Building a Free Press

Owen M. Fiss†

The year 1989 marked a new beginning. The Berlin Wall fell, and with it, the Soviet empire. East Germany was soon absorbed by the Federal Republic of Germany, but other nations in Central and Eastern Europe long held in captivity by the Soviet Union proclaimed their independence. History took still another turn in 1991. The Soviet Union itself disintegrated, and from its ruins a great many new nations emerged in Central Asia and Eastern Europe.

All the nations that once constituted the Soviet Union and its empire are now engaged in a reconstructive process of considerable scope and intensity. One dimension of this reconstructive process is economic: the great socialist experiment, in which all the means of production were owned by the state, has been declared a failure. The production of goods and services under socialism lagged behind that of capitalist societies, and in the name of economic efficiency reformers are now transferring the ownership of state enterprises to private hands.

Another facet of the reconstructive process is political. Many former Soviet-bloc countries have denounced their totalitarian past and have, often through the adoption of a constitution, committed themselves to democratic principles — to making government responsive to the desires and wishes of the citizens instead of the other way around.

In many respects, the economic and political facets of the reconstructive process are consistent with one another. Indeed, economic reforms may facilitate the establishment of democracy and are often justified in those terms. Removing the power over economic decisions such as jobs and income from the hands of government officials not only improves efficiency, but also deprives these officials of a powerful instrument of control over the public. Citizens will feel freer to criticize and disagree. Of course, state officials can still retaliate against citizen-critics by launching criminal prosecutions. Criminal sanctions are more visible, however, and thus perhaps harder to deploy than economic decisions like deciding not to hire or promote someone. In any event, criminal sanctions were available even under a socialist economy.

From this perspective, the task of building a free press in the new democracies is rather straightforward. Transfer ownership of all the state-owned media — both the newspapers and the electronic media — to private interests. Sell, or simply give away, assets like printing presses and broadcast facilities. Allow free entry of new media enterprises. In some domains,

---

† Sterling Professor of Law, Yale University. This paper was originally presented on June 21, 1993, at the Central European University in Budapest, Hungary, at a conference on "The Development of Rights of Access to the Media." It benefitted greatly from the work of Christopher Kutz and Richard St. John.

licenses may be necessary to avoid interferences on broadcasting frequencies due to spectrum scarcity, but such licenses can be awarded to the highest bidders or through a lottery. Aside from the economic gains, this program of rapid privatization would enhance the independence of the print and electronic media from government officials; the media would then be able to provide citizens with information and opinions that are fiercely critical of state officials. For the first time, citizens would be in a position to choose their representatives in an informed manner and to force state officials to respond to the desires of the public.

One hitch may arise from the fact that the reporters and journalists working for the newly privatized media are likely to be the same ones who worked for the state-owned media in the past. Changes in ownership do not immediately produce a change of staff. Additional efforts may therefore be necessary to overcome the effects of life in a totalitarian society, which is likely to have dulled or destroyed the critical faculties of journalists who served the dictatorship.[1] Reporters and other journalists must therefore be encouraged to use the privileges of freedom purchased for them by private capital. Journalists may also need to organize themselves and elevate journalism into an honorable profession, independent of the state and devoted to making government policies responsive to citizens' desires.

In time, state officials might retaliate or sanction outspoken critics in the newly privatized press. Such actions might take criminal or civil forms. State officials might charge particular journalists or broadcasters with lessening the esteem of the state (seditious libel), destroying the reputations of individual public officials (defamation), disclosing state secrets (subversion), or even fomenting unrest (inciting a breach of the peace).[2] Such state actions are not necessarily mean-spirited or vindictive. They often are intended to protect legitimate state interests — for example, maintaining public order or insuring the smooth functioning of government. Nevertheless, in order to permit the press freely to criticize government — to provide what has been called "breathing space"[3] — these retaliatory actions by the state against the newly privatized media should be strictly restrained.

How might this be done? We in the United States have struggled with this question for some time now in a setting where the press is almost entirely privately owned, and we have hit on a solution that may be instructive. We have adopted a written constitution that guarantees freedom of the press and turned to the courts — an institution that stands above the fray of partisan politics and insulated from sanctions by the political branches — to enforce that law. As a result, legal doctrine has emerged that confers a certain measure of autonomy on the press. This autonomy varies from context to context, depending on the political value of the speech and the strength of the countervailing state interest. Small, tentative gestures in the same direction

1. *See* RFE/RL Research Institute Staff, *Regional Survey: The Media in Eastern Europe*, RADIO FREE EUROPE/RADIO LIBERTY RES. REP. 22, 22-23, 26, 28, 29, 31, 32 (May 7, 1993).

2. For a discussion of the various ways in which the state may interfere with the free functioning of the press, see HARRY KALVEN, JR., A WORTHY TRADITION 3-73 (1988).

3. New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964).

have appeared in the new democracies of the East, most notably Hungary.[4] They should be encouraged, though they will not be enough.

Underlying the general strategy I have been outlining for building a free press — privatizing the press, encouraging journalists to see themselves as members of a profession, and creating for the press a constitutionally protected zone of autonomy from state regulation — is an assumption that the state is the natural enemy of democracy. Indeed, aside from the purely economic considerations, privatization recommends itself so strongly as a democratic strategy because it takes control of the press away from the state. Such an assumption about the unfriendly posture of the state is most understandable in a transitional democracy, where people have lived under a state dictatorship for many years and are now trying to escape from that horror. The transition occurring in the former Soviet empire, however, will not last forever. In any event, memories of the immediate past should not obscure the full dimensions of the reconstructive process. For more than two hundred years the United States has had a continuous democracy, and in this setting we have learned that the state can have two faces — sometimes it acts as an enemy of democracy, sometimes as its friend.

This view of the state may initially seem paradoxical, a replay of the double-talk that characterized the socialist dictatorships of the not-too-distant past. The role of the state in protecting democracy becomes clear, however, once it is understood that the market is itself a structure of constraint. Although the newly privatized press might be called "free" because the state does not own or control the papers or radio and television stations, the media do not operate in a social vacuum. The owners will seek to maximize their profit by maximizing revenue and minimizing costs, and competitive pressure will curb their capacity to maximize revenue. These are the iron laws of capitalist economics; they will hold true for the newly privatized press as much as they do for any other business. The state might therefore be needed to counteract those constraints placed on the press by the market.

No social actor is completely autonomous. Everyone is embedded in a social structure and is constrained by it. A question must thus be asked whether, from a purely political perspective, the constraints imposed by the market on the media are of any special concern. Those most devoted to privatization argue that these constraints are not inconsistent with democratic goals and indeed might actually further such goals. The desire to maximize revenue will drive publishers and broadcasters to increase the attractiveness of their product to the public and thus make the coverage and method of presentation responsive to consumer desires. The public gets what it wants. Economic theory and the American experience demonstrate the force behind

4. Although the democracies emerging in the former Soviet empire continue to struggle in carving out an independent role for their judiciaries, on specific occasions the Russian and Hungarian Constitutional Courts have lent a measure of protection to the press and have kept hostile government officials at bay. *See* Frances H. Foster, *Izvestiia as a Mirror of Russian Legal Reform: Press, Law, and Crisis in the Post-Soviet Era*, 26 VAND. J. TRANSNAT'L L. 675, 694-702 (1993); Andrew Arato, The Hungarian Constitutional Court in the Media War: Interpretations of Division of Power and Model of Democracy 4-5 (June 21, 1993) (paper presented at Central European University conference "The Development of Rights of Access to the Media").

this view, but I do not believe it conveys the whole story.

First, costs will limit the capacity of the newly privatized media to respond to consumer desires. Businessmen seek to maximize profits, which requires minimizing costs as well as maximizing revenues. Therefore, the media may well offer the public considerably less than it wants. Overwhelmed by the costs of gathering the news or producing high quality documentaries, leaders in the television industry will be tempted, for example, to rely on reruns of "sit-coms" or "soap operas."

Second, reliance on advertising as the method of generating revenue — typical wherever the press is privatized — will introduce a number of distortions. Such distortions have occurred in the United States and undoubtedly will occur in the East. One stems from the obvious fact that regardless of how much the public desires a program or series of articles, advertisers will not underwrite these programs or articles unless they are likely to enhance the sales of the would-be advertisers' products. Some reporters claimed, for example, that the commercial television networks slighted coverage of the Gulf War in the United States because advertisers did not want their products associated with scenes of death and destruction.[5]

The power of advertisers over the content of the press is not confined to such deliberate or discrete interventions. As a general matter, advertisers will use a particular newspaper or television show only if it is likely to be viewed or read by people who have the money, taste, and inclination to buy their products, and publishers and broadcasters will shape their product to appeal to those persons. As a result, particular "target audiences," not the public in general, are the special concerns of the privately owned press, and privately owned newspapers or broadcast facilties may neglect the informational and cultural needs of groups whose purchasing power is weak or for whom advertising will have less of a payoff.

Third, while a certain segment of the public may govern the content of broadcasts and newspapers through ordinary market processes, these individuals do not make that choice through a process of collective deliberation. Rather, they act atomistically, and this mode of interaction may have profound consequences for the statement and definition of their preferences. The radio or television programs that individuals choose in the privacy of their homes, after dinner and a day's work, might well be different than the programs they would choose after fully discussing and debating all the options. The same is true regarding the daily purchase of a newspaper. In repudiating the dictatorships of the past and turning to democracy, 89ers have not committed themselves to deliberating collectively about each and every social decision, nor does democratic theory require such a commitment. However, the normative force of any claim made in the name of "the public" — in this case concerning the coverage of the press — often presupposes such

5. *See* Bill Carter, *Few Sponsors for TV War News*, N.Y. TIMES, February 7, 1991, at D1; Rick Dubrow, *TV and the Gulf Wars: TV Networks Shying From Vivid Violence*, L.A. TIMES, February 7, 1991, at A10. In response to the withdrawal of advertiser support, CBS executives assured advertisers that "war specials could be tailored to provide better lead-ins to commercials. One way would be to insert the commercials after segments that were specially produced with upbeat images or messages about the war, like patriotic views from the home front." Carter, *supra*.

deliberation.

Thus, there is good reason to doubt that the newly privatized media will give the public all that it wishes. Coverage or broadcasts determined by the market — what I will call "market-determined speech" — will only be a rough approximation of "democratically determined speech," the broadcasts and coverage that a people would choose after full deliberation, unconstrained by costs, and governed by the principle of one person, one vote.[6] There may, however, be a deeper source of concern: Should the ideal or standard by which one judges the output of the market be what I have called democratically determined speech? Democracy involves a choice by a people, but perhaps that choice does not extend to the views that they should hear or the positions that they must confront. Perhaps the aspirations should be even higher.

Democracy is a system of government that ultimately allows the public to decide how it wishes to live; but democracy presupposes that the public is fully informed when it makes the judgment. Democracy requires that the public has all the relevant information and is aware of the contending or conflicting points of view on any issue. A free press is meant to make this supposition a reality. One way of expressing this concept is to say that the mission of the press in a democratic system, whether in one of the new democracies of the East or in an established democracy such as the United States, is to produce on matters of public importance a debate that is "uninhibited, robust, and wide-open."[7]

Suppose the people decide, however, that they are sick and tired of "robust public debate," exhausted by discussions over economic policy or the treatment of ethnic minorities, and are only interested in mind-dulling entertainment, tabloid newspapers, or television programs that give expression to their sexual fantasies. Would a democracy require us to respect that choice? I think not, no more than a commitment to contractual freedom would require us to respect a contract in which someone sells himself or herself into slavery.

A distinction should thus be drawn between "democratically determined speech" and what I have called "robust public debate," and the latter should be the standard against which we must measure the output of the market. Such a view may seem alien to the system of liberties we have traditionally associated with democratic governments, but it is not. The American Bill of Rights, including the protection afforded to the press in the First Amendment, is often spoken of as a protection of "minority rights" or "individual rights," or as a bulwark against the "tyranny of the majority."[8] In protecting the press against state interferences, the Supreme Court never assumed that, by trying

---

6. Writing on the Polish experience, Karel Jakubowicz makes a similar distinction between what he terms "free communication" and "democratic communication." He argues that the emerging democracies of Central and Eastern Europe have placed greater emphasis on the libertarian, market-oriented concept of "free communication" than on communication that is representative of the community at large. *See* Karel Jakubowicz, *Freedom vs. Equality*, 1993 E. EUR. CONST. REV. 42, 43.

7. New York Times v. Sullivan, 376 U.S. at 270.

8. *Cf.* Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1147-52 (1991) (challenging conventional wisdom that First Amendment freedoms of speech and press are essentially aimed at protecting minorities and arguing that "structural core" of First Amendment seeks to protect popular majorities from hostile congressional action).

to muzzle the press, the state was acting autonomously, in contravention or disregard of popular desire or majority will. On the contrary, the Court knew all too well that state officials, whether legislative or executive, usually act as instruments of popular will. The Court has therefore imposed upon itself a responsibility to preserve the robustness of public debate — in other words, to protect democracy from itself.

In a similar vein, then, the nation builders of the East should be concerned with constraints imposed by the market, not simply because market-determined speech will be a poor approximation of democratically determined speech, but rather because it may well depart significantly from the more abstract, largely idealized standard of robust public debate. Once the media are privatized, programming and coverage will be largely determined by the confluence of a number of factors — marginal cost and marginal revenue, for example — that have no discernible relationship to needs of a democratic polity. As businessmen, the owners of the media will have their minds on profits, not on the task of supplying the public with the information and opinions it needs in order to exercise its sovereign prerogative.

Even accepting this view, some may treat state constraints on public debate as being on a wholly different plane than constraints emanating from the market. This position is commonplace in the United States. To some extent its currency derives from the precise wording of our guarantee of freedom of the press, which reads "Congress shall make no law abridging the freedom of speech, or of the press."[9] Conceived in these terms, the distinction often drawn by American lawyers between the constraints of the state and those of the market may not be relevant to those now actively engaged in the process of building new democratic societies, because they may be drafting new constitutions or interpreting constitutional provisions worded in more affirmative terms. For example, the new Hungarian constitution, following the European tradition, states that "[t]he Republic of Hungary shall recognize and protect freedom of the press."[10] My own impression, however, is that the American distinction between market constraints and state constraints actually rests on grounds that are more philosophic than textual and thus is likely to have a broader appeal.

One justification for drawing a distinction between market and state constraints construes the domain of public debate and narrowly confines it to speech that pertains to elections for public office or the work of government.[11] The democratic mission of the press, so the argument runs, is to assist the public in choosing government officials and evaluating their work; the principal danger is that government officials will use their power to retaliate against those who dare to criticize them.

In my view, however, there is no reason to construe the democratic mission of the press so narrowly. Certainly, the press should "check"

9. U.S. CONST. amend. I.

10. A MAGYAR KÖZTÁRSASÁG ALKETMÁNYA [Constitution] ch. XII, § 61, cl. 2 (Hungary).

11. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

government officials, to borrow Professor Blasi's term,[12] but it also has a responsibility to address large questions of economic and social structure such as the distribution of wealth and the role of workers in the management of their firms. All such subjects are within the jurisdiction of the electorate in a democratic society.

Moreover, even if the domain of public debate is conceived narrowly, thereby limiting it to criticism of government officials and their policies, there still may be reason to fear market constraints because they have the effect of favoring certain government policies and the officials who implement them. Imagine the position a newly privatized press, necessarily relying on huge infusions of private capital, would take on a political candidate urging a radical redistribution of wealth or the institution of worker control.[13] Although not every government policy is market-sensitive in this way, many are; there is thus reason for concern about the impact of market constraints on public debate even if the concern is confined only to speech that considers government affairs.

State constraints and market constraints have also been sharply differentiated because they are enforced by different methods.[14] The state has a monopoly over the legitimate use of force and can throw those who violate its edicts in jail. A media mogul enforces his demands by excluding an article, shaping a show in a certain way, or firing a reporter who turns in copy that does not sell papers. In actual practice, however, this distinction between enforcement methods may be less clear-cut. The state can enforce its constraints through civil remedies (e.g., damage awards or denial of licenses); if the United States is any guide, such remedies may well become commonplace. The presumed difference in the harshness of the sanctions is also questionable. How much worse is it to throw someone in jail than for a person to be fired or have his business fail? Yet even if we allow for these distinctions, the different methods by which the state and market enforce their edicts is not significant from democracy's perspective. What matters is not the moral quality of the means used to enforce a constraint nor the hardship suffered by the individual who bears the brunt of the sanction, but rather the effect of the constraint upon public discourse.

For these reasons, I believe that reformers of the East must be as aware of the market constraints on the press as they are of state constraints. Rapid privatization, buttressed by judicial doctrine declaring the autonomy of the press and a professional ethos promoting independence from the state, should remain the overall strategy. Privatization is necessary to eradicate the traditions of suppression that the dictatorial practices of the past may have created. However, the reformers must not stop at that point. They must also contemplate a wide number of interstitial strategies to counteract the

---

12. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 523.

13. For a discussion of the ways in which the Western press has failed to cover the "grand issues," including social structure and distribution of wealth, see CHARLES E. LINDBLOM, POLITICS AND MARKETS 204-07 (1977).

14. *See* Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 235-37 (1992).

constraining effect of the market.

Although crafting these interstitial strategies will be a daunting responsibility for the 89ers, they may find some guidance in the experience of America, which for many years has accepted private ownership for the basic economic structure of the media but supplemented that structure in a number of ways. We have experimented with two types of supplemental regulations; one might be called "program regulation," the other "structural regulation." Within the category of program regulation, I would include the Federal Communications Commission's ("FCC") "fairness doctrine," which requires broadcasters to cover issues of public importance and to do so fairly.[15] Program regulations might also include laws allowing persons subject to personal or political attack to respond,[16] and requirements that the networks give adequate coverage to presidential elections.[17] At one time public interest groups attempted to have the FCC require networks to air "editorial advertisements."[18] This too might be considered a program regulation.

Antitrust laws are an example of structural regulation, though they are limited in that they seek to perfect the market rather than to counteract it.[19] A more robust variant appears in the "cross ownership" rules of the FCC, which prohibit the owner of a newspaper from acquiring a television or radio station in the same market.[20] The assumption is that such acquisitions could not be barred on purely economic grounds. An even more significant form of structural regulation is Congress's decision in the 1960s to establish and fund a public broadcasting network that was to supplement rather than supplant the commercial networks.[21] Such a public broadcasting system could cover issues likely to be slighted by the commercial networks but that are nevertheless vital to democratic self-government.[22] Finally, mention should be made of the FCC's policy to give preference to racial minorities in awarding licenses.[23]

---

15. For a discussion of the background and content of the fairness doctrine, see Red Lion Broadcasting v. FCC, 395 U.S. 367, 369-71 (1969). *See also* Randall Rainey, *The Public's Interest in Public Affairs Discourse, Democratic Governance, and Fairness in Broadcasting: A Critical Review of the Public Interest Duties of the Electronic Media*, 82 GEO. L.J. 269 (1993).

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

17. *See* CBS v. FCC, 453 U.S. 367 (1981).

18. *See* CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

19. Despite antitrust laws and enforcement in the United States, 98% of all American cities with a daily newspaper had only one such publication as of 1986. *See* Robbie Steel, *Joint Operating Agreements in the Newspaper Industry: A Threat to First Amendment Freedoms*, 138 U. PA. L. REV. 275, 277 (1989). *See generally* William E. Lee, *Antitrust Enforcement, Freedom of the Press, and the "Open Market": The Supreme Court on the Structure and Content of Mass Media*, 32 VAND. L. REV. 1249 (1979).

20. *See* Second Report and Order, Amendment to Rules Relating to Multiple Ownership of Standard, FM, and Television Stations, 50 F.C.C.2d 1046 (1975). The FCC's "cross ownership" rules were at issue in a recent case in the Court of Appeals for the District of Columbia. *See* News America Publishing v. FCC, 844 F.2d 300 (D.C. Cir. 1988).

21. *See* Public Broadcasting Act, 47 U.S.C. §§ 390-99 (1967).

22. CARNEGIE COMMISSION ON EDUCATIONAL TELEVISION, PUBLIC TELEVISION: A PROGRAM FOR ACTION (1967).

23. The United States Supreme Court upheld the constitutionality of this policy in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990). Two years later, however, the United States Circuit Court of Appeals for the District of Columbia Circuit invalidated a similar FCC policy giving preference to women in the licensing process. *See* Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir 1992). The author of *Lamprecht*, Clarence Thomas, is now a justice of the Supreme Court. Four of the five justices in the

To some extent, the policy can be understood as a way of improving the social status of minorities; yet it also has a speech dimension and can therefore be considered a form of structural regulation. This view assumes that race is a proxy for viewpoint, and that the new owners will exercise discretion allowed to them by the market in favor of diversifying programming and thus enriching public debate.

Although the regulatory measures I have just described are aimed mainly at television and radio, as opposed to newspapers, they can be adapted to the newspaper industry. The Supreme Court has accepted some legal constraints on newspapers (for example, in the antitrust context), but it has generally been hostile to any regulation of newspapers and has built into the law a distinction between electronic and print media. Most notably, the Court invalidated a Florida right-to-reply statue that presumably would have been constitutional if applied to broadcasters.[24] This distinction is difficult to justify, however, and those trying to create a new constitutional framework for their countries might safely ignore this odd feature of our law.

Newspapers are part of the working press, as are television and radio stations. All shape public discourse and inform people of the world that lies beyond their immediate experience. Broadcast television and radio stations must receive licenses from the state in order to avoid interferences on the electromagnetic spectrum. Cable television and radio stations transmit their signals over wires, but they might also need a system of licensing to preserve the integrity of public streets or spaces, in much the same manner as does a telephone system.[25] There is, however, no physical imperative for the licensing of newspapers. Consequently, a distinction between the electronic and print media may be thought to arise from the way property rights are created. The property rights of a television or radio station have their origins in a deliberate, allocative decision of government, specifically the award of a license. The property rights of newspapers have a more diffuse origin; they come from laws that apply to all businesses. However, the special status of the press and its claim for freedom derive from the function of that institution in society — to inform the public — and should not turn on the source of its property rights or the particular dynamics that gave rise to them.[26]

The supplemental state interventions I have described seek to enrich rather than impoverish public debate and are generally referred to under the category of the "right to access." This term, introduced into American constitutional discourse by an influential article in the late 1960s by Professor

---

majority in *Metro Broadcasting*, Justices Brennan, White, Marshall, and Blackmun, have since retired.

24. *See Miami Herald Publishing Co.*, 418 U.S. at 241.

25. *See* Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445 (1994) (holding that must-carry provisions, because of special burdens and obligations they impose upon cable operators and programmers, demand heightened First Amendment scrutiny).

26. The Supreme Court has recognized the place of television and radio as part of the working press in other areas of the law, such as libel, where broadcasters are endowed with the very same privileges and responsibilities that belong to newspapers. Admittedly, the obscenity standard has been adjusted to permit greater state control of the electronic media. *See* FCC v. Pacifica Foundation, 438 U.S. 726 (1978). Nevertheless, this greater state control is premised on the difficulty of shielding unwitting or especially vulnerable audiences (e.g., children) from radio or television broadcasts, rather than on the idea that television or radio are not part of the press.

Jerome Barron,[27] seeks to capitalize on the mystique that surrounds "rights-talk" in the United States. The term is misleading for that very reason, however. While most of the rights that figure in contemporary constitutional debates, for instance the right to procreative freedom, further some individualistic value, properly understood Barron's "right to access" does not attempt to protect the self-expressive interests of an individual citizen seeking access. Rather, it is intended to further a social goal: the production of robust public debate. A more apt expression — and the one I will use to refer to the entire panoply of program and structural regulations that seek to enrich public debate — is "access regulations."

Even with this emendation, an ambiguity persists. People speak of access, but they do not specify access to what. Because the purpose of access regulations is to enrich public discourse, rather than to give vent to some self-expressive interest of an individual, what must be guaranteed is access to the public, not access to a medium. Access to a radio or television station or newspaper is only a means of affording access to the public, and any access regulation should be judged accordingly. For this reason, the so-called public access channels commonly found on American cable television are inadequate. The person appearing on the television at 3:00 A.M. may feel some measure of personal satisfaction, but what he or she says plays no more role in public deliberations than the insights of a book buried deep in the stacks of a university library. Of course, a would-be listener can seek out the viewpoint, but one must be realistic about the public's inquisitiveness. On the other hand, as long as the viewpoint or information is in general circulation and thus fully available to the public, no further demand for access remains. The predicate for regulation dissolves, and to insist upon access in these circumstances would be unnecessary, perhaps even vindictive. To use a metaphor of Charles Fried, it would be "a way of showing off power by hoisting flags on other people's flagpoles."[28]

Viewed broadly, then, the American constitutional experience has two sides. To fulfill its democratic mission, the press must have a measure of autonomy from the state, but that autonomy must never preclude access regulations. The basic structure should be privately owned, but some state subsidies are appropriate to create television or radio stations and even opinion journals that are not totally controlled by the market. Legal doctrine must protect the press from state regulations that stifle public debate (e.g., prosecutions for seditious libel), but not those that have the opposite effect (e.g., the fairness doctrine). As a matter of professional ethics, journalists must maintain their independence from the state without identifying too closely with the economic goals of the enterprises for which they work. At every turn, the press must inform the public of the issues before them and present the conflicting and diverse views on those issues. Only then will citizens be in a position to exercise the prerogative that democracy promises.

---

27. Jerome A. Barron, *Access to the Press — A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967). Professor Barron has further developed his ideas in JEROME A. BARRON, FREEDOM OF THE PRESS FOR WHOM? THE RIGHT OF ACCESS TO MASS MEDIA (1973).

28. Fried, *supra* note 14, at 253. Fried applied this metaphor to all program regulation, which he refers to as "forced programming," on the questionable hypothesis that the public will always tune out.

The risk is great, however, that 89ers will ignore the multifaceted quality of the American constitutional experience. The reformers may come to believe that freedom of the press requires no more than autonomy from the state, ignoring the need for access regulations. This misreading of the American experience may have many sources, including the activism of international monetary organizations. More likely, this belief will derive from an odd fortuity of timing: the reconstruction is being undertaken at a time when the validity of access regulations are most suspect. During the 1960s and early 1970s, America understood the importance of access regulations. Over the next two decades, however, the activist state fell into disfavor and we became more and more obsessed with the wonders of the market. As a result, the "right of access" and the entire idea of regulating the press in the name of democracy came under increasing attack. I fear that 89ers, like all politicians, may have limited time horizons and confuse the Reagan years with the whole of the American experience.

Looking to America to guide them in the reconstructive endeavor, the 89ers will therefore need a broad historical perspective. They will also require a measure of critical discernment to assess the many objections that were raised to access regulations during the 1970s and 1980s. One such objection arose from a doubt about whether such regulations actually enriched public debate. Some argued that the fairness doctrine made the networks more careful about what they broadcasted, for fear that if they carried a controversial show, they would need to allow time for a response. The effect of regulation was, so some claimed, a form of self-censorship — grey speech.

On the other side, proponents of state intervention argued that certain features of the regulatory program — for example, the affirmative requirement to cover issues of public importance — might guard against grey speech. These proponents also insisted upon the need to judge the efficacy of the fairness doctrine or other access regulations on a comparative basis. Even assuming some self-censorship due to regulation, broadcasting might be more varied and more keyed to public issues than if the regulation did not exist at all. To assess fully the impact of access regulations, one must not look simply to the incidents of self-censorship, but should also consider the whole program of access regulations and imagine how varied broadcasting or coverage would be if these regulations did not exist. Only then would we know whether they enriched or impoverished public debate.

This objection to access regulations turned on empirical judgments about their likely consequences, but others were more principled. Specifically, some critics argued that access regulations, by their very nature, are not content-neutral and thus violate the principle prohibiting content regulation. This principle is founded on the idea that the choice over public issues belongs to the public, and that state officials should not determine the merit of ideas or even favor one side over another in a public debate. State officials must be neutral on public issues and let the people decide what is best for themselves. Such a requirement of state neutrality seems attractive, firmly rooted in

democratic theory,[29] but I do not see it as barring access regulations either in the United States or in the new democracies of the East.

Admittedly, content judgments are implicit in access regulations. With program regulation, content judgments are made directly; with structural regulation, indirectly. Given the scarcity of resources and the multiplicity of viewpoints, state officials must judge what views or positions to favor, whether they are awarding subsidies, granting preferences to groups in the licensing process, or determining whether an issue is one of public importance. However, such content judgments made in fashioning or enforcing access regulation do not determine outcome, but only protect the integrity of the deliberative process. The state is functioning like a parliamentarian, trying to make certain that the public is fully informed, almost as if it were saying, "Let's hear from the other side," or "We have heard that point several times now."

In making these calls the state *qua* parliamentarian is obviously looking to the content of what is said. However, the rule requiring content neutrality should not bar the state from doing so, for properly understood, that rule bars only those content judgments that have no purpose or justification other than to shape outcome. Of course, any regulation of process will necessarily affect outcome. Yet the choice that democratic theory seeks to insulate from state influence or control is one preceded by full debate, not one that is uninformed or ill-considered. Although a fully informed citizen is likely to make a different decision than an uninformed one, the state's role in educating the citizen and thus producing a different outcome is not at all inconsistent with democratic principles.

Sly politicians can always say they are interested in regulating only process when in fact they have no purpose other than to manipulate outcome. The danger of such manipulation calls for institutional arrangements that take program or structural regulation out of the hands of those most intensely interested in political outcomes and place it in the hands of agencies that are relatively removed from politics. In the United States, for example, we placed the administration of the fairness doctrine and control over the licensing process in the hands of the FCC rather than the President or Congress. Similarly, we established an independent public corporation, the Corporation for Public Broadcasting, to administer the congressionally funded radio and television networks. This corporation is still dependent on annual appropriations but otherwise is insulated from direct control by Congress or the President.[30]

---

29. *See* T.M. Scanlon, Jr., *Content Regulation Reconsidered, in* DEMOCRACY AND THE MASS MEDIA 331, 331 (Judith Lichtenberg ed., 1990); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987). *See generally* KALVEN, *supra* note 2.

30. By statute, the Corporation for Public Broadcasting is largely independent of control by Congress or the Executive; 47 U.S.C. § 398(a) prohibits "any department, agency, officer, or employee of the United States [from exercising] any direction, supervision, or control over public telecommunications, or over the Corporation or any of its contractors, or over the charter or bylaws of the Corporation. . . ." Measures have also been taken to lessen the influence of partisan politics on the Corporation. The members of the Corporation's board are appointed by the President and confirmed by the Senate, but 47 U.S.C. § 396(c)(1) provides that no more than six of the ten members may be from the same political party. *See generally* Steven D. Zansberg, Note, *"Objectivity and Balance" in Public Broadcasting:*

These measures built on a long American tradition, dating from the turn of the century, of independent regulatory agencies. Obviously, the emerging democracies of the East have no such tradition on which to rely, and must therefore be especially inventive. They must create new institutions that are part of the state, yet far from direct political control. The difficulties inherent in such a task, especially where the totalitarian regime of the recent past politicized all institutions, are indeed formidable. Still, this challenge is no less daunting than creating the institutions of advanced capitalism — a banking system or a securities market — out of the shambles of state socialism.

Even with such independent agencies or institutions, the risk still persists that the power to make content judgments will be used, not to preserve the integrity of public debate, but to skew the debate in favor of one outcome. Although the regulators say they want the public to hear both sides of debate on the proposed tax law, they give access only to the proponents of the tax law or curb the speech of business interests because they want the measure enacted. The risk of a skewed outcome can be minimized but can never be eliminated altogether. On the other hand, by adopting a strong prophylactic rule — one denying state officials any power whatsoever to make judgments based on content — a government would simply allow the debate to be wholly shaped by the market, which, of course, is not neutral as to content. The biases of the market are not produced by government officials acting deliberately, but rather derive from businessmen competing with one another. Nevertheless, from democracy's perspective, the concern is just as great. Democracy requires full and open debate on all issues of public importance. Any constraint on that debate threatens democracy, regardless of the identity of the interfering agency or the precise nature of the dynamic that brings it into being.

Access regulations not only require the government to make content judgments, but also sometimes — especially in the case of program regulation — require a newspaper or television or radio station to carry a message or article that the owners of the enterprise find odious. The purpose of such a requirement is not to punish or humble the newspaper or station for having engaged in scandalous reporting, but rather to increase the amount of information and number of viewpoints available to the public. Still, some critics question whether such compulsion is consistent with the guarantee that individuals remain free not to support or affirm an idea that they find offensive. In the United States that principle found expression in a famous Supreme Court decision of 1943, *West Virginia Board of Education v. Barnette*;[31] elsewhere, it may be seen as a necessary corollary of democracy.

In its original context, the *Barnette* decision was a powerful affirmation of freedom of conscience and religious liberty. Handing down the decision during wartime, the Supreme Court refused to capitulate to the patriotic fervor then sweeping the country and protected young school children from being

---

Unwise, Unworkable, and Unconstitutional, 12 YALE L. & POL'Y REV. 184 (1994) (arguing that 1992 "objectivity and balance" amendment to legislation reauthorizing funding for Corporation for Public Broadcasting is unconstitutional and inconsistent with purpose of government-funded public broadcasting).

31. 319 U.S. 624 (1943).

compelled to salute the American flag. These children, who were Jehovah's Witnesses, found the pledge of allegiance inconsistent with their faith.[32] The Court's decision did not seem to apply to the various regulations of the type I am recommending. In fact, access regulations were never challenged on *Barnette*-type grounds during the period in which they were first developed. However, in the late 1980s the Supreme Court, in *Pacific Gas & Electric Co. v. Public Utilities Commission*,[33] ripped the right not to speak from its original context and used it to invalidate an access regulation developed by California for public utilities, thereby casting serious doubts on the validity of all access regulations.

In the *Pacific Gas* case, a power company challenged a regulation requiring it to allow a public interest organization to use the so-called extra space in its billing envelope in order to reach the public. The extra space consisted of the space in a billing envelope that could carry an insert without increasing the minimum postage charge. The power company had previously used that space for distributing its own newsletter, until the utility commission allocated it to the public interest group to use four times a year. In response, the Supreme Court invoked the *Barnette* principle and concluded that the utility commission had violated the free speech guarantee of the First Amendment.

The significance of *Pacific Gas* for program regulation of the press was recognized immediately. The author of the plurality opinion, Justice Powell, made reference to the earlier Court decision invalidating the Florida right-to-reply statute to support his conclusion, and in 1987 the FCC read *Pacific Gas* as requiring it to abandon the fairness doctrine.[34] If requiring a utility company to carry in its billing envelope a message that it finds offensive violates the First Amendment, the FCC reasoned, requiring a network to broadcast a show that it finds offensive would also violate the First Amendment. In my view, both the Supreme Court's decision in *Pacific Gas* and the FCC's extension of it to the press are questionable.

In a society in which the press is privately owned, program regulation or state-mandated access compromises property rights and diminishes the economic values associated with those rights. The mandated message or program will displace an article or program a station or publisher deems more profitable. The displaced message can only be carried if extra pages are added or the broadcast day is somehow extended. The economic loss may be small, but it is still a loss.

Some may see this economic loss as imposing a duty of compensation on the state, under the theory — commonplace in capitalist societies — that property cannot be taken for public use without compensation. However, the Supreme Court rejected a claim of compensation in a case involving still a another type of access regulation — California required shopping center owners to allow political activists on their property for purposes of reaching

32. *Id.* at 629.
33. 475 U.S. 1 (1986).
34. Syracuse Peace Council, 2 F.C.C.R. 5043, 5057, 5070 n.227, 5071 nn.241-46 (1987).

the public.[35] The Supreme Court ruled that the economic loss caused by this requirement of the state (protest activities may induce shoppers to stay away) was only a regulation, not a taking of property. In reaching this conclusion, the Court placed great stress on the general application of the regulation.

Wisely, *Pacific Gas* did not question this ruling. No member of the Court thought the utility commission regulation was a taking of the power company's property. Presumably, the result would be the same in a press case or a case involving a business without a government-conferred monopoly. If the economic loss occasioned by granting access to a shopping center or a billing envelope is not a taking, neither is the economic loss suffered by the press when access to it is granted. Although there is an economic loss, most government regulation of business involves such a loss and none of the special conditions that transform regulations into takings are present.

The free speech claim does not arise from the economic loss alone, but rather from the compulsion of owners to support financially ideas that they may actually detest. It is hard, however, to turn this objection into a viable principle of constitutional law without dismantling the modern democratic state. The entire taxation system of the modern state is predicated on the idea that money taken from citizens may support activities they detest, like war, parades, particular lectures at state universities, or controversial books in public libraries. Such compelled financial support is an obligation of citizenship, necessary to serve community purposes, which in the case of access regulations include the preservation of the democratic process itself. The use of an individual's property to support activities he or she detests is a necessary price of democracy.

The Court faintly acknowledged this idea in *Pacific Gas*. Justice Powell readily admitted that the power company could be taxed or assessed for purposes of supporting the public interest group.[36] Given that admission, the objection to directly giving access to the billing envelope to this public interest group is hard to comprehend. There is no functional difference between, on the one hand, giving the public interest group the space ordinarily used by the power company and then requiring the company to pay the extra postage and, on the other hand, taxing or assessing the power company and then giving the money to the public interest group in order to disseminate its ideas. No constitutional difference exists between property and its economic value, or, to put the point more generally, between program and structural regulation.

Of course, giving access to some specific items of property — a shopping center, mailing envelope, newspaper, radio station, or television channel — presents a risk of false attribution not present with taxation. Some readers or viewers might think the message conveyed is that of the publisher or station rather than the view of the person or organization given access. For that reason, the right claimed in *Pacific Gas* is often described as a right against forced association instead of a right not to speak (as in the *Barnette* case). However, as the shopping center case demonstrates, few people would falsely

35. PruneYard Shopping Center v. Robbins, 447 U.S. 74 (1980).
36. *Pacific Gas*, 475 U.S. at 19.

attribute the ideas of those given access to the utility company, the publisher, or the television station. In any event, the danger of false attribution should require a disclaimer, not denial of access altogether. Requiring an organization to issue a disclaimer — for example, "the ideas presented are not those of the station" — forces that organization to speak, but not in the way that the child in *Barnette* was forced to speak. This speech does not perpetuate an orthodoxy; it makes the opposite possible.

Like the rule against content regulation, the rule protecting the right not to speak should not be read as a bar to access regulations. Both rules have an important role to play in democratic societies, but the proper domain of these rules must be carefully delineated. They should not be read as precluding state regulation that broadens public debate and thus enables the press to perform its democratic mission. We in the United States have often overlooked this point, and over the last twenty years have used these two principles to cast access regulations, especially program regulations, into doubt. It can only be hoped that the reconstructive enterprises now afoot in the East will not replicate this experience.

In building a free press, the reformers should look to the American experience, but only selectively. They must create for the press a measure of autonomy from the state without delivering the press totally and completely to the vicissitudes of the market. Privatization of the most rigid and unrelenting variety, denying any role whatsoever for access regulations, may be a step beyond the dictatorships of the past, but it is still a great distance from the dreams of 1989.