

Review – Saving the News

Written by Damian Tambini

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DAMIAN TAMBINI, OCT 6 2022

Saving the News: Why the Constitution Calls for Government Action to Preserve Freedom of Speech
By Martha Minow
Oxford University Press, 2021

Around a century ago, a series of US Supreme Court judgements strengthened the first amendment of the US constitution as a bulwark against state interference in public speech. After the second world war, the rules-based liberal democratic order also bolstered free speech through the international human rights standards of the UN and the Council of Europe. The internet, as has been clear for many years, now demands a rethink of freedom of speech. Martha Minow's book seeks to clarify and redefine twentieth century interpretations of the free speech clause of the US Constitution in ways that she sees as necessary to promote more reliable news media capable of sustaining democracy and mitigating our current crisis of trust. The argument — that the state has a positive obligation to promote speech and not merely a negative one to get out of the way, is not in itself new. Alexander Meikeljohn, C.E Baker, Laura Stein, Judith Lichtenberg, Steven Schiffrin, and a long tradition of first amendment scholars have made these arguments in successive phases since the mid twentieth century. What is new is the urgency that technological change gives Minow's argument. Without a new interpretation of the first amendment, she argues, trustworthy news, and as a result, democracy, will remain in their death spiral.

Minow's book should thus be read alongside the work of a growing number of scholars in the US and around the world calling for progressive reinterpretation of the right to freedom of speech. Andrew Kenyon's recent "Democracy of Expression" is another work seeking to advance a theory of free speech that stresses positive responsibilities for state action. Andras Koltay and Jan Oster have set out convincing arguments that European Law at the very least permits and perhaps obliges states to support news media.

The rationale for Minow's re-examination, and what sets it out against most of these analyses, is its focus on the crisis of journalism. This, she argues, should convince US courts to jettison their traditional reticence about positive supports for the media, which she argues are fundamental to saving democracy. Showing that the state has always made laws that impact speech and the press (but do not necessarily 'abridge' it in ways that would contravene the First Amendment), she presents a convincing case that even in the US, the media have always benefitted from tax, distribution and other forms of support. Because the media system is in many ways the product of these public policy decisions, the crisis of news is not an accident of nature, but a failure of the state. By extension, we should jettison a simplistic reading of the First Amendment that falsely prohibits policy support of the media. Rather, government has a positive responsibility to create a media system capable of sustaining democracy.

In this light, the first stage in responding to the crisis of democracy, which many argue has its roots in a crisis of trust in the media, is a new constitutional theory of the media. The theory Minow advances claims that freedom of speech and the press cannot be defined merely by the absence of state control: media regulation is justified in part because it is a necessary condition for the exercise of speech freedom. Minow is thus to be commended for bringing together this literature on the crisis of news (see also Pickard's *Democracy Without Journalism* and Julia Cage's excellent *Saving the Media*) with the literature on speech rights. She is absolutely right that it is time to take on the crisis of media at the most basic level: the constitutional theory of the media. In the US constitution, this is expressed in the rather well-developed area of jurisprudence on the First Amendment.

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Minow sets out to ask whether the First Amendment “permits, prohibits or requires” government support of news industries. Her answer is nuanced (reflecting the uncertainty underlying the first amendment itself), but she ultimately argues — as reflected in her title — that government support is required. “Federal, state and local governments can and indeed should be obliged to act — while remaining as neutral as possible toward content and viewpoint in private speech” (pp. 146-7). What is sometimes less clear is whether she is arguing that it is the First Amendment that requires such support, or whether some other normative imperative does, and the first amendment merely permits state support for the media.

What the book does do rather successfully is destroy the myth that any and all forms of support for the media will necessarily undermine democracy and speech freedom. She does this by tracing the long history of state support for the media which has been deemed compatible with the first amendment (though she neglects some of the recent caselaw in which these very supports have been found incompatible with free speech).

Is this part of a wider intellectual re-assessment of a previously dominant interpretation of the First Amendment? It is indeed, and Minow’s book is likely to emerge as one of the more authoritative and succinct statements of the case. For specialists, this will be a key text. But in the context of this period of global media, counter-globalisation and the splinternet, it is worth asking whether this discussion of the US constitution is of relevance to wider audiences.

The difference with the next cycle of discussions of freedom of speech is that the next one, if it is to be successful, will be genuinely global, because we now live in a genuinely multipolar world, and the US will not be able to impose selective standards through the UN or other international bodies, whilst claiming US exceptionalism through selective abrogation from the key international treaties. Progressives should continue, once again, to press for a positive interpretation of the first amendment in the hope that this supports the development of news media and journalism capable of supporting US democracy in these new environments. Minow is absolutely right that this must go hand in hand with safeguards such as viewpoint neutrality, and that these must be updated.

Much could be done simply by bringing the US in line with the international standards that US policy and NGOs have done so much to support. The action, increasingly, is in supporting genuine and legitimate standards for media and speech freedom that have global ambition. It is private actors, more than states or even courts, and international norms and the ‘Brussels Effect’ (Bradford 2020) that will do most to create these standards.

As they do so, they must address some of the contradictions of the notion of freedom of speech and its relationship to freedom of the media. Above all, if the kind of positive actions to promote the media are to be trusted, the public must have a coherent understanding of what the media are, what they are free from, and to do what. And media support must be subject to transparency and oversight to safeguard media independence. Martha Minow’s book is a crucial step towards understanding this in the US context. The First Amendment has developed doctrinal complexities that render it baroque and distant. Liberal democracies should work together for a simpler and more widely understood formulation: having gifted freedom of speech to the world for modern liberal democracy, the US can re-import the more progressive notion that Minow so keenly, and rightly, desires.

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