

Utilitarianism and Freedom of Speech

- Why and how broadcasting should be regulated -

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I. UTILITARIANISM AND FREEDOM OF SPEECH

This paper considers the questions of how and why broadcasting should be regulated with respect for freedom of speech in view of utilitarianism.

The fundamental assertion of utilitarianism is that the only justifiable criterion of morality is the maximization of the aggregate happiness of society as a whole. According to Jeremy Bentham, “the greatest happiness principle” is “the standard of right and wrong in the field of morality in general, and of Government in particular.”¹⁾ From this it follows that all other goods, if any, have only instrumental, as opposed to intrinsic, value.

From the utilitarian viewpoint, freedom of speech can therefore be a good only in terms of its instrumental value. In this regard, consider the so-called marketplace of ideas theory usually associated with John Stuart Mill. As generally understood, this theory holds that freedom of speech should be protected because it enhances the attainment of truth. Freedom of speech, in this view, is thus an instrument for maximizing the amount of truth available to society as a whole.

Admittedly, the extent to which this theory should be taken at face value is questionable. From

1) Preface to the second edition of JEREMY BENTHAM, *A FRAGMENT OF GOVERNMENT*, in *THE COLLECTED WORKS OF JEREMY BENTHAM* (J.H. Burns and H.L.A. Hart eds., Athlone Press, 1977), at 509.

a relativistic point of view, that is, a theory that defines those ideas that attract the greatest number of adherents as true,²⁾ the above theory amounts to a tautology. Yet Mill himself can not be understood to take such a relativistic viewpoint, and if truth can be determined objectively, that is, irrespective of what most people believe, then the notion of a marketplace of ideas that determines the truth is not very plausible. Such a marketplace is particularly implausible in today's world, in which diverse academic disciplines have become so technical that most people have only a scarce idea of what is going on in them. Mill's argument that the marketplace of ideas leads towards the truth should be understood to concern not facts or logic but philosophical ideas to which the concept of "truth" does not apply. Mill can thus be interpreted to argue for a pluralistic and competitive forum for thoughts that may not necessarily lead to a greater amount of truth, but nevertheless promote a democratic and tolerant society.³⁾

Instrumental lines of reasoning can also be discerned in contemporary views on the value of freedom of speech; broadly speaking, two types of rationales for protecting free speech — one framed in terms of the public good, and the other in terms of autonomy — are most commonly put forward today.

According to arguments of the first type, freedom of speech should be valued highly because it produces certain public goods, such as a properly functioning democratic process and the dissemination of basic information, that are beneficial not only to right-holders but to all members of societies in which the right to free speech is generally respect-

ed.⁴⁾ On the basis of such public goods, a privileged position among constitutionally protected rights is often accorded freedom of speech when judiciaries exercise their powers of constitutional review.

In contrast to arguments of this type, rationales for freedom of speech based on autonomy place the individual at the centre. According to such arguments, freedom to communicate one's ideas is a necessary pre-condition for independent thought, itself a necessary pre-condition for personal autonomy. To deny a person freedom of speech thus amounts to denying that she is a reasonable, independent individual who has the ability, like other individuals, to decide for herself what is right and good. It is on this basis that some scholars argue that freedom of speech sometimes trumps goal-based policy decisions justified by their utility to society.⁵⁾ The question of whether rights can trump utility lies beyond the scope of this inquiry, but even if one assumes that they can, one can safely conclude from the preceding argument that only individuals are qualified to claim rights as trumps, because only individuals can enjoy autonomy.⁶⁾

Hence, corporations such as newspaper companies can be entitled to freedom of speech only to the extent that granting them this freedom benefits society as a whole. This holds particularly true in the case of the mass media, and it follows that the freedom of speech of the mass media can therefore be restricted not only in cases where it clashes with the human rights of individuals, such as the right to privacy, but also where restricting it provides the greatest benefit to society as a whole.

2) A similar view was expressed by Oliver Wendell Holmes in his dissenting opinion in *Abrams v. U.S.*, 250 U.S. 616, 630-631 (1919).

3) See ERIC BARENDT, *FREEDOM OF SPEECH* 10 (2nd ed., Oxford University Press, 2005).

4) See Joseph Raz, *Free Expression and Personal Identification*, 11 OXFORD JOURNAL OF LEGAL STUDIES 303(1991).

5) E.g., RONALD DWORKIN, *A MATTER OF PRINCIPLE* ch.18 (Harvard University Press, 1985).

6) The author doubts that the idea of rights as trumps can even be a subject of argumentation or proof. To borrow Joseph Raz's useful terminology, the idea presents a case of "constitutive incommensurability", in the sense that only by committing oneself to the belief that some rights are so essential for individual autonomy that trade-offs between these rights and utility to society as a whole are prohibited can one acquire the ability to view individuals as equal and autonomous beings. Judgment of the non-comparability of individual autonomy and social utility is itself constitutive of the ability to regard individuals as autonomous. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 345-353 (Clarendon Press, 1986).

Let us keep this point in mind in considering why and how broadcasting should be regulated. In the following sections, the broadcasting system in Japan serves as a case for examining these issues.

II. THE BROADCASTING SYSTEM IN JAPAN

Japan's broadcasting system has two defining characteristics. First, both the content of programming and the organizational structure of Japanese broadcasters are extensively regulated, in contrast to the print media, which are not subject to such heavy regulation. In this regard, the Japanese broadcasting system is not very different from the systems in Great Britain and the United States.⁷⁾

Secondly, Japan's broadcasting system comprises both a powerful public broadcasting network and commercial networks that operate side by side; in this regard, the Japanese system resembles more closely the system of Great Britain than that of the United States. On its public domestic networks, NHK (Nihon Hōsō Kyōkai, or the Japan Broadcasting Corporation), operates two terrestrial TV channels, two satellite TV channels,⁸⁾ and several radio

channels; NHK derives its revenue from receiver's fees, the equivalent of license fees of the BBC. Japan's commercial broadcasters comprise four major TV networks and three major radio networks, all of which depend upon advertising fees as their main source of revenue.

Article 21 of the Japanese Constitution of 1946 provides for freedom of expression, and the same clause prohibits all forms of governmental censorship. Moreover, it is generally held in Japan that freedom of expression should be protected with special care as it is essential to the proper functioning of representative democracy. The question, therefore, of whether or not the two characteristics of the Japanese broadcasting system described above entail the abridgement of freedom of expression is a crucial one. Following a view widely held in a number of Western countries, the conventional wisdom in Japan is to favour an approach to regulation that strongly focuses on broadcasting, justifying this on the basis of two circumstances: first, that broadcasting has been dependent upon the scarce resource of radio spectrum; and secondly, that broadcasting has exerted a particularly strong social influence.⁹⁾

However, contrary opinion has been mounting

7) More specifically, under the Japanese Broadcast Act, broadcasters are obligated to follow standards for compilation of programs that provide for maintaining political impartiality, among other matters (art. 3-2), and to have a Consultative Organization on Broadcast Programs (art. 3-4).

8) The number of the households able to view digital satellite broadcasting exceeded 30 million as of the end of October 2007 (NHK BROADCASTING CULTURE RESEARCH INSTITUTE ed., *NHK DATABOOK ON WORLD BROADCASTING 2008 (NHK DATABOOK SEKAI NO HŌSŌ 2008)* 10 (NHK Publishing, 2008)).

9) The traditional rationales for regulating broadcasting, following from these circumstances, may be summarized as follows. First, in order to avoid interference and otherwise manage the constraints imposed by the physical characteristics of radio waves, some public authority is needed to regulate the use and users of radio spectrum. Because the spectrum available for well-regulated use is extremely scarce compared to the number of prospective users, it is necessary not only to select licensees, but also to regulate the contents of their broadcasts, if the radio spectrum is to be used effectively and appropriately, from the viewpoint of public interest. It is also generally believed that in order to ensure the availability of diverse views and information, the need arises to prevent the formation of monopolies and to regulate consolidation in the broadcasting industry, as well as to require individual broadcasters to ensure that their programming is properly balanced in subject matter, that it is politically unbiased, and that issues are discussed and clarified from diverse points of view.

Secondly, broadcasting exerts an especially pronounced influence on society. In contrast to print media, TV and radio broadcasts can directly enter private households to convey information in such powerful forms as moving pictures and sound. Moreover, since viewers/listeners can watch or listen to broadcasts without any positive effort on their part, TV and radio broadcasts virtually hold them in the position of a captive audience. The social impact of the broadcast media is amplified even further by the power of radio waves to reach their entire broadcast area both instantaneously and simultaneously. The increased need for regulations aimed at ensuring diversity of information follows from this argument; on the other hand, however, since broadcasting is uniquely accessible to children (even those too young to read), regulations to eliminate programs that are indecent, if not obscene, are also necessary.

in recent years regarding the received rationales for regulating broadcasting. First, recent technological developments have increased the range and usability of frequencies available for broadcasting; moreover, the scarcity of broadcasting spectrum has also been substantially mitigated by the emergence of various new media such as satellite TV and MVDS. The social influence of broadcasting, too, has become more diffuse with the diversification of the media. Thus, even if the conventional rationales for regulation remain valid, it is no longer appropriate to regulate all types of broadcasting uniformly.

Furthermore, certain arguments have become quite influential that cast doubt on the very validity of regulatory rationales based on scarcity of spectrum or unique social influence.¹⁰⁾ For example, one can not directly conclude from the premise that radio waves are scarce that the selection of broadcasters should be made by some public authority; broadcasters might alternatively be selected through lots or tenders, or by referendum.¹¹⁾

Moreover, it is questionable whether the scarcity of radio spectrum really justifies treating broadcasters and newspapers differently. Since the newspaper industry is one in which average cost diminishes as scale increases, and since demand in newspaper publishing has gradually been decreasing, conditions favouring consolidation are apparent. Thus, the number of broadcasting stations will not necessarily remain smaller than that of newspaper companies.

Finally, the influence of broadcasting has never been proven to be unique.

As such arguments have gained prominence, more and more people have come to hold the view that broadcasting should be dramatically liberalized, and the roles of public broadcasters reduced, through the introduction of market mechanisms into broadcasting systems. This view is being voiced with

particular strength in Great Britain and the United States. As a notably consistent and clear expression of this view, let us consider the so-called *Peacock Report*, which is also exemplary in its goal of maximizing the utility of broadcasting for audiences.

III. THE FREE MARKET IN BROADCASTING

The *Report of the Committee on Financing the BBC*, known as the *Peacock Report*, advocates a new model for broadcasting based on the idea of viewer and listener sovereignty. Its arguments may be summarized as follows.¹²⁾

First, viewers and listeners are the best judges of their own welfare. From this it follows that the choice of which programs to view or listen to should be left to the discretion of audience members. It is therefore desirable for viewers and listeners to be able to convey their programming preferences directly to broadcasters, but this is impractical under the present system, which depends on license fees and advertising revenues as its main sources of income. Hence, a new system should be established in which a price is fixed and collected for each program actually viewed by an audience member. While the indivisibility in the consumption of broadcasting services has hitherto made such a system unfeasible, technologies such as encoded TV or subscription TV now offer the means to introduce a price mechanism whereby audience members convey their preferences directly to program providers. The competitive pressures resulting from such a price mechanism would not only enhance efficiency in the management of broadcasting enterprises, but also maximize the utility of broadcasts for the audience.

Secondly, for the choices made by audience members to be meaningful, the number of available

10) See, for example, Lee Bollinger, *Freedom of the Press and Public Access*, 75 MICHIGAN LAW REVIEW 1(1976); Mark Fowler and Daniel Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEXAS LAW REVIEW 207(1982).

11) Under the Broadcasting Act of 1990 in Great Britain, broadcasting licences are normally to be awarded to the highest bidder.

12) *REPORT OF THE COMMITTEE ON FINANCING THE BBC*, Cmnd. 9824 (HMSO, 1986).

channels must be dramatically increased, and a far greater variety of programming must be offered than at present. The necessary increase in the number of channels might be achieved, for example, by connecting fibre-optic cables to each and every household. To diversify programming, cable operators should serve strictly as common carriers, and be denied any role in supplying programs; no others who want to supply programs, whoever they may be, should ever be denied access to the market.

Thirdly, public financial support should be provided for the production and supply of programs of high cultural or artistic value, programs intended for minorities, religious programs, and all other programs which the consumer-sovereignty approach might not be expected to supply adequately. Aside from providing financial support for such public service broadcasting, the role of the government should be restricted to the enforcement of general laws concerning matters such as defamation and obscenity.

IV. CRITICISM OF THE FREE MARKET ARGUMENT

Two justifications can be offered for the plan envisaged in the *Peacock Report*. One is utilitarian: the plan promises to maximize the utility of broadcasting for consumers. The second is libertarian: by neither imposing restrictions on the free flow of information nor intervening paternalistically in the choices of viewers and listeners, this plan promises to secure both autonomous choice for viewers and freedom of expression for broadcasters.

Both the utilitarian and libertarian justifications for the plan are problematic, however. Regarding the utilitarian justification, it is by no means certain that a pay-TV system would lead to a greater consumer surplus than systems supported by license fees and

advertising. Since broadcasting service, with its marginal cost of zero, is an extreme case of a public good, the optimal price for consumers to pay for it should be close to zero even when exclusion in consumption is taken into account. However, such a price could never be realized, because establishing and administering a pay-TV system would be expensive, and this would produce an immediate divergence between the direct charge and the marginal cost. This means that a pay-TV system may undersupply and overcharge the market.¹³⁾

Regarding the libertarian justification, the important function performed by current broadcasting systems of promoting individual autonomy bears consideration. On this issue, an argument advanced in Japan in a 1988 report entitled the *Composite Study and Research on Broadcasting Policies* is illuminating. This report argues that the impartial distribution of basic information is a more important policy goal in broadcast law than maximizing the overall utility of, or willingness to pay for, broadcasting programs.

The *Composite Study* frames this argument as follows: "in our pluralistic contemporary society, people with different ideas about the meaning of life or about ultimate values share the benefits of social collaboration despite such differences. There is a need to ensure that each member of society is supplied impartially with the basic goods, services, and social facilities that are essential for pursuing his or her objectives in life. Guarantees of human rights and of equal opportunity to hold public office are based on this idea. From this viewpoint, there should also be maximum impartiality in the provision of basic information."¹⁴⁾

Given the ever-rising flood of information present in society, knowledge of the most important information and the most vital issues is becoming more and more essential to full participation in society. The

13) BOOZ, ALLEN AND HAMILTON LTD., *SUBSCRIPTION TELEVISION: A STUDY FOR THE HOME OFFICE: FINAL REPORT* (HMSO, 1987) and RICHARD COLLINS, NICHOLAS GARNHAM AND GARETH LOCKSLEY, *THE ECONOMICS OF TELEVISION* (Sage Publications, 1988).

14) *COMPOSITE STUDY AND RESEARCH ON BROADCASTING POLICIES (HŌSŌ-MONDAI SŌGŌ-KENKYŪKAI HŌKOKUSHO)*, 33-34 (Hōsō-Bunka-Kikin, 1988).

Composite Study argues that such basic information should be offered impartially, made as easily accessible as possible, and supplied at the lowest possible cost to all members of society. Since the broadcast media, using radio waves, can penetrate at low cost into private households to convey such information instantaneously and simultaneously to society as a whole, it can be concluded that the impartial provision of basic information to society can best be carried out by these media. In practice, television and radio, the main broadcasting media, have over the years contributed substantially to the provision of basic information, and hence to narrowing of the information gap between members of society.

If all of the media that convey basic information to the general public were biased in their political creed or standpoint, there would inevitably arise a grave inequality among the members of society. Hence, it is desirable to ensure that the media clarify issues from diverse angles and from a position of political impartiality. To guarantee a plurality of viewpoints from which news and opinions originate, there would seem to be good reasons for deconcentration in broadcasting.

V. THE THEORY OF PARTIAL REGULATION

Yet questions can be raised concerning these implications of the *Composite Study* as well, among which the most serious is that of why only broadcasting should be regulated. The goal of promoting the equal provision of basic information does not necessarily justify regulating broadcasting exclusively; the task of conveying basic information, and any accompanying regulatory constraints, might just as well be assigned to the newspaper industry.

On this issue, Professor Lee Bollinger's theory of partial regulation of the mass media merits consideration.¹⁵⁾ According to Bollinger, the traditional rationales for broadcast regulation are not valid, because broadcasters and newspapers can not be distinguished from one another either in terms of scarcity or social impact. Yet Bollinger argues that in a contemporary society in which a small number of mass media corporations monopolize the means of conveying information to the public, it is nevertheless appropriate to impose regulation on broadcasting alone. By such partial regulation, Bollinger argues, the opinions of minorities are afforded access to broadcasting, while the free print media are left to take up opinions which might not be disseminated by broadcasting, as well as to criticize excessive government regulation of broadcasting. Partial regulation would furthermore preserve the unregulated press as a benchmark against which every regulatory imposition would have to be carefully scrutinized and justified. This approach would thus promote the mass media that as a whole deliver diversified information to society, while at the same time limiting governmental regulation of the mass media.

Although the choice of regulating not only broadcasters but also newspapers to ensure equality of access to basic information remains an option, partial regulation, as Bollinger argues, would better achieve the goal of diversification of information for society as a whole. And conventional broadcasting, as mentioned above, is the most suitable of the media for performing the function of providing equal access to basic information, possessing as it does the characteristics of being able to penetrate at low cost into private households, and to convey information to society as a whole instantaneously and simultaneously.¹⁶⁾

15) See Bollinger, *supra* note 10. See also LEE BOLLINGER, *IMAGES OF A FREE PRESS* (University of Chicago Press, 1991).

16) This argument also supports maintaining the dual system of public and commercial broadcasting in Japan. If this dual system is changed to a strictly commercial one without a public broadcaster, the most likely result would be that broadcasters compete with one another for maximum audience ratings by producing similar, standardized programs, and programs which exceed in cost the advertising revenues they might generate would seldom be seen. One of the best solutions

VI. IS PARTIAL REGULATION REALLY BENEFICIAL?

Yet there are serious arguments against partial regulation of the mass media, including the objection that the risk of abuse of regulatory measures is so great that its overall outcomes are not likely to be entirely beneficial to society. In the United States, for example, a number of cases of Presidents influencing the ostensibly independent FCC to manipulate the mass media in their favour have been reported.¹⁷⁾

Whether one is for or against regulation of the media would seem to depend to some extent on one's general view of how politics produces regulations; two conflicting perspectives on this process are germane here. The first is a pluralistic view of politics as a competition between groups seeking to achieve political outcomes that maximize their particular interests; accordingly, most regulations in economic arenas play the role of private cartels, restricting competition in the market. According to this view, broadcast regulations are thus the products of the rent-seeking activities of broadcasting companies.

To maximize utility for consumers, regulation of the media should be abolished, restoring free and fair competition between broadcasters.

The second view of politics is the republican understanding of it as a forum wherein public-minded citizens actively participate in and reasonably deliberate on public affairs in order to determine the genuine common interest. In this view, citizens should subordinate their private interests for the sake of achieving decisions in the public interest.

This latter view may seem overly optimistic, but the coherence of the apparently cynical former view is also questionable insofar as it presupposes that by abolishing current regulations, some fair and neutral base line that is untainted by any private interest can be established. If all legislation is a product of transactions and compromises between interest groups, the cancellation of any particular regulatory regime can lead only to the recovery of a prior, equally private-interest regarding compromise. Short of the abolishment of all regulations, which would mean a return to the state of nature, there is no compelling argument for stopping the process of deregulation at any particular point.¹⁸⁾

to this problem might be the introduction of a subscription TV system; however, the adoption of such a system would entail the loss of the instantaneity and simultaneity of broadcasting, as well as its capacity to penetrate into households at low cost.

The current dual system of broadcasting in Japan attempts to avoid these problems by relying on receivers' fees as the source of income for public broadcasting. The high-quality programs supplied by NHK contribute to the improvement of programs by commercial broadcasters, while the creativity and innovative approaches of commercial broadcasters stimulate NHK in its program production. Thus, the dual system enables both NHK and commercial broadcasters to better perform their task of providing basic information equally to society as a whole. As long as the impartial delivery of basic information is assured, diversification of information and the maximization of utility of audiences, promoted by market mechanisms, should be encouraged.

17) See LUCAS POWE, *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* ch. 8 (University of California Press, 1987); WILLIAM RAY, *FCC: THE UPS AND DOWNS OF RADIO-TV REGULATION* ch. 2 (Iowa State University Press, 1990).

Professor Eric Barendt argues that the theory of partial regulation is incoherent: "if regulation of the press is always wrong (and perhaps unconstitutional) and if there is no significant difference between its position and that of the broadcasting media, it follows that the latter should also be wholly unregulated" (ERIC BARENDT, *BROADCASTING LAW* 8 (Clarendon Press, 1993)). However, Bollinger's point seems to be not that regulation of the press is always wrong but rather that, taking into consideration the history of the mass media, its partial regulation would produce more benefit than either wholly regulating it or not regulating it at all.

18) One of the reasons governmental regulation cannot be abolished in economic areas altogether is that, as David Hume and later Jeremy Bentham pointed out, legal rules regulating property rights and economic activities can be viewed as conventions that solve coordination problems that arise in social interactions (see GERALD POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* (Clarendon Press, 1986)). According to Hume, these conventions comprise "only a general sense of common interest; which sense all the members of society express to one another, and which induces them to regulate their conduct by certain rules. I observe, that it will be for my interest to leave another in the possession of his goods, provided he will act in the same manner with regard to me. He is sensible of a like interest in the regulation of his conduct. When this common sense of interest is mutually express'd and is known to both, it

Although ordinary citizens admittedly have little obvious incentive to care about most public policy, certain principles should not be left to compromise between interest groups. Basic policy governing broadcasting regulation concerns such principles.

VII. WHO SHOULD REGULATE THE REGULATORS?

After basic policy is decided through public debate and deliberation, it must be implemented, and hence there remains the question of who should guarantee its proper implementation by regulatory agencies. In Japan, as in the United States, this task is left largely to judges, in particular in their capacities as constitutional reviewers.

The prevalent judicial opinion in cases concerning broadcast regulation requires the government to prove that restrictions on broadcasting are “narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues”¹⁹⁾; unless the government succeeds in proving such an interest, the courts have chosen to strike down the regulations in question as unconstitutional.

Relying on the judiciary in this regard may run contrary to the spirit of Jeremy Bentham, who had little trust in government officials. Indeed, Bentham’s distrust was one of the reasons he objected to censorship. Bentham wrote, “The liberty of the press has its inconveniences; nevertheless, the evils which results from it are not to be compared to those of

a censorship”²⁰⁾; in Bentham’s view, censors are almost always too stupid and arbitrary to be entrusted with the task of deciding what should and should not be published.²¹⁾

Nor did Bentham have much trust in judges in particular. For him, “Judge & Co.” was itself an interest group that sought to maximize its own sinister interests. Bentham’s main strategy for reforming the judiciary of his day was to make it squarely dependent on the people. In his view, judicial deliberations, actions, and decisions should be subject to the critical scrutiny of the public; his “public opinion tribunal” constitutes the last court of appeal, in which every judge should appear and to which every judge should be accountable. In order to make explicit the accountability of each judge, Bentham recommended single-seatedness as well as a process for removing judges through popular recall.²²⁾

Doubts can be raised as to whether Bentham’s project of reforming the judiciary would be beneficial in the context of judicial review of broadcast regulation today. A system of removing judges by popular vote presents the danger of making them too dependent not on the people as a whole but rather on various interest groups. The “public opinion tribunal” may also not be trustworthy in this context because what is at issue is the question of how to regulate those who lead and form public opinion. That is, the pronouncements of the “public opinion tribunal” may to a large extent reflect the views expressed in the popular media. Perhaps for these reasons, most constitutional scholars today seem to favour an in-

produces a suitable resolution and behaviour” (DAVID HUME, *A TREATISE OF HUMAN NATURE*, Book III, Part II, Section ii). Because any legal system regulating this sense is artificial, natural rules can never be distinguished from artificial regulations; this means there is no natural legal base line (cf. CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* ch. 5 (Harvard University Press, 1993)).

19) *F.C.C. v. League of Women Voters of California*, 468 U.S. 364 (1984).

20) JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 370 (C.K. Ogden ed., Kegan Paul 1931) (1802).

21) *Id.*, pp. 370-371. See also Stephen Holmes, *Liberal Constraints on Private Power?: Reflections on the Origins and Rationale of Access Regulation*, in *DEMOCRACY AND THE MASS MEDIA* (Judith Lichtenberg ed., Cambridge University Press, 1990) 21, at 64.

22) See JOHN DINWIDDY, *BENTHAM* 68 (Oxford University Press, 1989); JEREMY BENTHAM, *CONSTITUTIONAL CODE*, in *THE WORKS OF JEREMY BENTHAM*, vol. ix (John Bowring ed., 1843), at 156, 470 and 532. This aspect of Bentham’s theory is discussed in FREDERICK ROSEN, *JEREMY BENTHAM AND REPRESENTATIVE DEMOCRACY*, 149-163 (Oxford University Press, 1983) and POSTEMA, *supra* note 18, ch. 11.

dependent rather than a dependent judiciary, and in particular, long and sometimes life-long tenure for judges to promote professional norms that might protect the judiciary from falling captive to particular political or social demands.²³⁾ In other words, the judiciary in contemporary democratic societies like those of the United States or Japan views protection of the independence of judges as yielding more utility than disutility.

What would Bentham have to say on the independent control today's judiciary exercises over broadcast regulation? According to the theory of his cited above, independent judges should be expected to promote their own private interests. However, most judges in contemporary democratic societies seem to act out of a strong concern for freedom of speech and of the media.²⁴⁾ This may indicate that despite their independence, members of today's judiciary are at least intellectually held captive by an interest group consisting of academics, journalists, authors, and others whom judges regard to be like them.²⁵⁾ From Bentham's perspective, the interests judges try to advance may not necessarily be restricted exclusively to their own interests, but may also include the interests of groups to which judges believe they belong. In view of the utilitarian premise that judges should protect freedom of speech because of the public interests it advances, Bentham would see the performance of today's judiciary as serving

a kind of junction of private interests and public duties. He might be satisfied.

Partial regulation of the mass media, overseen by an independent judiciary, seems to offer the least dangerous approach to curbing the risks to the public interest posed by private media power, as well as to correcting structural distortions of the media market. This conclusion would also seem consonant with the views of J.S. Mill, who endorsed the idea of governmental intervention to provide information to the public.²⁶⁾

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23) See, e.g., Owen Fiss, *Why the State?*, in *DEMOCRACY AND THE MASS MEDIA* (Judith Lichtenberg ed., Cambridge University Press, 1990) 136, at 148-149.

24) In various cases, the Japanese Supreme Court has said that the freedom of speech of the mass media should be guaranteed with special care, and furthermore allowed that the mass media may be granted some privileges that are not accorded to the general public. See for example, Supreme Court Judgement, 24 April 1987 (Minshu, vol. 41, p. 490), in which the Court denied the right of reply regarding a national newspaper because such a right would indirectly abridge the newspaper's freedom of speech; and Supreme Court Judgement, 8 March 1989 (Minshu, vol. 43, p. 89), in which the Court said that it was reasonable to accord the mass media special facilities in reporting judicial cases because doing so would be beneficial to society as a whole.

25) Cf. RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 621 (4th ed., Little, Brown, 1992).

26) Mill wrote, "There is another kind of intervention which is not authoritative: when a government, instead of issuing a command and enforcing it by penalties, adopts a course so seldom resorted to by governments, and of which such important use might be made, that of giving advice and promulgating information; or when, leaving individuals free to use their own means of pursuing any object of general interest, the government, not meddling with them, but not trusting the object solely to their care, establishes side by side with their arrangements, an agency of its own for a like purpose" (JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY*, vol. 2, 443 (1848), cited by Holmes, *supra* note 21, at 55).