

---

---

## ARTICLES

# THE MEDIA THAT NEED CITIZENS: THE FIRST AMENDMENT AND THE FIFTH ESTATE

ADAM COHEN\*

### TABLE OF CONTENTS

I. INTRODUCTION .....	2
II. THE CHANGING MEDIA ECOLOGY—AND THE ELITE RESPONSE .....	7
III. THE FIFTH ESTATE AND FIRST AMENDMENT VALUES .....	23
A. INFORMATION NEEDED IN A DEMOCRACY .....	25
B. CHECKING GOVERNMENT ABUSES .....	30
C. CHECKING THE PRIVATE SECTOR .....	32
D. ENCOURAGING INTEREST GROUP FORMATION.....	35
E. PROMOTING SELF-EXPRESSION.....	38
IV. TOWARD A RIGHT TO PARTICIPATE.....	43
A. THE RIGHT OF EQUAL TREATMENT .....	45
B. THE RIGHT OF ACCESS TO GOVERNMENT INFORMATION.....	59
C. POLICIES OF PARTICIPATION .....	66
V. AN ARCHITECTURE OF ACCOUNTABILITY .....	76
VI. CONCLUSION .....	85

---

\* Lecturer in Law and Kauffman Fellow, Yale Law School. Member, *New York Times* Editorial Board, 2002–2010. A.B. Harvard College, 1984; J.D. Harvard Law School, 1987. I would like to thank Jed Rubenfeld, Jack Balkin, Amy Chua, Gerald Frug, Michael Heller, and Lance Liebman for helpful comments and suggestions.

## I. INTRODUCTION

*Burke said there were three estates in Parliament; but in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all.*

—Thomas Carlyle<sup>1</sup>

*The future is here. It's just not evenly distributed yet.*

—William Gibson<sup>2</sup>

The Federal Trade Commission (“FTC”) adopted new disclosure rules in 2009 for “consumer-generated media.”<sup>3</sup> The “Guides Concerning the Use of Endorsements and Testimonials in Advertising” warn bloggers, people who post on social networking sites, and other generators of new media content that they must disclose when they receive payments or free products related to what they write about.<sup>4</sup> Failure to disclose material connections can result in fines of up to \$10,000 for each violation.<sup>5</sup>

The FTC endorsement rules do not apply to journalists who work for newspapers, magazines, or television and radio stations.<sup>6</sup> When the guides were released, new media journalists protested that the government was creating a two-tiered regulatory regime that singled them out for unfavorable treatment.<sup>7</sup> Jack Shafer, the media critic for *Slate*, called the rules “preposterous” and denounced “[t]he FTC’s [m]ad [p]ower [g]rab.”<sup>8</sup>

The FTC defended the guides’ different rules for different kinds of media. The FTC, which has statutory authority to combat advertiser fraud,

---

1. THOMAS CARLYLE, ON HEROES, HERO-WORSHIP, & THE HEROIC IN HISTORY 141 (Norman & Charlotte Strouse eds. 1993) (emphasis omitted).

2. William Gibson, *The Science in Science Fiction*, on TALK OF THE NATION, NPR (Nov. 30, 1999, 11:55), <http://www.npr.org/templates/story/story.php?storyId=1067220/>.

3. Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. pt. 255 (2009).

4. *Id.*

5. See 15 U.S.C. § 45(m)(1)(A) (2006).

6. See Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,124, 53,136 (Oct. 15, 2009) (codified at 16 C.F.R. pt. 255) (“In general, under usual circumstances, the Commission does not consider reviews published in traditional media (i.e., where a newspaper, magazine, or television or radio station with independent editorial responsibility assigns an employee to review various products or services as part of his or her official duties, and then publishes those reviews) to be sponsored advertising messages.”).

7. Jeff Jarvis, *FTC Regulates Our Speech*, BUZZ MACHINE (Oct. 5, 2009, 3:53 PM), <http://www.buzzmachine.com/2009/10/05/ftc-regulates-our-speech/>; Jack Shafer, *The FTC’s Mad Power Grab*, SLATE (Oct. 7, 2009, 6:29 PM), <http://www.slate.com/id/2231808>.

8. Shafer, *supra* note 7.

insisted that journalistic organizations that have “independent editorial responsibility” are more trustworthy than those without it.<sup>9</sup> If a journalist must respond to someone higher up in a hierarchy, the FTC reasoned, there was minimal danger of corruption from receiving material support. To anyone who has followed journalism for the last half century, the logic is hard to defend. In the FTC’s view, the crusading journalist I.F. Stone, laboring away in solitude on *I.F. Stone’s Weekly*, would have been presumed corruptible if he received a review copy of a new book. Glenn Beck, whose entreaties to his audience to invest in gold may have been driven by personal financial gain, would have no duty to disclose so long as the producers of Fox News or a right-wing radio network back him up.<sup>10</sup>

The FTC guides are a single data point, but they are emblematic of something larger—the failure of the law to keep up with the changes that are fast overtaking journalism. A historic transformation is underway. Newspapers, network and local television news, radio news, and other old media are in retreat. As the Fourth Estate ebbs, an Internet-based Fifth Estate is emerging, including solo blogs, group-discussion websites, Twitter news bulletins, crowd-sourced news research, and WikiLeaks disclosures, among others. This new sector is a mixture of different kinds of actors: some are clearly journalists, some are communicators who would never be confused with journalists, and some lie in between.

This journalistic transformation is part of a more overarching Internet-driven shift from an “industrial information economy,” in which information is produced by firms, to a “networked information economy,” in which decentralized actors play a greater role.<sup>11</sup> The old model was “one-to-many,” a top-down system of media professionals producing and delivering news to a mass audience. The new model is “many-to-many,” in which anyone with a computer and Internet access can produce and disseminate news. No one can say where all of this is headed. As the Spanish sociologist Manuel Castells has said, where the Internet is concerned we are living in a state of “informed bewilderment.”<sup>12</sup> What is

---

9. Guides Concerning Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. at 53,136.

10. See Brett Michael Dykes, *Glenn Beck’s Gold-Gate Problem*, YAHOO NEWS (Dec. 8, 2009, 3:47 PM), [http://old.news.yahoo.com/s/ynews/ynews\\_ts1022](http://old.news.yahoo.com/s/ynews/ynews_ts1022) (discussing such “conflict of interest allegations”). Any faith in Fox News to police Glenn Beck is misplaced, since the company said it does not apply its rules against doing paid endorsements to its journalists who are also radio hosts. *Id.*

11. YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 3 (2006).

12. MANUEL CASTELLS, *THE INTERNET GALAXY: REFLECTIONS ON THE INTERNET, BUSINESS AND SOCIETY* 4 (2003).

clear is that the media ecology is now a mix of the Fourth and Fifth Estates, and that the Fifth Estate's role is growing.

As journalism moves forward, media law and policy are looking backward. Public officials and academics have largely reacted to the transformation with ideas for rescuing old media in its current form, including government subsidies, foundation bailouts, and changes in tax or copyright law. The suggestions are well intended, and some may even be useful. But they are also framed in the way media reform initiatives long have been—as ways to provide “The Media That Citizens Need,” as the title of a classic law review article by C. Edwin Baker put it.<sup>13</sup>

The proposals have a common deficiency: they assume, as Baker's title suggests, that the professional media will play an active role and the audience a passive one. This model of “an informing press” and “an informed public,” as another law review title expressed it, has been upended.<sup>14</sup> The public now not only consumes news, but reports it, disseminates it, critiques it, and talks back to it. The audience is rapidly becoming the “former audience.”<sup>15</sup> Citizens are returning to an era before the rise of mass media when, in Habermasian terms, “[a]ccess to the public sphere [wa]s open in principle to all citizens.”<sup>16</sup>

These changes are not a referendum on the performance of old media institutions. Newspapers have been a remarkably effective instrument for producing and disseminating high-quality “accountability journalism.” Mainstream magazines continue to break important news and to produce thoughtful analysis of current events. Television news, both broadcast and cable, continues to bring well-reported stories to audiences of millions. Old media is not retreating because it is failing journalistically, but rather because its business models are in decline.

New media should not be seen as a replacement for old media, but as a necessary supplement. As the Fourth Estate has fewer resources available to cover the federal government, state capitals, city halls, private enterprises, and other centers of power and influence, the Fifth Estate is increasingly stepping in to fill the gaps. This “replacement journalism” is

---

13. C. Edwin Baker, *The Media That Citizens Need*, 147 U. PA. L. REV. 317 (1998).

14. Lillian R. BeVier, *An Informed Public, An Informing Press: The Search for a Constitutional Principle*, 68 CALIF. L. REV. 482 (1980).

15. DAN GILLMOR, *WE THE MEDIA: GRASSROOTS JOURNALISM BY THE PEOPLE, FOR THE PEOPLE* 137 (2004).

16. Jürgen Habermas, *The Public Sphere*, in *MEDIA STUDIES: A READER* 92, 92 (Paul Marris & Sue Thornham eds., 2d ed. 2000).

an important and growing part of the overall news ecology.<sup>17</sup>

The Fifth Estate's contribution, however, goes beyond providing foot soldiers. Citizen journalists, nonprofit news sites, and other Fifth Estate actors often report the news from different perspectives, and these journalistic differences can advance the values underlying the Constitution's free press guarantee. Members of the Fifth Estate may discuss issues that the old media has placed outside of the "sphere of legitimate debate."<sup>18</sup> They may do a better job of exercising a "checking function"<sup>19</sup> on the public and private sectors. They can also abandon what one critic has called the "view from nowhere" to offer more opinionated assessments, which can help shed light on events and reinvigorate democracy.<sup>20</sup> The Fifth Estate also offers a platform for citizens who do not have access to the mainstream media to engage in self-expression about current events.

As journalism's transformation proceeds, less focus should be placed on the Media that Citizens Need and more on the Media that Need Citizens—that is, media that are produced by citizen journalists and other kinds of nontraditional journalistic actors. Courts can do this by recognizing a First Amendment "right to participate." In the 1960s, scholars and courts promoted a First Amendment "right of access" for people and groups who were excluded from the mass media.<sup>21</sup> After some early successes, the right foundered not because the principles underlying it were wrong, but because courts were unwilling to interfere with the property rights and editorial control of newspaper owners and broadcasters.<sup>22</sup> Now that the Internet provides a platform that is freely available to anyone who wants to speak, those concerns do not apply.

---

17. Ken Doctor, *The Newsonomics of Replacement Journalism*, NIEMAN JOURNALISM LAB (Oct. 14, 2010, 10:30 AM), <http://niemanlab.org/2010/10/the-newsonomics-of-replacement-journalism/>.

18. Jay Rosen, *Audience Atomization Overcome: Why the Internet Weakens the Authority of the Press*, PRESSTHINK (Jan. 12, 2009, 12:02 AM), <http://archive.pressthink.org/2009/01/12/atomization.html>.

19. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 539.

20. Jay Rosen, *The View from Nowhere: Questions and Answers*, PRESSTHINK (Nov. 10, 2010, 2:04 AM), <http://pressthink.org/2010/11/the-view-from-nowhere-questions-and-answers/>.

21. See, e.g., Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1642–43 (1967).

22. *Bus. Execs. Move for Vietnam Peace v. FCC*, 450 F.2d 642, 660 (D.C. Cir. 1971) (limiting the ability of broadcasters to exclude opposing viewpoints), *rev'd*, *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 111–13 (1973) (allowing broadcasters editorial discretion when considering alternative viewpoints).

---

---

A First Amendment right to participate would pick up where the right of access left off. It would have two main elements. First, it should provide the Fifth Estate with legal equality with the Fourth Estate. The FTC guides are only one way in which the law currently favors old media. The equality principle would hold that in areas ranging from reporter's privilege statutes to the allocation of press passes, citizen journalists should be on an equal footing with members of the mainstream media. This right of equal treatment would be rooted in the First Amendment principle that government should not discriminate among speakers, a doctrine that the Supreme Court recently strengthened with its ruling in *Citizens United v. Federal Election Commission*.<sup>23</sup>

Second, the right to participate should include an affirmative right of access to certain government information that journalists need for their work. This access principle could, among other things, compel government to make more public documents and government proceedings available online. This right would draw on and expand upon the First Amendment right of access that the Supreme Court has recognized with respect to criminal court proceedings, and that some lower federal courts have taken further.

In addition to this constitutionally grounded right, government at all levels should adopt "policies of participation,"<sup>24</sup> statutes, regulations, and executive orders that would help the Fifth Estate achieve greater equality and access. These laws could extend participation in areas ranging from increasing reporters' access to corporate information to preventing Internet service providers from discriminating against smaller media organizations.

For all of its promise, the Fifth Estate also brings perils. Some new media journalists do not adhere to conflict of interest policies and do not have mechanisms for correcting errors. In many cases, they do not have recognizable news brands, so a malicious new media journalist can disseminate false or misleading information and audiences may not know to be on guard. To rein in this darker side, the Fifth Estate should voluntarily adopt an "architecture of accountability,"<sup>25</sup> a system of self-regulation that would build accountability tools into its journalism.

Part II of this Article will examine the shifting media landscape, marked by a declining Fourth Estate and a rising Fifth Estate, and the ways

---

23. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

24. *See infra* Part IV.C.

25. *See infra* Part V.

in which elite actors are responding. Part III will explore how the Fifth Estate is advancing First Amendment values, along with the risks it poses to the media ecology. Part IV will argue that courts should recognize a First Amendment “right to participate,” which would grant the Fifth Estate equal rights with the Fourth Estate and recognize broader access rights to government information for all journalists. It will also propose that government adopt “policies of participation.” Finally, Part V will argue that the Fifth Estate should police itself by putting in place an “architecture of accountability.”

## II. THE CHANGING MEDIA ECOLOGY—AND THE ELITE RESPONSE

The Internet is tearing down the old media order with the sort of “[c]reative [d]estruction” that Joseph Schumpeter saw as “the essential fact about capitalism.”<sup>26</sup> Newspapers have been hit the hardest. Printing and delivering the news to readers used to be labor intensive and expensive, with enormous barriers to entry. In an Internet economy, those barriers are falling and suddenly the “material means of information and cultural production” are available to “a significant fraction of the world’s population.”<sup>27</sup>

The availability of free news online has substantially reduced newspaper readership. Circulation was eroding before the Internet, in part due to competition from television, but recently the industry has been facing steeper declines.<sup>28</sup> In the past decade, circulation has fallen more than 25 percent, and some papers have fared far worse: for example, the *Boston Globe* lost nearly 50 percent of its readership from 1990 to 2009.<sup>29</sup>

---

26. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 83 (3d ed. 1950).

27. Benkler, *supra* note 11, at 3.

28. See Alan D. Mutter, *Driving Circulation? Raise Newspaper Prices*, REFLECTIONS OF A NEWSOSAUR (Apr. 27, 2009, 8:24 AM), <http://newsosaur.blogspot.com/2009/04/diving-circulation-raise-newspaper.html>.

29. See Robert MacMillan, *U.S. Newspaper Circulation Plunge Accelerates*, REUTERS (Oct. 26, 2009, 11:17 AM), <http://www.reuters.com/article/2009/10/26/newspapers-idUSN2633378520091026> (“Average weekday circulation at 379 daily newspapers fell 10.6 percent to about 30.4 million copies for the six months that ended on Sept. 30, 2009 from the same period last year.”); Jennifer B. McKim, *Circulation Drops at Globe*, *Herald*, BOS. GLOBE (Apr. 27, 2010, 7:39 AM), [http://www.boston.com/business/ticker/2010/04/circulation\\_dro.html](http://www.boston.com/business/ticker/2010/04/circulation_dro.html) (“The Globe’s daily circulation fell 23.2 percent to 232,432 in the six-month period that ended in March, compared to the same period a year ago.”); Choire Sicha, *A Graphic History of Newspaper Circulation Over the Last Two Decades*, AWL (Oct. 26, 2009), <http://www.theawl.com/2009/10/a-graphic-history-of-newspaper-circulation-over-the-last-two-decades> (stating that the Boston Globe’s circulation declined “from 521,000 in 1990 to 264,105 [in 2009]”); *Boston Shoot-Out*, AM. JOURNALISM REV., Nov. 2000,

Newspapers' most loyal readers are people sixty-five and older, 62 percent of whom responded to a 2009 survey that they had read a paper the previous day. Among those in the 18–24 age bracket, only 27 percent had the same response.<sup>30</sup>

The second tent pole of newspaper economics, advertising, has also been destabilized. Newspapers' rise in the nineteenth and twentieth centuries was due to their role as "market intermediaries."<sup>31</sup> As one of the few channels for businesses to reach customers, they could impose near-monopoly pricing and use some of their profits to subsidize high-quality journalism. It was a historical accident that "the expense of printing created an environment where Wal-Mart was willing to subsidize the Baghdad bureau,"<sup>32</sup> but that accident was the edifice on which twentieth-century journalism was built.<sup>33</sup>

Newspapers have lost their privileged economic status. They now compete with an almost limitless number of websites that have the ability to connect businesses and consumers. Moreover, in critical ways their competitors offer a more compelling advertising product. Google's AdSense service delivers ads tailored to specific words in a user's search. Craigslist offers something even harder to compete with: a price tag of zero. Not surprisingly, newspaper print advertising fell 43 percent from 2007 to 2009 and has continued to decline even as the economy has rebounded.<sup>34</sup> In 2010, a Rubicon was crossed: for the first time, more advertising dollars were spent on the Internet than on newspapers.<sup>35</sup>

Newspapers are attracting record numbers of readers to their websites,

---

[http://www.ajr.org/article\\_printable.asp?id=2927](http://www.ajr.org/article_printable.asp?id=2927).

30. See Pew Project for Excellence in Journalism, *Audience*, STATE OF THE NEWS MEDIA 2010, <http://stateofthedia.org/2010/newspapers-summary-essay/audience/> (last visited Nov. 15, 2011).

31. Paul Starr, *Goodbye to the Age of Newspapers (Hello to a New Era of Corruption)*, NEW REPUBLIC (Mar. 4, 2009, 12:00 AM), <http://www.tnr.com/article/goodbye-the-age-newspapers-hello-new-era-corruption>.

32. Clay Shirky, *Newspapers and Thinking the Unthinkable*, SHIRKY.COM (Mar. 13, 2009, 9:22 PM), <http://www.shirky.com/weblog/2009/03/newspapers-and-thinking-the-unthinkable>;

33. Starr, *supra* note 31 (noting that advertisers no longer need to "piggyback on the news to reach consumers").

34. See Tom Price, *Overview of the CQ Researcher Issue on "Future of Journalism,"* CQ RESEARCHER BLOG (Mar. 27, 2009, 9:49 AM), <http://cqresearcherblog.blogspot.com/2009/03/overview-of-cq-researcher-issue-on.html>.

35. Russell Adams, *Online Ads Pull Ahead of Newspapers*, WALL ST. J., Dec. 20, 2010, <http://online.wsj.com/article/SB10001424052748704443704576026073503437388.html>; Kristen Schweizer, *U.S. Web Advertising Exceeds Newspaper Print Ads in 2010, eMarketer Says*, BLOOMBERG (Dec. 20, 2010, 6:43 AM), <http://www.bloomberg.com/news/2010-12-20/u-s-web-ads-exceed-newspaper-print-ads-in-2010-emarketer-says.html>.

but they have not had comparable success in generating online revenues.<sup>36</sup> Internet advertising rates are a small fraction of print rates, and inventory of ad space keeps growing, not only on rapidly proliferating news and opinion sites, but on search engines, Facebook pages, email, and Twitter. As their readers abandon print editions for websites, newspapers find that they are trading “analog dollars” for “digital dimes.”<sup>37</sup> Some are erecting pay walls, but it is unclear how they will fare. Increasingly, news is being viewed as a commodity, which the public will take as cheaply as it can be found. Financial newspapers have succeeded in charging readers, but general interest newspapers may not have the same pricing power.<sup>38</sup>

In some industries, revenue declines do not significantly affect quality; they just lead to fewer goods being produced. In newspapers, however, a large part of the expenses are the fixed costs of journalists’ salaries; as revenues have fallen, newsgathering staff have been diminished—diminishing the quality of the product.<sup>39</sup> From 2001 to 2010, the number of professionals employed by newspapers fell from over 55,000 to 41,500—a drop of roughly 25 percent.<sup>40</sup> When the economy rebounded in 2010, newsrooms lost as many as 1500 more, and the losses continued into 2011.<sup>41</sup> As newsroom budgets have shrunk, newspapers have scaled

---

36. See Pew Project for Excellence in Journalism, *Newspapers—Summary Essay*, STATE OF THE NEWS MEDIA 2010, <http://stateofthemediamedia.org/2010/newspapers-summary-essay/> (last visited Nov. 15, 2011) (“But during 2009, online advertising revenues, which had grown at a robust rate as high as 35% a year earlier in the decade, actually declined year-to-year by about 10%.”).

37. Lacey Rose, *Zucker on the Media*, FORBES (Mar. 18, 2009, 1:42 PM), <http://www.forbes.com/2009/03/18/jeff-zucker-nbc-cnbc-jon-stewart-business-media-zucker.html>.

38. For different perspectives on whether the *New York Times*’s paywall is working, compare Henry Blodget, *Time For People to Eat Crow: The New York Times’ Paywall Is Working!*, BUSINESS INSIDER (June 8, 2011, 12:55PM), <http://www.businessinsider.com/time-for-a-lot-of-people-to-eat-crow-the-new-york-times-paywall-is-working-2011-6> (arguing the paywall has increased online revenue and print circulation), with Joshua Benton, *A New York Times TimesSelect Flashback: Early Numbers Are Nice, but Growth Over Time is Nicer*, NEIMAN JOURNALISM LAB (Apr. 21, 2011, 12:45 PM), <http://www.niemanlab.org/2011/04/a-new-york-times-timesselect-flashback-early-numbers-are-nice-but-growth-over-time-is-nicer> (arguing sustained growth could prove difficult).

39. Richard Posner, *The Future of Newspapers*, BECKER-POSNER BLOG (June 23, 2009, 7:37 PM), <http://www.becker-posner-blog.com/2009/06/the-future-of-newspapers--posner.html>.

40. *Decline in Newsroom Jobs Slows*, ASNE NEWS NOW IDEAS SUMMIT (Apr. 11, 2010, 3:28 PM), [http://asne.org/annual\\_conference/conference\\_news/articleid/763/decline-in-newsroom-jobs-slows.aspx](http://asne.org/annual_conference/conference_news/articleid/763/decline-in-newsroom-jobs-slows.aspx). See also Anick Jesdanun, *Star-Ledger Cuts Newsroom Staff By Nearly Half*, USA TODAY (Oct. 24, 2008, 7:04 PM), [http://www.usatoday.com/money/economy/2008-10-24-3307530075\\_x.htm](http://www.usatoday.com/money/economy/2008-10-24-3307530075_x.htm) (noting that the “Star-Ledger of Newark, N.J., will reduce its newsroom staff by nearly half through voluntary buyouts” and that “[n]ewspapers across the country have been reducing staff through attrition, buyouts or layoffs, but few have seen such drastic cuts.”).

41. See Rick Edmonds, Emily Guskin, & Tom Rosenstiel, *Newspapers: Missed the 2010 Media Rally*, STATE OF THE NEWS MEDIA 2011, <http://stateofthemediamedia.org/2011/newspapers-essay/> (last visited Nov. 15, 2011). In June 2011, Gannett announced it was laying off 700 employees, its fourth

back their journalistic ambitions. The *Boston Globe*, which historically prided itself on its foreign coverage, closed its last overseas bureau in 2007.<sup>42</sup> Two years later, the *Washington Post* shut all of its domestic bureaus.<sup>43</sup> Newspapers have also been physically shrinking: in 2007, the *New York Times* reduced its “web width,” the width of its pages, by 1.5 inches in order to cut down on newsprint costs, and the *Wall Street Journal*, the *Chicago Tribune*, and the *Los Angeles Times* have similarly decreased in size.<sup>44</sup> The *Detroit News* cut delivery of its print edition to just three days a week,<sup>45</sup> and the *Christian Science Monitor* is now an almost entirely online publication.<sup>46</sup> The number of newspapers in the United States has been declining since the introduction of radio, but in recent years the rate of newspaper closings has accelerated. In 2009 alone, more than 140 went out of business, including the 150-year-old *Rocky Mountain News*.<sup>47</sup>

With the decline of newspapers has come a loss of the “accountability journalism” they have traditionally excelled at. Newspapers have been closing their Washington bureaus, including the Copley chain, whose *San Diego Union-Tribune* won a Pulitzer Prize in 2006 for an investigation that put a Congressman in jail.<sup>48</sup> Many more have cut key staff. One of the 700 people Gannett laid off in June 2011 was the *Des Moines Register*’s

---

major round of layoffs in three years. Burgess Everett, *Mass Layoffs at Gannett Papers*, POLITICO (June 21, 2011, 7:51 PM), [http://www.politico.com/blogs/onmedia/0611/Mass\\_layoffs\\_at\\_Gannett\\_papers.html](http://www.politico.com/blogs/onmedia/0611/Mass_layoffs_at_Gannett_papers.html).

42. Robert Gavin, *Globe to Close Last Three Foreign Bureaus*, BOS. GLOBE, Jan. 24, 2007, available at [http://www.boston.com/business/articles/2007/01/24/globe\\_to\\_close\\_last\\_three\\_foreign\\_bureaus/](http://www.boston.com/business/articles/2007/01/24/globe_to_close_last_three_foreign_bureaus/).

43. Howard Kurtz, *Post to Close National Bureaus, Send Reporters Afield from D.C.*, WASH. POST, Nov. 25, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/24/AR2009112404074.html>.

44. *New York Times Slims Down in Width*, ASSOCIATED PRESS, Aug 6., 2007, available at <http://www.foxnews.com/story/0,2933,292197,00.html>; Savita Sauvin, *Chicago Tribune, LA Times to Cut Print Size*, SFNBLOG.COM, (Feb. 2, 2010, 5:55 PM), [http://www.sfnblog.com/financials/2010/02/chicago\\_tribune\\_la\\_times\\_cut\\_print\\_size.php](http://www.sfnblog.com/financials/2010/02/chicago_tribune_la_times_cut_print_size.php); Katherine Q. Seelye, *In Tough Times, a Redesigned Journal*, N.Y. TIMES, Dec. 4, 2006, available at <http://www.nytimes.com/2006/12/04/business/media/04journal.html>.

45. Ed White, *“Detroit News” and “Free Press” Cut Delivery to 3 Days a Week*, USA TODAY (Dec. 19, 2008, 1:35 PM), [http://www.usatoday.com/money/media/2008-12-16-detroit-newspapers\\_N.htm](http://www.usatoday.com/money/media/2008-12-16-detroit-newspapers_N.htm).

46. David Cook, *Monitor Shifts from Print to Web-Based Strategy*, CHRISTIAN SCI. MONITOR, Oct. 29, 2008, <http://www.csmonitor.com/USA/2008/1029/p25s01-usgn.html>.

47. Alan D. Mutter, *Presses Stopped Forever at 140+ Papers in 2009*, REFLECTIONS OF A NEWSOSAUR (Dec. 21, 2009, 6:00 AM), <http://www.newsosaur.blogspot.com/2009/12/presses-stopped-forever-at-140-papers.html>.

48. Richard Pérez-Peña, *Big News in Washington, but Far Fewer Cover It*, N.Y. TIMES, Dec. 17, 2008, at A1, available at <http://www.nytimes.com/2008/12/18/business/media/18bureaus.html?pagewanted=all>.

Washington-based agriculture reporter, who was regularly one of the few people in congressional agriculture committee hearings who did not work for the agriculture industry.<sup>49</sup>

Important beats are being cut at newspapers across the country. The professional association of investigative reporters lost more than 25 percent of its members from 2003 to 2010.<sup>50</sup> The environmental reporters' association has lost more than 40 percent of its membership since 2004.<sup>51</sup> State and local reporting have been hit hard. In six years, the number of full-time newspaper reporters covering state capitals fell 32 percent.<sup>52</sup> In an analysis of the state of reporting on state government, the *American Journalism Review* declared that "triage and narrowed priorities are the orders of the day."<sup>53</sup> Given the role of statehouse and city hall reporters in keeping government officials honest, observers worry that this decline could usher in a "[n]ew [e]ra of [c]orruption."<sup>54</sup> In its 2011 report *The Information Needs of Communities*, the Federal Communications Commission ("FCC") warned that at the local level "[t]he independent watchdog function that the Founding Fathers envisioned for journalism" was "at risk."<sup>55</sup> The report argued that one reason the municipal scandal in the Bell, California city government—the working-class suburb whose chief administrator was earning \$787,637—took some five years to come to light was that there were no reporters who regularly covered the Bell city government.<sup>56</sup>

The decline of newspapers has secondary and tertiary effects throughout the media ecology because other news outlets rely heavily on

---

49. *Des Moines: Why They're Dancing on K Street*, GANNETT BLOG (June 24, 2011, 2:51 PM), <http://gannettblog.blogspot.com/2011/06/des-moines-why-theyre-dancing-on-k.html>.

50. STEVEN WALDMAN & THE WORKING GROUP ON INFORMATION NEEDS OF COMMUNITIES, FED. COMM'NS COMM'N, *THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE* 11 (2011) [hereinafter *INFORMATION NEEDS OF COMMUNITIES*], available at [http://transition.fcc.gov/osp/inc-report/The\\_Information\\_Needs\\_of\\_Communities.pdf](http://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf).

51. *Id.*

52. Jennifer Dorroh, *Statehouse Exodus*, AM. JOURNALISM REV., Apr./May 2009, at 20, 22.

53. *Id.* at 24. See also Rob Gurwitt, *Death and Life in the Pressroom*, GOVERNING MAG., Jan. 2009, at 33, 34 ("Newspapers that once sent five people to cover state government are down to two and are pruning the space they get on the page . . ."); John Nichols & Robert W. McChesney, *The Death and Life of Great American Newspapers*, NATION, Apr. 6, 2009, available at <http://www.thenation.com/article/death-and-life-great-american-newspapers?page=full> ("Newspapers . . . are shuttering at warp speed what remains of city hall, statehouse, and Washington bureaus."); Price, *supra* note 34 ("[N]ewspapers are shrinking the government coverage that's most important to informing citizens in a democracy.").

54. Starr, *supra* note 31.

55. *INFORMATION NEEDS OF COMMUNITIES*, *supra* note 50, at 5.

56. *Id.* at 12.

them to set the news agenda. Television and radio news reports often closely track the front page of that morning's newspaper and in many cases use facts reported in the paper. Newspapers also have a major influence on new media. A study by the Pew Project for Excellence in Journalism found that bloggers link extensively to newspaper reports.<sup>57</sup>

Although the loss of newspaper reporting power is particularly worrisome, the declines are being felt throughout old media. The Associated Press, a backbone of the news industry, has been losing clients, including the *Chicago Tribune* and the *Los Angeles Times*, which have switched to a lower-cost competitor.<sup>58</sup> Staffing at *Time* and *Newsweek* magazines have declined nearly 50 percent since 1983.<sup>59</sup> *U.S. News & World Report* has gone almost entirely online.<sup>60</sup>

Network news, which now has to compete with 24-hour news channels and the Internet, has lost more than 50 percent of its audience since 1980, and network news divisions have had sizeable layoffs.<sup>61</sup> Cable news, once a great success story, has reversed direction. In 2010, the big three cable-news networks all lost prime-time viewers, ranging from 5 percent at MSNBC to 37 percent at CNN.<sup>62</sup> At local stations, by one

---

57. Pew Project for Excellence in Journalism, *New Media, Old Media: How Blogs and Social Media Agendas Differ from Traditional Press*, PEW RESEARCH CTR. PUBL'NS (May 23, 2010), <http://pewresearch.org/pubs/1602/new-media-review-differences-from-traditional-press>.

58. See, e.g., Russell Adams, *Thomson Reuters to Offer New U.S. News Service*, WALL ST. J., Dec. 14, 2010, <http://online.wsj.com/article/SB10001424052748704681804576018041323133966.html>; Joshua Benton, *How One Newspaper Is Adjusting to Life Without the Associated Press*, NEIMAN JOURNALISM LAB (Mar. 13, 2009, 8:39 AM), <http://www.niemanlab.org/2009/03/how-one-newspaper-is-adjusting-to-life-without-the-associated-press/>; Michael Liedtke, *Associated Press Profit, Revenue Fall*, ASSOCIATED PRESS (Apr. 29, 2010, 4:56 PM), available at [http://www.huffingtonpost.com/2010/04/29/associated-press-profit-r\\_n\\_557616.html](http://www.huffingtonpost.com/2010/04/29/associated-press-profit-r_n_557616.html); David Kaplan, *Editors React to AP Rate Cut: "A Good Starting Point" or "This Changes Nothing,"* PAIDCONTENT.ORG (Oct. 23, 2008, 9:09 PM), <http://www.paidcontent.org/article/419-editors-react-to-ap-rate-cut-a-good-starting-point-or-this-changes-noth/>.

59. See Katerina Eva Matsa, Tom Rosenstiel & Paul Moore, *Magazines: By the Numbers*, STATE OF THE NEWS MEDIA 2011, <http://stateofthedia.org/2011/magazines-essay/data-page-4/> (last visited Nov. 15, 2011).

60. Richard Perez-Pena, *U.S. News Will Become a Monthly Magazine*, N.Y. TIMES, Nov. 4, 2008, at B3, available at <http://www.nytimes.com/2008/11/05/business/media/05mag.html> (noting "that the magazine was accelerating its plans to focus on Internet publishing").

61. See Emily Guskin, Tom Rosenstiel & Paul Moore, *Network: By the Numbers*, STATE OF THE NEWS MEDIA 2011, <http://stateofthedia.org/2011/network-essay/data-page-5/> (last visited Nov. 15, 2011); Joseph Tartakoff, *ABC News Plans Major Job Cuts As Part of "Fundamental Transformation"; Westin's Memo*, PAIDCONTENT.ORG (Feb. 23, 2010, 3:35 PM), <http://paidcontent.org/article/419-abc-news-plans-major-restructuring-offers-buyouts-to-all-full-time-non-/>.

62. See Jesse Holcomb, Amy Mitchell & Tom Rosenstiel, *Cable: Audience vs. Economics*, STATE OF THE NEWS MEDIA 2011, <http://stateofthedia.org/2011/cable-essay/> (last visited Nov. 15, 2011).

estimate, only one in ten newsrooms now operate with a beat system.<sup>63</sup> Strapped local news stations are sharing staff, equipment, and content with newspapers and even with competing stations.<sup>64</sup> A study of radio news found “serious cracks” in its advertising model and predicted that it will lose significant audience share to Internet radio and podcasts.<sup>65</sup>

As the Fourth Estate declines, a Fifth Estate is rising. The Internet’s “generativity” is helping ordinary citizens create new enterprises of all kinds.<sup>66</sup> The Internet promotes innovation by making barriers to entry low, experimentation easy, and the cost of failure minimal. The power of networks lowers the cost of collective action so that it is easy, as Yochai Benkler notes, for people with loose affiliation to engage in “effective, large-scale cooperative efforts,”<sup>67</sup> including reporting, writing, editing, and disseminating news stories. Journalistic enterprises exist that would have been impossible a few years ago, from an online archive of police brutality videos<sup>68</sup> to *earthquakejapan*, a Twitter news feed set up after the March 2011 disaster.<sup>69</sup>

These new communication channels make it possible to tap vast stores of what media theorist Clay Shirky calls “cognitive surplus,” the extra time and intelligence that people have that could be given over to cooperative undertakings.<sup>70</sup> At the same time that old media’s labor supply is in sharp decline, the Internet is putting far more human capacity within reach. In the decade since Wikipedia was founded, volunteers have spent some one hundred million hours writing and editing entries.<sup>71</sup> That is a staggering amount of time, but trivial, Shirky notes, when compared to the two

---

63. Diana Marszalek, *Are Beat Reporters Key to Better TV News?*, TVNEWSCHECK (July 12, 2011, 7:19 AM), <http://www.tvnewscheck.com/article/2011/07/11/52450/are-beat-reporters-key-to-better-tv-news>.

64. Pew Project for Excellence in Journalism, *Local TV—Summary Essay*, STATE OF THE NEWS MEDIA 2010, <http://stateofthemediamedia.org/2010/local-tv-summary-essay/> (last visited Nov. 15, 2011).

65. Pew Project for Excellence in Journalism, *Audio—Summary Essay*, STATE OF THE NEWS MEDIA 2010, <http://stateofthemediamedia.org/2010/audio-summary-essay/> (last visited Nov. 15, 2011).

66. Jonathan L. Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974, 1981–83 (2006).

67. Benkler, *supra* note 11, at 5.

68. See, e.g., Robert Allison, *Jackboot Hall of Shame: Police Brutality Videos Archive*, PRISON PLANET (June 1, 2009), <http://www.prisonplanet.com/jackboot-hall-of-shame-police-brutality-videos-archive.html>.

69. See *Japan Earthquakes*, TWITTER, <http://twitter.com/#!/earthquakejapan> (last visited Nov. 15, 2011).

70. CLAY SHIRKY, *COGNITIVE SURPLUS: CREATIVITY AND GENEROSITY IN A CONNECTED AGE*, 9–10 (2010).

71. *Id.*

hundred *billion* hours that Americans watch television each year.<sup>72</sup> Wikipedia's one hundred million hours of labor is roughly equal to the amount of time Americans spend just watching commercials every weekend.<sup>73</sup>

The vast majority of the public does not produce any journalism. But given how many people there are in the country, and how much free time they have, even a very small percentage of the public acting as citizen journalists can produce a considerable amount of journalism. Many members of the public who do not produce journalism nevertheless participate in it and also in the construction of public opinion, by sharing links through Facebook and Twitter, commenting on online news stories, or participating in community websites.

As technology transforms how news is created, it is also changing how audiences consume it. The Internet is organized differently than old media with, as Castells says, a new "space of flows."<sup>74</sup> Instead of going to a single authoritative source, the audience finds the news it wants by visiting news aggregation sites;<sup>75</sup> following links in emails, Tweets, and Facebook posts; and "foraging and opportunism."<sup>76</sup> One college student summed up the new ethos: "If the news is that important, it will find me."<sup>77</sup>

Old media is largely organized on a single model: a for-profit company employing people to report, write, edit, and disseminate news stories in one-to-many form, supported by advertising and, in some cases, subscriptions. Fourth Estate outlets with very different content—the *New York Times*, Fox News, the *Vineyard Gazette*—share this same structure. The Fifth Estate, by contrast, takes many diverse forms. It includes, among other things, individual bloggers, online community news sites, and

---

72. *Id.*

73. *Id.*

74. William H. Dutton, *The Fifth Estate Emerging Through the Network of Networks*, 27 PROMETHEUS 1, 6 (2009).

75. See Om Malik, *There is No New Media: It's All New Consumption*, GIGAOM (Oct. 22, 2010, 1:35 PM), <http://gigaom.com/2010/10/22/there-is-no-new-media-its-all-new-consumption/> (stating that "Generation D, where D is for disruption" is a generation whose "consumption and online behavior is going to be predicated on a distribution medium whose basic premise is abundance. They will find, curate and consume on their own terms, on their own choice of screens and on their own time.").

76. Kristin Purcell et al., *Understanding the Participatory News Consumer: How Internet and Cell Phone Users Have Turned News into a Social Experience*, PEW INTERNET & AM. LIFE PROJECT 2 (Mar. 1, 2010), [http://www.pewinternet.org/~media/Files/Reports/2010/PIP\\_Understanding\\_the\\_Participatory\\_News\\_Consumer.pdf](http://www.pewinternet.org/~media/Files/Reports/2010/PIP_Understanding_the_Participatory_News_Consumer.pdf).

77. Brian Stelter, *Finding Political News Online, the Young Pass It On*, N.Y. TIMES, Mar. 27, 2008, at A1, available at <http://www.nytimes.com/2008/03/27/us/politics/27voters.html>.

nonprofit organizations whose primary purpose is not journalism.

The Fifth Estate's borders cannot be precisely drawn. A noncommercial blogger's solo blog and a citizen journalist's Tweets from a disaster site are clearly within it. *NBC Nightly News* and the *Chicago Tribune* are clearly not. In between are many news sources that are more difficult to categorize. There are Internet-native news organizations like *Yahoo News* and AOL blogs that are corporately owned but have a new media sensibility. There are citizen blogs that have close relationships with old media, such as *The Local*, a Brooklyn blog that is produced by unpaid City University of New York journalism students and appears on the *New York Times* website.<sup>78</sup> There are also a great number of solo bloggers who have taken steps of various sizes away from the pure citizen journalism model—by running advertising, hiring an assistant or a small staff, or being acquired by a media company while maintaining editorial control.

Rather than attempt to draw rigorous distinctions, it makes more sense to consider the Fifth Estate category expansively while acknowledging variations within it. The following are some of the major categories that fall within the Fifth Estate rubric. They are Internet-based organizations and individuals who collect newsworthy information and disseminate it to a larger audience, who are not generally considered, for one reason or another, to be part of old media.

*Individual Bloggers* – Bloggers are a quintessential form of Fifth Estate journalism, and some see the two groups as co-extensive.<sup>79</sup> Solo bloggers are in many cases the classic citizen journalists, engaging in reporting and commentary not as a profession but out of commitment to the work. The Iraqi bloggers who have provided a local perspective on the Iraq War are a pure form of the model.<sup>80</sup> At the same time, many bloggers are professionals to some degree or another. Companies such as blogads help bloggers monetize their work by running ads on their sites.<sup>81</sup> Other bloggers, like Andrew Sullivan, publish individual blogs under the

---

78. See THE LOCAL, <http://fort-greene.thelocal.nytimes.com> (last visited Nov. 15, 2011). See, e.g., Ken Doctor, *9 Questions: Zell's Clown Car, the New "100," Tablets & Print Circ & Daughter of Alesia*, NEWSONOMICS (Oct. 27, 2010), <http://newsonomics.com/9-questions-zellss-clown-car-the-new-100-tablets-print-circ-daughter-of-alesia/>.

79. See STEPHEN D. COOPER, WATCHING THE WATCHDOG: BLOGGERS AS THE FIFTH ESTATE (2006).

80. See Jonathan Finer, *Iraqi Bloggers Describe Life Lived Amid Long Turmoil*, WASH. POST, Aug. 12, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/11/AR2005081102195.html>.

81. See BLOGADS, <http://web.blogads.com> (last visited Nov. 15, 2011).

umbrella of a larger media organization.<sup>82</sup>

*Nonprofit Investigative Sites* – There are dozens of nonprofit news sources, funded mainly by foundations and private donors.<sup>83</sup> *ProPublica* employs more than thirty journalists who produced over one hundred major investigative pieces in 2010, in cooperation with more than forty different partners.<sup>84</sup> In 2010, *California Watch*, which had eleven full-time investigative reporters, ran its stories in partner news outlets that reached nearly twenty million print readers and millions more on television, radio, and online.<sup>85</sup> Some of these sites focus on specific subjects, such as *Kaiser Health News*.<sup>86</sup>

*Online News Communities* – In online news communities, members report on and discuss the news, often from an ideological perspective. *Daily Kos*, a liberal web site with 2.5 million unique visitors a month, allows its 250,000 registered members to write and post “diaries,” many of which are based on original reporting. The community can “vote up” diaries to a prominent place on the home page.<sup>87</sup> *Redstate* is a similar news-and-politics-oriented site for conservatives.

*Independent Community Journalism* – There are a growing number of community-based news sites run by citizen journalists. Many are in places that are not adequately covered by old media, such as the *Appalachian Independent*, which invites readers to submit articles through a tab on its home page,<sup>88</sup> and north Alabama’s *Locust Fork News-Journal*.<sup>89</sup> Some are affiliated with nonprofit organizations, such as *Hartsville Today*, a small-town news site operated in partnership with the University of South Carolina.<sup>90</sup>

---

82. See Lucia Moses, *Andrew Sullivan Jumps to NewsBeast*, ADWEEK (Feb. 28, 2011), <http://www.adweek.com/news/advertising-branding/andrew-sullivan-jumps-newsbeast-125864>.

83. Jesse Holcomb et al., *Assessing a New Landscape in Journalism*, PEW RESEARCH CTR.’S PROJECT FOR EXCELLENCE IN JOURNALISM 1 (July 18, 2011), [http://www.journalism.org/analysis\\_report/non\\_profit\\_news\\_1](http://www.journalism.org/analysis_report/non_profit_news_1).

84. See *Frequently Asked Questions*, PROPUBLICA, <http://www.propublica.org/about/frequently-asked-questions/> (last visited Nov. 15, 2011).

85. See Mark Katches, *Looking Forward to Another Year of Life Outside the Comfort Zone*, CAL. WATCH (Sept. 9, 2010), <http://californiawatch.org/dailyreport/looking-forward-another-year-life-outside-comfort-zone-4488>.

86. See *About Us*, KAISER HEALTH NEWS, <http://www.kaiserhealthnews.org/About.aspx> (last visited Nov. 15, 2011).

87. See *About Daily Kos*, DAILY KOS, <http://dailykos.com/special/about#dk> (last visited Nov. 16, 2011).

88. APPALACHIAN INDEP., <http://www.appindie.org/> (last visited Nov. 16, 2011).

89. LOCUST FORK NEWS-JOURNAL, <http://blog.locustfork.net/> (last visited Nov. 16, 2011).

90. See Douglas J. Fisher & Graham Osteen, *Hartsville Today: The First Year of a Small-Town*

*Journalism by Non-Journalistic Organizations* – People affiliated with institutions that are not primarily media organizations are producing a considerable amount of journalism. Arizona State University’s student-run Walter Cronkite News Service provides reporting to newspapers, television stations, and websites across Arizona.<sup>91</sup> *Scotusblog*, a well-regarded blog about the Supreme Court, is run by a practicing lawyer and underwritten by a law firm.<sup>92</sup> The U.S. Holocaust Museum, whose contemporary genocide division is run by a former *Washington Post* editor, produces its own reporting from war-torn regions.<sup>93</sup>

*Collaborative Journalism* – More journalism is being produced by “[c]ommons-based peer production,”<sup>94</sup> the methodology that created Wikipedia. One example is Wikipedia itself, whose entries often break news ahead of the mainstream media.<sup>95</sup> There are sites, such as *Spot.Us*, that ask their audience to suggest and help create news stories.<sup>96</sup> *ProPublica* and *Talking Points Memo* crowdsource projects, in some cases asking their readers to help review newly released government documents.<sup>97</sup> The editor of the *Guardian*, a paper that also uses crowdsourcing, has predicted the rise of the “mutualized newspaper,” based on collaboration between staff and audience.<sup>98</sup>

*Social Media and Raw Data Platforms* – Facebook, Twitter, YouTube, and similar websites have become powerful news distribution channels. On Facebook, ordinary citizens can act as editors, directing news stories or links that they like to members of their network, or they can write

---

*Citizen Journalism Site*, KNIGHT CITIZEN NEWS NETWORK 2 (Mar. 29, 2006), [http://www.kcnn.org/images/uploads/HartsvilleToday\\_Year1.pdf](http://www.kcnn.org/images/uploads/HartsvilleToday_Year1.pdf).

91. Jim Romenesko, *ASU’s Cronkite News Service to Launch Washington Bureau*, POYNTER (Dec. 21, 2010, 1:36 PM), <http://www.poynter.org/latest-news/romenesko/111845/asus-cronkite-news-service-to-launch-washington-bureau/>.

92. Jess Bravin, *On Tom Goldstein’s Transition Back to Small Law*, WALL ST. J. L. BLOG (Jan. 3, 2011, 7:22 PM), <http://blogs.wsj.com/law/2011/01/03/on-tom-goldsteins-transition-back-to-small-law/>.

93. See, e.g., *Sudan at the Crossroads: A Bearing Witness Trip*, U.S. HOLOCAUST MEMORIAL MUSEUM, [http://www.ushmm.org/genocide/bearing\\_witness/sudan\\_2010/](http://www.ushmm.org/genocide/bearing_witness/sudan_2010/) (last visited Nov. 16, 2011).

94. Yochai Benkler, *Coase’s Penguin, or, Linux and The Nature of the Firm*, 112 YALE L.J. 369, 375 (2002).

95. See Zachary M. Seward, *Why Wikipedia Beats Wikinews as a Collaborative Journalism Project*, NIEMAN JOURNALISM LAB (Feb. 8, 2010, 10:00 AM), <http://www.niemanlab.org/2010/02/why-wikipedia-beats-wikinews-as-a-collaborative-journalism-project/>.

96. See SPOT.US, <http://spot.us/> (last visited Nov. 16, 2011).

97. See, e.g., Dan Gillmor, *ProPublica Invites the Public’s Help*, CENTER FOR CITIZEN MEDIA (Apr. 9, 2009), <http://citimedia.org/blog/2009/04/09/propublica-invites-the-publics-help/>.

98. Leonard Downie, Jr. & Michael Schudson, *The Reconstruction of American Journalism*, COLUM. JOURNALISM REV. (Oct. 19, 2009, 1:00 PM), [http://www.cjr.org/reconstruction/the\\_reconstruction\\_of\\_american.php?page=all](http://www.cjr.org/reconstruction/the_reconstruction_of_american.php?page=all).

news bulletins of their own.<sup>99</sup> Citizen journalists use Twitter to break news and update ongoing stories, such as the path of deadly wildfires,<sup>100</sup> terrorist attacks,<sup>101</sup> and anti-government protests.<sup>102</sup> People have been able to observe the Iraq War, dubbed “the first YouTube war,” through videos taken and uploaded by the soldiers themselves.<sup>103</sup>

*For-Profit Internet-Based Sites* – There are for-profit websites that could be considered part of the Fifth Estate despite their professional status. *Daily Kos* is a for-profit website that takes advertising and has a number of paid writers, but most of its content is produced by volunteer diarists and commentators.<sup>104</sup> *Talking Points Memo* began as Joshua Micah Marshall’s solo blog, but it has evolved into a for-profit entity that prints the writings of both its professional staff and outside bloggers.<sup>105</sup> Even some sites produced exclusively by professionals could be considered to be part of the Fifth Estate. Nikki Finke’s *Deadline Hollywood Daily*, like Andrew Sullivan’s *The Daily Dish*, is a onetime solo blog that, even after being acquired by a large media organization, retains the look and sensibility that it had when it was independent.<sup>106</sup> AOL’s Patch network of local sites pays the freelance reporters who create its content so little that they could be said to have more in common with citizen-journalist neighborhood bloggers than with metro reporters employed by the Fourth Estate.<sup>107</sup>

As indefinite as these categories already are, they are becoming more

---

99. See Ben Elowitz, *SEO is Dead and the New King is “SMO,”* PAIDCONTENT.ORG (Oct. 27, 2010, 10:00 AM), <http://paidcontent.org/article/419-seo-is-dead-and-the-new-king-is-smo/> (“[T]here is buzz among many publishers around Facebook logins and likes, and the traffic bumps that come with them.”).

100. See, e.g., Mark Glaser, *California Wildfire Coverage by Local Media, Blogs, Twitter, Maps and More*, PBS (Oct. 25, 2007), <http://www.pbs.org/mediashift/2007/10/california-wildfire-coverage-by-local-media-blogs-twitter-maps-and-more298.html>.

101. See, e.g., Charles Arthur, *How Twitter and Flickr Recorded the Mumbai Terror Attacks*, GUARDIAN (Nov. 27, 2008, 9:42 AM), <http://www.guardian.co.uk/technology/2008/nov/27/mumbai-terror-attacks-twitter-flickr>.

102. See, e.g., Sue Fleming, *U.S. State Department Speaks to Twitter Over Iran*, REUTERS (June 16, 2009, 3:26 PM), <http://www.reuters.com/article/2009/06/16/us-iran-election-twitter-usa-idUSWB01137420090616>.

103. Ann Marie Cox, *The YouTube War*, TIME, July 19, 2006, available at <http://www.time.com/time/nation/article/0,8599,1216501,00.html>.

104. See *About Daily Kos*, DAILY KOS, <http://www.dailykos.com/special/about2#2k> (last visited Nov. 15, 2011).

105. Joshua Micah Marshall, *The Growth of Talking Points Memo: A Case Study in Independent Media*, ALTERNET (Oct. 6, 2008), <http://www.alternet.org/media/101705?page=1>.

106. See Tad Friend, *Call Me: Why Hollywood Fears Nikki Finke*, NEW YORKER, Oct. 12, 2009, available at [http://www.newyorker.com/reporting/2009/10/12/091012fa\\_fact\\_friend](http://www.newyorker.com/reporting/2009/10/12/091012fa_fact_friend).

107. See *About Us*, PATCH, <http://www.patch.com/about> (last visited Nov. 21, 2011).

fluid due to a fast-moving “convergence culture” in media.<sup>108</sup> The *Huffington Post* sold itself to AOL and began hiring professional journalists from the *New York Times* and other leading media organizations.<sup>109</sup> At the same time, it has thousands of unpaid bloggers, and an Internet-native sensibility that makes it a hard-to-define amalgam of Fourth and Fifth Estates. *ProPublica*, which started out with foundation funding, announced in 2011 that it would accept advertising, making it more like a Fourth Estate news organization.<sup>110</sup>

The decline of the Fourth Estate and the rise of the Fifth have prompted elected officials, academics, and other elites to call for an organized response. Overwhelmingly, their focus has been the Fourth Estate, and their main interest has been in propping it up so it can continue doing what it has done in the past.<sup>111</sup> The problem is often expressed as “how to save newspapers,” or more specifically, “How will the Baghdad bureau be funded?”<sup>112</sup> Put that way, a transformation that is being driven by a combination of new technology, new audience preferences, and new economic imperatives is reduced to a simple question of finance: What business model can be found to preserve the journalistic status quo?

Media critics and scholars have made a number of proposals. The president of an Ivy League university has called for the government to subsidize newspapers and broadcast news, along the lines of public television or the National Endowment for the Arts.<sup>113</sup> The chief investment officer of another Ivy League university has suggested that foundations should establish a large endowment fund for newspapers.<sup>114</sup> There have

---

108. HENRY JENKINS, *CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE* 15–16 (2006).

109. David Kaplan, *AOL HuffPo Media Group on Editorial Hiring Spree Following Layoffs*, PAIDCONTENT.ORG (May 16, 2011, 8:00 AM), <http://paidcontent.org/article/419-aol-huffpo-media-group-on-editorial-hiring-spre-following-layoffs/>.

110. David Cohen, *ProPublica Now Running Ads*, SOCIAL TIMES (Jan. 5, 2011, 10:44 AM), [http://socialtimes.com/propublica-now-running-ads\\_b11046](http://socialtimes.com/propublica-now-running-ads_b11046).

111. There are exceptions to this singular focus on the Fourth Estate. *See, e.g.*, Bruce Ackerman & Ian Ayres, *A National Endowment for Journalism*, GUARDIAN (Feb. 13, 2009, 2:00 PM), <http://www.guardian.co.uk/commentisfree/cifamerica/2009/feb/12/newspapers-investigative-journalism-endowments> (suggesting that the government allocate funds to both Fourth Estate and Fifth Estate investigative journalism based on the print circulation or number of online clicks they attract).

112. *See, e.g., Reading Between the Lines*, ECONOMIST, Mar. 26, 2009 (statement of Time, Inc. chief executive officer Ann Moore) (“Somebody does have to pay for the Baghdad bureau.”), *available at* <http://www.economist.com/node/13362043>.

113. *See* Lee C. Bollinger, *Journalism Needs Government Help*, WALL ST. J., July 14, 2010, *available at* <http://online.wsj.com/article/SB10001424052748704629804575324782605510168.html>.

114. David Swensen & Michael Schmidt, *News You Can Endow*, N.Y. TIMES, Jan. 27, 2009, at A31.

also been calls for the federal government to give the public tax credits to spend on daily newspaper subscriptions.<sup>115</sup>

Government officials have put forward other ideas. A Maryland senator proposed the Newspaper Legislation Act of 2009, which would allow newspapers to convert to tax-exempt nonprofit status,<sup>116</sup> and a federal appellate judge has called for helping newspapers fend off the Internet threat by changing copyright law.<sup>117</sup> The FTC and the FCC have both launched investigations into what the government can do. In a preliminary staff discussion draft entitled “Potential Policy Recommendations to Support the Reinvention of Journalism,” the FTC raised the possibility of creating “Local News Fund Councils” that would distribute tax dollars to pay for news reporting.<sup>118</sup>

The instinct to try to push the new media genie back into the bottle is understandable. Old media, and newspapers in particular, have been an extraordinarily effective force for accountability journalism, one that will not easily be duplicated. Newspapers’ privileged economic position has allowed them, through extensive cross-subsidies, to fund large amounts of public-good journalism. Their professional standards have helped to keep the quality high. And their broad circulation and institutional standing has meant that when they publish a story about abuse of power there are often significant consequences. One example of many is the *Boston Globe*’s Pulitzer Prize-winning coverage of the sexual abuse in the Catholic Church, which has been widely credited with giving the scandal national prominence.<sup>119</sup> WikiLeaks’s decision to publish its Afghan War documents in collaboration with the *New York Times*, the *Guardian*, and *Der Spiegel* was an acknowledgement of old media’s advantages in reaching audiences

---

115. John Nichols & Robert W. McChesney, *The Death and Life of Great American Newspapers*, NATION, Mar. 18, 2009, available at <http://www.thenation.com/article/death-and-life-great-american-newspapers?page=full>.

116. Winter Casey, *Cardin Favors Help for Newspapers—But No Bailouts*, NAT’L J. (May 14, 2009), <http://www.nationaljournal.com/njonline/cardin-favors-help-for-newspapers-but-no-bailouts-20090514> (discussing Senator Ben Cardin’s bill that would allow newspapers to reorganize as nonprofits).

117. Richard Posner, *The Future of Newspapers—Posner*, BECKER-POSNER BLOG (June 23, 2009, 7:37 PM), <http://www.becker-posner-blog.com/2009/06/the-future-of-newspapers--posner.html>.

118. FED. TRADE COMM’N STAFF, POTENTIAL POLICY RECOMMENDATIONS TO SUPPORT THE REINVENTION OF JOURNALISM 18 (2010), available at <http://www.ftc.gov/opp/workshops/news/jun15/docs/new-staff-discussion.pdf>.

119. Jon Henley, *How the Boston Globe Exposed the Abuse Scandal that Rocked the Catholic Church*, GUARDIAN, Apr. 21, 2010, at G2, available at <http://www.guardian.co.uk/world/2010/apr/21/boston-globe-abuse-scandal-catholic>.

and commanding respect.<sup>120</sup>

The proposals for pushing back against the Internet's disruptions, however, all have serious drawbacks. The idea of government subsidies for news has drawn considerable opposition, most prominently from old media journalists.<sup>121</sup> Studies of countries that subsidize media have produced extensive examples of government interference and journalistic self-censorship.<sup>122</sup> The British Broadcasting Corporation ("BBC") and National Public Radio ("NPR") are often cited as cases in which subsidies and independence co-exist, but neither example is ultimately reassuring. The BBC has a unique history and a distinct culture that would likely be difficult to replicate in the United States. NPR, which derives only a small part of its budget from public money, has faced troubling interference from government. In early 2011, notably, House Republicans voted to eliminate NPR's funding and pressured the board of directors to fire its chief executive officer.<sup>123</sup>

The more practical problem with government subsidies for troubled old media outlets is that it is unlikely to happen. There appears to be little political support for funding quality journalism. The consternation that some elites feel about the decline of newspapers is not broadly felt. In one poll, just 37 percent of respondents favored government subsidies to keep newspapers operating.<sup>124</sup> If a main goal is to underwrite the *New York Times* and papers like it, one potential obstacle is that just 24 percent of those surveyed in another poll expressed a favorable view of the *New York Times*, while 44 percent viewed it unfavorably.<sup>125</sup>

---

120. See Bill Keller, *Dealing with Assange and the WikiLeaks Secrets*, N.Y. TIMES, Jan. 26, 2011, available at [http://www.nytimes.com/2011/01/30/magazine/30Wikileaks-t.html?\\_r=2](http://www.nytimes.com/2011/01/30/magazine/30Wikileaks-t.html?_r=2).

121. Jeff Jacoby, *A Free Press Means No Subsidies*, BOS. GLOBE, July 25, 2010, available at [http://www.boston.com/bostonglobe/editorial\\_opinion/oped/articles/2010/07/25/a\\_free\\_press\\_means\\_n\\_o\\_subsidies/](http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2010/07/25/a_free_press_means_n_o_subsidies/).

122. See, e.g., OPEN SOC'Y INST., *THE PRICE OF SILENCE: THE GROWING THREAT OF SOFT CENSORSHIP IN LATIN AMERICA* (2008) (describing government coercion of press through advertising in four Latin American countries).

123. *House Votes to Stop NPR Funding*, CNN (Mar. 17, 2011), [http://articles.cnn.com/2011-03-17/politics/house.of.reps.npr.funding\\_1\\_npr-federal-funding-public-funds?\\_s=PM:POLITICS](http://articles.cnn.com/2011-03-17/politics/house.of.reps.npr.funding_1_npr-federal-funding-public-funds?_s=PM:POLITICS).

124. *37% Support Government Subsidies to Keep Newspapers Going*, RASMUSSEN REP. (Apr. 1, 2009), [http://www.rasmussenreports.com/public\\_content/business/general\\_business/april\\_2009/37\\_support\\_government\\_subsidies\\_to\\_keep\\_newspapers\\_going](http://www.rasmussenreports.com/public_content/business/general_business/april_2009/37_support_government_subsidies_to_keep_newspapers_going).

125. *24% Have Favorable Opinion of New York Times*, RASMUSSEN REP. (Feb. 27, 2008), [http://www.rasmussenreports.com/public\\_content/politics/current\\_events/media/24\\_have\\_favorable\\_opinion\\_of\\_new\\_york\\_times](http://www.rasmussenreports.com/public_content/politics/current_events/media/24_have_favorable_opinion_of_new_york_times). See also *Many Would Shrug if Their Local Newspaper Closed*, PEW RESEARCH CTR. (Mar. 12, 2009), <http://people-press.org/2009/03/12/many-would-shrug-if-their-local-newspaper-closed/>.

Turning leading newspapers into nonprofit organizations would likewise face serious hurdles. There are examples of successful nonprofit newspapers, including Britain's *Guardian* and Florida's *St. Petersburg Times*, one of the United States's better papers. Even if the shareholders and controlling families of America's major newspapers could be persuaded to sell, however, the cost of buying the nation's newspapers and operating them would likely be prohibitive. The ongoing costs alone would require an endowment of \$114 billion, by one estimate, an amount equal to the total assets of the nation's ten largest foundations.<sup>126</sup> Even if this happened, newspapers' biggest problem would remain: that every year fewer and fewer people choose to read them. Funding newspapers in their current form would only insulate them from the preferences of audiences, making them even less read and more marginal.<sup>127</sup>

Michael Kinsley, a journalist with strong roots in print journalism, argued in the *Washington Post* that the market for news should simply be allowed to operate.<sup>128</sup> If it does, old media is unlikely to disappear any time soon. Newspapers will no doubt focus more on their websites and add more social tools to keep up with their audience's growing desire for engagement.<sup>129</sup> In a free market, newspapers like the *New York Times* and the *Washington Post* can be expected to transform into smaller, more nimble digital news organizations. One financial analyst who has been critical of the *New York Times*'s business decisions over the years has argued that as an online-only publication, it would bring in enough revenue through advertising alone to support a substantial, if smaller, newsroom.<sup>130</sup> That may be true of other newspapers as well.

While there has been much discussion of the Fourth Estate's decline, public officials and commentators have said far less about how society and the law should respond to the Fifth Estate's rise. The FTC's forty-seven-

---

126. Zachary M. Seward, *Endowing Every U.S. Newspaper: \$114 Billion. Innovation: Priceless*, NIEMAN JOURNALISM LAB (Jan. 30, 2009, 9:00 AM), <http://www.niemanlab.org/2009/01/endowing-every-american-newspaper-114-billion-innovation-priceless/>.

127. See Jack Shafer, *Alms for the Press?: The Case Against Foundation Ownership of the New York Times*, SLATE (Feb. 3, 2009, 6:51 PM), <http://www.slate.com/id/2210333/>; Mark Potts, *Not-For-Profit: Just Say No*, RECOVERING JOURNALIST (Jan. 30, 2009, 3:23 PM), [http://recoveringjournalist.typepad.com/recovering\\_journalist/2009/01/notforprofit-just-say-no.html](http://recoveringjournalist.typepad.com/recovering_journalist/2009/01/notforprofit-just-say-no.html).

128. Michael Kinsley, *Life After Newspapers*, WASH. POST, Apr. 6, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/05/AR2009040501733.html>.

129. See *id.*

130. See Henry Blodget, *On Our Third Birthday, Some Thoughts on Digital Media and the Future of the Newspaper Business*, BUS. INSIDER (July 20, 2010, 12:00 PM), <http://www.businessinsider.com/dear-newspaper-folks-no-one-else-is-being-honest-with-you-so-we-will-be-2010-7>.

page staff discussion draft report on the “reinvention” of journalism mentions blogs only once, in a parenthetical about soccer blogs, and citizen journalism not at all.<sup>131</sup> The FTC’s endorsement guides treat the new media as a threat to the integrity of the old journalistic order. In Congress, there has been no new media counterpart to the proposed Newspaper Revitalization Act,<sup>132</sup> offering help to the emerging Fifth Estate. The government, as one Fifth Estate member noted, appears focused on protecting “journalism’s past”<sup>133</sup> by rallying to the defense of old media “incumbents” rather than new media “innovators.”<sup>134</sup>

### III. THE FIFTH ESTATE AND FIRST AMENDMENT VALUES

It is not necessary to go to the blogosphere to see the Fifth Estate’s increasing prominence in the media ecology. During the anti-government protests in Iran in 2009, the *New York Times*’s *The Lede* blog, which runs on the *New York Times* homepage, regularly quoted Iranian blogs, posted Twitter messages from people on the scene, and embedded videos shot by amateur Iranian videographers.<sup>135</sup> The *New York Times* was not alone. CNN’s broadcast about the turmoil in Iran included video clips that its viewers uploaded to iReport, a website that CNN set up for citizen journalism.<sup>136</sup> The BBC’s coverage relied heavily on emails from its readers, and it posted both emails and amateur videos on its website.<sup>137</sup>

In 2009, the *New York Times*’s embrace of Fifth Estate journalism was tentative. A news story by one of the paper’s media reporters declared that the Iran coverage constituted “the biggest embrace yet of a collaborative new style of news gathering—one that combines the contributions of

---

131. See FED. TRADE COMM’N STAFF, *supra* note 118, at 2–3.

132. See *supra* note 116 and accompanying text.

133. Jeff Jarvis, *FTC Protects Journalism’s Past*, BUZZ MACHINE (May 29, 2010, 11:10 AM), <http://www.buzzmachine.com/2010/05/29/ftc-protects-journalisms-past/>. See also Adam Thierer, *FTC Draft Plan to “Save Journalism” Drawing Scrutiny; Raising Concern*, TECH. LIBERATION FRONT (June 4, 2010), <http://techliberation.com/2010/06/04/ftc-draft-plan-to-save-journalism-drawing-scrutiny-raising-concern/>.

134. Jeff Jarvis, *FTC Circles Wagons Around Newspapers*, HUFFINGTON POST (May 29, 2010, 8:44 PM), [http://www.huffingtonpost.com/jeff-jarvis/ftc-circles-wagons-around\\_b\\_594583.html](http://www.huffingtonpost.com/jeff-jarvis/ftc-circles-wagons-around_b_594583.html) (arguing against changing laws to “favor incumbents over those innovators”).

135. Brian Stelter, *Journalism Rules Are Bent in News Coverage from Iran*, N.Y. TIMES, June 28, 2009, at B1, available at <http://www.nytimes.com/2009/06/29/business/media/29coverage.html?pagewanted=all>.

136. *Id.*

137. Liz Heron, *Amid Iran Crackdown, Online Chatter Indicates Protests Will Resume*, WASH. POST (June 24, 2009, 9:06 AM), [http://voices.washingtonpost.com/livecoverage/2009/06/amid\\_iran\\_crackdown\\_online\\_cha.html](http://voices.washingtonpost.com/livecoverage/2009/06/amid_iran_crackdown_online_cha.html).

ordinary citizens with the reports and analysis of journalists.”<sup>138</sup> The story said that this new approach had “bent” the old rules of journalism, including the one about checking the source of information before publishing it. But it argued that mainstream news organizations “had little choice but to throw open their doors in this case,” because Iran had “sharply curtailed the foreign press.”<sup>139</sup>

The use of Fifth Estate journalism to cover the Iranian protests was not an anomaly, but a precursor. The *New York Times*, CNN, and other old media outlets now use citizen journalism regularly. In its coverage of the “Arab Spring” protests sweeping across Libya, Bahrain, and other parts of the Middle East in early 2011, the *New York Times*’s *The Lede* once again included extensive local blog accounts, while a stream of Twitter messages from eyewitnesses to the demonstrations ran in a column along the side.<sup>140</sup>

In the media world, there is by now a broad acceptance that citizen journalism is indispensable. Policymakers and elite commentators, however, are lagging behind. The FTC, with its endorsement guides and its reinventing journalism report, has showed its lack of enthusiasm for the Fifth Estate.<sup>141</sup> Courts are often similarly dismissive. A New Jersey state appellate court rejected a citizen journalist’s claim to being covered by the state’s reporter’s privilege by stating, “Simply put, *new* media should not be confused with *news* media.”<sup>142</sup>

The skeptics fail to appreciate the important ways in which the Fifth Estate contributes to the media ecology. Citizen journalists and other members of the Fifth Estate promote important First Amendment values with their work, in many cases more fully than Fourth Estate journalists do. There are also legitimate reasons to be concerned about the rise of Fifth Estate journalism, but they do not outweigh the contributions it is making and will make in the future.

---

138. Stelter, *supra* note 135.

139. *Id.*

140. See, e.g., Robert Mackey, *Feb. 22: Updates on Middle East Protests*, N.Y. TIMES, (Feb. 22, 2011, 11:21 AM), <http://thelede.blogs.nytimes.com/2011/02/22/latest-updates-on-middle-east-protests-7/>.

141. See Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,124, 53,136 & n.101 (Oct. 15, 2009) (codified at 16 C.F.R. pt. 255) (stating that consumers would not care if an old media organization received free review copies, but would in the case of citizen journalists).

142. *Too Much Media, LLC v. Hale*, 993 A.2d 845, 857 (N.J. Super Ct. App. Div. 2010).

## A. INFORMATION NEEDED IN A DEMOCRACY

The most obvious way in which the Fifth Estate is advancing First Amendment values is by carrying out the most essential task of the journalist: bringing new and newsworthy facts to light. The Supreme Court recognized in *Thornhill v. Alabama* that a fundamental value underlying the First Amendment is ensuring that the press can supply “the public need for information and education with respect to the significant issues of the times.”<sup>143</sup> In a democratic society, information of this kind plays a vital role, as Robert Post has observed, in “the formation of public opinion so as to preserve the democratic legitimacy of our government.”<sup>144</sup>

With the decline of old media, the Fifth Estate is providing “replacement journalism” that helps meet this need.<sup>145</sup> The mainstream media has never been able to be everywhere that news broke, but as budgets have shrunk, old media are undercovering or completely missing important stories. At the same time, in this age of twenty-four-seven Internet news, the public has come to expect news reports to reach them in real time. To a large extent, Fifth Estate journalism has been filling the gaps. During the Wisconsin labor protests of early 2011, some of the best coverage was on *Daily Kos*, which published live blogs from the scene of the demonstrations and included links to community radio coverage, a level of detail the national media did not attempt to deliver.<sup>146</sup> When the *Economist* examined coverage of the anti-government protests in Iran in 2009, it summed up its findings with the headline “Twitter 1, CNN 0,” explaining that while CNN was ignoring a major story, “Twitter and YouTube carried a stream of reports, pictures and film from Iran’s streets.”<sup>147</sup>

It is sometimes argued that the Fifth Estate does not produce “real”

---

143. *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). See also *Cox Broad. v. Cohn*, 420 U.S. 469, 492 (1972) (“Without the information provided by the press most of us . . . would be unable to vote intelligently or to register opinions on the administration of government generally.”).

144. Robert C. Post, *A Progressive Perspective on Freedom of Speech*, in *THE CONSTITUTION IN 2020*, 179, 182 (Jack M. Balkin & Reva B. Siegel eds., 2009). See also OWEN M. FISS, *THE IRONY OF FREE SPEECH* 3 (1996) (“Democracy allows the people to choose the form of life they wish to live and presupposes that this choice is made against a background of public debate that is, to use the now famous formula of Justice Brennan, ‘uninhibited, robust, and wide-open.’”).

145. Doctor, *supra* note 17.

146. *Liveblog: Wisconsin Demonstrations Live*, DAILY KOS (Feb. 19, 2011, 1:03 PM), <http://www.dailykos.com/story/2011/02/19/947102/-Liveblog:-Wisconsin-Demonstrations-Live>.

147. *Twitter 1, CNN 0*, *ECONOMIST*, June 18, 2009, available at <http://www.economist.com/node/13856224>.

journalism—that it produces undigested facts, like live Tweets from a major news events, or opinionated blogs that rely on news reported by old media. In fact, the Fifth Estate is becoming an important source of investigative reporting. Some of the best in-depth journalism is now being done by nonprofit Internet-based news organizations. *ProPublica* won the 2011 Pulitzer Prize for National Reporting for hard-hitting coverage of Wall Street and the 2010 Pulitzer Prize for Investigative Reporting for a story about a hospital’s medical decisions in the wake of Hurricane Katrina.<sup>148</sup> *California Watch* now has more investigative reporters than any other news outlet in the state, including the *Los Angeles Times*, and it has been uncovering the sort of improprieties and abuses of power that were once largely the province of newspapers.<sup>149</sup>

The Fifth Estate is also producing more news “scoops.” One media critic who studied the source of original news reports found that new media are becoming the main source of scoops in several news areas, including politics and technology.<sup>150</sup> Citizen journalists are responsible for a growing number of these news exclusives. When the *Huffington Post* established its “Off the Bus” project during the 2008 presidential campaign to print the work of citizen journalists, it produced one of the biggest stories of the election. One of the citizen journalists working for the site reported that Barack Obama had told a private fundraising party in San Francisco “that small-town voters bitter over their economic circumstances ‘cling to guns or religion or antipathy to people who aren’t like them,’”<sup>151</sup> a quote that generated enormous controversy. The news that Osama Bin Laden had been killed was broken on Twitter by a former top defense department official who passed on what turned out to be an accurate rumor an hour before President Obama addressed the nation.<sup>152</sup>

The integration of Fifth Estate journalism into the larger media

---

148. *Awards and Honors*, PROPUBLICA, <http://www.propublica.org/awards> (last visited Nov. 21, 2011).

149. See Katches, *supra* note 85; Lance Williams & Stephanie Rice, *Unsupervised City Workers Accused of Brazen Theft, Cheating Taxpayers*, CAL. WATCH (July 2, 2010), <http://californiawatch.org/money-and-politics/unsupervised-city-workers-accused-brazen-theft-cheating-taxpayers>.

150. See Timothy B. Lee, *Online News as a Disruptive Technology*, TIMOTHYBLEE.COM (Mar. 30, 2011), <http://timothyblee.com/2011/03/30/online-news-as-a-disruptive-technology/>.

151. Katharine Q. Seelye, *Blogger Is Surprised by Uproar Over Obama Story, but Not Bitter*, N.Y. TIMES, Apr. 14, 2008, available at <http://www.nytimes.com/2008/04/14/us/politics/14web-seelye.html>.

152. Brian Stelter, *How the Bin Laden Announcement Leaked Out*, N.Y. TIMES (May 1, 2011, 11:28 PM), <http://mediadecoder.blogs.nytimes.com/2011/05/01/how-the-osama-announcement-leaked-out/>.

ecology is becoming more formalized. Some new media organizations have arrangements with old media to distribute their reporting. *ProPublica*'s 2010 Pulitzer Prize-winning article was produced jointly with the *New York Times* magazine.<sup>153</sup> Groups are being established to help give citizen journalists' work wider distribution. Global Voices, a volunteer organization co-founded by a former CNN Tokyo bureau chief, curates citizen journalism from blogs, YouTube videos and Twitter posts, editing and adding links.<sup>154</sup> After it produced extensive citizen-journalism reports from the government unrest in Tunisia and tsunami-stricken Japan in early 2011, the *New York Times* profiled Global Voices under the headline, "When Unrest Stirs, Bloggers Are Already in Place."<sup>155</sup> NPR's senior product manager for online communities has been described as "the first human news platform" for his curation and re-Tweeting of citizen journalism Tweets reporting on the anti-government protests across the Middle East.<sup>156</sup>

This replacement journalism is important, but the Fifth Estate is not merely filling gaps in the Fourth Estate's coverage. In many cases, it is producing news old media would not have. The media scholar Daniel C. Hallin has pointed out that one of the key functions of the media is to establish the "sphere of legitimate debate."<sup>157</sup> In Hallin's formulation, the media create three news categories, which he represents with concentric circles. At the very center is a "sphere of consensus," issues about which no debate is allowed, such as the legitimacy of the Constitution. On the outside is the "sphere of deviance," issues not discussed because they are too extreme, such as whether America should live under Sharia law.<sup>158</sup> Between those two spheres lies a sphere of issues the media considers it appropriate to debate, such as whether to privatize Social Security or abolish the estate tax.<sup>159</sup>

This boundary-setting role gives the media an outsized role in shaping what Robert Post calls the "communicative processes necessary for the

---

153. *2010 Winners & Finalists*, PULITZER PRIZES, <http://www.pulitzer.org/awards/2010> (last visited Nov. 21, 2011).

154. *See About*, GLOBAL VOICES, <http://globalvoicesonline.org/about/> (last visited Nov. 21, 2011).

155. Jennifer Preston, *When Unrest Stirs, Bloggers Are Already in Place*, N.Y. TIMES, Mar. 13, 2011, available at [http://www.nytimes.com/2011/03/14/business/media/14voices.html?\\_r=1](http://www.nytimes.com/2011/03/14/business/media/14voices.html?_r=1).

156. Jim Romenesko, "The Conditions Are Finally Right to Give Newspaper Paywalls a Fair Shake," POYNTER (Apr. 4, 2011, 6:40 PM), <http://www.poynter.org/latest-news/romenesko/126462/the-conditions-are-finally-right-to-give-newspaper-paywalls-a-fair-shake/>.

157. Rosen, *supra* note 18.

158. *Id.*

159. *Id.*

formation of public opinion.”<sup>160</sup> The danger in allowing a small group to act as gatekeepers is that it may make “category error[s]”<sup>161</sup> and keep important issues out of the sphere of legitimate debate.<sup>162</sup> This is no idle concern. As historian Deborah Lipstadt has documented, the American press knew a great deal about the Holocaust as it was unfolding but it made a collective decision to bury the story.<sup>163</sup> If what was known of the atrocities had been reported, there might have been more pressure to intervene on behalf of the victims. In the early years of the AIDS crisis, the *New York Times*, whose leadership was prejudiced, did not cover the outbreak, despite pleas from the most affected communities.<sup>164</sup> Other major media, including the *Wall Street Journal*, followed the *New York Times*’s lead.<sup>165</sup> AIDS activists contend that if the press had acted differently, many lives would have been saved.<sup>166</sup>

A more recent example of a significant category error was the reporting on the lead-up to the Iraq War. In the months before the hostilities began, the intelligence community was divided over the case for war, but that debate was almost entirely absent from the mainstream media.<sup>167</sup> Questions about the government’s claim that Iraq had weapons of mass destruction were placed outside of the sphere of legitimate debate.<sup>168</sup>

---

160. ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 302 (1995).

161. Rosen, *supra* note 18.

162. See Benkler, *supra* note 11, at 9 (“[A]t a minimum we can say that individuals are less susceptible to manipulation by a legally defined class of others—the owners of communications infrastructure and media.”).

163. See DEBORAH E. LIPSTADT, BEYOND BELIEF: THE AMERICAN PRESS AND THE COMING OF THE HOLOCAUST 1933–1945, 220–21 (1993) (discussing how some dailies “almost totally ignored the story” and if “one compares the *New York Times* coverage with its editorial declaration of the need to continuously ‘remind’ Americans of what was taking place or its claim to be the ‘newspaper of record,’ then it was a failure”).

164. JOSEPH C. GOULDEN, FIT TO PRINT: A.M. ROSENTHAL AND HIS TIMES 397–99, 403 (1988).

165. *Id.* at 403.

166. See, e.g., EDWIN DIAMOND, BEHIND THE TIMES: INSIDE THE *NEW YORK TIMES* 200 (1993) (statement of Gay Men’s Health Crisis organization foundation Larry Kramer) (“If the public had been told that a transmissible disease was going around and that they had to start cooling it, an awful lot of people who are dead would be alive today.”); Larry Kramer, *Nuremberg Trials for AIDS*, COMMONDREAMS.ORG (July 26, 2006), <http://www.commondreams.org/views06/0726-32.htm> (criticizing the *New York Times*’s “enormous role in allowing this plague to progress”).

167. See MICHAEL MASSING, NOW THEY TELL US: THE AMERICAN PRESS AND IRAQ 25–26 (2004) (“Many journalists knew about this, but few chose to write about it.”); Orville Schell, *Preface to MICHAEL MASSING, NOW THEY TELL US: THE AMERICAN PRESS AND IRAQ*, at v (2004) (“[T]hose dissenting voices in the US press that did speak out remained buried in the back pages of newspapers or confined to the margins of the media, unamplified through mass outlets in any meaningful way.”).

168. MASSING, *supra* note 167, at 28.

The *New York Times*'s coverage has been widely criticized, but other establishment media organizations were no better. During the run-up, network television news departments handed their airwaves over to military analysts briefed by the Pentagon on how to make the case for war.<sup>169</sup> The one mainstream media outlet that consistently raised questions was the Knight Ridder newspaper chain, but because it had no newspapers in Washington or New York, its impact was limited.<sup>170</sup>

Fifth Estate journalists promote democracy by, in many cases, defining the sphere of legitimate debate more expansively than the Fourth Estate. There is no way to know how bloggers or nonprofit news sites would have reacted to early reports of the Holocaust or AIDS. But in the Iraq War run-up, the Fifth Estate did exist. An analysis by the dean of the University of California-Berkeley's Graduate School of Journalism concluded that journalism's "lower tier," including Internet-based outlets, presented a broader "spectrum of viewpoints" than the mainstream media.<sup>171</sup> *Daily Kos*'s coverage is illustrative. It made clear that the government's weapons of mass destruction—claims were in the sphere of legitimate debate. A January 30, 2003 post on the blog's main page entitled "No conclusive evidence," warned that the Bush administration was "hell-bent on going to war . . . all on circumstantial evidence."<sup>172</sup> The case for the war "has not been made," it declared, and the administration "keeps using discarded 'evidence' of a nuclear program (the aluminum tubes)" to make it.<sup>173</sup> The *Daily Kos* archives contain numerous similar posts from this period, including some refuting claims made in the mainstream media.<sup>174</sup> For instance, a February 23, 2003 main-page blog entry rebutted "A Last Chance to Stop Iraq,"<sup>175</sup> a pro-war op-ed piece that Brookings Institution scholar Kenneth Pollack had just published in the *New York Times*.<sup>176</sup>

---

169. MANUEL CASTELLS, COMMUNICATION POWER 265 (2009); David Barstow, *Behind TV Analysts, Pentagon's Hidden Hand*, N.Y. TIMES, Apr. 20, 2008, at A1, available at <http://www.nytimes.com/2008/04/20/us/20generals.html?pagewanted=all>.

170. Schell, *supra* note 167, at v.

171. *Id.* (stating that of the high and low tiers of American journalism, the "lower tier, populated by niche publications, alternative media outlets, PBS, NPR, and Internet sites, hosted the broadest spectrum of viewpoints").

172. *No Conclusive Evidence*, DAILY KOS (Jan. 30, 2003, 9:00 AM), <http://www.dailykos.net/archives/001328.html>.

173. *Id.*

174. *See War Archives*, DAILY KOS, [http://www.dailykos.net/archives/cat\\_war.html](http://www.dailykos.net/archives/cat_war.html) (last visited Nov. 22, 2011).

175. Kenneth M. Pollack, *A Last Chance to Stop Iraq*, N.Y. TIMES, Feb. 21, 2003, available at <http://www.nytimes.com/2003/02/21/opinion/a-last-chance-to-stop-iraq.html>.

176. *Pollack's Arguments a House of Cards*, DAILY KOS (Feb. 23, 2003, 9:45 AM), <http://www>.

## B. CHECKING GOVERNMENT ABUSES

Another important value underlying the First Amendment is allowing the press to monitor the government and hold it accountable. Vincent Blasi's "checking function"<sup>177</sup> is "probably the most important contribution the press can make to either democracy or to the public sphere"<sup>178</sup> and was arguably uppermost in the Framers' minds. In *Mills v. Alabama*, the Supreme Court recognized the importance of press oversight as a "powerful antidote to any abuses of power by governmental officials."<sup>179</sup>

Blasi was writing in the shadow of Watergate, and the press's coverage of that scandal is one of the great examples of the Fourth Estate exerting a checking function on government. There have been countless more, on issues ranging from food safety to city hall corruption. There is evidence that this checking function is effective, from quantitative studies correlating newspaper readership with lower rates of public corruption<sup>180</sup> to Amartya Sen's assertion that famines disappeared in India with the rise of multi-party democracy and a free press.<sup>181</sup>

At the same time, the mainstream media often holds back in the face of government pressure. That was true before the Iraq War and again during the war itself, when the Pentagon told reporters it was keeping a list of those who were insufficiently supportive.<sup>182</sup> Intimidation of this kind often works. In his book *On Bended Knee*, historian Mark Hertsgaard recounted how reporters covering the Reagan administration were transformed into "an unwitting mouthpiece of the government."<sup>183</sup>

It can be difficult to notice the dog that does not bark,<sup>184</sup> but there have been instances in which old media's deference to government has

---

dailykos.net/archives/001686.html.

177. Blasi, *supra* note 19.

178. Baker, *supra* note 13, at 325.

179. *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

180. Alicia Adserà, Carles Boix & Mark Payne, *Are You Being Served? Political Accountability and Quality of Government*, 19 J.L. ECON. & ORG. 445 (2003).

181. Amartya Sen, *Democracy as a Universal Value*, 10 J. DEMOCRACY 3, 8 (1999). *See also* C. Edwin Baker, *Giving the Audience What it Wants*, 58 OHIO ST. L.J. 311, 355 (1997) (discussing the "media's power to expose governmental misdeeds and its ability to deter those misdeeds by increasing the likelihood of exposure").

182. Schell, *supra* note 167, at vii.

183. MARK HERTSGAARD, *ON BENDED KNEE: THE PRESS AND THE REAGAN PRESIDENCY* 5 (1988).

184. ARTHUR CONAN DOYLE, *The Silver Blaze*, in *THE MEMOIRS OF SHERLOCK HOLMES* 1, 22 (New York, A.L. Burt Co. 1894), available at <http://www.archive.org/stream/memoirsofsherlo00doyliala#page/10/mode/2up>.

come to light. In May 2008, on *Anderson Cooper 360*, a CNN correspondent said she had been told by network executives before the start of the Iraq War to support President Bush's position.<sup>185</sup> When the war was underway, Farnaz Fassihi, a *Wall Street Journal* correspondent, sent a lengthy email to her friends saying that things in Iraq were far worse than Americans were being led to believe.<sup>186</sup> After the email leaked out, it was widely discussed that her private account of the war painted a different picture than her stories in the *Wall Street Journal*.<sup>187</sup>

The Fifth Estate is often not as restrained about criticizing government and government officials. When Senator Trent Lott stated that he believed the civil rights movement was a mistake at Strom Thurmond's 100th birthday party in 2002, the mainstream media was largely silent, but liberal blogs insisted he should be forced to resign as Majority Leader, which he ultimately did.<sup>188</sup> Citizen journalists generally have fewer ties to those in authority, and thus less to lose when criticizing them. At a 2008 bicyclists' rally in Times Square, a police officer shoved a bicyclist off his bike and onto a hard sidewalk. An anonymous bystander captured the incident on video and posted it on YouTube, where it attracted millions of viewers.<sup>189</sup> Critics of the police officer would likely have had difficulty persuading the mainstream media to air the video, but once it went viral online it was picked up by television news. The officer was eventually convicted of filing a false report and removed from the force.<sup>190</sup>

Governments around the world have quickly come to understand that the Fifth Estate may be a more vigilant watchdog than the mainstream

---

185. Castells, *supra* note 169, at 203 n.32. After the Iraq war was well underway, the mainstream media began to raise questions about the government's claims. See MASSING, *supra* note 167, at 25 ("Watching and reading all this, one is tempted to ask, where were you all before the war?"). The *New York Times* eventually apologized for "a number of instances of coverage that was not as rigorous as it should have been." *The Times and Iraq*, N.Y. TIMES, May 26, 2004, available at [http://www.nytimes.com/2004/05/26/international/middleeast/26FTE\\_NOTE.html](http://www.nytimes.com/2004/05/26/international/middleeast/26FTE_NOTE.html).

186. Tim Rutten, *Private E-Mail Is Public*, L.A. TIMES, Oct. 2, 2004, available at <http://articles.latimes.com/2004/oct/02/entertainment/et-rutten2>.

187. *Id.*; Liz Halloran, *Private E-Mail Portrays Iraq Headed for Disaster*, HARTFORD COURANT, Oct. 2, 2004, available at [http://articles.courant.com/2004-10-02/news/0410020654\\_1\\_e-mail-iraq-farnaz-fassihi](http://articles.courant.com/2004-10-02/news/0410020654_1_e-mail-iraq-farnaz-fassihi).

188. CLAY SHIRKY, HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS 61–66 (2008).

189. GDragon9666, *Officer Patrick Pogan*, YOUTUBE (July 30, 2008), <http://www.youtube.com/watch?v=AXzRczBk06M>.

190. Sean Gardiner & Chad Bray, *Officer Is Cleared in Shoving*, WALL ST. J., Apr. 30, 2010, available at [http://online.wsj.com/article/SB10001424052748704302304575214622821565764.html?mod=WSJ\\_topics\\_obama](http://online.wsj.com/article/SB10001424052748704302304575214622821565764.html?mod=WSJ_topics_obama).

media, which can often be bribed or intimidated. The Committee to Protect Journalists, which monitors the status of reporters in repressive countries, reports that bloggers and other online journalists were the most-imprisoned journalist group as of December 1, 2008, having surpassed print and broadcast journalists.<sup>191</sup> Burma, which ranks at the top of the committee's "10 Worst Countries to be a Blogger," sentenced a popular blogger to prison for fifty-nine years for posting a video of a deadly 2008 cyclone.<sup>192</sup>

### C. CHECKING THE PRIVATE SECTOR

The media also exert an important "checking function" on private actors. Blasi originally conceived of the checking function as aimed at government because the "particular evil of official misconduct is of a special order."<sup>193</sup> While that may have been true in the Watergate Era, corporations today are far more influential than they were then. They have new powers that have been given to them by the courts, including the right to make unlimited expenditures in political campaigns.<sup>194</sup> They have wrested new power from the political system, including increased influence on the drafting of legislation that affects them.<sup>195</sup> And they have new power as a result of technological advances, such as greater capacity to spy on people.<sup>196</sup> Corporations are also taking over more government functions, from running prisons<sup>197</sup> to fighting wars,<sup>198</sup> and as they become

---

191. EUGENE L. MEYER, CTR. FOR INT'L MEDIA ASSISTANCE, BY THE PEOPLE: THE RISE OF CITIZEN JOURNALISM 9 (2010), available at [http://cima.ned.org/sites/default/files/CIMA-Citizen\\_Journalism-Report.pdf](http://cima.ned.org/sites/default/files/CIMA-Citizen_Journalism-Report.pdf).

192. *10 Worst Countries to Be a Blogger*, COMM. TO PROTECT JOURNALISTS (Apr. 30, 2009, 12:01 AM), <http://www.cpj.org/reports/2009/04/10-worst-countries-to-be-a-blogger.php>. See also *Myanmar: A Year After Cyclone Nargis, MSF Still Provides Mental Health Care*, DOCTORS WITHOUT BORDERS (May 1, 2009), <http://www.doctorswithoutborders.org/news/article.cfm?id=3580&cat=field-news> (noting that Cyclone Nargis left behind 140,000 dead or missing people).

193. See Blasi, *supra* note 19, at 558.

194. *Citizens United v. FEC*, 130 S.Ct. 876, 913 (2010).

195. See, e.g., Laura Sullivan, *Shaping State Laws with Little Scrutiny*, NPR (Oct. 29, 2010), <http://www.npr.org/2010/10/29/130891396/shaping-state-laws-with-little-scrutiny> (discussing the ability of corporations to influence legislation at the state level).

196. See, e.g., *Deep Packet Inspection and Privacy*, ELEC. PRIVACY INFO. CTR., <http://epic.org/privacy/dpi/> (last visited Nov. 22, 2011) (discussing how Internet service providers read email and other Internet traffic to build dossiers about Internet users).

197. See, e.g., DONNA SELMAN & PAUL LEIGHTON, PUNISHMENT FOR SALE: PRIVATE PRISONS, BIG BUSINESS, AND THE INCARCERATION BINGE 1-5 (2010); John Howard, *Private Prison Company Finds Gold in California*, CAPITOL WEEKLY, Jan. 28, 2010, available at <http://www.capitolweekly.net/article.php?xid=y182yoctf9d1au>; Andy Obermueller, *Strapped States Are Bullish for Private Prisons*, FORBES (Mar. 18, 2010, 4:15PM), [http://www.forbes.com/2010/03/18/corrections-corporation-america-private-prisons\\_print.html](http://www.forbes.com/2010/03/18/corrections-corporation-america-private-prisons_print.html).

198. See JEREMY SCAHILL, BLACKWATER: THE RISE OF THE WORLD'S MOST POWERFUL

increasingly transnational, it is harder for governments to regulate them.

Fourth Estate journalists have a long tradition of reporting critically on business,<sup>199</sup> but there is a countervailing tradition of mainstream media holding back on criticizing powerful corporations. There are many documented cases of businesses coercing editors and reporters to kill or modify stories.<sup>200</sup> Advertisers can and do apply pressure, and instances of improper influence frequently become public.<sup>201</sup> The *Detroit News's* automobile reviewer resigned in 2011 after an editor made changes to the online version of his review to please a powerful advertiser.<sup>202</sup> After a firestorm of criticism, the *Detroit News* apologized for the changes and hired him back.<sup>203</sup> Academic research strongly suggests that advertisers affect coverage. The *New England Journal of Medicine* published a statistical analysis showing that magazines that accept cigarette advertisements are less likely than ones that do not to write about the risks of smoking.<sup>204</sup>

The reluctance of the Fourth Estate to check corporations is likely being bolstered by the fact that the mainstream media is itself becoming more corporate. Newspaper chains have bought up many of the nation's independent papers. As these papers have lost their independent status, there has been a shift toward entertainment, lifestyle, and sports coverage and away from hard news and business reporting.<sup>205</sup> Large newspapers that were once owned by public-spirited families have increasingly been taken over by conglomerates. The *Los Angeles Times* was sold by the Chandler family to the Tribune Company in 2000, and seven years later the

---

MERCENARY ARMY xiv (2007) (noting Defense Secretary Donald Rumsfeld's announcement of a "major initiative to streamline the use of the private sector in the waging of America's wars").

199. See LOUIS FILLER, *THE MUCKRAKERS* 9 (1976) (noting a "new, moral, radical type of writing . . . [that] described great businesses as soulless and anti-social.").

200. See, e.g., James McNair, *Corporations Work Hard to Prevent Reporting*, NEIMAN REPORTS, Summer 2002, at 12, 13 (discussing Enron Chairman Kenneth Lay's attempt to kill *Fortune* magazine's critical story about Enron's finances).

201. See, e.g., Sarah Lacy & Paul Carr, *John Montorio Joins HuffPo: Journalism vs Churnalism Battle Rages On*, TECHCRUNCH (Mar. 13, 2011), <http://techcrunch.com/2011/03/13/john-montorio-joins-huffington-post/> (former editor at the *Los Angeles Times* and *New York Times* says that in his newspaper career he had "been in meetings where pressure from advertisers . . . directly affected editorial policy").

202. *Detroit News Publisher: Reviewers' Independence Key*, MONDO TIMES (Mar. 19, 2011, 10:28 AM), <http://www.mondotimes.com/3/news/21040>.

203. *Id.*

204. See Kenneth E. Warner et al., *Cigarette Advertising and Magazine Coverage of the Hazards of Smoking. A Statistical Analysis*, 326 NEW ENG. J. MED. 305, 307 (1992).

205. Miles Maguire, *Changes in Ownership Affect Quality of Oshkosh Paper*, 26 NEWSPAPER RES. J. 74, 80 (2005).

Bancrofts sold the *Wall Street Journal* to NewsCorp.<sup>206</sup>

Fifth Estate journalists are not immune to pressure from big business, but they are often in a different relation to corporations than the Fourth Estate. Contrary to the assumptions of the FTC endorsement guides, new media are often less prone to coercion than old media. Many citizen journalists are not part of larger institutional hierarchies and therefore are freer to write what they believe. Many blogs and nonprofit news sites take little or no advertising. Perhaps as a result, the Fifth Estate can appear less restrained than the Fourth Estate in discussing corporations and corporate interests. After the *Citizens United* ruling, the bluntest criticism of the decision was in the blogosphere on sites such as the *ACSBlog*, *Firedoglake*, and the *Corporate Justice Blog*.<sup>207</sup> Fifth Estate websites have also proposed overturning *Citizens United* in ways that are rarely broached in the mainstream media.<sup>208</sup>

The Fifth Estate often discusses consumer products in harder-hitting ways than the Fourth Estate. The disparity can be seen in coverage of Apple, which is not only a major advertiser but a powerful force in the media world—and a company that newspapers and magazines are reluctant to alienate. CNN media critic Howard Kurtz has observed that the mainstream media's coverage of Apple has been described as “worshipful,” a description that is particularly apt when the company unveils new products like the iPhone or the iPad.<sup>209</sup> In the Fifth Estate, however, readers can find more skeptical takes, such as a blog written by a former Apple Store employee that is sharply critical of the company's products and services<sup>210</sup> or an essay by the editor of the influential blog *BoingBoing* on

---

206. Joe Mysak, *Murdoch Laughed Last as Useless Bancroft Family Sold WSJ: Books*, BLOOMBERG (May 11, 2010, 9:01 PM), <http://www.bloomberg.com/news/2010-05-12/murdoch-laughed-last-as-useless-bancroft-family-sold-wsj-books.html>.

207. See, e.g., *Citizens United and the 2010 Mid-Term Elections*, CORP. JUST. BLOG (Nov. 9, 2010, 5:46 AM), <http://corporatejusticeblog.blogspot.com/2010/11/citizens-united-and-2010-mid-term.html> (“Citizens United, as described many times in this blogspace, enables an atmosphere of diabolical electioneering, and we have just now begun to see its impacts.”).

208. See, e.g., Jeffrey D. Clements, *Citizens United: The Amendment Option Gains Momentum*, ACSBLOG (Jan. 21, 2011), <http://www.acslaw.org/acsblog/citizens-united-the-amendment-option-gains-momentum> (“The Amendment process under Article V is the best means to continue the national conversation about the role of multinational corporations under our Constitution and in our democracy, and to correct the Court's misstep in *Citizens United*.”).

209. *Olbermann Out at MSNBC; Jobs Takes Another Medical Leave From Apple* (CNN “Reliable Sources” television broadcast Jan. 23, 2011), transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/1101/23/rs.01.html>.

210. WELCOME TO THE CRAPPLE STORE, [http://pdf.ifoman.com.s3.amazonaws.com/crapple\\_archive.pdf](http://pdf.ifoman.com.s3.amazonaws.com/crapple_archive.pdf) (last visited Nov. 22, 2011).

“[w]hy I won’t buy an iPad (and think you shouldn’t, either).”<sup>211</sup>

#### D. ENCOURAGING INTEREST GROUP FORMATION

Another way the Fifth Estate contributes to First Amendment values is by encouraging like-minded citizens to organize. Democracy is advanced when people coalesce into groups and work through the political process to advance common interests. The mainstream media’s emphasis on journalistic “objectivity” has diminished the American press’s traditional role in promoting interest group formation, an important value advanced by the First Amendment.<sup>212</sup> The Fifth Estate is often more willing to cover the news in expressly partisan ways that can prompt audiences to be more politically engaged.

The tradition of partisan media is older than the tradition of journalistic objectivity. From the time the First Amendment was written through the 1820s, newspapers were essentially political tracts.<sup>213</sup> In 1850, 95 percent of newspapers had party affiliations,<sup>214</sup> and most slanted their coverage in favor of their own candidates and elected officials.<sup>215</sup> The rise of “objective” journalism mainly occurred in the twentieth century, and it was largely prompted by economic considerations. Newspaper owners realized that the best way to maximize their advertising profits was “by alienating the fewest consumers.”<sup>216</sup>

Corporate-owned media, which have a duty to their shareholders to maximize profits, often provide what media critic Jay Rosen has called “the view from nowhere.”<sup>217</sup> The mainstream media generally take pride in producing news reports that fall equally between the views of the two major political parties, and in not being seen as taking sides on matters of public controversy. Comedian Jon Stewart has mocked CNN’s practice of allowing representatives of opposing views to shout at each other without trying to determine who is right in a *Daily Show* segment called “CNN

---

211. Cory Doctorow, *Why I Won’t Buy an iPad (and Think You Shouldn’t, Either)*, BOINGBOING (Apr. 2, 2010, 5:37 AM), <http://boingboing.net/2010/04/02/why-i-wont-buy-an-ipad-and-think-yo.html>.

212. See Baker, *supra* note 13, at 327.

213. Downie & Shudson, *supra* note 98.

214. C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* 28 (1994).

215. MICHAEL SCHUDSON, *THE SOCIOLOGY OF NEWS* 80–81 (2003).

216. BAKER, *supra* note 214, at 18 n.\* (quoting W. RUSSELL NEUMAN, MARION R. JUST, & ANN N. CRIGLER, *COMMON KNOWLEDGE: NEWS AND THE CONSTRUCTION OF POLITICAL MEANING* 76 (1992)). See also Baker, *supra* note 181, at 335.

217. Rosen, *supra* note 20.

Leaves It There.”<sup>218</sup> There are a few Fourth Estate news outlets that have broken with the “view from nowhere,” notably on cable television. Fox News has created a highly profitable franchise airing right-leaning news and commentary, and MSNBC has a lineup of liberal shows. These instances of successful segmentation of the news market along ideological lines are, however, the exception, not the rule. Network evening news continues to strive for journalistic “objectivity.” The pressure on corporate-owned media not to have a point of view was illustrated when AOL acquired the left-leaning *Huffington Post*. The site’s cofounder, Arianna Huffington, immediately announced that it was “time for all of us in journalism to move beyond left and right.”<sup>219</sup>

At its best, opinionated journalism can be more illuminating than the view from nowhere. John Stuart Mill argued in *On Liberty* that the best way to arrive at the truth is to hear arguments “from persons who actually believe them, who defend them in earnest.”<sup>220</sup> Journalism that offends no one can sap a news story of passion and leave the audience unsure of why it should care. An example of this sort of coverage was the mainstream media’s reporting on the federal deficit reduction commission. The *Washington Post* headlined one story “Bipartisan commission proposes strict budget rules to stabilize U.S. debt,” a colorless summary that obscured the important issues at stake.<sup>221</sup> The partisan blogosphere did a far better job of showing why the story mattered. Michelle Malkin’s conservative blog mocked Democrats for being “incensed” that the commission “may recommend [s]weeping ::gulp:: [s]pending [c]uts.”<sup>222</sup> *Daily Kos* consistently called the budget commission the “catfood commission” because it insisted that if the commission succeeded in cutting Social Security, the elderly would be unable to afford groceries.<sup>223</sup>

218. Jay Rosen, “*CNN Leaves It There*” Is Now Officially a Problem at CNN, PRESS THINK (July 3, 2011, 11:05 AM), <http://pressthink.org/2011/07/cnn-leaves-it-there-is-now-officially-a-problem-at-cnn/>.

219. Kimberly Nordyke, *Arianna Huffington on Journalism: “It’s Time to Move Beyond Left and Right,”* HOLLYWOOD REP. (Feb. 7, 2011, 8:11 PM), <http://www.hollywoodreporter.com/news/arianna-huffington-journalism-time-move-97280>.

220. See Baker, *supra* note 13, at 372 n.161 (quoting JOHN STUART MILL, *ON LIBERTY* 45 (Bobbs-Merrill ed. 1956) (1859)).

221. Lori Montgomery, *Bipartisan Commission Proposes Strict Budget Rules to Stabilize U.S. Debt*, WASH. POST (Nov. 10, 2010, 6:22 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/10/AR2010111003300.html>.

222. Doug Powers, *Dems Incensed Obama’s Fiscal Commission May Recommend Sweeping ::Gulp:: Spending Cuts*, MICHELLE MALKIN (Nov. 10, 2010, 10:47 PM), <http://michellemalkin.com/2010/11/10/dems-incensed/>.

223. See, e.g., Tasini, *Catfood Commission Dead: Thank God*, DAILY KOS (Dec. 3, 2010, 7:26

Fifth Estate journalism is particularly suited to mobilizing like-minded citizens to coalesce and take collective action.<sup>224</sup> The Internet's networked nature allows people to deliberate together and reach group decisions.<sup>225</sup> Partisan group blogs organize drives to encourage favored candidates to run for office,<sup>226</sup> urge their readers to carry recall petitions, and serve as gathering places for citizens who are ideologically aligned to follow election night returns.<sup>227</sup> The collective nature of Internet communication is more fundamental than any specific initiatives that the Fifth Estate undertakes. In his book *Collective Intelligence*, the French media theoretician Pierre Levy argues that the Internet is replacing the Cartesian conception of "I think, therefore, I am," and that society is passing from *cogito* ("I think") to *cogitamus* ("we think").<sup>228</sup>

The Fifth Estate's ability to galvanize political action has been on display around the world in recent years. Citizen journalism's role in the "Arab Spring" uprisings of early 2011 has been particularly notable. Although skeptics like Malcolm Gladwell have argued that "the revolution will not be Tweeted,"<sup>229</sup> it seems clear that social media have played an important facilitating role in the Arab democracy movement.<sup>230</sup> Wael Ghonim, a Google executive who was heavily involved in the protests that led to Egyptian President Hosni Mubarak's ouster, insisted that the uprising "started on Facebook" when "hundreds of thousands of Egyptians started collaborating content."<sup>231</sup>

---

AM), <http://www.dailykos.com/story/2010/12/03/925177/-Catfood-Commission-Dead:-Thank-God>.

224. Baker, *supra* note 13, at 372.

225. Benkler, *supra* note 94, at 383.

226. See, e.g., Rob Anderson, *Daily Kos Starts "Draft Elizabeth Warren for Senate" Campaign*, BOSTON.COM (Feb. 16, 2011, 2:03 PM), [http://www.boston.com/bostonglobe/editorial\\_opinion/blogs/the\\_angle/2011/02/daily\\_kos\\_start.html](http://www.boston.com/bostonglobe/editorial_opinion/blogs/the_angle/2011/02/daily_kos_start.html).

227. See, e.g., *Polls Have Closed in Wisconsin (Follow Results Here)*, RED STATE (Apr. 5, 2011, 9:18 PM), <http://www.redstate.com/proudgop/2011/04/05/polls-have-closed-in-wisconsin-follow-results-here/>.

228. PIERRE LEVY, *COLLECTIVE INTELLIGENCE: MANKIND'S EMERGING WORLD IN CYBERSPACE* 17 (1997).

229. Malcolm Gladwell, *Small Change: Why the Revolution Will Not Be Tweeted*, NEW YORKER, Oct. 4, 2010, available at [http://www.newyorker.com/reporting/2010/10/04/101004fa\\_fact\\_gladwell?currentPage=all](http://www.newyorker.com/reporting/2010/10/04/101004fa_fact_gladwell?currentPage=all).

230. Nathan Olivarez-Giles, *Tunisia Protesters Use Facebook, Twitter and YouTube to Help Organize and Report*, L.A. TIMES (Jan. 14, 2011, 4:40PM), <http://latimesblogs.latimes.com/technology/2011/01/tunisia-students-using-facebook-and-twitter-to-organize.html>.

231. Catharine Smith, *Egypt's Facebook Revolution: Wael Ghonim Thanks the Social Network*, HUFFINGTON POST (Feb. 11, 2011, 3:36 PM), [http://www.huffingtonpost.com/2011/02/11/egypt-facebook-revolution-wael-ghonim\\_n\\_822078.html](http://www.huffingtonpost.com/2011/02/11/egypt-facebook-revolution-wael-ghonim_n_822078.html).

## E. PROMOTING SELF-EXPRESSION

A final First Amendment value that the Fifth Estate promotes is self-expression. An important purpose underlying the First Amendment, as Thomas Emerson explained, is “individual self-fulfillment.”<sup>232</sup> The self-expression value has lost currency over the years, as more emphasis has been put on speech than on speaking—following Alexander Meiklejohn’s well-known injunction that what is important is “not that everyone shall speak, but that everything worth saying shall be said.”<sup>233</sup> As Jack Balkin has noted, the idea that it is not important that everyone speak gained currency as the rise of radio and television made it necessary for most people to become passive audience members.<sup>234</sup>

In the Internet age, any individuals who want to speak can find a place in the Fifth Estate to do so. They can write their own blog, even if there is no guarantee of a large audience. They can post essays or comments on group political blogs. If other community members like what they write, their words can achieve prominent placement.<sup>235</sup> There are community newspapers and websites that allow anyone to contribute articles,<sup>236</sup> and subject-specific discussion groups for everyone from families of prisoners<sup>237</sup> to liberal Mormons.<sup>238</sup>

The Fifth Estate also allows citizens to talk back to the mainstream media, another kind of self-expression. Before the Internet, major columnists used to hold forth on op-ed pages and the audience had few ways to respond, other than writing a letter to the editor, which the newspaper could decide whether to publish. Now, bloggers regularly criticize and debate columnists. Duncan Black, who blogs under the name Atrios, got considerable traction when he coined the term “Friedman Unit,” a unit of time equal to six months, which referred to the fact that *New York*

---

232. THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1970).

233. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (1948).

234. Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 *PEPP. L. REV.* 427, 439 (2009).

235. Simon Owens, *How Political Diarists Power RedState*, *Daily Kos*, PBS (Oct. 21, 2008), <http://www.pbs.org/mediashift/2008/10/how-political-diarists-power-redstate-daily-kos295.html>.

236. See, e.g., *About Us*, *MUNI DIARIES*, <http://www.munidiaries.com/about-md/> (last visited Nov. 22, 2011) (“If you have something to say about a ride, about a route, or even about politics surrounding public transit in the city, Muni Diaries is your forum to let the world know.”).

237. See, e.g., *Families of Prisoners Support Group*, *DAILYSTRENGTH.COM*, <http://www.dailystrength.org/c/Families-of-Prisoners/support-group> (last visited Nov. 22, 2011).

238. See, e.g., *THE LDS LEFT BLOG*, <http://theldsleft.blogspot.com/> (last visited Nov. 22, 2011).

*Times* columnist Tom Friedman asserted for at least two and a half years that “the next six months” in Iraq would show whether a decent outcome could be achieved.<sup>239</sup> The *Huffington Post* declared “Friedman Unit” the “Best New Phrase” of 2006,<sup>240</sup> and it got its own Wikipedia entry.<sup>241</sup> Fifth Estate feedback appears, in at least some cases, to get results. A black blogger recently complained in a Tweet that the online publication *Business Insider* had posted a racist photograph to accompany an article on slums.<sup>242</sup> Within minutes of the Tweet, the photograph was changed.<sup>243</sup>

Not surprisingly, many people want to engage in the self-expression that the Fifth Estate makes possible. A 2010 study by the Pew Internet and American Life Project found that 37 percent of Internet users had created, commented on, or disseminated a news item online.<sup>244</sup> The people who are participating appear to be more diverse than journalists working in old media. In 2010, only 13 percent of newsroom staff were nonwhite, although the U.S. population of nonwhites is more than 20 percent.<sup>245</sup> Network public affairs shows are even more skewed—almost 90 percent of the guests on NBC’s *Meet the Press* in 2005 and 2006 were white.<sup>246</sup> Online, the demographics are different. One 2006 study found that about 30 percent of bloggers were black or English-speaking Hispanic, and another 10 percent belonged to other nonwhite groups.<sup>247</sup> Another reported that 47 percent of black Internet users said that they were news participants, meaning they had written, commented on, or distributed a news item

---

239. Atrios, *F.U.*, ESCHATON, (Oct. 7, 2006, 11:21 PM), <http://www.eschatonblog.com/2006/10/fu.html>.

240. Rachel Sklar et. al, *Media Winners of 2006: Honorable Mentions (Rapid-Fire Round II)*, HUFFINGTON POST (Jan. 2, 2007, 6:29 PM), [http://www.huffingtonpost.com/eat-the-press/2007/01/02/media-winners-of-2006-ho\\_e\\_37571.html](http://www.huffingtonpost.com/eat-the-press/2007/01/02/media-winners-of-2006-ho_e_37571.html).

241. *Friedman (unit)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Friedman\\_%28unit%29](http://en.wikipedia.org/wiki/Friedman_%28unit%29) (last visited Nov. 22, 2011).

242. Oliver Willis, *Business Insider Hits “Undo” on Racist Illustration*, OLIVER WILLIS (Apr. 8, 2011, 3:37 PM), <http://www.oliverwillis.com/2011/04/08/business-insider-hits-undo-on-racist-illustration/>.

243. *Id.*

244. Purcell, *supra* note 76, at 2.

245. Jen Quraishi, *Making Newsroom Diversity a Priority*, MOTHER JONES (Aug. 23, 2010, 12:24 PM), <http://motherjones.com/mojo/2010/08/making-newsroom-diversity-priority>. See also Bill Dedman & Stephen K. Doig, *Newsroom Diversity Has Passed Its Peak at Most Newspapers, 1990–2005 Study Shows*, KNIGHT FOUND. (June 1, 2005), <http://powerreporting.com/knight/report.pdf> (noting that 346 newspapers contained an all-white newsroom in 2005).

246. *Sunday Shutout: The Lack of Gender & Ethnic Diversity on the Sunday Morning Talk Shows*, MEDIA MATTERS FOR AM. (May 14, 2007, 10:22 AM), <http://mediamatters.org/reports/200705140001>.

247. Amanda Lenhart & Susannah Fox, *Bloggers*, PEW INTERNET & AM. LIFE PROJECT, ii (July 19, 2006), <http://www.pewinternet.org/~media/Files/Reports/2006/PIP%20Bloggers%20Report%20July%2019%202006.pdf.pdf>.

online, compared to just 36 percent of white Internet users.<sup>248</sup>

For all of its contributions, the Fifth Estate also brings perils. The FTC endorsement guides focus on a relatively small problem: the possibility that a blogger or other creator of “consumer-generated media” will accept remuneration for endorsing consumer goods.<sup>249</sup> A more serious concern about the Fifth Estate is that it is degrading the public discourse by disseminating improperly vetted, self-serving, or biased news reports—a process one old media journalist compared to “sending unchecked meats out to the public.”<sup>250</sup>

An incident that illustrated the harm that Fifth Estate journalism can do is the firestorm that raged over Shirley Sherrod, a low-level black employee of the Department of Agriculture, in the summer of 2010. Sherrod’s ordeal began on the morning of July 19, when Andrew Breitbart, a right-wing blogger, posted a video that appeared to show her saying she discriminated against whites while doing her job. He reported that the Georgia NAACP audience she was addressing had received her “racist tale” with “nodding approval.”<sup>251</sup>

The video and Breitbart’s description of it quickly ricocheted through the right-wing blogosphere. It landed at *FoxNews.com*, which reported that the video showed “an Agriculture Department official regaling an NAACP audience with a story about how she withheld help to a white farmer facing bankruptcy.”<sup>252</sup> Within a matter of hours, Sherrod resigned, after the Agriculture Secretary had given her the choice of quitting or being fired.<sup>253</sup>

The following day, it became clear that the video was a fraud. Sherrod had been speaking out in support of racial understanding, but her words had been edited to suggest the opposite.<sup>254</sup> On the third day, the Agriculture Secretary apologized and offered Sherrod a new job.<sup>255</sup> As the focus shifted

---

248. Purcell, *supra* note 76, at 45.

249. See *supra* notes 3–10 and accompanying text.

250. Edmund Lee, *Does Who Creates Content Matter to Marketers in a “Pro-Am” Media World?*, ADVER. AGE, June 7, 2010, available at <http://adage.com/article/mediaworks/creates-content-matter-marketers/144286/>.

251. *Timeline of Breitbart’s Sherrod Smear*, MEDIA MATTERS FOR AM. (July 22, 2010, 7:38 AM), <http://mediamatters.org/research/201007220004>.

252. *Id.*

253. *Id.*

254. *Id.*

255. Alex Wagner, *Shirley Sherrod Gets Apology from Obama, Mea Culpa and Job Offer From Vilsack*, POLITICS DAILY, <http://www.politicsdaily.com/2010/07/21/shirley-sherrod-gets-apologies-job->

to Breitbart, commentators began to point out that he had previously promoted misleading videos.<sup>256</sup> The liberal watchdog site *MediaMatters* posted a list of what it called Breitbart's "lies, smears, and distortions," which had several incidents involving deceptive videos, including one that attempted to discredit the progressive group ACORN.<sup>257</sup>

The Sherrod controversy is hardly the only case of a bad reporting from a blogger, but it contains many of the elements that concern people most about the rise of Fifth Estate journalism. First, there is the question of whether the self-proclaimed journalist can be said to be acting as a legitimate journalist. Breitbart is a far-right activist who speaks frequently at Tea Party events across the country.<sup>258</sup> His political agenda is so stark that it casts doubt on whether he is engaged in the truth-seeking function of journalism at all, or if he is instead merely a political operative hiding behind the trappings of journalism.

There are other citizen journalists who bring different kinds of agendas to their work. In some cases, there is legitimate concern that a blogger is acting out of crass commercial motives rather than journalistic ones—a question that must also be asked about Fourth Estate journalists.<sup>259</sup> There have been periodic revelations of bloggers whose views on various products and subjects appear to have been paid for by corporate interests, such as the 2009 blowup over the ethics of a number of "mommy bloggers" who participated in a program in which they accepted things of value from General Mills and were then under pressure to write positive reviews.<sup>260</sup> As

---

offer-from-obama-administra/ (last visited Nov. 22, 2011).

256. See, e.g., Mike Madden, *ACORN Tape Fraud: Does Andrew Breitbart Care?*, SALON (Mar. 2, 2010, 10:30 AM), [http://www.salon.com/news/politics/war\\_room/2010/03/02/breitbart](http://www.salon.com/news/politics/war_room/2010/03/02/breitbart); Molly McDonough, *NY Prosecutor Clears ACORN Workers in Pimp and Hooker Incident*, ABA J. (Mar. 2, 2010, 7:31 AM), [http://www.abajournal.com/news/article/ny\\_prosecutor\\_clears\\_acorn\\_workers\\_in\\_pimp\\_and\\_hooker\\_incident/?from=widget](http://www.abajournal.com/news/article/ny_prosecutor_clears_acorn_workers_in_pimp_and_hooker_incident/?from=widget).

257. *Big Falsehoods: An Updated Guide to Andrew Breitbart's Lies, Smears, and Distortions*, MEDIA MATTERS FOR AM. (July 21, 2010, 3:24 PM), <http://mediamatters.org/print/research/201007210054>.

258. See, e.g., Bill Glauber, *Breitbart Rallies Tea Party Supporters*, J. SENTINEL (Feb. 19, 2011), <http://www.jsonline.com/blogs/news/116533028.html>; Patrik Jonsson, *As Counter-Media Fuels Tea Party Movement, Main Stream Media Catches On*, CHRISTIAN SCI. MONITOR (Feb. 6, 2010), <http://www.csmonitor.com/USA/Politics/2010/0206/As-counter-media-fuels-tea-party-movement-main-stream-media-catches-on>.

259. See *infra* Part IV.A.

260. Jessica Ramirez, *Trusted Mom or Sellout?*, NEWSWEEK, July 15, 2009, available at <http://www.thedailybeast.com/newsweek/2009/07/14/trusted-mom-or-sellout.html>. Among other criticisms, it emerged that more than 900 bloggers were participating in a General Mills program in which they accepted free items from the company and were then subjected to heavy pressure to write positive reviews. See Brian Morrissey, *General Mills Recruits Blog Backers*, ADWEEK, Apr. 28, 2009

with Breitbart and the Sherrod case, such incidents raise the question: Was this person truly engaged in journalism?

The Sherrod incident also raises institutional concerns. Breitbart runs a network of blogs that operate as a for-profit business, but that appear to lack an editorial structure that subjects his work to internal scrutiny. If a reporter who works for an old media organization had wanted to post the Sherrod video, he would likely have been required to persuade an editor of its accuracy. Breitbart does not answer to anyone but himself. Nor does he conform to the journalistic conventions that old media reporters generally adhere to. Breitbart did not call Sherrod for comment before posting the video and writing about her, and his site did not mention any ethics or conflict-of-interest policies.

Perhaps the biggest problem raised by the Sherrod incident is that Breitbart operated in a reputational vacuum. Most mainstream media have developed brands that audience members and other media can rely on in assessing their work. Readers who see a story from the *Los Angeles Times* might come to it with one set of assumptions about its reliability, while they might have very different expectations about an article from the *National Enquirer*. At the time Breitbart wrote about the Sherrod video, his previous record of promoting deceptive videos should have made other journalists and audience members extremely skeptical. But his past acts were not well enough known to affect how his reporting was received.

These risks created by blogs and other Fifth Estate journalism should not be overstated. The success of Wikipedia has shown that most people who produce information for general consumption operate in good faith and strive for accuracy.<sup>261</sup> Mainstream media that have incorporated citizen journalism into their own reports have generally found it to be trustworthy. The editor of *The Lede*, the *New York Times*'s breaking-news blog, said that he had observed "very little mischief-making" in the Twitter reports coming out of Iran, and that in his experience "[p]eople generally want to help solve the puzzle."<sup>262</sup> The Sherrod case and others like it do not diminish the contributions the Fifth Estate is making or detract from the case for giving it greater support. They do, however, suggest that the media

---

(explaining how General Mills recruited more than 900 bloggers under the condition: "If you feel you cannot write a positive post regarding the product or service, please contact the . . . team before posting any content."), available at <http://www.adweek.com/news/technology/general-mills-recruits-blog-backers-99110>.

261. See JOSEPH MICHAEL REAGLE JR., GOOD FAITH COLLABORATION: THE CULTURE OF WIKIPEDIA (2010).

262. Stelter, *supra* note 135 (quoting *The Lede* editor Robert Mackey).

ecology should work to rein in bad actors and limit the damage they can cause to the public discourse.

#### IV. TOWARD A RIGHT TO PARTICIPATE

In June 1967, Jerome Barron published “Access to the Press—A New First Amendment Right” in the *Harvard Law Review*.<sup>263</sup> In that article and later writings, he argued for a positive right to communicate over radio and television and in newspapers.<sup>264</sup> When the First Amendment was written, it was possible to have the kind of marketplace of ideas that the Framers intended, he said, since anyone who wanted to get his views out could mount a soap box or distribute a pamphlet.<sup>265</sup> But in modern times the notion of a marketplace of ideas had become “romantic nonsense.”<sup>266</sup> As Barron saw it, “in the era of mass communication, the words of the solitary speaker or the lonely writer, however brave or imaginative, have little impact unless they are broadcast through the great engines of public opinion—radio, television, and the press.”<sup>267</sup>

The right of access had a quick and dramatic trajectory. Other scholars were soon writing in support of Barron,<sup>268</sup> and before long, a series of federal court rulings recognized an affirmative, if limited, right of access to the mass media.<sup>269</sup> Within a few years, however, the Supreme Court rejected the emerging right, overturning a D.C. Circuit decision establishing a First Amendment right to buy political advertising on television. The Supreme Court ruled that the courts could not intrude on the

---

263. Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1654–55 (1967) [hereinafter Barron, *Access to the Press*].

264. See, e.g., JEROME A. BARRON, *FREEDOM OF THE PRESS FOR WHOM?: THE RIGHT OF ACCESS TO MASS MEDIA* xiii (1973) [hereinafter BARRON, *FREEDOM OF THE PRESS FOR WHOM?*]; Jerome A. Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487, 487 (1969); Jerome A. Barron, *Access—The Only Choice for the Media?*, 48 TEX. L. REV. 766, 767 (1970).

265. Barron, *Access to the Press*, *supra* note 263, at 1643. See also *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 248 (1974).

266. Barron, *Access to the Press*, *supra* note 263, at 1642–43.

267. BARRON, *FREEDOM OF THE PRESS FOR WHOM?*, *supra* note 264, at xiii.

268. See, e.g., William C. Canby, Jr., *The First Amendment Right to Persuade: Access to Radio and Television*, 19 UCLA L. REV. 723, 728 (1972); Nicholas Johnson & Tracy A. Westen, *A Twentieth-Century Soapbox: The Right to Purchase Radio and Television Time*, 57 VA. L. REV. 574, 606 (1971).

269. See, e.g., *Bus. Execs.' Move for Vietnam Peace v. FCC*, 450 F. 2d 642, 663 (D.C. Cir. 1971) (deciding that broadcasters could not shut out the public by completely adopting bans on all advertising on controversial political issues), *rev'd* *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973); *Banzhaf v. FCC*, 405 F. 2d 1082, 1103 (D.C. Cir. 1968) (holding that under the fairness doctrine, advertising for cigarettes created a right of reply for smoking opponents).

“editorial judgment” and “journalistic discretion” of media organizations by directing them to give access to speakers and ideas they did not choose to include.<sup>270</sup> Justice William Brennan, writing in dissent, argued that the First Amendment contained “not only the abstract right to be free from censorship, but also the right of an individual to utilize an appropriate and effective medium for the expression of his views.”<sup>271</sup> For citizens to exercise this right “in the age of technology,” Justice Brennan said, it was essential that they “be permitted at least *some* opportunity to express their views on public issues over the electronic media.”<sup>272</sup>

Barron’s right of access movement was driven in large part by the social dynamics of the 1960s. Barron and the scholars and courts that agreed with him were seeking a way for civil rights activists, anti-war protesters and other rising voices to be heard in the mainstream media. Today, there are twenty-first-century reasons that it is important to make the media ecology more inclusive. As old media declines, the public needs the “replacement journalism” that new kinds of reporters can provide. There is also a need for the different approaches and perspectives that these new journalists bring to reporting the news.

The right of access movement had died out by the 1970s because the Supreme Court was unwilling to interfere with the private property and editorial judgments of the owners of television and radio stations and newspapers. But those concerns do not apply in the Internet age, because ordinary citizens no longer need access to a broadcast studio or the columns of a newspaper to reach a mass audience.

What citizens need today is not a right of access to privately owned media, but a First Amendment right to participate, which would help to put them on an equal footing with the Fourth Estate. The right to participate would have two elements: a right of equal treatment, and a positive right of access to certain government information. In addition to this First Amendment right, federal and state governments should enact laws and adopt practices that create “policies of participation.” Taken together, the right to participate and policies of participation would help remove some of the obstacles that currently exist to effective Fifth Estate journalism and would enrich the public discourse.

---

270. *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 111 (1973).

271. *Id.* at 193 (Brennan, J., dissenting).

272. *Id.* at 201 (Brennan, J., dissenting) (emphasis added).

## A. THE RIGHT OF EQUAL TREATMENT

The Fourth and Fifth Estates are rapidly converging, but the law and government policies still draw firm distinctions between these journalistic categories. When the FTC issued its “Guides Concerning the Use of Endorsements and Testimonials in Advertising,” it called for bloggers and other “consumer-generated” media to make disclosures if they accept material support from those about whom they wrote.<sup>273</sup> The guides did not impose the same obligation on old media.<sup>274</sup> For the FTC, the touchstone is whether a journalistic enterprise exercises “independent editorial responsibility.”<sup>275</sup> A book blogger who publishes a review without mentioning that she received a free copy of the book from the publisher can be fined as much as \$10,000. A journalist who writes a book review for an old media outlet who does the same thing has not violated the law.

The FTC guides’ two-track approach clearly disadvantages citizen journalists and other members of the Fifth Estate. The disclosure that members of the Fifth Estate are required to make calls the integrity of their journalism into question. A reader who sees two reviews, one with a disclosure of possible conflict and one without, is likely to give less credence to the one that contains the disclosure.

When the guides were issued, bloggers and other citizen journalists protested that the government was denigrating their work. The writer of *Fermentation: The Daily Wine Blog* objected to the FTC’s double standard. He was troubled, he said, by the government’s “presumption” that he was “more likely to deceive” his readers “by being on the take than the *Wine Spectator* or *Wine Enthusiast* or *Wine & Spirits*, which are moneymaking ventures.”<sup>276</sup>

The FTC guides are not alone in creating two journalistic classes, one with greater privileges than the other. Another prominent example is the right of a reporter to protect confidential sources. This reporter’s privilege, which is largely though not exclusively guaranteed by state law, is more available to journalists affiliated with major media organizations than to

---

273. See Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.5 (2009).

274. Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,124, 53,136 n.101 (Oct. 15, 2009) (codified at 16 C.F.R. pt. 255).

275. *Id.*

276. Tom Wark, *This Wine Blog Is More Likely to Deceive You*, TOM WARK’S FERMENTATION: THE DAILY WINE BLOG (Oct. 6, 2009, 7:58 AM), <http://fermentation.typepad.com/fermentation/2009/10/this-wine-blog-is-more-likely-to-deceive-you.html>.

citizen journalists and other members of the Fifth Estate.

The reporter's privilege exists under both federal and state law. The Supreme Court, in *Branzburg v. Hayes*,<sup>277</sup> left open the question of whether the First Amendment created such a right, but most federal appeals courts and many state courts recognize the existence of at least a qualified privilege.<sup>278</sup> Where they have recognized the privilege, courts have generally interpreted it broadly, extending it to anyone who "at the inception of the investigatory process, had the intent to disseminate to the public the information obtained through the investigation."<sup>279</sup> As early as 1999, in a case involving the then-fledgling *Drudge Report* gossip site, a federal court recognized that Fifth Estate journalists may invoke the First Amendment privilege.<sup>280</sup>

This federal privilege is, in practice, of limited use to journalists seeking to protect their sources. Some circuits do not recognize it. Courts that do recognize it, rather than regarding it as an absolute right, often apply a balancing test that weighs society's interest in the use of confidential sources against its interest in giving prosecutors and litigants access to relevant information. Courts have also been more reluctant to apply the constitutional privilege in criminal cases than in civil cases.<sup>281</sup>

There is no federal reporter's shield statute, though there have been efforts to pass one. If a federal statute is enacted, it may not include Fifth Estate journalists. There has been resistance from both the White House and Congress to adopting a broad privilege. Attorney General Michael Mukasey, at his 2007 confirmation hearings, told the Senate that the Bush administration was worried that any shield law passed by Congress "might inadvertently protect . . . bloggers who are also spies or terrorists."<sup>282</sup> So far only the House of Representatives has passed a reporter's privilege law, and the bill is drawn narrowly. It covers only those who gather, edit, or report news "for a substantial portion of the person's livelihood or for

---

277. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

278. See Jeffrey S. Nestler, Comment, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege*, 154 U. PA. L. REV. 201, 203 (2005).

279. *Von Bulow v. Von Bulow*, 811 F.2d 136, 143 (2d Cir. 1987). See also *Developments in the Law: The Law of the Media*, 120 HARV. L. REV. 990, 999 (2007) [hereinafter *Developments in the Law*].

280. *Blumenthal v. Drudge*, 186 F.R.D. 236, 244 (D.D.C. 1999); *Developments in the Law*, *supra* note 279, at 999.

281. *Developments in the Law*, *supra* note 279, at 1000-01.

282. See Carol J. Toland, Comment, *Internet Journalists and the Reporter's Privilege: Providing Protection for Online Periodicals*, 57 KAN. L. REV. 461, 462-63 (2009).

substantial financial gain,”<sup>283</sup> a definition that would exclude many Fifth Estate journalists.<sup>284</sup>

Given the sparse federal protections, journalists must rely primarily on state reporter’s privilege laws to protect their sources. About two-thirds of states have such laws, but most do not cover bloggers and other citizen journalists.<sup>285</sup> Some limit the privilege to reporters who earn their principal living from journalism.<sup>286</sup>

Some state shield laws exclude even reporters who work for new media outlets that are corporately owned. Alabama’s shield law covers persons “connected with or employed on any newspaper, radio broadcasting station or television station.”<sup>287</sup> Under it, journalists employed by a new media publication like *Yahoo News* or *Politico* would have no right to protect their sources. Pennsylvania’s statute applies to reporters connected to newspapers of “general circulation” or to television or radio stations or press associations.<sup>288</sup> Ohio’s law is limited to people working for or with newspapers, radio stations, television stations, or press associations.<sup>289</sup> The Ohio law thus gives press associations considerable gate-keeping power.

Courts could interpret these statutory categories broadly, but they generally do not. In *Price v. Time, Inc.*, the U.S. Court of Appeals for the Eleventh Circuit rejected a *Sports Illustrated* reporter’s attempt to invoke the Alabama shield law.<sup>290</sup> He argued that although the law did not expressly mention magazines, *Sports Illustrated* was the functional equivalent of a newspaper. The Eleventh Circuit ruled that the word “newspaper” meant “newspaper.”<sup>291</sup> Similarly, a federal district court in Ohio refused to let a bimonthly business periodical invoke that state’s

---

283. H.R. 2932, 112th Cong. § 4 (1st Sess. 2011). See J.C. Derrick, *Federal Shield Law Introduced in House Once More*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (Sept. 19, 2011, 7:03 PM), <http://www.rcfp.org/newsitems/index.php?i=12156>.

284. Zachary M. Seward, *Shield Law: House and Senate Differ on Who’s a Journalist*, NEIMAN JOURNALISM LAB (Sept. 17, 2009, 9:00 AM), <http://www.niemanlab.org/2009/09/shield-law-house-and-senate-differ-on-whos-a-journalist/>.

285. Amy Bauer, Note, *Blogging on Broken Glass: Why the Proposed Free Flow of Information Act Needs a Specific Test for Determining When Media Shield Laws Apply to Bloggers*, 10 MINN. J.L. SCI. & TECH. 747, 747–48 & n.5 (2009).

286. See, e.g., DEL CODE ANN. tit. 10, § 4320 (1999).

287. ALA. CODE § 12-21-142 (2011).

288. 42 PA. CONS. STAT. ANN. § 5942 (West 2000).

289. OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (West 2006).

290. *Price v. Time, Inc.*, 416 F.3d 1327 (11th Cir. 2005).

291. *Id.* at 1339.

shield law, insisting that a bimonthly periodical was not a newspaper.<sup>292</sup>

Not being able to invoke a reporter's privilege puts Fifth Estate journalists at a substantial disadvantage. Confidential sources are an important part of investigative reporting, and journalists who are able to protect their sources have a better chance of winning the cooperation of people with sensitive information. Being excluded from the privilege can also have a chilling effect on journalists' decisions about what to write. A reporter who knows that a hard-hitting investigative piece could leave her vulnerable to being subpoenaed for the identity of her sources is likely, as Justice William O. Douglas observed, to "write with [a] more restrained pen[.]"<sup>293</sup>

Other protections that the Fifth Estate may not be able to count on are federal and state laws limiting government searches of newsrooms and reporters' homes. In 1980, soon after the Supreme Court upheld a search of a student newspaper newsroom in *Zurcher v. Stanford Daily*,<sup>294</sup> Congress enacted the Privacy Protection Act.<sup>295</sup> The law prevents law enforcement from searching newsrooms and journalists' homes for "work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or similar form of public communication."<sup>296</sup> The statute's protection of "similar forms" gives courts a textual hook for protecting bloggers and other new media, but it is not clear how willing they are to do so. A number of states, including California, Illinois, and New Jersey, have analogous laws, but their scope is also uncertain. In 2010, in a highly publicized incident, California police searched the home of a writer for the technology blog *Gizmodo*, apparently without considering whether either the federal or state statute applied.<sup>297</sup>

If bloggers and other members of the Fifth Estate are unprotected by newsroom search laws, it makes it more difficult for them to do serious reporting. In his *Zurcher* dissent, Justice Potter Stewart noted that searches of this kind are disruptive and can directly interfere with "newsgathering,

---

292. *Deltec, Inc. v. Dun & Bradstreet, Inc.*, 187 F. Supp. 788, 790 (N.D. Ohio 1960).

293. *Branzburg v. Hayes*, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting).

294. *Zurcher v. Stanford Daily*, 436 U.S. 547, 567–68 (1978).

295. 42 U.S.C. § 2000aa (2006).

296. *Id.* § 2000aa(a).

297. See Lyrissa Lidsky, *Search of Gizmodo Journalist's "Newsroom"/Bedroom: Federal Law*, PRAWFSBLAWG (Apr. 26, 2010, 9:53 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2010/04/search-of-gizmodo-journalists-newsroombedroom.html>. The search may, in any case, have fallen under an exception that permits the government to conduct a search when it is investigating a crime it believes the reporter was involved in.

writing, editing, and publishing.”<sup>298</sup> These searches also have the potential to turn up material obtained from confidential sources and to reveal the identities of those sources.<sup>299</sup> Like not being included in coverage by shield laws, not being protected from searches can make it more difficult for reporters to win the confidence of sources who wish to remain anonymous. It can also lead the unprotected journalists to do their jobs more cautiously, and to steer clear of sensitive subjects.

Another area where government draws lines between the Fourth and Fifth Estates is in granting access to government buildings and newsmakers. The Senate and the House of Representatives have limited space in their press galleries, and the rules for admission are heavily weighted in favor of old media. To qualify for Senate press credentials, applicants “must be employed by periodicals that regularly publish a substantial volume of news material of either general, economic, industrial, technical, cultural, or trade character.”<sup>300</sup> The editor of the Internet-based *Washington Independent* was denied access to the congressional press galleries because her publication was supported by foundation grants and contributions.<sup>301</sup>

State and local governments often show a similar bias. A Minnesota citizen-journalism website that had the most comprehensive state coverage of the Al Franken-Norm Coleman Senate race recount was turned down when it requested space in the capitol press room. A newspaper had objected that the website was too partisan.<sup>302</sup> In Maryland, a former Baltimore County Attorney who wrote a blog called the *Baltimore Organ* sued when the governor’s office denied him a press pass for the state legislature.<sup>303</sup> The New York City Police Department was sued by three bloggers after it denied them press credentials because they worked for nontraditional press outlets, a decision the department later reversed.<sup>304</sup>

---

298. *Zurcher*, 436 U.S. at 571 (Stewart, J., dissenting).

299. *Id.* at 571–72 (Stewart, J., dissenting).

300. Ryan Benjamin Witte, *It’s My News Too! Online Journalism and Discriminatory Access to the Congressional Periodical Press Gallery*, 12 YALE J.L. & TECH. 208, 216 (2010) (citing *Rules and Regulations*, PERIODICAL PRESS GALLERY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, <http://periodical.house.gov/rules.shtml> (last visited Nov. 23, 2011)).

301. Josh Stearns, *Access Denied: A Brief History of New Journalism Organizations and Press Credentials*, SAVETHENEWS.ORG (June 7, 2011, 12:03 PM), <http://www.savethenews.org/blog/11/01/07/access-denied-brief-history-new-journalism-organizations-and-press-credentials>.

302. Stearns, *supra* note 301.

303. *O’Malley v. Liner*, CITIZEN MEDIA LAW PROJECT (Mar. 10, 2010), <http://www.citmedialaw.org/threats/omalley-v-liner>.

304. *After Police Relent, Bloggers Get Press Credentials*, N.Y. TIMES (Jan. 9, 2009, 12:27 PM), <http://cityroom.blogs.nytimes.com/2009/01/09/bloggers-get-press-credentials-after-police-relent/>.

Press passes often entitle journalists to more than just access to restricted areas. House and Senate passes bring an array of benefits, including reserved seating, access to support facilities and staff, and entry into press conferences held by congressional leaders.<sup>305</sup> In addition, journalists must have a congressional press pass to apply for a White House press pass.<sup>306</sup>

In journalism, access matters a great deal. The essence of reporting is bringing significant and unknown information to light. Many important government events are not broadcast or recorded. Without access, reporters cannot form their own impressions and draw their own conclusions—they must rely instead on the accounts of others. If a reporter is not able to attend a press conference, she may not be able to ask a question of a government official, and if she is not in the pressroom, she may be deprived of the professional exchanges that are common among members of the press corps. This kind of exposure to news events as they happen is the lifeblood of journalism, and if members of the Fifth Estate are denied it they are put at a serious disadvantage.

The government could adopt more laws and policies favoring the Fourth Estate over the Fifth Estate. There is pressure from opinion leaders to come up with ways to “save” newspapers, and federal officials have been considering what role, if any, government should play in trying to support news media.<sup>307</sup> The FTC’s forty-seven-page staff discussion draft, which discussed newspapers and old media at length while mentioning blogs only once, suggested that if the government does intervene, it might not do so in an even-handed way.<sup>308</sup> It is at least conceivable that one day the federal government, or a state or local government, might decide to adopt policies that are expressly aimed at helping the Fourth Estate to hold onto its position against the onslaught of the Fifth Estate.

Laws and government policies that favor Fourth Estate journalists over Fifth raise significant First Amendment concerns. The government can draw distinctions between different media distribution systems without violating the First Amendment. In *Turner Broadcasting System, Inc. v. FCC*, the Supreme Court upheld the FCC’s right to impose “must-carry”

---

305. Witte, *supra* note 300, at 216.

306. Joshua E. Keating, *Can the White House Revoke a Reporter’s Credentials?*, FOREIGN POL’Y, June 7, 2010, available at [http://www.foreignpolicy.com/articles/2010/06/07/can\\_the\\_white\\_house\\_revoke\\_a\\_reporter\\_s\\_credentials](http://www.foreignpolicy.com/articles/2010/06/07/can_the_white_house_revoke_a_reporter_s_credentials).

307. See *supra* Part II.

308. See *supra* notes 131–34 and accompanying text.

rules on cable broadcasters, requiring them to carry local and public broadcasting that they did not want to air.<sup>309</sup> If the FCC had required newspapers to carry any particular content, the policy would almost certainly have been struck down.<sup>310</sup>

But when the government is drawing lines not between methods of distribution, but between speakers, the First Amendment requires it to tread much more carefully. The Supreme Court has long disfavored government regulation of speech that elevates one category of speakers on a subject over another. As the Court explained in *First National Bank of Boston v. Bellotti*,<sup>311</sup> the “inherent worth” of “speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”<sup>312</sup>

In its 2010 ruling in *Citizens United v. Federal Election Commission*,<sup>313</sup> the Court was particularly emphatic in disapproving of speaker-based discrimination.<sup>314</sup> *Citizens United* was a challenge to portions of the Bipartisan Campaign Reform Act of 2002 (“BCRA”)<sup>315</sup> that barred corporations and unions from spending in federal elections. The Court ruled that the law’s two-track approach of prohibiting corporate and union speech while allowing individuals to speak impermissibly discriminated on the basis of “corporate identity.”<sup>316</sup> Applying strict scrutiny, the court ruled that key parts of the regime that Congress established violated the First Amendment because “certain disfavored associations of citizens—those that have taken on the corporate form—are penalized for engaging in the same political speech”<sup>317</sup> as individuals and unincorporated associations.

The *Citizens United* ruling was widely viewed as a bold expansion of

---

309. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 668 (1994).

310. *See Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). Some government tax policies that draw lines among different kinds of media have also been upheld. *See Leathers v. Medlock*, 499 U.S. 439, 453 (1991) (upholding Arkansas tax on cable and satellite television that did not apply to print media).

311. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978).

312. *Id.* at 777.

313. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

314. The Court went further than it had gone not only in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the case it expressly overruled, but also than it had in a number of other cases in which it considered corporate speech to be different from individual speech. *See Randall P. Bezanson, No Middle Ground? Reflections on the Citizens United Decision*, 96 IOWA L. REV. 649, 654 (2011).

315. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

316. *Citizens United*, 130 S. Ct. at 900.

317. *Id.* at 908.

corporations' rights, but its "take no prisoners"<sup>318</sup> approach to free speech has significant implications beyond corporate speech. The Court insisted that favoring some speakers on political matters over others offends the First Amendment by interfering with the American people's freedom of thought: "When government seeks . . . to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves."<sup>319</sup>

Discriminating among speakers, the Court said, also denies members of the less-favored group their First Amendment right of self-expression. When the government "identifies certain preferred speakers," the Court said, it "deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice."<sup>320</sup>

This nondiscrimination principle has important implications for media. Under *Citizens United*, the government cannot pick and choose among categories of speakers that want to talk about federal elections. It cannot ban Exxon-Mobil from speaking, while letting wealthy individuals and the *Washington Post* editorial page speak to mass audiences. The *Citizens United* Court was concerned that Congress's speech rules discriminated against corporations. The two-tiered system of the BCRA, which put special restrictions on corporate speech, "muffle[d] the voices that best represent the most significant segments of the economy."<sup>321</sup> The Court's nondiscrimination logic, however, works equally in reverse. Laws and regulations that give primacy to corporate speech—such as laws that favor corporate media speakers over individuals—should be just as constitutionally troubling.

Laws that distinguish among categories of speakers can also raise freedom of association concerns. In his *Citizens United* concurrence, Justice Antonin Scalia noted that the First Amendment free speech guarantee includes "the right to speak *in association with other individual persons*."<sup>322</sup> But implicit in the freedom of association is the right not to

---

318. Bezanson, *supra* note 314, at 649.

319. *Citizens United*, 130 S. Ct. at 908.

320. *Id.* at 899.

321. *Citizens United*, 130 S. Ct. at 907 (quoting *McConnell v. FEC*, 540 U.S. 93, 257–58 (2003) (Scalia, J., concurring in part and dissenting in part), *overruled by Citizens United v. FEC*, 130 S. Ct. 876 (2010)).

322. *Citizens United*, 130 S. Ct. at 928 (Scalia, J. concurring).

associate with others.<sup>323</sup> The government burdens freedom of association when it favors speakers who associate with others over individual speakers.<sup>324</sup>

Drawing on *Citizens United* and other speaker-discrimination precedents, courts should impose an equality principle on laws and policies governing journalism. Government should still be able to draw lines between journalists and non-journalists. There is a strong, even compelling, state interest in promoting journalism and having important news reported on.<sup>325</sup> But when the government is drawing lines between categories of journalist it must not “identif[y] certain preferred speakers.”<sup>326</sup>

To avoid improperly favoring certain speakers, laws and policies that extend special rights and privileges to journalists should apply to anyone who is engaging in journalism. The government should not be permitted to decide that it likes newspaper and television reporters, but does not like bloggers. It should not be permitted to promote the work of professional reporters while disfavoring those who do their journalism for free. The government should not be permitted to favor journalists who work for corporations over those who lack such a “corporate identity.” And it should not be permitted to reward journalists who associate with others by joining together in editorial structures, while penalizing those who chose to associate only with themselves.

This equality principle casts doubt on laws and government policies that favor the Fourth Estate over the Fifth. The FTC endorsement guides establish a two-tiered regime based on the identity of the speaker. Journalists who work for media organizations with hierarchical editing structures are exempt from the disclosure requirements. Solo bloggers and other members of the Fifth Estate who do not operate as part of an editorial hierarchy must include disclosure statements that undermine their journalism.<sup>327</sup>

The line the FTC has drawn between old and new media speakers should not survive First Amendment challenge.<sup>328</sup> When the government

---

323. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (“Freedom of association therefore plainly presupposes a freedom not to associate.”).

324. Indeed, the dissenters noted that when the Framers “constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.” *Citizens United*, 130 S. Ct. at 950 (Stevens, J., concurring in part and dissenting in part).

325. *Boos v. Barry*, 485 U.S. 312, 318 (1988).

326. *Citizens United*, 130 S. Ct. at 883.

327. See *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988).

328. The consumer-generated speech that the FTC guides apply to should not be categorized as

creates favored and disfavored categories of speakers in this way, courts should impose strict scrutiny.<sup>329</sup> Even if the FTC's concerns about preventing misleading endorsements rise to the level of a compelling government interest, as the Supreme Court instructed in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, the burdens on speech must be "narrowly tailored to advance the . . . objective."<sup>330</sup> A government policy that imposes a substantial burden on consumer-generated media as a class while ignoring other media is not properly tailored.

The FTC guides sweep in a significant amount of new media that should not be covered. They assume that any journalist who is not part of an editorial hierarchy is at risk of corruption. Many independent new media journalists, however, have strong reputations for integrity. When Lawrence Lessig, a prominent law professor, was blogging about technology, there was no reason to believe that he was more prone to outside influence than a member of the old media.<sup>331</sup> The same could be said of *The Business Ethics Blog*, written by an ethics professor at Saint Mary's University,<sup>332</sup> or *FBI Whistleblower Blog*, written by a prominent advocate for whistleblowers' rights.<sup>333</sup> By imposing disclosure on these independent journalists, the guides impermissibly sweep in a "wide range" of expression that is unrelated to the interest the state is pursuing.<sup>334</sup>

At the same time, the guides leave out a great deal of speech that should be covered. Many old media journalists accept material goods from the subjects they cover. One published investigation revealed a widespread culture of journalists at fashion magazines accepting free clothing and accessories.<sup>335</sup> These practices exist in other areas of old media as well, including travel writing and technology reporting.<sup>336</sup> Critics often raise

---

mere commercial speech, deserving of lower levels of protection. The vast majority of the speech it applies to is ordinary journalism. See Recent Regulation, *Internet Law—Advertising and Consumer Protection—FTC Extends Endorsement and Testimonial Guides to Cover Bloggers—74 Fed. Reg. 53,124 (Oct. 15, 2009)(to be codified at 16 C.F.R. pt. 255)*, 123 HARV. L. REV. 1540, 1543–47 (2010).

329. *Citizens United*, 130 S. Ct. at 898–99.

330. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120–21 (1991).

331. See LESSIG BLOG, <http://www.lessig.org/blog/> (last visited Dec. 8, 2011).

332. About, BUS. ETHICS BLOG, <http://businessethicsblog.com/about/> (last visited Nov. 25, 2011).

333. *FBI Whistleblower Blow*, WHISTLEBLOWERS PROT. BLOG, <http://www.whistleblowersblog.org/articles/fbi-whistleblower/> (last visited Nov. 25, 2011).

334. *Simon & Schuster*, 502 U.S. at 122.

335. See Barbara Rudolph, *Press: Skirting the Issues*, TIME, June 5, 1995, available at <http://www.time.com/time/printout/0,8816,983001,00.html>.

336. See, e.g., Roy Stevenson, *The Real Insight into Travel Writing Perks*, WRITERS WEEKLY

troubling questions about whether Fourth Estate journalists are giving special treatment to their advertisers. Not long ago, the MSNBC show *Morning Joe* aired a long, friendly interview with Starbucks chief executive officer Howard Schulz about the chain's fortieth anniversary after accepting \$10 million from it in advertising.<sup>337</sup> There is social science research pointing to a connection between advertising and editorial content, such as the *New England Journal of Medicine* study on the effect of cigarette advertising in magazines.<sup>338</sup>

If the FTC wants to impose disclosure rules on journalists, to comport with the First Amendment it should do so in ways that focus tightly on the harm being addressed. If the government's concern is preventing people from masking paid product endorsements as journalism, it should develop rules that apply to all such conduct by journalists. The rules should focus on indications that material support may be affecting coverage, not on the kind of journalist involved.

Reporter's shield laws that favor the Fourth Estate over the Fifth are also at odds with the equality principle. The government has a compelling interest in promoting effective journalism, which it has every right to advance through a reporter's privilege. It is within its rights to restrict the privilege to those who are actually engaged in journalism. But any lines it draws among categories of journalists should be narrowly tailored to advance the government's interest. A shield law that applies only to journalists who work for old media outlets fails this test. Alabama's law, for example, protects the fashion reporter or pets columnist for the *Birmingham News*. The author of *Legal Schnauzer*,<sup>339</sup> a hard-hitting investigative journalism blog that regularly breaks news about political malfeasance in the state, is not covered by the privilege.

In deciding who is covered by a reporter's privilege—whether under state or federal law, by statute or judge-made law—it is “incumbent on the State” to make its decisions based “on some acceptable neutral principle.”<sup>340</sup> Courts and legislatures should apply the sort of pragmatic analysis the Supreme Court has taken in free exercise of religion cases.<sup>341</sup>

---

(Nov. 24, 2010), [http://www.writersweekly.com/this\\_weeks\\_article/006406\\_11242010.html](http://www.writersweekly.com/this_weeks_article/006406_11242010.html) (illustrating that the acceptance of free airfare and lodging by travel journalists is common).

337. Brian Steinberg, *Is Starbucks' "Morning Joe" Brew Too Strong?*, ADVER. AGE, Mar. 8, 2011, available at <http://adage.com/article/tuning-in/starbucks-morning-joe-brew-strong/149288/>.

338. See *supra* note 204 and accompanying text.

339. LEGAL SCHNAUZER, <http://legalschnauzer.blogspot.com/> (last visited Nov. 25, 2011).

340. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995).

341. I am indebted for this analogy to a conversation with First Amendment advocate Floyd

In deciding whether a belief system is protected, courts look to see whether that belief system functions the way religions generally do.<sup>342</sup> By similar logic, the test of who is covered by a journalist's privilege should be whether they are engaged in activities that should properly be considered to be journalistic.

Some courts have begun taking this kind of functional approach in interpreting state shield laws. A leading ruling of this kind is the California Court of Appeals opinion in *O'Grady v. Superior Court*, in which an operator of an "online news magazine" about Apple invoked the California shield law when Apple tried to make him disclose a source.<sup>343</sup> Apple argued that he did not qualify under California's shield law, which applies to a "publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication," since he merely "post[ed] information on a website," and was not part of "any professional community governed by ethical and professional standards."<sup>344</sup> The court looked at the actual work of the online news magazine and decided that it was as journalistic as a newspaper. "The shield law is intended to protect the gathering and dissemination of news," the court said, "and that is what petitioners did here."<sup>345</sup>

Not everyone who communicates online is necessarily a member of the Fifth Estate who should be accorded journalistic privileges. As for where the category of journalist should end, in a 2011 case New Jersey's highest court began to sketch out where the limits might lie. In *Too Much Media, LLC v. Shellee Hale*,<sup>346</sup> the court rejected the shield law claim of a woman who investigated the online adult entertainment industry and posted her findings on a public message board. The court noted that New Jersey's shield law is written broadly and did not apply only to reporters for traditional news outlets like newspapers.<sup>347</sup> Still, it insisted the person claiming a reporter's privilege must have some connection to the "news media."<sup>348</sup> The court noted that a "single blogger" might qualify, but that Hale did not because she had left her comments on what was essentially an

---

Abrams.

342. See *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

343. *O'Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 77 (Ct. App. 2006).

344. *Id.* at 99 (quoting CAL. CONST. art. I, § 2(b)).

345. *Id.* at 97.

346. *Too Much Media, LLC v. Hale*, 20 A.3d 364 (N.J. 2011), *aff'g* 993 A.2d 845 (N.J. Super Ct. App. Div. 2010).

347. *Id.* at 368.

348. *Id.* at 383.

online forum for “conversations.”<sup>349</sup>

It is not clear that the court drew the line in the correct place. Hale was clearly closer to being a journalist than someone merely sending out an email to a friend or posting a Facebook update. She had done legitimate reporting about what she saw as an industry rife with abuses, and she conveyed her findings in the place where she thought she could reach the largest interested audience. Even though the court ruled against Hale, it rejected a lower appellate court’s analysis that focused on factors such as whether a journalist had press credentials and adhered to practices like fact-checking and calling subjects for comment.<sup>350</sup> Whether or not it put her in the right category, the New Jersey Supreme Court’s ruling was a victory for the functional approach to defining who is a journalist.<sup>351</sup>

Under the equality principle, newsroom-search laws should similarly not draw lines between the Fourth and Fifth Estates. The federal Privacy Protection Act provides a textual basis for taking a functional approach since it extends to individuals “reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or similar form of public communication.”<sup>352</sup> But however a particular newsroom-search law is written, the First Amendment should be interpreted as prohibiting a regime in which the Fourth Estate is protected and the Fifth Estate is not. In applying federal and state newsroom-search laws, it is important that law enforcement and courts be attentive to the different ways in which the Fourth and Fifth Estates often work. For a newspaper reporter, the most important consideration might be protecting the newsroom and his desk and workspace. For a blogger, a home office, a computer bag, or a virtual storage space in the cloud, may be where the most important journalistic secrets are kept.

Government officials, to comport with the First Amendment equality principle, should also avoid favoring the Fourth Estate over the Fifth in handing out press passes. Blanket rules that exclude bloggers, or that require applicants to be full-time professional journalists, should be seen as improper discrimination among categories of speakers. This does not mean that the government cannot draw any lines. Not everyone who wants to get

---

349. *Id.* at 379–80.

350. *Id.* at 382.

351. Aaron Mackey, *N.J. Shield Law Not Limited to Professional Journalists*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (June 7, 2011, 6:04 PM), <http://www.rcfp.org/newsitems/index.php?i=11909>.

352. 42 U.S.C. § 2000aa(a) (2006).

into the courtroom for a high-profile trial will be able to. The government could distribute press passes on a first-come, first-served basis, or based on neutral principles like how many audience members an outlet has. A blogger who will be given prime placement on the *Huffington Post* may reach a larger audience than a reporter for the *Dallas Morning News*, and if so, he should not lose out simply because he is a blogger. Government could also consider more resourceful solutions, such as setting aside a few press passes that citizen journalists can apply to use for a single day. Such a system would be a way of acknowledging that while a newspaper like the *Cleveland Plain Dealer* or the *San Jose Mercury News* may have more readers than most blogs, the blogosphere as a whole has far more readers than either of them.

Courts may be inclined to analyze press pass policies under First Amendment “public forum” doctrine. Press passes admit journalists to spaces that have limited capacity, and are not simply open to all comers—even all members of the news media. In making decisions about access to limited public forums, the government has some discretion, but it still cannot discriminate on the basis of viewpoint. As the Supreme Court noted in *Rosenberger v. University of Virginia*, even when the government is administering a limited public forum it must avoid imposing restrictions based on the “the perspective of the speaker.”<sup>353</sup> There is enough difference in the perspective of Fourth Estate journalists and citizen journalists that conditioning admission to a limited public forum on being part of the old media should be seen as problematic.<sup>354</sup>

The overarching principle running through all of this is a right of equal treatment: a dedicated reporter seeking to uncover socially important information and disperse it to a wider audience should be treated the same by the government whether she works for the *Washington Post* or for herself. The FTC, a state legislature, or a courthouse press office may have reasons for preferring the Fourth Estate to the Fifth, but the First Amendment should be interpreted as disallowing preferences of this kind. The government should not decide which are trusted and “distrusted sources,” as the Supreme Court said, because “[t]he First Amendment confirms the freedom to think for ourselves.”<sup>355</sup>

---

353. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

354. *See Nation Magazine v. U.S. Dept. of Def.*, 762 F. Supp. 1558, 1573–75 (S.D.N.Y. 1991) (noting that the Pentagon should not select reporters for press pools to cover war on the basis of the content of their writings).

355. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 908 (2010).

---

---

## B. THE RIGHT OF ACCESS TO GOVERNMENT INFORMATION

The second element of the right to participate is a broader First Amendment right of access to government information than currently exists. As the Fourth Estate retreats, there are fewer professional journalists reporting on government and uncovering information of public interest. Expanded access to government information would help the Fifth Estate to fill some of this gap in accountability reporting, providing citizens with more of the information they need to make wise policy decisions and engage in democratic self-government.

Citizen journalists and other members of the Fifth Estate often lack the resources and free time to cover government the way the Fourth Estate does. Many are located far from Washington, D.C., and they may not be able to afford to travel there, making it difficult to cover the President, Congress, the Supreme Court, and federal agencies in person. Distance and limited resources can also interfere with their ability to cover state capitols and city halls. Members of the Fifth Estate who hold other jobs may not have time to attend lengthy legislative sessions, press conferences, or trials. If they work weekdays at non-journalism jobs, they may not be able to attend most government proceedings.

Even if they are able to be where news is happening, Fifth Estate journalists may face other obstacles. They may not be able to get press passes to legislative or executive buildings, and they may not be selected for press seats at high-profile trials. When they want to get information from government officials, Fifth Estate journalists may have trouble getting their phone calls or emails returned. And they may lack the time and resources to do extensive Freedom of Information Act requests.

Fifth Estate journalists and the citizens whose interests they serve would benefit from a broader First Amendment right of access to government information. There are legal precedents to build on, in which courts have recognized the importance of media access to various kinds of information under government control.<sup>356</sup>

The idea of a positive First Amendment right to government information has deep roots. Thomas Emerson, the constitutional scholar, insisted decades ago that the First Amendment contains an affirmative

---

356. This kind of robust right of access could also have success under state constitutions, many of which provide an additional textual hook. Thirty-four state constitutions expressly require that the legislature meet in public, something that is not true of the United States Constitution. Note, *Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 HARV. L. REV. 1199, 1203 (1962).

“right to know” that is “the reverse side of the coin from the right to communicate.”<sup>357</sup> Emerson argued that there was a “firm, indeed overwhelming, theoretical bas[is]” for recognizing a positive right of access.<sup>358</sup> As he saw it, the right of the people to obtain information from government is analogous to the “right of the legislative and judicial branches to obtain information from the executive branch,” which the Supreme Court endorsed in *United States v. Nixon*, the Watergate tapes case.<sup>359</sup>

The Supreme Court has recognized a negative First Amendment right to receive information. In *Lamont v. Postmaster General*, the Court struck down a federal law requiring the Post Office to intercept “communist political propaganda” and deliver it only if the addressee expressly requested it.<sup>360</sup> Interference with the flow of information, the Court said, “is at war with the ‘uninhibited, robust, and wide-open’ debate and discussion that are contemplated by the First Amendment.”<sup>361</sup> In *Stanley v. Georgia*, the Court overturned a state law making it illegal to possess obscene materials at home, citing the constitutional “right to receive information and ideas.”<sup>362</sup>

In 1980, the Supreme Court recognized a positive First Amendment right of access in one area: judicial proceedings. The Sixth Amendment gives criminal defendants a right to a public trial, but it is one they can waive. *Richmond Newspapers, Inc. v. Virginia* arose out a suit by journalists seeking access to a criminal trial that the defendant wanted closed.<sup>363</sup> The Supreme Court ruled that the press and the public had a First Amendment right to attend. Chief Justice Warren Burger’s opinion for a fractured majority emphasized that criminal trials were historically open to the public. Justice William Brennan, in a concurring opinion, justified the right based on the structural role the First Amendment plays in securing and fostering a republican system of government. Implicit in it, he said, was the “assumption that valuable public debate—as well as other civic behavior—must be informed.”<sup>364</sup>

The Supreme Court went on to extend the right of access to other

---

357. Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 2.

358. *Id.* at 14.

359. *Id.* at 15; *United States v. Nixon*, 418 U.S. 683, 707 (1974).

360. *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965).

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

362. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

363. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 555 (1980).

364. *Id.* at 587–88 (Brennan, J., concurring).

aspects of criminal trials. In a series of cases, including *Globe Newspaper Co. v. Superior Court*,<sup>365</sup> *Press-Enterprise Co. v. Superior Court*,<sup>366</sup> and a second *Press-Enterprise Co. v. Superior Court*<sup>367</sup> (“*Press Enterprise II*”), the court arrived at an “experience and logic” test that combined Chief Justice Burger’s focus on the history of openness and Justice Brennan’s focus on when access plays “a significant positive role in the functioning of the particular process in question.”<sup>368</sup>

Lower federal courts have taken the right of access beyond criminal trials. They have recognized a First Amendment right of access to bail hearings,<sup>369</sup> suppression hearings,<sup>370</sup> criminal court records,<sup>371</sup> post-conviction proceedings,<sup>372</sup> civil court proceedings<sup>373</sup> and civil court records.<sup>374</sup> Other access claims have lost, including a suit for access to school board disciplinary records.<sup>375</sup>

A few federal courts have extended the First Amendment right of access beyond the judicial branch, and these rulings begin to suggest what a more expansive positive right of access could look like. Two federal courts have recognized a right of access to news events that are unfolding within the government’s control. A federal court in Boston ruled that the National Transportation Safety Board’s exclusion of the media from the site of an air crash investigation at Logan Airport was inconsistent with the First Amendment.<sup>376</sup> A federal district court in New York ruled that television stations have a limited First Amendment right to cover presidential debates.<sup>377</sup>

Several courts have recognized a First Amendment right of access to administrative agency proceedings. A federal district court in Utah ordered the Mine Safety and Health Administration (“MSHA”) to allow the media to observe an investigative hearing into a coalmine fire that killed twenty-

---

365. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982).

366. *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 501–02, 508 (1984).

367. *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 9 (1986).

368. *Id.* at 8.

369. *In re Globe Newspaper Co.*, 729 F.2d 47, 59 (1st Cir. 1984).

370. *In re The Herald Co.*, 734 F.2d 93, 99 (2d Cir. 1984).

371. *Associated Press v. U.S. Dist. Court*, 705 F.2d 1143, 1145 (9th Cir. 1983).

372. *CBS, Inc. v. U.S. Dist. Court*, 765 F.2d 823, 825–26 (9th Cir. 1985).

373. *See, e.g., Westmoreland v. CBS*, 752 F.2d 16, 23 (2d Cir. 1984).

374. *See, e.g., Wilson v. Am. Motors Corp.*, 759 F.2d 1568, 1571 (11th Cir. 1985).

375. *First Amendment Coal. v. Judicial Inquiry & Review Bd.*, 784 F.2d 467, 477 (3d Cir. 1986).

376. *Westinghouse Broad. v. Nat’l Transp. Safety Bd.*, 8 Media L. Rptr. 1177, 1184 (D. Mass. 1982).

377. *WPIX, Inc. v. League of Women Voters*, 595 F. Supp. 1484, 1489 (S.D.N.Y. 1984).

seven miners. The court relied on the experience and logic test, and in doing so it put considerable emphasis on the fact that access would help ensure that the MSHA did its job properly.<sup>378</sup> The U.S. Court of Appeals for the Second Circuit recently recognized a presumptive First Amendment right of access to New York City Transit Authority hearings at which individuals contest citations they receive on public transportation.<sup>379</sup> In applying the experience and logic test, the court noted that because these hearings are part of “a larger web of government authority,” allowing access helps to inform the public “of the workings of government and fosters more robust democratic debate.”<sup>380</sup> In the wake of the terrorist attacks of September 11, 2001, circuit courts split on whether there is a public right of access to “special interest” immigration hearings.<sup>381</sup>

Another federal court has recognized a First Amendment right of access to the president. In *CNN v. ABC*, CNN challenged a White House ban on television reporters at press conferences, which had been instituted to punish the networks for failing to agree among themselves on how to allocate the limited spots available.<sup>382</sup> In ruling for CNN, a federal district court in Georgia invoked “a right of access to news or information concerning the operations and activities of government,” which is necessary “for a determination by the public of the adequacy of the President’s performance.”<sup>383</sup> The court said it was not enough that print reporters were still allowed to attend the press conferences since “[m]any citizens likely rely on television as their sole source of news” and “[t]elevision film coverage of the news provides a comprehensive visual element and an immediacy . . . not found in print media.”<sup>384</sup>

Expanding on these precedents, a robust First Amendment right of access could require government to make itself more open to the media and the public. As the federal courts that granted access recognized, the public interest is advanced when administrative proceedings are conducted in the open. Just as the *CNN* court recognized that restricting press conferences to

---

378. *Soc’y of Prof’l Journalists v. Sec’y of Labor*, 616 F. Supp. 569, 576 (D. Utah 1985). See also Michael J. Hayes, Note, *What Ever Happened to “The Right to Know”?: Access to Government-Controlled Information Since Richmond Newspapers*, 73 VA. L. REV. 1111, 1125 (1987).

379. See *N.Y. Civil Liberties Union v. N.Y. City Transit Auth.*, 652 F.3d 247, 250 (2d Cir. 2011).

380. *Id.* at 264 (quoting *United States v. Doe*, 63 F.3d 121, 126 (2d Cir. 1995)).

381. Compare *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (finding that the First Amendment requires a presumption of openness) with *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002) (rejecting First Amendment access right).

382. *CNN v. ABC*, 518 F. Supp. 1238, 1239–40 (N.D. Ga. 1981).

383. *Id.* at 1244.

384. *Id.* at 1245.

---

---

print reporters was inadequate because many citizens likely get their news only from television, today the best way of making government proceedings accessible to citizens and journalists who want to observe and comment on them is the Internet. The most effective way to open up most government proceedings would be by livestreaming them online and making an archive of the proceedings available on the Internet. The government should take all reasonable steps to ensure that, in the words of one Fifth Estate journalist, citizen journalists can “cover Congress”—and all of the other parts of government—“[w]ithout [l]eaving [h]ome.”<sup>385</sup>

A First Amendment right of access could prod government to make a broad range of proceedings available to the public online. These could include presidential, gubernatorial, and mayoral press conferences; congressional, state legislative, and city council sessions; agency hearings at the federal, state, and local levels; and most trials and judicial proceedings. The burden and cost of putting in place a small stationary camera and feeding the video online would be minimal—no greater, and perhaps far less, than maintaining press galleries, issuing press passes, and monitoring to ensure that only credentialed reporters gain access. In cases in which putting proceedings online would be unduly burdensome on a unit of government, members of the public could be allowed to make their own videos and post them on the Internet. Given the widespread availability of video cameras in smartphones, it is likely that most government proceedings of any substantial interest to the public would end up on YouTube or somewhere else online. There is a downside to this level of transparency: with omnipresent video, government officials would have to be careful what they say, since their mistakes would live forever. But given the strong interest in observing how government officials conduct the public’s business, the advantages outweigh the disadvantages.

In the case of trials and court proceedings, streaming online is a modern way of achieving the ideal of public access to the courtroom. In another era, allowing members of the public to wander into the courthouse provided a considerable amount of openness. In today’s busy society, the best way to ensure that the public has a reasonable opportunity to observe court proceedings is to make them available online, and to archive the videos so they are available when people have the time to see them.

There may be some trials and court proceedings with subject matter so

---

385. Kelly McBride, *How to Cover Congress Without Leaving Home*, POYNTER (July 26, 2010, 11:08 PM), <http://www.poynter.org/latest-news/making-sense-of-news/104575/how-to-cover-congress-without-leaving-home>.

sensitive, or for which the danger of prejudice is so great, that Internet access would be inappropriate.<sup>386</sup> But the presumption should be that trials and proceedings that are open to the public would be viewable online.<sup>387</sup> In many cases, online access would reduce prejudice rather than contribute to it. Alex Kozinski, the Chief Judge of the U.S. Court of Appeals for the Ninth Circuit, has argued that given the number of spectators who now attend trials with laptops and smartphones and immediately post their reactions in blogs and on Twitter, putting the actual proceedings online would serve a salutary purpose by providing the public with the ability to make its own assessments.<sup>388</sup>

The First Amendment right of access broadly construed should also require that more government documents be put online where they would be more accessible to the Fifth Estate and the general public. Members of the public have a common law right to inspect criminal and civil court records,<sup>389</sup> a right that “like the right to attend judicial proceedings, is important if the public is to appreciate fully the often significant events at issue in public litigation and the workings of the legal system.”<sup>390</sup> It would not be a great leap to hold that the public and journalists have a right to see other government documents that are necessary for monitoring government and holding it accountable.

Access to government documents is an area that has largely been ceded to statutory law since the enactment of the Freedom of Information Act (“FOIA”) and its state-law analogs. But those laws are in many ways inadequate to the needs of journalists, especially citizen journalists. Fifth Estate journalists may not have the time, resources, or expertise to make FOIA requests. Even if they are able to file requests, FOIA only applies to the executive branch, there are generally lengthy processing delays, and as

---

386. The Supreme Court expressed these concerns in *Hollingsworth v. Perry*, 130 S. Ct. 705, 712–14 (2010). The trial judge hearing the constitutional challenge to Proposition 8, the California anti-gay marriage initiative, had ordered that the proceedings be livestreamed to courtrooms in other cities for those who wanted to watch. *Id.* at 706–07. By a 5–4 vote, the Supreme Court blocked the plan, in part out of concern for the effect on witnesses in the highly politically charged trial. *Id.* at 712–15.

387. *See id.* at 719 (Breyer, J., dissenting) (arguing that in a civil case, concerns about transmitting proceedings for viewing in other courthouses are outweighed by, *inter alia*, “the public’s interest in observing trial proceedings to learn about this case and about how courts work”).

388. Alex Kozinski & Robert Johnson, *Of Cameras and Courtrooms*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1107, 1129 (2010) (“If the public is going to judge the resulting cascade of information, it must be given the tools and information necessary to decide for itself whom to believe.”).

389. *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978).

390. *Newman v. Graddick*, 696 F.2d 796, 803 (11th Cir. 1983).

many as two in five requests are never processed at all.<sup>391</sup>

A First Amendment right of access could include a right of access to at least the most important documents “concerning the operations and activities of government,” as the *CNN* court put it.<sup>392</sup> These could include calendars for public hearings, federal, state, and local budgets and proposed budgets, new laws when they are enacted, and special investigative reports. For many citizen journalists, the right to review these documents in Washington, D.C. or the state capital, or in a remote courthouse or government archive, is of little value. To truly vindicate the right of access, a court may have to require that the documents be made available online.

At a minimum, the right of access should create a strong presumption that citizens can post nonsecret government documents without cost. This is not always the case, as an access fight in Oregon demonstrated. Like a number of states,<sup>393</sup> Oregon claims a copyright in its statutes.<sup>394</sup> When a database service tried to make the Oregon Revised Statutes available online for free, the state insisted on being paid for their use.<sup>395</sup> After supporters of free access protested, the state gave in and allowed the statutes to be made available for free.<sup>396</sup> It was not, however, a complete victory. Oregon officials proceeded to assert copyright in the *Attorney General’s Public Records and Meetings Manual*, a guide to the workings of the state’s public information laws.<sup>397</sup> A court applying the First Amendment right of access could hold that citizens have a right to put statutes, government regulations, and government manuals online without paying to do so.

---

391. Ellen Miller, *The Merciful Death of the Freedom of Information Act and the Birth of True Government Transparency: A Short History*, REBOOTING AM. 60–61 (2008), <http://rebooting.personal-democracy.com/files/EllenMiller.pdf>.

392. *CNN v. ABC*, 518 F. Supp. 1238, 1244 (N.D. Ga. 1981).

393. See, e.g., MISS. CODE ANN. § 1-1-9 (2011) (asserting copyright in the state’s laws). See also *Statement of Carl Malamud, Public.Resource.Org, Before the Legislative Counsel Committee, Oregon State Legislature*, PUBLIC.RESOURCE.ORG 3 (June 19, 2008), <https://public.resource.org/scribd/3426062.pdf>.

394. The state’s claim is not to the laws themselves, but to the arrangement of the text, the introductory matter, the numbering, and the organizational structure. See Letter from Dexter Johnson, Legislative Counsel, State of Or., to Tim Stanley, Chief Exec. Officer, Justia Inc. 1 (April 7, 2008). The effect of the claims is the same, however, since they put the Oregon Revised Statutes off limits to anyone who would like to make them available without cost.

395. *Id.* at 1, 2.

396. Letter from Carl Malamud, President & CEO, Public.Resource.Org, to Dexter A. Johnson, Legislative Counsel, State of Or. 3 (Apr. 13, 2008), available at <http://www.scribd.com/doc/2530912/The-Honorable-Dexter-A-Johnson>.

397. See CJ Ciaramella, *Professor Fights State Over Records Manual*, OR. DAILY EMERALD, Oct. 2, 2009, available at <http://dailymerald.com/2009/10/02/professor-fights-state-over-records-manual/>.

## C. POLICIES OF PARTICIPATION

Many changes in law or policy that would help the Fifth Estate report and disseminate news would be difficult to achieve through a First Amendment right of equal treatment or of access to government information. There are, however, policy initiatives that can and should be adopted to support citizen journalists and other members of the Fifth Estate. These policies fall into three broad categories: (1) institutional support; (2) greater government and private sector transparency; and (3) accessibility and openness of the Internet and digital devices.

A lack of institutional support is one of the biggest burdens on citizen journalists. Members of the Fourth Estate do their jobs with the knowledge that they have a powerful media organization behind them. If a member is sued for libel, the company's legal department will provide representation and its insurance will pay any damage award. When the *New York Times's* editors decided that they wanted to publish the Pentagon Papers, the company's lawyers appealed up to the Supreme Court to vindicate their right to do so.<sup>398</sup> And when the *New Yorker* printed an exposé of the Church of Scientology, which has a history of litigating intensely when it is criticized in the press,<sup>399</sup> its journalists were secure in the knowledge that Condé Nast would back them up.<sup>400</sup>

Citizen journalists are more vulnerable than mainstream media to outside pressures of this sort. If a large corporation threatens to sue for libel or law enforcement wants to find out the identity of confidential sources, they may not be able to afford a lawyer to mount a defense. When San Francisco blogger Josh Wolf was imprisoned for refusing to give law enforcement a video he had taken of a demonstration, he had to turn to his mother to operate his blog, on which he solicited contributions toward his legal bills.<sup>401</sup>

Large corporations often use cease-and-desist letters and lawsuits to

---

398. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971); James C. Goodale, *The First Amendment and Freedom of the Press*, USIS—ISSUES OF DEMOCRACY, Feb. 1997, available at [www.jamesgoodale.net/images/109A.doc](http://www.jamesgoodale.net/images/109A.doc).

399. See, e.g., *Supreme Court Declines to Review Libel Case from Church of Scientology*, BOS. GLOBE, Oct. 1, 2001, available at <http://www.9170.org/articles/9170/?&place=north-america&section=scientology> (discussing the Supreme Court's dismissal of a ten-year libel lawsuit by Church of Scientology against Time magazine).

400. See *The Church of Scientology, Fact-Checked*, NPR (Feb. 8, 2011), <http://www.npr.org/2011/02/08/133561256/the-church-of-scientology-fact-checked>.

401. Laura Locke, *Blogging All the Way to Jail*, TIME, Aug. 3, 2006, available at <http://www.time.com/time/nation/article/0,8599,1222780,00.html>.

intimidate citizen journalists. When a blogger who was critical of Wal-Mart registered the website [www.wal-qaeda.com](http://www.wal-qaeda.com), the retailing giant brought a baseless suit for trademark violation.<sup>402</sup> Apple sued a nineteen-year-old blogger who published rumors about new products, claiming he was inducing Apple employees to violate their nondisclosure agreements.<sup>403</sup>

The personal stakes can be high for citizen journalists, who may worry about losing their life savings or their home if they are sued and lose. Not infrequently, members of the Fifth Estate cave under pressure from powerful actors. The National Merit Scholarship Corporation, a well-funded nonprofit organization, threatened to sue an independent college counselor for posting the state-by-state PSAT cutoffs for merit scholarships on her blog, which got about 200 visitors a day. Although the legal claims were weak, she took the information down.<sup>404</sup>

One way policymakers can protect citizen journalists from pressure not to publish is to enact strong anti-SLAPP statutes. These laws are aimed at so-called “strategic lawsuits against public participation,” suits that are filed to intimidate people from speaking out on matters of public concern. Anti-SLAPP laws are designed to embolden citizens to speak out by reducing the burden of these lawsuits and making meritless lawsuits go away quickly. Under California’s statute, defendants can file a special motion to strike, freezing discovery and potentially ending the case at an early stage.<sup>405</sup> If the defendant prevails, he can collect attorneys’ fees and costs.<sup>406</sup>

Citizen journalists have used anti-SLAPP laws to protect themselves against powerful interests that want to silence them. When a Florida developer sued a blogger for writing critically about its projects, the blogger got the suit dismissed under that state’s anti-SLAPP law and recovered more than \$180,000 in attorney’s fees.<sup>407</sup> Another citizen journalist used California’s anti-SLAPP law to dismiss a defamation action

---

402. *Smith v. Wal-Mart Stores, Inc.*, 537 F. Supp. 2d 1302, 1340 (N.D. Ga. 2008).

403. *Apple Targets Harvard Student for Product “Leaks,”* INFORMATIONWEEK (Jan. 13, 2005, 12:00 PM), <http://www.informationweek.com/news/57701119?queryText=imac>; Saul Hansell, *Who Is Really Hurt By Apple Rumor Site’s Closure*, N.Y. TIMES (Dec. 20, 2007, 6:07PM), <http://bits.blogs.nytimes.com/2007/12/20/who-is-really-hurt-by-apple-rumor-sites-closure/>.

404. Eric Hoover, *How a Scholarship Corporation Tried to Muzzle a Blogger*, CHRONICLE OF HIGHER EDUCATION (Feb. 8, 2010), <http://chronicle.com/article/How-a-Scholarship-Corporation/64052/>.

405. CAL. CIV. PROC. § 425.16(g) (West 2010).

406. *Id.* § 425.16(c).

407. *Veranda Partners, LLC v. Giles*, CITIZEN MEDIA LAW PROJECT (Sept. 10, 2007), <http://www.citmedialaw.org/threats/veranda-partners-v-giles-lawsuit>.

brought by a plastic surgeon she had criticized on her blog.<sup>408</sup>

Only about half of states currently have anti-SLAPP laws,<sup>409</sup> and some of the statutes are written so narrowly that they do not cover many of the citizen journalists who need them. New York's law only applies to speech concerning applications to government, which protects citizen journalists who write about real estate development projects but does not help journalists who write about other important subjects. States that do not have anti-SLAPP laws should enact strong ones, and states with narrow laws should broaden them.<sup>410</sup> A strong federal anti-SLAPP law would be the best solution of all.<sup>411</sup>

Another way policymakers could give citizen journalists some of the institutional support that they now lack is to subsidize libel insurance. Many bloggers and community news sites do not carry insurance, which can be prohibitively expensive and often comes with high deductibles.<sup>412</sup> If government subsidized libel insurance, it would be a recognition that society as a whole benefits from Fifth Estate journalism.<sup>413</sup> There is precedent for government providing subsidies for insurance when it is socially desirable for people to have it. The Federal Crop Insurance Corporation has subsidized farmers' crop insurance since 1938.<sup>414</sup> The federal government subsidizes flood insurance for homeowners and businesses, and in 2014 it will begin to subsidize health insurance.<sup>415</sup>

Bringing down the cost of libel insurance could be seen as creating a moral hazard, encouraging journalists to speak too freely and engage in excessive risk taking. But freewheeling speech on matters of public concern is precisely what the First Amendment contemplates. In *New York*

---

408. *Gilbert v. Sykes*, 53 Cal. Rptr. 3d 752, 757 (Ct. App. 2007).

409. See *Rule 10. Seek Legal Advice*, KNIGHT CMTY. NEWS NETWORK, [http://www.kcnn.org/legal\\_risk/rule\\_10/](http://www.kcnn.org/legal_risk/rule_10/) (last visited Nov. 25, 2011).

410. See, e.g., N.Y. CIV. RIGHTS LAW § 70-a (McKinney 2011) (limiting New York anti-SLAPP law to speech concerning an application or permission by the government); N.M. STAT. ANN. § 38-2-9.1 to -9.2 (2001) (limiting New Mexico law to statements in connection to a public hearing or public judicial proceeding).

411. See, e.g., Citizen Participation Act of 2009, H.R. 4364, 111th Cong. (1st Sess. 2009).

412. Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1339 (1992).

413. FREEING THE PRESSES: THE FIRST AMENDMENT IN ACTION 64 (Timothy E. Cook, ed., 2005).

414. *A History of the Crop Insurance Program*, U.S. DEP'T OF AGRIC. RISK MGMT. AGENCY, <http://www.rma.usda.gov/aboutrma/what/history.html> (last visited Nov. 25, 2011).

415. See Schauer, *supra* note 412, at 1340; *About the National Flood Insurance Program*, FLOODSMART.GOV, [http://www.floodsmart.gov/floodsmart/pages/about/nfip\\_overview.jsp](http://www.floodsmart.gov/floodsmart/pages/about/nfip_overview.jsp) (last visited Nov. 25, 2011); Peter Grier, *Health Care Reform Bill 101: Who Gets Subsidized Insurance?*, CHRISTIAN SCI. MONITOR, Mar. 20, 2010, available at <http://www.csmonitor.com/USA/Politics/2010/0320/Health-care-reform-bill-101-Who-gets-subsidized-insurance>.

*Times v. Sullivan*, the Supreme Court set an extremely high bar for proving libel because it wanted to promote “uninhibited, robust, and wide-open” discourse.<sup>416</sup> Given the choice of protecting speech edging toward recklessness or punishing such speech at the risk of chilling expression, the Court has consistently erred on the side of more robust speech.<sup>417</sup>

More widely available libel insurance might well encourage citizen journalists to act with more care, not less. Insurers have a financial incentive to induce their customers to engage in less risky behavior. Auto insurance companies give discounts for attending safe driving school, and homeowners can reduce their premiums by installing burglar alarms. Libel insurers would be likely to lower rates for members of the Fifth Estate who adhere to good journalistic practices, such as correcting errors quickly and prominently, or for taking lessons in responsible journalism. At the same time, they would be likely to raise premiums for customers who engage in reckless practices.<sup>418</sup>

Government can also help compensate for the institutional support many Fifth Estate journalists are missing by removing the bias in favor of old media from existing laws and policies, whether or not it is constitutionally required. Strong shield and newsroom search laws that clearly apply to the Fifth Estate make it easier for citizen journalists to protect themselves from outside pressures. More equitable press pass and press access policies can help make up for the fact that Fifth Estate journalists often do not have a major media organization behind them when they go out to report.

A second way that government can promote participation is by adopting laws and policies that increase transparency in both the public and private sectors. Open meeting and freedom of information laws are generally thought of as good-government policies, but in the current media ecology they also have important implications for journalism. Federal, state, and local government should strengthen and expand these laws to make it easier for the Fifth Estate, and the resource-strapped Fourth Estate, to do accountability journalism.

Open meeting laws exist at the federal level and in all fifty states.<sup>419</sup>

---

416. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

417. Schauer, *supra* note 412, at 1340 & n.57.

418. See Stephanie Auwerter, *Six Ways to Save on Auto Insurance*, SMART MONEY, July 9, 2008, available at <http://www.smartmoney.com/spend/family-money/six-ways-to-save-on-auto-insurance-14275/>.

419. See *The First Amendment Handbook Chapter 9—Freedom of Information Acts*, REPORTERS

Governments should take these laws to the next level by requiring meetings not only to be open but livestreamed over the Internet, so journalists can cover them remotely. When elected officials hold press conferences, from the President on down to local zoning boards, there should be mechanisms in place for citizen journalists to submit questions over the Internet.<sup>420</sup> Public sessions of federal, state, and local agencies should also be livestreamed. The government should archive these videos online so journalists can go back and review proceedings after they are over.

Government should adopt policies to make public documents more accessible. Rather than wait for a FOIA request, public officials should begin with the presumption that nonconfidential information of broad general interest will be placed online as it is created. The executive branches of federal, state, and local government should regularly put orders, agency rules and regulations, and reports online.<sup>421</sup> Congress and state and local legislatures should post statutes, draft legislation, committee reports, and vote tallies. Congress's Thomas system is a good step in this direction.<sup>422</sup> Internal legislative machinations should also be made more transparent. Committees should put their rules, hearing schedules, witness lists, and votes online. "Dear Colleague" letters, in which a member of Congress asks for support from other members, should also be posted.<sup>423</sup>

The judiciary should also be more open. Federal, state, and local courthouses should be outfitted with cameras and proceedings should be livestreamed over the Internet unless there is a compelling reason not to, such as a clear threat to a criminal defendant's fair trial rights.<sup>424</sup> The U.S.

---

COMM. FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/handbook/?pg=9-1&PHPSESSID=443b553852cde37f667a3d72862dbc7f> (last visited Nov. 25, 2011).

420. President Obama's 2010 YouTube press conference is a model that should be widely replicated. See Jesse Lee, *That Time You Interviewed the President*, WHITE HOUSE BLOG (Feb. 1, 2010, 9:23 PM), <http://www.whitehouse.gov/blog/2010/02/01/time-you-interviewed-president>.

421. Testimony of Ellen S. Miller, Executive Director of the Sunlight Foundation Before the Senate Committee on Homeland Security and Governmental Affairs Subcommittee on Federal Financial Management, Governmental Information, Federal Services, and International Security, SUNLIGHT FOUNDATION (Mar. 18, 2010), <http://www.scribd.com/doc/28821821/Sunlight-Foundation-Senate-Committee-on-Homeland-Security> (stating that the standard for "public" should be "freely accessible online").

422. See *About Thomas*, THOMAS, [http://thomas.loc.gov/home/abt\\_thom.html](http://thomas.loc.gov/home/abt_thom.html) (last visited Nov. 25, 2011).

423. House Rule Changes: Sunlight's Proposals for the 112th Congress, SUNLIGHT FOUNDATION 4 (Sept. 16, 2010), <http://assets.sunlightfoundation.com/s3.amazonaws.com/policy/papers/112th%20Congress%20-%20Proposals%20for%20House%20Rules%20Changes.pdf>.

424. See, e.g., *Estes v. Texas*, 381 U.S. 532, 534-35 (1965). See also FED. R. CRIM. P. 53; MARC A. FRANKLIN, DAVID A. ANDERSON & LYRISSA BARNETT LIDSKY, *MASS MEDIA LAW* 700-02 (7th ed. 2005) (discussing role of media in federal criminal trials); Michael C. Dorf, *Arlen Specter's Swan Song*:

Supreme Court still bars cameras, and the federal rules of criminal procedure prohibit them at federal criminal trials, but these rules are ripe for reconsideration.<sup>425</sup> Courts should post all published decisions, briefs, motions, and dockets. The Public Access to Court Electronic Records (“PACER”) is a laudable effort to share federal court documents, but it has two significant shortcomings. There are fees to use PACER documents, which is a major impediment to use by both citizen journalists and the public. It also works on proprietary standards, which means it is not as interoperable and easily used as a service like LexisNexis.<sup>426</sup>

Citizen journalists need not only access to raw documents, but also explanations, or what has been called “level-two transparency.”<sup>427</sup> Government press offices generally provide guidance to mainstream journalists, walking them through the details of complicated government actions or documents. To ensure that Fifth Estate journalists get the information they need, press offices should routinely prepare online FAQs for all significant actions. Press offices should use tools like email alerts and RSS feeds so that citizen journalists, who may have more distractions than members of the Fourth Estate, can keep up with breaking news.<sup>428</sup>

Policymakers should also work to increase the transparency of the private sector. With old media in decline, there will be more need for Fifth Estate journalists to undertake the difficult work of understanding corporations and their activities. Laws that require companies to disclose more of their documents and financial information can make this kind of reporting easier.<sup>429</sup> The disclosure provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act provide examples of how this kind of corporate transparency can work. Among other things, they require

---

*Mandating Cameras in the Supreme Court*, FINDLAW (Sept. 20, 2010), <http://writ.news.findlaw.com/dorf/20100920.html> (noting the Supreme Court’s resistance to permitting television coverage in its courtroom).

425. The recognition of this right would no doubt occur in some courts, and for some kinds of trials, before others. It would likely come slowest to the Supreme Court and federal criminal trials, where television cameras are now banned. FRANKLIN, ANDERSON & LIDSKY, *supra* note 424, at 702.

426. See Timothy B. Lee, *The Case Against PACER: Tearing Down the Courts’ Paywall*, ARS TECHNICA, <http://arstechnica.com/tech-policy/news/2009/04/case-against-pacer.ars> (last visited Dec. 11, 2011).

427. McBride, *supra* note 385.

428. FED. COMM’NS COMM’N, *Connecting America: The National Broadband Plan* 317 (Mar. 16, 2010), <http://download.broadband.gov/plan/national-broadband-plan.pdf> [hereinafter *Connecting America*].

429. Zachary A. Goldfarb, *SEC Tightens Rules on Investment Advisers, Corporate Transparency*, WASH. POST, Dec. 17, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/16/AR2009121604148.html>.

mining companies to include safety information in their annual and quarterly SEC filings and to report any shutdown and violation notices that they receive from the Department of Labor's Mine Safety and Health Administration.<sup>430</sup> Having this information easily accessible makes reporting on mine safety substantially easier than it would otherwise be.

Corporate transparency of this sort is needed in other subject areas. One high priority, after the *Citizens United* ruling, should be strict disclosure rules for all corporate campaign expenditures.<sup>431</sup> There should also be transparency laws aimed at important but opaque institutions, such as the hedge fund industry. Since the economic meltdown of 2008, there have been concerns about the paucity of disclosure requirements for hedge funds. The proposed Hedge Fund Transparency Act is an effort to change that.<sup>432</sup> Among other things, it would require hedge funds to disclose information on fund owners, assets, equity structure, and affiliations, and it would make this information available to the public in searchable form.<sup>433</sup> Like the mining disclosures, this information would be invaluable to citizen journalists who lack the investigative resources of old media.

A final area in which policies of participation are needed is in making the Internet more widely available and ensuring that it remains a relatively neutral platform. Even in what is often called the Internet Age, the FCC found in 2010 that about one-third of the U.S. population, or one hundred million people, lack broadband connections at home.<sup>434</sup> Many Americans still live in areas without a broadband infrastructure, while for others cost is a deterrent.<sup>435</sup> The high percentage of Americans who are not participating in broadband undermines the nation's longstanding commitment to universal communications service.<sup>436</sup> It also creates a "digital divide," since

---

430. See Marcy Murningham, *Extractives: Dirty Industries, Clean Standards*, MURNINGHAN POST (Dec. 21, 2010), <http://murninghampost.com/2010/12/21/extractives-dirty-industries-clean-standards/>.

431. See John Bresnahan, *Schumer to Push New Campaign Law*, POLITICO (July 22, 2010, 5:34 PM), <http://www.politico.com/news/stories/0710/40126.html>.

432. See William McEachron, *The Hedge Fund Transparency Act*, THE RACETOTHEBOTTOM.ORG (Mar. 14, 2009, 6:00 AM), <http://www.theracetothetbottom.org/miscellaneous/the-hedge-fund-transparency-act.html> ("Funds with more than \$50 million in assets, regardless of the number of clients, must file with the SEC.")

433. Anita K. Krug, *The Hedge Fund Transparency Act of 2009*, BERKELEY CTR. FOR LAW, BUS. AND THE ECON. 1 (Feb. 9, 2009), [http://www.law.berkeley.edu/files/Hedge\\_Fund\\_Transparency\\_Act\\_Comments\\_A.Krug.pdf](http://www.law.berkeley.edu/files/Hedge_Fund_Transparency_Act_Comments_A.Krug.pdf).

434. *Connecting America*, *supra* note 428, at 3.

435. *Id.* at 129.

436. 47 U.S.C. § 151 (2006) (expressing Congress's desire to "make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges").

poor people, blacks, Hispanics, rural residents, the elderly, and Indians living on tribal lands are disproportionately disconnected.<sup>437</sup>

For the Internet to live up to its promise of allowing all Americans to participate in journalism, both as producers and consumers, there has to be broader access.<sup>438</sup> Federal, state, and local governments should work together to extend broadband to underserved communities and individuals through economic incentives and through their own infrastructure-building projects.<sup>439</sup>

To participate in new media journalism, people need a basic level of “digital literacy.” They should be able to create and maintain blogs; upload photographs, video and audio; and set up and run comment sections. Many potential citizen journalists lack these skills, and even much more basic ones, such as the ability to navigate with a mouse or use passwords. In an FCC study, about half of the 22 percent of Americans who do not use the Internet gave a lack of digital skills as a main reason.<sup>440</sup>

There should be a broad societal commitment to digital literacy. Public schools should train students in the tools of citizen journalism and adults should be able to learn these skills in community colleges, community centers, and public libraries. The FCC is moving in the right direction by calling for the creation of a National Digital Literacy Corps, modeled on programs like AmeriCorps, to bring digital literacy to underserved communities.<sup>441</sup>

In addition to increasing access, the government should ensure that platforms on which new media is transmitted remain relatively neutral. The

---

437. *Connecting America*, *supra* note 428, at 23, 60; *Informing Communities: Sustaining Democracy in the Digital Age*, KNIGHT COMM’N ON THE INFORMATION NEEDS OF CMTYS. IN A DEMOCRACY 1 (2009), [http://www.knightcomm.org/wp-content/uploads/2010/02/Informing\\_Communities\\_Sustaining\\_Democracy\\_in\\_the\\_Digital\\_Age.pdf](http://www.knightcomm.org/wp-content/uploads/2010/02/Informing_Communities_Sustaining_Democracy_in_the_Digital_Age.pdf) [hereinafter *Informing Communities*]. Having broadband in the home is important for participation. In libraries and other communal sites, the use of Internet-connected computers often has time limits. Libraries also have limited hours, preventing users from accessing computers for much of the day. They may also have filters, and there may be prohibitions or limits on downloading information. *Informing Communities, supra*.

438. See Tim Wu & Christopher S. Yoo, *Keeping the Internet Neutral?: Tim Wu and Christopher Yoo Debate*, 59 FED. COMM. L.J. 575, 585 (2007).

439. *Id.* at 586–87. In March 2010, the FCC announced a plan to make affordable broadband available to all Americans, but it is not attempting to achieve universal access until 2020. See *Connecting America, supra* note 428, at 135; Marguerite Reardon, *FCC Unveils National Broadband Plan*, CNET (Mar. 15, 2010, 10:37 AM), [http://news.cnet.com/8301-30686\\_3-20000453-266.html](http://news.cnet.com/8301-30686_3-20000453-266.html).

440. *Connecting America, supra* note 428, at §§ 9.1, 9.3.

441. Grant Gross, *FCC to Propose National Digital Literacy Corps*, COMPUTERWORLD (Mar. 9, 2010, 4:59 PM), [http://www.computerworld.com/s/article/9168318/FCC\\_to\\_propose\\_national\\_digital\\_literacy\\_corps](http://www.computerworld.com/s/article/9168318/FCC_to_propose_national_digital_literacy_corps).

neutrality of the Internet—the fact that it generally treats the data that travels over it equally regardless of its source<sup>442</sup>—has been a boon to citizen journalism. It allows an individual blog or a nonprofit website to have the same potential audience as a major media site, and to operate at the same speed. It has also been important for the Fourth Estate, especially for smaller journalistic players that compete with large media companies.

This neutrality could be compromised, however, as Internet service providers (“ISPs”) assert the right to pick and choose among content.<sup>443</sup> ISPs have a financial incentive to adopt schemes such as “access tiering,” in which media companies pay to have their content travel in the “fast lane.”<sup>444</sup> In addition to delivering content at different speeds, ISPs may decide to block some content entirely, either because they see it as not in their corporate interests or because they do not agree with it.<sup>445</sup> There have already been instances of ISPs engaging in content discrimination of this sort, including one in which AT&T shut off the sound on streaming video of a Pearl Jam concert when the lead singer, Eddie Vedder, sang “George Bush, leave this world alone.”<sup>446</sup> ISPs may be especially inclined to block entertainment sites that compete with their business partners.

If the Internet’s neutrality erodes, it will put ordinary citizens who want to engage in journalism at a disadvantage. Large and well-capitalized news websites will be able to pay to have their content receive favored treatment. Citizen journalism outlets and other less well-funded media could be relegated to the Internet slow lane, a handicap that will matter more as video becomes a larger part of online journalism. Major media companies might persuade ISPs to block some Fifth Estate sites completely.<sup>447</sup> To prevent the media landscape from being distorted in this way, Congress and the FCC should adopt strong network neutrality rules, something that seems unlikely in the near future.<sup>448</sup>

---

442. JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET AND HOW TO STOP IT* 178 (2008).

443. Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 428–29 (2008); Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986, 996–1002 (2008); *Network Neutrality 101: Why the Government Must Act to Preserve the Free and Open Internet*, AM. CIVIL LIBERTIES UNION 6–8 (Oct. 2010), [http://www.aclu.org/files/assets/NetNeutrality\\_report\\_20101019.pdf](http://www.aclu.org/files/assets/NetNeutrality_report_20101019.pdf) [hereinafter *Network Neutrality 101*].

444. Wu & Yoo, *supra* note 438, at 582. See also Barbara Van Schewick, *Towards an Economic Framework For Network Neutrality Regulation*, 5 J. TELECOMM. & HIGH TECH. L. 329, 335–36 (2007).

445. Wu & Yoo, *supra* note 438, at 577–78.

446. *Network Neutrality 101*, *supra* note 443, at 6–9.

447. See *Network Neutrality FAQ*, TIMWU.ORG, [http://timwu.org/network\\_neutrality.html](http://timwu.org/network_neutrality.html) (last visited Nov. 25, 2011) (describing blocking as “the worst deviation from neutrality”).

448. Edward Wyatt, *House Votes Against “Net Neutrality,”* N.Y. TIMES, Apr. 8, 2011, available

The threat to neutrality does not come only from ISPs. As more news is consumed on smartphones, tablet computers, and other digital devices, the manufacturers of those devices are becoming powerful news gatekeepers. In its App Store, Apple promotes content it likes while censoring other content.<sup>449</sup> The publisher of a magazine about the Android, a leading iPhone competitor, complained that Apple banned his publication from the App Store because of its subject matter.<sup>450</sup> With more than 160 million iTunes subscribers making media purchases through Apple, the company has become a more powerful force in content promotion than any bricks-and-mortar retailer.<sup>451</sup> Apple's power as a gatekeeper is only likely to increase as it moves into new areas like Apple Television.<sup>452</sup>

Walled gardens like the App Store present the same problems for the Fifth Estate—and the Fourth Estate—as a non-neutral Internet. When corporations have the power to choose among content, they can favor media organizations that pay for preferred treatment and ones with which they have business arrangements. At the same time, they can shut out publications that are critical of them or that take editorial positions that are not in the corporations' interest.<sup>453</sup> If media organizations have to rely on the goodwill of the censors in the App Store and other distribution hubs, they may engage in self-censorship. Federal regulators have reportedly been considering an antitrust inquiry into Apple's application policies.<sup>454</sup> Although there have been questions about the legal basis for such an inquiry,<sup>455</sup> regulators should use whatever authority they have to prevent

---

at <http://www.nytimes.com/2011/04/09/business/media/09broadband.html>.

449. Nathan Olivarez-Giles, *Apple Launches Subscriptions in App Store for Magazines, Newspapers, Videos and Music*, L.A. TIMES (Feb. 15, 2011, 1:00PM), <http://latimesblogs.latimes.com/technology/2011/02/apple-launches-subscriptions-in-app-store-for-magazines-newspapers-videos-and-music.html>.

450. Dakota Torres, *Android Magazine Banned from Apple App Store*, ANDROID CMTY. (Nov. 28, 2010), <http://androidcommunity.com/android-magazine-banned-from-apple-app-store-20101128/>.

451. Ken Doctor, *Apple's "New" Policy: Looking Beyond Digital Circ Dollars to Ads & Data*, NEWSNOMICS (Feb. 15, 2011), <http://newsonomics.com/apples-new-policy-looking-beyond-digital-circ-dollars-to-ads-data/>.

452. See Jesus Diaz, *An Apple Television is a Very Stupid Idea*, GIZMODO (Aug. 16, 2010, 3:05 PM), <http://gizmodo.com/5613905/an-apple-television-is-a-very-stupid-idea>; Jason Kincaid, *Why Are You People Defending Apple?*, TECHCRUNCH (Feb. 16, 2011), <http://techcrunch.com/2011/02/16/why-are-you-people-defending-apple/>.

453. See, e.g., Emma Barnett, *Adobe: Apple Wants to Turn the Web into a Walled Garden*, TELEGRAPH (May 6, 2010, 9:28 AM), <http://www.telegraph.co.uk/technology/apple/7684631/Adobe-Apple-wants-to-turn-the-web-into-a-walled-garden.html>.

454. Thomas Catan & Yukari Iwatani Kane, *Apple Draws Scrutiny From Regulators*, WALL ST. J., May 4, 2010, available at <http://online.wsj.com/article/SB10001424052748703612804575222553091495816.html>; Doctor, *supra* note 78.

455. Nathan Koppel, *Apple's Subscription Rules Raise Possible Antitrust Issues*, WALL ST. J.

Apple from exerting a chokehold over the distribution of news and other content.<sup>456</sup>

Search engines like Google are another potential source of non-neutrality. Search engines have considerable power to promote some media sites and bury others based on how they apply their search algorithms. A number of prominent websites, including Expedia, TripAdvisor, and WebMd.com have accused Google of favoring its own websites over theirs.<sup>457</sup> There are growing calls for “search neutrality,” to rein in the power of search engines to favor some content over others.<sup>458</sup> Both federal and European Union regulators have been investigating Google for possible anticompetitive practices.<sup>459</sup>

Search engines could put the Fifth Estate and citizen journalists at a disadvantage if they begin to favor major media organizations in their search results. Google has readjusted its algorithm to reduce the prominence of “content farms,” a move that many journalists have welcomed.<sup>460</sup> But in the future, Google, Bing, and other search engines could promote media organizations they like and downgrade or remove ones they do not approve of. This is a sensitive area, since Google may have First Amendment rights in how it displays search results, but the government should look for ways to ensure that the Fifth Estate and smaller media voices are not denied a fair opportunity to reach potential audiences.

## V. AN ARCHITECTURE OF ACCOUNTABILITY

A right to participate could encourage the emergence of a robust Fifth Estate that helps to replace old media resources that are being lost and that makes its own contributions to First Amendment values. It does nothing, however, to rein in the abuses of new media—the Andrew Breitbart

---

(Feb. 16, 2011, 1:56 PM), <http://online.wsj.com/article/SB10001424052748704409004576146613997208194.html>.

456. See, e.g., Jay Yarow, *The OpenAppMkt Is Here to Break Down Apple's Walled Garden*, S.F. CHRONICLE (July 30, 2010), <http://www.sfgate.com/cgi-bin/article.cgi?f=/g/a/2010/07/30/business-insider-the-openappmkt-apple-2010-7.DTL>.

457. Thomas Catan & Amir Efrati, *Feds to Launch Probe of Google*, WALL ST. J., June 24, 2011, available at <http://online.wsj.com/article/SB10001424052702303339904576403603764717680.html>.

458. Nate Anderson, *Search Neutrality? How Google Became a "Neutrality" Target*, ARSTECHNICA, <http://arstechnica.com/tech-policy/news/2010/04/search-neutrality-google-becomes-neutrality.ars> (last visited Nov. 25, 2011).

459. Catan & Efrati, *supra* note 457.

460. Michael Arrington, *Google Targets Content Farms with Major Search Algorithm Tweaks*, TECH CRUNCH (Feb. 24, 2011), <http://techcrunch.com/2011/02/24/google-targets-content-farms-with-major-search-algorithm-tweaks/>.

problem and its variations.<sup>461</sup> It is difficult to legislate responsible journalism because of the constraints of the First Amendment, but the Fifth Estate can and should self-police.

New media should establish an “architecture of accountability.” Not every member of the Fifth Estate will want to do this. An individual who Tweets from the scene of a natural disaster or who occasionally posts amateur videos of protests may not worry about credibility the way a traditional news organization does. But new media outlets that do want to be taken seriously as news providers—including some individual blogs, nonprofit community newspapers, and the like—may want to establish their credibility as a journalistic source. They can work to do so by adopting polices that (1) promote factual accuracy; (2) discourage, or at least reveal, conflicts of interest; and (3) identify and marginalize bad actors. The government can help promote accountability as well, not by imposing regulations on the news media, but by working to make news audiences more discerning.

A common criticism of new media is that it is far less reliable than old media. This contention is often overstated. The cliché of the new media as being made up of bloggers in pajamas with little concern about quality control was never true, but it is especially far from the mark today. There is certainly a great deal of inaccuracy in the blogosphere, but there are also many Fifth Estate news outlets, such as *Talking Points Memo* and *SCOTUSblog*, with well-earned reputations for accuracy. Blogs and nonprofit news sites often have corrections policies that are similar to those used in old media. The Mayo Clinic’s blog, for example, states that it will correct content that is “confusing, misleading or inaccurate,” and it keeps a running list of all content that has been revised in the past thirty days.<sup>462</sup>

If the Fifth Estate is not as unconcerned about accuracy as is often said, the Fourth Estate’s editorial practices are not always as exacting as their audiences might assume. Even the most respected newspapers rarely assign fact checkers to review stories before they are printed.<sup>463</sup> When mistakes are identified, old media’s commitment to running corrections is uneven. One survey of thirty-five leading newspapers found that fewer than

---

461. See *supra* notes 248–62 and accompanying text.

462. See *Corrections Policy*, MAYO CLINIC, <http://www.mayoclinic.com/health/AboutThisSite/AM00045> (last visited Nov. 25, 2011).

463. Brendan Koerner, *Who Uses Fact Checkers, Anyway?*, SLATE (May 23, 2003, 2:40 PM), <http://www.slate.com/id/2083529/>.

half had published corrections policies.<sup>464</sup> A journalism professor writing in a Nieman Foundation publication stated that when old media makes errors they are “rarely . . . corrected.”<sup>465</sup> Television news almost never runs a correction, despite high error rates.<sup>466</sup> There are plenty of examples of the most respected old media outlets printing and publishing wildly inaccurate information.<sup>467</sup>

Further blurring the lines between Fourth and Fifth Estates is the fact that, as the news cycle speeds up, the journalistic practices of old and new media are beginning to converge. Newspaper and television websites have begun acting more like the Internet-based news sites they are now competing with. When Congresswoman Gabrielle Giffords was shot in early 2011, NPR, CNN, and the *New York Times* website all falsely declared Giffords to be dead, just as many new media sites did. If old media has different standards for verifying important facts on a breaking news story, it was not apparent that day.<sup>468</sup>

If the differences between the Fourth and Fifth Estate are not always as stark as their reputations might suggest, it is nevertheless true that old media generally ascribes to a particular editorial model that is intended to promote accuracy. For the most part, old media journalists collect their information and produce copy, and an editor then reviews it for style, accuracy, and fairness before publication. This process is intended to

---

464. Mark Follman & Scott Rosenberg, *The Wrong Stuff*, MEDIA BUGS (Nov. 8, 2010), <http://mediabugs.org/pages/the-wrong-stuff>.

465. Scott R. Maier, *Confessing Errors in a Digital Age*, NEIMAN REPORTS (Fall 2009), <http://www.nieman.harvard.edu/reportsitem.aspx?id=101903>.

466. CRAIG SILVERMAN, REGRET THE ERROR: HOW MEDIA MISTAKES POLLUTE THE MEDIA AND IMPERIL FREE SPEECH 78 (2007).

467. In 2010, the *Washington Post* printed in its paper edition an erroneous report on where the Obamas had spent Valentine’s Day of 2010. The error was made by a staff member who researched the item using Google, and failed to realize that the news story he was relying on was a year old. Andy Alexander, *Embarrassing Error on Obamas’ Valentine’s Dinner*, WASH. POST (Feb. 15, 2010, 3:39 PM) [http://voices.washingtonpost.com/ombudsman-blog/2010/02/embarrassing\\_error\\_on\\_obamas\\_v.html](http://voices.washingtonpost.com/ombudsman-blog/2010/02/embarrassing_error_on_obamas_v.html). In July 2010, a seasoned *New York Times* political reporter fell for a prank and reported that a black Senate candidate from South Carolina had produced a hip hop campaign video. *Not Again! NYT’s Katharine Q. Seelye Falls for Phony Alvin Greene Campaign Video Posted on YouTube by Pranksters*, NYTPICKER (July 25, 2010, 11:14 AM), <http://www.nytpick.com/2010/07/not-again-nyts-katharine-q-seelye-falls.html>.

468. See NPR, Reuters, CNN and Other Major News Orgs Incorrectly Declare Death of Rep. Giffords, REGRET THE ERROR (Jan. 8, 2011), <http://www.regrettheerror.com/2011/01/08/npr-reuters-cnn-and-other-major-news-orgs-incorrectly-declare-death-of-rep-giffords/> (“Major news organizations raced to gather reporting, and information began to spread quickly . . . As is often the case, this led to a lot of mistakes . . .”). In fact, Giffords was still in surgery and survived the attack. Keach Hagey, *Media Chaos Over Giffords’ Status*, POLITICO (Jan. 8, 2011, 3:13 PM), [http://www.politico.com/blogs/onmedia/0111/Media\\_chaos\\_over\\_Giffordss\\_status.html](http://www.politico.com/blogs/onmedia/0111/Media_chaos_over_Giffordss_status.html).

provide a check by the news organization, through an editor it trusts, on the decisions of individual journalists.

Some Fifth Estate news organizations also follow this editorial model, but many more do not, whether due to lack of resources or lack of desire. Instead of the old media practice of “filter, then publish” they “publish, then filter.”<sup>469</sup> In this model, Fifth Estate journalists produce their work, post it online, and invite responses to it either expressly or implicitly. The journalistic outlet can then make changes based on any criticism it receives.<sup>470</sup> In effect, fact checking and editing are outsourced to a network of readers.<sup>471</sup> Networked approaches to editing news may not be much worse than the old media model. At least one academic study concluded that Wikipedia, which operates on a group-editing model, is roughly as accurate as encyclopedias written and edited the traditional way.<sup>472</sup>

To optimize the way in which networked fact checking operates, the Fifth Estate should put the right mechanisms in place. New media news outlets can promote accuracy by saying prominently and clearly that it is something they value. They should adopt strong corrections policies and promote them heavily so the audience knows about them. There should be easy templates for submitting proposed corrections, and when errors are identified they should be corrected immediately. New media should be transparent about corrections when they make them, posting an announcement that a change has been made, so the audience can follow along.

Although the FTC was wrong to assume in its endorsement guides that the Fifth Estate is inherently more corruptible than the Fourth Estate, the two sectors often take different approaches to ethical standards. Major newspapers generally have conflict-of-interest policies that apply to all of their journalists.<sup>473</sup> Among other things, these policies usually bar reporters from accepting items of more than nominal value from individuals and

---

469. Clay Shirky, *Broadcast Institutions, Community Values*, SHIRKY.COM (Sept. 9, 2002), [http://www.shirky.com/writings/broadcast\\_and\\_community.html](http://www.shirky.com/writings/broadcast_and_community.html).

470. In another model, the journalistic outlet whose work is criticized does not necessarily make changes, but the truth emerges in the interplay between that source and its online critics.

471. Glenn Fleishman, *Is the Internet a Self-Correcting Mechanism?*, ADOBE MAG., Jan.–Feb. 1996, at 22, 22, available at <http://www.adobe.com/products/adobemag/archive/pdfs/9601cogf.pdf>.

472. See *Internet Encyclopaedias Go Head to Head*, 438 NATURE 900, 900–01 (2005) (concluding that Wikipedia is roughly as accurate as the Encyclopedia Britannica).

473. They are not, however, as transparent as they should be. The *New York Times*'s public editor has said that the paper should make its standards easier for readers to find and searchable. See Arthur S. Brisbane, *Standards that Everyone Can See*, N.Y. TIMES, Apr. 2, 2011, available at [http://www.nytimes.com/2011/04/03/opinion/03pubed.html?\\_r=1](http://www.nytimes.com/2011/04/03/opinion/03pubed.html?_r=1).

companies that they write about and prohibit them from holding stocks in the companies and industries they cover.<sup>474</sup>

On Fifth Estate news sites, conflict-of-interest standards are more rare. In new media, there is a growing sense that “[t]ransparency is the new objectivity.”<sup>475</sup> Many new media organizations do not aspire to the old media model of avoiding any entanglement that appears to create a conflict and aiming for coming down squarely in the middle of all debates. As these critics of the old model see it, when journalists try to present themselves as having no opinions or conflicts, they actually undermine their credibility. Instead, many new media news organizations are inclined to prominently disclose journalists’ activities and potential conflicts, so the audience can take those into account.<sup>476</sup>

The key, on this view, is being transparent about information that the audience might want to know. AllThingsD.com, a technology website owned by Dow Jones, provides individual disclosure statements for each of its staff members, stating in detail the speaking engagements they accept, the stocks they own, how they handle free products sent for review, and other information relating to potential biases and conflicts.<sup>477</sup> The *Wall Street Journal*, which is also a unit of Dow Jones, does not make similar disclosures about its reporters. The technology blogger Timothy B. Lee includes prominently on his blog a detailed list of all of his sources of income going back several years.<sup>478</sup> Transparency of this kind allows readers to make their own assessments about whether one of the AllThingsD.com journalists or Lee has a conflict on a particular story.

New media should adopt clear policies about ethics. If they go the old

---

474. See *The New York Times Company Policy on Ethics in Journalism*, N.Y. TIMES CO., <http://www.nytc.com/press/ethics.html> (last visited Nov. 25, 2011) (stating acceptance of gift policies in paragraph 35 and stock policies in paragraph 104); *Dow Jones & Company Code of Conduct*, DOW JONES, <http://www.dowjones.com/codeconduct.asp> (last visited Nov. 25, 2011) (noting policies related to “Business Relationships and Activities” as well as “Securities Transactions”).

475. *Transparency Is the New Objectivity*, ECONOMIST (July 7, 2011, 4:47 PM), <http://www.economist.com/blogs/newsbook/2011/07/special-report-news>.

476. Mathew Ingram, *Is Transparency the New Objectivity? 2 Visions of Journos on Social Media*, NEIMAN JOURNALISM LAB (Sept. 28, 2009, 9:58 AM), <http://www.niemanlab.org/2009/09/is-transparency-the-new-objectivity-2-visions-of-journos-on-social-media/> (“Those criticizing the newspaper’s [professed goal of objectivity] are of the view that objectivity is ultimately impossible, and that transparency is actually a better goal. In other words, disclosure of personal views and opinions whenever and wherever possible, rather than a pretense that they don’t exist.”).

477. See *About Us*, ALL THINGS D, <http://allthingsd.com/about/> (last visited Nov. 25, 2011) (statements of individual staff members).

478. *Disclosure Statement*, TIMOTHYBLEE.COM, <http://timothyblee.com/disclosure-statement/> (last updated Aug. 4, 2011).

---

---

media route, they should post their conflict-of-interest policies and see that they are enforced. Alternatively, they can go the transparency route and require disclosures of the kind AllThingsD.com uses. If book reviewers accept free review copies, they should say so in a general disclosure—old media could do the same thing—and leave it to their readers to decide whether that matters.

A final step the Fifth Estate could take to build accountability into its journalism is to adopt a mechanism for creating and judging news brands online. In old media, many brands are well enough established that audience members know what to expect. For some readers, the *New York Times* stands for a commitment to quality journalism and objective reporting. For others, it might represent a left-wing slant on the news, or a corporatist one. Although audience members will disagree, they generally have enough information to make up their own minds. People who get news from CNN, Fox News, the *Washington Post*, or the *National Enquirer* can adjust their reactions based on the source.

In the new media, news brands are not as well established. People may have a general sense of the practices and values of some of the bigger sites, but in many cases they will not have a much of a basis for evaluating new media sources, especially smaller outlets and individual blogs. Fifth Estate journalists could address this problem by creating a system to build and monitor reputations for online news sources. This could be done by establishing a New Media News Association (“NMNA”), modeled on the Motion Picture Association of America (“MPAA”), the nonprofit standard-setting organization created by the film industry.<sup>479</sup>

The NMNA could create a standard disclosure label, like the MPAA’s movie ratings, that would appear on the front of news sites. These labels would be used by Fifth Estate news sites that aspire to be journalistic outlets—and not on more informal realms of citizen engagement with the news, such as an individual’s Twitter feed or Facebook updates. The NMNA label could link to a page of basic information about the site, starting with who owns it, its major sources of funding, and a searchable list of advertisers. Disclosure of this kind would allow audience members to make their own determinations about what financial considerations might be influencing a site’s news coverage. For example, a label on *dontregulate.org*, an anti-net-neutrality site designed to appear like a grass-

---

479. Cf. Cass Sunstein, *Television and the Public Interest*, 88 CALIF. L. REV. 499, 549–557 (2000) (urging voluntary self-regulation by the television industry to promote broadcasting in the public interest).

roots movement, would reveal that it is funded almost entirely by the cable and telecommunications industries.<sup>480</sup> Having this information, readers of the site could evaluate it accordingly.

Individual news stories could have their own disclosure labels. These labels would list every journalist who worked on the story, including editors, writers, designers, and photographers. If a reader clicked on the name of one of them, a journalist-specific disclosure label could appear, providing information about their professional backgrounds, sources of income, financial holdings, and political involvements.

If the industry established a voluntary system of disclosure labels, it could create a new role for the FTC. Rather than try to enforce its own material support guides, the FTC could monitor compliance with the NMNA labels. Once a website has made express representations about its sources of financial support, the backgrounds of its journalists, and similar matters, the FTC would have standing to investigate misrepresentations as possible “unfair or deceptive acts or practices” under § 45 of the Federal Trade Commission Act.<sup>481</sup>

The second part of the NMNA disclosure label could be a “feedback forum” for audience members to rate news sites the way they would rate a book on Amazon. The public could be asked to give the site numerical rankings for accuracy, ethics, responsiveness to requests for corrections, and similar criteria. It could also have space for audience members to explain their ratings and leave more detailed comments. Subjects of news stories and sources who believe they have been mischaracterized or misquoted could post responses. Individual journalists could have their own ratings forms, which would allow audience members to evaluate their work by the same standards. In effect, this mechanism would export responsibility for evaluating journalism to the network.

This rating mechanism would operate like the feedback forum on eBay, allowing news organizations and individual journalists to acquire online reputations.<sup>482</sup> Audience members could use the NMNA labels to evaluate the trustworthiness of news sources that are not well known to them. A reputational mechanism of this kind would create strong incentives for good journalistic conduct. Research on eBay auctions has found that

---

480. See *Hands Off the Internet*, SOURCE WATCH, [http://www.sourcewatch.org/index.php?title=Hands\\_Off\\_the\\_Internet](http://www.sourcewatch.org/index.php?title=Hands_Off_the_Internet) (last visited Nov. 25, 2011).

481. 15 U.S.C. § 45 (2006).

482. See ADAM COHEN, *THE PERFECT STORE: INSIDE EBAY* 27–28 (2002).

reputations matter online, and that there are consequences for acting badly.<sup>483</sup> News sites and individual journalists with records of inaccuracy or bad ethics would lose credibility and traffic, and the advertising dollars that come with them. If membership in the NMNA became a strong norm in the Fifth Estate, a site's decision not to affiliate and not to disclose would stand out and audience members could draw negative inferences from it.

Had labeling of this kind been in place in 2010, the Shirley Sherrod incident might have been avoided. If Andrew Breitbart participated in the NMNA, his feedback forum would likely have contained warnings posted by credible media watchdogs about his past journalistic deceptions. Any news organization that did its due diligence and read his disclosure label would have learned that he had a record of false and misleading journalism—including having been found by a New York prosecutor's office to have promoted a deceptively edited video about the activist group ACORN.<sup>484</sup> The NMNA label and the feedback forum would act as a signal to old media journalists about Breitbart's unreliability.

Breitbart and others like him could, of course, refuse to participate in the NMNA, but that would itself send a message to their audiences. If there were widespread adoption of NMNA labeling among online news outlets, those that opted out would be sending a message that they were not committed to conforming to generally accepted journalistic standards—and they would be branded as rogue actors. Audience members and other journalists could then be appropriately skeptical of their work.

There is one way that government can intervene directly to combat irresponsible Fifth Estate journalism. It should do more to promote "media literacy," providing the public with the skills to take in news critically, and to evaluate a particular news source's quality, biases, and possible deceptions.<sup>485</sup> With the proliferation of news sources, audience members are having a harder time than ever deciding whom to trust. One study found that older teenagers researching science papers did not fully understand how Wikipedia differed from non-peer-created sources.<sup>486</sup> Another

---

483. See, e.g., Craig A. Depken, II & Brandon Gregorius, *Auction Characteristics, Seller Reputation, and Closing Prices: Evidence from eBay Sales of the iPhone*, 8 INT'L J. ELECTRONIC BUS. 170 (2010) (finding that sales prices on eBay were higher when sellers had higher reputation scores).

484. See *supra* note 256 and accompanying text.

485. *Informing Communities*, *supra* note 437, at 45.

486. Andrea Forte & Amy Bruckman, *Part 1: Learning Information Literacy in the Age of Wikipedia*, in SYMPOSIUM ON LEARNING AND RESEARCH IN THE WEB 2.0 ERA: OPPORTUNITIES FOR RESEARCH (2008).

concluded that young adults who get news online put too much emphasis on the quality of the search engine that led them to a news source and too little on the quality of the news source.<sup>487</sup> It is not just young people or journalistic amateurs, however, that are having difficulty. As the Shirley Sherrod incident demonstrated, professional journalists also have trouble properly evaluating news sources.

While the Internet is making a great deal of quality content available, it is also putting unreliable sources within easy reach. Online news audiences may not be able to identify sources that are written to push a political or corporate agenda. They may not be able to spot articles that are produced by “content farms,” which are often written quickly by poorly paid freelancers who know little about the subject matter.<sup>488</sup> News consumers should be given training in how to distinguish among news sources of different kinds. They also should be taught about photoshopping and video editing techniques so they can spot online images that may have been manipulated.

Rather than impose restrictions on speech, the government should address the Fifth Estate’s weaknesses through more speech. It should provide media education to young people in schools and to adults in other settings. The FCC and FTC could produce written guides and online course materials. The NMNA could support the government’s efforts by undertaking its own campaign to educate journalists and non-journalists in how to think critically about the media.

The lesson of the Shirley Sherrod incident is not that Fifth Estate news is uniquely unreliable, but rather that as news media of all forms proliferates, the public must become better at deciding which sources to trust. Breitbart’s video should never have had the impact it did, not because he writes for a blog, but because he had a history of journalistic deception.<sup>489</sup> As the media ecology continues to evolve—and as audience members become journalists, and journalists become audience members—we will all have to evolve with it.

---

487. Eszter Hargittai et al., *Trust Online: Young Adults’ Evaluation of Web Content*, 4 INT’L J. COMM. 468, 479–80 (2010).

488. Lauren Kirchner, *The Growing Problem of Search Engine Spam: And What Google Says It’s Doing About It*, COLUM. JOURNALISM REV. (Jan. 25, 2011, 12:00 PM), [http://www.cjr.org/the\\_news\\_frontier/the\\_growing\\_problem\\_of\\_search.php](http://www.cjr.org/the_news_frontier/the_growing_problem_of_search.php).

489. Jay Bookman, *In the Curious Case of Shirley Sherrod, Let’s See the Whole Tape*, AJC (July 20, 2010, 7:31 AM), <http://blogs.ajc.com/jay-bookman-blog/2010/07/20/in-the-curious-case-of-shirley-sherrod-lets-see-the-whole-tape/> (questioning whether the video was a “deceptively edited excerpt of a longer story”).

## VI. CONCLUSION

The Internet is a force for Schumpeterian “creative destruction” on many aspects of society—including the news media. The news landscape is transforming rapidly, as the old media Fourth Estate declines and a new media Fifth Estate rises. Courts and policymakers can help to ensure that the new media order that emerges is one that promotes the social good and strengthens democracy.

Rather than trying to prop up old media in its current form, those who care about First Amendment values should focus more on creating an environment in which new media, and citizen journalism in particular, can thrive. Courts can play a critical role by recognizing a First Amendment “right to participate.” This right would put Fifth Estate journalists on an equal legal standing with the Fourth Estate, and it would give all journalists, old media and new, greater access to government information. Policymakers could augment this right by adopting “policies of participation,” which would promote Fifth Estate journalism.

For all of its promise, Fifth Estate journalism also brings perils. To address them, the Fifth Estate should adopt an “architecture of responsibility” that would promote good journalistic practices and marginalize bad actors. The government can help rein in the worst practices of new media journalism not by direct intervention—which would raise First Amendment concerns—but by promoting greater media literacy. These educational efforts could help prepare the public for the brave new media age that is rapidly arriving.