of legal scholars.

2. Methods

To address the foregoing questions, the author gathered information from a variety of legal and scholarly sources. Principal among these were court opinions. Frequently—and particularly with respect to copyright law—these opinions were issued by the Supreme Court of the United States, although some analogous recent cases and the common law nature of the hot news misappropriation tort demanded inclusion of additional courts. These cases were found using Westlaw and LexisNexis online databases,⁴⁶ with a preference for those that had the greatest number of subsequent citations. These searches returned many of the opinions that gave rise to relevant principles of copyright law, such as the merger doctrine of *Baker v. Selden*⁴⁷ and the rejection of the “sweat of the brow” doctrine in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*⁴⁸ as well as *Harper & Row, Publishers, Inc. v. Nation Enterprises*,⁴⁹ *Campbell v. Acuff-Rose Music, Inc.*,⁵⁰ and *Kelly v. Arriba Soft Co.*⁵¹ Title Seventeen of the United States Code⁵² was also examined.

Regarding unfair competition and the hot news doctrine, Westlaw and LexisNexis were again used, with appellate opinions from 2000 and later strongly preferred.⁵³ Websites for organizations such as the Electronic

⁴⁶ Searches used included, e.g., “‘copyright’ /5 ‘fair use,’” and “(‘copyright’ /s ‘fair use’) and ‘internet.’” The term “aggregat!” was originally used, but these searches returned a disproportionate number of cases discussing aggregate damages, and so results from such searches were dismissed unless referenced contextually by an included opinion.

⁴⁷101 U.S. 99 (1879).

⁴⁸499 U.S. 340 (1991).

⁴⁹471 U.S. 539 (1985).

⁵⁰510 U.S. 569 (1994).

⁵¹336 F.3d 811 (9th Cir. 2003).

⁵²17 U.S.C. § 101 et seq.

⁵³ A search for “‘hot news’ /5 ‘misappropriation’ and DA(aft 12-31-1999),” using state and related federal databases for the five states that recognize hot news misappropriation as a cause of action returned 13 cases, all but one of which were

Frontier Foundation⁵⁴ and Reporters Committee for Freedom of the Press⁵⁵ were also monitored for recent developments in related areas. Historical cases were explored: the seminal case of *International News Service v. The Associated Press*⁵⁶ and its progeny were examined, as were several more contemporaneous applications of the doctrine, such as *National Basketball Ass'n v. Motorola, Inc.*,⁵⁷ which was until recently the preeminent case on hot news misappropriation, before it was further limited in 2011 by *Barclays Capital, Inc. v. Theflyonthewall.com*.⁵⁸ Additionally, the author consulted recent scholarly literature discussing the hot news doctrine and its application to Internet news sources.⁵⁹

3. Limitations

The questions addressed by this article are currently on the cutting edge of the state of the law. Although online news aggregators have been the subject of much attention in the recent decade,⁶⁰ only a handful of lawsuits have been brought,⁶¹ and fewer still have reached a decision on the merits.⁶² Moreover, the hot news cause of action appears to have fallen into disuse, and is currently recognized in only five states.⁶³ Therefore, the number of judicial opinions discussing and interpreting the doctrine from a modern perspective is decidedly modest.

II. Theory and Policy

Several theories and principles have been advanced as justification for intellectual property and the hot news doctrine.⁶⁴ Foremost among

from trial courts. The appellate-level opinion was included, and the others were included if they addressed issues discussed herein.

⁵⁴<http://www.eff.org> (last accessed June 4, 2014).

⁵⁵<http://www.rcfp.org> (last accessed June 4, 2014).

⁵⁶248 U.S. 215 (1918).

⁵⁷105 F.3d 841 (2d Cir. 1997).

⁵⁸650 F.3d 876 (2d Cir. 2011).

⁵⁹ These were found by searching Google and Google Scholar, as well as Academic Search Premier, JSTOR, and ERIC databases, using terms such as "hot news," "online," "internet," and "aggregator."

⁶⁰See Isbell, *supra* note 10 at 3.

⁶¹See the explanation in note 53, *supra*.

⁶² Isbell, *supra* note 10 at 3.

⁶³Bruce Sanford, Bruce Brown, and Laurie Babinski, *Saving Journalism with Copyright Reform and the Doctrine of Hot News*, 26 COMM. LAW 8, 9 (2009) (the states are California, Illinois, Missouri, New York, and Pennsylvania).

⁶⁴See, e.g., Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (December, 1988); see also, e.g., Monica Youn, *Neither Intellectual Nor Property*, 107 YALE L.J. 267 (October, 1997), GaëllKrikorian and Amy Kapczynski, ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY 29 (2010).

these are John Locke's labor theory of property,⁶⁵ the related legal doctrine of unjust enrichment, and Garrett Hardin's tragedy of the commons.⁶⁶

A. Locke's Labor Theory of Property

Although the exact interpretation of John Locke's labor theory of property is a source of scholarly debate,⁶⁷ it has been said that Locke's view of property is best summed up as follows:

Locke's justification for property derives property rights in the product of labor from prior property rights in one's own body. A person owns her body and hence she owns what it does, namely, its labor. A person's labor and its product are inseparable, and hence ownership of one can be secured only by owning the other. Hence, if a person is to own her body and thus its labor, she must also own what she joins her labor with—namely, the product of her labor.⁶⁸

The notion that one owns the fruits of his labor has been applied conspicuously in *International News Service v. Associated Press*,⁶⁹ as well as more modern cases,⁷⁰ and has served as a long-standing justification for the hot news doctrine and intellectual property rights.⁷¹

Locke's labor theory undergirds a relevant—and recurring—legal principle: the curtailment of unjust enrichment.⁷² Stemming from common law *assumpsit*,⁷³ the prevention of unjust enrichment is present in a variety of legal doctrines, and plays a prominent role in unfair competition law.⁷⁴ Historically, the concept of unjust enrichment has had broad implications, standing for the “[g]eneral principle that one person should not be permitted unjustly to enrich himself at expense of another, but should be required to make restitution of or for property or benefits received, retained or appropriated, where it is just and equitable that such

⁶⁵John Locke, *TWO TREATISES OF GOVERNMENT* (Rod Hay ed., 2004) (1689).

⁶⁶Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968).

⁶⁷Herman Tavani, *Locke, Intellectual Property Rights, and the Information Commons*, 7 *ETHICS & INFO. TECH.* 87, 88 (2005).

⁶⁸*Id.*

⁶⁹248 U.S. 215.

⁷⁰*See, e.g., id.*; *see also NBA*, 105 F.3d at 845 (the first prong of the court's test is whether the “plaintiff generates or gathers information at a cost”).

⁷¹*See, e.g., Hughes, supra note 64* at 296-97 (“Locke's labor theory ... can be used to justify intellectual property”); *but see Feist Publications*, 449 U.S. at 349 (“The primary objective of copyright is not to reward the labor of authors”).

⁷²James Hill, *Trade Secrets, Unjust Enrichment, and the Classification of Obligations*, 4 *VA. J.L. & TECH.* 2, 18 (1999).

⁷³*See generally*, J. B. Ames, *The History of Assumpsit*, 2 *HARV. L. REV.* 53 (1888).

⁷⁴Hill, *supra note 72* at 33.

restitution be made.”⁷⁵ In this form, unjust enrichment has long been present in intellectual property law as a justification for remedies,⁷⁶ and has served as a framework for the creation of the hot news misappropriation tort.⁷⁷ Further, unjust enrichment appears as a required element of the modern-day hot news claim.⁷⁸

B. The Tragedy of the Commons

The tragedy of the commons is the name given to the notion that where multiple individuals acting in their own self-interest all have common access to a limited resource, they will eventually exhaust or pollute the resource even though it is not in their long-term interest to do so.⁷⁹ More simply, it describes the pursuit of short-term individual gain at long-term community expense. Traditionally, this theory has served as a justification for the private ownership of property, both tangible and intellectual.⁸⁰ Historically, this theory has been applied against intellectual property rights, proposing that such rights present a barrier to the dissemination and building-upon of knowledge and culture.⁸¹ The argument is that allowing a single person to exercise control over knowledge and remove it from the public domain is detrimental to the common good.⁸² Such control restricts a society’s ability to advance the state of knowledge.⁸³

However, loss of control precludes many of the financial incentives that drive the knowledge economy. The Second Circuit acknowledged this explicitly, observing that “[t]he ability of their competitors to appropriate their product at only nominal cost and thereby to disseminate a competing product at a lower price would destroy the incentive to collect news in the first place.”⁸⁴ As a result, “[t]he newspaper-reading public would suffer because no one would have an incentive to collect ‘hot news.’”⁸⁵ The court

⁷⁵BLACK’S LAW DICTIONARY 1377 (5th ed. 1979).

⁷⁶ Terrence Ross, INTELLECTUAL PROPERTY LAW: DAMAGES AND REMEDIES § 1.03[2] (2005 ed.).

⁷⁷Shyamkrishna Balganesh, “Hot News”: *The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419, 427 (2011) .

⁷⁸See, e.g., *NBA*, 105 F.3d at 845 (the third prong of the court’s test is whether the “defendant’s use of the information constitutes free riding on the plaintiff’s efforts”).

⁷⁹See generally Hardin, *supra* note 66.

⁸⁰See, e.g., Harold Demsetz, *Toward a theory of property rights*, 57 AM.ECON.REV. 347 (1967).

⁸¹See generally Robin Gross, “TRAGEDY OF THE COMMONS”: INTELLECTUAL PROPERTY RIGHTS IN THE INFORMATION AGE (2006).

⁸²*Id.*

⁸³*Id.*

⁸⁴*Motorola*, 105 F.3d at 853.

⁸⁵*Id.*

thus accounted for the risk of public harm arising from private abuse of a common resource by including disincentivization as an element of hot news misappropriation.⁸⁶

III. Legal Principles

This section will discuss the two bodies of law primarily implicated by the practice of online news aggregation: unfair competition and copyright law. Because these two areas protect different rights and proscribe differing activities, and because each has evolved from distinct doctrinal foundations, they will be discussed separately.

A. Unfair Competition

Although unfair competition had its beginnings in common law,⁸⁷ it has long since been codified by the Federal Trade Commission Act.⁸⁸ Section Five of the Act provides that “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”⁸⁹ However, beyond that blanket prohibition, the Act is conspicuously reticent.⁹⁰ This is because Congress “explicitly considered, and rejected, the notion that it reduce the ambiguity of the phrase ‘unfair methods of competition’ by tying the concept of unfairness to a [...] standard or by enumerating the particular practices to which it was intended to apply.”⁹¹ It did so because it believed “there were too many unfair practices to define, and after writing [some] of them into the law it would be quite possible to invent others.”⁹²

Despite the patent lack of clarity, unfair competition has evolved into a powerful legal doctrine. Although some states have drafted or adopted specific legislation related to specific types of unfair competition,⁹³ the law in this area comprises a variety of traditional common law torts.⁹⁴ Of particular relevance to this discussion is the tort of misappropriation and its incarnation in the hot news doctrine.

1. Misappropriation Generally

⁸⁶*Motorola*, 105 F.3d at 845 (the fifth prong of the court’s test is whether “the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened”).

⁸⁷Balganesh, *supra* note 77 at 427-428.

⁸⁸See 15 U.S.C. § 45(a).

⁸⁹15 U.S.C. § 45(a)(1).

⁹⁰See 15 U.S.C. § 45(a).

⁹¹*FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239–40 (1972).

⁹²S. Doc. No. 597, 63d Cong., 2d Sess. (1914).

⁹³See, e.g., Unif. Deceptive Trade Practices Act, Rev. (1966).

⁹⁴Balganesh, *supra* note 77 at 427-428.

Broadly speaking, the misappropriation tort provides a remedy for the unauthorized use of intangible assets not otherwise protected by classic intellectual property laws.⁹⁵ Historically, misappropriation has been applied in two scenarios: (1) where the defendant, without authorization, obtains and uses confidential or trade secret business information;⁹⁶ and (2) where the defendant reuses material published by the plaintiff in ways that do not implicate copyright but nevertheless seem to constitute unjust enrichment.⁹⁷ It is the latter — often referred to as hot news misappropriation — with which this article is concerned.

2. The Hot News Doctrine

The seminal case for the hot news misappropriation tort is the 1918 case of *International News Service v. The Associated Press*,⁹⁸ regarding news reporting from World War I.⁹⁹ Despite its name, the International News Service was prevented by foreign governments from sending international news cables from Europe to the United States.¹⁰⁰ Therefore, in order to get news on the war to sell to subscribing newspapers, the INS would either bribe AP members and subscribers to obtain early access to AP stories, or would copy AP news from bulletin boards and early edition newspapers.¹⁰¹ The INS then rewrote the stories and transmitted them by telegraph to subscribing newspapers on the West Coast.¹⁰² Due to time differentials and distribution schedules, the INS-subscribing newspapers were often able to publish the pirated stories simultaneously with or even before the AP-subscribing papers.¹⁰³ The Associated Press brought suit, and the case eventually reached the Supreme Court of the United States.¹⁰⁴ The Supreme Court held that as between the two news services, the news material must be regarded as *quasi*-property,¹⁰⁵ and that the INS's practice of collecting and rewriting the information gathered by the AP without

⁹⁵ 248 U.S. 215; *see also* *E.I. duPont deNemours v. Christopher*, 431 F.2d 1012 (5th Cir. 1970) (misappropriation found where defendant photographed the construction site of a chemical plant and discovered plaintiff's process for synthesizing methanol).

⁹⁶ *See, e.g., E.I. duPont deNemours*, 431 F.2d 1012.

⁹⁷ *See, e.g., International News Service*, 248 U.S. 215.

⁹⁸ *Id.*

⁹⁹ *Id.* at 263.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 231.

¹⁰² *Id.* at 238.

¹⁰³ *Id.* at 238-239.

¹⁰⁴ *Id.* at 221.

¹⁰⁵ *Id.* at 236.

exerting the effort or incurring the expense required by such gathering amounted to unfair competition.¹⁰⁶

Importantly, the Court specifically limited the scope of the *quasi*-property interest in news material to the parties involved:

The question here is not so much the rights of either party as against the public but their rights as between themselves. And although we may and do assume that neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves.¹⁰⁷

The Court did not truly find a property right in news material as much as it found a cause of action in the INS's free-riding on the efforts of the AP.¹⁰⁸ Justice Pitney's majority opinion made much of the fact that the INS and the AP were in direct competition,¹⁰⁹ and he observed that "[t]he parties are competitors in this field; and, on fundamental principles, applicable here as elsewhere, when the rights or privileges of the one are liable to conflict with those of the other, each party is under a duty so to conduct its own business as not unnecessarily or unfairly to injure that of the other."¹¹⁰

Further, the Court also held that whatever *quasi*-property interest existed, it relied on the freshness of the news material.¹¹¹ News that is no longer fresh is not protected: "the news of current events may be regarded as common property."¹¹² Justice Pitney clarified this, saying:

It is to be observed that the view we adopt does not result in giving to complainant the right to monopolize either the gathering or the distribution of the news, or, without complying with the copyright act, to prevent the reproduction of its news articles; but only postpones participation by complainant's competitor in the processes of distribution and reproduction of news that it has not gathered, and only to the extent necessary to prevent that competitor from reaping the fruits of

¹⁰⁶*Id.* at 236-240.

¹⁰⁷*Id.* at 236 (internal citations omitted).

¹⁰⁸ Eric Easton, *Who Owns "The First Rough Draft of History"?: Reconsidering Copyright in News*, 27 COLUM. J.L. & ARTS 521, 548 (2004).

¹⁰⁹*See* 248 U.S. at 235-236.

¹¹⁰*Id.* (citing *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 254 (1917)).

¹¹¹248 U.S. at 235 ("We are dealing here not with restrictions upon publication but with the very facilities and processes of publication. The peculiar value of news is in the spreading of it while it is fresh").

¹¹²*Id.*

complainant's efforts and expenditure, to the partial exclusion of complainant.¹¹³

Thus, it appears that the Court intended to craft a narrow remedy that was applicable only in situations where a direct competitor abuses the distribution process to gain an unfair advantage over the original publisher.

The Court's creation of a *quasi*-property right in news has not enjoyed a particularly warm reception; many legal scholars have criticized this result as a departure from traditional intellectual property principles.¹¹⁴ Justice Louis Brandeis, in his dissent in that case, was particularly concerned about the potential harm to the public's interest in news that might be caused by the Court's holding.¹¹⁵ He observed that "[t]he general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use."¹¹⁶ Justice Brandeis noted that the attribute of property is granted only to certain classes of ideas, such as those involving creativity or invention—the constitutional foundations for copyrights and patents, respectively—as demanded by public policy,¹¹⁷ and remarked that the creation of such a right and the proscription of certain newsgathering and reporting practices is a matter best left to the legislature.¹¹⁸

It is important to note that *International News Service v. Associated Press* was decided in 1918, before many of the cases—such as *Abrams v. United States*¹¹⁹ and *Schenk v. United States*¹²⁰—that have since shaped modern understanding and interpretation of First Amendment doctrine.¹²¹ Nevertheless, it is surprising that neither the majority nor the dissenting opinions squarely addressed any of the free speech and press concerns resulting from their holding.¹²² Justice Holmes, in his dissent, touches briefly on the issue before dismissing it, saying:

If a given person is to be prohibited from making the use of words that his neighbors are free to make some other ground must be found. One such ground is vaguely expressed in the phrase unfair trade. This

¹¹³*Id.* at 241.

¹¹⁴See generally Clay Calvert, Kayla Gutierrez, and Christina Locke, *All the News That's Fit to Own: Hot News on the Internet & the Commodification of News in Digital Culture*, 10 WAKE FOREST INTELL. PROP. L.J. 1, 15-18 (Fall, 2009).

¹¹⁵*Id.* at 18.

¹¹⁶248 U.S. at 250 (Brandeis, J., dissenting).

¹¹⁷*Id.*

¹¹⁸*Id.* at 264-267.

¹¹⁹250 U.S. 616 (1919).

¹²⁰249 U.S. 47 (1919).

¹²¹See, e.g., Isbell, *supra* note 10 at 15.

¹²²See 248 U.S. 215.

means that the words are repeated by a competitor in business in such a way as to convey a misrepresentation that materially injures the person who first used them, by appropriating credit of some kind which the first user has earned. [...] Apart from that the defendant may use such unpatented devices and uncopyrighted combinations of words as he likes.¹²³

Holmes' fleeting mention of the free use of words is as close as the Justices come to acknowledging the First Amendment, and offers little guidance on the matter.

Another problem that the *International News Service* opinion faces is from *Erie R. Co. v. Tompkins*¹²⁴ and its abolition of the federal common law. Although the Supreme Court has yet to reaffirm *International News Service v. Associated Press*—and in the nearly one full century since the Court's decision in *International News Service v. Associated Press*, the hot news doctrine has fallen into disuse¹²⁵—courts have accorded advisory status to *International News Service v. Associated Press*,¹²⁶ and have affirmed the viability of the hot news misappropriation tort where provided for by state law.¹²⁷

The staunchest supporter of hot news is New York.¹²⁸ The Second Circuit established the most prominent test for hot news misappropriation claims in 1997, in *NBA v. Motorola*.¹²⁹ The Second Circuit Court of Appeals—whose holding has been adopted wholesale or cited with approval by a number of other courts¹³⁰—established the following test for hot news misappropriation:

¹²³*Id.* at 246 (Holmes, J., dissenting).

¹²⁴304 U.S. 64 (1938).

¹²⁵ Sanford, *supra* note 63 at 9.

¹²⁶ *Theflyonthewall*, 650 F.3d at 894. *See also, e.g.*, Elaine Stoll, *Comment and Casenote: Hot News Misappropriation: More Than Nine Decades After International News Service v. Associated Press, Still an Important Remedy for News Piracy*, 79 U. CIN. L. REV. 1239, 1247-1248 (Spring 2011); *but see* Calvert, *supra* note 114 at 9-10.

¹²⁷*See*, Calvert, *supra* note 114 at 10 (discussing *Associated Press v. All Headline News Corp.*, 608 F.Supp.2d 454 (S.D.N.Y. 2009)).

¹²⁸*Barclays Capital Inc. v. Theflyonthewall.com*, 700 F.Supp.2d 310, 332 (S.D.N.Y. 2010) (“*INS* was adopted into state common law by several states, including most enthusiastically in New York”).

¹²⁹ 105 F.3d 841. As of August 20, 2012 Westlaw lists 1,774 citing references for this case.

¹³⁰*See, e.g.*, *X17, Inc. v. Lavandeira*, 563 F.Supp.2d 1102 (C.D. Cal. 2007) (adopting the *Motorola* test); *see also, generally*, *Agora Financial, LLC v. Samler*, 725 F.Supp.2d 491, 499 n. 9 (D. Md. 2010) (listing courts that have adopted the *Motorola* test).

(i) a plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant's use of the information constitutes free riding on the plaintiff's efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.¹³¹

The Second Circuit also considered the issue of preemption of state law hot news claims by federal copyright law.¹³² The court stated that although “[b]ased on legislative history of the 1976 amendments, it is generally agreed that a ‘hot-news’ *INS*-like claim survives preemption,”¹³³ “only a narrow ‘hot-news’ misappropriation claim survives preemption for actions concerning material within the realm of copyright.”¹³⁴ In order to be sufficiently narrow, a claim for “misappropriation otherwise within the general scope [of copyright] will survive preemption if an ‘extra-element’ test is met.”¹³⁵ The court said that the extra elements in a surviving hot news misappropriation claim were: “(i) the time-sensitive value of factual information, (ii) the free-riding by a defendant, and (iii) the threat to the very existence of the product or service provided by the plaintiff.”¹³⁶

The Second Circuit again addressed the preemption question in 2011, in *Barclays Capital, Inc. v. Theflyonthewall.com*.¹³⁷ In that case, the plaintiffs were a group of financial firms that provided securities brokerage services to the public.¹³⁸ In connection with those services, they also made investment recommendations regarding the purchasing, holding, or selling of corporate securities, which they circulated to their clients each day before the markets opened.¹³⁹ The defendant website distributed—for a price—financial information to its subscribers, and had through various means had obtained information about the firms’ recommendations before they were circulated to the firms’ clients,¹⁴⁰ subsequently distributing that information to its own subscribers.¹⁴¹

There, the court found that The Fly’s dissemination of the firms’ investment advice “tend[ed] to remove the informational and attendant trading advantage of the Firms’ clients and [...] authorized recipients of the

¹³¹ *Motorola*, 105 F.3d at 845.

¹³² *Id.* at 848-853.

¹³³ *Id.* at 845.

¹³⁴ *Id.* at 852.

¹³⁵ *Id.* at 850 (referring to the extra elements exceptions 17 U.S.C. § 301).

¹³⁶ *Id.* at 853.

¹³⁷ 650 F.3d 876 (2d Cir. 2011).

¹³⁸ *Id.* at 878.

¹³⁹ *Id.* at 878-880.

¹⁴⁰ *Id.* at 880.

¹⁴¹ *Id.*

reports and recommendations,”¹⁴² and that it makes the recipients less likely to use the brokerage services of the firms, “thereby reducing the incentive for the Firms to create such reports and recommendations in the first place.”¹⁴³ However, the Second Circuit held that copyright law preempted the firms’ claims, saying:

In deciding whether a state-law claim is preempted by the Copyright Act, then, it is not determinative that the plaintiff seeks redress with respect to a defendant’s alleged misappropriation of uncopyrightable material—e.g., facts—contained in a copyrightable work. [...] [P]reemption bars state law misappropriation claims with respect to uncopyrightable as well as copyrightable elements, if the work as a whole satisfies the subject matter requirement.¹⁴⁴

In so holding, the court stated that “unfairness alone is immaterial to a determination whether a cause of action for misappropriation has been preempted by the Copyright Act. The adoption of new technology that injures or destroys present business models is commonplace. Whether fair or not, that cannot, without more, be prevented by application of the misappropriation tort.”¹⁴⁵ The Second Circuit also noted that “central to the principle of preemption generally is the value of providing for legal uniformity where Congress has acted nationally,”¹⁴⁶ and went on to discuss the incongruity and unpredictability of having a patchwork of inconsistent state laws.¹⁴⁷ Finally, and perhaps most telling, the court stated that the five-part test from its earlier *NBA v. Motorola* decision was not precedential, but rather dicta.¹⁴⁸

Nevertheless, the Second Circuit did acknowledge that the hot news misappropriation tort is not entirely preempted by the Copyright Act.¹⁴⁹ Despite that court’s earlier enumeration of the required extra elements in *NBA v. Motorola*, the Second Circuit severely narrowed that list, reducing five elements to one: free riding.¹⁵⁰ Although the court’s new definition of free riding included the formerly independent requirement of

¹⁴²*Id.* at 879.

¹⁴³*Id.*

¹⁴⁴*Id.* at 892 (internal quotations omitted).

¹⁴⁵*Id.* at 896 (internal citations omitted).

¹⁴⁶*Id.* at 897.

¹⁴⁷*Id.*

¹⁴⁸*Id.* at 898-901.

¹⁴⁹*Id.* at 905-906.

¹⁵⁰*Id.* at 905 (“An indispensable element of a [preemption-surviving] *INS* ‘hot-news’ claim is free-riding by a defendant on a plaintiff’s product, enabling the defendant to produce a directly competitive product for less money because it has lower costs,” citing *Motorola*, 105 F.3d 876).

direct competition,¹⁵¹ and reformulated parts of two others into a new financial advantage sub-element,¹⁵² the remaining elements—the time-sensitive nature of the information and the disincentivizing potential—were discarded wholesale.¹⁵³ Unfortunately for the firms, the court found that TheFly was not free riding, but rather was reporting on the news of their recommendations, and thus the firms’ hot news claim lacked the necessary extra element to survive preemption:

It is collecting, collating and disseminating factual information—the facts that Firms and others in the securities business have made recommendations with respect to the value of and the wisdom of purchasing or selling securities—and attributing the information to its source. The Firms are making news; Fly, despite the Firms’ understandable desire to protect their business model, is breaking it.¹⁵⁴

3. Unfair Competition Law as a Remedy for Online News Aggregation

Ultimately, hot new misappropriation claims face several substantial hurdles that have only become more formidable after the Second Circuit’s decision in *Barclays Capital v. Flyonthewall*. As discussed in the preceding subsection, foremost among these is preemption by copyright law. While there remains a narrow realm of applicability, the Second Circuit’s decision to restrict the viability of the hot news misappropriation tort to cases of actual free riding by a direct competitor has significantly diminished its application.

As it relates to online news aggregators, these limitations make hot news misappropriation claims unavailing in many situations, such as where the aggregator uses the collected news material as a topic for commentary and criticism, as in the case of blog aggregators. User-curated aggregators, which use collected material to encourage commentary and interaction among website visitors, would also seem to fall outside of the scope of the tort as envisioned by the Second Circuit. But even in the case of feed and specialty aggregators, which tend to act as online indices in order to call attention to material at the original source and to facilitate the users’ searches for information and news, it is quite possible to argue that

¹⁵¹*Id.*

¹⁵²*Id.* This sub-element brings hot news misappropriation more closely in line with trade secret misappropriation; see UNIF. TRADE SECRETS ACT §2 cmt (1985) (discussing the “trend of authority limiting the duration of injunctive relief to the extent of the temporal advantage over good faith competitors gained by a misappropriator”), available at <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1980s/utsa85.htm>.

¹⁵³ *Theflyonthewall.com*, 650 F.3d at 905.

¹⁵⁴*Id.* at 902.

the aggregators are not in the kind of direct competition required for actual free riding. Instead, it would appear that the court had in mind the more blatant form of free riding that involves two entities engaged in the same business, one of whom is taking material and either rewriting it¹⁵⁵ or simply using it verbatim in its entirety.¹⁵⁶

In addition to the narrowed scope of the misappropriation tort, another serious problem faces the hot news doctrine. Conspicuously absent from the Second Circuit's discussion in *Barclays Capital v. Theflyonthewall.com* was any mention of the First Amendment issues raised by the hot news misappropriation tort.¹⁵⁷ In particular, there are concerns as to the chilling effects on public commentary and criticism that may result from reserving news to the elite media.¹⁵⁸ Further, others have expressed concern regarding potential burdens that the hot news doctrine will place on the public's right to receive speech.¹⁵⁹ Moreover, the First Amendment has long been held to ensconce a right to report truthfully on matters of public concern,¹⁶⁰ but the application of the hot news doctrine to websites that link to and discuss news articles threatens the historical protection not only of speech about matters of public concern, but of Internet-based speech in general.¹⁶¹ But despite amici urging the court to address such matters,¹⁶² the Second Circuit declined to consider the issue.¹⁶³

B. Copyright

Even if a hot news claim is preempted or unavailable in the jurisdiction where the suit is brought, a claim for copyright infringement

¹⁵⁵Such as in the case of *International News Service v. Associated Press*, 248 F.3d 215.

¹⁵⁶ Such as in the case of *Los Angeles Times v. Free Republic, Inc.*, 2000 WL 565200 (C.D. Cal. 2000) (finding that verbatim reposting of news articles in their entirety sufficiently diverted readers from the original source infringed copyright and was without a fair use defense).

¹⁵⁷See *Theflyonthewall.com*, 650 F.3d 876.

¹⁵⁸See, e.g., Isbell, *supra* note 10 at 18.

¹⁵⁹See, e.g., Calvert, *supra* note 114 at 13-14.

¹⁶⁰E.g. *Bartnicki v. Vopper*, 532 U.S. 514, 527-528 (2001).

¹⁶¹See, e.g., *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (holding that speech on the Internet receives the highest level of First Amendment protection).

¹⁶²See, e.g., Brief *Amici Curia* of Citizen Media Law Project, Electronic Frontier Foundation, and Public Citizen, Inc. in Support of Neither Party, 2010 WL 2647631 (C.A.2).

¹⁶³Corynne McSherry, *The "Hot News" Doctrine After Fly On the Wall: Surviving, But On Life Support*, ELECTRONIC FRONTIER FOUNDATION (June 24, 2011), <https://www.eff.org/deeplinks/2011/06/hot-news-doctrine-surviving-life-support>.

may still exist. But unlike a hot news claim, which requires that the tortfeasor use factual knowledge derived from a competitor's publication in order to compete directly in the same news industry,¹⁶⁴ a cause of action for copyright infringement arises when the offender violates one of the exclusive rights granted to a copyright holders, such as the right to make copies,¹⁶⁵ to prepare derivative works,¹⁶⁶ to distribute copies,¹⁶⁷ and to perform or display the work publicly.¹⁶⁸

1. Copyright in General

Protection for copyrights is authorized in the Constitution¹⁶⁹ and codified in Title Seventeen of the United States Code.¹⁷⁰ In order to be protected by copyright, a work must be original to the author and fixed in a tangible medium of expression.¹⁷¹ Copyright protection does not extend to any idea contained in such a work,¹⁷² nor does it extend to any facts contained therein.¹⁷³ However, the work itself need not be fictional: “[c]reation of a nonfiction work, even a compilation of pure fact, entails originality.”¹⁷⁴ Thus, news stories can be copyrightable subject matter, subject to the following exceptions and defenses.

2. The Merger Doctrine and Short Phrases

Some ideas can be expressed in a very limited number of ways.¹⁷⁵ In such instances, the idea is said to have merged with the expression.¹⁷⁶ But “[t]o the extent the expression merges with the idea, the merger doctrine precludes protection of that expression.”¹⁷⁷ The law prohibits a claim of copyright in such idea-expression mergers as part of its refusal to extend copyright protection to ideas.¹⁷⁸

¹⁶⁴See *Theflyonthewall.com*, 650 F.3d 876.

¹⁶⁵17 U.S.C. § 106(1).

¹⁶⁶17 U.S.C. § 106(2).

¹⁶⁷17 U.S.C. § 106(3).

¹⁶⁸17 U.S.C. §§ 106(4)-106(6).

¹⁶⁹U.S. CONST. art. I, sec. 8, cl. 8.

¹⁷⁰17 U.S.C. § 101 et seq.

¹⁷¹17 U.S.C. § 102(a).

¹⁷²17 U.S.C. § 102(b); *Baker v. Selden*, 101 U.S. 99, 103 (1879).

¹⁷³*Harper & Row, Publishers*, 471 U.S. at 547 (“no author may copyright facts or ideas”).

¹⁷⁴*Id.*

¹⁷⁵ The classic example is the layout of a book-keeping ledger, as in *Baker v. Selden*, 101 U.S. at 47.

¹⁷⁶See, e.g., *Kregos v. Associated Press*, 937 F.2d 700, 705 (2d Cir. 1991).

¹⁷⁷*Id.*

¹⁷⁸*Id.*

A related concept is the principle that names, titles, and short phrases are not properly protectable under copyright law.¹⁷⁹ It is not clear exactly how short is too short; rather, the Copyright Office states that “[t]o be protected by copyright, a work must contain a certain minimum amount of original literary, pictorial, or musical expression.”¹⁸⁰ One legal scholar suggests that the prohibition on copyright protection for short phrases is intended to apply to short nominative or descriptive phrases only, rather than all short phrases.¹⁸¹ That assertion appears to be borne out in the courts: a mere fifty-four words has been found to be enough for copyright protection.¹⁸² Similarly, coffee mugs with the brief inscriptions “E.T. Phone Home” and “I Love You, E.T.” were found to infringe copyright because the eponymous character was a central, copyrightable—and copyrighted—component of the *E.T.* movie.¹⁸³

3. Sweat of the Brow

Alternatively known as industrious collection,¹⁸⁴ sweat of the brow was the legal doctrine that held that one could earn a copyright as a reward for hard work invested in the gathering and compiling of information.¹⁸⁵ In 1991, the Supreme Court roundly rejected the sweat of the brow doctrine in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*,¹⁸⁶ holding that the sweat of the brow doctrine “eschewed the most fundamental axiom of copyright law—that no one may copyright facts or ideas.”¹⁸⁷ Instead, the Court held that originality is required, and “originality requires independent creation plus a modicum of creativity.”¹⁸⁸ The works to be protected are “the fruits of intellectual labor.”¹⁸⁹

¹⁷⁹*CMM Cable Rep., Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504, 1519-1520 (1st Cir. 1996).

¹⁸⁰UNITED STATES COPYRIGHT OFFICE, CIRCULAR 34, COPYRIGHT PROTECTION NOT AVAILABLE FOR NAMES, TITLES, OR SHORT PHRASES (November 2010), available at <http://copyright.gov/circs/circ34.pdf>.

¹⁸¹ Richard Stim, *I May Not Be Totally Perfect But Parts of Me Are Excellent: Copyright Protection for Short Phrases*, STAN. U. LIBRARIES (September, 2003), http://fairuse.stanford.edu/commentary_and_analysis/2003_09_stim.html.

¹⁸²*CRA Mktg., Inc. v. Brandow's Fairway Chrysler-Plymouth-Jeep-Eagle, Inc.*, 1999 WL 562755 (E.D. Pa. 1999).

¹⁸³*Universal City Studios v. Kamar Industries*, 217 U.S.P.Q. (BNA) 1162 (S.D. Tex. 1982).

¹⁸⁴*See, e.g., Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83 (2d Cir. 1922).

¹⁸⁵*Feist Publications*, 499 U.S. at 352.

¹⁸⁶*Id.*

¹⁸⁷*Id.* at 353.

¹⁸⁸*Id.* at 346.

¹⁸⁹*Id.*

The Court observed that the sweat of the brow doctrine came about from courts' desire to protect the very interests that are at stake in the case of online news aggregation: "[S]weat of the brow' courts handed out proprietary interests in facts and declared that authors are absolutely precluded from saving time and effort by relying upon the facts contained in prior works."¹⁹⁰ When abolishing this doctrine, the Supreme Court pointed out that "it is just such wasted effort that the proscription against the copyright of ideas and facts is designed to prevent."¹⁹¹ However, the Court did acknowledge that "[p]rotection for the fruits of such research ... may in certain circumstances be available under a theory of unfair competition."¹⁹²

4. The Fair Use Doctrine

Fair use is something of a darling among the Internet community, with many users erroneously believing that most personal, non-commercial uses are fair.¹⁹³ The more vocal of these misguided users are quick to invoke and proselytize their interpretation of fair use to validate all manner of activities, from uploading a mashup video¹⁹⁴ to downloading copyrighted music.¹⁹⁵ But regardless of the rampant misunderstanding of the fair use defense, it may remain a viable shield against allegations of copyright infringement.

The doctrine of fair use creates exceptions to the otherwise exclusive rights granted by copyright law. It carves out several limited purposes for which the use of copyrighted works will not be an infringement, such as: commentary and criticism; news reporting; or

¹⁹⁰*Id.* at 354.

¹⁹¹*Id.* (internal quotations omitted).

¹⁹²*Id.*, citing M. Nimmer & D. Nimmer, 1 NIMMER ON COPYRIGHT § 3.06 (1990) (omission in original).

¹⁹³ Lauren Yamamoto, *Copyright Protection and Internet Fan Sites: Entertainment Industry Finds Solace in Traditional Copyright Law*, 20 LOY. L.A. ENT.L. REV. 95 at 99 (2000).

¹⁹⁴For an example of a mashup video, see, e.g., *Mentos Commercial HellraiserMashup / Recut - Fair Use Parody*, YOUTUBE.COM (June 12, 2009), <http://www.youtube.com/watch?v=qGXJzEuuq2s> (last accessed June 5, 2014) (audio track in a 30-second clip from the horror movie "Hellraiser"—containing screams and suspenseful music — was removed and replaced with the inappropriately light-hearted and cheerful Mentos® jingle, and the resulting video was uploaded with a disclaimer claimer asserting fair use due to modification for "humor and entertainment").

¹⁹⁵See, e.g., Team Outlaw, *Harvard professor says downloading is 'fair use'*, ITPROPORTAL (May 19, 2009), <http://www.itproportal.com/2009/05/19/harvard-professor-says-downloading-fair-use/> (discussing Harvard law professor Charles Nesson's defense of Joel Tenenbaum against charges of copyright infringement over his alleged downloading of music from peer-to-peer file sharing networks).

teaching, scholarship, and research.¹⁹⁶ To determine whether a use is fair, there are four factors to consider: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect of the use upon the potential market for the copyrighted work.¹⁹⁷ No one factor is dispositive; rather, all must be explored and weighed together.¹⁹⁸

The first factor, the purpose and character of the use relates principally to whether the new use is transformative, as opposed to merely derivative:

The central purpose of this investigation is to see [...] whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is transformative.¹⁹⁹

To a lesser extent, this factor also considers whether the new use is a commercial one.²⁰⁰ The Supreme Court has stated that “[t]he use, for example, of a copyrighted work to advertise a product, even in a parody, will be entitled to less indulgence under the first factor of the fair use enquiry than the sale of a parody for its own sake.”²⁰¹ In general, while a derivative commercial use is likely to cut against a finding of fair use, a transformative non-commercial use supports such a defense.²⁰²

Because the type of use varies across the different types of aggregators, each must be analyzed individually. User-curated aggregators, which encourage user commentary and criticism of the original source or the events therein described, and blog aggregators, whose writers provide the commentary and criticism are likely to involve the kind of transformative use contemplated.²⁰³ On the other hand, feed and specialty

¹⁹⁶17 U.S.C. § 107.

¹⁹⁷*Id.*

¹⁹⁸*Campbell*, 510 U.S. at 578.

¹⁹⁹*Id.* at 579 (internal quotations and citations omitted); *and compare* *Mattel Inc v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003) (fair use found where Barbie® dolls were used within a photography project to parody the Barbie® brand and American life in general) *with* *Art Rogers v. Jeff Koons*, 960 F.2d 301 (2d Cir. 1992) (fair use not found where defendant created sculptures based on plaintiff's photograph and sold them for a total of \$367,000).

²⁰⁰*See, e.g., Campbell*, 510 U.S. at 584-585 (the commercial character of a work is merely informative as to this factor, not conclusive).

²⁰¹*Id.* at 585.

²⁰²*Id.*

²⁰³*See, e.g., Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 1997 WL 34605244 (N.D. Cal. 1997) (holding that posting

aggregators, whose posts typically have very little transformative character, and which are often ad-supported, are less likely to be engaged in activities protected by the fair use defense. However, courts have found the creation and indexing of reduced size “thumbnail” images for use in a search engine to be sufficiently transformative for fair use.²⁰⁴ Thus, it is possible that indexing and collection of a truncated story may similarly be transformative enough to satisfy the fair use inquiry.

The second factor—the nature of the copyrighted work—examines whether the original was primarily creative or factual in nature, and “calls for recognition that some works are closer to the core of intended copyright protection than others.”²⁰⁵ The Supreme Court has allowed that “copying a news broadcast may have a stronger claim to fair use than copying a motion picture,” suggesting that the scope of fair use is broader when the source is a factual work.²⁰⁶ This factor also considers whether a work remains unpublished: “the scope of the fair use doctrine is considerably narrower with respect to unpublished works which are held confidential by their copyright owners.”²⁰⁷ The combination of the fact-versus-fiction nature of the inquiry, the relevance of publication, and the specific mention of news media as a likely subject of fair use suggests that this second factor may play out in favor of news aggregators.

The third factor weighs the amount and substantiality of the portion used, particularly in relation to the whole.²⁰⁸ This is not merely a question of how many words, or what percentage has been taken, but rather, a weighing of the expressive value of the excerpts and their role in the infringing work.²⁰⁹ Where an allegedly infringing work takes what the Court refers to as the “heart” of the work—the most powerful or important passages²¹⁰—this factor cuts against a finding of fair use.²¹¹ As regards news aggregators, each case is necessarily different, turning on the material taken and how it was used. It may be that by taking the headline and lead paragraph or kicker, aggregators are taking the most important and salient parts of the story. But other uses, such as the inclusion of choice excerpts to generate interest and drive traffic to the original story may be more likely to be fair.

Scientologist literature as an illustrative accompaniment to user’s criticism of Scientology was fair use).

²⁰⁴See, e.g., *Kelly*, 336 F.3d 811; see also, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 408 F.3d 1146 (9th Cir. 2007).

²⁰⁵*Campbell*, 510 U.S. at 586.

²⁰⁶*Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n. 40 (1984).

²⁰⁷*Campbell*, 510 U.S. at 597 (quoting with approval M. Nimmer & D. Nimmer, 3 NIMMER ON COPYRIGHT § 13.05[A]).

²⁰⁸*Campbell*, 510 U.S. at 588.

²⁰⁹*Harper & Row Publishers*, 471 U.S. at 566.

²¹⁰*Id.* at 600 (Brennan, J. dissenting).

²¹¹*Id.* at 565.

The final factor, the effect of the use on the market for the copyrighted work, has historically been held to be the most important element of the fair use analysis;²¹² however, the 1994 case of *Campbell v. Acuff-Rose* tempered this view somewhat, stating that the four fair use factors may not be “treated in isolation, one from another.”²¹³ Rather, “[a]ll are to be explored, and the results weighed together, in light of the purposes of copyright.”²¹⁴ To have the contemplated effect, a use must replace the demand for the original by serving as a substitute, rather than alter it, such as when a scathing review destroys interest in a work.²¹⁵ Thus, while courts have often found verbatim copying to have a significant effect on the market,²¹⁶ they have been much more likely to find a transformative use to have little or no effect.²¹⁷ Similarly, non-commercial uses are less likely than commercial ones to have an effect on the market.²¹⁸

As with the first factor, the different types of aggregators cannot be generalized together, and must be analyzed independently from one another. While some aggregators may serve to call attention to a work,²¹⁹ or to provide commentary and criticism,²²⁰ others may serve by providing a short preview, either piquing or slaking the user’s interest.²²¹ Again, the commentary-focused nature of user-curated and blog aggregators may place their market apart from that of the original news source, while feed aggregators and specialty aggregators may be supplying enough of the original story, in a format that is sufficiently similar to that of the original so as to actually supplant the market for the original.²²²

Given the differences between the differing types of aggregators, the applicability of the fair use defense varies greatly depending on the specific material taken and the use to which it is put. While some legal scholars believe that fair use may be a viable defense to an allegation of copyright infringement in the case of online news aggregators,²²³ the differences between the different types of aggregators—and indeed, even between aggregators of the same type—is such that the analysis must be conducted anew for each case.

5. Copyright Law as a Remedy for Online News Aggregation

²¹²*Id.* at 566 (describing the market effects factor as “undoubtedly the single most important element of fair use”).

²¹³*Campbell*, 510 U.S. at 578.

²¹⁴*Id.*

²¹⁵*Id.* at 591-592.

²¹⁶*See, e.g., Sony Corp. of America*, 464 U.S. at 451.

²¹⁷*See, e.g., Campbell*, 510 U.S. at 590-591.

²¹⁸*Id.*

²¹⁹For example, user-curated aggregators.

²²⁰As in the case of blog aggregators.

²²¹Such as feed aggregators.

²²²*See, e.g., PhysOrg.com, supra* note 18; *but see Chiou, supra* note 20.

²²³*See, e.g., Isbell, supra* note 10.

Although copyright law does not suffer from the same risk of preemption as do unfair competition law and the hot news misappropriation tort, it is necessarily more limited, as copyright law does not protect facts. Thus, while an action for infringement can be brought if an aggregator reproduces the original, or creates a sufficiently derivative work, articles that consist of original content written about the content of the news material are outside of the purview of copyright law. Furthermore, all but the most egregious and blatant reproductions²²⁴ may be able to successfully invoke the fair use defense, especially because the purpose of many aggregators—facilitating commentary, criticism, and news reporting—are among the contemplated fair uses enumerated within the statute.²²⁵

IV. Conclusion

Although the Supreme Court has yet to definitely decide the issue, it appears as though the practice of online news aggregation is largely safe from legal challenges. While hot news misappropriation remains a viable cause of action in several states, it has suffered from ongoing limitation, and has now been restricted to use only in cases of actual free riding. Conditioning such claims in this manner severely limits the usefulness of the tort as against all but direct competitors who are flagrantly abusing the news publication and distribution system so as to gain an unfair business advantage. Similarly, copyright law protects news organizations against those who would pirate stories wholesale, but it does not bar the use of the facts embodied therein, nor does it proscribe discussion, commentary, or critique of either the story or its underlying events. Therefore, until such time as the courts hear a hot news and aggregation case on the merits, it can be said that online news aggregators that collect news material for the purposes of indexing and improving access, or for providing or facilitating commentary and criticism may continue to do so with relative impunity.

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²²⁴See, e.g., *Los Angeles Times v. Free Republic*, supra note 156.

²²⁵17 U.S.C. § 107.