International Media Law Reform and First Amendment Agnosticism: Review of Lee Bollinger's *Uninhibited, Robust, and Wide-Open: A Free Press for a New Century*

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Scholars and practitioners in communications law and the First Amendment will recognize Lee Bollinger's status as our most preeminent and thoughtful writer on press freedom. His latest effort, *Uninhibited, Robust, and Wide-Open: A Free Press for a New Century*,[1] is a slim, elegant, and forceful piece of advocacy, taking its title from the most celebrated line in First Amendment jurisprudence,[2] and perhaps in all of

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1. LEE C. BOLLINGER, UNINHIBITED, ROBUST, AND WIDE-OPEN: A FREE PRESS FOR A NEW CENTURY 162–63 (2010).

2. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("[W]e consider this

constitutional law.[3] In the book, Bollinger turns his focus to international law, and on how "[t]o project a U.S. free press system onto the world,"[4] so as "to create a *global* system of a free press for the emerging global society."[5] In broad strokes, Bollinger offers a compelling argument for the need for universal free press principles in the era of globalization, as well as the means by which to achieve them. But in his argument's particulars, Bollinger presents an incomplete analysis and an overriding irony. The incompleteness is in his failure to discuss a number of areas in which other countries' conceptions of the press are irreconcilable with our own, or how to resolve these differences. And the irony is that many of the measures Bollinger proposes that other countries take in adopting First Amendment values would themselves likely not survive First Amendment scrutiny here in the United States.

Part I of this Review will briefly describe Bollinger's project, as well as his discussion of the First Amendment values that animate his vision of a global free press. Part II will raise some implementation problems associated with exporting the United States' free press system that Bollinger fails to give their needed airing. Part III will discuss how comfortably Bollinger's project rests with a vision of the First Amendment most recently articulated by the United States Supreme Court in the 2010 decision *Citizens United v. Federal Election Commission*[6]—a vision that attaches constitutional importance to speech in its own right rather than to the values speech might serve, and that is agnostic as to a speaker's identity or the content of the speaker's message.[7] Part IV concludes with a real-world example that demonstrates some of the practical difficulties

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case against the background of a profound national commitment to the principle that debate on public issues should be *uninhibited, robust, and wide-open* . . .") (emphasis added).

3. Ronald K.L. Collins, First Amendment Ctr., New York Times v. Sullivan*: The Case That Changed First Amendment History*, FREEDOM F., http://catalog.freedomforum.org/SpecialTopics/NYTSullivan/summary.html (last visited Apr. 15, 2011).

4. BOLLINGER, *supra* note 1, at 162–63.

5. *Id.* at 112.

6. 130 S. Ct. 876 (2010).

7. As discussed more fully below, my use of the term "agnosticism" in discussing the Speech and Press Clauses intends to signify an interpretive principle that disavows the determinability of a particular "truth." More simply, it values speech for its own sake, rather than for what that speech might say, who might be speaking, or the effects that speech may have on other speakers or listeners. I know the term is primarily used in religious philosophy to describe an individual who does not take a position as to the existence of a deity, or (more precisely) who believes there is a lack of sufficient proof to lead her to a conclusion on the matter. It has also been used to describe the Constitution. *See, e.g.*, Steven D. Smith, *Our Agnostic Constitution*, 83 N.Y.U. L. REV. 120 (2008). For a use of the term that is closer to mine, see J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 392.

identified in this Review.

I. "PROVIDING THE WORLD" A FREE AND INDEPENDENT PRESS

Bollinger begins *Uninhibited, Robust, and Wide-Open* by establishing three "pillars" of First Amendment jurisprudence—press protection from censorship, no special press rights of access, and press regulation—that shape and support the freedoms the press enjoys in the United States today.[8] As to protection from censorship, Bollinger describes how the Supreme Court's initial First Amendment cases addressed, at first "inauspicious[ly]" but then correctly, the problem of speech that advocated illegal action, caused reputational harm, invaded privacy, potentially prejudiced jurors, or divulged state secrets.[9] These cases collectively stand for the proposition that the First Amendment, "underscored by a passion for a largely unbounded national forum," protects a broad range of speech, including speech by the institutional press.[10] The second pillar, in Bollinger's view, represents a more lamentable line of cases—those that deny the press's newsgathering activity any special constitutional protection.[11] Accordingly, for example, there is no First Amendment right protecting the disclosure of a journalist's confidential source or mandating access to a crime scene.[12] Finally, the third pillar, "[r]egulating the [p]ress to [i]mprove the [p]ress,"[13] affirms the authority of the FCC to impose limits on broadcaster speech and media ownership, protects public broadcasters' speech rights despite their receipt of government subsidies, and declines to qualify the First Amendment rights of Internet speakers.[14]

Turning to the rest of the world, Bollinger next argues that as globalization speeds on and the American press enters the global arena, it will be subject to a number of legal regimes that are well outside of the three pillars' protection. *Lese majesté* laws that criminalize insults of royal family members and heads of state, overprotective or nonexistent access to information laws, website-censoring authoritarian regimes, and "bureaucratic licensing rules" that bar or frustrate foreign correspondents and media outlets all inhibit the free flow of information upon which we have become increasingly dependent in the Internet era.[15] Bollinger

8. *See* BOLLINGER, *supra* note 1, at 12–43 (deriving the three "pillars" from Supreme Court cases).

9. *Id.* at 13.

10. *Id.* at 24.

11. *Id.*

12. *Id.* at 25–27 (quotation omitted).

13. *Id.* at 29.

14. *Id.* at 29–42.

15. *Id.* at 89 (citing Jane Macartney, *Time Out Magazine Banned by China's Censors in*

therefore proposes the need for "a central, overriding system of constitutional protections" "to provide a free and independent press to a world in desperate need of such an institution . . . ."[16]

To implement this system, Bollinger calls on the U.S. Supreme Court to lead in the formation of a global free press by "draw[ing] on the language and concepts in current international conventions and laws,"[17] such as freedom-of-expression-affirming provisions in the *Universal Declaration of Human Rights* and similar agreements.[18] Doing so would establish freedom of expression not as a legal right granted by sovereignty, but rather a natural "right of individual citizens throughout the world."[19] He also calls for a number of other steps the United States should take in "nurtur[ing] a press focused on broader global issues,"[20] such as using public funds to develop a "nationally sponsored media" similar to the BBC in its focus on international reporting.[21] Finally, he explores the potential use of contractual relationships between nations, as manifested in international trade and investment law, to enforce global norms for a free press.[22] By taking these actions, Bollinger claims, the United States can lead in developing increased protections for journalists and speakers worldwide, thus setting off a rising tide of freedom of expression that will lift all boats.

II. THE "FREE PRESS" AND INTERNATIONAL LAW

Bollinger acknowledges that there are a number of implementation problems associated with developing an uninhibited global marketplace of ideas. Most of these problems stem from the disparate levels of protection afforded to the press for its speech here in the United States and abroad. For example, Bollinger mentions the problem of libel tourism, where defamation plaintiffs seek redress against authors and journalists in jurisdictions such as England, where the burden is on the writer to show truth rather than on the plaintiff to show falsity, as is the case in the United States.[23] For obvious reasons, Internet publishing has become a boon to libel plaintiffs. Fortunately, however, domestic courts have refused to apply

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Run Up to Olympics, TIMESONLINE (June 11, 2008), *available at* http://www.timesonline.co.uk/tol/news/world/asia/article4113093.ece).

16. BOLLINGER, *supra* note 1, at 105.
17. *Id.* at 118.
18. *Id.* at 118–19.
19. *Id.* at 119.
20. *Id.* at 131.
21. *Id.* at 134.
22. *Id.* at 145–153.
23. *Id.* at 96–97.

the law of these countries or enforce their judgments, finding them inconsistent with the First Amendment. In *Bachchan v. India Abroad Publications Inc.*, for example, a New York state trial court held that England's lack of a First Amendment equivalent meant that "[t]he protection to free speech and the press embodied in that amendment would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded the press by the U.S. Constitution."[24] But Britain has shown some interest in statutory fixes to its libel regime that would raise plaintiffs' burden of proof and create a speech-protective qualified public interest privilege.[25] Additionally, over the past ten years, many countries have decriminalized libel, or at least removed the prospect of imprisonment for publication crimes.[26] So, in this sense, the United States' more protective model of speech rights is already taking hold, or at least being considered, in other parts of the world.

But there are other areas where the incompatibility between other countries' conceptions of a free press and our own is far more intractable, in part because the same justifications—or "pillars"—lead other countries to draw opposite conclusions than those reached here in the United States.

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24. Bachchan v. India Abroad Publ'ns Inc., 585 N.Y.S.2d 661, 665 (N.Y. County Sup. Ct. 1992); *see also* Sarl Louis Feraud Int'l v. Viewfinder Inc., 406 F. Supp. 2d 274, 285 (S.D.N.Y. 2005 (refusing to enforce a French libel judgment that was "incompatible" with the First Amendment); Ellis v. Time, Inc., No. Civ. A. 94-1755, 1997 WL 863267, at *13 (D.D.C. Nov. 18, 1997) (prohibiting application of British libel law); Matusevitch v. Telnikoff, 877 F. Supp. 1, 2 (D.D.C. 1995) (declining to enforce British libel judgment); Abdullah v. Sheridan Square Press, Inc., No. 93 Civ. 2515 (LLS), 1994 WL 419847, at *1 (S.D.N.Y. May 4, 1994 (finding that "establishment of a claim under the British law of defamation would be antithetical to the First Amendment protections accorded the defendants").

25. *See, e.g.*, *Libel Law: Improving a Reputation*, THE ECONOMIST (May 27, 2010), *available at* http://www.economist.com/node/16219883. The proposed bill, introduced in May of 2010 by Lord Anthony Lester in the House of Lords, can be found at Defamation Bill, 2010–11, H.L. Bill [55] (U.K.), *available at* http://www.publications.parliament.uk/pa/ld201011/ldbills/003/11003.1-7.html#j01.

26. Countries that have decriminalized defamation in the past decade include Ukraine (2001), Ghana (2001), Sri Lanka (2002), Bosnia and Herzegovina (1999), Georgia (2004), Moldova (2004), Ireland (2009), Romania (2009), and the United Kingdom (2009). *See, e.g.*, ORG. FOR SEC. & CO-OPERATION IN EUR., LIBEL AND INSULT LAWS: A MATRIX ON WHERE WE STAND AND WHAT WE WOULD LIKE TO ACHIEVE 34, 63, 107, 165 (2005); *Helsinki Comm'n Hearing on the Threats to Free Media in the OSCE Region*, 6 (June 9, 2010) (statement of Dunja Mijatovic, Rep. on Freedom of the Media, Organization for Security and Cooperation in Europe), http://www.osce.org/fom/68432; Alexis Arieff, *Senegal: Freedom ... With Limits*, COMMITTEE TO PROTECT JOURNALISTS (Jun. 6, 2005), http://www.cpj.org/reports/2005/06/senegal-05.php; *Indian Government Takes First Step Toward Decriminalizing Defamation*, GLOBAL JOURNALIST (Feb. 2, 2011), http://www.globaljournalist.org/worldwatch/2011/02/india/indian-government-takes-first-step-toward-decriminalizing-defamation/.

For example, the U.S. Supreme Court has found rights of reply in the print context to be facially incompatible with the First Amendment. In *Miami Herald v. Tornillo*, Chief Justice Burger, writing for a unanimous Court, noted that "implementation of a remedy such as an enforceable right of access"—particularly because it required "governmental coercion" for its implementation—"at once brings about a confrontation with the express provisions of the First Amendment" and could not be reconciled with the guarantee of a free press.[27] But nearly every democracy outside of the United States grants story subjects either a constitutional or statutory right—implemented by "government coercion" (and by "government coercion" I mean only law, just as the *Tornillo* Court meant it)—to reply to print stories written about them.[28] So too does the *American Convention on Human Rights*, an international human rights instrument which Bollinger advocates the United States should ratify.[29] In addition, tribunals applying the international freedom of expression law upon which Bollinger seeks to rely have read a right of reply into nominally press-protective agreements such as the *European Convention on Human Rights*.[30] According to these tribunals, one justification for doing so is that a right of reply ensures a diversity of opinion on matters of public interest.[31]

There are other examples. Even though the Inter-American Court of Human Rights found the licensing of journalists to be incompatible with freedom of expression back in 1985, a number of countries in the world, including a few countries that have submitted to that court's jurisdiction, impose some form of licensing regime for domestic or foreign journalists, newspapers, or the importation of books and films.[32] So too do some of the international conventions Bollinger characterizes as speech-protective.[33] Foreign investment in media outlets is not nearly as universal a free-press principle as Bollinger describes; he bemoans limitations India has placed on ownership stakes in its newspapers as limiting the free flow of

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27. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 254 (1974).

28. *See, e.g.*, Kyu Ho Youm, *The Right of Reply and Freedom of the Press: An International and Comparative Perspective*, 76 GEO. WASH. L. REV. 1017, 1018–20 (2008).

29. American Convention on Human Rights art. 14, Nov. 21, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 99; *see also* BOLLINGER, *supra* note 1, at 143.

30. *See, e.g.*, Melnychuk v. Ukraine, 2005-IX Eur. Ct. H.R. 6–7.

31. *Id.* at 7; *see also* Ediciones Tiempo S.A. v. Spain, App. No. 13010/87, 62 Eur. Comm'n H.R. Dec. & Rep. 247, 254 (1989).

32. *See, e.g.*, Mark Fitzgerald, *Latin America Continues to 'License' Journalists*, EDITOR & PUBLISHER (Jan. 12, 2004), http://www.editorandpublisher.com/Headlines/latin-america-continues-to-license-journalists-58922-.aspx.

33. For example, the *European Convention on Human Rights* allows for licensing of "cinema enterprises." *See* Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 222.

information across borders, for example, without acknowledging that the United States imposes similar limitations in the broadcast sector.[34] These are difficult problems. By failing to address them, Bollinger's roadmap for implementing a worldwide First Amendment takes a view from too high a level.

Given that these compatibility issues are mostly ones of sovereignty, Bollinger naturally must rely for the most part on judges' interpretation of law, rather than on legislatures' promulgation or on executives' implementation of it. After all, the Third Soviet Constitution of the U.S.S.R. included not only the right to "freedom of speech [and] of the press," but also the right to "develop[] television and radio, . . . book publishing and periodic press."[35] But how can press-protective principles be "imported," as Bollinger calls it, by other jurisdictions and adopted as rules of decision in their own courts? Will it be through the "encouragement" Bollinger believes will come if the United States subjects itself to the "international oversight" of human rights law?[36] Bollinger recognizes the enforceability problems with international instruments such as Article 19 of the *International Covenant of Civil and Political Rights* (ICCPR) and the *Universal Declaration of Human Rights*, both of which state a right to "seek," "receive," and "impart" information.[37] He declines to mention, however, that the ICCPR seems to not serve as much of a deterrent to countries like Egypt, Turkmenistan, Venezuela, and Somalia, which have been parties to the Covenant for decades and have been jailing journalists for almost as long.[38] If some countries continue to repress the press despite their status as parties to Article 19, it is difficult to see why they would act any differently in the face of encouragement from the United States, let alone follow its example.[39]

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34. BOLLINGER, *supra* note 1, at 89–90; 47 U.S.C. § 310 (1996) (forbidding the grant of station licenses to various foreign entities or domestic corporations with substantial foreign ownership).

35. KONSTITUTSIIA SSSR (1977) [KONST. SSSR] [USSR CONSTITUTION] arts. 50, 46.

36. BOLLINGER, *supra* note 1, at 144.

37. *Id.* at 118–19.

38. *See, e.g.*, *Egypt Journalists Get Jail Terms*, BBC NEWS, http://news.bbc.co.uk/2/hi/5118876.stm (last visited Apr. 15, 2011); Louise Hallman, *Venezuelan Journalist Fined, Jailed and Banned from Working, After Accusing Mayor of Nepotism*, INT'L PRESS INST. (June 18, 2010), http://www.freemedia.at/singleview/4999/; *Two Journalists Get Long Jail Terms in Human Rights Crackdown*, REPORTERS WITHOUT BORDERS (Aug. 25, 2006), http://arabia.reporters-sans-frontieres.org/article.php3?id_article=18660; *Somali Journalist Jailed for Airing Interview*, RTÉ NEWS, http://www.rte.ie/news/2010/0814/somalia.html (last visited Apr. 15, 2011).

39. Bollinger also calls for the Supreme Court to "develop a broader newsgathering right in the context of international or global government actions." BOLLINGER, *supra* note 1, at 125. But he gives no insight as to how such a right would be defined or enforced. To

III. EXPORTING THE AGNOSTIC FIRST AMENDMENT

At its core, Bollinger's project is one of international law, and it should be judged as such. But the project's animating principle is a particular vision of the First Amendment's protection of the press. It is thus worthwhile to consider whether the current First Amendment can support the weight Bollinger asks it to bear. The Supreme Court's most robust discussion of the First Amendment's application to the media in recent years—and the most definitive declaration of First Amendment principles by the Roberts Court—came in a campaign finance case, last term's *Citizens United.* Like the examples discussed above, the case implies some incompatibility between the First Amendment's present meaning and the First Amendment Bollinger seeks to export to the rest of the world.

The statute at issue in *Citizens United*, which barred corporations and unions from spending general treasury funds on a broadcast, cable, or satellite communication mentioning a candidate within sixty days of a general election or thirty days of a primary election, included an express carve-out for media companies.[40] In finding the statute unconstitutional, the majority overruled *Austin v. Michigan Chamber of Commerce*,[41] which upheld a Michigan state statute that prohibited corporations from using treasury money to support or oppose candidates in elections because of corporations' potentially corruptive influence on elections, made possible through the accumulation of wealth effectuated by the corporate form. As support for rejecting *Austin*, both the majority and the concurrence noted that under *Austin*'s theory of the First Amendment, large media corporations enjoyed protection to speak about elections under the statute—including endorsements—only as a matter of legislative grace. Justice Kennedy, for example, stated that the rationale relied upon in *Austin* "could ban political speech of media corporations," and "wealthy media corporations could have their voices diminished to put them on par with other media entities."[42] In concurring, Chief Justice Roberts similarly argued that the rationale would "apply most directly to newspapers and other media corporations," because "[t]hey have a more profound impact

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take one example, Bollinger's proposed right would seem to allow a U.S. journalist working in Iraq to demand access to a meeting in Duhok between the U.S. Secretary of State and the head of the Kurdish Regional Government. One wonders what court the journalist would go to when the Diplomatic Security Service bars him from the meeting room, or what type of relief the journalist would seek after being barred. In the end, even if speech is no longer limited by borders, jurisdiction continues to be.

40. *See* Citizens United v. Fed. Election Comm'n, 130 S.Ct. 876, 905 (2010) (citing 2 U.S.C. §§ 431(9)(B)(i), 434(f)(3)(B)(i) (2006)).

41. 494 U.S. 652 (1990).

42. *Citizens United*, 130 S.Ct. at 905.

on public discourse than most other speakers."[43]

As a matter of Press Clause jurisprudence, however, the majority and concurring Justices' concerns about the media's speech rights are red herrings. As Justice Stevens pointed out in his dissent, *Austin* itself distinguished media endorsements from speech-related expenditures by other corporations.[44] More importantly, however, in their rush to defend the rights of the press, neither Justice Kennedy's majority opinion nor the Chief Justice's concurrence makes any mention of the long line of precedent that would find unconstitutional a statute barring press discussion of election-related speech during the period leading up to a primary election—a principle that Justice Kennedy himself recognized in *Austin*.[45] A statute that sought to "ban political speech of media corporations"[46] by, for example, prohibiting newspapers or television stations from spending funds to pay for endorsement-associated expenses would run afoul of the *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*[47] and *Arkansas Writers' Project, Inc. v. Ragland*[48] line of cases, which would find the statute had impermissible "censorial effects" that would "deter the exercise of First Amendment rights."[49] *Mills v. Alabama* held that statutes that do not single out the press but still have the effect of "punish[ing] a newspaper editor for doing no more than publishing an editorial on election day urging people to vote a particular way in the election" violate the First Amendment,[50] which directly refutes the concerns of the majority and concurrence. A prosecution for violating any such "ban" would likely be subjected to *Sullivan*'s actual malice standard for laws regarding speech concerning public officials.[51] In addition, the government's attempts to

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43. *Id.* at 923 (Roberts, C.J., concurring).

44. *Id.* at 976 (Stevens, J., dissenting). In fact, the Michigan statute at issue in *Austin* included an exemption for media companies that the Court upheld against an equal protection challenge. *Austin*, 494 U.S. at 666–68. It thus makes little sense to find that *Austin*'s rationale would allow the prosecution of media companies for political speech when *Austin* itself addressed and rejected the possibility.

45. *See Austin*, 494 U.S. at 712 (Kennedy, J., dissenting) ("It is beyond peradventure that the media could not be prohibited from speaking about candidate qualifications. *The First Amendment would not tolerate a law prohibiting a newspaper or television network from spending on political comment because it operates through a corporation*.") (citing Mills v. Alabama, 384 U.S. 214, 218–20 (1966)) (emphasis added).

46. *Citizens United*, 130 S.Ct. at 905.

47. 460 U.S. 575 (1983).

48. Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987).

49. *Minneapolis Star & Tribune Co.*, 460 U.S. at 588 (internal quotation omitted).

50. *Mills*, 384 U.S. at 218 (finding punishment of newspaper endorsement author under Alabama Corrupt Practices Act violated First Amendment).

51. *See* Garrison v. Louisiana, 379 U.S. 64, 67–75 (1964) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964)) (discussing that the Constitution limits state

enjoin a media outlet from making an endorsement prior to an election pursuant to enforcing such a ban would be struck down as a prior restraint.[52]

If these hypothetical prosecutions sound like they are far off from any First Amendment world that you might recognize, it is because they are. By exposing the press to harms it does not face and extending protections to the press that it does not need, *Citizens United*'s high-spirited defense of the institutional media is, in the end, mostly smoke and mirrors. But the case does stand for a proposition that is relevant to Bollinger's project: the notion that the value of the First Amendment lies in its protection of *the act of* speech, regardless of its content. This content agnosticism has its roots in a number of Supreme Court Press Clause opinions, many of which Bollinger identifies. Examples include Justice Brennan's separate opinion in *Nebraska Press Ass'n v. Stuart*, which noted that even if the press were "arrogant, tyrannical, abusive, and sensationalist, . . . the decision of what, when, and how to publish is for editors, not judges,"[53] and Justice Douglas's dissent in *Branzburg v. Hayes*, in which he denounced the "amazing position that First Amendment rights are to be balanced against other needs or conveniences of government."[54]

This agnosticism is in tension with another First Amendment value that the Speech and Press Clauses have long been thought to serve and upon which Bollinger heavily relies: the public's right to know. In *Pell v. Procunier*, for example, the Court found that reporters had no First Amendment-based right to have face-to-face interviews with prison inmates.[55] Three Justices dissented, basing their disagreement not on the reporter's right to conduct the interview or even write the story, but rather on the public's right to read it: "[The prison's ban on press interviews with

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power to impose sanctions for speech concerning public officials to those statements made with actual malice).

52. New York Times Co. v. United States, 403 U.S. 713, 714 (1971). It also bears mentioning that despite the *Citizens United* majority's clarion call for press freedom, one member seems unperturbed at the possibility of depriving the institutional press of its previously recognized First Amendment rights. *See, e.g.*, John W. Dean, *Justice Scalia's Thoughts, and a Few of My Own, on* New York Times v. Sullivan, FINDLAW (Dec. 2, 2005), http://writ.news.findlaw.com/dean/20051202.html (quoting Justice Scalia as implying that *New York Times v. Sullivan* was wrongly decided). But to the degree Justice Scalia criticized *Sullivan* for granting the press special privileges, the interpretation underlying his criticism is inconsistent with his own opinions. *See id.* (quoting Scalia as stating "[t]he press is the only business that is not held responsible for its negligence"); Citizens United v. Fed. Election Comm'n, 130 S.Ct. 876, 927–28 n.6 (2010) (Scalia, J., concurring) (noting that the Press Clause protects printing, not the institutional press).

53. 427 U.S. 539, 613 (1976) (Brennan, J., concurring).

54. 408 U.S. 665, 713 (1972) (Douglas, J., dissenting).

55. Pell v. Procunier, 417 U.S. 817 (1974).

inmates] is an unconstitutional infringement on *the public's right to know* protected by the free press guarantee of the First Amendment."[56] Relatedly, *Red Lion* upheld the now-discarded Fairness Doctrine against a First Amendment challenge from a broadcaster who claimed it infringed on his speech rights.[57] The Court rejected the broadcaster's claim that the Doctrine constituted forced speech, because in the scarce speech context of radio, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[58]

Red Lion demonstrates the tension between a First Amendment theory that values speakers and one that values the receipt of speech. If the value of speech is in an uninhibited right to speak, then a listener's right to receive the speech will always be satisfied; this is so because the fulfillment of the listener's right is a result to be produced, rather than an independent value that needs its own protection. If, on the other hand, a speaker can be deemed to cause interference in some way with the greater value of listeners' receipt of speech, then the speaker's right could theoretically be diminished. To apply *Citizens United*'s agnostic theory to an extreme case, constitutional values should be untroubled if a corporation or union bought every available advertisement on every available broadcasting station and newspaper in a particular market. The *Citizens United* dissenters, however, would view this result as trampling on a value—the public's right to hear all sides of political debates—that the First Amendment was intended to preserve. Another, more realistic, example demonstrating the tension is the Fairness Doctrine. A First Amendment agnostic would find the doctrine unconstitutional on its face for its forcing of speech onto broadcasters, while a consequentialist like Bollinger would balance the harms it causes in suppressing speech against its benefits in facilitating the airing of many sides of a given issue. Indeed, Bollinger expressly calls for the Fairness Doctrine's return.[59]

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56. *Id.* at 841 (Douglas, J., dissenting) (emphasis added).

57. Red Lion Brdcst. Co. v. FCC, 395 U.S. 367 (1969).

58. *Id.* at 390.

59. *See* BOLLINGER, *supra* note 1, at 126. For a seeming rejection of the consequentialist approach, see United States v. Stevens, 130 S. Ct. 1577, 1585 (2010). ("[The First Amendment] does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs."). The same Justices who decided *Stevens* by an 8–1 vote later split 5–4 in *Citizens United*. But there is little doubt that the Justices dissenting in *Citizens United* engaged in an "ad hoc balancing of relative social costs and benefits" of corporate speech. *Id.* Perhaps the *Citizens United* dissenters are more accurately described as fainthearted agnostics who balance only when they view the First Amendment costs as sufficiently significant.

This tension is more than academic, especially for Bollinger's project. While *Citizens United* casts the majority of the current Supreme Court as free speech agnostics, Bollinger is firmly entrenched in the consequentialist camp. In setting out a "framework for how to think about the press . . . in the twenty-first century,"[60] he advocates requiring broadcasters "to sell time" and "provide a certain amount" of free on-air time "to those wishing to express their views about public issues" and requiring or encouraging "broadcasters to cover international and global issues," despite decades of court and FCC precedent barring the imposition of such requirements.[61] He calls for significant, systematic public investment in media outlets, including federal subsidies for foreign bureaus, and says courts should have the power to force cable systems to carry foreign news channels such as Al Jazeera in English.[62] In addition, he argues that the First Amendment may even "*require*" the government to disperse media ownership in the interest of maintaining a free press,[63] a position supported by a number of the international judicial bodies with which Bollinger seeks affinity.[64]

Whether these policies would result in a demonstrably better or freer media is beside the present point (though I have my doubts). What they undoubtedly express, however, is a content preference, and a determination on Bollinger's part that some decisions as to what media cover should not be left entirely to individual editorial discretion. Further, based on these speech proscriptions in the name of a greater good, there is no reason to believe Bollinger would find rights of reply incompatible with the First Amendment values he seeks to export—in other words, Bollinger would seem to think that *Tornillo* was wrongly decided.[65] One therefore cannot

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60. BOLLINGER, *supra* note 1, at 115.

61. *Id*. at 128–29; *see* FCC v. WNCN Listeners Guild, 450 U.S. 582, 585 (1981) (upholding the FCC's policy statement in which it concluded that FCC review of program formats does not serve the public interest); Univision Comm. Inc., *Memorandum Opinion and Order*, 22 F.C.C.R. 5842, para. 28 (2007) ("[With rare exception,] licensees are afforded broad discretion in the scheduling, selection and presentation of programs aired on their stations, and the Commission will not substitute its judgment for that of the station regarding programming matters.").

62. *See* BOLLINGER, *supra* note 1, at 130–37.

63. *Id.* at 60.

64. *See, e.g.*, Informationsverein Lentia v. Austria, 276 Eur. Ct. H.R. 6, ¶¶ 38–44 (1993); *see also* Written Comments of the Open Society Justice Initiative at ¶¶ 4–13, 17–31, *Centro Europa 7 S.R.L. v. Italy*, App. No. 38433/09 Eur. Ct. H.R. (March 2010) (quoting a number of European court decisions holding, *inter alia*, that "state regulation will likely continue to be constitutionally required to safeguard pluralism of viewpoints and freedom of broadcasting").

65. Bollinger reconciles *Red Lion* and *Tornillo* in *Uninhibited, Robust, and Wide-Open* and elsewhere by arguing that "under the First Amendment it is not necessary that all communication technologies be structured identically, that there are merits to having multiple approaches to a vigorous press, and that having multiple approaches yields benefits

help but wonder if Bollinger's actual vision of the First Amendment, at least in part, is that of a Western European consequentialist rather than of an American agnostic, which is an odd mindset for a Press Clause exporter.

IV. CONCLUSION

I end with an anecdote that I believe demonstrates the difficulties of implementing Bollinger's vision in the way he suggests. In February 2007, I represented a team of media scholars and practitioners working on a press reform project in Rwanda, where fifteen years earlier media outlets had facilitated and encouraged genocide, first by spreading divisionist ideology and then by reading out the names and hiding places of Tutsis who were taking cover from machete-wielding Hutu *genocidaires*.[66]

The draft media law my colleagues and I had reviewed as part of this reform project contained a number of expression-unfriendly measures, including a licensing requirement for journalists. Like any good free speech advocate, I told the regulators, legislators, and cabinet members with whom I met that such a requirement was inimical to freedom of expression. One minister listened, politely waited for me to finish, and responded to my soliloquy with a question.

"Is it correct that your country requires you, as an attorney, to be licensed?"

"Yes," I replied.

"And what of doctors? Are they required to be licensed as well?"

"Yes," I responded again. Like any able attorney, I attempted to parry the minister's point with a distinction. "But I need licensure as an attorney, because if I make a mistake, someone can lose money or be imprisoned. And a doctor needs licensure because if he makes a mistake, someone could die."

"And what is the difference between your American doctor and a Rwandan journalist?"

The minister's attempt at enlightenment did not trigger in me a full consequentialist conversion, and subsequent actions by the Rwandan government have demonstrated that self-preservation, more than national

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of experimentation . . . ." BOLLINGER, *supra* note 1, at 129. *See generally* LEE C. BOLLINGER, IMAGES OF A FREE PRESS (1997). In addition to being a classically consequentialist statement, it is difficult to see how the press can take much comfort in a First Amendment that follows "multiple approaches."

66. For more information on the Rwandan genocide and the media's role in it, see generally THE MEDIA AND THE RWANDAN GENOCIDE (Allan Thompson ed., 2007). For more information on the Rwandan Media Reform Project, see *We Wish to Inform You*, ON THE MEDIA (Mar. 23, 2007), http://www.onthemedia.org /transcripts/2007/03/23/04 (click on "Download MP3" or press the "Play" icon).

security, may explain the motivation behind its suppression of the press.[67] But his argument demonstrates that media law, like any other body of law, is a product of context, and efforts to reform it in individual countries must take that context into account. Press protection in the United States can be a beacon in completing that important work, but it cannot be the sole yardstick against which those countries' efforts will be measured.

Even if Bollinger's prescriptions for a global free press are in the end not fully formed or argued, he performs a great service by articulating the links between a free press, democratic stability, and self-fulfillment, and by placing these links alongside those interconnecting the modern world. Freedom of information, as he notes, is not only "the key to securing other rights and to serving other ends"—it also both "prevent[s] the worst of human tragedies . . . and . . . make[s] the most of human relationships."[68] This is so because, as Bollinger demonstrates, "in general people *behave better* when they *know more*."[69] Bollinger's sanguine and insightful book reminds us that even in today's vast, differentiated, but interconnected world, liberty, stability, and democracy ride in on the front pages of newspapers, over the broadcast airwaves, and across the network of the Internet—and not on the backs of bombs.

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67. *See, e.g.*, *Rwanda Shuts Critical Papers in Run-up to Presidential Vote*, COMMITTEE TO PROTECT JOURNALISTS (Apr. 13, 2010), http://cpj.org/2010/04/rwanda-shuts-critical-papers-in-run-up-to-presiden.php.

68. BOLLINGER, *supra* note 1, at 113, 115.

69. *Id.* at 113.