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Challenging the Autonomous Press

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BOOK REVIEW

CHALLENGING THE AUTONOMOUS PRESS

Lili Levi †

IMAGES OF A FREE PRESS. *By Lee C. Bollinger.*‡ University of Chicago Press. 1991. 209 pp. $22.50.

Dean Lee Bollinger's most recent book—*Images of a Free Press*[1]—comes at a time in which both the press and the First Amendment are under searching scrutiny. Complaints about the press-protectiveness of libel law[2] vie with charges of press bias, sensationalism, and scandal-mongering.[3] Those doing the complaining have easy targets. Economic incentives lead local newscasts to focus on fires, crimes, and plane crashes.[4] Network news narratives, particularly in the political arena, are often driven by the whiff of scandal or employ sports metaphors like the "horse race."[5] Politicians pitch their appeals on MTV, soliciting viewers suspected of having attention spans of a nanosecond. Not surprisingly, public confidence in traditional journalism is at a low ebb.[6] New evidence suggests that

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1 LEE C. BOLLINGER, IMAGES OF A FREE PRESS (1991).

2 *See, e.g.*, RENATA ADLER, RECKLESS DISREGARD (1986); RANDALL BEZANSON ET AL., LIBEL LAW AND THE PRESS: MYTH AND REALITY (1987); *see also* DONALD M. GILLMOR, POWER, PUBLICITY AND THE ABUSE OF LIBEL LAW 78-91 (1992) (describing proposed alternatives).

3 *See, e.g.*, LARRY J. SABATO, FEEDING FRENZY: HOW ATTACK JOURNALISM HAS TRANSFORMED AMERICAN POLITICS (1991).

4 *See, e.g.*, PHYLLIS KANISS, MAKING LOCAL NEWS 117 (1991); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 280-81 (1992).

5 *See, e.g.*, SIG MICKELSON, FROM WHISTLE STOP TO SOUND BITE: FOUR DECADES OF POLITICS AND TELEVISION 173 (1989); Sunstein, *supra* note 4, at 281; *cf.* SHANTO IYENGAR, IS ANYONE RESPONSIBLE? 133-34 (1991) (describing analyses of the effects of horse-race reporting on voting preferences).

6 *See, e.g.*, JOE S. FOOTE, TELEVISION ACCESS AND POLITICAL POWER: THE NETWORKS, THE PRESIDENCY, AND THE "LOYAL OPPOSITION" 139-40 (1990) (describing anti-media sentiments in the 1980s); GILLMOR, *supra* note 2, at 15-17.

even journalists themselves are dissatisfied with their news organizations' effectiveness in informing the public.[7]

At the same time, commentators increasingly perceive traditional approaches to the First Amendment as ripe for examination. On the one hand, elite law reviews abound with challenges to libertarian interpretations of the Free Speech Clause.[8] On the other hand, expansive free speech language marks both recent Supreme Court opinions[9] and scholarly critiques of the calls for "positive" interpretations of the First Amendment.[10] Since the 1980s, market-based deregulatory arguments have convinced the Federal Communications Commission to revise many of its regulations of broadcast licensees in order to bring the broadcast medium into greater First Amendment parity with the assertedly freer print press.[11]

For these reasons alone, Dean Bollinger is prescient in his observation that freedom of the press is now "approaching a turning point."[12] Post-publication events further underscore the sense of reaching a crossroads, with a new administration having been elected on the promise of "change," after twelve years of Republican presidencies. *Images of a Free Press* seeks to develop "a new theoretical perspective"[13] that will help us decide "which way to turn"[14] at this juncture. In so doing, it builds on Dean Bollinger's previous work to make an intricate, ambitious, provocative, and important

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7 William Glaberson, *Press: Survey Finds Newsrooms Discontented*, N.Y. TIMES, Nov. 23, 1992, at D6.

8 For arguments supporting affirmative state intervention to protect free speech values, *see, e.g.*, Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 789-90 (1987); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986); Charles R. Lawrence III, *If He Hollers, Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Sunstein, *supra* note 4; *cf.* Jack M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375 (identifying as "ideological drift" the process of conservative appropriation of libertarian interpretations of the Free Speech Clause once championed by the Left).

9 *See, e.g.*, R.A.V. v. St. Paul, 112 S. Ct. 2538, 2542-44 (1992); Hustler Magazine v. Falwell, 485 U.S. 46, 50-55 (1988).

10 *See, e.g.*, Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225 (1992); *cf.* Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405 (1987).

11 *See, e.g.*, JONATHAN EMORD, FREEDOM, TECHNOLOGY AND THE FIRST AMENDMENT 233-40 (1991); ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM (1983); LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT (1987); Ronald Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959); Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982); Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990 (1989).

12 BOLLINGER, *supra* note 1, at 151.

13 *Id.* at 136.

14 *Id.* at 151.

contribution to the literature on the legal status of the modern press.

Bollinger's anti-absolutist theoretical perspective is predicated on an admission of ambivalence toward the idea of a completely free press and a belief in the potential of a properly regulated press to transform the character of public discourse. Yet, consistent with Bollinger's recognition of the complexity of the press issue, *Images of a Free Press* finally—and wisely—preserves the tentative character of a call for further inquiry.

I
BOLLINGER'S ACCOUNT OF PRESS IMAGES

Dean Bollinger's argument is packed densely into a mere 157 pages of text. Unsurprisingly, then, it is schematic, raising numerous questions and requiring the reader to fill in subtle connections. In essence, however, it seems to consist of two major strands: revisionist description of Supreme Court press law and a prescriptive call for a new focus on the idea of freedom of the press.

In its descriptive portion, Dean Bollinger's "interpretive exercise"[15] seeks to accomplish two ends: providing a rich description of the ambiguity of First Amendment doctrinal reality and suggesting a self-conscious and rational history for the Supreme Court's adoption of ostensibly contradictory free press doctrines in the print and broadcast contexts.

Bollinger begins by positing the unregulated and autonomous press as the central image of freedom of the press,[16] at least since *New York Times v. Sullivan*.[17] In a world in which government cannot be trusted to refrain from censorship designed to preclude review of its performance, this image of the press as transmitter of information to the sovereign citizenry enshrines it as a guarantor of democracy.[18]

Bollinger notes, however, that this glowing image ignores the numerous ways in which an untrammeled press can undermine the very democratic virtues that it purportedly guarantees. The classic critique of journalistic autonomy is that press freedom "is purchased at too high a human price," measured by defamatory statements and invasions of privacy.[19] Bollinger, going beyond such a traditional articulation of the costs of press autonomy to private interests, focuses on the threat to quality democratic decisionmak-

15 *Id.* at xii.
16 *Id.* at 1-2.
17 376 U.S. 254 (1964).
18 BOLLINGER, *supra* note 1, at 1.
19 *Id.* at 24-25.

ing posed by a fully autonomous modern press. In particular, he sees the threat as arising from an unregulated press' ability to abuse its freedom by excluding points of view, misrepresenting information, avoiding public issues, and playing to the fear and personal biases of the population.[20] Reiterating a criticism of press performance launched as early as 1947 by the Hutchins Commission,[21] Bollinger worries that the concentration of ownership and control in the press, combined with the decline in the number of sources of information on which the public relies, increases the risk of these abuses.[22]

According to Bollinger, the Supreme Court's First Amendment jurisprudence does not deal seriously with any such social concerns about the quality of public discussion and the risks of a free press. What might explain the Court's "strange" expansion of press protection—its "immoderate judicial enthusiasm for press liberty"—in the face of such criticisms?[23] Bollinger's explanation, challenging received wisdom, is that the development after World War II of freedom of the press as a "working concept" was in fact (if not in rhetoric) "less blind" to the risks posed by the press than might be assumed.[24] Bollinger, generously trusting in the intellectual self-consciousness of the Court, suggests that its articulation of an autonomy model of the press must be understood in light of two different sources of constraint on journalistic freedom. He sees the First Amendment rhetoric of the Court's free press decisions as providing one such source of constraint, and the regulation of the electronic media as providing the other.

First, Bollinger proposes the "paradoxical hypothesis" that, despite the apparent absolutism of their autonomy rhetoric, the Court's press rulings contain images of the press that exert a controlling and shaping influence on the way in which autonomy is actually exercised.[25] Attributing to the Court a "deeply educative role,"[26] Bollinger argues that it is "one of the principal speakers in the general marketplace of ideas"[27] and that its decisions carry

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20 *Id.* at 27.

21 THE COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS (1947).

22 BOLLINGER, *supra* note 1, at 27-32.

23 *Id.* at 40.

24 *Id.* at 40. Another possibility explored by Bollinger is a psychologistic and institutional account. According to this view, the Court's resolute avoidance of the possible risks of an autonomous press can be explained by its "pathological" fear of paternalism and its need to deny contradictory evidence after having decided to protect the press. *Id.* at 38-39.

25 *Id.* at 40.

26 *Id.* at 42.

27 *Id.*

"symbolic meaning."[28] Thus, the Supreme Court's opinions, in the course of developing press-sensitive doctrines, contain rhetoric implying a particular image of a good press and of appropriate standards of journalism.[29] At least by negative inference, then, the Court's autonomous press cases suggest a set of preferred journalistic norms and practices. When coupled with the appearance, within the First Amendment doctrinal framework, of a developing hierarchy of speech designed to mold social preferences, this image of an ideal press serves to constrain the actions of the actual institution.[30]

According to Bollinger, however, these constraints are not simply designed as particular behavioral gnides. In addition to establishing a floor of proper and ethical journalistic practices,[31] Bollinger suggests that the image drawn by the Court more broadly attempts to influence the entire character and identity of the press. Specifically, Bollinger sees the journalistic autonomy model as seeking to promote in the press a spirit of "intellectual independence"[32] to stand against the "crushing power of conformity."[33] By fielding an image of the "reporter-as-Ulysses,"[34] an artist who lives outside society's conventions and can expose its shortcomings,[35] the Court can engage in the pedagogical act of shaping the press' identity. Thus, Bollinger contends that the journalistic autonomy model, rather than resting on "theoretical justifications" for the First Amendment, consists of "rhetorical stimulants designed to inspire the press to particular behavior and to limit abuses from the freedom conferred."[36]

The second source of constraint on the autonomous press—and a contending, secondary image of the press identified by Bollinger in the Court's opinions—is the "remarkable experiment"[37] represented by the regime of widespread regnlation for the broadcast media. The FCC has historically subjected the electronic media to extensive regulation: from signal interference prohibitions (designed to avoid broadcast cacophony) to the political broadcasting rules and the fairness doctrine (designed to ensure the accuracy and quality of public discussion).[38] This regnlatory regime depicts a

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28 *Id.* at 43.
29 *Id.* at 44.
30 *Id.* at 47.
31 *Id.* at 55.
32 *Id.* at 57.
33 *Id.* at 56.
34 *Id.* at 59.
35 *Id.* at 55.
36 *Id.* at 60.
37 *Id.* at 22.
38 *Id.* at 64-65. Section 315(a) of the Federal Communications Act of 1934 provides that "[i]f any licensee shall permit any person who is a legally qualified candidate

secondary image of the press far different from the central notion of autonomy thought to be embodied in the First Amendment conception of the press. Thus, Bollinger notes that we have never actually had a system of a truly autonomous press, but, rather, a "dual system" with only one half of the press free from governmental interference.[39]

Bollinger emphasizes that the anomaly of the regulated broadcast media has been virtually ignored both by the Court and by most First Amendment commentators.[40] He notes that the Supreme Court, characterizing broadcasters as "licensees" and "private censors"[41] rather than as part of the heroic and autonomous press, "enthusiastically embraced" broadcast content regnlations that were far more intrusive than the access regulations it absolutely rejected for the print press in *Miami Herald v. Tornillo*.[42] Both the Court and First Amendment experts sought to distance broadcast regulation from the realm of the print press, treating it as an isolated and atypical intervention simply compelled by the physical scarcity of broadcast frequencies.

In direct contrast to these views, Bollinger takes the position that the broadcast experience has actually exerted a "profound" influence both on the Court's approach to the autonomous print press and on the print press' behavior.[43] Specifically, Bollinger argues that print has lived under the threat that the highly regulated broadcast regime could become a relevant analogy "with the potential for spreading throughout the media as a whole."[44] He suggests that the regulatory regime for electronic media has had a "spreading influence" on the behavior of the print press.[45] In light of the illusory character of the distinctions between print and broadcast media that have been relied on to justify broadcast regulation, Bollinger surmises that the Court's statements about the regulatory requirements

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for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office . . ." Federal Communications Act of 1934, 47 U.S.C. § 315(a) (1988), *cited in* BOLLINGER, *supra* note 1, at 65 n.9.

The fairness doctrine, which the FCC no longer enforces, imposed on broadcasters a two-pronged obligation: to cover controversial issues of public importance in their communities of service and to provide a reasonable opportunity for the presentation of contrasting viewpoints on those issues. *See* Syracuse Peace Council, 2 F.C.C.R. 5043, 5058-65 n.2, *recon. denied*, 3 F.C.C.R. 2035 (1988), *aff'd*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990); *see also* Arkansas AFL-CIO v. FCC, 61 U.S.L.W. 2372 (8th Cir., Dec. 2, 1992) (affirming FCC's discretion to abolish fairness doctrine).

39 BOLLINGER, *supra* note 1, at 85.

40 *Id.* at 71-72, 90-91.

41 *Id.* at 72.

42 418 U.S. 241 (1974) (finding unconstitutional a state right-of-reply statute).

43 BOLLINGER, *supra* note 1, at 85.

44 *Id.*

45 *Id.*

for the broadcast medium are perceived as normative statements about what constitutes good journalism generally. Specifically, Bollinger notes that the physical scarcity argument, on which the broadcasting regulatory edifice rests, is "illogical."[46] Furthermore, he sees it as an insufficiently distinguishing characteristic between the broadcast and print press. Thus, if the only rational scarcity-based justification for governmental regulation of broadcasting is that too few people can communicate by the broadcast medium, then this clearly presents a threat to the now concentrated newspaper press.[47]

This is not to say that Bollinger sees the influence of the images as running only in one direction. Rather, he takes the position that the relationships of the print and electronic media and of the two corresponding judicial models of the free press are "subtle, shifting, and reciprocal."[48] Just as the broadcast regulatory regime constrains the autonomy model, Bollinger posits that the existence of the print model has also influenced the development of broadcasting.[49] Specifically, he suggests that the print model has both acted as a constraint on excesses of regulation of the electronic media and has been useful in teaching journalistic values to a "new and as yet ethically unformed medium."[50] While, at first, the unexplored potential of broadcasting and its original development as a forum for simple entertainment operated by businessmen led to the suspicion justifying extensive regulation,[51] the Court's tolerance for broadcast regulation has decreased with the growth of the medium as a "true journalistic enterprise."[52]

Having described the coexistence and mutual pedagogic influences of the autonomous and the regulated press systems, Bollinger praises such a regime of "partial regulation."[53] He does not do so on the traditional ground that differences between print and electronic media justify different treatment under the First Amendment. Rather, in a reprise of a seminal early work,[54] Bollinger takes the position that in adopting a dual system, the Court chose "a compromise . . . on a reasoned, principled, accommodation of competing First Amendment values" of access to a concentrated press and minimal governmental intrusion into expression.[55]

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46 *Id.* at 88.
47 *Id.* at 93.
48 *Id.*
49 *Id.* at 97.
50 *Id.*
51 *Id.* at 97.
52 *Id.* at 99.
53 *Id.* at 116.
54 Lee C. Bollinger Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976).
55 BOLLINGER, *supra* note 1, at 116.

In Bollinger's view, the existence of an unregulated sector is desirable because it acts as a check against the costs of regulation, provides some assurance that information not disseminated by one branch will be covered by the other, creates a beneficial tension in the system, and preserves a benchmark of press freedom to restrain excessive regulatory interventions.[56] More siguificantly, he praises the theory of partial regulation because he, like many, feels "deeply ambivalent" about the prospect of a fully autonomous press and believes that divided systems best allow for "experimentation and the manifestation of ambivalence."[57] He contends that the current arguments in support of broadcast deregulation and the elimination of the fairness doctrine are not persuasive, and that there is a benefit to the existence of a medium that transmits a message about fairness as a "valued intellectual trait."[58] He also asserts a scholarly consensus that the history of broadcast regulation shows little excess in governmental intervention, taking issue with Professor Lucas Powe's recent argument that the history of regulation has been peppered with governmental abuse.[59]

Yet, instead of providing a particular programmatic solution to the issues raised by the disparate images of the press in our legal culture, Bollinger uses his suggestion of a reciprocal and complex relationship between the models of press freedom as a springboard to call for a new perspective. This constitutes the second thematic strand of *Images of a Free Press*. Bollinger seeks to turn the analytic focus away from the quantity of information made available by the media to the quality of public discussion and decisionmaking.

Bollinger argues that the central image of the autonomous press has addressed journalistic freedom solely in terms of widening the stream of public debate to enhance the flow of information.[60] Challenging the assumption that increased access to information adequately enhances the quality of public discourse or exhausts the values underlying press freedom, Bollinger makes two suggestions. First, he calls for the establishment of an independent commission

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56 *Id.* at 114.

57 *Id.* at 117.

58 *Id.* at 119.

59 POWE, *supra* note 11. Bollinger mounts a six-pronged critique of Powe's thesis that the history of the FCC shows the imposition of governmental penalties on marginal and radical voices. BOLLINGER, *supra* note 1, at 128-31. He disputes not only Powe's identification of abuses, particularly in connection with the fairness doctrine, but also Powe's apparent assumptions that we can predict future patterns of abuse on the basis of the past and that we cannot regulate around such abuses. Ultimately, Bollinger and Powe have different assumptions both about the core of the First Amendment (on the basis of which abuses can be identified as such) and about the risk of harm posed by private media to full and fair public discussion.

60 BOLLINGER, *supra* note 1, at 108.

of inquiry, a modern Hutchins Commission. This body would investigate issues such as the effects of Supreme Court images and the regime of partial regulation on the identity of the press, and would address the more broadly philosophical question of the level of heterogeneity in identity and journalistic style we should seek to promote in the press.[61] Second, Bollinger calls for a new theoretical perspective to supplant the polarities of the current models of public regulation and press autonomy. He argues that we need to develop a new image of the press that will influence its behavior in improving the quality of public discourse. He suggests that the ordinary arguments for regulations such as the fairness doctrine—claims rooted in fears of market failure in the dissemination of voices and points of view—do not fully explain the need for some state intervention in mediating the deficiencies of a free press in a free market system.[62] That mediation, he opines, should account for and neutralize the "failures of intellect"[63] inherent in human nature—our biases and tendencies to laziness, iguorance, and narrow-mindedness that skew public debate. Bollinger believes that:

> [E]ven in a world in which the press is entirely free and open to all voices, with a perfect market in that sense, human nature would still see to it that quality public debate and decision making would not rise naturally to the surface but would, in all probability, need the buoyant support of some form of collective action by citizens, involving public institutions.[64]

The "failures of intellect" identified by Bollinger can be generally categorized as laziness, iguorance, insecurity, and tribalism:

> We may not be sufficiently interested in informing ourselves about public issues, preferring entertainment and pleasure to the responsibilities of citizenship . . . . We may not feel sufficiently educated to know what questions to ask about certain public issues or what level of deference to pay to expertise. We may fear that we do not understand what possible heights can be reached in art or in discussions of public issues. We may wish to avoid the opinions of those with whom we disagree, especially those on the margins of public debate, the radical voices. As a result, there may be a diaspora of viewpoints and an unheeding of troubled or troubling voices. We may not think clearly about some aspects of public issues. We may be too concerned with avoiding the costs of reasonable choices, too unwilling to accept an imperfect world . . . or too unconcerned about the future costs of our choices and reforms, too willing to see greener grass in new alternatives . . . .

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61 *Id.* at 135.
62 *Id.* at 136-39.
63 *Id.* at 139.
64 *Id.*

> We may have irrational prejudices against particular groups or individuals within society. Or we may be unduly influenced, and have our judgment distorted, by particular kinds of information in specific contexts.[65]

These concerns, which Bollinger labels as "internal bias," persist regardless and "independently of the amount of information available in the marketplace of ideas."[66] Thus, they can skew public debate even if there are numerous sources of information fully responsive to what audiences desire to see and hear.

Images of a Free Press is as much about images of the citizenry and of quality public discourse as it is about images of the press. Bollinger's response to the issue of internal bias is to propose a societal decision, reached together through public regulation, "that we would like to alter or modify the demands we find ourselves making in the market context."[67] Bollinger answers the question whether the government should be trusted to participate in that process of enhancing public debate by noting that complete governmental exclusion is impossible and that history can guide us in our assessment of whether such intervention would be problematic.[68] In any event, he argues that issues such as the status of newsgathering rights and the breakdown of traditional justifications for the differential treatment of print and broadcast media unavoidably raise important questions about the quality of public debate and drive us to the development of a more complex vision of the press than the binary option provided by the autonomy and public regulation models.[69]

II
QUESTIONING THE ACCOUNT

Dean Bollinger's effort deserves praise for many reasons. His attempt to lay bare the multi-layered doctrinal reality underlying our reflexive free press rhetoric is an important step in assessing the future role of a free press. His suggestion of an architectonic and rational explanation for the development of First Amendment doctrine is an elegant and original effort at reclamation. His attention to the ambivalence fostered by social institutions with simultaneously pernicious and deeply beneficial characteristics is a refreshing admission of the complex reality sought to be ordered by legal doctrine. His argument that deregulation and market sovereiguty are not ineluctably entailed by a recognition of the problematic charac-

65 *Id.* at 139-40.
66 *Id.* at 140.
67 *Id.* at 141.
68 *Id.* at 142.
69 *Id.* at 145.

ter of traditional regulatory rationales is an important call for a more sophisticated set of claims than those common in current judicial and scholarly literature. His emphasis on First Amendment doctrine as symbolic discourse and pedagogy offers an interesting and unusual approach to the issue. Finally, his focus not only on the press itself, but also on the audience for news and information, constitutes a laudable move in expanding the contours of our discussions about the role of the press in social life.

Ultimately, however, I am troubled by Dean Bollinger's suggestions. Although his argument is elegant, it does not fully address some of the difficult issues it raises. First, I am skeptical of Dean Bollinger's claim about the Supreme Court's role as the primary shaper of press identity. Even if we agree with Bollinger's notion that the Supreme Court structures its doctrine around the desire to shape a particular press identity, the book does not adequately answer the question whether the Court's images actually influence and shape the practices of the press in the ways and to the extent Bollinger suggests. The empirical realities are not nearly as clear as Bollinger would hope.

Second, I fear that Bollinger's faith in the symmetry of a dual system of regulation for the broadcast and print press is both unrealistic and misplaced. Indeed, I wonder whether his entire argument about the existence of an equipoise-based press control regime is undercut by his own assumption of reciprocal influence between the print and broadcast components of the press system.

Third, I am deeply troubled by his rather casual approach to the continuing threat of censorial government activity and by his implicit reliance on public institutions to prompt a transformative role for the press in public discourse. Although Dean Bollinger clearly recoguizes the "difficult and deeply troubling" character of attempting to advance "quality public decision making"[70] through regulations of the press, the highly intrusive character of the particular suggestions implicit in the book hardly mitigates those concerus. Ultimately, Dean Bollinger's book asks the press to help transform public life, having itself been transformed by legal rules and images. There is, of course, nothing to criticize in the desire to improve the quality of public debate and thereby reinvigorate democracy. Yet, as Dean Bollinger himself recognizes, we need to think long and hard before we embrace too casually a regime in which public institutions are given the power to promote a single vision of a "good" press and "quality" public debate.

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70 *Id.* at 149.

Recent significant developments in the media portend unanticipated and complicated transformations in politics and the press and thus require us to assess Bollinger's book in a new context. Both fact-oriented and interpretive journalism view the press as the elite intermediary between news and the public, translating events by applying a panoply of professional skills. However, the recent popularity of "politics by talk show," with accompanying claims of direct democracy, and the increasing prevalence of real-life television programming, suggest that the interposition of that elite is breaking down. This trend, in turn, leads the reader to question whether Dean Bollinger's attention to the re-characterization of our images of the traditional press would adequately address the newest and perhaps most troubling issues regarding the press' role in the political context.

A. The Power of the Judicial Image

The first problem with Bollinger's account in *Images of a Free Press* concerns his assumption that the entire edifice of post-*Sullivan* press law is largely a pedagogical exercise in which the Supreme Court self-consciously engages in order to shape the identity, operation, and practices of the autonomous press. Just as Bollinger's characterization of the Court's "coy" self-consciousness[71] in such a teaching function may be questioned,[72] his rather cavalier assumptions about the nature and power of the Court's images of the press are also subject to challenge.[73]

Assuming that a single, unambiguous image of the "good" autonomous press can be found consistently in the Court's First Amendment jurisprudence, the question still remains whether—and to what extent—that image is important. Has Bollinger succeeded in establishing his premise that the Court can "alter behavior" and perform a "deeply educative role" through its power of characterization?[74]

Although Bollinger's application of the concept is novel, his underlying belief in the importance of Supreme Court decisionmaking to effect social change is fully consistent with traditional views of the Court's role since the Warren era. Yet, this faith in the shaping power of legal discourse has increasingly been subject to attack in

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71 *Id.* at 96.

72 Geoffrey R. Stone, *Imagining a Free Press*, 90 MICH. L. REV. 1246, 1251-54 (1992).

73 For a review criticizing Bollinger for his assumptions about the influence of judicial images, see Lucas A. Powe, Jr., *The Supreme Court, Social Change, and Legal Scholarship*, 44 STAN. L. REV. 1615 (1992).

74 BOLLINGER, *supra* note 1, at 42-43.

recent scholarly literature.[75] While the Court's images of the press probably do have some effect on the press, the extent and character of that effect is far less clear than Bollinger suggests. Dean Bollinger's attempt to find a rational explanation for the Court's free press jurisprudence, with all its apparent contradictions and confusions, impels him to attribute excessive influence to juridical images, while leaving unaddressed the interaction with other factors of influence on the press. At a minimum, his recognition that it is "extremely difficult to either measure or trace the influence of law"[76] should lead to a more sustained analysis than he presents.

Bollinger rests his argnment solely on certain "signs"[77] of the influence of the Court's image on the press. Most importantly, Bollinger notes that the press depends on the Court for continuing recognition (and, perhaps, expansion) of its First Amendment privileges, particularly in the face of a hostile public.[78] This is true, Bollinger argnes, because public support for the press is "fragile," and because the Court's refusal to provide a "fixed and permanent" set of protections against future government regnlations creates a "compelling self-interest in meeting the Court's expectations about its role in society."[79] Indeed, he relies on the Court's influence over public opinion, which, in turn, sways a press dependent on the market. In addition, Bollinger sees the press' condemnation of misbehavior by other members of the journalistic fraternity as suggestive of the extent to which the institution "polices itself in order to preserve its constitutional image."[80] Bollinger also explains the press' "sever[e]"[81] reaction against the Burger Court's First Amendment opinions on the ground that some of them "introduced a tone of skepticism and even outright criticism" regarding the press by drawing a less flattering and more business-oriented image of the institution, even though they were otherwise press-protective in result.[82] Finally, Bollinger credits the changes in journalism in the 1960s—the development of an adversarial and critical press—not only to social ferment but also to the emergence of the Court, through *New*

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75 For example, Gerald Rosenberg has recently made an important contribution to an assessment of the Court in a book questioning the extent to which Court decisions in areas such as civil rights and abortion have had a major directive impact on social change. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

76 BOLLINGER, *supra* note 1, at 47.

77 *Id.*

78 *Id.* at 48-49.

79 *Id.* at 49.

80 *Id.* at 51.

81 *Id.* at 52.

82 *Id.* at 53-54.

York Times v. Sullivan,[83] as an institution whose rhetoric defines the press.[84]

This account of judicial influence, however, does not plumb the ambiguities and conflicts within the Court's asserted image of the good press. Moreover, although Bollinger relies on the cited factors to prove the press' special susceptibility to control by the images of the Supreme Court, those observations do not by themselves provide sufficient support. Without belaboring the point, they distinguish neither action from rhetoric nor the press from any other actors subject to legal action. Nor do they provide a persuasive account of why the Supreme Court's images should be deemed more central to press identity than any other formative factors that could lead to similar behavioral characteristics.

The Court's free press cases do not necessarily provide as seamless an image of the autonomous press as Bollinger's abstract characterization suggests. Although Dean Bollinger argues that an underlying prescription for a good press exists in even the Court's most press-protective decisions, he does not attempt to describe the contours of that image with any specificity. His most definite description of the image of the autonomous American press is that of "a press that performs a vital role in helping, through its powers of investigation and exposure, to reduce the risks of official incompetence and abuse, to convey information about the affairs of government, and to serve as a forum for citizens to communicate among themselves."[85] According to Bollinger, "[d]ecision after decision has restated and refined this image of the American press."[86] The "ethical content" in the general press image requires journalists to "focus their attention on the political issues of the day, speak the truth about official conduct, expose errors and abuse, represent the opinions of different groups, and, of course, avoid lies and misrepresentations."[87] Bollinger also describes the Court's characterizations of the press as "various," including: "a fourth branch of government, a legitimate profession, and a wily Ulysses."[88] In addition to fostering "independent-mindedness,"[89] Bollinger views the Court as breathing life into an image of the press "conceived in the image of the artist, . . . who lives figuratively outside society, beyond normal conventions, and [can] . . . expose its shortcomings."[90]

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83 New York Times v. Sullivan, 376 U.S. 254 (1964).
84 BOLLINGER, *supra* note 1, at 60-61.
85 *Id.* at 44.
86 *Id.*
87 *Id.*
88 *Id.* at 133.
89 *Id.* at 58.
90 *Id.* at 55.

While Bollinger correctly notes that aspirational statements about press practices can be found throughout the Court's press opinions since 1964, different and contending visions of the press are also evident.[91] It would surely over-simplify the Court's press jurisprudence to reduce it to the endorsement of a single press image, largely lacking variety and complexity. Moreover, the assorted functions or goals specified by Bollinger are not necessarily as harmonious as appears from their consecutive listing in this description. The imperatives of "impartial," neutral, and balanced reporting of "just the facts," for example, are not easily reconcilable with the characteristics of the kind of investigative journalism that has recently been called "the journalism of outrage."[92] Even a press that does not serve as a fornm for intra-citizen communication can function well as a disseminator of information and investigator of abuse. A reporter with too independent a spirit might not necessarily conform to the standards and procedural routines established by press organizations and promoted by the Court's decisions in areas such as defamation. Moreover, Dean Bollinger's description of the power of images is not sufficiently complete to provide a rich account of change in the Court's own rhetoric. For example, what led to the changes in the image of the press in the Burger years?[93] How did the more ambiguous and ambivalent elements of the image come to suffuse the central vision, particularly if that vision was supposed to be a self-consciously overdrawn pedagogical tool used by the Court in attempting to achieve behavioral results? Without overstating the point, the mixed images that Bollinger describes might make us wary of assuming too quickly a simple and unambiguous Supreme Court influence on journalism, reflecting an image of the "good" press. Underscoring this concern about Bollinger's apparent assumption is the recognition that the press today has many sides: the term can refer, *inter alia*, to an institution, a collection of

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91 The case of Cohen v. Cowles Media, 111 S. Ct. 2513 (1991), for example, is only one instance in which the Court addressed the press in its corporate capacity, as a business (despite the option of a traditional reading more consistent with the autonomy notions stressed by Bollinger.) In Cohen, the Court refused to find a First Amendment bar to the imposition of damages under state law for a newspaper's voluntary disclosure of the identity of a confidential source, even though the newspaper argued that the identity of the source became the central part of the story once the editors discovered that confidentiality had been obtained in a "dirty trick" attempt by the source to manipulate the coverage of an election story for partisan political purposes without taking responsibility for doing so.

92 DAVID L. PROTESS ET AL., THE JOURNALISM OF OUTRAGE: INVESTIGATIVE REPORTING AND AGENDA BUILDING IN AMERICA (1991); *see also* ROBERT MIRALDI, MUCKRAKING AND OBJECTIVITY: JOURNALISM'S COLLIDING TRADITIONS 6-19 (1990); Jason P. Isralowitz, *The Reporter As Citizen: Newspaper Ethics and Constitutional Values*, 141 U. PA. L. REV. 221, 275-77 (1992).

93 BOLLINGER, *supra* note 1, at 52-54.

individual journalists, a private business, a set of professional editors, and a management structure. Which of these facets does Bollinger believe the Supreme Court's images have shaped?

Contrary to Bollinger's account that the press is a passive receptor, both individual press organs and the institution as a whole are themselves producers of images. Although Bollinger is normally very sensitive to ambiguity, synergy, and interconnection, his discussion of the judicial images of the press seems to assume that the Court's images of the press have a uni-directional influence upon journalistic operations. It would be more realistic—albeit theoretically knottier—to conclude that, to the extent that those images have power and influence, they do not come exclusively out of the Court's imagination. Undoubtedly, the Court's images are shaped by the briefs and arguments presented in relevant cases. They are also influenced, presumably, by the images that the press publicizes about itself in an attempt to influence both judicial and audience perceptions. The fact that the press is itself an active and reactive imagemaker suggests that Bollinger may be too hasty in assuming that the Court's image of a free press is the fundamental influence on the press' practices rather than simply its rhetoric. The Court's image may simply be reflected in a parallel set of aspirational images that the press publicizes about itself to keep the Court on its side, all the while tailoring its practices to more material rather than rhetorical influences. Why not assume that the press' agenda may be as programmatic as the Court's?

If we are to engage in speculation, I hazard that Bollinger's focus on the judicial image as the central influence on the practices and perceptions of the press overstates the causal link. Bollinger does not explicitly take the position that the Court's imagistic "rhetorical stimulants" would influence the operations of the press even if those images explicitly were to conflict with material factors such as the exigencies of competition. Yet, in light of the existing background of media influences today, an emphasis on the power of images might suggest such a counter-intuitive consequence.

Media theorists have long suspected that the practices and images of journalism are influenced, among other factors, by journalistic history and custom,[94] institutional factors,[95] the dictates of

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94 *See, e.g.*, PHILIP GAUNT, CHOOSING THE NEWS: THE PROFIT FACTOR IN NEWS SELECTION 19, 21 (1990) (taking this position in the context of a comparison of the content of foreign news coverage in French, British, and American regional newspapers); DENIS MCQUAIL, MASS COMMUNICATION THEORY: AN INTRODUCTION 211 (2d ed. 1987) (discussing the "systematic differences between television news-giving in different societies").

95 *See, e.g.*, HERBERT J. GANS, DECIDING WHAT'S NEWS (1979) (describing the institutional and newsroom imperatives that influence the coverage of news); PAMELA J. SHOE-

technology,[96] commercial exigencies,[97] and culture, including the particular narrative forms that the press appropriates from the varying traditions and cultural histories out of which it operates.[98] While it is beyond the scope of this review to canvass the field of journalism in order to discover and describe all the effects attributed to these different factors by social theorists, it also seems incontrovertible that the increasing fragmentation of news markets and the pressures of competition in a technologically sophisticated world have a profound effect on the perceptions and practices of the press.[99] Although we should not conclude that law is unimportant solely because media theorists largely ignore the influence of legal standards on press operations, we should be equally wary of discounting their alternative explanations for media practices by too exclusive a reliance on the power of legal discourse. Perhaps the

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MAKER & STEPHEN D. REESE, MEDIATING THE MESSAGE: THEORIES OF INFLUENCES ON MASS MEDIA CONTENT (1991); GAYE TUCHMAN, MAKING NEWS: A STUDY IN THE CONSTRUCTION OF REALITY (1978); *see also* MARK FISHMAN, MANUFACTURING THE NEWS 14 (1980) (noting that journalists' work methods centrally affect how they construct the news).

96 DAVID L. ALTHEIDE & ROBERT P. SNOW, MEDIA WORLDS IN THE POSTJOURNALISM ERA (1991); *cf.* M. ETHAN KATSH, THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW (1989) (taking the position that legal developments have been affected by the inherent characteristics of differing media forms ranging from print to electronic information processing); MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSION OF MAN (1964) (coining the phrase "the medium is the message" and opining on the transformative effects of the electronic medium on human perception and social life).

97 *See, e.g.*, C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097 (1992).

98 *See, e.g.*, RICHARD CAMPBELL, SIXTY MINUTES AND THE NEWS: A MYTHOLOGY FOR MIDDLE AMERICA (1991) (characterizing the narrative forms of programs such as 60 Minutes as cultural systems based on the literary rather than the scientific conventions of journalism); *cf.* JOHN FISKE, TELEVISION CULTURE 293-308 (1987) (on the structure of news narratives and news as discourse).

99 The development of program "nicheing" by broadcasters, for example, is a clear reaction to competition and to the erosion of the traditional mass audience for broadcasting. *See, e.g.*, JAMES L. BAUGHMAN, THE REPUBLIC OF MASS CULTURE: JOURNALISM, FILMMAKING AND BROADCASTING IN AMERICA SINCE 1941 218-20 (1992). Another example of extra-judicial effects on press operations is the construction of local news. Phyllis Kaniss recently took the position that the dispersing effect of suburban expansion on the local newspapers' readership base has had significant influence on the content of the news, promoting, for example, stories that have symbolic unifying effects across regions. KANISS, *supra* note 4, at 2-5, 59-70. Kaniss argues that local news content is largely influenced by the economic interests of media owners, the personal and professional values of local journalists, and the media strategies of local officials. Regarding economic factors, Kaniss makes two argnments: first, that the metropolitan media are local businesses linked to the fortunes of their local economies; and, second, that the demographic and political structures of metropolitan areas affect the coverage of newspapers. She suggests, for example, that there is an economic incentive for metropolitan newspapers to focus on stories with a "consensus building symbolic character" in order to forge dispersed audiences with an illusory common bond of local identity centered on the city. *Id.* at 4, 46-68.

greatest influence of the judicial image of the press is on the lawyers and First Amendment scholars who deal with these matters.

While Bollinger correctly notes that the influence he hypothesizes cannot be proved (or, presumably, disproved) scientifically,[100] a broader inquiry into actual press practices raises some serious questions about his sweeping assumptions of rhetorical influence.[101] One account that undermines Bollinger's suggestion of a monolithic judicial influence on the press is the anecdotally documented resistance of working journalists to "over-lawyering" their stories. Any press lawyer will attest to reporters' notoriously prickly response to advice from their newspaper or broadcast stations' legal departments. The working press resists recasting stories to satisfy lawyers' concerns about matters such as feared claims of defamation. While this may not reflect the attitudes of publishers and broadcast top management,[102] such suspicion of lawyers on the part of working journalists suggests that reporters do not perceive themselves as learning the practices and standards of their profession from the implied constraints accompanying the central image of the press in the Court's jurisprudence. Although such professed independence, because of its self-interested character, should not foreclose inquiry, it surely shifts the burden of persuasion to Bollinger.

Even if we are not to take journalistic testimonials at face value, an inquiry into the realities of the press today does not demonstrate a clear correlation with many of the elements of the image described by Bollinger—an adversarial and informational press focusing on political issues. As many observers of the modern press have lamented, the history of journalism in the twentieth century does not represent a consistently critical and independent press dedicated to

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100 BOLLINGER, *supra* note 1, at 60.

101 First, a caveat. It might be said that this look at the reality and complexity of press practices is in fact unfair to Bollinger, who only characterizes the central image of an autonomous press as an aspirational ideal that the Court must know is inconsistent with the reality of press practice. *See id.* at 55-57 (noting the "tremendous pressures" in society not to report things "as they are" and characterizing the Court as a press "enthusiast" advocating a free press in a world in which powerful forces operate to stifle an independent journalism). Thus, the Court could be said to over-protect the press knowingly and programmatically, in order to promote the quality of intellectual independence and allow the institution to live up to its image despite the "crushing power of conformity." *Id.* at 56.

The problem, however, is that Bollinger's notion of the juridical image has a complex set of goals and effects whose interactions and contradictions he does not fully explain. Bollinger initially describes the Court's image as a self-conscious denial of the realities of press practice in the service of an aspirational goal, yet in the same breath argues that the image in fact has a profound influence on press practices.

102 Bollinger does cite to two empirical studies for the proposition that "media are increasingly aware of legal decisions and issues relating to press freedom . . . ." *Id.* at 47. As he notes, however, this evidence says nothing about whether journalists are affected by images of the press articulated in Supreme Court opinions. *Id.*

the discovery and dissemination of information.[103] The much-touted adversarialism of the post-Watergate press, although certainly demonstrating greater journalistic independence than was evident in the 1950s, is nevertheless overstated.[104] Even after judicial celebrations of the autonomous, independent, and critical press, journalists permit themselves to be managed both by government and by other sources.[105]

The extent to which the press departs from the ideal of the central First Amendment image can also be discerned from its conception of politics. For example, Larry Sabato has recently criticized the press for its sensationalistic focus on scandals involving political figures.[106] Shanto Iyengar has suggested that the episodic character of television news coverage of politics has the effect of diluting the audience's assessments of political responsibility, thus reducing the likelihood that viewers will blame politicians for systemic problems underlying the individualized episodes highlighted on the news.[107] Television critic Edwin Diamond's *The Media Show* focuses on the media conglomeration of the 1980s and suggests that, as part of the new business-like procedures introduced into network operations, the networks have been "downsizing their commitment to serious news and public affairs coverage"[108] and moving away from big political issues in their documentaries. Cable television is also useful in addressing the issue of the influence of judicial images of the press. After the generative capacities of cable television were recognized, the medium was first hailed as the great hope for public access to a wide range of information and a potential forum for democratic dialogue. While reality was always far from this ideal, the ambiguity of the medium has become increasingly more evident: cable transmits the worst sort of tabloidism and commercialism—featuring such things as program length commercials[109] and drama-

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103 *See generally* MICHAEL SCHUDSON, DISCOVERING THE NEWS (1978) (providing a social history of the American press); Lili Levi, *Dangerous Liaisons: Seduction and Betrayal in Confidential Press-Source Relations*, 43 RUTGERS L. REV. 609 (1991) and sources cited therein (discussing the history of the American press in the context of an examination of voluntary press breaches of promises of confidentiality to sources).

104 *See* Levi, *supra* note 103, at 678-89 and sources cited therein; *see also* DANIEL DAYAN & ELIHU KATZ, MEDIA EVENTS: THE LIVE BROADCASTING OF HISTORY 193 (1992) (arguing that ceremonial media events lead even assertedly adversarial media to eschew their adversarial roles for the duration of the events).

105 *See, e.g.*, MARK HERTSGAARD, ON BENDED KNEE: THE PRESS AND THE REAGAN PRESIDENCY (1989).

106 SABATO, *supra* note 3.

107 IYENGAR, *supra* note 5.

108 EDWIN DIAMOND, THE MEDIA SHOW: THE CHANGING FACE OF THE NEWS, 1985-1990 xii, 14-15, 32-33 (1991).

109 Rick Marin, *The Stepford Channel*, N.Y. TIMES, Oct. 4, 1992, at A1.

tizations of crimes of passion[110]—while, at the same time, allowing programming sources like CNN and C-SPAN to be carried to every cabled home.

Even to the extent that the press still seeks to perform a socially educative role, there is at least a binary split in the late twentieth century American journalistic tradition between interpretive and objective, factual reporting. The idea of the modern press as a descendant of the "objective," "scientific" press of the late nineteenth century—seeking to provide the audience with the full and unmediated panoply of information on matters of import—has been increasingly questioned both within the press and by media observers. As Dean Bollinger himself notes in passing,[111] students of culture, media, and the press have challenged the image of news purveyors as simply transparent conduits of some sort of unselected and uninterpreted social reality.[112] By suggesting that news events are constructed, rather than somehow "natural" and simply discovered, these critics have focused on those who construct the news, including political handlers, spin doctors, and the press itself.[113] Moreover, while journalistic objectivity is still the avowed mission of the mainstream press,[114] different strands of the journalistic tradition have even been developing in that context as well. Programs such as 60 Minutes point to the adoption, even within the mainstream press, of a news production model based on story-telling and other literary conceits.[115] This aptly illustrates the problem with discussing the influence of Supreme Court rhetoric on the press: by suggesting a monolithic institution, the approach misses the different traditions and influences in the news.

The recognition that the press does not actually live up to the idealized norms Bollinger finds embedded in the Court's opinions does not, however, mean that the Court's images do not have any

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110 John Carman, *Highlights and Low of February Sweeps*, S.F. CHRON., Mar. 8, 1993, at D1 (reporting on the USA Network's movie about Amy Fisher).

111 In the context of describing the Hutchins Committee report, Bollinger adverts to the development of social science scholarship about the media, seeking to explain tbe construction of news. BOLLINGER, *supra* note 1, at 34.

112 *See, e.g.*, GAYE TUCHMAN, *supra* note 95, at 5, 182-97; Baker, *supra* note 97, at 2137-38; Robert K. Manoff, *Writing the News (By Telling the "Story")*, *in* READING THE NEWS 228-29 (Robert K. Manoff & Michael Schudson eds., 1986).

113 *See, e.g.*, DANIEL J. BOORSTIN, THE IMAGE OR WHAT HAPPENED TO THE AMERICAN DREAM (1961).

114 Baker, *supra* note 97, at 2128-31; *see also* FISKE, *supra* note 98, at 288 (on the ideological role played by the concept of objectivity); MIRALDI, *supra* note 92, at 6, 15-17; WILLIAM J. WILLIS, THE SHADOW WORLD: LIFE BETWEEN THE NEWS MEDIA AND REALITY 53-73 (1991) (on different understandings of objectivity); Isralowitz, *supra* note 92, at 224-29, 240-47 (sketching the history of American journalism by looking at the rise of objectivity).

115 *See* CAMPBELL, *supra* note 98.

formative influence on press practices. It does mean that Bollinger's unadorned claim that the Supreme Court's rhetoric is the central formative influence is overstated. The interaction between legal rhetorical influences, socio-political factors, and the ambiguous reality of actual press practices calls for a more complex analysis than the conclusory attribution of influence in *Images of a Free Press*.

B. The Benefits of Partial Regulation

The second problem with Bollinger's argument relates to his assumption that we need to maintain a partial regulatory structure "for its own sake," because it allows us to reap the benefits of distinct constitutional values.[116] Bollinger suggests that the "schizophrenic" system of press regulation is one of the most important architectonic lessons of the Court's free press jurisprudence.[117] Although his approach is tentative, Bollinger's continuing attraction to the regime of partial regulation is unrealistic, problematic given today's political and technological climate, and potentially in tension with the prescriptive elements of his argument. There is good reason to doubt that the current regulatory regime does represent, as Bollinger contends, "the best of both worlds."[118]

First, Bollinger has not adequately established his claim of reciprocal broadcast and print influence. He thinks it "reasonably arguable" and "plausible" that the regulation of the broadcast media has made the interpretations of proper broadcast journalism standards relevant for the print press as well.[119] Yet, Bollinger does not provide persuasive evidence that the print press feels constrained in its practices by the fear that, otherwise, unless it adheres to such standards, it too may become subject to regulation. To the contrary, he demonstrates the extent to which the broadcast regime has been ignored except as a technologically justified aberration. The development of "objective" journalism at the close of the 19th Cen-

116 BOLLINGER, *supra* note 1, at 116.

117 *Id.* at 114.

118 *Id.* at 110. Bollinger has also changed his mind since the first article in which he praised a partial regulation model and argued for the regulatory interchangeability of the print and broadcast press. He now posits "special advantages to limiting regulation to new technologies"—advantages "having to do with the importance of the different social perceptions that seem to attach to traditional (print) and newer (electronic) media." *Id.* at 120. Ultimately, then, his argument for not regulating the print press rests on the "psychological value" of maintaining print as the benchmark. *Id.* Yet the particular psychological value to which Bollinger refers is unclear. He probably means to suggest that by now people have settled expectations about the freedom to be accorded to the print press. Although I do not dispute Bollinger's reliance on people's perceptions, I wonder whether the population as a whole would support content-based regulation of precisely that medium on which most of us now rely for the dissemination of information.

119 *Id.* at 95-96.

tury[120] also suggests that principles of fairness and accuracy predated the broadcast regulatory regime, while the growth of alternative theories of journalism during the 1960s and 1970s indicates that the claimed influence was, at best, marginal. Moreover, as Bollinger admits, people "fervently believe" the technological scarcity arguments made on behalf of broadcast regulation despite what Bollinger dismissively calls their "weak and illogical" character.[121] Under these circumstances, it is doubtful that the print press' practices have been directed by a sophisticated recognition that the traditional regulatory justifications for the broadcast system are specious. In any event, even if the print press had recognized that the traditional rationales for broadcast regulation are flawed, it could nevertheless have concluded, along with Dean Bollinger, that the Court would find a mixed, dual system preferable to unitary consistency. Accordingly, the print press' recognition of the failures of the scarcity rationale would not necessarily lead to a fear of potentially encroaching governmental regulation.

With respect to the broadcast press, Bollinger suggests that the print model has affected the broadcast model by providing "a school of journalism" that serves as a role model of journalistic values "in a new and as yet ethically unformed medium."[122] Even if existing journalistic norms in the print context would affect the professional standards of new media, neither the character of the particular journalistic values transmitted nor their appropriateness as general norms is established in the book. Bollinger does not adequately define the "uncontestable minimum standards" of journalism that he sees reflected from the print model. If such minimum standards consist of addressing public issues in a truthful manner, then the existence of FCC regulations such as news staging prohibitions and the fairness doctrine make it virtually impossible to detect the separate influence of print press standards. If the standards to

120 Baker, *supra* note 97.

121 BOLLINGER, *supra* note 1, at 93. Dean Bollinger realizes that his argument appears to be at cross-purposes when he contends that the regulation of the broadcast medium serves as an external constraint on the print press' autonomy, and when he bemoans the fact that broadcasters were not traditionally perceived as organs of the press either in the Court's jurisprudence or by the print press. *Id.* at 93. While he admits that "there is a good deal of truth" in the conclusion that broadcasting is isolated, "it is not the full truth." *Id.* The argument is complex, but boils down to the following: because the scarcity-based justification for broadcast regulation can only refer logically to access scarcity, and because such scarcity increasingly characterizes the state of daily newspapers in the country, it is therefore reasonably arguable that broadcasting is perceived as an analogy. However, in light of the Supreme Court's decision in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), in which the concentration of the print press did not serve to justify a right of access, such predicted anxiety on the part of the print press seems less than plausible as a central motivating factor.

122 BOLLINGER, *supra* note 1, at 97.

which Bollinger refers are intended to be standards of independent-mindedness and critical inquiry, then the degree to which those standards have actually influenced broadcasting is an important and arguable point left unaddressed by Bollinger. Moreover, claims of the direct transmission of print press norms to the broadcast press must be examined with the recognition that the very forms of different media have different characteristics or "media logics" influencing their transmission of information.[123] As audiences, we might even respond to television differently than to print.[124] Although Bollinger's description of the secondary image of the press does not address this differential impact argument, it may well be a significant question whether the same journalistic values are, and should be, inculcated in the various media.

Second, Bollinger's own argnment ultimately undermines his image of distinct and reciprocal influences between the print and broadcast press. If the central image of the autonomous press contains internal constraints that promote the fair transmission of information as a journalistic norm, what additional constraint would the broadcast regime's fairness doctrine entail? And, to the extent that the print model actually succeeds in transmitting its lessons to new electronic media (such as broadcasting and cable), then the purportedly distinctive character of the two systems surely disappears. If we accept Bollinger's central premise of the regulative character of free press rhetoric, his characterization suggests that we have a unitary system of regulation along a single conventional continuum. This, however, appears to undermine his suggestion of a system of reciprocal and balanced influence. Although Bollinger does not detail the characteristics of that system, it seems to privilege factualism, fairness, accuracy, documentation, standardized news practices, editorial oversight, and hierarchy. Yet, as Bollinger himself recognizes, we might question the desirability of regulatory approaches that undermine the development of a "rich mix of intellectual styles" within the overall media.[125]

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123 *See, e.g.*, ALTHEIDE & SNOW, *supra* note 96; KATSH, *supra* note 96. If it is true that people interpret and understand messages differently depending, in part, on the nature of the medium, then Bollinger's suggestion of equipoise between the print and broadcast press is surely overstated.

124 It has been said that we respond to visual images over television affectively rather than cognitively. Therefore, questions of truth or validity give way to questions of liking what we view, and the medium provokes more feeling than thought. For example, television makes us look at political candidates from the point of view of their apparent character. *See, e.g.*, HENRY J. PERKINSON, GETTING BETTER: TELEVISION AND MORAL PROGRESS (1991) (making this point in a rather controversial attempt to demonstrate that television news enhances people's ability to think critically about stereotypes).

125 BOLLINGER, *supra* note I, at 119.

Third, even if the dual system did theoretically provide the kind of equipoise deemed proper by Bollinger, the benefits of a partial regulation system are overstated. Bollinger himself admits that the value of such a system is lost if the realm of information comes to be dominated by the electronic media of broadcast, cable, and the new technologies.[126] In fact, the electronic media now dominates the American informational landscape. A great majority of Americans today rely only or primarily on the electronic media for their news and information.[127] Current events—such as CNN's coverage of the Gulf War—have also enhanced the legitimacy and respectability of the electronic medium as a news source, thus changing the traditional balance between the broadcast and print media. Particularly when the electronic medium increasingly appears to be the medium of choice for political candidates, it is no longer realistic to see it as a mere counterweight to the print press.

Perhaps most importantly, the FCC's recent regulatory efforts illustrate the undue optimism of Dean Bollinger's suggestion that the regime of partial regulation has maintained the First Amendment as a "benchmark" and precluded regulatory abuses.[128] The history of our dual system does not prove Dean Bollinger's argument that the unregulated branch and the traditional First Amendment regime have "force[d] every departure to be carefully scrutinized and justified."[129] Therefore, even if there have been few "egregious abuses"[130] in the application of the fairness doctrine, the history of FCC regulation does not demonstrate the kind of sensitivity Bollinger suggests. Characterizing the FCC as "extraordinarily circumspect"[131] and its history of broadcast regulation as one of "admirable self-restraint"[132] might well come as a surprise to those scholars who castigate the FCC as one of the administrative agencies that has historically been most susceptible to capture.[133]

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126 *Id.* at 120.

127 *See, e.g.*, POWE, *supra* note 11, at 44; Charles D. Ferris & Terrence J. Leahy, *Red Lions, Tigers and Bears: Broadcast Content Regulation and the First Amendment*, 38 CATH. U. L. REV. 299, 315-16 (1989); Judy Mann, *No-Cost, No-Frills Education Reform*, WASH. POST, Sept. 4, 1992, at E3 (relating results of poll conducted by Times-Mirror Center for People and the Press).

128 Indeed, Bollinger's characterization of the role of the autonomous print press as a mere benchmark to keep us from straying too far into regulation is somewhat puzzling. BOLLINGER, *supra* note 1, at 115. Surely, the central image of the First Amendment tradition in our culture has a more siguificant role than to remind us not to distance ourselves too far from it.

129 *Id.* at 115.

130 *Id.*

131 *Id.*

132 *Id.* at 142.

133 Much administrative law commentary about the FCC has noted the agency's apparent susceptibility to capture. *See, e.g.*, ROBERT BRITT HORWITZ, THE IRONY OF REGU-

In any event, Bollinger does admit that the Commission has abused its discretion in the past in connection with the enforcement of indecency prohibitions.[134] Since the Commission's decision to cease enforcement of the fairness doctrine in the late 1980s, its only regulatory intervention into content has focused on indecency.[135] The current spate of activity by the FCC in the elimination of broadcast indecency, such as the $600,000 fine levied for the broadcast of certain programming featuring shock radio star Howard Stern,[136] illustrates the problematic character of this kind of governmental intervention. This is not to say that every such regulatory intervention in connection with "indecency" is necessarily an abuse. My point, rather, is that the Commission's policy toward indecency—based on an encompassing and vague definition avowedly adopted to protect children—is restrictive without considering the ambiguous and complex social meanings of broadcast sex talk. Given the social and political character of the material swept into the Commission's increasingly stringent regulatory net, Bollinger's implication that the abuses in the indecency area are not the kinds of abuses meriting concern is baffling.

At the very least, it is puzzling that Bollinger rests his point about responsible exercises of administrative power on the history of the fairness doctrine, abandoned by the Commission in 1987, while only cursorily noting the unprecedented and continuing FCC activity in the indecency context.[137] This is particularly troubling in light of Bollinger's failure to address the extent to which the direction of the FCC's application of its stringent new indecency rules has been determined by the efforts of organized socially conservative pressure groups.[138]

Finally, Bollinger's approach toward the dual system of press regulation may well create a tension with the prescriptive portion of the book, in which he calls for a new conception of the press' social role. On the one hand, he suggests that the duality serves a positive

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LATORY REFORM 34-38 (1989); ERWIN G. KRASNOW ET AL., THE POLITICS OF BROADCAST REGULATION 48-52 (1982).

134 BOLLINGER, *supra* note 1, at 131.

135 For a discussion of the FCC's efforts in the indecency area, see Lili Levi, *The Hard Case of Broadcast Indecency*, 21 N.Y.U. REV. L. & SOC. CHANGE 501 (forthcoming May 1993).

136 *FCC Fines Infinity Broadcasting $600,000 for Indecent Broadcasts*, FCC REP. No. MM-684, Dec. 18, 1992, *available on* LEXIS, 1992 FCC Lexis 6906.

137 Admittedly, Congress has at various points expressed interest in the codification of some analog to the fairness doctrine. Nevertheless, after one Congressional fairness initiative was vetoed by President Reagan in 1987, the fairness doctrine has never been voted into law. DOUGLAS H. GINSBURG ET AL., REGULATION OF THE ELECTRONIC MASS MEDIA 490 (2d ed. 1991); Ferris & Leahy, *supra* note 127, at 300-01.

138 John Crigler & William J. Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U. L. REV. 329 (1989).

social function by accurately reflecting our own ambivalence about a free press. Thus, he identifies the conflicting images of the press in the Supreme Court's print and broadcast jurisprudence as rational responses to the ambivalence about which image to endorse, and thereby legitimates the doctrinal *status quo*. On the other hand, Bollinger wishes to set the preconditions for enhancing and improving public debate. Although he does not specify the kind of transformative regulation he would support in order to enhance public discourse, it is unlikely to consist of a mere replication of the current dual system. Indeed, even the dual system of regulation subsisting after *New York Times v. Sullivan* would not clearly solve the problems Bollinger identifies with public discourse and the press' role as newsgatherer.

Nevertheless, it may be that the tension is actually illusory. Perhaps Bollinger's major aim is to provide a new rationale for regulation precisely because so many scholars and government officials have joined the deregulation bandwagon.[139] It may be that Bollinger ultimately wishes for nothing more than a return to the pre-1987 characteristics of the partial regulation scheme. Yet, the book's implicit intent seems more ambitious. Bollinger, after all, believes that "our working conceptions of press freedom will change dramatically over the next century,"[140] that the central image of *New York Times v. Sullivan* will be "displaced,"[141] and, presumably, that *Images of a Free Press* is a step in that transformation. Convincing the reader that press regulations need to be reconceived if we are to ask the press to participate in a reinvigorated public life tends to subvert Bollinger's praise of the dual regime of press law.

C. Transformative Possibilities for the Press in Public Discourse

The third problem with Bollinger's argument arises from his speculations about a potentially transformative role for the press, properly constrained by public institutions. In Bollinger's view, vibrant, rich, and democratic public discourse requires regulations of the press that can bypass and neutralize not only market failure and access problems but, more importantly, our intellectual biases as

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139 This view is supported by Bollinger's point that "[i]t is important . . . to recognize that public regulation requiring the media to grant access to the public under certain conditions need not be thought of as desigued only to correct structural defects in the market." BOLLINGER, *supra* note 1, at 141. Even in the absence of market failure as commonly understood, Bollinger believes that the internal biases of human beings themselves prompt and justify regulation.

140 *Id.* at 143.

141 *Id.* at 151.

human beings. Although this vision is original, it is also unrealistic and susceptible to dangerous consequences.

Laziness, ignorance, insecurity, and tribalism—the human "biases" that hamper the quality of public debate—are problematic as the lynchpins for Bollinger's argument that there is a need to reimagine the press.[142] To begin with, the identified intellectual biases are too abstract, as described, to be assessed properly.[143] Furthermore, since Bollinger does not draw a clear picture of the ideal level and quality of public debate, it is difficult to assess whether his chosen factors are, indeed, the particular failings that lead to an impoverished public life.

However, even if we were to accept Bollinger's characterization of our intellectual biases as those factors that ultimately lead to the degradation of public discourse, Bollinger makes unsupported assumptions when he describes these failings as somehow "natural" or inherent in human nature. This suggests a view that we are naturally disinclined to live our lives in our public or civic capacity. But why should we assume that the dearth of public discourse is necessarily due to some inherent failing in human nature?

Low voter turnout and the disaffection of the populace—as well as the adulation being received by political candidates not marketed or perceived as "pols" or "insiders"—suggest that the lack of public discourse per se may be less a result of human fault than of powerlessness. The economic realities of our time impose constraints on most people's ability to participate in the public sphere. Social observers suggest that more Americans than ever are working longer hours just to keep even economically.[144] The exigencies of daily life leave little room for rumination on issues of public moment, thus making absence from public life less a matter of laziness than a lack of time and attention. This is particularly likely when the growing influence of PACs may leave individuals with the impression that their voices will have no impact.[145] If it is true, as some

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142 These "biases" cannot be the only hindrances to a fully developed public discourse. For example, although Bollinger does not mention libel and invasions of privacy by the press in his prescriptive section at the end, his earlier discussions of the harms they pose to public debate would presumably attract him to some reforms in the relevant legal rules. Bollinger does not, however, discuss such reforms in this book.

143 For example, Bollinger points simultaneously to too much and too little risk-adversity with respect to change and reform. However, how can those diagnoses be made in the abstract? On what basis do we identify the appropriate level of risk-aversity?

144 *See, e.g.*, JULIET B. SCHOR, THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE (1991).

145 *Cf.* David Kleeman, *Monday Memo: Television Can Be a Leading Teacher and Advocate for Civic Involvement*, BROADCASTING, Mar. 23, 1992, at 95 (describing results of Kettering Foundation study of attitudes toward the political process, including its finding that

media theorists suggest, that television depoliticizes society by contributing to a mere illusion of political involvement,[146] then incentives for actual involvement are further eroded. In fact, the character of our most recent presidential contest may serve as the clearest evidence that Bollinger's assessment of human nature is off the mark. It is telling that the audience of the Phil Donohue show rejected Donohue's attempt to question Bill Clinton about his alleged extra-marital affair with Gennifer Flowers, instead turning to the candidate's substantive policies.[147]

Bollinger's diagnosis of human failing as the root cause of the inadequacies of the modern press and public discourse leads him to contemplate reform. Yet, Bollinger never explicitly specifies what role the press would play in his image of ideal civic dialogue, or how such a role could be promoted by regnlatory intervention.[148] Although Bollinger recognizes that solutions must be specifically targeted and tailored to identified problems, the question yet remains of which government interventions could counteract the distorting effects of the intellectual biases Bollinger has diagnosed.

One possibility Bollinger suggests, but does not specifically endorse, is the adoption of the fairness doctrine, which he describes as "a desired intellectual style."[149] Bollinger's praise for the abolished doctrine is consistent with his suggestion that the broadcast content rules seek to improve the quality of public debate.[150] He also speaks favorably about the self-reflection prompted by the fairness doctrine, which somehow, "[b]y its very nature, . . . forces us to think

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most people participate beyond voting "when they feel their actions make a difference.").

146 DAYAN & KATZ, *supra* note 104, at 59 (and sources cited therein).

147 Sharon D. Moshavi, *Elections Enter New Television Age*, BROADCASTING, Nov. 2, 1992, at 12; Jay Rosen, *Campaign Issues: Discourse*, COLUM. J. REV., Nov.-Dec. 1992, at 34.

148 Although Bollinger cites the goals identified by the Hutchins Commission as the benchmarks against which the press' performance should be measured, he does not specifically adopt those standards. BOLLINGER, *supra* note 1, at 30-31. Even if he had done so, however, they are too abstract and question-begging to serve as clear blueprints for the discussion. The Hutchins Commission report suggested that the press be charged with presenting a truthful account of the day's events in context; serving as a forum for commentary and criticism; allowing for communication between groups by portraying their views to one another; presenting the goals and values of society; and reaching every member of society. *Id.* While these are all, of course, laudable in the extreme, they do not provide a basis for the discretionary judgments they all require.

149 *Id.* at 119. Although Bollinger characterizes regulations like the fairness doctrine as "healthy efforts" in general, he disclaims a purpose "to assert that we should continue all the various kinds of controls on the quality of public discussion encountered throughout this book, nor that we should expand those controls or substitute others." *Id.* Nevertheless, it is a useful technique in identifying the possible pitfalls in Dean Bollinger's approach to test his abstract call for the involvement of public institutions in the development of a new perspective on the First Amendment against his own interpretations of the characteristics, costs and benefits of previously applied regulations.

150 *Id.* at 65.

about problems of bias and irrationality in our own thought processes."[151] Under a fairness doctrine regime, for example, the press would engage in extensive coverage of matters of public moment, even if the consumption preferences of the misguided public would have dictated entertainment programming. Bollinger's apparently assumes that free markets would not produce the optimal level of information necessary to capture the attention of the intellectually alienated audience.

Bollinger's argument for the value of the fairness doctrine is not much more than a bootstrap. Although he admits that specific benefits from the doctrine are hard to establish,[152] he posits that it has inherent value as a symbol. It is hard to see, however, when reliance on symbolic power could not be used to trump more concrete assessments of the doctrine's application.

Even if we were to agree with Bollinger that the FCC did not make a sufficiently compelling argument for the elimination of the fairness doctrine, and that fear of market failure is not the only proper justification for the doctrine, the more fundamental problem is that the traditional fairness doctrine served to homogenize speech. As Bollinger notes, the fairness doctrine in practice did not promote the discussion and dissemination of marginalized issues and points of view not yet the subject of mainstream public debate.[153] More generally, fairness, even-handedness, and balance constitute a choice that unavoidably precludes other intellectual styles. Consequently, there are different narrative structures in journalism that regulations such as the fairness doctrine may ultimately undermine; the dialectical model of approaches like the fairness doctrine promotes one type of news tradition without allowing us to look at the competing models.[154]

In any event, although Bollinger does not admit it, his definition of fairness is different from, and far more difficult to enforce than, the old fairness doctrine formerly applied by the FCC. Bollinger characterizes the fairness doctrine by choosing cases desigued to demonstrate the ways in which the doctrine drew "those involved into a difficult study, not only of what constitutes 'fairness' in the presentation of information but of questions about how information is received and its impact on the audience."[155] For example, in his

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151 *Id.* at 84.

152 *Id.* at 128.

153 *Id.* at 127.

154 *See, e.g.*, CAMPBELL, *supra* note 98, at 234. In effect, Bollinger recognizes this when he speculates that we do not want to "undermine the . . . development of a 'rich mix' of intellectual styles within the overall media." BOLLINGER, *supra* note 1, at 120.

155 BOLLINGER, *supra* note 1, at 84.

discussion of the *Pensions*[156] case—involving a documentary on private pension plans, Bollinger describes a D.C. Circuit court opinion as "silly" in its characterization of the fairness doctrine as requiring that good pensions plans be presented along with "rotten" ones.[157] Instead, in Bollinger's view, "the fairness doctrine claim is that there must be a fuller discussion of the *significance* and extent of the rottenness for purposes of thinking about public policy."[158] Yet this level of intrusiveness on the part of the Commission was not traditionally associated with the application of the fairness doctrine, and the *Pensions* court emphasized that the Commission must respect licensees' reasonable judgments in fairuess doctrine matters.[159]

Bollinger admits, in his discussion of access regulations, "that there are good First Amendment reasons" to "limit carefully the intrusiveness of" governmental requirements.[160] Yet, his description of the *Banzhaf*[161] case, concerning the implicit messages in cigarette advertising, indicates the extent and degree of governmental oversight that Bollinger would tolerate in the name of quality public debate. Without emphasizing the court's explicit limitation of its decision to the public health hazard of cigarettes,[162] Bollinger approvingly describes the D.C. Circuit's suggestion that the FCC consider not only "the frequency and amount of information received" by the public about smoking, but also the population's "capacity to understand and appreciate" the information in light of the irrationality prompted by addiction.[163] This discussion suggests Bollinger's attraction to the notion that public debate could be enhanced if regulations could ensure that messages have equal power or impact: that "counter-information" is as effective and persuasive as the original message, particularly when the population is irrational on the subject. Consistent with that interpretation, Bollinger suggests that the development of psychological theories of audience effects can guide us in deciding how to regulate, particularly as differences in media can lead to different reactions.

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156 National Broadcasting Co. v. FCC, 516 F.2d 1101 (D.C. Cir. 1974), *vacated as moot*, 516 F.2d at 1180 (D.C. Cir.) [hereinafter *Pensions*] (vacating FCC's finding that NBC had violated fairness doctrine by airing a Peabody Award-winning documentary, entitled "Pensions: The Broken Promise," that was critical of private pension plans), *cert. denied*, 424 U.S. 910 (1976).

157 BOLLINGER, *supra* note 1, at 80.

158 *Id.*

159 *National Broadcasting Co.*, 516 F.2d at 1118.

160 BOLLINGER, *supra* note 1, at 109.

161 Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968) (affirming FCC ruling that cigarette advertisements, which implicitly promote the desirability of smoking, give rise to fairness doctrine obligations), *cert. denied*, 396 U.S. 842 (1969). *See* BOLLINGER, *supra* note 1, at 76.

162 *Banzhaf*, 405 F.2d at 1099.

163 BOLLINGER, *supra* note 1, at 77.

If this kind of regulation is what underlies Bollinger's suggested "new theoretical perspective,"[164] it is more than a far cry from the traditional fairness doctrine. It is also a radical call for the kind of qualitative and standardless intervention into the specific content and impact of programming that may well become an irresistible invitation to abuse. Bollinger himself admits that the interest in improving the quality of public debate will "push any decision maker into deeper and deeper analysis of the publication in question and of the mind that listened to or watched it."[165]

Although Bollinger does not delineate his notion of an ideal public discourse, his use of language reminiscent of revived notions of civic republicanism suggests that he envisions a largely rationalist model: one of civic-minded citizens addressing important public issues through the positive intervention of the press. With our irrational and intolerant responses neutralized by messages with proportional impact, we could then engage in quality discourse and improve our democratic decisionmaking. This model of enlightened and sanitized rational discourse may be subject to critique on a variety of grounds, not the least of which is that it does not seem to leave much room in quality public debate for partisanship, passion, and individual dissent.

Moreover, the suggestion of impact-specific assessments of news coverage would be highly problematic to enforce. Who is to decide what broadcast or printed information has real impact? On what basis would that decision be made? Currently, there is a large and still-developing body of work addressing the effects of television on audiences. The literature encompasses numerous contending theories ranging from the hypodermic approach to the resistance model of television viewing.[166] Because the experts themselves currently disagree about the necessarily complex interaction between televised messages and audience interpretation, the notion that an ideal regulatory regime designed to promote a truly civic-minded notion of democracy should be grounded on theories of television effects is less than appealing.

The complexity entailed by the issue of public intervention into press accounts is evident in Bollinger's own discussion of *State v. Lashinsky*, in which a reporter claimed a newsgathering right to film the scene of a car accident in which a woman was decapitated.[167]

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164 *Id.* at 136.

165 *Id.* at 123.

166 *See* ALTHEIDE & SNOW, *supra* note 96, at 3-12 (providing a brief description of the literature).

167 *See* BOLLINGER, *supra* note 1, at 149-50 (discussing State v. Lashinsky, 404 A.2d 1121 (N.J. 1979)).

Bollinger asserts that the right to gather news is "[t]he most powerful force driving us toward [a] more complex vision" of the press today.[168] He also suggests that despite its "grotesque and seemingly bizarre" character, *Lashinsky* is "representative of the kinds of free [speech] issues" we are likely to face in the future.[169]

Yet, Bollinger's perspective on the proper role of the press in ensuring quality public debate and decisionmaking does not provide a particularly useful method for analysis. He is right that the *Lashinsky* case poses a dilemma that cannot be resolved by mere reference to ordinary First Amendment platitudes and metaphors;[170] contending arguments are plausible. On the one hand, one could easily argue that this kind of programming is a transparent attempt to improve ratings by pandering to people's morbid and prurient desires—not the kind of news to which the grand protections of the First Amendment should attach. On the other hand, one could take the position that, in light of how jaded the public has become, only shocking visual images will affect viewers and lead them to insist on policy changes concerning problems of highway safety. Even then, those very images that stir us in all their sensationalism and concrete specificity may well, in the end, reinforce our individualistic attributions of responsibility and inability to lay systemic blame for systemic problems.[171] And, finally, our ambivalence about the journalist's desire to pander to the audience's purported appetite for exotica should not make us forget that the *Lashinsky* case was about whether a police officer at an accident scene should be able to turn away the press even without a significant showing of actual physical disruption.[172]

There is no dearth of current situations that raise the same kinds of ambiguities. The broadcast footage of starving Somalis,[173] the attempted airing of campaign advertisements containing the depiction of an abortion,[174] and the controversy over televising executions[175] are only three of the numerous examples of circumstances to which the application of Bollinger's approach is simply unclear.

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168 *Id.* at 145.

169 *Id.* at 149.

170 *Id.*

171 *See, e.g.*, IYENGAR, *supra* note 5, at 2-5, 14-16, 135-38.

172 *Lashinsky*, 404 A.2d at 1134-35 (Pashman, J., dissenting) and 1136 (Clifford, J., dissenting).

173 *Somalia: Media, Military Each Have Role to Play*, USA TODAY, Dec. 10, 1992, at 10A.

174 Gillett Communications of Atlanta, Inc. v. Becker, 807 F. Supp. 757 (N.D. Ga. 1992); Clarence Page, *Our Right to be Revolted*, CHI. TRIB., Apr. 26, 1992, at 3.

175 *See, e.g.*, Philip Hager, *U.S. Judge Upholds Ban on TV Cameras at Executions*, L.A. TIMES, June 8, 1991 at A1; Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 950, 959 (1992); Jef I. Richards & R. Bruce Easter, *Televising Executions: The High-Tech Alternative to Public Hangings*, 40 UCLA L. REV. 381 (1992).

Bollinger suggests that the Supreme Court insists on presenting an absolutist rhetoric of press independence precisely because such an attitude and spirit are difficult to maintain.[176] If so, then the question remains as to what kind of governmental regulation could preserve and nurture that same spirit of intellectual independence and distrust of authority. This is not necessarily to dispute the potentially positive effects of regulations arising out of the fairness approach. Rather, it is to suggest that the fairness doctrine and its kin[177] are slender reeds with which to build the kind of social transformation that Bollinger's book implicitly endorses.

Bollinger is fully aware that the "potential for official misbehavior . . . should not be lightly disregarded."[178] Yet, on the question of whether government should be trusted with the power to intervene in the field of public debate, Bollinger rests his rather sanguine attitude on the ground that because we cannot completely eliminate government involvement, our history of mild FCC regulation of the electronic media should be a reassuring sign for the future. However, as he himself points out in responding to the physical scarcity argument traditionally used to justify broadcast content regulation, the necessity of some governmental involvement in the initial allocation does not necessarily justify all subsequent interventions.[179] Bollinger astutely acknowledges the dangers of trying to predict what would happen in a fully regulated future by looking to a past marked by what he takes to be a rational level of balance.[180]

Although I am sympathetic to Bollinger's concern about the character of public discourse and recognize the failings of the enormously powerful private press, I continue to be troubled by the dangers posed by recent governmental censorship. Even if the image of

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176 BOLLINGER, *supra* note 1, at 55.

177 Bollinger's discussion of the failures in the Commission's justifications for the elimination of the fairness doctrine suggests other options. Alternatives range from a requirement that time periods be set aside for public discussion on a first-come basis to a mandate requiring commercial media to sell time to individuals or groups wishing to debate public issues. However, these options cannot easily be seen as antidotes to the particular kinds of intellectual failures Bollinger identifies in human nature. For example, there is no reason to believe that access requirements would function to neutralize the effects of laziness, ignorance, and tribalism that hobble public discourse. Moreover, access requirements have been criticized by progressives as arising from the republican tradition. That tradition, which assumes a well-informed, well-read, participatory society based on a citizenry committed to civic virtue, in no way describes what such critics see as the reality of modern American society. *See, e.g.*, Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1387-89 (1984). Finally, Bollinger himself points to harms associated with access regulations, including the possibility that administrative access machinery will be used to force the press to toe the official line. BOLLINGER, *supra* note 1, at 110-12.

178 BOLLINGER, *supra* note 1, at 112.

179 *Id.* at 89.

180 *Id.* at 86-87.

the adversarial press has come to dominate our vision of the desirable press after Vietnam and Watergate,[181] we cannot forget the government's direct control over the flow of information in the Persian Gulf War, Panama, and Grenada.[182] In the Gulf War, for example, governmental news blackouts and pooling arrangements served to limit the availability of information precisely when technology was allowing unprecedented access to direct wartime footage in viewers' living rooms. The military's recent complaints about the disruptive character of television cameras covering troop arrivals in Somalia, despite the government's initial invitation to the press, suggests a continuing desire to constrain and circumscribe press access.[183] Without minimizing interests in troop safety and national security, it seems fair to conclude that governmental manipulation of press access to battlefronts involves a neutering of the independent, critical media to the extent that it exists.

I agree, in theory, with the view that a principal value of the press is its ability to facilitate an active democratic exchange among citizens whose intellectual deficiencies have been corrected. However, we cannot afford to forget the role of the press in detecting, revealing, and checking governmental abuses of power. Although I do not take the "wilting perspective" that any regulation of the press will necessarily be "democracy-depriving," I am not convinced that deeply intrusive governmental regulation of journalistic content, geared to the promotion of quality debate, will likely be "democracy-enhancing."[184]

Even though any substantive regulation of the press today would be undertaken by a Democratic administration with whose interventions I might well be comfortable, the immediate past holds a lesson that such regulation might not survive a future conservative Republican government. After all, Bollinger's prescriptive specula-

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181 *See* SCHUDSON, *supra* note 103, at 163 (identifying growth of "adversary culture" in the 1960s).

182 *See, e.g.*, WILLIS, *supra* note 114, at 187 (on limited press access in Panama and Grenada); Matthew J. Jacobs, *Assessing the Constitutionality of Press Restrictions in the Persian Gulf War*, 44 STAN. L. REV. 675, 675-77, 686-92 (1992) and sources cited therein (describing "the menu of Gulf War media regulation" as "broader in scope and magnitude than the restrictions of any previous war"); Kevin P. Kenealey, *The Persian Gulf War and the Press: Is There a Constitutional Right of Access to Military Operations?*, 87 NW. U. L. REV. 287, 287-94, 312-318 (1992) and sources cited therein (describing limitations on press access in Grenada, Gulf War, and Panama); Roger W. Pincus, *Press Access to Military Operations: Grenada and the Need for a New Analytical Framework*, 135 U. PA. L. REV. 813, 835-50 (1987); John B. Engber, Comment, *The Press and the Invasion of Grenada: Does the First Amendment Guarantee the Press A Right of Access to Wartime News?*, 58 TEMP. L.Q. 873, 873-78 (1985) and sources cited therein (exclusion of press from Grenada invasion).

183 Michael R. Gordon, *TV Army on the Beach Took U.S. by Surprise*, N.Y. TIMES, Dec. 10, 1992, at A18.

184 BOLLINGER, *supra* note 1, at 144.

tions take place against the backdrop of the ideologically conservative administrations of Presidents Reagan and Bush, and a pronounced shift to the right in both the judiciary and the administrative apparatus during that period.[185] Indeed, traditional liberal scholarship has been criticized for failing to come to terms with the conservative shift in constitutional law.[186] With the exception of a regulatory renaissance in matters relating to social life—like the attacks on indecency in art and broadcasting—the legacy of these years has been a profoundly deregulatory, market-based approach. The FCC's relaxation last autumn of radio multiple-ownership limitations, already relaxed once during the past decade, is only one recent example of the Commission's largely deregulatory course since the 1980s.[187] If the ultra-right wing succeeds in its goal of taking over the Republican party, then a future Republican administration might make the Reagan-Bush years look moderate by comparison. Accordingly, I would question the wisdom of a broad and media-wide interpretation of Bollinger's proposal to invoke public institutions in improving the press and redefining public discourse. While I lament what often passes as news reporting today, I fear equally the consequences of regulatory quality control so extensive that it could, among other things, distract the press from a critical stance on issues of governmental operations.

III

THE COMPLEXITY OF PRESS FREEDOM IN THE AGE OF POLITICS BY TALK SHOW

Dean Bollinger's *Images of a Free Press* is surely right to focus on the failures of the press and the ambivalence engendered by its practices. The privately owned press in this country is a far cry from an ideal pedagogical tool designed to instill a democratic and critical spirit in the citizenry. Contrary to the old adage about sticks and stones, an autonomous press surely imposes significant personal and social costs. Standard libertarian concerns about the power of government censorship should not automatically blind us to the dangers posed by a highly concentrated private press. Admittedly, a wholly untrammeled press, in conjunction with a disaffected and disengaged public, can pose serious threats to the development of a

185 Admittedly, the current Democratic administration will have the opportunity to fill a large number of vacancies on the federal bench. Henry J. Reske, *Molding the Courts: Clinton May be Able to Surpass Number of Bush Judicial Nominations*, A.B.A. J., Jan. 1993, at 20.

186 *See, e.g.*, Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441 (1990).

187 Joe Flint & Peter Viles, *Hill Squeezes the FCC's Radio Rules*, BROADCASTING, Aug. 10, 1992, at 4.

democratic discourse emphasizing truthful and thoughtful exchanges among informed citizens. Yet, competing interests both in the free press and in quality public debate call for a far more complex inquiry and balancing than Bollinger's exploration ultimately admits.

Bollinger's treatment of privacy is a telling example of the limits to his inquiry into the full complexity of press freedom issues. He points out that the Supreme Court characterizes the harms from invasions of privacy as merely affecting the private individual. In Bollinger's astute reading, this characterization enables the Court artificially to ignore the undesirable social effects of such practices. Thus, Bollinger fears that the Court's analytic method may lead to unduly press-protective decisions.[188] Bollinger approvingly quotes at length from Warren and Brandeis' seminal article[189] calling for the recognition of a cause of action for invasions of privacy in light of the social cost of "idle gossip" undermining the "robustness of thought and delicacy of feelings."[190] However, the mere re-characterization of invasion of privacy as entailing social rather than purely individual costs does not mean that these costs of an autonomous press necessarily weigh equally in the "balance" of the harms of speech. Like everything else discussed by Bollinger, claims regarding the social interest in privacy involve complex and ambignous assessments.

Just as the Court's press cases may be read as insufficiently protective of important social interests in reputation and privacy, intrusive press coverage of "private" matters can also be read as having historically played a socially positive and democratizing role. Newspapers historically served as great equalizers, with many serving to advise immigrants and the urban poor on "tips for urban survival."[191] Warren and Brandeis' *The Right to Privacy* may be criticized as a class-conscious argument to keep such mass appeal newspapers from divulging to the public the details of the lives of the highly privileged.[192] Moreover, too great a distaste for public

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188 BOLLINGER, *supra* note 1, at 25-26.

189 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

190 BOLLINGER, *supra* note 1, at 37.

191 KANISS, *supra* note 4, at 20-21.

192 *Cf.* James H. Barron, *Warren and Brandeis,* The Right to Privacy, *4 Harv. L. Rev. 193 (1890): Demystifying a Landmark Citation*, 13 SUFFOLK U. L. REV. 875, 877 (1979) (contradicting traditional views of the article's origin and the conventional view of the late 19th century Boston press as largely engaged in intrusive "yellow journalism," and characterizing the famous article as an example of Mugwump thought favoring a narrow, patrician definition of news); Randall P. Bezanson, *The Right to Privacy Revisited: Privacy News, and Social Change, 1890-1990*, 80 CAL. L. REV. 1133, 1139 (1992) (discussing the "distinctly class-based character" of late 19th century privacy notions); Robert C. Post,

dissemination of "private" information might well dampen the press' desire and ability to publicize matters like allegations of sexual harassment. For every claim that the press cheapens public discourse by focusing on irrelevant matters such as the private sex lives of public figures, we can also point to discourse-enriching instances, such as the press' exposure of the Tailhook scandal and Anita Hill's sexual harassment charges. The distinction between private and public matters is neither abstract nor self-defining. It depends not only on the kinds of speech we think desirable for "quality" public discourse, but also on the context in which the issue arises.[193]

Thus, although I fully agree with Dean Bollinger that we have "a need for clearer working images" of the press,[194] we must also keep in mind his own admonitions about ignoring the complexities of press freedom. Some of the most interesting complexities, in light of which Bollinger's call for a new free press perspective must be assessed, postdate *Images of a Free Press*. Bollinger wrote this book at the close of one era; we ultimately need to consider it in light of the challenges posed by the next.

Both a fairness doctrine model of the press and a fact-oriented *New York Times* model assume that the press plays the role of an intermediary between events and the public. This notion partially relies on the press as an institution of professionals plying their elite skills of investigation, interpretation, translation, and mediation. If the 1992 campaign is any indication, however, the public discourse that Bollinger seeks to transform may increasingly occur, at least initially, outside the traditional press context that forms the central object of Bollinger's inquiry.

The character of the most recent presidential campaign suggests a change in the role of the traditional press in politics. This campaigu saw the appropriation of television and other new technologies in novel ways designed to minimize the conventional press

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The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell, 103 HARV. L. REV. 603, 671-72 (1990) ("In retrospect, public fascination with the doings of the rich and aristocratic at the turn of the century may have played an integral part in the general movement toward the creation of the welfare state, with its progressive tax and other instruments of wealth redistribution.").

193 Take, for example, the issue of publicizing matters about the sex lives of political candidates. There are, of course, some voters who presumably find this information central to their decisionmaking because of their strong moral or religious convictions. Nevertheless, I suspect that most of the rest of us (including Dean Bollinger) believe that such information is far less important than the candidate's substantive positions on policy matters. Yet, information about "private" lives is differentially disseminated. Thus, I might argue that a heterosexual candidate's extra-marital affairs should only be considered private matters so long as, for example, a homosexual candidate's sexual identity is also perceived as private.

194 BOLLINGER, *supra* note I, at 23.

and to "remove the traditional filter and get our message out."[195] Ross Perot effectively announced his candidacy on the Larry King Show, a television talk program, outlined his program for governance on the Today Show, and sought to persuade voters of his program through several lengthy, paid "infomercials."[196] Bill Clinton appeared on the late night Arsenio Hall Show to talk about his candidacy, answer questions about his marijuana use, and don his sunglasses to play the saxophone.[197] The 1992 campaign may well be remembered as the occasion when radio and television talk shows, call-in shows, video hand-outs, toll-free telephone numbers, electronic town halls and satellite hook-ups came into their own as ways for politicians to speak directly to the American people.[198] The phenomenon of the talk show—constituting what is now the "alternative media"[199]—reflects broader trends such as the decline in the influence of network news shows.[200] While the personalization of candidates and their attempts to evade critical scrutiny by the professional press corps are not new phenomena in electoral politics, they are clearly becoming more common and being perceived as more legitimate than ever before.

In addition, the conventional distinctions between the press and entertainers as disseminators of information and opinion are blurring rapidly. For example, last fall, the television character

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195 Carl M. Cannon & Marc Gunther, *Hopefuls Turn Up on TV Talk Shows*, MIAMI HERALD, June 10, 1992, at A1, A4; *see also* Howard Fineman, *People's Politics*, NEWSWEEK, Apr. 20, 1992, at 30; Walter Goodman, *Ross Perot Tackles TV*, N.Y. TIMES, June 8, 1992, at B2; Charles Krauthammer, *Ross Perot and the Call-in Presidency*, TIME, July 13, 1992, at 84; Timothy J. McNulty & Steve Daley, *Call-in TV Provides Candidates Opportunity to Avoid the Press*, CHI. TRIB., June 14, 1992, at 1-3.

196 *See, e.g.*, Clara Germani, *Larry King—'The Guy' During Political Season*, CHRISTIAN SCI. MONITOR, Oct. 16, 1992, at 3; Elizabeth Kolbert, *Perot's 30-Minute TV Ads Defy the Experts, Again*, N.Y. TIMES, Oct. 27, 1992, at A19; Sharon D. Moshavi, *Elections Enter New Television Age*, BROADCASTING, Nov. 2, 1992, at 12-13.

197 *See, e.g.*, Sharon D. Moshavi, *Is Campaign '92 Bypassing Network News?*, BROADCASTING, June 15, 1992, at 4. Clinton also appeared on MTV to answer questions posed by a group of young people. Larry Black, *Zapping into Direct Democracy*, THE INDEPENDENT, June 27, 1992, at 21.

198 Richard L. Berke, *Democratic Image Makers Churn Out the 'News'*, N.Y. TIMES, July 16, 1992, at A12; Elizabeth Kolbert, *Whistle-Stops á la 1992: Arsenio, Larry and Phil*, N.Y. TIMES, June 5, 1992, at A18 [hereinafter Kolbert, *Whistle-Stops*]; Elizabeth Kolbert, *Technology Brought In To Add Personal Touch*, N.Y. TIMES, June 9, 1992, at A25; Art Levine, *Talk Radio: New Voice of Outrage in the Land*, L.A. TIMES, June 27, 1992, at F1; Joe Urschel, *TV Takes Us to a New Level of Democracy*, USA TODAY, Oct. 13, 1992, at A14.

Since his election, President Clinton has continued his direct appeals to the American people through "electronic town meetings" as well as more formal presidential addresses. *See, e.g.*, R.W. Apple, Jr., *Clinton's Town Meeting; With a Cue from Larry, Phil and Franklin D.*, N.Y. TIMES, Feb. 11, 1993, at A1.

199 Tom Fiedler, *'Nomination by Talk Show' Startles Pundits*, MIAMI HERALD, June 7, 1992, at C5; *see also* Elizabeth Kolbert, *Political Candidates and Call-In Shows: When the People Want to be Heard*, N.Y. TIMES, June 10, 1992, at A20.

200 Kolbert, *Whistle-Stops*, *supra* note 198.

Murphy Brown, a journalist, responded to then-Vice President Dan Quayle's criticism of cultural elites and the erosion of family values through television's asserted glorification of unwed motherhood. This response in turn became the subject of extensive news coverage in real newspapers and television news programs.[201]

The image of democracy by talk show is both attractive and worrisome. On the one hand, the notion that the people can somehow speak directly about their concerns to their governors—allowing them to see the world unshielded by Beltway blinders—suggests a greater possibility for accountability and responsiveness to the public. Recent surveys indicate that a majority of Americans approve of the effect of talk show candidacies on the political process.[202] On the other hand, the hope that public life will be transformed through "electronic politics" raises serious concerns.

The notion of talk show democracy is easily manipulated and, indeed, largely illusory. There is little reason to think that the forms of "direct" interaction promised either by politicians or by talk show hosts actually assure the kind of public representation that the media hype of last fall suggested. The speakers and topics on the talk shows are still selected by an army of media professionals even less insulated from concerns about advertising revenue than the traditional press, with its ethic of separation between editorial and commercial functions. The "public" does not in any fundamental sense establish the agenda. To the extent that one of the classic complaints about the mainstream press is that it does not reflect public opinion or allow access to the public, these new forms of "mediaized" politics do not provide a significant remedy to that problem.

In fact, these new media forms put the staging of politics squarely in the hands of candidates' handlers and producers of entertainment programming. The intermediaries in these contexts are generally not tough and insistent questioners. Certainly, they are not, by and large, trained in traditional journalistic interviewing techniques. Thus, the politicians do not undergo the kind or degree

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201 Arthur Spiegelman, *1992 Presidential Campaign Blurs Line Between Fiction and Fact*, REUTER LIBR. REP., Sept. 23, 1992; Bill Carter, *Back Talk from 'Murphy Brown' to Dan Quayle*, N.Y. TIMES, July 20, 1992, at C14; *cf.* Anthony Chase, *Toward a Legal Theory of Popular Culture*, 1986 WIS. L. REV. 527, 553 (discussing the diminishing distinction between fiction and non-fiction television); Bill McKibben, *TV Or Not TV*, N.Y. TIMES, May 27, 1992, at A21; Melissa Morrison, *Murphy's Law: Fact, Fiction Line is Blurring*, MIAMI HERALD, June 10, 1992, at E2. Indeed, a number of "real" news correspondents appeared on the Murphy Brown program in attendance at Murphy's baby shower. John J. O'Connor, *On Screen Journalism: Show Biz or News?*, N.Y. TIMES, May 14, 1992, at C17.

202 Columbia Journalism Review Press Release, *Americans Say They Learn More About Political Candidates from Questions Posed by Ordinary Citizens vs. Journalists*, Oct. 28, 1992 (reporting findings of CJR/Roper survey, inter alia, that 59% of those surveyed approved of candidate appearances on talk shows).

of scrutiny traditional for review by the mainstream press.[203] At the very least, the format allows the candidates to set forth their positions without having to answer pointed questions. This is not to suggest that the mainstream press is itself sufficiently independent, probing, or educated on all relevant issues. For example, there is little excuse, other than reporters' lack of familiarity with economic issues, for the press' delayed understanding of the savings and loan scandal.[204] Yet, neither the talk show nor the politician-run electronic town meeting can hope to do any better.

Moreover, there is every possibility that the currently proposed forms of electronic democracy would lead to distorted and skewed images of public opinion. At the very least, we could too easily be lulled into thinking that we were really seeing the full spectrum of representative opinion on important issues simply because of the "electronic town meeting" or talk show formats. This is particularly troubling because there has historically been a relatively conservative cast to the talk show form, with radio talk shows often serving as theaters for the expression of disenchantment by the politically right-wing.[205]

We should also think twice about the isolating character of the interactive media that received such popular support in the last campaign. The metaphors of the electronic town meeting and democracy by talk show are both overstated and misleading. Electronic town meetings are opportunities for individuals to call in their opinions to a central depository. With their national focus and technological parameters, electronic town meetings are not contexts in which people can deliberate together about the public issues they collectively identify as important. Talk shows offer participatory opportunities for a small number of pre-screened individuals. The rest of us participate by proxy, listening or watching in the passive pose associated with consumption of broadcast messages in the home.[206]

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203 *See, e.g.*, Germani, *supra* note 196; McNulty & Daley, *supra* note 195. Of course, others disagree, saying that the American people are more likely to ask questions about policy matters they are really concerned about, rather than media scandals like the sexual and drug-taking proclivities of the candidates.

204 *See, e.g.*, Howard Kurtz, *Asleep at the Wheel: How the Press Bungled the Savings and Loan Story*, WASH. POST MAG., Nov. 29, 1992, at W10.

205 *See, e.g.*, Mike Hoyt, *Talk Radio Turning Up the Volume*, COLUM. J. REV., Nov.-Dec. 1992, at 45, 48; Ralph Z. Hallow, *As America Listens, Talk Show Dials Turn Right*, WASH. TIMES, July 9, 1991, at A3; *cf.* Peter Viles, *Talk Radio Riding High*, BROADCASTING, June 15, 1992, at 24.

206 Electronic democracy raises large questions about representative government generally, that transcend, but also implicate, press issues. Even if the new media can serve as transparent vehicles for the reflection of public opinion in some kind of enormous electronic town meeting, the elimination of mediators and the immediacy of the interaction are problematic. It is uncertain that electronic town meetings could distinguish will from whim, ensuring deliberative and thoughtful participation rather than re-

What, then, is to be the role of the traditional press, whether print or broadcast? Bollinger's call for an investigation of press performance in today's public debate is timely indeed. Perhaps changed circumstances will create incentives for the mainstream press to take on more critical and analytical tasks, subjecting talk show democracy to the acid test. After all, the traditional press did report on the changes in its own role during the 1992 Presidential campaign. And the "CBS Evening News" did attempt to cut back on politics by "sound bite."[207] As the manipulability of unmediated broadcast politics becomes clearer, perhaps a press with an enhanced independent spirit and anti-authoritarian bent will develop and serve as a more effective counterweight. Or, perhaps, the profusion of media forms, the fragmentation of audiences, and the blurring of lines between fact and fiction, and news and entertainment, will ultimately lead to an even less critical traditional press. Both working journalists and media observers have already criticized campaign coverage by the mainstream press on the grounds that it has been bored, irrelevant, and trivialized.[208] Autonomy is, as Bollinger perceptively notes, "an extension of trust."[209]

How should we seek to "mediat[e] the deficiencies of a free press in the context of a free market system"?[210] Bollinger tells us that we need to decide "whether the virtues of freedom of the press have become so internalized in our culture, by government and by the society at large, that society can afford to move, even if only very gradually, in the direction of new forms of self-correction."[211] I agree with Dean Bollinger that this "will not be an easy question to answer."[212] I second his argument that the extent and nature of the relationship between law and the American press "deserves further study;"[213] so do the consequences of deregnlation. I also applaud

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flexive and uninformed responses to complex issues. *See* Philip Elmer-Dewitt, *Dial D for Democracy*, TIME, June 8, 1992, at 44 (discussing outbreaks of mass paranoia and Anti-Semitism on existing interactive video services). Indeed, it is unclear whether the purpose of such direct media democracy would be simply to provide access to the broadcast forum so that each person could express her opinion, or whether such interactive video contexts could lead to the formation of some kind of true consensus.

207 It did so by instituting a policy that presidential candidates in political stories be granted at least 30 seconds to talk. Richard L. Berke, *Ever-Shrinking Sound Bites Prompt Edict at CBS*, N.Y. TIMES, July 3, 1992, at A14. Admittedly, the network "retreat[ed]" to 20 seconds thereafter. D.D. Guttenplan, *Covering a Runaway Campaign*, COLUM. J. REV., Nov.-Dec. 1992, at 23, 25.

208 Guttenplan, *supra* note 207, at 24; Times Mirror Center for The People and the Press, *The People, The Press & Politics Campaign '92: The Campaign and the Press at Halftime*, COLUM. J. REV. Supp., July-Aug. 1992 (reporting results of Times Mirror Center survey).

209 BOLLINGER, *supra* note 1, at 57.

210 *Id.* at 138.

211 *Id.* at 142-43.

212 *Id.* at 143.

213 *Id.* at 107.

Dean Bollinger's call for "open debate" about how far we should move toward government involvement to assure quality public discourse.[214] In that open debate, however, we should not forget that public support for vigorous press freedom is "forever fragile,"[215] that there is no unambiguous definition of "quality" when it comes to public debate on controversial issues, and that now, more than ever, we need a press prepared to play the "noble, even heroic" role inspired by the Supreme Court's First Amendment rhetoric.[216]

214 *Id.* at 23.
215 *Id.* at 48.
216 *Id.* at 44.