

2007

# In Search of Regulatory Equilibrium

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## Recommended Citation

Lili Levi, *In Search of Regulatory Equilibrium*, 35 *Hofstra L. Rev.* 1321 (2007).

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# IN SEARCH OF REGULATORY EQUILIBRIUM

*Lili Levi\**

## I. INTRODUCTION

Suggestions for how to reform the media obviously depend on what we think most needs reforming. But they also depend on our views of the most appropriate and constitutionally viable regulatory models for achieving reform. There is no dearth of analysis of modern media's failings.<sup>1</sup> Such media criticism is joined by a vocal and apparently burgeoning grassroots movement to improve the media landscape.<sup>2</sup> Yet there is also a school of thought that rejects regulation as a workable solution to media's identified failings.<sup>3</sup> And, with the decline of what was once an almost visceral belief in broadcast exceptionalism, there is now an increasing tendency among lower federal courts to see electronic media owners as First Amendment rights-holders, indistinguishable

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\* Professor of Law, University of Miami School of Law. I am very grateful to Ed Baker, Mary Coombs, Ellen Goodman, Tom Krattenmaker, Anne Louise Oates, Steve Schnably, Ralph Shalom, and Sylvia Shapiro for helpful discussions and comments. I also thank Eun Chang, Bill Reynolds and Kathleen Valbrun for excellent research assistance. All remaining errors are my own.

1. For criticisms by journalists, see, for example, LEONARD DOWNIE JR. & ROBERT G. KAISER, *THE NEWS ABOUT THE NEWS: AMERICAN JOURNALISM IN PERIL* (2002); JAMES FALLOWS, *BREAKING THE NEWS: HOW THE MEDIA UNDERMINE AMERICAN DEMOCRACY* (1996); BILL KOVACH & TOM ROSENSTIEL, *THE ELEMENTS OF JOURNALISM: WHAT NEWSPEOPLE SHOULD KNOW AND THE PUBLIC SHOULD EXPECT* (2001).

2. For a description of the movement in the context of the battle over the FCC's attempt to roll back some of its media ownership rules in 2003, see, for example, *THE FUTURE OF MEDIA: RESISTANCE AND REFORM IN THE 21ST CENTURY* (Robert McChesney, Russell Newman & Ben Scott eds., 2005) [hereinafter *THE FUTURE OF MEDIA*].

3. See, e.g., THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., *REGULATING BROADCAST PROGRAMMING* (1994); LUCAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* (1987); Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 *GEO. L.J.* 245 (2003).

from their print counterparts.<sup>4</sup> Thus, suggestions for media reform today are made against a backdrop of fundamental conflict—of disagreements both as to normative goals and empirical assessments of regulatory effectiveness. With this Article, I hope to stake out a middle ground in today's media debate, devising a workable program to improve media performance.

My focus will be on the need to induce the modern electronic media to act as the press: to engage in serious newsgathering and provide ambitious, analytically complex, contextually grounded, high quality journalism in its news and public affairs programming. A media so focused can serve two salutary social goals. First, it may function as a countervailing "fourth estate," acting as a check on government and other powerful institutions.<sup>5</sup> Indeed, it might deter some wrongdoing merely by appearing to be a powerful watchdog. Second, it may afford individuals a rich understanding of political and social life by providing information necessary to participate in the public sphere and in culture-generation.<sup>6</sup> The media today face significant economic, social, and governmental pressures that undermine their ability to serve either of those goals. It is important to seek reforms that would counterweigh those pressures.

But excellent journalism does not necessarily guarantee that "everything worth saying shall be said."<sup>7</sup> Thus, a flexible access right for advocacy advertising might be useful to open the door for viewpoints that might not have had a full airing through the professional journalistic efforts of the broadcaster. The very fact that mainstream broadcasters

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4. For a nuanced discussion of this development, see C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS* (2007) [hereinafter BAKER, *MEDIA CONCENTRATION*].

5. For the seminal statement of this idea, see Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527.

6. See, e.g., *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978) (recognizing the role the press plays in "informing and educating the public, offering criticism, and providing a forum for discussion and debate"); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) (opining that the First Amendment helps "preserve an untrammelled press as a vital source of public information.") For a rich description of the different roles of the media in different conceptions of democracy, see C. Edwin Baker, *The Media That Citizens Need*, 147 U. PA. L. REV. 317 (1998); see also Lili Levi, *Reporting the Official Truth: Reviving the FCC's News Distortion Policy*, 78 WASH. U. L.Q. 1005, 1121-29 (2000) (discussing different press traditions). For a First Amendment model grounded on promoting democratic culture, see Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004).

7. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 26 (1965).

have rejected third-party requests to purchase airtime for controversial advocacy advertising solely on the grounds of concerns about advertiser or viewer offense is itself evidence that such access is needed.

In addition to identifying the most urgent media problems, a media reform proposal must at least minimally suggest how to achieve its ends. The current climate is generally inhospitable to traditional command-and-control regulation. In areas other than media and communications, scholarship has focused on alternatives to command-and-control regulatory regimes.<sup>8</sup> At the same time, the opposite extreme—faith in self-regulation—has also been put to critique.<sup>9</sup>

In summary form, my approach seeks to strengthen journalistic standards and professionalism against commercial pressures; to keep government out of journalistic autonomy and editorial decisions in a direct fashion while providing incentives for certain kinds of journalism; to enhance the availability of diverse discourses across all media; and to seek ways to empower the audience. At the same time, I argue for modesty and restraint. I take to heart Dean Thomas Krattenmaker and Professor Lucas Powe's observation that "it is the one mass medium from which no demands are too great. Therefore, of necessity, it must always fall short."<sup>10</sup> There is much to be said for an incrementalist and intentionally flexible approach that depends for its continuation on close study of how the approach is actually working.

Accordingly, this Article proposes a two-pronged, multi-factorial approach to electronic media reform in the hope of promoting the electronic press's roles as educator and watchdog. The first prong is directed to the information market as a whole and concerns itself with ways of promoting media pluralism. The notion behind this aspect is to create an overall balance in which mainstream commercial media, non-profit public media, and alternative media can flourish and enrich one another and compensate for one another's weaknesses.

The second prong of the reform proposal is internal to the context of broadcasting. The Article suggests experimenting with the following:

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8. See, e.g., Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 547-49 (2000); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 371-404 (2004); Cass R. Sunstein, *A New Progressivism*, 17 STAN. L. & POL'Y REV. 197, 199-200 (2006).

9. See, e.g., Angela J. Campbell, *Self-regulation and the Media*, 51 FED. COMM. L.J. 711, 717-19, 726, 756-57 (1999).

10. KRATTENMAKER & POWE, *supra* note 3, at 313.

1) structural regulations designed to promote journalistic values; 2) a requirement that broadcasters spend a certain percentage of their gross advertising revenues on news and public affairs production and programming; 3) different options for constructing a requirement that broadcasters devote a percentage of their advertising time to advocacy advertising, for which they would be allowed to be paid a premium over their ordinary commercial rates; and 4) audience empowerment, including disclosure-oriented requirements designed to foster audience activism and strategies to engage an audience whose attention is claimed by an unprecedented abundance of content.

## II. PRESSURES ON ELECTRONIC MEDIA JOURNALISM

What are the factors that suggest that the electronic media is hampered in playing its watchdog and/or educator roles? Much has been persuasively written about the types of pressures that afflict the commercial media in connection with its approach to news and public affairs.<sup>11</sup> Whatever the explanation, the fundamental problem appears to be an increasing focus on the bottom line, for both newspapers and electronic media. This, in turn, has disastrous results on quality journalism—a classic public good.<sup>12</sup>

Several important changes in the nature of electronic journalism in particular are likely to affect professional journalistic norms. First is the fact that electronic news organizations have ceased seeing their news divisions as principally designed to give the company prestige, regardless of their degree of profitability.<sup>13</sup> They are now expected to

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11. For discussions that focus on media consolidation and corporate/public ownership, see, for example, BEN H. BAGDIKIAN, *THE NEW MEDIA MONOPOLY* 1-21 (2004); ROBERT W. MCCHESENEY, *THE PROBLEM OF THE MEDIA: U.S. COMMUNICATIONS POLITICS IN THE TWENTY-FIRST CENTURY* 57-97 (2004) [hereinafter MCCHESENEY, *PROBLEM OF THE MEDIA*]; ROBERT W. MCCHESENEY, *RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES* 15-33 (1999); C. Edwin Baker, *Commentary, Media Structure, Ownership Policy, and the First Amendment*, 78 S. CAL. L. REV. 733, 734-39 (2005) [hereinafter Baker, *Media Structure*]; C. Edwin Baker, *Media Concentration: Giving up on Democracy*, 54 FLA. L. REV. 839, 899-915 (2002) [hereinafter Baker, *Media Concentration*]. See KOVACH & ROSENSTIEL, *supra* note 1, at 29-33; David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 439-41 (2002).

12. See, e.g., C. EDWIN BAKER, *MEDIA, MARKETS, AND DEMOCRACY* 8-10, 20-37 (2004).

13. One of the things that I noticed when I worked in the Legal Department at CBS in the early 1980s was a generalized sense that the News Division was the network's crown jewel. Everyone who worked for the company basked in the atmosphere of journalistic excellence (whether or not that perception was accurate). It was understood, of course, that the company was a commercial entity that had to make money, but it was also understood that being the guardians of the public interest made the company better and more significant in the social order than other

make maximal profits. Most importantly, it appears that the networks now require *each* of their news shows to be profitable individually, rather than requiring profitability from the news division as a whole.<sup>14</sup> The perception that news divisions cannot subsidize critically acclaimed news programming will predictably lead to increasing underproduction of the more resource-intensive, critically admired but less profitable versions of news-type programming.

This focus on bottom line profitability has led to significant reductions in the resources devoted to news and public affairs programming. The number of television network overseas news bureaus has been reduced by half since the 1980s.<sup>15</sup> There have been large staffing cutbacks at all the network news divisions.<sup>16</sup> This in turn has led to increased workload for the remaining reporters.<sup>17</sup>

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commercial businesses. We were all doing something important. We had public service as a goal. We had a reputation to uphold. This sense began to change perceptibly with the threat of hostile takeovers in the mid-1980s.

Critics of all stripes might smile at the CBS employees' (and my) naïveté in the pre-Tisch days. But the sentiment—and how it changed—are nevertheless instructive, both as to the company's mythology about itself and as to how that mythology fit into the image of the regulated media as a whole. It stands to reason that ownership changes as well as the vagaries of increasing competition from other media challenged the network's self-perception as "special" because of its contributions to the public interest, but I would wager that changes in the regulatory rhetoric also played some role in the change. Once everyone heard from Chairman Mark S. Fowler of the Reagan FCC that television was nothing more than a "toaster with pictures," there was little "special" left about television operations. Bernard D. Nossiter, *Licenses to Coin Money: The F.C.C.'s Big Giveaway Show*, 241 NATION 402, 402 (1985) (quoting Fowler's comment); see also Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 209-10, 242 (1982) (expanding on Fowler's view of broadcasters as marketplace participants rather than public trustees). The rhetoric of property that infused much of the anti-FCC criticisms of the 1980s doubtless had an effect on mainstream broadcasters. They were no longer the businesses chosen to "do well and do good," reputationally heads above other commercial enterprises because of their social role. Once that "unique" role was challenged, and once other economic pressures were brought to bear, the seeds were sown for a revision of broadcasters' self-image.

14. Evidence for this proposition is anecdotal but persuasive. For example, when ABC decided to reconfigure *Nightline*, ABC management stated that it wanted the program to appeal to younger audiences and would consider replacing it with an entertainment program if it could not successfully change its style. PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2006: AN ANNUAL REPORT ON AMERICAN JOURNALISM (2006), [http://stateofthemedias.org/2006/narrative\\_networktv\\_intro.asp?cat=1&media=5](http://stateofthemedias.org/2006/narrative_networktv_intro.asp?cat=1&media=5) ("Network TV" chapter, "Economics" section) [hereinafter STATE OF THE NEWS]. The implicit argument is that "every program in network TV is now viewed as its own profit center. Whatever can maximize revenues in a given time slot is the goal." *Id.*

15. *Id.* ("Network TV" chapter, "News Investment" section); see also Anderson, *supra* note 11, at 477.

16. One study concludes that "[t]he long-term picture for staffing and workload in network news has been grim." STATE OF THE NEWS ("Network TV" chapter, "Intro" section), *supra* note 14

Resource constrictions appear to have had significant impacts on news programming on commercial media.<sup>18</sup> The current economics of the network news appear to push editorial personnel to look for the easiest stories when selecting among various possibilities. Overworked journalists will likely be satisfied by relying on government news releases and the usual coterie of sources (predominantly governmental), and will have less time and ability to indulge their professional desires for more fully fleshed out accounts. Moreover, investigative journalism and long-form documentaries are the most resource-intensive programming and will predictably be the first sacrifice of profit-seeking media entities. The consolidated media makes it difficult for the electronic press to do its job as watchdog. At a minimum, the kind of investigative journalism that a watchdog profile requires is both labor- and cost-intensive. The one reality of consolidated media ownership, however, is a focus on cost-cutting and a reduction of resources devoted to newsgathering functions. Even the prime-time news magazines, a profit-making aspect of each of the three networks' news divisions since the success of the original *60 Minutes*, have been reduced and replaced by cheaper-to-produce reality shows.<sup>19</sup> There has also been a reduction in the coverage of politics on television. Until recently, all the networks habitually aired at least important political debates in major races.<sup>20</sup> Purportedly because of the availability of such coverage in other fora,

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(noting that the number of reporters appearing on network news in 2002 had declined thirty-five percent from its peak in 1985).

Some would argue that the staffing cutbacks are the result of more efficient newsgathering and the availability of online information. *Id.* However, that does not account for the reduction in news programming evident in broadcasting. Moreover, coverage of news and public issues needs reporters, researchers, and editors, rather than simply technology and online information resources. At a minimum, there can be debate about what the reduced numbers mean. *See id.*

17. *See id.*

18. Recent polls suggest that significant majorities of journalists believe that economic pressures are affecting news coverage. *See, e.g.*, PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, PRESS GOING TOO EASY ON BUSH: BOTTOM-LINE PRESSURES NOW HURTING COVERAGE, SAY JOURNALISTS 1-2 (2006), <http://www.stateofthenewsmedia.org/2006/prc.pdf> [hereinafter BOTTOM-LINE PRESSURES]; *see also* Bill Kovach, Tom Rosenstiel & Amy Mitchell, *A Crisis of Confidence: A Commentary on the Findings*, in BOTTOM-LINE PRESSURES, *supra*, at 27, 27-28.

19. STATE OF THE NEWS, *supra* note 14 ("Network TV" chapter, "Audience" section).

20. *See, e.g.*, Seth Grossman, Note, *Creating Competitive and Informative Campaigns: A Comprehensive Approach to "Free Air Time" for Political Candidates*, 22 YALE L. & POL'Y REV. 351, 359 (2004). *Cf.* Thomas E. Patterson, Is There a Future for On-the-Air Televised Conventions? 1, 3 (presented July 30, 2000) (unpublished panel discussion background paper), [http://www.ksg.harvard.edu/presspol/vanishvoter/VV2000/Papers/vv\\_conv\\_paper.pdf](http://www.ksg.harvard.edu/presspol/vanishvoter/VV2000/Papers/vv_conv_paper.pdf) (noting changes in network coverage of political conventions as well).

some broadcasters aired entertainment programming instead.<sup>21</sup> Reports indicate that there has been a significant decrease in public affairs programming.<sup>22</sup> Finally, the networks have quietly reduced the amount of news in each newscast, so that a thirty-minute newscast is now close to eighteen minutes of non-advertising content.<sup>23</sup>

In addition to lessened quantities of resources and programming devoted to news and public affairs, the current media's structure and profit maximization goals appear to have a negative effect on journalistic values and the content of the material aired. The focus on profitability creates incentives to attract advertisers by airing programming geared to the audience demographics most desired by advertisers, and not to alienate advertisers by overly controversial or less popular programming choices. In addition, conglomerate ownership—and especially the ownership of media by non-media firms—imposes pressures on the media divisions to avoid programming dangerous to their parent companies or inconsistent with the parent companies' more general business plans or government negotiations.

In a more micro-level effect on editorial choices, conglomerate ownership of broadcast media appears to lead to more sponsored segments, cross-promotions and product tie-ins, particularly in morning news programs.<sup>24</sup> Current news and public affairs programming also displays a marked distancing from notions of "objective," factual reporting. The blurring of news and entertainment has led to the development of news-type programming designed to provide extreme viewpoints rather than the bland neutrality and balance often associated with the traditional "objective" press.<sup>25</sup> This is consistent with "horse-race" coverage of electoral contests as well.<sup>26</sup> There has also been a

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21. Patterson, *supra* note 20, at 3.

22. Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. J.L. SCI. & TECH. 1, 33-37 (2004).

23. STATE OF THE NEWS, *supra* note 14 ("Network TV" chapter, "News Investment" section).

24. *Id.* ("Network TV" chapter, "Audience" section).

25. PROJECT FOR EXCELLENCE IN JOURNALISM, CHANGING DEFINITIONS OF NEWS 3, 5-6 (1998), available at <http://www.journalism.org/files/ChangingDefinitionsOfNews.pdf>; see also Catherine Crier, *Journalism and the Law*, 56 SYRACUSE L. REV. 387, 389 (2006) (describing such television news phenomena from a journalist's perspective); Lili Levi, *A New Model for Media Criticism: Lessons from the Schiavo Coverage*, 61 U. MIAMI L. REV. 665, 694-96 (2007) (describing development of "news as catfight" programming and what one media analyst has dubbed the "Argument Culture" in modern electronic media) [hereinafter Levi, *New Model*].

26. Much has been written about the effect of horse race rather than issue journalism in electoral coverage. See, e.g., ROBERT M. ENTMAN, *DEMOCRACY WITHOUT CITIZENS: MEDIA AND*



significant rise in the number of stories in which reporters share their personal views of an event.<sup>27</sup> A recent economic analysis of news in the electronic media suggests that the economics of media will lead to increased soft news, as opposed to hard news.<sup>28</sup> A concern with profit can also dull concerns about the impact of particular kinds of editorial choices. For example, the news divisions in electronic media often decide what to cover on the basis of what they think will most titillate the public, and this assertedly consumer-responsive production of news may replicate important cognitive biases that are socially and culturally undesirable.<sup>29</sup>

All of these developments have been taking place against a backdrop of governmental attempts to intimidate the press—attempts reminiscent of the glory days of the Nixon administration.<sup>30</sup> It is particularly under these circumstances that it is most important to promote a strong press that is ready and able to criticize government, reveal abuse, and challenge attempts to suppress reporting. But it is also under such circumstances that a press most interested in increasing its share prices and negotiating with government to receive benefits will

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THE DECAY OF AMERICAN POLITICS 21 (1989) (“[S]cholars find that coverage of presidential campaigns generally emphasizes the horse race (who’s gaining, who’s fading, and why) much more than the policy issues or records of the candidates.”); see also Steven Shiffrin, *The Politics of the Mass Media and the Free Speech Principle*, 69 IND. L.J. 689, 701-02 (1994) (explaining attraction of horse race coverage).

27. See STATE OF THE NEWS, *supra* note 14 (“Cable TV” chapter, “Content Analysis” section).

28. See JAMES T. HAMILTON, ALL THE NEWS THAT’S FIT TO SELL: HOW THE MARKET TRANSFORMS INFORMATION INTO NEWS 160-89 (2004).

29. Jerry Kang has argued, for example, that the focus of local news on crime is likely to implicate cognitive biases such as underlying racism. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1495 (2005); see also Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 673-96 (2006) (describing variety of cognitive biases).

30. See, e.g., Anderson, *supra* note 11, at 523 (“Because of the conglomeration and interconnectedness of today’s media, . . . opportunities [to pressure the press by threatening license non-renewals] are far more numerous now than they were thirty years ago, and the replacement of the Katherine Grahams of the media world with managers who come from the culture of finance rather than journalism raises questions about the will of the media to resist such sticks and carrots.”); Levi, *New Model*, *supra* note 25, at 722-23; Adam Liptak, *In Leak Cases, New Pressure on Journalists*, N.Y. TIMES, Apr. 30, 2006, at A1; Michael Massing, *The End of News?*, N.Y. REV. BOOKS, Dec. 1, 2005, at 23, 23; David Remnick, Comment, *Nattering Nabobs*, NEW YORKER, July 10, 2006, available at [http://www.newyorker.com/archive/2006/07/10/060710ta\\_talk\\_remnick](http://www.newyorker.com/archive/2006/07/10/060710ta_talk_remnick) (“More than any other White House in history, Bush’s has tried to starve, mock, weaken, bypass, devalue, intimidate, and deceive the press, using tactics far more toxic than any prose devised in the name of Spiro Agnew.”).

tend timorously to produce entertainment rather than serve its watchdog role.

In addition to these economic factors, it is possible that the existence of ideology will be magnified in the smaller universe of a consolidated media marketplace.<sup>31</sup> Also, the owners of corporate conglomerates with many interests other than their news functions are also likely to be more easily at the mercy of governmental attempts to intimidate. This can be because government can be more efficient at intimidation if it only has a few giants to pressure.<sup>32</sup> It can also be because the multiple points of intersection between the media conglomerates and the government are vulnerabilities exploitable by government to achieve censorious effects. Killing or delaying a news story might appear to be a small price to pay for significant regulatory benefits available to other parts of the enterprise, for example.

The electronic media as currently constituted will not give the people as a whole what they want in terms of news and public affairs programming.<sup>33</sup> Advertising skews toward money, youth, and non-

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31. Mainstream media have been criticized as biased from both the right and the left. See Levi, *New Model*, *supra* note 25. The right describes mainstream media as displaying clear liberal bias. See *id.* at 667-68. The left characterizes the “liberal media bias” argument as a clever ploy by the right to delegitimize media criticism of the Republican governance project. See *id.* at 670-71, 684-85. Recently, researchers purported to demonstrate that media are not in fact politically biased as a result of their publishers’ or reporters’ biases, but that they instead reflect the political bent of their audiences. Austan Goolsbee, *Lean Left? Lean Right? News Media May Take Their Cues from Customers*, N.Y. TIMES, Dec. 7, 2006, at C3; Matthew Gentzkow & Jesse M. Shapiro, *What Drives Media Slant? Evidence From U.S. Daily Newspapers* 4-5, (Nat’l Bureau of Econ. Research, Working Paper No. 12707, 2006), available at [http://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID947640\\_code274383.pdf?abstractid=947640&mirid=1](http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID947640_code274383.pdf?abstractid=947640&mirid=1). Analysis of this research is beyond the scope of this Article.

32. See, e.g., Baker, *Media Concentration*, *supra* note 11, at 908.

33. See *id.* at 875-76; BAKER, MEDIA CONCENTRATION, *supra* note 4, at 28-39; Ellen P. Goodman, *Media Policy out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1389, 1422-23 (2004) (calling this a “narrow market failure[]” and arguing that while “digital technologies will improve market responsiveness to some degree, . . . [they will do so] less than some have supposed”). Some challenge the notion that media should “give people what they want,” seeing this analog to economic market exchange as overly commodifying expression and information. For a discussion of the commodification implicitly accepted by market economists addressing media regulation, see Baker, *Media Structure*, *supra* note 11, at 742-47. This Article focuses instead on a smaller point: the observation that the current mass media environment will predictably lead to market failures with respect to the provision of the informational programming that people would want and from which they would benefit. For arguments that the structure of the media tilts against the left, see, for example, Shiffrin, *supra* note 26. For arguments that the Supreme Court’s press decisions create disincentives for serious journalism, see, for example, William P. Marshall & Susan Gilles, *The Supreme Court, the First Amendment, and Bad Journalism*, 1994 SUP. CT. REV. 169.

controversial programming. Programming is not designed to respond to the desires of “people” as an undifferentiated general mass. Rather, advertisers look for programming that is supposed to please certain audiences. People naturally want different things at different times, and the current market is not sufficiently well calibrated to reflect that. It is old hat that broadcast viewers cannot register the intensity of their desires and what they want obviously is influenced by the choices they have available. However, it may also be influenced by predictable cognitive errors. My suggestion is to think of what people want in a more cohesive, complex, and evolving way.

### III. THE MACRO LEVEL: MEDIA PLURALISM

The question, then, is whether there is any way, through regulation or the market, to counter-balance these developments and their effects on the news and information available to the public. If the market will not provide a rich variety of news and public affairs programming, what reforms can nudge it in the right direction? Methodologically, I am inclined to avoid single-factor resolutions to difficult social problems. I am interested in exploring the possibility of multi-factorial approaches to regulation. This is because every regulatory solution has its weaknesses and its strengths. If we calibrate our multi-factorial approach to the media, we can look for systems that will both counteract one another’s weaknesses and enhance one another’s strengths.<sup>34</sup>

Devotees of market solutions mostly argue that attempting to correct media failures by regulation will fail and exact worse costs than would simple market deference.<sup>35</sup> Why is such failure to be expected? Deregulationists argue that the history of Federal Communications Commission (the “FCC” or the “Commission”) intervention in the electronic media shows several things: that the regulations chosen by the FCC have been ineffective or have led to results inconsistent with their

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34. For others who argue for media pluralism, see, for example, BAKER, *MEDIA CONCENTRATION*, *supra* note 4, at 198 (citing James Curran, *Rethinking Media and Democracy*, in *MASS MEDIA AND SOCIETY* 120-54 (3d ed. 2000)).

35. See, e.g., KRATTENMAKER & POWE, *supra* note 3, at 277-96; Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905, 912 (1997); Christopher S. Yoo, *Architectural Censorship and the FCC*, 78 S. CAL. L. REV. 669, 683 n.45. Even some who do not think regulation will do much harm conclude that “it won’t do much good either.” Glen O. Robinson, Essay, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 907 (1998).

goals;<sup>36</sup> that the Commission has been captured by the powerful broadcast industry and adopted rules protective of their principal “clients;”<sup>37</sup> and that the Commission’s interventions have had far more significant costs in First Amendment terms than the benefits that justified them.<sup>38</sup>

But I do not believe that the only plausible response to the failures of past regulation is necessarily to throw up our hands entirely and move to a totally privatized, property regime for broadcasting. The results of FCC deregulation since the 1980s have not led to the richly contentious marketplace of ideas that the “unregulated” market was supposed to promote. Instead, what has been striking has been the reduction of news and public affairs programming on the networks, the rise of a trio of twenty-four-hour news channels principally defined by the journalistic thinness of much of their product, and the development on radio of incendiary right-wing talk shows. The next Part will address interventions we might address at the micro-level to enhance journalism in broadcasting, assuming that we do not move to a wholly privatized regime. Here, however, I want to take seriously the deregulationists’ suggestions that we look at the communications order as a whole to enhance the availability of a rich mix of news and public affairs programming in the overall information marketplace.

One macro level approach is to increase support for serious alternatives to the commercial media so that the various alternatives will serve as checks and balances for one another in the media market as a whole. What does this mean operationally? First, it means a renewed commitment to and increase in funding for public broadcasting.<sup>39</sup>

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36. See, e.g., KRATTENMAKER & POWE, *supra* note 3, at 244.

37. See, e.g., Robinson, *supra* note 35, at 931.

38. See, e.g., *infra* note 58 (describing such criticisms in connection with the fairness doctrine).

39. Henry Geller, for example, has focused on the importance of a well-funded and well-designed public broadcasting system, and has argued that it should be funded by a modest spectrum usage fee. Henry Geller, *Promoting the Public Interest in the Digital Era*, 55 FED. COMM. L.J. 515, 518 (2003). For a summary of current funding proposals, see Free Press, Put the Public Back in Public Broadcasting, <http://www.freepress.net/publicbroadcasting/=policy> (last visited Apr. 22, 2007). For an overview of the U.S. public broadcasting system, including funding, for a lay audience, see Free Press, Put the Public Back in Broadcasting: Public Broadcasting 101, <http://www.freepress.net/publicbroadcasting/=101> (last visited Apr. 22, 2007) [hereinafter Free Press, Public Broadcasting 101]. For the current state of funding for Public Broadcasting, see GLENN J. MCLOUGHLIN, CONG. RESEARCH SERV., THE CORPORATION FOR PUBLIC BROADCASTING: FEDERAL FUNDING FACTS AND STATUS 3-5 (2005), <http://fpc.state.gov/documents/organization/48836.pdf>.

Currently, federal funding for public broadcasting (which is less than fifteen percent of all public television and radio funding<sup>40</sup>) is under attack.<sup>41</sup> Public broadcasting is responsible for excellent programming, including the renowned *NewsHour with Jim Lehrer*.<sup>42</sup> National Public Radio's news programming is critically acclaimed and boasts an audience that has grown significantly since the 1990s.<sup>43</sup> Although resolving the question of how best to enhance public broadcasting funding while maintaining public broadcasting independence is beyond the scope of this Article, we would benefit from a full-fledged study of the issue.

While enhancement of public broadcasting is central, it should not completely overshadow the desirability of promoting a broad palette of information sources. Thus, we should promote the FCC's allocation of low power services at the community level, enhance free or cheap municipal provision of Wi-Fi (wireless Internet), and promote the development of a broadcast commons in which the public can freely participate with the use of interference-reducing technology.<sup>44</sup> This is not simply to promote enhancements to delivery as such. Rather, it is a suggestion that we promote delivery systems whose characteristics are likely to lead to the creation of new and diverse content. Studies indicate that recently, there has been an efflorescence of non-profit "alternative" media, such as Free Speech TV and Indymedia.<sup>45</sup> New technologies are

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40. MCLOUGHLIN, *supra* note 39, at 1.

41. See Free Press, Put the Public Back in Broadcasting: Attack on Federal Funding, <http://www.freepress.net/publicbroadcasting/=funding> (last visited Apr. 22, 2007). The Bush Administration has apparently planned further drastic cuts to public broadcasting. See *id.* Previous massive cuts were averted in 2005 due solely to the strength of the public outcry and the PBS lobbying campaign for adequate funding. Many sources contrast the United States's expenditure of less than \$2 per viewer for public broadcasting with the more substantial expenditures of other developed countries. See, e.g., Free Press, Public Broadcasting 101, *supra* note 38.

42. STATE OF THE NEWS, *supra* note 14 ("Network TV" chapter, "Content Analysis" section); *id.* ("Network TV" chapter, hyperlink; "Audience" section).

43. THE PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, MATURING INTERNET NEWS AUDIENCE—BROADER THAN DEEP: ONLINE PAPERS MODESTLY BOOST NEWSPAPER READERSHIP 14 (2006), <http://people-press.org/reports/pdf/282.pdf> [hereinafter MATURING INTERNET NEWS AUDIENCE] (reporting that in 2006, seventeen percent of Americans said they listened regularly to NPR, up from nine percent in 1994).

44. Cf. Philip J. Weiser & Dale N. Hatfield, *Policing the Spectrum Commons*, 74 FORDHAM L. REV. 663 (2005) (suggesting the need for a theory of regulation for unlicensed commons uses).

45. See, e.g., Free Speech TV, <http://www.freespeech.org/fscm2/genx.php?name=home> (last visited Apr. 22, 2007); Independent Media Center, <http://www.indymedia.org/en/index.shtml> (last visited Apr. 22, 2007); see also Jessica Clark & Tracy Van Slyke, Welcome to the Media Revolution, IN THESE TIMES, July 2006, at 20, 20-21; Center for Digital Democracy, Beyond Broadcast: Expanding Public Media in the Digital Age, <http://www.democraticmedia.org/>

particularly helpful in enabling the development of such alternative media. Subsidies of both new content and technologies likely to produce it could enhance robustness in independent alternatives both to mainstream commercial media and public broadcasting.

How do I think that media pluralism might provide a checks-and-balances structure beneficial to society? The principal notion is that each type of media has its own strengths and weaknesses. If we can enhance their strengths and if they can counter-balance or compensate for one another's weaknesses, we can anticipate at least an incremental improvement in the overall communications picture.

What are the strengths of the various media? I will necessarily draw with a very broad brush here. The strengths of private, commercial media—particularly the television networks—reside in their mass reach, their ability to spend advertising revenue for high production values, their formal independence from government, and the ability that their size and self-image sometimes gives them to resist governmental pressure. Network broadcasters have provided news and public affairs programming of high quality. Because of its nationwide reach, such programming is likely to have had at least some effect on public policy. Another of the significant benefits of mass media is that it provides common referents and understandings shared by large segments of the population. Even cable has significant strengths: Because of its structure, cable—more than over-the-air broadcasting—has developed important and useful programming for niche audiences that would otherwise be underserved by network television. Cable has also led to the development of all-news channels quite popular with audiences, whatever one thinks of their quality. In addition, as a result of regulation, cable provides public access and leased access channels. Although the effectiveness of public access channels in providing valuable programming has been questioned—particularly by those who wish to eliminate the access requirements—the recent past appears to demonstrate a more systematic approach to the use of public access channels.<sup>46</sup>

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BB/BBfront.php (last visited Apr. 22, 2007) (describing the collective effects of alternative media). With a grant from the Ford Foundation, the American University School of Communication's Center for Social Media has created the Future of Public Media project "with the aim of exploring the future of public media in a digital era." Resource Library, Center for Social Media, <http://www.centerforsocialmedia.org/resources/> (last visited Apr. 22, 2007).

46. See MATURING INTERNET NEWS AUDIENCE, *supra* note 43, at 3, 27-30.

By contrast, public radio and television have strengths that come with not having to satisfy the exigencies of advertisers. Moreover, public broadcasting has a legislatively set goal of balanced, high quality programming for audiences whose tastes would otherwise be underrepresented in the commercial media.<sup>47</sup> Most generally, public broadcasting has the strength of not being profit-oriented.

Finally, alternative news outlets can serve underserved populations, create common cause among people, enable media literacy, and mobilize activism. Unlike public broadcasting, with its legislative commitment to balance, alternative news outlets can be opinionated voices of advocacy. They can turn attention to the power of the commercial broadcast lobby in Congress.<sup>48</sup>

These different strengths are accompanied by different weaknesses.<sup>49</sup> For example, commercial broadcasting is likely to be overly solicitous of the needs and concerns of its commercial advertisers and increasingly pressured by the economic imperatives of Wall Street. Those pressures are likely to reduce broadcast licensees' efforts to program a large quantity of diverse news and public affairs programming for the full panoply of the public, and, at least sometimes, to interfere with the journalistic role of watchdog.

By contrast, public broadcasting is principally vulnerable to government pressure and content-related funding manipulation. Admittedly, because of its need for funding from corporate and other non-governmental sources, public television can be seen as sharing in some of the advertiser-induced pressures on programming common in the commercial media realm. Nevertheless, public broadcasting is vulnerable to government pressure far more directly than commercial media because of its public funding.<sup>50</sup>

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47. Goodman, *supra* note 33, at 1404.

48. See Charles Layton, *Lobbying Juggernaut*, AM. JOURNALISM REV., Oct/Nov. 2004, at 26 (describing power of the broadcasting lobby and mainstream journalists' apparent complicity).

49. For another analysis that focuses on the different vulnerabilities of various press organs, see BAKER, MEDIA CONCENTRATION, *supra* note 4, at 130-48.

50. The structure of the public broadcasting system was designed to help insulate PBS stations and NPR from direct governmental funding pressure, with the Corporation for Public Broadcasting ("CPB") rather than Congress itself providing grants to individual public television and radio entities. See MCLOUGHLIN, *supra* note 38, at 2-3. Nevertheless, stories of government pressure on public broadcasting are legion. The most recent attempt to influence public broadcasting content was the campaign by Kenneth Tomlinson, the former chairman of the CPB, to correct what he characterized as PBS's liberal bias. See John Eggerton, *Battle over CPB Chief, Round Two*, BROADCASTING & CABLE, Sept. 26, 2005, at 10; John Eggerton, *Tomlinson Defends Pursuing PBS 'Balance'*, BROADCASTING & CABLE ONLINE, Sept. 22, 2005,

Alternative media suffer from lack of funding and the historical collective action problems that have plagued social action. Purists in the alternative media structure have balked at accepting any funding—including foundation funding—that might undermine (or be perceived to undermine) their independence.<sup>51</sup> To the extent that alternative media reflect an open communication structure, they can become a theater for virulent extremism and reporting untrammelled by journalistic professional norms.<sup>52</sup> Alternative media are also subject to pressure from government, and are likely to be more ideological and uninterested in the mainstream media's notions of journalistic balance.

Even so, there is the question of how we can get all of these different counter-weight media forms to have viable weight against one another. This is another way of articulating what some media theorists have identified as today's "audience scarcity" problem.<sup>53</sup> If it is true that the only scarcity to afflict modern media is the lack of time or interest on the part of the audience, then simply providing access and funding for different forms of mainstream and non-mainstream media will not be very helpful in expanding public debate. If everyone still gets news from a single source—Fox News, for example—then the fact that PBS is available will not really mean that commercial electronic media have reached equilibrium on the see-saw with public media.

Obviously, while we cannot force people to watch a variety of media, studies show that people already do consult a variety of media environments.<sup>54</sup> New technologies can also help in that regard. In addition, while audience scarcity is an important issue, it should not unduly divert attention from the scarcity of resources for journalism. In any event, public media and alternative media do not need to be as large as mainstream commercial media in order to have an important impact on the media landscape.<sup>55</sup> In addition, educators and media activists have

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<http://www.broadcastingcable.com/article/CA6259417.html>. The fact that Tomlinson was rebuffed does not eliminate the problem. See John Eggerton, *Tomlinson: Betraying the Public Trust?*, BROADCASTING & CABLE, Nov. 21, 2005, at 13; John Eggerton, *Tomlinson Violated Statute, Ethics, Says Report*, BROADCASTING & CABLE ONLINE, Nov. 15, 2005, <http://www.broadcastingcable.com/article/CA6283818.html>.

51. See, e.g., Indymedia, Frequently Asked Questions, <http://docs.indymedia.org/view/Global/FrequentlyAskedQuestionEn#pay> (last visited June 8, 2007).

52. See *id.* (describing Indymedia as employing an "open publishing" model).

53. See Goodman, *supra* note 33, at 1392-93.

54. See, e.g., MATURING INTERNET NEWS AUDIENCE, *supra* note 43, at 8-18; STATE OF THE NEWS, *supra* note 14 ("Network TV" chapter, "Audience" section).

55. For example, it has become virtually a cliché to refer to the impact of blogs on mainstream media coverage of events. See, e.g., Levi, *New Model*, *supra* note 25, at 690-92.



argued for systematic promotion of public media literacy.<sup>56</sup> If that can help viewers and listeners adopt a demanding and critical outlook toward news and public affairs programming by mainstream media, pressure to improve quality is likely to arise.

This is not to say that the media pluralism approach will lead to a perfect communications order. Rather, it is an attempt to reach a second-best, not a fourth-best, result. Nevertheless, the fact that there are different kinds of media entities with different funding and different mandates is not sufficient to create the preconditions of a robust information marketplace and a vigorous watchdog press. We still need to attend to the internal balances of the various media forms.

#### IV. THE MICRO LEVEL: REGULATORY FLEXIBILITY

This Article's second principal suggestion with regard to the regulatory approach with which we should experiment is that it be a hybrid or mixture of different regulatory styles, as appropriate. Thus, the Article discusses some direct (but flexible) regulation designed to promote (but not micro-manage) good content, as well as disclosure-enforcing regulations.<sup>57</sup> Specifically, I propose that the FCC adopt structural regulations designed to enhance journalistic professional

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56. For a good description of the history and state of the media literacy movement as of 2003, see MARJORIE HEINS & CHRISTINA CHO, *FREE EXPRESSION POLICY PROJECT, MEDIA LITERACY: AN ALTERNATIVE TO CENSORSHIP* (2d ed. 2003). See also Center for Digital Democracy, *supra* note 45; Media Awareness Network, <http://www.media-awareness.ca/english/index.cfm> (last visited June 8, 2007); Understand Media, <http://www.understandmedia.com/> (last visited June 8, 2007); Alliance for a Media Literate America, About AMLA, <http://www.amlainfo.org/home/about-amla> (last visited June 8, 2007); Center for Media Literacy, About CML, [http://www.medialit.org/about\\_cml.html](http://www.medialit.org/about_cml.html) (last visited June 8, 2007); Free Press, <http://www.freepress.net/> (last visited June 28, 2007). Web sites such as Free Press and the Free Expression Policy Project have provided easily accessible factual information about the media landscape. See Free Press, <http://www.freepress.net/issues/> (last visited June 28, 2007); The Free Expression Policy Project, Fact Sheets on Media Democracy, <http://www.fepproject.org/factsheets/mediademocracy.html> (last visited June 28, 2007).

57. Critics might ask whether there is an inherent tension between my suggestion of a market-wide equilibrium, as suggested in Part III, and the suggestions I make for specific FCC regulations of broadcast entities in this Part. After all, if the weaknesses and vulnerabilities of each form of media are ameliorated by the other suggested forms, won't we achieve an overall equilibrium that should provide the public with a viable market of information and journalistic oversight?

My answer is that the overall strategy suggested in Part III does not yet reflect today's reality. In addition, to the extent that people still get most of their news and information from television, and to the extent that the proliferation of information and entertainment sources creates an attention deficit, there is only an added benefit to the possibility of promoting—although not mandating—attention to hard and hard-soft news in the currently most ubiquitous commercial electronic media.

values; that broadcasters be required to spend a percentage of their gross advertising revenues on news and public affairs programming; and that broadcasters be required to sell a percentage of their advertising time, for a premium over standard rates, for advocacy advertising. Incentive-based approaches should also be explored, but the details of such approaches are beyond the scope of this Article.<sup>58</sup>

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58. Of the FCC's content interventions, the fairness doctrine is one of the principal examples of a regulation that is often mentioned as continuing to be necessary. Congressional bills are often proposed to revive the doctrine. *See, e.g.*, Fairness and Accountability in Broadcasting Act, H.R. 501, 109th Cong. (2005); Meaningful Expression of Democracy in America Act, H.R. 4710, 108th Cong. (2004). There is a current legislative debate as to the reintroduction of the doctrine. *See* John Eggerton, *McCain Backs Bill to Block Fairness Doctrine*, BROADCASTING & CABLE, June 29, 2007, <http://www.broadcastingcable.com/article/CA6456710.html?q=fairness+doctrine> (describing developments). When we think about whether to bring back some version of regulation designed to influence content, the first question to ask is whether the current content landscape shows that the goal of the regulation is being met now that the regulation is no longer in place.

The fairness doctrine consisted of two requirements: coverage and balance. It called for broadcasters to devote adequate coverage to controversial issues of public importance and, in doing so, to provide opposing views in their overall programming. *See, e.g.*, Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 F.C.C. 598 (1964). *See generally* R. Randall Rainey, S.J., *The Public's Interest in Public Affairs Discourse, Democratic Governance, and Fairness in Broadcasting: A Critical Review of the Public Interest Duties of the Electronic Media*, 82 GEO. L.J. 269 (1993) (describing the fairness doctrine and arguing for electronic media public trustee duties). We should not revive the fairness doctrine as a mandatory rule, at least as currently envisioned. The fairness doctrine was trenchantly criticized for having failed to achieve its goals—and, indeed, for having led to a reduction of broadcast programming on controversial issues. Both liberals and conservatives have found fault with the doctrine. First Amendment traditionalists who emphasize the link between free speech and autonomy criticize the fairness doctrine as an ineffective governmental intrusion into the editorial choices and speech of media entities. *See, e.g.*, KRATTENMAKER & POWE, *supra* note 3, at 237-75; LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 108-20 (1987). Although some positive theorists of the First Amendment have argued in favor of fairness-like regulations, (*see, e.g.*, CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 107-08 (1993)), others have criticized the doctrine for having provided at best the illusion of fairness, while serving as an ineffective barrier to the adoption of an access regime. *See, e.g.*, BAKER, MEDIA CONCENTRATION, *supra* note 4, at 195-197. *See also* KRATTENMAKER & POWE, *supra* note 3, at 244-46 (making a similar argument from a different First Amendment perspective). After all, broadcasters typically complied with the doctrine by seeking only two opposing viewpoints—often of Democrats and Republicans—regarding the controversial issues they covered. *See* POWE, *supra*, at 112-16. For those who believe that political discourse guided by a principle of fairness results in censoring the speech of those who are outside of the mainstream orthodoxy, the fairness doctrine was a subtle constriction, rather than an expansion, of the scope of public debate on controversial public issues. *See, e.g.*, BAKER, MEDIA CONCENTRATION, *supra* note 4, at 195-97; POWE, *supra*, at 108-20. For a history of the fairness doctrine, see Varona, *supra* note 22, at 18-26; Comment, *The Regulation of Competing First Amendment Rights: A New Fairness Doctrine Balance After CBS?*, 122 U. PA. L. REV. 1283 (1974) (discussing the actual operation of the doctrine).

What about the argument that, even if the fairness doctrine did not valorize viewpoints not heard in mainstream media, it provided salutary balance in the mainstream media itself? The

### A. *The Illustrative Case of Children's Educational Television*

Since the development of radio as a mass communications medium, Congress and the FCC have enacted regulations to increase public access and viewpoint diversity.<sup>59</sup> Starting in the 1980s, the necessity, effectiveness, and legitimacy of this regulatory project were severely questioned.<sup>60</sup> Critics argued that the rise of new media (cable television,

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"mainstream" itself covers a lot of ground: there are important differences even among mainstream voices. As shown by the Kennedy/Johnson Administration's attempts to use the fairness doctrine to counter the radical right at the time, *see, e.g.*, POWE, *supra*, at 108-20, mainstream broadcasting is not all one thing. Would we obtain *some* benefit from a well-enforced fairness doctrine, even if it did not satisfy the access needs of the underrepresented? Is it called for because of changes in the professional norms of mainstream news organizations? At least some of what has come to pass as journalism today—ironically on cable channels in particular—has veered very far from the notion of fairness and balance in coverage. Economic pressures of a variety of sorts have influenced electronic media to concentrate on a handful of big stories that implicate at least some social conflict and to cover them through polarizing narratives supported by extreme articulations of opposing viewpoints. *See* Levi, *New Model*, *supra* note 25, at 695-96 (discussing, *inter alia*, the description of modern electronic media as an "Argument Culture"). What passes for balance in much of today's electronic media, cable particularly, is a balance constructed from the duel of extreme viewpoints without much mediating editorial judgment.

Nevertheless, even these developments do not support mandatory re-imposition of the fairness doctrine. Most fundamentally, the balance element of the fairness doctrine is a content-based penalty for a broadcaster's choice of speech and thus constitutes a classic case of censorship. As such, it will predictably deter broadcast speech and offer opportunities for enforcement abuse by the state, as the history of the original fairness doctrine demonstrates. Moreover, the mainstream media today—overall—reflect a variety of approaches to balance on public issues. The degree of balance varies among media organs and even within different sorts of public affairs programming. Ironically, the very obviousness of imbalance in certain media organs or programs may mean that the public is likely to be critical and skeptical of what is presented, making a mandatory fairness doctrine unnecessary (and perhaps even misleading, if people come to assume balance). Progressives will argue that the range of opinions in the mainstream media at best reflects the narrow continuum between moderate liberal and conservative. Yet a re-imposition of the fairness doctrine will not solve that problem.

So what policy can we craft that would address the concerns both about the scope of mainstream public debate and the concerns about manipulatively gladiatorial public affairs programming? This Article's proposal (in Part IV.B.2, *infra*) to require the expenditure of resources on news and public affairs programming is akin to the fairness doctrine's coverage prong, as it is designed to promote coverage of public issues. As for the balance aspect of the doctrine, one possibility worth exploring is an incentive-based approach to fairness as balance. Describing such an approach in detail is beyond the scope of this Article.

59. For general overviews of the history of the FCC's regulations of broadcasting, *see*, for example, Henry Geller, *Public Interest Regulation in the Digital TV Era*, 16 CARDOZO ARTS & ENT. L.J. 341, 343-45 (1998); Robinson, *supra* note 35, at 908-31. The Supreme Court ruled many of these measures consistent with (though not compelled by) the First Amendment, though it rejected similar efforts outside the electronic media. *See, e.g.*, *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (upholding the constitutionality of an aspect of the fairness doctrine).

60. A politically important attack was FCC Chairman Mark Fowler's deregulatory manifesto. *See* Fowler & Brenner, *supra* note 13.

and later the Internet) undercut a key rationale for broadcast regulation—the scarcity of the airwaves.<sup>61</sup> They pronounced the FCC's restrictions on media ownership ineffective and criticized content-based regulation of any media as inconsistent with the First Amendment.<sup>62</sup> The critique helped effect a fundamental narrowing of the regulatory project. The FCC rescinded or narrowly interpreted content regulations aimed at access or viewpoint diversity, and with Congress's blessing, it adopted a largely deregulatory approach to media ownership and structure.<sup>63</sup>

However, despite its decisions to reduce content-referential regulation, the FCC did quietly experiment with a different, multi-factor regulatory approach in 1996 in its children's educational television rules.<sup>64</sup> In its attempt to implement the Children's Television Act of 1990<sup>65</sup> ("CTA") in 1996, the Commission adopted a definition of "core" children's educational programming specifically designed to educate and inform,<sup>66</sup> and informational requirements<sup>67</sup> designed to educate parents

61. See, e.g., *id.* at 223, 225-26.

62. See, e.g., *id.* at 217-18, 229.

63. *Id.* at 235.

64. For histories of the Commission's approach to children's television, see, for example, NEWTON N. MINOW & CRAIG L. LAMAY, *ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT 17-57* (1995); Angela J. Campbell, *Lessons from Oz: Quantitative Guidelines for Children's Educational Television*, 20 *HASTINGS COMM. & ENT L.J.* 119, 137-49 (1997); James J. Popham, *Passion, Politics and the Public Interest: The Perilous Path to a Quantitative Standard in the Regulation of Children's Television Programming*, 5 *COMMLAW CONCEPTUS* 1, 2-8 (1997).

65. Pub. L. No. 101-437, 104 Stat. 996, 996-98 (codified at 47 U.S.C. §§ 303a, 303b, 394 (2000)). This Act limits the amount of advertising permitted in children's programming. 47 U.S.C. § 303a(b). It also requires the Commission to consider at license renewal whether broadcasters have "served the educational and informational needs of children through the licensee[s'] overall programming, including programming specifically designed to serve such needs." *Id.* § 303b(a)(2). See also Popham, *supra* note 64, at 7 (describing the enactment of the CTA). For a history of the adoption of the CTA, see Dale Kunkel, *Policy Battles over Defining Children's Educational Television*, 557 *ANNALS AM. ACAD. POL. & SOC. SCI.* 39, 40-41 (1998).

Because the Act did not contain any specific programming requirements, the Commission initially implemented it by continuing to rely on broadcaster discretion, as it had prior to the CTA's passage. Some licensees responded by increasing advertising during children's programming, reducing the amount of children's educational programming aired, and claiming that shows like *The Jetsons*, *G.I. Joe*, and *Teenage Mutant Ninja Turtles* satisfied their obligations to air children's educational programming. See MINOW & LAMAY, *supra* note 64, at 49-55; see also Policies and Rules Concerning Children's Television Programming, 6 *F.C.C.R.* 2111, 2111 (1991) (focusing on advertising and advising broadcasters that, during the renewal process, the Commission would consider whether they had "served the educational and information needs of children").

66. Policies and Rules Concerning Children's Television Programming, 11 *F.C.C.R.* 10,662, 10,696, 10,698-714 (1996). The FCC had originally suggested that licensees air "programming that furthers the positive development of children 16 years of age and under in any respect, including the child's intellectual/cognitive or social/emotional needs." *Id.* at 10,695-96 (quoting its then-existing

and empower them to pressure broadcasters. Finally, the rules included a license renewal processing guideline under which broadcasters could receive expedited FCC staff-level approval of their renewal applications with regard to CTA compliance if they either aired at least three hours weekly of core educational television programming for children, or, having provided somewhat less than that amount, if they aired “a package of programming that demonstrates a level of commitment to educating and informing children that is at least equivalent to airing three hours per week of core programming.”<sup>68</sup> As an alternative, the rules also contained what might be called a “sponsorship” or “pay-or-play” option. Broadcasters not satisfying what came to be known as the “three hour rule” would have their renewal applications referred to the full Commission, with “an opportunity to make a showing before the Commission that [the broadcaster] has satisfied its Children’s Television Act obligations in other ways”<sup>69</sup> in part, for example, by sponsoring

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regulation and concluding that this broad definition provided insufficient guidance for broadcasters).

While the Commission reassured broadcasters that it had no intention of “influencing—or even knowing—the viewpoint of any core programming,” *id.* at 10,701, it explained that to qualify as “core” educational programming, “a show must have serving the educational and informational needs of children . . . as a significant purpose,” *id.* at 10,700. The Commission did not draw distinctions between educational and informational programming that furthers children’s cognitive and social development, nor did it require licensees to use educational consultants or advisors to help with the production of programming with a significant purpose of educating children. *Id.* at 10,701-02. This definition of “core” programming also included the following “objective” elements: “core” programs must be regularly scheduled weekly programs of at least thirty minutes in length, aired between 7 a.m. and 10 p.m. *Id.* at 10,662.

The Commission made clear that despite its adoption of a definition of core children’s educational programming, it proposed “ordinarily [to] rely on the good faith judgments [sic] of broadcasters” as to whether programming satisfies this test and to evaluate compliance of individual programs with this definition “only as a last resort.” *Id.* at 10,701.

67. *Id.* at 10,662, 10,682. See Press Release, Fed. Comm’n Comm’n, FCC Chairman Reed Hundt Encourages Parents and Activists to Watch, Critique, and Report on New Kids TV Shows (Sept. 18, 1997), [http://www.fcc.gov/Bureaus/Miscellaneous/News\\_Releases/1997/nrmc7068.html](http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/1997/nrmc7068.html). Thus, “[e]asy public access to information permits the Commission to rely more on marketplace forces to achieve the goals of the CTA and facilitates enforcement of the statute by allowing parents, educators, and others to actively monitor a station’s performance.” Policies and Rules Concerning Children’s Television Programming, 11 F.C.C.R. 10,662, 10,682 (1996).

68. Policies and Rules Concerning Children’s Television Programming, 11 F.C.C.R. 10,662, 10,662-63 (1996). Chairman Reed Hundt, on whose watch the 1996 processing guidelines were adopted, explained that stations fear devoting resources to children’s programming when their competitors are not required to do so, therefore, a rule would place all stations on equal footing and remove that disincentive. See Christopher Stern, *FCC’s Hundt Takes Children’s Television Under His Wing*, BROADCASTING & CABLE, July 24, 1995, at 61.

69. Policies and Rules Concerning Children’s Television Programming, 11 F.C.C.R. 10,662, 10,724 (1996).

“core educational and informational programs on other stations in the market that increase[] the amount of core educational and informational programming on the station airing the sponsored program and/or on special nonbroadcast efforts which enhance the value of children’s educational and informational television programming.”<sup>70</sup>

New developments in digital technology pushed the Commission to revisit the issue of children’s educational television requirements. Because digital compression technology permits the transmission of up to six channels of programming with the same bandwidth previously devoted to one channel of analog transmission, the Commission was faced with the question of adapting its children’s educational television rules to the evolving digital landscape.<sup>71</sup> In 2004, the Commission reinvigorated its commercial time limits and adopted a proportionality rule to extend the 1996 “three hour rule” to digital broadcasters who multicast.<sup>72</sup> More recently, broadcasters and children’s advocacy groups

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70. *Id.* This provision is part of the CTA itself. 47 U.S.C. § 303b(b) (2000). However, the legislative history does not reveal what led to the inclusion of § 303b(b). It may well have resulted from arguments by public television stations seeking private support from commercial broadcasters for their children’s educational programming.

71. Congress in 1996 had allocated the digital spectrum to incumbent broadcasters on the condition that they return their analog channels to the government after completion of the Digital Television (“DTV”) transition. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). See *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, 11 F.C.C.R. 17,771, 17,787 (1996) (Fourth Report and Order). Some uses of bandwidth—such as high definition television (“HDTV”)—are spectrum intensive and will require the entirety of the station’s allocated spectrum. *Id.* at 17,774-75. But other uses—such as “multicasting” in standard definition format (“SDTV”)—will allow the broadcaster to transmit as many as six (or more) streams in the allocated bandwidth (depending on the degree of picture resolution desired in each programming stream). See Thomas W. Hazlett & Matthew L. Spitzer, *Digital Television and the Quid Pro Quo*, 2 BUS. & POL. 115, 116 (2000) (suggesting that as a general rule between four and ten SDTV signals may be transmitted in the same 6MHz band used to broadcast one HDTV signal). Therefore, even though HDTV is delivered by DTV, DTV need not deliver HDTV (or only HDTV). *Id.* at 116. In addition to being able to provide more channels of programming, digital technology gives broadcasters the ability to provide services—such as interactive television and data transmission (including wireless Internet access)—that were virtually impossible for analog broadcasting. *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, 12 F.C.C.R. 12,809, 12,820-21 (1997) (Fifth Report and Order).

72. Children’s Television Obligations of Digital Television Broadcasters, 19 F.C.C.R. 22,943 (2004). The agency explained that “digital broadcasters that choose to provide streams or hours of free video programming in addition to their required free over-the-air video program service will have an increased core programming benchmark roughly proportional to the additional amount of free video programming they choose to provide.” *Id.* at 22,944. Although digital broadcasters would be required to air at least three hours of core programming per week on their main program streams in order to “provide broadcasters with flexibility in choosing how best to serve their child audience,” they would be permitted to air all of their additional digital programming either on one free digital video channel or to distribute it across multiple free digital video channels, at their

agreed to a compromise on children's television rules that maintains the three-hour programming guideline.<sup>73</sup>

While I do not suggest that the particular trio of hybrid regulations adopted in the children's educational proceeding should simply be adopted for media reform more broadly, I would propose to plumb the regulatory structure in the children's television rules to instruct some proposals for television reform more generally.<sup>74</sup>

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discretion. *Id.* at 22,952. The only limitation is that "the stream/s on which the core programming is aired [have] comparable carriage on multichannel video programming distributors ("MVPDs") as the stream whose programming generates the core programming obligation under the revised processing guideline." *Id.* However, "[e]ducational and informational programming aired on subscription channels," would not be considered "core" under the Commission's processing guideline. *Id.*

The Commission took the opportunity of the digital proceeding to clean up problems revealed by experience under the 1996 rules. Accordingly, it specified limits to broadcasters' ability to preempt core children's educational programming, and to repeat core programming during a programming week. The only exemption from this requirement would be a program stream that merely time shifts the entire programming lineup of another program stream. In addition, the Commission would not count as repeated programming core programs that are aired on both the analog station and a digital program stream during the digital transition. *Id.* In order to improve the informational aspect of the guidelines, the Commission changed its rule regarding on-air identification of core programming. The revised guidelines require both analog and digital broadcasters to identify the programming with the same symbol, E/I, and require this symbol be displayed throughout the program in order for the program to qualify as core educational programming. *Id.* at 22,944. The Commission's order also added that the educational and informational objective and the target child audience must be specified in writing in the licensee's Children's Television Programming Report. *Id.* at 22,951.

73. See John Eggerton, *FCC OK's Kids TV Compromise*, BROADCASTING & CABLE ONLINE, Sept. 26, 2006, <http://www.broadcastingcable.com/article/CA6375143.html>. The Commission's ruling to that effect has not yet been released.

74. I do not mean to suggest that the particular application of the hybrid regulatory approach that animated the 1996 children's television rules is the right one, or that it has worked well in the context of children's educational programming. Arguments have been made that the best children's programming has been generated by cable rather than local broadcast stations or commercial networks. Children's advocacy groups are studying broadcaster compliance with the children's educational television rules in light of Univision's recent \$24 million settlement of outstanding children's programming complaints. See, e.g., John Eggerton, *Children Now to Study Educational TV Shows*, BROADCASTING & CABLE, Feb. 26, 2007, <http://www.broadcastingcable.com/article/CA6419489.html?title=Article&spacedesc=news&q=children>. My points, rather, are that the children's television context represented a regulatory alternative to the deregulatory impulse of the post-Fowler FCC, and, more importantly, that the alternative was self-consciously designed to resemble a regulatory "third way." See, e.g., Reed E. Hundt, Keynote Address, *A New Paradigm for Broadcast Regulation*, 15 J.L. & COM. 527, 539-47 (1996); Reed Hundt & Karen Kornbluh, Policy Commentary, *Renewing the Deal Between Broadcasters and the Public: Requiring Clear Rules for Children's Educational Television*, 9 HARV. J.L. & TECH. 11, 17, 22-23 (1996). The proposals in this Article—such as the news and public affairs expenditure requirement—are designed to be mindful of the criticisms prompted by the children's educational television requirements.

## B. Mandatory but Flexible Regulations

First, a caveat: I worry about proposing specific plans for media reform. Largely, I worry that we have not been able to forecast the unintended harmful consequences of our interventions and that we do not have a clear enough view of what effect one or another change will entail in the media overall.<sup>75</sup> Nevertheless, I wish to make some proposals on an experimental basis, and to generate discussion.

### 1. Structural Regulation: Journalistic Justification for Ownership Regulations

First, the Commission should scale back its attempt to limit ownership restrictions. The FCC is currently considering what it should do with regard to its remaining anti-concentration rules. After the setback to its 2003 attempt to deregulate industry structure, it is currently studying the issue and soliciting public comment.<sup>76</sup> I would suggest, at a minimum, that proponents of consolidation be required to demonstrate clearly, and not simply theoretically, the benefits that have accrued to media audiences from mergers in the media industry.<sup>77</sup> The burden should rest squarely on the consolidators to show that permitting concentration will affirmatively benefit the public. Is there clear and uncontroverted evidence that discernible efficiencies from past consolidation were passed along to readers, viewers, and listeners? Are the benefits supposedly to be gained for the public from further

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75. See, e.g., Sunstein, *supra* note 8, at 197-98 (describing experiments assessing the success of social engineering).

76. 2006 Quadrennial Regulatory Review, 21 F.C.C.R. 8834, 8835-36 (2006). See also the FCC's media ownership web page, <http://www.fcc.gov/ownership/> (last visited June 8, 2007).

77. I am indebted to Tom Krattenmaker for this suggestion. It is true that the 1996 Telecommunications Act instructed the Commission to review its broadcast ownership rules biennially "to determine whether any of such rules are necessary in the public interest as the result of competition" and to "repeal or modify any regulation it determines to be no longer in the public interest." Varona, *supra* note 22, at 32 & n.131. See also Quadrennial Regulatory Review, 21 F.C.C.R. 8834 (2006) (apparently placing the burden on regulators to show why continued regulation is warranted). However, the fact that the FCC is to bear the burden to assess the continued necessity of ownership regulations does not mean that the Commission cannot choose to require that proponents of further consolidation demonstrate public benefits from the combinations. The agency may decide that the test for its assessment of continued necessity is general public benefit, rather than simply protection against monopoly. It would serve the Commission's statutory mandate to regulate broadcasting in the public interest to adopt a standard requiring consolidators to show public rather than simply private benefit from proposed media combinations. Cf. Howard Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CAL. L. REV. 371 (2006) (concluding that antitrust is unlikely to further the FCC's democracy objectives).



ownership rule relaxations significant? I suspect that the answer to those questions is no.<sup>78</sup> Thus, further consolidation is unwarranted.<sup>79</sup>

One of the key problems facing advocates of structural regulation is the fact that the traditional rationale in support of such regulation—namely, that it is a proxy for diversity of ideas—is subject to critique.<sup>80</sup> Assuming that this critique is empirically accurate, are there any other reasons that we should argue for at least some anti-concentration rules for the media? An alternative possibility is to focus on the diversity of ownership as a way of promoting journalistic values.<sup>81</sup> A multiplicity of owners will tend to give journalists and editors more leverage to resist publisher and broadcast management decisions that would undermine journalistic values. The more concentrated the market, the more pressure there is on journalists with limited exit strategies to resist pressure to relax their journalistic standards. If structural regulations create more exit opportunities for journalists, journalists will have more leverage

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78. The media spin-offs of the recent past suggest that the benefits of media mergers are in fact hard to achieve, even for the merged entity (let alone the public as a whole). BAKER, MEDIA CONCENTRATION, *supra* note 4, at 49-53. As for public benefit, theoretical mention of potential synergies should not be considered sufficient. Studies provided by opponents of ownership deregulation indicate that whatever synergies there are do not inure to the public's benefit. *See, e.g.*, John Eggerton, *FCC Faces Flurry of Studies*, BROADCASTING & CABLE ONLINE, Oct. 19, 2006, <http://www.broadcastingcable.com/article/CA6383270.html>; John Eggerton, *New Ownership Studies Expected*, BROADCASTING & CABLE ONLINE, Oct. 20, 2006, <http://www.broadcastingcable.com/article/CA6383555.html>; John Eggerton, *Free Press Unveils Study on Minorities, Women*, BROADCASTING & CABLE ONLINE, Sept. 19, 2006, <http://www.broadcastingcable.com/article/CA6373590.html>; Media Ownership, [http://hearsnow.org/no\\_cache/print/mediaownership/](http://hearsnow.org/no_cache/print/mediaownership/) (last visited June 8, 2007).

79. Although this approach initially appears to resemble antitrust, traditional antitrust analysis does not require that efficiencies from mergers go to the public and that business combinations bring affirmative social benefits. *See* BAKER, MEDIA CONCENTRATION, *supra* note 4, at 56-76 (arguing that antitrust law does not provide a sufficient justification for a rejection of media concentration); *see generally* Shelanski, *supra* note 77. The proposal in text, however, is consistent both with the FCC's statutory mandate to promote broadcasting in the public interest, and with the general public understanding of the particular importance of electronic media to the social fabric.

80. *See, e.g.*, Yoo, *supra* note 35, at 681. For why monopolists may provide greater diversity of programming (at least in format) under certain circumstances, *see* Peter O. Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, 66 J. ECON. 194, 206 (1952); *see also* Baker, *Media Structure*, *supra* note 11, at 735; Jim Chen, *The Last Picture Show (On the Twilight of Federal Mass Communications Regulation)*, 80 MINN. L. REV. 1415, 1448 (1996).

81. A similar argument is made in BAKER, MEDIA CONCENTRATION, *supra* note 4, at 40-41. Of course, this is not to say that the journalism-based argument is the only alternative in support of ownership controls. Another important argument is the FCC's historical claim that diversity of ownership is a good for its own sake and not because of the likelihood that it will lead to more diversity of viewpoints. Yet another is the degree to which dispersal of ownership can provide democratic safeguards. *Id.* at 16-28; *see also* Baker, *Media Structure*, *supra* note 11, at 735-38.

against owners' and advertisers' primarily commercial preoccupations. Deconcentration might well promote the expenditure of additional resources on journalistic projects, at least on the part of some of the media participants.<sup>82</sup> If, for example, media are deconcentrated, the economies of scale to be gained from joint news operations will not be

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82. See BAKER, MEDIA CONCENTRATION, *supra* note 4, at 198-200. Broadcasters have advanced the argument that media consolidation in fact increases news programming. Without challenging that proposition, this Article argues that the asserted increase in news has been measured by reference to past media structure. Since this Article suggests a multi-factor approach to media reform, it argues for a requirement of news and public affairs expenditures in addition to its call for restraints on consolidations that cannot expressly demonstrate public benefits. Thus, the question is whether the increases in news assertedly resulting from consolidation are likely to be greater than the expenditures required under the program proposed in this Article. In any event, the focus of this Article is on increasing news expenditures. A reference to greater news programming aired by television stations cross-owned with newspapers does not indicate anything conclusive about news expenditures.

Moreover, the purported causal relationship between media consolidation and increased news programming is in fact a complex empirical issue which has not yet been fully explored. Recently, the FCC released ten studies it had commissioned as part of its quadrennial review of its broadcast ownership rules, including studies of the impact of different patterns of ownership on news coverage. See FCC, Research Studies on Media Ownership (July 31, 2007), <http://www.fcc.gov/ownership/studies.html>. The studies do not provide a single answer to the question of the correlation of consolidation and news programming. For example, one of the studies concludes that even though network-owned television stations and those cross-owned with local newspapers appear to air more news coverage than independently owned stations, stations owned by large groups do not show the same result. See, e.g., FCC, Study 4: News Operations, [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DA-07-3470A5.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A5.pdf); see also FCC, Study 6: The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News (June 13, 2007), [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DA-07-3470A7.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A7.pdf); FCC, Study 3: Television Station Ownership Structure and the Quantity and Quality of TV Programming (July 23, 2007), [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DA-07-3470A4.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A4.pdf). Thus, at most, the studies could be said to indicate that completely independent, unconcentrated ownership promotes news programming less than some consolidated ownership. Even if that is accepted, the studies' results do not establish whether the increased news coverage observed in some cross-ownership contexts would continue with greater consolidation. Just because two co-owned television stations in a single market or a newspaper-television cross-owned entity may air more news than an independently owned station in the market does not mean that having two or three media behemoths would necessarily promote more news.

Finally, the empirical findings of the quadrennial review studies are currently being analyzed. The Commission recently made available the data sets on which the studies relied and created a procedure for review of proprietary information. FCC, FCC's Media Bureau Adopts Procedures for Public Access to Data Sets Underlying Economic Studies for 2006 Quadrennial Review of Commission's Media Ownership Rules, Public Notice, MB 06-121, 2007 WL 2510585 (Sept. 5, 2007); see also FCC, 2006 Quadrennial Regulatory Review, Protective Order, MB Docket 06-121 (Sept. 5, 2007), available at [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DA-07-3741A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3741A1.pdf). The Commission is awaiting comments responsive to the studies by October 2007. FCC, FCC Seeks Comment on Research Studies on Media Ownership, Public Notice, DA 07-3470 (July 31, 2007), available at <http://www.fcc.gov/ownership/studies.html>.

available, and each media outlet's own journalistic staff will have to search out and report the news. I would propose that the fundamental justification for regulations designed to affect media structure is the desire to promote journalistic and professional values. Thus, calling at least for a limit to further concentration might provide a countervailing First Amendment value.

The point of this Article is not to describe the right mix of structural media regulation. Rather, it is to suggest that if we decouple the notion of why structural regulation is desirable from the facile assumption that it will necessarily lead to a diversity of ideas, and if we couple the regulatory approach with the desire to reinforce journalistic values that are undermined by a plethora of factors facing the modern media, we can craft structural regulations that will promote what I take to be at least one very important goal of a mass communications medium: the provision of news consistent with fundamental journalistic values.

## 2. Requiring News and Public Interest Expenditures

The second proposal is that broadcasters<sup>83</sup> be required to spend a set percentage of their overall advertising revenues, including their revenues from non-subscription multicast digital television channels, on the production of news and public interest programming.<sup>84</sup> This proposal is

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83. This Article chooses to focus discussion of the news and public interest expenditures on broadcasters. As is discussed below, see *infra* text accompanying notes 88-90, this choice is supported both by the continuing significance of broadcasting and the relevance of broadcasting to cable. This Article does not address whether such expenditure requirements are desirable, viable, or legally permissible in other contexts.

84. Admittedly, one key question here is the ability to identify which programming should be considered news and public interest programming. One can easily imagine critics pointing to the media's excessive celebrity coverage as evidence of how far from "true" hard news the mainstream media has come. They would argue that a definition with "teeth" is the only way to ensure that the required expenditure is not spent entirely on events whose world importance is equivalent to Paris Hilton's arrest and incarceration. See, e.g., Sharon Waxman, *Paris Hilton Out of Jail, Into a Gilded Cage*, N.Y. TIMES, June 8, 2007, at E5. I do not believe, however, that too detailed a description of what should count to satisfy the requirement would be workable as the standard for broadcaster compliance. Even if the fact that the requirement is a monetary condition (rather than speech compulsion) would satisfy doctrinal First Amendment objections, I am troubled by the state making content-based decisions effectively penalizing a broadcaster for airing news or public affairs "light." The Commission has previously defined public affairs programming as that "dealing with local, state, regional or international issues or problems, documentaries, mini-documentaries, panels, roundtables and vignettes, and extended coverage (whether live or recorded) or public events or proceedings, such as council meetings, congressional hearings, and the like." WILLIAM E. KENNARD, REPORT TO CONGRESS ON THE PUBLIC INTEREST OBLIGATIONS OF TELEVISION BROADCASTERS AS THEY TRANSITION TO DIGITAL TELEVISION (Jan. 18, 2001), <http://www.fcc.gov/Speeches/Kennard/Statements/2001/stwek106.pdf>. News has been defined as

designed to enhance professional journalistic values in news and public affairs programming. This would set a floor for the production of such programming. At least for now, the FCC would not have to micromanage this process, other than ensuring the accuracy of reported information regarding revenues and expenditures. Since the broadcasters would all be required to spend this money for news programming, they should be given the opportunity to allow competitive factors and the

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programming “dealing with current local, national and international events, including weather and stock reports, and commentary, analysis, or sports news when they are an integral part of a news program.” *Id.* In the context of proposing adoption of public interest processing guidelines in 2004, Alliance for Better Campaigns, a coalition of media watchdog organizations, called for a definition of public interest programming as “local civic or electoral affairs programming . . . designed to provide the public with information about local issues.” Varona, *supra* note 22, at 91 (citing Alliance for Better Campaigns, Benton Found., Center for Creative Voices in Media, Center for Digital Democracy, Common Cause, Institute for Public Representation of Georgetown University Law Center, Media Access Project, New American Foundation, Office of Communication of the United Church of Christ, Inc., Public Interest Obligations Proposed Processing Guidelines (Apr. 7, 2004)). Each of these definitions suffers from some insufficiency—whether being too format-centered, or too vague, or too limited in scope.

An alternative to a substantive definition of news and public affairs programming is a procedural, ascertainment-based approach. The FCC requires broadcast licensees to demonstrate that they have ascertained the public issues of interest to their communities and have aired responsive programming. See Varona, *supra* note 22, at 24, 31 (Although the agency eliminated its formal ascertainment procedures in the 1980s (Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076, 1078 (1984)), the licensees still have the underlying obligation to provide programming responsive to their communities. They are required to demonstrate their compliance by making available “[I]ssues/[P]rograms” lists that indicate their responsive programming. 47 C.F.R. § 73.3526(e)(11)(i) (2006). One of the difficulties of this type of procedural approach, however, is that it is either highly manipulable—with issues of public concern identified at such a level of generality that virtually any programming could be deemed responsive—or too market preference-based—implicitly grounded on the notion that programming that is of public interest is necessarily (and only) programming that interests the public.

A third alternative is to define news and public affairs programming as that programming which the professional journalists in the media organization characterize as such. This approach differs from the procedural ascertainment approach described above in that it is supposed to be based on professional, editorial judgment rather than simple responsiveness to purportedly preset community interests and concerns. Powerful criticisms of such an approach can be imagined—including (but not limited to) dubiousness about the professional, editorial judgments made by electronic media today. Nevertheless, common sense suggests that the public can identify hard news. With regard to public interest or public affairs programming beyond traditional hard news, a definition that focuses on editorial judgment with respect to the expenditure of money that cannot be otherwise spent on entertainment programming could serve to empower the assertion of professional journalistic standards.

Reliance on editorial judgment, which grounds Professor Randall Bezanson’s functional analysis of press freedom, has been powerfully criticized by Professor David Anderson as unrealistic and elitist. Anderson, *supra* note 11, at 451-82. However, because this critique is designed to address theories justifying differential constitutional protection for the press, it does not fatally undermine my attempt to rely on editorial judgment as a pragmatic tool used simply in support of my expenditure proposal.

desire to capture brand value and prestige points to push them to innovate and enhance quality. This proposal does not indicate that broadcasters should air a particular number of hours of such programming and does not micro-manage when such programming is to air. This feature of the proposal is intentional, because investigative reporting, newsgathering, and keeping a large number of reporters expert in a number of areas are expensive propositions. If a particular network, for example, were to decide to devote more resources to the ferreting out of news than to the airing of news broadcasts, such a choice would be a benefit to the public interest. It would make most sense for the broadcasters themselves to decide how to spend the news production money to best serve their strengths.

How would the proposal work?<sup>85</sup> One possibility would be to say that licensees' compliance with their news and public affairs promises would be assessed at license renewal. The problem with this traditional approach, however, is that license periods are now so long that the possibility of non-renewal at a much later date is not likely to serve as a powerful disincentive. An alternative possibility is to impose monetary penalties on non-compliance at preset intervals. Thus, for example, monetary penalties of two or three times the amount not spent as directed could be assessed annually, based on a report to be sent to the Commission. Yet another possibility is to impose heavy licensing fees that could be waived, at least in part, in proportion to the amount of news and public affairs programming promised and aired by the licensees.<sup>86</sup> We could also envision a "pay-or-play" option, as in the

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85. Although the details are beyond the scope of this Article, at least one of the practical issues to be addressed in the application of the proposal is the network/individual licensee distinction. In addition, what about administrability? For example, how will the FCC as administrator know precisely how to identify the advertising revenue to which this rule will apply? How will the Commission deal with the fact that networks currently are trying to position themselves as purveyors of multiple platforms to advertisers, and selling advertising time in coupled segments—for NBC and MSNBC, for example? If this proposal were to be considered, there would be much work left to do on the details.

86. Another alternative approach (with regard to public affairs programming, rather than news) would be to ask the licensees to determine their planned balance of internally produced and externally produced public affairs programming, and permit licensees to be exempt from some advocacy advertising if they chose to produce more public affairs programming internally. This alternative is problematic from the point of view that the proposed system attempts to balance both the programming that the media will air as a matter of its own editorial judgment and programming that the media will air as simple conduits for others' voices on controversial public issues. There are benefits to the open access for advocacy advertising that would be lost by allowing the media entities to opt out of advocacy carriage. Moreover, given the potentially expansive interpretation broadcasters might take of the public interest programming category, we might be trading advocacy

children's educational television context. Such an approach would permit broadcasters to fund other media's news and public affairs services.<sup>87</sup>

Critics of this proposal might ask why I focus on broadcasting.<sup>88</sup> After all, isn't such a focus a perfect example of looking for the lost keys under the streetlight because the streetlight provides light? Isn't cable the real locus of the problem with television journalism? In fact, haven't digital technologies so altered the conditions of speech that a focus on mass media simply represents Twentieth Century nostalgia?<sup>89</sup> Broadcasting is still of significant importance because of the free grant of spectrum to broadcasters, the fact that broadcasting is still the most "mass" form of media, and the fact that the multicasting expected from the transition to digital programming streams will likely revive broadcast as a stronger competitor to cable.<sup>90</sup> The importance of broadcasting will only be increased by the digital conversion. Despite the extraordinary possibilities—for speech and culture—enabled by digital technology, it

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advertising for low value crime-related programming. Accordingly, this Article does not support this alternative proposal.

87. Details of such a pay-or-play system are beyond the scope of this Article. It would be important, for example, to ensure that one broadcaster's subsidy of another's public affairs obligation not count as an expenditure for the entity receiving the payment. The details would certainly be particularly important for a pay-or-play system, because such an alternative is open to manipulation, difficult to administer, and hard to enforce. That a pay-or-play option was permitted in the children's television context is no answer. No broadcaster appears to have taken advantage of the option in the children's educational television context, so we have no experience. More importantly, the proposal here would be much broader and more complex in scope than simply airing three hours of a particular type of programming per week.

The pay-or-play option raises some broader issues in addition to the need for careful attention to detail. On the one hand, it might funnel needed funds to media entities (such as public broadcasters, predictably) that might have shown particular talent for news and public affairs programming. On the other hand, such a system would not promote the increase of professional journalistic values in the broadcasters choosing the pay-or-play option. This might not be a problem: Excellence in journalism is neither necessary nor feasible for every broadcast outlet, and the desire to foster it is nothing more than nostalgia for the early days of radio regulation. Yet, without significantly increased media literacy, and without adequate information-selection technologies to help us navigate the expanse of information available in the market as a whole, a pay-or-play paradigm might undermine the practical availability of quality journalism to the public.

88. The fact that this Article focuses on broadcasting does not preclude subsequent analysis of the need to extend such a journalistic enhancement program to other electronic media.

89. *Cf.* Balkin, *supra* note 6, at 19-31 (criticizing the "capitalist," property-centered view of the free speech clause and focusing on the mass media character of electronic speech in the twentieth century to explain the access-focus of "republican" or "progressivist" views of the First Amendment).

90. *See generally* ALLAN GREENBLATT, *CQ RESEARCHER, TELEVISION'S FUTURE: WILL TV REMAIN THE DOMINANT MASS MEDIUM* (Feb. 16, 2007).

remains important to attend to the continuing reality that we are still a society whose culture is largely defined by the mass media.

Part II has shown that network television is reducing its commitment to news and public affairs programming and that it is likely to continue to do so, as it is pressed by the audience shifts triggered by new technologies. Thus, without a reason to increase resources devoted to the journalistic enterprise, broadcasters may well continue down the current path. They can do so while pointing to the asserted variety of alternative sources of news and information, particularly the Internet.

Moreover, what is on broadcast stations is not irrelevant to what is on cable. The likely effect of such a requirement on the improved newsgathering and production of the television networks and stations might serve as a competitive spur to cable news and public affairs programming. Also, to the extent that the proposal creates excess production capacity, cable will benefit as well because it will be able to buy or rent these resources. There are many means by which news and public affairs output can find distribution on cable.

Critics might also wonder why we should believe that quality would be enhanced over what we have today. There are no limitations on advertising during news and public affairs programming, unlike children's educational programming.<sup>91</sup> Thus, broadcasters who sought to charge more money for their advertisements during news-type programming would have an incentive to improve the quality of their programming (at least to a degree that would attract audience and advertisers).

But that does not answer whether, given the increasing trend to soft news and infotainment in the current media marketplace, whether—outside of a minimum of hard news programming—the result of this proposal would be anything but an increase in the amount of the worst kind of what passes for journalism today. Why should I anticipate that we will get a lot of Edward R. Murrow rather than *To Catch a Predator*? After all, it is too dangerous to have the FCC oversee news programming to determine whether it is sufficiently “hard news,” sufficiently analytical, sufficiently informative, and sufficiently contextual.<sup>92</sup> If it is the broadcasters that will ultimately decide what will

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91. See Campbell, *supra* note 64, at 147.

92. Whatever one thinks of the definition of children's educational programming in the FCC's current rules implementing the CTA, attempting to define news and public affairs programming in like manner is not workable.

constitute news and public affairs programming, then do we not face a possible avalanche of “entertaining” news, or news as scandal, or “news” designed to appeal to our worst instincts? So, will the unintended consequence of my media reform be to make the electronic press even worse in quality, at the same time that it improves its profile in quantity?

There is no guarantee that the proposal will actually lead to an increase in better news and public interest programming. One admittedly overly sanguine answer is that if media conglomeration is curbed, the preconditions for more journalistically desirable news and public affairs programming will be increased. But there is a great “if” in that response. Another optimistic view is that if people do not like that kind of news, they will make their dissatisfaction known and thereby pressure licensees and advertisers. But this view assumes that the people as a whole will rebel against such “dumbed down” news, and there is no guarantee that that will be the case. Even if it is, the effectiveness of citizen complainants can potentially be compromised if they are successfully characterized as an elitist, fringe group of activists attempting to dictate what the American public should like in its public affairs programming.

At the same time, we can hope that the expenditure on resources on the news infrastructure—the addition of reporters, editors, news bureaus, newsgathering technologies—may lead to a more journalistically professionalized atmosphere. Setting a floor on the resources available for production of news and public interest programming could have a “pump priming” effect of increasing the positions and/or wages of broadcast producers and reporters, which should have a beneficial effect on the quality and depth of news and public interest programming. Rather than cutting news resources to the minimum required to maintain a news division, a certain set of resources would be guaranteed, leading broadcasters to make the best use of dollars they would be spending anyway. Rather than focusing on cutting the budget for journalistic programming, the focus should turn more to making the most out of that budget. As for attempts to minimize citizen critics, the increasingly sophisticated organization and tactics of such groups can constrain the media industry’s attempts to minimize and marginalize their voices (as is evident from the success of grassroots efforts to restrain structural deregulation by the FCC).<sup>93</sup> Moreover, to the extent that the proposal

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93. See, for example, MCCHESENEY, *THE PROBLEM OF THE MEDIA*, *supra* note 11, at 54-55 for a description of such grassroots efforts. For an account from a different perspective, see, for



increases the amount of news and public affairs programming over what is currently aired, it is likely to displace current entertainment programming rather than the already-limited better hard news programming. Query whether even sensationalistic “news-ish” programming would not be somewhat of an improvement over the blanket of reality shows and *CSI/Law & Order* programming currently on the entertainment roster of broadcast entities. In addition, if there is a significant increase of bad public affairs programming on some stations as a result of this proposal, it is possible that other broadcasters will attempt to counter-balance it in their programming, in an attempt to create news-based brand differentiations.

Ultimately, it is impossible to predict the degree to which the news funding proposal would in fact increase the quality as well as the quantity of news and public interest programming on broadcast channels.<sup>94</sup> There is, however, at least a possibility that there would be some significant improvement over the current situation. If the proposal were implemented, the key to its assessment would be a close study of its effects over time.

### 3. Access to Advocacy Advertising

A third possible reform is access to the air for advocacy advertising on controversial issues of public importance.<sup>95</sup> The reason for this is that when left to their own devices, licensees are often influenced by economic factors that lead them to reject controversial issue advertising.<sup>96</sup> Issue advertising,<sup>97</sup> particularly about controversial issues,

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example, Stuart Minor Benjamin, *Evaluating the Federal Communications Commission's National Television Ownership Cap: What's Bad for Broadcasting Is Good for the Country*, 46 WM. & MARY L. REV. 439, 439, 448 (2004).

94. Arguably, all media outlets—and not just broadcasters—are cutting back on basic journalism as a result of the new media environment, Wall Street pressure, and the dispersal of advertising. See Levi, *New Model*, *supra* note 25, at 680-86. If the common assumption that the best journalism has been produced by newspapers rather than television is true, wouldn't it be better to focus on ways of promoting print journalism—including, perhaps, permitting newspaper/broadcast combinations—rather than relying on increases in broadcast expenditures on news? Let me focus on one answer to this critique: Most Americans still get most of their news from television. To the extent that a news expenditure requirement can improve the quality of such coverage, it is likely to have an immediate impact on the general public's awareness of news and public events. (An analysis of the newspaper/broadcast cross-ownership issue is beyond the scope of this Article.)

95. For a recent article arguing in favor of a constitutional right to access for “advertorials,” see Daniel Matheson, *No Moderator Needed: A Liberty Tradition Right to Broadcast Advertorials*, 33 HASTINGS CONST. L.Q. 255 (2006).

96. The networks made clear as early as *Columbia Broad. Sys., Inc. v. Democratic National Committee*, 412 U.S. 94 (1973), that they resisted selling airtime for advocacy advertising. The

is perceived as unpopular and is not accepted by broadcasters even when it would be profitable. The need for access to the media for discussion of controversial issues of public importance may be particularly acute now that venues for public speech are being increasingly reduced.<sup>98</sup> And there is no guarantee that even a journalistically-revitalized mainstream media will provide the viewpoints and arguments that might be provided in advocacy advertising.<sup>99</sup>

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networks all still appear to have a policy precluding the airing of controversial issue advertising. Bill McConnell, *Advocacy Ads: Easy Money?*, BROADCASTING & CABLE, Feb. 28, 2005, at 12 [hereinafter McConnell, *Advocacy Ads: Easy Money?*]. Some high profile rejections of advocacy ads have been justified on the basis of the licensees' rejection of advocacy advertising. *Id.*; Allison Romano, *CBS Defends MoveOn Ad Refusal*, BROADCASTING & CABLE ONLINE, Jan. 30, 2004, <http://www.broadcastingcable.com/article/CA378077.html>; Cheryl Bolen, *Politics: Broadcasters' Nervousness on Ads Could Affect 2004 Election, Experts Say*, BNA TELECOMMS. MONITOR, Mar. 8, 2004. Nevertheless, it is true that some licensees have accepted advertising designed to influence Congressional legislation. Bill McConnell, *Advocates Spent \$229M on TV*, BROADCASTING & CABLE ONLINE, Mar. 16, 2005, <http://www.broadcastingcable.com/article/CA511352.html>. It appears that the expenditure on such ads was a monumental increase (459%) over such expenditures during the 2001-2002 Congress. *Id.* The 2002-2003 expenditures were apparently lopsided with regard to many issues, with only six percent of the issues having competitive spending. *Id.* One of the claims made by advocacy groups is that licensees have relied on their policies to reject issue advertising in a politically discriminatory fashion. Bill McConnell, *Advocacy Ads: Easy Money?*, *supra*; Bill McConnell, *Critics: Ad Bans Curry White House Favor*, BROADCASTING & CABLE, Feb. 7, 2005, at 14, available at <http://www.broadcastingcable.com/article/CA501626.html?q=Critics%3A+Ad+Bans+Curry+White+House+Favor>. The fact that some issue advertising relating principally to Congressional legislation appeared on some stations in the recent past does not eliminate the need for the proposal in text.

97. I use the terms "issue advertising" and "advocacy advertising" interchangeably for purposes of this discussion.

98. Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439, 440 (2006).

99. The discussion in text has focused on advocacy advertising. There is also the question of whether reforms should be contemplated vis-à-vis candidate political advertising. While a detailed inquiry into this question is beyond the scope of this Article, I would suggest exploration of incentive-based changes with regard to political news/advertising. One alternative is to attempt to perfect the system currently in place by creating incentives to improve the nature and quality of political advertising. Political advertising today is often both negative and lacking much substantive content. A common explanation is that short television spots are insufficient to communicate complex policy ideas. If we take that explanation at face value, we can try to create remedial incentives. So, broadcasters might be allowed to charge a high advertising rate for particularly short political ads, and a far lower rate (and the lowest unit rate at relevant times) for thirty- or sixty-second or longer spots. This would create an incentive for politicians to create and air longer and presumably more substantive ads. To the extent that we believe in the benefits of political advertising to the public's deliberations about politics, such a scheme might tilt toward more substance and less pure negativity. Obviously, whether this would work as predicted is an empirical question that needs to be investigated.

The most contentious issue with regard to political advertising has been whether we should compel broadcasters to provide free airtime for such advertising. I assume for purposes of

But is regulation necessary, or can an incentive program work to achieve this end? After all, if there were adequate inducements for broadcasters to accept such advertising, including, for example, the ability to charge a premium over the market rate for an ad of a particular length at a particular time, a shift in the economic calculus might well result. The difficulty with this approach, however, is that broadcasters *already* have the ability to charge above-market rates for advocacy advertising, if they wish. The concern is that even under the current climate in which they could charge as much as they wished for the inconvenience of airing unpopular advocacy ads, there are sufficient situations in which mainstream commercial television stations do not accept such ads to pose a worry about the public's access to a variety of voices other than that of the broadcaster.

If a simple incentive program will not be adequate, what should we try? There are at least two possibilities. Option A would be to experiment with a rule that media outlets would be required to fill up to a certain percentage of their advertising time—an amount to be set by the FCC—for advocacy advertising, so long as these advertorials paid 100 + a set percentage of some measure of the licensees' standard commercial rates. If the demand for such advocacy advertising time did not reach the preset percentage of the broadcaster's advertising window, the time could be turned over to commercial advertisements.<sup>100</sup> Option B

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this discussion that there would be no substantial constitutional impediment to such a requirement. While the notion sounds democracy-enhancing in the abstract, whether it would particularly enhance public political discourse in reality would depend, at a minimum, on the free airtime scheme adopted. If we have doubts about the salutary effect of candidate advertising on political discourse, we might explore giving broadcasters the choice either of providing free air time for candidates, or providing more news and public affairs programming particularly related to election contests.

100. The reader might ask: "why a premium? Shouldn't we instead require that broadcasters sell this time at a discount?" After all, issue advocacy ads can prime the discussion of public concerns and thereby generally benefit society far more than most product ads that are designed simply to promote consumption.

My proposal is prompted by a tactical concern, pursuant to which I attempt to craft policy proposals that are as likely as possible to be accepted by the regulated parties. My proposal is designed to engage broadcasters voluntarily. If they are required to provide issue advertising access and can charge a premium for it, they will have an economic incentive to air such advertising and accept the requirement. In other contexts, the FCC has effectively regulated broadcasters by obtaining their consent—or at least making it difficult for them to challenge the regulatory action on judicial review. Given the complexity of the First Amendment precedent in the broadcast context, and the pro-licensee free speech interpretations recently favored by the appellate courts, it is practical to consider how one can benefit the public interest by inducing licensee agreement. If there is a real possibility that an advocacy access scheme on a discount basis would not be voluntarily accepted by licensees or permitted to stand by courts, then we have lost more than the premiums the

would be for the FCC to indicate that broadcasters are required to sell some time to proponents of issue advertising, but that they need to identify the percentage of their advertising time that they will devote to such advertising.<sup>101</sup> This option is closer to a promise/performance model of public interest programming with which the FCC had experimented prior to the deregulatory 1980s.<sup>102</sup> It does not governmentally mandate the amount of time to be sold to non-licensee editorializing. In other words, the broadcasters would make a promise about their programming, and the FCC would determine at review time whether they had satisfied their promises. This option, like Option A, would permit broadcasters to be paid a premium over their standard commercial rates for such advertising.

But if broadcasters are not forced to act as common carriers for these advertisements and have the option of choosing among them or limiting the amount they will air, will licensee owners' views skew the advocacy advertising that will be aired? What would prevent broadcasters from skewing their sales of advocacy advertising? One possibility would be to incorporate in both Options A and B a provision that if it could be shown that the broadcaster consistently sold more time to proponents of one particular point of view on a controversial issue, it would lose the ability to charge a premium for advocacy spots for some period of time. This would be a type of "fairness doctrine" for advocacy

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licensees can extract for airing socially beneficial speech. Finally, I would be reluctant to impose a specific content-based tax on broadcasters alone for the negative externalities of their commercial products if we do not impose such additional taxes on other businesses with similar effects.

101. Is there a good reason to consider Option B, rather than simply proposing Option A alone? My principal goal is to demonstrate that there can be more or less mandatory ways in which to structure (or at least describe) plans for access for advocacy advertising. What is perceived as a less coercive alternative is likely to be more easily accepted by broadcasters. In light of the power of the heavily-funded broadcast lobby, it is useful to consider whether a less coercive articulation of the access requirement would be more likely to persuade Congress or the FCC and whether it would in fact adequately address the need for access for advocacy advertising. It may well be that the end result of Options A and B would be quite similar.

102. The promise/performance approach focused, at license renewal, on whether there was a disparity between a licensee's programming promises and its actual performance. See, e.g., Hyman H. Goldin, Comment, "Spare the Golden Goose"—*The Aftermath of WHDH in FCC License Renewal Policy*, 83 HARV. L. REV. 1014, 1022 (1970); Nicholas Johnson, *The Second Half of Jurisprudence: The Study of Administrative Decisionmaking*, 23 STAN. L. REV. 173, 192 (1970) (book review); Heidi Young, Note, *The Deregulation of Commercial Television*, 13 FORDHAM URB. L.J. 373, 378-80 (1985). The promise/performance model is an alternative to a specific set of programming requirements. See also Anthony E. Varona, *Out of Thin Air: Using First Amendment Public Forum Analysis to Redeem American Broadcasting Regulation*, 39 U. MICH. J.L. REFORM 149, 157 (2006) (discussing FCC requirements for public interest programming prior to the 1980s).

advertising. If they are taking the chance of losing the ability to charge a premium for advocacy ads overall if they do not air some rough balance of viewpoints on controversial issues, it will only be the most ideologically committed broadcasters that will skew the debate unduly. But there are significant problems associated with this approach. Primarily, it is an invitation to litigation, with its costs in time and money and its ability to be used strategically.<sup>103</sup> Broadcaster opposition to such a measure would be fierce as a result. A less problematic idea would be to institute, under both Options A and B, a lottery or other non-discriminatory selection mechanism (such as a queue) if there is too much demand for advocacy advertising.

In addition, in both Options A and B, broadcasters would have to file all requests for such advertising in their public files, along with explanatory comments about requests they have rejected, in a model similar to the disclosure-oriented aspects of the children's educational television rules. The potential pressure of public scrutiny could reinforce the decision to air more than a minimum of such ads, particularly in light of the premiums they would receive for airing such programming. Either of these approaches would create a market for buyers of issue advertising time who may not be able to get airtime now as a result of commercial advertisers pressuring media outlets to avoid being associated with the issues and ads.

The next question is whether advocacy advertising under this proposal should be limited to ads by individuals or non-profit groups, and exclude corporate-sponsored ads whether by corporations themselves or non-profit groups receiving funding from such profit-making firms. The rationale in support of a source-based standard for advocacy advertising is similar to that underlying the campaign finance reform that resulted in the Bipartisan Campaign Reform Act, commonly known as the McCain-Feingold legislation.<sup>104</sup> Although the potential

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103. See, e.g., McConnell, *Advocacy Ads: Easy Money?*, *supra* note 96, at 12 (describing RNC strategy of making misrepresentation complaints about competing advocacy ads); Bill McConnell, *Advocacy Ads: Not-So-Easy-Money*, BROADCASTING & CABLE, Feb. 28, 2005, <http://www.broadcastingcable.com/article/CA506961.html> (“[S]ome activists—on both right and left—have hinted they’ll force stations to fend off costly FCC complaints or challenges to their broadcast licenses for showing even the slightest favor to one side of an issue.”).

104. For an overview of the rationales for the legislation and its limits on corporate funding for speech in elections, see McConnell v. FEC, 540 U.S. 93 (2003). (Although the *McConnell* rejection of a facial First Amendment challenge to the BCRA’s electioneering communications sections still stands, its significance has been greatly eroded by the Supreme Court’s analytic approach in *FEC v. Wisc. Right to Life, Inc.*, 127 S. Ct. 2652 (June 25, 2007), which held in an “as-applied” challenge

ability of corporate interests to capture the proposed advocacy advertising forum is a powerful concern, this Article does not ultimately propose limiting the source of advocacy advertising at the outset. Instead, it proposes to make corporate involvement transparent by requiring extensive identification of such advocacy advertising, so that viewers or listeners of the ads become clearly aware of precisely which person, institution or corporate entity is responsible for funding the ad.<sup>105</sup>

The access advocacy proposal raises some important objections. Will a mandatory requirement likely to lead to resistance, lobbying for change, and rational non-compliance if the FCC's enforcement effectiveness of the past can be used as a guideline? How can such a rule be implemented in light of the transfers of licenses during license terms? Will these suggestions disadvantage dissenting political groups with little money? Is this likely to be an illusory reform in fact?

These are serious objections. However, the details of the reforms can be structured with a view to these concerns. For example, broadcaster resistance is less likely if the requirement gives broadcasters flexibility and allows them to charge a premium for advocacy advertising. And if they are required by the FCC to carry advocacy ads, then they are faultless vis-à-vis complaining advertisers. The recommended lottery approach can reduce the concern about conscious skewing of advocacy by broadcasters manipulating their advocacy advertising policies. In addition, the fact that they need to make files disclosing advocacy advertising requests and their responses publicly available can also serve as an inducement to avoid the kind of skewing that would lead to public outcry. The broadcasters could worry that they will lose their benefits on grounds over which they have no control. After all, if they receive many advertising requests from the NRA and many fewer from gun control groups, they could reasonably argue that the lopsidedness in their overall advocacy ads is not due to any viewpoint censorship on their part, but to the realities of the advocacy advertising market. Moreover, if (as I will discuss below) there is adequate funding for advocacy advertising, it can be expected that there

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that the First Amendment was offended by the application of the provision to an ad by an anti-abortion group that the Court found could reasonably have been interpreted as a true issue ad rather than a disguised electioneering communication.)

105. For an analysis of the harms to democratic discourse from lack of sponsorship disclosure, see Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83 (2006) [hereinafter Goodman, *Stealth Marketing*].

would not be great variations in demand for such advertising on any given issue.

As for the expense of such ads for advocacy groups, it should be noted that many public interest groups, particularly when working collectively, may well be able to afford the cost of advertising. In addition, although line-drawing problems and potential compelled speech concerns may arise, we can also think about structuring public funding of the premiums charged for advocacy advertising. The funding for the premiums could come from a variety of possible sources. There could be a small set-aside of the money collected by government in its spectrum auctions,<sup>106</sup> or there could be a small tax imposed on television advertising. Another possibility would be a small electricity tax.<sup>107</sup> It is true that this proposal does not provide for government funding, no-questions-asked, of any issue advertising as a whole. It simply pays the premium over the broadcasters' rates offered to commercial advertisers. Thus, some speakers will still lack access to advocate their views if they cannot afford the base advertising rates. The difficulty with a full subsidy model, however, is that it presents an almost insuperable moral hazard problem. A partial subsidy program encourages advocacy groups to raise funds to pay the base advertising rates. Particularly in light of the growth of the grassroots media reform movements, the infrastructure for effective fundraising is rapidly developing.

### *C. Disclosure-Based Proposals: The Empowered Audience*

There is an additional element to this multi-factorial proposal: empowering the audience. One way to empower the audience is to require the media to disclose information that the audience might need either to make decisions about what to watch or to push for reform.<sup>108</sup>

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106. A spectrum auction is the current method used by the FCC to assign licenses. See, e.g., Fed. Comm'n's Comm'n, About Auctions, [http://wireless.fcc.gov/auctions/default.htm?job=about\\_auctions](http://wireless.fcc.gov/auctions/default.htm?job=about_auctions), (last visited Aug. 26, 2007); Gerald R. Faulhaber, *The Question of Spectrum: Technology, Management, and Regime Change*, 4 J. TELECOMM. & HIGH TECH. L. 123, 128 (2005) (noting Congress's grant of auction authority to the FCC and the subsequent debate over the spectrum commons alternative to auctions).

107. One wonders whether it would be viable or wise to tap advertisers for some portion of such funds, for example, by permitting broadcasters to charge an "avoidance fee" to advertisers who would wish to distance themselves from particular advocacy advertising that would otherwise air in the same time frame. The avoidance fee could be then be funneled to a fund to pay for advocacy advertising.

108. Thus, broadcasters are already required to keep in their public file descriptions of all requests to purchase advertising time for electioneering ads along with their responses to those

There have been proposals to harness the pressure that audiences can bring to bear on advertisers in order to press for programming changes by the broadcasters.<sup>109</sup> Technology now permits interest groups to communicate easily with one another, with government, with broadcasters, and with advertisers. Such communication could be an effective tool for discussion and change. Although media have in the past been required to make informational disclosures—such as having to keep information in their public files about all requests for political advertising time—two problems have plagued the usability of such disclosures. First, the FCC has eliminated a number of information-gathering and disclosure requirements.<sup>110</sup> Second, the FCC has required broadcasters to maintain their information in a station public file that would be available for inspection at the station.<sup>111</sup> The fact that information has not been readily available in electronic form has doubtless hampered systematic review efforts. Thus, this Article

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requests. See Bolen, *supra* note 96; Goodman, *Stealth Marketing*, *supra* note 105. Section 317 of the Communications Act requires broadcasters to disclose the identity of sponsors, including source announcements for political or controversial material even if it is not paid for. 47 U.S.C. § 317 (2000). For articles regarding the controversy over stations broadcasting unidentified video news releases (“VNRs”), see generally Janel Alania, Note, *The “News” from the Feed Looks Like News Indeed: On Video News Releases, the FCC, and the Shortage of Truth in the Truth in Broadcasting Act of 2005*, 24 CARDOZO ARTS & ENT. L.J. 229, 236-45 (2006) (discussing the Truth in Broadcasting Act of 2005); John Eggerton, *Little Progress Cited in Identifying VNRs*, BROADCASTING & CABLE ONLINE, Nov. 14, 2006, <http://www.broadcastingcable.com/article/CA6391055.html>; John Eggerton, *RTNDA Slams VNR Study, FCC investigation*, BROADCASTING & CABLE ONLINE, Nov. 14, 2006, <http://www.broadcastingcable.com/article/CA6391211.html>; John Eggerton, *Free Press Outs Unidentified VNRs*, BROADCASTING & CABLE ONLINE, Apr. 6, 2006, <http://www.broadcastingcable.com/article/CA6322706.html>; John Eggerton, *Viewers Want VNR IDs, Poll Finds*, BROADCASTING & CABLE ONLINE, June 13, 2005, <http://www.broadcastingcable.com/article/CA608087.html>; John Eggerton & Bill McConnell, *FCC: VNRs Need IDs*, BROADCASTING & CABLE, Apr. 18, 2005, at 17; Joe Mandese, *The Art of Manufactured News*, BROADCASTING & CABLE, Mar. 28, 2005, at 24.

109. This is one of the prongs of the children’s television regulatory approach. Another good example is the grass-roots movement mobilized by media reformers in response to the FCC’s attempt to limit structural regulations in 2003. See MCCHESENEY, *PROBLEM OF THE MEDIA*, *supra* note 11, at 252-97. For another article supporting informational regulation, see, for example, Adam Candeub, *Creating a More Child-Friendly Broadcast Media*, 2005 MICH. ST. L. REV. 911, 914.

110. See, e.g., Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order, 98 F.C.C.2d 1076, 1077 (1984); Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Memorandum Opinion and Order, 104 F.C.C.2d 357 (1986).

111. 47 C.F.R. §§ 73.3526 to .3527 (2006).



proposes that we explore the possibility of requiring that information be made electronically available.<sup>112</sup>

However, even though informational disclosure requirements might well end up empowering well-organized activist groups to pressure broadcasters to provide higher quality news and public affairs programming, the resulting availability of good content on the mass media might be beside the point because of audience attention deficit at a time of informational excess.<sup>113</sup> Thus, the empowerment strategy also needs to have a component focused on engaging the audience with such higher quality material. Perhaps one aspect of that strategy would emphasize programs of media literacy. Cautious optimism might be warranted by the significant attention apparently being devoted to the media literacy project.<sup>114</sup> In addition to promoting media literacy, another aspect of the empowerment strategy would focus on improving our filters,<sup>115</sup> “card catalogs,” and electronic program guides to help the public navigate the expanded universe of information available today.<sup>116</sup>

112. For a similar suggestion, see, for example, James T. Hamilton, *Private Interests in “Public Interest” Programming: An Economic Assessment of Broadcaster Incentives*, 45 DUKE L.J. 1177, 1187-89 (1996). The transparency that I seek to promote vis-à-vis the media must also be fostered with respect to the processes of the FCC. Last fall, for example, it was reported that members of the FCC bureaucracy had apparently suppressed the results of commissioned studies that did not reflect the desired position with regard to localism. See, e.g., John Eggerton, *Missing FCC Study Sparks Inquiry*, BROADCASTING & CABLE, Sept. 18, 2006, at 14; John Eggerton, *Missing in D.C.*, BROADCASTING & CABLE, Sept. 25, 2006, at 16; Powell, *Politics Quashed No Reports*, BROADCASTING & CABLE ONLINE, Sept. 19, 2006, <http://www.broadcastingcable.com/article/CA6373385.html>; John Eggerton, *Officials Ordered FCC Report Destroyed, Says Ex-Staffer*, BROADCASTING & CABLE ONLINE, Sept. 14, 2006, <http://www.broadcastingcable.com/article/CA6372324.html>.

113. For an excellent account of this phenomenon and its effects on the traditional assumptions of promoters of broadcast regulation, see Goodman, *supra* note 33, at 1457.

114. See *supra* note 56. It is beyond the scope of this Article to propose any other specific strategies for bringing the audience back to better content on the mass media.

115. For an important early article on filters, see J.M. Balkin, *Media Filters, The V-Chip and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131 (1996).

116. Again, I must thank Tom Krattenmaker both for the thought and the quote. Dean Krattenmaker writes informally, in an e-mail:

We need better “filters,” better “card catalogs,” to help us wade thru the morass of data out there and find out what’s worth reading/watching/hearing. . . . [M]ost of all, we need empowerment of the individual so that people can demand what they want and need from the media—and get it!! The way to do this is not to tell publishers what to publish, but to tell readers what is being published and where it can be found (and to clear away artificial barriers separating publishers and readers, where they exist.) Let a thousand flowers bloom. . . . Don’t tell farmers they should plant only 200 flowers. But do let us know where we can find tulips and how to avoid cacti (if we so wish).

## V. WILL THE FIRST AMENDMENT STAND IN THE WAY?

One quelling response to an attempt to create a multi-valent regulatory strategy is to claim that the only justifications that purportedly justified electronic media regulation as an exception to traditional First Amendment analysis have lost any salience. With scarcity out of the way, the question is said to be whether the First Amendment will be read to prohibit any regulatory initiatives that have an impact on broadcasters' speech.<sup>117</sup> Thus, in the absence of such justifications, non-interventionists argue that one cannot constitutionally treat electronic media differently from their print counterparts.

Obviously, the question of the constitutionality of broadcast regulation depends on one's view of the appropriate scope of the First Amendment. In broad brush, the current literature reflects a dichotomous

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E-mail from Thomas G. Krattenmaker to Lili Levi (Dec. 11, 2006) (on file with author); *see also* Goodman, *supra* note 33, at 1419-61 (examining the expansive amount of information and media content currently available).

Improved guides and filters present two related problems, however. The first is that as the organizing sources of information (such as Internet search engines) narrow, whether because of consolidation or simple selection via popularity, information bottlenecks can limit or skew the kind of rich, high quality content we seek for the audience. *But cf.* Robinson, *supra* note 35, at 969-70 (recognizing the necessity of "information-selection agents" and the likelihood that they will make mistakes, but finding it "hard to see a serious threat to freedom of speech in attempts to optimize the value of the information"). The second problem is that highly efficient filters and guides can allow audience members to circumscribe narrowly the information to which they will be exposed. At least as to that concern, however, cautious optimism is warranted by research indicating that Internet users as a whole do not limit their exposure only to ideas with which they agree. *See* STATE OF THE NEWS, *supra* note 14 ("Online" chapter, "Public Attitudes" section).

117. The scarcity rationale for communications regulation has been roundly criticized. *See, e.g.,* Jim Chen, *Conduit-based Regulation of Speech*, 54 DUKE L.J. 1359, 1403 & n.310 (2005), and sources cited therein ("No one besides the Supreme Court actually believes the scarcity rationale. Dissatisfaction with *Red Lion* has spawned an academic cottage industry."); R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 12-17 (attacking scarcity rationale). Even otherwise progressive scholars appear to have relinquished the scarcity doctrine. *See* sources cited in Yoo, *supra* note 3, at 266-92. Admittedly, the Supreme Court has not repudiated the scarcity notion as a rationale for distinguishing broadcast regulation. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994) ("The justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium."). Nevertheless, because of the Court's refusal to extend broadcast regulation to other media, such as cable or the Internet, on a scarcity rationale, *Reno v. ACLU*, 521 U.S. 844 (1997), because of the Court's suggestion in *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 376 n.11 (1984), that it might reconsider scarcity if given a congressional signal to do so, because of the Court's focus on other rationales for broadcast regulation (*Reno*, 521 U.S. at 868), and because of Justice Stevens' careful limitation in *Reno* of broadcast scarcity to "the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum," (*Reno*, 521 U.S. at 870), the scarcity of broadcast frequencies is unlikely to justify expansive new regulatory interventions.

view. If one takes an autonomy-based interpretation of the free speech guarantee and assimilates the corporate media and the individual speaker, then one is likely to read the First Amendment as allergic to government regulation of such corporate speech, even if the regulations are designed to affect speech indirectly.<sup>118</sup> If, on the other hand, one takes a positive view of the First Amendment,<sup>119</sup> or sees it primarily as a listener-oriented rather than speaker-oriented protection,<sup>120</sup> or at least distinguishes between the individual speaker and the corporate media voice,<sup>121</sup> the Constitution does not stand as a bar to government regulations intended to enhance speech in the public sphere, even if such regulations indirectly affect the media's speech choices.<sup>122</sup>

The "black letter" does not resolve this issue. Autonomy theorists can cite to *Miami Herald Publishing Co. v. Tornillo*<sup>123</sup> and *Arkansas Educational Television Commission v. Forbes*,<sup>124</sup> as well as indicators in some of the Supreme Court's broadcast regulation cases questioning the regulatory viability of the scarcity rationale.<sup>125</sup> They can refer to the apparent acceptance of First Amendment claims by electronic speakers at the lower federal court level as reflecting a developing trend in

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118. See, e.g., Chen, *supra* note 80, at 1451-56; Yoo, *supra* note 35, at 714.

119. See, e.g., Owen Fiss, Essay, *Why the State?*, 100 HARV. L. REV. 781 (1987); Owen Fiss, Essay, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986) [hereinafter Fiss, *Free Speech*]; see also CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* xv-xvi (1993); Jerome Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

120. See, e.g., Fiss, *Free Speech*, *supra* note 119, at 1417 (describing his "listener oriented" approach to free speech analysis). There is dispute about whether we should think of the First Amendment as speaker-centered or audience-centered. This tension might be ameliorated in the broadcast context if we took seriously the notion of the broadcast licensee as public trustee. As a public trustee, the licensee has a fiduciary duty to the public to act as its representative and not to engage in self-dealing transactions. This means that the licensee as speaker must speak to the audience whose interests it is representing. Just as advertisers must guess at the content that would attract their desired demographic, licensees must guess at the news and public affairs programming that would represent its community of license. This requires interpretation, of course, and might well be wrong. But it also means that the licensee should exercise its editorial discretion at least to some degree in order to promote a diversity of ideas. Naturally, there is a tension between this view and the view of the broadcaster as autonomous speaker.

121. Baker, *Media Structure*, *supra* note 11, at 739.

122. For an argument as to the "ubiquity of potential constitutional claims with respect to any real substantial media regulation," and a claim that simplistic economic libertarianism is not an adequate response to complex problems, see Daniel A. Farber, *Access and Exclusion Rights in Electronic Media: Complex Rules for a Complex World*, 33 N. KY. L. REV. 459, 473 (2006).

123. 418 U.S. 241 (1974).

124. 523 U.S. 666 (1998).

125. See, e.g., *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984).

support of limiting or eliminating broadcast exceptionalism.<sup>126</sup> By contrast, interventionists can distinguish *Miami Herald* by explaining that it is less an absolute affirmation of editorial freedom than a statement about the First Amendment prohibition of compelled speech as a “punishment” for editorializing.<sup>127</sup> They can remind us that the Supreme Court has not abandoned the scarcity doctrine for broadcasting; that the Supreme Court has consistently deferred to congressional and administrative regulatory decisions affecting structure;<sup>128</sup> that the Court has recently approved disclosure-based regulations for broadcast entities,<sup>129</sup> and that the lower federal court cases that appear to extend strict scrutiny to any regulations affecting broadcast speech go much further than the Supreme Court’s electronic media cases.<sup>130</sup>

Another approach to the anti-interventionist critique is to challenge the by-now-traditional conclusion of First Amendment theorists that there are in fact two different First Amendment traditions in this country, with broadcasting subject to a lesser constitutional protection.<sup>131</sup> At least one important First Amendment theorist suggests that at the Supreme Court level, with the conspicuous exception of one case distinguished in *Turner Broadcasting System, Inc. v. FCC*,<sup>132</sup> the two traditions are in fact not so very different after all.<sup>133</sup> On this view, current First

126. Lower federal courts have been increasingly accepting the First Amendment claims of electronic speakers, and putting the government to the test of providing evidence to back up what the claimants have asserted are regulations that have a suppressive impact on their speech. See BAKER, MEDIA CONCENTRATION, *supra* note 4; Baker, *Media Concentration*, *supra* note 11, at 851-55; Adam Candeub, *The First Amendment and Measuring Media Diversity: Constitutional Principles and Regulatory Challenges*, 33 N. KY. L. REV. 373, 386-90 (2006).

127. See C. Edwin Baker, *Turner Broadcasting: Content-based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 111-13; see also Chen, *supra* note 103, at 1382.

128. See, e.g., *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 793-97 (1978); *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 224-26 (1943). For an example of Supreme Court deference to less clearly structural congressional rules, see *Columbia Broad. Sys., Inc. v. FCC*, 453 U.S. 367, 396-97 (1981) (upholding Congress’s limited statutory right of access for federal candidates to purchase advertising time).

129. See *McConnell v. FEC*, 540 U.S. 93, 194-202 (2003).

130. See *supra* note 126.

131. For descriptions of dual First Amendment traditions, see, for example, LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 85-87 (1991); Marvin Ammori, *Another Worthy Tradition: How the Free Speech Curriculum Ignores Electronic Media and Distorts Free Speech Doctrine*, 70 MO. L. REV. 59 (2005); 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); Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101 (1993).

132. 512 U.S. 622 (1994); see C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 112-14.

133. See BAKER, *supra* note 4; Baker, *supra* note 127, at 93-94.

Amendment rhetoric has been captured by corporate interests and conservative judges who have used crabbed readings of the First Amendment to undermine reasonable economic regulation designed to enhance the communications order.<sup>134</sup> For proponents of this interpretation, such structural regulations—including ownership rules and even access rules—should be permissible whether in the print or electronic context as long as they are not intended to censor speech. In “scrutiny terms,” they should receive at most intermediate First Amendment scrutiny.<sup>135</sup> The key issue, then, is whether the government is legitimately attempting to regulate the structure of the information industry at a minimum in order to make up for market imperfections.

This reading of First Amendment history, however, does not eliminate the problem. Most fundamentally, even though there is agreement among media law theorists that the FCC should not be allowed to censor speech directly, there is a fundamental disagreement about how we should define impermissible censorship as opposed to benign structural regulations with an impact on speech.<sup>136</sup>

I worry both about the deregulatory and the regulatory First Amendment. Some deregulatory analysts attempt to straddle an inconsistency, arguing for an autonomy and speaker-based First Amendment, but simultaneously justifying media speech as an important

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134. See Jack M. Balkin, Commentary, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 27-28 (2004) (“Freedom of speech is becoming a generalized right against economic regulation of the information industries.”); J.M. Balkin, Commentary, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869, 873-74 (1993); J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 375-87 (discussing ideological drift in the First Amendment); Robinson, *supra* note 35, at 944.

Some have referred to this as First Amendment Lochnerism. See, e.g., Kenneth D. Katkin, Introduction, *First Amendment Lochnerism? Emerging Constitutional Limitations on Government Regulation of Non-speech Economic Activity*, 33 N. KY. L. REV. 365 (2006) (introducing symposium on the subject); see also Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 109-10 (1993); Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of “Rights Management,”* 97 MICH. L. REV. 462 (1998).

135. Professor Baker, for one, has argued against formalized First Amendment scrutiny analysis. See, e.g., Baker, *Media Structure*, *supra* note 11, at 759 & n.96; see also Donald W. Hawthorne & Monroe E. Price, *Rewriting the First Amendment: Meaning, Content and Public Broadcasting*, 12 CARDOZO ARTS & ENT. L.J. 499, 520 (1994) (arguing against “mechanistic application of First Amendment doctrine”).

136. For critiques of structural regulation as sub-text censorship, see, for example, Yoo, *supra* note 35, at 673-74; J. Gregory Sidak, *An Economic Theory of Censorship*, 11 SUP. CT. ECON. REV. 81, 81 (2004).

part of the marketplace of ideas designed to benefit the public.<sup>137</sup> They recognize the distributional problems that lead to media concentration in elite hands, but rest their hopes for representative public discourse by corporate media on the assumption that rational economic owners will program to satisfy the desires of the public and thereby serve as proxies for more expansive ownership.<sup>138</sup> In so doing, they do not fully confront the market failures built into the structure of advertising-supported commercial media.<sup>139</sup> They do not explain why public discourse will not be undermined by property rights in broadcast frequencies, and they put too much faith in new technologies such as the Internet to solve the problems of consolidated media ownership.<sup>140</sup>

At the same time, some interventionist theorists attach insufficient significance to the dangers of command-and-control government regulation. There are different kinds of dangers. One is the danger posed by resource problems, inaccuracy, inefficiency, and bureaucratic lack of nimbleness.<sup>141</sup> Another danger, emphasized primarily by public choice theorists, is the danger of agency capture and consequent innovation-

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137. See, e.g., Yoo, *supra* note 3. (This point is distinct from the claim that Professor Yoo's First Amendment interpretation is overly commodified. For such an argument, see Baker, *Media Structure*, *supra* note 11, at 742-47.).

138. See SUNSTEIN, *supra* note 119, at 17-18; Lili Levi, *Reflections on the FCC's Recent Approach to Structural Regulation of the Electronic Mass Media*, 52 FED. COMM. L.J. 581, 595-96 (2000).

139. This is essentially an "internal" criticism of the market satisfaction argument. It focuses on whether the market will, in fact, adequately provide the public with programming that the public desires and that is important for participation in public life. See Baker, *Media Structure*, *supra* note 11, at 736-37; see also BAKER, *supra* note 12, at 63-95. There are other critiques as well, the principal one being that democracy itself, as a normative matter, requires the broadest dissemination of avenues for speech. See BAKER, *MEDIA CONCENTRATION*, *supra* note 4; Goodman, *supra* note 33, at 1415-19 (describing both "narrow" and "broad" market failures).

140. See, e.g., BAKER, *MEDIA CONCENTRATION*, *supra* note 4, at 97-123. Enrique Armijo, Recent Development, *Public Airwaves, Private Mergers: Analyzing the FCC's Faulty Justifications for the 2003 Media Ownership Rule Changes*, 82 N.C. L. REV. 1482, 1494-99 (2004).

141. One could be concerned, for example, about the extent to which the FCC has, at least in the past, taken regulatory positions in reliance on empirical data produced by or under the direction of regulated entities. Granted, media watchdog and advocacy groups have taken to providing their own alternative data and studies in highly visible, controverted contexts such as media ownership, but this appears to be a newer phenomenon. See, e.g., Eggerton, *FCC Faces Flurry of Studies*, *supra* note 78. Industry will have the incentive to produce data in every instance in which it seeks FCC action. Moreover, there may be disparity in the information available to industry insiders and outside advocacy groups, which might hamper the effectiveness of empirical counter-studies. Moreover, some have complained that there is little transparency in the way the FCC chooses empirical studies on which to rely. See, e.g., John Eggerton, *FCC Picks Ownership Studies; Copps Takes Aim*, BROADCASTING & CABLE ONLINE, Nov. 22, 2006, <http://www.broadcastingcable.com/article/CA6394503.html>.

suppressing protectionism.<sup>142</sup> Yet another danger is that of ideological pressure by government—particularly in times of what can be characterized as political emergency—via the expedient of regulation (or threats of regulation).<sup>143</sup> The fact that FCC regulations that do not seek to censor speech directly can be characterized as structural regulations designed merely to redress market imbalances does not obscure the reality that they are specifically calculated to affect speech and speaker identities. Permitting this sort of intervention without searching review opens the door to much governmental mischief. Moreover, corporate media occupy a complex and ambiguous reality as both speakers and conduits, proxies and trustees. Even if we see them as trustees and proxies for the public, the electronic media are also, at least in their journalistic functions, speakers and editors. We may decide that they should share their amplified soapboxes with other speakers because their channels give them unprecedented and exclusionary access to the public, and we may criticize their choices of both entertaining and informational speech, but their role as speakers and editors bears attention.<sup>144</sup>

My response to these tensions is to attempt to find a practical middle ground. I propose that we negotiate the constitutional shoals by crafting a regulatory approach that limits the openings for governmental censorship, that endeavors to provide as much flexibility and editorial decision-making as possible in order to promote journalistic content

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142. See, e.g., Hazlett, *supra* note 34, at 931-32; Robinson, *supra* note 35, at 904-05.

143. Professor Lucas Powe, for example, has written in detail about the history of broadcast regulation as engendering these kinds of censorial dangers. See POWE, *supra* note 3, at 142-61. *But see* Robinson, *supra* note 35, at 923-24 (challenging the account that the threats were really effective.)

144. This suggests that even corporate media speakers should be seen as speakers with independent editorial judgment, at least in some of their expressive roles. Some media theorists, such as Professor Baker, see the media as speakers protected under the First Amendment's press clause and not under the speech clause. See C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955 (2007). Other theorists appear to reject a special constitutional role for modern media organizations and criticize attempts to define the press by focusing on their exercise of independent editorial judgment as unrealistic and elitist. See, e.g., Anderson, *supra* note 11 (arguing that the media as currently constituted do not differ from other information businesses and do not warrant special First Amendment protection in their reportorial roles). My point here is to suggest that the dual nature of speech intermediaries—as both speakers and conduits for the voices of others—makes the constitutional analysis more complicated than either polar approach to the First Amendment might suggest. See Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653 (1998) (describing, *inter alia*, how speech intermediaries look both like speakers and governors of others' speech, and describing various explanations for differential constitutional treatment of such speech intermediaries).

likely to be under-produced by the market, and that attempts to enlist the public in enhancing the effectiveness of self-regulation.

If we take as a given the existing picture of electronic media regulation and understand how much of what we have results from particular sorts of programmatic government choices about media structure,<sup>145</sup> we might conclude that problems that arise in the industry are at least partially attributable to the government's plan. It is therefore not irrational to task the government with regulating in order to minimize the consequences of its prior regulatory choices.<sup>146</sup> One might respond that it would be wiser to deregulate, because the project of trying to find the right regulatory balance is likely to fail for a variety of reasons. The problem with that response is that even if non-intervention could have been workable in the early twentieth century, when modern electronic communication was in its infancy, we are today not dealing with a *tabula rasa*. If we were to disband the FCC and give up on media-specific regulation altogether, the existing electronic media system would still owe its origin, architecture, and consequences to seventy years of prior regulation and administrative distribution of rights.

Moreover, scholars have explored regulation as a *quid pro quo* for the benefits bestowed without charge on electronic media participants.<sup>147</sup> Critics of such approaches have lamented that the FCC has consistently

145. See PAUL STARR, *THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS* (2004) (tracing the historical impact of the constitutive choices that led to the media system we have today).

146. Professor Christopher Yoo has argued that there is something fundamentally inappropriate and boot-strapping in a self-justifying culture of regulation. See Yoo, *supra* note 3, at 253, 269-79. But that is only so if we wish to dismantle the entire regulatory structure. And even so, what would be subject to market ordering would depend on pre-existing regulatory choices.

Some have tried to assimilate this rationale to the rationale based on pervasiveness. Professor Jim Chen, for example, argues that the notion makes sense if we see it as grounded on the public's association of the government with the message: that is, if a medium has not been widely regulated for a long period, it is unlikely that people will associate the government with the content they see on the medium. Chen, *supra* note 80, at 1396. This raises the question, however, of why the government appearing neutral is the basis for justifying regulation.

147. See, e.g., Michael M. Epstein, *Broadcast Technology as Diversity Opportunity: Exchanging Market Power for Multiplexed Signal Set-Asides*, 59 FED. COMM. L.J. 1, 2-4 (2007); Hundt & Kornbluh, *supra* note 77, at 17; Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1690-91 (1997); Gretchen Craft Rubin, *Quid Pro Quo: What Broadcasters Really Want*, 66 GEO. WASH. L. REV. 686, 687-90 (1998) (reviewing RATIONALES & RATIONALIZATIONS: REGULATING THE ELECTRONIC MEDIA (Robert Corn-Revere ed., 1997)). For a criticism of *quid pro quo* arguments, see, for example, Robert Corn-Revere, *Regulation and the Social Compact*, in RATIONALES & RATIONALIZATIONS: REGULATING THE ELECTRONIC MEDIA, *supra*, at 43.



given broadcasters a lot more *quo* than the *quid* required in return, that there is no principled way to define the appropriate exchange, and that profit-motivated broadcasters are too likely to bargain away important speech rights for economic benefits that will not be shared by society at large.<sup>148</sup> Yet the notion of establishing an exchange in which broadcasters would proportionately address the market failures occasioned by their industry structure is a common-sense goal and provides some sort of benchmark, regardless of the problems with prior implementation.<sup>149</sup> As for the claim that broadcasters are improperly enticed to bargain away speech rights, doesn't that depend on the type of *quid pro quo* at issue, on what speech rights are attributed to broadcasters as an initial matter, and on whether we assume that such bargains are, by definition, unconstitutional conditions?

In any event, even if we understand the market itself to be regulatory and grounded on regulation, and even if we recognize the extent to which broadcasters have been given the opportunity to extract monopoly rents, that does not mean that the only viable regulations are those command-and-control concepts that would inevitably pose challenges for classical First Amendment theorists at this time. Hybrid regulatory structures can hopefully evade the clash between the dichotomous readings of the First Amendment today. Some theorists have persuasively argued that crafting regulations as subsidies rather than government commands in the media context can circumvent free speech challenges.<sup>150</sup> In keeping with this approach, I believe that the proposals suggested here would stand a good chance of passing constitutional muster even under a more traditional, speaker-based First Amendment interpretation.

My proposals for media pluralism are non-mandatory and dependent on funding. My proposal for a percentage of advertising revenues to be used for news and public affairs program-creation is equivalent to a spectrum license fee. While it promotes a particular

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148. See Corn-Revere, *supra* note 147, at 692; Varona, *supra* note 22, at 32-52.

149. Admittedly, although the original broadcast licensees may have received a windfall—namely, their right to broadcast for free—present owners have in fact paid full market price in the private secondary market for licenses, as if they had received their licenses by government auction. Thus, I am indebted to Professor Baker for the observation that what underlies the *quid pro quo* argument may be an attempt to limit to broadcasting the recognition of government power to regulate the economic order in ways that serve the public interest.

150. For a powerful article making, *inter alia*, this point, see Ellen P. Goodman, *Bargains in the Information Marketplace: The Use of Government Subsidies to Regulate New Media*, 1 J. TELECOMMS. & HIGH TECH. L. 217, 218-21, 291-92 (2002).

category of speech by the media, it does not promote any particular viewpoint. Nor does it provide censorial opportunities for the FCC. It does not even require any particular amount of news and public affairs programming per se and cannot reasonably be said to compel speech. It is not even a tax discriminatorily imposed on expression. My proposal for access for advocacy advertising is mandatory to a degree, but, at least in one of the versions discussed, it allows broadcasters to decide how much such advertising they wish to air and permits them to be paid a premium for the advocacy advertising.<sup>151</sup> My disclosure-oriented proposals can rely on the Court's openness to mandatory disclosure in many contexts, including television.<sup>152</sup> With regard to structural regulations—principally ownership regulations—this Article has not attempted to craft or select particular regulations, even though ownership rules may ultimately have the most significant impact on the future development of the electronic media. Obviously, the constitutional

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151. The proposal can be supported under existing Supreme Court precedent. Admittedly, the Supreme Court in *Columbia Broadcasting System v. Democratic National Commission*, 412 U.S. 94 (1973) rejected a reading of the First Amendment that would have compelled broadcasters to accept paid editorial advertisements. At first glance, this would appear to cast doubt on the constitutional viability of my proposal regarding advocacy advertising. However, the opinion in *Columbia Broadcasting System v. Democratic National Commission* relied on the existence of the fairness doctrine in its analysis of why broadcasters need not be required to provide access for editorial advertisements. The Court emphasized the need to promote broadcasters' editorial freedom, but did so specifically because the fairness doctrine would ensure adequate and balanced coverage of controversial public issues. In light of the demise of the fairness doctrine and the remaining broadcaster incentives not to offend product advertisers, the Court's analytic assumptions in *Columbia Broadcasting System v. Democratic National Commission* no longer hold true. Moreover, *Columbia Broadcasting System v. Democratic National Commission* addressed the issue of whether the First Amendment affirmatively required a generalized right of access to the press, and the Court concluded that it did not. This does not address the question whether a mandatory requirement that broadcasters accept some amount of advocacy advertising could be considered permissible under the First Amendment. Finally, despite its rejection of a general right of access to the press in *Columbia Broadcasting System v. Democratic National Commission*, the Court did uphold a congressionally created right of access to the air for federal political candidates in *Columbia Broadcasting System v. FCC*, 453 U.S. 367 (1981).

152. See *McConnell v. Fed. Elections Comm'n*, 540 U.S. 93, 194-202 (2003). Of course, their viability will depend on details that are beyond the scope of this Article. See Goodman, *Stealth Marketing*, *supra* note 105, at 130 ("Even under the most exacting First Amendment review . . . a carefully drawn sponsorship disclosure law survives constitutional scrutiny and, indeed, furthers First Amendment interests.") *But cf.* Lyrisa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1553-55 (2007) (describing "deep theoretical inconsistency" between the *McConnell* approach and the Court's earlier recognition of the right to speak anonymously in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995)). See also See C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 993-95 (2007).

question will depend on the particular structure of the proposed regulation.

Ultimately, though, the most important practical question is not the constitutional question. It is the question of policy: Should we undertake an experiment with the kinds of proposals I have advanced in this Article? I think we should do so only if we view these interventions as revisable in light of additional knowledge and changed conditions. We must have the appetite to study their results carefully and expertly, and treat them as constantly subject to supplementation, change, or elimination, as appropriate. The FCC has sometimes been lackadaisical or careless—and sometimes apparently political—with respect to its promises to study the consequences of its rules.<sup>153</sup> If the media as a whole are further emboldened—whether because of funding or audience pressure or technological change—then we should be ready to revisit the calculus discussed here.

## VI. CONCLUSION

This Article has argued for a two-pronged approach to electronic media reform in order to enhance the electronic press's ability to function both as educator and as watchdog. The first prong focuses on attempts to enhance media pluralism in the service of an overall market balance. It suggests that we search for some kind of media equilibrium in which mainstream commercial media, public broadcasting, and non-profit alternative media can enhance one another's strengths and compensate for one another's weaknesses.

The second prong of the reform proposal focuses on commercial broadcasting. The Article suggests experimenting with the following: 1) structural regulations designed to promote journalistic values; 2) a requirement that broadcasters spend a certain percentage of their gross advertising revenues on news and public affairs production and programming; 3) two options for a requirement that broadcasters air advocacy advertising, for which they would be paid a premium over their ordinary commercial rates; and 4) disclosure-oriented requirements

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153. Since its release of one FCC staff study undertaken in 1999, three years after the adoption of the original children's educational television rules the Commission has delayed undertaking or issuing subsequent studies as promised. Media activists (and Democratic Commissioners) complained that politics skewed the Commission's 2003 study of the continuing necessity of its ownership regulations. *See, e.g.*, Ben Scott, Essay, *The Politics and Policy of Media Ownership*, AM. U. L. REV. 645, 650-51, 656-58 (2004).

designed to empower the audience.

I propose these possibilities not as cure-alls, but as options for discussion and, perhaps, experimentation. Let me reel off some clichés with relevance to discussions of media reform: Nothing is perfect. The devil is in the details. There is no such thing as a killer app or one size fits all. All virtues have accompanying vices. We should value modesty and prudence. Things change.

Critics might respond that we will not know whether my proposals, if implemented, would improve public discourse. That may be true, but my evaluative questions are somewhat simpler ones: Are the mainstream electronic media producing more quality journalism? And is there more access for non-mainstream points of view than currently available? If so, I suspect the game is worth the candle.