

No Time for Equal Time: A Comment on Professor Magarian's *Substantive Media Regulation in Three Dimensions*

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Introduction

The resurgent support for the fairness doctrine, which Professor Magarian thoughtfully explores in his symposium contribution *Substantive Media Regulation in Three Dimensions*,¹ reflects a justifiable and deeply held dissatisfaction with the state of American media. Many believe that American media are overly commercial, partisan, trivial, and concentrated.² Despite the proliferation of media outlets in recent years, critics decry what they see as either a monolithic sameness or a polarizing partisanship in mainstream media.³ In particular, the failure of leading media organizations to reveal errors in the justifications for the Iraq War exposed concerns that the media have systematically silenced dissenting and marginal voices.⁴ Such criticism fuels not only the fairness doctrine revival movement, but also the surprisingly strong and widespread opposition to media consolidation.⁵

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¹ Gregory P. Magarian, *Substantive Media Regulation in Three Dimensions*, 76 GEO. WASH. L. REV. 845 (2008).

² See *id.* at 857–60 (discussing the view that media is subject to control of wealthy private interests); *id.* at 864 (discussing the view that media regulation is necessary to facilitate democratic debate in media).

³ For an overview, see C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS* (2006); ROBERT MCCHESENEY, *THE PROBLEM OF THE MEDIA: U.S. COMMUNICATION POLITICS IN THE TWENTY-FIRST CENTURY* (2004).

⁴ See, e.g., W. LANCE BENNETT ET AL., *WHEN THE PRESS FAILS: POLITICAL POWER AND THE NEWS MEDIA FROM IRAQ TO KATRINA* 29 (2007).

⁵ For discussions of the grassroots movement to roll back media consolidation, see Russell Newman & Ben Scott, *Introduction* to *THE FUTURE OF MEDIA: RESISTANCE AND REFORM IN THE 21ST CENTURY* 4 (Robert McChesney, Russell Newman & Ben Scott eds., 2005). For arguments concerning the relationship between media ownership structure and content, see MCCHESENEY, *supra* note 3, at 57–97; 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,

Professor Magarian suggests that a reconstructed fairness doctrine might cure some of the media's deficiencies, thereby enhancing the contributions of media institutions to democracy and the democratic functions of the First Amendment.⁶ The erstwhile fairness doctrine required broadcasters to cover topics of public interest and to provide equal time for both sides of controversial issues that they chose to cover.⁷ The doctrine's premise was that broadcasters had an obligation to inform the public about important issues and to provide a forum for different perspectives on the most contested of these issues.⁸ Professor Magarian's support for the fairness doctrine grows out of his approach to the First Amendment, which emphasizes the government's affirmative obligation to foster certain types of communication in addition to its negative obligation to refrain from censoring speech.⁹ While I am generally sympathetic to this approach, I do not agree that reviving the fairness doctrine is either necessary or useful in furtherance of First Amendment values.

Professor Magarian acknowledges that the fairness doctrine "presents major problems . . . given the conceptual complexity of fairness regulations and the number, variety, and rapidly evolving technological platforms of contemporary information sources."¹⁰ He suggests that these problems can be addressed by applying the fairness doctrine to the "conventional mass media," so that at least they will "provide substantial exposure for debate about issues of public concern."¹¹

In this Comment, I argue that the underlying goal of exposure to particular media content is not achievable through the fairness doctrine. In doing so, I accept for the sake of argument that it would be

734–39 (2005). See generally BAKER, *supra* note 3 (arguing against media ownership concentration).

⁶ Magarian, *supra* note 1, at 850.

⁷ See *id.* at 845–46 (describing the fairness doctrine); see also *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 111 (1973) ("[T]he [fairness] doctrine imposes two affirmative responsibilities on the broadcaster: coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints.").

⁸ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 377 (1969).

⁹ See Gregory P. Magarian, *Regulating Political Parties Under a "Public Rights" First Amendment*, 44 WM. & MARY L. REV. 1939, 1944 (2003) (advocating view of First Amendment "as an affirmative constitutional commitment to foster a vigorous, broadly participatory electoral discourse"); see also *id.* at 1972–91.

¹⁰ Magarian, *supra* note 1, at 850.

¹¹ *Id.*; see also *id.* at 891 (defining "conventional mass media" as "the media sector in which large enterprises' desire for economic gain through generalized programming . . . meets the mass audience's desire for a stratum of broad cultural confluence" and excluding the Internet from this category).

both legally and practically possible to implement a regulatory requirement of fairness; that is, that there remains in today's world such a thing as "conventional mass media" to which the doctrine could apply, that the doctrine is constitutional, that it would not unduly chill speech or experimentation in new forms of content, that government is capable of enforcing fairness in media, and that neutrality is the desirable end state for every mass media channel. About all of these propositions I have considerable doubt, but even accepting them, I conclude that with respect to the third dimension of Professor Magarian's schema¹²—the fit between the media landscape and the regulatory goals of the fairness doctrine—coverage and balance regulations will not achieve the goal of public exposure to desired content.

I. *The Goal of the Fairness Doctrine*

Professor Magarian, following Professor Jerome Barron, characterizes the fairness doctrine as an instrument for "administering access rights" because it affords speakers on the other side of a controversial topic access to the airwaves.¹³ As the Supreme Court observed in upholding the doctrine, however, its focus is not actually on speaker access; rather, the speaker's interest in accessing the audience is far less important than the audience's interest in hearing diverse speakers.¹⁴ The hope of the fairness doctrine is that the public not be left uninformed.¹⁵ In this respect, the doctrine's purpose is not to administer speaker access so much as to promote audience exposure. Indeed, in its most comprehensive report on the doctrine, the Federal Communications Commission ("FCC") announced that its "goal in this area must be to foster 'uninhibited, robust, wide-open' debate on public issues."¹⁶

¹² For a detailed discussion of the debate surrounding this third dimension, see generally *id.* at 864–69. For a more detailed account of Professor Magarian's thesis highlighted *supra* in text accompanying notes 6–8, see generally *id.* at 881–95.

¹³ See *id.* at 851–52 (citing JEROME A. BARRON, FREEDOM OF THE PRESS FOR WHOM? THE RIGHT OF ACCESS TO MASS MEDIA 158–59 (1973)).

¹⁴ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."); see also *Handling of Pub. Issues Under the Fairness Doctrine & the Pub. Interest Standards of the Comm'ns Act*, 48 F.C.C.2d 1, 3 (1974) ("It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.")

¹⁵ See *Green v. FCC*, 447 F.2d 323, 329 (D.C. Cir. 1971).

¹⁶ *Handling of Pub. Issues Under the Fairness Doctrine*, 48 F.C.C.2d at 1 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

The gap between speaker access and audience exposure was relatively small during the operation of the fairness doctrine (between 1949, when it was adopted,¹⁷ and 1987, when it was abandoned).¹⁸ In this “broadcast era,” broadcasters controlled audiences by virtue of their control over the sole means of transmitting electronic communications to a mass audience. At bottom, broadcasters’ power over audience exposure was rooted in the scarce broadcast transmission capacity, which naturally concentrated audiences and held them captive to a few channels of broadcast content.¹⁹

Because the Supreme Court upheld the constitutionality of the fairness doctrine on grounds of broadcast scarcity,²⁰ it is the constitutional relevance of scarcity that receives the most attention. There has been plenty of debate over the vitality of scarcity as a constitutional justification, whether viewed as an organic characteristic of broadcast spectrum or an artifact of government policies that limited the number of licensees able to broadcast over the spectrum.²¹ That there was a scarcity of broadcast channels when the fairness doctrine reigned is unquestioned. Although the fairness doctrine was a content-based regulation, as distinguished from a structural media regulation, it was fundamentally tied to the structure of broadcasting at mid-century and the constraints on broadcast transmission capacity present at that time. In this sense, content-based media regulations assume structural realities and must take into account changes to those assumed structures.

Transmission capacity lies at the bottom of what some scholars and commentators have labeled the “layered model” of telecommunications.²² Applying this model to broadcasting, we are able to break down what happens when a television program is broadcast into its independent parts.²³ First, there must be physical infrastructure—the

17 Editorializing by Broad. Licensees, 13 F.C.C. 1246, 1257–58 (1949).

18 Syracuse Peace Council, 2 F.C.C.R. 5043, 5057–58 (1987).

19 See Yochai Benkler, *Communications Infrastructure Regulation and the Distribution of Control over Content*, 22 TELECOMM. POL’Y 183, 187–88 (1998).

20 See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388–89 (1969).

21 See Magarian, *supra* note 1, at 868–69 (summarizing the critique of the scarcity rationale as a constitutional justification for content-based broadcast regulation).

22 See, e.g., Richard S. Whitt, *A Horizontal Leap Forward: Formulating a New Communications Public Policy Framework Based on the Network Layers Model*, 56 FED. COMM. L.J. 587, 615–24 (2004); Douglas C. Sicker & Joshua L. Mindel, *Refinements of a Layered Model for Telecommunications Policy*, 1 J. ON TELECOMM. & HIGH TECH. L. 69, 77–81 (2002); Kevin Werbach, *A Layered Model for Internet Policy*, 1 J. ON TELECOMM. & HIGH TECH. L. 37, 57–64 (2002).

23 Commentators give the distinct layers a variety of names and propose more and less complex models with different numbers of layers. The three-layer model is the simplest and

towers, transmitters, and wireless spectrum—to convey the signal. This is the transmission layer. Second, riding atop of the transmission layer are the software protocols and standards that enable information to be transmitted and understood across the physical conduits. This is the protocol layer. Finally comes the media content itself at the third and uppermost layer, the content layer. It is this layer of programming that we ultimately care about in terms of free-speech values.

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| CONTENT LAYER – PROGRAMS |
| PROTOCOL LAYER – TECHNICAL STANDARDS |
| TRANSMISSION LAYER – CABLE, BROADCAST CONDUITS |

Understood in terms of these layers, the fairness doctrine appears to have operated at the content layer to address the constraints imposed by scarcity at the transmission layer. Content-based obligations were supposed to correct for possible abuses, or inevitable exercises, of control over broadcast transmission capacity. This is why the fairness doctrine applied only to the content of a single transmission technology—broadcasting—and not more generally to mass media content providers like cable. This is why repeal of the fairness doctrine turned on whether or not scarcities at the transmission layer persisted.²⁴

The aspirations of fairness doctrine supporters are more comprehensible if we complicate the three-layered model. If the fairness doctrine were merely designed to “guard against one-sided presentation of controversial issues”²⁵ at the content layer, then mere inclusion of multiple points of view at the content layer would have sufficed. But the fairness doctrine required a “reasonable opportunity” for the presentation of opposing views, not just any opportunity.²⁶ No fairness doctrine complainant would be satisfied with coverage of a story, or a reply to such coverage, that aired at three in the morning when few

most influential on communications policy discussions. See Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 568 (2000).

²⁴ See *Syracuse Peace Council*, 2 F.C.C.R. 5043, 5051 (1987).

²⁵ *FCC v. League of Women Voters*, 468 U.S. 364, 372 (1984).

²⁶ *Editorializing by Broad. Licensees*, 13 F.C.C. 1246, 1250 (1949) (stating that licensees must “afford a reasonable opportunity for the presentation of all responsible positions on matters of sufficient importance to be afforded radio time” in order to maintain “a medium of freedom of speech for the people as a whole”).

viewers are watching.²⁷ Nor would inclusion of content by one broadcast station compensate for the failure of another broadcast station to feature such content. In rejecting a proposal that broadcast content be considered fungible across channels, the FCC emphasized the goal of viewer exposure to content, not mere ability to access it: “[T]he requirement that *each* station provide for contrasting views greatly increases the likelihood that individual members of the public will be exposed to varying points of view.”²⁸

This ideal of audience exposure to content suggests that the fairness doctrine operated atop the content layer, at a layer that we might call “salience.” The doctrine compelled more than simple access to the content layer; it compelled access to the content layer in a manner that was likely to confer salience on the speaker in public discourse.

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| SALIENCE LAYER – AUDIENCE EXPOSURE |
| CONTENT LAYER - PROGRAMS |
| PROTOCOL LAYER – TECHNICAL STANDARDS |
| TRANSMISSION LAYER – CABLE, BROADCAST CONDUITS |

This right of access to the salience layer of communications resonates with a democratic theory that values diversity insofar as diverse points of view are broadly circulated. As Professor Magarian observes, the fairness doctrine is rooted in the civic republican aspiration that democratic public discourse be a discourse in common.²⁹ Significantly, this republican ideal of “mediated public discourse” assumes that citizen preferences are best fashioned through communication with others.³⁰ The FCC, reflecting this ideal, had hoped that the fairness doctrine would enhance the contributions of the mass media to

²⁷ See, e.g., Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1653 (1967) (“If ideas are criticized in one forum the most adequate response is in the same forum since it is most likely to reach the same audience.”).

²⁸ Handling of Pub. Issues Under the Fairness Doctrine & the Pub. Interest Standards of the Commc’ns Act, 48 F.C.C.2d 1, 9 (1974).

²⁹ See Magarian, *supra* note 1, at 892 (“[T]he fairness doctrine embodies republican values of mediated public discourse and broadly shared experience.”).

³⁰ Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1545 (1988) (stating that the function of politics “is to select values, to implement ‘preferences about preferences,’ or to provide opportunities for preference formation rather than simply to implement existing desires”). The republican idea of political freedom posits the interplay of “different conceptions of the public good [to be mediated] through discussion and dialogue” for the purpose of producing “agreement among political equals.” *Id.* at 1554.

“the development of an informed public opinion.”³¹ Professor Magarian similarly speaks of public opinion as “democratic discourse,” arguing that “[a] carefully conceived renewal of the fairness doctrine could substantially improve the mass media’s crucial contribution to democratic discourse.”³² It is in the hopes of shaping discourse that the fairness doctrine insists on making diverse information available at the salience layer, where it is offered up for common consumption.

In the broadcast era, the broadcast networks and their local affiliates, because of their control over transmission, were uniquely positioned to set the agenda for public discourse. For a story to become part of the public discourse, it was enough that the story was broadcast during a time of day when a suitably large audience was in attendance. The audience merely had to stumble over the content being offered.³³ It is this very characteristic of compulsory encounters that Professor Magarian thinks separates the conventional mass media from Internet-based media. The former have provided “a space where members of the political community stumble over speakers and views they might otherwise choose to ignore.”³⁴ By contrast, the Internet permits “radical consumer choice.”³⁵ Whereas the conventional mass media create “a space for communal gathering and shared experience,”³⁶ Internet fora support atomized consumption of niche content.

In proposing to apply the fairness doctrine to broadcast stations and “cable systems,” but not to Internet-based media, Professor Magarian suggests that salience is still tied to the broadcast and cable transmission media.³⁷ But what is it about these modes of transmis-

³¹ Editorializing by Broad. Licensees, 13 F.C.C. 1246, 1249 (1949).

³² Magarian, *supra* note 1, at 885. Professor Magarian argues that a renewed fairness doctrine should include stricter enforcement of the coverage requirement of the fairness doctrine and a shift in emphasis from two-sided balance to multisided debate. *Id.* at 887–91.

³³ See Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1390, 1458 (2004).

³⁴ Magarian, *supra* note 1, at 890. Professor Magarian goes on to propose a functional distinction between the conventional mass media and other, primarily Internet-based, sources of media content: conventional mass media enterprises “strive for broad-based appeal to maximize profit, rather than offering a distinctive content category to a particular audience.” *Id.* at 891. This distinction is increasingly suspect as conventional mass media entities strive for niche audiences, online content producers strive for mass audiences, and content moves between broadcast and Internet platforms.

³⁵ *Id.* at 890.

³⁶ *Id.* at 891.

³⁷ *Id.* It is not clear how the fairness doctrine could be applied to “cable systems” because the systems produce very little of the content that they carry. Access requirements, like the

sion that produce salience? In the broadcast era, ABC, CBS, NBC, and their local affiliates, along with the newspapers, controlled the public agenda by virtue of their control of transmission capacity and hence content. The layers adhered to one another. Today, can the obligations the fairness doctrine imposes at the content layer produce more coverage and balance *that is salient*? I believe the answer is no. This is because digital technologies and existing business practices have, to a significant degree, unbundled the distribution, content, and salience layers.

II. *Salience in the Postbroadcast Era*

In the current, what we might call the postbroadcast, era, broadcast content constitutes only a small portion of the total amount of electronic media content the public consumes. By 1995, the big-three network stations that had dominated the market during the broadcast era accounted for only forty-four percent of television viewers.³⁸ That number had shrunk to twenty-three and one-half percent by 2006.³⁹ There are now approximately 565 national satellite-delivered television networks and 101 regional networks.⁴⁰ To this we can add the thousands of television programs available on video-on-demand services. About eighty-seven percent of U.S. households subscribe to cable or satellite and have access to programming in this range.⁴¹ Millions of videos are available on YouTube and other video sites and are downloaded or viewed by about sixty percent of U.S. Internet users.⁴² Blogs, podcasts, and other forms of online information are innumerable.

mandate that cable systems transmit community access channels, can be imposed on cable systems because they operate at the transmission layer. But fairness doctrine requirements of coverage and balance operate at the content layer and would seem to have to be applied to cable channels, not systems. Of course, most cable channels do not produce news of any kind; far fewer produce local news. One of the problems with fairness doctrine requirements that apply only to news-producing channels is, of course, that it creates disincentives to engage in such production.

³⁸ Carriage of Digital Television Broadcast Signals, 73 Fed. Reg. 6043, 6050 (Feb. 1, 2008) (to be codified at 47 C.F.R. pt. 76). In contrast, ad-supported cable channels' total day share of the market increased from twenty-eight to forty-nine and one-half percent. *Id.*

³⁹ *Id.*

⁴⁰ Press Release, FCC, FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report 4 (Nov. 27, 2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278454A1.pdf.

⁴¹ *See id.* at 3.

⁴² *See id.*

This abundance is the result of the loosening of constraints at the transmission layer and innovation at the protocol layer. The number of cable channels has steadily increased as both cable infrastructure has developed and as satellite and telephone infrastructures have been deployed to distribute media content.⁴³ The Internet has further leveraged the capabilities of this infrastructure by providing low-cost points of entry for content providers. In this way, content providers can bypass the control that infrastructure owners might otherwise exercise over media content. In the postbroadcast era, changes at the layers below content have substantially removed constraints on “shelf space” for media products.

There has always been an abundance of media content—the fairness doctrine was never primarily about producing more content, but about amplifying it on the broadcast platform. What is new in the postbroadcast era, however, is the potential for all content to be easily located on the same platforms without amplification. In the digitally networked communications environment, consumers substitute Internet for broadcast content.⁴⁴ And they access the very same content over multiple platforms.⁴⁵ The mode of transmission disappears behind the content.

The convergence of content onto the same platforms makes possible what journalist Chris Anderson has famously depicted as the “long tail” distribution of media audiences.⁴⁶

⁴³ Carriage of Digital Television Broadcast Signals, 73 Fed. Reg. at 6050.

⁴⁴ See JOEL WALDFOGEL, FED. COMM’NS COMM’N MEDIA OWNERSHIP WORKING GROUP, CONSUMER SUBSTITUTION AMONG MEDIA 3 (2002) (summarizing evidence of the substitutability of Internet and broadcast-television news).

⁴⁵ For example, television programming can be accessed over the Internet as well as through broadcasting or cable. One in four Internet users views full-length television episodes over the Internet. See Brian Stelter, *Serving Up Television Without the TV Set*, N.Y. TIMES, Mar. 10, 2008, at C1. It was this growing share of Internet downloads of television programming that was at the root of a prolonged strike by the Writers Guild of America. See Richard Verrier & Claudia Eller, *Private Overtures Led to Strike Breakthrough; Living-Room Meetings Cut Through Animosity in Writers Walkout*, L.A. TIMES, Feb. 12, 2008, at A1.

⁴⁶ See CHRIS ANDERSON, THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE 6–13 (2006) (arguing that online transactions eliminate constraints on “shelf space” and allow businesses to profit from low-volume sales on niche products that represent the “long tail” of the products/sales demand curve); see also Chris Anderson, *The Long Tail*, WIRED, Oct. 2004, at 174–75.



Source: The Guardian

At the head of the long tail, a small number of content offerings are very popular. A progressively larger number of offerings attract progressively smaller audiences until audience support diminishes to a trickle for the vast majority of programs. In the broadcast era, programs attractive to niche audiences alone would not have been produced.⁴⁷ Advancements in cable and satellite technologies enabled support for content farther along the tail. The Internet extends the long tail, as constraints on shelf space fall away and search engines enable audiences to find the media content they want. In this environment, every kind of niche audience can find content that appeals to it, even while only a small subset of available content reaches a mass audience. Moreover, dissent grows easier with functions like the Google News feature allowing subjects of news stories to post comments that appear with that story.⁴⁸

Professor Magarian acknowledges this abundance and agility, but points out that broadcast programming continues to attract much

⁴⁷ Because of the high “first copy” costs of broadcast programming and the nonrivalrous nature of broadcast program consumption, broadcasters have the incentive to transmit programming that appeals to the largest possible audience to capture maximal advertising revenue. See YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 165–66 (2006) (discussing motivation for broadcasters to capture largest possible audience); Christopher Yoo, *Rethinking the Commitment to Free, Local Television*, 52 *EMORY L.J.* 1579, 1628–29 (2004) (discussing “first copy” costs).

⁴⁸ See Noam Cohen, *Quoted in the News? Post a Comment, Please*, *N.Y. TIMES*, Dec. 24, 2007, at C3.

larger audiences than any other news source.⁴⁹ In other words, broadcast programming continues to control salience by occupying the head of the long tail.⁵⁰ The question remains: what policy conclusions can we draw from the current composition of the head of the long tail?

One of the problems with regulating based on popularity is that viewing habits are changing rapidly; we can expect residency along the curve of media consumption to be fluid. In 1950, soon after the FCC adopted the fairness doctrine, the average top-ten television show had an average audience rating of 44.8; in 2005, the rating had declined to 13.4.⁵¹ Today, more than half of all television viewing is nonbroadcast, and a growing percentage of video consumption does not involve television. Cable and new media consumption grew almost twenty percent over the last five years while consumption of newspapers and broadcast television declined six percent.⁵² Online media consumption will likely only grow as wired and mobile broadband penetration increase.

The trend of declining viewership for broadcast programming is nowhere more evident than for news programming. Network evening news has lost a million viewers in each of the last twenty-five years.⁵³

⁴⁹ Magarian, *supra* note 1, at 892.

⁵⁰ Professor Magarian's distinction between "conventional mass media" and broadband media turns on the degree to which content providers seek to attract a mass audience. In other words, broadband falls far along the x-axis of the long tail. But this is not a stable distinction. Many cable channels, and an increasing number of broadcast digital-multicast channels, seek to reach specialized audiences rather than mass audiences. See Emily Nelson & Bruce Orwall, *Change of Season: Desperate for a Hit, ABC Is Refocusing on Middle America*, WALL ST. J., Sept. 13, 2002, at A1 (noting that "several . . . networks and cable channels are narrowing their programming to target niche audiences"). In doing so, they direct their own offerings farther down the long tail. This dynamism raises the question of whether niche cable and broadcast channels should fall out of the category of conventional mass media or whether YouTube "channels," which rival the reach of many cable channels, should come within the definition of mass media. Professor Timothy Wu made the point almost a decade ago that the Internet is not a single "medium" for First Amendment analysis because it has many functional characteristics depending on the application. Timothy Wu, *Application-Centered Internet Analysis*, 85 VA. L. REV. 1163, 1171 (1999). Conventional "mass media" such as cable and broadcasting will also include many differentiated services (e.g., on-demand, interactive, mobile) that are functionally distinguishable for policy purposes.

⁵¹ BEAR STEARNS, ENTERTAINMENT INDUSTRY: A LONGER LOOK AT THE LONG TAIL 10 (2007) (on file with author).

⁵² VERONIS SUHLER STEVENSON, SHIFT TO ALTERNATIVE MEDIA STRATEGIES WILL DRIVE U.S. COMMUNICATIONS SPENDING GROWTH IN 2007–2011 PERIOD (2007), http://www.vss.com/news/index.asp?d_News_ID=166. Veronis Suhler Stevenson predicts that the fastest-growing media segments over the next five years will be Internet and mobile services, branded entertainment (programming created to promote an advertiser's brand), out-of-home media, and public relations. *Id.*

⁵³ PROJECT FOR EXCELLENCE IN JOURNALISM, *Audience*, in THE STATE OF THE NEWS ME-

In the last few years, local news ratings and share numbers have also dropped sharply, in some cases by double digits,⁵⁴ although broadcast news still attracts far more viewers than cable news at any given time.⁵⁵ While broadcast and cable news numbers are declining, viewership of new and alternative “news” programming is increasing. In 2006, *The Daily Show with Jon Stewart*, a satiric news program on cable television’s Comedy Central, averaged 1.6 million viewers (up twelve percent from 2005).⁵⁶ The program also has a strong online following. In 2006, *The Daily Show* drew 2.8 million viewers per month on Comedy Central’s Web site alone,⁵⁷ not to mention the millions of viewers who watched clips of the Daily Show posted to YouTube.⁵⁸ Another satiric news program, Comedy Central’s *Colbert Report*, attracted 1.2 million television viewers and 2.5 million sanctioned online viewers in 2006.⁵⁹

More important than the fluidity of viewing patterns is the source of this fluidity. Viewing is fluid because what gets watched today has very little to do with the nature of the physical transmission or who controls it. In other words, control over the transmission layer no longer confers control over the salience layer. Consider what would happen if the local school board bought the transmission capacity of local station WXYZ and replaced network programming with school

DIA 2007: NETWORK TV (2007), http://www.stateofthenewsmedia.com/2007/narrative_cabletv_audience.asp?cat=2&media=5 [hereinafter STATE OF THE NEWS MEDIA 2007: NETWORK TV].

⁵⁴ Mark Dominiak, *Look at Engagement as a Consumer*, TELEVISION WEEK, Oct. 24, 2005, at 16 (citing evidence that local news ratings have eroded at same rate as prime-time network news ratings in top-ten markets); see also PROJECT FOR EXCELLENCE IN JOURNALISM, *Audience*, in THE STATE OF THE NEWS MEDIA 2007: LOCAL TV (2007), http://www.stateofthenewsmedia.com/2007/narrative_localtv_audience.asp?cat=2&media=7 (demonstrating same declines).

⁵⁵ See STATE OF THE NEWS MEDIA 2007: NETWORK TV, *supra* note 53; PROJECT FOR EXCELLENCE IN JOURNALISM, *Audience*, in THE STATE OF THE NEWS MEDIA 2007: CABLE TV (2007), http://www.stateofthenewsmedia.com/2007/narrative_cabletv_audience.asp?cat=2&media=6 (finding that broadcast-network evening news garnered 26 million viewers in 2006 compared with about 2.5 million for prime-time cable news).

⁵⁶ PROJECT FOR EXCELLENCE IN JOURNALISM, *Alternative News*, in THE STATE OF THE NEWS MEDIA 2007: CABLE TV (2007), http://www.stateofthenewsmedia.com/2007/narrative_cabletv_alternativenews.asp?cat=8&media=6 [hereinafter STATE OF THE NEWS MEDIA 2007: ALTERNATIVE NEWS].

⁵⁷ *Id.*

⁵⁸ Viacom alleged that its programs, including *The Daily Show*, had been downloaded a total of 1.5 billion times as of the date in 2007 when it sued YouTube for copyright infringement. Miguel Helft & Geraldine Fabrikant, *WhoseTube?; Viacom Sues Google over Video Clips on Its Sharing Web Site*, N.Y. TIMES, Mar. 14, 2007, at C1. According to one analysis, clips of *The Daily Show* generated more than 38 million page views on YouTube before they were taken down in response to Viacom’s requests. Idealog, NewsCloud Releases Reporting Engine for YouTube’s Comedy Central Takedowns, <http://www.idealogue.us/> (Nov. 4, 2006, 0:58 EST).

⁵⁹ STATE OF THE NEWS MEDIA 2007: ALTERNATIVE NEWS, *supra* note 56.

board meetings. The network programmers would have many other distribution options, including cable and online channels. As for the broadcasts on WXYZ, it is hard to believe that the school board programming would come to be especially salient in public discourse just because it was delivered over the air. Very few community-access channels enjoy such salience merely because they are transmitted over cable.

There remain large differences in the relative scarcities of different transmission media, with broadcast capacity much more scarce than cable, and cable more scarce than broadband. But these relative scarcities do not clearly translate into control over salience given the freedom of viewers to shift from one medium to another. It would be hard to say that a broadcast news anchor like Katie Couric has more influence over public discourse than cable news anchors like Bill O'Reilly or Chris Matthews (and, therefore, that her newscast should be subject to more regulation). Moreover, there is no reason that online platforms like YouTube could not create anchors who are just as influential. Indeed, the online viewership of Jon Stewart and Stephen Colbert suggests that their influence is already heavily dependent on online exposure. It no longer makes sense to regulate the content of particular transmission-layer operators for the purpose of affecting salience, because salience has become unbundled from transmission-layer control.

III. New Scarcities and Methods of Salience Control

I have contended that the fairness doctrine imposed content requirements on broadcasters in order to influence what was salient in public discourse. The doctrine operated at the content layer on entities that controlled salience by virtue of their scarce transmission capacity. I have further contended that mere operation of a transmission medium like broadcast or cable is no longer enough to confer control over salience. Instead of adopting policies like the fairness doctrine that mistakenly assume that transmission capacity governs salience, policymakers should ensure that salience remains unbundled from the transmission and other lower layers in the layered model of communications.

The ideals of access and exposure to different points of view underlying the fairness doctrine are at the heart of two current communications policy debates.

The first of these is the net neutrality debate. The operators of broadband transmission capacity have generally refrained from exer-

cising control over the content layer and thus the salience layer. The operators have the means to exercise such control, however, and have at times done so.⁶⁰ Net neutrality proponents advocate nondiscriminatory rules to prevent the owners of broadband transmission infrastructure from discriminating against broadband content and applications at the content layer.⁶¹

The second debate concerns new mechanisms for the production of salience that are not tied to transmission capacity—principally, search engine rankings. Search engines operate between the content and transmission layers for the sole purpose of producing salience. Search capability is rendered scarce by the necessary scale it requires to perform searches well. The more searches that an entity performs, the more information it is able to gather about consumer preferences, the more relevant its search results will be, the more people will use it, the more advertising revenue it can attract, the more capital it will have to support servers, the more content it can cache, the faster and more comprehensive will be its search results, and so on.⁶² Given the benefits of scale, it is not surprising that the search market is highly concentrated, with Google enjoying a sixty-seven percent share of all searches.⁶³ Search engines that are able to achieve scale produce salience.⁶⁴

⁶⁰ See Bill D. Herman, *Opening Bottlenecks: On Behalf of Mandated Network Neutrality*, 59 FED. COMM. L.J. 107, 122–23 (citing examples of broadband operators' blocking of content and applications); Adam Liptak, *Verizon Rejects Text Messages from an Abortion Rights Group*, N.Y. TIMES, Sept. 27, 2007, at A1 (reporting that Verizon Wireless refused to make its mobile network available to an abortion rights group for a text-message program). Verizon later reversed this decision, which it said was a mistake. Adam Liptak, *In Reversal, Verizon Says It Will Allow Group's Texts*, N.Y. TIMES, Sept. 28, 2007, at A20.

⁶¹ See, e.g., Timothy Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141, 165–68 (2003). For opposition to net neutrality regulation, see Christopher S. Yoo, *Beyond Network Neutrality*, 19 HARV. J.L. & TECH. 1, 20–27 (2005).

⁶² See Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness and Accountability in the Law of Search* 34 (Univ. of Tex. Sch. of Law, Pub. Law & Legal Theory Research Paper No. 123, 2007), available at <http://ssrn.com/abstract=1002453>. A result of these “structural features of the search market is substantial advantages to large incumbents and very high barriers to entry.” *Id.* at 35.

⁶³ See Steve Lohr, *The Risks to Google's Rise*, N.Y. TIMES, Oct. 13, 2007, at C1. Yahoo! has nineteen percent and Microsoft has nine percent of market share. *Id.*

⁶⁴ See Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 8 YALE J.L. & TECH. 188, 189 (2006) (noting the power of search engines to “shape searcher behavior and perceptions” by selecting and presenting data in particular ways); Lucas Introna & Helen Nissenbaum, *Defining the Web: The Politics of Search Engines*, COMPUTER, Jan. 2000, at 61 (identifying Internet intermediaries that filter and select information in ways that control information flows).

Unlike broadband operators, search engines are in the business of producing salience. None can be said to be truly neutral, as most have an inherent and intentional bias toward the popular. This is because “organic” search results (those that are not sponsored) are based on algorithms that rank Web content in large part according to the number of hits the site has received.⁶⁵

Salience can be manipulated in several ways. First, search engine operators sometimes manually influence the rankings in order to promote or demote certain content.⁶⁶ This practice, while apparently infrequent today, could become more common as search engine companies like Google become larger content providers themselves.⁶⁷ Second, content providers can affect the rankings by purchasing preferred access or by gaming the search engine to make their content appear more popular than it is.⁶⁸ Because search algorithms are not public, neither the underlying biases of the search methodology nor the deviations from the expected results can be tested or easily disputed. The importance of the search in the production of salience, combined with the ability of dominant search engines and motivated content providers to control salience, has led some commentators to call for increased (and regulated) transparency in search results.⁶⁹

One need not agree with proponents of net neutrality or search engine transparency regulation to recognize the legitimacy of their concerns about the control of content and production of salience on broadband platforms. Although market arrangements may be too much in flux at this point to fashion regulatory interventions, or to know if they are necessary, it seems quite likely that the production of

⁶⁵ See Urs Gasser, *Regulating Search Engines: Taking Stock and Looking Ahead*, 8 YALE J.L. & TECH. 201, 205–06 (2006); James Grimmelmann, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 9–11 (2007); Frank Pasquale, *Rankings, Reductionism, and Responsibility*, 54 CLEV. ST. L. REV. 115, 118 (2006).

⁶⁶ See Jennifer Chandler, *A Right to Reach an Audience: An Approach to Intermediary Bias on the Internet*, 35 HOFSTRA L. REV. 1095, 1109 (2007) (“[F]orms of bias introduced by search engines[] include[] (1) the removal of websites from the search engine index, (2) the reduction of website ranking, (3) the refusal to accept keyword-triggered advertisements from certain websites, and (4) the practice of providing preferences in indexing or ranking for paying websites.”). There have been a handful of unsuccessful lawsuits challenging the ways in which search engines make ranking decisions. See, e.g., *Kinderstart.com LLC v. Google, Inc.*, No. 06-2057, 2006 WL 3246596 (N.D. Cal. July 13, 2006) (dismissing claims based on the Free Speech Clause, Sherman Act, and Communications Act, among others).

⁶⁷ Google’s purchase of YouTube, launch of Google News, and development of an encyclopedia to compete with Wikipedia are all examples. For the encyclopedia efforts, see Scott Morrison, *Google Takes Aim at Wikipedia*, WALL ST. J., Dec. 15, 2007, at A6.

⁶⁸ Pasquale, *supra* note 65, at 123–25.

⁶⁹ See, e.g., *id.* at 132; Bracha & Pasquale, *supra* note 62, at 5.

salience through search and broadband transmission control will be far more important than the programming choices of a single-content channel that is itself increasingly subject to new forms of control.

I have focused mostly on the balance requirement of the fairness doctrine. The coverage requirement works a little differently. The coverage requirement is about the production, rather than the mere amplification, of content. It seeks to remedy the failure of mass media news outlets to cover issues of public importance.⁷⁰ In terms of contributions to public discourse, coverage, like balance, is valuable largely to the extent that the resulting content becomes salient in the discourse. The stimulation of investigative journalism through the coverage requirement, however, may be valuable even if the resulting content is not widely consumed. This would be true, for example, where the production of such content functions as a check on government and other abuses.⁷¹

As Professor Magarian points out, media organizations are divesting in investigative journalism at a fast pace.⁷² Even in our digital era of abundant media content, media critics decry the shortage of serious investigative reporting.⁷³ The high cost of investigative journalism makes it unattractive for news enterprises as they lose audience share to other outlets and, with it, advertising and subscription revenue. Indeed, it is the very lack of economic incentive to produce news that fairness doctrine supporters seek to counteract by compelling news production through the coverage requirement.

The problem is that the fairness doctrine would only apply to media outlets that are producing *some* news. Presumably, an outlet associated exclusively with entertainment programming would have no

⁷⁰ See Magarian, *supra* note 1, at 845.

⁷¹ The checking function of the press was laid out in Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 528–44 (1977). Others have elaborated on the positive externalities that certain kinds of reporting can have even when the reporting is not widely consumed. See C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311, 355–56 (1997). To be clear, neither the coverage requirement in the old fairness doctrine, nor the one proposed by Professor Magarian, would require that covered entities perform investigative journalism rather than mere reportage.

⁷² Magarian, *supra* note 1, at 884–85; see also Lili Levi, *In Search of Regulatory Equilibrium*, 35 HOFSTRA L. REV. 1321, 1326 (2007) (describing the economic pressures that have led to a reduction in investigative journalism).

⁷³ See, e.g., David Glenn, *The Marshall Plan*, COLUM. JOURNALISM REV., Sept./Oct. 2007, at 22–27 (describing the Web-based Talking Points Media, which supports investigative journalism in part through reader donations); Charles Lewis, *The Nonprofit Road*, COLUM. JOURNALISM REV., Sept./Oct. 2007, at 33–34 (describing efforts by nonprofit organizations to step in where commercial enterprises have failed to support investigative journalism).

balance or coverage obligations. As the profitability of news production falls, particularly if the regulatory obligations of stations producing news increase, we can expect fewer outlets to choose to be in the news-producing business. Thus, fairness doctrine obligations could further depress investment in news. This is the chilling problem writ large. Professor Magarian would seek to assuage fears that the balance requirement has potential to chill the coverage of controversial issues with a robust coverage requirement.⁷⁴ But a vigorously enforced coverage requirement would simply deepen the chill, particularly where news is not profitable, and push media enterprises out of the news business altogether. As I have argued elsewhere, policies that subsidize the production of high-cost media content that has significant public value have more advantages in the digital environment than policies that burden select media outlets with regulation.⁷⁵

Conclusion

If we judge a revival of the fairness doctrine only on its effectiveness in today's digital mediascape, it fares poorly. There is nothing so special anymore about broadcast or cable programming—not in its reach and not in its audience—that can support regulatory distinctions between “conventional mass media” and other media. And the abundance of media options in general both at the content layer and at the transmission layer dooms a government attempt to shape public discourse through targeted content requirements. What is salient in public discourse is much more likely to be affected by search engine algorithms and network traffic management practices than by whether news-producing broadcast stations have to include differing viewpoints.

⁷⁴ Magarian, *supra* note 1, at 884, 871–73.

⁷⁵ See Goodman, *supra* note 33, at 1461–71.