

## PRIVATE POWER, THE PRESS, AND THE CONSTITUTION

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Unlike constitutions that have no state action restriction, our constitution guarantees most individual rights only against violation by government. A common view is that whatever policy issues are presented by potential abuse of private power,<sup>1</sup> private power has little to do with American constitutional law. Then, on second thought, commentators typically admit that given the protean nature of our notion of state action, sometimes the interpretation of this concept makes private power constitutionally relevant. This limited view of the relevance of private power for constitutional interpretation is, I will argue, wrong.

Certainly, private power can be a major threat to freedom, equality and other fundamental individual liberties. Constitutional commentators vary in the extent to which they recognize this fact. Of course, the extent of an interpreter's concern about private power affects her willingness to find state action. My general thesis, however, is that an interpreter's concern or lack of concern about private power will also significantly affect her substantive interpretation of constitutional provisions. Moreover, since I think this is as it should be, my claim implies that an informed understanding of private power—presumably gained through normatively guided historical, sociological and economic studies—is crucial for getting constitutional law “right.” I will illustrate my thesis primarily by examining how concerns about private power could and should affect interpretation of the First Amendment's guarantee of freedom of the press.<sup>2</sup>

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1. “Power” here refers to the capacity of the power-holder to control others or to get them to act other than they would have chosen if not for the exercise of power. Elsewhere, following Hannah Arendt, I have discussed a much less instrumentalist conception of power—people's capacity to get together to do things. See C. Edwin Baker, *Human Liberty and Freedom of Speech* 99 (Oxford U. Press, 1989).

2. The discussion of the press, especially in Parts II and V, below, are based on C. Edwin Baker, *Advertising and a Democratic Press* (Princeton Press, forthcoming 1993), revising and expanding an article of the same title published in 140 U. Pa. L. Rev. 2097 (1992).

## I. PRIVATE POWER AND THE CONSTITUTION

The constitutionalist's initial, unreflective response to threatening aspects of private power is to note that, with a few exceptions, our constitution applies only to the actions or inactions of government. On this view, problematic private power raises only questions concerning the scope of—that is, the actors or activities covered by—but not the substance of, constitutional provisions.<sup>3</sup> Ominous private power could induce the constitutionalist to find “state action” and, on that basis, to apply recognized constitutional norms to some realm of otherwise presumptively private behavior.

This picture is misleading from the start. Students commonly begin thinking that the “state action issue” is an objective, evidentiary matter of looking for tell-tale signs of the state, of looking for a border between a public or government realm and a private realm. Most serious commentators, however, soon realize that this search is a largely unhelpful diversion. State action is a sea in which everything else floats.<sup>4</sup> For this reason, constitutional theorists often conclude that the question is seldom whether there is state action but whether the obvious state action (including obvious state inaction) is acceptable. That is, the real question is always a matter of a substantive interpretation of constitutional norms. Still, the notion of state action does embody and highlight a real normative concern. The importance of preserving realms of private autonomy or areas of diminished collective responsibility properly motivates substantive interpretation.

State action disputes present, however, only a small subset of the interpretive contexts influenced by concerns about private power. The societal need to rein in private power can motivate constitutional analysis in two quite different directions—toward expanding the application of constitutional norms (by finding state action) in order to civilize private power or toward restricting or

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3. In typical realist fashion, David Strauss in this symposium pushes this view (although farther than I think wise) by suggesting not only that the concern with the threatening aspects of private power stimulated an enlarged conception of state action during the period of the civil rights struggle, but today, the comparative lack of fear of governmental power (at least, that of local governments) and benefits of government experimentation (compare Harlan and Frankfurter's views expressed in the incorporation debate) should lead to a narrowing of the concept of state action to exclude at least some activities of local governments. David A. Strauss, *State Action After The Civil Rights Era*, 10 Const. Comm. 413 (1993).

4. In different ways, both Larry Alexander's and Michael Seidman's contributions to this symposium make this point. Larry Alexander, *The Public/Private Distinction and Constitutional Limits on Private Power*, 10 Const. Comm. 363 (1993); Louis Michael Seidman, *The State Action Paradox*, 10 Const. Comm. 381 (1993).

sculpting constitutional protections of private power in order to leave that power subject to legislative control.

The second interpretative move is pervasive in area after area of constitutional law. The most obvious examples may be in relation to property. Here, constitutional law eventually followed popular politics and social theory—although even today some conservative scholars and Republican appointees would have us go back to the *Lochner* days, treating programs adopted by virtually all other western democracies as not merely unwise but unconstitutional. Constitutional commentary and judicial opinion eventually recognized that much property, especially exchange-valued or commercial property, involves the instrumental use of private power in ways that often contradict social values or group welfare. This recognition helped motivate restrictive interpretations of constitutional guarantees related to property—including interpretations of the Due Process Clause, the Takings Clause, the Contracts Clause and the economic applications of equal protection. In contrast, property's historic role in protecting a private realm of autonomy and security—against intrusion by either public or, sometimes, private power—continues to motivate expansive constitutional interpretations. For example, these traditional property-related values encourage recognition of guarantees of basic welfare minimums; likewise, they require a doctrine of unconstitutional conditions to police the relation of government and private individuals. Arguably, some constitutional protections of newer forms of property may be significant in preserving the fundamental values ideologically associated with traditional private property, while protecting the traditional property, when used in the market as a form of private power over others, could today undermine those values.<sup>5</sup> In a sense, as contexts change—and here, the context is a heightened appreciation of the problem of private power—the appropriate institutional embodiments of a liberal commitment may be almost inverted (bringing to mind how John Stuart Mill eventually saw that his liberalism might require elements of socialism).<sup>6</sup>

Rather than ranging through the constitution, however, I can adequately serve my present purposes by staying within the confines

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5. C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 132 U. Pa. L. Rev. 741 (1986).

6. Mill's pronounced egalitarian inclinations clearly affected his views about the need to reform the system of private property and introduce elements of what have come to be seen as the welfare state. The significance of his claim in his *Autobiography* that "our ideal of ultimate improvement . . . would class us under the general description of Socialists," is discussed in Lionel Robbins, *The Theory of Economic Policy in English Classical Political Economy* 151-68 (Macmillan, 2d ed. 1978).

of the First Amendment. My focus here is on the Press Clause. But, in addition, concern with private power is at the root of various disputes about the proper interpretation of free exercise of religion, freedom of association and even freedom of speech. I will first describe how private power threatens press freedom. Then I will contrast this threat to problems posed by private power in relation to other First Amendment rights. With that background, I will suggest how the concern with private power could and should motivate the interpretation of the Press Clause.

## II. PRIVATE POWER AND THE PRESS

Like most constitutional commentators, both here and abroad, I assume that the freedom of the press refers not merely to written speech but rather protects an institution, a set of commercial and non-commercial enterprises engaged in the activity of communicating "to" and sometimes "with" a broader public. The Press Clause in the Constitution grants these enterprises a variety of protections against government limitation. Nevertheless, at least in liberal theory, institutions, unlike people, will at bottom have only instrumental, not intrinsic, value. The value of institutions must lie in how they serve human interests. I will assume that the justification of constitutional protection of the press relates to the special contribution that a free press makes to democracy broadly conceived. Or, more specifically, the Constitution should help protect the press's role in checking government abuse, in providing a forum for a common public cultural and political debate and forums in which subgroups develop their own identities, in being a crucial instrument of political and social mobilization and in providing broadly for people's need or desire for non-governmentally controlled facts, vision and direction.

Governmentally unimpeded private power—power to challenge and expose government—might be precisely what freedom of the press implies. The Constitution guarantees protection of the press as a power center outside governmental control in order to be a counterweight to government. Thus, press freedom might mean, and mean only, freedom from governmental regulation or distorting influence—but that interpretation is neither the wisest nor most common. As an institution, the press is an amalgamation of many private centers of power. The legal regime can affect the relative role and strength of these different and sometimes conflicting forces. It is my thesis that, depending on the context, some of these forces, especially the power of owners and of private advertisers, often inappropriately fetter press performance and in that way undermine

press freedom. Under this view, press freedom can be undermined either by government or by private power. I claim this point is not only analytically true, but popularly recognized.

In this country, I suspect that most people (possibly not including most constitutional lawyers) believe that a violation of freedom of the press occurs if a conglomerate owner, say a company that produces nuclear reactors, causes its television network to promote positive stories but not to cover negative stories about nuclear energy,<sup>7</sup> or if an owner refuses to publish an exposé about misdeeds of a major advertiser—and an even greater violation of press freedom occurs if the owner fires the reporter.<sup>8</sup> More generally, a plausible conception of press freedom is violated by any use of power, whether public or private, to suppress or slant stories for non-journalistic reasons or for reasons contrary to the public's interest in or need for the story. This view of press freedom identifies the protected institution primarily with the editors and journalists involved in the enterprise and their professional judgement, not with the owners. In this vision, the answer to Jerome Barron's compelling question, "freedom of the press for whom?"<sup>9</sup> is, in the broadest sense, that the guarantee of freedom is to benefit the public. Operationally, however, this view assumes that the public is best served by journalistic entities free from censorial constraint by either government or private power.<sup>10</sup>

Recognition that private power can limit press freedom confronts no initial conceptual roadblocks in countries such as Germany, whose constitutional guarantee of press freedom contains no state action limitation. German law recognizes that constitutionally-based press freedom can be abridged by owners or by private economic decisions whereby commercial television siphons off advertising revenue needed to support newspapers. Some German legislative proposals to protect against private power have gone

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7. Martin A. Lee and Norman Solomon, *Unreliable Sources: A Guide to Detecting Bias in News Media* 77-80 (Carol Pub. Group, 1990).

8. For apparent examples of firings, see John R. Logan and Harvey L. Molotch, *Urban Fortunes: The Political Economy of Place* 73 (U. of Cal. Press, 1987); Ben H. Bagdikian, *The Media Monopoly* 37 (Beacon Press, 4th ed. 1992). Bagdikian reports that "a survey by the American Society of Newspaper Editors found that 33 percent of all editors working for newspaper chains said they would not feel free to run a news story that was damaging to their parent firm." *Id.* at 30.

9. Jerome A. Barron, *Freedom of the Press for Whom?* (Indiana U. Press, 1975); Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641 (1967).

10. Baker, *Human Liberty and Freedom of Speech* at 250-271 (cited in note 1). Cf. Clyde Haberman, *Israeli Court Limits Publisher's Power Over Staff*, N.Y. Times, May 16, 1993, at 12 (editors and reporters praised decision as upholding their freedom of expression).

even farther. As I understand it,<sup>11</sup> the German Social Democrats acceded to the exemption of newspapers from the codetermination labor laws because codetermination would limit a newspaper's journalistic freedom by giving (non-journalistic) "labor," specifically, the newspaper's mechanical, clerical, and distributional workers, a say in the newspaper's journalistic operations. But the Social Democrats argued that the same logic required that the press be granted substantial freedom from capital, from ownership. Even though the Social Democrats' legislative position did not prevail, the idea that the press freedom belongs largely to the journalistic enterprise, not to ownership, made perfect sense and is widely accepted in Germany and elsewhere.

Thus, common conceptions of press freedom recognize that it can be abridged by private power. My empirical thesis is that private power causes the press to be too timid in exposing corruption and abuse both of public and especially of private power, insufficiently diverse in its presentations, relatively unresponsive to significant elements of society and more encouraging of political passivity than public involvement. This factual thesis requires careful substantiation, but if correct, the question then arises whether legal responses could change the situation for the better. If, as I think, the answer to this policy question is also "yes," the problem of private power intersects with constitutional law. The question posed is whether legal intervention to promote press freedom would be, as many in the media industry routinely assert, an unconstitutional abridgment of press freedom.

But before moving to the constitutional question, what about the empirical thesis? Private power, especially that of advertisers and owners, might not restrict the press's freedom or its inclination to serve democratic society. The explanation of the benignity of private power most likely to be advanced within the academic legal community is that this country's incredible number of media outlets, on the whole, respond to market demand, and that this responsiveness roughly corresponds to the constitutionally-valued performance.<sup>12</sup> In other words, the standard argument is that unregulated markets generally cause enterprises, including the press, to produce what people value. And the attempt to produce any-

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11. This account is based on conversations in 1991 with Professor Fritz Kubler, who was involved in the events described.

12. An alternative argument that I also think is wrong, at least when stated strongly, is that various aspects of professional craft, professionalism and technical demands of producing news operate as determinants of media performance to an extent that makes the influence of ownership and advertising largely irrelevant. I plan in later work to consider this claim it in greater depth.

thing other than what people value is authoritarian and/or paternalistic. This defense asserts that critiques of market-oriented performance tend to be elitist and subjective as well as paternalistic—and should be rejected as a basis for any government intervention directed at the press. Rather, free press means a free market.

This standard economic argument is riddled with errors. Most generally, mere responsiveness to market expressions of consumer desire should be rejected as an adequate standard of media performance. For example, second order (often politically rather than market expressed) preferences exist for arenas of public debate and for institutions promoting education and enlightenment to an extent not indicated by “private” market-expressed desires. Moreover, the underlying justifications for “often” treating preferences as appropriate guides to policy is that the preferences reflect the outcome of people’s experience and their discussions within an ethically-defensible environment, an environment that would include opportunities for informed and reflective development of desires or preferences. In other words, the existence of an adequate free and democratic media should be seen as prior to—as a prerequisite for—rather than the outcome of justifiable reliance on market expressions of preferences.

But even if the economic market model generally provides a proper standard of performance, a host of special empirical characteristics of the media marketplace cause serious market failures. Some of these failures go to the heart of a free press’s service to democracy. Out of a much larger list, four features of the media market will illustrate these failures.

First, the market predictably produces a much more perverse distribution in the media setting than in most contexts; media and cultural products are foundational for choice and democratic participation. Thus, arguably these goods ought to be distributed more like the vote or like education, that is, on a basis of relative equality of access, rather than on the market basis of willingness and ability to pay. Although I find that egalitarian claim quite persuasive, I will put it aside here. Still, surely the poor should not be charged a higher proportion of the cost of those media products that they desire than the wealthy are charged for their favored products.<sup>13</sup> But this inequality, this subsidy for the wealthy, is built into much of the existing media marketplace.

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13. Implicit in the following textual argument is the assumption, for which there is considerable empirical support, that not only do “tastes” for media products vary, but the variation partially correlates with income and personal wealth (and with racial or ethnic status).

Advertisers pay the major portion of the cost of news and opinion products—and, as market theory predicts, those who pay significantly determine the product produced. Readers often do not even pay the entire cost of a newspaper's paper and ink. Newspapers' efforts to cover costs, much less gain profits, typically depend on selling readers to advertisers. These advertisers differentially value media consumers. Specifically, advertisers pay more, that is, provide a much greater per person "subsidy," for media products delivered to, and hence designed for, the comparatively affluent than for those delivered to the poor. The different value of different readers to the advertiser is probably most explicit in *Los Angeles Times* publisher Otis Chandler's comment that giving more attention to minority issues "would not make sense financially . . . [because] that audience does not have the purchasing power and is not responsive to the kind of advertising we carry."<sup>14</sup> The "danger" is that, if the paper reports news relevant to the minority community, people in that community might buy the paper. A *New York Times* marketing executive expressed the same point, I think, when he said that the *New York Times* "make[s] no effort to sell to the mob."<sup>15</sup> Gannett, one of the larger and most profitable chains, apparently adopted a policy of raising cover prices as a means of shedding its least valuable readers as well as increasing circulation revenues.<sup>16</sup>

In both television and newspapers, advertising subsidizes media products designed for the comparatively affluent, thereby increasing the inequality already embedded in society's unequal distribution of wealth. The competitive dominance of this "combination product"—media products sold to the public and audiences sold to advertisers—increases the media's tilt toward the comparatively affluent. Although the social and political consequences of this media tilt are uncertain, some rough predictions are possible. Subsidized production of content designed for the relatively affluent should result in their being, as compared to the relatively poor, better informed and more likely to participate in the political process.

A second problem with reliance on the market relates to the overall structure of the media industry and its products. I will illustrate this problem in relation to newspapers, probably the politically

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14. Stephen Bates, *If No News, Send Rumors* 198-99 (St. Martin's Press, 1989). Elsewhere Chandler said that the *L.A. Times* had "arbitrarily cut back some of [its] low-income circulation," because "American newspaper publishing is based on an advertising base, not a circulation base." Bagdikian, *The Media Monopoly* at 116 (cited in note 8).

15. William B. Blankenburg, *Newspaper Ownership and Control of Circulation to Increase Profits*, 59 *Journalism Q.* 390, 392 (Donald Nizen quoted in *Editor & Publisher*, Jan. 3, 1981, at 15).

16. *Id.* at 393-94.



most important news medium.<sup>17</sup> A significant portion of the costs of producing a daily edition of a newspaper—all the costs of journalists, editors, wire services, etc.—are required to produce the first copy. Mostly for this reason, the more copies sold within a given geographical area, the less the average cost per copy. This type of declining cost is the trait that often causes a business to be a natural monopoly. However, people's differing interests in news, opinion and vision create demand for competing products—for example, differently edited newspapers. This demand for competing, differentiated products predictably results in actual or potential monopolistic competition. The existence of competing daily newspapers in most large towns and cities at the turn of century illustrates such monopolistic competition—but over the course of the twentieth century, this competition steadily declined. Now only a handful of cities have two separately owned and operated competing daily newspapers.

Monopolistic competition has an interesting, policy-relevant characteristic. Assuming a firm's inability to price discriminate effectively, the introduction of a "new" monopolistically competitive product could draw off enough of the demand for previously viable products that they are no longer economically viable *even though* their existence would still produce more value, measured by people's willingness to pay, than they cost.<sup>18</sup> Moreover, if the products made unprofitable by this monopolistic competition have comparatively steeply sloping demand curves, that is, are quite highly valued but only by a relatively small group, while the newly introduced prevailing product has a comparatively flat demand curve, the new product's introduction quite likely results in a decline in consumer surplus, that is, a decline in the "value" (as measured by willingness to pay) produced. Or, in slightly less economic and more politically relevant terms, the competitive success of some media products may reduce the total diversity of media products *even if* media consumers value the diverse media more than they do the prevailing product. Elsewhere, I have argued that this outcome probably occurred and occurred largely due to the influence of advertising in the media marketplace.<sup>19</sup> That is, market processes are likely to have pro-

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17. John P. Robinson and Mark R. Levy, *The Main Source: Learning from Television News* (Sage Publications, 1986).

18. That is, the introduction of the new product would cause the demand function for the old products to shift downward such that the demand curve would at all points lie below the average cost curve even though, at specific selling prices, the area under the demand function (the value produced) would be greater than the cost of providing the product at that price.

19. Baker, *Advertising and a Democratic Press* (cited in note 2). This role of advertising reflects several dynamics, including the reduced incentive to respond to readers' preferences

duced, in economic terms, market failures or, in social-political terms, a homogenization of news and vision.

The third problem is the assumption that the market causes the media to be responsive to the public—or, more specifically, the buying portion of the public. Empirical economic studies, industry self-perceptions and academic commentary on the media industry, especially the newspaper industry, all conclude that this assumption is significantly false. Competitive pressures apparently do not effectively restrict newspapers' considerable discretion as to the quality and orientation of their content.<sup>20</sup> Many serious observers believe that some media firms, but not others, use this discretion to serve the firms' ideas of the public interest rather than to extract all possible profit from the enterprise. In any event, this widely recognized discretion makes the characteristics of ownership and control crucially important in determining how well the media serves a diverse society. Specifically, existing concentration and relative lack of diversity in ownership suggests a likely failure on the part of the media to serve the democratic functions that justify constitutional protection.

Fourth, markets produce the claimed beneficial results only to the extent that the purchaser can accurately evaluate the product she receives. If the reader wishes to purchase the journalists' best professional judgment about identification and presentation of the relevant news of the day, but if information about whether the news has instead been sculpted to fit the hidden economic or ideological desires of advertisers or owners is not "cheaply" available to her, the market will be vulnerable to abuse. (In other areas, the legal response to this difficulty is embodied in the law of fraud or, in the case of some professions, in fiduciary or trust obligations.) Market failures are predictable to the extent media enterprises have economic or other incentives not to provide the desired product. If advertisers or owners value "distortions" enough, the media will be most profitable if it "sells out." And the best (economic) result for the media is if, at the same time it bows to these private interests, it keeps this fact secret so that it can also sell "integrity and profes-

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for a diverse product as the *proportion* of the media's revenue that comes from satisfying that preference declines as the proportion coming from advertising increases.

20. This discretion predictably results from various features of the daily newspaper industry, including its typically local monopoly status that allows for operating profit margins as a percentage of revenue, which routinely exceed 20% and often go far beyond 30%, to be much greater than for most industries. Jonathan Kwitny, *The High Cost of High Profits*, *Washington Journalism Rev.*, June 1990, at 19. Still, a few informed observers argue that newspapers' competition with other media, especially their competition for advertising dollars, precludes or severely limits this discretion. See, e.g., James N. Rosse, *Economic Limits of Press Responsibility* (Studies in Industry Economics #56, Stanford University, 1975).

sionalism" to the public. This provides an economic explanation for the media's constant public proclamations of their journalistic independence and integrity—their claim to maintain a wall of separation between the journalistic and business side of their operations. The lack of cheaply assessable public information on this issue, however, provides the basis for abuse—or, in economic terms, for a market failure.<sup>21</sup>

These four problems merely begin to illustrate the way the market is unlikely to produce a democratically responsive media. The influence of advertisers can cause or, more often, exacerbate these problems. Likewise, the discretion left to owners makes their identity—increasingly huge media conglomerates—and their corresponding interests crucial to the likelihood that the media will perform its democratically-valued role. This concern with ownership discretion is intensified because the structure of the media market routinely places the interest in profits in tension with journalistic professionalism and democratic service. A fuller investigation would only show more ways in which the existing distribution and prerogatives of private power predictably cause the media to be less diverse, less critical of the status quo and less likely to be a mobilizing agent for needed or desired change than democratic theory requires.

### III. THE CONSTITUTION AGAIN—ASSOCIATION AND RELIGION

The concern with abuses of private power generates interpretative issues in respect to many constitutional provisions, including other parts of the First Amendment. The common liberal emphasis on rationalism and individualism, along with its fear of concerted action, inclines interpretation of freedom of assembly and of association toward encompassing only assemblies and associations that operate in aid of speech, in aid of communicating ideas in a public arena<sup>22</sup> (or intimate associations as an aspect of a substantive due process privacy right<sup>23</sup>).

This interpretation of freedom of assembly and association is

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21. Of course, considerable information on this issue is available and assimilated by the public—for example, the credibility of some media organizations is quite obviously not great.

22. The comments on assembly and association are based on observations in Baker, *Human Liberty and Freedom of Speech* at 86, 132-34, 223-24, 316-17 n.18 (cited in note 1).

23. The intimate/public distinction does not seem evident in John Witherspoon's (whose lectures James Madison attended) listing, as a basic human right, a "right to associate, if he so inclines, with any person or person, whom he can persuade (not force)—under this is contained the right to marriage." David Richards, *Toleration and the Constitution* 233 & notes (Oxford U. Press, 1986).

too narrow. Theoretical notions of liberty require, and some First Amendment based Court decisions involve, constitutional protection of voluntary associations in which people associate to act, to embody values and to accomplish aims. Such associations are private centers of power, which is one of the reasons justifying protection.<sup>24</sup> Still, as power centers, associations can pose threats to various societal objectives and values, including freedom, even as they claim protection on the basis of being a manifestation of freedom. This conflict presents one of the most troublesome problems in constitutional law.

Without trying to resolve the complexities, several threads of a desirable approach can be noted. First, courts have properly granted assemblies and associations less protection against state intrusion in three overlapping contexts. Commercial or market-oriented associations receive virtually no protection. Courts also sometimes permit intervention in relation to associations and assemblies that exist in significant degree to exercise coercive or instrumental power over nonmembers—rather than to further members' joint activities or aims in ways that do not involve domination of outsiders. And intervention can be appropriate when association membership is a formal prerequisite to opportunities that in a democratic society should be available on a non-exclusive basis or when membership is otherwise non-voluntary. In thinking about these three contexts, note that in a market economy, commercial entities exercise instrumental power over people;<sup>25</sup> and associations that are non-voluntary or are prerequisite to fundamental opportunities have a non-consensual basis of leverage with which the association can exercise power over members. The presence of these types of power can justify legal intrusion into otherwise voluntary associations.

Second, in contexts where some intervention is justifiable, the type or purpose of state intervention often matters (although in respect to profit-oriented commercial associations virtually any legislative conception of the public good typically suffices to justify intervention). Most appropriate and most legitimate is a purpose of making associations more like local democratic governments<sup>26</sup>—

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24. See note 1, *supra*.

25. Baker, *Human Liberty and Freedom of Speech* at 210-18 (cited in note 1).

26. These considerations suggest rejection of some precedents—for example, the Court should have permitted the union activity in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), while upholding the state restriction on corporations in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). Baker, *Human Liberty and Freedom of Speech* at 223-24 & notes (cited in note 1). But see Sheldon Leader, *Freedom of Association* (Yale U. Press, 1992).

that is, interventions to require that membership criteria be non-invidious and to guarantee democratic rights for members. Many statutory mandates in the labor context illustrate this type of intervention.

Potential abuse of private power also complicates claims to engage in the free exercise of religion. Even without Justice Scalia's attempt to wipe out most of the significance of the Free Exercise Clause as a protector of behavior dictated by conscience,<sup>27</sup> free exercise claims often run afoul of concerns that the claimant asserts illegitimate degrees of private power. Many liberals who are quite sympathetic to free exercise attacks on laws that involve implicitly paternalistic judgments find more difficult free exercise claims that involve the religious group (or its members) exercising power over others.

Surely one significant difference between a religiously-based decision to ingest a drug or to refuse service in the military and a religiously-based assassination or kidnapping is that the latter acts involve the religious person applying instrumental force or violence to another person. Unsurprisingly, religious claims are also comparatively unpersuasive when they would create competitive advantages in the economic marketplace. The low paid religious worker, the cost-avoiding neglect of safety in a religious day-care center, the business open on a day when the law requires competing businesses to be closed, all create competitive disadvantages for other, nonreligious enterprises. Similarly problematic are free exercise claims that assert the right to control others' behavior. Even if a person could, for religious reasons, demand not to identify herself with a number, her claimed right to require others to organize their book-keeping in ways that this religiously observant person values involves her exercising power over others. The issue reoccurs in relation to land use. A religious group's religiously-based decision to use its land in a particular way usually poses a much lesser threat of private power than a claimed right to determine the use of land owned by others. Without trying to resolve these issues—on the facts of actual cases I think several of the judicially-denied religious claims should have prevailed—the point is that various doctrinal moves respond to a concern to limit private power operating under the label of religious freedom.

#### IV. PARALLELS AND DIFFERENCES

The earlier discussion of state action and these free exercise

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27. *Employment Division v. Smith*, 494 U.S. 872 (1990).

and freedom of association examples illustrate the ubiquitous influence of concerns about private power on constitutional interpretation. Still, these problems with private power differ in interesting ways from the problems private power poses in interpreting freedom of the press. These differences become clear when comparing the responsive interpretative moves. In the situations just discussed, the two most common interpretative responses are to expand the right, usually under the rubric of finding state action, or to narrow the right, either by careful sculpting (by the absolutist) or by accepting justified abridgments (by the balancer).

For example, if a use of a constitutionally unprotected power of a private employer or property owner<sup>28</sup> undermines a constitutionally-based right<sup>29</sup> or interest, the private power could be restricted and the right vindicated by an appropriately expansive finding of state action (although more often the liberty, equality or dignitary interest will have to await legislative protection). Likewise, as illustrated in the discussions of freedom of association and free exercise of religion, to the extent that constitutional protection extends to private power, the constitutional right may threaten other important interests—efficient economic activity or public control over the environment or even other constitutionally-based interests.<sup>30</sup> Often the response is either to narrow the right or to countenance its abridgment.

My earlier discussion of private power and the press poses a different issue. The very power that arguably undermines press freedom also claims protection as an aspect of that freedom. Or, to describe it differently, the private power of elements of the press may restrict the freedom of other elements, thereby undermining the functioning of the press in relation to the very performances

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28. I assume little plausibility to most constitutionally-based claims of a right to use commercial property to exercise power over others, for example those rejected by the Court in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980)—but the reach of constitutional protection of private power can be and is contested.

29. In reasoning also reflected in his “ratchet theory” of section five of the Fourteenth Amendment, see, e.g., *Katzenbach v. Morgan*, 384 U.S. 641 (1966), Justice Brennan once noted the Constitution may recognize a right but then not give it full protection—that is, the Constitution may only protect it against “state” action. *United States v. Guest*, 383 U.S. 745, 774-86 (1966) (Brennan, J., concurring in part and dissenting in part). Only such a non-positivist reading of the Constitution permits talk of a private threat to First Amendment rights as opposed to a constitutional interest or value. See, e.g., Jason P. Isralowitz, *The Reporter as Citizen: Newspaper Ethics and Constitutional Values*, 141 U. Pa. L. Rev. 221 (1992).

30. For example, the purported association “rights” of the Junior Chamber of Commerce arguably restricted the equality “interests” of women. A possible press clause analogy is presented by publications that purportedly invade people’s privacy, damage their reputations or cause them emotional distress.

that provide the rationale for constitutional protection. The problem is internal to the conception of press freedom.

The difficulty can be resolved neither by expanded findings of state action, by balancing freedom of the press against other values, nor by steadfast maintenance of press freedom combined with using other means to handle its possible ill effects. Unlike the other examples examined, here recognizing claims made under the rubric of the right arguably undermines the right. Recognizing press freedom, if press freedom means advertisers' and private owners' freedom to pursue their communicative ends, may undermine press freedom if that freedom refers to freedom of the journalistic entity to pursue the communication endeavors that justify the constitutional protection in the first place. The issue requires a choice of conceptions of press freedom. Under one view, greater realization of press freedom certainly permits and arguably calls for<sup>31</sup> the government to intervene, not to restrict private power external to the press, like the power of the employer or shopping center who are restricted in order to further speech, but to influence the institutional organization of the press itself.

This internal conflict has analogies to recent debates about free speech. Some critiques of pornography and hate speech identify an evil resulting from these forms of speech beyond the offensive and injurious expression or the anti-social or criminal behavior that the speech sometimes encourages, whether or not intentionally. Rather, a central evil, according to this argument, is the capacity for socially dominant groups to use this speech to silence socially subordinate groups, to silence women or racial minorities.<sup>32</sup> (Similar silencing claims are sometimes made concerning massive uses of wealth in the political process.) Although I find these arguments in crucial respects empirically unconvincing, if persuasive, they parallel the argument in relation to private power and the press. They

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31. The difference between permitting and requiring government intervention has a clear history in the broadcast arena, where intervention has been permitted but not required. See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (upholding fairness doctrine); *CBS v. FCC*, 453 U.S. 367 (1981) (upholding obligation of broadcasters to allow candidates reasonable [paid] access); *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) (broadcasters have no constitutional obligation to accept paid ads from responsible individuals or groups even though Congress might be able to impose such an obligation).

32. In describing what pornography does, Catharine MacKinnon argues that it "normaliz[es] the terror that enforces silence on women's point of view." It "makes protest inaudible." Thus, "the free so-called speech of men silences the free speech of women." Catharine A. MacKinnon, *Toward A Feminist Theory of the State* 205 (Harv. U. Press, 1989). See also Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 *Tenn. L. Rev.* 291 (1989); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 *Duke L.J.* 431.

would illustrate how protection of private power under the rubric of a constitutional right can itself undermine the right or, at least, the functioning of the right in relation to aspects of the affirmative rationale that justifies protection. Certainly, if empirically convinced by these claims of silencing, the account of private power implicit in the speech might influence interpretative choices relating to the substantive right.

Still, an important difference between the speech cases and the press cases could lead to different interpretative responses. The rights have different sorts of rationales. Speech, association and religion receive constitutional protection (at least in part) as embodiments of collective respect for individual liberty or autonomy. Within liberal constitutional theory, these rights have intrinsic and not merely instrumental value. Of course, the exercise of basic rights can cause problems, even serious harms. But any restriction placed on individual choice within the proper scope of the right is implicitly intolerant of personhood or agent autonomy and is necessarily an abridgment of the right. This point strongly affirms the civil libertarian instinct that asserts that the appropriate collective response should take forms that do not involve suppressing liberty or abridging the right.

In contrast, liberal constitutional theory values institutions, like the press, only instrumentally. The secular value of institutions and their freedom lies only in their service to human interests, broadly defined. Given that a right's scope is related to its justification, the appropriate interpretation choices related to the Press Clause should relate to whether the interpretation promotes a free and independent press that can be expected to best serve its democratic functions.

These two features of press freedom—that private power presents a problem internal to the conception of press freedom and that the Constitution values the press only instrumentally—should influence constitutional doctrine. When a constitutionally protected power center negatively affects other significant interests, usually the government (and private groups) can most effectively support those negatively affected interests in ways that do not limit the offending constitutional right. But that response makes little sense where the problem of private power is internal to the right, because the asserted evil is that the power is crippling the functioning of the right itself. And where the constitutionally protected private power is itself intrinsically valued, modifying the right to take account of the abuse typically contradicts the very rationale of the right. An example is preventing a person from making bad choices



when her interest—or right—is precisely to make decisions, good or bad, for herself. But that objection does not apply when the right has primarily an instrumentalist justification.<sup>33</sup>

Thus, although sources of private power—owners or advertisers—themselves make arguable claims for Press Clause protection, that claim is weakened since their private power involves censorial control over expressive choices made by other portions of the protected institution, choices by other people within the protected institutional framework.<sup>34</sup> It is further weakened given an empirical conclusion that this private power significantly undermines the institution's performance of the roles that justified constitutional protection in the first place. The interpretative response should take the form of instrumentally construing the right in a manner that walks a tightrope between protecting against the twin dangers of abuse by government and by private power. At this point, that interpretative issue should be directly addressed.

#### V. FOUR INTERPRETATIONS OF THE PRESS CLAUSE

Consider four possible doctrinal readings of the Press Clause. First, the guarantee might be read as prohibiting the government from any actions especially directed at the press—a “neutrality” or “wall of separation” requirement analogous to the wall of separation sometimes asserted to separate church and state.<sup>35</sup> This reading would be logical if press freedom were threatened only by government. Government interventions would always be dangerous to, and never required by, the idea of press freedom. Thus, press freedom reasonably could be identified with free enterprise within a relatively unregulated marketplace. Such a wall of separation reading, however, strays far from two centuries of practice involving governmental intervention.

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33. In contrast to rights of free exercise, free speech and freedom of association, but like the Press Clause, the Establishment Clause is best seen through an instrumentalist rather than an autonomy-based lens. Still, despite important parallels, equally important differences between the particular instrumentalist and power concerns justifying these two institutionally-oriented constitutional provisions should shape their interpretation.

34. Justice Hugo Black made the most perceptive judicial comment on this point. For the Court, he reasoned: “It would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. . . . Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.” *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

35. Admittedly, in establishment clause jurisprudence there is a subtle difference between the wall of separation and the neutrality metaphors; this first interpretation of the Press Clause is more like “neutrality.” Still, I will also use the former metaphor because, as an image, wall of separation is more suggestive of the government practice required by this interpretation of the Press Clause.

Throughout our history, often with judicial approval, the government has acted in ways that subsidize the press, frequently with the intent of influencing the press to develop in particular ways. Obviously government policy significantly affects the structure and broadcast content of radio and television. But this has always also been true in respect to newspapers. Especially during the nineteenth century, postal subsidies often made newspapers possible—and the terms of the subsidies greatly affected the nature of newspaper enterprises. Patronage, government advertising and government printing contracts were other major influences purposefully designed to promote a particular array of media enterprises.

Government policy continues to be pervasive and to exercise considerable influence. Probably the most commonly noted example is the Newspaper Preservation Act, special press-oriented legislation that selectively advantages some papers and disadvantages others. A Rand Corporation study concludes that federal legislation, mostly tax laws, not efficiency or market considerations, is the major cause for the continuing trend toward chain ownership of newspapers.<sup>36</sup> Variable postal subsidies continue and they continue to influence the makeup of the press. The White House gives press privileges that obviously amount to a subsidy for the press—a subsidy that lessens the cost of reporting certain types of information and a subsidy differentially granted to some journalists from some media entities but not to others.<sup>37</sup> Many state law examples can also be cited. For example, in 1991, under Governor Pete Wilson's leadership, California adopted a sales tax on newspapers' circulation sales but not their advertising sales—legislation that is almost the exact converse of the legal regime in most European countries, where more enlightened thinking about press policy exists. The California tax scheme creates incentives for newspapers to increase their responsiveness to the wishes of advertisers and decrease their responsiveness to readers.

These examples, some of which have received judicial sanction, just begin to describe the extent to which practice has rejected the wall of separation interpretation of the Press Clause. Given my thesis here, that private power as well as government power pose significant threats to press freedom, rejection of this interpretation has been wise.

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36. James N. Dertouzos and Kenneth E. Thorpe, *Newspaper Groups: Economies of Scale, Tax Laws, and Merger Incentives* (Rand, R-2878-SBA, 1982).

37. As described in *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977), two of the requirements for obtaining a White House press pass are residence in Washington and a regular need to report from the White House. Obviously, many (particularly less established) media entities will not have journalists that meet these criteria.

Three other interpretations either allow or require more direct government intervention. A second, "effects" interpretation would permit government support but not allow laws directed at the press if they have a negative effect on any portion of the press. Under a third, "bad purposes" interpretation, even some burdening or restrictive effects (although not censorship) would be allowed unless the structural regulation was adopted for the purpose of limiting the vitality or freedom of the press. The fourth, most interventionist approach reads the guarantee of freedom to require the government to adopt laws that promote that freedom, that is, promote the effective functioning of some vision of a free press.

I will put aside the fourth approach here. Something of the sort arguably appears in countries that do not have our state action qualification to their constitutional guarantee of a free press. And something like the fourth approach has seen some advocacy in this country, particularly in relation to the claim that the constitution imposes some public access requirements on at least some elements of the press. Nevertheless, this interpretation has received virtually no judicial recognition in this country. Moreover, it may be unwise to expect a constitutional court to be an appropriate body to make the instrumental judgments about how best to further press operations or the normative judgments about exactly what vision of press performance ought to be constitutionally favored.

This leaves the second and third interpretations—both of which allow limited governmental interventions. The second, permitting government intervention but only to support, benefit or subsidize the press, might initially seem most attractive. But if the fear to be alleviated by the constitutional guarantee is improper government influence, which motivated the wall of separation interpretation, the second, "effects" approach does not eliminate the danger. It does not prevent the government from using a carrot—various forms of benefits—to undermine proper press performance. And the carrot, whether in the form of monetary subsidies, selectively granted news scoops, interviews and access, or licenses and permissive exemptions,<sup>38</sup> can be, and historically constantly has been, used to influence media content.<sup>39</sup> Thus, if the only concern were an

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38. When Knight-Ridder's *Detroit Free Press* was seeking approval from Attorney General Edwin Meese to enter into a Joint Operating Agreement (JOA) with *The Detroit News*, both the *Free Press* and Knight-Ridder's *Miami Herald* reportedly "cooled" their criticism of Meese, and Meese cartoons "were prohibited until after he ruled on the JOA." James D. Squires, *Read All About It!* 123 (Times Books, 1993).

39. Mark Hertsgaard suggests that the Reagan administration was more successful using promises of carrots to manipulate the press than the Nixon administration had been using burdens or threats of burdens. Mark Hertsgaard, *On Bended Knee: The Press and the Reagan Presidency* 182 (Farrar Straus Giroux, 1989). More dramatically, the Mexican political es-

overriding fear of government, the second interpretation is inadequate. In contrast, although many contexts will be too ambiguous to justify judicial limitation, the "bad purpose" approach properly helps police objectionable use of carrots.

On the other hand, if a robust, democratic press requires restrictions on uses of private power that undermine press freedom, the second approach is too restrictive. The rationale for the move from the wall of separation approach to an interpretation that allows government support or subsidy is the conclusion that certain governmental interventions help. But this reasoning supports even broader governmental interventions. It endorses the propriety of various regulations directed specifically at the media even if the regulations disadvantage some elements if they are justified as advantaging others. For example, the concern with private power and the view that government intervention can help suggest the propriety of laws directed at the structure and distribution of media ownership, at the organization of control within media enterprises (that is, a media-oriented labor law) and at economic incentives within the media realm as long as the purpose of these laws is to promote, not undermine, media independence and performance.<sup>40</sup>

Of course, such affirmative legislative power can be abused. The third interpretation asserts that the Press Clause primarily prohibits this government abuse. Given judicial review, a constitutional court could police legislative perversions. In addition to outlawing any form of censorship, this interpretation treats as unconstitutional governmental purposes to undermine the press's capacity to perform the functions that provide the rationale for constitutional protection. But other (non-censorial) laws, laws aimed at improving its functioning, especially laws aimed at expanding or strengthening press freedom, are constitutional.

This doctrinal discussion shows that the greater the concern with private power, the greater the appeal of the third, "bad purpose" interpretation and the clearer the inadequacies of the first and second interpretations. If private power were both adequate and

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establishment reportedly achieves extensive control over newspapers almost exclusively by means of cash "advertising" payments. Raymundo Riva Palacio, *The Kept Mexican Press*, Nieman Reports, Summer 1992, at 53.

40. The answer to the question "Who is the press that receives constitutional protection?" could reasonably be the people whose professional activities constitute the press—although possibly more commonly within legal thinking in this country, the press is identified with the owners. The choice between these two answers is not a matter of logic and, I have argued, should be answered contextually on the basis of public discussion. See Baker, *Human Liberty and Freedom of Speech* at 250-71 (cited in note 1). Although the effects analysis arguably rules out legislation based on this public discussion, it is clearly contemplated, although bounded, by the bad purpose interpretation.

not abusive in the context of media production, the wall of separation analysis would have obvious appeal. If private power is not adequate, that is, if the problem is that the market provides the press with inadequate resources, then government support under the second, "effects" analysis might seem appropriate. But if private power is also seen as a threat to democratically needed press performance, the third, "bad purpose" (or possibly the fourth) interpretation is most appealing.

Moreover, I suggest that this "bad purpose" interpretation provides the best understanding of both much historically enacted and accepted law relating to the media and of a range of judicial decisions approving such laws. Only this approach would permit adoption of the Newspaper Preservation Act, limitations imposed uniquely on (some) newspapers restricting their ability to increase their "speech" by owning broadcast facilities, various regulations of utilities such as a requirement that telephone companies operate as common carriers or that Baby Bells not own and originate cable programming. Although this structural area of press law remains in flux, existing constitutional doctrine appears most comprehensible as illustrating a wise response to the problems posed by private power in undermining press freedom.