

Article

The Fourth Estate Under Siege: The Making of a Democratic Institution and Its Pressing Challenges*

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ABSTRACT

The press—or the media in its current incarnation—is under siege in the twenty-first century. Financially most firms are heavily stretched, due to ever increasing competition for advertising revenue as well as gradual but unmistakable decline in paid subscription. Social-politically they are often criticized for slipping journalistic standard and professional ethics. The “Fourth Estate” as we know it—the vital institution in a democratic society that provides “organized, expert scrutiny of government”—is waning before our eyes.

This article aims to answer why the health of the news media industry is deteriorating. It starts with a concise profile of the idealized press, one that could live up to the epithet “Fourth Estate.” It would also explain what legal protection and other perquisites afforded to such a precious institution, as well as what is expected in return. What follows is a series of historical accounts intended to highlight a few critical decisions that, together with stages of social change, helped the press grow into its free and uninhibited self. The subsequent sections shift the spotlight to an undercurrent that has lurked from day one—the unease of entrusting a vital public service to private media. Social and economic development in the last

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two decades—thanks to, among other things, media ownership deregulation and growing popularity of the Internet—has further exacerbated the situation. It has been a strenuous battle for public interest-minded news media to stay true to its democratic commitment.

Keywords: *News Media, Freedom of the Press, Fourth Estate, Media Concentration, Internet*

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I. INTRODUCTION

The press—or the media in its current incarnation—is under siege in the twenty-first century. Financially most firms are highly stretched, due to ever increasing competition for advertising revenue as well as gradual but unmistakable decline in paid subscription. Social-politically they are often criticized for slipping journalistic standard and professional ethics. The “Fourth Estate” as we know it—the vital institution in a democratic society that provides “organized, expert scrutiny of government”—is waning before our eyes.

To understand why the health of the news media is deteriorating, we should start by debunking an old myth that takes the democratic institution for granted. The myth can be traced back to the days when “the Fourth Estate” was given its modern meaning. Reflecting on the power of writing, Thomas Carlyle described the relationship between writing/printing and democracy in a ringing tone:

Burke said there were Three Estates in Parliament; but, in the Reporters’ Gallery yonder, there sat a Fourth Estate more important far than they all. . . . Printing, which comes necessarily out of Writing . . . is equivalent to Democracy: invent Writing, Democracy is inevitable. . . . Whoever can speak, speaking now to the whole nation, becomes a power, a branch of government, with inalienable weight in law-making It matters not what rank he has, what revenues or garnitures. The requisite thing is, that he have [sic] a tongue which others will listen to¹

Carlyle’s romantic depiction, however, overstates the inevitability. Printing, in fact, is never equivalent to democracy. A robust news publishing industry maturing hand-in-hand with modern western democracies has not happened by chance; nor has it been predicated on technological progress alone.² The printing press was no doubt a great enabler, but it could not work its magic without a suitable environment, one that could nurture the “marketplace of ideas.”³

1. THOMAS CARLYLE, ON HEROES, HERO-WORSHIP, AND THE HEROIC IN HISTORY 265 (1841). If British statesman Edmund Burke indeed said the words quoted in the passage, he would have coined the term “Fourth Estate” in this usage (referring to reporters) back in late 18th century. There is no known evidence that supports this assertion, however, and Thomas Macaulay’s essay in 1828 is the earliest known writing to use the term in this sense. See David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 90 n.79 (1975).

2. See PAUL STARR, THE CREATION OF THE MEDIA (2004).

3. The concept is usually attributed to Justice Holmes’s dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 631 (1919), though he never uttered the exact term.

It is therefore the intention of this article to identify the main characteristics of one such environment—the one best associated with the idea of free media—as well as its pressing challenges in the twenty-first century. The inquiry starts with a concise profile of the idealized press, the one that could live up to the epithet “Fourth Estate,” so we would know what a healthy press is like. It would also explain the legal protection and other perquisites afforded to such a precious institution, as well as what is expected in return. What follows is a series of historical accounts intended to highlight a few critical decisions that, together with stages of social change, helped the press grow into its free and uninhibited self. The subsequent sections shift the spotlight to an undercurrent that has lurked from day one—the unease of entrusting a vital public service to private media. Social and economic development in the last two decades—thanks in no small part to media ownership deregulation and the growing popularity of the Internet—has further exacerbated the situation. It has been a strenuous battle for public interest-minded news media to stay true to its democratic commitment.

For historical accounts and law-related discussion I would rely extensively on the American jurisprudence and experience, not only because it is in America that we find a news industry arguably closest to the ideal type, but also because the critical decisions I intend to tell were made there. The main reason why we are losing the Fourth Estate as we know (or want) it, however, is not geographically bound, for the change instigated by media consolidation and digital convergence is global.

The article takes a positive (descriptive) approach, with the intent to provide an accurate account of the defining characteristics of the news media, how it has matured into a vital democratic institution, as well as a vigorous analysis of the formidable challenges currently confronting this very institution. Though there is no prescriptive or normative suggestion at the end, hopefully—if the narrative makes sense—some hints would flow naturally from it.

It should be noted up front that mass media today has grown into a gigantic trade encompassing a far greater variety of forms and contents than its paper-based forebears. This article nonetheless focuses on just one functional aspect of the media: news reporting and commentary, which most closely resembles the old press and is the core of the democratic institution known as the Fourth Estate. This article therefore chooses the term *the news media* when referring to the modern version of *the press*, though it uses *the media* as an equivalent occasionally for brevity and stylistic symmetry.

II. THE IDEAL TYPE: DEFINING THE FOURTH ESTATE

A true democracy has to be built on “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,”⁴ and it is the salient duty of the press—or *the media* in its current incarnation—to facilitate such debate. When the framers of the U.S. Constitution lined up freedom of the press at the side of freedom of speech atop of the Bill of Rights, they did it to protect the news media from unwarranted interference so that it could provide this crucial service to the young democracy to the fullest extent.⁵ Starting out as an ordinary trade, the press has in a single century grown into an essential organ for democracy, to the degree that it is hailed as the “Fourth Estate.”⁶ A concept with a quaint root in the European aristocratic society that referred to different classes of people at different times, today the notion of the Fourth Estate symbolizes a vital institution for, in Justice Stewart’s words, “organized, expert scrutiny of government.”⁷

The following section would shed light on two key aspects of this institution: the journalistic standards we have come to expect and the legal protection afforded to it.

A. *Key Characteristics of the News Media*

To fulfill its role as the Fourth Estate in democracy, the news media has to perform three interconnected functions: to report news, to engage in news commentary, and to provide a forum for public debate. In carrying out these functions, the press evolved from a trade of printers to one of journalists—a profession in newsgathering and news dissemination with a set of common practices. While there is no legal or scientific definition for it, journalism has come to encompass a set of professional norms and standard practices, according to which journalists should perform the duties entrusted to them. Senior journalists Bill Kovach and Tom Rosenstiel have compiled a list called “the elements of journalism”:⁸

1. Journalism’s first obligation is to the truth.
2. Its first loyalty is to citizens.
3. Its essence is a discipline of verification.

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

5. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 22 (1998).

6. *Id.*

7. Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1974-1975).

8. BILL KOVACH & TOM ROSENSTIEL, *THE ELEMENTS OF JOURNALISM: WHAT NEWSPEOPLE SHOULD KNOW AND THE PUBLIC SHOULD EXPECT* 5-6 (2007).

4. Its practitioners must maintain an independence from those they cover.
5. It must serve as an independent monitor of power.
6. It must provide a forum for public criticism and compromise.
7. It must strive to make the significant interesting and relevant.
8. It must keep the news comprehensive and proportional.
9. Its practitioners must be allowed to exercise their personal conscience.

While not everyone subscribes to the whole list, the above does sum up what the public has come to expect, and in general the news media is judged accordingly. A closer examination of the list also makes it clear that news reporting is of paramount importance among the three basic functions provided by the news media, for most principles on the list are there to ensure maximum integrity in news reporting. As we shall see in Section 6 below, it is also news reporting that is facing the greatest threat today.

The above list also shows us the essence of journalism, the one attribute but for which none of the above could be possible: independence—from the government, from other political powers, from the media owner, from advertisers, and even from the journalists' self-interest. That is not to say the public expects journalists to be saints. At least in societies where there is an effective "Fourth Estate," however, a sufficient amount of independence is expected.

As a testament to the importance of journalistic independence, layers of legal protection have been built around it.⁹ Equally important, however, are myriads of internal regulations, industry norms and ethic codes augmenting the basic principles outlined by Kovach and Rosenstiel. Many news publishers, for instance, have in internal code with explicit rules guarding editorial independence.

Some go even further. A legendary example is provided by Colonel Robert McCormick—the former owner of Chicago Tribune and one of the most respected publishers in the industry. In order to prevent inappropriate exchanges between editorial employees and business employees, he went to such length of maintaining separate banks of elevators for each at the Tribune headquarters.¹⁰ Stories of the sort not only serve to instill professional pride in journalists, but also help elicit appreciation and raise expectations from the public, which would in turn implant greater pride and sense of duty into the profession, forming a virtuous circle.

9. See Sec. 2.2 *infra* for detail.

10. KOVACH & ROSENSTIEL, *supra* note 8, at 64.

B. *Legal Protections for Journalism*

To strengthen the news media's journalistic independence—against the menacing state in particular—legal protections have evolved over time. It starts, of course, with the constitutional protection of free speech and free press.¹¹ In *New York Times Co. v. Sullivan*,¹² the U.S. Supreme Court shielded the New York Times from Alabama State's law of libel, even though there were indeed some misrepresentations of facts. In *New York Times Co. v. United States*,¹³ the Court declined to restrain publication of the evidently top-secret Pentagon Papers. In a series of other cases, in addition, the Court protected the news media from discriminatory taxation, a subject matter on which the legislature generally enjoys ample discretion.¹⁴

At the core of journalism lies the exercise of editorial judgment,¹⁵ and the Supreme Court has been adamant in protecting it from unwarranted interference. In *Columbia Broadcasting System, Inc. v. Democratic National Committee*,¹⁶ for instance, the Supreme Court refused to grant a "right of access" to the Democratic National Committee for editorial advertisement in deference to the broadcaster's editorial judgment. On similar ground *Miami Herald Public Co. v. Tornillo*¹⁷ struck down a Florida statute imposing a "right of reply" on newspapers "because of its intrusion into the function of editors."¹⁸ The same commitment also prompted the Court in *Arkansas Educational Television Commission v. Forbes* to curtail the application of its own public forum doctrine in order to protect "the editorial discretion that broadcasters must exercise to fulfill their journalistic purpose and statutory obligations."¹⁹

11. There has been considerable confusion as to what constitutes "freedom of the press" that is distinct from "freedom of speech," since they are listed side by side in the U.S. Constitution. Scholarly debate was mainly stirred up by Justice Stewart's speech at Yale, published in *Hastings Law Review*, *supra* note 7. See, e.g., David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983) (exploring the Framers' intent based on extensive historical research). The rise of non-print news media also adds to the problem since those are technically not "the press," and the Supreme Court has always steered clear of the Press Clause when deciding cases involving non-print media. While this article—this section especially—does borrow heavily from American jurisprudence, the difference is not really important for the purpose of this article.

12. 376 U.S. 254 (1964).

13. 403 U.S. 713 (1971).

14. See, e.g., *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 591 (1983); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). It should be noted that press-related taxation cases have a checkered history that cannot be easily summarized here. For details, see David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 492-97 (2002).

15. See Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754, 757-61 (1999).

16. 412 U.S. 94 (1973).

17. 418 U.S. 241 (1974).

18. *Id.* at 258. For the other ground, see Anderson, *supra* note 11, at 458 n.24.

19. 523 U.S. 666 (1998).

It should be noted that the news media's entitlement to editorial judgment is not absolute even in America, especially for electronic media, over which the Congress and by extension the Federal Communications Commission (FCC) does enjoy much more expansive power.²⁰ There are also cases that test various boundaries of the meanings of "press," "editorial judgment," or "speech."²¹ Still, the core message from the Court is clear: news-related editorial discretion is subject to the highest protection. This is true even for electronic media.²²

In addition to direct constitutional protection, additional legal safeguard is afforded by statutes. The so-called "shield laws," for example, safeguard reporters' privilege to withhold the identity of their source.²³ In spite of—or perhaps because of—the steadfast refusal by the Supreme Court to recognize such a privilege on constitutional ground,²⁴ an increasing number of states have provided the much coveted privilege by law. Eighty percent of the states have some form of shield laws at this writing,²⁵ though a federal version pending in Congress has seen its progress stalled due to adamant opposition from the White House after the WikiLeaks incidents.²⁶

Newsgathering is another area that depends a lot on statutory and common law protection because the Supreme Court has been reluctant to interpret the Free Speech and Free Press Clauses—defensive mechanisms in principle—in a way that would give them offensive power. The Freedom of Information Act²⁷ and similar state statutes²⁸ are the most important. While those laws in general provide access to everyone, the news media are no doubt the prime beneficiary; they may even enjoy reduced fees.²⁹ The media

20. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (upholding the so-called "must carry" rules which "restrain cable operators' editorial discretion in creating programming packages"). See also *Cablevision Sys. Corp. v. FCC*, 570 F.3d 83 (2d. Cir. 2009), cert. denied 130 S.Ct. 3275 (2010).

21. Bezanson, *supra* note 15.

22. Compare, e.g., *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (denying protection when the editorial discretion intruded is one concerning channel lineup, which is more peripheral) with *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) (protecting editorial judgment more central to the news function).

23. James C. Goodale et al., *Reporter's Privilege*, 1027 PLI/PAT 173 (2010).

24. *Branzburg v. Hayes*, 408 U.S. 665 (1972). It should be noted, however, that many lower courts have recognized the privilege in other cases. Anderson, *supra* note 14, at 489-493.

25. As of this writing, 40 states have passed such laws, including three new additions in the last two years: Kansas, Wisconsin and West Virginia; James C. Goodale et al., *Reporter's Privilege: Recent Developments 2010-2011*, 1068 PLI/PAT 223, 236 (2011) and James C. Goodale et al., *Reporter's Privilege: Recent Developments 2009-2010*, 1027 PLI/PAT 151, 157 (2010).

26. See Goodale et al., *Reporter's Privilege: Recent Developments 2010-2011*, *supra* note 25, at 230-34.

27. 5 U.S.C. § 552 (2007).

28. For details, see Bruce D. Goldstein, Comment, *Confidentiality and Dissemination of Personal Information: An Examination of State Laws Governing Data Protection*, 41 EMORY L.J. 1185 (1992).

29. See, e.g., 5 U.S.C. § 552(a)(4)(A)(ii)(II) (2007) (FOIA access fees are limited to "reasonable standard charges for document duplication" when records are sought for non-commercial purposes by,

also enjoy special access privileges to government meetings, judicial records, etc.,³⁰ as well as other preferential treatment when access is open to the public.³¹ In addition, there are statutes designed to prevent newsroom searches—even with a warrant—as well as statutory exemptions for the news media from certain regulations.³² Tax breaks at various levels are also common.³³

More privileges are afforded to the news media by pure courtesy, thanks to the long-term relationship between a news outlet and an agency, or personal friendship between a journalist and a public official. There are also circumstances where social or political pressure makes it difficult to resist media requests, such as invitations for an interview or to join a debate, requests that could easily be refused should it come from an average person. The fact that such pressure exists at all is a telling testament to the clout of the media, for the society has come to expect them as their proper representatives for these purposes.

III. THE CREATION OF THE FOURTH ESTATE

While we have come to expect professional reporting, editorial independence and the provision of a forum for public debate from the news media, the industry certainly did not start out anywhere close to the ideal. For what made the free press a lasting institution in a democratic society, we need to revisit a series of deliberate choices made at different times in history. The constitutional amendment that topped the Bill of Rights was certainly the most well-known, but it had limited impact before the 20th century.³⁴ This section will revisit five such choices that helped deliver us the Fourth Estate: the early effort to extend the reach of the press and make it financially sustainable, the partisan press that wove itself deeper into the fabric of democracy, the penny press that weaned itself off governmental support and moved toward independence and professionalism, the conscious decision to leave electronic media to private capital, and finally a sensible copyright law that stimulates healthy competition.

among others, “a representative of the news media”).

30. See Anderson, *supra* note 14, at 485-86.

31. For example, press rooms in the U.S. Capitol provide more facilities than regular spectator galleries for reporters’ convenience, and they are allowed to take notes when others cannot. Likewise, journalists usually get special seating in American court rooms; see WALTER ALLAN STEIGLEMAN, *THE NEWSPAPERMAN AND THE LAW* 58-59 (1971).

32. Anderson, *supra* note 14, at 487.

33. *Id.* at 488.

34. See LAWRENCE M. FRIEDMAN, *AMERICAN LAW: AN INTRODUCTION* 209 (2d ed. 1998).

A. *Humble Beginning of the News Industry*

Movable type was invented in the 11th century by a Chinese named Bi Sheng, but little political change came out of the invention. The same applies to the Koreans that later improved upon the technology and saw wider use of it.³⁵ Four centuries after Bi Sheng, Johannes Gutenberg's similar invention with a few valuable improvements in the mid-15th century jumpstarted the spread of printing technology throughout Europe, though rather unevenly from region to region.³⁶ It would take another one and a half centuries before the first newspapers—i.e., periodic publications dedicated to current affairs and intended for public consumption—appeared.³⁷

Though a de facto public sphere was formed in Europe following the introduction of transnational newspapers wherein current affairs were communicated and discussed, it was limited in reach and participation. The power of central governments grew as Europeans witnessed the ascension of nation-states, and political elites had every reason to rein in on the press.³⁸

North American colonies were another world where burgeoning new societies with generally laid-back governments provided a more fertile ground for both news publishing and the idea of democracy. To the European political elites back home, the new territories were either too far-flung to keep a tight leash on or too insignificant to be bothered with. The crown's lieutenants there—the governors and their staff—were short on manpower and other resources; they had better things to do than regulating printers. Smart governing on the frontier thus called for extensive local involvement, and it would not be easy to keep the crowds quiet when you needed their help.³⁹

Thanks to this rough and loose environment, American printers enjoyed much greater freedom than their European counterparts. During the colonial period, the press had already played a substantial role in public debate. The legendary John Peter Zenger trial, for example, took place because Zenger angered royal governor Cosby by attacking him in his paper repeatedly.⁴⁰ After the mid-17th century, the American public was hungry for information as tension with their motherland rose. The debates on how they should go forward—to war or to submit, to declare independence or to keep petitioning, etc.—had such huge implications that would affect everyone, so each had an opinion. After independence, issues such as how best to shape

35. See ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 12-13 (1983).

36. See ASA BRIGGS & PETER BURKE, A SOCIAL HISTORY OF THE MEDIA 13-14 (2005).

37. See STARR, *supra* note 2, at 31-33.

38. See *id.* at 41-46.

39. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 38-41 (3rd ed. 2005).

40. See STARR, *supra* note 2, at 58-59; AMAR, *supra* note 5, at 24.

the first democratic republic kept the minds busy. The press provided information and a forum for debate.⁴¹

Even then it would be naïve to suggest the press had secured political clout or financial success. Benjamin Franklin—the successful publisher turned statesman regarded as one of America’s founding fathers—was the exception, not the rule.⁴² Though unable to hold as tight a grip as European dictators, American politicians never stopped trying to reign in on the press. For quite a while after Zenger, in fact, colonial assemblies had replaced royal authorities as the most menacing threat to press freedom; publishers had to try their best to remain neutral in order not to run into trouble.⁴³ Economic sustainability was another major concern. News publishing was practically a one-person operation. Income was unsteady and competition was fierce. Newspapers went out of business all the time.⁴⁴ Before turning itself into a democratic institution, the press had to find a way to survive. The first big break came with the new republic upon independence.

B. *Sustainability First*

One major factor that hampered early growth of news publishing in Europe was the cost of distribution. Postal services had limited penetration and they were expensive. The young American republic had a lengthy territory—stretching more than 1200 miles from Maine to Georgia, about twice as long as Great Britain—and was still expanding. America needed to find ways to “knit far-flung Americans together, economically and socially.”⁴⁵ As a democracy, especially one of many states, letter exchanges were a vital form of communication. For the republican form of government to work, furthermore, the people had to be involved, so “knowledge of every kind” had to be spread throughout the country.⁴⁶ A mission statement was thus planted in the Constitution according to which the world’s earliest universal postal system was established.⁴⁷

The Constitution did not specify the makeup of the postal system, however; Congress did. In what turned out to be a brilliant design judging from hindsight, the Post Office Act of 1792 made Congress directly in charge of postal routes, subjecting Congress to direct appeals from local communities for postal service. That led to rapid expansion of the network as politicians loathed to say no to such requests. The Act also provided special

41. See STARR, *supra* note 2, at 62-71.

42. See STARR, *supra* note 2, at 60.

43. See *id.* at 60.

44. See Lange, *supra* note 1, at 90 n.80.

45. AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 108 (2005).

46. STARR, *supra* note 2, at 88 (quoting Benjamin Rush).

47. U.S. Const. art. I, § 8, cl. 7.

discounts to newspapers, making them more affordable.⁴⁸ One other perquisite provided by the 1792 Act was free delivery of newspaper exchanges. Before wire service such exchanges were the main sources for out of town reports to news publishers. Free delivery of newspaper exchanges hence helped keep the cost of newsgathering to the minimum.⁴⁹ The colonial practices of government printing contracts and paid official notices also continued after Revolution, albeit such perks were doled out in a more arbitrary manner. Adding up, aid from the government was a big reason the fledgling American news industry could endure difficult early decades.⁵⁰

C. *From Partisan Organ to Independent Voices*

Though timely government aid might have kept many news printers in business in the early days, it could have been a curse in disguise. Heavy reliance on such assistance made it difficult for the press to stay independent politically, and politicians were quick to realize the value of personal or factional mouthpieces. The Federalists won the passage of the Constitution in no small part on the persuasive power of the celebrated Federalist Papers and other similar writings, and for a time commanded the loyalty of a majority of newspapers. When Jefferson, Madison and their followers formed their own Democratic-Republican Party, they founded their own partisan papers. Andrew Jackson, after losing the presidential election despite winning the popular vote in 1824, built an unprecedented national party network and used newspapers as a tool for party communication extensively.⁵¹ This was an era of partisan press.

The lack of political neutrality notwithstanding, partisan papers had their share of contribution to the young American democracy. Dispersed ownership with relative parity characterized the fledgling industry grown out of one-person print shops. The public forum thus provided was therefore filled with diverse—albeit partisan—opinions. After newspapers became party organs during the so called Second Party System era, they helped broaden citizen participation and raise voter turnouts, giving elected offices a much more substantiated claim to legitimacy.⁵² Bitter competition among partisan newspapers also helped raise the quality of their works.⁵³

48. See STARR, *supra* note 2, at 87-90.

49. See *id.* at 90.

50. See *id.* at 60, 84-90, 92-94.

51. See *id.* at 93, 130.

52. For the relationship between partisan politics and newspapers, see *id.* at 92-94, 130. See also Bradley A. Smith, *The Siren's Song: Campaign Finance regulation and the First Amendment*, 6 J.L. & POL'Y 1, 8-9 (1997).

53. See STARR, *supra* note 2, at 92-94.

The rise of the penny press in the 1830s was a watershed development. New printing technology had reduced the cost of production dramatically. The emergence of urban centers in industrial northern states created a new reader base distinct from the rural one. Some entrepreneurs seized the opportunity to make the bold move of selling news for one penny per copy—compared to the going rate of six cents each—in big cities. By doing so, the penny press enlarged its readership to a degree that it could survive on subscription and advertising revenue alone, making it possible to cut its reliance on political patronage.⁵⁴ That was the first step to independent journalism.

To further increase circulation, the penny papers innovated on paper size (smaller so easier to read on the road), layout (large headlines to grab attention), contents (more local and non-political news as well as more sensational stories), and reporting style (interviews to inject sense of directness). They also hired more professional reporters and other specialized staff, turning news publishing into an enterprise.⁵⁵

By upping the ante, the penny press reshaped the industry. News exchanges and hearsay went out of fashion; direct reporting became the norm, exerting significant pressure on smaller news operations. The creation of the Associated Press after the introduction of news wire was therefore another major milestone. Political impropriety, antitrust concerns⁵⁶ and other controversies notwithstanding, the organization helped increase the economic scale of news reporting and held the cost of news collection low enough for small town newspapers.⁵⁷ In so doing, it helped keep the tradition of diffuse press ownership—and by extension diversity of voices—alive.

Copyright law played a part too. The British statute of Anne, the world's first copyright law, was originally conceived to protect privileged stationers with royal ties.⁵⁸ It was not so with the 19th century American system, which was reasonably designed in comparison with limited terms and a narrow scope of applicability, aiming at thwarting blatant plagiarism without stifling creativity.⁵⁹ For news reports (and advertisements), however, not even such limited protection existed because copyright was not intended for works “of so fluctuating and fugitive a form . . . the subject-matter of which is daily

54. Newspapers in America have always carried a large amount of advertisement, but their circulation was too small to matter. The penny papers had such high volume in comparison that they could charge a premium for advertisement. See STARR, *supra* note 2, at 134.

55. See *id.* at 131-35.

56. See *Associated Press v. U.S.* 326 U.S. 1 (1945). It should be noted that the establishment of Associated Press and its basic business model predated modern antitrust legislation.

57. See STARR, *supra* note 2, at 184-85.

58. Edward Lee, *Freedom of the Press 2.0*, 42 GA. L. REV. 309, 318-24 (2008).

59. See LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 104-09 (2001). See also STARR, *supra* note 2, at 115-16.

changing, and is of mere temporary use,” according to Justice Thompson.⁶⁰ It was a time of restricted intellectual property in favor of “free expression, competition, and the public domain.”⁶¹ One could quarrel with Justice Thompson’s conclusion in excluding news from copyright protection, but there can be no dispute in his keen observation that the true economic value of news lies more in the promptness of delivery than anything else. News publishers therefore stole from each other all the time, yet by and large that did not discourage news publishing. Instead the cost of news was lowered and the reach of news was extended as a result.

That is the story of the first information and communication revolution. In a time of trouble we could only count on someone from above. During a time when news publishing was hampered by stamp taxes, censorship and other state interventions on the other side of the Atlantic Ocean, American press benefited from a much friendlier environment. The middle class grew with spreading land ownership and increasing industrialization. The literacy rate rose thanks to growing availability and affordability of education. Reading population expanded; so did civil participation. Democracy was strengthened in consequence, followed by higher journalistic standard—including neutrality in news reporting—due to popular demand, which would further expand readership, closing a virtuous cycle.

IV. THE UNDERCURRENT

Just as the printing press was gradually growing into an indispensable democratic institution in America throughout the 19th century, a disturbing issue began to rear its head in the second half, lurking for the most part like an undercurrent for more than a century, only to burst into full view in the last two decades. The issue is one of media ownership, or more precisely for the purpose of this paper, of private control over a vital public institution. The cause—the architectural change that eventually reshaped the industry and thrust the issue to the foreground—is the invention of electronic communications.

A. *Public Service, Private Control: A Delicate Relationship*

No nation has ever attempted a governmental monopoly on printing, though European countries came close once with strict control on printing houses and heavy censorship on content.⁶² Newer, paperless long-distance communications technologies were a different story. Following a series of

60. *Clayton v. Stone*, 5 F.Cas. 999, 1003 (1829).

61. STARR, *supra* note 2, at 122.

62. *See id.* at 25-30; Lee, *supra* note 58, at 320-24.

experiments since the mid-17th century, electric and electro-magnetic telegraph methods were realized in the 1830s. By the end of the decade, commercial telegraph services were built on both sides of the Atlantic, by Cooke and Wheatstone in the U.K. and Morse & Vail in the U.S. respectively.⁶³ While it might seem like an ancient craft on the verge of extinction to cellphone texting youngsters today, there was a time when the telegraph was novel, its potential—military as well as economic—high, and the cost of its mass deployment astronomical. One by one the European powerhouses nationalized the telegraph, with France leading the way.⁶⁴ Britain was the only exception initially, but eventually followed suit in the 1860s after private telegraph services alienated the public with high charges.⁶⁵

A key political choice thus loomed over American Congress when the telegraph was introduced in the new continent. For want of funding, industry pioneers led by Samuel Morse lobbied fervently for government assistance and guidance modeled after European practices. Instead of doing something, however, what mattered this time was a conscious choice not to do anything: the U.S. government chose not to nationalize the service, despite having built the world's largest universal public postal network on government funding.⁶⁶ Private efforts drove the development of telegraph instead in America.

The decision to leave the telegraph in private capital cast a long shadow over subsequent policy choices concerning the development and regulation of novel communications technologies. When telephone, radio and terrestrial television broadcasting came onto the stage in the ensuing decades, Europeans—followed by much of the world—cast them in the same light as the telegraph and other public utilities before them: public services with substantial national security/public interest implications and a strong tendency of natural monopoly due to high initial cost. Heavy-handed regulation—or even direct governmental management sometimes—became the norm consequently.⁶⁷ Services were for the most part provided by either the government itself or at arm's length by semi-public entities. For radio and television broadcast, the programs might be produced in private hands

63. See ANDY KESSLER, *HOW WE GOT HERE: A SLIGHTLY IRREVERENT HISTORY OF TECHNOLOGY AND MARKETS* 104 (2005). See also BRIAN WINSTON, *MEDIA TECHNOLOGY AND SOCIETY* 19-29 (1998).

64. France was an early adopter of "semaphore," an optical telegraph technology developed a little earlier than electric telegraph, and made a law in 1837 to establish a French government monopoly in long-distance communications; see WINSTON, *supra* note 63, at 21.

65. STARR, *supra* note 2, at 165-69.

66. It should be noted that Morse did secure some initial funding from Congress; see *id.* at 160-63.

67. See Enrique Armijo, *Media Ownership Regulation: A Comparative Perspective*, 37 GA. J. INT'L & COMP. L. 421, 427-30 (2009).

but were often regulated and sometimes supervised by public authorities.

Time and again the U.S. left them to thrive on their own in the early stages of development. Inventors and entrepreneurs engaged in some of the fiercest business battles in history as a result, with little interference from the government; some even paid the price with their own lives.⁶⁸ The Federal government did step forward when issues of broad public interest concerns—such as airwave interference, monopoly and unfair competition, to name a few—surfaced later. The Communications Act of 1934⁶⁹ was enacted, the FCC was born, regulations piled up, and the AT&T was broken up into pieces,⁷⁰ and yet Americans never waived in their commitment to private media (and other telecommunications services).

B. *Constant Struggle in Ownership Regulation*

American insistence on private media ownership should not be taken as a sign of public interest losing out to business greed. On the contrary, in fact, public interest considerations played a major role behind the conscious decisions to keep the media private. As suggested earlier, one of the key factors that drove much of Europe toward public media in the first place was content control—for political, social, or military reasons. In America, the very same consideration worked in the opposite direction. For a citizenry that had grown accustomed to the diverse, opinionated, and indomitable press, the mere possibility of state censorship—no matter how noble the causes may be—was enough to send chills down the spine. Accordingly, the idea of public media—widely seen, rightly or wrongly, as too conducive to state censorship—had difficulty gaining traction in public debate.

That does not mean the uneasy relationship between private ownership and the news media's democratic responsibilities has escaped public scrutiny. While the Fourth Estate has grown into a potent institution in democracy, there are no institutional checks and balances between it and other constitutionally delineated powers. The hostility toward state censorship and the respect for editorial independence imply minimum democratic control over the content provided by the media. What has been keeping the media honest is a market structure where the power is shared among many, a key attribute of the printing press of old but never as pronounced with electronic media.

68. See, e.g., LAWRENCE LESSIG, *FREE CULTURE* 3-6 (2004) (recounting how Edwin Howard Armstrong, the inventor and patent holder of radio broadcasting, took his own life after bitter struggle with RCA).

69. Pub. L. No. 73-416, codified as amended at 47 U.S.C. § 151 et seq. (2007).

70. See *U.S. v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982) (approving with modification the consent decree between the Department of Justice and the AT&T, by which the AT&T was broken up).

Hence the evolution of FCC's media regulations—the various media ownership rules chief among them—illustrates best the constant struggle in keeping media power diffuse. To serve the public interest when allocating broadcast spectrum as required by the Communications Act, the FCC has had broadcast ownership regulations in place almost since the beginning.⁷¹ Using its power to grant license to radio and TV stations, FCC's regulations have taken a number of forms, mainly cross-media ownership bans or caps, single-media ownership caps, and prohibition on joint operations. Restrictions can be either national (as in “no more than 7 stations nationally”) or local (as in “no concurrent FM and AM radio station in the same market”) in scope. For the purpose of cross-media ownership rules, in addition, newspapers are also regulated.⁷²

These rules have been highly contested throughout the years, with battles fought in agency proceedings, in Congress, and in courts. In *National Broadcasting Co. v. United States*,⁷³ the Supreme Court gave FCC a crucial victory by upholding the early Chain Broadcasting Rules. The Court also betrayed its concerns on media ownership concentration in other cases. *Tornillo*, for instance, observed that growing newspaper ownership consolidation and same-market cross-media ownership between newspaper and broadcast media have “place[d] in a few hands the power to inform the American people and shape public opinion.”⁷⁴ Still, resistance from the industry never subsides, and the FCC has continued to fine-tune the formulas.

In another front of the struggle, effort has been made to check media power by giving people direct access to the media. As previously observed, the Supreme Court has been extremely reluctant to grant such a right in order to protect the independence of editorial judgment.⁷⁵ Scholars have nevertheless argued that rights of access to media are also First Amendment rights, citing as main support the danger of media concentration.⁷⁶

The concern is not unique to electronic media; the traditional press has been on the path of growing consolidation for decades. The Florida “right of reply” statute struck down by *Tornillo* was directed at newspapers.⁷⁷ The printing press is nonetheless not within the jurisdiction of the federal Communications Act (and the FCC) except in cross-media ownership cases.

71. Adam Candeub, *Media Ownership Regulation, the First Amendment, and Democracy's Future*, 41 U.C. DAVIS L. REV. 1547, 1555 (2008).

72. *See id.* at 1555-61.

73. 319 U.S. 190 (1943).

74. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 249-50 (1974).

75. *See* Bezanson, *supra* note 15.

76. *See, e.g.*, Jerome A. Barron, *Access to the Press — A New First Amendment Right*, 80 HARV. L. REV. 1641, 1660-66 (1967).

77. *See Tornillo*, 418 U.S. 241, at 244.

To this technology, moreover, traditional rationales used to justify lowered constitutional protection—spectrum scarcity⁷⁸ and unique accessibility to children⁷⁹—do not apply. Most of the access to media regulations we have seen are directed at electronic media as a result. Some of them have not survived judicial review,⁸⁰ some have been repealed by the Commission itself,⁸¹ but some have stayed. The statutory “equal time” rule and “reasonable access” rule, both concerning political candidates’ right to air time access, for example, have both been held constitutional and are still effective.⁸²

Without passing judgment on the merits of the various cases, rules or arguments, the above description shows that the inherent danger of private control over an essential public organ has not lost on the American public in spite of their insistence against state media. The issue was largely dormant in the nineteenth century thanks to a vibrant press industry, but has followed the popularity of electronic media to prominence. Efforts have been made to keep the Fourth Estate straight, though not to everyone’s satisfaction. Greater challenges, however, lie ahead given the accelerating trend of media consolidation and the new media landscape the Internet has brought.

V. THE NEW FRONTIER

Just as we think time-honored professional norms, court-tested legal protections and a set of well-designed ownership regulations have collaborated to give us a news media industry that is sufficiently diverse and professional when performing its democratic functions, the technological, economic and regulatory landscapes are on the move again. In particular, two critical developments which began in the late twentieth century have taken the industry to a new frontier where old premises have been seriously undermined and carefully struck balances have been thrown off. The first is the trend of media ownership deregulation; the second is the coming of age of the Internet.

A. *Media Ownership Deregulation*

The pros and cons of either regulatory approach—European style public

78. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375-77, 389-90 (1969).

79. See *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978) (plurality opinion).

80. See, e.g., *Radio-Television News Dirs. Ass’n v. FCC*, 229 F.3d 269, 270-72 (D.C. Cir. 2000).

81. The fairness doctrine regulations, e.g., were abolished by the FCC in 1987, despite having been held constitutional by the Supreme Court unanimously (8:0) in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Jerome A. Barron, *Access Reconsidered*, 76 GEO. WASH. L. REV. 826 (2008).

82. See *id.* 839-40.

services or American style private (albeit regulated) ownership—have been discussed at length by scholars and do not need repeating.⁸³ Suffice it to say that the American approach has not only survived but pulled the world a few steps over, setting off a huge, ongoing wave of communications liberalization and deregulation throughout the world. New economic reality has been the main driving force behind the change. In a time of deteriorating public finances, it is much harder for many governments to justify “non-essential” expenditure, let alone the capital investment needed to shore up sagging services in the face of regional and global competition. The 150-year American experiment has proven that private media enterprises are in general more efficient, a key factor for their competitive edge. The FCC’s media ownership rules began to crack during this era of deregulation. After several new appellate court rulings have punched holes in those regulations,⁸⁴ sweeping change was mandated by the Telecommunications Act of 1996.⁸⁵ The rules are still in place, but they are mere shadows of their former selves.⁸⁶

The upshot is an ongoing string of media consolidations of all sizes, from headline grabbing mega mergers between global giants to low-profile small town acquisitions. Many more local media have folded after realizing they have little chance competing against those 800-pound gorillas with no help in sight. Even fabled icons such as the Wall Street Journal and the Chicago Tribune have found it difficult to stand alone and eventually changed hands. Since efficiency concerns drive most of these mergers and acquisitions, the wheel of media consolidation, once started, can hardly be stopped, for even those content with the status quo may be forced into action in order to stay competitive.

B. *Cyberspace: The Land of the “Free”*

If ownership deregulation and other communications regulation overhaul around the world have ushered in a new era of media realignment, it is the new architecture and economic landscape on the Internet that has added fuel to the trend. A highly experimental network built from scratch

83. See generally, e.g., Armijo, *supra* note 67; PETER J. HUMPHREYS, MASS MEDIA AND MEDIA POLICY IN WESTERN EUROPE 111-98 (1996) (detailing the establishment and transition of European public-service broadcasting systems); Simeon Djankov et al., *Who Owns the Media?*, 46 J.L. & ECON. 341 (2003) (arguing that “government ownership undermines political and economic freedom” after extensive empirical research); C. Edwin Baker, *Media Concentration—Giving Up on Democracy*, 54 FLA. L. REV. 839 (2002) (critically analyzing media ownership deregulation).

84. See, e.g., *Schurz Commc’ns, Inc. v. FCC*, 982 F.2d 1043 (7th Cir. 1992) (invalidating FCC’s “financial interest and syndication rules”). For discussion on the case and other cases, see Candeub, *supra* note 71, at 1570-80.

85. Pub. L. No. 104-104 (1996).

86. See Candeub, *supra* note 71, at 1558-60.

based on a design principle known today as “end-to-end” (e2e),⁸⁷ the Internet has by and large embraced a routing policy of nondiscrimination among applications.⁸⁸ By making the network open to all applications, the policy has made cyberspace a land of innovation—a gigantic laboratory, so to speak, or a “generative” wonderland.⁸⁹ Anyone with an Internet connection could try her luck on something new on the electronic frontier⁹⁰

Inevitably for a space whose earliest inhabitants were scientists and students, and true to its original purpose as a means for resource sharing, the Internet has embraced a “free” culture: free thinking, freedom to innovate, free software, and free content. Before the National Science Foundation opened it up for commercial applications in 1992, practically everything on the net was free. It has been almost twenty years since, but a large part of that culture is still very much alive, and has a significant impact on the fate of the news media.

The two traits mentioned above have been feeding off each other. To attract people to a new application or service, the best strategy is to give it away for free, at least initially. On the other hand, exciting new applications and services—even better if free—attract more people to the Internet, further enhancing the appeal of the platform in the eyes of innovative entrepreneurs. The upshot is, new applications, new content and new services are made available—mostly for free—on the Internet on a daily basis, to such a degree that it seems routine.⁹¹

This “free” culture nevertheless places tremendous economic pressure on the media, sending many into panic pursuits of a bigger tent, accelerating the trend of media consolidation which started with media ownership deregulation. To survive, moreover, they have increased their reliance on advertising revenue with grave implication.⁹²

87. The principle says in essence “the ‘intelligence’ in a network should be located . . . at its ‘ends,’ while “[t]he communications protocols themselves . . . should be as simple and as general as possible.” Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925, 930-31 (2001).

88. While irrelevant to the discussion here, it should be noted that it has been more common in the last decade for Internet service providers to engage in discriminatory practices, leading to a series of debates surrounding a proposed policy principle called “net neutrality.” See generally Tim Wu, *Network Neutrality Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141 (2003).

89. The “generative net” is a term coined by Jonathan Zittrain in his book which warns against malware the other dark matters that the Internet also generates; see generally JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET—AND HOW TO STOP IT* (2008).

90. See Lemley & Lessig, *supra* note 87, at 932-33.

91. The phenomenon is probably best analyzed in the economic model of two-sided market and is out of the scope of this paper.

92. See *infra* Sec. 6.1 for detail.

C. *Cyberspace: The Land of Self Expression*

Comparing the new landscape with the old, we can count the blessings and the curses for the news media. The entry barriers to publishing have been lowered since the introduction of the Internet. Not only are bandwidth costs constantly dropping, especially in the broadband era, but also the technical proficiency required to publish on the Internet are decreasing steadily. First it was the World Wide Web, the brainchild of Sir Tim Berners-Lee and the greatest contributor to the popularity boost of the Internet in the 1990s. Its ingenious design enhanced the approachability and usability of the Internet; at once everyone realized how antiquated the old net was.

Nonetheless it requires some training to write in HTML, the language of the web, let alone to configure and maintain a web server. Web-hosting services springing up during the first dotcom boom promised to make creating a homepage easy by shielding their customers from the dirty laundry. Millions took up the offer to establish their first online presence beyond an email address, an outpost in cyberspace so to speak, only to see it crumble later for want of fresh content; plenty of those personal homepages never went far beyond “hello world!” anyway.

Blogging, one of the success stories of the so-called Web 2.0 services, is much less intimidating to writers in comparison. Though the backend could be just as finicky as an HTML server, updating the contents is rather straightforward after settling down on a competent hosting site. Specialized content sharing sites like Flickr (picture sharing) and Youtube (video sharing), as well as a new generation of social networking sites like Facebook, Google+ and Twitter, all thrive on making it effortless for people to express themselves. With netbook computers and smartphones as well as pervasive wireless networks, ubiquitous access is close to becoming a reality. Given the way technology is advancing, we are perhaps just one step or two away from the days when we can post something on the Web just by thinking out loud.

Diminishing cost and increasing ease are merely part of the reason behind the blogging boom or the Facebook craze. Why so many who have never kept a diary in realspace suddenly develop a newfound interest in having one online, we must ask. Keeping a diary with pens and paper costs little too, and is just as easy if not easier. One would have done so already if cost and ease are the main concerns. The social side of blogging must be examined to see its true appeal.

Keeping a diary is a lonely pursuit, writing for yourself and yourself alone. While some do enjoy the daily moment of solitude, many do not. Even those with a fancy to publish memoirs someday pause for second

thought from time to time on the long journey to eventual publication, if ever. The same vexing feeling of loneliness has—perhaps more so than has the syntax of HTML—dampened the initial enthusiasm for personal web publishing. Writing vanilla web pages is like shouting into the ether; one rarely knows who actually listens. Not blogging, which wipes the lonesomeness away with an ingenious device: a simple mechanism for reader feedback. While getting negative comments can be discouraging, for many it still trumps getting no response at all, and a couple of encouraging words could make it all the more rewarding. No wonder viewer feedback is now a standard feature for all new web services.

Together low cost, low technical barrier and high reward have made online publishing a worthy pursuit to many people, especially the younger generation, even though the reward is more psychological than financial but for a select few. A genuine marketplace of ideas was born as a result, whose diversity in themes, styles, depths, and originality could easily put dead-tree publishing—let alone traditional electronic media—to shame. Best of all, most of the “goods” on this market are free for the taking. For someone who cares deeply about the well-being of the Fourth Estate, however, this phenomenon is a mixed blessing.

VI. THE CHALLENGES

The new developments described in the previous section have made it much more challenging for the news media to stay loyal to the journalistic standards we have come to expect. The following will highlight the most pressing challenges to journalistic independence, professional news reporting and healthy public debate.

A. *Journalistic Independence Under Siege*

What have been somewhat subdued amid the regulatory sea change are concerns over the impact of private ownership on the news media’s democratic functions. At first glance, the triumph of private media throughout Europe and beyond is a blessing, for even the most public interest-minded state media might be reluctant to bite a feeding hand.⁹³ Once unleashed, they could be expected to be more independent in judgment and less timid when criticizing the government, at least in theory. How well

93. See, e.g., Jeffrey A. Dvorkin, *Reporting on Terrorism: Choosing Our Words Carefully*, 37 U. RICH. L. REV. 811, 814 (2003). But see Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 163-64 (2004) (arguing that private media might sometimes be more vulnerable to government pressure).

they would do regarding other institutional functions of the Fourth Estate is another matter, and there are plenty of reasons to be concerned.

Other than the government, to begin with, businesses have always been under media scrutiny as well. The 2006 Hewlett-Packard spying scandal was uncovered by Newsweek,⁹⁴ for example, and it was due to the relentless pursuit of two *Wall Street Journal* reporters that Enron was eventually exposed.⁹⁵ Whenever a Taiwanese consumer vents online about her grievance, the most typical advice given—instead of going to court or to the police—is to go to the media and make it news. Would the media she approaches be as responsive as usual should her complaint be directed at one of its major sponsors?

Maintaining effective public scrutiny on the state, furthermore, often necessitates keeping an eye on the activities of government contractors and regulated industries, businesses and corporate officials under investigation or on trial, corporate interests lobbying for favorable policies or special treatments, not to mention politicians' business connections. The Siemens scandal of 1914 which eventually brought down the Japanese cabinet, for instance, was unearthed by a British newspaper.⁹⁶ What would happen if Siemens was the corporate parent of the newspaper and placed a gag order on the story before it broke?

Given the general trend of government downsizing in many parts of the world, in addition, public services and even some auxiliary administrative functions are increasingly privatized, often with the thinly veiled intention to skirt congressional or executive oversight. While it might be so by design in exchange for greater managerial flexibility and enhanced operational efficiency, other forms of public scrutiny are required to maintain a proper level of accountability, and the one most counted on to step up to the plate is the media. Could the media stay vigilant once it establishes long-term business relationships with those privatized new entities?

Public policy issues, too, often touch upon the business interest of a company, an industry, or several of them to some degree. Could a media company reflect public concerns and moderate public debate as competently as it used to, should a proposed policy change happens to be intimately related to the interest of a major sponsor or a member in its corporate group?

To our chagrin both the logical and the empirical answers to the above

94. See David A. Kaplan, *Suspicious and Spies in Silicon Valley*, NEWSWEEK, Sept. 18, 2006, at 40, available at <http://www.thedailybeast.com/newsweek/2006/09/17/suspicious-and-spies-in-silicon-valley.print.html>.

95. See generally JOHN R. EMSWILLER & REBECCA SMITH, *24 DAYS: HOW TWO WALL STREET JOURNAL REPORTERS UNCOVERED THE LIES THAT DESTROYED FAITH IN CORPORATE AMERICA* (2003) (detailing the authors' Enron investigation).

96. JOHN STEWART BOWMAN, *COLUMBIA CHRONOLOGIES OF ASIAN HISTORY AND CULTURE* 150 (2000).

questions are “maybe, or maybe not” at best. Logically speaking, given the simple fact that members of the media are as rational and self-interested as everyone else—economists have taught us as much—they would act in their best interest, which means no but for sufficient counter-incentives. Journalists could be motivated by professional pride, for instance, newsroom peer pressure grown out of long-standing norms, or the belief that telling the truth would enhance their reputation that could be turned into a competitive advantage. Some of these motivations might be still working here and there, but there are telling signs that they are losing their grip.

Jeffrey Wigand, for example, first blew the whistle on the big tobaccos when he gave an interview to *60 Minutes*, a well-respected news program of CBS. This might be hindsight wisdom but judging from the size of damage suffered by the tobacco industry later, it had to be a major scoop for anyone. The interview was nevertheless held back by CBS’s corporate lawyers for fear that it might, among other things, adversely affect the ongoing merger negotiation with Westinghouse and put the son of CBS president in jail.⁹⁷ The corporate interest of CBS as well as the personal interest of a few high level executives took priority, professional pride be damned.

Three years ago, the Washington Post, another iconic newspaper was publicly chastised—by its own media ombudsman, no less—for ethical lapse, because “[f]or a fee of up to \$25,000, underwriters were guaranteed a seat at the table with lawmakers, administration officials, think tank experts, business leaders and the heads of associations,” had a marketing plot not been halted at last minute after being exposed by other media.⁹⁸ Put it in contrast to the legend of separate banks of elevators at the Chicago Tribune, and the change in the industry is telling.

The issues raised in this section would be relatively minor should there be sufficient competition in the field. What one firm sweeps under the carpet would most likely be uncovered by another. That is exactly what happened to the 60 Minutes blunder over the Wigand story. The *Wall Street Journal* picked up the ball and ran with it, forcing CBS to air a slimmed-down version of the buried interview, making itself a fool.⁹⁹

Over the course of less than two decades, however, we have witnessed one mega-merger after another in the media industry. The army of feisty little print shops less than two centuries ago has largely given way to a handful of multinational giants,¹⁰⁰ and there is no sign that current waves of

97. See Marie Brenner, *The Man Who Knew Too Much*, VANITY FAIR (May 1996), <http://www.vanityfair.com/magazine/archive/1996/05/wigand199605>.

98. Andrew Alexander, *The Stumbles that Led to an Ethics Blunder*, WASH. POST (July 12, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/11/AR2009071100290.html>.

99. See Frank Rich, *Smoking Guns at '60 Minutes'*, N.Y. TIMES, Feb. 3, 1996, at 23.

100. See LESSIG, *supra* note 68, at 161-74.

global media industry realignment have subsided. Though language and cultural barriers may have shielded pockets of regional/local firms from sweeping global acquisitions somewhat, at least for the moment, intra-region business consolidation are by and large just as intense. What is even more alarming is the fact that most of today's media titans are no longer pure media firms, some of them not even media-centered firms; instead they are part of multi-industry conglomerates with an interest in many fields. It would be even harder for such media to stay true to their public-interest character going forward.

B. *Forum Without News*

The first dotcom bubble of the 1990s was akin to a gold rush: everyone rushed to the scene before they had a moment to stop and strategize what to do. The news media were no exception. With few notable exceptions—the Wall Street Journal for one—they made their contents available for free; most still do today. The abundance of free information has been a blessing for readers. Flip the side, however, and the joy is gone. Media outlets thought they would find a way to break even eventually; some of them might even fancy some profits down the road. Most of them are still longing.

The penny papers of the antebellum era more than made up for the loss in subscription revenue with higher advertising income. Free news outlets today could hardly duplicate the feat.¹⁰¹ The reason is simple: the news media no longer has the advertising market to itself. From Usenet newsgroups, online bulletin boards, blogs, chat rooms, Digg, Tweets, to portals and social networking sites, our regular news intake nowadays comes from a great many new sources augmenting the traditional ones. Unfortunately most of those new online sources are merely news aggregators. Their original contents, if any, consist mostly of opinions, commentaries, parodies, cross references, or other “value-adding” material. They take audience away from those who produce first-hand news reports, along with it advertising revenues.

Competition for advertisement revenues, moreover, comes from non-news domains as well. Today's Internet is full of free information or services whose providers also depend on ads.¹⁰² Google, for one, dominates a lion's share of the online advertising market. Many others—hobby blogs, for instance—are owned by those who do not need ads for a living, yet

101. See, e.g., Michael Sokolove, *What's a Big City Without a Newspaper?*, N.Y. TIMES MAGAZINE, Aug. 9, 2009, at MM36, available at <http://www.nytimes.com/2009/08/09/magazine/09Newspaper-t.html>.

102. See, e.g., Claire Cain Miller, *YouTube Ads Turn Videos Into Revenue*, N.Y. TIMES, Sept. 3, 2010, at B1, available at <http://www.nytimes.com/2010/09/03/technology/03youtube.html>.

welcome them nonetheless. This would be less of a problem if the online advertising market itself is growing. Overall this could be the case, yet part of the gain has come at the expense of advertising in traditional media.

The fallout of this development is belt tightening for old school news outlets, which usually involves layoffs, resulting in a shrinking pool of professional journalists and growing reliance on amateur reporting, i.e., reporting by someone who happens to be at the scene. The smart phone texting generation may be happy to oblige, yet the contrast cannot be missed: the penny press of old marked the first step toward professional reporting, and yet the “mostly-free” news media today seems to be moving backward. Increasing reliance on advertising also means the news media must court sponsors more aggressively. To woo commercial sponsors one has to attract viewers first, which means more appealing contents and more frequent content updates, putting even greater strain on a staff already depleted after rounds of layoffs.

Where this trend will lead us remains to be seen, yet there have been some disconcerting signs already. The dearth of original news has made media outlets increasingly reliant on press releases from corporates and the government as a source of news. Worse yet, the press releases are being presented as is, for there is not enough manpower to check the facts, or to rewrite it in a more balanced manner. Product placement, or embedded marketing—the practice of planting advertisements into programs, movies, news stories, literary works, stage performances, etc., wherein no advertisement is expected—is increasingly mainstream. It is a practice once deemed acceptable only for entertainment material and off limits for news reporting and editorials;¹⁰³ not any longer.

Not that the distinction between news and entertainment is any straightforward. In their desperate attempts to attract viewers, many news outlets are spicing up their contents with large pictures, sensational headlines, lewd stories and celebrity gossips, stealing one trick after another from the penny papers of old. The news business looks increasingly like the show business every day. We are also witnessing sloppy journalism on the rise, such as unverified stories, invented quotes, and intentionally misleading camera works.

Cyber-romantics might be inclined to dismiss the severity of the trend, for what is left off by the news media could be picked up by others. If the news media could no longer provide the “organized, expert scrutiny of government” as envisioned by Justice Stewart, they might suggest, others will. Thanks to the vast public forum provided by the Internet, in fact, public

103. This view is epitomized by current European law; see Directive 2010/13/EU (Audiovisual Media Services Directive), art. 11.

offices have been subject to much greater public scrutiny than ever. While such grass-roots public scrutiny may lack in organization and professional quality, it makes up for it with greater intensity, more spontaneity, and untamed curiosity.

Amiss from this optimistic picture, however, is a vital prerequisite for any form of meaningful scrutiny to work in a democratic society: we need someone to relay hard and truthful facts—not anecdotes—to us. It is for this very reason news reporting has been at the heart of modern journalism, governed by the most vigorous professional norms.¹⁰⁴ The public needs to be informed first before it could deliberate, judge and hold someone accountable. If the media could no longer be counted on to inform us, who can take its place?

C. *Echo Chambers*

Swimming in the sea of information overload can make us feel like drowning; thus a good filtering tool is often the first thing we grab as we gasp for air. For certain, filtering is nothing new. Throwing out junk mail, flipping right to the Sports section when picking up a newspaper, programming favorite television channels onto the remote control, and subscribing to a trade newsletter etc. are all techniques we employ to deflect unwarranted distraction. Time is in short supply no matter how resourceful one is otherwise.

Contemporary computing technology has taken these mundane tricks to another level. The beauty of bits is that they can move freely without being cramped in a tiny pamphlet or buried in an unwieldy broadsheet. The architectural constraints inherent in paper-based publishing, in other words, are mostly gone with digital news media. Instead of favorite sections therefore we now have favorite columnists, tracked stocks, dream items, and keyword-tagged articles, all tailored according to our personal taste, streamed to our desktop via RSS feeds so we no longer have to visit homepages anymore.

Advanced help comes in the form of collaborative filtering. Google, for instance, pioneered the practice of putting the pages visited by the most users at the top of a search result.¹⁰⁵ Amazon took it one step further by recommending books according to what other books you own, have bought before, or people who have a similar taste or preference have bought. The social networking scene is all about group logics, where one could easily manage circles of trust, fun, intimacy, or business interest.¹⁰⁶

104. See *infra* Sec. 2 for detail.

105. See JOHN BATTELLE, *THE SEARCH* 73-81 (2005).

106. Some bloggers call this kind of technique “collaborative micro-filtering.” The clearest and

While we also filter in real space, as suggested earlier, we have to contend with what is physically and economically feasible within its architectural confines. Filtering, in other words, is far from perfect in real space. We take it as given, for instance, that from time to time we would run into rough encounters—people whose ideas sounded so alien, offensive even, to us—in daily commute, during tea breaks, in weekend social gatherings and so on. The architecture of code, on the other hand, has made possible finely-grained social filtering, and the generative nature of the net ensures new filtering tools spread easily. Unpleasant confrontation could be a thing of the past should one be so inclined. We can read only news commentaries from writers who share similar views with us, or join only forums full of like-minded participants.

Collective micro-filtering is nevertheless a double-edged sword; the convenience it brings might come at the price of a more severely fractured society. If friendly communication is music and objectionable opinions are noise, then many of us would be hard pressed to resist the temptation to stay in an ambit of high signal-to-noise ratio. Before we know it, the net may be turning into an assortment of echo chambers large and small, wherein like-minded people gather and reinforce one another's belief, conviction, or bigotry. The upshot is group polarization, a phenomenon Professor Sunstein has repeatedly warned us about. What follows may be more frequent inter-group confrontations of much greater intensity.¹⁰⁷ People on the other side would look like enemies; in time we might as well call them devils.

If this sounds like a stretch, it might be so only because we still have to spend a substantial amount of time in real space. The social value of open-mindedness, in addition, could have been so deeply internalized by some of us that we are willing to reach out and listen. The threat is not baseless fantasy, however, if we take notice of the increasing polarization around certain "hot button" issues as well as growing harshness in words of choice and tone of delivery during political campaigns.

The news media used to play a vital role of mind bridging for it provided us regular dosages of common information, which in turn would serve as shared knowledge during conversation. The more micro-filtered news we absorb, the more likely we would be deprived of such shared knowledge, making it harder for people to understand one another. The zeal to court sponsorship, however, have driven online news media toward providing greater assistance in filtering, because not only would the convenience help attract viewers, but also a better-clustered audience is more

most cited blog page for the concept by Sarah Cooper unfortunately no longer exist, but there remain some others touching upon it; *see, e.g.*, Lefty, Collaborative Micro-Filtering, MY LIFE, STARTING UP BLOG (Feb. 26, 2008), <http://www.mylifestartingup.com/2008/02/collaborative-micro-filtering.html>.

107. *See* CASS SUNSTEIN, REPUBLIC.COM 2.0, 46-96 (2007).

attractive to advertisers.

D. *Censorship*

Last but not least, censorship is a growing rather than receding threat, though it might not be obvious in some parts of the world. The American press in its defining era had it lucky for all conditions—political, economic and cultural—worked against government censorship. The news media in some developing countries are not as fortunate. Censorship has been much more successful there, and will remain so for years to come, at least against old media. To these third world censors, the unruly net is the greatest threat, for good reason.

Censorship could be directed at the source; European countries, for instance, used to keep a tight rein on publishers. It could also be conducted at the conduit, as American military censors used to do during the Civil War: they filtered news delivered by the Western Union.¹⁰⁸ Lastly, censorship could be directed at the tools people use to receive messages; the prohibition of satellite dishes by the Taiwanese government in the past is but one example.

The architecture of bits has once again changed the math. In cyberspace, there are too many sources of information to control. The end-to-end architecture of the Internet made it much more challenging to conduct censorship at the conduit. As to end devices, they are practically all “computers,” in one form factor or another. Consequently, the censors are losing their grip, and they need help—from new partners.

Being hungry for new markets, most of these partners—many of them mega firms with roots in the developed world—are eager to please, and would do what it takes to gain access to a desirable market (tipping my hat to Google here for daring to say no to assist Chinese censors). They develop technologies that help censorship work better, including technologies that track people’s movements (both on- and off-line), analyze people’s behavioral patterns and might eventually penetrate people’s mind, at the cost of privacy.

This is not, nonetheless, merely “their” problem. What is at stake is not just about the freedom for people trapped in an authoritarian state—though that, too, is important—but that for all of us. The technologies that facilitate effective cyber-censorship and cyber-surveillance are culled from the same toolbox with which advertisers track, filter and classify consumers. All it takes is some customization to fit the need of the host government. In time the assisting firms could discover new tricks from the partnership enabling

108. See STARR, *supra* note 2, at 186.

them to further polish their tools. Hence make no mistake, whatever China is doing to its people, the underlying technologies will be deployed at home, though not necessarily by the government.

Censorship is no longer conducted predominantly by the state. Commercial interests have always had their reasons to censor undesirable speech; now they may be getting the means. The constitutional guarantees of free speech and free press have worked reasonably well against state censorship in countries where the guarantee is taken seriously. Without being translated into some form of concrete statutory mandates first, however, there is very little they can do against private censorship. Such concerns as these would be relatively minor should there be healthy competition in the news industry, giving us another good reason to take the trend of media concentration seriously.

VII. CONCLUSION

It matters not that the idealized version of the press—one with a fearless and relentless zeal to tell the truth and nothing but the truth—may have never been with us. The history of the Fourth Estate's humble beginning in late 18th century America should be enough of a reminder that even a shoddy version, partisan and vicious and all, can achieve a lot. Witnessing how the press has evolved into an essential institution of democracy, its breath intimately woven with that of the public, convinces us that its service is much needed.

It is undeniable, however, that the very route Americans have chosen to establish this fundamental institution carries a hidden risk: by entrusting a fundamental public service to private media, we can never be sure it would not put its corporate agenda above public interest. Media ownership regulations have thus been put in place to address this very concern and maintain a proper balance between public and private interests.

Deregulation and the Internet have nonetheless threatened to throw the delicate balance by undermining a key premise of media ownership regulation that the market is big enough for everyone. Media ownership deregulation kick-started the trend of media mergers and acquisitions, which would then raise the bar of market participation for other firms, which would then be forced to get into the hunt as well. The Internet, with its unrelenting demand for free contents, makes it even more difficult for smaller media firms. In less than two decades, as a result, we have seen the news media deserting the tenants of their trade one by one, as if they were eager to unlearn what they had accumulated over two hundred years. The saddest part is, we could hardly blame them given contemporary market reality.

This does not suggest there is nothing we can do. We could, for instance, reinstate some (many) of the media ownership regulations. Alternatively, we could give the idea of public media another chance. Leaning more heavily on antitrust law to regulate the market may also be an option. None of these is easy, politically or administratively; more research is needed.

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第四權的困境

一個關鍵民主機制的形塑與其當前困境

王 明 禮

摘 要

廿一世紀的新聞媒體可謂四面楚歌。一方面，願意付費閱讀、收聽或收視的消費者越來越少，而搶食廣告大餅的競爭者又越來越多，使多數媒體都在財務上十分吃緊。在另一方面，近年來社會各界又對新聞報導品質的不斷下滑迭有怨言。一個本來在現代民主社會裡扮演重要角色、甚至因此博得第四權封號的關鍵機制，似乎正在吾人的眼前逐漸生鏽、退化當中。

究竟新聞媒體在當世面臨的是何等困境及其成因，是本文企圖探索的課題。首先，本文將描繪新聞媒體與民主社會的理想關係——究竟新聞自由與由此而來的各種保障甚至特權，是為了讓新聞媒體扮演好什麼樣的角色，而社會大眾對此等角色的期待又是如何。其次的章節將從新聞媒體在十九世紀從一個普通產業，逐步發展出其公益性格的這段過程，指出促成此等蛻變的幾個關鍵決策與環境因素，以及因此而形成的潛在危險。再其次，本文將說明過去二十多年來的兩項重要發展——解除管制之浪潮與資通訊科技之發達——如何促使前述的潛在危險浮上檯面。最後，本文將剖析因為前述的發展，在當前的環境下，對新聞媒體主要民主機能的發揮，究竟有那些主要的障礙。廿一世紀的新聞媒體可謂四面楚歌。一方面，願意付費閱讀、收聽或收視的消費者越來越少，而搶食廣告大餅的競爭者又越來越多，使多數媒體都在財務上十分吃緊。在另一方面，近年來社會各界又對新聞報導品質的不斷下滑迭有怨言。一個本來在現代民主社會裡扮演重要角色、甚至因此博得第四權封號的關鍵機制，似乎正在吾人的眼前逐漸生鏽、退化當中。

究竟新聞媒體在當世面臨的是何等困境及其成因，是本文企圖探索的課題。首先，本文將描繪新聞媒體與民主社會的理想關係——究竟新聞自由與由此而來的各種保障甚至特權，是為了讓新聞媒體扮演好什麼樣的角色，而社會大眾對此等角色的期待又是如何。其次的章節將從新聞媒體在十九世紀從一個普通產業，逐步發展出其公益性格的這段過程，指出促成此等蛻變的幾個關鍵決策與環境因素，以及因此而形成的潛在危險。再其次，本文將說明過去二十多年來的兩項重要發展——解除管制之浪潮與資通訊科技之發達——如何促使前述的潛在危險浮上檯面。最後，本文將剖析因為前述的發展，在當前的環境下，對新聞媒體主要民主機能的發揮，究竟有哪些主要的障礙。

關鍵詞：新聞媒體，新聞自由，第四權，媒體集中化，網際網路