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RELIGION, RACE, AND THE FOURTH ESTATE: XENOPHOBIA IN THE  
MEDIA TEN YEARS AFTER 9/11

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**ABSTRACT**

September 11, 2011 marked the tenth anniversary of the most horrific attacks in the United States. In the decade after the September 11, 2001 attacks (9/11), matters of race and religion maintained an awkwardly prominent role in American culture, with the media arguably fueling perceptions. This interdisciplinary Article's thesis is that media elites, most of which are large corporations, threaten American democracy with xenophobic influence in an age of unmediated communication. Thus, the frequent imagery of "us" versus "them" has exasperated religious tensions between Judeo-Christian faith groups and religious minorities.

In the wake of the United States Supreme Court's decision in *Citizens United v. Federal Election Commission*, corporate media entities are now able to control the news and the newsmaker, with free speech that has become very costly. Indeed, empirical studies and research show that media has misused its trusted status as the proverbial "fourth branch of government," because of capitalism and consumerism. Moreover, in an effort to increase ratings and associated advertising dollars, media has reinforced stereotypes by marketing and essentially selling fear as part of the War on Terror. The authors seek to prove their thesis by emphasizing the historical significance of the First Amendment's individual protections, examining deregulation and the media's profit-making interests, and criticizing the *Citizens United* decision as creating an inherent conflict of interest for media corporations, considering their proven interest in "selling" news for pecuniary gain.

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**RELIGION, RACE, AND THE FOURTH ESTATE: XENOPHOBIA IN THE MEDIA TEN YEARS AFTER 9/11<sup>+</sup>**

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**I. INTRODUCTION**

In the days following those horrific attacks that shook the United States at its core, a dangerous attitude of blind anger and retribution pervaded through the country and parts of the world. And it was such an attitude that brought Mark Stroman, a self-described “Arab slayer” armed with a gun, to a gas station in Texas. Ignorantly assuming the three men behind the counter were Arabs and therefore responsible for the terrorist attacks, Stroman shot them all. Two of the men, Vasudev Patel (an Indian immigrant who was a Hindu) and WaqarHasan (a Muslim born in Pakistan), died on the scene. The third man, RaisBhuiyan, a Bangladeshi-born naturalized US citizen, was shot in the face and blinded in one eye but survived the attack.

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There is a moment in every generation that becomes so etched in our collective memory that it really tests our ability to move on. There is a moment that essentially starts a new era, especially if it is one filled with increased violence, unrest and a major breakdown of trust and tolerance. *As the United States marks the 10<sup>th</sup> anniversary of the worst attacks on its soil, we must also not forget what was triggered the day after that tragedy, and has continued since.* The country slipped into paranoia, racial bias and hate crimes. This, in turn, set off a decade of wars, further around the world, and disintegrating rights in the U.S.\*\*\*

September 11, 2011 was a day of national mourning and remembrance in the United States,<sup>1</sup> marking the tenth anniversary of the country's most horrific domestic terrorist attacks.<sup>2</sup> In the days immediately following the attacks, President George W. Bush's rhetoric conveyed an image of the nation's struggle against a sociopolitical and cultural phenomenon.<sup>3</sup> The United States had a new enemy and consequently entered a new war: the "War on Terror."<sup>4</sup>

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\*\*\* Pulkit Datta, *9/12: The Aftermath of 9/11 Gave Rise to Intolerance & Bias, and the Breakdown of Basic Rights* (NONRESIDENT INDIAN Sept. 11, 2011) (emphasis in original), <http://www.the-nri.com/index.php/2011/09/912/>

<sup>1</sup> See Rick Hampson, *Decade's Passage Doesn't Dim Memories of What Was Lost*, USA TODAY, Sept. 11, 2011, available at [http://www.usatoday.com/NEWS/usaedition/2011-09-12-911-weekend-cover\\_CV\\_U.htm](http://www.usatoday.com/NEWS/usaedition/2011-09-12-911-weekend-cover_CV_U.htm); Michael Howard Saul, *America Grieves, Reflects*, Sept. 12, 2011, WALL ST.J. at A1.

<sup>2</sup> See, e.g., *The Story of Flight 93*, <http://www.september11news.com/Flight93.htm> (last visited Nov. 4, 2011) (noting that although the vast majority of media attention on the September 11, 2001 terrorist attacks focused on the destruction of the World Trade Center in New York City, the aircraft hijackers also killed many innocent Americans by crashing commercial planes into the Pentagon and a field in Pennsylvania) [hereinafter "9/11"].

<sup>3</sup> See Mary Ellen O'Connell, *The Legal Case Against the Global War on Terror*, 36 CASE W. RES. J. INT'L L. 349, 349 (2004).

<sup>4</sup> Nick J. Sciullo, *The Ghost in the Global War on Terror: Critical Perspectives and Dangerous Implications for National Security and the Law*, 3 DREXEL L. REV. 561, 563 (2011); see also Joshua Azriel, *Five Years After the 9/11 Terrorist Attacks: Are New Sedition Laws Needed to Capture Suspected Terrorists in the United States?*, 6 CONN. PUB. INT. L.J. 1, 2 (2006).

In the decade following 9/11, one can easily argue that much has changed—some for the better and some for the worse.<sup>5</sup> While issues like the accuracy of media coverage in political elections have arguably improved,<sup>6</sup> little argument can be made that societal perceptions and attitudes toward Muslims, Arabs, South Asians, Sikhs, and other non-Judeo-Christian faith groups have improved as well.<sup>7</sup> A logical inference, therefore, is that matters of race and religion constitute a prominent element of American culture in the ten years after 9/11 as media influences cultural perception. Xenophobia has unquestionably become more a part of American culture in the years after 9/11 than it was prior.<sup>8</sup>

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<sup>5</sup> See, e.g., *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107-56, 2001 U.S.C.A.N. (115 Stat.) 272 (2001) (exemplifying change over the last 10 years, as frequently portrayed in popular media, including more private citizen surveillance under the “USA PATRIOT Act”); Angela J. Davis, *Racial Profiling Post 9/11: Still a Bad Idea*, available at [http://www.brennancenter.org/content/resource/racial\\_profiling\\_post\\_9\\_11\\_still\\_a\\_bad\\_idea/](http://www.brennancenter.org/content/resource/racial_profiling_post_9_11_still_a_bad_idea/) (last visited Nov. 4, 2011) (stating the corresponding allegations of racial profiling); see also Jonathan C. Augustine & Craig M. Freeman, *Grading the Graders and Reforming the Reform: An Analysis of the State of Public Education Ten Years After No Child Left Behind*, 57 LOY. L. REV. 237 (2011) (observing how traditional public schools were taken over and operated as charter schools as part of an education reform movement under the No Child Left Behind Act of 2001).

<sup>6</sup> Cf. JEFFREY TOOBIN, *TOO CLOSE TO CALL: THE THIRTY-SIX DAY BATTLE TO DECIDE THE 2000 ELECTION* 18 (2001) (discussing the time sequence under which major television networks relied on exit polling and called the 2000 presidential election in Florida in favor Vice President Al Gore over then-Texas Governor George W. Bush).

<sup>7</sup> See, e.g., Tamar Lewin & Gustav Niebuhr, *A Nation Challenged: Violence, Attacks, and Harassment Continue on Middle Eastern People and Mosques*, N.Y. TIMES, Sept. 18, 2001, at B5; Gregory Rodriguez, *Aftermath: Identify Yourself: Who’s American?*, N.Y. TIMES, Sept. 23, 2001, at A1; see also Matthew Miller, *Lansing Man Who Burned Koran Was Drunk, Angry*, LANSING ST.J. Nov. 27, 2010, available at <http://www.lansingstatejournal.com/apps/pbcs.dll/article?AID=201011280493>.

<sup>8</sup> For the purposes of this Article, the authors use the term xenophobia to mean an irrational and deep-rooted fear of or antipathy towards people of different cultures. GUIDO BOLAFFI, RAFFAELE BRACALENTI, ET AL., eds., *DICTIONARY OF RACE, ETHNICITY AND CULTURE* 331 (2003) (noting that xenophobia also denotes a fear of or anxiety towards anything foreign); Harry N. Scheiber, *Xenophobia and Parochialism in the History of American Legal Process: From the Jacksonian Era to the Sagebrush Rebellion*, 23 WM. & MARY L. REV. 625 (1982) (defining xenophobia in the context of economic and legal policies that manifest a fear of and toward foreign things); see generally NEW YORK ADVISORY COMMITTEE TO U.S. CIVIL RIGHTS COMMISSION, *CIVIL RIGHTS IMPLICATIONS OF POST-SEPTEMBER 11 LAW ENFORCEMENT PRACTICES IN NEW YORK* (March

In its most rudimentary form, xenophobia threatens democracy. As a democratic nation, the United States has a republican system of governance that structurally embodies participatory and representative features.<sup>9</sup> Moreover, the United States Constitution illustrates the nation's democratic character by protecting certain *individual liberties*, including freedom of speech, press, association, and religion.<sup>10</sup> If any democracy loses its distribution of political

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2004), available at <http://www.usccr.gov/pubs/sac/ny0304/ny0304.pdf> (noting examples of how xenophobia has manifested in the years after 9/11 with respect to law enforcement and racial profiling) [hereinafter "POST-9/11 CIVIL RIGHTS REPORT"].

<sup>9</sup> EDWARD S. CORWIN & J.W. PELTASON, UNDERSTANDING THE CONSTITUTION 20-25 (4th ed. 1958).

<sup>10</sup> See U.S. CONST. amend. I (1791). As part of the Bill of Rights, the First Amendment was originally intended to protect *individual*, opposed to corporate rights, or the rights of a corporate entity. As one well-known commentator notes:

[t]he Bill of Rights consists of ten amendments that, like the Constitution itself and the Declaration of Independence before it, are grounded in Natural Law. *These ten amendments are designed to protect individual freedoms that the Founders considered natural rights, thus God-given*, but feared that the new federal government might ignore. The Bill of Rights is supposed to prevent the federal government from denying these fundamental rights to any person. They reflect human nature in the absence of a tyrannical government.

ANDREW P. NAPOLITANO, THE CONSTITUTION IN EXILE: HOW THE FEDERAL GOVERNMENT HAS SEIZED POWER BY REWRITING THE SUPREME LAW IN THE LAND 19 (2006) (emphasis added). Further, some individual rights, including those guaranteed by the First Amendment, are so sacrosanct that they are deemed "fundamental rights" such that the government cannot infringe upon them unless strict scrutiny is met. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964); see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 638-39 (1997) (noting that a reasonable question exists as to whether the currently constituted Supreme Court has taken this historical perspective into consideration); *infra* note 16 and accompanying text (the authors note media's former role as the proverbial "fourth branch of government," and further argue that in its pre-deregulated state, media was a *de facto* coordinate branch charged with providing objective insight for the public's interest). In discussing the powerful role media plays as an integral and arguably coordinate branch of American government, the following has been noted:

The reporter is the recorder of government but he is also a participant. He operates in a system in which power is divided. He as much as anyone . . . helps to shape the course of government. He is the indispensable broker and middleman among the subgovernments of Washington . . . . He can illuminate policy and notably assist in giving it sharpness and clarity; just as easily, he can

power with imbalances, a branch of the ruling system may become harmful to democracy itself.<sup>11</sup> Xenophobia in the media presents such a threat, particularly to religious and racial minorities in a post-9/11 unmediated digital environment that one must wonder whether America will ever become the “colorblind society” described more than a century ago.<sup>12</sup>

This Article argues that influential media entities, most of which are now large corporations, threaten American democracy with xenophobic influence in an age of unmediated communication. Media elites operate with a privileged global reach unlike any other segment of society,<sup>13</sup> and influence domestic and

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prematurely expose policy and, as with an undeveloped film, cause its destruction. At his worst, operating with arbitrary and faulty standards, he can be an agent of disorder and confusion. At his best, he can exert a creative influence on Washington politics.

DOUGLASS CARTER, *THE FOURTH BRANCH OF GOVERNMENT* 7 (1959); *see also* TIMOTHY E. COOK, *GOVERNING WITH THE NEWS: THE NEWS MEDIA AS A POLITICAL INSTITUTION* 1 (2d ed. 2005) (expounding upon media as the fourth branch of government theory). Indeed, in considering the media’s inherent role and function, “[t]he Communications Act of 1934 centrally requires broadcaster licensees to operate in the public interest, based on the notion that the airwaves are a public resource entrusted to licensees.” Erwin Chemerinsky, *Not A Free Speech Court*, 53 ARIZ. L. REV. 723 (2011) (arguing the current Supreme Court, under the leadership of Chief Justice John Roberts, has a dismal record on individual free speech rights); Gregory P. Magarian, *Substantive Media Regulation in Three Dimensions*, 76 GEO. WASH. L. REV. 845, 852 (2008) (citing 47 U.S.C. § 151 (2000)) [hereinafter “Magarian, *Substantive Media Regulation*”]; *see generally* STEPHEN HOLMES, *Liberal Constraints on Private Power?*, in *DEMOCRACY AND THE MASS MEDIA* 21-65 (Judith Lichtenberg, ed. 1991) (detailing the 17th century French political philosopher Montesquieu and the origins of the “Fourth Estate” arguments that publicity was the cure for an abuse of power as the basis for media’s role in democratic governance).

<sup>11</sup> AHRON BARAK, *THE JUDGE IN A DEMOCRACY* 40 (2006).

<sup>12</sup> *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (originating the concept of America being a colorblind society under the Fourteenth Amendment’s Equal Protection Clause in Associate Justice Harlan’s famous dissent); *see* Destiny Peery, *The Colorblind Ideal in Race-Conscious Reality: The Case for a New Legal Ideal for Race Relations*, 6 NW. U. J.L. & SOC. POL. 473 (2011) (noting that in the more than one hundred years since its introduction, the very concept of a “colorblind society” remains a polarizing source of legal debate); *see also* William M. Carter, Jr., *Affirmative Action as Government Speech*, 59 UCLA L. REV. 2, 9-18 (2011) (detailing contemporary issues associated with interpretations of Justice Harlan’s colorblind theory).

<sup>13</sup> *See* Kristine A. Oswald, Comment, *Mass Media and the Transformation of American Politics*, 77 MARQ. L. REV. 385, 387 (1994) (arguing a class of “media elites,” comprised of owners,

international policy with unfettered discretion.<sup>14</sup> Similar to an oligarchy, media power rests within an elite group of corporations, distinguished by wealth and other privileged statuses.<sup>15</sup>

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producers, and managers, determines which messages reach the public) (internal citations omitted) [hereinafter “Oswald”]; Tim Arango, *Citing Write-Down, Time Warner Posts Loss and Forecasts Flat Year*, N.Y. TIMES, Feb. 4, 2009, available at <http://www.nytimes.com/2009/02/05/business/05warner.html> (analyzing that as of 2008, ten global corporations dominated American media and together, the ten companies’ revenues approximated \$60 billion dollars, with Time-Warner leading the pack at \$46.98 billion). It bears noting that:

[t]oday, large corporations own the largest papers, networks, and stations. ‘The twenty-five biggest [newspaper] chains own 31 percent of all dailies and account for 52 percent of circulation.’ ‘[t]he six largest [newspaper chains], Knight-Ridder, Newhouse, Chicago Tribune, Gannett, Scripps-Howard, and Times-Mirror, alone control more than a quarter of total circulation.’ Regarding broadcast ownership, ‘Capital Cities/ABC controls three of the largest basic cable services (ESPN, with Nabisco; Arts and Entertainment, with Hearst and RCA; and Lifetime, with Hearst and Viacom).’ NBC’s parent company, RCA (which is owned by General Electric), controls large amounts of the satellite transponder space used to distribute cable signals and is part owner of the Arts and Entertainment cable network. Turner Broadcasting owns the Cable News Network (CNN), the CNN Headline News Network, and Atlanta superstation WTBS. Time-Warner, Inc. owns American Television and Communications (the second-largest cable system), Home Box Office (HBO), Cinemax, and portions of the USA Network and Black Entertainment Television (BET).

Oswald, *supra* at 386, (internal citations omitted).

<sup>14</sup> See Robert Kane Pappas, *Orwell Rolls in His Grave* (Sag Harbor-Basement Pictures 2003), available at [http://www.youtube.com/watch?v=g\\_1YGyIaK80t](http://www.youtube.com/watch?v=g_1YGyIaK80t) (suggesting America’s manufactured enemy, in the name of corporate interest and oil control, is Islam and that such a public perception was necessary for President George W. Bush to invade Kuwait in 2003 in the capitalist interest of crude oil).

<sup>15</sup> In understanding the size and power of corporate media conglomerates, the following observation is helpful:

In September of 1999, Viacom announced its merger with CBS. The huge deal combined CBS’s television network, its 15 TV stations, more than 160 radio stations, and several Internet sites with Viacom’s well-known cable channels (e.g., MTV, Nickelodeon, Showtime, TNN), 19 television stations, movie and television production (Paramount Pictures, UPN), publishing (Simon & Schuster), theme parks, and more. The \$38 billion merger was bigger than

Specifically, media enjoys a special status as the “fourth branch of government.”<sup>16</sup> In maintaining its fourth branch status, however, in a post-9/11

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bigger than any previous deal between two media companies. In fact, it was almost double the size of the previous record. The 1995 record-setting deal in which Disney acquired Capital Cities/ABC had been worth \$19 billion.

While the Viacom/CBS deal was unprecedented, the basic dynamic underlying the merger was not . . . . Including the Viacom/CBS merger, the 1990s alone saw well over \$300 billion in major media deals. So rather than unique, the Viacom/CBS announcement was just another example—and certainly not the last—of mergers that transformed the industry toward the end of the 20th century.

DAVID CROTEAU & WILLIAM HOYNES, *The New Media Giants: Changing Industry Structure*, in GENDER, RACE, AND CLASS IN MEDIA: A TEXT READER 21-22 (Gail Dines & Jean M. Humez, eds., 2d. ed. 2003); see ROBERT MICHAELS, POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACIES 224-34 (1962).

<sup>16</sup> See William T. Coleman, Jr., *A Tree Press: The Need to Ensure an Unfettered Check on Democratic Government Between Elections*, 59 TUL. L. REV. 243, 252 (1984) (arguing that the press educates public officials, provides for a channel of information between the branches of government and the federal agencies, and allows for a system of checks and balances among the respective branches of government); see also Christiana S. Drale, *Communication Media in a Democratic Society*, 9 COMM. L. & POL’Y 213, 218 (2004) (discussing the media’s role as the fourth estate in checking the integrity of democratic procedures); Blake D. Morant, *The Endemic Reality of Media Ethics and Self-Restraint*, 19 NOTRE DAME J.L. ETHICS & PUB. POL’Y 595, 595-96 (2005) (internal citations omitted). In addressing media’s optimal status as an observant informer, Wake Forest dean and professor of law Blake Morant writes that:

[d]emocracy, despite its diverse conceptualizations, generally connotes a governmental structure that is continually monitored by an unabashed media industry. Such scrutiny of governmental operations contributes to the media’s characterization as ‘the fourth estate.’ To optimize its function as a governmental overseer, the media must have, as a guaranteed norm, expressive autonomy that is tempered by journalistic prudence and professional integrity. This responsible exercise of the right to free expression ensures that coverage of governmental activities is earnest, balanced, and truly informative.

*Id.* Furthermore, in other scholarship addressing the media’s function, Dean Morant also opines:

[M]edia’s most utilitarian function is its tendency to inform on matters of social import. The motivation to inform the public ideally leads to dissemination of information about the government and, theoretically, preserves democracy. The informative function, which is virtually tantamount to a duty, has prompted many to refer to the industry as the ‘Fourth Estate.’

xenophobic world, media *should not* promote content that fuels stereotypes and adversely affects racial, ethnic, and religious minorities in the name of corporate profit, as advertising dollars increase with more pleasure seeking “entertainment value”<sup>17</sup> and “product consumption.”<sup>18</sup>

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Blake D. Morant, *Democracy, Choice, and the Importance of Voice in Contemporary Media*, 53 DEPAUL L. REV. 943, 946 (2004) (internal citations omitted). Indeed, media has a special and unique coordinate branch status:

Given the significance of the media in our society, it is only natural that the media are considered by several commentators as the ‘fourth branch of government.’ According to this view, the media have *at least* the same amount of power in setting public policy as do the executive, judicial, and legislative branches of the United States government. It could even be argued that the media have more power in setting the political agenda than the national government. This view is entertained, in part, because the media have the power to directly contact the public, and furthermore, are protected by the First Amendment from responsibility for what they report.

Oswald, *supra* note 13, at 390-91 (citing WALTER H. ANNENBERG, *The Fourth Branch of Government*, in *IMPACT OF MASS MEDIA: CURRENT ISSUES* 235 (Ray E. Hiebert & Carol Reuss, eds., 2d ed. 1988)) (emphasis in original); Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 333-34 (2003) (discussing the media as the fourth estate with independence from government as critical in providing a check on governmental abuse); *see also* N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring) (quoting Associate Justice Hugo Black, “[t]he Government’s power to censor the press was abolished so that the press would remain forever free to censure the Government”); CARTER *supra* note 10, at 7.

<sup>17</sup> *See, e.g.*, DANIEL J. BOORSTIN, *THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA* 9-12 (1987) (noting how interdisciplinary research shows human beings thrive on “news” as entertainment, such that there is a demand for illusions); *see generally* DAVID J. LINDEN, *THE COMPASS OF PLEASURE: HOW OUR BRAINS MAKE FATTY FOODS, ORGASM, EXERCISE, MARIHUANA, GENEROSITY, VODKA, LEARNING, AND GAMBLING FEEL SO GOOD* (2011) (analyzing how human neurological patterns fuel pleasure and satisfaction (from events including news coverage)).

<sup>18</sup> *See* All American News, [http://all-american-news.com/?page\\_id=49](http://all-american-news.com/?page_id=49) (last visited Nov. 4, 2011) (showing through empirical research that American consumption of television averages 151 hours per month); *Id.* (noting that according to those figures, with an average of seven hours of sleep per night and time for work and/or school, Americans spend approximately 30% of all their leisure time watching television).

With the post-9/11 increased presence of xenophobia in American media, the question becomes *who* exactly is the enemy in America's War on Terror?<sup>19</sup> In giving "the enemy" an image—an apparent effort to identify and vilify—Muslims and racial minorities have become the target of media attention,<sup>20</sup> especially in a climate in which newscasters and journalists are encouraged to entertain, arguably more so than to inform.<sup>21</sup>

While legal and interdisciplinary scholarship on Islam and disdain against Muslims in America following 9/11 abounds,<sup>22</sup> this Article is unique. The authors

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<sup>19</sup> See *supra* note 4 and accompanying text.

<sup>20</sup> See, e.g., The Pew Forum on Religion & Public Life, *Religion in the News: Islam Was No. 1 Topic in 2010* (Feb. 24, 2011), <http://pewforum.org/Politics-and-Elections/Religion-in-the-News--Islam-Was-No--1-Topic-in-2010.aspx#1>.

<sup>21</sup> See also BOORSTIN, *supra* note 17, at 14-15 (describing how news-gathering turned into news-making amid the pressures to entertain and create pseudo events). Moreover, in considering the media's profit-making interest, more recent scholarship notes:

[i]t is well established that the media operate in a commercial realm. Thus, under the 'marketplace' approach, market forces determine what is broadcast. In order to be successful, the broadcaster must supply the consumer with goods of value. According to one view, in order to survive in the commercial market, broadcasting should serve the interest of its audience. Thus, satisfying the 'public interest' often results in forgoing the ideals of diversity to accommodate the business demands of the industry.

Oswald, *supra* note 13, at 392 (citing RICHARD R. ZARAGOZA, *et al.*, *The Public Interest Concept Transformed: The Trustee Model Gives Way to a Marketplace Approach*, in PUBLIC INTEREST AND THE BUSINESS OF BROADCASTING: THE BROADCAST INDUSTRY LOOKS AT ITSELF 27, 30 (Jon T. Powell & Wally Gair, eds., 1988)); see also GERALD J. BALDASTY, *THE COMMERCIALIZATION OF NEWS IN THE NINETEENTH CENTURY* (1992).

<sup>22</sup> See, e.g., Neha Sing Gohil & Dawinder S. Sidhu, *The Sikh Turban: Post-9/11 Challenges to This Article of Faith*, 9 RUTGERS J. L. & RELIGION I (2008), available at <http://lawandreligion.com/sites/lawandreligion.com/files/sidhu.pdf>; Dalia Hashad, *Stolen Freedoms: Arabs, Muslims, and South Asians in the Wake of Post-9/11 Backlash*, 81 DENV. U. L. REV. 735 (2004); Thomas M. McDonnell, *Targeting the Foreign Born by Race and Nationality: Counter-Productive in the "War on Terrorism,"* 16 PACE INT'L L. REV. 19 (2004); Kevin R. Johnson, *Racial Profiling After September 11: The Department of Justice's 2003 Guidelines*, 50 LOY. L. REV. 67 (2004); Leti Volopp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002); see also Sameer M. Asha, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002).

examine religion, race, and xenophobia through the lens of media, which has been the ubiquitous source of socio-cultural and political influence, prior to and most certainly after 9/11. Accordingly, in providing a multidisciplinary exegesis, the authors examine xenophobia in media and respectfully argue that it has peaked among Judeo-Christian faith groups<sup>23</sup> as a result of media influence.<sup>24</sup> Further, considering the corporate nature of media and media conglomerates, the authors also suggest legislative and/or administrative action is necessary to deal with the far-reaching and presumably unanticipated consequences of the Supreme Court's

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<sup>23</sup> Ironically, many Judeo-Christian faith practitioners justified racial discrimination, including the institution of slavery, under the so-called Curse of Ham detailed in *Genesis* 9. See DAVID M. WHITFORD, *THE CURSE OF HAM IN THE EARLY MODERN ERA: THE BIBLE AND THE JUSTIFICATION FOR SLAVERY* 1-2 (2009) (discussing former U.S. Senator Robert Byrd's opposition to the Civil Rights Act of 1964 and his justification of Jim Crow segregation based on *Genesis* 9:18-27); George H. Taylor, *Race, Religion, and the Law: the Tension Between Spirit and Its Institutionalization*, 6 U. MD. J. RACE, RELIGION, GENDER & CLASS 51, 52 (2006) ("Biblical predicates for racist claims by [w]hite Christians include the condemnation by Noah of his son Ham's progeny, due to Ham's misconduct. The book of *Genesis* quotes Noah saying of Ham's son, Canaan: 'Cursed be Canaan; a slave of slaves shall he be to his brothers.'" (quoting *Genesis* 9:25 (RSV)); see also *Numbers* 25 (detailing the violence instituted because of interracial relations between the children Israel and other nations).

<sup>24</sup> See EDWARD W. SAID, *COVERING ISLAM: HOW THE MEDIA AND THE EXPERTS DETERMINE HOW WE SEE THE REST OF THE WORLD* (1997) [hereinafter "SAID."]; see also EDWARD P. WIMBERLY, *AFRICAN AMERICAN PASTORAL CARE AND COUNSELING: THE POLITICS OF OPPRESSION AND EMPOWERMENT* 22 (2006) (describing the negative portrayals of African Americans in mainstream media as a reason for which members of African-American community deny their self-worth and value).

decision in *Citizens United v. Federal Election Commission*,<sup>25</sup> a ruling under which free speech now costs so very much.<sup>26</sup>

Positing that racial discrimination causes disparate treatment and impact in American culture,<sup>27</sup> to support the thesis that influential media entities threaten

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<sup>25</sup> The authors respectfully argue the Supreme Court's ruling in *Citizens United*, extending free speech to major corporations, is contrary to the Framers' original intent in adopting the First Amendment and larger Bill of Rights as a means of protecting individual rights; however, the authors recognize that under the Reconstruction Era Fourteenth Amendment, corporations and corporate entities have "individual rights." *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876 (2010); *see, e.g.*, *Near v. Minnesota*, 283 U.S. 697 (1931); *see supra* notes 10 & 16 and accompanying text; *see also* KENT R. MIDDLETON AND WILLIAM E. LEE, *THE LAW OF PUBLIC COMMUNICATION* 34-35 (7th ed. 2010) (noting that the media obtains an unique coordinate status as a fourth branch of government, which the authors respectfully argue presents an inherent conflict of interest in light of the *Citizens United* ruling).

<sup>26</sup> *See, e.g.*, ANTHONY LEWIS, *FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT* (2007) (analyzing and noting that the scholarly criticism of media corporations has historically centered on freedom of the press); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 965-74 (1978); Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735, 739 (1995); Coleman, 59 TUL. L. REV. *supra* note 16; Timothy Dyk, *Newsgathering, Press Access and the First Amendment*, 44 STAN. L. REV. 927 (1992); *see also* LEONARD W. LEVY, *FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: A LEGACY OF SUPPRESSION* (1963) (noting that the concept of Fourteenth Amendment incorporation includes the First Amendment's individual liberty of free speech is applicable to major corporations); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 514 (2001) (addressing conflicts of interests as it relates to major media corporations stimulatingly covering the news and controlling the newsmaker (which is also referred to as "the fox guarding the hen house") and within the relational role of corporate directors and shareholders); *see generally* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides*, 124 HARV. L. REV. 83 (2010) (arguing that the decision of control over corporate political speech costs society much more than it benefits media corporations' financial interests).

<sup>27</sup> *See, e.g.*, Jonathan C. Augustine & Hon. Ulysses Gene Thibodeaux, *Forty Years Later: Chronicling the Voting Rights Act of 1965 and Its Impact on Louisiana's Judiciary*, 66 LA. L. REV. 453 (2006) (detailing the need for judicial and legislative state elections to be protected under the Voting Rights Act); Jeffery S. Sutton, *San Antonio Independent School District v. Rodriguez and Its Aftermath*, 94 VA. L. REV. 1963 (2008) (highlighting disparate fiscal appropriations for public educational facilities); Christopher J. Tyson, *At the Intersection of Race and History: The Unique Relationship Between the Davis Intent Requirement and the Crack Laws*, 50 HOW. L.J. 345 (2007) (discussing the disparity between cocaine and crack);

American democracy and religious minorities with xenophobic influence, this Article is organized into five interconnected parts, each meeting at the interdisciplinary crossroads of race, religion, and media. In order to establish the legal foundation upon which this Article's thesis is built, Part I provides an introductory overview of the freedoms of religion and speech. Part II builds upon Part I's foundation by providing a cursory historical look at the First Amendment,<sup>28</sup> its Religion Clauses,<sup>29</sup> and rights of free expression, while emphasizing the nature of the individual protections detailed therein. In essence, Part II attempts to illustrate why the First Amendment has been—and remains—such an important part of America's legal framework in keeping the sacrosanct division between church and state.<sup>30</sup> Support for the position that freedom of religion means choice of practice *should not* have such racial and political consequences,<sup>31</sup> especially under media scrutiny.<sup>32</sup>

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<sup>28</sup> U.S. CONST. amend. I (1791) (providing that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”); *see* *Wallace v. Jaffree*, 472 U.S. 38, 48-49 (1985) (applying the First Amendment's restrictions to the states and/or state action through the Fourteenth Amendment's Due Process Clause); *see also supra* notes 10 & 16 and accompanying text.

<sup>29</sup> *See supra* note 28 (noting that the First Amendment's Establishment Clause and Free Exercise Clause comprise what are commonly referenced as the Religion Clauses).

<sup>30</sup> *See* DONALD L. DRAKEMAN, *CHURCH-STATE CONSTITUTIONAL ISSUES: MAKING SENSE OF THE ESTABLISHMENT CLAUSE 2* (1991) (noting that although the Religion Clauses were adopted as part of the First Amendment to the Constitution by the first Congress in 1789, they were not discussed at length by the Supreme Court until 1947 and that the metaphoric phrase “separation between church and state” is not expressly provided in the Constitution but the concept was introduced by the modern Court in *Everson v. Board of Education*, 330 U.S. 1 (1947)); LESLIE C. GRIFFIN, *LAW AND RELIGION: CASES AND MATERIALS* 332 (2d ed. 2010); DAVID BARTON, *ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, & RELIGION* 13-14 (2010); *see also* Lisa Shaw Roy, *History, Transparency, and the Establishment Clause: A Proposal for Reform*, 112 PENN. ST. L. REV. 683, 685 (2008).

<sup>31</sup> *See, e.g.,* BARTON *supra* note 30, at 38-39 (relying upon statements by Thomas Jefferson and Zephaniah Swift to argue that America is pluralistic and tolerant of other religions only because it is a Christian nation); *see* Bryan Adamson, *The Muslim Manchurian Candidate: Barack Obama, Rumors, and Quotidian Hermeneutics*, 25 ST. JOHN'S J. CIV. RTS. & ECON. DEV. 581, 582-83 (2011) (quoting 2008 Republican presidential candidate John McCain as saying “[s]ince this nation was founded on Christian principles . . . I prefer someone who I know has a solid grounding in my faith[.]”) (internal citations omitted). The great irony regarding race and religion in America is that Judeo-Christian African-Americans benefited from the Supreme Court's expansive

Part III continues by examining media's profit making interests as major corporate entities and how media fuels racial stereotypes in the name of capitalism. Further, Part III also highlights the ongoing 9/11 aftermath that continually offends notions of racial and religious harmony in the United States, especially during the administration of America's first "[B]lack"<sup>33</sup> president,<sup>34</sup>

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First Amendment interpretations during the American Civil Rights Movement. *See also* Jonathan C. Augustine, *The Theology of Civil Disobedience: The First Amendment, Freedom Riders and Passage of the Voting Rights Act*, 21 S. CAL. INTERDISC. L.J. 255 (2012). Muslims and other ethnic minorities have not similarly benefited, however, where the Court has been called a national theology board. *See generally* *Cnty. of Allegany v. ACLU*, 492 U.S. 573, 678 (1989) (Kennedy, J., concurring in part and dissenting in part) (reflecting the common American sentiment that the United States is a "Christian nation").

<sup>32</sup> The authors' argument that media has a special coordinate branch status and its regulation is necessary for the public good impliedly speaks to the Federal Communication Commission's ("FCC") now defunct fairness doctrine. *See supra* notes 10 & 16 and accompanying text; *In re Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1249 (1949) (requiring television and radio broadcasters to do two things: (1) devote a reasonable amount of airtime to covering issues of public importance; and (2) provide a reasonable opportunity for the expression of opposing views on such issues); Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. J.L. SCI. & TECH. 1, 26 (2004) (citing *Columbia Broadcasting Sys. Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 110-11 (1973)); *see also* *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (upholding the doctrine's constitutionality); Varona, *supra* at 29 (noting that the FCC repealed the fairness doctrine as an unconstitutional violation of the First Amendment); *see also* *Syracuse Peace Council*, 2 F.C.C.R. 5043, 5052 (1987), *aff'd* by on appeal by *Syracuse Peace Council v. FCC*, 867 F.2d 654, 669 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990); Robert D. Hershey, Jr., *F.C.C. Votes Down Fairness Doctrine in a 4-0 Decision*, N.Y. TIMES, Aug. 5, 1987, at A1; Robert Kane Pappas, *Orwell Rolls in His Grave*, [http://www.youtube.com/watch?v=g\\_IYGyIaK80t](http://www.youtube.com/watch?v=g_IYGyIaK80t) (arguing that the fairness doctrine's repeal was the result of President Reagan's conservative influence and profit-driven corporate power base).

<sup>33</sup> *See, e.g.*, D. Wendy Greene, *Black Women Can't Have Blonde Hair . . . in the Workplace*, 14 J. GEN. RACE & JUST. 405, 405 n. 2 (2011) (arguing "Black" should be capitalized as a proper noun because, similar to Asian and Latino, it denotes a specific cultural group); *see* Kimberlé Williams Crenshaw, *Race, Reform, and Entrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n. 2 (1988); *see also* Neil Gotanda, *A Critique of "Our Constitution is Colorblind"*, 44 STAN. L. REV. 1, 4 (1991). In deference to these scholars' advocacy, the authors hereinafter either use the terms "African American" or "Black" to denote Americans of African descent.

<sup>34</sup> On November 4, 2008, Barack Obama was elected as the first Black president of the United States. During the Obama Administration, issues of race have arguably surfaced like never before, including veiled issues of racism like the popular belief that President Obama—an openly

who was elected at the unprecedented crossroads of race and religion.<sup>35</sup> Part IV continues the interdisciplinary analysis by looking at *Citizens United* and criticizing its ruling that results in media's subjects being controlled by the

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professed Christian—is Muslim. See Adamson, *supra* note 31, at 584 (discussing the statistical results of election polls taken prior to the 2008 presidential election wherein “as many as 18% and no fewer than 10% of likely or actual voters believed that Obama is a Muslim”); Alex Altman, *Time Poll: Majority Oppose Mosque, Many Distrust Muslims*, TIME MAGAZINE, Aug. 10, 2010, available at <http://www.time.com/time/nation/article/0,8599,2011799,00.html> (reporting that 61% of Americans oppose the construction of a mosque at Ground Zero in lower Manhattan believing it to be an insult to the victims of 9/11, one third of Americans believe Muslim adherents should be barred from running for president and 24% of Americans believe President Obama actually is Muslim); see also Sarah Netter, *Racism in Obama's America: One Year Later*, Jan. 27, 2011, <http://abcnews.go.com/WN/Obama/racism-obamas-america-year/story?id=9638178>.

<sup>35</sup> See, e.g., Charlton C. Copeland, *God-Talk in the Age of Obama: Theology and Religious Political Engagement*, 86 DENV. U. L. REV. 663, 663 n.6 (2009) (discussing the controversy of then-candidate Obama's membership in Trinity United Church of Christ and long-term association with its former pastor, Rev. Dr. Jeremiah A. Wright); Michael Powell, *A Fiery Theology Under Fire*, N.Y. TIMES, May 4, 2008 at 1; see also Barbara L. Bernier, *Unholy Troika: Gender, Race and Religiosity in the 2008 Presidential Contest*, 15 DUKE J. GENDER L. & POL'Y 275, 296 (2008) (discussing the complexities of race and gender in America's 2008 presidential election) Paul Horwitz, *Religion and American Politics: Three Views of the Cathedral*, 39 U. MEM. L. REV. 973 (2009). Furthermore, in arguing President Obama's historic election revived the so-called “civil religion” from the perspective of the political left, George Washington law professor David Fontana writes:

[b]y the time Obama became politically relevant, it might have been impossible for civil religion to be advocated by those on the [political] right . . . [T]here is a shared monotheistic, Western religious angle to American public sentiment. The most recent annual poll conducted by the Pew Form on Religion & Public Life found that 92 percent of American citizens believe in God.

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The issue with the American civil religion, though, is that it had come to be seen as so ideological and exclusionary that it alienated many mainstream and liberal voters . . . . An American liberal civil religion held out more promise as an inspiring American nationalism, but with a tolerant edge. Enter Obama onto the national political stage, perhaps ‘the most theologically serious politician in modern American political history,’ whose speeches have been just as full with religious imagery and rhetoric as they have been with civil imagery and rhetoric.

David Fontana, *Obama and the American Civil Religion From the Political Left*, 41 GEO. WASH. INT'L L. REV. 909, 910-11 (2010) (internal citations omitted).

industry's financially-motivated corporations. In conclusion, Part V synthesizes the arguments advanced herein by addressing the potentially adverse consequence of the media-perpetuated xenophobic atmosphere that dominates American culture ten years after 9/11.

## II. THE FIRST AMENDMENT: A HISTORICAL OVERVIEW OF RELIGION AND FREE SPEECH

The United States Constitution was adopted by the Constitutional Convention on September 17, 1787, with its first amendment being made in 1791.<sup>36</sup> An analysis of both religious and legal history suggests the First Amendment was a natural protective reaction to the wide suppression of religious and speech freedoms that existed in England.<sup>37</sup> Indeed, "throughout much of English history, the Crown and Parliament attempted vigorously to suppress opinions deemed pernicious."<sup>38</sup>

Evidence of social oppression by the combined Church and Crown especially included religious practices during the Protestant Reformation in Great Britain. Mary Tudor ("Bloody Mary") assumed the crown after King Edward VI died. Regarding her efforts to control religious practice by suppressing Protestantism and restoring Catholicism, a noted church history scholar writes:

[a]s soon as she felt herself secure on the throne . . . Mary began a series of increasingly repressive measures against Protestants. Late in 1554, England officially returned to obedience to the pope. Most of what had been done during the reigns of Henry and Edward had now been undone. The feast days of the saints were restored. Married clergy were ordered to set their wives aside.

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<sup>36</sup> See U.S. CONST. art. V (describing the process by which the Constitution can be amended); see also DRAKEMAN, *supra* note 30, at 2.

<sup>37</sup> BARTON *supra* note 30, at 22-23 (highlighting the arguments of "Anti-Federalists" including George Mason, Patrick Henry, Samuel Adams and John Francis Mercer to support the establishment of the Bill of Rights, and the importance placed upon protecting individual religious liberty expressed in the First Amendment); see also E. Gregory Wallace, *Justifying Religious Freedom: The Western Tradition*, 114 PENN. ST. L. REV. 485 (2009) (providing a comprehensive history of early religious history in America).

<sup>38</sup> GEOFFREY R. STONE, *et al.*, CONSTITUTIONAL LAW 1073 (3d ed. 1999).

Finally, open persecution of Protestant leaders became the policy of the kingdom. Almost three hundred of them were burned, while countless others were imprisoned or went into exile. For these reasons, the queen acquired the name by which she is known to this day: Bloody Mary.<sup>39</sup>

Arguably, therefore, mere suppression of pernicious opinions was an understatement in describing Reformation Era English history.<sup>40</sup>

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<sup>39</sup> JUSTO L. GONZALEZ, II *THE STORY OF CHRISTIANITY: THE REFORMATION TO THE PRESENT DAY* 94 (2010).

<sup>40</sup> The example of “Bloody Mary” and much of the widespread bloodshed during the English Reformation, all in the name of religion, clarifies why the Founders of the United States established a clear separation between church and state. *See, e.g.*, SARAH BARRINGER GORDON, *THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA* 92-93 (2010) (discussing the politics of organizations like Protestants and Other Americans United (POAU), the 1960 election of John F. Kennedy as American’s first Roman Catholic president, and POAU’s 1972 name change to Americans United for Separation of Church and State (AU)); GRIFFIN, *supra* note 30 at 40-41 (discussing the Establishment Clause and the Supreme Court’s three-part test founded in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)); Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 *LOY. U. CHI. L.J.* 121 (2001); John C. Jefferies, Jr. & James A. Ryan, *A Political History of the Establishment Clause*, 100 *MICH. L. REV.* 279 (2001); *see also* WILLIAM LEE MILLER, *THE PROTESTANT AND POLITICS* 31-32 (1958) (discussing the sound defeat of 1928 Democratic presidential nominee Al Smith to Herbert Hoover and Smith’s articulated feelings about his defeat because of his Roman Catholic faith). By further way of example, in defining a religious persecution as either the systematic effort to kill all people who believe in a minority faith or the systematic effort to eliminate the entire practice of a faith within a jurisdiction, while discussing the New England Colonies, a noted University of Virginia scholar writes:

The New England theocracy expelled dissenters, executed Quaker missionaries who returned, and, most infamously, perpetrated the Salem witch trials. The political reaction to these trials broke the power of the theocracy in Massachusetts. Colonial Virginia imprisoned Baptist ministers for preaching without a license. But the largest and most important colonial religious persecution is relatively unknown. This was the total suppression of African religion among the slaves, what one historian has called ‘the African spiritual holocaust.

DOUGLAS LAYCOCK, *The Remnants of Free Exercise*, in *RELIGIOUS LIBERTY VOLUME TWO: THE FREE EXERCISE CLAUSE* 128 (2011) (internal citations omitted); LEWIS PAUL TODD & MERLE

### A. *Pluralism, Religious Liberty, and Religious Freedom*

The now sacrosanct separation of church and state has its historical and philosophical roots in perpetual efforts to preclude recurrence of the oppression and corruption that existed in England,<sup>41</sup> allowing for the necessary division to permit religious liberty and freedom of conscience. Religious persecution in present-day Rwanda reminds the world that the human proclivity to consolidate power by imposing one's beliefs on others still remains a threat to democracy.<sup>42</sup> Consequently, prohibiting governmental manipulation of religion and religious manipulation of government is as significant in post-modernity as it was in the First Century, especially considering contemporary media's expansive influence and racially-biased, profit-making corporate interests.<sup>43</sup> Moreover, such a prohibition is especially valid considering the practical reality of media's role as a coordinate branch of government.<sup>44</sup>

#### 1. *From One to Twenty-One: A Closer Look at Contemporary Concerns Regarding Religion Through a Historical Lens*

The first millennium of the Christian Church under Roman and Jewish rule was a period of martyrdom during which Christians refused to abide by so-called pagan practices that conflicted with their beliefs.<sup>45</sup> By the late eleventh century, a state system of imperialism exploited Christianity as a source of

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CURTI, RISE OF THE AMERICAN NATION 36 (3d ed. 1972) (discussing Lord Baltimore and the state of Maryland's Catholic origins).

<sup>41</sup> See Zephyr Teachout, *The Historical Roots of Citizens United v. FEC: How Anarchists and Academics Accidentally Created Corporate Speech Rights*, 5 HARV. L. & POL'Y. REV. 163, 165 (2011) (“[a]t the time the Constitution was drafted, fighting corruption was at the core of the drafters’ vision for the constructive principles of the country. Corruption was as fundamental an anti-principle as the concept of ordered liberty was a positive principle.”).

<sup>42</sup> See U.S. DEPARTMENT OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, RWANDA INTERNATIONAL RELIGIOUS FREEDOM REPORT (2007), available at <http://www.state.gov/g/drl/rls/irf/2007/90115.htm>.

<sup>43</sup> See *infra* Part III.

<sup>44</sup> See *supra* notes 10 & 16 and accompanying text.

<sup>45</sup> See JOHN WITTE, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 5-7 (2000 2d ed. 2005) [hereinafter “WITTE”].

authority for extending Western Germanic kingdoms and ruling diverse peoples.<sup>46</sup> The relationship of church and state changed dramatically between 1050 and 1150, when a large contingent of clergy united under the Bishop of Rome to form an independent polity, separate from state authorities.<sup>47</sup> Western religious balkanization and persecution in the twelfth through sixteenth centuries was no less contentious. Additionally, the many common formulations of religious rights and liberties that came to prevail in eighteenth century American colonies were first forged—not by a James Madison or a Thomas Jefferson—but by Catholic theologians and canon lawyers more than four centuries earlier.<sup>48</sup>

A further historical example of why the separation of church and state came to be in America is due to the Spanish Inquisition. Fifteenth century Spanish monarchs subordinated ecclesiastical courts and assumed exclusive political and legal control over the prosecution and execution of heretics, Jews, and Muslims.<sup>49</sup> These actions signaled the Protestant Reformation, inaugurated by Martin Luther's call for religious freedom by posting the Ninety-Five Theses in 1517 and burning the canon law books in 1520.<sup>50</sup> Emory University's John Witte writes "[t]he Protestant Reformation broke the unity of Western Christendom and eventually laid the foundations for the modern Western system of religious pluralism."<sup>51</sup> Protestant groups in Europe and America cast these theological doctrines into democratic forms designed to protect rights; thus laying the foundation for an expansive theory of legal rights and liberties.<sup>52</sup> Consequently, the Reformation Era produced concepts including term limits, codification of laws, and distribution of political power between self-checking

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<sup>46</sup> See *id.* at 7.

<sup>47</sup> See HAROLD BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983) (noting that church history scholars refer to this separation as the Papal Revolution, wherein Pope Gregory VII proclaimed that emperors and kings had no authority over the church).

<sup>48</sup> See WITTE, *supra* note 45, at 9.

<sup>49</sup> See *id.* at 9-10.

<sup>50</sup> See *id.* at 10.

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

<sup>52</sup> *Id.* at 10-11.

executive, legislative, and judicial branches.<sup>53</sup> These perspectives presumably had monumental influence on the theories of inalienable rights in early modern Europe and eighteenth century America.

## 2. *A Colonial Look at Religious Liberty in America*

Colonial America proved to be a haven for European dissenters in which Anglo-Puritans who escaped religious persecution wanted others to worship “their way” in the seventeenth and eighteenth centuries.<sup>54</sup> Accordingly, they fined, banished, whipped, killed, and imprisoned non-conforming people.<sup>55</sup> As a consequence, the seventeenth and eighteenth century Enlightenment philosophers sought unity of “rights” in non-religious, exclusive and monopolistic terms.<sup>56</sup>

For a nation to disestablish religion altogether and grant universal associated liberty without governmental obstruction was a novel exercise. Undoubtedly, a plurality of theological and political views informed the Constitution’s Framers.<sup>57</sup> By design, therefore, the First Amendment reflects only part of the early constitutional experiment. On their face, the Religion Clauses define the outer boundaries of appropriate governmental action respecting religion.<sup>58</sup> As such, government may not prescribe religion nor proscribe its exercise.

Nineteenth and twentieth century neo-liberalist theorists and practitioners built upon the foregoing history and further secularized First Amendment rights and liberties beyond religious language. Consequently, America now celebrates

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<sup>53</sup> See *id.* at 13.

<sup>54</sup> *Id.* at 16.

<sup>55</sup> See *id.*

<sup>56</sup> See BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW 1150-25* (1997).

<sup>57</sup> BARTON, *supra* note 30, at 38.

<sup>58</sup> See *supra* note 28; Wallace, *supra* note 37, at 488 (Professor Wallace noting “[w]e should not be surprised to learn that the original reasons for singling out religion and placing it beyond government’s power mostly religious”).

pluralism, at least in theory.<sup>59</sup> Such separation is clearly essential in avoiding religious tyranny. Indeed, Thomas Jefferson once said that, “[a] democracy is nothing more than mob rule, where fifty-one percent of the people may take away the rights of the other forty-nine.”<sup>60</sup> History demonstrates how true Jefferson’s aphorism can be without partitions between canon and secular law.

3. *A Cursory Look at Why the Bill of Rights was Formed and Who was Being Protected: Freedom of Speech was Intended for Individuals, not Media Corporations*

To underscore the previously noted theory that the First Amendment was adopted to protect individual rather than corporate interests, one need only look at the historical setting under which the Bill of Rights was adopted. If nothing else, the consolidated role of church and state that precipitated the English Reformation proved such centralized governance could produce tyranny and abuse. With this backdrop, several Anti-Federalist delegates to what is now known as the 1787 Constitutional Convention in Philadelphia argued against a structure that could usurp individual rights and liberties.<sup>61</sup>

The Anti-Federalist message, fueled by the pre-Revolutionary War tyranny in England, warned against a powerful federal government and cautioned that specific limits to the federal Constitution were necessary to prevent the federal government from invading upon individual rights.<sup>62</sup> Although the Convention adopted the Constitution, the delegates sent a clear message, and President George Washington urged the Congress to consider how it might address the Anti-Federalist concerns raised by several state conventions.<sup>63</sup> In response to President Washington:

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<sup>59</sup> Cf. Michael deHaven Newsom, *Common School Religion: Judicial Narratives in a Protestant Empire*, 11 S. CAL. INTERDISC. L.J. 219 (2002); Michael deHaven Newsom, *The American Protestant Religion: A Historical Perspective*, 40 WASHBURN L.J. 187 (2001).

<sup>60</sup> Thomas Jefferson (1820), <http://www.monticello.org/site/jefferson/democracy-nothing-more-mob-rule>.

<sup>61</sup> BARTON, *supra* note 30, at 22-23; *see also* STONE, *et al.*, *supra* note 38, at 5-6.

<sup>62</sup> *See id.*

<sup>63</sup> BARTON, *supra* note 30, at 23 (internal citations omitted).

The result was twelve proposed amendments, specifying exactly what the federal government, and only the federal government could not do. Of those twelve, ten (now termed the Bill of Rights) were ratified by the states. At the top of the ratified list was the amendment completely removing the subject of religion and religious expression from the jurisdiction of the federal government, thereby leaving it as it had been: in the hands of the states and *the people*.<sup>64</sup>

Thus, it only makes sense that the First Amendment's express language demonstrates the Framers' desire to protect and encourage free press, speech, assembly, and the guarantee of government redress.<sup>65</sup> Moreover, given the history at issue, it also makes sense that Congress intended these protections to be for *individuals*.<sup>66</sup>

With respect to the clear individual liberties at issue, the appropriate rhetorical question becomes why the colonial settlers felt the need to protect themselves from the "government?"<sup>67</sup> The previously detailed historical

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<sup>64</sup> *Id.* at 23 (emphasis added).

<sup>65</sup> See generally KEITH WERHAN, FREEDOM OF SPEECH (2004).

<sup>66</sup> As part of a passage noting his disagreement with the frequently cited philosophical divisions between the original Constitution and the Bill of Rights, and conceding the wide acceptance that the Bill of Rights was only to protect individuals, Yale professor Akhil Amar writes:

[c]onventional wisdom acknowledges that the original Constitution proposed by the Philadelphia convention focused primarily on issues of organizational structure and democratic self-governance: federalism, separation of powers, bicameralism, representation, and constitutional amendment. By contrast, the Bill of Rights proposed by the first Congress is generally read to have little to say about such issues. *Its dominant approach, according to conventional wisdom, was rather too different: to vest individuals and minorities with substantive rights against popular majorities.*

Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1132 (1991) (emphasis added).

<sup>67</sup> Amar, *supra* note 66, at 1136 (noting that because of the compromise between the Federalists and Anti-Federalists, the term government was limited to the federal government, not the states; however, "[t]hrough the Fourteenth Amendment . . . [that] almost all the provisions of the Bill of Rights have come to be 'incorporated' against the states.") (internal citations omitted).

backdrop shows the First Amendment was obviously for *individuals*, not corporate and individual rights.<sup>68</sup> Accepting the argument that media is a *de facto* fourth branch of government,<sup>69</sup> the Framers' presumed original First Amendment intent was to protect its enumerated freedoms from government control. Arguably, these basic tenants are so implied that the Framers did not expressly incorporate them into the original Constitution "because of their belief that the government they envisioned, limited to the enumerated powers, could not constitutionally enact a law restricting free speech because that was not among the government's enumerated powers."<sup>70</sup> Now, however, in the twenty-first century, religious fundamentalists team with corporations and media to impact policy and proselytize "unbelievers."<sup>71</sup> History suggests government plus religion equals

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<sup>68</sup> See *infra* Part IV.

<sup>69</sup> See *supra* notes 10 & 16 and accompanying text.

<sup>70</sup> JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1144-46 (7th ed. 2004). Further, in keeping with this argument, in the context of a larger Second Amendment analysis, two highly reputed constitutional scholars note the following with respect to the Bill of Rights:

[T]he commonplace observation that the [F]ramers of the Bill of Rights did not believe they were creating new rights. Instead, they believed that they were recognizing rights already part of their English constitutional heritage and implicit in natural law. In fact, many of the [F]ramers cautioned against a bill of rights, arguing that the suggested rights were inherent to a free people, and that a specific detailing of rights would suggest that the new constitution empowered the federal government to violate other traditional rights not enumerated.

Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 320 (1991) (internal citations omitted).

<sup>71</sup> As evidence of contemporary attempts to proselytize, where media (the Fourth Estate) attempts to control religion and religion attempts to control media, in December 2011 TLC was scheduled to begin airing a new reality show about Lebanese-American Muslims living in Dearborn, Michigan called the *All-American Muslim*. Amid protests and pressure from right-wing political and evangelical Christian groups, Lowe's, a nationally branded home improvement store, withdrew its previously pledged sponsorship of the reality show. Rap music icon Russell Simmons expressed his disappointment and subsequently purchased the requisite advertisement sponsorship so the show could air as originally scheduled. In response to an announced boycott of the home improvement store, spokesperson Karen Cobb defended Lowe's actions by claiming it was only one of approximately a dozen others to withdraw their support after the controversy. See Fahima Haque, *Russell Simmons Buys Ads for "All-American Muslim"*, Dec. 13, 2011, available at [http://www.washingtonpost.com/blogs/therootdc/post/russell-simmons-buys-ads-for-all-american-muslim/2011/12/13/gIQAp5dmrO\\_blog.html](http://www.washingtonpost.com/blogs/therootdc/post/russell-simmons-buys-ads-for-all-american-muslim/2011/12/13/gIQAp5dmrO_blog.html); Edith Honan, *U.S. Home Improvement*

authoritarianism. Adding corporate conglomerates to that societal mix can lead to fascism.<sup>72</sup> If today's media fascination with anti-Islamic imagery is any indication, media needs more regulation, not less.

Religious pluralism and liberty of belief—something that also entails the right not to believe—encourages diversity and understanding through dialogue, especially in times of disagreement.<sup>73</sup> These principles of a deliberative and participatory democracy should be encouraged and defended. However, with Americans spending 151 hours on average per week watching television,<sup>74</sup> consumed with media images of racial, religious, and ethnic divisions,<sup>75</sup> a deliberative and participatory democracy is not easily achieved.

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*Chain Lowe's Monday Defended its Decision to Pull Advertising From Reality TV Show "All-American Muslim" Amid Charges the Company Had Given In to Bigotry*, Dec. 12, 2011, <http://www.reuters.com/article/2011/12/13/us-media-muslim-lowes-idUSTRE7BC01D20111213>; see also Camille Mann, *Russell Simmons Weighs in on TLC's "All-American Muslim" Ad Controversy*, Dec. 13, 2011, [http://www.cbsnews.com/8301-31749\\_162-57342090-10391698/russell-simmons-weighs-in-on-tlcs-all-american-muslim-ad-controversy/](http://www.cbsnews.com/8301-31749_162-57342090-10391698/russell-simmons-weighs-in-on-tlcs-all-american-muslim-ad-controversy/) (discussing how Lowe's caved to pressure from conservative evangelical groups and pulled its pledged advertisements to air during the *All-American Muslim* TV program).

<sup>72</sup> See *Orwell Rolls in His Grave*, [http://www.youtube.com/watch?v=g\\_1YGyIaK80t](http://www.youtube.com/watch?v=g_1YGyIaK80t) (filmmaker Robert Kane Pappas repeatedly reminds viewers of Winston Smith, the hypothetical protagonist of author George Orwell's novel, *1984*, who was employed by the Ministry of Truth where he was responsible for altering past records such that when the government, "Big Brother," changed matters, a record check would verify the government's position); see *id.*

<sup>73</sup> See Diana L. Eck, *What is Pluralism?* (Harvard Project on Religious Pluralism 2006), available at [http://pluralism.org/pages/pluralism/what\\_is\\_pluralism](http://pluralism.org/pages/pluralism/what_is_pluralism).

<sup>74</sup> See The Pew Forum on Religion & Public Life, *Religion in the News: Islam Was No. 1 Topic in 2010* (Feb. 24, 2011), <http://pewforum.org/Politics-and-Elections/Religion-in-the-News--Islam-Was-No--1-Topic-in-2010.aspx#1>.

<sup>75</sup> See *id.*

### III. MEDIA IN 21ST CENTURY AMERICAN CULTURE: RACE, VIOLENCE AND ISLAM

#### A. *Deregulation, Fin-Syn, and the Business Agenda*

For better or worse, technological advances in digital media proved to promote globalization and cultural imperialism.<sup>76</sup> In order to appreciate such within this Article's context, it is beneficial to briefly examine the politics of media deregulation.

The FCC originally adopted the Financial Interest and Syndication ("Fin-Syn") Rules in 1970 to place significant limitations on the ability of established networks (*e.g.*, ABC, CBS, and NBC) to acquire financial interest or syndication rights in television programming.<sup>77</sup> As the FCC reported, "[t]he Commission imposed these constraints to limit network control over television programming and thereby encourage the development [of] a diversity of programs through diverse sources of program services."<sup>78</sup>

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<sup>76</sup> While proponents of media deregulation argued the Internet's emergence leveled the playing field between media corporations and small independent producers that necessitated, for example, the fairness doctrine, the opposite proved to be true. During the Internet boom, as successful, large media companies saw the value of their stock rise, they often acquired tangible assets, including other media companies. This allowed the smaller companies to maintain value after Internet stock prices fell. After small companies demonstrated how the Internet could be used for commerce, major media players began buying them or forcing mergers for the smaller companies' continued existence. *See supra* note 32; CROTEAU & HOYNES, *supra* note 15, at 29-30 (noting that major media companies hostilely acquired and merged with smaller media companies after the smaller companies demonstrated positive returns due to internet); *id.* at 30 (noting that during the first six-months of 1999 alone, there were more than 650 Internet mergers and acquisitions valued at over \$37 billion).

<sup>77</sup> *See, e.g.*, FCC Rcd. No. DC 95-54 (Apr. 5, 1995), *available at* [http://transition.fcc.gov/Bureaus/Mass\\_Media/News\\_Releases/nrmm5050.txt](http://transition.fcc.gov/Bureaus/Mass_Media/News_Releases/nrmm5050.txt); *see* Schurz Commc'n, Inc. v. FCC, 982 F.2d 1043, 1045 (7th Cir. 1992) (noting that the Fin-Syn Rules prevented networks from syndicating network-produced programs to independent television stations and networks were prohibited from purchasing syndication rights from independent producers).

<sup>78</sup> FCC Report, *supra* note 77, at 1.

In November 1993, after an anti-regulatory court ruling,<sup>79</sup> the FCC eliminated the Fin-Syn Rules.<sup>80</sup> Moreover, the Reagan-Bush 1980s anti-regulatory sentiment that led to the fairness doctrine's repeal<sup>81</sup> carried over into the Clinton Administration with Congress' enactment of the Telecommunications Act of 1996. As sociology and media professors Croteau and Hoynes write:

The act had been heavily promoted by the media and telecommunications industries, leading even the New York Times to editorialize 'Forty million dollars' worth of lobbying bought telecommunications companies a piece of Senate legislation they could relish. But consumers have less to celebrate.' The Times went on to argue that the bill's 'anti-regulatory zeal goes too far, endangering the very competition the bill is supposed to create.'

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While the Telecommunications Act was promoted using a market approach that emphasized more competition, the changes actually helped to fuel a new wave of media mergers and acquisitions.<sup>82</sup>

In fact, less than a month after the FCC regulatory changes, Viacom and CBS announced their plans to merge, something that would previously have been impossible.<sup>83</sup>

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<sup>79</sup> See generally *Schurz Commc'n, Inc.*, 982 F.2d 1043.

<sup>80</sup> See FCC Report, *supra* note 77 (After the *Schurz Communication, Inc.* remand, the FCC allowed the Fin-Syn Rules to sunset); Tamber Christian, *The Financial Interest and Syndication Rules—Take Two*, 3 COMMLAW CONSPECTUS 107, 108-14 (1995).

<sup>81</sup> See *supra* note 32 and accompanying text.

<sup>82</sup> CROTEAU & HOYNES, *supra* note 15, at 30 (citing Opinion, *A Flawed Communications Bill*, N.Y. TIMES, June 20, 1995 at A14), available at <http://www.nytimes.com/1995/06/20/opinion/a-flawed-communications-bill.html>; Blake D. Morant, *The Inescapable Intersection of Credibility, Audience and Profit in Broadcast Media's Coverage of Elections*, 24 ST. JOHN'S J. LEGAL COMMENT 479, 484 (2009) (internal citations omitted) [hereinafter "Morant, *Intersection of Credibility*"] (quoting that "[b]roadcast deregulation in the 80s and the . . . Telecommunications Act of 1996 . . . accelerated the industry's trend toward conglomeration. The FCC's relaxation of rules that restrict ownership of media sources within localities added more velocity to monopolization").

<sup>83</sup> CROTEAU & HOYNES, *supra* note 15, at 32.

Documentary filmmaker Robert Kane Pappas' *Orwell Rolls in His Grave*<sup>84</sup> chronicles how corporate media elites have obtained increasing power and financial influence by acquiring local news channels and newspapers, and concentrating national *and* local influence within the control of just a few companies that sell their influence through technological innovation.<sup>85</sup> Indeed, local TV news is viewed and "consumed" by more people than any other source.<sup>86</sup>

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<sup>84</sup> See *supra* note 14.

<sup>85</sup> As an example, the documentary notes how under loosened FCC regulations, media moguls like Rupert Murdoch, owner of FOX News and *The New York Post*, was also able to acquire ownership of Direct TV. See *id.* Moreover, in addressing the financial interest and perceived bias in journalism, an inherent conflict based on the financial structure of the news marketplace, noted media scholar Blake Morant writes the following, based on Pew Research Center numeric analysis:

Monopolization of media, particularly by large corporate entities, contributes to the perception that disseminated information is tainted by corporate influence. In fact, corporate control of mass media foments the view that money and power contribute to corporate-friendly news and minimized reporting of opposing views. As a result, news reported by media becomes subject to advertisers' preferences and corporate profitability.

Empirical data confirm the reality of corporate influence. A survey 547 journalists and media executives conducted by the Pew Center reveals that 66% of national journalists and 57 percent of local journalists feel that the economic interest in terms of profit negatively affects the quality of their work-product. The respondents opine that both corporate owners and advertisers often usurp the editorial judgment of media personnel. It comes as no surprise, therefore, that 80% of the journalists surveyed feel that market pressures often kill relevant or socially pertinent stories that are judged as dull or less attention-grabbing.

Morant, *Intersection of Credibility*, *supra* note 82, at 485 (internal citations omitted).

<sup>86</sup> See *In re* 2002 Biennial Regulatory Review, 18 F.C.C.Rcd. 13, 620 (2003), *aff'd in part and remanded*, *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) (addressing the racially-biased influence of local news, in the context of the FCC's 2003 Media Ownership Order); ROBERT M. ENTMAN & ANDREW ROJECKI, *THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA* 79 (2000) (citing a 1997 Pew Research Center Report) [hereinafter "THE BLACK IMAGE"]; Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1495 (2005) (UCLA law professor Jerry Kang opines "[t]roubling is what's on the local news. Sensationalistic crime stories are disproportionately shown: 'If it bleeds, it leads.' Racial minorities are repeatedly featured as violent criminals. Consumption of these images, the social cognition research suggests, exasperates our implicit biases against racial minorities") [hereinafter "Kang"].

Further, author William Leach critiques new media developments as mechanisms for large media corporations consolidating their industry influence to create a culture enthralled in the cult of “the new,” with associated pecuniary value.<sup>87</sup> Consumption and consumerism, both of which play into the media’s corporate profit interests, have clearly reshaped the America existence. While such reshaping began prior to 9/11, it has significantly increased in the decade since as media corporations continue to “manage” news in the interest of ratings and advertising fees,<sup>88</sup> at the expense of religious and ethnic minorities.<sup>89</sup>

**B. *Managing Corporate Interest in News Media: Black Stereotypes and the “If it Bleeds, it Leads!” Marketing Philosophy***

*1. Black Stereotypes in the Media*

“Negrophobia” can generally be described as a fear of Blacks.<sup>90</sup> In a culture where so many individual perceptions are based on television rather than personal experiences,<sup>91</sup> many Americans are presumably exposed to Blacks through news coverage and sitcoms,<sup>92</sup> both of which are influenced by profit margins as media corporations consider the bottom line.<sup>93</sup> “Stereotypes are especially effective in conveying ideological messages because they are so laden with ritual and myth, particularly in the case of African Americans; but,

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<sup>87</sup> See William R. Leach, *LAND OF DESIRE: MERCHANTS, POWER, AND THE RISE OF A NEW AMERICAN CULTURE* (1994).

<sup>88</sup> See Kang, *supra* note 86, at 1555.

<sup>89</sup> See SAID, *supra* note 24; see also *infra* notes 108 to 111 and accompanying text.

<sup>90</sup> JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* (1997).

<sup>91</sup> See *supra* note 18, and accompanying text (discussing the average of 151 weekly hours during which Americans “consume” television).

<sup>92</sup> See ROBIN R. MEANS COLEMAN, *Black Sitcom Portrayals*, in *GENDER, RACE, AND CLASS IN MEDIA*, *supra* note 15, at 79; Kang, *supra* note 86, at 1494 (describing this phenomenon, as part of a discussion on communications law and policy, as a “vicarious experience with the racial other, transmitted through the media”).

<sup>93</sup> *THE BLACK IMAGE*, *supra* note 86, at 79.

invariably, these [B]lack representations are totally at odds with the reality of African Americans as individual people.”<sup>94</sup>

In evaluating the imagery of non-threatening Blacks cast in primetime television, it is beneficial to consider, for example, the post-Civil Rights Movement sociopolitical context in which the popular sitcom *Good Times* was cast. In establishing a foundation, scholar Jannette Dates writes as follows:

Television viewers’ perceptions about African Americans changed during the 1960s as the civil rights story unfolded at dinnertime each day. Moreover, law and order and the ‘silent majority’ were much discussed by those in the Nixon White House of the late 1960s and early 1970s. Then . . . Richard Nixon was forced to resign as president of the country, Gerald Ford served out Nixon’s term, and Jimmy Carter was elected to a single term in office. When ‘Good Times’ first aired at this point, the civil rights era was drawing to a close. The series was introduced to American viewers by its producers as a sympathetic, ‘authentic,’ and realistic portrayal of the black man’s plight.<sup>95</sup>

According to Dates, the sitcom’s weekly portrayal of a lower-class poor Black family living in Chicago housing developments, (“The Projects,”) showcased white, middle-class values, opposed to those that would have been authentic to a Black family living in the depicted socioeconomic and cultural situation.<sup>96</sup>

In further examining the popularly accepted and stereotyped image of Blacks in primetime sitcoms, one may consider *Sanford and Son*,<sup>97</sup> and *Benson*,<sup>98</sup>

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<sup>94</sup> JANNETTE L. DATES & WILLIAM BARLOW, *A War of Images*, in *SPLIT IMAGE: AFRICAN AMERICANS IN THE MASS MEDIA* 5 (Jannette L. Dates & William Barlow, eds., 2d. ed. 1993).

<sup>95</sup> JANNETTE L. DATES, *Commercial Television* in *SPLIT IMAGE*, *supra* note 94, at 292.

<sup>96</sup> *Id.* at 293.

<sup>97</sup> *See id.* *Sanford and Son* was based on the assumption that its characters were unintelligent and in the mode of the controversial but popular *Amos-n-Andy*. *Sanford and Son* starred Red Foxx, a well-known stand-up comic from the nightclub circuit, as Fred Sanford, the main character. Because the show was modeled after the British comedy *Steptoe and Son* with the injection of American racial problems and satire, its white producers presented Black characters who were shaped by perspectives of Black culture rather than Black culture itself.

<sup>98</sup> *See id.* at 295. *Benson* was a spinoff from the popular 1970s sitcom *Soap*. *Benson* featured the Black butler, Robert Guillaume as Benson Dubois, who moved-up from his purely domestic duties

both of which portrayed Blacks as acceptable in placating cultural stereotypes. No popular primetime portrayals of Black life added to Negrophobia. Instead, primetime showcased Blacks as marginalized and innocuous.<sup>99</sup> The media's portrayal of Blacks as fearful and dangerous was left to the nightly news.

## 2. *Violence in the Media that Often Includes Blacks*

In recent years, newspaper editors and television producers have been forced to consider marketing along with traditional journalistic matters.<sup>100</sup> As evidence of this economic phenomenon, noted media scholars reported on Chicago, Illinois' local news as a case study through which empirical and anecdotal research supports the conclusion that local news markets are managed with images of blood, loaded guns, bodies on stretchers, and other vivid images of violence in the name of entertainment.<sup>101</sup> Moreover, from a statistical perspective, the local images of violence are overwhelmingly of Blacks or other minorities.<sup>102</sup> In an age of electronic media consumption, could pecuniary interest cause local newsmakers to "manage" news in the name of capitalism?

Local news producers' decisions to feature violence reflect their presumption that it helps them cope with the competition. The ability of local news to draw ratings that often surpass those of the network news programs seems to support that belief. Moreover, much evidence does suggest a public whose attention is captured most readily by violence and human interest.

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to become a trusted and dependable confidant to the governor of a mythical state. Indeed, "*Benson* fit the pattern that scripted African American male characters as innocuous true-believers in the system, who supported, defended, and nurtured mainstream, middle-class American values . . . ." *Id.*

<sup>99</sup> See Leonard M. Baynes, *White Out: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment Programming*, 45 ARIZ. L. REV. 293, 304 (2003) (noting that most negative stereotypes of people of color are learned through television); see also DONALD BOGLE, *TOMS, COONS, MULATTOES, MAMMIES, & BUCKS: AN INTERPRETATIVE HISTORY OF BLACKS IN AMERICAN FILMS* (4th ed. 2008) (detailing Black imagery in popular American film and television, including associated pictorial depictions).

<sup>100</sup> See DOUGLAS UNDERWOOD, *WHEN MBAS RULE THE NEWSROOM: HOW THE MARKETERS AND MANAGERS ARE RESHAPING TODAY'S MEDIA* (1993).

<sup>101</sup> See *THE BLACK IMAGE*, *supra* note 86, at 78.

<sup>102</sup> See *id.* at 78-83.

According to the Pew Research Center, the ten stories in 1998 in which the public voiced the most interest were: the Jonesboro, Arkansas school shooting . . . the Oregon high school shooting . . . the U.S. Capitol shooting . . . military strikes against Iraq . . . military strikes in Sudan and Afghanistan . . . outcome of elections . . . unreasonable weather . . . nationwide heat wave . . . conflict with Iraq and U.N weapons inspectors . . . and Clinton/Lewinski. Such figures can only heighten the pressures on those to running news organizations to keep the news simple and, perhaps, sensational.<sup>103</sup>

Further, these same media scholars and researchers specifically wrote about a 2000 analysis of Chicago's CBS affiliate, WBBM, which tried to move away from the typical routine of crime and calamity—with the starring roles reserved for minorities—by introducing a serious news journal program.<sup>104</sup> Three months after the program's February introduction, during the May sweeps, ratings plunged with WBBM collecting only eight percent of the viewers, compared with twenty-three and eighteen percent for Chicago's ABC and NBC affiliates, respectively.<sup>105</sup> By July 2000, because the ratings continued to drop, the station resorted to "leading with bleeding" for the ratings to rebound.<sup>106</sup>

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<sup>103</sup> *Id.* at 92 (internal citations omitted).

<sup>104</sup> *See id.* at xi-xii.

<sup>105</sup> *Id.* at xii.

<sup>106</sup> This economic consequence causes some scholars to argue that the news media, while thought to be an institution supporting American democracy as the proverbial fourth branch of government, may actually be destroying it. *Id.*; Morant, *Intersection of Credibility*, *supra* note 82 at 486 ("Media's insatiable quest for ratings intensifies competition and leads to the adoption of strategies that guarantee a sizable audience."); *see, e.g.*, JOSEPH N. CAPPELLA & KATHLEEN HALL JAMIESON, *SPIRAL OF CYNICISM: THE PRESS AND THE PUBLIC GOOD* 30-37 (1997); Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decision Making*, 69 MD. L. REV. 849, 851 (2010) (noting the media has long been criticized for overemphasizing the prevalence of crime) (citing Susan Bandes, *Fear Factor: The Role of Media in Covering and Shaping the Death Penalty*, 1 OHIO ST. J. CRIM. L. 585, 597 (2004)); *see* Lyrissa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 218 (1998) (arguing news shows can afford to use questionable newsgathering techniques as "dramatic exposes lead to higher ratings and, consequently, higher profits."); *see also* JAMES FALLOWS, *BREAKING THE NEWS: HOW THE MEDIA UNDERMINE AMERICAN DEMOCRACY* 5-6, 9 (1996); Oswald, *supra* note 13, at 386-87.

The previously cited scholarship is not unique in addressing the unfortunate nature of bias in so-called fair journalism, as corporate interests incentivize media to sensationalize, entertain, and placate consumers in the name of capitalism.<sup>107</sup> In drawing parallels between media news coverage of crime and common perceptions of the criminal justice system, as well as the sociopolitical trend of “get tough on crime” laws, Duke law professor Sara Sun Beale writes:

I begin with the question of how the news media treats crime, focusing on economic factors and changes in media coverage. *The news media are not mirrors, simply reflecting events in society. Rather, media content is shaped by economic and marketing considerations that override traditional journalistic criteria for newsworthiness. This trend is apparent in local and national television’s treatment of crime, in which the extent and style of news stories about crime are adjusted to meet perceived viewer demand and advertising strategies, which frequently emphasize particular demographic groups, with a taste for violence.* In the case of local television news, this trend results in virtually all channels devoting a disproportionate part of their broadcast to violent crimes, and to many channels adopting a fast-paced, high-crime strategy based on an entertainment model. In the case of

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<sup>107</sup> See RICHARD DAVIS & DIANA OWEN, *NEW MEDIA AND AMERICAN POLITICS* (1998). Further, in addressing this empirically definable and financially-motivated trend, while noting the media’s obvious departure from its revered “Fourth Branch” status in the Western world, Professor Moriearty opines as follows:

Once defined as the ‘Fourth Estate’ of government, the news media has long been regarded as an indispensable element of Western society. In its purest form, the news media is envisioned as a guardian of the public interest, responsible for exposing abuses of power while defending the democratic values of the populace. In a true free market system such as ours, however, it is all but inevitable that less noble pursuits would emerge. In the early 1990s, the media began to incorporate an ‘infotainment’ approach to reporting. Nowhere was this more apparent than in the news media’s coverage of crime and criminal justice. The 1990s saw a decisive shift by both the print and broadcast news media toward a ‘soft news’ agenda that sensationalized and, in many ways, radicalized crime stories.

Moriearty, *supra* note 106, at 860-61 (internal citations omitted).

network news, this strategy results in much greater coverage of crime, especially murder, with a heavy emphasis on long-running, tabloid-style treatment of selected cases in both the evening news and news magazines. Newspapers also reflect a market-driven reshaping of style and content, accompanied by massive staff cuts, resulting in a continued emphasis on crime stories as a cost-effective means to grab readers' attention. These economic and marketing considerations shape the public's exposure to crime in the news media.<sup>108</sup>

Clearly, therefore, with the ethics of fair and balanced news subordinate to competition for consumers, one must ask: Could the media be vilifying Islam in the decade after 9/11 the same way it has traditionally vilified Blacks<sup>109</sup> and portrayed crime<sup>110</sup> in the name of capitalism?<sup>111</sup>

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<sup>108</sup> Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 401 (2006) (emphasis added) [hereinafter "Sun Beale"]. Professor Moriearty also addresses disparities in a famous study regarding the likelihood of African Americans shown committing violent crimes:

[a] now famous study of Los Angeles local news during the mid-1990s, for example, [which] found that African-Americans were twenty-two percent more likely to be shown by the media committing violent crime than nonviolent crime, while in reality, they were equally likely to be arrested for both violent crime nonviolent crime. White Americans, on the other hand, were thirty-one percent more likely to be depicted committing a nonviolent crime than a violent crime, when, in fact, they were just seven percent more likely to be arrested for a nonviolent crime.

Moriearty, *supra* note 106, at 870-71 (internal citations omitted).

<sup>109</sup> See THE BLACK IMAGE, *supra* note 86, at 78-83.

<sup>110</sup> See Sun Beale, *supra* note 108, at 401; see also Moriearty, *supra* note 106, at 870-71.

<sup>111</sup> Oswald, *supra* note 13, at 386-87 (quoting that "Many fear that the media companies will ignore the interests of their public audiences in order to attend to their stockholders. This in turn forces editorial decisions to be ultimately based upon making a profit, rather than informing the public."). Professor Sun Beale addresses media's profit interest as follows:

Television networks and stations sell audiences to advertisers by offering programs to viewers. James Hamilton's groundbreaking study demonstrated that broadcasters adjust the level of violence in entertainment programming on television to the target audiences they seek to attract and products to be

### C. *Orientalism and Fear Politics Prior to 9/11: History in a Nutshell*

#### 1. *Media's Corporate Power Interest at Work*

With corporate interests in mind, leading law and film scholars note that “visual media is a powerful tool of persuasion, manipulation, and communication.”<sup>112</sup> In fact, this interdisciplinary connectedness between law and broadcast images is documented in scholarship.<sup>113</sup> As *Orwell Rolls in His Grave* highlights, while journalistic integrity in broadcast media may often be compromised in the name of ratings to increase advertising revenue without

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advertised. They manipulate violence in entertainment programming to establish specific brand identities, increase viewership during periods when local advertising rates are set, and counter especially popular programming on competitor's channels. In the context of entertainment programming, use of violence is an economic strategy to develop specific types of audiences.

See Sun Beale, *supra* note 108, at 421-22. Indeed, in support of Professor Sun Beale's research regarding the direct correlation between media messaging and public perceptions on crime, with respect to African Americans, other scholars argue “[t]he American justice system has permitted, and in some cases sanctioned, the use of the immutable characteristic of race as the motivating factor in the enforcement of public laws.” Floyd Weatherspoon, *Ending Racial Profiling of American-Americans in the Selective Enforcement of Laws: In Search of Viable Remedies*, 65 U. PITT. L. REV. 721, 723 (2004) (citing Erika L. Johnson, “A Menace to Society:” *The Use of Criminal Profiles and Its Effects on Black Males*, 38 HOW. L.J. 629 (1995)); see also Mary Maxwell Thomas, *The African-American Male: Communication Gap Converts Justice Into “Just Us” System*, 13 HARV. BLACKLETTER L.J. 1, 28 (1997). Accordingly, it is a more than logical extrapolation that the media uses vilified Islamic imagery to “cook” public perception and peak consumer interests, to grow its bottom line.

<sup>112</sup> Taunya Lovell Banks, *What Documentary Films Teach Us About the Criminal Justice System*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1 (2008); see Howard Kurtz, *Time's ‘Sinister’ Simpson: Cover Photo Was Computer-Enhanced*, WASH. POST, June 22, 1994, at D1 (noting that the purposefully darkened image of O.J. Simpson on Time Magazine's June 27, 1994 cover during his 1994 murder trial served as one of the most infamous reminders of the powerful connection between imagery and persuasion in media); see also Peter Rainelle, *O.J. Lessons*, 69 S. CAL. L. REV. 1233, 1258 (1996) (drawing the connection between the darkened *Time* magazine imagery and underlying societal problems with race).

<sup>113</sup> See, e.g., Peggy Cooper Davis, *What Does Documentary Filmmaking Have to Do With Practicing Law?*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 7 (2008).

vetting or validation,<sup>114</sup> images in the media may simply reflect other images,<sup>115</sup> with powerful and lasting influence, such as evident by “framing.” “The media frames stories when it ‘select[s] some aspects of a perceived reality and make[s] them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation.’”<sup>116</sup> As Professor Sun Beale writes, “[f]raming is significant because it activates some ideas, feelings, and values more than others, and thus encourages particular trains of thought and leads audiences to arrive at certain conclusions.”<sup>117</sup> Is this really what America expects from its “fourth branch of government?”<sup>118</sup> By framing, the media has exasperated the concept of “orientalism” and widened cultural divisions based on religion, especially between Judeo-Christians and Muslims.<sup>119</sup>

Edward Said, the late media scholar and Columbia University professor wrote of orientalism by describing the relationship between Islam and Christianity and the West as follows:

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<sup>114</sup> Robert Kane Pappas, *Orwell Rolls in His Grave*, [http://www.youtube.com/watch?v=g\\_1YGyIaK80t](http://www.youtube.com/watch?v=g_1YGyIaK80t); Oswald, *supra* note 13, at 386 (supporting the view that “the business interests of a media conglomerate often dictate its news coverage. In effect, broadcasters sell audiences to advertisers. National television advertisers consist of large corporations such as Phillip Morris, Proctor & Gamble, General Motors, Sears, and RJR Nabisco . . .”).

<sup>115</sup> Banks, *supra* note 112, at 2.

<sup>116</sup> Sun Beale, *supra* note 108, at 447 (quoting Robert M. Entman, *Framing: Toward Clarification of a Fractured Paradigm*, J. COMM. 52 (Dec. 1993) (first alteration in original)).

<sup>117</sup> *Id.* (citing ELIZABETH M. PERES, *MEDIA EFFECTS AND SOCIETY* 106 (2001)); *id.* n. 226 (citing Patti M. Altenburg et al., *The Effects of News Frames on Readers’ Thoughts and Recall*, 26 COMM. RES. 550 (1999) (noting that framing is very powerful in influencing reality as it literally impacts audiences’ ability to recall information)).

<sup>118</sup> *See supra* notes 10, 16 and accompanying text.

<sup>119</sup> ROBERT T. MORAN, PHILLIP R. HARRIS AND SARAH V. MORAN, *MANAGING CULTURAL DIFFERENCES: GLOBAL LEADERSHIP STRATEGIES FOR THE 21ST CENTURY* 309 (7th ed. 2007) (noting that the world’s three major religions, Judaism, Christianity, and Islam, all originated in the Middle East with a shared reverence for Abraham, considered a patriarch by Jews, an ancestor of Jesus by Christians, and a prophet by Muslims) [hereinafter “MORAN, HARRIS & MORAN”].

From at least the end of the eighteenth century until our own day, modern Occidental reactions to Islam have been dominated by a radically simplified type of thinking that may still be called Orientalist. The general bias of Orientalist thought is an imaginative and yet drastically polarized geography, dividing the world into two unequal parts, the larger, ‘different’ one called the Orient, the other, also known as ‘our’ world, called the Occident or the West.<sup>120</sup>

With the foregoing as a backdrop, Said chronicles the Christian perception of Islam during the Middle Ages and the beginning of the European Renaissance when the religion was believed to be demonic and blasphemous.<sup>121</sup> These perceptions were apparently fueled by the hundreds of years that Islamic armies and navies threatened Europe, destroyed certain parts of it, and colonized others.<sup>122</sup>

In twentieth century America, Muslims were vilified by the media create an “enemy” as gas prices rose in the 1970s and Islamic terrorism became a symbolic message.<sup>123</sup> In support of this position, Junaid Rana, a University of Illinois Asian American Studies professor offers that:

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<sup>120</sup> SAID, *supra* note 24, at 4 (internal citation omitted).

<sup>121</sup> *Id.* at 5.

<sup>122</sup> *Id.* As history reveals, many of the actions for which Western Christians criticized Islam were originated by Christian armies in antiquity. In describing the Holy Crusades, for example, Christian offenses against Islam, church historian Justo Gonzales writes that:

[a]mong the many ideals that captivated the imagination of Western Christendom during the Middle Ages, no other was as dramatic, as overwhelming, or as contradictory, as the crusading spirit. Tragically romanticized by many, the Crusades have the distinction of being one of the most blatant of the many instances in which Christianity, fueled in part by its own zeal, has contradicted its very essence—on this score, only the Inquisition can be compared with it.

JUSTO L. GONZALEZ, I THE STORY OF CHRISTIANITY: THE EARLY CHURCH TO THE DAWN OF THE REFORMATION 345 (2010); *see id.*

<sup>123</sup> SAID, *supra* note 24, at 5; *see also* Pappas, *Orwell Rolls in His Grave*, [http://www.youtube.com/watch?v=g\\_IYGyIaK80t](http://www.youtube.com/watch?v=g_IYGyIaK80t).

[m]obilizing a stereotype of Muslims as threatening by equating them solely with a culture of violence and a notion of terrorism as a socialization process, the assumptions and the logic of Islamophobia use the argument of culture as learned to imagine an essential difference that is hard-wired through innate qualities. This sort of racism shifts the terms of a solely naturalized biological difference to a cultural notion of difference that is nonetheless crafted through a racial logic and that emerged in the United States as a neoconservative strategy in the 1970s.<sup>124</sup>

Indeed, in 1978, Islamic anxiety took center stage in American media and culture with the Iranian Hostage Crisis.<sup>125</sup>

In detailing media's image of Muslims during the hostage crisis and thereafter, Said writes as follows:

Ayatollah Khomeini's image and presence took over the media, which failed to make much of him except that he was obdurate, powerful, and deeply angry at the United States. Finally, as a result of the ex-shah's entry into the United States on October 22, 1979, the United States Embassy in Teheran was captured by a group of students on November 4; many American hostages were held, and released several months later.<sup>126</sup>

It also bears noting that conspiracy theorists assert the refusal to release the hostages until Inauguration Day in January 1981, was politically motivated in that it occurred moments after Republican Ronald Reagan became president, having defeated Democrat Jimmy Carter in the 1980 presidential election.<sup>127</sup> Regardless of whether there is any validity to the conspiracy theorists' assertions, orientalism and Islamaphobia consumed America and the media profited by fueling consumption. This "us" vs. "them" perspective—the very essence of

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<sup>124</sup> Junaid Rana, *More than Nothing: The Persistence of Islamophobia in 'Post-Racial' Racism*, 12 GLOBAL DIALOGUE (Summer/Autumn 2010), available at <http://www.worlddialogue.org/content.php?id=482>.

<sup>125</sup> Pappas, *Orwell Rolls in His Grave*, [http://www.youtube.com/watch?v=g\\_IYGyIaK80t](http://www.youtube.com/watch?v=g_IYGyIaK80t).

<sup>126</sup> SAID, *supra* note 24, at 6.

<sup>127</sup> Pappas, *Orwell Rolls in His Grave*, [http://www.youtube.com/watch?v=g\\_IYGyIaK80t](http://www.youtube.com/watch?v=g_IYGyIaK80t).

orientalism—continued into the 1990s, after the end of the Cold War when Islam became America’s major foreign enemy.<sup>128</sup>

2. *Leftovers Anyone? Is the New Millennium’s War on Terror the 1980s’ Recycled News?*

Some might argue media’s modern day vilification of Muslims as part of the War on Terror is merely recycled news. In *Media Control: The Spectacular Achievements of Propaganda*,<sup>129</sup> political theorist Noam Chomsky argues this point exactly, as did documentary filmmaker Robert Kane Pappas in *Orwell Rolls in His Grave*.<sup>130</sup>

In arguing the post-9/11 War on Terror originated with the 1980s Reagan administration, Chomsky writes:

The war on terrorism was not declared on September 11; rather, it was *redeclared*, using the same rhetoric as the first declaration twenty years earlier. The Reagan administration . . . came into office announcing that a war on terrorism would be the core of U.S. foreign policy, and it condemned what the president called the ‘evil scourge of terrorism.’ The main focus was state-supported international terrorism in the Islamic world, and at that time also in Central America.

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<sup>128</sup> SAID, *supra* note 24, at 7; Oliver Cromwell Cox, *Race, Prejudice, Class Conflict, and Nationalism*, 4 RACE/ETHNICITY: MULTIDISCIPLINARY GLOBAL CONTEXTS 169, 178 (2011) (quoting that “the more nationalistic a people, the less will be its tendency to assimilate, the more it will tend to value its culture, especially its non-material culture, its religion. Moreover, when two highly nationalistic groups come into contact, there will be a mutual fear, distrust, and intolerance”) (published by The Ohio State University Kirwan Institute Office of Diversity and Inclusion and reprinted from RACE: A STUDY IN SOCIAL DYNAMICS: 50TH ANNIVERSARY EDITION OF CLASS, CASTE, AND RACE (2000)); *see* Sun Beale, *supra* note 108, at 418 (noting that only the 9/11 attacks and associated concerns surpass crime in the top consumer spot for news coverage, highlighting the inherently biased nature of sensationalized and tabloid-like journalism).

<sup>129</sup> *See generally* NOAM CHOMSKY, *MEDIA CONTROL: THE SPECTACULAR ACHIEVEMENTS OF PROPAGANDA* (2002).

<sup>130</sup> *See supra* note 14.

The phrase . . . quoted from Reagan had to do with terrorism in the Middle East, and it was the year 1985. That was the year international terrorism in that region was selected by editors as the lead story of the year in an annual Associated Press poll. . .

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[T]here's a striking continuity; the same people are in leading positions. So Donald Rumsfeld is running the military component of the second phase of the war on terrorism, and he was Reagan's special envoy to the Middle East during the first phase of the war on terrorism, including its peak year, 1985. The person . . . in charge of the diplomatic component of the war at the United Nations [wa]s John Negroponte, who during the first phase was supervising U.S. operations in Honduras, which was the main base for the U.S. war against terror in the first phase.<sup>131</sup>

Furthermore, in continuing to develop the argument that today's War on Terror originated in the 1980s, Chomsky also writes:

The depraved opponents of civilization itself in the year 2001 were in the 1980s the freedom fighters organized and armed by the CIA and its associates, trained by the same [S]pecial [F]orces who are now searching from them in Afghanistan. They were a component of the first war against terror and acting pretty much the same way as the other components of the war against terror.

They didn't hide their terrorist agenda that began early on, in fact in 1981, when they assassinated the [p]resident of Egypt, and is continuing. That included terrorist attacks inside Russia severe enough so that at one point they virtually led to a war with Pakistan, although these attacks stopped after the Russians withdrew from Afghanistan in 1989, leaving the ravaged country in the hands of U.S. favorites, who turned at once to mass murder, rape, terror—generally described as the worst period in

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<sup>131</sup> CHOMSKY, *supra* note 125, at 71-72 (internal citations omitted) (emphasis added).

Afghanistan's history. They are now back in charge outside Kabul.<sup>132</sup>

Indeed, there are striking similarities between the news coverage of and policies toward terrorism in the 1980s and those of the decade following 9/11.

**D. *Fear Politics After 9/11: The Media and Racial Profiling of "Other" Americans***

**1. *Understanding Race and Racism Through the Media After 9/11***

Media's imagery of Islam and "other" Americans after 9/11 arguably precipitated the now-recognized term "Islamophobia."<sup>133</sup> Because this xenophobic form of racism has become such a prevalent part of American life after 9/11, academics attempt to study it through religious dialogue, presumably in hopes of defeating its ignorance.<sup>134</sup> On the international front, the United Nations'

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<sup>132</sup> *Id.* at 75-76.

<sup>133</sup> In an attempt to define the often misunderstood academic and practical reality of Islamophobia, Professor Rana writes that "[a]cademics and activists of many persuasions find themselves in all sorts of twisted positions trying to explain a counterintuitive claim [of whether Islamophobia is a form of racism]. Islam is a religion, so how can it be racialized when there is so much heterogeneity present in Muslim populations?" Rana, *supra* note 124; *see also* L. Bennett Graham, *Defamation of Religions: The End of Pluralism?*, 23 EMORY INT'L L. REV. 69, 69-71 (2009) (defining "Islamophobia" in the post-9/11 context and the resulting treatment of Muslims in the public square); MORAN, HARRIS & MORAN, *supra* note 119, at 309 (arguing that "as a religion, Islam is diverse in terms of having different applications of its teachings—for instance, by Sunni Muslims in Algeria and Saudi Arabia, or Shi'is Muslims in Iran or Iraq where most believers are Shi'ites.").

<sup>134</sup> *See* Pacific School of Religion, <http://www.panainstitute.org/jaideep-singh-presumed-guilty-race-religion-and-post-911-racialized-state> (last visited Dec. 28, 2011). For example, during the Spring 2007 academic semester, the Pacific School of Religion Institute for Leadership Development and Study of Pacific and Asian North American Religion (PANA) in Berkley, California hosted Jaideep Singh, Ph.D., as a visiting scholar-in-residence for a course entitled "Presumed Guilty: Race, Religion, and the Post 9/11 Racialized State", Of particular interest, the course description included the following advertisement:

This course examines the daily racialized realities of non-Christian communities of color in the post-9/11 United States, with specific emphasis on the newly-articulated relationship between the state and these communities, especially the religious communities of Muslims, Sikhs, and Hindus and the ethnic

International Convention to Eliminate All Forms of Racial Discrimination (“the Convention”),<sup>135</sup> monitored by the Committee on the Elimination of Racial Discrimination (“CERD”), cites concerns and recommendations regarding apparent racism, xenophobia and intolerance against minority groups evident in media.<sup>136</sup> As a human rights instrument, the Convention commits its members to the elimination of racial discrimination and the promotion of understanding among different races.<sup>137</sup>

In 2002, in the wake of 9/11, CERD urged the Convention’s signatories and parties to adopt a media code of ethics as member states raised concerns regarding increased xenophobia and racial discrimination in media.<sup>138</sup> Although the transactional nature of media ownership brings such responsibility back to the

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communities of Middle Eastern Americans and Asian Americans. Of particular interest in our analysis will be the role of religion in marking targeted Asian Americans as ‘other,’ and the Christian-centric national discourse which continually marginalize and suppress the voices of non-Christians of color.

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Among the issues explored in this course will be the ominously clandestine mass detentions, disappearances and deportations in Muslim American communities; the renewedly aggressive reassertion of racial profiling in law enforcement; and the numerous errors enacted by the state and news media which exasperated the national hate crime epidemic of historic proportions which followed the terrorist attacks of September 11, 2001.

Pacific School of Religion, <http://www.panainstitute.org/jaideep-singh-presumed-guilty-race-religion-and-post-911-racialized-state> (last visited Dec. 28, 2011).

<sup>135</sup> See UNITED NATIONS TREATY COLLECTION, CHPT. IV, HUMAN RIGHTS, *available at* [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en) (last visited Dec. 23, 2011) The United Nations’ General Assembly adopted the Convention and opened it for signatories on December 21, 1965 and it became effective on January 4, 1969; unfortunately as of October 2009, however, the Convention had only 86 signatories and 175 parties.

<sup>136</sup> See CERD, Section C (14), *available at* [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/806a21c075d1b3ddc1256b90004bbcce?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/806a21c075d1b3ddc1256b90004bbcce?Opendocument) (last visited Nov. 4, 2011).

<sup>137</sup> See *id.*

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

United States, the United States *is not* a party to the Convention and has refused to ratify it.<sup>139</sup> As such, the inquiry central to examining the issue of xenophobia in a post-9/11 America is whether influential media corporations are threats to American democracy, given their well-documented profit interests in “cooking” news stories with minorities as the fare,<sup>140</sup> and the modern-day market for unmediated consumerism in communication.<sup>141</sup>

Media coverage of religion more than doubled in 2010,<sup>142</sup> as the Roman Catholic Church was bumped from its dominant spot in mainstream religion news and replaced by Islam.<sup>143</sup> Much of the coverage of Islam in the United States focused on the plan to build a mosque and Islamic center near ground zero in New York City,<sup>144</sup> a Florida pastor’s threat to organize a public burning of the Koran (Qur’an),<sup>145</sup> and commemorations of the 9/11 anniversary.<sup>146</sup> Stories about these

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<sup>139</sup> Section 10 of CERD’s 2000 World Conference specifically identifies religious minorities as targets of xenophobia. CERD’s Secretary-General reports that “religious minorities suffer an added layer of social exclusion from mainstream society as national or even racial minorities . . . [T]he racist stereotyping and targeting of Muslims as ‘fanatics’ can, in turn, create an environment that is likely to foster or promote higher levels of xenophobia and racism.” *See id.*

<sup>140</sup> *See* THE BLACK IMAGE, *supra* note 86, at 92.

<sup>141</sup> *See supra* note 18.

<sup>142</sup> *See, e.g.*, The Pew Forum on Religion & Public Life, *Religion in the News: Islam Was No. 1 Topic in 2010* (Feb. 24, 2011), <http://pewforum.org/Politics-and-Elections/Religion-in-the-News--Islam-Was-No--1-Topic-in-2010.aspx#1>.

<sup>143</sup> *See id.*

<sup>144</sup> *See* Hugh Collins, *Construction Workers Oppose Mosque Near Ground Zero*, AOL NEWS Aug. 20, 2010, <http://www.aolnews.com/2010/08/20/construction-workers-voice-opposition-to-ground-zero-mosque/>.

<sup>145</sup> *See* Lynn Waddell, *Florida’s Quran-Burning Pastor: Rev. Terry Jones Gained Infamy This Week for his Call to Burn Hundreds of Qurans*, Sept. 7, 2010, <http://www.thedailybeast.com/articles/2010/09/07/terry-jones-pastor-who-want-to-burn-qurans.html>.

<sup>146</sup> *See* The Pew Forum on Religion & Public Life, *Religion in the News: Islam Was No. 1 Topic in 2010* (Feb. 24, 2011), <http://pewforum.org/Politics-and-Elections/Religion-in-the-News--Islam-Was-No--1-Topic-in-2010.aspx#1>; *see also* 9/11 in 2010, *Remembrance and Rebuilding*, BOSTON.COM, Sept. 13, 2010, [http://www.boston.com/bigpicture/2010/09/911\\_in\\_2010\\_remembrance\\_and\\_re.html](http://www.boston.com/bigpicture/2010/09/911_in_2010_remembrance_and_re.html).

three Muslim-related events collectively accounted for more than forty percent of all religion-related coverage studied in mainstream American media (broadcast and cable television, newspapers, radio and major news websites).<sup>147</sup> Arguably, the only explanation is that profit-driven media corporations attempt to sell xenophobia to a consumer-driven marketplace the same way they sell crime.<sup>148</sup>

## 2. *Racial Profiling in the Media After 9/11*

As further evidence of how media bias and xenophobic imagery has fueled prejudicial action and racial profiling, Professor Rana explores religious prejudice by expounding upon several ethnographies. In relevant part, she writes that:

[a]s might be expected many of these ethnographic examples and other social-science research do not come to clear conclusions about the racial nature of anti-Muslim sentiments. *Although many of the studies consistently demonstrate the existence of forms of discrimination, xenophobia, prejudice, and violence, and although racism against Arab, South Asian, and Muslim Americans is often widely acknowledged, how race is actually deployed is unclear. Much of this has to do with the paucity of theori[z]ations of race and racism that clearly outline the relationship of race to religion and culture and more specifically to Islam and Muslims.*

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A number of studies have focused on urban experiences of social exclusion in the post-9/11 era through intersectional and comparative analysis. In her study of Arab and Muslim Americans in the Chicago area, Louise Cainkar describes suspicion, physical vulnerability, and exclusion after 9/11 that have historical antecedents in social and political contexts that developed well before 2001. In what she calls ‘cultural sniping’, Cainkar argues that Arab Muslims are more vulnerable to hostility, verbal and

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<sup>147</sup> See The Pew Forum on Religion & Public Life, *Religion in the News: Islam Was No. 1 Topic in 2010* (Feb. 24, 2011), <http://pewforum.org/Politics-and-Elections/Religion-in-the-News--Islam-Was-No--1-Topic-in-2010.aspx#1..>

<sup>148</sup> See Sun Beale, *supra* note 108, at 421-22.

physical, in certain social contexts than non-Arabs and non-Muslims. . . . Although Cainkar prefers to make her argument at the level of sociological theories of exclusion and violence instead of the concept of race and racism, her study shows the complex nature of these dynamics and the need for a more flexible theory of racism.<sup>149</sup>

As further evidence of xenophobia in a “flexible theory of racism,” one must consider the deplorable comments of a former member of the United States House of Representatives. In the days immediately following 9/11, former Louisiana Congressman John Cooksey encouraged racial profiling in a most offensive fashion. While providing an interview to a network of radio stations, Cooksey exclaimed, “If I see someone that comes in that has a diaper on his head and a fan belt wrapped around the diaper on his head, that guy needs to be pulled over and checked.”<sup>150</sup> With such comments exemplifying the bias toward non-Judeo-Christian faith groups, sensationalizing news for consumerism in a post-9/11 culture makes xenophobia commonplace.<sup>151</sup>

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<sup>149</sup> Rana, *supra* note 124 (emphasis added) (internal citations omitted).

<sup>150</sup> PETER G. DE KRASSEL, CUSTOM MAID SPIN FOR NEW WORLD DISORDER: POLITICAL DUST STORMS, CORROSIVE MONEY AND SICK OIL 126 (2004) (quoting former Congressman Cooksey’s post-9/11 radio interview); *see also* David Van Biema et al. *Backlash: As American As . . .*, TIME MAGAZINE (Oct. 1, 2001), *available at*, <http://www.time.com/time/magazine/article/0,9171,1000900,00.html>.

<sup>151</sup> As an important contrast, however, South Carolina Governor Nikki Haley, elected in 2010, was apparently *not* harmed by the post-9/11 widespread racial and religious xenophobia manifested in the former congressman’s statement.

Haley is Asian American of Sikh cultural/religious heritage. Indian Sikhs wear head coverings such as turbans, and as such, some Americans pejoratively mischaracterize them as Arabs or Muslims—especially in America’s post-9/11 political climate. Since 2001, Sikh Americans nationwide report hate crimes similar to those of Muslim Americans, in which references such as ‘ragheads’ or ‘towelheads’ are commonplace.

Roslyn Satchel Augustine, Race & Gender in Political Communication Final Examination (MC-7999, Professor Regina Lawrence, Louisiana State University Manship School of Communication, Dec. 10, 2010) (manuscript on file with author).

In addressing a predominantly Mormon readership on the realities of racial and religious profiling, Utah attorney Karen McCreary reminds Americans that:

After 9/11, tens of thousands of Muslims were questioned, thousands deported for civil immigration infractions, and hundreds subjected to secret arbitrary detention and abusive interrogation. Yet not a single person was arrested or publicly prosecuted for a terrorism-related crime as a result.

The truth is, terrorism knows no religious or other boundaries. Terrorism is not a 'Muslim' phenomenon. In the 10 years since 9/11 we witnessed an American citizen fly a plane into an IRS building in Texas, killing himself and an IRS manager; he left behind an anti-government rant against taxes. We saw the targeted killing of Dr. George Tiller, an abortion doctor, while he was serving as an usher in his Kansas church. In 2005, the FBI declared eco-terrorists the country's biggest domestic terrorist threat.

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As Americans, and particularly as Utahns, we should appreciate the dangers of allowing a minority religious group to be singled out for discrimination. Our history shows that when we target people based on their race, ethnicity, religion or political associations, there are disastrous consequences for our democratic ideals. Lynching. Japanese internment. McCarthyism.<sup>152</sup>

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<sup>152</sup> Karen McCreary, *Muslim Americans and September 11*, THE SALT LAKE TRIBUNE, Sept. 9, 2011, *available at* <http://www.sltrib.com/csp/cms/sites/sltrib/pages/printerfriendly.csp?id=52537665> (referring to Japanese internment as a reminder of the Supreme Court's then-legalized bigotry in the name of national security and the Palmer Raids which were also justified incarcerations due to the threat of communism and political leftism); *see Korematsu v. United States*, 323 U.S. 214 (1944); David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753, 1755 (2004) (Georgetown law professor David Cole argues that Japanese internment and the Palmer Raids, combined with the post-9/11 racial and religious profiling arrests of countless Arabs and Muslims as so called "persons of interest," are among the three most shameful moments in American history).

Indeed, those who do not learn from the past are doomed to repeat its mistakes. American democracy and religious pluralism are far too important to encourage mistakes fueled by sensationalized news that is marketed and sold to consumers.

### 3. *Other Racial Profiling After 9/11*

In the wake of 9/11, as the concept of domestic terrorism became reality, racial profiling became a basis for scholarship in articles<sup>153</sup> and books.<sup>154</sup> Some even attempted to justify this most offensive phenomenon in the name of national security.<sup>155</sup> Such an attempted justification is arguably the most vivid example of xenophobic influence on society, something that given the widespread negative coverage of Islam,<sup>156</sup> can be empirically linked to media.<sup>157</sup>

In May 2003, the New York Advisory Committee to the United States Commission on Civil Rights (“the Committee”) hosted a community forum on post-9/11 civil rights issues.<sup>158</sup> In relevant part, with respect to the issue of racial profiling and examining whether certain law enforcement measures targeted particular racial and ethnic populations, thus violating the civil rights of members of Muslim, Arab, and South Asian communities in New York, the Committee reported disturbing conclusions:

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<sup>153</sup> See, e.g., R. Richard Banks, *Racial Profiling and Antiterrorism Efforts*, 89 CORNELL L. REV. 1201 (2003); Samuel Gross & Deborah Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413 (2002); see also Daphne Barak-Erez, *Terrorism and Profiling: Shifting the Focus From Criteria to Effects*, 29 CARDOZO L. REV. 1 (2007).

<sup>154</sup> See, e.g., FRED C. PAMPEL, *RACIAL PROFILING* (2004); JAMES T. O'REILLY, *POLICE TRAFFIC STOPS AND RACIAL PROFILING: RESOLVING MANAGEMENT, LABOR AND CIVIL RIGHTS CONFLICTS* (2004); see also DARIN D. FREDERICKSON & RAYMOND P. SILJANDER, *RACIAL PROFILING: ELIMINATING THE CONFUSION BETWEEN RACIAL AND CRIMINAL PROFILING AND CLARIFYING WHAT CONSTITUTES UNFAIR DISCRIMINATION AND PERSECUTION* (2002).

<sup>155</sup> See STUART TAYLOR, JR., *The Skies Won't Be Safe Until We Use Commonsense Profiling*, in *CIVIL LIBERTIES V. NATIONAL SECURITY: IN A POST 9/11 WORLD* 157 (M. Katherine B. Darmer, et al. eds., 2004).

<sup>156</sup> See *supra* note 20, and accompanying text.

<sup>157</sup> See *supra* note 18, and accompanying text.

<sup>158</sup> See POST-9/11 CIVIL RIGHTS REPORT, *supra* note 8, at vii.

*There are parallels between the racial profiling of Japanese Americans during World War II, pre-9/11 profiling of African Americans and Hispanic Americans, and post-9/11 profiling of Muslims, Arabs and South Asians. Racial profiling has been statistically proven by government studies, including the New York State Attorney General's 1999 study of stop-and-frisk practices, to be an ineffective law enforcement tool for identifying criminal conduct. Much racial profiling of African Americans and Latinos continues unnoticed in the post-9/11 law enforcement environment . . . . [R]acial profiling has taken on new dimensions targeting Muslims, Arabs, and South Asians . . . .*<sup>159</sup>

Moreover, as the Committee reported, there is now a general societal perception that law enforcement authorities do not seriously consider complaints from Muslim, Arab, and South Asian residents who are subjected to hate crimes as a result of misplaced retaliation after 9/11.<sup>160</sup>

#### **IV. IN THE WAKE OF *CITIZENS UNITED*: FREE SPEECH NOW COSTS SO MUCH!**

With violence and xenophobia being perpetuated by the financially motivated Fourth Branch—a clear reality in America's post-9/11 existence—what happens when the news reporter (media) controls the newsmaker (government)? The authors respectfully argue this judicially sanctioned reality creates an inherent conflict of interest that comparatively costs society at-large much more than any free speech benefit extended to media elites.

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<sup>159</sup> *Id.* at vii-viii (emphasis added); I. Bennett Capers, *The Trial of Bigger Thomas: Race, Gender, and Trespass*, 31 N.Y.U. REV. L. & SOC. CHANGE 1, 6 (citing Tanya E. Coke, *Racial Profiling Post-9/11: Old Story, New Debate*, in LOST LIBERTIES: ASHCROFT AND THE ASSAULT ON PERSONAL FREEDOM 91-111 (Cynthia Brown ed., 2003) (referring to “‘brown’ [as] appearing to be the new ‘black’ insofar as law enforcement has turned its attention to males of Arab or Muslim descent since 9/11”); see, e.g., DAVID A. HARRIS, *Racial Profiling Reduces the Effectiveness of the Criminal Justice System*, in THE LEGAL SYSTEM: OPPOSING VIEWPOINTS 103, 104-05 (Laura K. Egendorf ed., 2003) (discussing the widespread phenomenon of “Driving While Black” and the history of Blacks being victimized through racial profiling prior to 9/11).

<sup>160</sup> POST-9/11 CIVIL RIGHTS REPORT, *supra* note 8, at viii.

According to highly reputed media scholars, governing political philosophies influence, justify, and create rationales for media roles in society.<sup>161</sup> Accessibility and function will vary because the relationship of mass media to the organized society of which it is a part is determined by certain basic philosophical assumptions, including media's role of providing insight into government action.<sup>162</sup> Accordingly, in theory at least, mass media must adapt to the sociopolitical form and structure in which it operates.<sup>163</sup> Things change, however, when the informer becomes the controller and government becomes the controlled.<sup>164</sup>

*Citizens United* represents the culmination of regulatory and judicial subordination of public policy that was highlighted by the FCC's abandonment of the fairness doctrine.<sup>165</sup> Indeed, in chronicling the last forty years, at least one

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<sup>161</sup> See FRED S. SIEBERT, THEODORE PETERSON & WILBUR SCHRAMM, *FOUR THEORIES OF THE PRESS: THE AUTHORITARIAN, LIBERTARIAN, SOCIAL RESPONSIBILITY AND SOVIET COMMUNIST CONCEPTS OF WHAT THE PRESS SHOULD BE AND DO* (1963); see also MANUEL G. GONZALES & RICHARD DELGADO, *THE POLITICS OF FEAR: HOW REPUBLICANS USE MONEY, RACE, AND THE MEDIA TO WIN* (2006).

<sup>162</sup> See SIEBERT, *et al.*, *supra* note 161, at 9-11.

<sup>163</sup> See *id.* at 1.

<sup>164</sup> See *supra* Section III (A), in considering the informer controlling the newsmaker, the following is of particular note:

[G]rowth in media conglomerates has been fueled, in part, by the changing regulatory environment. In the years when public interest concerns about monopolies were preeminent, media companies were constrained in their ability to grow unchecked. However, with the rise of more media outlets via new technology, the conservative shift toward business deregulation since the Reagan era, and the growth in the media industry's lobbying clout, media corporations have been relatively unencumbered in their desire to grow.

CROTEAU & HOYNES, *supra* note 15, at 32.

<sup>165</sup> See *supra* note 32, and accompanying text. Although the *Citizens United* decision deals with corporations (considered individuals under the 14th Amendment) making contributions to political campaigns and political entities, the authors respectfully argue the decision presents an inherent conflict of interest for media corporations, theoretically a part of government). See *supra* notes 10 & 16 and accompanying text.

We have seen how the development of the current news media has always been closely fostered by practices and public policy, how *the news media perform*

noted media law scholar argues “[t]he Court’s turn against substantive media regulation reflects a free speech orthodoxy that crystallized in the 1970s and still prevails today, under which the First Amendment simply protects whatever distribution of expressive opportunities the economic market happens to produce.”<sup>166</sup> Consequently, almost any regulation of the Fourth Estate has receded into antiquity.<sup>167</sup>

Furthermore, as Professor Magarian notes, although media regulation has become a thing of the past, a few noted commentators continue to defend the idea of substantive media regulation against dominant legal and political influence.<sup>168</sup> In particular, Professor Magarian writes as follows:

In [Jerome] Barron’s conception, the First Amendment is not a lock that safeguards the market-derived expressive prerogatives of power media corporations. Rather, the Amendment’s guarantees of free speech and a free press form a key, designed to open public debate to the diverse range of participants and ideas necessary for our democratic system to flourish. Barron’s pioneering writings on First Amendment access rights mark the pinnacle of this First Amendment vision.<sup>169</sup>

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*governmental tasks, how reporters themselves (like it or not) are political actors, and how government officials attempt to use the news to as part of their daily jobs of governing. So the American news media do not only constitute a political institution; they are part of government.*

COOK, *supra* note 10, at 164 (emphasis added); *see id.* The authors’ intent is not to provide a scholarly critique of *Citizens United*, but to only reference the controversial decision as the most recent anti-regulatory political action toward media, a theoretical part of American government.

<sup>166</sup> Magarian, *Substantive Media Regulation supra* note 10, at 846; *see* JAMES T. HAMILTON, ALL THE NEWS THAT’S FIT TO SELL: HOW THE MARKET TRANSFORMS INFORMATION INTO THE NEWS 160-89 (2004) (analyzing the culture of network news during the 1960s and 1970s, political deregulation, changes in ownership, and corporate interests affected as a result).

<sup>167</sup> *See* Magarian, *Substantive Media Regulation supra* note 10, at 847; *see also* Gregory P. Magarian, *Regulating Political Parties Under a “Public Rights” First Amendment*, 44 WM. & MARY L. REV. 1939, 1946-59 (2003).

<sup>168</sup> Magarian, *Substantive Media Regulation, supra* note 10, at 847.

<sup>169</sup> *Id.* (citing JEROME A. BARRON, FREEDOM OF THE PRESS FOR WHOM?: THE RIGHT OF ACCESS TO MASS MEDIA (1973); Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80

The Supreme Court's 2010 decision in *Citizens United* is arguably the antithesis of Barron's Fourth Branch freedom. In *Citizens United*, the Supreme Court was forced to address the validity of two of its previous rulings<sup>170</sup> and the constitutionality of a provision of the Bipartisan Campaign Reform Act of 2002 (McCain-Feingold).<sup>171</sup> The Court ultimately overruled *Austin* and the portions of *McConnell* that upheld McCain-Feingold's extension of restrictions on corporate independent expenditures.<sup>172</sup>

In January 2008, Citizens United, a non-profit corporation that accepts funds from both individual donors and for-profit corporate entities, released a film entitled *Hillary: The Movie (Hillary)*, a 90-minute documentary about then-U.S. Senator Hillary Rodham Clinton who was a candidate for the Democratic nomination for the presidency.<sup>173</sup> *Hillary* was quite critical of then-Senator Clinton and unequivocally portrayed her as unfit for the office she sought.<sup>174</sup>

Although *Hillary* was released in theaters and on DVD, Citizens United sought to increase the film's distribution by making it available through video-on-demand, allowing individual cable subscribers to pay a fee to watch the film at their leisure. In December 2007, a cable company offered Citizens United \$1.2 million dollars to make *Hillary* available on "Election '08," a video-on-demand channel.<sup>175</sup> Although Citizens United was prepared to accept the cable company's offer, it was aware that its impending advertisements might violate applicable provisions of McCain-Feingold, prohibiting corporations and unions from using general treasury funds to make direct contributions to candidates or independent

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HARV. L. REV. 1641 (1967); Jerome A. Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487 (1969).

<sup>170</sup> See *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003) (upholding statutory limits placed on electioneering communications); see also *Austin v. Mi. Chamber of Commerce*, 494 U.S. 652 (1990) (holding that political speech can be panned based on the speaker's corporate identity).

<sup>171</sup> Pub. L. 107-155; 2 U.S.C. § 441b.

<sup>172</sup> *Citizens United*, 130 S.Ct. at slip. 57.

<sup>173</sup> *Id.* at slip. 9.

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

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

expenditures that expressly advocate for the election or defeat of a candidate for certain federal offices, through any form of media.<sup>176</sup> Consequently, to clarify its uncertainty, Citizens United sought declaratory and injunctive relief against the Federal Elections Commission (“FEC”) by filing suit in the U.S. District Court for the District of Columbia.<sup>177</sup> The district court denied Citizens United’s requested relief and granted the FEC’s motion for summary judgment.<sup>178</sup> On appeal, the Supreme Court reversed.

In relevant part, related to this Article’s focus on media corporations, the Court set a foundation by noting that “[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people . . . . For this reason, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are subject to ‘strict scrutiny’ . . . .”<sup>179</sup> With this established, the Court wrote:

The media exemption discloses further difficulties with the law now under consideration. There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not.

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The law’s exemption for media corporations is, on its own terms, all but an admission of the invalidity of the antidistortion rationale. And the exemption results in a further, separate reason for finding this law invalid: Again by its own terms, the law exempts some corporations but covers others, even though they both have the need or the motive to communicate their views. The exemption applies to media corporations owned or controlled by corporations

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<sup>176</sup> See *id.* at slip 9-11 (noting that Citizens United feared both the film and associated advertisements would be covered by McCain-Feingold’s ban on corporate independent expenditures, thereby subjecting the non-profit corporation to civil and criminal penalties).

<sup>177</sup> See *id.* at 11.

<sup>178</sup> See *id.* at 12.

<sup>179</sup> *Id.* at 30 (Kennedy, J.) (internal citations omitted).

that have diverse and substantial investments and participate in endeavors other than news.<sup>180</sup>

Further, in addressing the “original intent” arguments raised in this Article, the Court opined that:

[t]he Framers may not have anticipated modern business and media corporations . . . . Yet television networks and major newspapers owned by media corporations have become the most important means of mass communication of modern times. The First Amendment was certainly not understood to condone the suppression of political speech in society’s most salient media. It was understood as a response to the repression of speech and the heavy taxes on the press that were imposed in colonies.<sup>181</sup>

Accordingly, the Court overruled itself by taking a new perspective on original intent and finding unconstitutional the provisions of McCain-Feingold at issue in the litigation. The consequence of *Citizens United*, therefore, is that the Fourth Estate, responsible for objectively informing the public about political affairs, can now effectively engage in political advocacy. Given media’s actual and implied conflict of interest, the fox has officially been put in charge of the henhouse.

## V. SYNTHESIS AND CONCLUSION

Notwithstanding the Fourteenth Amendment’s incorporation doctrine or the Court’s creativity in reimagining the Framers’ original First Amendment’s intent in *Citizens United*, corporations *are not* individuals. Instead, corporations are mere fictions with juridical personality. The Court clearly recognized this in *Trustees of Dartmouth College v. Woodward*,<sup>182</sup> for example, where it described the corporate entity as “an artificial being . . . existing only in contemplation of law,” and “created only for such objects as the government wishes to promote.”<sup>183</sup>

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<sup>180</sup> *Id.* at slip 43.

<sup>181</sup> *Id.* at slip 44 (internal citations omitted).

<sup>182</sup> *Tr. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819).

<sup>183</sup> *Id.* at 636-37; *see also* JEFFREY D. CLEMENTS, *Beyond Citizens United v. FEC: Re-Examining Corporate Rights*, 4 *ADVANCE: THE JOURNAL OF THE ACS ISSUE GROUPS* 37, 42 (2010).

The Court's erosion of *Woodward* and its time-honored legal doctrine only began in the mid-1970s, coincidentally the same time media began to vilify Islam,<sup>184</sup> with the development of its "commercial speech" doctrine.<sup>185</sup> Indeed, in addressing the now-blurred line separating corporations and individuals, the following should be noted:

Citizens United disregards a fundamental distinction between a 'corporate regulation case' and a 'speech case.' State requirements that corporations comply with SEC filing and statement requirements, along with many more examples of corporate regulations, do not implicate First Amendment interests. Rather, these regulations reflect what seems obvious: legislatures may apply rules to the use of use of the corporate form itself where the legislature decides such rules advance the policy goals sought to be achieved by the legislature in permitting the corporate form in the first place.<sup>186</sup>

Indeed, as the Founder's original First Amendment intent shows,<sup>187</sup> along with the Court's ruling in *Woodward*,<sup>188</sup> corporations are not individuals, making the logic underlying the *Citizens United* decision inherently flawed. As the fourth branch of government, media corporations should be held to a higher ethical standard that regulates and restricts the use of media towards minority groups. By allowing media corporations to enjoy the same freedom of speech rights offered to individuals, however, the Court underestimates the current harm these corporations are inflicting on the American public through news and the extent of this detriment because of the corporations' Fourth Estate status.

This Article's authors do not intend in any form or fashion to criticize American capitalism. Instead, the authors' intent is to highlight the inherent

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<sup>184</sup> See *supra* Part III (C)(1).

<sup>185</sup> See *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Va. Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); see also *supra* note 166 and accompanying text.

<sup>186</sup> CLEMENTS, *supra* note 183, at 47.

<sup>187</sup> See *supra* Part II (A)(3).

<sup>188</sup> See *supra* note 182.

conflict of interest that occurs when media corporations—a part of the theoretical Fourth Estate—are allowed to simultaneously cover the news and control the newsmaker. Moreover, given media's unique place as a participant in government and its documented profit-making interest in sensationalizing to sell violence and xenophobic imagery, media should not be allowed to participate in the electoral process of those that control its last strand of regulation.

Additionally, the authors argue that regulation on these media corporations should not be decreased as the current trend in media regulation has reflected, but rather increased. While xenophobic imagery and “leading with bleeding” increased in the last decade, so has anti-Islamic sentiment in America. As this Article shows, media's corporate profitability has simultaneously increased with a corresponding decline in its ethical standards. In light of *Citizens United*, conglomerate media corporations now have even more control of news stories they produce to society, regardless of how bias or negative the news may be. In an age of unmediated communication and associated consumerism, allowing media to control the decision maker while covering the decision costs society far too much. Specifically, it is costing certain religious and minority groups' freedom by allowing this multi-billion dollar industry to exploit members of their community in the pursuit of financial gain. Simply put, America deserves more from the Fourth Estate.



