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## Rehearsal for Media Regulation: Congress Versus the Telegraph-News Monopoly, 1866-1900

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# Rehearsal for Media Regulation: Congress Versus the Telegraph-News Monopoly, 1866-1900

**Menahem Blondheim\***

I.	THE CENTURY THAT NEVER HAPPENED .....	300
II.	FREE SPEECH AND THE RISE OF CORPORATE AMERICA .....	302
III.	WESTERN UNION, THE ASSOCIATED PRESS, AND THE LEGISLATURE .....	304
IV.	WESTERN UNION'S MONOPOLY OF KNOWLEDGE .....	308
V.	ZEROING IN ON THE ASSOCIATED PRESS .....	314
VI.	THE REGULATOR, THE AP, AND THE FIRST AMENDMENT .....	318
VII.	EXIT CONGRESS, ENTER THE JUDICIARY .....	322
VIII.	EXIT THE HISTORIAN, ENTER THE LEGAL SCHOLAR .....	325

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## I. THE CENTURY THAT NEVER HAPPENED

Until quite recently, legal scholarship tended to consider the nineteenth century a First Amendment wasteland. No landmark Supreme Court decisions or major debates in the legal system alerted legal scholars to the evolution of free expression ideas and practices in that otherwise lively century.<sup>1</sup> This presumed century-long stasis should have appeared curious: after all, the years between the demise of alien and sedition laws and the era of the World Wars witnessed the radical democratization of American politics, political debate, and the media coverage of both. That period also witnessed revolutions, first in transportation and then in electric communications, which together transformed the nation's information environment and its press. The nineteenth century also produced the greatest event of United States history—the Civil War—in which the concepts of freedom and rights were central. That same century hosted the American Industrial Revolution and processes of centralization and national integration. These historical processes should have had a significant bearing on the development of free-speech-related theory and practice.

And indeed, recent historians of the First Amendment, taking their cue from developments beyond the narrow confines of the legal system, have been encountering a rich nineteenth century legacy of discourse on freedom of the speech and press. Scholars including Michael Kent Curtis (tracing free speech issues in the antebellum and Civil War eras) and David M. Rabban (studying turn-of-the-century events) have been exploring heretofore untraveled paths for understanding the transformation of First Amendment sensibilities prior to the Supreme Court's great free speech decisions in the twentieth century's interwar period.<sup>2</sup> Yet with all of its

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1. "Legal system" is used here in a broad sense, such as that suggested by Morton Keller: "that densely woven fabric of lawyers and judges, cases and decisions" which together form an "important part of the . . . American polity." MORTON KELLER, *AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA* 343 (1977).

2. See MICHAEL KENT CURTIS, *FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY* (2000); DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* (1997). Among the many recent works that address free expression in the nineteenth century are: DONNA LEE DICKERSON, *THE COURSE OF TOLERANCE: FREEDOM OF THE PRESS IN NINETEENTH-CENTURY AMERICA* (1990); MARK A. GRABER, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* (1991); JOHN LOFTON, *THE PRESS AS GUARDIAN OF THE FIRST AMENDMENT* (1980); JEFFERY A. SMITH, *WAR AND PRESS FREEDOM: THE PROBLEM OF PREROGATIVE POWER* (1999)

richness, this new scholarship has failed to find antecedents for one of the major issues on our contemporary free expression agenda: government regulation of powerful, new technology-empowered communication corporations that play a major role in shaping America's public sphere. As Rabban has observed, "[S]ome current free speech issues were not addressed before the [first world] war."<sup>3</sup> A case in point was media regulation. "Regulation of mass media and cyberspace," Rabban averred, "were not topics of concern . . . between the Civil War and World War I."<sup>4</sup>

The present essay is intended to add a chapter to the emerging story of freedom of expression in the nineteenth century. Its focus is precisely on the missing link highlighted by Rabban: it discusses free press dilemmas emerging from the diffusion of powerful media of public communications in the post-Civil War generation. More specifically, it reconstructs a prominent, generation-long debate over government regulation of the telegraph ("the Victorian Internet") and the newswire services (America's first national media enterprise) in the Gilded Age. This inexplicably neglected chapter in the history of free speech is particularly compelling in that issues that were rigorously negotiated during that time resonate in present-day jurisprudence dilemmas regarding the nexus of communications technology, government regulation, and free expression. Such parallels between the nineteenth century debate and our contemporary quandaries are not explicitly drawn out in what follows. They are, however, quite patent, even striking. Moreover, and at least as important, the case of telegraph and wire service regulation seems to provide a coherent link between nineteenth century technological, business, and social developments, and twentieth century First Amendment thought.

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(providing an excellent discussion of free speech in parts of the nineteenth century, although it focuses thematically on war); Timothy W. Gleason, *19th-Century Legal Practice and Freedom of the Press: An Introduction to an Unfamiliar Terrain*, 14 JOURNALISM HIST. 26 (1987) (providing an important insight on nineteenth century developments from the perspectives of common law and legal scholarship); see also JEFFERY A. SMITH, *PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM* (1988). For discussions of nineteenth century free expression developments in the historical tradition, see *infra* note 5.

3. RABBAN, *supra* note 2, at 15.

4. *Id.*

## II. FREE SPEECH AND THE RISE OF CORPORATE AMERICA

In antebellum America, political and ideological controversies over the fate of the Union subsumed the free speech debate.<sup>5</sup> Free expression was a significant aspect of the overall contest between slavery and freedom, as illustrated by the Republicans' 1856 battle cry: "Free Speech, Free Press, Free Men, Free Labor, Free Territory, and Frémont."<sup>6</sup> The Union's victory, in a war construed by the North as a conflict about the overall meaning of freedom, vindicated and enshrined an expansive theory of civil liberties, freedom of expression included.<sup>7</sup> Thus, during the Gilded Age, it was no longer politics and ideology that launched and fueled the free speech debate, but rather the state of the Union's economic, business, and technological development. Concern over freedom of press and speech in the postwar era emerged as an aspect of the nation's grappling with the rise of corporate America and its search for a new industrial and business

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5. Historical accounts of important antebellum and wartime free speech-related developments include: CLEMENT EATON, *THE FREEDOM-OF-THOUGHT STRUGGLE IN THE OLD SOUTH* (1964); JOHN NERONE, *VIOLENCE AGAINST THE PRESS: POLICING THE PUBLIC SPHERE IN U.S. HISTORY* 84-110 (1994); RUSSEL B. NYE, *FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY, 1830-1860* (1963); LEONARD RICHARDS, "GENTLEMEN OF PROPERTY AND STANDING": ANTI-ABOLITIONIST MOBS IN JACKSONIAN AMERICA (1970); Menahem Blondheim, "*Public Sentiment is Everything*": *The Union's Public Communications Strategy and the Bogus Proclamation of 1864*, 89 J. AM. HIST. 869 (2002); William E. Gienapp, *The Crime Against Sumner: The Caning of Charles Sumner and the Rise of the Republican Party*, 25 CIVIL WAR HIST. 218 (1979); Richard B. Kielbowicz, *The Telegraph, Censorship, and Politics at the Outset of the Civil War*, 40 CIVIL WAR HIST. 95 (1994).

6. CURTIS, *supra* note 2, at 302 (citing RICHARD H. SEWELL, *BALLOTS FOR FREEDOM* 284 (1976) (footnote omitted)). For an alternative wording of the slogan ("Free Soil, Free Labor, Free Men, Free Speech, and Frémont"), see Gienapp, *supra* note 5, at 229.

7. This dynamic and its rationale are proposed and discussed in Menahem Blondheim, *Regulating Freedom of the Press* (1997) (paper presented at the Fifth Conference on the Nineteenth-Century Press, the Civil War, and Free Expression in America, available from the author upon request). It is congruent with scholarship on the Civil War's more general impact on civil liberties. Popular renderings of that process are WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998); and GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* (1992). These arguments should, however, be supplemented with HAROLD M. HYMAN, *A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION* 65-80 (1973) (pointing out the controversial and divisive nature of the war administration's record on civil liberties); and MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* (1991) (exploring the actual performance of the Lincoln administration on civil liberty issues).

order in the aftermath of the late-century Industrial Revolution. In that context, the particular focus of the freedom of speech debate was on the role of government. More specifically, it centered on the powers of government to regulate utilities that affected the circulation of information and opinion.<sup>8</sup>

The story of the emergence of industrial America and the appearance of its big business organizations has been told from a variety of perspectives. One of the most important, albeit neglected, is the communication perspective. After all, the earliest and most formidable of the new generation of businesses, corporations of unprecedented scale and scope, were concentrated in the communication and transportation sector. As concern over big business mounted in the decades after the Civil War, it came to be focused on the problem of monopoly. And indeed, the first two private-sector national monopolies in America were communication concerns: the New York Associated Press and the Western Union Telegraph Company. These two major players in the field of communications foreshadowed the emergence of giant national corporations in other sectors of the economy. Moreover, as business historian Alfred Chandler has persuasively argued with reference to Western Union, and as I have tried to demonstrate in the case of the Associated Press, national communications concerns were instrumental, perhaps even prerequisite, for the emergence of other clusters of industrial and service corporations operating on a national scale and dominating their respective fields of business.<sup>9</sup>

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8. For an exceptionally broad perspective on the rise of big business in the Gilded Age see MORTON KELLER, *AFFAIRS OF STATE* 162-96, 289-587 (1977). More recent works on the rise of big business in its relation to government include: WILLIAM R. NESTER, *A SHORT HISTORY OF AMERICAN INDUSTRIAL POLICIES* (1998); HARLAND PRECHEL, *BIG BUSINESS AND THE STATE: HISTORICAL TRANSITIONS AND CORPORATE TRANSFORMATION, 1880s-1990s* (2000); and WILLIAM G. ROY, *SOCIALIZING CAPITAL: THE RISE OF THE LARGE INDUSTRIAL CORPORATION IN AMERICA* (1997). For a standard introduction to government regulation of business corporations, see THOMAS K. McCRAW, *PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN* (1984). Two recent collections provide a broad perspective on problems of regulation: *THE REGULATED ECONOMY: A HISTORICAL APPROACH TO POLITICAL ECONOMY* (Claudia Goldin and Gary D. Libecap eds., 1994); and *THE RISE OF BIG BUSINESS AND THE BEGINNINGS OF ANTITRUST RAILROAD REGULATION, 1870-1900* (Robert F. Himmelberg ed., 1994).

9. See ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 79-80, 188-205 (1977). See generally *A NATION TRANSFORMED BY INFORMATION: HOW INFORMATION HAS SHAPED THE UNITED STATES FROM COLONIAL TIMES*

Thus, once government confronted the rise of big business and the problem of private-sector monopoly, it would inevitably encounter the First Amendment. But the bar, the prosecution, and the courts played no part in the drama, and consequently, scholars who focused on the legal system in tracing the development of First Amendment ideas—particularly when using that system's records as their sources—followed suit and tended to ignore these free expression quandaries. More surprisingly, perhaps, the public debate over the regulation of communications during the Gilded Age has evaded most students of American political economy, and of communications history as well. In these realms, however, the oversight was not due to a lack of sources: a massive corpus of primary materials recording the debate, in print and in manuscript, is extant, and although not always easily accessible, these materials are certainly compelling.<sup>10</sup>

### III. WESTERN UNION, THE ASSOCIATED PRESS, AND THE LEGISLATURE

For more than a generation after the Civil War, government studied the new realities of American communications as shaped by novel technologies and microeconomic change. In the course of that generation, the legislative and executive branches pondered their powers to control and regulate the telegraph and news monopolies, which in turn profoundly

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TO THE PRESENT (Alfred D. Chandler, Jr. & James W. Cortada, eds., 2000). For an illuminating perspective on Chandler's approach, relevant to the fundamental observation pointed out in the text, see Richard R. John, *Elaborations, Revisions, Dissent: Alfred D. Chandler, Jr.'s The Visible Hand after Twenty Years*, 71 *BUS. HIST. REV.* 151 (1997). See also DEBRA L. SPAR, *RULING THE WAVES: CYCLES OF DISCOVERY, CHAOS AND WEALTH FROM THE COMPASS TO THE INTERNET* (2001). On the AP's role in processes of national integration and growth, see MENAHEM BLONDHEIM, *NEWS OVER THE WIRES: THE TELEGRAPH AND THE FLOW OF PUBLIC INFORMATION IN AMERICA, 1844-1897* (1994) [hereinafter BLONDHEIM, *NEWS OVER THE WIRES*].

10. For an important exception to this failure of vision, see ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM: ON FREE SPEECH IN AN ELECTRONIC AGE* 75-100 (1983). Pool, although expecting to find First Amendment implications in telegraph law and court decisions, failed to uncover the relevant regulatory action. The broader implications of regulation on media development are discussed, although not in detail, in DAN SCHILLER, *THEORIZING COMMUNICATION: A HISTORY* (1996). See also Dan Schiller, *Social Movement in Telecommunications: Rethinking the Public Service History of U.S. Telecommunications, 1894-1919*, 22 *TELECOMM. POL'Y* 397 (1998). For an example of the great potential of tracing legislative debates affecting communication, see ROBERT W. MCCHESENEY, *TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY: THE BATTLE FOR CONTROL OF U.S. BROADCASTING, 1928-1935* (1993) (studying radio regulation in its early phases).

affected the American communications environment and the nation's press. Indeed, the debate over telegraph and wire service regulation served as a significant prelude and a useful rehearsal for realigning the powers of government, judiciary, and corporate America, as well as the freedoms of America's press and of its people.<sup>11</sup>

Western Union, established in 1851 as the New York and Mississippi Valley Printing Telegraph Company, began buying out and merging small Midwestern telegraph companies in the mid-1850s, the telegraph's "era of consolidation."<sup>12</sup> By the Civil War it represented the western leg of a national telegraph duopoly, and after the war it managed to swallow up its major eastern rival, the American Telegraph Company. Thus, by 1866, Western Union could be considered what business historians call a "center firm"—a corporation controlling more than ninety percent of its field of business.<sup>13</sup>

Less conspicuous, but at least as dominant in shaping the national communication and information environment, was the Associated Press ("AP"). By 1867, the AP was a coalition of regional press associations, dominated by the New York Associated Press ("NYAP"). The NYAP, founded in 1846, had managed, by shrewd maneuvering in both the telegraph and newspaper sectors, to gain the questionable distinction of being America's first private-sector national monopoly. From the mid-1850s on, the AP and Western Union were very closely aligned. They fully deserved their contemporary description as "a double-headed monopoly."<sup>14</sup>

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11. The only detailed study of this regulatory debate is Lester G. Lindley, *The Constitution Faces Technology: The Relationship of the National Government to the Telegraph, 1866-1884* (1971) (unpublished Ph.D. dissertation, on file with Rice University). See also Richard Du Boff, *The Rise of Communication Regulation: The Telegraph Industry, 1844-1880*, 34 J. COMM. 52 (1984).

12. This term and periodization is proposed in ROBERT LUTHER THOMPSON, *WIRING A CONTINENT: THE HISTORY OF THE TELEGRAPH INDUSTRY IN THE UNITED STATES, 1832-1866* (1947), which remains the best and most authoritative narrative of the emergence of Western Union.

13. *Id.* On "center firms," see, e.g., Thomas K. McCraw, *Rethinking the Trust Question*, in *REGULATION IN PERSPECTIVE* 19 (Thomas K. McCraw ed., 1981).

14. S. REP. NO. 43-242, at 105 (1874). For background information concerning the emergence of the AP, see VICTOR ROSEWATER, *HISTORY OF COOPERATIVE NEWS-GATHERING IN THE UNITED STATES* (1930); RICHARD A. SCHWARZLOSE, *THE NATION'S NEWSBROKERS: THE FORMATIVE YEARS FROM PRETELEGRAPH TO 1865* (1989); BLONDHEIM, *NEWS OVER THE WIRES*, *supra* note 9; and Menahem Blondheim, *The Click: Telegraphic Technology*,



While Western Union was a household name to most Americans, few had ever heard of the AP, let alone realized its key role in the information business. This was paradoxical. Only a small minority of Americans actually used Western Union's facilities, but practically all literates in America were daily consumers of AP's product: the telegraphic news appearing daily in their morning and evening newspapers—the news that really mattered. The AP, however, had a strong preference for working backstage, leaving the limelight to its newspaper clients. When Congress began to express its alarm over the rise of big business and to test the extent of its own powers over private-sector monopolies, it was Western Union that emerged as one of its foremost targets. The AP remained in the shadows.<sup>15</sup>

Business historian Thomas McCraw has suggested that to 19th century Americans, “[c]enter firms seemed to be mutations, the consequence of some sinister tampering with the natural order of things.”<sup>16</sup> Such firms seemed, moreover, “not merely economic entities but powerful new political forces which must be opposed in the name of American democracy.”<sup>17</sup> And indeed, between 1866 and the close of the century, the administration and the legislature incessantly, perhaps compulsively, tried to find some way to keep Western Union in check. In the period between 1866 and 1900, all Congresses but one considered plans to regulate Western Union.<sup>18</sup> This intensive involvement yielded no less than ninety-six bills and resolutions brought before Congress that addressed the problem of Western Union. The various congressional committees that took issue with the telegraph monopoly published forty-eight reports during that period, some very extensive; other legislative reports and documents remained in manuscript. The issue of telegraph regulation was very prominent in the public sphere as well. It was debated extensively in the

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*Journalism, and the Transformations of the New York Associated Press*, AM. JOURNALISM, Fall 2000, at 27 [hereinafter Blondheim, *The Click*].

15. The relative invisibility of the wire service until the 1880s, when AP datelines began to appear regularly, is illustrated by the fact that only seven references to the NYAP appear in the *New York Times* index in the 1850s; but on each day that newspaper appeared it carried NYAP telegraphic reports. BLONDHEIM, NEWS OVER THE WIRES, *supra* note 9, at 6.

16. McCraw, *supra* note 13, at 19.

17. *Id.*

18. The one exception was the 44th Congress. During its tenure, however, the Atlantic & Pacific Telegraph Company offered lively competition to Western Union. See MAURY KLEIN, THE LIFE AND LEGEND OF JAY GOULD 197-205, 277-82 (1986).

press and even constituted a favorite topic for college exercises in rhetoric and debating.<sup>19</sup>

But with all of this preoccupation with the telegraph monopoly, remedies remained elusive. Presidents, postmasters-general, congressional committees, and individual legislators, in their endless procession of addresses, annual reports, investigations, bills, and speeches, demonstrated that they had no clear idea of what to do or how to do it. Most disturbingly, neither could they seem to articulate a clear rationale for why something needed doing. Notwithstanding their sustained efforts, legislators and bureaucrats found it difficult to prove that Western Union's monopoly harmed the common weal as prevailing economic theory postulated.<sup>20</sup> Lacking detailed information, experience, and an appropriate yardstick, would-be regulators could not sustain the allegation that Western Union was leveraging its monopoly position to charge unfair prices for its services. Additionally, they could not demonstrate that the corporation retarded technological development in order to buttress its monopoly. Even the most populist voices that joined in the debate could not convincingly point to a pattern of corrupt or even unfair business practices of the corporation.<sup>21</sup>

Gradually, however, concerned legislators crystallized a general premise for why it was not only right but also imperative to regulate

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19. References to all these bills and reports, as well as to speeches in Congress on the issue, are conveniently collected in *Postal Telegraph Facilities*, a pamphlet issued by the Office of the Postmaster General, Sept. 25, 1890 [hereinafter *POSTAL TELEGRAPH FACILITIES*].

20. The antebellum background is essential for understanding Gilded Age notions about monopoly and government involvement in the issue. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 109-39 (1977).

21. One Congressman did go so far as asserting that the \$370 million aggregate personal wealth of the members of the Western Union board was derived largely from speculation based on advance knowledge of commercial information. However, he presented no proof that could substantiate the charges. Speech of Charles Sumner of California in the House of Representatives, 25-27 (1884). Western Union, wary of foul play concerning the flow of commercial quotations, called in Pinkerton Detectives to investigate charges that its employees had used advance knowledge of quotations for speculation. The suspicions were indeed confirmed, and the company acted vigorously in investigating them and took severe action against the offenders. Letters from William Orton to Anson Stager (Nov. 15, 1867); Orton to Alan Pinkerton (Nov. 19, 1867); Orton to M.H. Painter (Nov. 19, 1867); Orton to John Van Horn (Dec. 23, 1867), in *WESTERN UNION PRESIDENTIAL LETTER BOOKS* (on file at the Smithsonian Institution); cf. *THE TELEGRAPHER* (June 1 & 15, 1867; Aug. 1, 1867).

Western Union. This rationale focused less on microeconomic structure, industrial dynamics, and business practices, and more on the fundamental nature of Western Union's line of business. The telegraph company handled knowledge, and its operations affected the minds of Americans. Since it had the power to shape what the people knew, it was presumed to wield power over what they thought. While general, abstract notions of center firms as dangerous aberrations hardly provided a mandate for legislative action, a monopoly of knowledge did.<sup>22</sup> Western Union's perceived power over knowledge was congruent with the notion of center firms as sinister political forces, endangering the American way. Monopoly control over information and opinion was precisely the kind of concentration of power that statesmen would respond to in earnest, even if it brought them to encounter sensitive issues touching on freedom of press and speech.

#### IV. WESTERN UNION'S MONOPOLY OF KNOWLEDGE

Western Union's supposed power over the circulation of commercial information and over political news emerged as a leading theme in arguments for government regulation of the corporation. Pursuant to the introduction of the first telegraph reform resolutions in 1866, a series of bills proposing that the government purchase the corporation, that Congress regulate its prices and business practices, or that the executive branch establish competition to Western Union (the "Postal Telegraph"), were characteristically justified by the crucial role the telegraph played in the flow of commercial information and political news. Prominent features of practically all the arguments made in Congress, whether for or against

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22. The concept of monopoly of knowledge and its theory are identified with the work of Canadian economic historian and communication theorist Harold Adams Innis. While the notion is applied frequently in Innis's two major communication works, *THE BIAS OF COMMUNICATION* (1951) and *EMPIRE AND COMMUNICATIONS* (1950), it is most clearly developed in *THE PRESS: A NEGLECTED FACTOR IN THE ECONOMIC HISTORY OF THE TWENTIETH CENTURY* (1949). There are numerous interpretations and applications of Innis's concept of monopoly of knowledge. A standard interpretation is James W. Carey, *Canadian Communication Theory: Extensions and Interpretations of Harold Innis*, in *STUDIES IN CANADIAN COMMUNICATIONS* 38-45 (Gertrude Joch Robinson & Donald F. Theal eds., 1975). A more recent interpretation may be found in Menahem Blondheim, *Harold Adams Innis and His Bias of Communication*, in *CANONIC TEXTS IN MEDIA RESEARCH* (Elihu Katz et al. eds., 2003). A popular modern work focusing on the issue of media monopoly is BEN H. BAGDAKIAN, *THE MEDIA MONOPOLY* (1987).

government involvement in the telegraph industry, were Western Union's services of commercial quotation distribution, representing its power over the nation's business, and the company's system of news distribution, representing the corporation's potential political influence.<sup>23</sup>

Before long, these two issues were differentiated. While Western Union's control over general and business news were both understood as a source of great power, the implications of centralized control were recognized to be different for either kind of information. Dissenter Benjamin Butler could be counted on to growl against both, but early on he focused on Western Union's control of commercial information. The telegraph company, he complained, was "a controlling agency of commerce." "There is no industry," he added, "no interchange of commodity, no value, that is not at its mercy."<sup>24</sup> To Butler, it followed that the telegraph monopoly was "burdensome, oppressive, and dangerous to the public welfare."<sup>25</sup> In defense, Western Union argued, with much merit, that by centralizing and nationalizing market information, it equalized opportunity rather than fostered privilege.<sup>26</sup> From as early as 1866-67, Western Union operated a Commercial News Department ("CND") that processed and distributed key market quotations to boards of trade and other commercial associations, as well as to individual business houses throughout the country several times during business hours. But this function of the telegraph giant, however intimidating, seemed to have a progressive effect. The CND leveled information advantages across the country and put all the nation's traders on the same footing, equalizing opportunity in the process.<sup>27</sup>

Beyond commercial markets, in the trade of political news, monopoly also affected centralization and uniformity. Thus, monopoly was thought to affect the marketplace of ideas, stifling public debate and bringing about a monolithic public sphere. Western Union's vast system sustained the distribution of uniform AP telegraphic news reports to the press of the

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23. See *Postal Telegraph Facilities*, *supra* note 19.

24. H. R. REP. NO. 43-125, at 5-6 (1st Sess. 1875).

25. *Id.* at 7.

26. See S. REP. NO. 43-242, at 81-82 (1874).

27. A short description of the CND and an analysis of its significance is provided in Menahem Blondheim, *When Bad Things Happen to Good Technologies: Three Phases in the Diffusion and Perception of American Telegraphy*, in *TECHNOLOGY, PESSIMISM AND POSTMODERNISM* 77-92 (Yaron Ezrahi et al. eds., 1994).

entire country. The implications of uniformity and centralized control in this type of information were vastly different from those of standardization in commercial information. Rather than benevolent, these effects could be, and were, recognized as dangerous. Having a single dominant source for political and social information could at best stifle, at worst eliminate, public debate and meaningful public opinion. As Gardiner G. Hubbard, the foremost lobbyist for the Postal Telegraph, argued, influence over the nation's telegraphic news report represented "a power greater than any ever wielded by the French Directory, because, in an era when public opinion is omnipotent, it can give, withhold, or color the information which shapes that opinion. It may impart an irresistible power to the caprice of an individual."<sup>28</sup> Western Union thus represented the specter of an uncontrolled private-sector economic interest wielding political and ideological power on a national scale by affecting the minds of Americans.

And indeed, as it evolved, the debate over regulation of Western Union became increasingly focused on the relationship between the telegraph monopoly and the press. As early as 1866, protagonists of telegraph regulation pointed to Western Union's potential influence over the press as sufficient justification for a postal telegraph. By 1870, the Select Committee on the Postal Telegraph reported that the wire services, "and consequently the newspapers, are completely in the power of the telegraph companies."<sup>29</sup> Two years later, a Senate committee that recommended government support for competition in telegraphy pointed out that the power "of influencing public opinion and action in any important crisis, is possessed by those who control the telegraph."<sup>30</sup> An unscrupulous person who controlled the wires would become the "master of the press," and could "give to the news of the day such a color as he chose, and thus fatally pollute the very fountain of public opinion."<sup>31</sup>

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28. S. REP. NO. 48-577, pt.1, at 17 (1884).

29. H.R. REP. NO. 41-114, at 46 (2d Sess. 1870).

30. S. REP. NO. 42-242, at 4 (3d Sess. 1872).

31. *Id.* at 5 (citation omitted). That same year, a committee recommending "to connect the telegraph with the postal service" pointed out:

The relations of the telegraph to the press and to the Government have reached a degree of importance overshadowing considerations heretofore considered. In this country the perpetuation of the Government must have its ultimate guarantee in the intelligence of the people. No agency is so potent in the dissemination of intelligence as the press, and to the daily press the telegraph is far more essential than the post.

The public and the press, however, appeared surprisingly oblivious to that ecological danger. The Postal Committee that studied bills in 1869 proposing to regulate the telegraph industry noted that if “the people desired to make the change that desire would naturally show itself in the form of petitions to Congress, or in the resolutions of State Legislatures.”<sup>32</sup> “[B]ut,” acknowledged the committee, “no such petitions or legislative resolutions have been received from any quarter.”<sup>33</sup> Western Union took up this argument with glee. It repeatedly explained that “there is no public demand” for measures of telegraph regulation, and moreover, that “the press does not support” them.<sup>34</sup> Celebrated economist David A. Wells appended to his widely circulated 1873 study, *The Relation of the Government to the Telegraph* (sponsored by Western Union), hundreds of newspaper clippings that proved the press’s overwhelming opposition to government involvement in telegraphy.<sup>35</sup>

But Western Union’s argument proved to be a double-edged sword. To the extent that the national newswire service set the agenda for the press, and that the press set the public agenda, indifference to the danger of Western Union’s monopoly was hardly an oversight. The Western Associated Press (“WAP”) was bound by its contract with Western Union, and other press associations by their best interests, not to support any other telegraph company. This clause in the WAP contract was intended to be broadly construed. It even extended to a dictum not to “speak in

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H.R. REP. NO. 42-6, at 7 (3d Sess. 1872). The committee report argued that since Congress had the power to regulate the mails, it had similar constitutional authority to regulate the telegraph. It stated that in order to secure freedom of the press it was necessary to exercise that authority. *Id.* Another committee, reporting in 1875, elaborated on the clause in the contract between Western Union and the WAP that forbade the press to encourage telegraph competition, to demonstrate “how complete, controlling, burdensome, oppressive, and dangerous to the public welfare, the telegraphic monopoly has thus become.” H.R. REP. NO. 43-125, at 7 (1st Sess. 1875).

32. H.R. REP. NO. 40-32, at 12 (3d Sess. 1869); *cf.* S. MISC. DOC. NO. 42-86, at 2 (2d Sess. 1872).

33. H.R. REP. NO. 40-32, at 12. My survey of petitions to Congress on this issue indeed yielded relatively few examples. *See, e.g., Memorial Recently Adopted by the Chamber of Commerce of Portland, Oregon, Favoring the Early Connection of the Post-Office Department with the Telegraphic and Telephone Businesses of the United States*, 52nd Cong. (1892) (on file at the National Archives, RG 46. Sen. 52 A-J20.1).

34. S. REP. NO. 43-242, at 108 (1874).

35. DAVID A. WELLS, *THE RELATION OF THE GOVERNMENT TO THE TELEGRAPH* (1873).

disparaging terms of the Western Union Telegraph Company.”<sup>36</sup> Before long, congressional investigators uncovered that clause in the contract between Western Union and the WAP. “[T]he Western Union has bound the Associated Press . . . to oppose any other telegraph company,” reported a congressional committee.<sup>37</sup> “Then,” the committee noted, Western Union “point[s] to the columns of the papers as evidence that neither the journals themselves nor the public desire a change.”<sup>38</sup>

Here was the specter of a restraining influence on the press, fully realized. But in no way did it resemble what the founders had dreaded. It was not the government making laws to abridge press freedom for its own interests; it was rather a powerful monopolistic corporation wielding a dominant technology and making business arrangements that restricted freedom of the press. Congress was seeking legitimacy to overcome Constitutional hurdles in exercising its legislative power over private-sector corporations, so as to “free the press.”<sup>39</sup> Government was thus searching for ways and means to regulate the circulation of information, and more generally, to shape the communication environment, but in the interest of freedom of the press, not its restraint.

Congress, although it debated the case of Western Union’s monopoly of knowledge in session after session, made no headway in solving the problem of monopoly in news through wielding legislative or executive action. Yet by merely staging the debates, Congress affected the newswire business significantly. As early as 1866, Western Union conceived a plan to venture into the news vending business on its own account. It allied itself with the WAP—at the time a discontented client of the NYAP—and also with NYAP’s retiring general agent, Daniel H. Craig. With their help, it

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36. H.R. REP. NO. 41-114, at 103 (2d Sess. 1870). Western Union’s contract with the WAP is quoted in CIRCULAR FROM THE EXECUTIVE COMMITTEE OF THE WESTERN ASSOCIATED PRESS, CONTRACT WITH THE NEW YORK ASSOCIATED PRESS, AND WESTERN UNION TELEGRAPH COMPANY 7-8 (1867) (private circular not for publication) (available in the William Henry Smith papers, on file at the Indiana Historical Society). Murat Halstead noted in that circular that the clause “which forbids us to encourage or support any opposition or competing telegraph Company; . . . was to the Telegraph Company a valuable consideration for the favorable terms upon which they contracted with us.” *Id.* at 2. Halstead’s statement was later quoted in numerous government documents concerning Western Union.

37. S. REP. NO. 43-242, at 3.

38. *Id.*

39. S. REP. NO. 43-242, at 9.

laid the groundwork for establishing its own news service that would supplant the AP as the national provider of telegraphic news. But as soon as Western Union learned that Congress was scheduled to take up Senator W. Gratz Brown's widely supported telegraph reform resolution of December 1866 and his bill of January 1867, it abandoned the venture. In 1882, Jay Gould, who then controlled Western Union, retreated from a similar scheme concocted together with the WAP. Once again, it was a House initiative in support of two postal telegraph bills—which were ultimately presented to Congress early in 1883—that made Gould abandon his ambitious plan.<sup>40</sup>

Between these two episodes, the press associations, realizing that Western Union was concerned about government action to counteract its supposed power over the press, took full advantage of Western Union's vulnerability by negotiating better terms for their news services.<sup>41</sup> The AP coalition skillfully leveraged the government's involvement to exert pressure on Western Union and managed to shift the balance of power between the two heads of the nation's "double-headed" telegraphic news monopoly. Thus, in explaining his strategy toward Western Union in 1873, the general agent of the WAP wrote an executive committee member: "Can the Telegraph Co. afford to offend the Western Associated Press? It is very well known," he answered his own rhetorical question, that Western Union "is very anxious to preserve a good understanding with us, especially while there is possibility of legislation in Congress."<sup>42</sup>

It would therefore appear that by the mere threat of wielding regulatory powers, Congress managed to strike a blow for press freedom and against capitalist control. Better yet, Congress did not even have to put the extent of its power to regulate freedom of speech to the Constitutional test—it had succeeded in defending the press by merely threatening to

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40. BLONDHEIM, *NEWS OVER THE WIRES*, *supra* note 9, at 143-51, 164-66.

41. See Letters from William Orton to Anson Stager (November 11 & 29, 1869), in *WESTERN UNION PRESIDENTIAL LETTER BOOKS* (on file at the Smithsonian Institution); Letter from W. Scott Smith to William Henry Smith (July 16, 1869) (William Henry Smith papers, on file at the Indiana Historical Society); Letter from W. H. Smith to Whitelaw Reid (February 17, 1877) (Whitelaw Reid papers, Library of Congress); Letters from W. H. Smith to Richard Smith, (Jan. 7, 1882, June 12, 1882) (William Henry Smith papers, on file at the Indiana Historical Society).

42. Letter from Smith to Haldeman (May 10, 1873) (William Henry Smith papers, Ohio).



make laws that would prevent the abridgment of the latter's freedom. But, as legislators shortly discovered, their de facto diminution of Western Union's powers in the news industry was hardly a victory for freedom of the press in America. Legislators would discover this through a gradual but significant shift in the focus of their investigative activities.

## V. ZEROING IN ON THE ASSOCIATED PRESS

In round after round of congressional investigations, Western Union defended itself from government criticism by pointing to the part played by its ally, the Associated Press, in disseminating the nation's commercial information and general news. As Congress was uncovering Western Union's control over commercial quotations in 1874, its president, William Orton, not only pointed to the public good affected by the service, he also magnanimously declined sole credit for accomplishing it. Orton pointed out that "the agents of the . . . Associated Press" gathered the news supplied by Western Union's Commercial News Department.<sup>43</sup> The news, he added, "comes over the cable and Western Union lines in cipher, and we don't know any more what is in them than the mail-carrier knows what is in a sealed letter."<sup>44</sup> In other words, Western Union merely played the role of carrier and distributor. It was the NYAP that gathered and edited the commercial news. Western Union would present the same argument in recurring debates over its monopoly in the supply of general and political news.

And indeed, as information about monopoly of knowledge in America accumulated, the crux of the debate in Congress gradually shifted from the role of Western Union in telegraphic transmission to the control the AP exerted over the flow of national news, over the press of the country, and supposedly, over the opinions of Americans.<sup>45</sup> What Congress found was

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43. S. REP. NO. 43-242, at 81 (1847).

44. *Id.* at 81-82 (1847). The most elaborate description of the working relationship between Western Union and the AP was provided by Orton in his testimony before the Committee on the Judiciary, on Feb. 21-22, 1875. *Investigation of the Western Union Telegraph Company*, 43rd Cong. (1875)(manuscript on file at National Archives, HR 43A-F14.5, RG 233) [hereinafter *Western Union Hearing*].

45. It was noted above that only a few petitions or public resolutions were presented to Congress in the interest of controlling Western Union. There was, however, a petition to Congress, submitted by the National Typographical Union in 1869, that called for regulation of the AP. It complained that because the AP restricted its reports, it was "lessening the

alarming. It discovered that the members of the NYAP—seven powerful dailies in New York City—practically controlled the national supply of news. It learned that the news—that was gathered daily from all over the country and the world—was “edited,” or “censored” (a term legislators were more comfortable with) in one office by one man.<sup>46</sup> Congress also discovered that the product of that “censorship”—a single dispatch—was then radiated throughout the country to AP members and clients, representing a vast majority of the nation’s important newspapers. Worse still, it discovered that there was no close alternative to the AP’s service; it was in effect the exclusive “fountain-head” of the confluence of America’s news.<sup>47</sup> Then Congress uncovered perhaps the most troubling feature of the system: the privilege of receiving AP reports was restricted. Certain newspapers could access them, others could not. Newspapers that were not so privileged had only a small chance for survival.<sup>48</sup> Congress also found that Associated Press newspapers were not allowed to receive telegraphic reports from any competing news service, thus effectively the AP ruled itself a monopoly. To top it all off, Congress revealed that freedom of the press did not apply to criticism of the management of the wire service. Newspapers receiving the wire service’s news were forbidden to criticize the Associated Press publicly, on pain of losing their franchise. The AP was the one institution in America that was immune from scrutiny by the press.<sup>49</sup>

But the main lesson the legislators learned concerned the technological and business rationale for the emergence of center-firms, and the elimination of small, peripheral firms. A national telegraph network and

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demand for our labor.” The resolution termed the Associated Press “one of the worst monopolies in existence.” S. MISC. DOC. NO. 41-13, at 1 (2d Sess, 1869).

46. See, e.g., *infra*, text accompanying note 47; GARDINER G. HUBBARD, THE TELEGRAPH AND THE PRESS: THE TELEGRAPHIC PRESS REPORTS AND THEIR COLLECTION, DISTRIBUTION AND TRANSMISSION [1874].

47. S. REP. NO. 43-242, at 108.

48. In most cases, local pools of newspapers determined whether a newcomer would get the news. When they opened their ranks, it was usually in consideration of a weighty bonus. BLONDHEIM, NEWS OVER THE WIRES, *supra* note 9, at 160-61. By 1879 an AP franchise in Chicago was worth more than \$100,000, and in New York more than \$500,000.

49. The most elaborate investigation of this point was perhaps in James W. Simonton’s testimony before the Committee on the Judiciary, Feb. 25, 1875. *Western Union Hearing*, *supra* note 44; cf. THE ASSOCIATED PRESS. WHY IT INVITES PRIVATE COMPLAINT AND OBJECTS TO PUBLIC ASSAULT (n.d.).

a national news service made news "broadcast" possible.<sup>50</sup> It was simply 600 times cheaper for 600 newspapers to share a single AP news dispatch, receiving it simultaneously via a single transmission over a national Western Union circuit, than for 600 newspapers to procure 600 individual news reports and receive them via 600 separate point-to-point transmissions. According to economists, telegraphic broadcast technology had thus made news reports a "public good," even if liberal statesmen seriously doubted how good they really were for the public.<sup>51</sup>

Finally, the AP bylaw, which forbade member newspapers from receiving additional telegraphic news reports from any alternative source, made it impossible for a would-be competitor to enjoy similar economies of scale and scope. Under the operation of the bylaw, no competitor could establish itself and serve the struggling outside press. Consequently, the newspaper market would remain closed, dominated by AP member-newspapers and franchise holders. Not surprisingly, therefore, by the late 1870s the justifications for regulatory action had been transformed. Regulation was no longer intended to rescue the press from the clutches of a telegraph monopoly; it was now aimed to free the people from the abuses of a press monopoly. Thus, in discussing the necessity of telegraph regulation in 1879, the chairman of the Committee on Railroads averred that "what has done more to agitate this question and to call . . . for some legislation" was the "very great monopoly upon the part of the Associated Press."<sup>52</sup> By 1884, telegraph regulation was freely presented as an attempt to promote competition to the AP. The Postal Committee believed that "[i]t is only the fact of a monopolized news distribution which makes a news censorship possible," such "as now exists in the case of the Associated

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50. See generally Blondheim, *The Click*, *supra* note 14 (discussing the "broadcast" mode of telegraphy).

51. In our contemporary terminology, the advantages of the Associated Press were in the maximization of productive and allocative efficiency and in economies of scale. For a general description of the nature and theory of the public good, see PAUL A. SAMUELSON, *ECONOMICS* (8th ed. 1970), and Jack Hirshleifer, *The Private and Social Value of Information and the Reward to Inventive Activity*, 61 *AM. ECON. REV.* 561 (1971). For its relation to telegraphy, see Erik D. Craft, *Private Weather Organizations and the Founding of the United States Weather Bureau*, 59 *J. ECON. HIST.* 1063 (1999); and Erik D. Craft, *The Value of Weather Information Services for Nineteenth-Century Great Lakes Shipping*, 88 *AM. ECON. REV.* 1059 (1998).

52. S. REP. NO. 45-805, at 4 (3d Sess. 1879).

Press.”<sup>53</sup> The committee submitted a postal telegraph bill and promised that “under the operation of this bill several associations shall be formed to collect and distribute the news.”<sup>54</sup> Since the Postal Committee held that “the telegraphic news is the breath of life to the daily press,” it considered its reform bill “a proclamation of emancipation” for the press.<sup>55</sup>

With the AP replacing Western Union in the hot seat of Congressional investigations of news control, the balance of power between the two organizations was once again altered. Western Union discovered that its affiliation with the wire service was no longer an asset in combating government regulation; it was becoming instead a very dangerous liability. In 1882, when the NYAP applied to the telegraph company for better terms, Western Union President Norvin Green, rather than conceding, lectured the president of the AP. Some of the association’s practices, wrote Green to David M. Stone, “devolved upon this company, as its assumed ally, more odium and antagonism in legislative bodies, the popular mind, and the outside press, than any one thing in the history of this company.”<sup>56</sup>

But Congress also came to realize that its existing legislative machinery was not necessarily capable of combating the news monopoly and emancipating the nation’s press. “This discrimination is inequitable and unjust,” stated one committee in reference to the AP’s practice of restricting the privilege of membership and preventing new newspapers from receiving its news reports, “but it is not contrary to any existing law.”<sup>57</sup> After all, the AP was a voluntary arrangement, and it received no particular sanctions or privileges: it was merely a successful player in a free marketplace of news, sustained by the logic of an advanced networking technology. There appeared to be only one solution that would allow full freedom of the press in the age of wire news, and the uninhibited Benjamin Butler could be counted on to propose it most bluntly. He suggested that by regulating the price of telegraphic news messages, government could minimize the economies of scale that the AP enjoyed. “Government shall fix the rates” of news transmission, proposed Butler, and “by that means all

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53. S. REP. NO. 48-577, pt. 1, at 17 (1884).

54. *Id.*

55. *Id.*

56. Letter from Norvin Green to David M. Stone (Jan. 5, 1882), in WESTERN UNION PRESIDENTIAL LETTER BOOKS (on file at the Smithsonian Institution).

57. S. REP. NO. 43-624, at 3 (1875).

questions of the Associated Press or other associations can be regulated by the government, by whom they should be regulated.”<sup>58</sup>

## VI. THE REGULATOR, THE AP, AND THE FIRST AMENDMENT

The AP responded to the charges of its dangerous concentration of power, and to the threat of regulation that would curtail it, with two arguments and one tactic. The tactic was elementary enough: the AP simply did not report the debates on its affairs and the allegations made against it to the press and public. By this tactic, it ironically confirmed the most severe accusations made in the statements it repressed. As its opponents correctly argued, the AP controlled the confluence of speedy news flow and thus had the power to set the press's agenda and affect public debate. The association went right ahead and exercised its gate-keeping powers in reporting the debate over its own regulation.

This gate-keeping tactic was best demonstrated in the case of Nathaniel P. Hill's 1884 attack on the AP in the Postal Committee he chaired. In committee, Hill interrogated the AP's general agent, William Henry Smith, on the extensive coverage the AP gave Western Union's arguments in favor of the status quo, in contrast to its suppression of arguments in favor of reform. Smith found it easy enough to explain the wide circulation of Western Union's statements in the press. The telegraph company, Smith informed the committee, frequently telegraphed press releases and its own official pronouncements in its controversy with Congress to every newspaper in the country via the AP, free of charge. "Does [the Associated Press] ever send anything that is injurious to the Western Union Telegraph Company?" asked Senator Hill. "It has done so repeatedly and constantly for years," replied Smith. "It is very difficult for those who read the newspapers to discover it," offered the Colorado Senator in response.<sup>59</sup> Smith, in turn, discovered that it was very difficult to explain the meager exposure legislative reformers received in AP reports. Hill questioned Smith as to why the AP's report of the elaborate and scathing speech he recently delivered in the Senate against the telegraph-news monopoly amounted to: "Senator Hill spoke on the postal telegraph bill." Smith answered, "That was probably recondensed somewhere."

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58. S. REP. NO. 45-805, at 32 (3d Sess. 1879).

59. S. REP. NO. 48-577, pt. 2, at 303 (1884).

“Very much,” Hill dryly responded.<sup>60</sup> And indeed, AP internal correspondence proves Hill’s point quite convincingly. When the Senator submitted the report of the committee he chaired, the Washington agent of the AP was aghast. “I can hardly believe,” the agent wrote Smith, “that anybody except . . . Mr. Hill, who fathered it, would be willing to endorse such nonsense . . . . But it is given to us . . . as the work of the ‘Committee.’”<sup>61</sup> The agent, of course, had no intention of sending “nonsense” to the American public. Accordingly, he informed Smith that “I make no use of [the committee’s report] except to send you [a] copy.”<sup>62</sup> Another AP staff member in Washington telegraphed Smith that “Hill’s report on postal telegraph contains many untrue statements concerning ass[ociate]d press which I cut out. He is either brainless or an intentional falsifier.”<sup>63</sup> The wire service kept the opinions of its Congressional opponents, as well as its opinion of them, off the public record.

The AP’s two arguments against the initiatives to break up its monopoly through regulation were at least as audacious as its tactics in reporting them. As an introduction to these arguments, AP management arrogantly informed Congress that it didn’t stand a chance of breaking the association’s power through tampering with telegraph rates. Then it went ahead to insist that Congress had no constitutional right to try and do so. Management also pointed to two important distinctions between its association and the railroads, or for that matter, the telegraph industry. The AP’s managers and spokesmen maintained that it was a private partnership, not a chartered or incorporated body, and it was therefore beyond the reach of legislatures. Its second argument was that any legislative action that would affect the AP and its monopoly would constitute infringement on freedom of the press.<sup>64</sup>

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60. *Id.* at 305.

61. Letter from David R. McKee to William Henry Smith (May 22, 1884) (William Henry Smith papers, on file at the Indiana Historical Society) [hereinafter McKee to Smith Letter]; *cf.* the very revealing correspondence between the two on the issue of Hill and his report, included in the undated Henry William Smith correspondence in the Delavan Smith papers, available at the Indiana Historical Society.

62. McKee to Smith Letter, *supra* note 61.

63. Unsigned telegram, (May 22, 1884) (William Henry Smith papers, on file at the Indiana Historical Society).

64. *See, e.g.*, S. REP. NO. 48-577; pt. 2, at 287-303; S. REP. NO. 45-805, at 38-51, 62-68 (3d Sess. 1879).

Accordingly, the AP informed the public that by considering regulatory measures to affect it, "Senators are seriously considering the propriety of regulating the *press* through Congressional enactments."<sup>65</sup> It added, sarcastically, that by doing so

[a]n improvement is to be attempted upon the Virginia Bill of Rights, the Ordinance of 1787 and the Constitution. Without doubt the average legislative mind conceives it possible to do that, and make regulation consistent with the First Amendment, which says Congress "shall make no law abridging the freedom of speech, or of the press."<sup>66</sup>

The association then topped off its constitutional argument against regulation by providing a broad frame, from a political-culture perspective, for interpreting the legislature's hyperactivity in its affairs. According to the AP, governmental involvement could not possibly have been triggered by the worried response of legislators and executives to the Industrial Revolution—to the rise of big business, industrial monopoly, and more generally, to the consolidation and nationalizing of American society. Rather, the association's representatives averred, the opposite was the case: "political theories, the logical result of which is socialism,"<sup>67</sup> emboldened government in its quest for centralized power, and gave rise to governmental regulatory action. The consequent "tendency to look to government for everything" encouraged "the demagogue [in Congress] to seek power under the shallow pretence of subserving the public welfare."<sup>68</sup> The AP concluded this appeal to conservative sensibilities and to sentimental notions of *laissez faire*, by returning to its theme of sinister governmental encroachment: "Will the politicians' dream of Governmental regulation of the press ever be realized?"<sup>69</sup>

The AP's position was replete with irony. On one hand, it considered itself too private to be interfered with by government, but on the other hand it argued that its role in the newspaper industry affected such great and sacred public rights, that even government could not touch them. Seven

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65. *Preface to Government Regulation of the Press: Testimony Taken Before the Senate Committee on Post Office and Postal Roads, March 7th and 8th, 48th Cong.* 1 (1884) (emphasis added).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 2; see also Letter from McKee to Smith (June 10, 1884) (William Henry Smith papers, on file at the Indiana Historical Society) (commending the strategic skill of the argument in "turning the guns of the enemy upon themselves.")

New York editors (comprising the NYAP) could decide, as they in fact did, that “there should be fewer newspapers . . . . We think there are too many newspapers.”<sup>70</sup> They claimed the right to determine for the people “how many papers ought to be published in a certain place,” and to “take away from lawyers who have failed at the bar, and preachers who have retired from the ministry, and politicians who have been repudiated by the people, the inspiration to become journalists.”<sup>71</sup> They could also enforce these theories in the newspaper industry, and in practice did so repeatedly. It was academic that Congress and the administration might take exception. Those who had framed the Bill of Rights long before the advent of the telegraph did not deem Congress responsible enough to intervene in such questions.

Senator Henry Wilson of Massachusetts, in perhaps the most thorough congressional debate on the regulation of the AP—that of 1884—took issue with the association’s two main contentions. He recognized that the AP was not an incorporated body, yet he did not think it could be treated as a private one. Wilson offered:

It seems to me that it is possible for the Associated Press to mislead the public with regard to public affairs and with regard to business . . . . They supply that to the press of the country, from which the great mass of the people derive their information, and on which they act in their business affairs and in public affairs. Now, it seems to me that an association or an individual engaged in that kind of business stands in a very different relation from the man who is conducting a store, a grocery establishment, a manufactory . . . .

[B]ecause of the close connection between that association . . . and the public affairs of the country, it stands upon a different basis from that of the ordinary business of the people.<sup>72</sup>

Wilson’s notion of the public nature of the AP’s business ultimately extended into a regulatory rationale. He thought it was “one of the governmental possibilities that a business occupying such a position might be touched by the power of regulation,” notwithstanding its being a private partnership.<sup>73</sup> Wilson also assaulted the AP’s defense based on the First Amendment, asserting that regulation not only could be done but also should be done. Conceding that “Congress cannot abridge the freedom of

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70. S. REP. NO. 45-805, at 69 (3d Sess. 1879).

71. S. REP. NO. 48-577, pt. 2, at 293, 314 (1884).

72. *Id.* at 298-99.

73. *Id.* at 299.



the press," Wilson countered the argument by proposing that in the present case, "regulation enacted by Congress . . . would make more effective the freedom of the press."<sup>74</sup> The conflict between the AP position and that of the Postal Committee was epitomized in a short, sharp exchange between the AP's William Henry Smith and Henry Wilson: "The Constitution guarantees the liberty of the press, and regulation is inconsistent with the liberty of the press," announced Smith. "It is not inconsistent," retorted Wilson, "to pass a law for the freedom of the press and the enforcement of that principle of the Constitution."<sup>75</sup>

## VII. EXIT CONGRESS, ENTER THE JUDICIARY

At this stage of the debate, in the mid-1880s, the issue of busting the Associated Press monopoly gradually faded away from the public agenda. Mainly for fear of government intervention, the Western Union, the NYAP, and the WAP encouraged the establishment of a competing news wire service, the United Press ("UP"). Then, the veteran powers in the news business entered into a secret trust agreement with the UP, the putative competitor they had nurtured.<sup>76</sup> According to the secret agreement, the AP clandestinely supplied the UP with a version of the news it had gathered—at considerable expense—thus lifting the barrier to entry into the wire news business. In return, the AP received a major share of UP's windfall profits from selling a product that cost practically nothing to procure. After 1884, once the UP became securely established, the notorious AP bylaw that forbade clients from receiving alternative news reports no longer affected a total restriction of trade. With a second commercial provider of telegraphic news securely established, new newspapers could be founded. There were no more complaints from would-be editors who could not get telegraphic news, and there was nominal competition between wire services.

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74. *Id.*

75. *Id.*

76. BLONDHEIM, NEWS OVER THE WIRES, *supra* note 9, at 167. For the emergence of the United Press as an adjunct to Western Union and the Associated Press alliance, see the extensive correspondence between Jay Gould, Thomas T. Eckert, Norvin Green, W.H. Smith, Richard Smith, and Whitelaw Reid, throughout 1882, in WESTERN UNION PRESIDENTIAL LETTER BOOKS (on file at the Smithsonian Institution); the William Henry Smith papers; and in the Whitelaw Reid papers, Library of Congress. The major features of the arrangement appear in E. D. Morgan and Jay Gould to David M. Stone (June 2, 1882), and W.H. Smith to Jay Gould (June 10, 1882) (William Henry Smith papers, on file at the Indiana Historical Society).

Legislators slept easier, and the veteran press associations received from their junior competitor and secret partner bountiful financial bonuses year after year.<sup>77</sup>

But the real issue was only disguised, not eliminated, and before long it surfaced once again. In 1891, the AP's secret trust agreement with the UP was publicly revealed. The revelation wrought havoc in the AP organizational framework.<sup>78</sup> A protracted war between AP factions ensued and was resolved only by a thorough reorganization of the nation's wire service.<sup>79</sup> In 1893 a new organization, formally entitled "AP," was chartered in Illinois.<sup>80</sup> Rather than a coalition of regional partnerships and cooperatives, the new AP was a coherent entity, which ultimately exercised a national monopoly. The government made no response. It had learned the lesson of a generation of unsuccessful attempts to regulate the news business in the name of freedom of the press. Legislators and government officials realized that the founding fathers had made it practically impossible to make any law in the premises.<sup>81</sup>

It was the judiciary that came to the rescue. The Supreme Court of Illinois took upon itself to address the principles involved in regulating the Associated Press. In 1900, the court, reversing a decision in a suit brought by the Chicago *Inter-Ocean* against the AP, fashioned the unique status of this private-sector company operating in the most public of businesses.<sup>82</sup>

The court reasoned that the news gathered by the Associated Press was of vast importance to the public, so that public interest is attached to the dissemination of that news. . . . It has devoted its property to a public use, and has, in effect, granted to the public such an interest in its use that it must submit to be controlled by the public for the common good.<sup>83</sup>

That, of course, was the rationale sounded time and again by Henry Wilson and other legislators in their attempts to regulate the AP—attempts that failed partially due to First Amendment scruples.

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77. BLONDHEIM, NEWS OVER THE WIRES, *supra* note 9, at 166-68.

78. *Id.* at 168.

79. *Id.*

80. *Id.*

81. SCHWARZLOSE, *supra* note 14, at 131-181; BLONDHEIM, NEWS OVER THE WIRES, *supra* note 9, at 166-68.

82. *Inter-Ocean Publ'g. Co. v. Associated Press*, 56 N.E. 822 (Ill. 1900).

83. *Id.* at 825.

The court then entered the realm of microeconomics and addressed the veteran AP bylaw that required clients to take its reports exclusively.<sup>84</sup> Throughout the congressional debates, the implications of this bylaw in buttressing the AP's monopoly were repeatedly highlighted. The court merely paraphrased a long series of legislative addresses, resolutions, and committee reports in finding that the bylaw tended "to restrict competition because it prevents [AP] members from purchasing news from any other source than from itself."<sup>85</sup> By this means the AP created a monopoly of knowledge that, as legislators had repeatedly pointed out over the past generation, prevented robust public debate, negating the rationale of free speech. Given its monopoly position, argued the court, the AP had the powers to

designate the character of the news that should be published, and, whether true or false, there could be no check on it by publishing news from other sources. [Associated Press] would be powerful in the creation of a monopoly in its favor, and could dictate the character of news it would furnish, and could prejudice the interests of the public.<sup>86</sup>

The court thus added nothing to the legislators' analysis of the bylaw and its consequences. Acknowledging that bylaws "must always be strictly subordinate to the constitution and the general law of the land," and not "infringe the policy of the state, nor be hostile to public welfare," the court simply struck down the bylaw. Its "tendency . . . to create a monopoly in its own favor" made it "illegal and void."<sup>87</sup>

The Illinois court's reasoning was thus identical with the rationale that congressional reformers had arrived at through a generation-long debate over the news-telegraph monopoly. Congress, however, could neither turn its notions into law nor implement them, due to constitutional limitations on Congress vis-à-vis the press. In other words, it was not really the Supreme Court of Illinois that interpreted and applied the First

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84. *Id.* at 826.

85. *Id.*

86. *Id.*

87. *Id.* By the time of the *Inter-Ocean* suit, the Associated Press was incorporated in Illinois. See SCHWARZLOSE, *supra* note 14, at 198-204; Frederick S. Siebert, *International Protection of Rights in News*, 9 JOURNALISM QUARTERLY 290 (1932); Frederick S. Siebert, *Rights in News*, JOURNALISM BULL., Nov. 1927, at 45; William F. Swindler, *The AP Anti-Trust Case in Historical Perspective*, 23 JOURNALISM QUARTERLY 40 (1946). See also LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA* 203-12 (1991) (discussing subsequent antitrust litigation against AP).

Amendment for an industrial, nationalizing America. Rather, it was a generation of representatives and senators, corporate executives and public activists, journalists and newspaper readers, who reflected on the First Amendment implications of technological change, industrialization, and national integration. They debated the issue in Congress, board meetings, the press, college exercises in rhetoric, and probably in cafés, salons, and saloons, too. After a generation of action, reaction, and reflection, the impact of the nineteenth century's industrial revolution and communications revolution on the meaning of freedom of speech and press had been crystallized. The Supreme Court of Illinois merely voiced public opinion and what had become the common sensibility. Its decision was essentially thrashed out in the public sphere—the bright light of American enterprise, politics, and legislation. It cannot be properly understood by merely traveling the blind alley of First Amendment legal sources.

### VIII. EXIT THE HISTORIAN, ENTER THE LEGAL SCHOLAR

The Founding Fathers had considered the press a crucial component of America's public sphere. As such, they defended it from a powerful potential rival: the federal government. By the end of the Civil War, government and press reached a *modus vivendi* in sharing the public sphere, and there emerged a wide consensus in considering a free and responsive press to be a crucial factor of American public life. The threats to freedom of press in the post-Civil War period came not from government but from private-sector corporations affecting the nation's public discourse. But government, held suspect by the word of the First Amendment, could not muster the legitimacy to regulate private-sector corporations impacting on the nation's press. The judiciary, however, was free from such restraints; it could step in and fill the void.

Indeed, the Illinois Supreme Court decision was merely a prelude to a series of resounding freedom of expression decisions handed down in the era of the World Wars.<sup>88</sup> The judiciary had marched into the First

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88. For summaries of these decisions, see, e.g., THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970); and RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* §§ 20.1-20.19 (3d ed. 1999). For historical context and background, see, e.g., FELIX FRANKFURTER, *MR. JUSTICE HOLMES AND THE SUPREME COURT* (1961); and RICHARD POLENBERG, *FIGHTING FAITHS: THE ABRAHAM'S CASE, THE SUPREME COURT, AND FREE SPEECH* (1987). For a critical survey of

Amendment void, and began applying the rationale of nineteenth century statesmen, soldiers, and reformers in setting rules shaping and reshaping America's communications environment, its public sphere, and the freedom of its press. In doing so, the court was expounding the accumulated wisdom bred of civil liberties activism in the Jacksonian era, of antebellum opposition of slavery and the slave power, of Civil War non-conformism, the framing of the Thirteenth and Fourteenth Amendments, and of Gilded Age legislative reform. By the time of the post-World War I great free-speech decisions, these nineteenth century ideas had crystallized into truths that came to be held as self-evident. The Court merely rendered them in legalese. In applying these now commonplace ideas, the court's rhetoric was so convincing, it sounded as if it was expounding the intent of the founders and framers. Perhaps even the Court itself was deceived by its own rhetoric, and confused what they found in their own hearts and minds with what the founding fathers said and did. Before long the Court's rhetoric, reflecting either self-deception or a manipulative quest for legitimacy, was taken at face value. Conventional legal wisdom began to read history backwards and hold that Brandeis and Black, Holmes and Frankfurter, were indeed sounding the voice of the framers, rather than their own contemporary sensibilities—sensibilities that had been nurtured in the nineteenth century.<sup>89</sup>

Leonard Levy, in his *Legacy of Suppression*, as well as subsequent free speech revisionists, uncovered this anachronism, but they generally failed to trace its origins and pave an alternative development path. Focusing on the legal system and its most conspicuous records and sources, they found little that could sustain a responsible reconstruction of the transformation of free speech ideas in the course of the nineteenth century.<sup>90</sup> As recent students of the First Amendment would suggest, and as

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the opinions of Holmes and the interwar court, see WALTER BERNS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* (1976).

89. For a seminal and remarkably dominant work in this vein, see ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* (1954). Of its 566 pages, a grand total of four pages are dedicated to the nineteenth century. For the origins of Chafee's views, see ZECHARIAH CHAFEE, JR., *FREEDOM OF SPEECH* (1920); and Zechariah Chafee, Jr., *Freedom of Speech in Wartime*, 32 HARV. L. REV. 932 (1919). For a history of Chafee's work and legacy, see RABBAN, *supra* note 2, and David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981).

90. See LEONARD W. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (1960); and LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS*

illustrated in the foregoing, that course may be traced by taking a closer look at nineteenth century library and archive shelves, in particular those with political, economic, and communication history call numbers. For as it appears, an examination of nineteenth century communications, ideology, political economy, and social process may help provide a proper understanding of subsequent, and even our contemporary, perspectives on freedom of speech and press.

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(1985). Levy finds that in the late eighteenth century, notions of press freedom were negatively construed as freedom from prior restraint, in contrast to the early twentieth century, in which press freedom was understood as a robust positive right. Representative examples of revisionist scholarship include EMERSON, *supra* note 88; JOSEPH J. HEMMER, JR., *THE SUPREME COURT AND THE FIRST AMENDMENT* (1986); and WILLIAM W. VAN ALSTYNE, *INTERPRETATIONS OF THE FIRST AMENDMENT* (1984).

