

FREEDOM OF THE PRESS FOR WHOM? THE QUESTION TO BE ANSWERED IN OUR CRITICAL JUNCTURE

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I. INTRODUCTION

“Freedom of the press for whom?” That was the question that Professor Jerome Barron raised some forty years ago.¹ It was a revolutionary question because in six words it called into question the dominant perception of freedom of the press, as it was commonly understood at the time, and subsequently. It was a brave question too, because it came at a time in which raising such a point was far from popular, and easily misinterpreted and misunderstood. It stepped on very powerful toes. It demanded that we come to terms with the political economy of the media, and deal frankly with the implications of media structures for media content. In many respects, Professor Barron was decades ahead of his time, and all of us today owe him an enormous debt of gratitude for his vision. In this Article, I would like to explain why I think this question is, right now, in the process of being answered. And if it is to be answered in a progressive manner, by the American people and ultimately by the Supreme Court, it will be so done by people standing on Professor Barron’s shoulders.

Let me make clear what this Article is not: a legal treatise on the First Amendment or constitutional law. What my Article will draw upon is my work as a communication policy historian, and with that my understanding of why we are in a rare period, a critical juncture, when

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1. JEROME A. BARRON, *FREEDOM OF THE PRESS FOR WHOM?: THE RIGHT OF ACCESS TO MASS MEDIA* (1973).

the shape of the media system is undergoing a dramatic transformation. As a result of this critical juncture it is likely that the Supreme Court will revisit the issue “freedom of the press for whom?” And I suspect that what happens politically in the coming years will influence how the Supreme Court ultimately answers that question. So this Article will also allude to what is happening “on the ground,” so to speak. My Article will also draw upon my work as an activist, to connect my research to a broader public and intervene to see that this critical juncture results in the best outcome possible.

II. CRITICAL JUNCTURES

Allow me to elaborate: our communication system and, to a lesser extent, our political economic system are now entering a critical juncture, a period in which the old institutions and mores are collapsing under long-run and powerful pressures.² The notion of critical junctures was developed to explain how social change works; it became apparent that there were relatively rare and brief periods in which dramatic changes were debated and enacted drawing from a broad pallet of options, followed by long periods in which structural or institutional change was slow and difficult. During a critical juncture, which usually lasts no more than one or two decades, the range of options for society is much greater than it is otherwise. It is in effect like having an informal “constitutional convention.” The decisions put in place will establish institutions and rules that will likely put us on a course that will be difficult to change in any fundamental sense for decades or generations.³

This notion of critical junctures is increasingly accepted in history and the social sciences, and it is has proven especially useful for communication. Most of our major institutions in media are the result of critical junctures, periods when policies could have gone in other directions, and, had they done so, put media and society on a different path. As a result of my research, I have concluded that critical junctures in media and communication tend to occur when at least two of the following three conditions hold: 1) there is a revolutionary new communication technology that undermines the existing system; 2) the content of the media system, especially the journalism, is increasingly discredited and seen as illegitimate; and 3) there is a major political

2. See RUTH BERINS COLLIER & DAVID COLLIER, *SHAPING THE POLITICAL ARENA: CRITICAL JUNCTURES, THE LABOR MOVEMENT, AND REGIME DYNAMICS IN LATIN AMERICA* 36 (Princeton Univ. Press 1991).

3. See *id.* at 27-39.

crisis in which the existing order is no longer working and there are major movements for social reform. In the past century, media and communication critical junctures occurred twice: In the Progressive Era when journalism was in a deep crisis and the overall political system was in turmoil; and in the 1930s when the emergence of radio broadcasting was combined with the public's antipathy to commercialism against the backdrop of the Depression. The result of the critical juncture in the Progressive Era was the emergence of professional journalism; the result of the critical juncture in the 1930s was the model of loosely regulated commercial broadcasting, which provided the model for subsequent electronic media technologies like FM radio, terrestrial television, and cable and satellite television.

A. *The Current Juncture*

We are in the midst of a profound critical juncture for communication today. For the first time in American history the stars are in alignment for a trifecta: the digital revolution is overturning all existing media industries and business models; journalism is at its lowest ebb since the Progressive Era; and our overall political system is awash in levels of corruption and growing inequality that, in most cases, bring on either periods of considerable political repression, or deep and progressive structural reform. (The economy is in turmoil, too, and it appears likely that we are entering a period of structural transformation to points unknown.) Both professional journalism and commercial broadcasting are in crisis and in a period of fundamental transformation. All the longstanding presuppositions that communication scholars were trained in, and that were taken for granted in our society, are much weaker and arguably no longer hold. If we know anything at this point in time it is that the communication system that emerges from this critical juncture will look little like the communication systems of 1990 and 2000. And, already, the media system of the 1960s seems about as relevant to what lies before us as a discussion of the War of the Roses does to contemporary military strategists. Most important, we know that how the emerging communication system is structured will go a long way toward determining how our politics and economics will play out.

B. *Media Reform and the Digital Revolution*

This critical juncture has spawned the birth of an extraordinary media reform movement in the past decade, especially since 2003.⁴ Literally millions of Americans have engaged with media policy issues in a manner that had been unthinkable for generations. Politicians and regulators are discovering for the first time in their careers that what they do with regard to media is being watched closely by voters and citizens and they are beginning to respond. What remains to be seen is whether there will be a broader resurgence of popular politics in the coming period. If there is, it will shift the emerging “media reform movement” into a much higher gear, and the range of possible outcomes will increase dramatically. Such a boom in popular social movements would also combine with media reform to lead, at the least, to the sort of periodic reformation of institutions that happens every two or three generations in American history,⁵ and for which we are sadly overdue. If such a broader popular political movement does not develop in the next decade or so, there will still be a critical juncture in media and communication; only the outcomes will be more likely to serve the needs of dominant commercial and political interests.

C. *Reforms in Recent History*

1. 1900-1920

In media, there were two great twentieth century critical junctures. The first critical juncture was during the late Gilded Age and Progressive Era when United States journalism was increasingly the domain of large commercial interests operating in semi-competitive or monopolistic markets.⁶ Social critics ranging from Edward Bellamy to Henry Adams were highly critical of the corrupt and anti-democratic nature of United States journalism, owing to its private ownership and its reliance upon advertising.⁷ Between 1900 and 1920 numerous muckrakers and social commentators wrote damning criticism of the anti-democratic nature of mainstream journalism. In many respects, this

4. See generally ROBERT W. MCCHESNEY, *THE PROBLEM OF THE MEDIA: U.S. COMMUNICATION POLITICS IN THE 21ST CENTURY* 252-97 (2004) [hereinafter MCCHESNEY, *THE PROBLEM*] (focusing on the changes in the media since 2003).

5. *Id.* at 39-48.

6. *OUR UNFREE PRESS: 100 YEARS OF RADICAL MEDIA CRITICISM* 11-12 (Robert W. McChesney & Ben Scott eds., 2004) [hereinafter *OUR UNFREE PRESS*].

7. See generally EDWARD BELLAMY, *LOOKING BACKWARD: 2000-1887* 180-83 (1995) (criticizing the corruption and anti-democratic nature of the media in the United States).

was the Golden Age of media criticism.⁸ In 1920, Upton Sinclair's *The Brass Check: A Study of American Journalism* was published. This breathtaking 440 page account of the corruption of journalism by moneyed interests sold some 150,000 copies by the mid 1920s.⁹ All but forgotten in the intervening years, it is a book that could well be the starting point for all assessments of journalism, if not contemporary media, in the United States. The topic of media control became a part of progressive political organizing. The great progressive Robert La Follette devoted a chapter of his book on political philosophy to the crisis of the press. "[M]oney power," he wrote, "controls the newspaper press . . . wherever news items bear in any way upon the control of government by business, the news is colored."¹⁰

It was as a response to the crisis in journalism that the revolutionary idea of professional journalism—the formal separation of the owner from the editorial function—emerged as the solution to the crisis.¹¹ Citizens no longer needed to worry about private monopoly control over the news; trained professionals serving the public interest were in charge and had the power. It was in this period that schools of journalism were formed. None existed before 1900; by 1920 the majority of major programs had been established, sometimes under strong pressure from leading newspaper publishers—desperate to reclaim legitimacy for their industry—over their state legislatures.¹²

2. 1925-1935

The second great critical juncture surrounded the rise of radio broadcasting in the 1920s and early 1930s; this was the subject of my dissertation and my first book.¹³

8. See OUR UNFREE PRESS, *supra* note 6, at 13.

9. Robert W. McChesney & Ben Scott, *Introduction* to UPTON SINCLAIR, *THE BRASS CHECK: A STUDY OF AMERICAN JOURNALISM* ix, xiii (University of Illinois Press 2002) (1920).

10. ROBERT M. LA FOLLETTE, *The Press and the Public*, in *THE POLITICAL PHILOSOPHY OF ROBERT M. LA FOLLETTE: AS REVEALED IN HIS SPEECHES AND WRITINGS* 345, 345 (Ellen Torelle ed., 1920).

11. McChesney & Scott, *supra* note 9, at xxvi-xxix.

12. Robert W. McChesney, *Waging the Media Battle*, http://freepress.net/action/tools/waging_battle.pdf (last visited July 7, 2007) [hereinafter McChesney, *Waging*].

13. ROBERT W. MCCHESNEY, *TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY: THE BATTLE FOR THE CONTROL OF U.S. BROADCASTING, 1928-1935*, 3 (1993) [hereinafter MCCHESNEY, *TELECOMMUNICATIONS*].

The foundation for my dissertation was provided by reading Jerome Barron and Alexander Meiklejohn in graduate school. It is hard for me to exaggerate the importance of their work upon my thinking. In the 1980s it was commonly presented that the First Amendment was an historical commandment that commercial media were protected from any government regulation, except in broadcasting, regardless of the content that these media firms produced. Barron and

It was on Jerome Barron and Alexander Meiklejohn's foundation that in my research I discovered that there was in fact a serious debate over whether the United States should adopt commercial broadcasting in the early 1930s. It was not seen by anyone at the time that corporate-owned, advertising-supported broadcasting was the natural American system.¹⁴ That came later, when the PR went into fifth gear after the system was consolidated. It certainly was not regarded as inherently democratic. (As the BBC put it at the time, the claim by capitalist broadcasters that commercial broadcasting was democratic was "outside our comprehension" and "clearly springs from a peculiarly American conception of democracy."¹⁵)

In the early 1930s citizens from across the political spectrum—probably as many Republicans as Democrats—made compelling arguments that the commercial broadcasting system produced results that were inimical to the needs of a democratic society, and that the policy making process in Washington was grotesquely corrupt, and served the interests of powerful media owners. The reformers wanted a significant nonprofit and noncommercial broadcasting sector, ideally dominant.¹⁶ And although the reformers lost—I will not keep you in suspense—they failed primarily because of the corruption of the process, not because the American people opted for commercial broadcasting. I argued that this battle over the control and structure of radio broadcasting was the last great battle over media in the United States.¹⁷ Thereafter, concerning FM radio, terrestrial television, and cable and satellite television, policymakers always assumed that corporations would rule media to maximize profits from advertising and this was the

Meiklejohn both challenged that notion of the First Amendment in a powerful manner. Meiklejohn elegantly made the case for the direct relationship of the First Amendment to self-government, destroying the notion that the First Amendment was meant to protect commercial investment in communication industries first and foremost. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1965). Barron's seminal 1967 piece in the *Harvard Law Review* built upon that and made a case for the need for a political economy of media of the First Amendment, if freedom of the press was going to be effective. Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967). Their interpretation of the First Amendment drew my attention in an important way to the relationship of policies, structures, media content and democratic governance in the Anglo-American legal tradition. There was no reason to assume a corporate-dominated, advertising-supported, profit-obsessed media system was the natural or proper press system in the United States.

14. Robert W. McChesney, *The 1997 Spry Memorial Lecture: The Mythology of Commercial Broadcasting and the Contemporary Crisis of Public Broadcasting* (Dec. 2, 1997), available at www.ratical.com/co-globalize/RMmythCB.pdf [hereinafter McChesney, 1997 Lecture].

15. *American Broadcasting*, in B.B.C. Y.B. 47 (1932).

16. McChesney, 1997 Lecture, *supra* note 14.

17. MCCHESNEY, *TELECOMMUNICATIONS*, *supra* note 13, at 3-4.

desire of the public—the confirmed “American way”—so the public played no role in the process.

I determined that the struggle over radio broadcasting qualified as a critical juncture because it met two of the three criteria I laid out. Broadcasting was a revolutionary communication technology that did not conform to existing business or regulatory patterns. In addition, there was an immediate crisis in the nature of the content of radio broadcasting. While some opponents of the status quo disliked what they regarded as the class bias of commercial radio, there was widespread, nearly universal, dislike of advertising on radio before people became accustomed to it and accepted it as a necessary evil.¹⁸ It was something everyone acknowledged at the time. One of the reasons the commercial broadcasters were so dead set against any form of noncommercial broadcasting in the early 1930s is that they were convinced no one would listen to their stations if there was quality noncommercial broadcasting available on the dial. It was these two factors that spawned the birth of the broadcast reform movement I chronicled in my book.¹⁹

It is the third factor, the need for a period of broad social turmoil, ironically enough, that doomed the reform effort. Although the 1930s is associated with radical politics and sweeping reform, the fight over radio was completed by 1934, before this was much of a factor. My hunch is that had radio developed five to ten years later, and the policy fights had fallen at the end of the 1930s, the political climate might have been much more supportive of the reform efforts. The Congress of Industrial Organizations (“CIO”), for example, was far more hostile to commercial broadcasting than the American Federation of Labor had ever been.²⁰ But by the time the CIO was formed in the late 1930s, the topic of who owned and controlled radio broadcasting was off the table. As the CIO understood well, by losing control over broadcasting to the commercial system, it made labor’s job of winning progressive political fights vastly more difficult.

III. FIVE CORE TRUTHS

Over the course of the past decade or so, a new wave of critical scholarship has continued that has examined the policymaking critical

18. *Id.* at 92-93, 101-06.

19. *Id.* at 5.

20. ROBERT W. MCCHESNEY, RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES 292 (1999) [hereinafter MCCHESNEY, RICH MEDIA].

junctures in United States communication history.²¹ Likewise, and urging this on, the media reform movement has blossomed. As a result five core truths have emerged that explain and guide progressive forces in this critical juncture. As you will see, the fingerprints of Professor Barron are all over one of them, and inspire the remainder. These five truths provide a way for communication scholars to share the significance of their work with a populace that has deep and pressing concerns about the role media play in their lives.

A. *Media Systems and Society*

First, media systems are not naturally run by profit-making concerns in the marketplace, often supported by advertising placed by other profit-making firms. Not in the United States. Not anywhere. They are created by societies, generally through explicit government policies and usually with direct or indirect subsidies.²² The type of media systems societies end up with are strongly influenced by the political economy of the nation, but it is not a mechanistic or vulgar relationship. Even in communist societies, expected to toe the Marxist-Leninist line, there was not a “default” media system.²³ It was pretty clear that control over the media would be under the thumb of the party or the state or labor federations or even the military, but it was not clear which of them or which combination of them would rule. It was not clear how the institutions would be structured, or how large the budgets would be or what the goals of the media institutions would be. Nor was it clear how many media imports from other communist nations or the non-communist world would be permitted. Different communist societies came up with differing media systems.²⁴ And that is in an authoritarian society with little public involvement in decision-making.

The matter is even clearer when we turn to democratic societies. That commercial media is not a “default” system is clear from liberal democratic political theory: A free people opt for the institution of private property because they regard it as the best way to advance their

21. For an in-depth discussion of this scholarship see MCCHESNEY, THE PROBLEM, *supra* note 4.

22. McChesney, *Waging*, *supra* note 12.

23. See Robert W. McChesney, *Thesis on Media Deregulation*, 25 MEDIA CULTURE & SOC'Y 125 (2003) [hereinafter McChesney, *Thesis*].

24. See *id.*

values.²⁵ Likewise, a free people opt for commercial media because they determine it is the best way to promote the type of press system they deem desirable.²⁶ In democratic theory, a free people may decide to have a non-capitalist economy, and likewise they may decide to have a noncommercial media system.

But, to be clear, the two matters are distinct. Even in capitalist societies, it is not a given that the entirety of the media or communication system will be run for profit. Capitalist societies, including the United States, have had elements, sometimes significant elements, of their communication systems operate outside the marketplace during their history. When telegraphy came along, or radio broadcasting nearly a century later, the United States was certainly a capitalist nation, but there were debates about whether these emerging industries should be conducted by private profit-maximizing concerns, even by people who favored capitalism otherwise.²⁷ Even today, professional journalism, perhaps the defining characteristic of our free press in our media textbooks, is explicitly a public service that does not, at its best, follow the commercial logic of the companies that house it. A core principle of professional journalism is to provide a safehouse for public service in the swamp of commercialism.²⁸

This is not simply a theoretical or philosophical argument. Nor is it an argument made only by scholars who oppose commercial media, or are as critical of commercial media as I am. In 2004 two books were published that laid out this basic argument: my *The Problem of the Media*, and Paul Starr's *The Creation of the Media*.²⁹ Starr relied upon secondary sources, but he did a masterful job nonetheless marshaling the evidence and chronicling how the United States government has "created" the media with a series of policies and subsidies since the beginning of the Republic. There was no natural "free market" default option. Starr contends creating a viable free press is one of the nation's crowning achievements,³⁰ and I agree. Starr is far from critical of the

25. Interview with Milton Friedman, Nobel Prize Winner, Commanding Heights on PBS (Oct. 1, 2000) available at http://www.pbs.org/wgbh/commandingheights/shared/miniertext/int_miltonfriedman.html.

26. MCCHESNEY, RICH MEDIA, *supra* note 20, at 6-7.

27. MCCHESNEY, THE PROBLEM, *supra* note 4, at 34-36, 38-40.

28. *Id.* at 83.

29. See MCCHESNEY, THE PROBLEM, *supra* note 4; PAUL STARR, THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS (2004). This argument is also supported by others. See, e.g., TIMOTHY E. COOK, GOVERNING WITH THE NEWS: THE NEWS MEDIA AS A POLITICAL INSTITUTION 1-3 (1998).

30. STARR, *supra* note 29, at 2-3, 14-16, 19.

way the media system has developed in the United States to the present day. He distinctly announces his support for the current corporate-controlled media system which he regards as being largely a success, in need of only minor policy tinkering that can be done with the existing toolkit.³¹ Mark Lloyd has done more research and made a compatible argument about the centrality of government policies to the formation of the communication system in his 2006 book, *Prologue to a Farce: Communication and Democracy in America*.³² In fact, I know of no evidence that contradicts this position. Yet countless communication scholars and pundits continue to gloss over it on their way to the notion that our media system is naturally commercial, the result of free-market competition, and any fundamental challenge to commercialism is anti-democratic or un-American, or both.³³

B. *The True Meaning of "Freedom of the Press"*

Second, along these lines, the First Amendment is not a piece of protectionist legislation meant to grant special privileges to investors in the communication sector to be exempt from government regulation. It does not lock us into the status quo and render all structural media reforms unconstitutional. The oft-stated "libertarian," or, more accurately, neoliberal position—the idea that the Constitution requires that capitalists be the natural rulers of all media and they could do as they pleased without government interference, regardless of the nature of the content they provided—is dubious, if not bogus. That is not the consensus opinion of the Supreme Court in its handful of important cases on the meaning of freedom of the press.³⁴ Yet the idea that freedom of the press means the government shall not interfere with media capitalists is commonly accepted among the laity as well as communication scholars as very close to the truth, if not an exact bulls-eye. A good deal of the reason for this is that freedom of speech is often

31. Paul Starr, *Democratic Theory and the History of Communications*, Paper Presented at Back to the Future: Explorations in Communication and History, A Symposium at the Annenberg School for Communication, University of Pennsylvania (Dec. 1, 2006).

32. MARK LLOYD, *PROLOGUE TO A FARCE: COMMUNICATION AND DEMOCRACY IN AMERICA* (2006) (discussing the relationship of government policies to the development of media communication).

33. *See generally, e.g.*, RICHARD A. GERSHON, *THE TRANSNATIONAL MEDIA CORPORATION: GLOBAL MESSAGES AND FREE MARKET COMPETITION* (1997) (discussing the media system and free market competition).

34. *See, e.g.*, *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375-76, 392 (1969) (upholding the FCC's "fairness doctrine" and holding that the First Amendment does not protect unlimited private censorship in broadcasting); *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

conflated with freedom of the press. Few people would condone government censorship of an individual's speech rights; by extension how can we condone the government's regulation of an individual's (or media corporation's) free press rights? Likewise, if one assumes that the market rules media, then the concern of the First Amendment is to keep the government not only off the backs of media firms, but also their audiences. As Thurgood Marshall put it in 1969: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."³⁵ Such a noble position is heartily encouraged by the large media corporations. It shifts attention away from them, and assumes their role as natural.

I could never square this conventional view with what I saw in the 1930s and my own analysis of history and of Supreme Court opinions. This point crystallized for me when I was doing my research on the 1930s broadcast reform movement. I was struck by the position of the American Civil Liberties Union ("ACLU") that commercial broadcasting, by its very nature, might violate the First Amendment. In essence, the ACLU argued that the profit motive in broadcasting was inconsistent with the First Amendment, which was Alexander Meiklejohn's position.³⁶ The ACLU adjusted its position once the commercial system became inviolate politically by the late 1930s, but its initial opposition to the emerging status quo was driven by a very different notion of the First Amendment than I was immersed in as a student.³⁷ During my research, I came across the work of Thomas Emerson, long considered a leading expert on the First Amendment in his stead at Yale Law School. Emerson made it clear that in the 1930s, nothing in the Constitution authorized commercial broadcasting or prevented the government from establishing a completely nonprofit radio and television system.³⁸ Indeed, all of the Supreme Court decisions on government regulation of broadcasting and cable to date have made the First Amendment first and foremost a right of all Americans—rich or

35. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

36. Malcolm Pitman Sharp, *Foreword* to MEIKLEJOHN, *supra* note 13, at xv-xvii.

37. Robert W. McChesney, *Constant Retreat: The American Civil Liberties Union and the Debate Over the Meaning of Free Speech for Radio Broadcasting in the 1930s*, in 26 *FREE SPEECH YEARBOOK* 40-59 (Stephen A. Smith ed., 1987).

38. *See generally* THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* (1966) (analyzing the values underlying the First Amendment).

poor—more than a private privilege for the handful of Americans who can afford to purchase successful commercial media.³⁹

The standard common sense interpretation of freedom of the press acknowledged that broadcasting and cable were different from everything else, due to spectrum scarcity and government licensing. There the First Amendment belonged to the public, whose interests are represented by the government. But once spectrum scarcity ends, and monopoly licensing ends, those areas will revert back to the unregulated media realm enjoyed by newspapers. Then freedom of the press will belong, as Liebling famously put it, to those that own them.⁴⁰ To the media firms, we live happily ever after.

But that did not make sense to me either. I never got the sense that that was what the First Amendment intended for freedom of the press, or that that was how it was universally interpreted by the Supreme Court. During the founding period, when freedom of the press was being discussed, often led by Jefferson and Madison, there is no sense that they regarded the press as an inherently market-driven institution, where the right to make profit was sacrosanct.⁴¹ The Founders provided massive printing and postal subsidies to spawn newspapers the market would have never countenanced, and the press was seen not as a business enterprise but as a quasi-formal and indispensable branch of government, the fourth estate.⁴² Ed Baker has argued persuasively that the First Amendment permits the government to play an active role in creating media.⁴³

Moreover, when the Supreme Court has actually pondered what freedom of the press, the industrial production of journalism, meant in the First Amendment, it has not endorsed the neoliberal model of profits über alles.⁴⁴ In some of the most important of those cases the opinions suggest that freedom of the press is not an individual right to do with as they please, primarily to make money. To the contrary, the matter is far

39. See, e.g., *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 112-13 (1973); *Red Lion Broad. Co.*, 395 U.S. at 389-90.

40. A.J. Liebling, *The Wayward Press: Do You Belong in Journalism?*, THE NEW YORKER, May 14, 1960, at 105, 109 ("Freedom of the press is guaranteed only to those who own one.").

41. See LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 45-50 (1991).

42. See *id.* at 233-34, 260-61.

43. Whenever I write about freedom of the press issues and the Constitution I find myself invoking the name Ed Baker, because his work provides the foundation on which I stand. His latest book is an instant classic: C. EDWIN BAKER, MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS (2007).

44. See, e.g., *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971).

more central: freedom of the press is in the Constitution to make self-government possible. Consider this from Hugo Black's magnificent majority opinion in the 1945 *Associated Press v. United States* case:

It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.⁴⁵

Or consider what Black wrote twenty-six years later in the Pentagon Papers (*New York Times Co. v. United States*) case:

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.⁴⁶

Or this from Justice Potter Stewart in the same case:

In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an

45. *Associated Press*, 326 U.S. at 20.

46. *New York Times Co.*, 403 U.S. at 717 (Black, J., concurring).

informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.⁴⁷

These statements by Black and Stewart about the importance of the press for monitoring the government's proclivity for foreign wars are especially striking because this was a central concern of James Madison, who thought unchecked militarism was probably the greatest threat to the republic.⁴⁸

In short, the spirit in several of these opinions is that the state has not only the right, but the duty, to see that a viable press system exists, for if such a media system does not exist the entire constitutional project will fail. If the existing press system is failing, it is imperative that the state create a system that will meet the constitutionally mandated requirements. At any rate, these opinions hardly suggest the First Amendment is meant to provide a constitutional blank check to corporate media to do as they please, regardless of the implications for self-government. At the same time, this is nothing if not a complex matter. The problem of establishing a press system, providing direct and indirect subsidies, yet preventing censorship and state domination defies simple solution. And there may be no ideal solution, only a range of solutions where some are better than others.

So there remains debate on the First Amendment, and my position is one of many. Those who tend to disagree with my position tend to point to *Miami Herald Publishing Co. v. Tornillo*.⁴⁹ In this case, the Supreme Court ruled that the government could not regulate the press as it did broadcasting, and to some this is a clear indication of the Court's "media are innately capitalist" orientation. I agree this is evidence on the other side, at least for the view that spectrum scarcity is the primary justification for the different treatment of broadcasting from other media. But I hasten to point out, as Ed Baker says,⁵⁰ that in that case the Supreme Court conflated the interests of editors and owners, making them identical. It made an eloquent argument for why the state could not censor editors, and at that level I quite agree with the Court's decision.

47. *Id.* at 728 (Stewart, J., concurring).

48. For examples of Madison's concerns, as well as a detailed presentation of the rich anti-militarist and anti-imperialist tradition in American politics, see *AGAINST THE BEAST: A DOCUMENTARY HISTORY OF AMERICAN OPPOSITION TO EMPIRE* (John Nichols ed., 2004).

49. 418 U.S. 241 (1974).

50. See C. EDWIN BAKER, *MEDIA, MARKETS, AND DEMOCRACY* 171-72 (2004).

But it did not really take up the issue of what happens if the interests of owners and editors are opposed, as they often are, assuming editors are not fired. What does that mean in monopolistic or semi-monopolistic markets where it is impossible for new owners to emerge to hire new editors? What happens to freedom of the press when the right to launch effective new media is non-existent in the market or effectively limited to billionaires, and the investors have no more interest in journalism than they do in insurance or producing undergarments? All they care about is profit. That framing, the actual record in the United States, the real world in which we live and die, remains to be discussed by the Supreme Court.

In short, how precisely the Supreme Court will come to interpret freedom of the press in the First Amendment in the digital era is up in the air. I suspect what happens with scholarship, and, even more important, with citizen activism, will go a long way toward influencing the outcome. If history is any guide, the Court's interpretation of the First Amendment will be flexible enough to accommodate the gist of what emerges from the critical juncture. For present purposes, my point is simply that there is nothing in the Constitution itself, or Supreme Court decisions to date, that mandates a neoliberal, or even capitalist, course.

C. Subsidies

Third, the media and communication systems in the United States have been the recipients of enormous direct and indirect subsidies, arguably as great as or greater than any other industry in our economy.⁵¹ When communication firms claim they work in free markets, it should provoke more howls than a Jerry Lewis film festival in France. All commercial enterprises benefit by government spending, and hence get indirect subsidies. Businesses use the roads, take advantage of a workforce educated in public schools, etc. But the subsidies provided to media and communication firms go far beyond that. Everyone thinks of the value of the monopoly licenses that are given for free to commercial radio and TV stations or to spectrum for satellite television, or monopoly cable TV and telephone franchises. When the value of the broadcast spectrum has been estimated it is put in the billions of dollars

51. MCCHESNEY, RICH MEDIA, *supra* note 20, at 142. *See also* Donald L. Barlett & James B. Steele, *Special Report: Corporate Welfare, a System Exposed*, TIME, Nov. 9, 1998, at 36-54 (investigating the system of "corporate welfare" in the American economy).

historically.⁵² Lord knows the precise value of the indirect public subsidy created by AT&T's telephone monopoly over the years. Add to that the still enormous postal subsidies for magazines, state and local subsidies for film studios, and the amount of money the government spends on advertising or purchasing media products like books for schools. The government also goes to considerable expense to train people to read, and hence be in the market for media products. Or consider the billions spent on TV political advertising every election cycle; policies effectively dictate that funds given to political campaigns end up in the pockets of those firms given monopoly licenses to the airwaves. Perhaps the largest subsidy of them all is copyright, a government created and enforced monopoly right meant to eliminate the possibility of competitive markets.⁵³ Accountants do not keep track of the value copyright creates for its holders, but lawsuits over the spoils suggest it is staggering. And there are many additional subsidies beyond these. No one has done any of this math systematically yet, but in combination these are subsidies of private firms to the tune of arguably hundreds of billions of dollars annually.

The term "government subsidies" is increasingly held in disrepute, so let me be clear about this. I think subsidies can be good, and I think that in principle they are necessary. It is in our interests that the extent and role of subsidies in our media system be recognized and appreciated. Copyright, for example, is a necessary evil, a "tax on knowledge" as the Founders understood it when it was put in the Constitution.⁵⁴ Our Founders regarded subsidies, in effect, as the price of civilization, or at least a viable republic. I know we have had them from the beginning of the republic and as Paul Starr concludes, they have been essential to the job of creating a viable free press.⁵⁵ Many, if not most, of our major communication revolutions, from radio to satellite communication to the Internet, were spawned as a result of massive government subsidies.

Even if one wanted a truly "free market" media system, without direct or indirect subsidies, it would be awfully difficult, if not impossible, to construct. And, ironically, to implement and maintain anything remotely close to a truly competitive market would require extensive government coordination, probably far beyond what currently

52. See, e.g., Harold Hallikainen, *Spectrum for Sale or Rent*, 5 INT'L J. COMM. L. & POL'Y 5 (2000), http://www.hallikainen.org/ijclp/ijclp_webdoc_6_5_2000.pdf.

53. See Copyright Act of 1976, 17 U.S.C. § 106 (2000).

54. See Siva Vaidhyanathan, *Why Thomas Jefferson Would Love Napster* (July 3, 2001), http://stayfreemagazine.org/ml/readings/siva_jefferson.pdf.

55. STARR, *supra* note 29, at 89-90.

exists. It would never happen naturally. But this is a discussion best left to the parlor room at the Ayn Rand Institute because the last thing the dominant commercial interests want is their subsidies removed, and, as far as I can tell, when the rubber hits the road all the “free market” think tanks are dedicated to promoting corporate domination in concentrated markets of the heavily subsidized communication system, rather than ending the heavily subsidized communication system. (One need only look at how the self-proclaimed pro-free market editorial page of the *Wall Street Journal* carries water for AT&T and the big government-created telephone and cable powerhouses to see how the notion of free markets in the realm of media and telecommunication is mostly a rhetorical ploy to protect entrenched monopolistic power.⁵⁶)

D. *The Policymaking Process*

So the question is not whether we will have subsidies and policies, but, rather, what will be the subsidies and policies and what institutions will they support and what values will they encourage and promote? The other side of the coin is that some policies and institutions and values will not be supported. This takes us to the heart of the matter, and to our fourth point of truth: the importance not just of policies, but more specifically of the policymaking process. When we talk about media, what most of us are concerned with, ultimately, is the content that the media system produces and what effect that has upon our lives. But the content is shaped to a significant extent by the institutional structures of media systems, which is why political theorists devote so much time to studying that issue.⁵⁷ And the institutional structures are determined by policies and subsidies which are in turn determined by the policymaking process. So that takes us to the nucleus of the media atom. This has been a largely overlooked area in communication, but can be no longer.

Allow me to refer to economics again for an analogy. As a student in the 1970s I had a professor who argued that when judging whether a nation was independent and advanced economically—whether it was “developed”—the key factor was not the level of GDP, the amount of consumer goods produced and consumed. He also said that the key was not the size of the capital goods sector, those industries like steel and

56. For a recent example, see Opinion, *Net Discrimination*, WALL ST. J., Jan. 2, 2007, at A22.

57. See generally STARR, *supra* note 29 (discussing the constitutive choices made by policymakers in shaping the communications media); C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311, 368-69 (1997) (discussing how varied media structures influence consumer preferences and the content of the media).

glass that provided the materials needed to produce consumer goods. He said the key to evaluating an economy's vitality was the size and strength of its sector that produced capital goods, meaning, especially, the machine tools sector. If a nation was strong there, it could adapt to changing circumstances and control its fate. This was striking to me and my fellow students, because while we knew about consumer goods and we knew all about the steel industry, we had barely considered the seemingly minuscule industry of manufacturing the tools that made capital goods. That, he said, was the key. I do not know whether this theory is widely accepted or whether it is dismissed as hooey among economists today, but it provides a nice manner to think about media. Consumer goods are the content of the media people consume with the effects that concern us. Capital goods are the structures and policies that produce the content. And the machine tool sector of media is the policymaking process that produces the policies and subsidies that create the media structures. That is where one must go to get to the root of the problem. If you understand that, it is a short path to understanding how the system will work, and how it can be changed.

When one examines the policymaking process, one can see what the real options are, and why a system later regarded as "natural" got put in place as it did. It is becoming a new area of intense research in communication history. In particular, for reasons already made clear, the research places particular emphasis upon critical junctures, as those are the moments in policymaking history when the range of debate is relatively broad and society can go in any number of directions with its media policies and subsidies.

E. Secrecy and Corruption

These first four points lead directly to opening up new research areas for scholars; the fifth and final truth is the one that results from this research and fans the flames of citizen activism. This final truth is simply that the policymaking process in the United States has grown increasingly secretive and corrupt as media and communication have become ever-increasingly lucrative industries. The policies and subsidies are made in the public's name, but without the public's informed consent. Much of my research has chronicled and analyzed this corruption.⁵⁸ In my talks and writings I like to use the metaphor of the

58. See, e.g., MCCHESNEY, *Waging*, *supra* note 12; MCCHESNEY, *THE PROBLEM*, *supra* note 4, at 11-12.

famous Havana patio scene in *The Godfather II*,⁵⁹ where Michael Corleone, Hyman Roth and the American gangsters are dividing up Cuba between themselves during the dictator Batista's era. After divvying up the spoils, Hyman Roth states how great it is to be in Cuba, with a friendly government that supports "private enterprise." That is pretty much how communication policymaking has been conducted in the United States. Monopoly broadcast licenses, copyright extensions, tax subsidies, the works, are doled out all the time but the public has no idea what is going on. Extremely powerful lobbyists battle it out with each other—like Michael Corleone and Hyman Roth—to get cushy deals from the FCC, whose members and top staffers almost inevitably move to private industry to cash in after their stint in "public service."⁶⁰ More than anything, the FCC has been dedicated to making the dominant firms bigger and more profitable above all else. Congress, too, is under the thumb of big money. The one thing the big firms—just like Roth and Corleone—all agree upon is that it is their system and the public has no role to play in the policymaking process. And because the news media almost never cover this story in the general news, ninety-nine percent of the public has no idea what is going on. If anything, they are fed a plateful of free market hokum, extolling an industry mandated by the Constitution that "gives the people what they want."

There is little challenge to this assessment of the corrupt and anti-democratic nature of the policymaking process. The empirical evidence is devastating: In the first six months of 2006 alone, communication and technology firms spent \$172 million on lobbying in Washington, more than any other sector or group.⁶¹ In view of what is at stake in terms of government subsidies and licenses, this is not a surprise. They spend this amount because, like Roth and Corleone, they are fighting with each other for the biggest slice of the pie, though, with the emergence of the media reform movement, some portion of that is now taking into consideration Leona Helmsley's little people. Even those who benefit by the policymaking system concede that it has been an insiders game with a bankroll in the hundreds of millions or billions the ante for admission. In the past, it was overlooked, because, despite the corruption, the system seemed to be working. The policies seemed marginal in scope

59. See, e.g., Robert W. McChesney, USC Annenberg Colloquium: The Politics of Media, Technology & Culture (Feb. 15, 2005) (transcript available at http://www.learcenter.org/images/event_uploads/BollierMcChesney.pdf); MCCHESNEY, THE PROBLEM, *supra* note 4, at 48.

60. See, e.g., *Former FCC Chairman Kennard to Join Carlyle*, WALL ST. J., May 3, 2001, at C16.

61. Amy Schatz, *Industry Braces for Net-Neutrality Fallout*, WALL ST. J., Jan. 2, 2007, at A3.

and technocratic, and it was no big deal. (Benjamin Compaine has been one of the few defenders of the policymaking status quo. He argues that the policymaking process is as democratic as it could possibly be, because the various large lobbies duking it out behind closed doors prevent excessive corruption from resulting.⁶²) But now that the system is breaking up it is becoming a very big deal. Policymaking is much like the man behind the curtain in *The Wizard of Oz*.⁶³ The corporate media lobbies do not want people to look there because when people do, they see that the entire rationale for our media system rests upon a fairy tale about free markets.

This fairy tale of free markets is the fig leaf, if you will pardon the mixed metaphor, that protects the corporate media system from the public review it deserves. I recall an exchange I had with one Jack Fuller, a top executive of the Tribune Company, at a conference on the future of family-owned newspapers at the University of Illinois in 2002. Fuller, the president of the Tribune's publishing subsidiary, was presented as the thinking person's media boss, because he has written some books.⁶⁴ Fuller thundered to the audience about how offensive he found it that he even had to travel to Washington D.C., and countenance the right of the government to have any say whatsoever over the affairs of his company. He said he found that to be a dire attack on the First Amendment. I asked Mr. Fuller about the many extremely valuable monopoly radio and TV licenses that the Tribune Company accepted from the government at no charge, and how that affected him as he was working up his anger over government meddling in the affairs of the Tribune. Fuller paused and explained that the Tribune Company had no interest in broadcasting but had been asked by the government to take the valuable monopoly licenses. We were left to assume that nobody else wanted the opportunity to have a multi-million-dollar industry handed to them at no charge, and the Tribune Company was just being a good Samaritan, helping out a government in distress.

In fact, Fuller had it exactly wrong. Back in the 1920s the Tribune Company sent its top lawyer, Louis Caldwell, to Washington D.C. to work for the government's newly created Federal Radio Commission, specifically to allocate the radio stations to commercial interests.⁶⁵ At the

62. Benjamin M. Compaine, *The Myths of Encroaching Global Media Ownership*, OPENDEMOCRACY 1, 5 (Nov. 6, 2001), <http://www.opendemocracy.net/content/articles/PDF/87.pdf>.

63. L. FRANK BAUM, *THE WONDERFUL WIZARD OF OZ* (Random House, Inc. 2003).

64. See, e.g., JACK FULLER, *FRAGMENTS* (1984); JACK FULLER, *NEWS VALUES: IDEAS FOR AN INFORMATION AGE* (1996).

65. Robert W. McChesney, *Free Speech and Democracy! Louis G. Caldwell, the American*

time, Caldwell argued that the government needed to have draconian power over selecting who was allowed to have a monopoly radio broadcasting license, and, conversely, who was not. Caldwell argued that determining the rulers of the airwaves was a government job of such magnitude it could not be trusted to as democratic a body as Congress, which might be unduly influenced by people without sufficient expertise to make the right call.⁶⁶ This expertise was to be found, apparently, exclusively in the hands of engineers and lawyers working for the commercial broadcasting industry. Coincidentally, as a result of Caldwell's labor, the Tribune Company's WGN was awarded, at no charge, one of the handful of clear channel signals, worth, even then, countless millions of dollars.⁶⁷ Once the commercial system was in place, and the lucrative monopoly licenses had been doled out in complete secrecy, Caldwell did a 180 degree turn, and argued that any regulation of commercial broadcasting violated the First Amendment.⁶⁸ In effect, the public airwaves should be privatized and turned over to those authorized by Louis Caldwell and his cronies. Jack Fuller is carrying on in Caldwell's tradition.⁶⁹

Once the importance of the policymaking process is understood, and the corruption of the process is grasped, it changes our understanding of communication dramatically. Consider the term "deregulation," which is used frequently by journalists and scholars to describe when big media firms look to see media ownership rules relaxed or eliminated. If we had a free market media system, this use of the term would be accurate, in the sense that market forces would play a larger role than the state in setting the terms of competition. But in broadcasting, cable, or satellite communication, the term is purely propagandistic. It is meant to imply a competitive market outcome because that is seen as desirable, when in fact it leads to far less market competition.⁷⁰ So when radio ownership rules were "deregulated" in the 1996 Telecommunications Act,⁷¹ that did not mean that lots of new

Bar Association and the Debate over the Free Speech Implications of Broadcast Regulation, 1928-1938, 35 AM. J. LEGAL HIST. 351, 357-58 (1991) [hereinafter McChesney, *Free Speech*].

66. *Id.* at 369-70.

67. *Id.* at 366; Geoffrey L. Thomas, Note, *The Listener's Right to Hear in Broadcasting*, 22 STAN. L. REV. 863, 884 n.120 (1970).

68. McChesney, *Free Speech*, *supra* note 65, at 352.

69. See *supra* notes 65-68 and accompanying text.

70. See James B. Speta, *Deregulating Telecommunications in Internet Time*, 61 WASH. & LEE L. REV. 1063, 1065 (2004).

71. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.).

small firms could enter radio broadcasting and compete with the giants without having to get the FCC's permission. It meant, instead, that a small number of firms were permitted to gobble up even more monopoly radio licenses from the government and establish vastly greater market power.⁷² The FCC was doing just as much regulation, only now it was simply regulating on behalf of the big guys. Deregulation in media policymaking means, in reality, re-regulation purely to serve powerful corporate interests with no concern for the general public whatsoever. The firms that dominate our media and communications systems seem to be there as much because they are spectacularly successful in lobbying as they have earned the confidence of the public.

Why these truths came together and had such power by the early 2000s was that the signs of being in the beginning stages of a critical juncture were all around us. If policymaking was about to move from the margins to the center as a new communication system was to be determined, these five truths, to the extent they were understood, were incendiary and potentially revolutionary. And we have seen, in the past five years, the striking development of the media reform movement. People are organizing to demand local media ownership, an open and accessible Internet, viable public media, limits of the commercial carpet-bombing of childhood and society at large, policies to encourage viable journalism; the list goes on and on. In 2007, Eric Klinenberg's *Fighting for Air: The Battle to Control America's Media* was published. It was the first scholarly examination of this burgeoning movement that grasped its historical significance.⁷³ It will not be the last.

The experience of Free Press, the group I co-founded, provides the most compelling evidence of the movement's growth. In the four years since its creation, Free Press has grown to some thirty staff members, has an annual budget of around \$3 million, and is approaching 400,000 members.⁷⁴ Granted, Free Press dwarfs nearly all the other groups in the field, but its growth is a testament to the changing times in which we live. The dynamism of the media reform movement was apparent at the third National Conference for Media Reform, organized by Free Press and held in Memphis from January 12-14, 2007. Registration had to be suspended because of the flush of demand to attend the conference. As it was, more than 3,000 people attended from all fifty states. If I had

72. See Speta, *supra* note 70, at 1121.

73. ERIC KLINENBERG, *FIGHTING FOR AIR: THE BATTLE TO CONTROL AMERICA'S MEDIA* (2007).

74. As the co-founder and because of my public visibility, I often receive credit for the work of the extraordinary Free Press staff, which is entirely misplaced.

speculated that this would take place merely five years ago, I would have been dismissed as a wild-eyed professor. Had I made this prediction one or two decades ago, and persisted after the laughter faded, it would have been grounds for insanity. There is something happening here.

IV. CONCLUSION

Finally, to circle back to my point of departure, invariably what occurs in a critical juncture will be reviewed by the Supreme Court, and its constitutionality will be measured. What the First Amendment means for freedom of the press is likely to be determined in the coming generation, and scholars, legal and communication, need to prepare for it beginning immediately. There has been tremendous pressure to make the First Amendment into a piece of protective legislation for media corporations and commercial values, although the Courts have not gone all the way in that direction. As cases work their way through the system in the coming generation, we need to have hard empirical research as well as thoughtful treatises on the relationship of free press to self-governance and what this means for the First Amendment. It is still to be determined. The important point is that this is not a legalistic matter to be left to the lawyers; it is the most fundamental of policies that requires the direct and indirect participation of communication scholars and engaged citizens. The simplistic interpretation of the First Amendment proffered by self-interest communication corporations and swallowed in whole by too many communication scholars at present is insufficient to the task at hand. Jerome Barron's critical approach is having its moment in the sun. His question is becoming everyone's question.