

DEMOCRATIC IDEALS AND MEDIA REALITIES: A PUZZLING FREE PRESS PARADOX

BY MICHAEL KENT CURTIS*

I. INTRODUCTION

Freedom of speech, press, assembly, and petition have long been celebrated as crucial to democratic government. (I will often refer to these rights collectively as ‘freedom of expression’ or as ‘freedom of speech’.) United States Supreme Court decisions have, quite rightly, justified strong protection of these freedoms because of their crucial role in the functioning of American democracy. (Of course, there are other justifications as well, but I will not discuss them in this paper.)

The Supreme Court has often noted the crucial function of free speech and press for democratic government. In *Stromberg v. California* (1931), Chief Justice Charles Evans Hughes’ opinion for the Court said “a fundamental principle of our constitutional system” is “the maintenance of the opportunity for free discussion *to the end that government may be responsive to the will of the people.*”¹ In *Roth v. United States* (1957), the Court said that “[t]he protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”² Seven years later, the Supreme Court decided *New York Times v. Sullivan*, a case involving an Alabama public official who sued the *Times* for libel based on an advertisement. The ad had criticized the way state government officials responded to civil rights demonstrations. The Court said, “the First Amendment . . . ‘presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. . . .’”³ The modern Supreme Court has often quoted a famous concurring opinion by Justice Louis Brandeis in *Whitney v. California* (1927): the preferred remedy for “falsehood and fallacies” is “more speech, not

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¹ 283 U.S. 359, 369 (1931) (emphasis added).

² 354 U.S. 476, 484 (1957) (Brennan, J.). The decision in *Roth*, however, seems inconsistent with this principle. See *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 453 (2002) (Souter, J., dissenting).

³ *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 [S.D.N.Y. 1943] [Judge Learned Hand]).

enforced silence."⁴ In the United States, freedom of the press, in particular, has been celebrated for its role in checking government misconduct and informing the electorate.

Curiously, however, in the United States, freedom of expression sometimes thrived well before the rights were shielded by protective judicial doctrine. (Supreme Court decisions protecting freedom of expression date from the 1930s.) In spite of judicial rules, the social and political environment has either nurtured or inhibited freedom of expression.

At the moment at least, Supreme Court decisions provide fairly strong protection for speech that expresses ideas on matters of public concern. But history is rarely a story of simple progress. Today, changes in the mass media environment raise troubling questions about America's system of freedom of expression. The concerns are not "new,"⁵ and they are hard to assess. They *are* a central free expression problem for the future. Government policy and "the market" are producing an ever more concentrated mass media, one that does an increasingly inadequate job of fulfilling its role as a facilitator of democracy. (By referring to "the market," I do not mean to suggest an impersonal force, like "the weather." While markets are a fact of life, the nature and performance of "the market" always depend on myriad government regulations.) The thesis of this paper is that changes in the media can undermine democratic self-government.

Section II will briefly explore free speech history from the end of the American Revolution to the ratification of the Fourteenth Amendment in 1868. During this period a fairly robust system of freedom of expression coexisted with a rather repressive legal doctrine. The repressive legal doctrine made criticism of government and public officials a crime—seditious libel—and it punished speech that judges thought had a tendency to cause bad effects. The quick historical tour provided in Section II demonstrates that a vibrant system of freedom of expression depends crucially on the larger environment. Free speech and press can thrive even as judges embrace repressive doctrines. The converse is also true. Judicial protection for free speech, important as it is, does not alone ensure a vibrant system of freedom of expression.

Section III will show that Supreme Court declarations about free speech and democracy made since the 1930s are in fact part of a long historic tradition that sees freedom of expression, and especially freedom of speech and press, as essential to democratic government. First, Section III will review historic defenses of freedom of expression. Second, it will look at assumptions about the environment of freedom of expression made by some leading writers in the period from 1830 to 1868. These writers often

⁴ *Brown v. Hartlage*, 456 U.S. 45, 61 (1982) (quoting *Whitney v. California*, 274 U.S. 357, 377 [1927] [Brandeis, J., concurring]).

⁵ See, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

assumed that promoting a vibrant outlet for debate was a crucial part of the democratic function of a free press.

Section IV will explore a basic free speech paradox. A strong public commitment to free speech values can itself protect free speech, though judicial doctrine would allow (but not require) suppression. At least this is so where diversity of media ownership and opinion foster free speech. Strong judicial rules protecting the right to express unpopular ideas are not sufficient.

In Section V, I will turn from early ideas about the press and past press practices to the current mass media, especially broadcasting. My contention is that many practices today and much of our environment is inconsistent with historic justifications for press freedom. There are losses as well as some gains in the transition from the press of the late eighteenth and nineteenth centuries to the mass broadcast media of the twenty-first.

In Section VI, I will explore a distinction between formal and functional freedom of expression, while in Section VIII, I will briefly consider a few reforms that might mitigate the antidemocratic tendencies of the present system. My main conclusion in Section VIII, however, is simply to argue that the problem of crafting a media to support democracy is a central free speech problem of our time and deserves careful study as a prelude to much-needed reform.

II. FREEDOM OF EXPRESSION FROM 1783 TO 1868: A BRIEF OVERVIEW

From the end of the American Revolution (1783) through the Civil War (1861–65), free speech history is paradoxical. In the years after the American Revolution and before the adoption of the First Amendment in 1791, a very broad free press practice coexisted with a repressive legal doctrine. The repressive legal doctrine—based on English law—held that expression that had a tendency to cause bad effects in the long run could be suppressed and that criticism of the government and its officials could be punished as the crime of sedition. Many insisted that the repressive doctrine survived the adoption of the First Amendment. In 1798, the Sedition Act prohibited “false” statements about Congress and the president, Federalist John Adams, but not about his likely opponent, Vice President Thomas Jefferson. Although Federalist judges upheld the Sedition Act, lectured grand juries on its necessity and wisdom, functioned as chief prosecutors during some of the trials, and jailed Jeffersonians, the act was repudiated. Federalists lost the election of 1800, and the new president, Jefferson, pardoned those convicted under the act. Set to expire with the inauguration of the new president in 1801, the act was not renewed, and, in the 1830s, Congress voted to repay the fines of at least one victim of the

act on the ground that it violated the First Amendment. The law laid down by the Sedition Act judges and the popular system of freedom of expression had moved in markedly different directions.⁶

In the 1830s, abolitionists in the North were besieged by mobs, whose exploits were celebrated by some United States senators and other commentators. In addition, critics of the abolitionists demanded that Northern legislatures pass laws to silence the abolitionists. Although abolitionists were quite unpopular, many people who opposed the abolitionists defended their right to free speech. Northern legislatures generally rejected Southern demands for laws to silence the “incendiary” abolitionists and ban their organizations. In 1837, anti-slavery minister and journalist Elijah Lovejoy was killed defending his printing press from an anti-abolitionist mob. It was the fourth of his presses to be destroyed by such attacks. In the North the attacks on free speech did not succeed, but instead produced a vigorous free speech defense.⁷

In contrast, from the end of the Revolutionary War to 1868 (and beyond), judges (as in the case of the Sedition Act) and commentators often embraced a repressive vision of freedom of expression. For them, the First Amendment’s protection of a free press was merely a protection against prior restraint. Speech with a bad tendency could be suppressed, repression could be justified by labeling the speech as “license,” and “false” opinions about the government and those in power could be punished.⁸ According to the Supreme Court, whatever protections the First Amendment afforded merely limited the national government and did not touch actions by the states.⁹

In the debate on whether to amend the Constitution by adding a bill of rights, James Madison presciently noted that states were as liable as the federal government to suppress the “invaluable privileges” of a free press and freedom of conscience. One of Madison’s proposed amendments provided that “no state shall” abridge these rights. The House of Representatives accepted Madison’s proposal, and it expanded his list of rights protected from state abridgement to include free speech and jury trial in criminal cases. The House sent this revised amendment to the Senate, where the proposed limit on the states was defeated. In 1833 in *Barron v. Baltimore*, the Supreme Court held that the U.S. Constitution did not protect the freedoms in the Bill of Rights from suppression by the states.¹⁰ Most, but not all, state courts agreed.¹¹

⁶ See generally, Michael Kent Curtis, *Free Speech, “The People’s Darling Privilege”: Struggles for Freedom of Expression in American History* (Durham, NC: Duke University Press, 2000), 34–104 (hereafter, Curtis, *Free Speech*).

⁷ *Id.* at 131–93, 215–70.

⁸ E.g., *id.* at 246, 271–76.

⁹ *Barron v. Mayor and City of Baltimore*, 32 U.S. 243 (1833).

¹⁰ *Id.*

¹¹ Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Durham, NC: Duke University Press, 1986), 22–25; Michael Kent Curtis, “Historical

At the same time, however, there was a strong and protective view of freedom of expression in much of the nation. It came from editors, ministers, social activists, politicians, and ordinary citizens. By this view, freedom of speech, press, petition, and assembly were privileges or immunities of all Americans—recognized by the federal Constitution as well as by state constitutions—that no state or national government could rightfully deny. These guarantees protected Americans against both prior restraint and subsequent punishment.¹² They forbade government from enforcing an orthodox opinion, and so ensured a broad right to discuss public men and public measures and all questions that concerned the human race. No government—indeed no person—had a right to suppress such discussion. Neither a perceived bad tendency, nor a charge that the speech in question was “license” rather than “liberty,” justified suppression. Though they did not use the modern terms, free speech defenders pointed to problems of ‘vagueness’ and the ‘chilling effect’ in legislation criminalizing speech on matters of public concern. A ‘vague’ statute would fail to make clear what sort of expression is permitted and what sort is prohibited. The result would be to vest government officials with broad power to pick and choose targets for suppression, allowing them to apply the law to their critics but not to their friends. The ‘chilling effect’ is the tendency of statutes suppressing speech to silence critics who fear that their legitimate speech might be within the scope of a statute punishing speech or press.

Free speech defenders also rejected the bad tendency approach (the view that speech with a “tendency” to cause harm in the future could be suppressed for that reason), noting that it is easy to predict horrific tendencies even from peaceful advocacy of fundamental change. Advocates of free speech insisted that majorities have no right to silence minorities and that citizens have a duty to protect the rights of those with whom they disagree.¹³

In the North, after a struggle, many embraced broad protection for freedom of expression on the issue of slavery—and on all other issues of human concern. For a time at least, free speech triumphed over demands for suppression. Since no repressive laws were passed to silence aboli-

Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States,” *North Carolina Law Review* 78 (2000): 1118–21. W. W. Crosskey and Charles Fairman, “‘Legislative History’ and the Constitutional Limitations on State Authority,” *University of Chicago Law Review* 22 (1954): 141–43. (Crosskey was a trailblazer on the question of the Bill of Rights, the Fourteenth Amendment, and the states, and my debt to his work is substantial.)

¹² A ‘prior restraint’ is a requirement that a person who wishes to publish a book, newspaper, or other item must first get the publication approved and licensed by the government. Under a prior restraint doctrine, printing without a license is a crime. Punishment after publication for what is said (as opposed to for failure to get a license) is referred to as ‘subsequent punishment’.

¹³ Curtis, *Free Speech*, *supra* note 6, e.g., at 66–77, 94–101, 166–81, 205–15, 227–40, 244–45, 250–56, 259, 266–70, 281–88, 296–99.

tionists, courts were mostly on the sidelines. Still, there were some repressive decisions. For example, William Lloyd Garrison was convicted of criminal libel for a somewhat inaccurate story about a Northern ship owner involved in the slave trade.¹⁴

The South, however, was a very different story. It became a closed society on the issues of slavery and race. The slaveholding elite used vigilance committees and repressive laws to suppress anti-slavery speech by abolitionists, and it later suppressed the speech of members of Abraham Lincoln's Republican Party. Still, even in the South there were cross-currents. The reaction of the Southern courts to laws suppressing anti-slavery speech was mixed. None proclaimed broad principles of freedom of expression that protected critics of slavery, but several found somewhat technical ways to free the accused. One Southern court insisted on strict construction of laws that impinged on free speech.¹⁵ Others did not.

Perhaps, the high tide of judicial repression came in 1860 when the North Carolina Supreme Court upheld the conviction of Daniel Worth, an anti-slavery Wesleyan minister and Republican Party activist.¹⁶ (There were two parties that used the name "Republican" in American history: that of the Jeffersonians, which eventually adopted the name Democratic, and the party of Lincoln, founded in 1854. Worth belonged to the latter.) Worth's "crime" was giving Hinton Helper's book, *The Impending Crisis of the South: How to Meet It*, to other whites. Helper was a white North Carolinian. His book presented a harsh criticism of slavery and a call for democratic action in the Southern states to abolish it. The book was republished in an abridged version by Republicans for use in the 1860 election campaign. In the South distributors were treated as felons.

Worth was accused of violating a North Carolina statute that banned distribution of printed matter with a "tendency" to make slaves or free blacks discontented. The North Carolina Supreme Court held that it was no defense that Worth had given the book only to whites. Once Helper's ideas began to circulate, the court said, there was the danger that they would reach blacks. As the court saw it, the essence of the crime was to distribute the book with the intent of propagating its ideas. Curiously, the court said it would not necessarily be an offense for opponents of the book's ideas to circulate it. (Southern secessionist papers published excerpts from the Helper book and accounts of Republican endorsements to emphasize the danger posed by the Republican Party and the need for secession.)¹⁷

Republicans roundly criticized Southern repression, embraced broad protection for freedom of speech on all matters of public concern, and ran

¹⁴ *Id.* at 199–201.

¹⁵ *Id.* at 261–62. E.g., *Commonwealth v. Barrett*, 9 Leigh 665 (Va. 1839); *Bacon v. Commonwealth*, 48 Va. 602 (Va. 1850).

¹⁶ *State v. Worth*, 52 N.C. 488 (1860).

¹⁷ Curtis, *Free Speech*, *supra* note 6, at chap. 13.

for office proclaiming their devotion to free soil, free speech, free press, free territory, and free men.¹⁸ Meanwhile, a North Carolina grand jury treated Republican endorsers of the Helper book as felons, indicted them, and the state demanded extradition.

Typically, studies of freedom of speech in the United States have been based almost exclusively on Supreme Court decisions. As a result, many people think that ideas protective of free speech were invented by the Supreme Court beginning in the 1930s.¹⁹ Indeed, in the 1930s, the Court began making protective free speech principles the law.²⁰ But, as the history of freedom of expression shows, key free speech concepts and practices are far older. Opposition to government-imposed orthodoxy, equal protection for ideas on all sides of public issues, rejection of the bad tendency test, sensitivity to problems of vagueness and the chilling effect, and many other modern doctrines have a far older historic lineage.

The struggles for free speech for critics of slavery are crucial to understanding the second great safeguard for free speech, press, petition, and assembly that was added to the United States Constitution after the Civil War: the Fourteenth Amendment. In 1866 Congress proposed this amendment. Its first section provides that all persons born in the nation or naturalized are citizens, that no state shall abridge the privileges and immunities of citizens of the United States, and that no state shall deprive "any person of life, liberty, or property without due process of law; nor deny to any person . . . the equal protection of the laws." As understood by its two leading framers, Congressman John A. Bingham and Senator Jacob Howard, the Amendment was designed in part to nationalize protection of the privileges and immunities contained in the First Amendment by forbidding states from abridging these fundamental guarantees. The amendment was ratified in 1868.

There are lessons that can be learned from the struggles for free speech in early American history.²¹ First is a point that free speech defenders emphasized again and again: free speech and a free press are central to American democracy, to the ideal that the people are sovereign. Advocates of free speech and press used the *functional role* of free speech in preserving representative government to elucidate the meaning of the constitutional guarantees.

¹⁸ E.g., *id.* at chaps. 12 and 13.

¹⁹ For a discussion of this approach and what has been omitted, see Michael Kent Curtis, "Teaching Free Speech from an Incomplete Fossil Record," *Akron Law Review* 34 (2000): 231.

²⁰ E.g., *Near v. Minnesota*, 283 U.S. 697 (1931); *Stromberg v. California*, 283 U.S. 359 (1931); *Herndon v. Lowry*, 301 U.S. 242 (1937); *De Jonge v. Oregon*, 299 U.S. 353 (1937); *Schneider v. State*, 308 U.S. 147 (1939).

²¹ See generally, Curtis, *Free Speech*, *supra* note 6, at 428–34. See also Wilson Huhn, book review, "Compelling Lessons in the First Amendment," *Constitutional Commentary* 19 (2002): 795.

Jeffersonian Republicans responded to the Sedition Act by invoking the nature of the American government. They insisted that to be representative of the people, government must allow the people to have broad access to criticism of public men and public measures. Otherwise, the people could not perform their electoral function. Since public officials were agents of the people, the agents should not be permitted to restrict the people's information about how the officials performed their public trust. Restrictions that allowed praise, but punished blame, were even more impermissible. Representative government required equal opportunity for both sides of the debate.²²

Similarly, in later years, critics of the suppression of anti-slavery speech noted that democracy entailed the right of the people to alter or reform any social or political institution. Popular sovereignty meant that no constitutional commitment—to tolerate slavery, for example—could preclude arguments for peaceful change and reform.

A second lesson can be learned from the early struggles for free speech. Justifications for suppression that *seem* attractive and plausible in theory have worked out quite differently in practice. It is plausible that people should not be permitted to incite others to commit crimes or to advocate ideas that have a "bad tendency" to cause crime and violence. In practice, however, these plausible justifications for repression of speech were often invoked against speech advocating peaceful change and democratic action. For example, Federalists treated Jeffersonian critiques of Adams as inciting revolution. Abolitionists called on slaveholders to repent and free their slaves at once, but, initially at least, rejected violence. Hinton Helper advocated political action in the Southern states to abolish slavery. He also called for peaceful political resolution of the slavery issue. Southerners treated each call for reform as an incitement to a slave revolt, or at least as having that bad tendency. In the 1850s and in 1860, mobs routed Southern supporters of Republican presidential candidates because of the supposed pernicious tendencies of their ideas.

The third lesson from early American history is that suppression theories are not administered with philosophical detachment. They are weapons employed by dominant groups to silence their critics. Federalist prosecutors, Federalist marshals, and Federalist judges administered the Sedition Acts, and they prosecuted criticism of the Adams Administration as sedition. Later, the slaveholding elite interpreted laws against speech tending to cause slave discontent in a manner that prevented Republicans from speaking to white voters in the South.

The fourth lesson to be learned from past struggles over free speech, and related to the third, suggests the need for clear and narrow rules. The vagueness of distinctions like 'license versus liberty' or terms like 'bad tendency' allowed the doctrines to be used for illicit political purposes.

²² Curtis, *Free Speech*, *supra* note 6, at 68–77, 94–101.

The fifth lesson is that the function of free speech in a democracy helps to explain the very broad repudiation (in popular constitutional discussions) of the claim that free speech is merely a protection against prior restraint. Prior restraint theory prevented Federalists from requiring that Jeffersonians submit their newspapers to censors, but the editors still were jailed after publication for “false” opinions about President Adams. This result chilled and suppressed the very speech that lies at the heart of democratic choice. The Jeffersonian Republican newspaper, *Aurora*, denounced the prior restraint argument as “comical.”²³ The democratic right to advocate reform of social institutions meant that protection of anti-slavery speech had to be more than a protection against prior restraint. This, indeed, was the position of Lincoln’s Republican Party in the years immediately before the Civil War.

The sixth lesson is that private suppression of speech matters. Most guarantees of liberty in the United States Constitution are interpreted to limit only government action, not private action. Still, private suppression of free speech on matters of public concern by mobs and vigilantes is an attack on the liberties of free expression enshrined in the Bill of Rights. Though the issue is tricky, the lesson is clear: “censorship” by “private” actors can be a grave threat to freedom of expression. In early free speech history, discussion was most often aimed at protecting speech and press from government suppression. From the 1830s to the Civil War, however, at least as much energy was expended defending freedom of expression against threats from mobs and vigilantes. In either case, if you listen with care to these voices from long ago, they convey another message as well: the importance of multiple perspectives.

In free speech struggles from the Sedition Act through the Civil War, advocates of broad protection for freedom of expression looked not to the musty precedents of the English common law, but instead to how free speech rules needed to function in order to support democracy. Recognition of the relation of free expression to representative government has a long and rich history. A review of the historic commitment to freedom of expression as essential to democracy shows the close relation between the two. It also reveals why freedom of expression was considered so crucial to democracy. A review of the historic understanding of the function of freedom of expression may help us as we seek to translate eighteenth and nineteenth century guarantees into our twenty-first century world.²⁴

²³ *Id.* at 75.

²⁴ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639 (1943): “True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence.” Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999), 109–21 (hereafter, Lessig, *Code*).

III. THE HISTORIC COMMITMENT TO FREE SPEECH, FREE PRESS, AND REPRESENTATIVE GOVERNMENT: A QUICK OVERVIEW

A. Historical defense of freedom of expression

The Levellers were the first mass-based, pro-democracy movement in English history. They were a group of seventeenth century English people who favored a written constitution with limits on governmental power, broad religious toleration, and Parliament elected by substantially broadened male suffrage from districts of roughly equal population. In one of their many pamphlets, the Levellers said censorship was an instrument of tyranny, for people “kept ignorant” were “fitted only to serve the unjust ends of Tyrants and Oppressers.”²⁵ Freedom of the press was necessary to preserve “any nation from the worst . . . bondage.” As a result, both for the government and the people, “it will be good, if not absolutely necessary . . . to hear all voices and judgments, which they can never do, but by giving freedom to the Press.” Scandalous pamphlets about the government could be answered by counterspeech.²⁶ Though the Levellers were suppressed, similar and more elaborate ideas about freedom of expression continued to emerge. *Cato’s Letters* are a prime example.

The *Letters* were a series of essays on civil and religious liberty first printed in England in the eighteenth century. The *Letters*, which were widely reprinted in America before and after the Revolution, also emphasized the connection between free speech and press and representative government. Since those who administered government were “but . . . trustees” doing the business of the people, it was in the interest of the people to see whether “public Matters” were “well or ill transacted.” For this, free speech was essential.²⁷ In its “Address to the Inhabitants of Quebec” during the American Revolution, the Continental Congress expressed similar sentiments.

Critics of the Sedition Act of 1798 produced a strong defense of freedom of expression as central to democracy. As we have seen, the act was written and deployed to punish “false” opinions about President John Adams and the Federalist-controlled Congress. But it did not punish “false” statements about Republican Vice President Thomas Jefferson. Republican critics of the Sedition Act emphasized the relation of free speech and press to elective government. People had no means of examining the conduct of their elected officials except through the press and free speech. The “unrestrained investigation” by the press of the “conduct of the government” was essential; it was “the heart and soul of a free

²⁵ Richard Overton, *To . . . The Commons of England* (1649), in Don M. Wolfe, ed., *Leveller Manifestoes of the Puritan Revolution* (New York: T. Nelson and Sons, 1944; New York: Humanities Press, 1967), 327–28.

²⁶ *Id.* at 328.

²⁷ John Trenchard and Thomas Gordon, *Cato’s Letters: Essays on Liberty, Civil and Religious*, No. 15 (New York: Da Capo Press, 1971) 1:96–98. See also No. 32, 1:246–54, and 2:42–43.

government." Restrictions on press freedom of the sort imposed by the Sedition Act would "destroy the elective principle" because the chilling effect of the Act would suppress all criticism.²⁸ For Republicans, one of the vices of the Sedition Act was that it silenced only one point of view in the political debate. Praise of President Adams was allowed. Criticism was silenced.

Strong defenses of freedom of expression as crucial to democracy also emerged, as we have seen, in the 1830s during controversies over slavery and anti-slavery expression. In 1836, Whig Senator John Davis of Massachusetts described the function of the press. Davis spoke in opposition to a bill sponsored by Senator John C. Calhoun that would have required the Post Office to censor publications touching on the subject of slavery when mailed to a slave state that forbade the expression. Davis declared:

The press is the great organ of a free people. It is the medium through which their thoughts are communicated, through which they act upon one another, and by which they reason with, instruct, and move each other. It rouses us to vigilance, warns us of danger, rebukes the aspiring, encourages the modest, and, like the sun in the heavens, radiates its influence over the whole country. The people viewed it as vital to a republic, and gave it the mail as an auxiliary; and you might as well expect the blood to flow through the system without the heart, as to have the press exert its influence in a salutary manner through the country without the aid of the mail.²⁹

Davis said that the reasons supporting this incendiary publication bill were the same ones always given for abridging the liberty of the press, that is, because the press

sends forth incendiary, inflammable publications, disturbing the public peace, and corrupting the public mind. All censorships are established under the plausible pretense of arresting evils. . . . Great principles fundamental in their character, are thus assailed on proof of abuses which no doubt at all times exist; and when once, through such pretenses, a breach is made, the citadel falls.³⁰

For this reason the Constitution prohibited abridging the liberty of the press "come what might."³¹

²⁸ Curtis, *Free Speech*, *supra* note 6, at 68–69 (quoting Congressman Nicholas); 94–96 (quoting James Madison).

²⁹ *Register of Debates* (Washington, DC: Library of Congress, 1999), 24th Cong., 1st sess. (1835–36), Senate, at 1152; available online at <http://memory.loc.gov/ammem/amlaw/lwrdlink.html#anchor24> [accessed November 20, 2003].

³⁰ *Id.* at 1153.

³¹ *Id.*

The *Boston Daily Advocate* discussed the function of free speech in an 1838 editorial condemning the killing of Elijah Lovejoy by an anti-abolition mob:

We are advocates of the freedom of discussion in the broadest sense. Were it otherwise we could not call ourselves democrats. Democracy is a principle which recognizes mind as superior to matter, and moral and mental power over wealth or physical force. . . . Democracy is also a principle of reform; consequently, it must examine, compare, and analyze, and how can it do this without freedom of inquiry and discussion. . . .

To argue that there are subjects, which ought not to be discussed, in consequence of their unpopularity with a majority of the people, is in reality to argue that the people are not capable of self-government; and the power of deciding what shall not be discussed, ought to be invested in a censorship. . . .³²

While freedom of discussion might not produce truth, "it is reasonable," the editorial continued, "to suppose that a nearer approach to it will be made" than under a system of suppression.³³ In popular understanding, as the controversy over anti-slavery speech shows, subjects protected by free speech included harsh criticism of powerful private interests—in this case the "slave power"—that shaped public policy.

There were also trans-Atlantic influences on the development of American free speech doctrine. In 1859, the English philosopher John Stuart Mill emphasized the need to protect minority opinion, because without considering a full range of views we are unlikely to come to wise decisions. Wise decisions, he suggested, require hearing all sides.³⁴ Though Mill wrote well after the ratification of the First Amendment in 1791, his and similar ideas are part of the background for the Fourteenth Amendment. (The First Amendment limited only the federal government. The Fourteenth Amendment extended the protections for freedom of expression to the states, a fact the Supreme Court belatedly "assume[d]" in the 1925 case *Gitlow v. New York*.)

These ideas about the relation of free speech to democratic government, announced long ago, were echoed in twentieth century Supreme Court opinions. As noted above, the Supreme Court has emphasized the importance of free speech and diverse perspectives for democratic decision-making.

³² "Freedom of Discussion," *Boston Daily Advocate*, January 3, 1838, at 2.

³³ *Id.* A line has been dropped from the copy of the paper I have examined, but I think this is the intended meaning.

³⁴ See John Stuart Mill, *On Liberty and Other Essays* (1859), reprinted in John Stuart Mill, *On Liberty and Other Essays*, John Gray, ed. (Oxford: Oxford World's Classics, 1991), 19–49.

As both the historic tradition and more modern expressions of it show, government suppression is problematic because it interferes with the democratic function of freedom of expression. In defending free speech and press as essential to democratic choice, the Court has assumed that freedom of expression provides citizens with a better basis for informed choice than a regime of suppression or of authoritative selection *and* that informed choice requires access to different perspectives and alternatives. Thus, suppression of minority points of view or enforcement of an orthodoxy is antidemocratic. As the twentieth century philosopher Friedrich Hayek noted, one should not confuse what the law is and what the law ought to be:

Majority decisions tell us what people want at the moment, but not what it would be in their interest to want if they were better informed; and unless [majority decisions] could be changed by persuasion, they would be of no value. The argument for democracy presupposes that any minority opinion may become a majority one.³⁵

To be sure, the historic emphasis on the need for broad freedom of expression never went unchallenged. In England, Parliament suppressed the Levellers; in the United States, as we have seen, attempts at suppression ranged from the Sedition Act to the harassment and jailing of abolitionists. Additional examples of suppression are not difficult to find: One of Lincoln's generals jailed a Northern Democratic politician for making an antiwar speech. After the end of Reconstruction in the South, both democracy and free speech were effectively suppressed for a substantial part of the population. When, in the 1960s, blacks in the deep South began demanding the right to vote, civil rights activists were shot, bombed, burned out of their homes and churches, and beaten. They were also arrested for peaceful protests that should have been protected by the guarantees of the First and Fourteenth Amendments.³⁶ Other twentieth century examples of suppression include the jailing of Eugene Debs for an antiwar speech during World War I³⁷ and the barring of Julian Bond from the Georgia Legislature for endorsing an antiwar circular during the Vietnam War—an effort that the Supreme Court held violated the First and Fourteenth Amendments.³⁸

Of course, commitment to democracy has not been uniform throughout American history either. From early times, some Americans worried about

³⁵ Friedrich A. von Hayek, *The Constitution of Liberty* (Chicago, IL: University of Chicago Press, 1960), 109. See also *American Booksellers Association v. Hudnut*, 771 F.2d 323, 332 (7th Cir. 1985) ("Free speech has been on balance an ally of those seeking change").

³⁶ The story is well told in Taylor Branch, *Pillar of Fire: America in the King Years, 1963–65* (New York: Simon and Schuster, 1999).

³⁷ *Debs v. United States*, 249 U.S. 211 (1919).

³⁸ *Bond v. Floyd*, 385 U.S. 116 (1966).

economic “levelling” and responded to the worry by favoring property qualifications to limit the right to vote. During Reconstruction (1865–77), Ku Klux Klan terrorism destroyed the Republican Party in the South as an effective force and contracted the electorate by preventing blacks from voting. Later, similar tactics were aimed at Populists. After Reconstruction, certain influential Northern intellectuals accepted Southern disfranchisement of blacks, rejected universal male suffrage, and considered restricting the vote for some white Northern men as well. During the Great Depression, the Republican chair of the Board of Elections in Lewiston, Maine, attempted to disfranchise relief recipients as ineligible paupers, a move that would have disfranchised one thousand people in that town alone.³⁹ When blacks sought to register and vote in the deep South in the 1960s, they were attacked by Klan terrorists and blocked by elected officials. While actual practice often has been inconsistent in American history, democracy and a functional view of free press and free speech have been vibrant American ideals, now accepted by most Americans.

B. The environment of freedom of expression: 1830–1868

To be more nearly complete, free speech history should examine the role of the larger environment in nurturing or hindering free speech and press. I will now look at the free speech environment, particularly in the years 1830–1868.⁴⁰ These were the years leading up to the Civil War, Reconstruction, and the ratification of the Fourteenth Amendment. My focus will be on the nature of the mass communication environment and how it interacted with the democratic goals of a system of freedom of expression.

The past is not a free speech golden age, as the killing of Elijah Lovejoy and the suppression of anti-slavery speech in the pre-Civil War South show. Adherence to the ideal of freedom of expression has often had its shortcomings, and no doubt always will. Yet, the free speech environment of the past embodied some positive values that are being lost in the modern world.

The era I have studied most closely runs from the 1830s through the Civil War, which ended in 1865, three years before the adoption of the Fourteenth Amendment. During that time the mass media consisted mainly of newspapers, books, pamphlets, and public meetings. There were numerous periodicals, mostly separately owned. Publishing for a mass mar-

³⁹ E.g., Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (New York: Basic Books, 2000), 105–16, 119–63, 238–39.

⁴⁰ For a brief discussion of the role of the press in American history, see Patrick M. Garry, *Scrambling for Protection: The New Media and the First Amendment* (Pittsburgh, PA: University of Pittsburgh Press 1994), 97–106, 128–32.

ket was decentralized, and the press carried on a lively dialogue on political issues and candidates.

William Seward, a Whig and later Republican politician, governor of New York, United States Senator, and Lincoln's Secretary of State, marveled at the development of the press. In his 1853 *Notes on New York*, Seward commented on the technological innovations of new labor-saving machinery and stereotype foundries that had made publishing so much more efficient.⁴¹ Books and newspapers, fiction and nonfiction, proliferated. The political press was, he said, "divided between contending parties," and subdivided further based on the "tempers and the tastes, the passions and the prejudices of the community." It conducted "political warfare" with "energy, zeal, and . . . unsparing severity."⁴² Still, Seward had a sanguine view of the press:

The press studies carefully the condition of all classes, and yields its reports with such a nice adaptation of prices as to leave no portion of the community without information [on] all that can . . . concern their welfare. . . . It . . . not unfrequently forms the public opinion which controls everything. Yet the press is not despotic. Its divisions distract its conduct, and prevent a concentration of its powers upon any one object. [T]he newspaper press is capricious and often licentious. . . ; yet if it assails, it arms the party assaulted with equal weapons of defence and yields redress for the injuries it inflicts. . . . Every improvement of the public morals, and every advance of the people in knowledge, is marked by a corresponding elevation of the moral and intellectual standard of the press; and it is at once the chief agent of intellectual improvement and the palladium of civil and religious liberty.⁴³

Another commentator on the press, Frederick Grimke, was born in Charleston, South Carolina and trained in the law. He was the brother of Sarah and Angelina Grimke, who became famous abolitionists and advocates of women's rights. After practicing law in South Carolina, Frederick Grimke migrated to Ohio where he served first as a trial judge and later on the Ohio Supreme Court. He wrote about the press in the 1856 edition of his book, *Considerations upon the Nature and Tendency of Free Institutions*. For Grimke, the press was "the organ of public opinion," and it distributed knowledge and a common sympathy among the great mass of the population.⁴⁴ "[F]reedom of the press was to knowledge what the abolition of primogeniture was to property: the one diffuses knowledge as the

⁴¹ William Seward, *Notes on New York*, in vol. 2 of *The Works of William H. Seward*, George E. Baker, ed. (New York: Redfield, 1853), 37.

⁴² *Id.* at 37.

⁴³ *Id.* at 38.

⁴⁴ Frederick Grimke, *The Nature and Tendency of Free Institutions* (1848), John William Ward, ed., (Cambridge, MA: Harvard University Press, 1968), 396.

other diffuses property."⁴⁵ "If the press were extinguished, the great principle on which representative government hinges, the responsibility of public agents to the people, would be lost. . . ." ⁴⁶

Grimke saw the crucial democratic function of the press in terms of political power. The power of opinions depended on their "intrinsic value" and on "the publicity which they acquire."⁴⁷ The principal political function performed by the press was to "equalize power throughout all parts of the community."⁴⁸ The press was "an extension or amplification of the principles of representation. It reflects the opinions of all classes as completely as do the deputies of the people."⁴⁹

Grimke had faith in the ability of the great mass of mankind to acquire knowledge "when it is communicated in detail."⁵⁰ Indeed, as Grimke saw it, much improvement in society had come from "the sagacious and inquisitive spirit of very obscure men in the inferior walks of life."⁵¹ "The freedom of religion, of suffrage, and of the press . . . was brought about by the very reasonable complaints of men who occupied an inferior position in society."⁵² In the United States, the press was "emphatically the organ of popular opinion." But "the power of the press is broken up into small fragments. . . ." ⁵³

Grimke had a realistic view of the function of government censorship in human history. It was "applied to restrain one class of publications only. No one ever heard in a monarchical or aristocratical government of any attempt to forbid the circulation of writings which were calculated to increase the influence of the prince and nobility. The utmost indulgence is extended to them. . . ." Still, the licentiousness of the press was a problem, but not one to be solved by government regulation. Instead, abuse of press power was to be controlled by the structure of the press:

There is but one way of remedying the defect and that is by causing the press itself to perform the office of censor; in other words, to grant such absolute freedom to all the political journals that each shall be active and interested in detecting the misrepresentations . . . of the others. There is real and formidable censorship of the press in America, but the institution is in and not out of the press. . . . [T]he efforts of all parties are most vehement and untiring, and yet more harmless and pacific than in any other country.⁵⁴

⁴⁵ *Id.* at 396.

⁴⁶ *Id.* at 397.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 399.

⁵⁰ *Id.* at 400.

⁵¹ *Id.*

⁵² *Id.* at 401.

⁵³ *Id.*

⁵⁴ *Id.* at 403.

Thomas M. Cooley, a Chief Justice of the Michigan Supreme Court, wrote a famous treatise on constitutional law. His appreciation for the importance of a free press in a democracy was as keen as Grimke's. In his 1868 book, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States*, he ranked the newspaper among the inventions of modern times that had powerfully influenced and advanced civilization. Newspapers brought the debates of leading legislative bodies, the events of war, the triumphs of peace, and many other subjects to "the knowledge of every reading person."⁵⁵

The press made the actions and words of public men "public property."⁵⁶ Cooley noted the importance of the press in reporting matters of public and commercial concern. "The public demand and expect accounts of every important meeting, of every important trial, and of all the events which have a bearing upon trade . . . or upon political affairs."⁵⁷ The power of the press was great, but its power was dispersed. "Every party has its newspaper organs; every shade of opinion on political, religious, literary, moral [and other] questions has its representative; every locality has its press to advocate its claims."⁵⁸ It was "one of the chief means for the education of the people" and on politics it was their "chief educator."⁵⁹ As he praised the press and remarked on its power and importance, Cooley also noted, paradoxically, that the law was not strongly protective.⁶⁰

The decentralized nature of the press helped to defeat a censorship proposal made in the mid-1830s. As noted in subsection III A, in the 1830s, Congress debated a bill to censor abolitionist publications aimed at the South. Senator John C. Calhoun had proposed a bill to prohibit postmasters from mailing any publication touching on the subject of slavery to a state whose laws prohibited the expression. The bill would have required postmasters to examine each newspaper, magazine, and pamphlet and compare its contents to the laws of the Southern state to which it was directed.⁶¹ Senator John Milton Niles of Connecticut noted that more than fifty periodicals were issued from New York City alone. Many were published daily and contained items taken from other papers. "[E]ach paper must be carefully examined in its entire contents, to see if it contains anything touching the subject of slavery. This would be utterly impracticable."⁶²

⁵⁵ Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* (Boston, MA: Little, Brown and Co., 1868), 451.

⁵⁶ *Id.*

⁵⁷ *Id.* at 454.

⁵⁸ *Id.* at 452.

⁵⁹ *Id.*

⁶⁰ *Id.* at 455-56.

⁶¹ Curtis, *Free Speech*, *supra* note 6, at 162-63.

⁶² *Id.* at 173.

Seward, Grimke, and Cooley shared some common assumptions. For each, the press was crucial to the functioning of democracy. Each emphasized the connection between freedom of expression and representative government. "The people" needed detailed information about public questions in order to perform their democratic function, and these writers thought that the press supplied it. Crucially, the press as a whole provided a wide range of points of view, and ownership was decentralized and dispersed among various political and other factions. A "checking function" is essential to a free press, but the checking function envisioned by these thinkers went beyond merely checking abuses of government power. They also saw that the dispersed and decentralized nature of the press would check abuses of press power, a power which they recognized to be potentially great.

Past supporters of broad protection for free speech and press emphasized or assumed a press environment that fostered democratic ideals. The environment included dispersed ownership, politicians and political parties that had substantial access to the press, and a press that purveyed diverse points of view.

I have spent a good amount of time in the past twenty years or so reading old newspapers from the 1830s through the Civil War. In contrast to our times, there was a great profusion of newspapers, often quite a number in each major city. Ownership was dispersed. Many papers were overtly partisan. Partisanship had advantages as well as drawbacks for democracy. Major parties and their candidates had substantial direct access to the mass media because newspapers typically and strongly supported one party or the other.

Newspapers presented very detailed information on major public controversies, often extensively reprinting debates in Congress. Most reprinted stories and editorials from other papers, sometimes for purposes of criticism. A few gave both sides considerable space. Abolitionist papers often reprinted pro-slavery arguments, in part because their editors were convinced that these arguments would aid the anti-slavery cause. While partisan newspapers generally did not reprint campaign speeches from leaders of the opposing party, they did give detailed accounts of the speeches of members of their own parties. In exceptional cases, such as the Lincoln-Douglas debates, speeches of both sides were presented and reported with reasonable accuracy.⁶³

Consider the following example: in the summer of 1866, a major issue was whether the Fourteenth Amendment should be ratified by the states. The amendment contained new limits on the states in order to protect civil liberties, and it did not allow Southern states to count disfranchised black males for purposes of representation in Congress or the electoral

⁶³ Paul M. Angle, ed., *Created Equal: The Complete Lincoln-Douglas Debates of 1858* (Chicago, IL: University of Chicago Press, 1985), xxv.

college. Page one of the *Cincinnati Commercial* for August 17, 1866, reported a speech by Congressman John A. Bingham of Ohio under the headline, "The Constitutional Amendment—Discussed by Its Author." The report covered virtually the entire front page.

Though newspapers typically had political allegiances, the dispersion of ownership produced diversity, even among papers affiliated with the same political party. In the mid-1830s, the Democratic *New York Post* strongly condemned efforts by government officials, legislators, or mobs to silence abolitionists, while the Democratic *Washington Globe* chortled gleefully at efforts to shut them up. Groups that at first had difficulty getting a hearing in the partisan press, such as the abolitionists, founded their own newspapers.

The major shortcoming of these nineteenth century papers was lack of balance within each paper, while the major virtue was that they provided an avenue through which politicians could directly and fully address their constituents. The newspapers also afforded a forum where citizens could express their views.

The press was one way to reach a mass audience. Another was public meetings. Speakers needed the ability to draw a crowd, but costs were minimal: the location could be a tree stump or a simple platform, and the largest cost might be advertisements for the meeting. With few other sources of entertainment, a speech on politics or the law could draw a crowd. Books and pamphlets offered another way to reach a large audience. Books such as the anti-slavery novel *Uncle Tom's Cabin* (1851) and Helper's *The Impending Crisis of the South: How to Meet It* (1857) became best sellers. Both helped to focus national attention on slavery in the South. Political leaders could and did get their messages out to the party faithful and the larger public through the mass media of newspapers, speeches, books, and pamphlets.

IV. THE PARADOX

Most of us think of speech-protective Supreme Court decisions as crucial. There is no doubt that protective decisions play a very important role in America's system of freedom of expression. The decision in *New York Times v. Sullivan* (1964)⁶⁴ stopped the effort to punish the national press for the way it reported the integration struggle in the South. More recently, the Supreme Court's decision in the "Pentagon papers" case (1971)⁶⁵ kept the government from banning publication of the "papers." (The federal government had sought an injunction to prevent the *New York*

⁶⁴ 376 U.S. 254 (1964). See generally, Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (New York: Random House, 1991), on the effort to silence press reports on the struggle of the Civil Rights movement in the South.

⁶⁵ *New York Times Co. v. United States*, 403 U.S. 713 (1971).

Times and *Washington Post* from publishing the contents of a classified study, entitled “History of U.S. Decision-Making Process on Viet Nam Policy.”) As a result of the Court’s decision, the public got to read a secret Defense Department discussion of the major public policy issue of the day: the war in Vietnam. In spite of the crucial role played by the Supreme Court in these and other landmark cases, the judiciary’s role in the history of freedom of expression in America is somewhat paradoxical.

Briefly, here is the paradox I see. Free speech triumphed in the North before the Civil War without strong protection from the judiciary. At the same time, free speech was suppressed in the South even though some Southern courts seemed less than enthusiastic. Judicial doctrine is important, but it is only one factor shaping the system of freedom of expression. The experience from the end of the American Revolution to the end of Reconstruction after the Civil War suggests that whether freedom of expression thrives or withers depends on a number of factors in the social, political, and economic environment. Protective court decisions are only one factor.

There is an ecology of freedom of expression. The environment can protect and foster freedom of expression even in the face of judicial doctrines that support suppression and punish ideas with “bad tendencies.” If this is so, then the converse is probably also true: changes in the environment can undermine effective freedom of expression, even if judicial doctrine broadly protects from punishment by government those who criticize dominant social, political, and economic orthodoxies. Today, judicial doctrine protects dissenters from being punished because of the content of their expression, but finding a place to speak in the incredible shrinking public forum is a different matter, as the cases show. For example, the Court has held that the interior sidewalk surrounding a post office building is not a public forum. Nor are advertising slots on city buses.⁶⁶ Structural changes beyond Court decisions have an impact on the free speech environment and can undermine effective freedom of expression.

V. FROM THE PAST TO THE PRESENT

A. Characteristics of today’s mass media

In the United States today, the mass media is, of course, far different from that of the nineteenth century. Although the differences are numer-

⁶⁶ E.g., *United States v. Kokinda*, 497 U.S. 720 (1990) (upheld arrests and jail time for sale of political literature on sidewalk outside a United States Post Office); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (ban upheld on all political ads in the advertising slots provided in city buses); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968) (public forum recognized in common areas of shopping center), limited by *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) and overruled in *Hudgens v. NLRB*, 424 U.S. 507 (1976). But see, e.g., *Watchtower Bible and Tract Society of New York v. Village of Stratton*, 536 U.S. 150 (2002) (striking down requirement of a permit for door-to-door citizen activity).

ous, I will discuss only the four most striking dissimilarities. First, there is so much more media today: movies, videos, DVDs, a dizzying array of television channels, radio, the Internet, etc. Few of us would be willing to return to the monochromatic media of the nineteenth century, whatever its virtues. Second, the mass media today is dominated by television. Americans spend a huge amount of time watching television. In 1999, the television set was in use for 7 hours and 24 minutes per day in the average household.⁶⁷ Women from age twenty-five to fifty-five spent over 30 hours per week viewing television; men in the same age group spent over 27 hours per week.⁶⁸ For women older than fifty-five the figure jumped to more than 41 hours per week, and for men older than fifty-five, to more than 36 hours per week.⁶⁹ A significant number of Americans get their political news only from television and even more get most of their news there.⁷⁰ Radio is the second major source of information.

Third, below the apparent diversity of the modern mass media is an ever growing corporate centralization. The media world of the first decade of the twenty-first century is consolidated and centralized to a degree unimaginable in the nineteenth century. Most Americans get the vast majority of their political information from a few mass media outlets owned by a few major corporations.⁷¹ It is true, of course, that information is now much more widely disseminated than in the nineteenth century, and with television and radio, it is available even to the illiterate. Depending on the quality of the information, this could be positive or negative.

Concentrated media control can be used for deleterious purposes and is prone to manipulation. By his control of most of Yugoslavia's television, then-President Slobodan Milosevic was able to control public opinion by pervasive propaganda. By his control of a "private" television empire, Silvio Berlusconi, the Prime Minister of Italy, can be assured of favorable

⁶⁷ See Nielsen Media Research, *2000 Report on Television* (2000), 14, as cited in Michael Kent Curtis, "The Constitution and the Other Constitution," *William and Mary Bill of Rights Journal* 10 (2002): 359, 366 (hereafter, Curtis, "The Other Constitution").

⁶⁸ See *id.*

⁶⁹ See *id.*

⁷⁰ In 1992, 41 percent of Americans got their news exclusively from television and 80 percent got most of their news there. Reed Hundt, "The Public's Airwaves: What Does the Public Interest Require of Television Broadcasters?" *Duke Law Journal* 45 (1996): 1089, 1102 (citing Thomas B. Rosentiel, "Survey: Public Prefers Tyson to Politics," *Los Angeles Times*, March 5, 1992, A13). As of 2000, one in three Americans got some of their news online: "Internet Sapping Broadcast News Audience," <http://people-press.org/reports/display.php3?PageID=202> [accessed July 11, 2003]. About 40 percent of the 33 percent who are online news consumers go to the Internet for political news: <http://people-press.org/reports/display.php3?PageID=204> [accessed July 11, 2003]. Curtis, "The Other Constitution," *supra* note 67, at 366 n.34.

⁷¹ Material in the preceding paragraph on television viewing and material that follows on conflicts of interest also appear in slightly earlier form in Curtis, "The Other Constitution," *supra* note 67, at 365-68. See also Michael Kent Curtis, "Judicial Review and Populism," *Wake Forest Law Review* (2003): 313, 330.

news coverage on at least half of Italy's television stations.⁷² His influence over Italian public television has made his control nearly universal. Concentrated media power can be abused, and this is true even when the power is "private."

Consider the media world of 1999, as described by columnist Molly Ivins:

At the end of World War II, 80 percent of American newspapers were independently owned. When Ben Haig Bagdikian published "Media Monopoly" (Beacon Press) in 1982, 50 corporations owned almost all of the major media outlets in the United States. That included 1,787 daily newspapers, 11,000 magazines, 9,000 radio stations, 1,000 television stations, 2,500 book publishers and seven major movie studios. By the time Bagdikian put out the revised edition in 1987, the number was down to 29 corporations. And now there are nine. They own it all.⁷³

Since 1999 consolidation has proceeded apace. Ivins' description ignored university presses, but it is an accurate picture of the major mass media as of the time she wrote.

The Federal Communications Commission, the courts, and Congress have all done their part in recent years to contribute to the consolidated corporate media world and to undermine guaranteed access for diverse points of view, for example by removing barriers to media consolidation, repealing the Fairness Doctrine (which required some air time for opposing points of view), and imposing legal barriers on legislative efforts to protect or promote diversity. (As of this writing it seems as though Congress, for the first time in recent years, may overrule the FCC's decision to allow greater consolidation of media holdings.) Government actions removing barriers to consolidation, together with other factors, have pro-

⁷² See generally, PBS, *Wide Angle*, "Media by Milosevic," at <http://www.pbs.org/wnet/wideangle/shows/yugoslavia/index.html> [accessed November 20, 2003]. Consider the following news story discussing Italian press coverage of Berlusconi's comparison of a German Social Democratic delegate to the European Parliament to a concentration camp guard:

[T]he reaction of the Italian media to his comments was almost a test case of the extent of his unhealthy domination of that industry. *Il Foglio* headlined its leading article: "Premeditated Aggression: A Just Reply". It is owned by his wife. *Il Giornale* accused the Germans and French of a plot against Italy. It is owned by his brother. The main news on the state television channels played down the story—they are not directly controlled by Mr. Berlusconi but are part of a web of political patronage. The prime minister also owns the three main private television channels, one of which did not even report Mr Berlusconi's words.

"Mr. Berlusconi's 'Joke' Exposes the Democratic Flaw at the Heart of the EU," *The Independent*, July 4, 2003.

⁷³ Molly Ivins, "Three New Books Offer Suggestions for Fixing the Media Mess," *Charles-ton Gazette*, November 2, 1999, A-4. See Curtis, "The Other Constitution," *supra* note 67, at 365.

duced both a much more consolidated electronic media and one far freer from requirements for viewpoint diversity.

Fourth, compared to the press of the nineteenth century, commercial television devotes a tiny amount of news time to serious discussion of candidates' views and policy issues. As one observer noted, "two elections ago [in 1998], the three networks together gave you about 25 minutes a night of election news, or about eight minutes apiece. This [2000] election they gave you about 12 minutes, or four minutes apiece per night."⁷⁴ But even this reduced amount was news of a special type. The Annenberg Public Policy Center found that only an average of 64 seconds per night was quality, "candidate-centered" time during which the candidates themselves had an opportunity to discuss their views on issues. The rest was "heavily filtered reporting about the suspense of who might win the horse race. . . ."⁷⁵ Of course, C-SPAN and some other cable networks provide more candidate time, but even this time can be degraded by journalists. In a December 2003 televised "debate" among Democratic candidates in New Hampshire, an event moderated by ABC's Ted Koppel, during the first forty-five minutes the journalist did not ask a single question devoted to public policy issues. All questions focused on Al Gore's endorsement of a candidate, on polls, candidate fundraising, and so forth.

Journalists typically frame campaigns as strategic games of people struggling for power. Policy issues and debates become noteworthy not in themselves but at most as moves in a strategic game.⁷⁶ Of course, the "horse race" is a part, but only part, of what is going on.

In 1968, the average presidential campaign sound bite on network news was 43 seconds. In the 1996 election, it dropped to 8.2 seconds.⁷⁷ Journalists spoke six minutes for every minute George Bush or Al Gore spoke on the evening news in the 2000 campaign.⁷⁸ An Annenberg study found that only one in four campaign stories aired in the month before the election was issue-oriented; the rest focused on the bumps and dips of polls and campaign strategy.⁷⁹ Journalists talking about the election accounted for 74 percent of the news airtime. Candidates actually shown speaking accounted for 11 percent. Sixteen of nineteen top-rated TV stations in the top eleven markets broadcast, on average, only 39 seconds a night about political campaigns, while top stations in Philadelphia and Tampa averaged 6 seconds a night.⁸⁰

⁷⁴ Steven Hill, *Fixing Elections: The Failure of America's Winner Take All Politics* (New York: Routledge, 2002), 189.

⁷⁵ *Id.* at 190.

⁷⁶ Thomas E. Patterson, *The Vanishing Voter: Public Involvement in an Age of Uncertainty* (New York: Knopf, 2002), 69

⁷⁷ Hill, *Fixing Elections*, 190. Compare, Patterson, *The Vanishing Voter*, 68.

⁷⁸ Patterson, *The Vanishing Voter*, 68.

⁷⁹ Hill, *Fixing Elections*, 190.

⁸⁰ See Charles Lewis, "Media Money: How Corporate Spending Blocked Political-Ad Reform, and Other Stories of Influence," *Columbia Journalism Review* (Sept./Oct. 2000): 20, 26;

However bad the situation is for candidates for president, coverage of other races is worse. There is very little day-to-day coverage, for example, of state politics and government. News reporting on state legislatures and almost all races for governor has virtually disappeared from much television news. The 2003 California recall, featuring a movie star as candidate for governor, was a rare exception. In the 1998 California gubernatorial race, local TV news on the subject was less than one third of one percent of possible news time—one tenth of what it had been in 1974.⁸¹

There are additional serious problems with today's mass media. First, broadcast and cable news coverage is often devoted to trivial issues. Trivial issues have always been aired, but based on my unscientific survey, the percentage of trivia in political discussion has grown dramatically compared to newspapers of the period from 1830 through the end of the Civil War. George W. Bush's arrest for drunk driving twenty-five years before the 2000 election got more election coverage than all foreign policy issues combined.⁸² The problem has existed for some time. Examples of quite trivial news coverage include Gerald Ford's statement in a 1976 presidential debate suggesting that Poland was not a puppet state of the Soviet Union; Jimmy Carter's 1976 "lust in my heart" Playboy interview (in which he confessed to feelings for women other than his wife); and, of course, obsessive reporting of politicians' sexual adventures.⁸³

After the first debate in the 2000 Presidential election, one network took footage from the debate and clipped out everything except Gore sighing or showing expressions of dismay. One after another, photos of Gore's expressions flashed across the screen. All context had been removed. The viewer did not hear or see the Bush statements that produced these reactions; the viewer did not hear or see what Gore had said, if anything, in response to statements that elicited these reactions. Then a group of journalists gravely discussed Gore's facial expressions in the debate. The episode is a metaphor for the current state of American television journalism, a journalism that drains substance from the discussion of politics and substitutes predictions about the horse race and critiques of style.

For the press at large, more than 50 percent of candidate gaffes got news coverage extended over at least two days compared with 15 percent of policy stories. Network news gave extended coverage to more than 65 percent of gaffes compared with 15 percent of policy issues.⁸⁴ News audiences took more notice of stories about gaffes and recalled them bet-

Robert W. McChesney, *Rich Media, Poor Democracy: Communication Politics in Dubious Times* (Urbana: University of Illinois Press, 1999), 263-64. Curtis, "The Other Constitution," *supra* note 67, at 370.

⁸¹ McChesney, *Rich Media, Poor Democracy*, 263-64.

⁸² Patterson, *The Vanishing Voter*, *supra* note 76, at 48.

⁸³ *Id.* at 55.

⁸⁴ *Id.* at 56.

ter,⁸⁵ but at least part of this effect can be attributed to the greater press attention that the gaffes received.

Gaffes (or alleged gaffes) and the evidence they supposedly provided that Gore was untrustworthy or Bush was ignorant and dumb were of major importance in the 2000 election.⁸⁶ Examples include Bush's "failure" of a pop quiz asking him to name leaders in various third world countries; Gore's statement that a schoolgirl "has" to stand for want of a desk and chair in her crowded science class when, in fact, she only "had" to stand for a time; and Gore's mistaken assertion that he had accompanied the Director of the Federal Emergency Management Agency to Texas in connection with forest fires. In fact, Gore had often accompanied the Director to scenes of disasters, but in this case he had been briefed by the Director's deputy.⁸⁷

Obsessive and often inaccurate press accounts become received wisdom too rarely corrected by the press. The checking function that Grimke saw in the press of the nineteenth century seems not to be functioning well in the twenty-first.⁸⁸ As the number of outlets run by diverse owners shrinks, viewpoint diversity and critiques of press orthodoxies in the mass media also seem to shrink.

The second serious problem with today's mass media is that, because most candidates cannot hope to reach viewers and listeners through free news coverage, candidates must spend more and more money to buy television or radio time. As serious news coverage has declined, revenue spent on political advertising has increased. In 2000, television political ads produced an estimated \$1 billion in revenue for broadcasters.⁸⁹ Revenue from political spots was up 40 percent from 1996 and, adjusted for inflation, amounted to a five-fold increase from the level of spending in 1980. Though they run only during a part of the year, political commercials were the third largest source of advertising revenue for broadcasters in 2000. Campaign coverage has decreased as ad revenue has increased.⁹⁰ (In the nineteenth century, in contrast, heavily partisan newspapers typically gave extensive, free coverage to the candidates of the party they supported.)

Critics charge that there is something amiss when stations, having received their broadcast licenses for free from government, turn around and sell access to their audiences to candidates for political office. Cable is a special case, but the dominance of existing cable companies was

⁸⁵ *Id.*

⁸⁶ For a detailed discussion of the effect of gaffes on each of these candidates, see Kathleen Hall Jamieson and Paul Waldman, *The Press Effect: Politicians, Journalists, and the Stories that Shape the Political World* (Oxford: Oxford University Press, 2003), 48–60.

⁸⁷ *Id.* at 55.

⁸⁸ See *id.* at 50–51; also Paul Waldman, "Gored by the Media Bull," *The American Prospect*, January 13, 2002, at 20.

⁸⁹ Hill, *Fixing Elections*, *supra* note 74, at 189.

⁹⁰ *Id.*

substantially advanced by monopolies granted to them by local governments. At any rate, the present system makes it ever more expensive for candidates to run for office, and it tends to undermine democracy, both by limiting who can run and the sort of appeal candidates can make, and by actually or apparently undermining the relationship of trust between public officials and voters. In three separate, recent polls, over three-fourths of the respondents agreed with the statement that “Congress is largely owned by the special interest groups,” which “have too much influence,” and “our present system of government is democratic in name only” because special interests run things.⁹¹

A third serious problem with the media is that coverage is even worse on issues of public policy that are not immediately connected with candidates for election. In 1998, when the tobacco industry decided to oppose the amended version of Senator John McCain’s Universal Tobacco Settlement Act—which unlike an earlier version did not protect tobacco companies from tort suits—the industry spent \$35 million on television ads attacking the bill.⁹² Viewers were regaled with pictures of a cuckoo bird coming out of a clock, while an announcer solemnly intoned that it was cuckoo time in Washington—with the settlement likely to cause huge new taxes on working people and sixty new bureaucracies.⁹³

Kathleen Hall Jamieson of the Annenberg School for Communication says that the ads lacked context and were misleading.⁹⁴ They did not explain, she points out, the purpose of the taxes or the use to which the money would be put. The charge of sixty new bureaucracies cited an apparently impartial source, yet in fact, the source was merely quoting from a speech made by a tobacco company executive.⁹⁵ By contrast, the American Cancer Society sponsored the only ad supporting the bill, which ran for a single week and reached a far smaller number of viewers. Both the *New York Times* and ABC News ran a single story pointing out inaccuracies in the tobacco industry ads. CNN, which aired most of the ads, did not run a single piece evaluating the accuracy of the tobacco companies’ ads.⁹⁶ In spite of very strong early support, this version of the bill was defeated.

Citizens for Better Medicare spent \$65 million in ads opposing an effort during the Clinton Administration to add a prescription drug benefit to

⁹¹ E. Joshua Rosenkrantz, *Buckley Stops Here: Loosening the Judicial Stranglehold on Campaign Finance Reform* (New York: Century Foundation Press, 1998), 16; “What Americans Think,” *Washington Post Weekly*, May 17, 1999, at 34. See also Daniel A. Farber and Phillip P. Frickey, *Law and Public Choice: A Critical Introduction* (Chicago, IL: University of Chicago Press, 1991), 12. Curtis, “The Other Constitution,” *supra* note 67, at 359, 373.

⁹² See *Bill Moyers: Free Speech for Sale*, PBS television broadcast, June 8, 1999, transcript by Burrelle’s Information Service; Waldman, *The Press Effect*, *supra* note 86, at 9–12; and Curtis, “The Other Constitution,” *supra* note 67, at 367–69.

⁹³ See all of the sources cited above in note 92.

⁹⁴ See *id.*

⁹⁵ See *id.*

⁹⁶ Waldman, *The Press Effect*, *supra* note 86, at 9.

Medicare.⁹⁷ In the ads, a woman named “Flo” warned viewers of the need to keep the government out of their medicine cabinets.⁹⁸ Under the law at that time, the ads did not need to tell viewers that Citizens for Better Medicare was created by the pharmaceutical industry.⁹⁹ The corporate owners of television did little or nothing to inform viewers on that score. The checking function of television journalism is hardly robust in such cases.

In initiative and referendum elections, poorly funded grassroots coalitions typically face well-financed, corporate-backed organizations. Often only one side gets a meaningful hearing in the electronic square, where advertising, especially on television, is expensive. The “debate” is closer to a monologue.

The fates of two recent Oregon ballot measures exemplify this disparity and the difficulty of overcoming the power of corporations to disseminate their preferred messages. Opponents of Oregon Measure 27, which would have required labeling of food containing genetically engineered material, spent \$5.4 million to defeat the measure; its supporters spent barely \$80,000. The measure failed in November 2002. The same year, insurance companies and their allies spent \$1.3 million to defeat Oregon Measure 23, which would have extended health insurance coverage to all Oregonians and authorized tax increases to pay for the program. Supporters spent about \$70,000.¹⁰⁰ This measure also failed.

In a 2002 California public power initiative, Pacific Gas and Electric (PG&E) spent \$2.7 million in its successful effort to defeat the measure, compared to \$50,000 spent by supporters. The initiative would have allowed the San Francisco Public Utilities Commission to provide power to all of San Francisco, rather than just its 30 percent share, and would have given it the prerogative to buy out PG&E’s local distribution network. PG&E outspent the supporters of public power by a ratio of fifty to one. As a result, according to news reports, PG&E was able to “blanket the city in broadcast and print advertisements.”¹⁰¹

A study of seventy-two ballot issues in California, Massachusetts, Michigan, and Oregon showed that the higher spending side won 76 percent

⁹⁷ See The Annenberg Public Policy Center of the University of Pennsylvania, Issue Ads @ APPC, <http://appcpenn.org/issueads/citizens%20for%better%20medicare.htm> [modified August 2000, accessed January 24, 2001]; as cited in Curtis, “The Other Constitution,” *supra* note 67, at 368.

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ Peter Wong, “Spending in Recent Election Broke Records,” *Statesman Journal* (Salem, OR), December 6, 2002, 1C. See also Tim Christie, “Health Care Plan Gets Little Backing from Oregon Voters,” *The Register Guard*, November 7, 2002; and James Mayer and Michelle Cole, “Oregon Voters Make Policy Choices at Polls,” *The Oregonian*, November 6, 2002.

¹⁰¹ Lance Williams, “Ethics Boss Raps Worker for Revealing PG&E Error,” *San Francisco Chronicle*, January 10, 2002, A1; Chuck Finnie and Susan Sward, “PG&E Spends Big to Defeat Prop. D,” *San Francisco Chronicle*, October 29, 2002, A1.

of the time. Lopsided spending is most effective in defeating proposals.¹⁰² With the repeal of the Fairness Doctrine, which guaranteed some degree of balance, the disparity in the amount of television time each side can obtain has increased.

The fourth serious problem with today's media is conflicts of interest. The press has always had such conflicts, but media consolidation has aggravated the problem. The Walt Disney Corporation hopes to market its products in China's huge and lucrative market. The Chinese elite dislikes films and news stories critical of how China treats Tibet.¹⁰³ Will Chinese objections affect how Chinese rule in Tibet is portrayed in future films or in the news outlets owned by Disney? In some cases, Chinese market power has already distorted the news. Television and press baron Rupert Murdoch wants to expand his media products in the Chinese market, and he has been careful to avoid offending the Chinese government.¹⁰⁴ In 1994, his Star TV eliminated the BBC international news from its satellite service because Chinese authorities objected to some of its coverage on human rights issues, and in 1998 his publishing house broke a contract to publish a book by the last British governor of Hong Kong because he was critical of China's antidemocratic policies.¹⁰⁵ Fortunately, the author found another publisher.¹⁰⁶

Many multinational corporations have substantial economic power that can affect press coverage. A number of magazines now allow advertisers to preview stories. In a 1977 article, the *Wall Street Journal* cited a letter from the Chrysler Corporation: "In an effort to avoid potential conflicts, it is required that Chrysler Corporation be alerted in advance of any and all editorial content that encompasses sexual, political, social issues or any editorial that might be construed as provocative or offensive." The *Journal* article suggested that business mergers have given advertisers far greater clout with publishers than they had in the past.¹⁰⁷

¹⁰² See Robyn R. Polashuk, "Protecting the Public Debate: The Validity of the Fairness Doctrine in Ballot Initiative Elections," *UCLA Law Review* 41 (1993): 391, 405 (citing Betty H. Zisk, *Money, Media, and the Grass Roots: State Ballot Issues and the Electoral Process* [Newbury Park, CA: Sage Publications, 1987], 93-95, 198-99).

¹⁰³ See Seth Faison, "Dalai Lama Movie Imperils Disney Future in China," *New York Times*, November 26, 1996, A1. Curtis, "The Other Constitution," *supra* note 67, at 366-68.

¹⁰⁴ See John Gittings, "Murdoch's Beijing Love-Fest," *The Guardian* (London), December 12, 1998, at 14. (Available online in LEXIS News Library, *The Guardian* [London file].) Cited in Curtis, "The Other Constitution," *supra* note 67, at 367.

¹⁰⁵ See *id.*

¹⁰⁶ See *id.* Murdoch denies that the decision was commercially motivated. C. Edwin Baker, *Media, Markets, and Democracy* (New York: Cambridge University Press, 2002), 195. In a world of ever-more concentrated media power in fewer and fewer hands, an admission that the decision was ideological would not be reassuring either.

¹⁰⁷ See G. Bruce Knecht, "Magazine Advertisers Demand Prior Notice of Offensive Articles," *Wall Street Journal*, April 30, 1997, at 1. Most of the specific issues reported in the article involve sexual matters. Magazines discussed in the article include *The New Yorker*, *Esquire*, and *People*. It seems likely that holders of such market power would be tempted to use it to

In a 2000 poll, some 26 percent of journalists admitted to engaging in self-censorship of news stories because of conflicts of interest involving their news organization, its parent company, advertisers, or friends of the boss.¹⁰⁸ Forty-one percent admitted to reshaping or softening stories.¹⁰⁹

America's ever more consolidated media have other serious conflicts of interest. As we have seen, television and cable corporations reaped rich rewards from the tobacco company ads against the McCain Bill, while they did almost no critical (or other) reporting about this massive advertising campaign.¹¹⁰ The problem is not that tobacco, insurance, utility, and drug companies can and do buy a lavish hearing for their preferred views. It is that the other side is often virtually absent from the televised "debate." The mass media is in the business of selling viewers to advertisers. An arrangement in which one side can afford to buy massive amounts of media time and viewer attention while the other cannot is, of course, not ideologically neutral. The United States has a regulatory system that favors the opulent over the poorly funded side of the debate.

Advertising is, of course, a major source of conflicts of interest between the fiduciary role of the press in a democracy and its role as a profit-seeking business. Advertisers can threaten to withdraw advertising from stations that carry stories critical of them. In addition, the pursuit of advertising revenue may tilt news coverage toward subjects and perspectives most likely to generate viewers in advertisers' target audiences.¹¹¹

The fifth problem with the media, especially the broadcast media, is the failure to perform their checking function. A version of 'Gresham's law' may be at work, by which simple stories that are cheaper to produce and easier to state in a few seconds drive out more complex and expensive investigative stories. The Savings and Loan scandal of the 1980s is estimated to have cost U.S. taxpayers between \$500 billion and \$1 trillion. Professor C. Edwin Baker observes that, "The media . . . found that early reporting was simply too difficult or boring."¹¹² Welfare fraud, costing perhaps 1/500th as much, was better covered.¹¹³ Similarly, even as crime was declining in the 1990s, reporting of crime stories increased.

B. Censorship by the media

The prohibitive cost of television time for the less well-funded side of public issues is a serious problem, as I noted above. Another related

protect themselves and their products from criticism. See also Curtis, "The Other Constitution," *supra* note 67, at 367.

¹⁰⁸ See Andrew Kohut, "Self Censorship: Counting the Ways," *Columbia Journalism Review* (May/June, 2000): 42-43; as cited in Curtis, "The Other Constitution," *supra* note 67, at 366.

¹⁰⁹ See *id.*

¹¹⁰ See Curtis, "The Other Constitution," *supra* note 67, at 366.

¹¹¹ Baker, *Media, Markets and Democracy*, *supra* note 106, at 13-14.

¹¹² *Id.* at 196-97.

¹¹³ *Id.*

problem is the power of media corporations simply to refuse to carry ads for dissenters, even when they are able to pay. For example, television executives would not permit the Media Foundation, a group opposed to the ethic of consumption, to purchase television time for its advertisements, a denial that is hardly surprising since the major purpose of television commercials is to promote precisely this ethic of consumption.¹¹⁴

Similarly, in 2003 a group called Win Without War, whose members include the National Council of Churches, attempted to place television ads opposing the war in Iraq. CNN, Fox, and NBC declined to sell airtime on their national networks. CNN explained that it did not accept "international advocacy ads on regions in conflict." An NBC spokesman, who confirmed the refusal of a local station to run the ad, said "[i]t pertained to a controversial issue which we prefer to handle in our news and public affairs programing." Officials at Fox did not respond to repeated calls from a journalist seeking their comment.¹¹⁵

Other antiwar groups experienced similar frustrations at the local level. The Princeton-based Coalition for Peace Action had planned to run six ads. Comcast had accepted \$5,000 in payment for the ads and agreed to run them in the Washington, DC, area, where the peace activists hoped to get the attention of lawmakers. Before any of the ads were telecast, Comcast issued a statement saying that it rejected the ads because it could not substantiate some of the claims made in them. Reverend Robert Moore, a United Church of Christ minister who is executive director of the coalition, was surprised: "I was under the impression that we enjoy freedom of speech in this country."¹¹⁶ Experts in constitutional law know, of course, that, with reference to the mass media, as journalist A. J. Liebling put it many years ago, "[F]reedom of the press is limited to those who own one." The Supreme Court, over only two dissenting votes in *Columbia Broadcasting System v. Democratic National Committee* (1973), found no free speech right to nondiscriminatory access to advertising on television.¹¹⁷ The question is not simply whether the Court's decision, viewed in isolation, was correct. The question is the effect of the decision as part of a larger pattern of media practices.

Understandably, media corporations often do a poor job of reporting stories that involve claims that their own interests and lobbying activities conflict with the public interest. Examples include conflicts over the tele-

¹¹⁴ *Affluenza*, PBS television broadcast, transcript (c) 1997, KCTS Assn. (*Affluenza* was a production of KCTS/Seattle and Oregon Public Broadcasting); cited in Curtis, "The Other Constitution," *supra* note 67, at 369.

¹¹⁵ Alan Cooperman, "Bishop in Bush's Church in New Antiwar Ad," *Washington Post*, January 31, 2003, A18.

¹¹⁶ Jeff Pillets, "Peace Ads Deemed Not Ready for Prime Time," *The Record* (Bergen County, NJ), January 29, 2003, A8.

¹¹⁷ 412 U.S. 94 (1973); for dissents by Justices Brennan and Marshall, see *id.* at 118.

vision spectrum and high definition television, and demands for free time for political candidates.¹¹⁸

C. *The Internet*

Of course, the Internet has greatly democratized publishing. For the moment, anyone can be a publisher, just as anyone can be a speaker in the public forum. Reaching a mass audience or even a modest one, however, is a very different proposition. Most people still get most of their political information from television and, to a lesser degree, radio. Many of those who get political information from the Web get most of it from major media companies such as AOL-Time Warner, General Electric, News Corporation, Disney, and Viacom. Often the most heavily visited sites are ones that are publicized in the mass media. Still, the Internet has provided remarkable opportunities for outsiders to organize and to get their messages heard by others. For people today who share a commitment to a broad-based popular democracy, preservation of the democratic character of the Internet is a prime concern.

Corporate interests may be winning the battle to transform the Internet from a kind of public forum to something closer to a private shopping mall.¹¹⁹ For those who champion some form of participatory democracy, who seek to come closer to the ideal of a government in which all have an equal voice, the prospect of effective corporate control of the "information superhighway" is distressing.

Initially, the Internet used telephone lines. The phone companies were obligated to operate their lines as common carriers. They had to open their lines to all and could not interfere with the message or decide who could send or receive it. Now the Internet is migrating to broadband, a much faster and more flexible system offered by local cable companies and by phone companies through digital subscriber lines (DSL). Eighty percent of U.S. households have access to these broadband systems, though so far only 10 percent of Internet users use these more expensive services. Led by Chairman Michael Powell, the FCC voted to classify cable modem service in a way that left it free of common carrier, open-access requirements. The FCC is also moving to deregulate DSL and free it from common carrier restrictions.¹²⁰ This is the most recent defeat for those who battle for more open access to the media.

We can hope that wide access to the Internet is preserved, and that access is not severely undermined by the FCC's ruling, as access has been lost to other media by regulatory changes. Preservation of democratic

¹¹⁸ Dean Alger, *Megamedia: How Giant Corporations Dominate Mass Media, Distort Competition, and Endanger Democracy* (Lanham, MD: Rowman and Littlefield, 1998), 100-11.

¹¹⁹ See Curtis, "Judicial Review and Populism," *supra* note 71, at 368-70.

¹²⁰ See Karen Charman, Recasting the Web, *Extra*, July/August 2002, at 22-24; available online at <http://fair.org/extra0207/open-access.html> [accessed November 20, 2003].

access would be served by regulation. As C. Edwin Baker notes, “prohibiting enterprises that own and operate transmission facilities from also owning and marketing media content . . . [was] a clean, structural solution” to the incentive that companies have to use their power to disadvantage creators of competitive content or, for that matter, to block disfavored ideas. This approach led to “sensible legal prohibitions on telephone companies owning and selling (as opposed to carrying) cable programming. By requiring phone companies only to carry content, the incentive for the phone companies was to . . . reduc[e] bottlenecks and increas[e] communications flows.”¹²¹

D. *The incredible shrinking forum*

Public streets and sidewalks of the 1930s were a judicially protected public forum. People on downtown sidewalks weren’t just shoppers; they were also citizens. They could go about their shopping, but their fellow citizens could also ask them to take political leaflets or listen to a street-corner speech. Then a change in architecture and ownership, combined with a change in the Court, transformed yesterday’s citizen-shoppers into today’s mall consumers. The change from public to private streets and sidewalks and malls set the stage for a greatly eroded public forum. The change was largely completed when the Burger Court reversed an earlier Supreme Court decision and held there was no free speech right in common areas of shopping malls.¹²²

Recently, sixty-year-old attorney Steve Downs refused to remove his “Give Peace a Chance” T-shirt on orders from a mall security guard at Crossgates Mall in New York. When he refused, he was ordered to leave the mall, and when he refused to leave, he was arrested.¹²³ As a free speech matter before the courts, the prospects for Downs’ vindication were bleak. New York’s highest court had found no free speech rights in common areas of shopping malls under its state constitution.¹²⁴ As a matter of federal and state constitutional law, the mall could disallow all political statements or it could discriminate among them, permitting, say, “Give War a Chance” T-shirts while banning those advocating peace.

¹²¹ Baker, *Media, Markets and Democracy*, *supra* note 106, at 295–96.

¹²² See *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968), limited by *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), and overruled in *Hudgens v. NLRB*, 424 U.S. 507 (1976). But see, e.g., *Watchtower Bible and Tract Society of New York v. Village of Stratton*, 536 U.S. 150 (2002) (striking down requirement of a permit for door-to-door citizen activity). In recent years, the Court has usually constricted the public forum doctrine. E.g., *United States v. Kokinda*, 497 U.S. 720 (1990); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (ban upheld on all political ads in the advertising slots provided in city buses).

¹²³ Carol Demare, “He Kept His Shirt on—and Got Arrested,” *Times Union* (Albany, NY), March 5, 2003, B1.

¹²⁴ *SHAD Alliance v. Smith Haven Mall*, 66 N.Y.2d 496 (Ct. App. 1985).

Still, there is a happy ending to the New York shopping mall story. Hundreds of people—peace activists and civil libertarians—appeared at the mall to protest its policy. Though the mall had legal precedent on its side, the mall sought to drop the prosecution. The popular perception that the mall’s censorship was a violation of free expression seemed to be a powerful force, even overcoming the “correct” legal view.

In *Tinker v. Des Moines Independent Community School District* (1969),¹²⁵ the Court, in an opinion by Justice Abe Fortas, upheld the right of public school children to wear black armbands to school to protest the war in Vietnam. Public schools, he wrote, are not enclaves of totalitarianism. In contrast, under Supreme Court precedent, “private” shopping malls, the successors to the downtown business districts of the 1930s and 1940s, can be enclaves of totalitarianism if they choose.

The danger is that corporations that own the cable or DSL lines that enter most of our homes will join the shopping malls. Thanks to the miracles of technology and a legal doctrine that treats the cable as purely private property, corporations might have the same control over expression that shopping malls now enjoy. Furthermore, corporate suppression of Internet speech might be harder to spot and might also get less publicity from the media.

The response to this concern, of course, is that the market would never tolerate such a transformation and that, in any case, regulation would violate the constitutional rights of the corporations. On this view, the cable or DSL lines that carry the speech that reaches mass audiences are treated as speakers, and the corporations that own them are treated as persons who may not be forced to carry ideas with which they disagree.¹²⁶ Thus, there is no public forum aspect to the information superhighway. Once corporations establish control over their “information private highway,” how will megamedia companies respond to Web sites that criticize their power?

As the case of Steve Downs and the shopping mall shows, public protest can sometimes make a difference, at least to a degree. At a minimum, however, for effective public protest any private censorship needs to be visible and widely publicized. Some Internet codes and filters that limit free expression are invisible.

VI. DO THE MULTIPLE MEDIA PROBLEMS MAKE A DIFFERENCE? FORMAL AND FUNCTIONAL FREEDOM OF EXPRESSION IN THE MASS MEDIA

Today, the American mass media is more consolidated, is dominated by a few major corporations, suffers from serious conflicts of interest that

¹²⁵ 393 U.S. 503 (1969).

¹²⁶ See *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

undermine the fiduciary nature of the press, censors points of view either directly or by pricing, and replaces serious discussion of issues with trivial matters. Do these things matter? Do these trends (assuming one agrees that they exist) make any difference to the sort of democracy Americans have? Does it matter, as Kathleen Hall Jamieson reports, that surveys show that the deceptive claims in the tobacco ads criticizing the 1998 McCain Bill were believed where the ads were widely aired and where there was little rebuttal? Many more people saw the deceptive claims than saw the isolated reports questioning the ads in the *New York Times* or on ABC News, and deception triumphed.¹²⁷ Of course it matters.

Where the government controls the media and provides a steady diet of propaganda we all agree that freedom of expression is seriously compromised. A pervasive private propaganda system is not much of an improvement. Is that the direction in which America is headed? At any rate, America's *mass* media environment is not conducive to vibrant democracy.

The Supreme Court once understood that freedom of expression requires more than a broad prohibition on government suppression based on the ideas expressed. The Court recognized this, for example, in 1939 when it announced the public forum doctrine: that the streets and parks are held by government as a public trust and that citizens have a right to assemble there to discuss public questions. In the 1940s, the Court said that the public forum was a place where the poorly financed causes of "little people" might have at least an opportunity to reach a larger audience.¹²⁸ In 1945, when upholding the application of antitrust laws to the Associated Press, Justice Hugo Black, one of the Court's strongest champions of a broad reading of First Amendment freedoms, wrote: "Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. . . . Freedom of the press from governmental interference . . . does not sanction repression of that freedom by private interests."¹²⁹ Similarly, in *Red Lion Broadcasting Co. v. Federal Communications Commission* (1969), a unanimous Court held: "There is nothing in the First Amendment which prevents Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."¹³⁰ Still, as C. Edwin Baker noted, the recent trend of lower court decisions

¹²⁷ Waldman, *The Press Effect*, *supra* note 86, at 11–12.

¹²⁸ The case stating the public forum doctrine is *Hague v. CIO*, 307 U.S. 496, 515 (1939). See also *Schneider v. State*, 308 U.S. 147, 163 (1939); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Jamison v. Texas*, 318 U.S. 413 (1943); and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

¹²⁹ *Associated Press v. United States*, 326 U.S. 1, 20 (1945). C. Edwin Baker, "Media Concentration: Giving Up on Democracy," *Florida Law Review* 54 (2002): 839.

¹³⁰ 395 U.S. 367 (1969).

has been to treat broadcast media corporations as individuals, as holders of rights, substantially shielded from structural government regulation designed to ensure a more diverse and broadly accessible mass broadcast media.¹³¹

The *functional view* of freedom of expression looks at the practical operation of the system. This view has coexisted with a *formal*, legalistic view of speech and press freedom that emphasizes legal protections that in theory protect all. By the formal, legalistic view, the right to free speech and free press is simply and entirely a right against government suppression; indeed, by some interpretations, it is merely a right to protection against government suppression because of the content of the expression. The argument is a neat syllogism. The First Amendment begins, "*Congress shall make no law.*" The Fourteenth Amendment forbids any *state* from making or enforcing any law abridging the privileges or immunities of citizens of the United States and from depriving any person of liberty without due process of law. Private persons (including corporate persons) are neither Congress nor states. So "private" suppression of speech does not violate the First or Fourteenth Amendments. This is the state action syllogism.

Justice Sandra Day O'Connor, joined by Justices Antonin Scalia, Clarence Thomas, and Ruth Bader Ginsburg, summarized the formal, legalistic view in *Turner Broadcasting System v. FCC* (1994): "[T]he First Amendment as we understand it today rests on the premise that it is government power, rather than private power, that is the main threat to free expression; and as a consequence, the Amendment imposes substantial limitations on the Government even when it is trying to serve concededly praiseworthy goals."¹³² As applied to government actions that imperil the power of the press to check abuses of power, the approach taken by Justice O'Connor and her colleagues is wise. As applied to preventing structural regulation designed to protect the system of freedom of expression from the dangers of concentrated private power or to provide somewhat wider access for political campaigns to *broadcast* media, the approach is far more dubious. But even if one favors such structural regulation, the problem is complex. Without careful limits, government regulations in the name of access could so occupy broadcast time as to undermine the checking function of the media.

The common refrain of the formalists—that the only threat to a vibrant system of freedom of expression comes from the government passing laws aimed at the content of speech—is grossly misleading. People in the nineteenth century understood that freedom of expression required more than lack of government intrusion. Again and again they characterized mobs that attacked abolitionists, destroyed their presses, dispersed their

¹³¹ See Baker, "Giving Up on Democracy," 842.

¹³² *Turner Broadcasting System v. FCC*, 512 U.S. 622, 685 (1994).

meetings, and burned their literature, as assailing the freedom of expression protected by the “American Magna Carta,” the Bill of Rights. The fact that the suppression came from private sources did not strike most people as reassuring or as evidence that the freedom of expression set out in the Bill of Rights was not imperiled. They read the guarantees in the First Amendment functionally, not formally or technically. The formalistic view is different: mobs are not Congress nor even the federal government, so, First Amendment rights are irrelevant.

As history shows, the formal, technical, legalistic understanding of the guarantees of freedom of expression has had costs as well as benefits. For example, the state action syllogism, together with the idea that First Amendment freedoms merely limited the national government—even after passage of the Fourteenth Amendment—combined to nullify congressional efforts to punish Klansmen and others who killed and terrorized people for supporting the Republican Party in the South during Reconstruction. As a result, the electorate was contracted, debate and democratic choice were stifled, and white supremacist “redeemers” regained control of the Southern states—control that lasted until the mid-1960s.¹³³ Again, during the struggle for voting rights in the deep South in the 1960s, private actors used bombs, guns, arson, and clubs in an effort to silence dissent. Obviously, these widely practiced tactics had a very chilling effect on political expression and dissent.

If the government produced all television programs, books, newspapers, and magazines, Americans would not believe that they had a functional system of freedom of expression. This would be so even if individuals retained an unfettered right of free speech. With only one official view permitted in the mass media, America would not produce effective “free discussion *to the end that government may be responsive to the will of the people*,”¹³⁴ or “unfettered interchange of ideas for the bringing about of political and social changes desired by the people,”¹³⁵ or a media environment where conclusions would “be gathered out of a multitude of tongues,” rather than “through any kind of authoritative selection. . . .”¹³⁶ This would be true even if the government media apparatus, in order to make itself seem more credible, occasionally devoted limited space to dissenting views.

This imaginary world of government monopoly over the mass media offends both the functional and the formal understandings of America’s constitutional protections for speech and press. A government monopoly could only be maintained by suppressing rival outlets. This would violate the formal understanding of freedom of the press: that the guarantee

¹³³ See generally, Branch, *Pillar of Fire*, *supra* note 36.

¹³⁴ *Stromberg v. California*, 283 U.S. 359, 369 (1931) (emphasis added).

¹³⁵ *Roth v. United States*, 354 U.S. 476, 484 (1957).

¹³⁶ *New York Times v. Sullivan*, 376 U. S. 254, 270 (1964) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 [S.D.N.Y.1943] [Judge Learned Hand]).

precludes governmental suppression. Of course, government monopolization of the mass media would violate the functional understanding of our constitutional guarantees as well.

Suppose that instead of a government monopoly on the mass media, the monopoly was privately owned. Suppose that a combination of legal rules and economic factors combined to extinguish competition from rival mass media outlets and that the private monopoly had a predominant political perspective, but not one that kept it from retaining a mass audience. Would the situation be greatly improved if there were several mass media corporations instead of one? Regardless of how eagerly consumers lapped up the latest episodes of *Survivor*, many would doubt that this sort of media is what is required for a robust popular democracy. Threats to the checking function can come from private consolidation as well as from government monopoly. Indeed, a prime purpose of government is to check abuses of private power.

Since the modern world is characterized by the growth of multinational corporations that exert a profound influence both on the life of ordinary citizens and on government policy, any free speech policy translated into the realities of the modern world also needs to protect criticism of concentrated private power—from both government and private suppression. As Chief Justice Earl Warren noted in 1967, there has been “a rapid fusion of economic and political power . . . and a high degree of interaction between the intellectual, governmental, and business worlds.”¹³⁷ Because those with power seek to suppress criticism of themselves, media consolidation can itself produce an effective form of mass media censorship.

A functional approach to freedom of expression asks what sort of a mass media is required by democracy. As shown by the experiences of the abolitionists, the Southern Republicans during Reconstruction, and the advocates of black voting rights in the South—all of whom suffered suppression at the hands of fellow citizens—rights can be threatened by private action as well as by government suppression. Similarly, censorship of access to the debate by a wealth test or by decisions of a few media conglomerates could threaten the democratic function of freedom of speech and press.

VII. IMAGINING CONSTITUTIONAL PROVISIONS TO PROVIDE A MEDIA THAT SERVES DEMOCRACY

If we set out to create a constitutional structure for mass media that would support robust democratic government, would we replicate the media world now being established by government policy and market

¹³⁷ *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (referring to private power and influence as factors making a person a public figure).

power? This is a central free speech question today. It is not resolved by the fact that the Court so far has done a reasonably good job of protecting speakers from government punishment for expressing unorthodox ideas. Yet, what a strong democracy requires and what the current United States Constitution will allow are quite different questions.

How one answers the question of what democracy requires depends both on what sort of democracy and electoral system one wants and on how well one thinks the current mass media and democratic system are functioning.

There is a vision of democracy embedded in most of the historic defenses of free speech and press that I have reproduced in this essay. This vision assumes that public understanding and political participation are important in order to protect individuals as well as the public interest, that is, that a well-functioning democracy requires a well-functioning system of free speech and press so that it can be an effective guardian of all other rights.¹³⁸ This vision is predicated on the assumption that people have the potential to perform their democratic role: it takes seriously the idea of popular sovereignty and assumes that the public needs substantial and reasonably diverse sources of information in order to perform its supervisory function. It rejects the idea that the people should hear only one side of public questions.

James Madison captured part of this vision in his 1822 letter to William T. Barry commending a generous appropriation the Kentucky legislature made for public education. "A popular Government," Madison wrote, "without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."¹³⁹

I know, of course, that this vision is contestable. At best, it describes an ideal to be pursued. The vision does not explain how it is to be implemented. In some circumstances, a broad prohibition of government censorship might be enough. In other conditions, achieving the same vision would require more.

If, in spite of its problems, the vision still appeals to us, and if, like me, one fears that the United States is moving away from the ideal rather than closer to it, then the real problem is what to do. Here I have only four suggestions for general guidelines.

First, we should recognize that the free speech and free press environment, including the structure of the media, is crucial.¹⁴⁰ As a result, public policy needs to shape the environment to produce a media that supports democracy.

¹³⁸ See the Virginia Resolution of 1798, quoted in Curtis, *Free Speech*, *supra* note 6, at 76.

¹³⁹ James Madison, *Writings* (New York: Library of America, 1999), 179.

¹⁴⁰ Curtis, "Judicial Review and Populism," *supra* note 71, at 325-28.

Second, the checking function of free speech and press is crucial, but it is a function that needs to check both governmental and private abuses of power. Thus, broad protection for both citizen and press criticism of government and private power are essential. Consolidation has the potential to curb criticism of the exercise of private and governmental power. Accordingly, one-sided television advertising campaigns on issues of public concern need to be checked by counterspeech.

The power of the few mass media corporations must be checked as well. One way to achieve such a check is to foster diversity of ownership and to seek to preserve what little diversity remains. The policies of the Reagan, Bush I, Clinton, and Bush II Administrations that promoted media consolidation are attacks on the environment required for a democratic media.

Third, the structure of the free speech environment is often the product of regulation. Should phone companies with DSL lines or owners of cables also be able to provide content with the inevitable conflicts of interest that consolidation of power provides? Should such lines be treated as common carriers or as speakers? The choice is simply between two forms of regulation. Should we insist on mandated free access to television time for candidates and ballot measures? Should we delegate to private broadcast companies the power to control access and censor ideas at their unfettered discretion and, even for permitted ideas, to ration access to viewers and voters based on wealth?¹⁴¹ Either response is a form of regulation and either involves dangers to freedom of expression. We should pursue policies that foster rather than impede the environment needed for a mass media that supports meaningful democracy, but how to do so is more complex than the principle itself.

It is important to recognize the dangers that government poses to the watchdog role of the press. The Nixon Administration, for example, had plans to obstruct the renewal of the Washington Post Company's television and radio broadcast licenses in order to punish it for Watergate reporting. As Professor Baker notes, "If the political branches must be watched, wisdom counsels against granting them power to control the watchdog."¹⁴² Of course, government can seduce or punish the press in a variety of ways, and many of these are quite difficult to control. Reporters are reluctant to be critical of sources that give them "inside access," for example.

The dangers to the watchdog role counsel caution. The public forum is a case where government is involved in the management of speech, but legal rules strictly limit government discretion. Public forum doctrine could provide a useful analogy. Fixed and generally applied limits on media consolidation seem not to have threatened the watchdog role of the

¹⁴¹ See *id.* at 313.

¹⁴² Baker, *Media, Markets, and Democracy*, *supra* note 106, at 198.

press in the past. Indeed, for reasons that Grimke and others suggested, media consolidation may pose an even greater threat than government to the watchdog role, particularly if the press is also an institution that should watch itself. Similarly, what if a suitable, though not perfect, formula could be arrived at for a limited, dedicated public forum? A fixed amount of free time for political candidates and ballot measures would limit the total control that broadcasters presently exercise, and this would not seem to pose much of a threat to the watchdog role, provided that the time involved was suitably limited. But if government went too far in reserving public forum space for candidates and issues, it could well imperil the checking function. In an ideal world, strict limits and criteria would be set by the constitution: it could constrain government discretion and also provide a statement of principle around which public opinion could coalesce.

My fourth and final suggestion for protecting the environment needed for a democratic system of freedom of expression is to encourage citizen activism. A recent example, as I noted earlier, is the citizen protest produced by a New York mall's censorship of a "Give Peace a Chance" T-shirt. Elsewhere I have suggested another form of protest to promote television time at no cost to candidates and advocates of ballot measures.¹⁴³ I noted:

Some Americans have politely asked television networks to do their part to respond to the current crisis in representative government. A group called Alliance for Better Campaigns (led by former Presidents Ford and Carter and Walter Cronkite) has suggested a modest beginning. It has called on television stations and networks, in the thirty days before an election, to devote 5 minutes a night to broadcasting what candidates say—up they say from a total of 40 seconds typically provided to all candidates.

The public has given television a license to use the public airways and has historically provided advantages for cable, and has not charged for the privilege. A contribution to democracy seems a small price to ask. . . .

Rather than dumping their TV sets in the nearest harbor, people could simply turn off those stations and networks that refuse to provide substantial time for candidates. They could also let the hold-outs know they have done so. People might also advertise the cause by picketing local television stations and network headquarters. It would be interesting to see if the protests make it onto the evening news.¹⁴⁴

¹⁴³ Curtis, "The Other Constitution," *supra* note 67, at 391–93. (Some of the examples of problems with media consolidation that I list here are also set out in the article.)

¹⁴⁴ *Id.* at 391–92.

Some people may believe such a protest is a terrible idea. (If so, they should relax. So far at least, this protest is not catching on.) To be sure, there are dangers. Boycotts could be—and already are—used as weapons of censorship as well as in an effort to provide broader candidate and issue access.¹⁴⁵ I assume, however, that most people would agree that the idea behind such an “access boycott” is to protect speech,¹⁴⁶ and that diverse political views should have a reasonable opportunity to become part of the public dialogue. Consider, however, consolidated media companies that own cable or DSL lines, television stations, and newspapers. Could we expect broad reporting of a planned boycott? Might targeted companies be tempted to block Web sites that advocate such action against them and use other devices at their disposal to keep their critics out of the mass media’s public square? Some seem to think the Internet is impervious to regulation, but this, of course, is a fallacy, as the Chinese government has demonstrated by blocking search engines and substituting carefully filtered information instead.¹⁴⁷ Indeed, the Chinese government is reported to have blocked some 50,000 Web sites. Of course, regulation of cyberspace is by no means limited to government. In *Code*, Lawrence Lessig shows how private corporate regulation of the Internet can and does work.¹⁴⁸

Some structural decisions about the media are easier to evaluate than others. For many years, the United States has had limits on media concentration. Limits on concentration seem to be among the least problematic regulations. Reserving a portion of television or cable time for competing candidates, ballot measures, or discussion of pending legislation, however, is more complex. How would candidates or speakers for different sides of ballot measures qualify? A second conceptual problem is the claim that broadcasters would be denied editorial control over what is broadcast by candidates and that such a denial would violate their right to free speech.

The public airways might be analogized to a public park. Cities can lease public parks to private enterprises to put on plays, concerts, circuses, etc., much as the broadcast spectrum has been allocated to licenses. If a city chooses to reserve a portion of a park as a public forum, should we treat the decision as a violation of a private company’s right to

¹⁴⁵ Louis B. Parks, “Chicks Face Landslide of Anger After Remarks,” *Houston Chronicle*, March 15, 2003. (A number of country music stations banned music by the Dixie Chicks after the group criticized President Bush’s plan for war in Iraq. Here, however, the *stations* initiated the ban and polls on whether to impose a ban. In the case of those that initiated polls, the results were that over 70 percent of listeners favored a ban.)

¹⁴⁶ *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982).

¹⁴⁷ Joseph Kahn, “China Toughens Obstacles to Internet Searches: Google Users Sent to Tamer Sites,” *New York Times*, September 12, 2002, late edition—final, A3; Joseph Kahn, “China Has World’s Tightest Internet Censorship, Study Finds,” *New York Times*, December 4, 2002, late edition—final A13.

¹⁴⁸ See e.g., Lessig, *Code*, *supra* note 24, at 211–21.

free speech? Of course not. At least as an initial matter, government ownership implies power to reserve a part of the grant as a forum for public dialogue.

Cable companies and networks are a more complicated case. They exist because the cable companies have been granted easements by local governments. Should it be treated as a denial of a cable company's free speech rights to reserve a portion of its broadcast days during election seasons for discussion of candidates and ballot measures? Reforms such as allocation of a small portion of the broadcast franchise for free time for candidates and advocates of ballot measures could contribute to a media better suited to democracy, and such reforms could respond to some of the shortcomings of the present system. These reforms are hardly a panacea, however.

VIII. CONCLUSION

A media that supports democracy is a public good. As C. Edwin Baker has shown, the unregulated market alone (if there is such a thing) is unlikely to deliver such benefits.¹⁴⁹ Still, broad government supervision of broadcast content is too dangerous to undertake, so creative thought is necessary to consider how the free marketplace of ideas can be structured to promote democracy. Possibilities include subsidy, limited mandated access to the electronic media along the lines of a public forum, and limits on concentration with its attendant conflicts of interest.

Reforms might bring us more thoughtful discussion of public issues than that provided by opinion polls. We could encourage programs to bring together a cross section of citizens for weekend discussions with experts and advocates on issues of major public importance, such as tax policy, Social Security, foreign policy, etc. We could publicize both the evidence and the arguments they considered, as well as the conclusions they reached. This sort of deliberative jury held four or five times per year might produce more thoughtful, deliberative polling and also provide a basis for more trenchant reporting of public issues.¹⁵⁰

The media environment is only one obstacle to implementing a more meaningful democracy. Democracy requires contested elections. The current winner-take-all electoral system combined with gerrymandering, raised to a fine art with the aid of computers, has helped to make contested elections an endangered species.¹⁵¹

The media environment should be a major concern for those who seek a more effective popular democracy. At a minimum, a healthy democracy and a vibrant system of freedom of expression require more than protec-

¹⁴⁹ See generally, Baker, *Media, Markets, and Democracy*, *supra* note 106.

¹⁵⁰ Lessig, *Code*, *supra* note 24, at 227-29.

¹⁵¹ See generally Hill, *Fixing Elections*, *supra* note 74; Robert Dahl, *How Democratic is the American Constitution?* (New Haven, CT: Yale University Press, 2001), 55-61.

tion against broad government power to punish speech on matters of public concern because that speech expresses the “wrong” ideas—as crucial as such protection is.¹⁵² The problems with the present system are more obvious than the solutions. Because the problems are important and complex, the work of those legal and other scholars who have focused on the problem deserves our careful attention.¹⁵³ A media environment that fosters democracy is one of the central free press problems of the future.

Law, Wake Forest University School of Law

¹⁵² Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (Berkeley: University of California Press, 1991), 225.

¹⁵³ See e.g., Alger, *Megamedia*, *supra* note 118; Baker, *Media, Markets, and Democracy*, *supra* note 106; C. Edwin Baker, “Giving Up on Democracy,” *supra* note 129; Jack M. Balkin, “Populism and Progressivism As Constitutional Categories: Book Review of Cass R. Sunstein, *Democracy and the Problem of Free Speech*,” *Yale Law Journal* 104 (1995): 1935; Herbert J. Gans, *Democracy and the News* (New York: Oxford University Press, 2003); McChesney, *Rich Media, Poor Democracy*, *supra* note 81; Lessig, *Code*, *supra* note 24; Robert Post, “Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse,” *University of Colorado Law Review* 64 (1993): 1109. See also, Garry, *Scrambling for Protection*, *supra* note 40, chap. 10.