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Property and Liberty Reconsidered

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BOOK REVIEWS

Property and Liberty Reconsidered

THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS. By James W. Ely, Jr.* New York: Oxford University Press, 1992. Pp. x, 193. $32.50.

*Reviewed by Herman Belz***

This perceptive, lucid, and sympathetic account of property rights in American constitutional law by Professor James W. Ely, Jr., is further evidence of the conservative challenge to liberal orthodoxy that has emerged in recent years in American historiography. That the book appears under the cosponsorship of the Organization of American Historians, one of the more militantly liberal scholarly associations in the United States, is a small but significant sign of the changing intellectual climate.

As conceived of in contemporary liberal historiography, protection of individual property rights is but one element of economic liberty. Equally if not more important, according to the legal historian Harry N. Scheiber, are the public duties and obligations of property ownership, which give rise to the idea of economic liberty as a legal construct embracing "the whole of the citizenry and . . . the prosperity of the larger society."[1] In contrast to this view, Professor Ely bases his constitutional history of property rights on the traditional concept of economic liberty as an attribute of individual rights that is essential to personal and political liberty. Maintaining a focus on the text of the

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1. Harry N. Scheiber, *Economic Liberty and the Constitution*, in *Essays in the History of Liberty: Seaver Institute Lectures at the Huntington Library* 75, 77 (Huntington Library, 1988).

Constitution as a standard of historical judgment within changing political, social, and ideological contexts, Ely employs a historical method that incorporates the perspective of the framer's intent and rejects the relativistic assumptions of liberal historicism.

I. Property Rights from the Revolution to the New Deal

A volume in the Bicentennial Essays on the Bill of Rights intended for instruction in college history courses, *The Guardian of Every Other Right* summarizes American constitutional development from the standpoint of economic liberty and property rights. The basic argument of the book is that economic liberty is an essential component of constitutionalism; property rights are a means of limiting government power over individuals; and a free market economy based on private property ownership is beneficial to society as a whole. Although a broad popular consensus has supported the institution of private property in the United States, Ely observes that there has nevertheless been continuous conflict over economic liberty. This has resulted primarily from the dynamic nature of property as an institution and from the tendency toward intergovernmental conflict inherent in the political system of federalism. Controversy over the forms and content of economic liberty has raised the further question of which branch of government under the separation of powers principle should decide conflicts over economic policy. Although in republican government the political branches have the primary responsibility for policymaking, the obligation of the judiciary to uphold the Constitution has given the Supreme Court a key role in reconciling conflicts over economic liberty. Accordingly, judicial decisions concerning property rights form a central focus of the book.

Ely writes from a Lockean liberal perspective that emphasizes the democratic character of private property ownership as a social institution. He describes the emergence in the colonial period of a middle class society based on widespread land ownership. Although wealth was unevenly divided and class stratification existed, economic advancement was within the reach of most colonists, and even day laborers could earn enough money to buy land. Contemporary English Whig political thought accorded with and reinforced developmental tendencies in the economics of colonial settlement by affirming the sanctity of property rights. To be sure, the property owner's dominion over his land was not absolute, as numerous customary restrictions and government regulations attest. In Ely's view, however, these mercantilist regulations were more formal than effective, and did not prevent the emergence of a free market in goods and services in fact, if not in law.

In seeking national independence the American people acted on the proposition, as expressed by Arthur Lee of Virginia, that "[t]he

right of property is the guardian of every other right, and to deprive the people of this, is in fact to deprive them of their liberty."[2] Accepting the truth of this contention, Ely says that "liberty and property" was the motto of the revolutionary movement. Despite the affirmation of property rights in the state constitutions, however, economic liberty was rendered insecure by antiproperty measures directed at loyalists and creditors by some revolutionary state legislatures. In response to this threat, conservative political reformers in the Federal Convention of 1787 created a new form of liberal republican government that afforded greater protection for property.

In addition to giving the national legislature power to tax and regulate commerce for purposes of economic development, the Constitution protected private and public contracts against impairment by state governments. The Fifth Amendment, added to the Constitution in 1791, confirmed the fundamental importance of private property ownership by declaring that no person shall be deprived of life, liberty, or property without due process of law, and by providing that private property shall not be taken for public use without just compensation. Ely states that these constitutional safeguards of economic liberty met popular approval in a society in which private property was broadly distributed. They were intended, he observes unapologetically, to project the new nation into the mainstream of acquisitive capitalism.

While acknowledging that property and economic issues figured largely in the making of the Constitution, Ely rejects the Beardian or progressive interpretation, which views the framers as acting out of self-interested or class-conscious motives.[3] According to Ely, the basic flaw in the progressive account is its failure philosophically to grasp the fact that property ownership is a necessary institution for the existence of political liberty. Noting that economic issues were little discussed in the ratification debate, and that no one questioned the concept of private property, he argues that the main issue between the Federalists and Anti-Federalists was whether the states or the national government would have the principal authority to regulate commerce and protect property.

The central theme in Ely's constitutional history of property rights from 1789 to the present is the problem of accommodating the demands of economic growth and social change with the security of settled property rights. The issue is controversial because the security of property

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2. James W. Ely, Jr., *The Guardian of Every Other Right* 26 (Oxford, 1992) (quoting Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain, in The Present Dispute with America* 14 (4th ed. 1775)).

3. Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (MacMillan, 1935).

rights is an essential condition for attracting the investment capital needed for economic development, yet economic development provokes political and social pressures that result in efforts to restrict or alter property relationships in the name of the public interest or a more democratic conception of economic liberty. This problem was less conspicuous in the nineteenth century, when the imperative of economic development was clear and the necessity of releasing productive private energies could not be denied. State governments regulated property and economic activity, but according to Ely regulatory measures were narrowly conceived, did not aim at redistribution of wealth, and left owners and entrepreneurs substantially free to use their property in socially productive ways. Furthermore, the federal judiciary consistently protected existing economic arrangements, preventing state legislatures in particular from interfering with property rights.

In the late nineteenth century, in the context of industrialization and the transformation of American economic life caused by the corporate form of business organization, conflict over the nature of economic liberty increased. Social dislocation and the unequal distribution of wealth, inherent features of a free market society, for the first time became prominent enough to call into existence political movements aimed at redistributing wealth and regulating the operation of the market. From the standpoint of progressive reformers the purpose of government regulation, according to Ely, was to correct the imbalance of economic power and preserve economic competition. Proponents of the free market, on the other hand, appealed to the traditional conception of economic democracy and insisted on the necessary connection between economic and political liberty.

Ely follows recent revisionist scholarship in attributing to laissez-faire judges and legal commentators a genuine concern for democratic principle in opposing the demands for class legislation that emanated both from political reformers and business lobbyists.[4] He contends that the basic policy objective of laissez-faire constitutionalism—namely, to facilitate the formation of investment capital necessary for economic growth—was sound. Furthermore, he regards as reasonable, the development of new legal concepts for the protection of property, the most important of which was judicial determination of the reasonableness of state police power regulations. In telling the familiar story of substantive due process and liberty of contract under the Fourteenth Amend-

4. Michael Les Benedict, *Laissez-Faire and Liberty: A Re-evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 Law & Hist. Rev. 293 (1985); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism 1863-1897*, 61 J. Am. Hist. 970 (1975); Mary C. Porter, *That Commerce Shall Be Free: A New Look at the Old Laissez-Faire Court*, 1976 S. Ct. Rev. 135.

ment, Ely, within the limits of a synthetic account, adds to our knowledge in his discussion of judicial interpretation of the Fifth Amendment takings clause. Tracing the conflict between proponents of regulation and laissez-faire constitutionalists from 1900 to the 1930s, he concludes that while the Supreme Court generally accepted regulatory measures directed to health, safety, and moral concerns, its paramount objective was to maintain entrepreneurial liberty. Ely notes that in pursuing this goal the Court did not systematically favor business enterprise.

From an historiographical point of view, the chief interest of *The Guardian of Every Other Right* is its unsentimental interpretation of the New Deal. More than most writers on the subject, Ely sees the policies of the Roosevelt administration, confirmed by the Supreme Court after the Court-packing episode of 1937, as marking a decisive and profound break in the constitutional tradition. Ely argues that New Deal liberalism rejected limited government, marketplace competition, and respect for property rights. Asserting the idea that government has an affirmative duty to promote the general welfare, New Deal liberals introduced into public policy a distinction between personal civil rights and liberties, which were accorded a preferred position in constitutional law, and property rights, which were relegated to an inferior status less worthy of judicial protection. In Ely's view this distinction, still fundamental in contemporary liberal jurisprudence, was a purely judicial fabrication that has no basis in the Constitution. The Constitution, he points out, contains express guarantees of property rights and makes no division of rights into categories. In a further departure from the constitutional tradition, the Supreme Court interpreted the commerce clause to give Congress power to regulate any economic activity in the United States. Ely writes: "It was difficult, however, to square plenary congressional authority over all commerce with the basic constitutional notion of a limited federal government of enumerated powers."[5]

As the appeal of New Deal liberalism eroded under the burden of the regulatory state and the pressure of continuing social and economic change, the Supreme Court began once again to recognize constitutional guarantees of property rights. In the past two decades the Court has applied the contract clause as a limitation on the state police power, curbed state interference with the national free trade market under the dormant commerce power, and revived the notion of regulatory takings under the Fifth Amendment. Nevertheless, the Court has neither challenged the use of the commerce and taxing powers to create a national government of unlimited authority, nor attempted to resuscitate eco-

5. Ely, *Guardian of Every Other Right* at 129 (cited in note 2).

nomic due process. Although some Justices have questioned the distinction between civil rights and property rights, the Supreme Court has not disturbed the rationality standard of judicial review under which state and federal legislatures can interfere with property rights with impunity.

II. Property and Constitutional Prudence

Challenging the historical relativism that so often passes for constitutional theory in contemporary legal scholarship, Ely offers for our consideration an historical methodology that embraces the perspective of original intent jurisprudence. Observing that constitutional law is shaped in a broad political and intellectual context, he "proposes an analytical framework to guide historical investigation."[6] Ely's analytical framework consists of three principles: (1) that the framers of the Constitution and the Bill of Rights envisioned some degree of federal judicial review of the substance of economic legislation; (2) that the relegation of property rights to a subordinate constitutional status is not historically warranted in view of the framers' concern with protecting property and nearly 150 years of Supreme Court activity toward this end; and (3) that property, one of several fundamental values protected under the Constitution, is not entitled to preferential treatment.

While apparently presented as historical in nature, these principles or propositions are not strictly or narrowly historical. They possess in addition a normative dimension and are intended to have the practical effect of reminding us that property is a *constitutional right*, which in a properly ordered regime ought not be consigned to the sphere of political expediency and legislative and bureaucratic discretion. Ely recognizes the necessity for prudential judgment about the nature and extent of private property protection in relation to the public interest; he therefore properly denies any intent to settle specific policy questions dealing with this issue. His larger and more important purpose is to assist in the historical process of elevating policy controversy over economic liberty to the level of constitutional law. Such a development would not eliminate the need for prudence in determinations about property rights, but it would place limits on policymaking. Constitutional prudence is different from the practical reason of ordinary politics because the Constitution, in Ely's view, in fundamental respects has a fixed and judicially unalterable meaning that guides and controls interpretation. In this approach to constitutional history the Constitution is not whatever politicians, judges, and commentators say it is.

We can explore Ely's historical method by examining further his

6. Id. at 9.

treatment of the New Deal. The dichotomy between property rights and personal liberties, announced by Justice Stone in *United States v. Carolene Products Co.*,[7] amounted to the creation of a double standard of judicial review. Affording a higher level of judicial protection to personal rights, the Supreme Court dismissed property rights, conferring on the government a dispensation whereby it could redress social ills, resolve conflicts, regulate business, and intervene in the economy. "Judged from a historical perspective," Ely writes, "the theory underlying *Carolene Products* was problematic. The fundamental constitutional dilemma . . . is that the framers of the Constitution assigned a much higher standing to property ownership than did the New Deal liberals."[8] He adds that the distinction between property rights and personal liberties contradicted the framers' belief that rights are closely related and that protection of property ownership is essential to political liberty. Moreover, "the Constitution does not divide rights into categories," and specific property guarantees in the document are irreconcilable with the subordination of property rights to civil rights.[9]

It seems fair to conclude that the "historical perspective" employed in this analysis might more accurately be described as an historical-constitutional standard. Defined by the intent of the framers as expressed in the text of the Constitution, it is charged with normative implications of a moral and political nature. Rejecting the liberal historicist concept of a living Constitution, Ely judges the New Deal to be not merely problematic, but plainly unconstitutional.

Sound historical method requires the writer of history to consider ideas and events from the viewpoint of contemporary actors and participants. To some extent Ely meets this obligation in stating that New Deal liberals believed, in the words of Justice Brandeis, that "[t]here must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs."[10] Liberals also justified the New Deal, however, by invoking the constitutionalism of the founding fathers. They argued that as the framers created a limited government and made political power accountable to the people, so their generation would limit private economic power and render it constitutionally accountable to the popular will. President Roosevelt accordingly spoke of an economic Bill of Rights that would establish the principle of consent in the domain of private government that existed in the legal form of the corpo-

7. 304 U.S. 144 (1938).
8. Ely, *Guardian of Every Other Right* at 133-34 (cited in note 2).
9. Id. at 134.
10. Id. at 119 (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)).

ration and private property.[11] In this view the New Deal can be justified as consistent with the constitutional tradition.

While not acknowledging this New Deal argument, Ely indirectly engages it in noting that the double standard of judicial review, based on the distinction between property rights and personal liberties, became a new orthodoxy after 1937. In effect he concedes it a degree of constitutional legitimacy deriving from the political approval conferred on New Deal antiproperty measures by the electorate. Ely thus recognizes that public opinion shapes and imposes limits on constitutional interpretation. He addresses this issue more explicitly in discussing the problem of property rights and political democracy.

As noted, Ely views protection of property rights as a fundamental purpose of the American Revolution that became a matter of constitutional consensus in the new nation. Guarantees of private property were therefore written into the state and national constitutions. Notwithstanding these constitutional safeguards, antiproperty measures were enacted in the revolutionary period and have continued to appear with disturbing regularity throughout American history. Ely states that this development was paradoxical; he sees the antiproperty tendency as inconsistent with political democracy rather than as a logical expression of democracy. As a matter of constitutional history if not democratic theory, however, Ely accepts the conflict between property and democracy. It becomes the basis in his account of the Supreme Court's key function of settling disputes between the need of government to regulate economic activity and the right of individuals and corporations to enjoy their property.[12]

This historical conclusion in turn guides Ely's constitutionalist teaching. He writes: "The Supreme Court must carefully adjust the demands of political democracy with the explicit protection of property ownership contained in the Constitution."[13] History, following the course indicated by the framers, has given the Court this role. In performing its task the Court has to allow some interference with property in order to prevent disparities of wealth that threaten political and social stability, and also to preserve economic opportunity for persons who do not own property. On the other hand, Ely says the Supreme Court has to protect property lest this vital social institution exist not as a matter of fundamental constitutional right but only under the discretion and at the sufferance of the legislature and the political opinion

11. Robert Eden, *The New Deal Revaluation of Partisanship*, in Peter Schramm, ed., *American Political Parties and Constitutional Politics* (University Press of America and The John Ashbrook Center, forthcoming, 1992).

12. Ely, *Guardian of Every Other Right* at 153 (cited in note 2).

13. Id. at 154.

on which it is dependent. Yet he states that property rights are always upheld within the parameters of democratic public opinion. In the final analysis, therefore, Ely asserts that "property rights, like all individual rights, rest[] on broad acceptance."[14]

If this conclusion smacks unduly of democratic positivism, suggesting that the voice of the majority is the ultimate authority in the constitutional system, Ely's historical account shows that a formative influence on public opinion has been the fact that property rights are written into the Constitution as an expression of the framers' intent. As against the tendency of some commentators to jettison political democracy in order to protect infinitely expanding rights claims under judicial government, Ely's judicious and balanced account reminds us that liberty and property are historically and politically related, and that through constitutional prudence faithful to the purposes of the founding it is possible to maintain a proper balance between property rights and majority rule.

14. Id. at 156.

Liberal Visions of the Freedom of the Press

IMAGES OF A FREE PRESS. By Lee C. Bollinger. University of Chicago Press, 1991. Pp. xii, 155. $22.50.

THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA. By Lucas A. Powe, Jr. University of California Press, 1991. Pp. xii, 298. $29.95.

FREE SPEECH IN AN OPEN SOCIETY. By Rodney A. Smolla. Alfred A. Knopf, 1992. Pp. xii, 373. $27.50.

*Reviewed by Michael J. Gerhardt**

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I. INTRODUCTION

Liberals have long regarded the First Amendment's freedom of the press guarantee as their special plaything.[1] For most of this century, liberals have dominated the scholarship and the doctrinal debate on the freedom of the press. They have often urged the federal courts to establish the press as "a fourth institution outside the Government as an

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1. The First Amendment provides in pertinent part that "Congress shall make no law . . . ahridging the freedom of speech, or of the press." U.S. Const., Amend. I.

additional check on the three official branches."[2] Liberal judges have ensured virtual autonomy for the print media through the cumulative effect of their rulings to immunize the press from damages for the publication of falsehoods about public figures unless the publication was done knowingly, recklessly, or with actual malice; to bar public access to newspapers; and to treat prior restraints of publications as presumptively unconstitutional. At the same time, the courts have not barred liberal lawmakers from regulating broadcasters to promote fairness and to prevent chaos in public debate on the airwaves.[3]

The liberal approach to the freedom of the press, however, seemingly stands on the brink of dismantlement. The present Supreme Court has "an activist outlook of the most virulent and blinding sort" under which the dominating conservative Justices "selective[ly] enforce[] . . . rights generally supporting state power and eroding libertarian values."[4] Indeed, no one currently on the Court is a staunch defender of an autonomous press, and the Court has already made some minor changes to, or at least refused to extend, the freedom of the press doctrine.[5] Meanwhile, polls indicate that the popularity of the press is plummeting, and liberals have taken a beating from the left and the right[6] that has cost them considerable political and judicial power.[7]

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2. Potter Stewart, *Or of the Press*, 26 Hastings L. J. 631, 634 (1975).

3. For a description of the system under which the print media enjoys virtual autonomy and the broadcast media is subjected to various regulations, see generally Ithiel de S. Pool, *Technologies of Freedom* (1983).

4. Guido Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 Harv. L. Rev. 80, 83, 151 (1991).

5. See, for example, *Cohen v. Cowles Media Company*, 111 S.Ct. 2513 (1991) (holding that the First Amendment does not prohibit a source from recovering damages under promissory estoppel law for a publisher's breach of promise of confidentiality given in exchange for information); *Masson v. New York Magazine*, 111 S. Ct. 2419 (1991) (stating that under California law the evidence raised a jury question as to whether an author acted with tbe requisite knowledge of falsity or reckless disregard of the truth or falsity of several cited passages); *Leathers v. Medlock*, 111 S. Ct. 1438 (1991) (holding that Arkansas' extension of its generally applicable sales tax to cable television services alone, or to cable and satellite services, but not to the print media, does not violate the First Amendment); *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695 (1990) (holding that a separate constitutional privilege for "opinion," in addition to established safeguards regarding defamation, was not required to ensure the freedom of expression guaranteed by the First Amendment and that a reasonable fact-finder could conclude that a reporter's column implying that a high school coach perjured himself was sufficiently factual to be susceptible of being proved true or false and might permit defamation recovery). But see *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991) (unanimously striking down on First Amendment grounds a New York law that required an accused or convicted criminal to deposit income from works describing his crime in an escrow account available to the victims of the crime and the criminal's other creditors).

6. Leftist critics argue, for example, that liberals have not done enough to eliminate or remedy discrimination against minorities. See, for example, Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Harvard, 1989); Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (Basic Books, 1987); Richard Delgado, *Brewer's Plea: Critical Thoughts*

Sensing that, for the time being, liberals may still dominate the playing field of the First Amendment, three liberal law professors—Dean Lee Bollinger of the University of Michigan Law School, Professor Lucas Powe of the University of Texas Law School, and Professor Rodney Smolla of the Marshall-Wythe School of Law at the College of William and Mary—have stepped into the breach to offer solutions to the dilemma of defending the freedom of the press in an age in which neither liberals nor the press is popular and in which the courts are overwhelmingly unreceptive to liberal values. In *Images of a Free Press*[8] Bollinger suggests that this dilemma is illusory, while Powe in *The Fourth Estate and the Constitution*[9] argues for the elimination of almost any governmental regulation of the print media. Smolla in *Free Speech in an Open Society*[10] contends that, properly understood, the First Amendment guarantees virtually absolute freedom of speech and of the press and should serve as a model for the rest of the world to follow.

Bollinger, Powe, and Smolla show that liberals still have plenty to say to the Court (if it will listen), elected officials, academicians, students, and the general public about the freedom of the press. Their books reveal the diversity of thought among liberals and shed light on the reasons for the seemingly unstable status of a complex liberal tradition of commentary on the freedom of the press.

In the context of the freedom of the press, this Review seeks to illustrate the ways in which these three authors differ in their efforts to evade the common criticisms leveled at liberal scholars.[11] Part II posits that the paradigmatic liberal inquiry under the First Amendment involves asking who can best be trusted to protect the values associated with the freedom of the press, particularly maintaining respectable public debate and effectively checking governmental abuses. The ob-

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on Common Cause, 44 Vand. L. Rev. 1 (1991). Commentators on the right criticize liberals for not doing enough to prevent the courts from interfering on unprincipled bases with the legitimate decisionmaking of the elected branches of government. See, for example, Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (Free Press, 1990); Gary L. McDowell, *Curbing the Courts: The Constitution and the Limits of Judicial Power* (L.S.U., 1988); Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Harvard, 1977). For one perspective on how liberals should respond to criticisms from the left and the right, see Ronald K. L. Collins and David M. Skover, *Commentary: The Future of Liberal Legal Scholarship*, 87 Mich. L. Rev. 189 (1988).

7. See Robin West, *Foreword: Taking Freedom Seriously*, 104 Harv. L. Rev. 43, 44-47 (1990) (suggesting a decline in the respect for and influence of liberalism).

8. Lee C. Bollinger, *Images of a Free Press* (Chicago, 1991).

9. Lucas A. Powe, Jr., *The Fourth Estate and the Constitution: Freedom of the Press in America* (U. of Cal., 1991).

10. Rodney A. Smolla, *Free Speech in an Open Society* (Knopf, 1992).

11. See sources cited in note 6.

jects of trust or distrust are the Supreme Court, elected officials, the public, and the press itself. Part III briefly describes the distinctively liberal arguments made by Bollinger, Powe, and Smolla in their new books. Part IV exposes the complexity underlying liberal commentary on the freedom of the press by focusing on the disagreement among Bollinger, Powe, and Smolla about who is best situated, given changing political and social conditions, to foster and protect the values the framers hoped to promote through the constitutional guarantee of the freedom of the press. Part V identifies some reasons for and consequences of the lack of a strong conservative counterpart to the liberal tradition of defending the freedom of the press. Part V suggests that the absence of conservative voices in this arena may reflect (1) a split between social conservatives and libertarians (similar to the liberals' infighting) over whether the government can perform a positive role in the First Amendment context and (2) the resulting freedom of liberals such as Bollinger, Powe, and Smolla to inculcate in lawmakers and the citizenry certain moral and political values regarding the freedom of the press and to develop fora for protecting the freedom of the press apart from the stereotypical liberal option of an ever vigilant and active judiciary.

II. THE PARADIGMATIC LIBERAL VISION OF THE FREEDOM OF THE PRESS

The paradigmatic liberal approach to the freedom of the press asks who society can trust—the press, the Supreme Court, or elected officials—to act most effectively in achieving and protecting the values associated with the First Amendment's guarantee of the freedom of the press. First, many liberals believe that the First Amendment guarantees an autonomous press. They trust the press to monitor itself, to check governmental abuse, and to perform in an ethically responsible and professional manner. Thus, Justice Hugo Black, who took an absolutist approach to the First Amendment, argued for a press completely free from governmental regulation: "The press [exists] to serve the governed, not the governors. . . . [It is] protected so that it [can] bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government."[12]

Second, liberals often argue that the federal courts can be trusted more than the state[13] to enforce the values embodied in the First

12. *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (The Pentagon Papers Case). Similarly, Justice Potter Stewart argued that the First Amendment protects "the institutional autonomy of the press." Stewart, 26 Hastings L. J. at 634 (cited in note 2).

13. In this Review, I use the term "state" to refer to the elected officials of the federal, state, and local governments.

Amendment. This argument rests on an abiding faith in the federal courts to engage in a flexible or even absolutist (but not unprincipled) interpretation of the First Amendment. For example, in *New York Times v. Sullivan*[14]—perhaps the most important decision in this century on the freedom of the press—Justice William Brennan, writing on behalf of a unanimous Supreme Court, explained that the "central meaning" of the First Amendment guaranteed a citizen the right to criticize his government in order to facilitate the search for truth and democratic decisionmaking. He argued that the First Amendment reflected the nation's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[15] He stressed further that a "citizen critic" must enjoy a qualified privilege from civil damages in order to perform his societal duty.[16] Consequently, the Court held that a plaintiff must prove actual malice to succeed in a defamation action.[17]

Liberal faith in the Supreme Court's capacity to protect the press often accompanies a corresponding distrust in the state's ability to craft even-handed and fair regulation of the press. This distrust stems from a belief that the state censors the press because the press has the power to embarrass the state. As Professor Thomas Scanlan observed, "where political issues are involved governments are notoriously partisan and unreliable."[18] Justice Louis Brandeis put it even more dramatically: Governmental power is dangerous because "[m]en feared witches and burnt women."[19]

Third, in contrast to liberals who adhere to one or both of the positions described above, many liberals trust the state to make balanced laws for the regulation of both economic and noneconomic matters. In the 1930s, most Justices agreed to defer to economic governmental regulations; they upheld New Deal legislation restructuring the public and private sectors in order to create conditions under which certain freedoms, such as the right to contract, could flourish and competing interests could be properly balanced for the sake of the greater public

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14. 376 U.S. 254 (1964).

15. Id. at 270.

16. Id. at 277-79.

17. The Court defined "actual malice" as "knowledge that [the publication] was false or with reckless disregard of whether it was false or not." Id. at 280, 285-86. Justices Black, Douglas, and Goldberg concurred, arguing for an absolute privilege. Id. at 293-97 (Black concurring), and at 297-305 (Goldberg concurring).

18. Thomas M. Scanlan, Jr., *Freedom of Expression and Categories of Expression*, 40 U. Pitt. L. Rev. 519, 534 (1979).

19. *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis concurring).

good.[20] By 1941, Professor Zachariah Chafee—perhaps the most prominent liberal First Amendment scholar in this century—recognized the potential in this reasoning for permitting limited regulation of the press. In his influential treatise, *Free Speech in the United States*,[21] Chafee argued that freedom of expression requires the government to provide fora for public debate on important political issues as a critical, if not indispensable, means to improve the quality of both the press and democratic decisionmaking. He feared that without such governmental assistance, unrestrained private interests would interfere with the free exchange of ideas.

Even though the post-New Deal Justices could not reach a consensus on whether to defer to regulation of so-called noneconomic liberties, they did agree to uphold various regulations of the broadcasting industry. In 1943, for example, the Court in *National Broadcasting Co. v. United States*[22] rejected First Amendment challenges to government regulation of the broadcast media for the first time. The Court upheld the "chain broadcasting rules," through which the Federal Communications Commission had sought to impose limits on the degree of autonomy a licensee could give up when joining a broadcasting network.[23] Using the "scarcity rationale," the Court rejected the plaintiff's First Amendment objection to the regulatory scheme. The scarcity rationale posits that because more people want to broadcast than the airwaves have room to accommodate, the government is in the best position to determine who should receive broadcast licenses based on its perception of "the 'public interest, convenience, or necessity.' "[24]

Similarly, in *Red Lion Broadcasting Co., Inc. v. Federal Communications Commission*[25]—a case as important to the broadcast media as *Sullivan* is to the print media—a unanimous Court upheld the fairness doctrine, which requires that broadcasters present controversial issues of public importance to their audiences and ensure that both sides of the issue are available.[26] Relying again on the scarcity rationale, the

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20. .See generally J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 Duke L. J. 375, 387-94.

21. Zachariah Chafee, *Free Speech in the United States* (Harvard, 1941). Chafee dedicated the book to Judge Learned Hand, one of the most influential commentators and jurists on the freedom of the press. For example, Judge Hand authored *Masses Publication Co. v. Patten*, 244 F.2d 535 (S.D.N.Y.), rev'd, 246 F.2d 24 (2d Cir. 1917), an influential lower court opinion setting forth a strong standard for protecting speech critical of the government.

22. 319 U.S. 190 (1943).

23. The commission designed these regulations to manage various aspects of a network's relationship with its affiliated stations. Id. at 198-209.

24. Id. at 226-27.

25. 395 U.S. 367 (1969).

26. Justice Byron White, the author of *Red Lion*, has personally rejected the view of an autonomous press: He has characterized the press as a "private-interest group rather than an insti-

Court reasoned that the differences between the print and broadcast media—reflected in noise restrictions on the use of voice amplifying equipment and the finite number of usable broadcast frequencies—justified the different kinds of regulatory treatment they received.[27]

Changing social, political, and legal conditions, however, increasingly have forced liberals to recognize the tension between the different elements of the standard liberal position on the freedom of the press. For example, *Sullivan* has posed several problems, including the escalation of damages in libel actions and the discouragement of qualified people from government service because they wish to avoid the highly invasive press coverage that *Sullivan* permits. Moreover, the intended beneficiaries of the standard liberal arguments regarding the freedom of the press—unpopular or politically powerless speakers or groups—often lack the resources to be heard in the public marketplace and therefore cannot get their messages to the intended audiences without governmental assistance. Hence, they now demand government support in obtaining access to government-owned property and information and to the outlets of private media. In addition, liberals face such tough interrelated issues as whether the print media is at least as limited in numbers of outlets as the broadcast media and consequently exceeds the allowable level of concentration for purposes of deserving autonomy status under the First Amendment, and whether broadcast regulation has worked well enough to serve as a model for regulation of the print

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tution with a central function to perform in the constitutional system of checks and balances." Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. Bar. Found. Res. J. 521, 593 (1977). Even though Justice White was also a long-time critic of *Sullivan*, see Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 Geo. Wash. L. Rev. 68, 126-27 (1991), the Court's unanimous decision in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (refusing in an opinion by Chief Justice Rehnquist to allow an "end-run-around" *Sullivan* by rejecting a tort action against the publisher of a parody of a public figure for the intentional infliction of emotional distress), indicates that his lonely battle to fundamentally rework libel law clearly has failed.

27. Only five years after *Red Lion*, the Supreme Court in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), rejected a plea from Professor Jerome Barron to apply the rationale of *Red Lion* to the print media. Barron's argument drew from his work as a prominent liberal advocate favoring the Court's application of similar regulations to both the broadcast and print media. See Jerome Barron, *Access—the Only Choice for the Media?*, 48 Tex. L. Rev. 766 (1970); Jerome Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 Geo. Wash. L. Rev. 487 (1969); Jerome Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641 (1967). Nevertheless, in *Tornillo*, the Court unanimously agreed to strike down a Florida law that required newspapers within the state to publish without cost the reply of any political candidate criticized in its columns. The *Tornillo* Court reasoned that the print media cases stood for the proposition that "any . . . compulsion [by the government on newspapers] to publish that which '"reason" tells them should not be published' is unconstitutional." 418 U.S. at 256. Access regulation violates that principle because it intrudes on "the function of editors" and presumably chills news content. Id. at 258.

media. The realities of press ownership and behavior and of the consequences of governmental regulation are forcing liberals to reconsider their positions on the freedom of the press and to do so before a hostile audience.

III. Three Liberal Answers to Problems with the Freedom of the Press

Bollinger, Powe, and Smolla are unabashedly liberal in their focus on clarifying the nature of the First Amendment's freedom of the press guarantee.[28] Their shared orientation is that the First Amendment requires a substantial degree of either judicial or governmental activity or both to protect the values the framers hoped to promote through the freedom of the press guarantee. Below I consider in turn each author's distinctively liberal arguments regarding the freedom of the press.

Bollinger argued in his previous book, *The Tolerant Society: Freedom of Speech and Extremist Speech in America*,[29] that the First Amendment guarantees robust political debate, including hate speech directed at minorities, to "help[] . . . shape the intellectual character of the society."[30] In his new book Bollinger returns to his first and predominant interest: Explicating our system of partial regulation of the media.[31] He is particularly concerned with exposing the nature and implications of the "images"—unexplored or unproven assumptions or beliefs—that we have developed with respect to the freedom of the press.[32]

Much of Bollinger's book is aimed at exposing the flaws in the "central image" of the freedom of the press that *Sullivan* has fostered.[33] He explains that *Sullivan* has spawned a jurisprudence on the

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28. Professor West suggests that liberal legal scholars "agree on the basic [premise] that individual freedom is the primary, if not the only, moral end of political organization [and] generally insist that individual freedom is best ensured by protecting and respecting individual rights." West, 104 Harv. L. Rev. at 46 (cited in note 7). See also Rogers Smith, *Liberalism and American Constitutional Law* 14 (Harvard, 1985) (submitting that "[l]iberalism's most distinctive feature is thus its insistence that government should be limited so as to free individuals to undertake private as well as public pursuits of happiness, even if this option erodes public spiritedness in practice").

29. Lee C. Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (Oxford, 1986).

30. Id. at 107.

31. See, for example, Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 Mich. L. Rev. 1 (1976); Lee C. Bollinger, Jr., *Elitism, The Masses and the Idea of Self Government: Ambivalence About the "Central Meaning of the First Amendment,"* in Ronald K. L. Collins, ed., *Constitutional Government in America* 99 (Carolina Academic, 1980); Lee C. Bollinger, Jr., *The Rationality of Public Regulation of the Media*, in Judith Lichtenberg, ed., *Democracy and the Mass Media* (Cambridge, 1990).

32. Bollinger, *Images of a Free Press* at 44 (cited in note 8).

33. Id. at 2, 133.

freedom of the press that rests on a flawed image, whose critical features are

> [a] government [that] is untrustworthy when it comes to regulating public debate, for it will forever try to recapture its authoritarian powers through laws such as seditious libel[;] a public that is incapable of gathering for itself all the information it requires to exercise its sovereign authority; and a press that performs a vital role in helping, through its powers of investigation and exposure, to reduce the risks of official incompetence and abuse, to convey information about the affairs of government, and to serve as a forum for citizens to communicate among themselves.[34]

According to Bollinger, this "central image" is flawed because it has generated a confused patchwork of decisions on the freedom of the press, and has not produced more responsible press behavior or improved the quality of public debate.[35] Further, it has led people to automatically distrust government regulation of the media even though such regulation has not always harmed the freedom of the press. Bollinger also points out that scholars have not fully appreciated the realities of partial regulation.

Bollinger posits that *Sullivan*'s central image has had two negative effects on the freedom of the press. First, it has discouraged many scholars from studying the social harm that may result from the spread of falsehoods and other politically and socially useless information in the public domain. Bollinger is concerned that the individual harms perpetrated by false publications can subvert the quality of public debate because those publications may confuse people about what is really at stake in political discourse and dissuade people from entering government service to avoid subjection to sensational press coverage.[36] He suggests that we cannot fully appreciate the harmful effects of *Sullivan*'s central image and the ways in which we can eliminate them (with governmental assistance) until we have developed an empirically sound "psychology of the people" to study how the public develops its images of the press and how it processes and reacts to the information to which

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34. Id. at 20, 44.

35. See id. at 57-58. In contrast to Bollinger, Professor Harry Kalven praised *Sullivan* for signaling the start of a journey that would lead the Court to protect *all* speech needed for genuine public debate. Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 S. Ct. Rev. 191. He concluded that "[t]he closing question . . . is whether the treatment of seditious libel as the key concept for development of appropriate constitutional doctrine will prove germinal." Id. at 221. Though Kalven thought it "not easy to predict what the Court will see in the *Times* opinion as the years roll by," he believed that *Sullivan* "invit[ed the Court] to follow a dialectic progression from public official to government policy to public policy to matters in the public domain, like art." Id. But see David Logan, *Tort Law and the Central Meaning of the First Amendment*, 51 U. Pitt. L. Rev. 493, 496, 568-73 (1990) (suggesting that *Sullivan* did not make inevitable the dialetic progression Kalven predicted, including the confusing patchwork of decisions we now have on the freedom of the press).

36. Bollinger, *Images of a Free Press* at 36, 37, 144, 145 (cited in note 8).

it is exposed.[37] Moreover, in Bollinger's opinion, we need to develop a "psychology of the press" to determine whether economic incentives inhibit the media from improving the quality of public debate on important issues.[38]

Second, Bollinger believes that *Sullivan*'s central image has fostered an unreasonable distrust of media regulation. He fears that *Sullivan*'s influence makes people less receptive to a system of partial regulation and discourages both examination of how partial regulation comports with the First Amendment and recognition of the similarities between the broadcasting and print media.[39] Once we have exposed the similarities between the different kinds of media, the flaws in *Sullivan*'s "central image," the nature of people's psychology, and the press's capacity to abuse its discretion, we will be able to consider whether broadcast regulation has succeeded. If it has succeeded, according to Bollinger, we should then consider application of the beneficial aspects of broadcast regulation to the print media.[40]

In contrast to Bollinger, who seeks to provide "a series of reflections" rather than a "treatise" on the freedom of the press,[41] Powe presents a bland but thorough study of the cases and the laws governing the print media. Powe's new book, when read in conjunction with his previous one, *American Broadcasting and the First Amendment*,[42] forms a rebuttal to Bollinger's *Images of a Free Press*. In much the same spirit as he earlier argued that broadcast regulation should be abandoned as unworkable, Powe makes the case in his new book against regulation of the print media. Although much of what Powe says is unoriginal, he brings together all of the constitutional arguments favoring a virtually autonomous print media.

Powe's study comprises three parts. Part I provides a comprehensive look at the history of the freedom of the press. In Powe's opinion, all relevant evidence—including the original understanding of the freedom of the press, the government's propensity to censor the press in times of crisis, and the Supreme Court's significant decisions on free-

37. Id. at 81, 139-40.

38. Id. at 36, 44, 56.

39. For example, both the broadcasting and print medias make use of public property—the airwaves for broadcasters and the streets and sidewalks to deliver newspapers and magazines; too few people have the resources to be able to express themselves through either media; and both media have few outlets. Id. at 90, 93-94.

40. Id. at 109.

41. Id. at xi-xii.

42. Lucas A. Powe, Jr., *American Broadcasting and the First Amendment* (U. of Cal., 1987). For other works by Powe on the First Amendment, see *Or of the [Broadcast] Press*, 55 Tex. L. Rev. 39 (1976); *Mass Speech and the Newer First Amendment*, 1982 S. Ct. Rev. 243; Thomas G. Krattenmaker and Lucas A. Powe, Jr., *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 Duke L. J. 151.

dom of the press—points in favor of an autonomous print media. He expresses full agreement, for example, with two of his colleagues, David Anderson and David Rabban, whose work, he claims, demonstrates that the framers of the First Amendment intended to prohibit both prior restraints of the press and seditious libel laws.[43] Powe reserves his highest praise for the Court's landmark rulings in *Sullivan*, which "protected falsity to protect truth"[44] and *The Pentagon Papers Case*,[45] which "protected truth to expose official lies."[46]

Part II of Powe's book explores several contentious areas of debate over the freedom of the press—libel, prior restraints, and antitrust—in order to expose the practical impossibilities of devising regulations of the press that do not undermine the press's constitutional role as a watchdog on governmental abuses.[47] Powe admits, however, that the press's need to obtain access to information has been satisfactorily fulfilled by statutes, such as shield laws, sunshine laws, and freedom of information acts.[48]

In Part III Powe compares and contrasts two competing conceptions of the "public's right to know" under which either the press or the government, but not both, should serve as the "public's surrogate" for keeping the public informed and the government honest.[49] Powe vigorously defends a constitutionally guaranteed reportorial privilege to government-controlled information in order "[t]o guarantee added information that will allow the public to better understand [social and political issues, to] bring to the public information which they could not otherwise acquire[, to] guarantee that the press cannot be intimidated by government[, and to] remove the chilling effect [of governmental control of information] on public discussions."[50]

Unlike Bollinger and Powe, Smolla focuses on the freedom of

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43. See Powe, *The Fourth Estate* at 20 (cited in note 9). For contrasting views on the history of the First Amendment, see, for example, Zachariah Chafee, *Free Speech in the United States* 18-20 (Harvard, 1941); Leonard W. Levy, *Emergence of a Free Press* (Oxford, 1985); William Mayton, *From a Legacy of Suppression to the "Metaphor of the Fourth Estate,"* 39 Stan. L. Rev. 139 (1986); David Rabban, *An Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 Stan. L. Rev. 795 (1985); William Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 Colum. L. Rev. 91, 95, 97, 117-20 (1984).

44. Powe, *The Fourth Estate* at 104.

45. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

46. Powe, *The Fourth Estate* at 104.

47. Id. at 109.

48. In addition, Powe admits that he omits a discussion of privacy because "the legal (as opposed to ethical) issues involved in discussing the private lives of elected officials are nonexistent" and because he prefers to "leave the private lives of entertainers to the grocery store lines and to others." Id.

49. Id. at 233.

50. Id. at 256-57.

speech rather than the freedom of the press. In *Free Speech in an Open Society* Smolla expands on his work as a premier chronicler and critic of defamation law[51] and as the director of the Annenburg Washington Program Libel Reform Project.[52] His new book sets forth the lasting lessons of the American experience with freedom of speech for the purpose of passing them on to the public, including our youth, and any countries interested in developing open societies similar to our own.

Smolla's book consists of three parts. Part I examines the theoretical and historical justifications for granting special status and protection to the freedom of speech. Smolla reviews various theories of free speech, including the marketplace of ideas and the relationship between free expression, human dignity, and democratic self-governance, and discusses the methodologies for deriving these theories from the First Amendment, including absolutism, historicism, and balancing.[53] Smolla concludes that all of these conventional approaches to the First Amendment "miscarry as coherent general theories of free speech."[54] Consequently, he proposes—in a manner similar to that of the prominent, liberal First Amendment scholar, Professor Thomas Emerson[55]—that a "comprehensive theory" or "coherent approach to the future of free speech" requires judges to ensure that speech regulations satisfy all of the rationales for free speech and free press.[56] This approach requires several steps, the most important of which is the promulgation of "[r]ules . . . to govern the regulation of the content of speech in the general marketplace,"[57] which, in turn, requires development of "rules tilted heavily in favor of free expression."[58] These rules compel in yet another step the development of various principles for protecting free

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51. See, for example, Rodney A. Smolla, *Jerry Falwell v. Larry Flynt: The First Amendment on Trial* (St. Martin's, 1988); Rodney A. Smolla, *Suing the Press: Libel, the Media, and Power* (Oxford, 1986); Rodney A. Smolla, *Law of Defamation* (Clark Boardman Co., 1986); see also Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. Pa. L. Rev. 1 (1984).

52. See *Proposal for the Reform of Libel Law: The Report of the Libel Reform Project of the Annenberg Washington Program* (R. Smolla, Project Director, 1988) ("*Anneberg Proposal*"). See also Powe, *The Fourth Estate* at 132 (cited in note 9) (critiquing the proposal).

53. Smolla, *Free Speech in an Open Society* at 6-42 (cited in note 10).

54. Id. at 42.

55. Emerson argued that judicial protection for freedom of speech was important to society as a safety valve or outlet for protest and that courts should regard all of the theories of freedom of speech and of the press as providing the full range of rationales on which they could rely in protecting the two interrelated constitutional guarantees. See generally Thomas I. Emerson, *The System of Free Expression* (Random House, 1970).

56. Smolla, *Free Speech in an Open Society* at 43.

57. Id.

58. Id. The other steps consist of the development of rules for governing the "noncontent regulation of speech" and for the "regulation of speech in special settings removed from the general marketplace." Id. at 43, 44.

speech in the general marketplace.[59]

Part II of Smolla's book examines the ways in which the government attempts to censor political speech. Using various reasons for protecting freedom of speech depending on the context, message, and governmental interest, Smolla argues for constitutional protection of symbolic dissent, such as flag-burning; dissent advocating violence unless the speech involved would demonstrably cause palpable harm to persons or property; the publication of any newsworthy information about public or private figures, including even the involuntary "outing" of gay politicians,[60] but not private facts about private persons;[61] hate speech except "when it poses a clear and present danger of violence, or is intertwined with actual discriminatory conduct;"[62] and campaign expenditures.[63]

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59. Id. at 46-51 (discussing the "neutrality," "emotive," "symbolism," "harm," "causation" and "precision" principles of freedom of speech).

60. Id. at 137. Smolla accepts *Sullivan* as a baseline. See id. at 118-19. His other works also reflect his general approval of *Sullivan*. See, for example, *Annenberg Proposal* at 7 (cited in note 52) (suggesting *Sullivan* was a "success"); Daan Braveman, William C. Banks, and Rodney A. Smolla, *Constitutional Law: Structure and Rights in Our Federal System* 1249 (Mathew Bender, 2d ed. 1991) (praising *Sullivan* for "captur[ing] the essence of the American constitutional experience: that dynamic and vigorous debate, conducted generation through generation, over what it means to be American, to he committed to democracy, equality, tolerance, religious freedom, freedom of expression, and due process of law, to place our ultimate trust in 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open' ").

61. After identifying the four conflicts between the freedom of the press and privacy values—newsworthy material and public figures, public figures and nonnewsworthy information, private people and newsworthy material, and nonnewsworthy information and either public or private figures—Smolla indicates that the only instance in which he would allow a cause of action for defamation is nonnewsworthy information about private citizens. Smolla, *Free Speech in an Open Society* at 124-27 (cited in note 10). The reason for this rather extreme position is that Smolla errs on the side of bringing any arguably socially or politically relevant information to the public marketplace.

62. Id. at 169. Acknowledging hate speech as "an abomination," id., Smolla considers how statutes regulating hate speech are tailored. He suggests that "[t]he only prohibitions [of hate speech] likely to be upheld are narrowly drawn restrictions on fighting words that present a clear and present danger of violence, or that punish physical injury to persons or property, or illegal discriminatory conduct, or that involve purely 'private' speech in a context completely removed from discussion of issues of general or public concern." Id. at 167. He reviews the constitutionality of the ordinance at issue in a case pending before the Supreme Court, *In re R.A.V.*, No. C8-90-1656, 59 U.S.L.W. 2453 (Minn. Sup. Ct., Jan. 18, 1991). This law provides that it is a misdemeanor to place, "on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender." Id. Smolla concludes that this ordinance violates his precision principle, which would have required the ordinance to "state that cross-burning creating a 'clear and present danger' of lawless action, or amounting to an 'incitement to lawless action,' is prohibited." Smolla, *Free Speech in an Open Society* at 168 (cited in note 10).

63. Smolla, *Free Speech in an Open Society* at 238-39. Yet another category of protected speech, Smolla argues, is speech financed with public funds. Protection exists for this type of

In Part III, Smolla considers how developments in the technologies of communication and publication can and should affect the future of freedom of speech in this country and the rest of the world. He argues that the advent of new technologies facilitating the free flow of information (such as fax machines) may require the modification or abandonment of old doctrines. For example, he suggests that the almost instantaneous sharing of information between news bureaus makes prior restraints of speech more problematic than ever before because information can be passed on and published before an injunction could take effect.[64] He argues further that new technologies are eliminating barriers between the print and broadcast media, common carriers, and cable companies, thus requiring the formulation of new doctrines to guarantee the freedom of the press.[65] He urges government not to succumb to the temptation to overregulate speech for the sake of separating "substance from clutter" in its efforts to develop such doctrines.[66]

Smolla concludes by making various suggestions about how the United States can become a more effective leader in shaping an international marketplace of ideas.[67] Although he recognizes that other countries may encounter problems in adapting our freedom of speech rules to their special cultures,[68] he believes that freedom of speech can flourish internationally as long as other nations remain firmly committed to "the faith that the free flow of information across international borders avoids more wars than it causes, averts more terrorism than it feeds, uncovers more violations of human rights than it incites."[69]

IV. Liberal Trust and Distrust Under the First Amendment

A central question on which liberals disagree is who society can trust to protect effectively First Amendment values: the Supreme Court, the state, the press, or the public. Bollinger tends to trust the Supreme Court and the state but not the people or even the press to promote the values embodied in the freedom of the press guarantee.

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speech unless the government regulation is sufficiently neutral, precise, proportionate to the government's economic contribution, relevant to the mission of the government program dispensing the benefits, acceptable to professionals in the field, viewpoint-neutral, and accommodating of applicable constitutional guarantees such as freedom of exercise of religion. See id. at 170-220.

64. Id. at 286-87.

65. See id. at 322.

66. Id. at 342.

67. For example, he suggests we could "make our own conduct consistent, so that our behavior toward speech in our foreign relations is equivalent to our behavior toward the speech of our own citizens." Id. at 347.

68. See, for example, id. at 353 (speculating that other countries are likely "to limit the neutrality principle to speech that does not attack values of ethnic and religious tolerance, or that in some other way attempts to undermine the very existence of the social community").

69. Id. at 367.

Powe trusts the Court, the press, and the people but harbors deep-seated distrust of the state's capacity to take seriously freedom of the press values. Smolla shares Powe's outlook on whom he can trust but in the broader context of the freedom of speech rather than the freedom of the press.

A. The Supreme Court

For the most part, Bollinger, Powe, and Smolla take conventionally liberal positions on how the Court should answer First Amendment questions. The specific methods each proposes for judicial interpretation of the First Amendment reflect how much each trusts the Court.

Bollinger believes that the Court has two important powers in the context of the freedom of the press. First, it can "shap[e] society's ideas about itself and hence its character" by "articulating a vision and commenting on the nature of society."[70] Second, it has the power to influence press behavior because the press depends on the Court for its freedom from intervention and the Court can influence public opinion about the press.[71]

The substantial degree to which Bollinger is willing to trust the Court not to abuse these powers is evident in his failure to defend the method he believes the Court should use to shape empirically sound images of society and of the press.[72] He merely assumes that the Court will do a good job of balancing competing interests to decide freedom of the press cases.[73] Bollinger repeatedly critiques the Court's decisions on the freedom of the press strictly in terms of the accuracy of its assessment of costs and benefits.[74] He suggests that regulation should be permitted only when "overwhelming" competing interests point in favor of

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70. Bollinger, *Images of a Free Press* at 42 (cited in note 8).

71. See id. at 49.

72. Although Bollinger argues, for example, that it is "crucial that courts begin to develop a more realistic set of images than that incorporating a regime of seditious libel," id. at 145, the only suggestion Bollinger offers for how the Court can achieve this objective is a general reference to the need to measure accurately the costs and benefits of different regulatory measures. See, for example, id. at 48.

73. See, for example, id. at 22-23, 26.

74. See, for example, id. at 35-38 (discussing the social harm produced by the proliferation of falsehoods and injurious statements); id. at 114 (examining the costs and benefits of partial regulation to assess its workability and real value to society); id. at 131 (critiquing Powe's broadcast analysis for failing to assess the costs and benefits of broadcast regulation); id. at 111, 146-47 (analyzing how the Court could balance competing interests related to a newsgathering right of access to government-produced information). He rejects the autonomous view of the press on the ground that the Court has failed properly to assess the social costs resulting from a misconception of the press, including the harm to the public's psyche caused by the proliferation of falsehoods. See id. at 26, 150.

regulating to ensure "free and open debate."[75]

Bollinger achieves something truly remarkable by never explaining the Court's authority or competence to balance competing interests in the First Amendment context. Despite Powe's contention that "no book about freedom of the press could ignore the framing of the First [Amendment,]"[76] Bollinger has managed to write a book on the freedom of the press without any serious discussion of the text, history, or structure of the First Amendment.[77]

Even though Bollinger has elsewhere defended the Court's authority and capacity for balancing competing interests,[78] it is odd that he does not bother to do so in his new book, which represents his most ambitious enterprise yet on the freedom of the press. He could, but does not, justify his approach on the grounds that, as Smolla acknowledges, the history of the First Amendment is ambiguous and unhelpful in resolving current issues,[79] that taking the text at face value when it seemingly speaks in categorical terms might lead to absurd results, and that the Court's approach in this area has traditionally consisted of balancing competing interests.[80]

In addition to his failure to cite any authority for the propriety of balancing interests in First Amendment cases or to show the superiority of balancing over other methods of interpreting the First Amendment, Bollinger's faith in the Court's balancing runs into two problems that Smolla identifies: Balancing "fails to recognize the powerful justifications for freedom of speech [and of the press] and fails to curb the recurring impulses that motivate antispeech legislation."[81] First, Bollinger often undervalues the textual commitment to the freedom of the press. For example, although the text of the Constitution clearly places a premium on the freedom of the press whenever government acts, Bollinger refers variously to freedom of the press as an "interest," a "value," and a "right."[82] These references reflect Bollinger's tendency to give differ-

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75. Id. at 133.

76. Powe, *The Fourth Estate and the Constitution* at 19 (cited in note 9).

77. Bollinger does, however, briefly discuss the relevance of Peter Zenger and the Sedition Act of 1798 to the contemporary understanding of the First Amendment. See Bollinger, *Images of a Free Press* at 5-6 (cited in note 8).

78. See, for example, Bollinger, *The Tolerant Society* (cited in note 29).

79. Smolla, *Free Speech in an Open Society* at 33 (cited in note 10).

80. See Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 Nw. U. L. Rev. 1212, 1251-55 (1983).

81. Smolla, *Free Speech in an Open Society* at 42.

82. See, for example, Bollinger, *Images of a Free Press* at 10 (cited in note 8) (referring to the First Amendment's "interest" in uninhibited debate about public issues and the state's "interest" in protecting individual reputations); id. at 58 (referring to the "deep and rich debate over the question whether rights exist to serve the public good or for some other reason"); id. at 116 (referring to the Court's "impos[ition of] a compromise [hased] on a reasoned, principled, accommoda-

ent weight to the freedom of the press depending on the context. Such discourse is typical of Bollinger's book and leaves one with cloudy impressions of what he thinks the freedom of the press entails and of how his thinking is grounded, if at all, in the text, history, and structure of the Constitution.

Second, Bollinger's balancing often seems weighted toward governmental regulation of the press. His manipulation is subtle, constant, and effective: he acknowledges that *Sullivan* was based on a vision that the marketplace of ideas is important for the search for truth *and* for the preservation of democracy, but he equates this "central image" sometimes with the promotion of the truth and other times with the fostering of democracy.[83] Grounding protection of the press on only one of the rationales underlying *Sullivan*—securing democratic government—permits greater regulation because as long as the press is not engaged in political speech it can make no serious claim to outweigh the government's interest. If Bollinger truly accepted that we need the press to facilitate the search for truth as well as to secure democratic government, he would make it more difficult to regulate the press because truth requires a greater proliferation and dissemination of information than mere political discourse.[84]

Unlike Bollinger, Powe and Smolla consider the text, history, and structure of the First Amendment, leading each of them to envision a pivotal role for the Court in holding unconstitutional regulations of speech and the press that do not satisfy all of the rationales underlying the First Amendment.[85] Both Powe and Smolla would grant the Court

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tion of competing First Amendment values").

83. See, for example, id. at 44 (suggesting that the press is a necessary precondition of a working democracy); id. at 73 (equating the marketplace of ideas concept with truth); id. at 110 (equating the marketplace of ideas with democracy).

84. Indeed, the marketplace of ideas was actually based on a conception that the dissemination of information was important for the search for truth, a conception that makes regulation more difficult because it is not strictly limited to political speech. See generally David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. Chi. L. Rev. 1205 (1983).

For a general critique of interest balancing in First Amendment cases, see Smolla, *Free Speech in an Open Society* at 39-42 (cited in note 10). Smolla's critique makes me wonder how Bollinger would argue a freedom of the press case before the Supreme Court: would he ever make reference to the text, history, or structure of the Constitution in trying to persuade the Court to reach his desired result? Bollinger never discusses the relevance of these traditional sources of constitutional decisionmaking to adjudication of First Amendment questions. Thus, his balancing leads him to sidestep some of the perennial questions in constitutional law about the scope and the history of the freedom of the press in this country, including whether the framers intended to incorporate the Blackstonian notion of freedom of the press as meaning only freedom from prior restraints or a broader view, proscribing seditious libel laws.

85. Compare note 84; Powe, *The Fourth Estate and the Constitution* at 251 (cited in note 9) (suggesting that the constitutionality of a regulation of the press depends on whether it infringes "the whole range of interests that the First Amendment protects"). Both Powe and Smolla are in good liberal company in asserting that every regulation of speech or of the press must satisfy the

considerable power—to use a strong, sometimes irrebuttable presumption of unconstitutionality of government regulation of the freedom of speech and of the press—for the sake of protecting the press (in Powe's case) and the press and unpopular speakers (in Smolla's case) from a hostile state.[86] Their common presumption derives from Smolla's development of complex rules that have the invariable effect of striking down speech regulations[87] and from Powe's endorsement of the Legal Longhorns' First Amendment, that is, his resolution of almost every major dispute about the scope of the freedom of the press in terms of the scholarship of his colleagues at the University of Texas Law School.[88] To the extent that Powe and Smolla pull the arguments that

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various interests underlying the First Amendment. Professor Steven Shiffrin of Cornell Law School explains that freedom of speech is supported by a multiplicity of values, including "individual self-expression, social communion, political participation, the search for truth and for informed choice, social catharsis, the social affirmation of the rights of equality, dignity, and respect, and the freedom from arbitrary, official aggrandizing or excessively intrusive government regulation." Steven Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. Rev. 1103, 1197-98 (1983). Similarly, Professor Laurence Tribe of Harvard Law School has suggested that an adequate conception of freedom of speech must draw upon "several strands of theory in order to protect a rich variety of expressional modes." Laurence Tribe, *American Constitutional Law* 579 (1st ed. 1978). See also Thomas I. Emerson, *Toward a General Theory of the First Amendment* 16-25 (Random House, 1966).

86. Whereas Bollinger's balancing enables him to speak of a "hierachy of speech," Bollinger, *Images of a Free Press* at 47 (cited in note 8), Smolla's strong presumption in favor of expression allows him to discuss a "hierarchy of governmental justifications" under which speech on public issues is routinely given a high value but the government's interests vary in importance. Smolla, *Free Speech in an Open Society* at 50 (cited in note 10). Bollinger does not indicate, however, the extent to which he agrees with the Court's current hierarchy of speech or whether his balancing of competing interests would lead him to reach some different ordering of speech. Compare Bollinger, *Images of a Free Press* at 140-41 (apparently agreeing with Alexander Meikeljohn that the First Amendment primarily protects political speech)

87. See, for example, notes 57, 58, 60, and 62.

88. Throughout his book, Powe repeatedly endorses different colleagues' scholarship on the First Amendment. First, he applauds David Anderson's and David Rabban's historical research on the First Amendment. See note 43 and accompanying text. Second, Powe agrees with Rabban's historical analysis of Justice Holmes' influential dissent in *Abrams v. United States*, 250 U.S. 616, 624 (1919), claiming that Holmes' argument that the First Amendment protected unpopular expression to ensure a marketplace of ideas rested on the concept that a marketplace of ideas was critical for facilitating society's search for the truth. Powe, *The Fourth Estate and the Constitution* at 69 (cited in note 9). Third, Powe agrees with Rabban's argument that the Espionage Act of 1917 symbolized congressional efforts to balance censorship desires and to identify worthwhile political speech. Id. at 69. Fourth, the only libel reform proposal for which Powe expresses full approval is that of David Anderson, who would require "plaintiffs to prove actual damages (allowing dignity awards *only* when economic injury is proven—a possible loophole that could run up damages), but takes away their need to prove actual malice." Id. at 135. Fifth, Powe accepts Sanford Levinson's "trenchant point" that the consolidation of wealth requires the Court to support regulation of campaign finance and expenditures. Id. at 250. Sixth, Powe endorses University of Texas Law School Dean Mark Yudof's distrust of state involvement in regulating the freedom of speech and the press on the ground that "with all its resources and prestige, government has a powerful incentive to infiuence public debate in ways that favor those currently holding power." Id. at 254. Lastly, Powe agrees with Jack Balkin that the "universal love of freedom of expression" no longer

support the results they would like to see—such as a virtually autonomous print media—out of different sources, they may actually be employing a balancing test because they are implicitly making judgments about the appropriate weight to attach to each of the factors they consider.[89] Moreover, in giving the Court substantial discretion to determine the constitutionality of a regulation of speech or of the press, Powe and Smolla appear willing to run the risk of substituting one tyrant—the Court—for another tyrant—the legislature. The danger of this approach is that the Court may not be competent to appreciate fully or to enforce all of the different rationales underlying the First Amendment. Moreover, the Court may lack the requisite authority to perform the tasks that Powe and Smolla assign to it. For example, if, as Smolla concedes, the text, history, and structure of the First Amendment do not point to clear constitutional principles of freedom of speech,[90] where exactly is Smolla looking when he defines the contours of his "comprehensive" and "coherent" theory of freedom of speech? Although he argues that we need such a theory to provide rules that the courts can sensibly apply to resolve disputes in the context of freedom of speech, his concession that many of the conventional sources of constitutional decisionmaking are indeterminate undermines his repeatedly stated preference for resolving ambiguity in favor of uninhibited speech and conflicts with Powe's reading of the same sources.[91] If none of the

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exists. Id. at 290.

89. For example, Powe, like Bollinger, accepts *Sullivan*'s rationale as promoting both the search for truth and democracy. Powe believes any regulation of the freedom of the press must satisfy *both* rationales, id. at 104-05, but Bollinger proceeds as if a regulation can be reviewed under either one. See notes 82-83 and accompanying text. Similarly, by making reference to all of the rationales for protecting freedom of speech and of the press, Smolla may be stacking the deck. For example, he acknowledges that "[i]f freedom of speech is to be authentically embraced as a value of transcendent importance," he must devise "rules tilted heavily in favor of free expression." Smolla, *Free Speech in an Open Society* at 43 (cited in note 10). In addition, as Smolla gets further away from the core kind of speech protected by the First Amendment, he seems to find balancing more convenient. He suggests that the tort of unauthorized appropriation of someone's name or likeness for commercial purposes should not bar the use of a famous person's photograph to help sell a magazine or newspaper featuring a story about that person. Smolla refers to the need to "adjus[t] th[e] balance to permit this 'secondary exploitation' " and recognizes that the balance he suggests "deliberately subsidizes speech." Id. at 144.

90. See Smolla, *Free Speech in an Open Society at 43.*

91. See note 42 and accompanying text. The ultimate authority for Smolla's preference to provide substantial protection to political dissent seems to be his recognition that, in "charting the future of free speech . . . [one must] strike the appropriate balance between . . . two irrepressible philosophical impulses"—classical republicanism and "a libertarian streak"—that influenced the drafting of the Constitution. Smolla, *Free Speech in an Open Society* at 72 (cited in note 10). Although Smolla strikes this balance in favor of the free exercise of individual rights, id. at 95, this balance is undercut by his criticism that balancing does not adequately protect the core values embodied in the First Amendment. See note 81. Moreover, he has claimed that the history of the First Amendment itself is ill-defined. See note 79. In short, Smolla leaves unclear precisely how republicanism and libertarianism influenced the First Amendment's drafting and why they must

conventional sources of constitutional interpretation clearly authorize a widespread judicial hostility to regulations of speech and of the press, then Smolla cannot claim constitutional authority for giving the Court the power he wants it to have.[92] Indeed, much of the impetus for the approaches of both Powe and Smolla to the First Amendment turns on their deep-seated distrust of the state, which is the subject of the next section.

B. The State

Bollinger trusts the state far more than either Powe or Smolla do. Bollinger's faith in the state turns on two interrelated principles. First, he suggests that "the market for freedom of the press necessarily exists within the larger context of a market for goods and services. This means that citizens arrive at the system of press freedom with vast inequalities of wealth and, thus, with very different abilities to participate effectively in public debate."[93] Therefore, the state may have a responsibility to prevent these inequities from distorting public debate.

Second, Bollinger suggests that the real concern with the marketplace of ideas is with power—that is, the "ability to command an audience more or less exclusively"—and that this concern is "undiminished by the means by which such power is achieved."[94] Bollinger agrees with Professor Owen Fiss that the state necessarily has a role in the marketplace of ideas, at least to protect speakers from private interference.[95]

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and how they can be balanced to produce certain results in the First Amendment context. For a discussion of why these two traditions do not need to be balanced in constitutional adjudication, see Michael J. Gerhardt, *Critical Legal Studies and Constitutional Law*, 67 Tex. L. Rev. 393, 404-07 (1988) (reviewing Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* (Harvard, 1988)) (suggesting that, as a historical matter, the liberal tradition was far more influential in the drafting of the Constitution than the republican tradition).

92. Ironically, distrust of the Court could lead someone to give the Court even more power than Powe and Smolla give it. Some conservatives argue, for example, that the Court needs to be given clear principles that can easily be applied to avoid unprincipled judicial interference with the legitimate business of the elected branches of government. They argue further that even an absolutist approach such as Justice Black's is defensible because it gives the Court a principle that is clear, easily applied, and grounded in the categorical language of the First Amendment, and therefore not susceptible to abuse. Although such a bright-line rule would produce many of the results Powe and Smolla would like to see in the context of the freedom of speech and of the press, it exists to preclude judicial abuse.

93. Bollinger, *Images of a Free Press* at 137 (cited in note 8).

94. Id. at 138. Bollinger contrasts his view with that of Professor Owen Fiss, who argues that the real problem with the marketplace of ideas is "market reach," Owen M. Fiss, *Why the State?*, 100 Harv. L. Rev. 781, 788 (1987), which refers to the conflict between the interests of those who manage for-profit media institutions and the interests of the democratic society in ensuring that citizens are supplied the information and ideas they ought to have. Bollinger, *Images of a Free Press* at 137.

95. See Bollinger, *Images of a Free Press* at 142. As this quote indicates, Bollinger sometimes uses the term "state" to refer to government in general, including the courts.

Moreover, Bollinger contends that there is no guarantee that the private owners of print or broadcasting outlets will be concerned about the First Amendment; rather, he suspects that they care more about their pocketbooks than the freedom of the press.[96]

Bollinger argues that the state is in the best position to eliminate the distortions that the unequal distribition of power and wealth have wrought in the marketplace of ideas. Not only can the state break up consolidated ownership of the outlets of communication and thereby encourage greater diversity of viewpoints, but the state can draft legislation that will improve the quality of public debate. In this respect, Bollinger resembles Zachariah Chafee;[97] they both argue that unless the state endeavors to create a level playing field for public debate, the wealthy and politically powerful pockets of society will dominate or monopolize political dialogue.

Bollinger's trust in the state allows him to overlook a serious problem with empirical support for his claims that broadcast regulation has been successful and that regulation of all media is needed. His claim that broadcast regulation works does not rest on empirical fact but rather on the symbolic value of partial regulation's "compromise" between the values of "access in a highly concentrated press and minimal government intervention."[98] This is begging the question; partial regulation cannot be a success because it is a "compromise." The question is whether the "compromise" is a success. Similarly, Bollinger praises the fairness doctrine because he finds that it ultimately is no worse than any other First Amendment doctrine.[99] But neither this justification for

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96. See id. at 139.

97. See note 21 and accompanying text. Chafee was also a member of a blue-ribbon commission, which authored a prominent report on the freedom of the press in 1947. See Commission on Freedom of the Press, *A Free and Responsible Press* (University of Chicago, 1947). The report expressed concern over the facts that "the development of the press as an instrument of mass communication has greatly decreased the proportion of the people who can express their opinions and ideas through the press," that the press had thus far failed to meet the societal needs that a free press should fulfill, and that the people "who direct the machinery of the press have engaged from time to time in practices which the society condemns and which, if continued, it will inevitably undertake to regulate or control." Id. at 1. The commission's solutions were to provide or encourage greater education about the condition of the freedom of the press, to allow self-regulation for the time being, and to call for the establishment of a privately funded institution that would monitor and report on the press. Id. at 92-100. The lasting influence of the report is reflected in Bollinger's assessment that it provides "as good a statement as we have of why the press is so important for the quality of our political system and why its freedom may be in jeopardy due to its inadequacies and abuses." Bollinger, *Images of a Free Press* at 28 (cited in note 8).

98. Bollinger, *Images of a Free Press* at 116.

99. See id. at 123 (stating that "the fairness doctrine is no more open-ended, no more vulnerable to unprincipled, 'subjective' decisions, and no more dependent on the development of a hierarchy of values in the realm of public issues than are other well-established areas of First Amendment jurisprudence").

the fairness doctrine nor his justification for accepting partial regulation is a sufficiently important governmental interest to uphold regulation of the press under Bollinger's own standard.[100] If Bollinger's empirical research can provide no stronger evidence for partial regulation, then partial regulation rests on a relatively weak foundation.

For all of Bollinger's talk about the need for more empirical research on the successes of the broadcasting experience, he does not cite a single instance in which broadcast regulation has actually resulted in better public debate than that which the print media already provides. Nor does he show that broadcasting would have produced poorer public debate without governmental interference than it has done under current regulations.

Ultimately, Bollinger is on a hopeless quest: He aims to figure out how a majoritarian institution—the state—can enforce a countermajoritarian notion—the freedom of the press.[101] Yet, despite his emphasis on the need for empirical research on the psychology of people to determine whether we need the state to protect us from reporting that distorts or manipulates,[102] he never discusses the need for a psychology of elected officials to determine how well *they* can process information in order to draft laws that adequately protect the freedom of the press. Nor does he develop a psychology of Supreme Court justices to determine how well *they* can balance competing interests.

Whereas Bollinger is willing to give the state a chance to regulate the press to improve public debate, Powe does not trust the state to protect freedom of the press. Powe finds two major problems with the arguments of Fiss and Fiss's intellectual ally, Judith Lichtenberg,[103] that the state should regulate the marketplace of ideas in order to permit a diversity of voices and a level playing field for public debate. First, Powe dismisses their argument that the marketplace of ideas "is a fit candidate for government countervailing power . . . [to eliminate] the distortions created by 'grossly unequal distributions of power.' "[104] According to Powe, they advocate a "monistic First Amendment theory [which] is inherently weak and undervalues the whole range of interests that the First Amendment protects. . . . [They] isolate a single strand

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100. Compare note 74 and accompanying text.

101. This dilemma may be part of what Professor Charles Lindblom refers to as the "problem of circularity," Fiss, 100 Harv. L. Rev. at 791 (cited in note 94) (quoting Charles Edward Lindblom, *Politics and Markets: The World's Political-Economic Systems* 201-21 (Basic Books, 1977)). Fiss's solution to this problem is much like Bollinger's: They both insist that fear of the state must be grounded in empirical evidence, not irrational distrust.

102. See notes 134-37 and accompanying text.

103. See Judith Lichtenberg, *Foundations and Limits of Freedom of the Press*, 16 Phil. & Pub. Aff. 329 (1987).

104. Powe, *The Fourth Estate and the Constitution* at 250 (cited in note 9).

of First Amendment justification [that is, the marketplace of ideas] and attack it separately, as if there were nothing else on the field."[105]

Second, Powe challenges the validity of Fiss's contention that even if government regulation of the marketplace of ideas did not work, the country would be no worse off because nothing else works the way it should, either.[106] Sounding for a moment like Bollinger, Powe suggests that Fiss should " 'look facts in the face.' "[107] Powe's own empirical research leads him to agree with Bollinger that the scarcity rationale does not make sense because it is common for a community to have only one daily newspaper but several television and radio stations and a multichannel cable system.[108] Powe also concurs with Bollinger that wealthy people can monopolize *any* kind of medium.[109]

Powe and Bollinger depart company, of course, in their respective readings of how well the state has done as a regulator of the media. Powe's conclusion is unambiguous: "[t]he broadcast experience with a regulated First Amendment offers the best evidence that a free press must be an autonomous press."[110] But where Powe finds abuse, Bollinger finds success. Bollinger criticizes Powe's earlier book in which Powe argued that broadcast regulation has not worked because it has produced too many abuses. Among the abuses Powe enumerated in that book are the government's propensity to drive from the airwaves some radical voices within the broadcast media, the practice of handing out television licenses in the 1950s as political rewards, and the tendency of

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105. Id. at 251-52. This criticism applies equally to Bollinger's approach to the First Amendment. See notes 82-83 and accompanying text.

106. See Powe, *The Fourth Estate and the Constitution* at 254 (cited in note 9).

107. Id. at 254 (citation omitted).

108. Id. at 207. Like Bollinger and Powe, Smolla argues that "it is important to keep straight what sprectrum scarcity, *assuming* it exists, will and will not justify." Smolla, *Free Speech in an Open Society* at 326 (cited in note 10). Otherwise, Smolla describes but does not critique the system of partial regulation. See id. at 321-24.

109. See Powe, *The Fourth Estate and the Constitution* at 211. Moreover, Bollinger argues that because there is insufficient space to accommodate all those who would like to broadcast, and without some system of allocation there would be chaos on the airwaves, the broadcasting industry may require some sort of regulation. Bollinger does not believe, however, that "the only possible method of allocation is through government licensing and regulation." Bollinger, *Images of a Free Press* at 89 (cited in note 8). As Bollinger suggests, "[t]here are alternatives, the most important being the system of private property rights and a market. . . . [Thus,] the question should be whether there is any reason why—in public policy or First Amendment terms—we ought to prefer a free market system over a government licensing-with-regulation system." Id. at 89. But if one responds that government regulation of broadcasting is necessary because broadcasting uses a public resource, this argument fails as a basis for partial regulation because "the print media also makes use of public property—the streets and sidewalks upon which newspapers and magazines are delivered." Id. at 90.

110. Powe, *The Fourth Estate and the Constitution* at 294. He also observes that "in our pluralistic society, private power over ideas and information is not monolithic. The power of the federal government can be; that is why it may stifle if it wishes." Id. at 255.

some Federal Communications Commissioners to curry political favor in dealing with access issues.[111] Bollinger suggests that Powe's parade of horribles may consist of isolated rather than repeated abuses. In Bollinger's view, we need to distinguish between committing abuse and attempting to commit abuse,[112] and we must determine how to change regulations to eliminate the abuses that do occur and consider the actual costs and benefits of a given law.[113] Ironically, Powe and Bollinger cancel each other's research and leave the reader confused about how well and whether the present system really works.

Nevertheless, Powe's distrust of the state is evident throughout his new book. For example, although he begins his chapter on prior restraints by observing that "the changes in the law may well have moved the 'no prior restraints' doctrine into functional obsolescence,"[114] he admits that he shares the press's "reflex loathing of prior restraints."[115] More importantly, he fails to cite any instance in which he approves of the use of a prior restraint, and argues that even publication of plans for building a hydrogen bomb should not be enjoined because "[i]nformation, even that which legal rules deem of no value, is essential to public debate and potential change. . . . The need to challenge the status quo, and to do so on the citizen's rather than the government's terms, provides a continuing reason for a special hostility to prior restraints."[116]

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111. See Powe, *The Fourth Estate and the Constitution* at 13-30, 112-17, and chapters 5, 8, and 9 (cited in note 9).

112. Bollinger, *Images of a Free Press* at 130-32 (cited in note 8).

113. Id.

114. Powe, *The Fourth Estate and the Constitution* at 141.

115. Id. at 167.

116. Id. at 169. Powe, however, makes at least two exceptions to his general distrust of the state. First, he agrees with Bollinger, see Bollinger, *Images of a Free Press* at 147-48 (claiming that courts may underenforce certain constitutional norms, particularly with respect to the newsgathering right of the press), that we need more than the courts to protect the press's access to important sources of information. Powe concedes that "other governmental officials have an important duty to facilitate the acquisition of information by the press—as shield laws, sunshine laws, and freedom of information acts recognize—and an equal duty on judges to broadly construe legislative efforts to implement these inchoate rights." Powe, *The Fourth Estate and the Constitution* at 199.

Second, Powe expresses approval for an antitrust policy that is not unique to the media. Recognizing that outlets for diverse views are shrinking because of the increasing concentration of newspaper ownership, id. at 226, Powe admits:

> [T]he Constitution does not stand as a bar to prevent the polity from taking steps to reduce concentration in the one industry most important to our well-being as a democracy. We should recall, though, Chafee's reminder that if we rely on the antitrust laws, we must nevertheless be wary of too great an association between government and the industry.

Id. at 229. Even though he expresses approval for laws breaking up harmful concentrations of power, id. at 221, and for the "application of general laws to the press," id. at 224, Powe feels that antitrust legislation is "unlikely to prove effective in combating media concentration." Id. at 227.

Like Powe, Smolla is most fearful of the government's tendency to censor, particularly in times of crisis.[117] After surveying the most famous cases involving political speech, Smolla concludes, for example, that "[i]n virtually *every* freedom of speech case involving political dissent that has ever reached the United States Supreme Court for resolution, *no palpable harm ever in fact occurred.* . . . It is not the irrationality, passion, or paranoia of *speakers* that society should fear, but of censors."[118] Smolla finds plenty of other evidence to confirm his fear of censorship, including the tendency of the government "to exaggerate national security threats and use the excuse to dissolve civil liberties"[119] and the Bush administration's restrictions on media access to various sources of information during the Persian Gulf War.[120] Like Powe,[121] Smolla fears that courts are moving away from the position he prefers: that "[p]rior restraints should be presumptively invalid, and permitted only when the government meets the burden of proving, with clear and convincing evidence, that imminent death or grave personal injury will almost certainly occur if the restraint is not issued."[122] In

117. See, for example, Smolla, *Free Speech in an Open Society* at 41, 290 (cited in note 10). In expressing their fear of governmental censorship in stressful times, Smolla and Powe echo Professor Vincent Blasi. See, for example, Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 Colum. L. Rev. 449, 449-50 (1985) (arguing that courts should adopt a "pathological perspective[:] . . . [T]he overriding objective at all times should be to equip the first amendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically.") Unlike Powe and Smolla, Blasi takes a relatively narrow view of how much speech the First Amendment should protect. Id. at 476-80 (arguing for a "lean, trim" First Amendment in order to withstand the stress of "pathological" periods in our history).

118. Smolla, *Free Speech in an Open Society* at 116.

119. Id. at 288.

120. Id. at 292. These rules included restrictions on publishing information pertaining to strategy and other data that would help the enemy, limited access to troops and combat areas for small pools of reporters, and rules requiring that in the event of a dispute between military officials and a reporter the final decision on whether to release the information would rest with the originating reporters' news organization. Smolla fears that such restrictions hinder the press's ability to inform the American people about the government's policies and activities during war, thereby cutting at the heart of the First Amendment. He suggests that the Vietnam War proved that the press can perform admirably in wartime without governmental interference. Id. at 299-300. Nevertheless, he finds, recent presidents have refused to follow the Vietnam press model, as President Reagan's restrictive media regulations during the Grenada invasion illustrate. Id. at 308.

121. Powe, *The Fourth Estate and the Constitution* at 169 (cited in note 9).

122. Smolla, *Free Speech in an Open Society* at 281. Smolla criticizes the temporary restraining order issued by a federal judge in Miami to prevent the Cable News Network from airing tapes containing telephone conversations between Manuel Noreiga and his attorneys. The Supreme Court ultimately rejected the press's request for an expedited review of the prior restraint in that case. Although the trial judge eventually allowed full airing of the tapes, Smolla claims that the trial court's restraint of publication was not supported by its claims that publication would have impaired a fair trial and breached the attorney-client privilege. He suggests that the government could have easily found jurors who had not heard of Noreiga, that the information on tbe tapes had already been transmitted to and published by other media, and that the disclosures

short, Smolla and Powe adopt the conventional liberal attitude that allowing the state to regulate the press is akin to asking a fox to guard a henhouse.

C. The Press

In recent years, liberals have split over the degree to which the freedom of the press requires or, conversely, is undermined by an autonomous press. Their disagreements turn on whether they believe the press merits special status as a watchdog on government. Bollinger, Powe, and Smolla take different positions on this issue: Bollinger distrusts the press because of its tendency to act out of economic self-interest rather than a desire to improve public debate; Powe, and Smolla in a much briefer discussion, trust the press to effectively monitor governmental abuse.

Bollinger argues that an autonomous press has not produced better public debate. For example, he ends his book with a disturbing tale of a reporter who took grisly photographs of the victims of a car wreck, refused to follow a policeman's order to get out of the way of medical personnel, and later asserted a First Amendment defense to a conviction under a statute prohibiting persons from disobeying a reasonable order from a police officer.[123] This story confirms Bollinger's opinion that

> [n]o one, including Supreme Court justices in their conferences, fully trusts the public to put issues in their proper perspective or digest information fairly. And having the press present may create opportunities for unproductive conflict—and the public lies dying while both the public officials and the press avoid their distressing duties by engaging in heated argument with each other.[124]

In response to this dilemma, Bollinger advocates the development of a psychology of the First Amendment that will allow us "to face the truth . . . that there are definite and substantial limits on our willingness to trust the process of wide-open public debate with all information."[125] In Bollinger's view, the public cannot trust the press to provide the information it needs, so the Court and the state are needed to regulate and ensure that public debate is not debased.

In contrast, Powe makes a particularly forceful case for the autonomy of the press.[126] He argues that the freedom of the press empowers

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might not have revealed information that could have prejudiced Noreiga's right to a fair trial. Id. at 245. Nevertheless, Smolla suggests that the real harm may have been that the case led some government officials to discount the harms of even temporary prior restraints. Id. at 250, 274.

123. Bollinger, *Images of a Free Press* at 149 (cited in note 8).

124. Id. at 150.

125. Id.

126. Unlike Powe, Smolla does not make an explicit case for an autonomous press. Instead, he describes the Supreme Court's compromise under which it would not "permit the imposition of

the press and that "[w]ith power goes responsibility, and the important questions are whether an accounting will be called for and if so, who will do it and by what means."[127] Ultimately, Powe's answer to these important questions rests on his faith that an autonomous press is an important check against government abuse.[128] He perceives an important parallel between an autonomous press and judicial review: both check governmental abuses, and both are considered crucial components of democracy.[129] While Powe concedes that, "[l]ike judicial review, freedom of the press has its good times and its bad times,"[130] he argues that, on balance, the press has generally performed better than judicial review, that it excelled during Watergate and *The Pentagon Papers Case*, that it has never produced abominations such as *Dred Scott v. Sandford*[131] and *Plessy v. Ferguson*,[132] and that even its failures have been reported by other journalists. Powe finds that "[t]he tensions inherent in the checking function and majoritarian decisionmaking ensure that the press, even as it serves its various functions, will be challenged, sometimes from the right, sometimes from the left, and maybe even sometimes by everyone."[133] For Powe, the public is the ultimate check on the press.

D. The Public

Until recently, constitutional commentary rarely focused on the public for whose benefit most constitutional guarantees exist. One sign of changing times, however, is that liberals are beginning to think more about the role of the people in public affairs. While Bollinger expresses skepticism about the public's ability to know what is in its best interest, Powe and Smolla stake the future of the freedom of the press on the people's willingness to exercise their power in a democracy.

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rights of access to the press [and in turn would not] grant to the press rights of access to the government." Smolla, *Free Speech in an Open Society* at 298 (cited in note 10). Smolla recognizes that under this compromise the First Amendment grants the press no special status and that instead "the actors in the marketplace remain atomistic, self-interested, and market-driven: the press, the government, and all other private citizens are left to tug and pull against one another in a free market, in which none may assert any special demands or claims on the others, short of freedom from restraints." Id. Smolla adds that "[t]he recognition of special status, however, would have placed a new connective tissue among these actors, in which certain crisscrossing fiduciary duties exist. This would have the effect of *decreasing* the freedom of the various actors but *increasing* the overall flow of information." Id. at 299.

127. Powe, *The Fourth Estate and the Constitution* at 290 (cited in note 10).
128. Id. at 294.
129. Id.
130. Id. at 295.
131. 60 U.S. 393 (1856), cited in Powe, *The Fourth Estate and the Constitution* at 296.
132. 163 U.S. 537 (1896), cited in Powe, *The Fourth Estate and the Constitution* at 295.
133. Powe, *The Fourth Estate and the Constitution* at 297 (footnote omitted).

In *Images of a Free Press*, Bollinger argues that the state can improve political debate only if it develops an accurate "psychology of people."[134] Such a psychology is needed to determine how well people process the information to which they are exposed and how the government can influence the marketplace of ideas in order to shape the public's images of the press. If people can adequately process the information they receive in order to engage in highly qualitative political debate, then no regulation is necessary. If people cannot process information well or if they develop unsound images because the press slants news, however, regulation of the press may then be needed.[135] Bollinger's vision of the public's psychology runs into two serious problems. First, although he criticizes others for constructing theories on freedom of the press without empirical support, his description of the psychology of the people does not rest on any empirical support. Bollinger believes but does not prove that without governmental regulation people would not naturally prefer high quality public debate:

> [E]ven in a world in which the press is entirely free and open to all voices, with a perfect market in that sense, human nature would still see to it that quality public debate and decision making would not rise naturally to the surface but would, in all probability, need the buoyant support of some form of collective action by citizens, involving public institutions.[136]

Thus, he asserts, we need the state to protect us from our own natural lack of "interest[] in informing ourselves about public issues, [because we tend to] prefer[] entertainment and pleasure to the responsibilities of citizenship."[137]

Bollinger's picture of popular psychology raises a paradox he never addresses: If we cannot trust ourselves and therefore must trust government to protect us from our natural tendencies to be intellectually lazy and easily distracted from serious public questions, then how can we know when the government is deceiving us? The only real check on legislative power under Bollinger's vision is provided by the public, whom he distrusts; the press, whom he also distrusts; or the federal courts, which he has criticized as the source of our flawed central image of the press.[138] Nor does Bollinger ever give the press credit for being an effec-

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134. Bollinger, *Images of a Free Press* at 81 (cited in note 8). Bollinger makes clear that one reason we need an empirically sound psychology of the people is that *Sullivan* confusingly "offered two competing images [of the people]—the image of citizens reluctant to enter politics, and the image of them as uncontrollably aggressive when they do engage in political debate." Id. at 35.

135. Id. at 123.

136. Id. at 139.

137. Id.

138. See notes 31-34 and accompanying text. Moreover, Bollinger does not consider the possibility (more real than not) that an Executive will appoint federal judges who tend to sympathize with the administration's political agenda.

tive watchdog for governmental abuse. In short, he seems to ignore Justice Brandeis's warning that "[e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[139]

Second, the vision of people's psychology depicted in Bollinger's new book seems to be at odds with his view of the public in *The Tolerant Society*.[140] In a recent article, he explains that the thesis of the book is that "the practice of toleration of verbal acts under free speech may help inculcate what I call the tolerance ethic."[141] The kind of person Bollinger envisions when he discusses social tolerance is someone who is open to new ideas yet smart enough not to be distracted or persuaded by hate speech.[142] Yet the public Bollinger depicts in *Images of a Free Press* is a different sort, prone to hateful speech, easily confused or swayed by distorted information, and determined not to think for themselves.[143] Bollinger could but does not resolve these conflicting images by arguing that the state can regulate the media to provide for the proliferation of information that would allow people to become better informed about social and political matters and more capable of reacting to hate speech in the kind of tolerant fashion Bollinger envisions. Instead, Bollinger leaves us with an image of intolerant or indifferent people who nevertheless have some undefined capacity to appreciate tolerance as a social and political value and government regulation of

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139. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis dissenting). Justice Frankfurter expressed a similar sentiment but in a different context: "[t]he accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Youngstown Sheet & Tube Co. v. Sawyer* (The Steel Seizure Case), 343 U.S. 579, 594 (1952) (Frankfurter concurring).

140. Compare Bollinger, *The Tolerant Society* at 82-83, 86, 140-41, 152-53, 238-40 (cited in note 29).

141. Lee C. Bollinger, *The Tolerant Society: A Response to Critics*, 90 Colum. L. Rev. 979, 984 (1990).

142. Bollinger suggests that "[a] person who feels healthy self-doubt toward her beliefs is a person who is not just prone to let more speech go uncensored, but a person who is going to behave differently, to insist on less and to compromise more, in the give-and-take of the political process." Id. at 985.

143. According to Bollinger,

> [w]e may wish to avoid the opinions of those with whom we disagree, especially those on the margins of public debate, the radical voices. As a result, there may be a diaspora of viewpoints and an unheeding of troubled or troubling voices. We may not think clearly about some aspects of public issues. . . . We may have irrational prejudices against particular groups or individuals within society. Or we may be unduly influenced, and have our judgment distorted, by particular kinds of information in specific contexts.

Bollinger, *Images of a Free Press* at 139-40 (cited in note 8).

the media as capable of providing the kind of information they need to make effective social and political choices.[144]

Unlike Bollinger, Powe and Smolla trust the public more than they trust the state even though both authors fail to address at length *how* the people should go about protecting the freedom of the press. For example, Powe refers approvingly to jury nullifications of many of the government's efforts to convict for seditious libel,[145] but he makes only brief references to the American people's need to develop the good sense and knowledge necessary to monitor the press.[146]

Smolla, like Bollinger, envisions a connection between the Court's enforcement of First Amendment values and the inculcation of those values in the government and the people. He also perceives the federal courts' hostility to prior restraints as one factor helping to instill a "constitutional habit of mind" in governmental actors against the use of prior restraints.[147] He goes even further, urging people to teach their children about the virtues of an autonomous press, the kinds of publications they should avoid, and the importance of ensuring that regulations of speech and of the press comply with all the rationales underlying the First Amendment.[148]

Both Powe and Smolla go beyond Bollinger's "paternalism"[149] and the liberalism of the 1960s that put its faith in the Court as the primary guarantor of the freedom of the press from the hostile state. Perceiving

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144. It is also possible that the different images of people expressed in Bollinger's two books are a byproduct of putting more weight on the social harm resulting from private defamation than on the social harm resulting from group defamation *or* putting less weight on the public interest in regulating hate speech than on the social need for greater regulation of defamatory speech of public figures. My guess is that Bollinger believes that hate speech is part of the core of the political speech that the First Amendment should protect, while falsehoods spread by the press do not always rise to that level. Yet, even if one concedes the latter point, it could still follow that the social barm caused by hate speech outweighs the collective harm to society that *Sullivan* may have caused. In any event, balancing seems to be an unappealing and inconclusive method with which to resolve these tensions.

145. Powe, *The Fourth Estate and the Constitution* at 15, 72 (cited in note 9).

146. For example, he cites jury nullification as one reason for the demise of tbe Sedition Act of 1798, id. at 13-15 and 35-36, but he does not mention that the law had a built-in expiration date and that the law lost political impetus. In addition, even though Powe suggests that "[t]here is more of a constitutional dimension to the general claim [for a newsgathering right] than judges can competently enforce[,]" id. at 199, he agrees with the Court that "[s]pecially tailored decisions, reflecting both the needs of a free press and the legitimate need to have access to a reporter's information, will serve both the press and public by allowing a reporter to respect confidences in the vast majority of circumstances." Id. at 190.

147. Smolla, *Free Speech in an Open Society* at 288 (cited in note 10).

148. Id. at 324, 333-35.

149. But see Bollinger, *Images of a Free Press* at 144 (cited in note 8) (stating tbat "[i]t is not paternalism when a majority of a society recognizes that its own intellectual limitations call for some institutional or structural correctives. When regulation stems from self-conscious awareness of biases, you do not have paternalism").

that the Court is no longer likely to protect the press as vigorously as it did in the 1960s, Smolla and Powe urge the American people to take a more vigilant role in protecting the press from the state. Thus, they aim to give fuel to efforts of the government and educators to inculcate in the people the value of a mostly, if not fully, free press.

One can envision a psychology of the people that puts more faith than Bollinger does in the intellectual capacity of the populace to distinguish politically useful matter from sensationalist material. As Smolla observes, although people were initially hostile to the Supreme Court's decisions providing First Amendment protection for flag-burning as unpopular political expression,[150] they changed their minds and accepted the principle that the First Amendment protects even expression that would desecrate it once *the press* had educated them about the harms of amending the Constitution to overturn those decisions.[151]

It is to this kind of educative process that Powe and Smolla are directing their arguments on the freedom of the press. They understand that poor political discourse may result more from the quality of political candidates debating public issues than from the press. Their solution is not to regulate the press but rather to encourage better and more informed candidates to run for public office and to instill in the people a sense of civic responsibility for learning about laws restricting the freedom of the press and making known their displeasure with the elected representatives supporting such laws. Ultimately, the future of our freedoms depends on the willingness of the people to exercise their rights with care and, in Powe's and Smolla's view, sensitivity to the kind of society they are shaping.[152]

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150. See *United States v. Eichman*, 110 S. Ct. 2404 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

151. Smolla, *Free Speech in an Open Society* at 93-95 (cited in note 10).

152. Professor West suggests that while "legal liberalism" may be on the decline and political conservatism on the rise, those people concerned about the preservation of individual freedoms and the increase in governmental discretion and regulation can learn from Czechoslovak President Vaclav Havel's " 'postdemocratic' political philosophy, [which] is grounded in an abiding commitment to the individual, belief in the compatibility of individual freedom with social order, and faith in the power of free individuals to create and protect a vibrant, diverse, pluralistic, and tolerant public life." West, 104 Harv. L. Rev. at 46 (cited in note 7). She explains further that Havel's liberalism "insists upon the possession of individual *responsibility*, rather than the possession of individual rights, as both the necessary condition of a liberal regime and the best evidence of the vitality of its guarantee of individual freedom" and "upon the importance of the civic and communitarian virtues of fraternity, compassion, fellow-feeling, solidarity, and sympathy to the maintenance of a free, tolerant, and diverse public sphere." Id. at 46, 47. She also acknowledges that it "ultimately depends upon the commitment and responsibility of individual citizens, not the written guarantees of a constitution, to maintain the conditions for freedom." Id. at 47.

V. Conservative Visions of the Freedom of the Press

Ironically, the complex and intense liberal debate on the freedom of speech and the press does not seem to have much of a corresponding conservative tradition. Notable exceptions include Alexander Meikeljohn,[153] Lillian BeVier,[154] Robert Bork,[155] and John Jeffries,[156] all of whom have tended to trust the majoritarian process more than the Supreme Court (except in a relatively narrow range of First Amendment cases), to overlook the tensions within the system of partial regulation,[157] and to disfavor or distrust an autonomous press.[158]

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153. Meiklejohn was perhaps the most prominent advocate in this century for the view that the First Amendment protected only political speech. See Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (Harper, 1948). Near the end of his career, however, he retreated from this position. See Alexander Meiklejohn, *The First Amendment Is An Absolute*, 1961 S. Ct. Rev. 245, 256 (broadening his theory to define protected speech as including "the range of human communications from which the voter derives the knowledge, intelligence, [and] sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express").

154. See, for example, Lillian BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 Cal. L. Rev. 1045 (1985); Lillian BeVier, *An Informed Public, An Informing Press: The Search for a Constitutional Principle*, 68 Cal. L. Rev. 482 (1980); Lillian BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 Stan. L. Rev. 299 (1978). President Bush recently nominated Professor BeVier to a judgeship on the United States Court of Appeals for the Fourth Circuit, making her only the second person with substantial academic experience regarding the First Amendment named to the bench within the past decade. The other person was Robert Bork. See note 155.

155. See, for example, Bork, *The Tempting of America* (cited in note 6); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1 (1971).

156. See, for example, John Jeffries, *Rethinking Prior Restraint*, 92 Yale L. J. 409 (1982); see also Thomas Jackson and John Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va. L. Rev. 1 (1979).

157. See Bollinger, *Images of a Free Press* at 91 (cited in note 8). But see Bork, *The Tempting of America* at 335 (cited in note 6) (referring to two of his decisions as a federal court of appeals judge "call[ing] on the Supreme Court to reexamine its position that the electronic media may be constitutionally subjected to restrictions that cannot be applied to the print media because of the [F]irst [A]mendment" and "deci[ding] that the restrictions, in [his] view wrongly, applied to the electronic media did not apply to cable television"). Bork's latter view reflects a libertarian strain among some conservatives, who oppose the regulation of not only the media but also other businesses.

158. Two prominent First Amendment scholars who do not fit easily into either of the political camps are Professors Fred Schauer and William Van Alstyne. For a sampling of Schauer's works on the First Amendment, see *Free Speech: A Philosophical Enquiry* (Cambridge, 1982); *Fear, Risk and the First Amendment: Unravelling the "Chilling Effect"*, 58 B.U. L. Rev. 685 (1978); *The Law of Obscenity* (Bureau of National Affairs, 1976); *"Private" Speech and the "Private" Forum: Givhan v. Western Line School District*, 1979 S. Ct. Rev. 217; *Speech and "Speech" — Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 Georgetown L. J. 899 (1979). For a sampling of Van Alstyne's First Amendment publications, see *The First Amendment and the Free Press: A Comment on Some New Trends and Some Old Theories*, 9 Hofstra L. Rev. 1 (1980); *A Graphic Review of the Free Speech Clause*, 70 Cal. L. Rev. 107 (1982); *The Möbius Strip of the First Amendment: Perspectives on* Red Lion, 29 S.C. L. Rev. 539 (1978).

There are three possible reasons for the paucity of conservative commentary on the freedom of the press. First, some conservatives may agree with the general trend of the Court's decisionmaking toward greater deference to majoritarian decisions. They may expect that eventually the Court will come around to their way of thinking. Consequently, they may not have an incentive to push the Court in the right direction.

Second, conservatives may not share much of a unified position on the First Amendment. At the very least, conservatives often differ in their preferences for libertarianism (favoring the deregulation of the broadcasting industry)[159] or for a socially conservative-oriented majoritarianism (favoring less judicial interference with regulation of offensive speech or aggressive press coverage). For example, Bork has sharply chided the Rehnquist Court for protecting offensive symbolic conduct[160] and suggested that "the entire enterprise of the Supreme Court in *New York Times v. Sullivan*, which laid down new rules making it more difficult for public figures to maintain actions for defamation, was illegitimate."[161]

Third, some conservatives may not discuss the freedom of the press because their traditional arguments are unlikely to produce the results they desire. For example, conservatives have criticized liberals for not adhering closely enough to the text or to the original understanding of the broadly phrased constitutional provisions.[162] Yet the text of the First Amendment speaks categorically and seems to envision substantial need for aggressive judicial enforcement of the constitutional norms embodied within it. Its history is, even according to Bork, not so clear as to preclude the necessity for consulting other sources for guidance.[163]

The dearth of conservative First Amendment scholarship has two consequences for the future of the freedom of the press. First, it does not portend much creative or aggressive decisionmaking by the Court in this area. The Court is not prone to follow liberal scholarship on the freedom of the press, and none of the present Justices are noted for expertise in First Amendment jurisprudence. Indeed, Bollinger, Powe, and Smolla do not characterize any current Supreme Court Justice as a prominent thinker on the freedom of the press. Consequently, one won-

159. See Bollinger, *Images of a Free Press* at 120-21 (cited in note 8). For example, the Federal Communications Commission has recently indicated that it is willing to reconsider the rules barring the owners of television networks or stations from buying cable outlets.

160. See Bork, *The Tempting of America* at 127-28 (cited in note 6) (criticizing the Court's decision in *Texas v. Johnson*, 491 U.S. 397 (1989), which held that flag-burning which expresses political protest is protected speech under the First Amendment).

161. Bork, *The Tempting of America* at 168.

162. See note 6.

163. See Bork, 47 Ind. L. J. at 22 (cited in note 155).

ders to whom or to what the Justices will turn for intellectual guidance on issues involving the freedom of the press.

Moreover, there are many important opinions, such as *Sullivan*, that the present Court may have decided differently but that it still must try to apply. While many of these precedents run counter to the Court's conservative ideology, the Court will probably not overrule many of those decisions because of the widespread political, social, and legal expectations built around them.[164]

Second, the scarcity of conservative commentary on the freedom of the press has left the entire playing field to the liberals. Hence, liberals are free to inculcate their visions of freedom of the press in elected officials, students, future judges, and the public. Liberals like Bollinger, Powe, and Smolla have not hesitated to suggest the moral values they think elected officials should take into account in making laws. Moreover, although Bollinger agrees with Bork that more deference should be paid to majoritarian decisions, he exhorts policymakers to do better even though many of their unwise efforts pass constitutional muster. Further, Bollinger argues that the Court still has some responsibility to provide moral leadership (rhetorical or otherwise) in freedom of the press cases.[165]

Perhaps one example will illustrate how the different attitudes that conservatives and liberals hold about the Court's capacity for moral leadership would work themselves out in practice. Both Bollinger and Smolla praise the virtues of a tolerant society and urge the Court to strike down hate speech regulations, although they acknowledge the noxiousness of the speech involved and the need for people to be discriminating in the kinds of ideas they hold and the language with which they try to express them.[166]

While conservatives have not written much about the constitutionality of hate speech laws, it is likely that the Rehnquist Court would strike them down either because such laws are not sufficiently narrowly tailored or because a hostile majority does not have the power to silence a minority's noxious political speech.[167] The ironic twist would then be

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164. See Gerhardt, 60 Geo. Wash. L. Rev. at 79, 87-90 (cited in note 26) (arguing that precedents such as *Sullivan* are virtually immune to reconsideration because there are so many political, legal, social, and economic expectations that they will not be overruled).

165. Bollinger, *Images of a Free Press* at 41-43 (cited in note 8). Bork shies away from these latter positions because he is a moral skeptic: he believes that the Court's only job is to define precisely the few issues that original intent indicates should be removed from legislatures, and he claims that once issues are within legislative discretion, the outcomes cannot be defended as being morally correct or superior but rather *only* as being a legitimate exercise of majoritarian will. Bork, *The Tempting of America* at 241-50 (cited in note 6).

166. See notes 28 and 61 and accompanying text.

167. Another possibility is that the Court, like Robert Bork, would support hate speech laws

the cumulative effect of the Rehnquist Court's civil rights jurisprudence under which minorities would lose in the Supreme Court when they ask for special treatment from harmful legislation *and* when they persuade majorities to protect them from serious harms. Thus, by design or default, the Court's likely statist-orientation could result in its refusal to shape or direct community values on race relations. If we are a better country because of such a statist ideology, the Court should do what Bollinger and Smolla say it should then do: Tell us why we are a better society for not tolerating distasteful speech and provide some guidance on the moral and political consequences of the speech regulations that could still pass constitutional muster.[168]

VI. CONCLUSION

Bollinger suggests that a "great intellectual transformation" is unfolding with respect to the freedom of the press,[169] and his book encour-

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to the extent they regulated expressive conduct. Compare Bork, *The Tempting of America* at 126-28, 333-36 (cited in note 6). Bork would argue that a legislature may outlaw an expressive act such as flag-burning or cross-burning because the conduct involved can be punished despite its expressiveness. The Rehnquist Court has in fact already shown a limit to its protection or tolerance of offensive expression. See *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2460, 2461 (1991) (concluding that nude performance dancing "is expressive conduct within the outer perimeters of the First Amendment" but that the requirement that such dancers wear pasties and G-strings does not violate the First Amendment because the public nudity statute was not directed at nude dancing and thus had only an "incidental" effect on constitutionally protected activity). Nevertheless, Bork's argument does not recognize that flag-burning or cross-burning occurs *only* for expressive purposes and that any law punishing such conduct exists solely to silence the offensive expression. If the Court were to adopt Bork's view, it would be abdicating a leadership role in shaping moral values embodied in the constitutional language and would be approving the majority's laws not because they were good or wise or made us better people but solely because they embodied a majoritarian preference.

168. It is also possible that, due to conservative influence, the future of freedom of tbe press will belong only to those who can afford it. The owners of newspapers or television stations are free to voice their views, and an individual is free to burn his or her own flag in political protest. But the Court might turn a deaf ear to someone who has little property or who cannot buy space or time to voice an opinion. See, for example, *United States v. Kokinda*, 110 S. Ct. 3115 (1990) (prohibiting people from protesting on the sidewalk in front of a post office); *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (indicating that the government can regulate the speech of family counseling organizations it is subsidizing to exclude any mention of abortion). The effectiveness of the messages excluded in *Rust* and *Kokinda* depended on the largesse of the government.

169. Bollinger, *Images of a Free Press* at 143 (cited in note 8). According to Bollinger, "the question to be answered is whether the virtues of freedom of the press have become so internalized in our culture, by government and by the society at large, that society can afford to move, even if only very gradually, in the direction of new forms of self-correction." Id. at 142-43. His tentative answer is that "the vastly different First Amendment analyses for the print media and for the electronic media, together with the very different analyses for restrictions on speech and for restrictions on access to information, are gradually coming together." Id. at 151. He hopes to persuade people to "bring into being a more integrated and complex analysis of the idea of freedom of the press, one that already has roots in places like the fairness doctrine—and the central image of *New York Times v. Sulllivan* will be displaced." Id.

ages people to trust the orientation of the state and the Court toward more regulation of the press. Powe and Smolla take a contrary position, expressing distrust in the government's capacity to regulate the press to improve public debate or the press's performance and expressing trust in the Court, the press, and the people to secure an autonomous press to check government abuse.

These disparate views reflect the dynamism of liberal thought on the freedom of the press. The tensions reflected within Bollinger's, Powe's, and Smolla's books and within liberal thought in general are not faults but rather signs of self-reflection and self-criticism. Their books challenge their conservative counterparts to offer alternative visions of the freedom of the press, particularly now that conservatives control the White House and the federal judiciary. But if the liberals, with all of their complexity of thought and passion for clarifying the political and moral values that should guide public decisionmaking, will not write the future of the freedom of the press, we are left to wonder who will write it, what will they say, and, besides the liberals, who will care.