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The Future and the First Amendment

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Sullivan Lecture

THE FUTURE AND THE FIRST AMENDMENT

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It is my honor and pleasure to deliver this year's Sullivan Lecture. I have an especially warm feeling toward this Law School. Two years ago, at the invitation of your Professor Distelhorst, I participated in the Capital Law School program for teaching American law to Japanese lawyers. For five stimulating weeks I enjoyed the intellectual and social company of Japanese attorneys, while teaching them the outlines of American constitutional law. Twice a week, in the evening, for three continuous hours, and after a full work day, these dedicated lawyers would willingly become students again and suffer patiently through my highly condensed course. And in the humid warmth of the Tokyo summer night, members of my tired and beleaguered audience would occasionally, and to me quite appropriately, fall fast asleep. I say this out of fondness and understanding for them, who perhaps will someday read this lecture, and out of respect and understanding for you, should you find it necessary this afternoon to follow their example.

The goal of my lecture today is to peer into the future, to look at the horizon of our constitutional principle of freedom of the press. But I cannot, and do not, want to leave behind the present. What I propose is to look at several ways in which our present thinking about the First Amendment and the press needs to be, in my judgment, substantially changed.

I intend to consider primarily the intellectual side of the field; that is to say, how we conceive of, or think about, what we are and ought to be doing in the name of the constitutional principle of freedom of the press. My intention is to argue for a change in perspective in two major respects; we need to better understand what has evolved under the principle and to appreciate what choices are open to us in the future.

Before identifying the areas that need rethinking, I will try to give a brief summary of the field. Many of you, I expect, have not taken a course in constitutional law, the first amendment, or mass media (or communications) law. That being so, to make my observations more comprehensible, it seems desirable to begin with a survey of the general field of freedom of the press.

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I

The origins of our present notions about freedom of the press really date to 1964, when the Supreme Court decided the seminal case of *New York Times v. Sullivan.* The issue facing the Court in *Sullivan* was whether and to what extent constitutional limits should be placed on the law of libel, which common law courts had developsed over several centuries. The particular facts of *Sullivan* presented an appealing case for constitutional intervention. The New York Times had run an advertisement placed by civil rights leaders and advocates, which asserted among other things that the police of Montgomery, Alabama, the home of Martin Luther King, had violated the civil rights of King and many other blacks throughout the region. Sullivan, who served on the Montgomery board of commissioners, and was the commissioner charged with oversight of the police department, sued the New York Times and the sponsors of the advertisement claiming that his reputation had been harmed by various falsehoods in the advertisement. The New York Times conceded that some of the charges in the advertisement were untrue. Some of those untrue statements were trivial, while some were arguably of a more serious nature. Whether the serious falsehoods actually led to a diminution of the reputation of Sullivan, who was not actually named in the advertisement, seems doubtful. But a Montgomery jury found he had been harmed and issued a verdict against the New York Times for $500,000. The judgment was affirmed by the Alabama Supreme Court and the case then went upto the Supreme Court.

The Court's answer to the specific problem of whether the First Amendment limits libel actions brought by public officials is widely known; it also continues to be controversial. A public official, the Court said, may not sue for injury to his or her reputation arising out of any false statements of fact unless those falsehoods can be shown to have been said with actual malice, that is with knowledge or reckless disregard of their falsity. Applying that rule to the facts of this case, the Court found that the record was insufficient to support a finding of actual malice and that, in any event, there was inadequate proof in the case to support the claim that the falsehoods would have been taken by a reasonable person to reflect unfavorably on the character of Sullivan, as the city commissioner charged with oversight of the police department.

The *Sullivan* decision was important for what it did to libel law. It spawned a series of decisions refining and expanding its central holding. Today the *Sullivan* limit on libel actions applies not just to those who hold public office but also to those running for political office and to those who hold positions of political and social power in the society, or so-called "public figures." Private individuals who are defamed must show that the defamatory statements were made negligently, which also represents a change from the old common law system, under which a

defendant was held strictly liable for defamatory statements. Damages must be established, not assumed; and various defenses for defendants have been expanded.

But important as this constitutional transformation of our libel law is, of even greater importance is the theoretical foundation that *New York Times v. Sullivan* laid for our modern thinking about the concept of freedom of the press. Professor Harry Kalven, a leading figure in First Amendment scholarship, was the first to proclaim, in a well-known law review article that appeared shortly after the *Sullivan* decision, that the Court's opinion had finally provided us with (in the words from Justice Brennan's majority opinion) "the central meaning of the First Amendment." *New York Times v. Sullivan* had located the core meaning of the concepts of freedom of speech and press and, from that, Kalven and others speculated, we would be able to derive a still-broader foundation upon which we now could build a secure and towering structure of subsequent case law.

Let me take a moment to describe that theoretical foundation, for it is, as Kalven thought, vitally important to understanding the field that has emerged since 1964. The logic of the *Sullivan* decision is this: The First Amendment principle of freedom of speech and press derives its meaning from its link to the social choice, embodied in the Constitution itself, to adopt a democratic system of government. In a self-governing polity, the citizens must possess some significant freedom to exchange information and opinions about public issues, as well as to criticize the people who at any given moment are the representatives or the would-be representatives of the public. Without that freedom, democracy would be meaningless. Consider the society that forbids any seditious libel, that forbids and punishes anyone who dares to criticize the government. In such a regime, the relationship between the state and the citizenry has been transformed from that of a citizen-controlled society into a state-controlled, or totalitarian, society. This country in fact once enacted a Sedition Act, in its very early years (around the turn of the eighteenth century) and, though no court ever held it unconstitutional, the Supreme Court in *Sullivan* concluded that the Act had been found unconstitutional by the "judgment of history": The Act was abolished by a subsequent Congress on the ground that it was unconstitutional; fines levied under it were repaid; and later scholars and judges had said it was an aberrant and unconstitutional blemish on the civil liberties visage of America.

From this idea of a linkage between a principle of freedom of speech and press and the social choice for a democratic system of government, the Court in *Sullivan* reasoned that libel actions brought by public officials against citizens and the press had an unacceptable potential to inhibit public debate. Fearing libel suits by unreasonably disgruntled officials, in a legal system that could not promise either reimbursement of costs to those found innocent of falsehood or a certain ability to find

innocent those who were truly innocent, the average citizen would understandably prefer to stay home rather than throw himself or herself into the treacherous arena of public debate. The psychology of people plus the inherent limitations of the legal system would yield a powerful "chilling effect" unless the Court intervened and in the name of the First Amendment changed the ground rules. And so the Supreme Court in *Sullivan* did, hoping to create a world of public discussion that would be, in the Court's words, "uninhibited, robust and wide-open."

Now, from this fertile perspective on the world much has grown over the last two and half decades. Case after case has come before the Court (and of course even more before the lower courts), calling on it to articulate the logical extensions of this vision. Many of these cases are well known. In *New York Times v. United States* (the Pentagon Papers case) the Court held that the government could not enjoin the New York Times and the Washington Post from publishing government papers about the Vietnam War, even though the papers were classified and the government claimed it would injure U.S. relations with foreign nations and even though the papers had been allegedly illegally purloined from the Defense Department and handed over to the press. In *Miami Herald v. Tornillo* the Court held that the state could not order a newspaper to print the reply of a candidate for public office, even though the candidate had been criticized earlier in the pages of the paper. In *Nebraska Press Association v. Stuart* the Court held that judges could not enjoin the press from publishing, prior to or during a criminal trial, confessions or other information "implicative of the accused," even though such publication might threaten the integrity of the process of criminal adjudication. In *Cox Broadcasting v. Cohn* the Court held that the state could not prohibit or punish the press for publishing the name of a rape victim when the victim's name was already a matter of public court record. In *Minneapolis Star v. Minnesota Commissioner of Revenue* the Court held that the state may not single out the press for special taxes. And in *Richmond Newspapers v. Virginia* the Court held that for *Sullivan's* vision of the First Amendment to be realized not only must there be strong protections against government censorship but also a means of insuring that the press and public had access to newsworthy information; accordingly, the Court found for the first time a constitutional right of the press and the public to attend criminal trials.

All these were significant cases and together they are the beginning of a jurisprudence of constitutionally protected freedom for the American press. To be sure, the press has not always won in court. The Supreme Court has been especially reluctant to carve out special protections for the press, protections or rights not available to members of the public generally. In *Branzburg v. Hayes*, for example, the Court refused to hold that the press had any special privilege, like that accorded to doctors and lawyers, to withhold information relevant to grand jury

investigations into criminal activity, even though meaningful assurances of confidentiality, the press vigorously argued, were necessary for effective gathering of news.

Certainly the greatest deviation from the path of total press independence from government regulation and control has been the extensive regulatory system for the broadcast and electronic media. It is true that the constitutional restrictions on government censorship are not significantly different for the electronic media (though there are a few outstanding exceptions, most notably in the area of indecent language, where the Court held in *Pacifica Foundation v. FCC* that the Federal Communications Commission could limit the use of such language to certain hours of the broadcast day, a result quite at odds with those cases involving speech outside the broadcast context). But there are real differences in the area of public access regulations, regulations that seek to expand the range of voices in the marketplace of ideas, by requiring, for example, the press to be "fair" in its coverage of public issues (as does the fairness doctrine) or to provide "equal time" to all candidates for political office (as does the equal time provision). In *Red Lion Broadcasting v. FCC*, decided in 1969, the Supreme Court upheld the fairness doctrine as constitutional in the broadcast media context, even though it held (as I noted a short while ago) five years later, in *Miami Herald v. Tornillo*, that similar governmental rules for the pages of the newspaper were unacceptable under the First Amendment. We have, therefore, two quite divergent traditions of constitutional law when it comes to the two major branches of the press, the print and the electronic media. I will have more to say about that in due course.

Let me conclude this general outline of the field now and turn to those matters where I think a change of perspective is called for. First, I want to think about the ambitions, as it were, of *Sullivan* and its progeny, and then to consider the troubles we have had in thinking clearly about the differential treatment of the print and broadcast media and about the possibility of public access regulations.

II

The first matter I want to consider goes to the very heart of our understanding of the nature of the constitutional enterprise under the freedom of press clause of the First Amendment. I have a very general, but, I think, vital question to ask you to consider. I want to think about how the process of constitutional adjudication in this area of our law may have effected, and have been designed to effect, the development of the institution of the American press.

Let me begin by describing what I find to be the common perception of the role of the Supreme Court in implementing the principle of freedom of the press. After describing this common vision of the process,

I can then better set against it what I believe is a more complex, and more accurate, vision—one that seems to me to require much greater attention and exploration in our future scholarship.

A survey of the relevant literature in this field reveals an implicit or explicit assumption that the role of law here serves to establish a barrier against social, or government, regulation of the press. The Court sets the limits of state intervention and then sees to it that those limits are observed. In performing that basic assignment, the Court must develop and articulate a theory of what it is doing. Because neither the language of the First Amendment nor the Framers' intention as to what that language should mean clearly resolves the controversies between the government and the press that tend to come before the Court, it is necessary for the Court to articulate a theoretical vision of the interests served by the freedom of speech and press clause of the First Amendment. Justices must not, of course, develop such a theory out of their own predelictions or values; they must look to the values of the larger society, as reflected through its laws and customs. One of the primary attractions, therefore, of the *Sullivan* link between freedom of speech and press and the principle of democratic self-government is that it offers a theory of freedom of press that is grounded in a completely clear and uncontroversial prior social choice, namely the choice for a democracy over other forms of political rule, and not in some personal political values held by a few judges. From this theoretical base, derived neutrally from sources external to the judges, the Court sets about deciding when the First Amendment interest in self-government outweighs the competing governmental interests that lie behind the effort to restrict press speech. While no one pretends that the choices are or will be easy, they nonetheless must be made and, once made, together compose the boundary line of permissible government regulation.

Now this conception of the process of First Amendment adjudication no doubt seems perfectly sensible and straightforward but, in my view, it is seriously incomplete as a description of what has been occurring in this field. Consider first the function of the judicial opinion in this area. Is it really intended to set forward a theoretical explanation of the Court's decision, in the way that an annotation explains a case? If it is, then the Court may justifiably be criticized for being highly simple-minded, because the typical opinions in this area offer anything but subtle exposition.

Take the *New York Times v. Sullivan* case as an illustration. Examined closely, *Sullivan* is a remarkably simplistic analysis of a very complex question. To justify its result the Court drew on a powerful image, the image of the Sedition Act and a government attempting to usurp the democratic authority of the people. The image is one of essential violation by the government of the sovereign authority of the citizens. True as well as false statements are proscribed under such a

regime, and there is no room for expression of opinion that conflicts with the established policy of the prevailing government.

But the issue to be faced in *Sullivan* was a far cry from that. The rules of libel had not been devised by some government bent on reestablishing an authoritarian regime but rather by the common law courts over several centuries. While it was very probably the case in the specific facts of *Sullivan* that the judicial system was being used to silence and punish legitimate public criticism, the Court's decision was not then nor was it later ever taken to be limited to the specific facts of that case. Moreover, the very theory embraced by the Court for deciding the case—that we must think of freedom of speech and press as serving the system of democracy—also cuts against the path the Court took of restricting libel actions brought by public officials. While it might well be true that an undiminished libel law would chill citizens from participating in public debate, it might also be true that a diminished libel law might discourage worthy citizens from running for political office, with the further possibility that those who would choose to run would be only those individuals with especially thick skins, who might in turn have less of a capacity for good judgment than more sensitive citizens. My point is not that these competing considerations should have been given preference over those identified and relied upon by the Court; it is rather that the Court too swiftly moved from an image of government regulation that is indeed basically violative of democratic principles (the Sedition Act) to one that is more complicated *without considering and entertaining those complexities*. The result is a major opinion that portrays the issue as fairly one-sided, with an evil party (the government), a good party (the "citizens") and the press as the peoples' representative with full "autonomy" from government regulation.

This vision of the world is echoed through the major cases in the First Amendment area. In virtually every one of the cases I referred to earlier as extending the *Sullivan* tradition, you will find the same, uncomplicated, view of the world. The government is potentially evil and not to be trusted when it comes to political debate; the citizens are the ultimate sovereign whose interest in open uninhibited discussion is both desired and properly secured by the courts; and the autonomous and independent press is the great representative of the citizens, charged with insuring that they receive the information they need about the operations of the state as well as serving as a check on government corruption and abuse of power. Considerations that support regulation, and especially considerations that support a different kind of democracy, are typically understated or ignored altogether.

If you take my description of the case law as accurate, then there are several ways of thinking about, or explaining, what is happening. It may be that the Court is simply ignorant of the complexities involved. Or it may be that the Court is aware of the complexities but in the heat of the

adversarial process within the Court the majority naturally prefer to make the problems appear less complicated than they in fact are. Both of these may well be true. But I tend to think there is something more to the motivation here, and that I call the wish to create an "ethic" of press freedom in the society.

By an "ethic" I mean that the Court is engaged in a process of trying to articulate a relatively simple vision of the world, one that encompasses the political system, the state, the citizenry and the press. It is trying to affect the central images by which participants define themselves and others in the larger process, and it is offering a set of arguments and propositions accessible to the diverse range of people who perform in the arena of political life.

Now, if that is true, then we should want to know several things. We should consider whether the desire to create such an ethic has an effect not just on the way in which judicial opinions are written but on the results themselves, for it is possible, when one thinks about it further, that the more one takes on as a purpose the creation of a certain ethic the more one might be inclined to stretch the results themselves to reinforce the ethic. Thus a desire to instill in the press a sense of public purpose, of performing an active check on government, may well produce not only a tendency to paint a portrait of the press as the great representative of the citizens in preserving democratic freedoms against an ever-threatening government, but also a tendency constitutionally to prohibit legal controls on the press when there is a perceived *symbolic* effect in doing so.

In other words, we must consider the possibility that constitutional law may be using the occasions of legal conflict as means of creating the *kind* of democracy we will have. The results of decisions together with the statements supporting and defending them are not simply occasions where a balance is struck to provide protection for valued expression; but rather a total response calculated to influence broadly public perceptions and behavior. Extreme positions, both in the degree of freedom afforded and in the articulation of that freedom, may be taken to counteract what the Court perceives as a general disposition to think and act differently.

To understand that kind of process is, of course, very difficult, even more so than understanding the process we commonly hear described, in which the problem is simply one of deciding what the competing state interests are and then weighing those against the public interest in having this particular speech, or this "kind" of speech, available. We have to understand more about the psychology of the various participants (the public, the press and the government), about how the Court understands that psychology, and about how the actions of the Court (both in result and in opinion) affect that psychology and through that influence behavior.

III

Now I want to turn to another dimension of the field of mass media law which I also think requires new conceptual understanding and about which clear thinking is, I shall contend, impeded by the central images, or the strategy, of the free press ethic of the *Sullivan* line. I want to focus on what I have called the differential treatment of the print and broadcast media, and, in particular, on how we ought to think about public regulation of the media designed to improve the quality of public discussion by adding new voices and opinions—what we call public access regulation. I have already indicated how there are really two quite different traditions within the First Amendment principle of freedom of the press. One is the print media, which the Court has protected against any form of public regulation intended to increase access, finding that while "a responsible press is an undoubtedly desirable goal . . . press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated." To the Court in *Miami Herald* public access regulation is invalid simply "because of its intrusion into the function of editors."

With respect to the broadcast media, however, the Court has taken a very different course. In *Red Lion Broadcasting v. FCC*, decided in 1969, a unanimous Court upheld the fairness doctrine as constitutional. The fairness doctrine requires broadcasters to provide reasonable coverage of constitutional issues of public importance and to provide reasonable coverage of opposing viewpoints. Such a rule, said the Court in *Red Lion*, is perfectly constitutional in a world in which only a select few are able to control the primary means of mass communication. The dominant constitutional interest involved belongs to the general public, in receiving the widest possible array of opinions; and to satisfy that interest it is entirely appropriate for the Congress to charge a public agency with the task of insuring that "private" censorship of broadcasters does not thwart that greater public interest.

There are many observations to be made about this fascinating development in our First Amendment tradition. But one must first see why the development is so puzzling. One might suppose that the different treatment was well supported by identifiable differences between the print and broadcast media. So the Court has tried to present it. Broadcasting makes use of the electromagnetic spectrum which is physically limited, there are more people who want to use that spectrum for broadcast communication than there is space available, and unless that space is allocated by government, and then regulated, interference will result and no one will be heard. But this syllogism has long been recognized, by commentators if not explicitly by the Court, as inadequate justification for distinguishing broadcasting from the print media. Everything is physically limited, trees that make paper for newspapers

just as frequencies within the spectrum. That demand is greater than the available supply of frequencies, and that interference will result from greater use than available supply, simply means that there must be a system of allocation, and for that we typically use the marketplace. There is, in other words, an alternative to government allocation and regulation, which is for the government to sell off the frequencies to the highest bidders, protect their rights to use the purchased frequencies through a system of property rights, and then rely on the marketplace to insure efficient use of this public resource.

I have pursued this analysis further in other writings and cannot do more here. I have concluded some time ago, and it remains my opinion today, that the justifications traditionally offered for why broadcasting is different from newspapers, or the print media, and can therefore be regulated while the print media cannot, are seriously deficient. But, even if one did not agree with that conclusion, there are still some very puzzling features of the case law in this area that require attention and explanation. For example, how can one explain the fact that broadcast regulation, in *Red Lion* and other cases, was not reluctantly accepted as constitutional, as the unfortunate but necessary deviation from the tradition; but instead was *enthusiastically* embraced as if it were a welcome result, and without any acknowledgment of the print media tradition? Similarly, how can one explain the fact that in the print media cases, and particularly in *Miami Herald*, there has been no reference whatever to the broadcast experience? And, finally, how can one explain the fact that even today casebooks in constitutional law devote a relatively tiny proportion of text in the First Amendment materials to the presentation and study of the broadcast regulatory experience? It is a striking fact about the history of First Amendment study that the broadcast cases have been virtually ignored and broadcast regulation treated as something unique, a separate tradition of its own.

For many years now I have felt certain that behind this historical experience lay some very important insights about the way in which our traditions and legal principles in the press area evolve. My own inclination has been to support this differential treatment of the two major branches of our media, but not for any of the reasons that have been offered by the Court or others to distinguish broadcasting from print. Instead I have started from a simple premise, which is that if you think of your goal as having a full and rich marketplace of ideas (whether for purposes of self-government or for some other, and broader, ends), then you ought to be concerned generally about the concentration of outlets in *both* the broadcast and the newspaper media; in other words, the fact that the one newspaper city is now a near universal reality is just as alarming from a free speech and press standpoint as is the narrow number of television outlets the spectrum can accommodate per community. But the fact that the two branches of the media share a common

problem does not mean that we must permit regulation throughout. There surely is virtue, and virtue from the standpoint of First Amendment values, in permitting corrective regulation in only one branch, leaving the other free. A link with tradition is preserved, which can have important psychological effects in limiting the potential of initiating a fall down the ever-feared slippery slope and important psychological effects on the broadcast regulators, who must always think of themselves in the context of an exception; and we preserve a voice free of the spectre of improper government intimidation, which can help reduce the risks of government abuse.

All this still seems to me as correct today as it did when I first wrote about it some twelve years ago. But now I want to add an observation. It seems to me now that we sometimes should acknowledge, and take account of in our law, feelings of ambivalence about which course to pursue. The treatment of broadcasting and print with respect to public access regulation seems to me precisely such an instance. To trust the corporate powers that control the press to determine alone what voices and viewpoints will enter public debate and which will not seems dangerous for the principle of self-government. On the other hand, to abandon the tradition that says the American press shall be independent of the state and free to pursue and report the news as it sees fit also seems dangerous for the principle of self-government. And there are many important things we cannot know right now. How will the press behave, responsibly or irresponsibly? How will the government behave, responsibly or irresponsibly? Will other sources of information emerge that will reduce the need for public regulation? These are difficult questions to answer, and it should be understood that there are periods in a society's history when to be forced to choose between one and another system is to lose the opportunity to muddle along with both.

This is partly how I have come to see the history of separate treatment for print and broadcasting. It explains, I think, why the two have not been linked mentally; why when you read the opinions in each area you are led to feel oblivious to the analytical structure in the other. The two exist alone, and apparently isolated from each other. It is as if a mind were trying out an identity, a way of looking at the world, for size. From my point of view, it would be a pity if this were disallowed for a society, just as it would be for the individual person. We should not demand consistency at the price of making unavailable the often beneficial struggle with ambivalence, with uncertainty and experimentation.

This leads me to a final set of observations I wish to make about the reasons we have for thinking seriously about public access regulation. There are two distinct justifications commonly given for such regulation. The first concerns the need or desire to correct the disparity of wealth, and hence the disparity of realistic access, with which people come to the

marketplace of ideas. For many years now, really since the early 1940's when another major free speech scholar, Professor Zechariah Chafee, pointed out the need for an "affirmative" approach to the thinking about freedom of speech and press, there has been growing appreciation of how the broad aims of the First Amendment cannot be realized simply by stopping government censorship. Barriers to the marketplace of ideas exist for many citizens in this society. Frequently those barriers are the result of the distribution of wealth. Those with ample resources, who have been winners in the economic system, have a fairly clear and certain advantage in the marketplace of ideas over those with few resources. Correcting that disparity is a laudable aim for a democracy. And one senses that motive behind many decisions in the First Amendment area—like the public forum cases which have designated the streets and parks as open to all on a first-come-first-served basis; and like *New York Times v. Sullivan* itself, which may be read somewhat differently from the interpretation I offered at the outset of this lecture, as recognizing that those on the periphery of the society may understandably become intemperate when participating in public debate and that legal rules should be structured with those people in mind.

The second primary justification for public access regulation is that it is needed in circumstances of market failure, when the free market for whatever reason is excessively closed to entry. This, as I suggested just a minute ago, has been the common argument advanced to support broadcast regulation. Because of the severe physical constraints on the availability of frequencies in the electromagnetic spectrum, and therefore on the number of potential entrants into that marketplace, the risks of private censorship and manipulation of public opinion have been thought by many to outweigh the risks historically associated with government regulation. A comparable claim has been made with respect to newspapers, where it is argued that economic barriers to entry exist because economies of scale involved in operating a newspaper are such that, as a practical matter, really only one newspaper per community will survive—a phenomenon readily and sadly observable across the country. From this it is argued that the ultimate reasons for the excessive concentration of power in both media, whether physical or economic, should not matter and that remedial regulation should therefore be permitted in both.

To this it is typically argued that there is not as much concentration of power in the marketplace of ideas as proponents of regulation contend. While there are few television stations and daily newspapers, there are many radio stations, many magazines, many national newspapers and many small print publications, which virtually anyone can establish for the minimal cost of using a copy machine. Whether these additional outlets are in fact of sufficiently comparable communicative power to allay concerns about the degree of control over public debate

possessed by television and daily newspaper owners is, I think, debatable. But to my mind this really misses an important theory for public access regulation, and it is a theory access proponents have largely ignored.

When opponents of public regulation assert that the marketplace is fairly unrestricted, they generally assume that legitimate concern about the nature of public discourse and thought in the democracy is at an end. In a free marketplace, people can select from a full range of sources of information and opinion, and they are the best judge, not some government agency, of the worth of the information and ideas presented. Left alone a full and free market will yield the best selection of the best ideas. That is the common perspective on what the First Amendment means.

It is a perspective I do not entirely share and believe will change over time, if the basic norms of freedom of speech and press remain as secure as they are today. Let me outline, in what I recognize are very general terms, what I think should to be considered. My central premise is that it is not easy to think well, to think free of bias and irrationality. Just as we recognize in the criminal trial that problems of character, intelligence and good judgment must be cultivated and inspired—by the architecture of the courthouse and the atmosphere of the courtroom and by the rules of evidence—so we must come to see the same problems as inhering in public discourse about public policy. We have, it seems to me, no particular reason to be confident that our behavior in the marketplace of ideas generally is likely, without more, to be as good as it might. Just to give one instance of an unfortunate bias, it is a reasonable assumption, I think (and actually supported by the history of the First Amendment itself), that people tend to avoid confronting opinions they dislike. If that is a strong disinclination, then even an open marketplace may well not produce confrontation with dissident voices. People can vote with their dollars and choose not to listen. And, if they don't listen, the society as a whole may be worse off for it.

There are many questions to be asked if we follow this course of thinking. Let me offer a brief outline of what needs to be thought about:

(1) We must try to understand in what ways public discourse will be deficient in an open market. I have suggested that people will not confront and deal with dissent. Another might be that people will neglect public issues in favor of other, more pleasurable activities (a thought commonly encountered in broadcast regulation, where there has been a fear that entertainment programming would totally supplant discussion of public issues).

(2) We must try to understand *why* public thinking about public issues in an open marketplace is not as good as we want it to be. It may be, as I have suggested, that people naturally dislike conflict and find it wearying. It may be that attention to public issues is hard work, and something most citizens will be inclined to let slide onto the backs of

others, if they can escape the burden. It may be that the nature of the marketplace tends to accentuate certain character traits in individuals and that those traits have undesirable consequences for public thinking about public issues.

(3) We must try to understand why the state, and the use of public regulation, is a valuable and socially legitimate method of dealing with defects in the market for information and ideas. When people object that regulations requiring what the free market does are not paternalistic, that intervention reduces rather than enhances social utility and welfare, what is to be said? Is the regulation enacted at the behest of a majority of citizens intended to improve the thinking of the minority? Or is it enacted by the majority to improve the conditions of its own thinking? If the latter, then why is it necessary to turn to regulation? Why doesn't the majority simply change and do what it thinks ought to be done?

The Constitution and the Bill of Rights, enforced by a judicial system, seems an appropriate place to look for an analogy. Social legitimacy can come from a widely shared self-recognition that we are not all that we might wish to be, that it is helpful in becoming what we would like to be to have our public institutions reflect (even if only through largely symbolic regulations) what we aim toward, and that just as we defer to our courts to develop a jurisprudence of rights we might extend to other political branches some measure of control over the structure of public debate.

(4) Finally we must continually consider whether the benefits of public regulation, defined in terms of the ends sought, outweigh the costs. On the benefit side, I sense a tendency to underestimate particularly the social symbolism of regulations. Public access requirements for cable television are a good example. Examined for the worth of the ideas generated, or even for the satisfaction to the participants extended, public access rules seem less than compelling. But examined as a social symbol its merits may increase. Few would think, I suppose, that the benefits to England of Hyde Park Corner are limited to improving the advancement toward truth.

On the other hand, on the cost side we need to be bold enough to ask whether the historical fear of government censorship remains as relevant today as it was one hundred or two hundred years ago. One might consider whether the values of freedom of speech and press have become internalized in American culture, and whether the judiciary now exercises such strong supervisory protection for free speech and press, that our fears of government abuse may be somewhat relaxed. Here the broadcast regulatory experience, which has few instances of serious government abuse, may prove instructive.

In the first part of my lecture today, I argued that we should enlarge our vision of the social consequences of the process of adjudication under

the free press clause, that we should consider the process as not simply setting the boundary of permissible legal intervention but as being designed to influence the behavior of the press, the public and the government within that boundary. The free press clause cases may be, and I think ought to be, studied as having a shaping influence on the kind of democratic experience we have. When I say that I am simply observing the reality as I see it, it of course remains open for anyone to argue that that situation is fundamentally wrong or to argue for a different set of values to be inculcated or behavior to be stimulated. But the fact remains, a fact at least as I see it, that the whole jurisprudence, has a decidedly stretched quality that can best be explained as an effort to shape broader social behavior.

In the second portion of the lecture, I considered ways to think about our most unusual and puzzling experience in this century with public regulation of the electronic media. The *New York Times v. Sullivan* ethic of the independent and autonomous press has tended to dominate and isolate this experiment with public regulation, though the experiment has gradually emerged in the past decade into the open light of First Amendment scrutiny. The free press ethic, however, which I think attempts in its own way to deal with some of the same problems (as a kind of rhetorical stimulant to increased public involvement in self-government, for example) as does the public regulation of broadcasting, also makes it difficult to think clearly about the legitimacy and desirability of public regulation. In pursuing its establishment of a social ethnic to counteract contrary cultural pressures that tend to defeat active self-government, the Court has certainly overemphasized the capacities of citizens and, I also suspect, overstated the risks of government abuse. And, while the Court may have done that with the same purpose in mind as that underlying public access regulation, the effect of that method seems clearly to conflict with the possibility of sound consideration of the social merits of the two approaches.

The issues I have discussed today are of course not simple, and many of us feel, as I have suggested, quite ambivalent about how they should be resolved. But progress will occur, I think, only with our willingness to step back from where we are at the moment and to reconsider where we want to go, even if that turns out to be in two directions simultaneously.