

5-9-2023

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Book Review



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Citation Information

Kapur, Ishaan. "Saving the News: Why the Constitution Calls for Government Action to Preserve Freedom of Speech by Martha Minow." *Osgoode Hall Law Journal* 60.1 (2023) : 227-232.
<https://digitalcommons.osgoode.yorku.ca/ohlj/vol60/iss1/6>

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Abstract

In *Saving the News*, Martha Minow, former Dean of the Harvard Law School and the 300th Anniversary University Professor at Harvard University, analyzes how the rise of internet platforms and social media has led to a decline in the viability of the American press and the spread of misinformation. Arguing that a viable press is fundamental to a constitutional democracy, Minow makes a case for the need for change and outlines the legal basis and specific policy initiatives that could be instituted to remedy the failures of the contemporary ecosystem of the news. She does so while navigating the potential constitutional barriers to such reforms imposed by the judiciary's current libertarian interpretation of the First Amendment. In addition, she advocates for government action to combat the technological developments that are currently eroding the trust, production, and distribution of the news.

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Book Review

***Saving the News: Why the Constitution Calls for Government Action to Preserve Freedom of Speech* by Martha Minow¹**ISHAAN KAPUR²

IN *SAVING THE NEWS*, Martha Minow, former Dean of the Harvard Law School and the 300th Anniversary University Professor at Harvard University, analyzes how the rise of internet platforms and social media has led to a decline in the viability of the American press and the spread of misinformation. Arguing that a viable press is fundamental to a constitutional democracy, Minow makes a case for the need for change and outlines the legal basis and specific policy initiatives that could be instituted to remedy the failures of the contemporary ecosystem of the news.³ She does so while navigating the potential constitutional barriers to such reforms imposed by the judiciary's current libertarian interpretation of the First Amendment. In addition, she advocates for government action to combat the technological developments that are currently eroding the trust, production, and distribution of the news.

Many of the topics addressed in this book, such as the freedom of the press and the implications of social media, have been at the heart of public discussion in recent years as a result of the presidency of Donald Trump and the COVID-19 pandemic. As such, the academic scholarship surrounding these topics is already

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1. (Oxford University Press, 2016).
 2. JD Candidate (2023), Osgoode Hall Law School; Honours Business Administration (2018), Ivey Business School.
 3. Minow, *supra* note 1 at 6.

fairly robust.⁴ However, Minow is able to uniquely contribute to this existing narrative by successfully leveraging this scholarship in her own analysis, advancing novel recommendations that could drive change across these topics to ultimately reverse the decline of the American press.

This book consists of five chapters, wherein the first three sections work together to lay the foundation for the author's recommendations, which are then outlined in chapters four and five. Chapter one identifies the deteriorating viability of America's press and diagnoses the specific causes contributing to its decline. Chapter two details historical government support of the media ecosystem to institute the First Amendment. Chapter three critiques the current libertarian judicial interpretation of the First Amendment and highlights methods that the government can implement to circumvent this interpretation and address related challenges. Chapter four offers a comprehensive framework to tackle the driving factors impacting the viability of the press. Finally, chapter five summarizes how this book's analysis and proposed solutions can effect societal change.

In chapter one, Minow begins by outlining the problem at the heart of the book: Significant declines in the news industry, indicated by substantial drops in journalism employment, have jeopardized the viability of the press and its ability to carry out its duty of ensuring informed citizenry as required for democratic self-governance. She submits that this decline is attributable to the investment deficits in local news and professional journalism caused by: (1) corporate investors prioritizing financial returns over quality journalism and local news outlets; (2) news outlets increasingly becoming acquired by wealthy individuals attempting to use them to advance their own ideological projects; and (3) online media platforms displacing significant advertising revenue from traditional media outlets.⁵ She argues that this shift in landscape has resulted in "news deserts" ripe for unregulated, financially-incentivized disrupters, such as social media platforms, to leverage their algorithms and unilaterally control citizens' consumption of the news.⁶ Accordingly, this has provided an environment conducive to foreign election interference and misinformation, as witnessed throughout both the 2016 election and the pandemic. Having worked to convince readers of the urgency and importance of addressing this problem and its dire effects, Minow shifts her focus in the subsequent chapters to providing the context and analysis she later uses to build her proposed solutions.

4. See *e.g.* Alvin I Goldman & Daniel Baker, "Free Speech, Fake News, and Democracy" (2019) 18 First Amendment L Rev 66.

5. Minow, *supra* note 1 at 11.

6. *Ibid* at 35.

In chapter two, anticipating that the libertarian interpretation of the First Amendment may undermine her recommendations, Minow effectively uses this section to demonstrate the historical relationship between the government and the press. Despite acknowledging the importance of an independent press, quoting Thomas Jefferson's statement that "the only security of all is a free press," she puts particular emphasis on the government's integral role in structuring, financing, and ensuring the effectiveness of the news industry through policy.⁷ Specifically, she cites examples of government-sponsored innovation in communication technologies, such as the postal service, radio, and internet, highlighting the government's "indispensable role" in facilitating free speech.⁸ The historical narrative presented in this chapter compellingly normalizes the view that government is a key facilitator of the First Amendment, thereby rendering its libertarian interpretation seemingly untenable. However, although Minow concedes that courts have previously struck down policy materially infringing on press operations, such as in *Grosjean v American Press Co*, she omits to specifically outline the judicial boundaries of government control.⁹ This would have been helpful in assessing the practical and legal limitations of her proposed solutions.

In chapter three, Minow briefs readers on the history of the judicial interpretation of the First Amendment. Here, she continues to solidify the narrative outlined in the previous chapter, that the government's role in relation to the First Amendment is not hands-off. To do so, Minow highlights instances in which government regulations, deemed constitutionally sound by the courts, have imposed limitations on this right. Specifically, she calls attention to the fairness doctrine, which required broadcasters to provide reasonably balanced expressions of competing views; and the must-carry provisions, which mandated cable networks to offer public educational stations.¹⁰ These examples showcase the government's authority to impose restrictions on the First Amendment for just causes.

With this context established, Minow outlines the lineage of the United States Supreme Court decisions, beginning in 2005, that have allowed for the First Amendment to be used as a tool to challenge governmental regulations, entrenching a libertarian view of the First Amendment into law. She issues two major critiques of the Court's adoption of this interpretation. First, she claims

7. *Ibid* at 37-39, citing Jerry W Knudson, *Jefferson and the Press: Crucible of Liberty* (University of South Carolina Press, 2006) at 171.

8. *Ibid* at 53.

9. Minow references *Grosjean v American Press Co*, 297 US 233, 250 (1936). See *ibid* at 44.

10. *Ibid* at 65-66.

that the overturning of decades of judicial precedents in favour of a libertarian approach has been fueled by political and pro-business interests rather than by any dictates of law. Observing that “the text of the First Amendment does not change, but political power does and interpretations by judges appointed through a political process can shift in turn,” she argues that corporations have capitalized on political shifts to advocate for the weaponizing of the First Amendment to protect their interests.¹¹ This was especially exhibited in *Janus v AFSCME*, where the Court overturned a forty-year precedent by allowing the First Amendment to be used to strike down a key part of the framework for labour-management negotiations.¹² Second, she claims that this interpretation is irreconcilable with ensuring the livelihood of the First Amendment, and in fact turns the Constitution into a “suicide pact.”¹³ Government action must always comport with constitutional guarantees; however, stripping the government of any power to protect freedom of speech, as called for by this libertarian interpretation, would jeopardize constitutional guarantees and democratic processes.¹⁴ For example, government regulation is necessary to prevent monopolization of the news; select media outlets have the ability to control the public narrative and restrict public access to unbiased information needed to participate in democratic self-governance.¹⁵ Based on these critiques, Minow broadly dismisses the Court’s current libertarian interpretation that restricts governmental actions protecting freedom of speech.

Minow then turns to investigating the constitutionality of government tools that could save the news industry while circumventing the libertarian interpretation of the First Amendment. She claims that the constitutionally valid coexistence of the First Amendment and other government regulations—including intellectual property and defamation, antitrust and consumer protections, and tax and subsidies—indicate that these tools could be appropriately leveraged by the government to correct the dire state of the US press.¹⁶ Detailing the proposed scope, legal basis, and potential impact of each tool, she provides the necessary context upon which her proposed recommendations are founded in later chapters.

In this analysis, Minow relies heavily on pre-2005 legal precedents, both to argue that these tools are constitutionally compatible and to attempt to insulate

11. *Ibid* at 77.

12. Minow references *Janus v AFSCME*, 138 S Ct 2448, 2501 (2018). See *ibid* at 73.

13. *Ibid* at 75.

14. *Ibid* at 95.

15. *Ibid* at 75-78.

16. *Ibid* at 77-78.

these tools from the Court's current libertarian interpretation. However, many of these tools have yet to be examined by the post-2005 Court, which has shown a willingness to overturn decade-long precedents. Accordingly, Minow fails to account for the impact of the Court's potential interpretation on the viability of these tools. As a result, she potentially overstates the powers that the government currently has at its disposal to address the problem. Because this analysis is fundamental to her recommendations, critics of *Saving the News* may point to this oversight as a foundational flaw, undermining the realistic applicability of her proposals.

In chapters four and five, having extensively established the government's authority to act as a facilitator of the First Amendment, Minow leverages her analysis of the problem, current judicial interpretation, and government tools to offer three well-informed responses. She argues that her proposed solutions would hold internet platform companies responsible for their effect on the accessibility of the news, protect users from abuse, and ensure the availability of independent non-profit and public media.¹⁷ Moreover, she claims that, if the government were to implement these responses together, the destruction of journalistic news could be halted and potentially reversed.¹⁸ She further supplements each response with examples of specific initiatives to support these efforts.

The first response calls "for digital platform companies [to be treated] as responsible players, subject to duties and expectations commensurate with their functions and their powers" as news broadcasters.¹⁹ To accomplish this, she proposes five measures for regulating large social media platforms: (1) requiring social media companies to pay for the news circulated on their platform(s); (2) curtailing the legislative protections afforded to internet platforms that enable their immunity from the liabilities currently imposed on traditional news publishers; (3) increasing the antitrust investigation and enforcement against internet platforms; (4) regulating large digital platform companies as public utilities to allow government to issue requirements around fair access and sustainability; and (5) introducing novel fairness and awareness doctrines, mandating that platforms present competing views and require adequately sourced content.²⁰ The second response prescribes the vitalization of "public and private protections against deception, fraud, and manipulation and [the bolstering of] the capacities of individuals and communities to monitor and

17. *Ibid* at 144.

18. *Ibid* at 104.

19. *Ibid* at 103.

20. *Ibid* at 104-28.

correct abuses and demand better media and internet practices.”²¹ To achieve this, she recommends that the government (1) institute regulations that require companies to create and abide by contractual terms-of-service agreements; (2) leverage laws against defamation and fraud to require the removal of fraudulent accounts from digital platforms; (3) require platform companies to post warnings that content may not be reliable and regularly explain their curation practices; and (4) support civil society efforts to monitor and protect individual internet users.²² Finally, the third response functions to “support, amplify, and sustain a variety of public interest news sources and resources at the local, regional, and national levels.”²³ Minow suggests that this could be done by (1) supporting non-profit news sources through tax exemptions, deductions, and credits; and (2) investing in public media and media education to address the local “news desert” created by private actors.²⁴ In crafting and laying out these solutions, Minow masterfully details how each of them is capable of addressing the declines in the news industry outlined in the first chapter. She simultaneously builds flexibility into each approach to provoke further contemplation about the best way in which to implement them.

Overall, *Saving the News* provides readers with a comprehensive analysis of the deterioration of the contemporary news ecosystem in the United States and its grave implications for democracy. Minow is successful in convincing readers that change is urgently needed and should be spearheaded by the government through policy initiatives to uphold its duties under the First Amendment. Moreover, this book advances public discourse beyond problem analysis and pushes it towards tangible reform by leaving readers motivated and armed with a framework to effect change.

21. *Ibid* at 103.

22. *Ibid* at 129-38.

23. *Ibid* at 103-104.

24. *Ibid* at 138-44.