

# Free But Not Independent: The Real First Amendment Issue for the Press

By JONATHAN MERMIN\*

A FUNDAMENTAL TENET of our First Amendment tradition is that the press does not simply report what public officials say, but acts instead as a “watchdog” over the government.<sup>1</sup> The Supreme Court has declared the importance of “[a] vigorous and dauntless press,” charged with “vigilantly scrutinizing the official conduct of those who administer the state” and functioning as “a potent check on arbitrary action or abuse.”<sup>2</sup> These images of autonomous, adversarial journalism go to the heart of what Supreme Court Justice Potter Stewart has described as “the critical role of an independent press” in American democracy.<sup>3</sup> “If it is to perform its constitutional mission,” Justice Stewart has written, “the press must do far more than merely print public statements or publish prepared handouts.”<sup>4</sup> None of this, one might think, would be subject to much debate in the United States. Indeed, one might say that these truths are held to be self-evident.

What then to make of the following statement by Jim Lehrer of PBS, in response to a question about why the media failed to focus, before the Iraq War started, on the problems an occupying army might expect to confront:

[T]he word occupation . . . was never mentioned in the run-up to the war. It was liberation. This was [talked about in Washington as] a war of liberation, not a war of occupation. *So as a consequence, those of us in journalism never even looked at the issue of occupation.*<sup>5</sup>

The media, Lehrer explains, simply focused on what officials in Washington were talking about. Issues not under discussion inside the gov-

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1. See *Leathers v. Medlock*, 499 U.S. 439, 447 (1991).

2. *Times-Picayune v. United States*, 345 U.S. 594, 602 (1953).

3. *Branzburg v. Hayes*, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting).

4. *Id.*

5. *Hardball with Chris Matthews: Interview with Jim Lehrer* (MSNBC television broadcast May 12, 2004), transcript available at <http://msnbc.msn.com/id/4969709/> (emphasis added) (last visited July 13, 2005).

ernment in the prewar period did not make the news. So much, then, for "vigilantly scrutinizing the official conduct of those who administer the state."<sup>6</sup>

Lehrer's account of the relationship between the press and the government may be unusual for its open acknowledgement of journalistic deference toward official sources. But it is consistent with a long-standing pattern observed by journalists and academics who study the media.<sup>7</sup> The tension between our conviction that democracy requires an independent press and the actual practice of major American news organizations is the subject of this Article.<sup>8</sup>

There is a general understanding that "freedom of the press means independence from government in decisions about whether and what to publish."<sup>9</sup> Legal academics writing about the media have for the most part taken for granted that the press does function as an independent check on the government, focusing instead on more refined concerns, such as whether the media are reporting a diverse spectrum of viewpoints and fostering meaningful public deliberation on issues of public concern.<sup>10</sup> The diversity of perspectives in the media has also been a central concern of the Federal Communications Commission ("FCC"), which "has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of . . . viewpoints."<sup>11</sup> This Article does not question

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6. *Times-Picayune*, 345 U.S. at 602.

7. See *infra* Parts III.A., III.B.

8. The focus here is on the largest and most influential media outlets, newspapers, and television news. Although the Internet has made it possible for a great number of voices to cast messages out into the public sphere, few of these voices are heard by mass audiences. See C. EDWIN BAKER, *MEDIA, MARKETS AND DEMOCRACY* 286 (2002) ("The new technologies expand the universe of people offering information, opinion, and other communicative content to strangers. . . . Nevertheless, to the extent these volunteers' web pages or postings are no more read than were their earlier leaflets when distributed on street corners, the fact that they now can self-publish may make less difference than they often naively hope."); TIMOTHY E. COOK, *GOVERNING WITH THE NEWS: THE NEWS MEDIA AS A POLITICAL INSTITUTION* 171 (1998) (noting that "the public is only selective and semi attentive," and that "[w]hether most people would take the time and effort to surf the Net [for news] on a daily basis is doubtful.") (internal quotation marks omitted). Moreover, the traditional media giants have come to dominate cyberspace as well. *Id.* (observing that the Internet "relies heavily on preexisting formats and versions of the news," and accurately predicting (in 1998) that the process of traditional news formats being reproduced on the Internet "should only accelerate as established news media move onto the Internet").

9. Randall P. Bezanson, *Means and Ends and Food Lion: The Tension Between Exemption and Independence in Newsgathering by the Press*, 47 *EMORY L.J.* 895, 896 (1998).

10. See *infra* Part II.A. The terms "the media" and "the press" are used interchangeably herein.

11. *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978).

the significance of the diversity objective, but instead challenges the unspoken premise that the more fundamental goal of the First Amendment—a press independent of government—is in fact being achieved by the major American media.<sup>12</sup>

Unmentioned in most of the law review commentary on the media and the First Amendment is this notable fact: social scientists who study the media have found, and a number of journalists now acknowledge, that the spectrum of viewpoints on government policy reported in the news is a function of the terms and boundaries of policy debate inside the United States government.<sup>13</sup> This means that perspectives that have not first been expressed by government officials are ignored or marginalized in the news.<sup>14</sup> Although journalists are quite critical on their own initiative of the perceived personal inadequacies of politicians,<sup>15</sup> one does not often see critical perspectives in the media on the substance of government policy that have not first been advanced inside the government.<sup>16</sup> This pattern has been most extensively documented in the realm of foreign policy, which is also the focus of this Article.<sup>17</sup>

To be clear, the point is not that media coverage necessarily supports American policy. Because the government is composed of two major political parties and three branches, often at odds with one another, journalism that reports the news from the vantage point of the government may encompass vigorous and contentious policy debate.<sup>18</sup> But if the spectrum of policy debate in the news is limited to the spectrum of debate inside the government, the First Amendment ideal of a press independent of the government is not being achieved.<sup>19</sup>

This phenomenon might not be of great practical significance if it could be presumed that meritorious arguments on issues of public concern would find expression somewhere in official Washington, so that nothing essential would be omitted from media coverage that

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12. See *infra* Part III.

13. See *infra* Parts III.A., III.B. One law journal article that does make this point is Robert M. Entman, *Putting the First Amendment in its Place: Enhancing American Democracy Through the Press*, 1993 U. CHI. LEGAL F. 61, 63 (1993) (“Despite the First Amendment, the government heavily influences or, in many cases, determines the information that most Americans receive via the news media.”).

14. See *infra* III.B.

15. See THOMAS E. PATTERSON, *OUT OF ORDER* 6–7 (1994).

16. See *infra* Part III.B.

17. See *id.*

18. See *id.*

19. See *infra* Part II.E.

took its cues from the government.<sup>20</sup> No such presumption, however, is warranted, because even in a well-functioning democracy, the spectrum of debate among politicians reflects strategic calculations, pursuant to which certain issues and perspectives are emphasized, and others are ignored, for reasons of perceived electoral advantage that are often unrelated to any assessment of the merits of policies.<sup>21</sup> A press that permits official actors to establish the terms and boundaries of policy debate in the news reinforces the strategic decisions of politicians to highlight certain issues and perspectives and to sidestep others, instead of offering an independent perspective on government policy.<sup>22</sup> Such a press is not independent of the government in this crucial sense and may fail to report key issues and perspectives that warrant public attention.<sup>23</sup>

Legal academics writing about the media and the First Amendment have overlooked this essential feature of the mainstream media's performance, focusing instead on questions such as whether the First Amendment directs the press to enhance the quality of public deliberation in the United States.<sup>24</sup> In rightly proclaiming the significance of his own work on this topic, Cass R. Sunstein has observed that it is "ironic that people interested in the theory and practice of free speech focus on such comparatively trivial issues as commercial speech, disclosure of the names of rape victims, and controls on obscenity," when in fact "[t]he principal questions for the system of free expression lie elsewhere," in the inquiry into whether the press is doing enough to promote public deliberation.<sup>25</sup> To this I would add: it is ironic that Sunstein and others who are concerned that the media are not making an adequate contribution to American democracy base their argument on a somewhat inchoate concern that the media should report a greater diversity of perspectives and do more to enrich public deliberation, while passing over the more remarkable departure of the media from the bedrock First Amendment ideal of a press independent of government.

This Article argues that although American news organizations are independent of the United States government in a formal legal sense, journalism that lets official sources determine the spectrum of

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20. *See id.*

21. *See id.*

22. *See id.*

23. *See id.*

24. *See infra* Part II.A.

25. Cass R. Sunstein, *Half-Truths of the First Amendment*, 1993 U. CHI. LEGAL F. 25, 35-36 (1993).

policy debate in the news is inadequate to fulfill the structural role of an independent press. This departure from the First Amendment ideal has significant implications for the constitutionality of policies aimed at improving the quality of media coverage of public affairs.<sup>26</sup> For if a fundamental concern of the First Amendment is to ensure that the press is independent of the government, certain policy initiatives designed to increase the independence of the press—by fostering the emergence of smaller and more varied media entities that would be more inclined than large corporate media to feature independent reporting—should be constitutional.<sup>27</sup>

Part I reviews the public deliberation approach to the media and the First Amendment, which holds that American democracy needs, and the First Amendment permits, policy initiatives that would encourage the media to report a greater diversity of perspectives and enrich public deliberation. The focus of this Part is on Sunstein's influential work.<sup>28</sup> Certain weaknesses of this approach as a political and constitutional argument are identified.

Part II sets out the independence of government approach, using the Iraq War as an example. After sketching the Supreme Court's understanding of the First Amendment ideal of a press independent of government, Part II reviews the observations of prominent journalists who acknowledge that the media have not been independent of the United States government in their Iraq War coverage, and describes the voluminous academic literature documenting the media's reliance on government officials to set the terms and boundaries of foreign policy debate in the news. Part II then examines how this phenomenon has played out around the Iraq War and argues that this form of journalism fails to fulfill the structural role of an independent press.

Part III describes certain advantages of the independence of government approach as a basis for upholding the constitutionality of policies designed to improve the quality of media coverage of public affairs and as a prescription for journalistic practice, and outlines in broad strokes a strategy for encouraging independent journalism.

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26. See *infra* Part III.B.

27. See *id.*

28. See generally CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH*, 17-51 (1993) [hereinafter SUNSTEIN, DPFS].

## I. Public Deliberation

Reading the legal scholarship on the media and the First Amendment, one gets the impression that American journalists are independent of the United States government, but that the First Amendment may be offended by their failure to encourage deliberation on issues of public concern.<sup>29</sup> The leading exponent of this argument in recent years has been Cass R. Sunstein.

### A. Promoting Public Deliberation

In his influential work on the media, Sunstein seeks to explain why certain policy initiatives aimed at improving the quality of media coverage of public affairs should be permitted under the First Amendment.<sup>30</sup> Sunstein begins with the proposition that “a central purpose of the First Amendment is to ensure a well-functioning democratic order.”<sup>31</sup> Sunstein advances what he describes as a “Madisonian conception” of American democracy, which holds that “a well-functioning system of free expression . . . is closely connected to the central constitutional goal of creating a deliberative democracy.”<sup>32</sup> In the deliberative process Sunstein envisions, “[e]xisting preferences should be subjected to general public discussion, rather than taken as the inevitable building-blocks for government outcomes.”<sup>33</sup> In other words, prevailing wisdom should be investigated, not simply assumed to be correct.<sup>34</sup>

Sunstein outlines two basic requirements for a system of free expression that meets the needs of deliberative democracy. First, the system “must reflect broad and deep attention to public issues.”<sup>35</sup> Toward that end, “serious issues must be covered, and they must be covered in a serious way.”<sup>36</sup> Second, “there must be public exposure to an appropriate diversity of view.”<sup>37</sup> This means that “a broad spectrum of opinion must be represented, [and] that people must be allowed to hear sharply divergent views” on public affairs, including “challenges to the conventional wisdom from a variety of different perspectives.”<sup>38</sup>

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29. See *infra* Part I.A.

30. SUNSTEIN, DPFS, *supra* note 28.

31. Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 501 (2000).

32. SUNSTEIN, DPFS, *supra* note 28, at 18.

33. *Id.* at 20.

34. See *id.* at 21–22.

35. *Id.* at 20.

36. *Id.*

37. *Id.* at 21.

38. *Id.* at 21–22.

Sunstein cautions that “[i]n the absence of different perspectives and a wide range of information, the system cannot function,” because it will “fail to expose errors of fact” and “fail to shed the kind of light that comes only from diverse perspectives about public issues.”<sup>39</sup>

Others writing on this topic have sounded similar themes. R. Randall Rainey argues that “the media’s power” should be “systematically directed toward enriching public understanding, discussion, and debate of important civic issues.”<sup>40</sup> For Rainey, the focus of communications policy should be on “making available all relevant and material information necessary for the formation of prudent judgments.”<sup>41</sup> Owen M. Fiss likewise asserts that the purpose of free speech is to “enrich public debate.”<sup>42</sup> For Alexander Meiklejohn, the First Amendment requires “that everything worth saying shall be said.”<sup>43</sup> Such are the expectations deliberative democracy theorists place on the media.

Seeking to establish that his conception of a “well-functioning democratic order” is grounded in the First Amendment, Sunstein identifies three sources of authority.<sup>44</sup> First, he argues that James Madison understood the importance of a free press in terms of its contribution to deliberative democracy. For this proposition he cites Madison’s observation that the “value and efficacy” of the right of citizens to elect members of their government “depends on the knowledge of the comparative merits and demerits of the candidates for the public trust.”<sup>45</sup> Thus, Sunstein’s “Madisonian” conception of the First Amendment holds that the job of a free press is to enable citizens to acquire the information necessary to deliberate on the merits of candidates for public office.<sup>46</sup>

Second, Sunstein points to the declaration by Justice Brandeis in his concurring opinion in *Whitney v. California*<sup>47</sup> that “[t]hose who won our independence believed . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and

39. *Id.* at 22.

40. R. Randall Rainey, *The Public’s Interest in Public Affairs Discourse, Democratic Governance, and Fairness in Broadcasting: A Critical Review of the Public Interest Duties of the Electronic Media*, 82 GEO. L.J. 269, 333 (1993).

41. *Id.* at 331–32.

42. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1411 (1986).

43. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 26 (1948).

44. Sunstein, *supra* note 31, at 501.

45. SUNSTEIN, *DPFS*, *supra* note 28, at xvii (quoting James Madison, Report of 1800 (Jan. 7, 1800)).

46. *Id.*

47. 274 U.S. 357 (1927) (Brandeis, J., concurring).

that this should be a fundamental principle of the American government."<sup>48</sup> From this Sunstein infers that the First Amendment should be read to encourage deliberation among citizens on issues of public concern.<sup>49</sup>

Third, Sunstein cites *Red Lion Broadcasting Co. v. FCC*,<sup>50</sup> where the Supreme Court declared: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount" under the First Amendment.<sup>51</sup> Rejecting the notion that the First Amendment exists merely to defend owners of media outlets against government regulation, the Court observed that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."<sup>52</sup> For the *Red Lion* Court, the First Amendment preserves "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences," not just the autonomy of private media owners.<sup>53</sup>

In sum, Sunstein concludes that the First Amendment as explicated by Madison, Brandeis, and the Supreme Court in *Red Lion* "does not stress the autonomy of broadcasters . . . from regulation," but "is based instead on the need to promote democratic self-government by ensuring that people are presented with a broad diversity of views about public issues."<sup>54</sup> Thus, "legal rules designed to promote freedom of speech should not be invalidated" pursuant to a reflexive opposition to government regulation of speech "if their purposes and effects are constitutionally valid"<sup>55</sup>—that is, if their aim is to enhance the quality of deliberative democracy by promoting discussion of public issues from a broad diversity of perspectives.<sup>56</sup>

## B. Critique of the Public Deliberation Approach

Sunstein offers an insightful commentary on the state of public deliberation in America and the media's limited contribution to delib-

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48. *Id.* at 375; SUNSTEIN, DPFS, *supra* note 28, at 26.

49. *See* SUNSTEIN, DPFS, *supra* note 28, at 27–28.

50. 395 U.S. 367 (1969).

51. *Id.* at 390.

52. *See* SUNSTEIN, DPFS, *supra* note 28, at 49; *Red Lion*, 395 U.S. at 390.

53. *See Red Lion*, 395 U.S. at 390.

54. SUNSTEIN, DPFS, *supra* note 28, at 49.

55. *Id.* at 37.

56. *See id.*

erative democracy. But his reading of the First Amendment has come under substantial criticism, on three general grounds.

First, it is unclear how to determine the parameters of the “appropriate diversity” of viewpoints journalists should report.<sup>57</sup> It would be impractical—and undesirable—for journalists to report all viewpoints on issues of public concern; a perusal of the World Wide Web reveals that innumerable “viewpoints” exist, many of which do not warrant much examination. As an abstract proposition, it is hard to disagree with the assertion that “there must be public exposure to an appropriate diversity of view”—or in Meiklejohn’s formulation, to “everything worth saying”<sup>58</sup>—but this is too vague a guidepost to inform journalistic practice.<sup>59</sup> Christopher S. Yoo points out that Sunstein’s approach “fail[s] to provide much guidance as to how to implement the systems that [he] envision[s].”<sup>60</sup> Indeed, most journalists would probably retort that they do report an “appropriate” diversity of viewpoints. Sunstein’s theory offers no clear basis for evaluating this claim.<sup>61</sup>

Second, Sunstein’s starting point—that ordinary citizens should engage in “broad and deep” public policy deliberation, and that the media should encourage them to do so—is easy to paint as unrealistic, elitist, and/or paternalistic. J.M. Balkin suggests that Sunstein’s call for greater attention to public affairs “reflects his distrust of and disappointment with American mass culture and the popular tastes reflected in that culture.”<sup>62</sup> To Laurence H. Winer, Sunstein’s work “has the distinct and troubling paternalistic (not to mention elitist) flavor of ‘we’ know best what speech is good for people and society and

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57. *Id.* at 21; see J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 *YALE L.J.* 1935, 1957 (1995) (reviewing CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993)) (questioning the wisdom of leaving to government regulation “[d]ecisions about what is ‘worth saying’”).

58. See MEIKLEJOHN, *supra* note 43, at 26.

59. SUNSTEIN, *DPFS*, *supra* note 28, at 21.

60. Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 *GEO. L.J.* 245, 326 (2003).

61. See Laurence H. Winer, *The Red Lion of Cable, and Beyond?* *Turner Broadcasting v. FCC*, 15 *CARDOZO ARTS & ENT. L.J.* 1, 38 (1997).

We used to have three, and now have four, vigorously competitive broadcast networks. Do they provide meaningfully diverse programming? Does a large cable system with fifty or more active channels create a diverse marketplace of ideas, or is there still basically nothing worthwhile to watch, only more channels on which to watch it? How can we address such a question if the reason for asking it is not just for the sake of social commentary, but to evaluate intrusive government regulation in the face of the First Amendment?

*Id.*

62. Balkin, *supra* note 57, at 1955.

therefore 'we' collectively can decide to ensure its availability."<sup>63</sup> Whether or not it is fair or helpful to characterize the suggestion that citizens should pay attention to public affairs as elitist or paternalistic, an academic argument that presumes that people should watch less NASCAR and more C-SPAN does invite such a response.

Third, it is not clear that Sunstein's conception of deliberative democracy is derived from the First Amendment. Indeed, his "vision of the First Amendment has . . . proven to be quite controversial," as "[f]ree speech theorists have long disputed the extent to which promoting the democratic process constitutes the central value of the First Amendment."<sup>64</sup> Sunstein rests his claim to be advancing a "Madisonian" conception of a well-functioning system of free expression not on any sustained argument found in Madison's seminal writings, but on a few sentences written by Madison in 1800,<sup>65</sup> leading one critic to declare that "Sunstein's 'Madisonian' theory of the First Amendment is about as Madisonian as Madison, Wisconsin."<sup>66</sup>

As for the *Red Lion* decision, Yoo observes that it has been characterized as "something of a freak" in the Supreme Court's First Amendment jurisprudence.<sup>67</sup> "Occasionally, the Supreme Court has flirted [as in *Red Lion*] with the idea that the First Amendment protects the right of the people to receive information rather than the right of speakers to speak, but generally, the Court operates on the assumption that the best way to protect everyone's right to receive information is to protect everyone's right to speak."<sup>68</sup> The *Red Lion* interpretation of the First Amendment, on which Sunstein depends, is therefore a questionable foundation on which to build a theory of the role of a free press.

## II. Independence of Government

If the Press Clause of the First Amendment has meaning beyond the literal proscription of laws that directly abridge freedom of the press, it might—as Sunstein suggests—establish the right of the public to be exposed to a diverse spectrum of viewpoints for the purpose of promoting public deliberation on issues of public concern. But it also

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63. Winer, *supra* note 61, at 38 n.161.

64. Yoo, *supra* note 60, at 311.

65. SUNSTEIN, DPFS, *supra* note 28, at xvii.

66. Balkin, *supra* note 57, at 1955; *see also* Yoo, *supra* note 60, at 319 ("A review of the historical record reveals that this so-called 'Madisonian' vision of the First Amendment . . . is more Sunstein's creation than Madison's.").

67. Yoo, *supra* note 60, at 320.

68. David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 525–26 (2002).

means simply that the press should be independent of the government.

The Supreme Court has repeatedly indicated that an independent press is a central goal of the First Amendment. In *Leathers v. Medlock*,<sup>69</sup> the Court identified the crucial importance of “the press as a watchdog of government activity.”<sup>70</sup> In *Times-Picayune v. United States*,<sup>71</sup> the Court noted the need for “[a] vigorous and dauntless press” to “vigilantly scrutiniz[e] the official conduct of those who administer the state” and to act as “a potent check on arbitrary action or abuse.”<sup>72</sup> A free press is thus characterized not just by the absence of direct government control—it is also expected to subject government actions to independent critical scrutiny.<sup>73</sup>

The Court has observed that it is a “basic assumption of our political system that the press will often serve as an important restraint on government.”<sup>74</sup> In his concurring opinion in *New York Times Co. v. United States*,<sup>75</sup> Justice Black declared:

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. . . . The Government’s power to censor the press was abolished so that the press would remain forever free to censure the Government. . . . And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.<sup>76</sup>

As Justice Stewart has put the point, “[i]f it is to perform its constitutional mission, the press must do far more than merely print public statements or publish prepared handouts.” Otherwise, the press would be reduced to the status of “a captive mouthpiece of ‘newsmakers,’”

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69. 499 U.S. 439 (1991).

70. *Id.* at 447. On the watchdog ideal in general, see TIMOTHY W. GLEASON, *THE WATCHDOG CONCEPT: THE PRESS AND THE COURTS IN NINETEENTH-CENTURY AMERICA* 3–7 (1990).

71. 345 U.S. 594 (1953).

72. *See id.* at 602.

73. *See Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 667 (1990) (observing that the Court has “consistently recognized the unique role that the press plays in . . . offering criticism . . .”) (emphasis added); *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (“the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.”).

74. *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983).

75. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

76. *Id.* at 717 (1971) (Black, J., concurring).

rather than an independent observer and critic.<sup>77</sup> Such are the Supreme Court's expectations of the press under the First Amendment.

All of this might seem uncontroversial, except for one problem: it turns out that this is not how the press operates in practice. Although the government cannot dictate the content of the news, it nevertheless exerts an extraordinary degree of influence over the editorial decisions journalists make.

### A. The Insider Critique

Notwithstanding C. Edwin Baker's observation that "[o]ne of the great attributes of [American] journalists is their almost religious insistence on independence,"<sup>78</sup> the experience of the Iraq War has caused a number of leading journalists to acknowledge their lack of independence in practice from the United States government. A case in point are the comments (quoted in part above) of Jim Lehrer in an interview with MSNBC's Chris Matthews.<sup>79</sup> Pressed to explain why the media had not prepared the nation for the challenges a military occupation of Iraq would pose, Lehrer indicated that this issue had not been examined in the news during the prewar period because it had not been a topic of discussion in official Washington:

the word occupation . . . was never mentioned in the run-up to the war. It was liberation. This was [talked about in Washington as] a war of liberation, not a war of occupation. So as a consequence, those of us in journalism never even looked at the issue of occupation.<sup>80</sup>

Elaborating on this point, Lehrer observed that if journalists had started looking into the "occupation" issue before the war started, "[i]t would have been difficult to have had debates about [the occupation issue] going in, when the president and the government . . . [were] not talking about occupation . . . . [Y]ou'd have had to have gone against the grain."<sup>81</sup> So for this member of our "vigorous and dauntless press," it would be too much to expect journalists to have "gone against the grain" by examining on their own initiative an issue that was not on the Washington agenda.<sup>82</sup>

Other leading journalists have echoed Lehrer's observation. As *Washington Post* columnist David Ignatius puts the point, journalists

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77. *Branzburg v. Hayes*, 408 U.S. 665, 729 (1972) (Stewart, J., dissenting).

78. BAKER, *supra* note 8, at 282.

79. *Hardball with Chris Matthews: Interview with Jim Lehrer*, *supra* note 5.

80. *Id.*

81. *Id.*

82. *Times-Picayune v. United States*, 345 U.S. 594, 602 (1953).

have “rules of our game” that “make it hard for us to tee up an issue . . . without a news peg.”<sup>83</sup> Pursuant to these rules, “if Senator so and so hasn’t criticized post-war planning for Iraq, then it’s hard for a reporter to write a story about that.”<sup>84</sup> Instead, reporters “wait for somebody [in Washington] to make a statement, and then . . . report on the statement.”<sup>85</sup>

Although this would seem to be a peculiar *modus operandi* for professional journalists with an “almost religious insistence on independence,”<sup>86</sup> the analysis advanced by Lehrer and Ignatius is supported by Pulitzer Prize-winning Associated Press reporter Charles J. Hanley, author of a Fall 2003 story on the AP wire that detailed the torture of Iraqis at Abu Ghraib months before a leaked United States Army report and the now-famous digital photographs indisputably depicting abuse caused the story to “break” in the Spring of 2004. Asked why his story was not picked up by major media outlets,<sup>87</sup> Hanley explained that the practice of the American media is to “invest[ ] U.S. official statements with credibility while disregarding statements from almost any other source,” such as the Iraqi prisoners he had interviewed.<sup>88</sup> Editors declined to publish the story in the Fall of 2003 because at that time, there was “no official structure to the story. It was not an officially sanctioned story that begins with a handout from an official source.”<sup>89</sup>

In the judgment of John Burns of the *New York Times*, the press “failed the American public by being insufficiently critical about elements of the administration’s plan to go to war.”<sup>90</sup> The cause of this failure is suggested by Burns’ *New York Times* colleague Judith Miller, author of a series of now-discredited stories about Iraq’s purported weapons of mass destruction (“WMD”) in the period leading up to the Iraq War. Responding to criticism that her reporting was too credu-

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83. *On the Media: Interview of David Ignatius* (NPR radio broadcast Apr. 30, 2004), transcript available at [http://www.wnyc.org/onthemedial/transcripts/transcripts\\_043004\\_media.html](http://www.wnyc.org/onthemedial/transcripts/transcripts_043004_media.html) (last visited July 13, 2005).

84. *Id.*

85. *Id.*

86. BAKER, *supra* note 8, at 282.

87. Greg Mitchell, *Where Was Press when First Iraq Prison Issues Arose?* EDITOR & PUBLISHER, Apr. 2004, at 22, 22 (interviewing Charles J. Hanley).

88. *Id.*

89. *Id.*

90. Joey Coburn & Betty Yu, *Journalists Spar over Media Coverage of War with Iraq*, DAILY CALIFORNIAN, Mar. 19, 2004, at A1; see also Paul Krugman, *Triumph of the Trivial*, N.Y. TIMES, July 30, 2004, at A15 (describing “the failure to raise questions about the rush to invade Iraq” as a “serious . . . journalistic betrayal”).

lous of White House claims about Iraq's alleged capabilities, Miller declared: "My job isn't to assess the government's information and be an independent intelligence analyst myself. My job is to tell readers of *The New York Times* what the government thought about Iraq's arsenal."<sup>91</sup> So Miller just reported "what the government thought." The truth or falsity of the government's position was evidently not her concern.<sup>92</sup>

## B. The Academic Critique

Academics who study the media have seen all of this before. In his ground breaking work, *The 'Uncensored War': The Media and Vietnam*, Daniel C. Hallin refuted the proposition that the media played an independent role in generating domestic opposition to the Vietnam War.<sup>93</sup> Hallin found that sustained criticism of the United States policy of military intervention in Vietnam did not emerge in the media until 1967, after critical views had been articulated in Congress and inside the Johnson administration.<sup>94</sup> According to Hallin, it was dissenting voices inside the American government that caused the media coverage to turn critical, not any independent critical impulse of journalists.<sup>95</sup>

The pattern of coverage Hallin described with respect to Vietnam has been a recurring phenomenon.<sup>96</sup> When the United States invaded Grenada in 1983, President Reagan explained that military action was necessary because the small Caribbean island posed a national security threat to the United States and because civil unrest in Grenada

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91. Michael Massing, *Iraq: Now They Tell Us*, N.Y. REV. BOOKS, Feb. 26, 2004, at 43.

92. It seems probable that American journalists would not be in the introspective mode in which we encounter Jim Lehrer and his colleagues if the invasion of Iraq, like the Panama invasion and the Gulf War, had achieved its own stated objectives. The Iraq War, however, has *not* achieved the Bush Administration's stated objectives of eliminating Iraq's vast stockpiles of WMD (none were found) and breaking the ties between Iraq and al Qaeda (none of any significance existed). Meanwhile, large numbers of Americans continue to be killed and injured. Journalists have thus come to reflect on their own contribution in getting us to this point.

93. DANIEL C. HALLIN, *THE 'UNCENSORED WAR': THE MEDIA AND VIETNAM* 3-4 (1986).

94. *See id.* at 159-174.

95. *See id.*

96. *See, e.g.*, HALLIN, *supra* note 93, at 213-14; JONATHAN MERMIN, *DEBATING WAR AND PEACE: MEDIA COVERAGE OF U.S. INTERVENTION IN THE POST-VIETNAM ERA* 143 (1999); PIERS ROBINSON, *THE CNN EFFECT: THE MYTH OF NEWS, FOREIGN POLICY AND INTERVENTION* 12 (2002); *TAKEN BY STORM: THE MEDIA, PUBLIC OPINION, AND U.S. FOREIGN POLICY IN THE GULF WAR* chs. 1, 3, 4, 9, 10, 12, 13 (W. Lance Bennett & David L. Paletz eds., 1994); W. Lance Bennett, *Toward a Theory of Press-State Relations in the United States*, 40 J. COMM. 2, 103-125 (1990); John Zaller & Dennis Chui, *Government's Little Helper: U.S. Press Coverage of Foreign Policy Crisis, 1945-1991*, 13 POL. COMM. (1996) at 385.

endangered American medical students there.<sup>97</sup> Because Democrats in Congress questioned these White House claims, critical perspectives on the decision to invade were reported.<sup>98</sup> In contrast, when the United States invaded Panama in 1989, claiming that Panama posed a national security threat to the United States and citing the death of an American at a Panamanian military roadblock, Democrats supported President Bush.<sup>99</sup> Although it seemed clear that Democratic support for the invasion was to a great extent the product of a strategic maneuver undertaken to counter the perception that the party of Jimmy Carter, Walter Mondale, and Michael Dukakis lacked fortitude on national security issues, the absence of Democratic opposition gave rise to media coverage devoid of critical perspectives on the decision to invade.<sup>100</sup>

When Iraq invaded Kuwait in August 1990 and President Bush countered by dispatching ground troops to Saudi Arabia and analogizing Iraq's action to Hitler's initial conquests, Democrats voiced support, and critical perspectives were marginalized in the media.<sup>101</sup> The Chairman of the Joint Chiefs of Staff, General Colin L. Powell, had been opposed to the decision to dispatch ground troops before it was made. Leading Democrats suggested in the few days after the Iraqi invasion, but before the American decision to send ground troops to the region was announced, that such a response would be unwarranted.<sup>102</sup> When the White House acted, however, and Democrats (as well as General Powell) declined to criticize its action, journalists geared to official sources found themselves with no critical perspectives to report.<sup>103</sup>

A few months later, in November 1990, when President Bush made clear that he intended to launch an offensive military operation to oust Iraq from Kuwait, Democrats voiced opposition to this course

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97. See MERMIN, *supra* note 96, at 37–42, 45–47.

98. See *id.*

99. See *id.* at 37–42, 48–51.

100. See *id.* at 48–51, 53–56, 62–64. Journalists did offer some overheated speculation in the first few days of the operation that the invasion might fail to achieve its own objectives, but the discussion was premised on the assumption that military action had in fact been necessary. See *id.*

101. See William A. Dorman & Steven Livingston, *News and Historical Content: The Establishing Phase of the Persian Gulf Policy Debate*, in TAKEN BY STORM: THE MEDIA, PUBLIC OPINION, AND U.S. FOREIGN POLICY IN THE GULF WAR 63, 65 (W. Lance Bennett & David L. Paletz eds., 1994); MERMIN, *supra* note 96, at 66–76.

102. See BOB WOODWARD, THE COMMANDERS 209–214 (1991); MERMIN, *supra* note 96, at 88–89.

103. See Dorman & Livingston, *supra* note 101, at 65; MERMIN, *supra* note 96, at 66–76.

of action, and a period of critical media coverage ensued.<sup>104</sup> When the war started, however, Democrats struck a supportive pose, and critical perspectives were once again relegated to the margins of the news.<sup>105</sup>

Numerous empirical studies have demonstrated that the spectrum of issues and perspectives reported in the news is a function of the spectrum of debate inside the government.<sup>106</sup> One recent work concludes that “[a]n idea must usually have *energetic sponsors* among at least a few *powerful leaders* to receive sympathetic attention” in major media outlets.<sup>107</sup> It is remarkable that our free and independent press requires that an idea have the energetic sponsorship of powerful government officials for it to receive positive coverage in the news. As Timothy E. Cook explains, Justice Stewart’s “presumption that the news media work to check government is simply empirically wrong.”<sup>108</sup>

Evidence that the media are not an effective check on the government does not mean that journalists are mere propaganda instruments of the President, for the simple reason that opposition party politicians in Congress often criticize White House actions, and journalists report their criticism.<sup>109</sup> But what is the relationship of the

104. See Robert M. Entman & Benjamin I. Page, *The News Before the Storm: The Iraq War Debate and the Limits of Media Independence*, in *TAKEN BY STORM: THE MEDIA, PUBLIC OPINION, AND U.S. FOREIGN POLICY IN THE GULF WAR 82*, 84 (W. Lance Bennett & David L. Paletz eds. 1994); MERMIN, *supra* note 96, at 66–67, 93–96.

105. See MERMIN, *supra* note 96, at 107–14.

106. See *supra* note 96; see also ROBERT M. ENTMAN, *PROJECTIONS OF POWER: FRAMING NEWS, PUBLIC OPINION, AND U.S. FOREIGN POLICY 4–5* (2004) (noting that authors such as Hallin, Bennett, and Mermin, whose work represents one of “two major approaches to understanding the government-media nexus in foreign policy” (the other approach ascribes even less independence to the media), “convincingly emphasize . . . elite opposition as a vital determinant of whether the news will deviate from the White House line,” although they do not “explain fully” certain aspects of media coverage of United States foreign policy). Journalists do report *foreign* criticism of United States military actions, even when a consensus exists in Washington, but such criticism—for example, Iraqi denunciations of impending American “aggression” during the buildup to the Iraq War—tends to be framed in terms that do not resonate with American audiences. See MERMIN, *supra* note 96, at 13.

107. ENTMAN, *supra* note 106, at 110 (emphasis added).

108. COOK, *supra* note 8, at 179.

109. Even where United States policy has bipartisan backing in Washington, journalists may continue to articulate *procedural* criticism of the President, such as criticism of a President who has sent troops abroad for failing to consult with Congress or for limiting the media’s access to the action. See ENTMAN, *supra* note 106, at 79–84. Journalists also introduce critical tension into the news, even in cases of bipartisan consensus in Washington, by speculating as to the possibility that the President’s policy might fail, on its own terms, to achieve its own objectives, or by noting the political risks run by the president if the operation does not go as planned. See *id.* at 118–19; MERMIN, *supra* note 96, at 9. Nevertheless, when there is bipartisan support in Washington for a White House action, critical perspec-

press to the government as a whole? If journalists use the spectrum of debate inside the government to set the spectrum of debate in the news, is the press independent of the government in practice? Such journalism is independent of the President, as it reports criticism of the President's policies when criticism has been expressed in Congress (or by other official actors). Congress, however, is a branch of the government. Thus journalism that reports critical perspectives on the President's policies only if they have first been articulated in Congress cannot plausibly be described as being independent of the government. This creates First Amendment concerns.

### C. The Iraq War

The contours of the media's independence problem have been on display in connection with the Iraq War.<sup>110</sup> When it emerged in 2002 that the Bush Administration was planning a "preemptive" attack on Iraq, voices inside and outside of Washington, including many Democrats and even some Republicans, expressed initial opposition to the idea.<sup>111</sup> In the Summer of 2002, top officials who had served under President George H.W. Bush criticized the impending march toward war, and their views received extensive coverage.<sup>112</sup> Their criticism was reflected in the news, which in the Summer of 2002 was full of criticism of the emerging United States policy towards Iraq.<sup>113</sup>

In the Fall of 2002, however, the political dynamic changed. As Republicans closed ranks behind President Bush and "resurrected the cold war era charge that Democrats were 'soft on defense'" in time for the congressional campaign, "most Democratic congressional leaders voiced support for presidential authority to wage war against Iraq."<sup>114</sup> Leading Democratic presidential candidates—including Senators John Kerry and John Edwards and Representative Richard

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tives on the wisdom and justification of the policy itself are ignored or marginalized in the news. *See id.* at 9–10, 143.

110. *See infra* Section III.A.

111. *See* ENTMAN, *supra* note 106, at 109–112.

112. *Id.* at 109; *see also id.* at 111 ("[E]lite source networks were buzzing with dissent in the summer of 2002."). *Id.*; William A. Dorman, *Stop Me Before I Shill Again: American Journalism and the Iraq War*, 13 POL. COMM. REP., Fall 2003, at 1, 1 ("such significant political elites and heavyweights from the first Bush administration as Brent Scowcroft, Lawrence Eagleburger, and General Anthony C. Zinni . . . raised serious questions [in mid-2002] about the current President Bush's thinking [about Iraq].").

113. *See* ENTMAN, *supra* note 106, at 111; Dorman, *supra* note 101, at 1.

114. ENTMAN, *supra* note 106, at 112.

Gephardt—did likewise.<sup>115</sup> This seemed to reflect not so much a judgment on the merits by Democrats that the president's policy was sound, but a political calculation that a Democrat who did not support the war could not be elected President.<sup>116</sup>

Once the formal debate in Congress had concluded and the White House had prevailed, critical perspectives faded to the margins of Washington debate and thus were marginalized in the news too.<sup>117</sup> In the crucial weeks before the war started, the media echoed the concerns expressed by some Democrats that the President's timetable for war seemed rather precipitous and that the opposition of France and Germany was cause for concern.<sup>118</sup> But because journalists declined to cast their gaze beyond official Washington in search of critical perspectives, major media outlets made no real inquiry into the merits of the policy of invading Iraq.<sup>119</sup> So as best one could determine by read-

115. See Jim Vandeltai, *Past Votes Dog Some Presidential Candidates*, WASH. POST, Sept. 12, 2003, at A1.

116. See ENTMAN, *supra* note 106, at 161 ("Many politicians seemed to feel they would lose more votes (and contributions) from hawks by opposing the war than they would gain from doves"); Dan Balz, *Democratic Rivals' War Dilemma*, WASH. POST, Jan. 31, 2003, at A1 (analyzing the strategic calculations of Democratic Presidential candidates); Jennifer Barrett, *Where's the Dissent*, NEWSWEEK.COM, Jan. 16, 2003, <http://www.newsweek.com> (archived document requiring payment to access) (last visited July 24, 2005) (interview with W. Lance Bennett) ("[T]he Democrats are in an extremely weak position at the moment and they are unwilling to challenge [President Bush] even if they don't feel the war is a good idea.")

117. See ENTMAN, *supra* note 106, at 111; W. Lance Bennett, *Operation Perfect Storm: The Press and the Iraq War*, 13 POL. COMM. REP., Fall 2003, at 1, 1.

Apparently the defeated Democrats [in the November 2002 congressional elections] have been advised to offend no one and take no political risks. . . . News organizations are so dependent on prominent official sources to advance challenges to a leading news frame that the strategic silence of the Democrats all but killed media deliberation about the war.

118. See ENTMAN, *supra* note 106, at 155 (As the war approached, the "framing contest [in the media] was restricted mostly to arguing over 'war soon' or 'work through the U.N.," not over the problem definition and causal analysis that pointed to disarming Iraq" as an appropriate course of action).

119. See INGRID A. LEHMANN, EXPLORING THE TRANSATLANTIC MEDIA DIVIDE OVER IRAQ 31 (The Joan Shorenstein Ctr. on the Press, Politics and Public Policy, John F. Kennedy Sch. of Gov't, Harvard Univ., Working Paper No. 2004-1, 2004).

U.S. journalists accepted, for the most part, uncritically the slogans of the Bush Administration, such as "Saddam the tyrant and madman" who was to be deposed in the interest of freedom and human rights, linking Saddam Hussein to Al Qaeda and the 9/11 terrorist attack, and arguing that Iraq's alleged weapons of mass destruction posed a direct threat to the United States.

Murrey Marder, *What Happens When Journalists Don't Probe?*, NIEMAN REP., Summer 2003, at 73, 74.

The Bush [Administration's] new policy of preemptive military engagement reached far beyond Iraq, and it was never seriously examined or debated in Con-

ing the morning paper and watching the evening news, the essential questions surrounding what was being billed as the “Battle of Iraq” engagement in the “Global War on Terrorism” were simply ones of alliance management and timing.<sup>120</sup>

Independent journalism guided by the First Amendment would have “looked at the issue of occupation” in advance of the war even if official Washington was not looking at it.<sup>121</sup> An independent press would have devoted more attention to opposition to the war among foreign policy experts outside of Washington, such as the thirty-three distinguished international relations professors who deemed it necessary to place a paid advertisement in the *New York Times* in September 2002 declaring: “Even if we win easily, we have no plausible exit strategy,” but “would have to occupy and police [Iraq] for many years to create a viable state.”<sup>122</sup> An independent press would not have waited for “Senator so-and-so” to “tee up” the issue of what would happen after the initial conquest of Iraq before focusing on this crucial question.<sup>123</sup>

Once the war started, critical perspectives in Washington—and therefore in the news—were few and far between.<sup>124</sup> The coverage

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gress. The press, also . . . failed “to connect the dots,” even though President Bush called it a new “doctrine”—the lofty term reserved for historic pronouncements such as the “Monroe Doctrine” and “Truman Doctrine.”

*Id.*

120. As former *New York Times* columnist, Tom Wicker, wrote a week before the war started: “Bush administration spokesmen have made several cases for waging war against Iraq, and the U.S. press has tended to present all those cases to the public as if they were gospel.” Marder, *supra* note 119, at 75 (quoting Tom Wicker, *Press Isn't Asking Right Question About Iraq*, EDITOR & PUBLISHER, Mar. 11, 2003); see also Anthony Lewis, *The Responsibilities of a Free Press*, NIEMAN REP., Summer 2004 at 60, 62. (noting “a press tendency to take its lead from the White House . . . in the run-up to the Iraq War. Diligent digging would have found the doubts that we now know existed in the intelligence agencies about the existence of weapons of mass destruction in Iraq. If the press had been more critical—more independent—the public would not have been led so easily from al Qaeda to Iraq as the enemy that 44 percent of respondent in a poll thought there were Iraqis among the airplane terrorists on September 11th.”)

121. See *Hardball with Chris Matthews: Interview with Jim Lehrer*, *supra* note 5.

122. *War with Iraq Is Not in America's National Interest*, N.Y. TIMES, Sept. 26, 2002, at A29 (paid political advertisement signed by over thirty leading international relations scholars).

123. See *On the Media: Interview of David Ignatius*, *supra* note 83.

124. See ENTMAN, *supra* note 106, at 118 (“CNN’s prime time news host, Aaron Brown, said that the justifiability of the war was ‘just not a relevant question’ once it started.”); Bennett, *supra* note 117, at 1 (characterizing the Iraq war as “a national patriotic rally that was led as much by a cheerleading press as by the administration”); Marder, *supra* note 109, at 75 (quoting BBC director-general Greg Dyke: “I was shocked while in the United States by how unquestioning the broadcast news media was during the war.”); Adam Nagourney, *Democrats Say Bush's Credibility Has Been Damaged*, N.Y. TIMES, July 14, 2003, at

continued in this noncritical mode until the Summer of 2003, when Democrats started remarking on the failure to locate weapons of mass destruction and questioning the President's plan for reconstruction.<sup>125</sup> Journalists reported this, and the coverage became more critical.<sup>126</sup>

Even after support for the war started to unravel in Washington, the critical perspectives featured in the news continued to be the ones that were articulated in Washington; other notable points were not emphasized. Like the Democrats, the media trumpeted the failure to locate WMD in Iraq.<sup>127</sup> Journalists neglected, however, a more instructive postwar WMD story. Although the White House had expressed grave concern before the war that Iraq's WMD might come into the possession of terrorists, and that al Qaeda was operating inside Iraq, American forces demonstrated no particular interest in securing suspected WMD sites in the chaotic period after the fall of Saddam Hussein.<sup>128</sup> If concern about WMD being given to al Qaeda had been among the real reasons for the war, one might have expected the American military not to have permitted the rampant looting of nuclear waste sites that transpired on their watch.<sup>129</sup> An independent press would have examined this issue and its implications, but with the Democrats declining to take the lead, the story never got off the ground.

An independent press would also have challenged the conflation of chemical and biological weapons with nuclear weapons under the "WMD" heading.<sup>130</sup> While hypothetical Iraqi nuclear weapons could

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All (noting that until the Summer of 2003 "most of the Democrats had been reluctant to criticize a war that had appeared successful" and had public support).

125. See Nagourney, *supra* note 124, at A11 ("Democratic presidential candidates offered a near-unified assault on President Bush's credibility in his handling of the Iraq war, signaling a shift in the political winds by aggressively invoking arguments most had shunned" up to this point).

126. See *id.*

127. See Barton Gellman, *Frustrated, U.S. Arms Team to Leave Iraq*, WASH. POST, May 11, 2003, at A1.

128. See Rob Norland, *WMDs for the Taking?*, NEWSWEEK, May 19, 2003, at 30, 30 (reporting the failure to secure suspected WMD sites).

129. See *id.*

130. See PAUL KRUGMAN, *THE GREAT UNRAVELLING: LOSING OUR WAY IN THE NEW CENTURY 11* (2003) (noting the significant distinction between chemical weapons and nuclear weapons); SUSAN D. MOELLER, *MEDIA COVERAGE OF WEAPONS OF MASS DESTRUCTION 41* (Ctr. for Int'l & Sec. Studies at Md., 2004), available at [http://www.cissm.umd.edu/documents/WMDstudy\\_full.pdf](http://www.cissm.umd.edu/documents/WMDstudy_full.pdf) (the media's persistent "[c]onflating [of] nuclear, chemical, and biological weapons amorphously together as 'weapons of mass destruction' often was a result of journalists keying off speeches and statements by President Bush," whose administration "deliberate[ly] aggregat[ed]" these different categories of weapons) (last visited

indeed have posed a real threat to the United States, Iraqi poison gas and anthrax, even if such things had existed in 2003, simply would not have warranted the same degree of concern.<sup>131</sup> Indeed, Iraq's purported chemical weapons would have posed no greater danger to the United States than a truck loaded with conventional explosives detonated next to a chemical plant in an American city.<sup>132</sup> White House statements, however, blurred this crucial distinction between chemical and biological weapons, which Iraq was believed to possess, and nuclear weapons, which Iraq was never even alleged to have obtained.<sup>133</sup> Democrats had their own reasons for not pointing this out, as any suggestion that the White House was exaggerating the threat posed by WMD would have played into the Republican strategy of painting Democrats as soft on national security. Thus, the media, once again taking their cues from Washington, failed to subject the Bush Administration's framing of the WMD issue to critical examination.<sup>134</sup>

Opponents of the war outside of Washington advanced a much more sweeping critique than did the Democrats, arguing not (as the Democrats argued) that the war was unjustified because Iraq turned out not to have chemical and biological weapons, but that even if Iraq had possessed such weapons, a United States attack would have been neither warranted nor wise.<sup>135</sup> Nevertheless, because the media were indexing debate in the news to debate in Washington, the public received extensive exposure to the view that the war may not have been justified because the United States had failed to find WMD.<sup>136</sup> The view that a preemptive war based on Iraq's possession of chemical and biological weapons, which it had neither the interest nor the means to deploy to any real effect against the United States, was a bad idea, even if such weapons had in fact existed—a much more profound in-

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July 13, 2005); *see also id.* at 26 ("The U.S. media typically confirmed the Bush administration's political and diplomatic agenda-setting. . . . If the White House acted like a WMD story was important, so too did the media. If the White House ignored a story (or an angle on a story), the media was likely [to] as well.").

131. *See* KRUGMAN, *supra* note 130, at 11.

132. *See id.*

133. *See id.*

134. *See id.*

135. *See War with Iraq is Not in America's National Interest, supra* note 122; ENTMAN, *supra* note 106, at 154–55 (noting that past United States administrations had been unconcerned about Iraq's use of chemical weapons).

136. *See* Dana Priest & Walter Pincus, *Bush Certainty on Iraq Arms Went Beyond Analysts' View*, WASH. POST, June 7, 2003, at A1 (reporting "a burgeoning controversy in Congress and within the intelligence community over the U.S. rationale for going to war," and that the failure to find WMD in Iraq was "fueling sentiment among some Democrats on Capitol Hill . . . that the administration may have exaggerated the threat posed by Iraq").

dictment of American policy—was marginalized in the prewar and postwar coverage.

Robert M. Entman has pointed to the “need to root debates over the First Amendment in the way that the media . . . actually behave, not in an abstracted ideal that neglects what scholars and practitioners of journalism know about the real world.”<sup>137</sup> As it turns out, how journalists actually behave is often flatly at odds with the role the First Amendment has reserved for an independent press.

#### D. Official Sources

Why are journalists so reliant on official sources to establish the terms and boundaries of foreign policy debate in the news? Sociologists who have observed the operation of news organizations describe a powerful structural bias toward covering events from the perspective of government officials.<sup>138</sup> In practical terms, what journalists need are “predictably available raw materials that can be assembled [into news stories] . . . in a routine fashion.”<sup>139</sup> As Herbert J. Gans has explained, the sources that best meet the requirements of news organizations are high-ranking government officials, who “have the power and staffs to create newsworthy events (ranging from decisions and activities to ceremonies) or statements (including reports, speeches, and news conferences . . .) regularly and quickly.”<sup>140</sup> This explains the tendency of journalists to cluster around top government officials.<sup>141</sup>

Because “[t]he government is organized to provide a timely flow of information, geared to the demands of daily journalism[,] it is extremely efficient for news organizations to locate their personnel at the channels provided by the government.”<sup>142</sup> Rather than spend money investigating potential stories on their own, journalists geared to official sources need simply to show up at their appointed beat and receive the daily offering.<sup>143</sup> “When officials create newsworthy events

137. Robert M. Entman, *Putting the First Amendment in its Place: Enhancing American Democracy Through the Press*, 1993 U. CHI. LEGAL F. 61, 80 (1993).

138. The classic study is HERBERT J. GANS, *DECIDING WHAT'S NEWS* (1980). See also MARK FISHMAN, *MANUFACTURING THE NEWS* 143 (1980); Gaye Tuchman, *Objectivity as Strategic Ritual: An Examination of Newsmen's Notions of Objectivity*, 77 AM. J. SOC. 676 (1972).

139. HERBERT J. GANS, *DEMOCRACY AND THE NEWS* 50 (2003).

140. *Id.* at 50; see also BAKER, *supra* note 8, at 196 (noting the economic pressure on media entities to “abandon expensive, investigative reporting and replace it with cheaper, routine beat reporting”).

141. See *id.*

142. HALLIN, *supra* note 93, at 71; see also ENTMAN, *supra* note 106, at 92.

143. GANS, *supra* note 139, at 51.

or statements, they . . . reduce costs for the news media.”<sup>144</sup> Indeed, the government operations designed to supply the media with the raw materials out of which to construct news stories are so extensive that one commentator has described the “public relations infrastructure” of the United States government as a form of “subsidy” to the news media.<sup>145</sup>

The second great virtue of official sources is their presumptive credibility.<sup>146</sup> To say that government officials are “credible” news sources does not mean that whatever they say is necessarily deemed to be true. Rather, government officials are credible in the sense that if a journalist reports a statement by a government official that proves to be inaccurate, it is the official—not the journalist—who receives the blame.<sup>147</sup> Since government officials are presumptively credible, it is always safe for journalists to report what they say.<sup>148</sup> Journalists place themselves at greater risk by citing sources who are not *per se* “newsworthy,” since a journalist who cites a non-official source whose information proves to be false may be held to have exercised poor judgment if the story generates controversy.<sup>149</sup> The prima facie credibility of official sources thus works in tandem with their low cost to create a powerful set of incentives encouraging their use and discouraging investigative reporting based on non-official sources.<sup>150</sup> The point is not that mainstream journalists never do investigative reporting based on nonofficial sources, but that the vast majority of their coverage is based on what government officials tell them.

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144. *Id.* at 51.

145. COOK, *supra* note 8, at 44.

146. GANS, *supra* note 139, at 50–51.

147. See COOK, *supra* note 8, at 92 (“reporters constantly gravitate toward ‘persons in a position to know,’ whereby they may then defend themselves from potential criticism against giving airtime or print space to someone who did not deserve it.”); ROBERT W. MCCHESENEY, RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES 49 (1999) (“To avoid the controversy associated with determining what is a legitimate news story, professional journalism relies upon official sources as the basis for stories.”).

148. See COOK *supra* note 8, at 92.

149. *Id.*

150. To be precise, many news sources are not current government officials, but instead are former government officials or inside-the-beltway experts affiliated with Washington think tanks or other institutions with close ties to the government. These sources offer the same basic cost and credibility advantages as incumbent government officials. When there is a bipartisan consensus inside the government, former government officials and Washington think tank experts tend to reflect that consensus, rather than offer an independent perspective. See JAMES A. SMITH, THE IDEA BROKERS: THINK TANKS AND THE RISE OF THE NEW POLICY ELITE 213 (1991) (The aim of Washington think tanks is to “define the middle ground and provid[e] an environment in which the knowledge of experts can be channeled to serve political ends.”).

A comment by a former editorial page editor of *USA Today*, Paul McMasters, reveals the extent to which journalists associate “news” with official sources. McMasters observes that journalists are in no position to resist White House “news management” techniques because “Federal officials, after all, have what journalists need: the news.”<sup>151</sup> In other words, as defined by American journalists, “the news” is what government officials say.<sup>152</sup> Again, because government officials are often in disagreement, news derived from official sources may be quite critical of United States policy.<sup>153</sup> Most critical reporting, however, is a function of the range of perspectives expressed by official sources, not the product of independent journalistic initiative.<sup>154</sup>

The idea that reporting the news from the vantage point of elected officials constitutes “objective” journalism—so long as the coverage is “balance[d]” as between official factions—was established early in the 20th Century.<sup>155</sup> The objectivity ideal emerged as large corporate news organizations replaced the smaller and more varied press of the 19th Century:

Modern news organizations clearly possess enormous power: they control the society’s major channels of political communication. Yet they are privately owned and have virtually no direct accountability either to the public or to formally constituted political authority; as the phrase goes, “Nobody elected the press.” The professionalization of journalism allows both the corporation and the journalist to respond to criticisms of their power with the claim that they have in effect placed it in “blind trust” to the principles of objective reporting.<sup>156</sup>

The professional technique of “objective journalism”—defined to mean balanced reporting of contending official perspectives—thus made it possible for reporters to answer concerns about the large scale and potential power of their news organizations with assurances that journalism was a profession, whose practitioners could be trusted not to shade or distort the news to serve private or partisan interests.<sup>157</sup> Indeed, most major American news organizations do seem to offer reasonably balanced coverage of Democratic and Republican positions. But how does journalism that reports “both sides” of the issue—

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151. Paul McMasters, *Blurring the Line Between Journalist and Publicist*, NIEMAN REP., Summer 2003 at 70, 70.

152. *Id.*

153. *See supra* Part II.B.

154. *See id.*

155. HALLIN, *supra* note 93, at 68.

156. *Id.* at 67.

157. *See id.* at 63–70.

that is, the Democratic and Republican sides—measure up against the First Amendment ideal of a press independent of government?

### E. The First Amendment Ideal

The significance of an independent press is most often explained in terms of the watchdog metaphor, with the reason for independence being to permit journalists to expose corruption and the abuse of government power.<sup>158</sup> In one of the earliest references to the need for an independent press, the Continental Congress explained that freedom of the press was necessary so that “*oppressive officers are shamed or intimidated[ ] into more honorable and just modes of conducting affairs.*”<sup>159</sup> According to the Alexandria Virginia Gazette of January 14, 1790, a free press must sound “the alarm” in the event that “any man or body of men dare to form a system against our interests . . . .”<sup>160</sup> In *Sheppard v. Maxwell*,<sup>161</sup> the Supreme Court declared that the press “guards against the miscarriage of justice” by subjecting official actions to “extensive public scrutiny.”<sup>162</sup> The Court expressed the same sentiment in *Near v. Minnesota*,<sup>163</sup> noting the “primary need of a vigilant and courageous press” to expose “malfeasance and corruption” in government.<sup>164</sup>

Academic commentators too have framed the case for an independent press in terms of exposing abuse and corruption. Vincent Blasi writes in an influential article that “one of the most important values attributed to a free press by eighteenth-century political thinkers was that of checking the inherent tendency of government officials

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158. See BAKER, *supra* note 8, at 133, 166, 169.

159. David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 463–64 (1983) (emphasis added).

160. LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 291 (1985); see also Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal for Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL'Y REV. 97, 106 (2002).

The checking-value theory [of the First Amendment] is grounded in political thought that addresses the tendency of officials to *abuse* the public trust. . . . [T]he colonial pamphleteers organized much of their political thought around the need they perceived to check the *abuse* of governmental power. The First Amendment was an outgrowth of this body of thought.

*Id.* (emphasis added).

161. 384 U.S. 333 (1966).

162. *Id.* at 350.

163. 283 U.S. 697 (1931).

164. *Id.* at 719–20.

to *abuse the power* entrusted to them.”<sup>165</sup> Lee Bollinger likewise declares that the “central image” of a free press under the First Amendment posits the press as “the public’s representative, its agent, helping stand guard against the atavistic tendencies of the state” towards authoritarianism.<sup>166</sup> For Lucas A. Powe, the “checking theory” of the First Amendment “is bottomed in neither truth nor rationality, but rather in distrust. It assumes a darker side of human nature and holds that those who wield governmental power will be prone to overreaching, and thus that it is essential to provide information for a resisting citizenry.”<sup>167</sup>

The premise behind these explanations of why democracy requires an independent press is that the evil to be prevented is corruption or abuse of public power. It would seem that modern American journalists have the same understanding of the significance of an independent press, as evidenced by the enormous volume of coverage devoted to “scandals” (such as the Clinton-Lewinsky affair) in which the President is accused not of making poor policy decisions, but of unethical or unlawful conduct.<sup>168</sup> Democracy, however, needs an independent press not simply to expose corruption and wrongdoing in the halls of power. In Justice Stewart’s influential formulation, the Press Clause is best understood as a “*structural* provision” of the Constitution, designed “to create a fourth institution outside the Government as an additional check on the three official branches.”<sup>169</sup> The argument here is that the “structural” significance of an independent press goes beyond the need to expose official corruption and abuse of power, encompassing also the job of revealing government policies that are simply wrongheaded or misguided.<sup>170</sup>

There is support for this position in the founding period. Leonard W. Levy writes that to the founders, “Freedom of the press . . . meant that the press had achieved a special status as an unofficial fourth branch of government, ‘the Fourth Estate,’ whose function was to check the three official branches by exposing misdeeds and *policies*

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165. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 538 (emphasis added).

166. LEE C. BOLLINGER, IMAGES OF A FREE PRESS 20 (1991); see also Floyd Abrams, *The Press Is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563, 591 (1979) (The press “serves as a vigilant protector of the public from its government.”).

167. LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION 238 (1991).

168. On the media’s obsession with scandal, see LARRY J. SABATO ET AL., PEEP SHOW: MEDIA AND POLITICS IN AN AGE OF SCANDAL (2000).

169. Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633–634 (1975) (emphasis in original).

170. See *id.*

*contrary to the public interest.*"<sup>171</sup> Levy points to the "representative view[ ]," published in the May 14, 1792 issue of the *National Gazette* of Philadelphia, that the role of the press was to "'estimate justly the wisdom of leading *measures of administration.*'"<sup>172</sup>

It is clear that corruption and abuse of power have the capacity to mislead citizens about issues of public concern. So, however, does the ordinary working of a democratic government, a phenomenon that is easy to recognize and is often remarked upon in commentary on American politics, but that has significant implications for the "structural" role of an independent press that are less often noted.<sup>173</sup> Although the expression "politics stops at the water's edge" exaggerates the degree to which American politicians are united on foreign policy, there often is bipartisan support for United States foreign policy in Washington, or at least for key premises on which it rests. History reveals, however, that the Washington consensus is sometimes wrong. A notable example is the consensus that prevailed in Washington during the early years of the Vietnam War, holding that the United States was fighting "Communist aggression" in Vietnam, rather than an indigenous revolutionary movement that would prove impossible to defeat.<sup>174</sup> A more recent instance would seem to be the consensus in Washington that Iraq posed a menacing threat to American national security.<sup>175</sup>

Based on the Supreme Court pronouncements cited herein, one might expect that if there were a consensus in Washington supporting a certain point of view, but voices outside of Washington questioned that point of view, an independent press would report the questions.<sup>176</sup> In so doing, the press would be fulfilling its structural role in the constitutional regime as a check on government power no less than it does when it reveals official corruption and malfeasance.<sup>177</sup>

171. See LEVY, *supra* note 160, at xii (emphasis added).

172. *Id.* at 291 ("Measures and not men are the proper subjects of cognizance to a free press." (quoting VA. GAZETTE & WINCHESTER ADVERTISER (Jan. 5, 1791))) (emphasis added).

173. Stewart, *supra* note 169, at 633.

174. See HALLIN, *supra* note 93, at 24–25.

175. See Dana Priest & Dafna Linzer, *Panel Condemns Iraq Prewar Intelligence*, WASH. POST, July 10, 2004, at A01 (reporting the conclusion of a Senate Committee that "[t]he U.S. intelligence community gave lawmakers debating whether to wage war on Iraq a deeply flawed and exaggerated assessment of Saddam Hussein's weapons of mass destruction"); see also *infra* Part III.C.

176. See *supra* notes 69–77 and accompanying text.

177. See *supra* notes 158–167 and accompanying text.

It is true that no one elected the press. So maybe it is appropriate for journalists to defer to government officials—who were elected to office, or appointed by those who were elected—in setting the spectrum of debate in the news.<sup>178</sup> This argument might have some force if Washington debate could be understood as a merit-based deliberative process in which plausible ideas received consideration and implausible ones did not. But instead of indicating that elected officials have weighed the pros and cons of policy options and reached a unanimous verdict on the merits, a Washington consensus on foreign policy may reflect nothing more than a political calculation by opposition party politicians that supporting the President is a sound electoral strategy, whatever the merits might be.<sup>179</sup> Democratic backing of the Iraq War, as noted above, would seem to be an example of this phenomenon.<sup>180</sup>

Notwithstanding the pervasive commentary of politicians and pundits about the need for “principled leadership,” building coalitions to win elections is precisely what politicians are supposed to be doing.<sup>181</sup> We expect politicians to emphasize differences between the parties on certain issues and to blur the differences on others, based on strategic calculations of electoral advantage.<sup>182</sup> But it is contrary to the First Amendment ideal for the press to let the strategic calculations of politicians determine the terms and boundaries of policy debate in the news. For it may be that good reasons exist for criticizing White House actions that the opposition party has decided, simply for strategic reasons, not to articulate. An independent press should report such criticism of United States policy as may be found outside of Washington, notwithstanding the strategic silence of opposition party

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178. See John Zaller, *Elite Leadership of Mass Opinion: New Evidence from the Gulf War*, in *TAKEN BY STORM: THE MEDIA, PUBLIC OPINION, AND U.S. FOREIGN POLICY IN THE GULF WAR* 186, 202 (W. Lance Bennett & David L. Paletz eds., 1994).

179. See RICHARD A. BRODY, *ASSESSING THE PRESIDENT: THE MEDIA, ELITE OPINION, AND PUBLIC SUPPORT* 66 (1991) (In times of foreign crisis, “political figures from whom we would normally expect negative comment on presidential performance will [often] instead be silent or supportive.”); Zaller, *supra* note 178, at 260 (“Members of Congress are deeply strategic players whose visible actions often obscure their real intent.”).

180. See *infra* Part III.C.

181. On the strategic nature of politics, see ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957); DAVID R. MAYHEW, *CONGRESS, THE ELECTORAL CONNECTION* (1974); WILLIAM H. RIKER, *THE ART OF POLITICAL MANIPULATION* (1986); E.E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 66–71 (1960).

182. See PATTERSON, *supra* note 15, at 241. (“To criticize politicians for ‘playing politics’ is to fault a process that is necessary to reconcile society’s competing interests.”).

politicians, and should not marginalize perspectives simply because they are not featured in Washington debate.<sup>183</sup>

It is therefore no defense, when consensus in official Washington results in non-critical media coverage, for journalists to blame politicians for not speaking up. As a former chief diplomatic correspondent for the *Washington Post* has observed: "When a President hornswoogles, or bamboozles [the media,] the greatest default rests with those being misled for their failure to fulfill their obligation to the public interest as counterweights in the American system."<sup>184</sup> In other words, journalists and politicians have different "structural" roles in a democratic system, and the Framers could not have envisioned that one institution would permit the other to set its agenda and call its tune.<sup>185</sup> The job of politicians is to figure out how to win elections, which may entail blurring differences between the parties and keeping under wraps what would otherwise be significant substantive disputes.<sup>186</sup> The job of journalists, pursuant to our First Amendment tradition, is to report the news from a vantage point independent of the government, that is, "to check the three official branches by exposing misdeeds *and policies* [that may be] contrary to the public interest."<sup>187</sup> If journalists do not examine the merits of government policies, except to report such criticism as actors inside the government have themselves first advanced, then we do not, in a crucial sense, have an independent press.

Few would dispute that a press that simply reported whatever the President and his subordinates in the executive branch said, and ignored the position of the opposition party, would not be an independent press and would not serve the needs of a democratic system. Independence is not achieved, however, simply by expanding the pool of sources with agenda-setting power to include the Congress, because Congress itself is a branch of the government, and its members are government officials.<sup>188</sup> Rather than offering an independent perspective on the actions of the government, members of Congress are the government; Congress does not constitute an independent vantage point from which to report on government policy.<sup>189</sup>

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183. *See id.*

184. Marder, *supra* note 119, at 74.

185. *See* Stewart, *supra* note 169, at 633–34.

186. *See supra* notes 179, 182.

187. *See* LEVY, *supra* note 160, at xii (emphasis added).

188. *See* U.S. CONST. art. I.

189. *See id.*

Of course, Democrats in Congress are free to criticize the actions of a Republican President, and do so at times with great force. Journalists report their criticism. But what the Democrats decide to say—and not to say—is a function of calculations of perceived advantage in the political game, which in recent years have led Democrats to support Republican military interventions for reasons that often seem to be independent of any assessment of the merits.<sup>190</sup> This means that Democratic support for a Republican military intervention is not compelling evidence that the policy advances American interests, or even that a broad spectrum of elected officials believe that it does. It may simply be that reelection-seeking Democrats have made a strategic decision not to criticize an American war.<sup>191</sup>

Certain media critics fault journalists for their deferential reporting of official pronouncements on the ground that the United States is not a genuine or well-functioning democracy, and its government does not represent the interests and opinions of ordinary citizens.<sup>192</sup> The argument here, in contrast, does not posit any particular view of how democratic or representative the United States government is. Instead, it rests on a phenomenon—politicians are strategic actors who emphasize certain issues and perspectives and ignore others for calculated political reasons—that may be observed in any democracy. This phenomenon must be reckoned with in determining what is required of an independent press.

### III. Policy Implications

This Part identifies three significant advantages of the independence of government approach to the media and the First Amendment over the public deliberation approach as a basis for upholding the constitutionality of policies aimed at improving the quality of media coverage of public affairs and outlines some policy initiatives that would encourage more independent journalism.

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190. See *infra* Part III.B.

191. See *supra* notes 179, 182.

192. See BEN H. BAGDIKIAN, *THE NEW MEDIA MONOPOLY* 112–113 (2004); EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA* 298 (1988) (arguing that the function of the American news media is “to inculcate and defend the economic, social, and political agenda of privileged groups that dominate the domestic society and the state”); MCCHESENEY, *supra* note 147, at 50, 281.

## A. Advantages of the Independence of Government Approach

Notwithstanding their differences, the two approaches to the media and the First Amendment described in this Article are based on the same basic concern: too narrow a spectrum of viewpoints is reported in the news. The public deliberation approach posits that the objective of the First Amendment is to promote active and informed public debate and faults the media for failing to report a sufficiently diverse spectrum of viewpoints on issues of public concern.<sup>193</sup> The independence of government approach concurs in the view that an inadequate spectrum of perspectives is reported, but offers a simpler and more concrete account of the dimensions of the problem and the appropriate remedy.<sup>194</sup> There are three notable advantages of the independence of government framework.

First, in contrast to Sunstein's sensible but prescriptively unhelpful call for journalists to report an "appropriate diversity" of viewpoints,<sup>195</sup> the independence of government approach argues that journalists fail to adhere to First Amendment principles when their reporting is limited to viewpoints that have been expressed inside the government. The solution to the independence problem is straightforward: do not select sources based on their ties to official Washington. Experts on United States foreign policy and world affairs may be found at colleges and universities around the nation to explain and interpret unfolding events from a vantage point independent of the government.<sup>196</sup> Representatives of organizations of engaged citizens are also available to aid journalists in covering American foreign policy from a perspective independent of Democratic-Republican debate.<sup>197</sup> Independent academics and engaged citizens, as a rule, are much less inclined than Washington insiders to follow the lead of politicians who may have closed ranks behind a presidential foreign policy initiative simply for strategic political reasons.<sup>198</sup> It is notable that Sunstein's aspiration that the media report "a broad spectrum of opinion" that includes "sharply divergent views," and "not merely the conventional wisdom and the reasons that can be offered on its behalf,"<sup>199</sup> would be greatly advanced if journalists simply made a practice of

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193. See *supra* Part II.A.

194. See *supra* Part III.

195. SUNSTEIN, DPFS, *supra* note 28, at 21.

196. MERMIN, *supra* note 96, at 28–32.

197. See *id.* at 32–35.

198. See *id.* at 30–33.

199. SUNSTEIN, DPFS, *supra* note 28, at 21–22.

looking outside of Washington for sources of information and analysis.

A second advantage of the independence of government approach is that it squares with traditional understandings of the First Amendment. As indicated *supra*, the claim that the First Amendment seeks to promote public deliberation has not won general acceptance.<sup>200</sup> The virtue of the independence of government approach is that it is based on an ideal—a press independent of government—that lies at the heart of our First Amendment tradition.<sup>201</sup> While the proposition that the First Amendment envisions a deliberative democracy in which citizens pay broad and deep attention to public affairs is debatable, it is beyond dispute that the First Amendment aims to promote an independent press.<sup>202</sup> Since the independence of government framework has deeper First Amendment roots, and increased independence of Washington debate would be a simple and effective way for journalists to expand the diversity of perspectives in the news, proponents of the public deliberation approach should have reason to embrace the independence of government framework.

A third advantage of the independence of government approach as a justification for policies aimed at improving the quality of media coverage of public affairs is that its express aim is to reduce the influence of the government over media content. The obvious concern with public policies intended to influence the media is that the government's true objective may be to assert control over the press to enhance its own power.<sup>203</sup> What is suggested here, however, is the need to encourage journalists to be less influenced by the government. This explicit objective of increasing the independence of the press from the government should lessen the concern that would otherwise exist that the government, in setting media policy, might simply be seeking to expand its power and influence over the press. In contrast, policy initiatives aimed at promoting public deliberation are susceptible to the interpretation that the desired "deliberative" process is one that leads the public to endorse the government's own position.<sup>204</sup> Policies designed to increase the independence of the press from the government may be the one class of policies that do not give rise to this concern.

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200. See *supra* Part II.B.

201. See *supra* Part III.

202. See *id.*

203. See POWE, *supra* note 167, at 289–98.

204. See *id.*

## B. Encouraging Independent Journalism

The question of what to do about inadequate public affairs coverage is often simply brushed aside because the First Amendment is deemed to preclude any policy response to the problem.<sup>205</sup> But “[i]f the media in its natural state is not a responsible, serious and dependable watchdog of government, then adherence to a fourth estate rationale for a constitutional protection for free speech would likely lead to a mandate for more rather than less legal regulation of media activities.”<sup>206</sup> As Alexander Meiklejohn observed in an influential work: “Congress is not debarred [by the First Amendment] from all action upon freedom of speech. Legislation which abridges that freedom is forbidden, but not legislation to enlarge and enrich it.”<sup>207</sup> First Amendment values are enlarged and enriched by measures that encourage the press to be independent of the government. So how might this objective be advanced? This subpart sketches in broad strokes a few steps that would address the problem identified in this Article, along with many of the concerns expressed by Sunstein.

The past twenty years have seen a “dramatic reduction in legal restrictions on ownership concentration” in the media, and a concomitant consolidation of media ownership in an increasingly small number of corporations.<sup>208</sup> This movement crested in 2003 when the FCC drafted new regulations that would have significantly increased the number of media outlets one corporation could own.<sup>209</sup> Since the regulations were announced, however, they have been opposed by “smaller broadcasters and a coalition of labor, consumer, religious,

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205. See SUNSTEIN, DPFS *supra* note 28, at 5 (describing “First Amendment absolutism” as holding that “[a]ny effort to regulate speech . . . threatens the principle of free expression.”) (internal quotation marks omitted).

206. Marin R. Scordato & Paula A. Monopoli, *Free Speech Rationales After September 11th: The First Amendment in Post-World Trade Center America*, 13 STAN. L. & POL’Y REV. 185, 202 (2002). See also COOK, *supra* note 8, at 182.

Congress is only prevented from making a law that *abridges* freedom of the press. The Bill of Rights does not advocate a “hands-off” governmental position vis-à-vis the news media. Indeed, legislation that facilitates or enhances freedom of the press would presumably not only be permitted but warranted by the First Amendment.

*Id.*

207. MEIKLEJOHN, *supra* note 43, at 19. See also BAKER, *supra* note 8, at 213 (“[T]he press Clause should be read to allow the government to promote a press that, in its best judgment, democracy needs but that the market fails to provide.”).

208. C. Edwin Baker, *Media Concentration: Giving up on Democracy*, 54 FLA. L. REV. 839, 841 (2002); BAGDIKIAN, *supra* note 192, at 27 (describing the dramatic increase in consolidation of media ownership between 1983 and 2003).

209. See *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3rd Cir. 2004).

artistic and civil rights organizations.”<sup>210</sup> The House and Senate have voted to overturn the new rules, and the United States Court of Appeals for the Third Circuit has struck them down.<sup>211</sup> In this political environment, it does not seem unrealistic to imagine the success of policy initiatives aimed at reducing the concentration of media ownership and encouraging the proliferation of smaller media outlets.

The existence of more (and more varied) media entities should result in more independent journalism.<sup>212</sup> As Baker points out, “[d]ispersal [of media ownership] can support performance of the ‘checking function’ or watchdog role” because “it is plausible to expect that a larger number of competing ‘watchdogs,’ each of which competes to discover abuse, will better perform this role than would only a few.”<sup>213</sup> In other words, “greater ownership pluralism will likely increase the angles pursued by these media watchdogs.”<sup>214</sup> Although Baker advances the conventional formulation of the checking function or watchdog role as being necessary to reveal “abuse” in government, rather than flawed policies, his general point is on the mark: the greater the number of news outlets, the better the odds of critical perspectives being reported.<sup>215</sup> “Just as divided political power fosters accountability—a central tenet of federalism—so too, divided media power fosters accountability.”<sup>216</sup>

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210. Stephen Labaton, *Court Orders F.C.C. to Rethink New Rules on Growth of Media*, N.Y. TIMES, June 25, 2004, at A1.

211. *Prometheus Radio Project*, 373 F.3d at 372 (striking down the FCC’s relaxation of restrictions on consolidated media ownership); Stephen Labaton, *F.C.C. Plan to Ease Curbs on Big Media Hits Senate Snag*, N.Y. TIMES, Sept. 17, 2003, at A1; Christopher Stern & Jonathan Krim, *House Votes to Prevent Change in Media Rule*, WASH. POST, July 24, 2003, at A1.

212. The sociological account of news production (see *supra* Part III.D.) might suggest that it makes no difference who owns the media, since the need for inexpensive and presumptively credible news sources would exist under any ownership regime. See Baker, *supra* note 196, at 900. But there is reason to believe that policy initiatives geared toward reducing the concentration of media ownership would tend to encourage more independent journalism, even if certain structural incentives of news production remained in place.

213. Baker, *supra* note 208, at 906.

214. *Id.*

215. *See id.*

216. Ronald J. Krotoszynski, Jr. & A. Richard M. Blaiklock, *Enhancing the Spectrum: Media Power, Democracy, and the Marketplace of Ideas*, 2000 U. ILL. L. REV. 813, 868. See also BOLLINGER, *supra* note 166, at 27.

The value the First Amendment places on many speakers is not based on a premise that more speakers results in less bias in any one, rather it is assumed that more speakers means more people who have a self-interest in correcting the biases of others, despite the fact that they are biased themselves.

*Id.*; McCHESENEY, *supra* note 147, at 306 (proposing “a pluralistic system [of public broadcasting], with national networks, local stations, community and public access stations, all controlled independently”).

Less concentrated ownership should also mean more news organizations that are less focused on the bottom line. Major public corporations—which own most of the leading United States media outlets—are required to maximize shareholder profits, which may come at the expense of other objectives that news organizations owned by smaller entities might elect to pursue. As Baker explains:

When a paper or other media entity is profitable but could be made more profitable by cutting the newsroom budget, the public interest in quality media is served by having owners (or editors) who would make the first choice. Society benefits by owners' willingness to exercise "social responsibility" or otherwise emphasize journalistic or creative quality rather than merely maximize the bottom line.<sup>217</sup>

Although "legally mandating social responsibility is inconsistent with a free press," it is appropriate for the law to recognize "the impact of legal structural regulation of ownership on the likelihood of producing or undermining more responsible ownership" of the news media."<sup>218</sup>

Translating these observations into the framework of this Article, one form of "responsible" journalism that seems to be more prevalent under non-corporate ownership is journalism that examines government policy from a perspective independent of the government. It is instructive that independent-minded journals such as the *Nation* and the *National Review* are not subsidiaries of large corporations. Nor are they noted for their profitability; they seem to exist for reasons other than to maximize the income of their owners. This supports the hypothesis that policies aimed at reducing the concentration of media ownership in large profit-maximizing corporations—the opposite of the direction in which the FCC has been moving—would encourage independent journalism. Potential policy initiatives to foster a more independent press therefore include tightening the limits on the number of media entities one corporation is permitted to own, and tax breaks or subsidies designed to aid smaller, non-corporate and/or nonprofit media that could be expected to focus less on the bottom line and more on practicing the craft and profession of journalism.<sup>219</sup>

A related problem with concentrated corporate media ownership is that large corporations tend to be risk averse. As explained *supra*,

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217. Baker, *supra* note 208, at 903–04.

218. *Id.* at 904.

219. See COOK, *supra* note 8, at 188; MCCHESENEY, *supra* note 147, at 305. Cook observes that media subsidies have existed throughout the course of American history. See COOK, *supra* note 8, at 38–60. Such subsidies do not need to be invented, but rather expanded and better targeted to foster smaller media entities.

the path of least resistance for a news organization is simply to report what government officials say, rather than seek to introduce non-official perspectives that may clash with a Washington consensus and create controversy.<sup>220</sup> But smaller media entities under non-corporate ownership should be less concerned with the potential controversy generated by stories based on non-official sources who challenge the prevailing wisdom in Washington.<sup>221</sup> "When a media entity is part of a conglomerate in multiple lines of business, either governmental or powerful private groups may find themselves both able and willing to put serious economic pressure on one portion of the conglomerate in order to induce the media entity to mute critical reporting."<sup>222</sup> In contrast, a media entity that is not embedded in a major corporation should be less fearful of giving offense—indeed it might welcome a degree of notoriety—and should therefore be more inclined to exercise its First Amendment right to criticize the government, undeterred by a Washington consensus. Again, policies aimed at fostering smaller, non-corporate media are indicated.

A further potential response to the independence problem is based on evidence that advertiser-supported media have incentives to avoid controversial stories that might offend major advertisers.<sup>223</sup> Just as large corporate media with mass audiences for their journalistic and other product lines may prefer to avoid association with controversial out-of-the-mainstream political views, any media outlet that relies on advertising for its revenue must concern itself with the potential reaction of its advertisers to stories that fly in the face of a Washington consensus.<sup>224</sup> Initiatives such as a tax on advertising, with the proceeds used to subsidize media that would not depend on advertising revenue, would encourage independent journalism to the extent that media less concerned about potential advertiser reaction should be less hesitant to feature voices that question the prevailing wisdom and the status quo in Washington.<sup>225</sup>

It is not unrealistic to expect that American politicians, who never miss a chance to expound upon the virtues of small businesses, could take a few steps to help small media businesses. Of course, increased

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220. See *supra* Part II.D.

221. See Baker, *supra* note 208, at 908.

222. *Id.* ("The greatest policy fear, of course, is that the mere vulnerability will influence initial journalistic decisions—a form of self-censorship—or prevent them from seeing the light of day.")

223. See C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* 56–58 (1994).

224. See *id.*

225. See COOK, *supra* note 8, at 188.

restrictions on concentrated corporate media ownership and incentives designed to favor smaller non-corporate media would be certain to elicit First Amendment challenges from media owners. One response (Sunstein's) would be that the First Amendment is concerned not just with the right of media owners to unfettered control of their private property, but also with seeing that citizens are exposed to a rich diversity of perspectives on issues of public concern.<sup>226</sup> A second response is that the point of the First Amendment is to ensure that the press remains independent of the government, and that if the press proves not to be independent of government in practice, policy initiatives aimed at increasing its independence should pass constitutional muster. Greater limitations on concentrated corporate ownership of media entities and tax incentives and subsidies aimed at encouraging smaller and/or less advertising-dependent media could help to create a media system in which the First Amendment ideal of a press independent of government described not just the legal rights and democratic aspirations of journalists, but the actual practice of the press.

## Conclusion

Critics of the news media sometimes assert that the First Amendment should not be read simply to protect media owners against government control, but also to protect the public against the concentration in a few private corporate hands of the power to control the media and influence their content.<sup>227</sup> In this view, the First Amendment creates "a social right to a diverse and uncensored press" that may be abridged not just by the government, but also by corporate domination of the media.<sup>228</sup> This Article has identified a more direct First Amendment problem with the actual practice of American journalism, rooted not in a "social right to a diverse" media system, but in the fundamental First Amendment concern that the press be independent of the government.

In a formal legal sense, the American news media are independent of the United States government. But when the Supreme Court discusses the importance of a free press to our democracy, it envisions a press that has not only the legal right to report critical perspectives on government policy, but the willingness and the wherewithal to do so in practice.<sup>229</sup> Thus Justice Black wrote in the Pentagon Papers case

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226. See *supra* Part II.A.

227. See McCHESNEY, *supra* note 147, at 257–58.

228. *Id.* at 269 (emphasis added).

229. See *supra* Part III.

not just about the rights of a free press, but about its “responsibilities”—which include “the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.”<sup>230</sup> Based on the evidence cited in this Article, the press needs to increase the distance between itself and the government if the expectations of the First Amendment are to be met.

As the Iraq War has demonstrated, the stakes in having the independent press envisioned by the First Amendment are often high. Although this Article has identified no law passed by Congress that abridges the freedom of the press, the problem it describes should concern students of the First Amendment. For the legal right of the press to be independent of the government, however expansive and secure it may be, has less significance than meets the eye if journalists, in the actual practice of their craft, fail to exercise it.

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230. *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring).