THE AMERICAN PATTERN OF FREEDOM OF THE PRESS

A Model to Follow?

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INTRODUCTION

We are living in an age of constitutional transformation. Newly emerging and newly recreated countries in Eastern Europe and the former Soviet Union are actively engaged in creating new constitutions, and much of the transformation of South Africa has focused on competing versions of what the constitution of a new South Africa will look like.

American constitutionalists have been prominent players in this process of constitution-making. One explanation for this is that the Constitution of the United States has survived for over two hundred years, and by many measures has been a considerable success. Consequently, the American Constitution may serve as a model for others, especially those seeking the goals of governmental stability and individual liberty that seem to have been comparatively well-served for much of the Constitution's existence. Another explanation might be that there are a large number of American constitutionalists, and thus there is a ready source of advice to those seeking guidance in constitutional drafting. And given that the United States has recently been as successful in exporting its culture as it has been unsuccessful in exporting its steel and automobiles, it may not be surprising that the Constitution itself, one of the most visible of American cultural artifacts, is the subject of considerable exportation.

Although there is much of value that other countries can learn from the American constitutional experience, there exists a risk that constitutional exportation will be characterized by the worst of colonialism, with Americans in general and American constitutionalists in particular seeking to persuade an enlightened world of the unalloyed benefits of the American approach. All too often it appears that Americans see in the new wave of constitution-making little more than a new series of opportunities to spread the gospel of constitutionalism American style.

There are two antidotes for the disease of over-willingness to transplant the American constitution into other environments. One is the tendency of some countries to start anew, and to create constitutions heavily dependent on the pertinent country's own traditions. Thus the Canadian Charter of Rights and Freedoms, despite the geographic proximity, is in style, in substance, and in judicial interpretation quite different from the Constitution of its neighbor to the immediate south. And all of the proposals for a new South African constitution, for all their differences, are uniquely focused on eliminating various aspects of the legacy of apartheid.

Another antidote is for non-Americans to look closely and critically at American constitutionalism, using their cultural distance as a way of avoiding an attitude so celebratory that it stifles careful thought. As the making of new constitutions throughout the world encourages the academic enterprise of comparative constitutionalism in general, one desirable offshoot is facilitating having non-Americans provide perspectives on the American Constitution that it is difficult for Americans themselves to see.

The following discussion paper is an ideal example of this approach. This paper was written by Santiago Sanchez Gonzalez, Professor of Law at the University of Madrid and former Dean of the Faculty of Law at that university, while he was in residence as a Fellow of the Shorenstein Barone Center. He focuses here on freedom of the press in a decidedly and admirably philosophical style, questioning the applicability to the modern economic, political, and technological climate of the American Constitution's preoccupation with negative liberties and the importance of keeping the government at bay. To Professor Sanchez Gonzalez, however, freedom of the press is as much about freedom *to* as about freedom *from*, and as much about fostering the conditions for democratic deliberation as about the libertarian goal of keeping the government away from the private press. These goals often clash, however, and his arguments for preferring the former goal to the latter in cases of conflict is decidedly at odds with the traditional American approach. By considering Sanchez Gonzalez's perspective, Americans may see parts of their Constitution that have heretofore escaped them, and others may see that a sensitive reading of the American constitutional experience shows that there are some aspects to be questioned just as there are so many to be admired.

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The United States Constitution is very old, and so too is the Bill of Rights. Yet this assertion is not a mere truism; it means that the Constitution and the first ten amendments are documents that were devised to meet the requirements of founding a polity under the circumstances of the time. Perhaps they were "intended to endure for ages to come,"[1] but . . . "time has upset many fighting faiths."[2]

After two hundred years there has been a profound transformation in the American society, and some of the changes have been constitutionally reflected in new amendments. But the main political structure and the ideological foundation remain basically the same, even if we take into account the flesh added to those bones by new laws and Supreme Court rulings.

The United States adopted a liberal constitution that is still in force. In doing so, it set up a political organization, the purpose of which was to secure life, liberty and the pursuit of happiness. From this point of departure, there was in the minds of the Founding Fathers a clear differentiation between two spheres: the political one, occupied by the government, that should be visible, limited and under control; and the private one, the world of family, economic relations, and society, the main character of which was the individual in search of welfare and self-realization. Of the two spheres, the public was thought to be subordinate to the private, a relationship reflected in the Bill of Rights. In other words, the prevailing factor in the dichotomy was the private citizen, who unless otherwise legally stated enjoyed unlimited freedom. Conversely, the presumption in the political sphere was against power, so achieving minimal intervention in the affairs of society.

Against that background, the recognition of some rights—very few originally—represented the erection of a chain of obstacles to every sort of government's intervention. Liberties were above all negative freedoms, signifying the absence of state coercion and guarding against undue restrictions on choice or action. These liberties amounted to a *social* mechanism for the control of political power because they were thought to be reserved for the use of private citizens. This was a mechanism of control complementary to the device of the separation of powers operating *within* the institutions of political power. At bottom, the idea behind both was that, though there existed the need for government in any human community, the natural tendency of power to corrupt had to be checked.

The liberties thus sanctioned in the American Bill of Rights, in the French Declaration of 1789, and in the western constitutions until the first quarter of the twentieth century came to be known under the global name of negative freedoms,[3] and/or individual rights, meaning that public powers, or their agencies, were prohibited from interfering with the protected rights. The governing principle was that people should be left alone, and provided with only the necessary conditions to facilitate their enjoyment of property, their carrying out of business, and their pursuit of happiness.

The main theoretical source for this perspective was John Locke's *Second Treatise on Government*. To Locke, life, liberty and property were rights *antecedent* to any kind of political arrangement. The enjoyment of these rights could only be limited when they intruded on other citizens' rights. "Liberty," according to section four of the French Declaration of Rights, "consists in the power to do all that does no harm to others." The political order, or the government, had as its main function to establish and enforce the rules necessary for the peaceful exercise of those rights, and obviously, could not infringe upon them.

Freedom of speech and of the press, like the other liberal liberties—freedom of thought, of trade, conscience, inviolability of domicile, freedom to circulate were thus conceived of as *negative freedoms*.[4] In the field of expression the freedom to speak out and publish meant there could be no prior restraint or censorship on any publication. This conception of freedom of the press was the logical reaction to the historical fact that governments in England and in the colonies of the Crown of England tended to suppress or restrict criticism of the state and of political leaders. Under a negative conception of

*Any reference to the press should henceforth be interpreted as referring to the mass media unless otherwise stated, and conversely.

freedom of speech and press, citizens and the press should be free to voice their opinions about public affairs without any previous official consent, and without fearing, just because of their expression, any subsequent punishment. Freedom of speech and of the press were thus recognized as an *individual right*, i.e., as a personal sphere of power, the use of which depended on that person's will, and upon which political power should not impinge.

Yet, in spite of the status acquired by the freedom of the press throughout the nineteenth century and the first quarter of the twentieth, freedom of the press cases brought to the state courts were settled according to the common law rule that "determined the value of expression by measuring the public benefit of that expression."[5] So, the pragmatic needs of government outweighed the advanced theoretical superiority of the right of free press. Judges were afforded great leeway to assess these sorts of claims, because freedom of the press did not enjoy a constitutionally superior status, due to the inapplicability of the amendments to the states. It was not until 1925, in *Gitlow v. New York*, that the U.S. Supreme Court stated:

> For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement from the Congress—are among the fundamental **personal** rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.[6]

Therefore, the free speech clause of the First Amendment began to be enforced at the federal, state and local levels of government only very recently, and by means of the incorporation doctrine. Six years later, in *Near v. Minnesota*,[7] the Court applied the incorporation doctrine to the free press clause as well.

II

Two centuries have elapsed since the First Amendment was enacted. In that time there have been profound changes in every sphere of American life. It is not simply that both the population and the number of states have multiplied; consider the technological changes that have revolutionized communications, the economic development that has brought about an urban and consumer society, the United States' central position in the world, and the globalization of news. Yet for all these changes the First Amendment is the same, as though the lonely pamphleteer and the "street corner speaker" were still the main characters in the drama; as if there existed only the world of thirteen states and the contrast to pre-revolutionary England.

To be truthful, the modern mass media are not reminiscent at all of the traditional press; first of all, the press today amounts to much more than the audacious reporter and the local newspaper; new instruments such as radio and television have altered the world of communication, and play as important a role as the traditional printed press; many citizens make political choices based primarily on the information they receive from broadcasting. Second, the task of setting up a newspaper with some chance to survive and to reach a considerable sector of some audience is not simply, as it was in the past, a question of personal endeavour and some economic resources. Publishing requires the combined efforts of many professionals and a great deal of money. That explains, partly, the emergence of corporate news media and the petering out of many local and national papers. The functioning of the market as it operates imposes material conditions for developing press activities that only the most wealthy can afford. To become part of a diverse profit-maximizing conglomerate is likely not the wish of the autonomous editor, but it comes out of the need to survive. The dimension and composition of the audiences that can be reached have also undergone a substantial transformation. As to the political processes and actors, the impact of the mass media bears no comparison with the past. To summarize, the press is not the same as it was at the turn of the eighteenth century.

People have seen changes in the structure and ownership of the media, and in the role they play in the political process; and their confidence in the ability of the press to provide objective information of every event of public interest has diminished. Somehow there is a perception that the press is now too close to political power and it is itself a power, and this has generated a a degree of distrust on the part of the public.

Now, if this is true, and the First Amendment has remained the same, what policies have the legislative and the executive branches of government followed in order to meet the new challenges? How has the Supreme Court interpreted the free press clause? Has it given it a distinctive meaning, one that is different from the free speech provision? Has the Supreme Court

developed an updated conception of the freedom of the press, one that takes into account the fact of the power acquired by the media? Has the Court kept abreast of the First Amendment implications of the communications revolution?

In this context, one must raise the fact that some of the limitations on free speech come today not from government but, paradoxically enough, from the use of private economic resources to buy and manage whole information industries. The challenge ahead is twofold. The temptation for political powers to abridge the freedom to speak has not disappeared. But in addition, there may be a need for legal protection from the private accumulation of power that has apparently begun to threaten the central root of speech and discussion: diversity, the essence of a healthy social body.

Summarizing, then, it would seem appropriate to address the following questions:

1. Is there a definite model of free press in the constitutional body of U.S. law? If so, what is it? Does it serve the purpose of protecting the press from government's interference under present political, economic and technological circumstances?.
2. Although some political liberal tenets, particularly the need to restrain power and to hold it accountable to the citizens, should always be present in any governmental design, the progressive adding of the democratic ingredient into the vessel of the U.S. political system has transformed its original structure. In view of this, and of the more active involvement of the press in the political processes, has not a legal amendment of the role of the press become necessary, so that it can make possible the proper working of the remodelled political system?
3. What about the private corporate takeovers of mass media and their consequences and developments for the free press? What about the increasing control of the means of information in a few hands, and its consequences for an ideologically plural society? On behalf of the fulfillment of political functions, now more required than ever because representative democracy is already a reality, should the government intervene to preserve the press and its variety from the private restraints? Or are there alternative solutions?

III

There are two ways of looking at freedom of the press: the constitutional, which is the traditional and old one, and the democratic, which is very recent and implies a radical change in the conception of the press functions. The first arose as the reaction against the oppressive, arbitrary and absolutist European monarchies, and focused on the limitation of political power. The democratic view is, instead, a product of the second half of the present century, and is centered primarily on the information the mass media should provide citizens, so that they become aware of major political issues and can make rational decisions. The constitutional may be as well called "liberal" because it aims at a free government and conceives of a free press as a means of political control that, together with other institutional mechanisms, serves to check governmental power. The democratic view imposes an affirmative duty on the government to facilitate the exchange of as much information and as many views as possible, and adds to the watchdog function of the press other tasks such as illuminating the public or contributing largely to the development of the electoral process. Finally, and more importantly, the liberal-constitutional vantage is based on one assumption: the separation of the political (public) sphere from the social (economic-private) one; accordingly, the changes that take place in the latter are not taken into account. Namely, by recognizing that all have the right to free speech and to a free press, the Constitution forgets about the differences in social status, knowledge, and above all economic strength among individuals and groups. By contrast, the acceptance of the democratic perspective requires an acknowledgement that politics and economics, that the public and the private, are not autonomous but interrelated spheres. Examples of the mutual interrelationship are, on one side, the intervention of the political power in the regulation of the economy and, on the other extreme, the relevant role played in the political sphere by associations and institutions born and developed in the private world, like the political parties and the press itself.[8]

Of these two free speech patterns, there is no doubt that the Founding Fathers chose the constitutional-liberal one, the so-called libertarian model; i.e., the press must be free from any government control or influence.

In order to obtain a clear idea of how deeply rooted the feeling of distrust in any governmental intervention was and how it should be

avoided by all possible means, it is expedient to recall here the precedents that led to the adoption of the First Amendment.

The key expression that best illuminates the original attitude of some of the prominent figures at the time is "omnis determinatio est negatio", i.e., all regulation restricts. Effectively there existed at the beginning a strong opposition to even annexing a Bill of Rights to the constitutional text. Alexander Hamilton wrote in this respect:

> I go further, and affirm that bill of rights are not only unnecessary in the proposed constitution, but would be even dangerous. They would contain various exceptions to powers that are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things should not be done which there is no power to do? *Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?* I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power.[9]

The argument may seem to a certain extent deficient but it is not wholly unsound, and was initially shared by Madison. Later he changed his mind and came to support a bill of rights.

Apart from that, the study of the origins of the First Amendment has revealed that free speech and a free press were referred to as natural rights, i.e., as inherent rights of men as human beings irrespective of the existence or the absence of a political commonwealth. That is at least how the draft of the would-be First Amendment defined them.[10] The importance of this conditioning for future interpretations cannot be dismissed, for as Justice Jackson asserted in 1943: "The very purpose of the Bill of Rights was to place certain subjects beyond the reach of majorities . . . One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights, may not be submitted to vote; they depend on the outcome of no elections.[11]

What are the implications of this negative and libertarian approach?

The Supreme Court has offered a detailed and sustained explanation of the Bill of Rights model of free press. It is true that the Supreme Court only began to confront the problem of interpreting the free press clause a few decades ago. But despite the time lapse the Court has remained faithful to what, apparently, was the original intent of the constitutional framers: *the prevalence* of individual rights over community values. The framers' design fit the liberal model both politically (the mission of government is to protect individual rights), and also socioeconomically, with the "laissez faire, laissez passer" maxim being the prevalent rule.

Thus when the Supreme Court in *Near v. Minnesota* first decided the issue of prior restraint of the press it ruled that:

> It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was impossible to conclude that this *essential personal liberty of the citizen* was left unprotected by the general guarantee of fundamental rights of person and property.(Emphasis added.)[12]

Some years later, in 1936 and 1939, the Court stated the same position and related it to the original constitutional intent:

> "This court has characterized the freedom of speech and of the press as *fundamental personal rights and liberties*. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men."[13]

This portrayal of the freedom of the press as a personal and separate right has remained the same until now. As stated by Margaret Blanchard: "In this view of the press as an extension of the individual freedom to speak, we find one of the more consistent lines of precedent in the Court's history."[14]

Free press was characterized, likewise, as a *preferred freedom*, together with the other freedoms entrenched in the First Amendment. Thus, in *Thomas v. Collins*, the Court held:

> "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the unusual presumption supporting legislation is balanced by the *preferred place given in our scheme to the great, the indispensable . . . freedoms secured by the First Amendment* . . . . That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And *it is the character of the right, not of the limitation, which determines what standard governs the choice.*[15]

A "preferred position" for First Amendment rights did not mean merely prevalence over conflicting utilities or interests, but indeed over some other civil rights guaranteed by the Constitution and the Bill of Rights.[16] This fact should be underscored, because to assume that all rights occupy the same rank in the constitutional structure leads to irresoluble contradictions in legal terms: if the constitutional value of, say, free speech is equal to the constitutional value of the right to property, one cannot decide which one should have precedence over the other in case of conflict. Every legal system, if logically construed, is arranged in a hierarchy, so that the foreseeable frictions within it do not evolve into conflicts that could break down the whole "corpus juris."

Certainly, the explicit references[17] to the "preferred position" have disappeared from the wording of the Supreme Court's rulings in the last three decades, due in part to the success of the balancing formula. But the centrality of the freedoms of speech and of the press cannot be denied even today, if only because of the lip service they receive through expressions like "the more exacting judicial scrutiny," the "compelling state interest," and "less drastic means." All these standards can be seen as the doctrinal elaboration of the view that it is the government's burden to justify the necessity of passing any measure which may negatively affect any fundamental right.

A third implication of interpreting freedom of the press as an individual right has been the almost complete neglect of the listener, the reader, or the audience. Seeing freedom of the press as a natural individual right entailed recognition of precisely the privileged situation of power granted to the right-holder, the press itself.

This autonomy of the print press was confirmed in a landmark decision of the U.S. Supreme Court striking down a Florida statute that granted political candidates a right of reply "if a newspaper in its columns assails (his/her) personal character . . . or otherwise attacks his official record . . . ." *Miami Herald Publishing Co. v. Tornillo* stands out in the history of American freedom of the press because of the ground chosen to make the decision and the reasoning leading to it. To be consistent with its treatment of the electronic media, the Supreme Court should above all have taken into account the *diversity* of expression and the relevance of information for the *democratic process*, as *Red Lion Broadcasting Co. v. FCC*[18] would suggest, but it did not. The Court gave two reasons for its decision. The first one was to prevent the chilling effect[19] that would follow the admission of a right of reply:

> Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right of access statute, editors might well conclude that the safe course is to avoid controversy." Therefore, under the operation of the Florida Statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably "dampens the vigor and limits the variety of public debate.". . .[20]

The second reason was more germane to the point we are considering:

> . . . The Florida statute—said the Court—fails to clear the barriers of the First Amendment because of its intrusion into the function of the editors. A newspaper is more than a passive receptacle or conduit for news, comment and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgement. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they evolved to this time.[21]

To cap it all, the Court brought in a significant excerpt from a previous case, *Columbia Broadcasting System, Inc. v. Democratic National Committee*,[22] that clearly delineated the autonomy of the print media. The quotation said:

> The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers — and hence advertisers—to assure financial success; and second, the journalistic integrity of its editors and publishers.

It would be very difficult to find anywhere statements making so clear the principle of the autonomy of the press: newspapers do not have to publish anything they disagree with, even if it is the answer to a personal attack made by them.

IV

It should be clear enough, so far, that the Supreme Court's interpretation of the free press clause fits well into the liberal-individualistic-marketplace approach that was the established mode of thinking at the end of the eighteenth century. *The question now is how to dovetail that prevailing interpretation with the transformations experienced in the American political and social systems and within the press itself.* Which are these?

Regarding *the political sphere*, no one would deny the progress in popular participation since the foundation of the United States "Novus Ordo Seclorum." Representative democracy is already a reality made possible through the successive enlargement of the franchise by the removal of discriminations based on gender, race and literacy. Some of these suffrage victories are indeed very recent and reveal how carelessly the expression liberal-democracy was in the past identified with democracy. Be what it may, the access of the majority of the adult population to the electoral and referenda processes amounts to a turning point with regard to the need for meaningful information by the citizenry. Freedom of the press is one of the tools that may or may not be used as a control of governmental abuses, but as far as democracy is concerned it is one of its neccesary conditions.

Another major change perceived in the political field is the increasing role assumed by the media in the elections, in the setting of the political agenda, and in the handling of national issues. Everybody is aware of the part played by the press in the Vietnam War and in the Watergate affair, but how many are conscious of the progressive assumption by the press of functions traditionally fulfilled by the political parties?[23] It is not just a question of measuring the quantity of power acquired by the media vis-à-vis the holders of political power or the community of citizens. It is that we have to take due notice of the repercussions for the working of the political system as a whole; in the past a watchdog press scrutinized from the outside; today, however, press and politics are inextricably intertwined.

In other spheres of life changes have been no less impressive; but if we restrict the scope of our interest to the mass media and leave aside for the moment the fact that television "has become the primary, *common* source of everyday culture, politics, and values of an otherwise heterogeneous population,"[24] the last decades "have been characterized by three related movements. . . . First, there has been an increasing integration of the media within the broader control of transnational corporations, such that there is a severe restriction on the autonomy of the press. . . . Second, there has been an increasing concentration of ownership of the media, such that there are far fewer independent voices available in the United States. . . . Third,. . . the media have increasingly become just another sphere of business such that their uniqueness and centrality as cultural forms are submerged beneath their treatment as commodities like any other."[25]

The context, implications, and negative effects of the above described process have been analyzed from different perspectives, as the studies of Ben Bagdikian,[26] Edward Herman and Noam Chomsky,[27] Herbert I. Schiller,[28] and Douglas Kellner suggest.[29] The point, briefly stated, is that the observed trends lead to less ideological pluralism, higher risks of manipulation, growing commercialization of the press, serious distortion of the marketplace of ideas, and an emerging censorship coming from the private property and control of the means of communication.

Some believe that private restrictions are not nearly as real or as dangerous as political restrictions, and so support continuing deregulation.[30] Furthermore, the growth of new media technologies should open other paths to the diversity of expression, and the deregulation policies of recent Republican administrations seem to have begun to liberate broadcasting activities from the government's supervision. All in all, it is difficult to deny the close relationship between the actual ability to disseminate information and economic power, and how that linkage has become today so conspicuous and operative. In this sense, freedom of the press and of communication runs against an unrestrained freedom of the market and may be seriously jeopardized.

Now, if we go back to our initial query, it does not seem easy to reconcile the conflicting assumptions of political democracy with the explicit protection of free press as an individual and autonomous right. Neither is it easy to decide if and how much the free market ordering should be altered, in order to prevent the concentration of ownership in the media business and its effects on the reduction of pluralism. Legal scholars and justices of the Supreme Court are aware of the importance of these two main problems, but, as I shall try to demonstrate, they have not actually confronted them.

In the aftermath of the Second World War, the

democratic rationale for a free press was primarily advanced by the work of Alexander Meiklejohn, for whom the crucial problem was how to protect expression that is relevant for the process of self-governance. "The First Amendment is a device for the sharing of whatever truth has been won. Its purpose is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal."[31]

The democratic argument sounds fully consistent with Meiklejohn's views because to him "political freedom does not mean freedom from control. It means self-control."[32] But if we take a liberal stand, i.e., we equate freedom of the press with the absence of governmental interference, it is inconsistent for institutions other than the press itself to demand that it be either socially responsible or that it fulfill specific democratic functions. Instead, it is quite legitimate for the press, in the exercise of its autonomy, to be sensitive and responsive to public issues and to cooperate with other groups active in the political process. In addition, it is reasonable for consultative bodies, such as the Commission on Freedom of the Press, to make nonbinding recommendations about press performance. But the recommendations sound troubling to the libertarian when they appear in the holdings or dicta of the Supreme Court. An institution fully committed to a negative and individual conception of rights and liberties may of course express convincing opinions in support of a democratically active press but cannot make an earnest request to the press to behave in one way or another and reasonably expect that it will.

Indeed, within the context of a negative approach to the speech and press liberties, it is difficult to characterize statements made by the Supreme Court of the following kind:

> The First Amendment embodies more than a commitment to free speech and communicative interchange for their own sake; it has a structural role to play in securing and fostering our republican system of self-government.[33]

As we have shown, the constitutional protection of the press was conceived of as a guarantee of individual autonomy. The question then is how to make this autonomy work for the benefit of a democratic polity. Because, unless the government intervenes to provide the means to that end, it is hard to imagine how that goal could otherwise be reached.

It is true though, that the autonomy value, which is held by the traditional interpretation, and the public debate value, which is held by the democratic approach, do not necessarily conflict with one another. And they will not conflict if autonomy is considered procedural[34] with respect to public information and discussion of matters of political relevance. However, if it does not, there is no way to mediate between a restrained and limited government, and the need to have information provided. Insofar as the likelihood that the press will fulfill the democratic expectations depends exclusively on the individual right-holders, it is hard to guess what will happen. Admittedly, the majority of the mass media reflect, at least partially, democratic values, but is it enough? I would argue that it might not be.

The Supreme Court has recognized that "the growing complexity of society has made the press a vital element in providing the information the public needs for effective self-government."[35] The Court has also said that "the electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech."[36] Nevertheless, the Court has not drawn the logical conclusions that would flow from these realities.

The same cannot be said of the legislative branch to the extent that, based on the scarcity of frequencies, it has been regulating the electronic media since the beginning of this century. A few examples are the Radio Acts of 1912 and 1927; the Communications Act of 1934 that created the Federal Communications Commission and gave to it the authority to produce rules regarding the coverage of issues of public interest; the Communications Satellite Act of 1962; and the Cable Communications Policy Act of 1984, but given the scarcity rationale invoked for regulation, those measures were not traditionally considered a limitation on the First Amendment.

An analogous picture can be obtained if we look at the *economic sphere*, i.e., the problem of the changing patterns of ownership of the media enterprises, and the developing contradiction between market competition and freedom of the press from private censorship. Here the situation is even more serious. There is no doubt that the Supreme Court is fully aware that the marketplace of ideas metaphor is no longer satisfactory, not only because of the obstacles to access to the means of communication, but also on account of the "corporate oligopoly model" now predominant.

Likewise, the Supreme Court admitted as early as 1945 that:

> 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.[37]

Again, however, the Supreme Court by and large not only has refused to live up to its own diagnosis and advisable treatment of the problem, but it has also allowed economic power to operate freely, and to triumph over the value of "uninhibited, open and wide-open debate." Two sets of Court decisions have contributed to this result. The first set includes practically all decisions about political expenditures, commercial speech, and First Amendment rights of corporations. In all these cases, to use Owen Fiss's phrase, "capitalism defeated democracy."[38] And, in one case, when it was argued that the government had a "justified interest in equalizing the relative ability of individuals and groups to influence the outcome of elections," the Court remained true to its individualistic model and answered that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[39]

The second set of decisions reveals a more worrisome trend: a deference to government's regulation of free speech when it comes to the alternate means of expression for those who do not have the wealth required to control a means of mass communication. "My concern," wrote Geoffrey R. Stone in connection with this, "is that the Court has seriously underestimated the cumulative significance of the restrictions upheld in *Lehman*, *Vincent*, *Greer*, *Heffron*, *Greenburgh*, *Cornelius*, and similar decisions. The Court seems oblivious to the reality that many participants in the political process, particularly at the local level, do not have large amounts of cash and therefore cannot afford access to television, radio, newspapers, and other mainstream means of communication. A healthy system of free expression . . . demands that groups and individuals have access to a wide range of alternative means . . . in their efforts to communicate their views effectively to others. By adopting a highly elitist perspective, the Court has permited the continuing constriction of such alternate means of communication."[40]

With all due respect, it is difficult to imagine how the Supreme Court could have charted a different course, everything else remaining the same. After all, the excessive influence of the wealthy interests might seem inconsistent with democracy understood as majority rule, but it is not contradictory with a free press interpreted as an individual right.

V

The problem of a responsible press which would meet the demands of a democratic system is insoluble (and by that I mean it cannot be legally enforced) within the frontiers of negative political liberal categories and assumptions. Freedom of the press received its constitutional sanction with liberalism, but liberal premises cannot provide us with useful tools to make the press perform some mediating functions required by the dynamics of the democratic process. And there is nothing extraordinary about that. Political liberalism has always been concerned with building obstacles so that power would be kept within certain limits; the target was to frustrate any concentration of political power likely to harm the governed citizens. Freedom of the press from that perspective rested basically on a checking value rationale. Democracy, on the other hand, relates to participation in the decision-making for whole communities and, as a line of thought, is foreign to the streams of constitutionalism and liberalism, either political or economic. Freedom of the press acquires a distinct character if we consider it from a democratic prism because the self-governing rationale puts the emphasis on the knowledge of the political truth as a requisite for meaningful political decisions.

Additionally, the free speech and free press clauses, appearing in the Constitution only as a shield against state intervention or censorship, cannot serve to hinder private persons, or corporations, from actually limiting other people's speech. The First Amendment does not extend its scope into the private sector; it restricts government, not private persons: "In order to invoke First Amendment protection, a plaintiff must first demonstrate sufficient federal, state or municipal involvement in the infringement conduct."[41] And again "it is, of course, a commonplace that the constitutional guarantee of free speech is one only against abridgement by government, federal or state."[42] Consequently, little can be done to prevent big corporations

from transforming their protected free speech autonomy into a power which is able to communicate more than many individual persons, and, simultaneously, to avoid the dissemination of any kind of message that might run counter to their interests, thereby flouting the marketplace of ideas.

Perhaps a legitimate and even constitutionally valid way to counteract the increased corporate power (and this is a simple suggestion) would be to approve authoritatively that corporations do not qualify as First Amendment rights holders, because the guarantee was acknowledged only to individual physical persons.[43] This would imply a different legal status for corporations in First Amendment issues than with other issues, where they would retain their position as fictional persons under the law. It is difficult to predict all the consequences that would follow from such a measure, but it could be seen as very much in accordance with the individualistic spirit that permeated the writing of the First Amendment.

Apart from that recommendation, what can be legally done in order to have a press that meets the requirements of a democratic government without losing its independence? And, on the other hand, how can we avoid the dominance of the communication media by privately owned corporate firms that results in a reduction in the number and type of messages, in a manipulation of public opinion, and in a commodification of the whole communicative process?

The relevance of these questions cannot be doubted, since the spontaneous development of the public self-righting[44] process, and of the operation of the press's responsiveness and social responsibility theory does not seem enough to meet the needs of the situation.

In my opinion, it is time to introduce a change of perspective. It would be advisable to bring into the range of First Amendment considerations not only the pure exercise of an individual right, but also the communicative activity itself, and the actual capacity of people to express opinions; by so doing, a more accurate and complete picture of what is implied in the exercise of the "autonomous" right of free press would probably follow. What I am trying to intimate is not new at all, but it is important *because it emphasizes the social character of every supposedly individual right and the material basis for its exercise.* What is the use of uttering or issuing any communication if we do not count on its reception? And to what does the right to speak amount without the real ability to make use of it?

The interest that has been protected is that of the speaker alone, because the purpose of the constitutional guarantee was interpreted from individualistic premises. But "in the context of a democratic political process, *speaking is not, like walking, a potentially private act.* It is public and social, for it is addressed to other persons, and potentially to large multitudes. It is also teleological, in that it aims at an end other than the mere performance of the action. It is tendentious, in that its aim is to influence other persons as to how they shall think and act with respect to issues of social policy."[45] In a representative democracy the objective is, above all, the information. We have to take into consideration the speaker, the audience, and the conditions under which a communicative activity can be carried out. A democratic approach could certainly recast the liberal theory of free expression only to make it richer; it could take it to its ultimate consequences, because it would lead to a situation in which all individuals may express themselves on equally solid ground.

The "vexata quaestio" is how to do it. But the fact that we may prove unable to find the adequate method does not disqualify our endeavor. The enterprise of discovering effective means of ensuring the satisfaction of a collective need to know has precedents and fragmentary answers.

Until now the energy has been chiefly devoted to the attainment of a rather indefinite right to know, which has been designated with several names, and has been interpreted as conveying various implicit or derivative claims: rights to receive and gather information, rights of access to the broadcasting media and to newspapers (right of reply); and rights of the press to justify its inquiries. Furthermore, the Supreme Court has quite often touched upon the issue, and even has claimed "that the right to receive is well established,"[46] but "the Court has done little more than point to the right. It has never explained the theoretical basis of the right."[47] Finally, eminent lawyers and scholars, like Jerome A. Barron and Bruce M. Owen,[48] have argued in favor of a right of access to information. But, how would it be accomplished? Can one consistently tie any right of access to a long-standing tradition of a theory and a practice of a negative, autonomous, and individual right to speak out or publish?

Fundamental rights were always considered purely protective rights that precluded the intrusion of government on the circle of individual freedom; by contrast, there have never been in the United States constitutionally

protected rights that something be done, i.e., legally-grounded social claims to have some goods, help or services provided by the State. One has only to remember the position stated by the Supreme Court regarding the so-called social and economic rights, i.e., work, education, adequate housing or health. "Welfare benefits are not a fundamental right, and neither the State nor the Federal Government is under any sort of constitutional obligation to guarantee minimum levels of support."[49]

The idea of "positive" rights is alien to the American constitutional tradition, and to the American political culture. These "rights" have, generally, not been considered as appropriate subjects for constitutional protection[50] perhaps because there is no way to find a literal support for them in the Constitution. Effectively, there is no mention in the Bill of Rights of a right of access to information. And one must say that, even in those western democratic countries where an explicit right to receive information has been explictly admitted[51] together with some social rights —all implying a duty on the part of the public authority to act in a certain direction— there is a lack of enforcement of that right primarily due to: a) the reluctance of public authorities to make available information on matters of public interest; b) the difficulty in constructing the legal concept of a "positive right," and the material obstacles to have it either achieved or judicially enforced; and c) the resistance to abandon the traditional interpretation of rights as individual rights.

The first reason is a persistent trait of political power in any regime and is contradictory with any notion of democracy in modern times because democracy requires free flow of information in matters of public interest not to be withheld or blocked. More than anything else—a method for the recruitment of politicians, majority rule, and the like—democracy from the freedom of the press point of view means that the process of political decision making is carried out in the open.

The second reason indicates the existence of some grounds to reject the idea of "positive" rights. One objection is that the concept of such a right (to receive information, to know) contradicts the very idea of a conventional right. Why? Because a conventional right is assumed to be self-sufficient in the sense that its holder does not need the active cooperation of anybody to enjoy it, and because a traditional right is associated with a duty of the others to abstain from interference. Instead, a "positive" right would require the affirmative action of government, its agencies, or, depending on whom we demand to be provided with information, on the part of a private person. A second objection is that the satisfaction of both rights —freedom of expression and the right, simultaneously, to have access to, or receive, information—is incompatible or impossible.

Against these contentions, it could be argued that for any right to be implemented, there is the need for its recognition, or legal sanction, which in its turn requires a specific positive action of the state. Secondly, there is no right unless it can be guaranteed, and if there are any rights that demand a complex network of mechanisms, institutions, and procedures for their peaceful enjoyment, such rights have been the conventional negative rights. More often than desirable, people forget that "the role of government in relation to civil liberties [and freedom of expression is one of them], is not only the negative one of non-interference but also the positive one of protecting them from interference on the part of other persons."[52]

The second objection takes for granted the idea of absoluteness of rights, which was rebutted by the Supreme Court in its initial decisions on free expression.[53] The simple reference to national security, privacy, reputation, social peace, and so on should be enough to realize how many limits there are on the pretended absoluteness of the right to free expression. A right to free speech can be in conflict, for instance, with the interest to conduct peace negotiations in secrecy, or with the right not to be slandered, or with the protection of children. Rights may, and do in fact, conflict with each other, and the problem is to decide which right will trump the other. Rights, moreover, may clash with the public interest, and must give way in many instances.

The third reason mentioned above has to do with the economic context of free enterprise and freedom of contract, and, ultimately, with the economic system based on private property and/or control of the means of production. At this point, the advocates of the individualistic and negative conception of freedom of speech and of the press should realize that the market mechanisms are suffocating numerous voices, and paving the way to an ideologically homogeneous society. Is that the spirit of any liberalism? Is it not high time to react against the adulterating influence of the market on freedom of expression?

A few years ago, C.B. Macpherson correctly asserted that "individuals, and whole societies,

insofar as they act by rational calculation, are continually having to decide, as between two things they value, how much of one they are willing to do without in order to get some amount of the other."[54] In our context, Alexander Bickel wrote that the "First Amendment is a series of compromises and accommodations confronting us again and again with hard questions to which there is no certain answer."[55] There is a need to decide as between two things highly valued, but which are to some extent incompatible. In other words, how steep a trade-off is the United States willing to make in its economic commitment to private property, entrepreneurial liberty, and a negative interpretation of freedom in order to gain in terms of such competing concerns as the maintenance of a democratic mass media? The answer will ultimately be determined by tradition and established interest, but also by the pressures of a people that recognize that control of information is political power.

Notes

1. *McCulloch v. Maryland*, 17 U.S. 316 (1819) (Marshall, C.J.).

2. *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J. dissenting).

3.The introduction into the constitutional texts of positive or claim rights began in 1917 in Mexico with the Constitution of Querétaro, and in Germany in 1919 with the Constitution of Weimar. I purposely leave out the Declaration of Rights of the Russian People, of 1919, because it was designed to serve only as an instrument of propaganda, and because of the fact that the people lacked absolutely the means to have the rights enforced.

4.The First Amendment was, thus, written in negative terms: "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

5.Timothy W. Gleason, *The Watchdog Concept* (Ames, Iowa: Iowa State University Press, 1990) 4.

6. *Gitlow v. New York* 268 U.S. 652 (1925) at 666. (Emphasis added.)

7. 283 U.S. 697 (1931).

8.Thus, Gary R. Orren and William G. Mayer have written: "*In a democracy*, intermediaries like political parties and the press are neither wholly public nor wholly private. Indeed, the appropriate question is not whether they are more public or more private but *whether they should fall on the private-public continuum to best perform their mediating functions.*" (Emphasis added.) "The Press, Political Parties, and the Public-Private Balance in Elections," *The Parties Respond. Changes in the American Party System*, L. Sandy Maisel, ed. (Boulder: Westview Press, Inc., 1990) 221.

9. Alexander Hamilton, *The Federalist No.84* (Middletown, Connecticut: Wesleyan University Press, 1961) 579."(Emphasis added.)

10. "The people have certain natural rights which are retained by them when they enter into Society. Such are the rights of Conscience in matters of religion; of acquiring property, and of pursuing happiness and Safety; of Speaking, writing, and publishing their Sentiments with decency and freedom; of peaceably assembling to consult their common good,and of applying to Government by petition or remonstrance for redress of grievances. Of these rights therefore they shall not be deprived by the Government of the United States." Reproduced as quoted by Eugene Gressman, "Bicentennializing Freedom of Expression," 20 *Seton Hall Law Review* (1990) 402.

11. *West Virginia v. Barnette*, 319 U.S. 624 (1943) at 638. As natural rights, they were innate and therefore permanent and inalienable, and in order to have them protected, following the above-mentioned hands-off principle, the First Amendment took a negative form: "Congress shall make no law abridging . . . ."

12. *Near v. Minnesota* 283 U.S. 697 (1931) at 707."(Emphasis added).

13. *Schneider v. State of New Jersey*, 308 U.S. 147 (1939) at 161, quoting *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) at 244. (Emphasis added.)

14. Margaret A. Blanchard, "The Institutional Press and Its First Amendment Privileges," *The Supreme Court Review* (1978): 227.

15. *Thomas v. Collins*, 323 U.S. 516 (1945) at 529-530. The same or similar words were used by the Supreme Court in *Schneider v. State of New Jersey* (308 U.S.147, (1939)), *Jones v. City of Opelika* (316 U.S. 584 (1942), by Justice Stone in a dissenting opinion, *Murdock v. Pennsylvania* (319 U.S.105, (1943)), *Marsh v. Alabama* (326 U.S.501 (1946)), *Saia v. New York* (334 U.S. 558 (1948)), *Kovacs v. Cooper* (336 U.S. 77 (1949)), and by Justice Douglas in a dissenting opinion, *Beauharnais v. Illinois* (343 U.S. 250 (1952).

16. "When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a peferred position." *Marsh v. Alabama* 326 U.S. 501 (1946) at 509..

17. I used the adjective "explicit" intentionally, for there are clear indications of the "firstness" of the freedom of the press—and of the other freedoms of the First Amendment—in statements of the nature of "the *extraordinary protections afforded by the First Amendment* carry with them something of a fiduciary duty to exercise the protected rights responsibly . . ." (Emphasis added.) In *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976) at 560.

18. 395 U.S. 367 (1969).

19. In the area of free speech, *chilling effect* is the inhibitory influence or restraining force upon one's wish to publish or speak and is normally the consequence of an external threat. See Frederick Schauer, "Free, Risk, and the First Amendment: Unraveling the 'Chilling Effect,'" *Boston University Law Review*, vol. 58 (1978) 685.

20. *Miami Herald Publishing Co v. Tornillo*, 418 U.S. 241 (1974) at 257.

21. Ibidem, at 258.

22. 412 U.S. 94 (1973).

23. Gary R. Orren and William G. Mayer discuss in detail the progressive assumption by the news media of functions like communicating with voters and evaluating candidates, hitherto performed by the political parties. See "The Press, Political Parties, and the Public-Private Balance in Elections," in *The Parties Respond. Changes in American Party System*, L. Sandy Maisel ed. (Boulder: Westview Press, Inc., 1990).

24. Michael Morgan, "Television and Democracy" *Cultural Politics in Contemporary America.* Ed. by Ian H. Angus & Sut Jhally (New York: Routledge, 1989) 242. (Boulder: Westview Press Inc., 1990) 204-219.

25. Ian H. Angus & Sut Jhally, *Cultural Politics in Contemporary America*, cit., 2.

26. Ben H. Bagdikian, *The Media Monopoly* (Boston: Beacon Press, 1990).

27. Edward Herman & Noam Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (New York: Pantheon Books,1988); and Noam Chomsky, *Necessary Illusions, Thought Control in Democratic Societies* (Boston: South End Press, 1990).

28. Herbert I. Schiller, *Culture Inc. The Corporate Takeover of Public Expression* (New York: Oxford University Press, 1989).

29. Douglas Kellner, *Television and the Crisis of Democracy* (Boulder: Westview Press, Inc., 1990).

30. See Jonathan W. Emord, *Freedom,Technology and the First Amendment* (San Francisco: Pacific Research Institute for Public Policy, 1991).

31. A. Meiklejohn, *Political Freedom* (New York: Harper & Brothers, 1960) 75. The first edition of this work appeared in 1948.

32. Ibidem, 3.

33. *Richmond Newspapers, Inc. v. Virginia* 448 U.S. 555 (1980) at 587-588.

34. I am not suggesting that autonomy should operate as an accessory value. If autonomy is not safeguarded, the resulting public debate may be seriously damaged

or worthless. By procedural, I mean "leading to" debate, and, above all, conducive to the idea that autonomy and rational and valid public discussion are mutually reinforcing values. Therefore, a correct approach to autonomy to speak in a democratic society should rebut its understanding as separate and independent condition.

35. Justice Powell's commentary on *Saxbe v. Wahington Post* 417 U.S. 843 (1974).

36. *Buckley v. Valeo*, 424 U.S. 1 (1976) at 19.

37. *Associated Press v. United States*, 326 U.S. 1 (1945) at 20.

38. Owen Fiss,"Free Speech and Social Structure," 71 *Iowa Law Review* (1986) 1405-1425.

39. *Buckley v. Valeo*, 424 U.S. 1 (1976) at 48-49.

40. Geoffrey R. Stone, "The Burger Court and the Political Process: Whose First Amendment?",10 *Harvard Journal of Law and Public Policy* (1987) 22. The names underlined correspond to the following cases: Lehman *v. City of Shaker Heights*, 418 U.S.298 (1974); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *Greer v. Spock* 424 U.S. 828 (1976); *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981); *United States Postal Service v. Council of Greensburgh Civic Associations*, 453 U.S. 114 (1981); and *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788 (1985).

41. *Public Utils. Comm'n v. Pollack* 343 U.S 451 (1952) at 461.

42. *Hudgens v. NLRB* 424 U.S. 507 (1976) at 513.

43. The first time corporations, by a legal fiction, were explicitly given the consideration of *persons* was in *Santa Clara County v. Southern Pacific Railroad*,118 U.S. 394 (1886), and with regard to the applicability of the equal protection clause of the Fourteenth Amendment.

44. By "self-righting" process I understand the ability of the public at large to muddle through the present time flood of information, and both to dispose of what is worthless and to accept and absorb what is necessary and useful in a democratic society.

45. Alan Gewirth, *Human Rights Essays on Justifications and Applications* (Chicago: The University of Chicago Press, 1982) 319. (Emphasis added.)

46. Owen Fiss,"Free Speech and Social Structure", 71 *Iowa Law Review* (1986) 1405-1425.

47. William E. Lee, "The Supreme Court and the Right to Receive Expression" *The Supreme Court Review* (1987) 307.

48. Jerome A. Barron, *Freedom of the Press for Whom? The Right of Access to Mass Media* (Bloomington: Indiana University Press, 1973); Bruce M.Owen, *Economics and Freedom of Expression* (Cambridge, MA: Ballinger Publishing Company, 1975).

49. *Lavine v. Milne*, 424 U.S. 577 (1976) at 584.

50. The great exception in the field of a presumed right of access is still, of course, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). *Lavine v.Milne*, 424 U.S. 577 (1976) at 584.

51. That is the case in Germany (Article 5 of the Fundamental Law), Portugal (Article 48 of the Constitution adopted in 1976), Spain (Article 20 of the Constitution of 1978), to quote a few examples. We may add the text of Article 10 of the European Convention on Human Rights, in force in most of the western European countries, that states: Everyone has the right to freedom of expression.This right shall include freedom to hold opinions and *to receive* and impart *information and ideas* without interference by public authority and regardless of frontiers." (Emphasis added.)

52. Alan Gewirth, op. cit., 317-318.

53. "We reject the view that freedom of speech and association(...) as protected by the First and Fourteenth Amendments, are "absolutes," not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment." *Konisberg v. State Bar of California*, 386 U.S. 36 (1961) at 49-51.

54. C.B. Macpherson, *The Rise and Fall of Economic Justice* (Oxford: Oxford University Press, 1987) 27.

55. A. Bickel, *The Morality of Consent* (New Haven: Yale University Press, 1975) 57.