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Substantive Media Regulation In Three  
Dimensions

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# Substantive Media Regulation In Three Dimensions

Gregory P. Magarian

## Abstract

Changes in the political and regulatory climates are prompting calls to revive substantive government regulation of the broadcast media, specifically the now-defunct fairness doctrine. In this article, Professor Magarian attempts to sharpen the present debate over substantive regulation by closely examining earlier defenses and criticisms of the fairness doctrine. The article assesses how supporters and opponents of the fairness doctrine have characterized three issues essential for assessing the doctrine's wisdom and constitutionality: who is regulating; who is being regulated; and the goal of the regulatory scheme. As to the first issue, who is regulating, fairness doctrine supporters emphasize the democratic polity, while opponents emphasize self-interested or captured government elites. As to the second issue, who is being regulated, supporters emphasize owners of media corporations, while opponents emphasize editors and reporters. As to the final issue, the goal of regulation, supporters emphasize the need to facilitate fulsome discussion of important public issues, while opponents emphasize the conceptually impossible aim of creating perfect balance between opposing points of view. With these contrasting positions in mind, the article attempts to synthesize principles that might guide a workable and beneficial revival of the fairness doctrine. In order to maximize the extent to which new fairness regulations would serve the political community rather than political elites, both Congress and the courts would have to take a more active role than under the former fairness doctrine in shaping and directing FCC enforcement. In order to minimize interference with socially valuable editorial functions, enforcement of fairness regulations would have to focus on countering economic disincentives to presenting political debate and, where possible, protecting editors from economic pressure imposed by owners and publishers. Finally, the goal of any new fairness regulations would most sensibly be framed as balancing the Internet's atomization of public discourse and

opinion by requiring conventional mass media to present varied perspectives on important public issues. The focus should not be on some elusive idea of balance but rather on the prominence of debate and dissension.

## SUBSTANTIVE MEDIA REGULATION IN THREE DIMENSIONS

Gregory P. Magarian<sup>1</sup>  
DRAFT November 2, 2007

### INTRODUCTION

From the dawn of broadcasting until the late 1980s, the federal government vigorously employed substantive media regulations – legal guidelines about the substance of programming – to try to ensure that the broadcast industry would serve the public interest.<sup>2</sup> The most familiar element of substantive broadcast regulation, and the term that has become shorthand for the entire effort, was the FCC’s fairness doctrine. That doctrine required television and radio broadcasters, first, to devote a reasonable percentage of airtime to covering issues of public importance and, second, to provide a reasonable opportunity for the expression of opposing views on those issues.<sup>3</sup> Substantive broadcast regulation also included FCC requirements that broadcasters offer reply time to any entity whose “honesty, character, or integrity” was attacked on the air in connection with a controversial issue of public importance<sup>4</sup> and to any political candidate

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<sup>1</sup> Professor of Law, Villanova University. Thanks to Ed Baker, Tom Dienes, and Ellen Goodman for their helpful and challenging comments on an earlier version of this article, presented at the symposium *Access to the Media – 1967 to 2007 and Beyond* at the George Washington University Law School on October 11, 2007. Special thanks to Jerry Barron, the honoree of that symposium, for his vision and inspiration.

<sup>2</sup> The scope of “substantive media regulation” as discussed in this article does not extend to regulations aimed at “obscene” or “indecent” programming, which arguably carry more force than ever today and raise their own distinctive and formidable problems. *See generally* FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (upholding FCC’s authority to restrict “indecent” programming).

<sup>3</sup> The FCC formally imposed these two obligations in *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949), and reiterated them in FCC, *Fairness Doctrine and Public Interest Standards, Fairness Report Regarding Handling of Public Issues*, 39 Fed. Reg. 26375 (1974). The fairness doctrine’s roots run back to language in the Federal Radio Commission’s Annual Report of 1929. *See* 1929 FRC ANN. REP. 33 (stating that “[i]nsofar as [a] program consists of discussion of public questions, public interest requires ample play for the fair and free competition of opposing views”). The first enforceable antecedent of the doctrine was the Commission’s short-lived ban on broadcast editorializing, announced in *Mayflower Broad. Co.*, 8 F.C.C. 333 (1941).

<sup>4</sup> *See* 47 C.F.R. §73.1920(a).

whose opponent a broadcast editorial endorsed.<sup>5</sup> In addition, Congress required broadcasters to give political candidates reasonable opportunities to purchase air time<sup>6</sup> and to extend opposing candidates the same access to free or purchased time.<sup>7</sup> The Supreme Court upheld the candidate access rules against a First Amendment challenge,<sup>8</sup> and they remain in effect. The FCC, however, has scrapped the fairness doctrine<sup>9</sup> and the personal attack and political editorial rules,<sup>10</sup> despite the Court's having rejected a First Amendment challenge to those regulations in *Red Lion Broadcasting Co. v. FCC*.<sup>11</sup>

The FCC's abandonment of the fairness doctrine resulted from a confluence of several currents in law and public policy. Legislators and regulators in the late Cold War period became fixated on the idea that the economic marketplace could solve every problem without interference from the heavy hand of government.<sup>12</sup> Meanwhile, the Supreme Court – just five years after, and in sharp contrast to, its *Red Lion* decision – struck down a personal attack reply requirement for newspapers in *Miami Herald Publishing Co. v. Tornillo*.<sup>13</sup> The Court's turn against substantive media regulation reflects a free speech orthodoxy that crystallized in the 1970s and still prevails today, under which the First Amendment simply protects whatever distribution of expressive

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<sup>5</sup> See 47 C.F.R. §73.1930(a).

<sup>6</sup> See 47 U.S.C. § 312 (a)(7).

<sup>7</sup> See 47 U.S.C. § 315 (a).

<sup>8</sup> See *CBS, Inc. v. FCC*, 453 U.S. 367 (1981).

<sup>9</sup> See *Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987). The F.C.C. declared in *Syracuse Peace Council* that the fairness doctrine violated the First Amendment. The D.C. Circuit upheld the Commission's decision without reaching the constitutional issue, deferring to the Commission's alternative conclusion that the doctrine did not serve the public interest. See *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

<sup>10</sup> The D.C. Circuit ordered the FCC to abolish the personal attack and political editorial rules because the Commission had adopted those rules in conjunction with the fairness doctrine but had failed to rule on requests to reconsider them after it disavowed the fairness doctrine. See *Radio-Television News Directors Ass'n v. FCC*, 229 F.3d 269 (D.C. Cir. 2000).

<sup>11</sup> 395 U.S. 367 (1969).

<sup>12</sup> See OWEN M. FISS, *THE IRONY OF FREE SPEECH* 58-60 (1996) (describing deregulatory movement that began in late 1960s and its effect on media regulation).

<sup>13</sup> 418 U.S. 241 (1974).

opportunities the economic market happens to produce.<sup>14</sup> That orthodoxy renders incoherent – even improper – any suggestion that constitutional expressive freedom should serve some instrumental conception of just distribution or effective public debate. As regulators and the Court have subordinated public policy and constitutional doctrine to the market, substantive media regulation has largely receded into antiquity. Few voices in the past two decades have spoken well of the fairness doctrine.

A few commentators, however, have continued to defend the idea of substantive media regulation against the dominant legal and political currents. Jerome Barron has led the effort. In Barron’s conception, the First Amendment is not a lock that safeguards the market-derived expressive prerogatives of powerful media corporations. Rather, the Amendment’s guarantees of free speech and a free press form a key, designed to open public debate to the diverse range of participants and ideas necessary for our democratic system to flourish. Barron’s pioneering writings on First Amendment access rights mark the pinnacle of this First Amendment vision.<sup>15</sup> In the ensuing decades, while engaging nuance and eschewing partisanship, Barron has continued to chart pathways toward enhanced media access and has relentlessly critiqued the Court’s and regulators’ retreat from the *Red Lion* decision’s tentative steps toward access rights.<sup>16</sup> From the beginning,

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<sup>14</sup> See Gregory P. Magarian, *Regulating Political Parties Under a “Public Rights” First Amendment*, 44 WM. & MARY L. REV. 1939, 1946-59 (2003) (discussing ascendancy of private rights theory of expressive freedom) (hereinafter Magarian, *Political Parties*).

<sup>15</sup> See JEROME A. BARRON, FREEDOM OF THE PRESS FOR WHOM?: THE RIGHT OF ACCESS TO MASS MEDIA (1973) (hereinafter BARRON, FREEDOM); Jerome A. Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487 (1968) (hereinafter Barron, *Emerging Right*); Jerome A. Barron, *Access to the Press – A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967) (hereinafter Barron, *New Right*).

<sup>16</sup> See JEROME A. BARRON, PUBLIC RIGHTS AND THE PRIVATE PRESS (1981) (hereinafter BARRON, PUBLIC RIGHTS); Jerome A. Barron, *Rights of Access and Reply to the Media in the United States Today*, 25 COMM. & L. 1 (2003) (hereinafter Barron, *Access Today*); Jerome A. Barron, *Structural Regulation of the Media and the Diversity Rationale*, 52 FED. COMM. L.J. 555 (2000); Jerome A. Barron, *The Electronic Media and the Flight from First Amendment Doctrine: Justice Breyer’s New Balancing Approach*, 31 U. MICH. J. L. REFORM 817 (1998); Jerome A. Barron, *Reading Turner Through a Tornillo Lens*, COMM. LAWYER

Barron understood the limits of the fairness doctrine better than most libertarian critics, stressing the clumsiness of administrative enforcement and the need to root access principles not merely in political discretion but in a positive constitutional vision.<sup>17</sup> Nonetheless, he has consistently defended those regulations as useful paving stones on the road to fulsome access rights, while offering incisive proposals to refine substantive media regulation.

The country may be starting to catch up with Barron. Since the Democrats took over Congress this year, calls to revive the fairness doctrine have grown louder.<sup>18</sup> Those calls, however, have often resonated only faintly with Barron's principled case for substantive media regulation as a component of access rights. Democrats and liberals, in advocating a fairness doctrine revival, routinely target conservative talk radio's one-sided attacks on Democrats and liberals.<sup>19</sup> The transparency of their self-interest has allowed Republicans and conservatives to conflate their own self-interest with libertarian free speech pieties in warning that renewed regulation would lay waste not merely to broadcasting but to the First Amendment.<sup>20</sup> The arguments on both sides lack much substance, obscure most nuance, and have nothing to do with the rigorous striving to understand how expressive freedom can best advance democratic values that Barron's work exemplifies. Meanwhile, the Internet has changed the mass communications landscape in ways both profound and elusive. By giving an unprecedented number and

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(Summer, 1995), at [page]; Jerome A. Barron, *What Does the Fairness Doctrine Controversy Really Mean?*, 12 HASTINGS COMM. & ENT. L.J. 205 (1989) (hereinafter Barron, *Controversy*).

<sup>17</sup> See BARRON, FREEDOM, *supra* note 15, at 150-59 (discussing defects of fairness doctrine in light of access principle).

<sup>18</sup> See Jim Puzzanghera, *Democrats Speak Out for Fairness Doctrine*, L.A. TIMES (July 23, 2007), at C1.

<sup>19</sup> See *id.* (describing criticisms of conservative talk radio by advocates of a fairness doctrine revival).

<sup>20</sup> See, e.g., George F. Will, *Why Howard Dean Wants to Re-regulate the Media*, NEWSWEEK (May 7, 2007), at [page]. Republicans in the House recently succeeded in passing a bill that would block the F.C.C. from reinstating the fairness doctrine, but Senate Democrats scuttled a similar measure. See Puzzanghera, *supra* note 18.

variety of speakers a public platform, online communication has dramatically increased the variety of perspectives available in public discourse; at the same time, it has created unprecedented opportunities to narrow the range of viewpoints one encounters.

Supporters of a renewed fairness doctrine tend to ignore the impact of the Internet, while opponents reflexively extol cyberspace as the harbinger of an unregulated world.

This article attempts to transcend the partisan divide and engage the debate over substantive media regulation in a manner that honors Barron's thoughtful example. It seeks to impose order on, and develop some insights from, arguments for and against substantive media regulation that allow for some government role in making the mass media more broadly accessible and more informative about matters of public concern. Elsewhere I have critiqued the libertarian position that the First Amendment absolutely bars any judicial or regulatory effort to broaden media access.<sup>21</sup> Accordingly, I set that position aside here, and with it much conventional First Amendment doctrine.<sup>22</sup> Instead I consider arguments that, without necessarily foreclosing the theoretical basis of Barron's case for access rights, nonetheless oppose substantive media regulation as some combination of practically unworkable; undesirable when compared with policy alternatives such as subsidy programs and structural regulations of media ownership; and distinctively, intractably offensive even to a conception of the First Amendment that permits some form of access initiative. These objections depend on descriptive accounts

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<sup>21</sup> See Gregory P. Magarian, *Market Triumphalism, Electoral Pathologies, and the Abiding Wisdom of First Amendment Access Rights*, 35 HOFSTRA L. REV. 1373, 1388-1405 (2007) (describing and critiquing libertarian attacks on proposals for expressive access rights) (hereinafter Magarian, *Access Rights*).

<sup>22</sup> See, e.g., Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101, 1181-93 (1993) (arguing that underpinnings of substantive media regulation clash irreconcilably with "core freedom-of-speech thinking"); but see C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 93-114 (contending that conventional First Amendment doctrine generally permits nonsuppressive, content-based regulation to structure media entities) (hereinafter Baker, *Content-Based Regulation*).

of substantive media regulations and their consequences that differ fundamentally from the accounts offered by supporters.

Disagreements about the constitutionality and wisdom of substantive media regulation – aired most forcefully between the mid-1960s and mid-1980s, when policy debate over the fairness doctrine achieved its greatest urgency – break down into three separate descriptive dimensions. The first part of this article explains how supporters and opponents of substantive media regulation have viewed each of those dimensions. The first dimension concerns whose interest substantive media regulation serves. Supporters of substantive regulation invoke the will and interests of the political community as a whole. Opponents, in contrast, claim that substantive regulation reflects the will and interests only of governing elites and powerful interest groups. The second dimension concerns which actors substantive regulation constrains. Supporters characterize substantive regulation as targeting and constraining the excessive power of media owners and advertisers. Opponents counter that substantive regulation undermines the journalistic discretion of editors and reporters. The final dimension – the most complex of the three – concerns regulatory goals for affecting the media landscape. Supporters posit that substantive regulation seeks to invigorate discussion of important public issues while ensuring some measure of diversity in the voices and viewpoints expressed in the mass media. Opponents indict substantive regulation as directed toward the impossible goal of perfect balance in an incoherently limited subset of the mass media. If the supporters’ descriptions of these three dimensions are right, then substantive media regulations are most likely both constitutional, under a First Amendment theory that allows for government access initiatives, and wise. If the opponents’ descriptions are

right, then substantive regulations are most likely unconstitutional, even under such a hospitable First Amendment theory, and unwise.

In each of the three dimensions, I find some merit in both sides' descriptive arguments. The second part of this article offers some tentative suggestions about how a revival of substantive media regulation might strive to maximize the characteristics emphasized by supporters while minimizing those emphasized by opponents. As to the first dimension – whose interests does substantive regulation serve? – a renewed fairness doctrine should entail greater interaction among Congress, courts, and the FCC while incorporating rules to discourage government actors from manipulating enforcement. As to the second dimension – whom does substantive regulation constrain? – Congress and the FCC should create and enforce rules that would fortify journalistic ethical norms of public service against interference by media owners and advertisers. The third and final dimension – how does substantive regulation aim to alter the prevailing media landscape? – presents major problems for any effort to revive substantive media regulation, given the conceptual complexity of fairness regulations and the number, variety, and rapidly evolving technological platforms of contemporary information sources. My tentative suggestion for addressing those problems is that any restoration of the fairness doctrine should aim to ensure that what I term the conventional mass media will provide substantial exposure for debate about issues of public concern. Such an effort could usefully furnish at least a near-term republican counterweight to the pluralizing dynamics of the Internet.

## I. THREE DIMENSIONS OF DISPUTE

In implementing substantive media regulation, the FCC made loud but often hazy representations about what the fairness doctrine required, and its appetite for enforcement oscillated unpredictably. Broadcasters confronted the doctrine with a mixture of combativeness and accommodation. Courts, academics, and the public expressed shifting views about the mass media's shortcomings and how effectively the doctrine addressed them. Out of this complex dynamic, the debate over the constitutionality and efficacy of substantive media regulation resolved into three distinct dimensions: Whose interests does regulation serve? Whose autonomy does regulation constrain? How does regulation aim to alter the prevailing media landscape? The fairness doctrine's advocates and opponents held fundamentally divergent views about each of those three dimensions. Even people who agree (or concede for the sake of argument) that democracy requires rich and diverse media, that media markets fall short of producing the media democracy requires, and that government therefore should seek ways to improve the media's performance nonetheless disagree sharply about whether or not substantive regulation can make a positive difference. Debate over reviving the fairness doctrine must begin with an understanding of that disagreement and the divergent observations behind it.

A. *Whose Interests Does Substantive Regulation Serve?*

1. *Thesis: The Political Community*

The fairness doctrine reflects a free speech tradition, substantially divergent from present First Amendment orthodoxy, that I have labeled the public rights theory of expressive freedom.<sup>23</sup> Professor Barron's media access principle forms a cornerstone of that tradition and provides a broad context for understanding the fairness doctrine.

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<sup>23</sup> See Magarian, *Political Parties*, *supra* note 14, at 1972-91 (describing public rights theory).

Barron began from the premise that the mass media have not only First Amendment rights but also First Amendment obligations to inform the public about political issues and to provide a forum for a diverse range of voices to participate in public discourse.<sup>24</sup> The mass media, however, hold sufficient power to resist providing access to the public, and their self-interest in avoiding “the novel and heretical” feeds their resistance.<sup>25</sup> Not merely public but private suppression of ideas threatens First Amendment values.<sup>26</sup> Accordingly, the government properly may intervene to ensure public access to the media. Indeed, Barron maintained that courts can and should enforce a right of media access as a positive First Amendment mandate.<sup>27</sup> In practical terms, however, administering access rights in our complex media culture presents at least some problems better suited for regulators. Thus, Barron embraced the fairness doctrine as a useful component of the access principle in action.<sup>28</sup>

The cornerstone of the access principle, and of any defense of the fairness doctrine, is the public interest.<sup>29</sup> As Barron declared, “[t]he party challenging the broadcaster under the Fairness Doctrine is not the state but the public.”<sup>30</sup> The

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<sup>24</sup> See Barron, *New Right*, *supra* note 15, at 1647-50 (conceptualizing First Amendment as providing basis for access rights).

<sup>25</sup> *Id.* at 1646.

<sup>26</sup> See *id.* at 1655-56.

<sup>27</sup> See BARRON, FREEDOM, *supra* note 15, at 155; Barron, *Emerging Right*, *supra* note 15, at 509; Barron, *New Right*, *supra* note 15, at 1667-69.

<sup>28</sup> See BARRON, FREEDOM, *supra* note 15, at 158-59 (“Access is more important than fairness, but a right of access harmonizes with enforcement of the fairness principle.”).

<sup>29</sup> See FISS, *supra* note 12, at 58 (describing fairness doctrine as intended “to make certain that the all-powerful broadcast medium covered issues of public importance and gave listeners or viewers all sides of the story”); Roscoe Barrow, *The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy*, 37 U. CIN. L. REV. 447, 509 (1968) (defending fairness doctrine as “governmental action which assures access of the public to information and ideas”); Charles D. Ferris and James A. Kirkland, *Fairness – the Broadcaster’s Hippocratic Oath*, 34 CATHOLIC U. L. REV. 605, 616 (1985) (contending that fairness doctrine “vindicate(s) the public interest in information on issues and candidates”); Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1715-25 (1997) (justifying broadcast regulation in terms of public’s interest in robust democratic debate).

<sup>30</sup> Barron, *Controversy*, *supra* note 16, at 244.

Communications Act of 1934 centrally requires broadcast licensees to operate in the public interest, based on the notion that the airwaves are a public resource entrusted to licensees.<sup>31</sup> The FCC and supporters of the fairness doctrine portrayed the doctrine as a natural corollary to this conception of broadcasters as public trustees.<sup>32</sup> Rejecting a First Amendment challenge to the fairness doctrine in *Red Lion*,<sup>33</sup> Justice White predicated his analysis on “the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences.”<sup>34</sup> The public interest means more than the will of the majority. If the fairness doctrine simply let the elected branches impose majoritarian preferences on media content, it would violate the First Amendment’s protection of unpopular ideas against government censorship. “The People” whose interests the doctrine’s supporters invoke are not majorities who seek to drown out dissenting voices, but rather the political community as a whole. The democratic impetus behind substantive regulation, which draws heavily on Alexander Meiklejohn’s First Amendment theory, is that the political community must hear a wide range of opinions,

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<sup>31</sup> See 47 U.S.C. §151.

<sup>32</sup> See THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 111-12 (1963) (linking regulation of the broadcast medium to government licensure); HENRY GELLER, THE FAIRNESS DOCTRINE IN BROADCASTING: PROBLEMS AND SUGGESTED COURSES OF ACTION 1-2 (1973) (same); Jerome A. Barron, *In Defense of “Fairness”: A First Amendment Rationale for Broadcasting’s “Fairness” Doctrine*, 37 U. COLO. L. REV. 31, 43-45 (1964) (justifying application of fairness doctrine to broadcasters on ground that broadcast license affords media owners temporary and contingent control of a public resource) (hereinafter Barron, *Defense*); Barrow, *supra* note 29, at 545 (treating substantive regulation as an incident of broadcast licensure); Charles D. Ferris and Terrence J. Leahy, *Red Lions, Tigers and Bears: Broadcast Content Regulation and the First Amendment*, 38 CATHOLIC U. L. REV. 299, 309-14 (1989) (discussing relationship between substantive broadcast regulation and licensure); Henry Geller, *Mass Communications Policy: Where We Are and Where We Should Be Going*, in JUDITH LICHTENBERG ED., DEMOCRACY AND THE MASS MEDIA 290, 292 (1990) (arguing that licensure “hook” is necessary to justify regulatory burden); Logan, *supra* note 29, at 1725-34 (justifying media regulation based on government’s preferential treatment of broadcast licensees); Richard D. Marks, *Broadcasting and Censorship: First Amendment Theory After Red Lion*, 38 GEO. WASH. L. REV. 974, 982-85 (1970) (positing the need for rational allocation of spectrum as the basis for broadcasters’ public interest obligations); R. Randall Rainey, *The Public’s Interest in Public Affairs Discourse, Democratic Governance, and Fairness in Broadcasting: A Critical Review of the Public Interest Duties of the Electronic Media*, 82 GEO. L. J. 269, 338-43 (1993) (discussing public interest obligations as an incident of broadcast licensure).

<sup>33</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

<sup>34</sup> *Id.* at 390.

prominently including opinions that offend the majority, in order to govern itself effectively.<sup>35</sup> A corollary, absent from Meiklejohn<sup>36</sup> but prominent in Barron's case for access rights, is that democracy benefits when the widest possible range of speakers participates in public discourse.<sup>37</sup>

The regulatory concept of fairness was narrower, and less onerous for regulated media, than Barron's ideal of access. The fairness doctrine left ultimate responsibility for presenting a wide range of views on controversial issues to broadcasters,<sup>38</sup> and even a more vigorous brand of enforcement than the FCC provided under the fairness doctrine would leave the media with significant discretion. Access connotes an obligation to admit not just divergent ideas but particular divergent speakers who specifically demand a platform, and not just two opposing positions but the widest possible range of opinions that bear on important public issues. In addition, the fairness doctrine operated in a reactive manner, requiring some action or willful inaction by broadcasters to trigger any liability; in contrast, the access principle reflects a proactive and instrumental effort to deepen and broaden public debate.<sup>39</sup> Given Barron's charge that First Amendment doctrine "protect[s] expression once it has come to the fore" but ignores the importance

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<sup>35</sup> See generally ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* (1948); see also Barron, *New Right*, *supra* note 15, at 1648-49.

<sup>36</sup> In Meiklejohn's well-known formulation, "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said." MEIKLEJOHN, *supra* note 33, at 26.

<sup>37</sup> See BARRON, *FREEDOM*, *supra* note 15, at 71 ("The essence of the idea of access is participation in the media for the authentic voice of each variety of opinion."); Barron, *New Right*, *supra* note 15, at 1649-50 (relating access principle to First Amendment's function of maintaining public order by allowing political dissidents to express their views).

<sup>38</sup> See, e.g., *Straus Communications, Inc. v. FCC*, 530 F.2d 1001, 1008 (D.C. Cir. 1976) (stating that FCC finds violations of fairness doctrine only where broadcasters' actions are unreasonable or in bad faith); see also Ferris and Kirkland, *supra* note 29, at 614-15 (approvingly describing deferential character of fairness doctrine enforcement).

<sup>39</sup> See BARRON, *FREEDOM*, *supra* note 15, at 150-51; Barron, *Emerging Right*, *supra* note 15, at 489-90; Barron, *New Right*, *supra* note 15, at 1664.

of “creat[ing] opportunities for expression,”<sup>40</sup> the fairness doctrine represented only a limited step in the right direction. Still, the fairness doctrine incrementally advanced the twin goals of the access principle: broadening the political community’s access to information and involving as many and varied people as possible in active discussion of public issues.

Few of the fairness doctrine’s supporters – least of all Barron – were blind to the risk that regulators, in the media field as in any other, could abuse their power.<sup>41</sup> Barron emphasized that the doctrine empowered the government only to enforce procedures to broaden public debate, not to introduce preferred substantive ideas into debate.<sup>42</sup> The doctrine at times made a decisive difference in broadening the store of information available to the public and the opportunities for excluded voices to access the broadcast media. Perhaps the doctrine’s signature achievement was the transformation in the 1970s of WLBT, an NBC television affiliate in Jackson, Mississippi.<sup>43</sup> The station’s owners during the 1950s and 1960s ran it in an unabashedly racist manner. They censored news reports about the civil rights movement and its leaders, editorialized rabidly against racial

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<sup>40</sup> Barron, *New Right*, *supra* note 15, at 1641; *but see* Ferris and Kirkland, *supra* note 29, at 618-21 (crediting fairness doctrine with making broadcast media not just more informative but also more inclusive).

<sup>41</sup> *See* BARRON, FREEDOM, *supra* note 15, at 64 (criticizing proposal to extend fairness doctrine to print media based on dangers of agency capture and political abuse); Barron, *Emerging Right*, *supra* note 15, at 507 (acknowledging danger of executive branch’s tampering in fairness enforcement); Barron, *New Right*, *supra* note 15, at 1676-77 (calling on courts to articulate “bounds to a right of access which could be utilized cautiously, but nevertheless meaningfully”).

<sup>42</sup> *See* BARRON, PUBLIC RIGHTS, *supra* note 16, at 18 (“The great appeal of the fairness principle is its ideological neutrality.”); Barron, *Emerging Right*, *supra* note 15, at 507 (identifying fairness doctrine as “a governmentally-sponsored *process* for stimulating the interchange of ideas” rather than a system “in which the government contributes substantively to the information process”); *see also* LEE C. BOLLINGER, IMAGES OF A FREE PRESS 110 (1991) (contrasting substantive broadcast regulations with censorship); STEVEN J. SIMMONS, THE FAIRNESS DOCTRINE AND THE MEDIA 189 (1978) (describing aim of fairness doctrine as broadening media access “in a general way”); Rainey, *supra* note 32, at 292-93 (describing fairness doctrine as rooted in the “right of the political community at large to seek the truth through a public exchange of ideas that is as free as possible from ideological manipulation”).

<sup>43</sup> A rich narrative of the WLBT case appears in KAY MILLS, CHANGING CHANNELS: THE CIVIL RIGHTS CASE THAT TRANSFORMED TELEVISION (2004), from which this paragraph draws its account.

integration without airing any opposing views, and even refused to show black and white teens dancing together on the station's music show. A coalition led by the United Church of Christ challenged WLBT's practices when its license came up for renewal by the FCC. The Commission timidly renewed the station's license twice, but at both stages the D.C. Circuit reversed, holding that the station owners' racist policies violated the fairness doctrine and failed to serve the interests of the community.<sup>44</sup> After a long battle, a biracial civic group succeeded in stripping away the racist owners' license and turned the station into an exemplar of evenhanded reporting and community service. Almost every commentator sympathetic to the fairness doctrine understandably spotlights the WLBT case,<sup>45</sup> because it exemplifies the doctrine's role in advancing the public interest.

## 2. *Antithesis: Governing Elites*

Opponents of substantive media regulation dismissed or disdained the idea that substantive regulation serves a generalized public interest. Some indicted the very concept of the "public interest" as a front for the interests of regulators or influential groups.<sup>46</sup> Opponents viewed substantive media regulation through the lens of public choice theory, maintaining that regulation advanced the interests of the governing elite and whatever interest groups could influence relevant government institutions to the detriment of ordinary consumers. "Government," one critic asserted, "is by definition

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<sup>44</sup> See *United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969); *United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).

<sup>45</sup> See BOLLINGER, *supra* note 42, at 131; FRED W. FRIENDLY, *THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT: FREE SPEECH VS. FAIRNESS IN BROADCASTING* 89-102 (1976); Barron, *New Right*, *supra* note 15, at 1663-66.

<sup>46</sup> See FORD ROWAN, *BROADCAST FAIRNESS: DOCTRINE, PRACTICE, PROSPECTS – A REAPPRAISAL OF THE FAIRNESS DOCTRINE AND EQUAL TIME RULE* 35-38 (1984); Mark S. Fowler and Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 *TEX. L. REV.* 207, 210 (1982) (arguing that the FCC "should rely on the broadcasters' ability to determine the wants of their audiences through the normal mechanisms of the marketplace"); Thomas G. Krattenmaker and L.A. Powe, Jr., *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 *DUKE L.J.* 151, 159-60.

integrated with the power class of American society, and it is axiomatic that the press already gives greater voice to the ‘outs’ than the government does or is likely to.”<sup>47</sup> Thus, opponents portrayed the fairness doctrine as, at best, no more than a handy tool that politically powerful groups could use to attack and harass broadcasters who impeded their interests.<sup>48</sup> At best, they noted, the doctrine filtered the public interest through “an examination and judgment by the Commission of program content.”<sup>49</sup> At worst, the doctrine instantiated “a public right to hear what government regulators determine listeners do or should prefer.”<sup>50</sup> No less a free speech paladin than Harry Kalven branded substantive regulation “government surveillance for broadcasting.”<sup>51</sup>

Even opponents of substantive regulation tended to acknowledge that the FCC enforced the fairness doctrine without overt political bias.<sup>52</sup> Nonetheless, opponents emphasized that the existence of a powerful tool for influencing media content created the danger that regulators or elected officials might abuse the enforcement apparatus to advance their own ends. The FCC may feel pressure from the top down, as the government exerts pressure on Commissioners to view disputes in a particular light or even to enforce the doctrine against disfavored media entities. The Nixon administration tried to use the fairness doctrine to monitor and intimidate media outlets that it perceived

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<sup>47</sup> Carl S. Stepp, *Access in a Post-Social Responsibility Age*, in LICHTENBERG, *supra* note 32, at 186, 194.

<sup>48</sup> See LUCAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 108-12 (1987) (critiquing early instances of fairness doctrine enforcement).

<sup>49</sup> Glen O. Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 137 (1967).

<sup>50</sup> Krattenmaker & Powe, *supra* note 46, at 155; *see also id.* at 159 (charging that fairness doctrine “substitutes monolithic governmental choice for the programs that otherwise would result from broadcasters’ competition for viewers and listeners’ time and attention”).

<sup>51</sup> Harry Kalven, Jr., *Broadcasting, Public Policy and the First Amendment*, 10 J.L. & ECON. 15, 16 (1967).

<sup>52</sup> See ROWAN, *supra* note 46, at 43; Fowler and Brenner, *supra* note 46, at 231; Kalven, *supra* note 51, at 18-20; *but see* POWE, *supra* note 48, at 161 (asserting that FCC decisions typically favor the political party to which most commissioners belong); C. Edwin Baker, *Misguided Fairness*, 26 PENN LAW J. 12, 14 (June 1991) (asserting that FCC’s “periodic enforcement predictably embodied a centrist and often progovernment conception of what ‘balance’ requires”).

as political enemies while scheming to strip media opponents of broadcast licenses.<sup>53</sup> Members of Congress have also used their leverage as regulators against broadcasters.<sup>54</sup> In other cases, the Commission may feel pressure from the bottom up, as the government uses its resources to foment complaints against disfavored media entities. The Kennedy administration employed this sort of strategy to generate the complaints that led to the Supreme Court's *Red Lion* decision.<sup>55</sup> The administration used a publicist to monitor right-wing radio broadcasts and encouraged progressive individuals and groups to demand reply time on stations whose broadcasts attacked them.<sup>56</sup> Even absent external pressures, commissioners' enforcement decisions may reflect their covert or unconscious ideological biases.<sup>57</sup>

Fairness doctrine opponents also criticized the FCC's enforcement practices as dangerously ad hoc and inconsistent.<sup>58</sup> They placed little faith in the Commission's reliance on public complaints to trigger enforcement actions, because the enforcement process served not the needs or will of the public but the machinations of interest groups.<sup>59</sup> "Broadcast viewer complaints," scoffed one critic, "may be uninformed, self-serving, publicity seeking, and an attempt to hinder, restrict, hamper and frustrate free

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<sup>53</sup> See FRIENDLY, *supra* note 45, at 131-33; POWE, *supra* note 48, at 121-41; SIMMONS, *supra* note 42, at 219. During the Nixon administration, the Democratic National Committee also invoked the fairness doctrine to pressure broadcasters to carry responses to presidential addresses. See FRIENDLY, *supra* note 45, at 133.

<sup>54</sup> See ROWAN, *supra* note 46, at 43.

<sup>55</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

<sup>56</sup> In addition, the Democratic National Committee effectively bankrolled the book whose author was attacked in the broadcast that triggered the *Red Lion* complaint. These tactics are documented in FRIENDLY, *supra* note 45, at 32-42; see also POWE, *supra* note 48, at 112-17.

<sup>57</sup> See Rex G. Howell, *Fairness . . . Fact or Fable?*, in JOHN M. KITROSS & KENNETH HARWOOD EDS., *FREE & FAIR: COURTROOM ACCESS AND THE FAIRNESS DOCTRINE* 133, 134 (1970).

<sup>58</sup> See ROWAN, *supra* note 46, at 43-46; Baker, *Misguided Fairness*, *supra* note 52, at 14 (warning of susceptibility of judgments required by fairness doctrine to manipulation).

<sup>59</sup> See HUGH CARTER DONAHUE, *THE BATTLE TO CONTROL BROADCAST NEWS: WHO OWNS THE FIRST AMENDMENT?* 179 (1989) (criticizing the "core belief among Fairness Doctrine supporters that each interest group owns a First Amendment right to the airwaves of every broadcaster").

expression.”<sup>60</sup> In general, opponents reasonably emphasized that, whatever the risks and benefits of regulation in ordinary settings, courts should take an especially risk-averse posture as to media regulation, where abuses could undermine First Amendment rights. Well-intentioned efforts to enhance public debate through regulation, one critic argued, “unwittingly may create a massive censorship system masquerading as marketplace reform.”<sup>61</sup>

B. *Whose Autonomy Does Substantive Regulation Constrain?*

1. *Thesis: Owners and Advertisers*

A recurring theme in arguments for substantive media regulation – as in arguments for most types of government regulation – is that the public needs the government to exercise power as a counterweight to wealthy and powerful private interests, in this case corporate media owners and advertisers. All news organizations sustain tension between two groups of decision makers: owners and publishers, who primarily focus on making money; and editors and reporters, who primarily focus on doing good journalism.<sup>62</sup> The two groups and their goals may coincide, but their tension is strong enough to require any analysis of substantive media regulation to identify which group’s autonomy the regulations constrain. As Lee Bollinger has noted, the *Red Lion* decision,<sup>63</sup> in validating the fairness doctrine, never refers to “the press” or “journalists” but only to “licensees” and “monopolies.”<sup>64</sup> By characterizing the burdens of the

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<sup>60</sup> Joseph L. Brechner, *A Statement on the “Fairness Doctrine,”* in KITTROSS & HARWOOD, *supra* note 57, at 143, 144.

<sup>61</sup> Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 56.

<sup>62</sup> See James C. Thomson, Jr., *Journalistic Ethics: Some Probing by a Media Keeper*, in BERNARD RUBIN ED., *QUESTIONING MEDIA ETHICS* 40, 45 (1978).

<sup>63</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

<sup>64</sup> See BOLLINGER, *supra* note 42, at 72-73.

doctrine as falling primarily on the narrow, socially empowered class of owners and publishers, the doctrine's supporters offered a natural complement to their contention that the doctrine broadly benefited the political community as a whole.<sup>65</sup>

The idea that mass media owners and publishers represent a potentially dangerous concentration of money and power plays a central role in Professor Barron's case for access rights.<sup>66</sup> "The media owners and managers," he declares, ". . . read freedom of the press as an immunity from accountability and any kind of legal responsibility."<sup>67</sup>

Emphasis on media owners as the natural target of fairness regulations inheres in the familiar justification of such regulations as incidents of broadcast licensure.<sup>68</sup>

Subsequent defenders of substantive media regulation rooted the argument in a broader account of social power dynamics. Dean Bollinger maintained that "the real concern is with power – that is, the ability to command an audience more or less exclusively – and . . . this concern is undiminished by the means by which such power is achieved."<sup>69</sup> The concern with power extended to dynamics within news organizations. "The ways journalists report and edit are shaped by the relations of power and by the institutional priorities within the organizations that employ them."<sup>70</sup> Supporters of substantive regulation contended that media owners' overriding emphasis on maximizing profit tends

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<sup>65</sup> See Rainey, *supra* note 32, at 345 ("[T]he broadcaster's duty regarding public affairs broadcasting is as extensive as the public's collective right to be informed and to receive competing perspectives regarding public issues.").

<sup>66</sup> See Barron, *Emerging Right*, *supra* note 15, at 507 (calling for assessment of media regulation "against a background of economic combinations continuously concentrating the ownership of the media"); Barron, *New Right*, *supra* note 15, at 1643 (objecting, in context of industrial mass media, to "the view that constitutional status should be given to a free market theory in the realm of ideas"); see also EMERSON, *supra* note 32, at 111-12 (endorsing regulation of the "small group which owns and operates the mass media").

<sup>67</sup> BARRON, FREEDOM, *supra* note 15, at 4-5; see also Barron, *Access Today*, *supra* note 16, at 2 ("Global media conglomerates have vast communicating power, and the rest of us have very little.").

<sup>68</sup> See *supra* notes 31-34 and accompanying text.

<sup>69</sup> BOLLINGER, *supra* note 42, at 138.

<sup>70</sup> JEREMY IGGERS, *GOOD NEWS, BAD NEWS: JOURNALISM ETHICS AND THE PUBLIC INTEREST* 16 (1998).

to create a media culture that merely focuses on the audience's market preferences while ignoring the people's interest in sustaining and advancing democratic self-government.<sup>71</sup>

They portrayed the fairness doctrine as elevating the interests of the people and the democratic system over media owners' desire to accumulate wealth and power.

Media advertisers constitute a second locus of financial control over mass media content for whose excessive power advocates of substantive media regulation viewed the fairness doctrine as a remedy. The mass media depend so heavily on advertisers for their economic survival that advertisers can exert decisive influence over programming content, and particularly over the audience preferences the media themselves promote.<sup>72</sup> This influence is especially pernicious because both media outlets and advertisers try to avoid revealing it to the audience.<sup>73</sup> In addition to advertising, large corporations can further influence media content by using their resources to package and deliver information.<sup>74</sup> The fairness doctrine broadly countered advertisers' power by subjecting broadcasters to countervailing public obligations. The doctrine played an especially prominent role in curbing the influence of the dominant advertiser of the 1960s. A few years after the Surgeon General declared that smoking tobacco products posed dire health risks, the FCC sustained a complaint that broadcast cigarette advertising impermissibly presented only one side of an issue of public importance – the issue of smoking's social

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<sup>71</sup> See C. EDWIN BAKER, *MEDIA, MARKETS, AND DEMOCRACY* 99-100 (2002) (hereinafter BAKER, *MARKETS*); Ferris and Kirkland, *supra* note 29, at 613 (characterizing fairness doctrine as “prevent[ing] a single-minded pursuit of profit that could lead broadcasters to ignore important and controversial issues and viewpoints”).

<sup>72</sup> See generally C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* (1994); see also GENE GOODWIN AND RON F. SMITH, *GROPING FOR ETHICS IN JOURNALISM* 76-78 (3d ed. 1994); IGGERS, *supra* note 70, at 30; PHILIP MEYER, *ETHICAL JOURNALISM* 39 (1987). One effect of advertisers' influence is that media firms focus their efforts on delivering the affluent audiences advertisers desire, thereby underserving poor and working class communities. See BAKER, *MARKETS*, *supra* note 71, at 75-76.

<sup>73</sup> See BAKER, *MARKETS*, *supra* note 71, at 26.

<sup>74</sup> See *id.* at 109.

desirability.<sup>75</sup> Given the tobacco industry's unparalleled contribution to broadcasters' advertising revenues and broadcasters' attendant complicity in keeping the public ignorant about tobacco's health risks,<sup>76</sup> the tobacco case represents the fairness doctrine's greatest success in curbing advertisers' control over media content.

Some supporters of substantive media regulation have acknowledged that regulation can impact editorial discretion and justified that impact in the name of democratic discourse. Barron has never shied away from questioning the nature and scope of editors' prerogatives.<sup>77</sup> In the end, however, even these arguments reflect an underlying antipathy toward owners and publishers. Claims of editorial autonomy may amount to "the assertion of a property right in the guise of a free speech right."<sup>78</sup> If the First Amendment embodies an overarching value of robust and participatory democratic discourse, then no actor's prerogatives automatically warrant protection. Editorial autonomy deserves protection to the extent, and only to the extent, that it serves society's best understanding of the aims of democratic discourse.<sup>79</sup> Any attempt to treat editorial autonomy as a trump in the system of free expression devolves, on this view, to nothing more than a fabrication of entitlement that ultimately rests on power rather than right.

## 2. *Antithesis: Editors and Reporters*

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<sup>75</sup> See *WCBS-TV*, 8 F.C.C. 2d 381 (1967), *aff'd sub nom. Banzhaf v. FCC*, 405 F.2d 1082 (1968), *cert. denied*, 396 U.S. 842 (1969).

<sup>76</sup> See BEN H. BAGDIKIAN, *THE NEW MEDIA MONOPOLY* 250-56 (2004); FRIENDLY, *supra* note 45, at 103-04.

<sup>77</sup> See Barron, *New Right*, *supra* note 15, at 1656-60 (criticizing reasoning and result in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

<sup>78</sup> Judith Lichtenberg, *Foundations and Limits of Freedom of the Press*, in LICHTENBERG, *supra* note 32, at 102, 120; see also BARRON, *PUBLIC RIGHTS*, *supra* note 16, at 15 (distinguishing proper constitutional protection for editorial discretion from a property-based conception of First Amendment rights).

<sup>79</sup> See BAKER, *MARKETS*, *supra* note 71, at 195 ("The only obvious reason that the press merits constitutional protection from democratic processes is that this protection is thought to serve its role in that democratic arrangement."); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1275 (2005) (suggesting pragmatic democratic basis for vigorous First Amendment protection of the institutional media).

Opponents of substantive media regulation, like supporters, tell a story about who bears substantive regulation's burdens that complements their account of who enjoys regulation's benefits. In the opponents' narrative, the fairness doctrine's narrow benefits do not operate as a check on rapacious capitalists<sup>80</sup> but rather as an "invasion of the editor's first amendment interests."<sup>81</sup> The National Association of Broadcasters, challenging the fairness doctrine in the late 1960s, made a strategic effort to push professional journalists into the foreground and "fat cats" into the background.<sup>82</sup> The Supreme Court accepted this narrative of editorial autonomy in denying political advertisers' demand that the FCC compel the CBS network to sell them air time: "For better or worse, editing is what editors are for; and editing is selection and choice of material."<sup>83</sup> Abuse of this editorial function had "no acceptable remedy other than a spirit of moderation and a sense of responsibility – and civility – on the part of those who exercise the guaranteed freedom of expression."<sup>84</sup> Regulatory skeptics portrayed editors' decisions about which ideas to publish as serving a valuable democratic role that regulations like the fairness doctrine stifle.<sup>85</sup> Undercutting the fairness doctrine with this

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<sup>80</sup> This discussion leaves aside the libertarian First Amendment dogma that owners' autonomy to decide how to deploy their expressive property is constitutionally indistinguishable from editors' autonomy to decide what to publish. See, e.g., Fowler and Brenner, *supra* note 46, at 217-19 (arguing that considering program content in broadcast licensure process raises First Amendment problems); see also POWE, *supra* note 48, at 248-49 (defending full First Amendment protection for corporate media because of their vulnerability to government).

<sup>81</sup> Krattenmaker & Powe, *supra* note 46, at 156 n.26; see also Kalven, *supra* note 51, at 20 (identifying as chief harm of substantive broadcast regulation "the insidious loss of morale that comes from the recognition that the government is looking over your shoulder while you communicate"); Donald E. Lively, *Deregulatory Illusions and Broadcasting: The First Amendment's Enduring Forked Tongue*, 66 N.C. L. REV. 963, 966 (1988) (characterizing fairness doctrine and other broadcast regulations as "official intrusion on editorial freedom"); Robinson, *supra* note 49, at 137 (emphasizing fairness doctrine's "substantial intrusion into the area of program selection").

<sup>82</sup> See FRIENDLY, *supra* note 45, at 51-52.

<sup>83</sup> CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 124 (1973).

<sup>84</sup> *Id.* at 125.

<sup>85</sup> See ROWAN, *supra* note 46, at 40 (arguing that professional journalists, not corporate interests, decide the content of broadcast news and thus suffer burden of fairness doctrine); Stephen Holmes, *Liberal Constraints on Private Power?: Reflections on the Origins and Rationale of Access Regulation*, in

widely appealing vision of editors as sentries of democracy helped to shift the debate from the terrain of commerce, which our legal system routinely subordinates to conceptions of the public interest,<sup>86</sup> to the domain of individual creative decisions, which exemplify the conscientious space protected by the First Amendment.<sup>87</sup>

Opponents of substantive regulation frequently pointed out that journalists operate under ethical standards that encourage them to present a range of viewpoints on important issues.<sup>88</sup> Throughout the 20<sup>th</sup> Century, news organizations embraced a model of objective, professional journalism, an economically driven departure from the predominantly partisan press of the 19<sup>th</sup> Century.<sup>89</sup> Modern journalists' sense of professionalism reflects a native propensity for critical thought and gives rise to a "First Amendment syndrome," which promotes a sense of professional responsibility and public service in editors and reporters even as it inspires them to safeguard their autonomy.<sup>90</sup> In addition, critics of regulation argued that television newspeople see a particular need to present opposing viewpoints in order to engage viewers.<sup>91</sup> Journalists' professional

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LICHTENBERG, *supra* note 32, at 21, 53 (arguing that substantive media regulation undercuts a trusteeship conception of editors' democratic function); Lively, *supra* note 81, at 973 ("The first amendment interests of the press and the public should be regarded as complementary rather than competitive."); *see also* Marks, *supra* note 32, at 989 (arguing that broadcasters' role as "individual centers of free expression" complicated efforts to justify fairness doctrine).

<sup>86</sup> *See* *Nebbia v. New York*, 291 U.S. 502 (1934) (disavowing doctrine of economic substantive due process).

<sup>87</sup> *Compare* ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 280-82 (1995) (critiquing fairness doctrine supporters' distrust of the public-private distinction) *with* Barron, *New Right*, *supra* note 15, at 1649 (characterizing media owners as "nongoverning minorities in control of the means of communication" who should be "inhibited from restraining the freedom of speech").

<sup>88</sup> *See* ROWAN, *supra* note 46, at 2; Krattenmaker & Powe, *supra* note 46, at 158; Stepp, *supra* note 47, at 195-96; *see also* Ferris and Kirkland, *supra* note 29, at 613 (calling responsibilities imposed by fairness doctrine "no greater than those required by journalistic ethics and sound journalistic practice").

<sup>89</sup> *See* ROBERT W. MCCHESENEY, *RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES* 49 (2000) (attributing rise of professional journalism to pragmatic sense of partisan journalism's commercial limitations in early 20<sup>th</sup> Century); Jeffrey B. Abramson, *Four Criticisms of Press Ethics*, in LICHTENBERG, *supra* note 32, at 229, 252 (crediting technological and economic changes for shift from partisan to professional journalism).

<sup>90</sup> Stepp, *supra* note 47, at 195-96.

<sup>91</sup> *See* ROWAN, *supra* note 46, at 92-93.

sensibility, opponents of regulation insisted, suffices to make reporters and their editors responsible and responsive to the public's need for information. Thus, the fairness doctrine countermanded not merely editorial autonomy but responsible journalistic discretion. Critics of substantive regulation – especially current or former journalists – frequently endorsed the goal of presenting a range of perspectives on important issues, but they condemned regulators for not simply trusting journalists to achieve that goal.<sup>92</sup>

Regulatory opponents also sought to turn concerns about media owners' concentrated power<sup>93</sup> against supporters. If the media fail to present diverse perspectives because too few entities own the media, then the government can implement a straightforward regulatory response: impose limits on the structures of media ownership rather than the selection of content. Thus, some fairness doctrine opponents advanced structural regulation as a method of encouraging the mass media to present a diverse range of perspectives without limiting editorial autonomy and inhibiting frank discourse.<sup>94</sup> This argument tracks the most common understanding of First Amendment doctrine, which generally does not treat structural media regulations as limiting speech.<sup>95</sup> Some commentators who cautiously sympathized with substantive regulation echoed this

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<sup>92</sup> “Professional development, self-restraint, open-mindedness, and maturity on the part of broadcasters are the best safeguards against unfairness, partisan bias, and inaccurate, sensational news.” *Id.* at 207; *see also* Brechner, *supra* note 60, at 150 (“[I]t is impossible for a federal regulatory agency to determine fairness with any degree of capability better than a broadcaster.”); Howell, *supra* note 57, at 141 (“It is the matter of prescribing the methods, rather than the desired results which gives both the FCC and the industry major problems.”).

<sup>93</sup> *See supra* notes 66-71 and accompanying text.

<sup>94</sup> *See* ROWAN, *supra* note 46, at 41; Holmes, *supra* note 85, at 54-55 (arguing that substantive regulation, although consistent with constitutional tradition, should give way to structural regulation); *see also* Brechner, *supra* note 60, at 149 (arguing in 1964 that existing broadcast ownership restrictions obviated need for substantive regulation of broadcasting); Krattenmaker & Powe, *supra* note 46, at 166-68 (advocating “competition” as alternative to fairness doctrine without endorsing structural regulation).

<sup>95</sup> *See* C. Edwin Baker, *Media Structure, Ownership Policy, and the First Amendment*, 78 S. CAL. L. REV. 733, 754-61 (2005) (defending First Amendment doctrine's noninterference with structural regulations) (hereinafter Baker, *Media Structure*); *but see* Time-Warner Entertainment Co. v. FCC, 240 F.3d 1126, 1137-39 (D.C. Cir. 2001) (invoking First Amendment to strike down restriction on cable operator's ability to program content produced by companies in which operator holds interest).

preference for structural regulation.<sup>96</sup> Another alternative more palatable to some cautious supporters was regulation by subsidy, such as former FCC chief counsel Henry Geller’s proposal to replace the entire broadcast licensure architecture with a spectrum fee that the government could use to finance public broadcasting programs.<sup>97</sup>

C. *How Does Substantive Regulation Seek to Alter the Prevailing Media Landscape?*

1. *Thesis: Incremental Improvement of Democratic Discourse*

Supporters of substantive media regulation defended the fairness doctrine as a flawed but useful tool for deepening the content and broadening the participatory character of democratic debate.<sup>98</sup> Supporters have rarely if ever characterized substantive regulation as a miracle cure for every democratic deficit of the mass media. What they have claimed is that rules like the fairness doctrine make a positive contribution to democratic discourse by increasing the media’s presentation of diverse viewpoints on important public issues. “[L]egal reforms,” wrote Cass Sunstein, “should not be expected

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<sup>96</sup> See BAKER, MARKETS, *supra* note 71, at 99-102 (discussing policy value of structural regulation); Geller, *supra* note 32, at 293 (positing general preference, as a policy matter, for structural over substantive regulation).

<sup>97</sup> See Geller, *supra* note 32, at 308; see also BAKER, MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS 183-86 (2007) (considering tax policies and subsidies as methods of dispersing media ownership) (hereinafter BAKER, CONCENTRATION); BAKER, MARKETS, *supra* note 71, at 98-99 (discussing policy value of content subsidies); Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1390, 1462-71 (2004) (portraying content subsidies as more promising than substantive regulation given explosion in available media content and premise that only spectrum scarcity justifies substantive regulation); Rainey, *supra* note 32, at 360-68 (proposing legislative establishment of a “Corporation for Public Interest Speech and Debate” to fund public interest media projects); Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 538-49 (2000) (advocating economic incentives, including a “play or pay” regime, as a preferable alternative to “command and control” regulation).

<sup>98</sup> See Barron, *Defense*, *supra* note 32, at 33-38 (noting fairness doctrine’s shortcomings but defending its utility); Barrow, *supra* note 29, at 495 (stating that fairness doctrine “makes an important contribution to the informing of our people on [controversial issues of public importance]”); Ferris and Kirkland, *supra* note 29, at 605-06 (defending fairness doctrine as a check against political action committees’ growing dominance of electoral debate); Rainey, *supra* note 32, at 310.

to bring about a Madisonian utopia. But they could help.”<sup>99</sup> The doctrine’s defenders recognized the inherent challenge of defining standards for sufficient coverage of important public issues and presentation of opposing viewpoints. They also struggled with the desirability and conceptual integrity of the Supreme Court’s eventual restriction of substantive regulation to the broadcast media. They maintained, however, that even the FCC’s imperfect efforts to define substantive standards for a limited range of media outlets opened substantial channels of mass communication to more voices and increased the aggregate breadth and depth of information about public issues available through the mass media.

The fairness doctrine fostered a climate in which concerns about covering public issues and presenting opposing viewpoints figured prominently in virtually every discussion about the nature and societal role of the mass media. Supporters of substantive regulation expressed frustration about the FCC’s failure to define the doctrine’s substantive requirements precisely.<sup>100</sup> They frequently acknowledged, and often lamented, the Commission’s sporadic and halting enforcement of the doctrine.<sup>101</sup> On only one occasion did the Commission invoke the doctrine’s first requirement – the obligation to cover issues of public importance – against a broadcaster that had ignored a

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<sup>99</sup> CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 67 (1993) (hereinafter SUNSTEIN, *DEMOCRACY*); see also Baker, *Content-Based Regulation*, *supra* note 22, at 91 (defending constitutional propriety of content-based regulation that “supports a desirable communications order”).

<sup>100</sup> See Barrow, *supra* note 29, at 542-43 (suggesting that FCC promulgate rules to clarify substantive fairness doctrine standards); Geller, *supra* note 32, at 300-02 (cataloguing conceptual problems and criticizing FCC for failing to embrace available resolutions); Howell, *supra* note 57, at 139; Marks, *supra* note 32, at 976-77.

<sup>101</sup> See BARRON, *FREEDOM*, *supra* note 15, at 133-35 (lamenting FCC’s weak enforcement of the fairness doctrine); FRIENDLY, *supra* note 45, at 27-29 (noting limited enforcement of the doctrine into the 1960s and sporadic enforcement later); SIMMONS, *supra* note 42, at 208-11; Jerome A. Barron, *The Federal Communications Commission’s Fairness Doctrine: An Evaluation*, 30 *GEO. WASH. L. REV.* 1, 20-24 (1961) (documenting and criticizing broadcasters’ ability to evade fairness obligations); Barrow, *supra* note 29, at 468; Marks, *supra* note 32, at 1000.

major public issue.<sup>102</sup> In the vast majority of cases that raised the doctrine’s second requirement – the obligation to provide a reasonable opportunity for the expression of opposing viewpoints – the Commission took no action. The Commission in practice deferred strongly to broadcasters’ own determinations about how best to satisfy the doctrine’s mandates.<sup>103</sup> Supporters maintained, however, that limiting enforcement to the most egregious cases struck a scrupulous balance between the doctrine’s policy aims and broadcasters’ operational autonomy, while the possibility of enforcement served to focus the media on the importance of publicly beneficial programming.<sup>104</sup>

Professor Barron argued vigorously – all the way to the Supreme Court in *Miami Herald v. Tornillo*<sup>105</sup> – that newspapers could be subject to fairness-type regulations under the same logic the Court in *Red Lion*<sup>106</sup> had applied to broadcasters.<sup>107</sup> Once the Court rejected that position, however, distinctions between print and broadcasting became prominent in defenses of the fairness doctrine. First, supporters contended, the broadcast medium lent itself to regulation in ways that print did not, whether because of the *Red Lion* rationale that the broadcast airwaves were a scarce resource<sup>108</sup> or, more

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<sup>102</sup> See Representative Patsy Mink, 59 F.C.C. 2d 987 (1976) (finding that West Virginia television station had duty under fairness doctrine to cover political dispute related to strip mining).

<sup>103</sup> See *supra* note 38 and accompanying text.

<sup>104</sup> Dean Bollinger pointed out that maintenance of print journalism as an unregulated sphere tended to discourage overzealous enforcement of broadcast regulations. See BOLLINGER, *supra* note 42, at 115. At the same time, broadcast regulations exerted a normative influence on media behavior that exceeded their legal force. See *id.* at 40-61; see also FRIENDLY, *supra* note 45, at 227 (suggesting that fairness doctrine had changed broadcast industry norms and attitudes about broadening public debate); Barron, *Controversy*, *supra* note 16, at 242 (positing generally that “[c]ompeting and contradictory consequences flow from a first amendment theory rich and generous enough to accord both the citizen and the media the right of free expression”).

<sup>105</sup> 418 U.S. 241 (1974).

<sup>106</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

<sup>107</sup> See, e.g., BARRON, FREEDOM, *supra* note 15, at 148-49 (positing applicability of *Red Lion* holding to “the press, print and electronic”). Professor Baker has contended that the Court in *Red Lion* actually justified the fairness doctrine as a permissible government approach to the real, but not distinctive, problem of broadcast scarcity, and he maintains that the same logic would justify imposing some similar regulations on newspapers. See Baker, *Content-Based Regulation*, *supra* note 22, at 100-14.

<sup>108</sup> See *Red Lion*, 395 U.S. at 388-89.

persuasively, because broadcasting had always been subject to government licensing, and the government had always treated the broadcast license as a public trust.<sup>109</sup> Second, broadcasting operated materially differently from print, whether because broadcasters were a lower grade of media professional<sup>110</sup> or, more persuasively, because broadcasting represented a revolutionary technological advance whose unprecedented importance for public discourse compelled public oversight.<sup>111</sup> To these technical distinctions between the print and broadcast media, Dean Bollinger added an ingenious substantive defense of their differential exposure to regulation. In his view, the inherent complexity of mass communication counseled against undue confidence in either the market or regulation. The wisest course, then, was to split the baby: let one medium – print – operate free from regulation, while making the other – broadcasting – subject to some measure of regulation.<sup>112</sup> Whatever disadvantages experience might reveal in either approach would remain absent from the other, and our system ultimately could maximize the advantages of either or both approaches.<sup>113</sup>

## 2. *Antithesis: Impossible Balance with Incoherent Scope*

Opponents of substantive regulation portrayed the goals of the fairness doctrine in more comprehensive, utopian terms than its supporters. In a flourish perhaps unwarranted by the FCC's cautious and incremental administration of the doctrine but

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<sup>109</sup> See *supra* notes 31-34 and accompanying text.

<sup>110</sup> See, e.g., MEIKLEJOHN, *supra* note 33, at 86-87 (generically criticizing commercial radio as undeserving of First Amendment protection).

<sup>111</sup> See, e.g., Ferris and Kirkland, *supra* note 29, at 622 (maintaining that “the crucial importance of broadcasting in our national dialogue places the fairness rules beyond constitutional challenge”) (footnote omitted).

<sup>112</sup> See Lee Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976).

<sup>113</sup> One might reject Bollinger's “partial regulation” strategy based on Martin Redish's assertion that “surely a solution so intellectually bankrupt as this must be rejected.” MARTIN H. REDISH, *MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY* 186 (2001). To do so however, one would have to augment Redish's invective with reasoning.

reflecting the doctrine's sweeping language, critics berated the doctrine as a doomed effort to impose a perfect state of fairness and balance on the broadcast media. "The Fairness Doctrine," asserted Thomas Krattenmaker and Scot Powe, "cannot be too hot, too big, or too hard. Nor can it be too cold, too small, or too soft. It must be just right."<sup>114</sup> At the same time, opponents derided the doctrine's limitation to broadcasting as theoretically indefensible and practically underinclusive. Objections to the fairness doctrine in operation repeatedly stressed three distinct problems.

First, opponents branded the fairness doctrine analytically unsound and thus inherently unenforceable. By its terms the doctrine required several necessarily subjective determinations. What is a "controversial issue of public importance"? How should regulators determine when a media entity has, in fact, raised such an issue? What "sides" does a given issue present? When has a broadcaster afforded a "reasonable opportunity" for the presentation of opposing viewpoints? What changes in circumstance effectively obviate fairness complaints? What presentation of controversial issues, in the end, counts as "fair"? Opponents of the fairness doctrine portrayed the conceptual difficulty of these questions as a challenge that the FCC was unable or unwilling to meet.<sup>115</sup> Even more sympathetic commentators acknowledged that "[o]ne man's fairness may be another man's bias."<sup>116</sup> Opponents called attention to the FCC's weak enforcement of the doctrine, which buttressed their charge that the FCC lacked a

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<sup>114</sup> Krattenmaker & Powe, *supra* note 46, at 169.

<sup>115</sup> See BAKER, CONCENTRATION, *supra* note 97, at 196 (generally criticizing fairness doctrine as unenforceable and manipulable); ROWAN, *supra* note 46, at 100-04 (discussing difficulty of assessing which issues fairness doctrine covers); Ingber, *supra* note 61, at 60-61; Kalven, *supra* note 51, at 47 (emphasizing vagueness of fairness doctrine's mandates); Krattenmaker & Powe, *supra* note 46, at 174-76; Robinson, *supra* note 49, at 140; see also SIMMONS, *supra* note 42, at 146-88 (discussing problems of identifying and categorizing issues for fairness doctrine purposes); *id.* at 189-250 (focusing on problems of balance and response).

<sup>116</sup> FRIENDLY, *supra* note 45, at 14.

sufficient hold on the doctrine's requirements to be able to administer it.<sup>117</sup> Ultimately, in critics' view, the doctrine's practical failings reflected the underlying futility of what they portrayed as an effort to enforce a norm of perfect objectivity and balance.<sup>118</sup>

Second, opponents charged that the fairness doctrine chilled discussion of controversial issues. Even critics sympathetic with the goal of broadening public debate routinely deny the doctrine's value based on what Ed Baker calls its "predictable deterrence" of reporting on political controversies.<sup>119</sup> Because the FCC in practice almost never enforced the fairness doctrine's first requirement – that broadcasters cover issues of public importance<sup>120</sup> – avoidance of controversial issues gave broadcasters a way to avoid the aspect of the doctrine that the FCC did enforce: the balance requirement.<sup>121</sup> A study by the antiregulation Cato Institute provided some support for this hypothesis as to radio, finding that the percentage of AM radio stations with news and/or talk formats increased dramatically after the fairness doctrine's repeal.<sup>122</sup> Critics also blamed the fairness doctrine for broadcasters' refusals, illustrated in *CBS v. Democratic National Committee*,<sup>123</sup> to sell advertising time for controversial political

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<sup>117</sup> See, e.g., ROWAN, *supra* note 46, at 51 (noting that in 1980, FCC issued decisions adverse to broadcasters in only six cases out of over 20,000 fairness complaints filed).

<sup>118</sup> See Krattenmaker & Powe, *supra* note 46, at 169-74 (critiquing particular instances of enforcement as ineffectual); ROWAN, *supra* note 46, at 125-26 (portraying journalistic subjectivity as a complex phenomenon that "[n]o amount of government regulation, short of . . . censorship" could counter).

<sup>119</sup> BAKER, CONCENTRATION, *supra* note 97, at 196.

<sup>120</sup> See *supra* note 102 and accompanying text.

<sup>121</sup> See DONAHUE, *supra* note 59, at 136 (asserting that fairness doctrine chilled editorial commentary); ROWAN, *supra* note 46, at 120-23; SIMMONS, *supra* note 42, at 216-19; Ingber, *supra* note 61, at 63-64; Krattenmaker & Powe, *supra* note 46, at 158, 162-66; Robinson, *supra* note 49, at 137-40; Stepp, *supra* note 47, at 195; Sunstein, *supra* note 97, at 526.

<sup>122</sup> See Thomas W. Hazlett and David W. Sosa, *Chilling the Internet? Lessons From FCC Regulation of Radio Broadcasting* (Cato Policy Analysis No. 270, March 19, 1997), at nn.68-83 and accompanying text (hereinafter Hazlett and Sosa, *Lessons*); see also Thomas W. Hazlett and David W. Sosa, *Was the Fairness Doctrine a "Chilling Effect"? Evidence From the Postderegulation Radio Market*, 26 J. LEGAL STUD. 279 (1997) (hereinafter Hazlett and Sosa, "Chilling Effect").

<sup>123</sup> 412 U.S. 94 (1973) (rejecting First Amendment challenge to television network's refusal to sell advertising time at market rates to political and antiwar groups).

messages.<sup>124</sup> Some opponents of substantive regulation took particular issue with what they saw as the fairness doctrine's inappropriate and unwise choice of balanced presentations by the mass media over a "partisan gadfly" vision of the press, under which different editors can voice their divergent opinions and let the people sort them out.<sup>125</sup>

Third, opponents emphasized the weakness of the conceptual basis that, in their portrayal, formed the only legal justification for the Fairness Doctrine: the *Red Lion* Court's theory of broadcast scarcity.<sup>126</sup> Opponents emphasized two distinct, serious problems with the scarcity rationale. First, the broadcast airwaves were never any scarcer than any other resource required for mass communication, such as ink or paper.<sup>127</sup> Thus, at most, the scarcity rationale actually served as a flimsy excuse for government management and licensing of the public airwaves.<sup>128</sup> Second, even if the scarcity rationale accurately described broadcasting, new technology was quickly rendering the broadcast technological model obsolete.<sup>129</sup> The advent of cable television, on this account, seriously undermined the scarcity rationale, and the rise of the Internet rendered it laughable. Without scarcity, the fairness doctrine's limitation to broadcasting could not stand, and without that limitation, the doctrine lacked any foothold in First Amendment doctrine. Opponents of substantive regulation also attacked the practical effects of

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<sup>124</sup> See ROWAN, *supra* note 46, at 158-59; Howell, *supra* note 57, at 137 (asserting that fairness doctrine had led broadcasters "for a time" to refuse American Medical Association spots critical of Medicare).

<sup>125</sup> See BAKER, CONCENTRATION, *supra* note 97, at 195-96; Holmes, *supra* note 85, at 51; Kalven, *supra* note 51, at 47; Krattenmaker & Powe, *supra* note 46, at 173-74.

<sup>126</sup> See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388-89 (1969).

<sup>127</sup> See POWE, *supra* note 48, at 197-209; Fowler and Brenner, *supra* note 46, at 221; Robinson, *supra* note 49, at 157-59; ROWAN, *supra* note 46, at 12-13.

<sup>128</sup> See, e.g., Ronald Coase, *Evaluation of Public Policy Relating to Radio and Television Broadcasting: Social and Economic Issues*, 41 J. LAND & P.U. ECON. 161 (1965) (criticizing FCC's system of broadcast licensure and arguing for market distribution of access to airwaves).

<sup>129</sup> See DONAHUE, *supra* note 59, at 155-57; POWE, *supra* note 48, at 239-40; ROWAN, *supra* note 46, at 14; see also FRIENDLY, *supra* note 45, at 215-16 (positing, in criticizing broadcast industry for pursuing regulation of new technologies even as it opposed fairness doctrine, that technological developments could end scarcity and thus eliminate basis for fairness doctrine).

limiting the fairness doctrine to broadcasting. Some insisted that the media's multiplicity of information sources rendered incoherent any assessment of "fairness" within only a single medium.<sup>130</sup> Others argued that broadcasting exerted insufficient influence on public opinion for a broadcast-only regulatory scheme to do much good.<sup>131</sup>

## II. SYNTHESIS AND PRESCRIPTIONS

Supporters of substantive media regulation made a substantial case for the fairness doctrine's broad and important benefits, narrow and appropriate burdens, and utility for the media landscape. Opponents, however, raised serious questions in each of those three dimensions, based on undeniably valid priorities: preventing political manipulation of communications regulation, safeguarding the democratically valuable functions of journalists, and avoiding futile and counterproductive government action in a critical expressive arena. This part offers a tentative set of suggestions for how our governing institutions might approach the challenge of reviving substantive media regulation in order to advance the values the fairness doctrine's supporters advanced while avoiding the traps the doctrine's opponents feared. These suggestions are necessarily general and preliminary; any of them might prove inadequate or unworkable. In particular, navigating the third dimension, the nature of substantive regulation's alteration of the media landscape, presents exceptional challenges in the digital age. My modest goal is to map, with guidance from the informative disagreements detailed in Part

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<sup>130</sup> See Lively, *supra* note 81, at 972; Robinson, *supra* note 49, at 142-43.

<sup>131</sup> See Louis L. Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768 (1972) (arguing that "the power of television broadcasting should not be overestimated," based on premise that "a mass audience which relies entirely, or to a great extent, on TV news is by its very nature not prepared to listen to or digest news of any great complexity or detail").

I, the sort of path that any effort to revive substantive media regulation would need to cut through the tangled thicket of communications policy and constitutional law.

A. *Dividing Regulatory Authority to Advance the Public Interest*

Supporters of substantive media regulation made a credible case that the fairness doctrine served a robust, meaningful account of the public interest in effective democratic debate. Opponents countered with the insight that government media policies do not spring from any perfect democratic ideal, in support of which they cited some disturbing political manipulations of the fairness doctrine. I have elsewhere expressed skepticism about the elected branches' motivation to promote inclusiveness of voices and diversity of information in public discourse.<sup>132</sup> That skepticism, however, provides no reason to abandon the effort. To the extent critics of substantive regulation deny government's capacity to regulate in the public interest,<sup>133</sup> they enable nongovernmental constraints on public discourse to operate unchecked. Government offers a unique source of what Owen Fiss calls "countervailing power" to push the public interest against the tide of market forces.<sup>134</sup> Assuming the elected branches could find the political will to renew the fairness doctrine, they would need to make sure its enactment and enforcement advanced the people's interest in inclusive, informative public debate and not the self-interests of government officials or their patrons. After all, the government's institutional resources and the patriotic allegiance it inspires place state power alongside economic power as objects of the fairness doctrine's concern about keeping the media honest.

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<sup>132</sup> See Magarian, *Access Rights*, *supra* note 21, at 1406-29 (describing and critiquing "regulatory reform" approach to broadening media access).

<sup>133</sup> See *supra* notes 46-48 and accompanying text.

<sup>134</sup> Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 788-89 (1987).

The most straightforward way to ensure regulation in the public interest is through a robust dynamic of interbranch checking and cooperation. The FCC’s status as an independent agency provides substantial insulation against political abuse.<sup>135</sup> In the context of substantive media regulation, however, the courts and Congress have natural and important roles to play in shaping and supervising the FCC’s necessary leading role in day-to-day enforcement. Unfortunately, neither institution pulled its weight under the original fairness doctrine. Congress set forth, at most, only the most general initial requirement for broadcasters to serve the public interest and added virtually nothing over the next four decades, to the extent that courts and commentators argued inconclusively about whether Congress even had codified the doctrine.<sup>136</sup> The courts failed even more egregiously. Professor Barron, in his early critiques of the fairness doctrine, pointedly called for judges to take an active role in administering substantive media regulation.<sup>137</sup> The Supreme Court in *Red Lion* flirted with providing an affirmative First Amendment basis for the fairness doctrine,<sup>138</sup> but the Justices merely affirmed the FCC’s authority to enforce substantive media regulations.<sup>139</sup> That deferential strategy reached its apotheosis

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<sup>135</sup> See Ferris and Leahy, *supra* note 32, at 318.

<sup>136</sup> Congress may have codified the doctrine either in its original imposition of a public interest standard on broadcasters or in a 1959 amendment to the Act, which refers to “the obligation imposed on [broadcasters] under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issue of public importance.” 47 U.S.C. § 315; see Barron, *Controversy*, *supra* note 16, at 223-33 (analyzing case law and contending that public interest standard codified fairness doctrine); see also Susan Low Bloch, *Orphaned Rules in the Administrative State: The Fairness Doctrine and Other Orphaned Progeny of Interactive Deregulation*, 76 GEO. L.J. 59, 66-84 (1988) (critically analyzing Congress’ use of informal pressure, rather than substantive policymaking, to preserve fairness doctrine).

<sup>137</sup> See Barron, *Emerging Right*, *supra* note 15, at 495-96 (“It is by the judicial process that we shall establish the contours for answers to questions which a working right of access obviously presents.”); Barron, *New Right*, *supra* note 15, at 1663-66 (suggesting that courts should clarify the fairness doctrine’s constitutional basis); Barron, *Defense*, *supra* note 32.

<sup>138</sup> See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (linking “the purpose of the First Amendment” with “the right of the public to receive access to social, political, esthetic, moral, and other ideas and experiences”).

<sup>139</sup> See *id.* at 389 (stating that “[t]here is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others”).

in the dyad of *CBS, Inc. v. Democratic National Committee*,<sup>140</sup> which rejected a positive First Amendment claim for media access, and *CBS, Inc. v. Federal Communications Commission*,<sup>141</sup> which rejected a First Amendment challenge to Congress' mandate that the broadcasters sell air time to political candidates.<sup>142</sup> The D.C. Circuit, with no authoritative constitutional direction from the Supreme Court, tended toward inconclusive decisions about the FCC's enforcement of the doctrine.<sup>143</sup>

A renewal of the fairness doctrine, to have any chance for success, would require Congress to lay out a well-informed and reasonably precise statutory framework and to examine periodically the FCC's enforcement practices. It would also require courts to provide meaningful guidance about the nature and extent of the substantive obligations the First Amendment allowed or required the government to place on regulated media, and to render decisive judgments about the statutory and constitutional propriety of the FCC's actions in important cases. Greater interaction among the branches would render a renewed fairness doctrine both more potent and less vulnerable to abuse.

Congress could never anticipate every complexity of a substantive regulatory regime, but lessons from the experience of the original fairness doctrine would allow it to forestall some problems. Congress could dramatically advance over its prior performance by making legislative findings to support a new fairness doctrine.<sup>144</sup> Based on those findings, Congress could legislate the outlines of the new regulatory regime, such as what quantity and type of public issue programming the doctrine would require

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<sup>140</sup> 412 U.S. 94 (1973).

<sup>141</sup> 453 U.S. 367 (1981).

<sup>142</sup> See *supra* notes 6-8 and accompanying text.

<sup>143</sup> See BOLLINGER, *supra* note 42, at 122-24 (explaining uncertainty of fairness doctrine decisions as a predictable and even desirable consequence of cautious assessment of a complex regulatory scheme); FRIENDLY, *supra* note 45, at 230 ("What the FCC and the courts have concluded in the paid-access areas of the Fairness Doctrine is that the complexities of adjudication make specific regulation unworkable.")

<sup>144</sup> Professor Barron long ago made this suggestion. See Barron, *Controversy*, *supra* note 16, at 220.

regulated media to present, what sort of presentation would constitute sufficient debate among differing perspectives, and whether enforcement should occur on an instance-by-instance or more periodic, cumulative basis.<sup>145</sup> Going forward, Congress could hold periodic hearings to evaluate specific enforcement issues and to assess more generally the doctrine's success in achieving its goals. Beyond these foundational elements, Congress could diminish the threat of government abuse by implementing specific safeguards to prevent the actual or attempted political hijackings emphasized by regulatory critics.<sup>146</sup> The most straightforward way to check that threat would be to prohibit any government official or politically responsible employee from filing a fairness doctrine complaint or causing a complaint to be filed.<sup>147</sup>

The Supreme Court ideally would contribute to any renewed regime of substantive media regulation an affirmative First Amendment jurisprudence of expressive access.<sup>148</sup> In the likely event, however, that the Court lacked the appetite for imposing First Amendment obligations on government regulators, it could clarify the First Amendment principles that allowed the government to impose substantive media

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<sup>145</sup> See EMERSON, *supra* note 32, at 112 (calling on Congress to articulate “reasonably concrete standards” for broadcast regulation and “to develop the institutions and techniques for applying the standard and supervising that application”).

<sup>146</sup> See *supra* notes 53-57 and accompanying text.

<sup>147</sup> Such a safeguard might raise First Amendment concerns as to lower-level government employees, although it could be justified as a protection against exploitation by political superiors. *Cf.* *United Public Workers v. Mitchell*, 330 U.S. 75 (1947) (upholding Hatch Act’s restrictions against political activity by Executive Branch employees). An alternative approach would be to require any government official or employee who participates in the filing of a fairness doctrine complaint to disclose the activity. *Cf.* *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976) (upholding requirement that candidates for federal political office disclose sources of campaign contributions). Congress could minimize any free speech concerns by limiting either sort of restriction to matters in which an employee’s political superiors had an active political interest.

<sup>148</sup> Elsewhere I have proposed that the Court review expressive access controversies under a standard of “participation-enhancing review,” which would promote a substantive value of democratic participation by determining which side of any given access dispute better served to advance the informational and inclusive dimensions of public discourse. See Gregory P. Magarian, *The Jurisprudence of Colliding First Amendment Interests: From the Dead End of Neutrality to the Open Road of Participation-Enhancing Review*, 83 NOTRE DAME L. REV. (forthcoming 2007).

regulations. Under those principles, and pursuant to the statutory foundation laid by Congress, federal courts could proceed to review particular instances of the FCC's enforcement, and nonenforcement, of the renewed fairness doctrine. The judicial branch could improve on its performance under the original fairness doctrine by working to ensure that the Commission honored its obligation to enforce the renewed doctrine's substantive mandates. The D.C. Circuit's strong performance in the WLBT case under the original fairness doctrine<sup>149</sup> provides a rare but exemplary model. At the same time, the courts would police the new regulatory regime by invoking traditional First Amendment rules against government abuses and encroachments on journalists' democratically valuable content decisions.

In addition to investing fairness rules with institutional safeguards, a new regime of substantive media regulation could limit the scope of possible regulatory abuses by leaving the personal attack rule buried.<sup>150</sup> In this regard I find myself uncomfortably at odds with Professor Barron's forceful defense of access for the subjects of media assaults.<sup>151</sup> In my view, however, the personal attack rule did far less than the fairness doctrine to advance the goals of inclusive participation and informational diversity that lie at the heart of Barron's case for access rights. The personal attack rule did bring different participants into public debate, and those participants added information that broadcasters otherwise probably would not have aired. From the standpoint of access, however, the personal attack rule offered a platform only to figures of sufficient

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<sup>149</sup> See *supra* notes 43-44 and accompanying text.

<sup>150</sup> Commentators on the original fairness doctrine from a variety of perspectives aimed distinct criticisms at the personal attack rule and advocated its elimination. See SIMMONS, *supra* note 42, at 87-91 (advocating elimination of personal attack rule but retention of political editorial rule); Brechner, *supra* note 60, at 146-48; Geller, *supra* note 32, at 302; Marks, *supra* note 32, at 997-1001.

<sup>151</sup> See, e.g., Barron, *New Right*, *supra* note 15, at 1656-60.

prominence to have inspired attacks in the first instance. Moreover, the rule addressed only those prominent figures' narrow, parochial interests in preserving their own reputations, rather than any more broadly defined goal of public information. The personal attack rule did provide a check against a species of one-sided media presentation, but the fairness doctrine empowered every member of the media audience to challenge any sort of one-sided presentation before the FCC and, if necessary, in court.<sup>152</sup> Disavowing the personal attack rule would help to clear the way for a renewed fairness doctrine to deepen and diversify public debate.

B. *Protecting Editorial Autonomy from Economic Power*

As to the second dimension of dispute over substantive media regulation – whom does regulation constrain? – the relationship between journalists and the media industry has changed decisively since the days of the original fairness doctrine. Opponents of regulation in that era built a plausible case that the doctrine constrained editors and journalists rather than media owners and advertisers and thus undermined the core protections of the Free Press Clause. If nothing else, many journalists' opposition to regulation substantiated the claim that the doctrine compromised their autonomy rather than merely forcing media corporations to set aside their profit fixations and self-interested perspectives. In addition, opponents credibly called attention to norms of journalistic ethics.<sup>153</sup> Although their argument overstated the simplicity of journalistic independence, which requires budgetary security and diversity in the backgrounds of

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<sup>152</sup> See *United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) (holding that broadcast viewers and listeners had standing to raise public interest considerations under fairness doctrine in challenge to FCC's grant of license renewal).

<sup>153</sup> See *supra* notes 88-92 and accompanying text.

working journalists in addition to ethical canons,<sup>154</sup> the widespread journalistic commitment to balanced coverage of public issues rendered the fairness doctrine's mandates at least theoretically extraneous. Two considerations, however, undermine any present admonition that we should trust the press to police itself.

First, legal regulations and professional ethics codes necessarily do different jobs.<sup>155</sup> For better or worse, journalistic ethical norms do little to effectuate the policy goals of the fairness doctrine. Unlike professions such as medicine and law, journalism lacks an overarching code of ethics.<sup>156</sup> Professional associations such as the American Society of Newspaper Editors and the Society of Professional Journalists promulgate ethics codes,<sup>157</sup> but journalists need not belong to those organizations, and membership does not bind them to observe the associations' ethical precepts. Journalists generally must obey only the particular ethical canons of the media firms that employ them. Unfortunately, many news organizations "cannot maintain or even define their ethical standards."<sup>158</sup> News organizations that do maintain ethical codes generally emphasize what is good for business, with particular focus on their own prerogatives, rather than the public value of information.<sup>159</sup> That emphasis requires maintaining credibility with

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<sup>154</sup> See BAKER, MARKETS, *supra* note 71, at 110.

<sup>155</sup> See JAY BLACK ET AL., DOING ETHICS IN JOURNALISM: A HANDBOOK WITH CASE STUDIES 14 (2d ed. 1995) (discussing differences between ethical constraints and legal rules).

<sup>156</sup> See Roberto Herrscher, *A Universal Code of Journalism Ethics: Problems, Limitations, and Proposals*, J. MASS MEDIA ETHICS 17(4), at 282-83 (2002).

<sup>157</sup> See ASNE *Statement of Principles* (2006), <http://www.asne.org/kiosk/archive/principi.htm> (last visited Sept. 8, 2007); Society of Professional Journalists Code of Ethics (1996), <http://www.spj.org/pdf/ethicscode.pdf> (last visited Sept. 8, 2007).

<sup>158</sup> Kenneth Starck, *What's Right/Wrong with Journalism Ethics Research?*, JOURNALISM STUDIES, Vol. 2, No. 1, at 143 (2001).

<sup>159</sup> See *id.* at 279 (discussing differences among ethical codes created by media organizations, international organizations, and federations of journalists).

audiences,<sup>160</sup> but news, by definition, is what audiences do not already know. Thus, news organizations can maintain credibility while ignoring important public issues and slighting significant points of view. The most rigorous news organizations maintain ethical rules that require avoiding actual or apparent conflicts of interest, reporting accurately, and making efforts to avoid ideological bias and to present different points of view.<sup>161</sup> Those directives resonate with the goals of the fairness doctrine, but they neither reflect the broad democratic imperative of inclusive and informative public discourse nor provide an extrinsic check on news organizations' biases or failures to present vigorous debate on public issues.<sup>162</sup>

Second, in the two decades since the fairness doctrine's demise, the economic pressures against which the doctrine's supporters directed their efforts have corroded journalistic autonomy and integrity as severely as any regulation ever could. Professor Barron in 1967 lamented the increasing consolidation of ownership in the mass media.<sup>163</sup> In the ensuing four decades, the problem has grown steadily worse.<sup>164</sup> Robert McChesney identifies as the most important structural features of the present media landscape *concentration* – the consolidation of media ownership in a few hands – and *conglomeration* – the diversification of media corporations' holdings to include different

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<sup>160</sup> See, e.g., *Los Angeles Times* Ethics Guidelines (2005), <http://www.latimes.com/media/acrobat/2005-07/18479691.pdf> (last visited Sept. 8, 2007) (“Credibility, a newspaper’s most precious asset, is arduously acquired and easily squandered. It can be maintained only if each of us accepts responsibility for it.”).

<sup>161</sup> See *id.*; Ethical Journalism: A Handbook of values and practices for the news and editorial departments, *New York Times* (2004), [http://www.nytc.com/pdf/NYT\\_Ethical\\_Journalism\\_0904.pdf](http://www.nytc.com/pdf/NYT_Ethical_Journalism_0904.pdf) (last visited Sept. 8, 2007).

<sup>162</sup> See BARRON, PUBLIC RIGHTS, *supra* note 16, at 31 (“The difficulty with journalistic responsibility imposed as a voluntary matter is that in a crisis, solutions imposed by conscience often prove less serviceable than mandates directed by law.”).

<sup>163</sup> See Barron, *New Right*, *supra* note 15, at 1666; see also *supra* notes 66-71 and accompanying text (discussing substantive regulation advocates’ concerns about media owners’ concentrated power).

<sup>164</sup> An especially thorough and incisive study of media concentration and its hazards for our democratic system is BAKER, CONCENTRATION, *supra* note 97.

sorts of media organs.<sup>165</sup> Five enormous corporations now own most of the media outlets in the United States, creating an unprecedented degree of ownership concentration.<sup>166</sup> The federal government has enabled this concentration by such deregulatory measures as the 1996 Telecommunications Act, which allowed three firms to seize control of over half the radio advertising revenue in each of the fifty largest U.S. radio markets.<sup>167</sup> In the newspaper field, the past two decades have accelerated a rush toward diminished competition, to the point where the vast majority of daily newspapers enjoy monopolies in their local markets<sup>168</sup> and six major chains dominate the industry.<sup>169</sup> In contrast to a regime of ownership by wealthy individuals or smaller companies, the “big five” media firms replicate one another’s essential characteristics, notably a political agenda well to the right of the public mean and the determination to advance that agenda through their media properties.<sup>170</sup>

Under these conditions, “[t]he walls that once separated the culture of the newsroom from the business culture of the surrounding corporation are being swept away.”<sup>171</sup> Intense economic pressures in the present media climate have led news organizations, once maintained by media firms as prestigious, publicly beneficial loss leaders, to subordinate professional norms and scruples to the interests of shareholders

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<sup>165</sup> See MCCHESENEY, *supra* note 89, at 16-29.

<sup>166</sup> See BAGDIKIAN, *supra* note 76, at 3. As recently as 1983, media dominance was spread among 50 major corporations. *See id.* at 16.

<sup>167</sup> See MCCHESENEY, *supra* note 89, at 75-76; *see also* BAKER, *MARKETS*, *supra* note 71, at 101-02 (criticizing recent efforts to deregulate mass media).

<sup>168</sup> See BAGDIKIAN, *supra* note 76, at 121-22.

<sup>169</sup> See MCCHESENEY, *supra* note 89, at 17-18.

<sup>170</sup> See BAGDIKIAN, *supra* note 76, at 11-16; IGGERS, *supra* note 70, at 37; *see also* Stephen A. Gardbaum, *Broadcasting, Democracy, and the Market*, 82 *GEO. L.J.* 373, 388-90 (1993) (positing that corporate efforts to influence public debate through media ownership occur against a broader backdrop of market-driven constraints on the range of issues and perspectives present in national political debate). Ideological bias within news organizations appears especially prominent in television news. *See* ELLIOT D. COHEN AND DENI ELLIOTT, *JOURNALISM ETHICS* 62-63 (1997).

<sup>171</sup> IGGERS, *supra* note 70, at 77; *see also* Thomson, *supra* note 62, at 46 (discussing breakdown in separation between media outlets’ editorial and business elements).

and advertisers.<sup>172</sup> The mass media's burgeoning obsession with making money and pleasing advertisers has crowded out the sense of obligation, prominent in our media culture throughout the 20<sup>th</sup> Century, to serve the public by devoting substantial resources to vigorous, reliable journalism.<sup>173</sup> Reporting on issues of public concern tends to bring in less revenue than alternative forms of content.<sup>174</sup> Accordingly, media corporations have cut costs by firing reporters and reducing the time and space devoted to news coverage.<sup>175</sup> "Our corporate superiors," laments former *Los Angeles Times* editor John Carroll, "regard our beliefs [in public service] as quaint, wasteful and increasingly tiresome."<sup>176</sup> Increased consolidation of ownership means that journalists who face pressure from ownership to compromise their standards cannot even jump to competing news organizations.<sup>177</sup> The FCC has made matters worse by easing its rules for how broadcasters can satisfy the obligation, still nominally a condition of licensure, to provide public service programming.<sup>178</sup>

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<sup>172</sup> See GOODWIN & SMITH, *supra* note 72, at 57-58 (discussing deterioration of journalistic standards due to increased profit motive); IGGERS, *supra* note 70, at 36 (discussing shift in news organizations' priorities "from informing the citizen to serving the customer"); MEYER, *supra* note 72, at 112-15 (discussing publishers' increasing dominance over editors in modern media firms); Thomas Kunkel, *The Gadfly: Frank Blethen's Battle Against Media Consolidation*, AM. JOURNALISM REV., Oct./Nov. 2004, at [page] ("[T]he corporatization of news has put the relationship of profit to good journalism out of balance, and . . . absentee ownership increasingly undermines hometown obligations."); see also BAGDIKIAN, *supra* note 76, at 235-38; MCCHESENEY, *supra* note 89, at 51-53.

<sup>173</sup> See MCCHESENEY, *supra* note 89, at 48-49; see also Abramson, *supra* note 89, at 259-62 (discussing television journalists' inability to reconcile news values with pressure from advertisers).

<sup>174</sup> See, e.g., Benjamin J. Bates and L. Todd Chambers, *The Economic Value of Radio News: Testing the Assumptions of Deregulation* (paper presented at 43<sup>rd</sup> annual International Communication Association Conference, Washington D.C., May 1993) (using economic analysis of deregulated radio markets to demonstrate that news and public affairs programming is generally unprofitable for radio stations).

<sup>175</sup> See BAGDIKIAN, *supra* note 76, at 105-06; GOODWIN & SMITH, *supra* note 72, at 61 (discussing conflicts between journalists and media owners over budget cuts).

<sup>176</sup> John S. Carroll, *Last Call at the ASNE Saloon* (speech delivered to 2006 American Society of Newspaper Editors convention, April 26, 2006), [http://www.knightfdn.org/clips/200604/2006\\_04\\_26\\_johncarroll\\_asne.pdf](http://www.knightfdn.org/clips/200604/2006_04_26_johncarroll_asne.pdf) (last visited Sept. 11, 2007).

<sup>177</sup> See GOODWIN & SMITH, *supra* note 72, at 78 (discussing effects of decreased competition on journalists' exit options when faced with ethical pressures).

<sup>178</sup> See MCCHESENEY, *supra* note 89, at 69-70.

Supporters of substantive media regulation might claim that these dire circumstances entirely obviated the second dimension of disagreement about the fairness doctrine. A renewed doctrine necessarily would constrain economic power rather than editorial autonomy, because economic power already constrains editorial autonomy. Whatever force journalistic ethical standards retain only reinforces this claim. If professionalism obligates journalists to do the right thing, then any failure by journalists to do the right thing represents either a straightforward professional lapse or meddling by owners and publishers. In either case, a renewed fairness doctrine would simply supplement journalistic standards.<sup>179</sup> Such a blanket justification, however, proves too much. As discussed above, fairness regulations cannot and do not perform the same function as journalistic ethical canons.<sup>180</sup> Moreover, to treat the working relationship between owners and publishers, on one hand, and editors and reporters, on the other, as a *fait accompli* – even in this age of consolidation and commercialism – oversimplifies a complex dynamic. Finally, for the government to supplant professional bodies’ promulgation and enforcement of journalistic ethics would centralize an important element of public discourse in the hands of a powerful, interested overlord, contrary to substantive media regulation’s prime directive of creating more inclusive and informative democratic debate. Turning the insight that fairness rules can advance rather than impede journalistic integrity into workable and constructive policy will require creative thinking.

Congress and the FCC should design any renewed fairness doctrine to protect the discretion of editors and reporters against the economic pressures imposed by media owners and advertisers. This approach would precisely tailor the doctrine’s mandate to

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<sup>179</sup> See, e.g., Ferris and Kirkland, *supra* note 29, at 614 (claiming that substantive media regulations “insulate broadcast journalists for external pressures and allow them to act as their conscience dictates”).

<sup>180</sup> See *supra* notes 155-162 and accompanying text.

its most compelling justification: preventing financially powerful interests' co-opting of journalists' professional judgment. The doctrine's substantive requirements could explicitly target failures of coverage and diversity that resulted from economic pressures.<sup>181</sup> The Commission, in adjudicating fairness complaints, could focus its inquiry on whether owners or advertisers caused a media outlet to subvert its public interest obligations. Of course, such a "due process of journalism" approach would present the same practical challenges as any similar oversight of institutional interactions.<sup>182</sup> At the same time, such a regulatory regime would strengthen determined editors' hands against owners' and advertisers' interference, and a pattern or practice of such interference would become difficult to conceal. A regulatory focus on whether media owners or advertisers interfered with editorial judgment would be novel and challenging, but not entirely unprecedented. The Commission in the past has imposed restrictions and penalties on broadcast licensees who subordinated their public interest obligations to controlling entities' judgments or interests.<sup>183</sup> In addition, other western democracies have enacted or considered legal measures to protect journalistic and editorial autonomy against media owners' interference.<sup>184</sup>

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<sup>181</sup> Cf. BAKER, MARKETS, *supra* note 71, at 94 (suggesting that "the law could require that journalists have a greater say in content decisions").

<sup>182</sup> Cf. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (striking down a federal civil service regulation as a violation of noncitizens' due process rights because the issuing agency lacked proper authority to assert the national interests that arguably could have justified the regulation's differential treatment of noncitizens).

<sup>183</sup> See National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (upholding FCC's chain broadcasting regulations, which barred certain relationships between broadcast licensees and networks as contrary to the public interest); Simmons v. FCC, 169 F.2d 670 (D.C. Cir. 1948) (upholding FCC's denial of station's application to increase its broadcast power on ground that station planned to serve as a mere conduit for a national network's entire slate of programming); Churchill Tabernacle v. FCC, 160 F.2d 244 (D.C. Cir. 1947) (affirming in part FCC's denial of license renewal based on broadcaster's contract with church that formerly owned station, which gave church temporary control of station and provided for station to revert to church in certain circumstances).

<sup>184</sup> See Baker, *Media Structure*, *supra* note 95, at 758. France and Austria accord journalists legal rights of conscience and mandate severance benefits for journalists who lose their jobs due to changes in ownership.

Opponents of substantive media regulation have argued forcefully for structural regulation as a sufficient alternative that obviates any need for government directives about media content.<sup>185</sup> Certainly structural regulation forms a critical part of any strategy to achieve greater diversity of ideas in the mass media. At least two considerations, however, counsel against exclusive reliance on structural rules. First, the deregulatory era has treated structural regulation little more kindly than substantive regulation.<sup>186</sup> The ongoing consolidation of media ownership<sup>187</sup> reflects the lack of political will to impose or maintain effective structural regulations, and the present FCC appears committed to rolling back structural limits on media ownership.<sup>188</sup> Perhaps structural regulation will flourish in the future while substantive regulation stagnates, but a prudent regulatory strategy for the present should pursue both avenues. This same imperative counsels against limiting government regulatory initiatives to subsidy programs.<sup>189</sup> Second, even a robust system of structural regulation may not accomplish all the goals that drive substantive regulation. Even a properly competitive media market

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*See* PETER J. HUMPHREYS, *MASS MEDIA AND MEDIA POLICY IN WESTERN EUROPE* 108 (1996). An Israeli court has also awarded severance benefits to journalists based on a principle of “internal press freedom.” *See* DANIEL C. HALLIN AND PAOLO MANCINI, *COMPARING MEDIA SYSTEMS: THREE MODELS OF MEDIA AND POLITICS* 40 n.4 (2004). Norwegian courts recognize common law rules, rooted in journalistic self-regulatory codes, that give editors the right to control content, while journalists in the Netherlands have achieved editorial control through collective bargaining. *See* HUMPHREYS, *supra*, at 109. Both Norway and the Netherlands predicate state subsidies for journalism on noninterference by owners and publishers. *See* HALLIN AND MANCINI, *supra*, at 175. Britain factors considerations of editorial independence into approval of media mergers. *See* BAKER, *CONCENTRATION*, *supra* note 97, at 181. In Germany, media owners in the 1970s defeated legislative efforts to bring news publications within the scope of laws that give workers rights to participate in management. *See* HUMPHREYS, *supra*, at 108.

<sup>185</sup> *See supra* notes 93-96 and accompanying text.

<sup>186</sup> As early as 1981, Professor Barron provided a trenchant critique of overreliance on structural regulation in his analysis of Judge David Bazelon’s rejection of the fairness doctrine in favor of structural regulation. *See* BARRON, *PUBLIC RIGHTS*, *supra* note 16, at 137-57.

<sup>187</sup> *See supra* notes 163-170 and accompanying text.

<sup>188</sup> *See* Stephen Labaton, *Plan Would Ease Limits on Media Owners*, N. Y. TIMES (Oct. 18, 2007), at [page] (describing FCC Chairman Kevin Martin’s ongoing efforts to reduce regulatory prohibitions on cross-ownership of broadcast and newspaper outlets and ownership of multiple broadcast stations in the same city).

<sup>189</sup> *See* BARRON, *PUBLIC RIGHTS*, *supra* note 16, at 21-22 (questioning political viability of subsidy-focused media reform).

will not deliver the full diet of robust public debate that democracy requires, because the market cannot accurately value the aspects of media performance that contribute to democratic engagement.<sup>190</sup> In addition, the market itself imposes distinctive content pressures toward satisfying the desires of more affluent consumers and maximizing the ratio of revenue to cost.<sup>191</sup> Accordingly, even if structural regulation succeeded in diversifying media ownership, we would still need substantive regulation to diversify media content.

### C. *Promoting Vigorous Political Debate in the Conventional Mass Media*

The most difficult question for any effort to revive substantive media regulation is how a renewed fairness doctrine would aim to alter the prevailing media landscape. Supporters of the original fairness doctrine articulated a strong democratic basis for enriching the content of public debate and a strong sociological basis for pursuing that enrichment through regulation of mass media. With remarkable consistency, however, their arguments tracked the contours of a media status quo that no longer prevails. Opponents, for their part, too frequently relied on libertarian platitudes that reduced liberty to the absence of regulation. But they also posed three challenging questions to which the doctrine's supporters never articulated fully satisfactory answers. First, how can regulators effectively enforce rules that require concrete understandings of such elusive concepts as fairness, balance, and issues of public concern? Second, how can substantive government regulation of the media promote, rather than inhibit, the free and

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<sup>190</sup> See BAKER, MARKETS, *supra* note 71, at 86; BOLLINGER, *supra* note 42, at 137-38; SUNSTEIN, DEMOCRACY, *supra* note 99, at 68-70; *see also* Barron, *New Right*, *supra* note 15, at 1678 (pointing out that “competition within a medium is no assurance that significant opinions will have no difficulty in securing access”).

<sup>191</sup> See BAKER, MARKETS, *supra* note 71, at 71-72; FISS, *supra* note 134, at 787-88.

vigorous exchange of ideas? Finally, how does the regulatory scheme justify the simultaneously inequitable and incomplete imposition of fairness obligations only on the broadcast media? The first two questions implicate the policy mandate of a substantive regulatory regime; the third goes to the regime's scope. Any attempt to renew the fairness doctrine will need to address all three questions squarely and effectively.

1. *Mandate: Coverage of Public Issues and Promotion of Debate*

Both of the primary arguments that regulatory critics raised to attack the original fairness doctrine's substantive mandates – that conceptual confusion precluded the doctrine's meaningful enforcement<sup>192</sup> and that the doctrine chilled controversial programming<sup>193</sup> – suffer from serious logical deficiencies. Everyone agrees that the doctrine presented formidable conceptual challenges and that the FCC failed to answer those challenges with sufficient certainty to sustain robust enforcement. Conceptual challenges, however, do not inherently or inevitably foreclose regulation in this area any more than in any other complex field.<sup>194</sup> At the same time, the Commission's failure to maintain regulatory bite seriously undermines the assertion that the doctrine chilled controversial speech.<sup>195</sup> Vague speech regulations can of course foment a climate of

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<sup>192</sup> See *supra* notes 115-118 and accompanying text.

<sup>193</sup> See *supra* notes 119-125 and accompanying text.

<sup>194</sup> See BOLLINGER, *supra* note 42, at 123 (“Uncertainty and the need to reach difficult judgments are hardly unique to public access regulations such as the fairness doctrine”); FISS, *supra* note 12, at 59-60 (indicting use of technical complaints to undermine worthy regulatory goals as reactionary gamesmanship); Barron, *Defense*, *supra* note 32, at 34 (maintaining that “if, as a result of active and vigorous enforcement, a developed administrative case law were to emerge,” broadcast fairness would become no less manageable than other complex regulatory concepts).

<sup>195</sup> One commentator pointed out, based on the number of fairness complaints the FCC pursued and acted upon each year, that the average broadcast licensee would have to answer a complaint once every 73 years and would actually suffer an adverse ruling once every 1,300 years. See Everett C. Parker, *The Fairness Doctrine*, in RUBIN, *supra* note 62, at 81, 82-83; see also Barrow, *supra* note 29, at 487-88 (questioning, based on weakness of FCC's enforcement regime, assertions that fairness doctrine chilled controversial programming).

fear,<sup>196</sup> but a sustained pattern of weak enforcement reduces vagueness to an annoyance. Rigorous assessments of the fairness doctrine found the evidence that the doctrine chilled broadcasters limited and anecdotal.<sup>197</sup> This dearth of evidence suggests that broadcasters' claims of a chilling effect reflected some combination of irrational fear and rhetorical posturing.<sup>198</sup> Even if the fairness doctrine did discourage some controversial programming, assessment of that effect must take into account the doctrine's countervailing success in promoting public affairs programming and exposing the polity to a wide range of ideas. Professor Barron has observed, for example, that the fairness doctrine inspired newspapers to enhance viewpoint diversity through innovations – such as op-ed pages, extensive letters to the editor, rigorous policies for retracting inaccuracies, and ombudsmen – that continue to enrich the medium.<sup>199</sup> No one appears to assail those advances as the badges and incidents of censorship.

The FCC's repeal of the fairness doctrine allowed broadcasters to disregard the public interest in balanced presentation of important public issues. The Cato Institute study that claims the doctrine's demise breathed new life into news and talk radio<sup>200</sup>

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<sup>196</sup> See, e.g., *Coates v. Cincinnati*, 402 U.S. 611 (1971) (striking down on vagueness grounds ordinance that prohibited “annoying” behavior in context of public assembly).

<sup>197</sup> Henry Geller, evaluating the various judicial and regulatory inquiries into whether the fairness doctrine chilled expression, concluded that the doctrine had not chilled networks and large broadcasters. He acknowledged the possibility that the doctrine might have influenced smaller stations to avoid controversy, but he believed that the doctrine at most may have reinforced such stations' inherent, advertiser-driven aversion to challenging programs. See Geller, *supra* note 32, at 299-300; see also ROWAN, *supra* note 46, at 123 (stating, after warning of chilling effect, that “[h]ard statistical evidence about any chilling effect is inconclusive”); Barrow, *supra* note 29, at 486-87 (citing Senate survey in which only nine percent of broadcasters believed that fairness doctrine chilled controversial programming); Ferris and Kirkland, *supra* note 29, at 615 (citing FCC and broadcast industry studies that failed to substantiate claims of a chilling effect); Rainey, *supra* note 32, at 314-15 (enumerating flaws in broadcasters' chilling effect argument).

<sup>198</sup> See BOLLINGER, *supra* note 42, at 125-26 (questioning credibility of broadcasters' claims of chilling effect). The broadcast industry resorted to the convenient claim that chilled broadcasters declined to come forward because they feared professional embarrassment. See ROWAN, *supra* note 46, at 120-21.

<sup>199</sup> See Barron, *Access Today*, *supra* note 16, at 6; see also Fiss, *supra* note 134, at 789 (positing that fairness doctrine may have contributed to improvement of professional standards in journalism).

<sup>200</sup> See Hazlett & Sosa, *Lessons*, *supra* note 122.

deserves little credence, because it presumes without analysis that coincidence between the doctrine's repeal and the growth of news and talk formats equals causation.<sup>201</sup> Even if we accept the study's causal hypothesis, however, it says not one word about whether the posited explosion in news and talk formats encouraged the multiplicity of perspectives on important issues that the fairness doctrine sought to generate.<sup>202</sup> The Cato study asserts that the fairness doctrine impeded what it sought to foster – genuine democratic debate – but the study proves, at most, only that the doctrine impeded what it sought to combat – hermetic, hidebound agit-prop that crowds out opportunities for democratic debate. At the same time, a renewed fairness doctrine would not smother the ideal of a partisan press. Mass media, by their nature, do not take bold, partisan stands. Instead, they make broadly influential decisions about what information is newsworthy under some standard of – or at least pretense to – objectivity.<sup>203</sup> The dominance of the partisan media ideal ended with the dawn of contemporary mass culture. Today that ideal thrives at the cultural margins, in thousands of specialty journals, websites, cable channels, and individual broadcast programs – none of which any new substantive media regulation presumably would, or should, disturb.

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<sup>201</sup> The study, for example, acknowledges two roughly contemporaneous phenomena that followed repeal of the fairness doctrine in 1987: FM stations' accelerating dominance of the radio dial, and the dramatic increase in AM stations' embrace of talk over music formats. The authors assert that "the repeal of the Fairness Doctrine allowed AM radio to exploit its comparative advantage over FM by substituting talk formats for music," identifying AM radio's comparative advantage as stemming from "differences in cost of operation and sound quality." *Id.* at n.83 and accompanying text; *see also* Hazlett & Sosa, "Chilling Effect," *supra* note 122, at 295-99. They never entertain the more straightforward hypothesis that FM radio's rapid growth and ability to broadcast in stereo was an independent factor that compelled AM stations to shift from music to talk formats.

<sup>202</sup> *See* BOLLINGER, *supra* note 42, at 126 (criticizing FCC for relying on asserted chilling effect in eliminating fairness doctrine without considering doctrine's countervailing effect of broadening public debate); FISS, *supra* note 12, at 60 (positing that "even if the regulation produced some measure of self-censorship, broadcasting might still be more varied, more keyed to public issues, if regulated than if not").

<sup>203</sup> *See* Abramson, *supra* note 89, at 252-53. For further discussion of the nature of conventional mass media, see *infra* notes 241-260 and accompanying text.

Despite their weaknesses, the conceptual confusion and chilling effect objections to the fairness doctrine spotlight dangers that any revival of the doctrine should strive to neutralize. The greater engagement by Congress and the courts that I have proposed would go some distance toward addressing these concerns.<sup>204</sup> On a substantive level, a renewed fairness doctrine would need to serve goals ambitious enough to advance democratic debate in a meaningful way but modest enough to avoid both exceeding policymakers' conceptual grasp and discouraging frank discourse. The most promising approach, I believe, would be to combine strengthened enforcement of the original fairness doctrine's first component – the coverage obligation – with a revised conception of its second component – the obligation to present varied perspectives – that focused less on achieving balance and more on promoting debate.

The mass media's performance since the fairness doctrine's demise, spurred in part by the structural changes discussed above,<sup>205</sup> demonstrates a widespread failure to present debate on controversial issues.<sup>206</sup> The most glaring and important example in recent years was the media's plunge down the Bush administration's rabbit hole toward the Iraq War, greased by uncritical acceptance of government assertions and contempt for dissent.<sup>207</sup> That embarrassment all too accurately represents the media's conspicuous unwillingness or inability to inform and engage the public about government malfeasance

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<sup>204</sup> See *supra* notes 135-149 and accompanying text.

<sup>205</sup> See *supra* notes 163-178 and accompanying text.

<sup>206</sup> See generally Rainey, *supra* note 32, at 275-76 & n.22 (compiling evidence from early years of broadcast deregulation that documents substantial decrease in public affairs programming). Studies conducted just prior to the relative acceleration of fairness doctrine enforcement in the mid-1960s found a similar dearth of commentary about public issues on most broadcast stations. See Joseph M. Ripley, *Policies and Practices Concerning Broadcasts of Controversial Issues*, in KITROSS & HARWOOD, *supra* note 57, at 179.

<sup>207</sup> See generally W. LANCE BENNETT ET AL., *WHEN THE PRESS FAILS: POLITICAL POWER AND THE NEW MEDIA FROM IRAQ TO KATRINA* (2007).

ranging from support for foreign despots<sup>208</sup> to disregard for domestic poverty.<sup>209</sup> At the local level, television news coverage has shifted its attention from matters of public deliberation to sensationalistic crime stories and entertainment features.<sup>210</sup> In the newspaper field – which never labored under the fairness doctrine – advertisers’ hunger for affluent readers has led the dwindling population of urban papers to report less news about the cities they supposedly serve.<sup>211</sup> Coverage of lifestyle and entertainment topics increasingly crowds out reporting of hard news, whether local or international.<sup>212</sup> Instances of courageous commentary or tenacious investigative reporting have become rare. Many of these failings predate the fairness doctrine’s repeal – regulated broadcasters did no better job of forestalling our Vietnam fiasco than deregulated broadcasters have done with Iraq – but all of them have accelerated in the two decades since the doctrine’s demise.

A carefully conceived renewal of the fairness doctrine could substantially improve the mass media’s crucial contribution to democratic discourse. First, any new regime of substantive media regulation should shut the controversy avoidance escape hatch by vigorously enforcing a requirement, along the lines of the original fairness doctrine’s first element, that regulated media cover important public issues. Professor Barron, recognizing that the mass media were “using the free speech and free press guarantees to avoid opinions instead of acting as a sounding board for their

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<sup>208</sup> See BAGDIKIAN, *supra* note 76, at 91-102.

<sup>209</sup> See *id.* at 108-13; see also BAKER, MARKETS, *supra* note 71, at 48-50 (discussing failure of market-driven media to provide strong check on government abuses).

<sup>210</sup> See IGGERS, *supra* note 70, at 2-3; SUNSTEIN, DEMOCRACY, *supra* note 99, at 59-62; MCCHESENEY, *supra* note 89, at 54-55.

<sup>211</sup> See Bernard Rubin, *The Search for Media Ethics*, in RUBIN, *supra* note 62, at 3, 5.

<sup>212</sup> See MCCHESENEY, *supra* note 89, at 55.

expression,”<sup>213</sup> vigorously advocated using the fairness doctrine to place broadcasters under a greater affirmative obligation “to originate debate and seek out controversial issues for presentation on radio and television.”<sup>214</sup> Numerous other commentators on the fairness doctrine similarly criticized the FCC’s refusal to enforce the coverage requirement.<sup>215</sup> At the same time, the coverage requirement arguably embodied the doctrine’s most serious threat to editorial autonomy, because it imposed a free-standing obligation that did not turn on the broadcaster’s autonomous decision to raise an issue.<sup>216</sup> Under a revived fairness doctrine, Congress, the FCC, and reviewing courts would need to develop a coverage mandate that both allowed for vigorous enforcement and minimized the danger of government abuse. Thoughtful reformers in the 1970s proposed that the FCC, rather than directing broadcasters to cover specified issues, should promulgate and enforce an aggregate airtime percentage requirement for public issue programming;<sup>217</sup> include cultural and local affairs programming within the public interest mandate;<sup>218</sup> and require broadcasters to consult with community leaders and ordinary viewers about which issues mattered to them and to document responsiveness to their concerns.<sup>219</sup> These ideas provide a useful starting point for structuring a new coverage mandate. Regulators would also need to adapt the coverage obligation to different sorts

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<sup>213</sup> Barron, *New Right*, *supra* note 15, at 1646.

<sup>214</sup> BARRON, FREEDOM, *supra* note 15, at 151.

<sup>215</sup> See FRIENDLY, *supra* note 45, at 221; SIMMONS, *supra* note 42, at 166-75 (assessing FCC’s failure to enforce fairness doctrine’s coverage requirement and proposing that FCC refocus fairness doctrine enforcement on coverage rather than balance requirement); Geller, *supra* note 32, at 303-04; Marks, *supra* note 32, at 992-93 (contending that First Amendment obligated FCC to enforce coverage requirement in order to prevent government from making broadcast licensing decisions based on licensees’ political views).

<sup>216</sup> See ROWAN, *supra* note 46, at 98-99; SIMMONS, *supra* note 42, at 172-73; *but see* BAKER, MARKETS, *supra* note 71, at 204 (suggesting that media regulations are more onerous when triggered by initial decision to publish certain content); Marks, *supra* note 32, at 990-92 (suggesting that fairness doctrine’s coverage requirement, unlike its balance requirement, avoided problem of prior restraint).

<sup>217</sup> See GELLER, *supra* note 32, at 61-64; SIMMONS, *supra* note 42, at 225-27.

<sup>218</sup> See Marks, *supra* note 32, at 1002.

<sup>219</sup> See SIMMONS, *supra* note 42, at 227-28.

of mass media. Existing requirements that cable systems carry community access channels offer one template for applying fairness-type rules to multichannel media outlets.<sup>220</sup>

As to the original fairness doctrine's second element – opportunity for presentation of opposing viewpoints – Congress and the FCC could give a new regulatory scheme a better chance of doing more good by focusing less on achieving balance and more on presenting and fostering debate. Commentators properly emphasize that important public issues have more than two sides.<sup>221</sup> No media presentation – voluntary or mandatory, however well-conceived – could fully present the competing positions on any complex issue. Critics also correctly warn that we cannot reasonably expect government, itself dominated by elites, to ameliorate professional journalism's historic embrace of elite and mainstream perspectives.<sup>222</sup> Indeed, even the most earnest regulatory pursuit of perfect balance or objectivity, aside from being futile, would reinforce professional journalism's tendency to embrace official accounts of truth and bleach out dissension.<sup>223</sup> Such a fetish for objectivity, at its worst, can provide cover for the very sort of partisan bias the fairness doctrine seeks to ameliorate.<sup>224</sup> On the other

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<sup>220</sup> Identifying the need to adapt the fairness doctrine's coverage requirement to different media prompts the question what sort of media a renewed fairness doctrine should cover. I address that question *infra* notes 235-267 and accompanying text.

<sup>221</sup> See SIMMONS, *supra* note 42, at 190-92 (discussing conceptual difficulty of identifying contrasting viewpoints on public issues); Krattenmaker and Powe, *supra* note 46, at 161-62 (criticizing fairness doctrine for overlooking multifarious character of public debate).

<sup>222</sup> See BAKER, CONCENTRATION, *supra* note 97, at 196-97 (criticizing fairness doctrine's balance requirement for reinforcing status quo); Ingber, *supra* note 61, at 62, 64-65 (criticizing fairness doctrine for enhancing stature of ideas that already enjoyed some public support while doing nothing for wholly unpopular ideas); Rainey, *supra* note 32, at 315 (noting tendency of original fairness doctrine to reinforce mainstream opinions).

<sup>223</sup> See BAKER, MARKETS, *supra* note 71, at 27 (discussing advertisers' preference for mass media that appeal to broad audiences and avoid controversy); Abramson, *supra* note 89, at 253-54 (critiquing relationship in journalism between reliance on official statements and norms of objectivity).

<sup>224</sup> See BAKER, MARKETS, *supra* note 71, at 158; Baker, *Misguided Fairness*, *supra* note 52, at 13 (arguing that "balance represents a middle of the road, status quo policy").

hand, an appropriate, ideologically neutral concern about conservative talk radio<sup>225</sup> is not that it aggressively presents a point of view – to that extent, it is a democratic exemplar – but that it insulates its audience from any need or inclination to question received truths.<sup>226</sup> The First Amendment guarantees the right to myopia of any ideology or belief system that declines to look outward. It provides no such guarantee, however, for a dominant mass medium. Our democratic system permits the government to structure the mass media landscape in ways that create at least some likelihood that people will encounter disagreements about public issues.

A renewed fairness doctrine could require regulated media to present active debate between or among some number of competing perspectives – what Barron frames as “the existence of adequate opportunity for debate, for charge and countercharge.”<sup>227</sup> Such a requirement would not ensure that the mass media fully informed the public about the profusion of opinions from far left to far right. At most, for example, it would require conservative talk radio to present some disputes between right and harder right, between social and economic conservatives, between libertarian and authoritarian conservatives. In requiring even that much, however, a new regime of substantive regulation would encourage critical thought and engaged discourse. It would provide a model of debate and dissension that could open space in the public consciousness for farther reaching disagreements.<sup>228</sup> This emphasis on the dynamic of debate, combined with the sort of coverage obligation discussed above, would also encourage a revival of investigative and

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<sup>225</sup> Cf. *supra* note 19 and accompanying text (noting self-interested partisan objections to conservative talk radio).

<sup>226</sup> Of course, the Internet is capable of doing the same thing in a different way. See *infra* notes 237-240 and accompanying text.

<sup>227</sup> Barron, *New Right*, *supra* note 15, at 1673.

<sup>228</sup> See MCCHESENEY, *supra* note 89, at 51 (identifying presentation of elite disagreement as strong suit of professional journalism).

analytic journalism – socially beneficial practices that require the sorts of journalistic resources the mass media possess but that economic pressures have all but led them to abandon.

Even if this recasting of the fairness doctrine’s mandate proved no more amenable to vigorous enforcement than the original fairness doctrine, reviving the doctrine could still bring significant benefits. The original doctrine’s greatest contribution to democracy may well have been its success in focusing the mass media on their essential role in fostering informative and inclusive public discourse.<sup>229</sup> Few commentators on either side of the regulatory debate during the 1960s and 1970s disputed the media’s public service obligations and responsibility to present varied perspectives on important public issues. Indeed, opponents of the fairness doctrine promoted the broadcast media’s willingness and capacity to serve those ideals without government regulation.<sup>230</sup> Meanwhile, the print media substantially internalized the fairness doctrine’s norms without ever being subject to the doctrine’s mandates.<sup>231</sup> The *Red Lion* decision, despite declining to anchor the fairness doctrine in a First Amendment mandate, expanded the free speech values extolled by journalists to encompass the doctrine’s regulatory aims.<sup>232</sup> Today, in contrast, mass media entities frequently disdain any role in, let alone responsibility for, public discourse.<sup>233</sup> The concern that substantive media regulation chills speech<sup>234</sup> states a serious danger, but so does the concern that deregulation fosters media cynicism and selfishness. The difference is that the latter effect has actually happened. Even if a

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<sup>229</sup> See *supra* note 104 and accompanying text.

<sup>230</sup> See *supra* notes 88-92 and accompanying text.

<sup>231</sup> See *supra* note 199 and accompanying text.

<sup>232</sup> See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (identifying public’s interest in access to information as a matter of First Amendment concern).

<sup>233</sup> See *supra* notes 171-178 and accompanying text.

<sup>234</sup> See *supra* notes 119-125 and accompanying text.

renewed fairness doctrine failed to provide an enforceable mandate for coverage of public issues and promotion of public debate, its mere presence in the media landscape could be expected to encourage a more democratically vibrant mass media.

## 2. *Scope: Conventional Mass Media*

The limitation of the original fairness doctrine to broadcasting invested media regulation with a split personality. Broadcasters labored under substantial regulatory obligations, while newspapers could go about their business unimpeded. The public received only a partial benefit from fairness regulation, while the two sorts of media faced seemingly arbitrary differences in expressive freedom. This state of affairs reflected a *mélange* of circumstances: the relative youth of the broadcast medium; government's initial decision to license broadcasting and impose public interest obligations; and the Supreme Court's decision to take editorial discretion and compelled speech concerns more seriously in the print setting than in the broadcast setting. Dean Bollinger offered his "partial regulation" theory<sup>235</sup> as a pragmatic accommodation of the Court's seemingly inconsistent treatment of an old medium, print, and a new medium, broadcasting.<sup>236</sup> He did not defend the differential treatment based on organic features of the two media; rather, he emphasized the benefits of diversity for its own sake.

Today, the media landscape has changed in ways that may offer new avenues for implementing, and justifying, fairness regulations. Organic features of the Internet provide a deeper justification for the differential treatment of media that Bollinger defended. Cyberspace fosters what optimists celebrate as pluralism and pessimists lament as divisiveness. The Web surfer enjoys an unprecedented and ever-increasing

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<sup>235</sup> See *supra* notes 112-113 and accompanying text.

<sup>236</sup> See BOLLINGER, *supra* note 42, at 85-107 (contending that experience of broadcast regulation had influenced and altered First Amendment understandings developed in context of print regulation).

opportunity to control her informational environment, piling on perspectives that reinforce her commitments and tastes while locking out those that do not.<sup>237</sup> This pluralizing capacity has an upside and a downside. On one hand, the Internet represents an apotheosis of self-direction in a world increasingly hostile to individuality. On the other hand, it allows us to look and talk past one another to an unprecedented extent, leaving us ill-prepared for the engagement with opposing viewpoints that democratic self-government requires.<sup>238</sup> Cass Sunstein has reacted to the dark side of this picture by proposing a set of Internet content controls that would, in effect, force people to confront unpopular ideas online.<sup>239</sup> The Internet's valuable democratizing and participatory attributes, however, make the notion of imposing such controls both implausible and undesirable.<sup>240</sup>

In contrast, regulating other media to complement the Internet could prove both feasible and beneficial. Any revival of the fairness doctrine should take account of the Internet's effects on public discourse and attempt to provide – in what I will call the *conventional mass media* – what the Internet does not. A democracy-centered understanding of the First Amendment permits, perhaps even compels, regulatory efforts to engage the full political community in debate about matters of collective self-government. In contrast to the pluralistic communication the Internet facilitates, the

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<sup>237</sup> See Barb Palser, *News a la Carte*, AMERICAN JOURNALISM REV. (Feb./March 2005), at [pages] (discussing Really Simple Syndication (RSS), a technology that allows Web users to extract preferred online content); Andrew Kohut, *Internet Users Are on the Rise, But Public Affairs Interest Isn't*, COLUM. JOURNALISM REV. (Jan./Feb. 2000), at [page] (suggesting that “the Internet is likely to accelerate the trend initiated by cable television toward discrete and more specialized news audiences, while not meaningfully increasing public engagement in politics and public affairs”).

<sup>238</sup> See BAKER, MARKETS, *supra* note 71, at 170-71 (discussing republican fears about pluralist media, notably the Internet, as agents of social disintegration).

<sup>239</sup> See CASS SUNSTEIN, REPUBLIC.COM 167-90 (2001).

<sup>240</sup> Cf. *Reno v. ACLU*, 520 U.S. 1113 (1997) (striking down congressional attempt to ban “indecent” speech online).

fairness doctrine embodies republican values of mediated public discourse and broadly shared experience.<sup>241</sup> Where the untamed Internet provides radical consumer choice, conventional mass media, constrained by a renewed fairness doctrine, could provide a space where members of the political community stumbled over speakers and views they might otherwise choose to ignore. A regulatory scheme aimed at ensuring that conventional mass media performed that function could serve as a holding action while our society studied and debated the question of how to sustain political engagement through public discourse in the event the Internet's pluralizing capacity came to dominate the media landscape entirely.<sup>242</sup>

What are conventional mass media? The original fairness doctrine applied straightforwardly to television and radio broadcasters, but contemporary media structures – such as cable systems, which distribute packages of channels and enjoy market power within their territories – complicate legal analysis of media regulations.<sup>243</sup>

“Conventional mass media” is a functional category. “Mass” distinguishes those media enterprises that strive for broad-based appeal to maximize profit, rather than offering a distinctive content category to a particular audience. The mass media, as a matter both of

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<sup>241</sup> See BAKER, MARKETS, *supra* note 71, at 173 (emphasizing fairness doctrine's republican character). Professor Baker, advocating a “complex democratic” framework that would balance pluralist and republican priorities in media policy, critiques Bollinger's “partial regulation” approach on the ground that the unregulated print media advance pluralism less effectively than the regulated broadcast media advance republicanism. See *id.* at 188. The Internet appears to obviate that practical concern. Baker's more recent, more sweeping attack on the fairness doctrine as ideologically biased in favor of republican democracy, see BAKER, CONCENTRATION, *supra* note 97, at 195-96, mistakenly evaluates the doctrine in a vacuum, without considering how it might provide a counterweight to government's equally willful decision to promote pluralism by leaving media sectors that foster pluralism, such as the Internet, unregulated.

<sup>242</sup> Such a process, of course, feeds into what should be an ongoing policy debate about which of the various democratic values that we want the media to advance feature excessively or insufficiently in the media landscape at any given time. See BAKER, MARKETS, *supra* note 71, at 191.

<sup>243</sup> See *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (applying intermediate scrutiny and upholding requirement that cable systems carry local broadcast stations among their offerings); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 760-66 (1996) (plurality opinion) (rejecting statutory allowance for cable operators to exercise editorial control over certain programming content).

self-definition and audience perception, “describe[e] the world ‘as it is.’”<sup>244</sup>

“Conventional” does not only mean “traditional” or “ordinary.” It also connotes a space for communal gathering and shared experience. Thus, the term “conventional mass media” describes the media sector in which large enterprises’ desire for economic gain through generalized programming, including but not limited to news coverage, meets the mass audience’s desire for a stratum of broad cultural confluence.<sup>245</sup> In today’s media landscape, the category includes, at a minimum, cable systems as well as television and radio networks, national news magazines, and daily newspapers. The Internet falls into a different category. In the aggregate the Web can be both “mass” and “conventional”; but at this point in its development, no single source or concerted assemblage of distinct online content either endeavors to unite and inform a mass audience or succeeds in doing so in the manner of a broadcast network or cable system.<sup>246</sup>

Conventional mass media maintain a dominant position even in today’s information-rich media landscape. Audiences continue to coalesce around familiar primary news sources. A Gallup Poll conducted in December, 2006 reports that 69 percent of Americans watch local television news at least several times a week, while 51 percent watch national network news, half watch cable news, and 40 percent watch

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<sup>244</sup> Lichtenberg, *supra* note 78, at 123; *see also* Sunstein, *supra* note 97, at 529-31 (defending regulation of television based on that medium’s distinctive contribution to democratic discourse).

<sup>245</sup> A network executive captured this idea when, in 1984, he described network television as “our only true mass medium . . . the only shared experience that crosses over all the differences that characterize this vast and varied nation.” Speech by John Severino, ABC, to Arizona Broadcasters Ass’n, Nov. 11, 1984, at 2 (quoted in Ferris and Kirkland, *supra* note 29, at 611).

<sup>246</sup> The Internet does, however, exhibit some signs of concentration. Because of the self-reinforcing system of search engines and hyperlinks, online news audiences give most of their attention to a handful of websites. *See* Matthew Hindman and Kenneth N. Cukier, *More News, Less Diversity*, N.Y. TIMES (June 2, 2003) at A17 (reporting that the top five news websites receive more traffic than the next fifteen; that, on issues such as abortion and gun control, over sixty percent of all hyperlinks on the Internet point to the top ten sites; and that 16 large media companies own the 20 most popular news websites). If cyberspace eventually spawned a new generation of conventional mass media, then the Internet’s democratizing and participatory attributes would pose no categorical bar to substantive regulation.

public television news; in addition, 57 percent read a local newspaper at least several times a week.<sup>247</sup> One third of the population uses Internet news sources, slightly more than listen to radio talk shows or NPR.<sup>248</sup> Growth in Internet news usage appears to have slowed over the past two years, and while local newspapers and network television news continue to lose market share, the daily audience for local television news remains at the same level, 55 percent, as in 1995.<sup>249</sup> The leading position of local broadcast news and newspapers indicates, in part, a pluralist taste for localism. At the same time, local news viewers and readers choose to share a broad base of information with other members of their local communities. Moreover, local news outlets increasingly draw content from national broadcast networks or wire services, a phenomenon that cuts against localism. More than the Internet, the factor that appears to be fraying conventional mass media's republican connectivity is partisanship. A 2004 study by the Pew Research Center found, to no one's surprise, that many more Democrats than Republicans patronize – and trust – CNN and NPR, while the opposite dichotomy holds for Fox News and Rush Limbaugh.<sup>250</sup>

My conception of the conventional mass media creates a problem, from the standpoint of legal doctrine, because it necessarily includes print as well as audiovisual media. Indeed, if we acknowledge the connotation in “conventional” of traditional or familiar, print emerges as a far more conventional medium than electronic transmission. Substantive regulation advocates of Professor Barron's generation, however, would find

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<sup>247</sup> See Lydia Saad, *Local TV Is No. 1 Source of News for Americans; Network and Cable News Viewership Down*, <http://www.galluppoll.com/content/?ci=26053> (last visited Sept. 9, 2007).

<sup>248</sup> See *id.*

<sup>249</sup> See *id.*

<sup>250</sup> See Pew Research Center, *Online News Audience Larger, More Diverse; News Audiences Increasingly Politicized* (June 8, 2004), at 1-2.

in this turn of the analysis not a problem but the closing of a logical circle. The technological scarcity analysis of *Red Lion*<sup>251</sup> never made much sense as a constitutional matter, and technological changes were diminishing its empirical force even as the ink dried on the Court's opinion.<sup>252</sup> The Court's shift in tone from *Red Lion* to *Miami Herald*<sup>253</sup> suggests the notion that newspaper editors, unlike broadcast news directors, exercise responsible professional judgment about what to publish.<sup>254</sup> Absent that romantic, seemingly antiquated bias in favor of ink-stained fingers, we should feel equally comfortable applying fairness regulations to video channels and daily newspapers.

A better reason, however, supports the conclusion to which the romantic bias leads. Newspapers and news magazines differ from broadcast stations in two important ways, corresponding with the two mandates of the original fairness doctrine, that combine to make the doctrine presumptively unnecessary in the print setting. First, newspapers' and news magazines' defining function is to present news. While newspapers devote the majority of their column inches to advertising and only a fraction of the remainder to news coverage,<sup>255</sup> they still conceive of themselves, and register with readers, as news organs first and foremost. In contrast, most television stations and many radio stations with news divisions devote most of their time to other sorts of programming. Second, newspapers and news magazines developed strategies during the

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<sup>251</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388-89 (1969).

<sup>252</sup> See *supra* notes 126-129 and accompanying text (discussing regulatory skeptics' arguments against scarcity rationale for broadcast regulation).

<sup>253</sup> *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974).

<sup>254</sup> See, e.g., Fowler and Brenner, *supra* note 46, at 240-41 ("The belated recognition of the first amendment rights of broadcasters may be due to the relatively late development of broadcast journalism as a serious professional calling.").

<sup>255</sup> See Abramson, *supra* note 89, at 258-59; see also Carroll, *supra* note 176 (warning against profit-driven deterioration of newspapers' emphasis on hard news).

original fairness doctrine's epoch to encourage viewpoint balance.<sup>256</sup> They still largely fail to offer a truly broad range of opinions,<sup>257</sup> but they do routinely present active debate between competing ideas. In contrast, the broadcast media present little commentary or debate about public affairs, let alone access for opposing viewpoints.<sup>258</sup> One need not overvalue newspapers or disparage television to recognize that print news media's ordinary practices tend to obviate the modest coverage and debate mandates that I have suggested should animate a revived fairness doctrine.<sup>259</sup> Thus, my seemingly novel, functional analysis of the fairness doctrine's proper scope leads back to television and radio as the proper subjects of any effort to revive the doctrine.<sup>260</sup>

None of this may matter. Ellen Goodman has constructed a persuasive model of the "digital mediascape," in which old conditions of content scarcity and audience passivity have given way to new conditions of content abundance and audience control. In this new world, Goodman argues, substantive media regulation is essentially futile, because it depends on the obsolete premise that audiences will consume the information that substantive regulation draws out.<sup>261</sup> Goodman's analysis provides a compelling justification for vigorously pursuing the subsidy policies that she believes will drive the next wave of effective democratic media policy.<sup>262</sup> In my view, however, she overstates

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<sup>256</sup> See *supra* note 199 and accompanying text.

<sup>257</sup> See BAGDIKIAN, *supra* note 76, at 120-21.

<sup>258</sup> In 1976, during the height of debate over the original fairness doctrine, Fred Friendly urged broadcasters to implement op-ed segments as a way to obviate the need for fairness regulations. See FRIENDLY, *supra* note 45, at 224-29. His proposal apparently never found much of an audience.

<sup>259</sup> See *supra* notes 213-228 and accompanying text.

<sup>260</sup> The availability of a basis for broadcast-specific regulation that avoids the scarcity rationale belies Professor Baker's concern that any revival of the fairness doctrine necessarily would refocus attention on the weakness of the scarcity rationale and thus endanger "other, more legitimate forms of regulatory intervention." Baker, *Misguided Fairness*, *supra* note 52, at 14-15.

<sup>261</sup> See Goodman, *supra* note 97, at 1455-61; see also Sunstein, *supra* note 97, at 526-31 (positing that likely convergence of communications technology will require new regulatory strategies to replace present model of broadcast regulation).

<sup>262</sup> See Goodman, *supra* note 97, at 1461-71.

the prevalence of the new model, and accordingly understates the continuing salience of the conventional mass media.<sup>263</sup> Goodman’s focus on video media draws attention away from the prominent role that print and radio continue to play in shaping public discourse.<sup>264</sup> She generally underestimates the continuing dominance of relatively few leading news sources.<sup>265</sup> Moreover, while Goodman acknowledges the media echo effect, through which an idea’s entry into the media landscape can amplify audiences’ exposure to the idea through secondary reports in other media,<sup>266</sup> I suspect she understates the extent to which conventional mass media “brand names” continue to provide an especially resonant echo. Finally, Goodman’s grounds for rejecting substantive regulation may prove too much, because she does not make clear how even the subsidy policies she prefers – indeed, how any initiative, public or private – could salvage any sort of shared public discourse for the attention-deficient audience she portrays.<sup>267</sup>

## CONCLUSION

My own views about the wisdom of reviving substantive media regulation remain conflicted. Unlike structural regulation and subsidies, substantive regulation, as embodied in the fairness doctrine, directly involved the government in evaluating the content of speech. Even to the extent we can fairly minimize the speech interests at issue because the mass media are immense, profit-making institutions rather than individuals or

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<sup>263</sup> For a response to other commentators’ more sweeping arguments that the Internet renders concerns about media access irrelevant, see Magarian, *Access Rights*, *supra* note 21, at 1384-88.

<sup>264</sup> *See, e.g.*, BAGDIKIAN, *supra* note 76, at 118-20 (predicting survival of newspapers for the foreseeable future).

<sup>265</sup> *See supra* notes 247-249 and accompanying text.

<sup>266</sup> *See* Goodman, *supra* note 97, at 1456-57.

<sup>267</sup> *See id.* at 1457-60 (describing digital mediascape’s diminution of audience’s capacities for attention and comprehension).

affinity groups, we must also acknowledge that our society depends on those institutions to help us fulfill an affirmative First Amendment vision of engaged, robust debate. At the same time, substantive media regulation does not directly empower marginalized voices to express their viewpoints in the mass media, as a true regime of access rights would. Moreover, the fairness doctrine's history presents ample cause for concern – less about oppression, despite libertarian alarmists' hyperventilation, than about administrative practicality. The original doctrine simply did not work well enough. Any effort to revive it would require more sophisticated understandings than the former regime generated about what issues regulated media must cover and what those media must do to satisfy our democratic need for robust debate. Most problematic of all, the development of online communication threatens to undermine any effort to define a coherent scope for a new regime of substantive media regulation.

Three considerations, however, should motivate efforts to overcome the problems of substantive media regulation. First, my analysis indicates that substantive media regulation has done significant good and little harm. Second, the present generation's apparent distaste for the idea of the fairness doctrine owes primarily to the fact of the doctrine's demise, and that demise owed not to any documented suppression of speech or even conclusive regulatory failure but merely to ideological fashion. The FCC, as one celebration of its shift reminds us, abolished the doctrine because official Washington was "riding a deregulatory wave,"<sup>268</sup> flush with the conviction that markets could solve every problem. That wave sought to sweep away the idea that powerful institutions owe responsibilities to ordinary people, the idea that lay at the heart of the fairness doctrine. It is an idea well worth recuperating. Finally, the fairness doctrine's thoughtful defenders,

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<sup>268</sup> DONAHUE, *supra* note 59, at 151.

exemplified by Jerome Barron, got several critical points exactly right. A healthy democracy requires broadly participatory and substantively diverse public discourse. The mass media figure centrally in any hope of generating such a discourse. A combination of institutional self-interest and, increasingly, an omnivorous profit motive deter the mass media from playing their essential constructive role. Only government intervention can solve the problem. The question those sound premises leave open is what form the intervention should take. Legitimate concerns about substantive media regulation lead most media reformers to hope for some effective combination of structural regulations and subsidies. But until one or both of those alternatives takes political flight, or until reflection forces us to concede that no benefits of substantive media regulation could exceed the costs of imposing it and of diverting effort from other reform strategies, the project of retooling and reviving the fairness doctrine should remain on our agenda.