BOOK NOTE

FREEDOM, TECHNOLOGY, AND THE FIRST AMENDMENT

By Jonathan W. Emord.[1]
San Francisco, California: Pacific Research Institute for Public Policy. 1991.
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"[T]he medium is the message."[2] — Marshall McLuhan

Marshall McLuhan, media visionary that he was, could not have imagined that his famous statement would someday summarize the state of First Amendment law. One recent book, however, presents a convincing case based firmly on that proposition.

In his new work, *Freedom, Technology, and the First Amendment*,[3] Jonathan Emord traces the reactions of lawmakers to each leap in the technology of communicating to the masses. He concludes that as the media continues to evolve away from the paper and ink "press" of our Founders, it comes under more regulation — regulation that forces the surrender of freedoms for the right to use the medium.[4] Lawmakers consciously use a set of matched regulatory tools, he posits, effectively to censor the message by controlling the medium by which it travels.

Emord goes beyond exposing this strategy. He provides the reader with the logical counterarguments for each of the arguments used to support the heavy regulation of new media. He also discusses a practical system for shifting the control of a medium to the users of that medium.

Emord's book is quite timely. The "information explosion" shows no

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1. Senior Research Fellow, Pacific Research Institute. Mr. Emord is also a member of the First Amendment Task Force of the Center for Applied Jurisprudence.

2. MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 7 (1964). McLuhan's research centered on the broad social transformations that accompany the introduction of new forms of communication. He referred to the legal implications only in passing, noting that a country's legal framework is grounded in some particular medium, and therefore is restricted when new media forms arise.

3. JONATHAN W. EMORD, FREEDOM, TECHNOLOGY, AND THE FIRST AMENDMENT (1991).

4. This work greatly expands upon the research and ideas Emord discussed in a recent article. *See* Jonathan W. Emord, *The First Amendment Invalidity of FCC Ownership Regulations*, 38 CATH. U. L. REV. 401 (1989).

signs of slowing, and new forms of communication are being developed at an ever-increasing rate. Direct broadcast satellites, digital radio transmissions, and massive personal computer networks are only a few of the new methods for delivering information. As more media are used to convey a greater volume of messages, it will fall upon the users of each medium to decide the level of control they wish to surrender to the government. As Emord shows, the default level places a high degree of control in the hands of the lawmakers; through a concerted effort armed with the fundamental knowledge in *Freedom, Technology, and the First Amendment*, though, it may just be possible for users to secure the full protection of the First Amendment and to control both their medium and their message.

Freedom, Technology, and the First Amendment begins with a discussion of the importance of the First Amendment. Emord sets the tone of the book at this early stage by showing how individual rights tend naturally to be overwhelmed by the government's use of political suppression; a government has not only greater resources to stave off challenges to the use of its censorship power, it also "owns" both the forum in which such challenges are heard and the police power to punish unsuccessful challengers. He moves from arguments against pervasive governmental suppression to those supporting private limitations—limitations he views as very narrow, binding only individual speakers and the specific forums controlled by media owners. Private limitations are entered into purely for economic gain in the resource marketplace; a valuable message neglected by one forum owner will still be disseminated by other forum owners who have an economic incentive to do so. Emord closes the first chapter of the book by contrasting the governmental silencing of dissenting voices in Tiananmen Square with the decision of some booksellers not to carry Salman Rushdie's *The Satanic Verses*. Both examples involved the denial of forums to speakers, but the private limitations of the booksellers did not keep the book from becoming a best seller, whereas, according to Emord, the Beijing government's suppression was brutally absolute.

The first portion of Emord's substantive work focuses on the historical setting which gave rise to the First Amendment. He cautions that before the First Amendment can be viewed with respect to modern media, "[w]e must respect these core values that it protects and that form the fundamental reason why the amendment was made a part of our Constitution" (p. 18). He summarizes what he considers to be the essential Relativist arguments, and then counters them with arguments in favor of a historically-based construction of the Constitution. He prefaces his study of the ideas and actions that gave birth to the First Amendment by stating that "[o]nce we understand *why* our Constitution includes a protection for freedom of speech and press, we will know

what we must protect if the freedom is to retain its status as a truly sovereign right of the people" (p. 18).

Emord traces the struggle for a free press back to the introduction of the printing press in England in the sixteenth century. Only decades after the first presses began printing, Henry VIII devised the quid pro quo system which Emord views as a basic tool used by governments seeking control of the press; printers were given valuable government contracts and monopoly publishing rights in exchange for "voluntarily" surrendering to heavy censorship. Those not enticed into the king's yoke by this financial "carrot" soon found themselves swatted into the yoke by the "stick"—a system of licensing that reached every printer and defined the permissible subject matter with the penalty of "uttermoste peryll"[5] (p. 27).

After setting this backdrop of governmental control, Emord shifts his focus to the people who fought this early censorship and the thoughts which drove them. Just as he views quid pro quo rewards and licensing schemes as the fundamental means of censorship, Emord sees an irrepressible desire to fight censorship—a desire that grows as more of the public becomes familiar with a particular medium. In the setting of early English printing, technology increasingly made more information available to more citizens, thereby raising the general political consciousness to the point where the enforcement of a prior restraint on the press met with great opposition. Emord shows how, in the case of early English printing, this began with a few individuals (most popularly John Wilkes) who actively disregarded the imposition of censorship. This opposition then spread as technology allowed more individuals surreptitiously to evade governmental controls and to reach more people with their ideas.

The American colonies at that time, bristling under even greater governmental control of the press, were heavily influenced by the great English advocates of free press. The words of John Trenchard and Thomas Gordon, collected in *Cato's Letters*, captured the minds of our Founding Fathers, and the actions of John Wilkes captured their hearts. Trenchard and Gordon provided the grand theoretical basis of the right to a free press,[6] stating that free speech is essential for a free govern-

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5. Emord quotes from the document introducing King Henry VIII's licensing system in 1530. EMORD, *supra* note 3, at 27.

6. Emord draws from *Cato's Letters* the three fundamental elements of free speech:

> (1) a right of the individual to expose corruption and to criticize those in power to ensure that they remain responsive to the people, (2) a right of the individual to propagate knowledge and to engage in discourse and debate in the search for truth, and (3) a right of the individual to control his thoughts and his expression for intellectual self-development and self-fulfillment.

ment. Wilkes put these words into action by openly violating the existing restrictions on the press. This resulted in his being removed from Parliament, fined, and jailed on account of his published works.

Emord documents the Founding Fathers' understanding of *Cato's Letters* and Wilkes' attempts to show the effect that understanding had on the constitutions adopted in the early states.[7] He then presents a succinct history of the debate surrounding the adoption of the First Amendment and the Bill of Rights. Emord concludes his historical study with a brief tour through the leading Supreme Court opinions that shaped the traditional interpretation of the First Amendment. This tour finishes in 1930, by which time the First Amendment had been held to apply to the states, and Oliver Wendell Holmes had experienced his decisive change of mind that brought free press protection to its current "traditional" state.

After providing the reader with this rich history of the First Amendment, Emord presents the central thesis of his work: a novel perspective of constitutional construction is needed to fully protect newly-developed media. His "Preservationist Perspective" is introduced to avoid the faults perceived in current theories of construction. Emord briefly addresses these other theories, finding the Literalist Perspective absolutely static in a world of change,[8] the Narrow Intentionalist Perspective dependent upon a "collective mind" of the Framers that is actually quite diverse and ill-defined,[9] and the Relativist Perspective erroneously plac-

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Id. at 31.

7. Emord notes that, of the 11 newly-created colonies which adopted state constitutions, nine colonies provided for express protection of a free press. *Id.* at 68. These provisions are grouped into four categories, but each seeks to "secure in *written* form the *natural* rights to speech and press that had been the [English free-press] rallying cry." *Id.* at 69.

8. Emord points to Justice Hugo Black as the figurehead of the Literalist Perspective, quoting Black's belief in the text of the First Amendment that "no law means no law." *Id.* at 101. Emord notes that the key features of this perspective, namely stability and predictability, are also its weak links. By looking only to the text of the document, the literalist is unable to translate the purposes behind the text into terms compatible with modern methods of communicating ideas. *Id.* at 102.

9. Emord captures this perspective in the words of Robert Bork: "All that counts is how the words in the Constitution have been understood at the time [of the founding]." *Id.* at 103 (quoting ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144 (1990)). Secondary materials—public debates, concurrent newspaper articles, and the like—are used to understand the Founders' frame of mind. Emord notes that this perspective is often criticized because of the lack of a consensus concerning the beliefs of the Founders. As he questions, what defines the group of individuals embodied in the phrase "Founders," and how are the conflicting intentions of those individuals settled?

ing executive and legislative powers in the hands of the judiciary.[10]

Having dismissed the Literalists view as unworkably archaic, and having reprimanded the Relativists for expanding governmental control, Emord patterns his Preservationist Perspective along the government-limiting Narrow Intentionalist view, with the key addition of a core set of free speech and press values in place of a vague "Founders' frame of mind." This accords with Emord's belief that the First Amendment does not empower the government to "guarantee" free speech and press by regulating it; instead, the First Amendment should be seen as "protecting" free speech and press from such governmental regulation.

The Preservationist Perspective consists of two elements: *static barriers* that restrict governmental intervention and *adaptive definitions* of "speech" and "press." As mentioned throughout his book, Emord places great value on the ability of the private sector to manage speech and press; his static barriers would place a "virtually impenetrable, high, wide, and thick" shield against governmental intrusion, while the adaptive definitions of the Preservationist Perspective ensure that these barriers remain strong over time and stretch to envelop new forms of speech and press (p. 129).

This "perspective for the future" provides the canvas on which Emord paints his analysis of how the traditional political regime has fared with the introduction of new media forms for the communication of ideas. He initiates this study with the first technological break from the original conception of "press": the transmission of information by radio waves.

The new medium of radio was launched with a brief era of open public and private use. Although radio was first used only by naval operators, the technology soon fell into the hands of many "amateurs" who shared the airwaves without imposition. The First World War forced the dedication of the radio spectrum to military use; private radio transmitters were either forbidden or purchased outright by the government. The continued placement of all radio transmission in governmental hands was strenuously advocated by naval authorities after the war. Ultimately, private actors were again permitted to broadcast by way of radio waves, but under a quid pro quo arrangement reminiscent of the

10. Emord includes Owen Fiss, Kenneth Karst, and Frank Michelman among adherents to the Relativist Perspective, which he sees as using constitutional interpretation to introduce an agenda of expanded affirmative rights. Emord, true to his faith in the private sector, states that such an expansion of the duties of government places an "unpredictable, rights-violative, and freedom-violative power center in the judiciary that cannot long coexist with any regime but an authoritarian one." *Id.* at 109. His analysis suggests his ultimate prescription: a perspective of construction that allows the First Amendment to progress with technology, without opening the door of interpretation to whatever ideas may flutter by.

early English regulation of printing presses: Radio broadcast "licenses" were granted to private broadcasters, but only under certain conditions, one of which required that a station's programming be "satisfactory to the public."[11]

Emord follows this "licensing" system to a point several years later, when a series of annual government-sponsored National Radio Conferences resulted in increased governmental control of radio waves. Large commercial radio broadcasters readily submitted to the government's "protection" of their investments,[12] much as the owners of early printing presses eagerly bore the yoke of Henry VIII's "protection." The "marketplace of ideas" was once again limited to government-licensed vendors, highlighting a recurring situation against which Emord vehemently argues.[13]

The Radio Act of 1927 placed the authority to license broadcasters and to control the content of their messages with the Federal Radio Commission ("FRC"). Emord compares the FRC with the printing press licensing authorities in England, noting that the FRC "coupled a police power to enforce its judgments with a promise of monopoly protection, thereby taunting and tempting the press into broadcasting in a manner favored by the government" (p. 175). Emord recounts several early cases demonstrating the FRC's willingness to use its police power by not renewing the licenses of broadcasters whose messages were not in the "public interest."[14]

Emord then describes how the Federal Communications Commission ("FCC"), the successor to the FRC, continued this form of regulation. The FCC avoided judicial scrutiny by simply "suggesting" a standard of

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11. Emord notes that one of the first private sector transmissions via radio waves was a message of Christmas greetings to naval radio operators, which created an even greater desire in the military for governmental control of the airwaves. *Id.* at 139.

12. By the fourth National Radio Conference, representatives of the radio industry had agreed that broadcast content should be controlled by the Secretary of Commerce. In exchange, government representatives assured them market protection by limiting the number of broadcast licenses issued and maintaining a preference for existing stations. The long-term assumptions of these large, commercial broadcasters can be judged by the answer of Westinghouse's representative, who, when asked to predict the total number of stations required to fill the needs of the country, stated, "I believe twelve good stations, certainly a maximum of fifteen, would supply most of the needs of this country." *See id.* at 150.

13. Emord focuses on private broadcasters. Several scholars have extended his reasoning to public broadcasters; even a voice funded by the government (such as PBS) receives the full compliment of First Amendment protection from government regulation over content. *See, e.g.*, Note, *Freeing Public Broadcasting from Unconstitutional Restraints*, 89 YALE L.J. 719 (1980).

14. Emord notes that the FRC itself defined the programming standard that fell within the "public interest" and forced licensees to prove that their broadcasts met that standard. EMORD, *supra* note 3, at 181.

content for radio broadcasters, but then failed to renew the licenses of broadcasters not meeting that standard.[15] While this approach may not technically have been prior restraint, licensees quickly understood the force of this regulation by "raised eyebrow." Supreme Court opinions of the day upheld the FCC's authority over the content of broadcasts, holding that the "scarcity of available airwaves" required some form of regulation; Emord disputes this argument, pointing to a brief period in the early 1920s when private property rights successfully regulated the scarce spectrum, with the public determining the content through simple economic supply and demand.[16] Emord marks these Supreme Court opinions as the point where First Amendment rights of the newspaper press were denied to the radio press and were trumped by the Court's focus on ensuring "the interest of the listening public in 'the larger and more effective use of radio'"[17] (p. 191).

This difference in treatment under the First Amendment is showing signs of mending, which Emord pinpoints to a determined system of deregulation by the FCC under the Reagan administration. The regulatory structure built up over the past half century was greatly weakened when the FCC abandoned the key concept underlying its control of the content in broadcasts: the "scarcity of the spectrum" argument that called for government rationing of radio frequencies on behalf of its citizenry. This change of heart was swift; Emord captures it in a quotation from a recent FCC decision: "[W]e believe that an evaluation of First Amendment standards should not focus on the *physical differences* between the electronic press and the printed press, but on the *functional*

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15. Noting the direct and indirect focus on content, Emord lists the current criteria used by the FCC's Review Board in judging a licensee's application for renewal:

> Criterion 1. The licensee's efforts to ascertain the needs, problems and interests of its community;
> Criterion 2. The licensee's programmatic response to those ascertained needs;
> Criterion 3. The licensee's reputation in the community for serving the needs, problems and interests of the community;
> Criterion 4. The licensee's record of compliance with the Communications Act and FCC rules and policies; and
> Criterion 5. The presence or absence of any special effort at community outreach or toward providing a forum for local self-expression.

Id. at 214–15.

16. Emord also questions the "scarcity" of the airwaves in relation to the components of the traditional press: "The print medium relies on products such as paper, ink, presses, and delivery trucks, which are not universally available, and yet the Court forbids regulation of the print media." *Id.* at 190.

17. Emord quotes from Justice Frankfurter's opinion in National Broadcasting Co. v. United States, 319 U.S. 190, 216 (1943).

similarities between these two media and upon the underlying values and goals of the First Amendment"[18] (p. 235).

To explain the crucial role that the "scarcity of the spectrum" argument has played, Emord moves from a description of its development to a demonstration of the inability of the FCC to control cable television—a technology with no "spectrum" for the federal government to manage. Emord posits that without that essential interest, the FCC has been unable to force the traditional quid pro quo of spectrum space for control over content. Emord finishes his study of the potency of the scarce spectrum rationale by noting that local governments currently have great success employing it to force the quid pro quo on cable operators bestowed with monopoly rights through a franchising process.

Freedom, Technology, and the First Amendment closes with a look to the future. Emord examines five principal arguments in favor of governmental regulation over new forms of communication, and then proposes a property rights approach to regulation, one that would place control of the marketplace of ideas in the invisible hand of the free market. Instead of governmental determination of the message sent through a medium, Emord favors a more adaptable and equitable system that places the control over content with the owners of a medium—those who ultimately answer to the public receiving the message. In Emord's view, allocation of the airwaves (or cable bandwidth or satellite transponders, as technology moves ahead) would be left to private actors. He poses the hypothetical case of a successful radio station that could expand its signal range by purchasing the broadcasting "property rights" of the surrounding stations that can transmit at that same frequency; instead of languishing under the regulation of government bureaucracy, communication technology, spurred by the drives of the market, can grow to its natural level, resulting in a freer flow of ideas.

This property rights approach to regulation, along with Emord's Preservationist Perspective of constitutional interpretation, fits well with the historical information in the book. The reader should be cautioned, however, that Emord's property rights approach is not given as rigorous a survey of competing ideas as is his Preservationist Perspective.

The idea of supplanting governmental regulation of a medium with an economic system of broadcasting rights is not without its detractors. For example, Emord briefly discusses the basic theory of regulation based on the fear of monopoly control of a medium, but the variety of theories building upon the basic monopoly model is left for the reader to discover

18. Emord here quotes from the FCC Record. Syracuse Peace Council, 2 F.C.C.R. 5043, 5055 (1987).

through his or her own research.

To continue with the monopoly example, even the theory's basic form commands an influential group of proponents. Emord refers to the weight that some courts give to the theory,[19] but he fails to mention the large body of scholarly work supporting the general doctrine[20] (p. 271). Other theories founded on the basic monopoly model receive scant attention in the book. One interesting example is the work of Marc S. Nadel, who proposes a theoretical splitting of the message and the medium; the First Amendment would apply to the message to protect the owners of the "software" broadcasted, while no such protection would be extended to the medium; "hardware" owners would be subject to the same governmental regulation as other monopolists if their economic environment warrants such treatment.[21]

This is not to detract from Emord's basic argument. Any reasonable reader with the time and desire could take the history and thoughts presented in the book to fashion sturdy arguments against these monopoly theories, as well as to counter attacks from theories centered along other lines. The problem is simply that a book about information technology, directed toward readers seeking to increase the flow of information, could invariably gain from the author's providing the reader with more pertinent information. Indeed, Emord's property rights approach can not only be better defended but also would be benefitted by such an expanded analysis. One early treatment of a free market in media broadcasting rights,[22] for example, provides a wealth of support for Emord's approach; yet, this influential source of ideas on the application of the First Amendment to new media is not referred to, even in passing. While it is certainly true that in our primitive "hardcopy" world of deadlines, an author is eventually forced to stop adding to a work, Emord's proposition regarding a property rights approach, so central to his theory, merits the strong grounding he brings to the other sections of his book.

Another aspect of *Freedom, Technology, and the First Amendment* may suffer from the same "lack of bandwidth" constriction inherent in

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19. Emord describes the monopoly theory foundation of Judge Posner's opinion in Omega Satellite Prods. Co. v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982). EMORD, *supra* note 3, at 271.

20. *See, e.g.*, Paul Bator, *The First Amendment Applied to Broadcasting: A Few Misgivings*, 10 HARV. J.L. & PUB. POL'Y 75 (1987); Note, *A Regulatory Approach to Diversifying Commercial Television Entertainment*, 89 YALE L.J. 694 (1980).

21. Mark S. Nadel, *A Unified Theory of the First Amendment: Divorcing the Medium from the Message*, 11 FORDHAM URB. L.J. 163 (1982).

22. ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 138 (1983). Professor Pool ultimately prescribes a system with some regulation based upon a monopoly theory, but the approach relies heavily on a property rights theory.

many books. Emord's treatment of possible future media would benefit greatly from use of more examples. Readers interested in applying Emord's concepts to emerging media deserve more than five pages of his analysis in order to assess his thoughts as to how best to foreclose a government quid pro quo in certain recently introduced forms of communication (pp. 307–11). The discussion in the book provides the proper insight to spark the motivated reader, but a prime opportunity for guiding further study is missed. With such a large potential readership, any cost-benefit calculation would counsel expanded discussion of new technologies approaching on the horizon.[23]

These minor critiques aside, *Freedom, Technology, and the First Amendment* provides a convenient introduction and sourcebook of ideas for anyone with an interest in preventing the mistakes made with past technologies from being repeated with emerging media forms. Emord has done an admirable job of defining the core values that must be protected under the First Amendment and capturing the major policy choices that must be made to protect those values. His book is a welcome entrant into the marketplace of ideas.

Brad Mitchell

23. Even a brief survey of other technologies, w th relevant references, would greatly add to the work.