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# AN UNWORKABLE SOLUTION FOR A NON-EXISTENT PROBLEM: A REPLY TO PROFESSOR CALVERT

ARNOLD H. LOEWY\*

## INTRODUCTION

On the immediately preceding pages, Professor Clay Calvert has argued that Americans' faith in journalists has reached such a low point that there is a compelling need to take extraordinary reparative measures.<sup>1</sup> His solutions are to: (1) require each daily newspaper to explain its choice of stories by a weekly addition to its editorial page or its web page; (2) require each newspaper reporter to disclose his or her political affiliation; and (3) limit the number of newspapers that can be owned by any one entity.

One of Professor Calvert's goals "is to provoke discussion . . . explain[ing] why . . . the measures set forth in the proposed 'Newspaper Credibility Enhancement Act' should not be adopted."<sup>2</sup> He can consider this my acceptance of the invitation. My short answer, discussed in the pages that follow, is that: (1) the system is not broken, and (2) if it were, the Calvert proposals would not fix it.

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1. Clay Calvert, *The First Amendment, Journalism & Credibility: A Trio of Reforms for a Meaningful Free Press More Than Three Decades After Tornillo*, 4 FIRST AMEND. L. REV. 9, 12, 27 (2005).

2. *Id.* at 14-15.

I. THE SYSTEM IS NOT BROKENA. *Public Discontent*

Professor Calvert reports that a recent survey taken by the Center for Survey Research and Analysis at the University of Connecticut tells us that 42% of adults surveyed think that the press has too much freedom and only 12% think that it has too little freedom.<sup>3</sup> Worded differently, that same survey found that 49% of the respondents concluded that media (as opposed to the press) has too much freedom while only 34% believe there is too much censorship.<sup>4</sup>

From this, we are supposed to believe that the public has little confidence in the press. However, this same survey concluded that only 15% of the respondents believed freedom of the press was protected by the Constitution.<sup>5</sup> Given that the vast majority of the surveyed populace does not even believe that the press is protected by the First Amendment, it is hardly surprising that most of them believe that the press is too free. Educating the public about the freedom of the press would be a far better solution than passing legislation that proves that the press is controlled by government.

B. *Credible Press and First Amendment Theory*

Professor Calvert appears to believe that it is legitimate for the government to be concerned with the public's lack of confidence in the press. In fact, he goes so far as to describe that interest as "compelling."<sup>6</sup> In my view, this analysis turns the First Amendment on its head. The point of the First Amendment is not to deify any entity that might be a part of the "press." Rather, it is

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3. *Id.* at 22 (citing FIRST AMENDMENT CENTER, STATE OF THE FIRST AMENDMENT 2004 SURVEY (2004), available at <http://www.firstamendmentcenter.org/pdf/SOFA2004.pdf>).

4. *Id.*

5. *Id.* at 23.

6. *Id.* at 12, 27.

to give each the opportunity to compete in the marketplace of ideas.<sup>7</sup>

Under this view of the First Amendment, the press has no right to government-enhanced credibility, but must stand or fall on its own merits. Indeed, one of the great values of the speech and press clauses is that a fool will disclose himself. As Woodrow Wilson once said: "I have always been among those who believed that the greatest freedom of speech was the greatest safety, because if a man is a fool, the best thing to do is to encourage him to advertise the fact by speaking."<sup>8</sup> Similarly, one has a First Amendment right to burn the flag<sup>9</sup> but not the right to avoid condemnation by others as a stupid, unpatriotic flag burner. In

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7. I take no position on the question of whether the press *qua* press ought to have a special place under the First Amendment as compared to other speakers. There are many competing theories of freedom under the Free Press clause of the First Amendment. See generally THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 7 (1970) (claiming that the press operates as a safety valve for information and "is an essential mechanism for maintaining the balance between stability and change"); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT* 25-26 (1948) (claiming that the purpose of the First Amendment is to protect a forum in which citizens can hear and pass judgment on all ideas relevant to the purpose of the particular forum: "*It is the mutilation of the thinking process of the community against which the First Amendment is directed.*"); LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 944-47 (2d ed. 1988) (describing the press as a unique body that makes information available "which allows citizens to acquire and exchange information and to make educated, consensual decisions"); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977) (arguing that the press has a special role in checking the abuses and excesses of government). Even on the assumption that the press has superior rights, it is no part of the First Amendment to enhance its credibility.

8. Woodrow Wilson, U.S. President, *That Quick Comradeship of Letters*, Address at the Institute of France, Paris (May 10, 1919), in *SELECTED LITERARY AND POLITICAL PAPERS AND ADDRESSES OF WOODROW WILSON* 333 (1927). President Wilson also suggested that "[t]he wisest thing to do with a fool is to encourage him to hire a hall and discourse to his fellow citizens. Nothing chills nonsense like exposure to air." WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 38 (1908).

9. *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (holding that defendant's conviction for desecrating a flag in violation of Texas law was not "consistent with the First Amendment").

short, the First Amendment allows us to sow as we will but requires that we reap what we sow.<sup>10</sup>

Under this standard, the First Amendment is working remarkably well, as the following recent examples illustrate. A highly respected reporter (Dan Rather) for a highly respected network (CBS) reports a half-baked story about President Bush's alleged nonfeasance with the National Guard. Ultimately, the story is found to be false (or at least not substantiated) by virtue of the free speech of others who can reveal its falsity.<sup>11</sup> Rather is embarrassed and (arguably) demoted, CBS suffers embarrassment, and the President's reputation is not harmed by this story.

Similarly, a *New York Times* reporter fabricates stories.<sup>12</sup> His dishonesty is discovered, and he is asked to resign. Editors are (presumably) disciplined and told to use more care. The *New York Times* loses some face but continues as a viable newspaper. The *Times* reader will presumably be a tad more skeptical of *Times*' articles in the future, but skepticism is a good thing. Indeed, a major theory behind the First Amendment is that truth is to be determined from all sources that are allowed to freely disseminate material.<sup>13</sup>

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10. Although the Wilson quotations and the *Texas v. Johnson* case appear to deal with speech rather than the press, on this account, the press is no different from any other speaker. To illustrate, I have read several editorials in which the author's foolishness was readily apparent to me, as well as to other columnists. See, e.g., John Leo, *Down-and-Dirty Rhetoric Cheapens Civil Discourse*, JEWISH WORLD REV. (Dec. 29, 2003), <http://www.jewishworldreview.com/cols/leo122903.asp> (criticizing numerous commentators of all political stripes for their "down-and-dirty" rhetoric, and singling out fellow conservative Ann Coulter for her comments "suggesting that Timothy McVeigh's mistake was not blowing up The New York Times building").

11. See, e.g., Dan Gilgoff, *A Fine Mess at CBS*, U.S. NEWS & WORLD REP., Oct. 4, 2004, at 29.

12. See Dan Barry et al., *Correcting the Record; Times Reporter Who Resigned Leaves Long Trail of Deception*, N.Y. TIMES, May 11, 2003, at A1 (discussing the case of Jayson Blair, the *New York Times* reporter who invented and embellished numerous stories and was fired for his systematic fraudulent reporting); Calvert, *supra* note 1, at 15-16.

13. This bedrock principle, that free expression is valuable precisely because it permits all kinds of speech to be heard so that the best will rise to

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the top, is at least as old as Milton, who famously wrote: “[l]et [Truth] and Falsehood grapple; whoever knew Truth put to the worse, in a free and open encounter?” JOHN MILTON, *AREOPAGITICA: FOR THE LIBERTY OF UNLICENSED PRINTING* 51-52 (John W. Hales ed., Oxford University Press 1961) (1644).

Fifty years later, John Locke put a finer point on this issue:

[T]he business of laws is not to provide for the truth of opinions . . . . For the truth certainly would do well enough if she were once left to shift for herself. She seldom has received, and I fear never will receive, much assistance from the power of great men, to whom she is but rarely known, and more rarely welcome. She is not taught by laws, nor has she any need of force to procure her entrance into the minds of men. Errors indeed prevail by the assistance of foreign and borrowed succors. *But if Truth makes not her way into the understanding by her own light, she will be but the weaker for any borrowed force violence can add to her.*

JOHN LOCKE, *TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION* 205 (Charles L. Sherman ed., Irvington Publishers 1979) (1689) (emphasis added).

Indeed, such a clarion call for government action to “rescue” free expression rings false in the ear of the First Amendment scholar for several other reasons. The government has never been a kind steward for any sort of expressive activity, particularly towards the body that is charged with being the watchdog of that same government. Instead, the First Amendment is predicated on the idea that the public must make its own determination as to what information it finds credible or relevant. *Cf.* Fredrick S. Siebert, *The Libertarian Theory of the Press*, in F. SIEBERT, T. PETERSON & W. SCHRAMM, *FOUR THEORIES OF THE PRESS* 39, 51 (1956). Fred Siebert argues:

[The First Amendment requires government to] let the public at large be subjected to a barrage of information and opinion, some of it possibly true, some of it possibly false, and some of it containing elements of both. Ultimately the public could be trusted to digest the whole, to discard that not in the public interest and to accept that which served the needs of the individual and of the society of which he is a part.

*Id.* Calvert’s proposal sounds a false note precisely because it places the cart before the horse. A free press that makes mistakes is quite properly subject to public criticism, not government-imposed credibility. It is for the People and the press to weigh the merits of a given story, not the State. *See generally* *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (noting that “the speaker and the audience, not the government, assess the value of the information presented”).

### C. The Checking Function

Professor Calvert has argued that the disrepute in which the press finds itself precludes the press from performing its checking function. I believe that this is both factually and logically false.

Factually, the press is not under-reporting bad government behavior. Indeed, much of the concern about the press has been its propensity to over-report. For example, the Dan Rather fiasco, or, more recently, *Newsweek's* decision to expose mistreatment of Muslims at Guantanamo<sup>14</sup> hardly bespeaks an unwillingness to perform the checking function.<sup>15</sup>

Professor Calvert would argue, however, that the credibility of the newspapers has been so damaged that nobody would believe them when they uncover government malfeasance. I am sure that President Clinton wishes that were true, but as we all know from the events leading to President Clinton's impeachment, the newspapers performed their checking function just fine. Calvert seems to be arguing for an unimpeachable checking function, but, as I have argued earlier, that is not what the First Amendment is about.<sup>16</sup>

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Indeed, on balance, a suspicious and discriminating public is, if anything, a sign of civic health. A public that blindly accepted all information placed before it would be a true cause for concern.

14. See *Newsweek Backs Off Quran Desecration Story*, CNN, May 16, 2005, <http://www.cnn.com/2005/WORLD/asiapcf/05/15/newsweek.quran/index.html> (discussing *Newsweek's* infamous false report that guards had put a copy of the Quran in a toilet to humiliate and enrage Muslim prisoners, which led to international condemnation as well as riots that resulted in the deaths of more than fifteen people).

15. Of course, the press should also be credited with accurate news reporting on a number of stories relating to government misdeeds. The most prominent example is the recent Abu Ghraib prisoner abuse scandal, first broken by the *Washington Post* and quickly picked up by every significant news outlet. See SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB (2005); THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005); see also Melissa Cirillo & Sherry Ricciardi, *Abu Ghraib Time Line*, AM. JOURNALISM REV. 22, 24-25 (Aug./Sept. 2004).

16. See *supra* note 13 and accompanying text.

Indeed, the very concept of checks and balances suggests that neither the politicians nor the press should always be right. Ironically, one of the surveys mentioned by Professor Calvert suggests that newsmen and politicians are regarded as about equally trustworthy.<sup>17</sup> Thus, the media is on at least a level playing field with the politicians. Nothing in the First Amendment in general, or the checking function in particular, requires more than that.<sup>18</sup>

## II. CALVERT'S PROPOSALS WILL NOT FIX IT

For Part II of this Article, I assume *arguendo* that the federal government has a legitimate interest in enhancing newspaper credibility beyond what the press deserves on its own. I will even assume, though this is surely a stretch, that this constitutes a compelling interest.<sup>19</sup> Even on these unlikely assumptions,

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17. Calvert, *supra* note 1, at 41 (citing Timothy W. Maier, *The Crumbling Fourth Estate*, INSIGHT ON THE NEWS, May 24, 2004, at 30).

18. The seminal discussion of the press' role as a watchdog on government is discussed in Vincent Blasi's *The Checking Value in First Amendment Theory*, *supra* note 7. However, Blasi makes it clear that this function entails primarily the duty to present information freely and with limited government control. "The most important stage in the checking process," he writes, "is typically that during which the public is first made aware of what is going on." *Id.* at 553. He goes on to say "[t]he agents of the electorate have no authority to decide what serves the general welfare." *Id.* at 555. Instead, the press acts as a watchdog, informing the electorate as to what they perceive the government is up to, and the electorate is then free to judge what to do with that information.

19. The cases seem to indicate that the only interests extreme enough to be "compelling," in the context of freedom of the press, are imperiling the security of an ongoing operation, such as publishing the time and place from which war ships are sailing, or competing rights protected by another constitutional provision. *See, e.g.,* *N.Y. Times v. United States*, 403 U.S. 713, 714 (1971) (holding that preventing the publication of highly sensitive Pentagon Papers describing Vietnam war strategy is not a compelling enough interest to override First Amendment freedoms); *see also* *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976) (noting that the interest in affording an accused a fair trial is not sufficient to justify prior restraint on freedom of expression); *cf.* John B. Kuhns, Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 *YALE L.J.* 317, 338



Calvert's proposals fail because they will not achieve the desired goal of enhancing credibility.

*A. Explaining News Selection & News Judgment*

Professor Calvert conflates two concepts that he believes will be furthered by the duty to disclose editorial choices of the placement of news. These are the credibility of the press and the agenda setting function of the press.

Let us assume that on a particular day, a hypothetical newspaper located in central North Carolina has the following four headline stories in this order of prominence: (1) **"Tar Heels Win National Championship,"** (2) **"Pope Dies in Rome,"** (3) **"Dog Bites Man,"** and (4) **"Couple Killed in Automobile Accident on I-85."**

How does the Calvert proposal affect credibility? All four stories are true and nobody thought that they were false. Even in a rare case such as Jayson Blair's fictitious story,<sup>20</sup> explaining the editorial process would not catch the error. The *Times* would simply say why it thought the story was important, and its falsity would go unnoticed unless it was discovered in some completely independent way.<sup>21</sup> So, unless there is a magic bullet hidden beneath the surface, it is hard to see how this proposal will contribute in any way to honest journalism.

Even with regard to the agenda-setting process, an issue that is surely more closely related to this remedy, it is hard to see how the proposal advances Calvert's agenda. In our hypothetical newspaper front page, I assume the newspaper would say

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(1971) (stating that "[t]his requirement of an extraordinary [or compelling] government interest seems to be primarily a rhetorical device used to emphasize that only in rare circumstances may First Amendment rights be restricted").

20. Barry et al., *supra* note 12.

21. In Blair's case, his dishonesty was uncovered by a fellow journalist from whom he had been plagiarizing. See, e.g., Macarena Hernandez, *What Jayson Blair Stole From Me, and Why I Couldn't Ignore It*, WASH. POST, June 1, 2003, at B5; Jacques Steinberg, *Times Reporter Resigns After Questions on Article*, N.Y. TIMES, May 2, 2003, at A30.

something like this to explain its choices: “A large percentage of our readership are rabid UNC basketball fans. Consequently, we concluded that the Tar Heels’ first national championship in twelve years was the story that would most appeal to our readers. Of course, the lead national and international story was the death of the Pope. We included it on the front page for that reason, but chose to subordinate it to the UNC story because of the passions of most of our readership. The dog that bit the man was a Rottweiler that was allowed to run free. We believe that the public safety menace this created was worthy of a front page warning. Finally, the automobile accident involved a prominent family in the community, so we put it on the front page.”

The reader should note this does not explain why the newspaper declined to run certain stories or subordinated others to page A14. Obviously, a newspaper cannot run an infinite number of stories on page one. For example, one can be fairly certain that no newspaper will run a story reporting the publication of this article with the headline: “**Law Professor Critiques Journalism Professor in an Article in the First Amendment Law Review.**” No newspaper could possibly print every conceivable story, nor could it explain its failure to present each and every possible one.<sup>22</sup>

Let us consider other possible stories either not covered at all or not covered on page A1 in our hypothetical newspaper. Consider the following additional stories: (1) “**Man Bites Dog,**” (2) “**Six People Killed in Pittsboro**”<sup>23</sup> **Accident,**” and (3) “**FCC Approves Newspaper’s Right to Purchase Television Station.**” Any graduate of Journalism 101 knows that the man bites dog story is more newsworthy than dog bites man. However, this newspaper chose to publish these stories the other way around. Let us suppose that the reason for rejecting the man bites dog story was that the man, who was mildly retarded, playfully bit his dog. His family would be mortified by publicizing the story, and frankly, it is not all that newsworthy to begin with. Consequently, the newspaper,

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22. Even one so important to the betterment of mankind as that just hypothesized.

23. Pittsboro is a small town located near Chapel Hill, North Carolina.

which knew about it,<sup>24</sup> chose not to publish it. Under the Calvert proposal, the decision not to publish this story would not be included in the editorial explanation page.

As for the Pittsboro accident story, assume that the newspaper relegated that to an inside page because the editors believed that Pittsboro was a less significant community and the accident victims therein were not as important as those in the front page interstate accident story. As I have said, I do not believe the Calvert proposal requires disclosing the information about the non-Page 1 stories, but would we wish that it did? I think not. What value would there be in publicly announcing to the grieving families of six accident victims that their newspaper did not view their loved ones' lives as being as important as another family that was killed on the same day?

Finally, what about omitting the story about the FCC and newspapers' right to purchase television stations? This is Calvert's paradigm concern. Once again, the newspaper would not have to explain itself. Even if the statute were broad enough to require the newspaper to explain its placement of stories, the newspaper could circumvent the requirement by not covering the story at all. When asked to explain itself, the newspaper could simply say: "This story was no more newsworthy than 'Law Professor Critiques Journalism Professor.' Therefore, we chose not to run it."

Consequently, the first section of Calvert's proposed "Newspaper Credibility Enhancement Act," which requires an editorial explanation of lead stories, will not fix the problems that he identifies.

### *B. Political Party Disclosure*

It is not entirely clear whether Professor Calvert views the evil to be avoided by disclosing political party affiliation as false factual reporting or biased editorial writing. I assume, however, that he means both. Neither is likely to be affected by Calvert's proposals, but for different reasons.

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24. Assume that the man who bit the dog was a cousin of the editor, and he was told the story as an intra-family story.

As for the problem of false factual reporting, for most stories, political affiliation is irrelevant. For example, do we really care whether the person who reported a story of a school shooting, an incident of domestic violence, or an automobile accident is a Republican or a Democrat? In those few stories where it may appear relevant, for example, "Clinton had sex with intern" or "Bush had drunk driving convictions expunged," it would shed more false innuendo than light. Calvert seems to suggest that we should question the story if the wrong political party reporter uncovered it. Were I an editor living in such a regime, I would assign all such stories to a person of the political party most likely to be viewed with the least amount of skepticism. That is, I would assign the Clinton story to a Democrat, and the Bush story to a Republican. It would not make the story more true, but it would prevent the reader from artificially impeaching the story because of the happenstance of the author's political affiliation.

With regard to biased editorials, party disclosure is either misleading or unnecessary. I do not know the political affiliations of most national editorialists, though I surely know which ones tend to lean right, which ones tend to lean left, and which ones are fairly neutral. That, I suggest, is more significant than whether the editorialist nominally calls herself a Democrat or a Republican. Indeed, if the Calvert proposal is enacted, it would not shock me to see a conservative editorialist register herself as a Democrat so that she could say: "Even a Democrat like me does not like what the Democrats are doing."

Furthermore, this proposal could lead to artificial criticism of the editorialist. As an amateur editorialist, I sometimes take philosophic positions with political overtones in my editorials. In a recent editorial, I criticized President Bush for hypocrisy in both opposing judicial activism and supporting federal judicial intervention in the *Schiavo* case.<sup>25</sup> It was clearly my intent to condemn hypocrisy and not Republicans. Indeed,

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25. Arnold H. Loewy, *State Law Had to Govern The Schiavo Case*, RALEIGH NEWS & OBSERVER, Mar. 30, 2005, at 13A.

contemporaneously with my editorial, I criticized Justice Marshall for the same type of hypocrisy in regard to the death penalty.<sup>26</sup>

Nevertheless, when I asked a Republican friend of mine what he thought of the editorial, he said that I sounded like an angry Democrat. Obviously, if I had to identify myself as a Democrat (which I am), more people might have come to that same wrong conclusion. In short, I see no reason why an editorialist's submission can not stand on its own merit. If it appears slanted, it will be so critiqued or dismissed. If it does not, there is no reason for the editorialist to condemn himself.

Furthermore, political affiliation is only one small part of a person's overall persona. Religion, geographical upbringing, exposure to a particular education, and both professional and non-professional interests may tell far more about a person than political affiliation. Indeed, as Professor Calvert appears to acknowledge, a pro-choice Republican may be more opposed to a pro-life judge than a pro-life Democrat would be. Yet under the Calvert proposal, the pro-life Democrat could write an attack on the judge and boost his credibility, particularly on an uneducated public,<sup>27</sup> by almost pompously listing himself as a Democrat.

### C. *Ownership Cap*

I have less quarrel with Professor Calvert's proposed ownership cap for several reasons. First, maximizing access to the marketplace of ideas, as opposed to maximizing newspaper credibility, is a legitimate First Amendment goal.<sup>28</sup> Second, it has

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26. Specifically, during one of my classes, I criticized the liberal Justice Marshall for his opinion in *Payne v. Tennessee*, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting). In *Payne*, Justice Marshall condemned the Court for rejecting prior precedent in a death penalty case. *Id.* I thought that this was especially inappropriate because Marshall regularly ignored precedent in death penalty cases. Consequently, I thought that he was guilty of the same type of hypocrisy for which I condemned President Bush.

27. Calvert, *supra* note 1, at 23. In assessing this proposition, 85% of the public is unaware that freedom of the press is protected at all by the First Amendment according to the study cited by Calvert. *Id.*

28. To the extent that Professor Calvert champions the proposal for purposes of enhancing credibility, I, of course, disagree with his assessment of

been unchallenged constitutional law for more than half a century that newspapers, like any other entity, can be reined in when their monopolistic practices threaten the public.<sup>29</sup> Finally, his proposal is nuanced, suggesting careful congressional study before enacting any particular ownership cap.<sup>30</sup>

My principal quarrel with this proposal is that the problem it seeks to remedy, the dearth of competing newspapers, is somewhat illusory. To be sure, there are fewer competing newspapers in most metropolitan markets than there used to be.<sup>31</sup> However, newspapers no longer constitute the sole, or even major, source of a person's access to news. Fifty years ago, a person's

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the legitimacy of that aim. Maximizing the number of speakers that can be heard, on the other hand, is a core First Amendment value. *See, e.g.,* N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964) (upholding a high standard of proof for "actual malice" in defamation cases measured "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"); United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) ("[The First Amendment] presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."); Daniel C. Moore, *Double Crossed: Why the Newspaper/Broadcast Cross-Ownership Ban Remains Necessary in the Public Interest*, 88 MINN. L. REV. 1697, 1700 (2004) (arguing that "the newspaper/broadcast cross-ownership ban should be retained, as the only effective means to safeguard the public's First Amendment interest in a robust and uncensored marketplace of ideas, and to prevent antidemocratic abuses by mass media conglomerates").

29. *See* Lorain Journal Co. v. United States, 342 U.S. 143, 155-56 (1951) (holding that the newspaper publisher's attempt to monopolize interstate commerce by forcing advertisers to boycott competing radio station justified an injunction barring the practice).

30. Calvert, *supra* note 1, at 39.

31. *See, e.g.,* Miami Herald v. Tornillo, 418 U.S. 241, 249-50 (1974). The *Tornillo* court stated:

The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspapers being owned by the same interests which own a television station and a radio station, are important components of this trend toward concentration of control of outlets to inform the public.

*Id.* The current evidence indicates that there are competing newspapers in only 4% of the larger cities in the United States. *Id.* at 249 n.13.

primary source of news was the newspaper.<sup>32</sup> Twenty-five years ago, television network news competed with newspapers. Today, numerous cable stations compete with both network news and newspapers. Thus, although fewer newspapers control the newspaper market today as compared to years gone by, the newspaper market itself is far less significant as a source of news than it used to be.<sup>33</sup>

Even if one were to contend that the apparent gain in diversity is illusory because of conglomerate ownership such as AOL Time Warner or Rupert Murdoch's News Corp,<sup>34</sup> the advent

32. See, e.g., Serena Wade & Wilbur Schramm, *The Mass Media as Sources of Public Affairs, Science, and Health News*, 33 THE PUB. OPINION Q. 197, 199 (1969) (indicating that in 1956, 96% of college graduates and 74% of those who had finished high school regularly turned to newspapers for information during the presidential election).

33. See generally Joe Saltzman, *Who Do You Trust and Why?: The Television Broadcasting of News is Trusted by More People Than Any Other Source of News, Including Word of Mouth*, USA TODAY, Jan. 2000, at 59 (citing a 2000 Gallup poll that indicates that television news is used and trusted more than any other source).

34. The *Columbia Journalism Review's* "Who Owns What" describes AOL Time Warner as "the largest media company in the world" and identifies hundreds of media outlets that AOL Time Warner owns including: CNN, HBO, *Time* magazine, *Sports Illustrated*, *DC Comics*, New Line Cinema, the Atlanta Braves, Netscape, Amazon.com, Road Runner Cablevision, and Warner Brothers Recreational Enterprises (which owns and operates theme parks). COLUM. JOURNALISM REV., *Who Owns What: Time Warner* (Aug. 11, 2004), <http://www.cjr.org/tools/owners/timewarner.asp>. The *Columbia Journalism Review's* Journalist's Tool "Who Owns What" lists all holdings of major media companies. See *id.*

News Corp.'s holdings are less diverse but much deeper in many specific areas. News Corp.'s holdings include: over fifty Fox Television broadcast and cable stations, Twentieth Century Fox Studios, over twenty-five newspapers including the *New York Post*, HarperMorrow Publishers (which encompasses over thirty-five distinct publishers), parts of the Los Angeles Kings and Lakers, and Hughes Electronic (the parent company of DirecTV). COLUM. JOURNALISM REV., *Who Owns What: News Corporation* (May 3, 2005), <http://www.cjr.org/tools/owners/newscorp.asp>. At one time, News Corp. was said to own around 60% of Australian newspapers and about 35% of the United Kingdom's newspapers. COLUM. JOURNALISM REV., *Who Owns What:*

News	Corp.	Corporate	Timeline,
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of Internet and weblogs (“blogs”) have taken news diversity to an all time high.<sup>35</sup> Additionally, the Supreme Court’s holding in *Turner Broadcasting System, Inc. v. FCC*,<sup>36</sup> that cable companies must carry local programming,<sup>37</sup> goes a long way to ensuring that

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<http://www.cjr.org/tools/owners/newscorp-timeline.asp> (last visited Nov. 12, 2005).

35. For more than a decade, scholars and commentators have observed that the Internet creates the sort of pure “marketplace of ideas” upon which the First Amendment is founded. See, e.g., Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619, 1624 (1995) (suggesting that the decentralized nature of Internet removes economic barriers to entry into the “marketplace of ideas” which previously prevented realization of First Amendment ideal); Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1846-47 (1995) (arguing that the Internet is the first medium that truly allows goals and premises of First Amendment jurisprudence to be realized); Jeffrey Rosen, *The End of Obscenity*, BALT. SUN, June 28, 1996, at 15A. Rosen observed:

The [Internet is] reducing the costs of entry for both speakers and listeners and creating relative equality among [all participants]. As a result . . . in cyberspace, even more than in newspapers and magazines, astoundingly diverse content is available, fulfilling Oliver Wendell Holmes’ romantic metaphor of a perfectly deregulated marketplace of ideas.

*Id.*

The more recent phenomenon of weblogs, where individuals post information and editorial content, seems to represent the next step in the ongoing evolution of the Internet as a tool to empower millions of citizens to make their own voices heard. See Daniel W. Drezner, Assistant Professor of Political Science, Univ. of Chi. & Henry Farrell, Assistant Professor of Political Science, George Washington Univ., *The Power and Politics of Blogs*, Address at the American Political Science Association Annual Meeting (July 2004) at 2, available at <http://www.utsc.utoronto.ca/~farrell/blogpaperfinal.pdf> (stating that “[w]eblogs occupy an increasingly important place in American politics . . . [because of] the distribution of readers across the array of blogs, and the interactions between significant blogs and traditional media outlets”); see also Brett T. Frishmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917 n.396 (2005).

36. 520 U.S. 180 (1997).

37. *Id.* at 185, 189-90.



the public will have access to a diversity of views, no matter how monopolistic the media giants become.<sup>38</sup>

For these reasons, I am not convinced that the ownership cap in newspapers is essential for the populace to have access to diverse views. Nevertheless, I would not consider such a law to be either unconstitutional or unwise.

### CONCLUSION

Professor Calvert and I envision a very different First Amendment. He sees the press as a government-created watchdog, designed, in some type of perverse symbiosis, to both attack and be protected by the government. I agree that a properly functioning press will watch over the government. I further agree that, in that capacity, it should be free from government interference. I do not agree, however, that the government has either the power or the duty to prop up the press when its own exuberance has led it to squander its credibility.

My position is much more *laissez-faire*. I contend that a free press does its job best when it is just that – free. I see little utility and much harm in a government directed scheme, however well-intentioned, designed to tell newspapers how to do their business. And finally, even if boosting press credibility were a legitimate government function, the Calvert proposals fail to accomplish that goal. Thus, Professor Calvert's proposals should be rejected.

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38. I totally endorse the must-carry provisions. In my view, cable companies should be treated as commercial conduits, public utilities if you will, rather than First Amendment actors. This is primarily because cable companies are frequently the beneficiaries of government-created monopolies in much the same way as power companies are so endowed. That being the case, they should not have the same First Amendment rights as newspapers, who, whether de facto monopolistic or not, do not have the benefit of a state created monopoly.